ARTS-MEDIA CENSORSHIP IN AUSTRALIA:

Doing The Right Thing The Wrong Way

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DECLARATION

This thesis is submitted to Macquarie University in fulfilment of the requirement for the degree of Master of Philosophy.

This thesis represents my own work and contains no relevant material that has been previously submitted for a degree or diploma at this University or any other institution.

Signature

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Date:

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Dr. Steve Collins, originally associate supervisor, but latterly the principal supervisor, had quite some work to do in the initial stages of the thesis. I fear I added much to his many other duties towards the end. My thanks to Steve for all his help and enthusiasm.

I graduated from Macquarie University as Bachelor of Arts in 1977 but an academic pursuit was not for me then. Since retiring from my regular work, I felt I had something useful to offer on a very controversial subject: the censorship of arts and media. Macquarie University afforded me the opportunity to make this small contribution to the universal store of knowledge. I am grateful for being given that opportunity.

During the course of this re-write, I suffered several physical ailments, which set the completion timetable back considerably. I thank the staff at the University's Higher Research Degree Office (HDRO) for their encouragement and assistance.

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SUMMARY

This study of arts-media censorship in Australia covers the period 1997 to 2012. The main aim of the thesis is to demonstrate that if arts-media censorship is necessary, the current system is neither the best nor most efficient means of achieving its ends. Two suggestions for change are offered: (1) sufficient and informative labelling, undertaken by the entertainment industry, would dispense with publicly-funded classification; (2) child sexual abuse images are evidence of crimes and, as such, should be left to the police to investigate as with any other evidence of crimes.

It is demonstrated that Australia's censorship apparatus is inefficient, expensive and, because it cannot entirely control the Internet, all but impotent in preventing access to censorable and banned material. (There is reliable evidence that Australians download more uncensored movies in a week than the censors review in several years). Of material submitted by the entertainment industry for classification, about 99% is found to be acceptable and what remains is most often either government control of the individual's expression of sexual preferences or evidence of crimes against children.

The protection of minors remains the prime reason for arts-media censorship in Australia. Other reasons are gleaned from the wording of the relevant legislation. Those reasons are: (1) to maintain community standards of morality, decency and propriety, (2) to prevent offence to others, and harm to others and the self. It is demonstrated that: (1) the standards are illusory; there never have been, nor are there now, any such generally accepted standards; (2) while there is no substantial evidence that access to arts-media causes harm, many other activities known to be harmful are either not government regulated (*e.g.* sports), or allowable (*e.g.* tobacco use). The reason for the one, and not the other, relates to the governance of morals; for example, the use of tobacco, although deadly, is not immoral.

The thesis concludes that arts-media are consumables and as such should fall within consumer affairs laws and regulations which require vendors to provide sufficient information as would allow consumers to make informed choices.

Finally, arts-media censorship involving the making, distribution and possession of images of minors is deserving of more examination than the scope of this thesis allows; especially where child protection law conflicts with the principles of justice.

ABBREVIATIONS

ABC	Australian Broadcasting Corporation
ABS	Australian Bureau of Statistics
ACMA	Australian Communications And Media Authority
AHEDA	Australian Home Entertainment Association
AIFS	Australian Institute of Family Studies
ALA	American Libraries Association
AFA	American/Australian Family Association (As in context)
ALRC1991	Australian Law Reform Commission Report On Censorship Procedure (No. 55, 1991)
ALRC2012	Australian Law Reform Commission Report—Classification Content Regulation And Convergent Media (No. 118, 2012)
AOD	Australian oxford Dictionary
BBFC	British Board of Film Classification
CAM	Child Abuse Material
CBR	Classification Board & Classification Review Board Annual Report
CTS	Children's Television Standard 2009
Cth.	Commonwealth
FAVA	Family Voice Australia
FCB	Film Censorship Board
Guidelines F	Guidelines for the Classification of Films And Computer Games
Guidelines P	Guidelines for the Classification of Publications
GSM	Guidelines for the Selection of Members of the Classification Board 2008
HRA	Historical Records of Australia
HRH	House of Representatives Hansard
HVP	House Votes And Proceedings
HRNSW	Historical Records of New South Wales
Infopack	*I*nformation Package for Intending Applicants for Appointment As Members of the Classification Board, 2005.
ISP	Internet Service Provider
MHR	Member of the House of Representatives
MP	Member of Parliament
MPPDA	Motion Picture Producers And Distributors of America
NCC	National Classification Code (Australia)
NSWLA	New South Wales Legislative Assembly
NSWLC	New South Wales Legislative Council
OFLC	Office of Film And Literature Classification
RB	Classification Review Board
RC	Refused Classification
SH	Senate Hansard
SMH	The Sydney Morning Herald
The Act	Classification (Publications, Films And Computer Games) Act 1995 (Cth.)
The Board	Generic Term for Australia's Various Censorship Boards
TPE	*Third Person Effect*
UK	United Kingdom
USA	United States of America

ARTS-MEDIA CENSORSHIP IN AUSTRALIA:

Doing the right thing the wrong way

PREAMBLE

Censorship, as is the case with many other subjects, employs a language of its own. For example "refused classification" is not used elsewhere than in consideration of "classifiable material" which itself is a term peculiar to censorship. Again, as is common with other subjects, many censorship-specific terms can be reduced to initials or acronyms; thus, throughout this work a term will be mentioned in full on the first occasion of its use and, thereafter, by a contraction. That said, I found in text contractions for refused classification (RC) and classifiable material (CM) clumsy, so both are written out in full. Also, unless it is necessary to distinguish one form of censorship from another (e.g. military censorship) all references to censorship relate to art and media.

References to censorship law can be cumbersome as, indeed, is the current system's title: *Classification (Publications, Films and Computer Games) Act 1995* (Cth), which hereinafter becomes *The Act*.[1] However, *The Act* is an administrative document that relies on the National Classification Code (*NCC*) and two sets of *Guidelines* for definitions and instructions to the censors. There are a few differences between the *Guidelines* but where it is necessary to differentiate, I have used *Guidelines P* for publications and *Guidelines F*, for filmic material. Otherwise *Guidelines* is used for both or either. Also, there are *Guidelines* for 2005, 2008 and 2012 — where necessary the year is added (*e.g. Guidelines* 2005)—otherwise the term applies to all versions.[2]

In the period particularly under review that is, from the 1970s to June 30, 2012,[3] the censors were, collectively, first known as the *Film Censorship Board* (FCB), and afterwards (1996) as *The Office of Film and Literature Classification* (OFLC); the Classification Board operated as a distinct unit within the OFLC. As this work covers all three, I refer to all censors of the period as *The Board*. In text references to the annual Classification Board Reports from *The Board* to the Federal government carry the

1 The latest version (for this work) takes in amendments up to number 127 and is dated 2010.
2 The Guidelines F, were amended in 2012 to accommodate computer games, see: http://www.comlaw.gov.au/Details/F2012L02541/Explanatory%20Statement/Text
3 The period 1970s to 1995 backgrounds the particular period under review here, namely, 1997-2012.

abbreviation CBR followed by the financial year; for example, CBR04-05.[4] A recommendation by the Australian Law Reform Commission (ALRC) 118, submitted in the 2012 report to the Federal Government suggested another name change to the New National Classification Scheme but at this writing (January, 2015) that scheme is yet to be adopted. Because this work also includes material from ALRC report 55 of 1990, the two reports are distinguished by the year in which they were presented to parliament, thus: ALRC1991 and ALRC2012; quotations from those reports will be cited by appending the paragraph number to the abbreviated title: *e.g.* ALRC2012, 10.1.[5]

Any essay or longer work on censorship necessarily includes references to law, thus, although this is not a law thesis, some consideration and explanation of certain laws as they impinge on what materials may be lawfully read, watched and heard, is a necessary part of examining the thesis question. Where censorship is a matter of law, the reference is to the government but where other forces, such as religion, bear on censorship to the point that they influence, or even drive, government decisions, I refer to "the establishment". In so doing, I am at one with Henry Fairlie, who wrote: "By the 'Establishment', I do not only mean the centres of official power—though they are certainly part of it—but rather the whole matrix of official and social relations within which power is exercised" (Fairlie, 2009, p. 70).[6]

There is no shortage of scholarly material on censorship but much of it examines the for-and-against-argument, or else deals with censorship law as a *fait accompli*. That is to say, we have these laws, which Butler describes as "entertainment law" that "sets parameters or boundaries which, "like all walks of life, must function within these borders" (Butler, 2010, p. 85), so we had better learn how to live with them. White's *Anatomy of Censorship: Why the Censors Have it Wrong* (1977) leans the other way. The entire for-and-against argument over censorship's value (and there is very much of it) cannot be incorporated in so limited a space as a doctoral thesis where one needs a sharp focus on the topic being considered. For such reasons, instead of offering the usual literature review it was considered preferable to cite appropriate references as

4 Typically titled Classification Board & Classification Review Board Annual Report followed by the reporting year, *e.g*. 2004-2005.

5 Australian Law Reform Commission Report on Censorship Procedure (No 55, 1991) and Classification - Content Regulation and Convergent Media (ALRC report 118, 2012)

6 The establishment here means those who have the power to impose their will on outsiders. For this meaning see, Stichting, N. E., 1994 (1965). *The Established and the Outsiders,* Sage Publications.

and when necessary throughout the work.

The politicians who decide(d) what should be censored are important commentators on censorship as practiced locally, that is, in Australia. Thus, the Australian Senate and House of Representatives' *Hansards*, as well as the States' *Hansards* are particularly relevant as original sources of information for this work.[7] Through the *Hansards* and other censorship-related political statements we gain an insight into the minds of the policymakers and learn what they were thinking and why they thought so at the time Australia's various censorships were being considered. However, political statements cannot be viewed in isolation, the complexities of governance requires other sources, such as censorship pronouncements by church leaders, analyses by reliable authors, and judicial outcomes, to augment the dichotomy here presented.[8]

Referencing. The Harvard citation style is used with the exception that lengthy websites are included as footnotes and also listed by chapter at the end of the bibliography.

Access to websites. All websites were last accessed within 5 to 30 days prior to submission.

7 The *Hansards* do not always show page numbers, thus some citations herein do not include them.

8 One might, without diminishing their worth, call the learned scholars "theorists", while politicians might be "practitioners"; thus, a dichotomy between what "ought" and what "is" to be done. Lenin's great question ("What is to be done?") offers an interesting parallel. Marx wanted absolute freedom ("ought") but Lenin considered the only means of achieving that end was a strong discipline of party members ("is").

INTRODUCTION

THE AIM OF THIS WORK

The aim of this work is to argue that if arts-media censorship is necessary, Australia's system, which is publicly-funded, is neither the most efficient nor effective means of achieving the desired ends.[9] It will be seen that the current system is a cumbersome apparatus that requires public servants in all governments: states, territories and federal, to make and enforce a set of regulations that are based on a prescribed set of values, namely: "the standards of morality, decency and propriety generally accepted by reasonable adults" (*The Act*, s11(a)). This work will demonstrate that no such common standards exist, or ever have existed outside the minds and desires of those who would impose the standards.

This thesis argues that arts-media materials are consumables and for that reason, the term "community standards" should be replaced by "consumer standards", as is the case with other consumables. It is further argued that the imposed community standards are demeaning of Australians at large because they imply that, without censorship and left to their own choices, adults would read, watch and hear items that are not morally decent or proper and, furthermore, parents and guardians would unwittingly allow their charges to access material that might harm or disturb them (*NCC* (b)). While such an argument would not entirely succeed, *The Act* itself is evidence that policymakers believe such outcomes would or could be so. For example, in 1972, Baptist preacher/teacher, Dr John Court circulated a booklet, endorsed by the then Governor-General Sir Paul Hasluck, which stated: "the average man in the street" lacks the "intellect" to make his own choices so it is up to those who know better to make decisions for himself and his family (Court, 1972, p. 41). The relevance of that booklet, at that time, will be better understood against the debates leading to the current system of censorship in Australia, as set out in Chapter 2: A More Liberal Censorship (*infra*).

The practical outcome of Court's advice is, during the 16-year period under examination in this study (1997 to 2012), arts-media censorship was overseen by a

9 Many of the costs are recovered, but this only adds to dissatisfaction among members of the industry who are required to pay for *The Board's* increasing costs. The incremental fee rises can be gleaned from the CBRs 1997-2012. The latest study fees study was undertaken for the years 2011 to 2013.

select coterie of only 56 Australians who were appointed as members of *The Board* and whose function it was to decide for the millions of adult Australians, what they could safely access without harming themselves, their families or others. Also, where there were differences of opinion regarding classification, 26 members of the Classification Review Board (henceforth: RB[10]) have been called upon, over the 16-year period, to settle those differences of opinion. (The term "harmful effects", where used, is intended to summarise, not define, the reasons for censorship.)

These people, the 82 overseers of what arts-media other Australians may access, pose a conundrum. If "the average man in the street" is synonymous with the average or ordinary person, or one who is "broadly representative of the Australian community" (*The Act*, s.48(c)), then he is the "reasonable person", therefore, whatever he finds acceptable is the community standard and, extrapolating from *The Act* s.11(a), he cannot lack the intellect to make informed choices. The conundrum is resolved when Court's "average man in the street" represents an underclass and *The Board* an elite. In Chapter 8: There's No Harm in Looking, it is demonstrated that the elite, (*The Board* and RB) are indeed the men and women in the street and *vice versa*.

In sum, *if* after all the arguments offered in this work, arts-media censorship is still considered necessary, it is argued that the current system could be replaced with self-classification undertaken by the entertainment industry (as is now partly the case: see *The Act*, s.17(5) and Schedule 1. 18) [11] and any reviews carried by an appeal to consumer affairs departments, which would rule on the question of whether a package contained sufficient information as would allow the potential user to make an informed choice, or whether the content(s) were true to the label. With these processes and procedures in place, *The Board* and the RB could then be abolished. (This suggestion is considered in Chapter 12: Classification and Censorship Unbound.)

CLASSIFICATION, CENSORSHIP AND CHILD PROTECTION

While censorship for adults is contentious, it is not unreasonable to suggest that censorship is necessary for child protection purposes. Nor would it be unreasonable to

10 The full title is *The Classification Review Board*, but as the abbreviation CRB could be confused with *The Board's* annual reports (CBR), I opted for the shorter title, which, incidentally, the RB often uses with regard to itself.

11 *The Act* at s.17(3) describes circumstances of extra-*Board* ratings of computer games, but "only if the person has completed training approved by the Director in the making of assessments" (s.17(5)).

suggest that most Australians would find images of child sexual abuse abhorrent. This much is conceded, but only insofar as the images are *evidence* of child sexual abuse. It is argued that one requires no particular analytical skill to see for oneself that a child was sexually abused in the making of the image. Thus, there is no need for *The Board* to assemble and vote on such images as they do with other material that is submitted for classification. The argument herein suggests giving this sort of evidence of crimes to the police, as one does with evidence of other crimes because, clearly, a crime (of sexual assault) has been committed. Also, for reasons best known to the policymakers the current system appears to work in reverse. That is to say when the police come into possession of what is alleged to be child sexual abuse material, it is submitted to *The Board*, whose members then classify (or more correctly refuse to classify) the material as child pornography or child sexual abuse, after which the police make out charges against alleged offenders. There is no explanation offered for this reversal of the usual procedure; in child pornography/sexual abuse matters (and other censored material, *e.g*. images of incest), *The Board* is, in effect, judge and jury rather than a witness for the prosecution. This view would appear to be supported by child sexual abuse law. When Barry Collier MLA, acting for the Attorney-General, introduced amendments to the relevant NSW law in 2010, he said:

> . . . by requiring that the literary, artistic or educational merit of the material is determined *prior to the work being defined as child pornography* [italics added], it ensures that works with genuine artistic merit are not confused with child pornography. [. . .] An existing defence relating to *material that has been classified, other than as refused classification*, [italics added] under Commonwealth classification law is also retained". [This refers to s.91G of the Crimes Act 1900 (NSW).] (*Crimes Amendment (Child Pornography and Abuse Material)* Bill 2010 (NSW), NSWLA *Hansard*. p. 21195).

Here, we arrive at the point of divergence between classification and prohibition. The making, dissemination and possession of child sexual abuse images are *prohibited* activities that are beyond *classification*. Except for quantity, there is no degree of culpability; that is to say, if an image clearly portrays a child being sexually abused,

there are no mitigating circumstances. There are, however, images of children that do not portray sexual abuse but are considered offensive to the reasonable adult; it is argued in Chapter 11: Images of Minors that such images should be considered on their respective merits rather than being bundled together as child pornography or child sexual abuse images.[12]

This work, then, has a secondary aim, which is to isolate child sexual abuse images from other arts-media material, and to argue that neither grouping need concern *The Board*; child sexual abuse images being dealt with by law enforcement and all other items labelled by the relevant industry, as is the case with all other consumables. Oversight of correct labelling would then be a matter for the relevant consumer affairs departments, making *The Board* unnecessary.

THREE SALIENT POINTS

This thesis does not argue against the activities of *The Board* as such; its members are bound to perform the duties required under the provisions of *The Act*. The argument is with the necessity for *The Board* itself, and in particular, the criteria for appointing members (see Chapter 3: Appointments to and Activities of *The Board*). *The Act* requires *The Board* to evaluate material according to the community standards (cited above), but from reading *The Act*, it becomes clear that whatever the standards are supposed to be, they represent a moral code that has been imagined by the establishment (governments and Christian religious in particular), intended to be imposed on all Australians. Thus, the governance and enforcement of a moral code becomes a salient point of deliberation in this work.

A second salient point concerns the way children *de jure* (those below the age of 18 years) are used (and sometimes legalistically abused) in the framing, application and enforcement of censorship law. For example, a 16-year-old is deemed capable of giving consent to sexual intercourse, but it is deemed unlawful (child sexual abuse) for that individual to make images, or even write descriptions, of self-sexual activity—even if the images and descriptions are fictions. It will be seen that censorship's child is a flexible commodity—old enough to know better than, for example, 16-year-olds

12 Of interest, UK law states in effect, the age of a child is ultimately for the jury to determine. It is a finding of fact for the jury, and expert evidence is inadmissible on the subject, since it is not a subject requiring the assistance of experts R v Land [1998] 1 Cr App R 301, CA. See also section 2(3) of the PCA 1978. http://www.cps.gov.uk/legal/h_to_k/indecent_photographs_of_children/#a03

sending nude images of themselves to each other ("sexting") but vulnerable according to censorship law, *e.g*. being photographed naked. Thus, a question arises as to censorship's purpose in respect of minors: Who is the law designed to protect and from what? If it is understood that it is right to protect minors from harm, especially from the sexual predations of adults, then, the answer to that question is important in helping decide whether current censorship is the right way of doing what is right. This, and other child-protection questions, is considered in Part 2 of this thesis.

There is a third salient point: the making and administration of censorship law is an expensive undertaking. It is argued that both the public and industry might be spared the expense if the entertainment industry were to make its own classifications. However, before that could happen, the law should be clear and consistent on what exactly is to be classified, why so and in what circumstances. For example, representations of nudes are classifiable (see Chapter 2: A More Liberal Censorship) but pictures of nudes in art galleries and sculpture, *e.g.* Michelangelo's *David* are not. One might have thought lawmakers would have offered an explanation for this, but none is offered. (This apparent anomaly is considered in Chapter 5: Instructions to *The Board* and the Review Board.) Nudity is just one of several censorable representations: dug use, sex and language are among the others, all of which are set out in the *Guidelines.*

The Board and RB are bound to classify material according to the *Guidelines*—which are available to all who want a copy. It is of relevance that in January 2011, this writer published an item headed "Censorship No! Labelling Yes!" in *Online Opinion*, the burden of which was that the industry could do its own classifying (see Appendix 2). On March 24, 2011, the federal government required the ALRC2012 to inquire into the classification system *inter alia* having regard to "the rapid pace of technological change in media available to, and consumed by, the Australian community" (ALRC2012, Terms of Reference). On July 10, 2011, this writer sent a submission the ALRC2012, which, in part offered the classification alternative suggested in Appendices 1 and 2 (*infra*); it is gratifying that ALRC2012 recommended that policymakers go part of the way. For example:

> **Recommendation 10–1** The Classification of Media Content Act should provide that *content providers should take reasonable steps to restrict access*

> *to adult content* [italics added] that is sold, screened, provided online or otherwise distributed to the Australian public. Adult content is:
> (a) content that has been classified R 18+ or X 18+; or
> (b) unclassified content that, if classified, would be likely to be classified R 18+ or X 18+.
> The Classification of Media Content Act should not mandate that all adult content must be classified (ALRC2012 : 10.1)

This is somewhat ambiguous; because ALRC2012 separates prohibited material from adult material it is clear that in the commission's opinion, not all R 18+ or X 18+ "must be classified". We are then left with the question of what adult material should be classified and what not, that depends for its answer on the answer to an earlier question, posed in **Recommendation 5-2(a):** "what types of media content may or must be classified" (ALRC2012.) The question is not answered but it would appear the onus of setting classification standards remains with policymakers who would introduce the proposed "Classification of Media Content Act".[13] That aside, ALRC2012 explains how the industry would "take reasonable steps"; it suggests a set of guidelines and precautionary measures that differ somewhat from the classification *Guidelines* thus: "a) industry codes, approved and enforced by the Regulator; and (b) standards, issued and enforced by the Regulator" (ALRC2012 **Recommendation 10–3**).

A NEED FOR UNAMBIGUOUS *GUIDELINES*

In context, "the Regulator" would appear to be an overarching authority who (or which) is given charge over all arts-media providers. The "Regulator", "a single agency" "would be responsible for the regulation of media content" (ALRC2012 **Recommendation 5–3**); here, one imagines there is to be a Pooh-Bah of censorship, in that the activities of all existing groups of censors: Australian Communications and Media Authority ACMA, *The Board*, advertising standards, broadcasting standards, Internet Service Providers (ISPs), would come under the purview of that agency. (See Chapter 12: Classification and Censorship Unbound for more on this.) Nevertheless, if

13 Recommendation 5 reads like a re-written version of *The Act's* requirement, even going so far as to "require that a content provider submit a film for classification (the equivalent of the existing call in power of the Director of the Classification Board". One can't avoid Jean-Baptiste Alphonse Karr's 1849 observation: "*plus ça change, plus c'est la même chose*."

Recommendation 10–3 were adopted, what might be called the "consumer standards" (not community standards) as applied to an item of wrongly-labelled arts-media could be called into question under consumer law, as would be the case with any other wrongly labelled consumer item. Whether or not the suspect material infringes a classification code, for example, adult pornography rated "G", would then be a separate matter that is dealt with under the appropriate consumer law. This thesis argues in favour of retaining the established classification symbols. See Chapter 12: Classification and Censorship Unbound.

In sum, *The Act's* desired ends (see Chapter 2: A More Liberal Censorship) regarding protection from harm and offence would be achieved by applying the consumer standards, leaving what are thought to be community standards of morality, decency and propriety (*The Act* s.11(a)) to the personal judgment of the prospective consumer, rather than the anonymous "reasonable adult". In other words, based on the information provided by labelling, the consumer would take the item or leave it; shoppers make such decisions every day. Under an industry-operated scheme, consumer regulations would apply and insufficient or misleading consumer labelling, such that an informed choice could not have been made would be an offence. (This is typical of consumer laws.)

This work, then, argues on three points that if protection from harm and/or offence is necessary: (1) Censorship law must include an unambiguous definition of vulnerable minors and precisely what representations of them are to be illegal. (2) Descriptive and informative labels provided by the entertainment industry; warning those likely to be offended by an item's content would provide adequate protection at no cost to the public purse. (3) Typical consumer standards, as have been in place for many years, should replace undefined community standards.

There is no question but that adults should be protected against inadvertent or unwitting exposure to images they consider offensive, however, this thesis continues to argue that *The Board* might not be the best means of providing that protection.[14]

14 Why the law goes to such lengths to protect against some offences, when nothing is done to protect people from other, everyday offences (e.g. unwitting exposure to objectionable language not directed at the self), has never been explained.

AN EXPENSIVE, OUTMODED AND INEFFECTIVE SYSTEM

As stated above, the current system is an expensive process to both the taxpayer and industry. Fees charged to the industry recover part of the government's outlay, but the actual cost is difficult to assess. In *The Board's* own words, for example: "The Financial Statements contained in Appendix V to this report have been audited by the Australian National Audit Office" (CBR97-98, p. 56). However, with the exception of title page, headers and footers, the pages that comprise Appendix V (184-193), are blank. (See Chapter 12: Classification and Censorship Unbound for more on *The Board's* finances.)

Currently *The Board* does no more than classify 99% of material submitted and ban the remainder—some of which is disputed.[15] (See Chapter 4: Appointments to and Activities of the Review Board.) In a submission to ALRC2012, the Victorian government stated: "Jurisdictional differences have the effect of creating significant compliance burdens on [. . .] industry groups that are then required to comply with eight different regulatory frameworks" (ALRC2012: 2.50). As to its being outmoded, Simon Bush, the Chief Executive of the Australian Home Entertainment Association (AHEDA) argued before a Senate committee in 2011, that *The Act* "is an analog piece of legislation in a digital world" (Senate Legal and Constitutional Affairs legislation Committee, April 7, 2011, p. 32.)[16]

In arguing that the current system is neither the best, nor the most effective means of achieving censorship's ends, it is observed that the Internet provides Australians with significantly more material in a week than can be classified by *The Board* in a year. For example, a survey of Australians who download free material revealed that "37% said they download for free because they wish to access TV shows or movies not yet available in Australia, 21% because it is convenient and 18% just because it's free." (Essential Report, 2012).[17] Another report states: "Just 12 hours after the first copy [of *Breaking Bad* final eposide] appeared online more than 500,000 people had already downloaded the show via various torrent sites. Most downloaders come from

15 This figure is extrapolated from CBRs 1997-2012, inclusive.

16 The weight of Bush's opinion can be gauged from the evidence he gave to the committee. "The Australian Home Entertainment Distributors Association represents the $1.3 billion Australian film and TV home entertainment industry, which covers both packaged goods and digital content. The association currently has 12 members, including all the major Hollywood film distribution companies, through to wholly owned Australian companies such as Roadshow Entertainment, Madman Entertainment, Hopscotch Entertainment, FremantleMedia [*sic*] Australia and Anchor Bay Entertainment" (ibid). Bush was also appointed to the Advisory Committee acting for ALRC2012.

17 http://essentialvision.com.au/main-reason-for-free-downloading.

Australia" (*Breaking Bad*, 2013)[18] A typical annual workload for *The Board* might involve classifying between 6,000 and 7,000 industry-submitted items (*vide* the CBRs for the years 1997 to 2012).

Further evidence that *The Board* is ineffective was given in a submission to the Senate Legal and Constitutional Affairs References Committee, by Ms Tankard Reist, Founder and Spokesperson of *Collective Shout: for a world free of sexploitation*, who said:

> We believe the system has failed and needs a complete overhaul. There are so many examples of failure it is actually difficult to cover them in this summary. Distributors of pornography have shown complete contempt for the system, and that has been revealed through Senate estimates hearings and elsewhere, where they completely ignore call in notices. The Classification Board has shown that it is ineffective to deal with recalcitrant distributors who continue to bring into the country material promoting sex with little girls, rape and incest. They have ignored hundreds and hundreds of call in notices (*SH* April 27, 2011).

On Mach 24, 2011, a month before Reist gave that evidence, the Federal government had required ALRC2012 to consider what one might call a complete overhaul of arts-media censorship. Following its deliberations, ALRC2012 appeared satisfied that:

> There is evidence of considerable, and growing, non-compliance with laws concerning the distribution of incorrectly marked adult content, unclassified adult content and X 18+ classified content. In particular, there is concern about the refusal on the part of distributors to submit such content to the Board for classification or to comply with call in notices. It has also been noted that current resources have been insufficient to effectively investigate and prosecute breaches (ALRC2012: 2.51).

18 "Based on a sample of more than 10,000 people who shared the site via a BitTorrent client, we see that Australia is once again in the lead with 18 percent of the total."
http://torrentfreak.com/breaking-bad-finale-clocks-500000-pirated-downloads-130930/

THE DIFFICULT AREA OF CHILD ABUSE IMAGES

There are several arguable points about the censorship of child images, the first and most obvious is the process of establishing what criminal elements are contained in an image. One might suggest that these elements are established in the appropriate federal, state and territory laws but if this were so there would be no need for *The Board*. The fact is, when suspect images are discovered or seized, the responsible law enforcement officers submit them to *The Board* for classification before any case can be made against an alleged offender. This, it is argued, is an unnecessary process because prosecuting police can see for themselves if the subject is (a) a young child and (b) whether sexual activity is evident. The combination of both elements is evidence of criminality, and this should satisfy a judge and/or jury that the subject portrayed was sexually assaulted; but what exactly does child sexual activity entail?

The difficulty arises from the interpretation of descriptors of images that are not overtly sexual, such as "sexual posing" and "appears to be" a person below the age of 18 years. For example, one might question what constitutes a sexual pose, and whether images of naked minors are child pornography.[19] (See Chapter 11: Images of Minors.) It is argued that the descriptors, and interpretations of them, can lead to unfortunate consequences for otherwise innocent individuals. (See the subhead **DIFFERENT VIEWS AND OPINIONS** in Chapter 7: Everyone wants to be a Censor.)

Consider this example. If two 17-year-olds are the subjects of self-made images that appear to portray sexual posing, it is relevant to ask which of them is the perpetrator and which the victim. Can both be both? For this, and other aspects of child imagery as outlined above, this work cannot avoid a review of censorship that includes some consideration of *sexual activity* as well as *sexual images* of minors.

AN ALTERNATIVE SYSTEM

In any event none of the arguments alluded to above suggest that protections are entirely unnecessary. Therefore, this thesis approaches the topic by first conceding the *rightness* of affording protection from offensive or harmful arts-media. In so doing, the academic quagmire of whether censorship itself is right or wrong is circumvented.

19 Amendment of Crimes Act 1900 No 40 (NSW). 91FB "(b) a person who is, appears to be or is implied to be, a child engaged in or apparently engaged in a sexual pose or sexual activity (whether or not in the presence of other persons)".

The work falls into three parts. **PART 1: CENSORSHIP AND ADULTS**, chapters one to eight, examines Australian censorship in general. **PART 2: CENSORSHIP AND MINORS,** chapters nine to eleven, examines censorship relating especially to minors. **PART 3: SUGGESTIONS FOR CHANGE**, chapter 12 and appendices 1 and 2, consider the present system, and suggests an alternative to *The Act* which alternative, it is envisaged, would be preferable to the current system and would *do the right thing the right way*.

It was previously suggested that the current system of censorship is expensive and clumsy; a bulky and costly apparatus that involves groups of public servants working in all States, Territories and Federal Attorneys-Generals' departments.[20] Yet, for all the effort and expenditure, during the period under review (1997-2012), *The Board* refused to classify (*i.e.* banned), year on year, less than 1% of all arts-media material submitted by the industry. The statistics are taken from *The Board's* annual reports (CBRs) to the Federal parliament for the period 1997 to 2012.[21]

After considering *The Board's* work, ALRC2012 commented: "*The Board* model of classification is resource intensive and therefore also costly. Financial and administrative burdens may therefore be a reasonable consideration in determining what content should be classified by whom" (ALRC2012: 7.25). That report also observed the cost and benefit of an alternative system:

> A benefit of industry classification is that it may generate cost savings and other efficiencies, such as reducing the time taken to classify products, and accounting for classification considerations in the content development and production process. This is particularly important for independent developers and small providers of niche products (ALRC2012: 7.26)

This, in part, approximates the point this author made in **Appendix 1** paragraph 3 (*infra*) that: "Industry self-labelling [. . .] will release taxpayers' funds while not imposing any greater financial burden on industry".

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20 It is bordering on the impossible (for the focus of this work) to ascertain the exact cost because there are no given expenditures for censorship-related matters in the States and Territories budgets for Attorneys-General. *The Board's* annual reports (CBRs) provide income and expenditure information, but from CBR06-07 and on, even these details are incomplete.

21 The reports were usually addressed to the Attorney-General but after 2007 the Minister for Home Affairs was the addressee, see CBRs 08-09, 09-10, 10-11, 11-12.

REVIEWING THE LITERATURE

There is an abundance of scholarly material on censorship, much of it on the specifics of one or other categories of arts-media. For example, Hajdu (2008) looks at the censorship of comic books; Wittern-Keller (2008) studied the censorship of American movies. In *Watching Sex*, Loftus (2002) analyses how men really respond to pornography and Lynn Hunt (1993) traces the *Invention of Pornography*.

As one studies the indices of relevant literature, there are two standout subjects: pornography and children and they are often combined to make child pornography (and/or child abuse) yet another important stream of study. (Indeed, in this work the association of children and matters sexual is a central consideration.) Among the more erudite writers, there are those who blame the media for the misdeeds of children[22] and those who argue, as does Sternheimer (2003), the problem is not the media, which she states is "a rather safe target" for policymakers, (p. 213) but poverty that harms children p. 208). See also Heins' (2007), in which she devotes chapter ten to "Media Effects" and her reference to the (USA) National Research Council's 1993 report, *Understanding and Preventing Violence* that "does not consider the media a serious factor" (Heinz, 2007, p. 241-2).[23] Bryant's research indicates that "the effect of adolescents' exposure to sexualised media on their intentions to have sex appears to be cumulative; that is, greater exposure translates to a greater intention to have sex; but pornography may be more influential than other media in shaping notions of women as sex objects" (Bryant, C., 2009, p. 5). Levine (2002) takes a different view of sexual taboos; she writes about the perils of protecting minors *from* exposure to sex and sexual images.

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22 This goes back to Plato who, while he did not exactly blame the media, argued we should not allow our children to listen to any stories that teach the very opposite of the standards we think they ought to have when they are grown up. We "shall induce nurses and mothers to tell their children only those which we have approved (Cassirer, 1974, p. 72). See also the (UK) *Childrens and Young Persons* (Harmful Publications) Act, 1955, which *inter alia* banned horror comics. I acknowledge David Hadju (2008) for his reference to that Act; it is of interest that the 10-year sunset clause was revoked and that Act is now permanent. The American Academy of Child and Adolescent Psychiatry (2011) guardedly advises that children may imitate the violence they observe on television.

23 *MailOnline* of October 7, 2012 reported a long-term study of the effects of children who play violent video games over a number of years .The study, undertaken by a research team at Brock University Ontario "suggests that long-term players of violent games may become more likely to react aggressively to unintentional provocations such as someone accidentally bumping into them" http://www.dailymail.co.uk/news/article-2214346/Violent-video-games-make-teens-aggressive-girls-affected-boys.html#ixzz2tW3N3vCx.

Then there are those who, like Butler (2010) appear to accept government censorship as a *fait accompli*. That is to say, we have these laws, which Butler describes as "entertainment law", so we had better learn how to live with them. In: *A Comparative Analysis of Ratings, Classification and Censorship in Selected Countries around the World*, Brand (undated) takes a universal approach to government censorship in practice. He suggests "the World Trade Organisation and the United Nations division UNESCO [. . .] could, and perhaps may need to be, instrumental in driving for unified approaches to content regulation".[24] Feinberg's four volumes (1985 to 1990) under the heading *The Moral Limits of the Criminal Law* is more generalised as he examines in detail the "liberty limiting principles" (Feinberg 1990, p. ix) of which censorable activity (e.g. obscenity, pornography) is a major consideration (esp. in Feinberg, 1985, *Offence to Others*).

Chen (2000) critiqued censorship politics and the difficulty of controlling internationally produced arts-media that is distributed *via* the Internet. Referring to the *Broadcasting Services Amendment (Online Services Act 1999* (Cth), he concluded: "Overall, the Government undertook a lengthy and politically complex path to produce an underwhelming outcome for concerned Australian Internet users" (Chen, 2000, p. 20). In another place, Chen refers to classification as "merely newspeak for 'a censorship regime in an age when regulation and classification are words we prefer to use' " (cited in Beattie, 2009, p. 39).

Important commentators on censorship as practiced in Australia are the politicians who decide(d) what should be censored. Thus, the Australian Senate and House of Representatives *Hansards*, as well as the States' *Hansards* are the most relevant original sources of information for this work.[25] This approach would appear to be in harmony with what Justice Michael Kirby said of the High Court of Australia's judgment, which:

> . . . unanimously endorsed [certain] principles as necessary to the accurate reading of legislation.
>
> That in deriving meaning from the text, so as to fulfil the purpose of parliament, it is a mistake to consider statutory words in isolation. The proper approach demands the derivation of the meaning of words from

24 Dr. Jeff Brand, as Director of the Centre for New Media Research and Education, Bond University.
25 The *Hansards* do not always show page numbers, thus some citations herein do not include them.

> the *legislative context* [italics added] in which those words appear. (Kirby, 2009, p.4)

It is through the *Hansards* and other censorship-related political statements that we can look into the minds of the policymakers and learn what they were thinking and why they thought so at the time Australia's various censorships were being considered and the law enacted. Therefore, "the correct starting point for analysis is the text of the legislation and not judicial statements of the common law or even judicial elaborations of the statute" (Kirby, 2009, p.4). Church leaders, international judgments and pronouncements, reliable authors, and judicial outcomes on matters of censorship, each, in their own ways, contribute to a general understanding of arts-media censorship.

However, all of this, and considerably more, bears on censorship of arts-media as a whole, but few learned works directly examine the question under consideration in this thesis, which is: if there must be arts-media censorship in Australia, is *The Act* the "wrong" way of carrying the policy into effect? Harry White's academic-polemic, *Anatomy of Censorship: Why the Censors Have it Wrong* (1977) does not quite do what this work aims to do, but this author's arguments are aligned in some degree with White's, especially, as will be seen in Chapter 8: There's No Harm In Looking (*infra*).

BACKGROUNDING AUSTRALIAN CENSORSHIP

While this work is not a history of censorship some historical examples must be offered as would demonstrate a continuity and development of Australian censorship from past to present. To this end, examples are given in context as the occasion arises. For more detailed information on censorship in Australia, and views on the various censorable topics, see among others Campbell and Whitmore whose concern is with "the multifarious ways in which the law and government affect the liberty of the individual in Australia" (1966, p. 270); Bertrand (1978) concentrates on film censorship, while Coleman (1974) writes on the censorship of blasphemy, obscenity and sedition.[26] Pollack, posits that the prevention of Australian writers from expressing their views is violence (1990, p. 7). Sullivan (1997) tackles the "notoriously difficult concepts" (p. 3) of prostitution and pornography in Australia since 1945. Dutton and Harris (eds.) argue

26 It was reprinted in paperback by Duffy and Snellgrove in 2000.

against the "whole decrepit apparatus" of censorship (1970, p. 6), which argument is supported by a series of media-specific essays. For a recent work on book censorship see Moore's *The Censor's Library* (2012). Maddox in: *For God and Country*: *Religious Dynamics in Australian Federal Politics* (1999) examines the establishment (*i.e.* government and religious influences on, in our case, censorship). Cockington (2005) runs quickly through "the bizarre history of Australian obscenity" from Lola Montez' "Spider Dance" in 1885 to an unsuccessful move to ban photographing school swimming carnivals in 2005.[27]

The books cited are but a sampling of works critical of censorship over time. Many of the criticisms no longer apply; books, for example, are no longer routinely examined for content. No longer does Australia give "arbitrary power into the hands of a Customs official, who one has no reason to believe is possessed of any aptitude for the position of censor" (Jean Devanny in Moore 2012, p. 96).

Before departing this brief review of literature, it is observed that while many works are critical of censorship, there appears to be relatively few that support it. Devlin's *The Enforcement of Morals*, although obliquely connected, is arguably the most important. Surprisingly, a report of librarians' attitudes to censorship in the USA found that some Internet censoring was desirable on the grounding that children use the computers installed in public libraries, therefore likely to be unwittingly confronted by disturbing sexual or violent images (Lukenbill, 2007, p.14). Daniel Mendez, University of Catalonia believes: "Many people in China accept [censorship], including a lot of people who work in the media. They take a paternalistic view of the state and believe that the Party knows what is best for them. They trust it and believe that this control of information is in the country's long-term interest."[28]

Whatever censorship's critics believe, in Australia, arts-media materials are required to be routinely examined for content. However, while governments have a duty to protect their citizens from harm, there is a concomitant responsibility that in carrying out their duties, authorities take care that no avoidable harm will ensue.[29] For example, it is argued in Chapter 10: Children and Adolescents that the damage done to

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[27] Cockington relates that the mostly male audience was "given glimpses of Lola's allegedly shapely ankles and calves" (p. 4).

28 http://www.uoc.edu/portal/en/sala-de-premsa/actualitat/entrevistes/2013/daniel-mendez.html

29 This is not stated in so many words. Section 51 of the Constitution enjoins the government "to make laws for the peace, order, and good government of the Commonwealth".

the participants in the police seizure of photographer, Bill Henson's pictures (May 2008) could have been avoided had child-images law been clearer and better understood by all who were concerned.

NOTHING TO FEAR BUT FEAR

Although the aim of censorship law is to protect individuals from, or to prevent, a number of harms, it could be argued that the law demonstrates an overly protective fear of harm. Some of the main harms are briefly stated, with summarized rebuttals as follows.

Harm to children reading, watching and listening. Even if this is so, given sufficient consumer information, parents and guardians are better placed than is the government to oversee their charges' arts-media entertainment. *The Board* acknowledges this: "ultimately, it is the responsibility of parents or guardians to make decisions about appropriate entertainment material for their children and to provide adequate supervision" (CBR07-08 p. 44). (See Chapter 9: Minors and Scary Stuff).

The subject children are harmed when adults access images of their sexual abuse for lustful purposes. A child might know the images exist but can have little or no idea who looks at them or for what purpose. The harm was done when the images were made. If, for example, the images were subsequently destroyed, the child might have no way of knowing but the initial harm would remain.

Harm to others follows from looking at images. No reliable evidence exists that looking at anything leads to harm in a general sense. There are studies that indicate a low percentage link between looking and harming but the cause and effect cannot be sustained. If 5% of lookers cause harm, why do the 95% not cause harm? (see Chapter 8: There's No Harm In Looking). (Protection from offence, such as inadvertent exposure to arts-media, is a relatively minor consideration.)

THE CORE OF CENSORSHIP

The core of arts-media censorship is that it represents control by some, using the force of law (*The Act*), over what others want to read, watch and hear. Much of the argument about censorship concerns looking at and listening to pornography, but according to one writer, it is doubtful whether either side of the argument will ever succeed: "The debate about pornography often begins with a quibbling over the definition of

pornography—and too often it ends there as well" (Kimmel, 2005, p. 83). However, certain images of children are defined in law as pornographic; this aspect of censorship is examined in Chapter 11: Images of Minors. That stated, we must not divert from a discourse on censorship by reducing it to one of what constitutes pornography. This thesis asks whether censorship is necessary and, if so, whether the current system is the best means of achieving its ends.

While what is generally understood to be pornography probably forms the bulk of censorable material, an antipathy to pornography itself is not the reason for censorship. If that were so, X 18+ rated movies would be banned *en bloc* and throughout Australia; the facts are quite the reverse; this material is lawfully traded. The *Guidelines* (2012) state: "*Note: This* [X 18+] *classification is a special and legally restricted category which contains only sexually explicit material. That is material which contains real depictions of actual sexual intercourse and other sexual activity between consenting adults*" (document's italics).

Furthermore, the *Guidelines F* (2008) state: "*Available only for sale or hire in the ACT and Northern Territory"* (the Territories). Thus, X 18+ movies are lawfully available in the Territories but the States ban the sale and hire of them in their respective jurisdictions. This creates a further inconsistency: individuals who reside in Australia's States can lawfully import X 18+ rated items from the Territories but cannot lawfully sell them.[30]

> In the States, the law only permits X rated films to be possessed for personal use. X rated films are not, and never have been, legally available for sale or hire in NSW. The sale of X rated films was legal in Victoria for a brief period in 1984 and in South Australia in 1984-85 (Griffith, 2003, p. 3)

It is unlikely that adults who live in the Territories would, *en masse*, have one set of community standards and their counterparts in the States a different set. The two

30 The Constitution at "**Section 92. Trade within the Commonwealth to be free**. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be *absolutely free*" (italics added). Presumably it is unlawful to send X 18+ material from one State to another. This, not being a law thesis, I didn't look to see if there had ever been a judgment on that point.

interpretations of *The Act* s.11(a) are considered in a wider context in Chapter 7: Everyone Wants to be a Censor. In any event, because X 18+ material can be lawfully possessed and traded, *The Act* assumes that no individual above the age of 18 years will be harmed, or cause harm to others, following exposure to images of "actual sexual intercourse and other sexual activity"; on the above evidence, the States' censorship laws would imply otherwise.[31] The disparity raises the question of why what is banned is banned and for what benefit. That question is considered in a general way in Chapter 8: There's No Harm in Looking.

CONTROLLING THE INTERNET

When he was communications minister, Senator Stephen Conroy[32] wanted to filter (censor) the Internet to "help Australian families stay safer when they're online". This ideal did not impress Senator Scott Ludlam who described it "as a solution in search of a problem" and added: "I haven't seen anything at all that justifies the implementation of mandatory net censorship in Australia" (ABC *PM*, December 16, 2009).[33] Conroy persisted in his efforts to filter the Internet. Six months later, during the Senate Estimates Committee hearing, Conroy said the technology experts on filtering "reckon they can do [block] 50,000" websites, to which Senator Ludlam queried: "So the sky is the limit then?" Conroy said: "technology improves all the time and it is possible technology will have improved by the time we reach a limit" (*SH*, May 24, 2010). Conroy was, eventually, persuaded to revise his plan.

> Following years of debate about trying to censor the internet (*sic*), the Communications Minister, Stephen Conroy, said the government would no longer proceed with "mandatory filtering legislation". It would, however, use powers under the Telecommunications Act to block hundreds of child abuse websites already identified on Interpol's "worst of" list (*SMH* November 9, 2012).

31 See, for example, Peter Breen, NSW Legislative Council Hansard, October 26, 2004 page 11902. "For the benefit of members, I actually bought one of these films on the weekend. Members will see that the film is classified X 18+: the cover says that it is restricted to adults 18 years and over. It is illegal to sell this film in New South Wales but it is not illegal to buy it. Even though it has been classified by the censor and has a classification number on the back of it".

32 Conroy was at that time Minister for Arts/Broadband, Communications & the Digital Economy.

33 ABC *PM* December 16, 2009. Reporter: Alexandra Kirk.

The Interpol approach is considered in Chapter 11: Images of Minors but it will be helpful here to demonstrate how difficult it can be "to keep families safe online", even supposing Conroy had achieved his government's end of filtering the Internet. As part of researching for this thesis a range of websites that contained material Conroy hoped to censor was accessed. The following paraphrased extract from the *Guidelines* for X 18+ material was used as the descriptor for what was deliberately (as distinct from inadvertently) accessed.

> No depiction of violence, sexual violence, sexualised violence or coercion is allowed in the X-18+ category. Nor does it allow sexually assaultive language, or consensual depictions which purposefully demean anyone involved in that activity *for the enjoyment of viewers* [italics added].[34] Fetishes such as body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting are not permitted" (*Guidelines for the Classification of Films* 2008, part 2, no page number).

The research began with entering "golden showers" into the browser. Any child can do this, it not being unlawful to learn what the term means. *Wikipedia* includes a graphic illustration, which a child would have no difficulty in understanding (http://en.wikipedia.org/wiki/Urolagnia).

In continuing the research there were, however, instances that gave other causes for concern. Relatively innocuous websites were accessed, such as presentations of models wearing lingerie (erotic but not *Victoria's Secret*), and young people posing scantily clad or naked. Images that likely would have been classified M 15+ or R 18+ if submitted to *The Board* were discovered. M 15+ allows implied sexual activity and nudity if justified by context; R 18+ allows that: "Sexual activity may be realistically simulated" and "Nudity is permitted" (*Guidelines F* part 2). Often, however, unwanted pages popped-up even though the browser was configured otherwise. One of the more serious

34 I have some difficulty understanding this. If it is consensual it must be presumed that the masochist enjoys it but it would appear *The Act* does not aim to stop the activity as such, merely the recording of it as still or moving images. What other reason would one make pictures if viewers were not expected to enjoy it? There is, of course, *The Passion of the Christ*, about which historian Alex von Tunzelmann wrote: "If you like your religion in the form of torture porn, you'll love this" (*The Guardian*, April 2, 2004).

aspects included a "stay on page – leave page" option. Opting to leave the page resulted in the same message (*i.e*. stay or leave) re-appearing apparently endlessly. The only way out (for this researcher) was to force-quit the browser. We do not know how many web browsers are transferred to a prohibited website (or attempts made) but ALRC2012 noted: "There is no requirement for the ISPs to report their statistics, but for the period 1 July [to] 15 October 2011, Telstra reported that there had been in excess of 84,000 redirections via its network" (ALRC2012. 12.74).[35]

Thus, regardless of an individual's best efforts, a family could endure quite some time exposed to unwanted images; this because determined website operators are clever enough to circumvent the filter's best intentions.[36] It is of interest here to note that in 1995, the year in which *The Act's* introduction was being debated in Federal parliament, Senator Chapman, citing *The New Scientist*, said: "Hiding messages in seemingly innocent pictures or texts is an old technique. But in the era of computers, it has become cheap, easy and undetectable" (*SH*, March 1, 1995, p. 1212). These difficulties are further considered in Chapter 8: There's No Harm In Looking.

FOR THE PROTECTION OF MINORS

There is no question but that responsible parents and guardians should do everything in their power to protect their young charges from any harmful effects of accessing material that is considered inappropriate for them. Indeed, this is such an important subject that it is examined in three chapters herein, namely: Chapter 9: Minors and Scary Stuff, which considers what young people read, watch and hear**.** Chapter 10: Children and Adolescents suggests a separation of minors into two groupings: those below teenage and teenagers up to the age of 18 years. Chapter 11: Images of Minors questions why images that are not considered censorable (*i.e*. objectionable) when the subjects are adults, become censorable when the subjects are minors. One must ask:

35 This is a remarkable number in itself, but when annualized the number increases to 291,200. If Telstra has, arguably, 60% of Australia's Internet business, then, by this extrapolation the number of redirections annually would approach half a million.

36 My computer retailer told me of a scam where a compromising web page pops up and is immediately followed by a page that gives the appearance of being a message from the Australian Federal Police. The scammer then locks the computer and will only free it after receiving a ransom of several hundred dollars. I have not experienced this so far in my work. It further illustrates, however, some of the difficulties of keeping families safe when online.

What are the elements that make an image "likely to offend most people"(*Guidelines P*) such that the image should be censored.

There is an argument to be made that censorship law is, in critical parts, imprecise or overbroad. For example, the cartoon characters *The Simpsons* were ruled "persons" for the purpose of censorship law (see Chapter 11: Images of Minors). Similarly, computer generated images that appear to be real (especially young) persons can be ruled illegal. This is because they are "depictions" of the censorable activity. The *Guidelines* state that an item containing: "Descriptions or depictions of child sexual abuse or any other exploitative or offensive descriptions or depictions involving a person who is, or appears to be, a child under 18 years" will be refused classification. The *Guidelines* include a "List of Terms" under which title is written, "*Note: Words which are used in the Guidelines but which are not contained in this List of Terms take their usual dictionary meaning. Refer to the latest edition of The Macquarie Dictionary."*

It could be argued that if non-children are held to be children, the entire purpose of anti child-abuse law becomes questionable. The protection of children from harm and abuse (especially sexual abuse) is an important, perhaps overriding, reason for curtailing (preferably eliminating) the supply of child abuse material, but it is argued the law must be clear on the sort of images that are evidence of child sexual abuse. If censorship is to protect real persons from being abused in the making of images, the depiction or description of fanciful figures does not satisfy that requirement. If the purpose is also to cut off the supply and demand for images, then, it is argued that as with prohibited drugs, firearms and the like, the police, and not *The Board* should deal with the matter. The ambiguity of the law as it now stands is considered in Chapter 11: Images of Minors.

THE PEOPLE'S REPRESENTATIVES APPOINTED TO *THE BOARD* AND REVIEW BOARD

To ensure that the aims and desires of arts-media censorship are maintained, *The Act* (ss.48-50) gives charge of assessing material to a carefully selected, small group of persons, as is demonstrated in Chapter 3: Appointments to and Activities of *The Board*. Similarly (*The Act* s.74(c)) creates the Classification Review Board (RB), which comprises a carefully selected group of six to eight individuals; Chapter 4: Appointments to and Activities of the Review Board examines those appointments. To assist members of both boards in making their classification decisions, the

policymakers have put in place a set of criteria by which arts-media material is to be assessed, namely the *NCC* and *Guidelines* (see Chapter 5: Instructions to *The Board* and the Review Board).

The Board commissions surveys into the public's understanding of media ratings, which provide evidence that Australians generally approve of its classification decisions; thus, *The Board* claims, its assessment of arts-media conforms to community standards. For example, "the overarching aims" of a 2007 survey, commissioned by *The Board* and conducted by phone calls to 1,516 individuals was intended to assess whether "(i) classification decisions on films and computer games generally reflect community standards; and (ii) whether classification decisions on films appropriately apply the R 18+ classification guidelines, particularly with respect to actual sex and the level of violence." The research findings indicated that classification decisions for films and computer games did reflect community standards. "Overall, 85% of film consumers felt the consumer advice for the film they saw was about right and 79% of computer game consumers felt that the consumer advice provided with their game was about right" (Galaxy 2008, p. i).

That survey was, essentially, no more than a large-scale version of *The Board's* classification activity, in which being provided with the *Guidelines*, an item was rated accordingly. In Chapter 5: Instructions to *The Board* and the Review Board, we learn that although there is some room for variation, and provision to appeal against classification ratings, *The Board* is legally bound by the *NCC* and the *Guidelines*. (Thus, for example, *The Board* would be out of order if it classified material that depicts or describes "golden showers".) That there was not 100% agreement among the 1,516 individuals surveyed is not surprising, Board members often do not entirely agree among themselves, for example: "The French documentary *No Body is Perfect* was classified RC due to the depiction of sexual activity accompanied by abhorrent fetishes. A minority of *The Board* was of the opinion that the film was a bona fide documentary and could be accommodated at the R 18+ classification" (CBR07-08 p. 48).

This is particularly interesting for its diversity of acceptance and rejection; one reliable (although not academic) survey of 94 user ratings, nine gave *No Body is Perfect* 10/10 and nine gave it 1/10, with a weighted average of 6/10.[37] In Chapter 12:

37 http://www.imdb.com/title/tt0835492/ratings?ref_=ttexrv_sa_4

Classification and Censorship Unbound, it is argued that adults can decide what to accept and reject without help from *The Board*.

It is right that young people are protected from harm, but to treat adults as children unable to make informed choices on their arts-media preferences is, one would argue, demeaning, therefore questionable. Except for a summary of *The Board's* report, it is not lawfully possible for the population at large to see for themselves any item that is banned. As it now stands one cannot lawfully access a refused classification movie. Thus, one is left wondering what are the "abhorrent fetishes" in *No Body is Perfect*? To whom are the fetishes abhorrent? (*The Board's* report on arts-media items, especially if controversial, might be more useful as critical reviews, much the same as books and movie reviews are helpful to potential consumers.)

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As one continues to seek reasons for imposing censorship, it becomes difficult to avoid the conclusion that it is, perhaps as it always has been, for the governance of morals. Every technological change to art and communications media has been met with some form of powerful resistance. The newer forms: among them the Internet and smart phone are proving difficult to control, which is why in 2010, the government commanded an inquiry that resulted in the report referred to herein as ALRC2012. There was also a concurrent inquiry "into Australia's media and communications policy framework": the "Convergence Review", which "received over 340 written submissions and 28000 comments" as well as undertaking "an in-person consultation programme across Australia".[38]

Although both reviews note a distinction between what can be privately accessed (*e.g. via* smart phone) and what is made public (*e.g. via* television), one senses that this does not quite translate to recommendations based on the difference but, rather, maintains the community standards requirement. Thus, it is argued that not only is community-standards censorship the wrong way of doing the right thing (*i.e.* protecting children and providing sufficient consumer labelling), it is also in the 21st century, demeaning of adult Australians who are capable of making their own personal and private decisions in respect of what they prefer to read, watch and hear.

38 The report is neither paginated, nor suggests a citation. Its title page appears to be Department of Broadband, Communications and the Digital Economy, *Convergence Review: Interim Report* (2011).

A LONG TERM VIEW OF CENSORSHIP

If long-term experience of censorship means anything, then a speech delivered to an international symposium of arts-media classifiers, held in Sydney in February, 2007 should prove instructive. A particularly relevant part of the speech is reproduced here; it is a longer quote than one usually cites in a work such as this, but necessary to an understanding of the speaker's knowledge and experience of censorship. It is particularly relevant that, at the time of delivering the speech, its author, Gunnel Arrback, had been Sweden's chief censor for 25 years.

> When I lecture at home about the Swedish form of film classification I often show a picture that I think is rather revealing. It is taken from a newspaper in Sweden and is a cavalcade of phenomena that has created what might be termed, perhaps a little carelessly, moral panic. The first of these is from 1908 and is not about movies but about a series of books about a detective called Nick Carter, obviously of the kind that shoots first and asks questions afterwards. It would have dangerous consequences if they fell into the hands of youngsters. The next picture shows Louis Armstrong and his trumpet and the heading is "jungle music produced by negroes in brothels", which is what jazz was actually called in the '30s and '40s, when it became popular among young people. The '40s also brought another shocking experience for the watchers of public morality. The Swedish name for it is impossible to translate but it had to do with what young people were doing on open-air dance-floors during the light and bright Swedish summer nights: orgies of drink and sex. Further into the '50s and '60s a whole generation of kids were considered to be at risk by reading cartoon magazines about *The Phantom* with his violent lifestyle. In the '70s, which in Sweden is regarded as a progressive and radical decade, leaning to the political left, a category of other cartoons was considered dangerous in a different way; the theme of "the imperialist duck", meaning Donald Duck, symbolizing American cultural imperialism with Donald always fighting and his uncle $crooge [*sic*] thinking of

> nothing but his money. Then came the 1980s when video hit Sweden and other countries, and *The Texas Chain Saw Massacre* became a household word. A decade later it was computer games and nowadays, of course, it is the Internet. The common factor of all these phenomena is naturally that adults were scared and worried and the younger generations loved them.
>
> So what is the point of this charade? Only to say that new things have a tendency to be scary to the grown-up establishment while they are popular with the young and once in a while you [his fellow classifiers] might confess, in retrospect, that perhaps we worried a little too much (Arrback, 2007).

It is argued that provided policymakers are willing, a simplified process can replace the current system of censorship, which is clumsy, expensive and controversial. But "there's the rub": from the evidence to be adduced in the coming chapters, it appears unlikely that policymakers would admit to "worrying a little too much".[39] As we progress though this work it will become clear that, when all other reasons are removed, censorship is about the governance of morals according to the standards of morality, decency and propriety adhered to by a certain class or section of the population. In the chapter immediately following, we examine how England's "grown-up establishment" carried its ideals for moral betterment into Australia and with it, the beginning and early development of censorship.

39 I found nothing on the record to indicate that Arrback's fellow classifiers agreed with him. Indeed, in Chapter 4: Appointments To And Activities Of The Review Board it is observed that although four members of the RB attended the meeting, no mention was made of this, or any other speech, except that RB member Anthony Hetrih presented a paper as a panel member. (CBR06-07, p. 70).

ARTS-MEDIA CENSORSHIP IN AUSTRALIA:

Doing The Right Thing The Wrong Way

PART 1: CENSORSHIP AND ADULTS

CHAPTER 1: THE GOVERNANCE OF MORALS

> People are never more sincere than when they assume their own moral superiority (Sowell, 1995, p. 3).

"COMING EVENTS CAST THEIR SHADOWS BEFORE"[40]

In the last quarter of the 18th century, two important events were unfolding, which although initially unconnected, were to profoundly affect both the Anglo-settlement of Australia and the governance of the country's morals. First, and most important, the British subjects in colonial America refused to pay taxes unless they were properly represented in the English parliament. This rebellious attitude led to the American War of Independence in the 1770s. Second, at or about the same time a movement for bettering the poor was taking hold in England. This Christian movement was to manifest itself in such groups as the Bettering Society, the Christian Influence Society, the Clapham Sect and the Society for the Suppression of Vice. As Mason observes: "The full range of Anglican Evangelical philanthropy and proselytizing involved scores of organizations and for many of these philanthropy was the exclusive project" (Mason, M., 2003, p. 255). All of such organisations are henceforth referred to as the "Betterers", except where any particular reference is necessary.

The Betterers were preceded by the Societies for Reformation of Manners (SRM) that flourished between 1690 and 1740, "during which time they were responsible for over 100,000 prosecutions for moral offences" (Hunt, A., 2009, p. 28) The SRM, however, "pluck[ed] up the weeds and prepare[d] the ground" for the Society for Promoting Christian Knowledge to "sow the good seed" (Allen, W. O. B., McLure, E., 2011, p. 19*fn*).[41] Some moral offences included the death penalty, *e.g*. sodomy—that "infamous crime against nature", which was so disgraceful it should not "be named among Christians" (Berkowitz, 2012, p. 54). Such was the earlier 18th century lead-up to the most successful of all Betterers: The Society for the Suppression of Vice (the Vice Society).

The Vice Society operated primarily as a prosecuting society, which targeted everything it considered unholy or indecent, in a range from trading on Sunday, to

40 From the poem *Lochiel's Warning*, (1802) by Thomas Campbell (1777-1844).

41 See also: *The Movement for the Reformation of Manners, 1688-1715*, the title of a Ph.D. thesis by Andrew Gordon Craig (University of Edinburgh, 1980).

public urination. The elimination of obscene publications was a high-priority target and, before the end of the first decade of the 19th century, the Vice Society was to "claim credit for the confiscation of 129,681 prints, 16,200 illustrated books, five tons of letterpress, 16,005 song sheets, 5,503 obscene artifacts [*sic*]" (Hunt, A., 2009, p.73).

Thus, while George III's army and navy were fighting the American colonists *circa* 1775-1782, England was undergoing what in modern parlance would likely be termed a war on immoral and irreligious activity. It was not enough that the English poor were being tried (very often for their lives) for offences against persons and property, they were also held to account for offences against Christian morality. Taken together, the mounting numbers of offences contributed greatly to prison populations, which for so long as England could transport convicts to the Americas, was not a seriously overburdening problem. That situation was to change, however, when the loss of the American colonies (1783)[42] put an end to prisoners being transported there.[43]

REFORMING THE IMMORAL POOR

Even before the American colonies were lost to England, the Betterers had two main focal points: (1) a reduction in the overcrowding of prisons, (2) correcting an official attitude that prison inmates were inherently bad. As the prisons became more overcrowded, post-1783, some of the Betterers saw an opportunity to alleviate the situation by creating a settlement at Botany Bay, New South Wales. The bettering groups had some considerable input into the plan including a requirement that the appointed governor of the new colony acquaint himself with the slums of England's major cities and to be sure the unhealthy, squalid conditions prevailing at home would not be repeated in New South Wales. One tangible result of this, which is recognised even today in Australia's ¼-acre suburban building block, allowed for clear air and healthier living conditions.[44]

42 The Treaty of Paris, September 3, 1783.

43 On August 28, 1783, just a few days before the American was of independence ended , one James Matra, submitted a proposal to the English government which began thus: "I am going to offer an object to the consideration of our Government what may in time atone for the loss of our American colonies" (HRNSW Vol I Part 2, p. 1). It was to be more than a dozen years before plans were made for the First Fleet to sail for Botany Bay. See Arthur Phillip's Commission as Governor dated April 2, 1786 in HRNSW Vil. I Part 2, 61 *et seq.*

44 A building block was to be not quite a ¼ acre, but at least 60 feet (~18.3metres) wide and 150 (~45.7metres) feet deep, which equals 0.2066 acres. Also, "Principal streets are placed so as to admit a free circulation of air and are two hundred feet [~61 metres] wide" (HRNSW Vol I. Pt 2, p.147).

So much for the body: the soul, made in God's image and likeness, was even more important. Nevertheless, it was thought that by bettering the physical condition, betterment of the soul would be easier to achieve—although the body had to be punished as part of the transformation. There would appear to be no question but that the convicts were, through learning, to be turned from their immoral and criminal ways. It was that kind of reasoning that lead to arrangements being made for a preacher (the Rev. Richard Johnson) and a library of bettering books to be included among the First Fleet's[45] cargo to Botany Bay. Mackaness provides these details:

> Though food, water, clothing and other essentials might possibly be lacking on the voyage, the Society for Promoting Christian Knowledge, at Johnson's request, provided an ample supply of religious reading matter—4,200 books in all—sufficient to allow each of the 700-odd convicts embarked to borrow six at a time. In addition to Bibles, Testaments, Prayer-books and Catechisms, the convicts—the few who could read—must have been edified by finding on board 200 copies of *Exercises Against Lying*, 50 *Woodward's Caution to Swearers*, 100 *Exhortations to Chastity*, and 100 *White's Dissuasion from Stealing* (Mackaness, 1978, p. 7).

The books appeared to be no help at all and moral correction failed. Any study of Australia's early settlement history would disclose, not only the convicts, but also the marines, lied, swore, fornicated and stole, which led Governor Phillip to impose severe penalties, including hanging, for some offences. In 1798, ten years after the First Fleet convicts landed at Sydney Cove, the Rev. Johnson complained to Governor John Hunter, that convicts "gamed away the clothes off their back, and the very provisions served them" and further, seeing "gross immoralities depredations, drunkenness, riots and even murders, daily committed" (Mackaness, 1978, p. 24). All of this is relevant to our work only inasmuch as the contemporaneous attitude to decency and morality set the tone, if not the standard, for Australia's continuing censorship of morals; not only morals, but religion, too, was censored.

45 As far as I know, the term "First Fleet" is unique to Australia; it is widely used among Australian historians and, indeed, many of the public, when referring to the eleven ships that set out from England on May 15th, 1787.

ONLY ANGLICAN CHRISTIANITY PERMITTED

The censorship of religion was inscribed in King George III's commission to his appointed Governor, Arthur Phillip, who was required to take, not only the oaths of loyalty to the King and the oaths of office, but also: "that you make use and subscribe to the declaration Mentioned in Act of Parliament made in the twenty-fifth year of the reign of King Charles the Second [1672] intituled 'An Act for preventing the dangers which may arise from Popish Recusants' (HRNSW Vol. I. Pt. 2, p. 62-63).

The Rev Thomas Walshe, a Catholic priest, was mindful of recusancy when he wrote to Lord Sydney: "That the Catholics of this country are not only of inoffensive principles, but that they are zealously attached to it, I may presume is well known to your Lordship". The letter was a plea for "two clergymen of the Catholick persuasion" to be sent out to attend to the spiritual needs of the probably 300 convicts of the Catholic faith.[46] Walshe sought no financial support, but asked only to be provided with two places aboard the ships. In the absence of any response to the letter, and no Catholic priest being sent out, we may presume the offer was declined in conformity with the establishment's antipathy to Catholicism. (HRNSW Vol. I. Pt. 2, p. 119-120). Thus was the Church of England established as Australia's religion. The bias in favour of Anglican supremacy is evident among the establishment even today; Australian seats of government, federal, state/territory and local, open their respective proceedings with the Anglican version of the Lord's Prayer.[47]

THE ESTABLISHMENT ESTABLISHED

From the outset, and by sovereign command, colonial Australia's Established Church and State were inextricably melded. This linkage was established in 1697, 90 years before the First Fleet sailed from England, under William III's "Act for the better Observation of the Lord's Day, commonly called Sunday", and was reinforced by: "A Proclamation" of King George III (June 1, 1787)[48] "For the Encouragement of Piety and Virtue, and for the preventing and punishing of Vice, Profaneness and Immorality" clearly bound Church and State. Playing dice, cards "or any other games whatsoever"

46 It is more than likely that some of the of marines sent out with the convicts were also Catholics.

47 Catholics do not include, "For thine is the kingdom, the power and the glory, now and forever," at the end of the prayer. Also, the "Gods" of religions more recently new to Anglo-Australia are not recognised in the Anglican prayer.

48 The First Fleet was two weeks at sea, thus, the proclamation missed the boat, but it caught up in 1790 with the arrival at Sydney Cove of the Second Fleet.

were banned on the Lord's day as was the selling of "Wine, Chocolate, Coffee, Ale, Beer, or other liquors" during the "Time of Divine Service", and "We do hereby require and command ["all our loving subjects"] and every of them, decently and reverently to attend the Worship of God on the Lord's Day, on Pain of Our highest Displeasure". Furthermore, the King commanded "Our Officers and Ministers, both Ecclesiastical and Civil, and all other Our Subjects, to be very vigilant and strict in the Discovery, and the effectual Prosecution and Punishment of all Persons who shall be guilty of excessive Drinking, Blasphemy, profane Swearing and Cursing, Lewdness, Profanation of the Lord's Day, or other dissolute, immoral or disorderly Practices".[49] The part of the proclamation that bears on the censorship of arts-media is as follows: [50]

> [Our Officers and Ministers] take care also to suppress [. . .] all unlicensed publick Shews, Interludes, and Places of Entertainment, using the utmost Caution in licensing the same; also to suppress all loose and licentious Prints, Books and Publications, dispersing Poison to the Minds of the Young and Unwary, and to punish Publishers and Vendors, thereof (*The London Gazette*, May 29 to June 2, 1787, p. 262-263.)

Under s.116 of the current Australian Constitution, all are free to practice their religion(s), or to have no religion, but nowhere in the country's history will one find any determined effort to separate Church and State. Anglican Archbishop Peter Hollingworth (later Governor-General) stated: "There is no clear cut separation

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49 Two hundred years later, Australia was still subject to some of these bans. For example, the sale of alcohol on Sundays was banned in NSW until 1979 when such trading was legalised by the *Liquor Amendment Act* 1979 (NSW). Also, as recently as 2011, Sunday trading was still banned in Western Australia (see "WA moves to end Sunday trading ban", *Courier Mail*, Aug 15, 2011).

50 For the full text on Popish dangers, therefore establishing Protestant Christianity, see Raithby, J., 1819. *An Act for preventing Dangers which may happen from Popish Recusants. Statutes of the Realm:* volume 5: 1628-80, pp. 782-785. History of Parliament Trust.

George III's advisor was wrong. (The King can do no wrong!) Charles was crowned king of England, Scotland and Ireland in April 1661, The act was made in 1672, the twelfth year of his united kingdoms reign. Charles died in 1685, the twenty-fifth year of the united kingdoms reign. However, if one takes into account Charles, King of Scotland, 1649, his total reign spanned 36 years. Even so, 1672 was the 23rd year of his total reign. One suspects the clerk who was left to fill in the details might have confused the dates, which is not surprising considering the changes to Charles' status in the early years.

See Harris, T., (2005) *Restoration*: Charles II and His Kingdoms 1660-1685, Penguin.

Incidentally, Queen Elizabeth I had introduced recusancy laws in the 1590s. The important point being, religion was to be of the long-established Protestant sort; Catholics, Quakers, Calvinists *etc*. were recusants.

between church and state as there is in the case of the US tradition" (*Focus*, Anglican Church of Brisbane, May, 2001[51]). Commenting on Hollingworth, Gerard Henderson stated:

> In democratic societies, the distinction between church and state is forever muddled. For the most part, elected politicians are content to stand apart from those matters that affect God. Yet non-elected religious leaders appear all too anxious to get involved with that which pertains to Caesar (*The Age*, October 22, 2002).[52]

The Rev Fred Nile would appear to be not among "the most part"; on his election to the NSW Legislative Council in 1981 and since, he has spoken of a connection between Judeo-Christian morals and the State. Nile's attitude to the censorship of matters sexual is mentioned in several chapters herein.

Meanwhile the relatively new Secular Party of Australia aims to "fight for the separation of religion from state institutions" (http://www.secular.org.au). In the 2013 Federal election the Secular Party received 4,834 votes in the House of Representatives, or 0.04%, and 12,698 first preference votes in the senate, or 0.09%" The numbers were reduced compared to the previous election.[53] One would suggest it would be unsafe to conclude that this low percentage of votes indicates unwillingness among Australians to separate church from state. (Research for another time, perhaps.)

"BETTERMENT" MEANS ESTABLISHMENT RULES

From the mid-16th century the reigning monarch's secular law and Anglican-religious dictates, combined to set the limits of access to knowledge in England and its colonies. Queen Elizabeth I's half-sister Queen Mary had, in 1557, put in place the means by which all printed matter would be controlled; the authority to do so was vested by Royal Charter in The Stationers Company. The particular purpose of (Catholic) Mary's

51 Cited by Max Wallace in the *Australian Humanist*, New Series. No.77 Autumn 2005. Gerard Henderson also cited this in *The Age*, October 22, 2002

52 An aside. It always surprises that religious leaders know what God thinks and that God's thoughts coincide precisely with their own.

53 http://results.aec.gov.au/17496/Website/SenateStateFirstPrefsByGroup-17496-NAT.htm There is a link to the House of Representatives. See http://www.secular.org.au/secular-party-history/ for the background and short history of the party. The party was formed in 2006.

control was to prevent the publication of Protestant material and to seize and burn that which had been published, in which latter case, the Company was also granted powers to imprison the publishers (Patterson, L. R., 1968, p. 118). Perhaps, in an example of the biter bit, Queen Elizabeth I was able to use for the Protestant cause that which Mary had put in place to aid the Catholic cause. This use of power over knowledge by both queens in their turn is a prime example of Sue Curry Jansen's astute observation that: "The way the powerful say things are is the way they are, or the way they usually become because the powerful control the power to name" (Jansen, 1991, p. 6). On that point, Jansen reminds us that although the monarch's instructions to colonial governors (Australia's included) required printing to be licensed, not forbidden, Virginia's Governor William Berkeley (1605-1677) outlawed printing presses entirely on the grounds that "learning has brought disobedience and heresy and sects into the world; and printing has divulged them and libels against the government" (Jansen, 1991, p. 142). This was the more surprising since Berkeley graduated as a Master of Arts at Merton College, Oxford (Billings, 2004, p. 30).[54] It is relevant here to note that *The Sydney Gazette*, first published in March, 1803, carried the imprimatur: "Published with Approval" of the NSW Governor.

From the above we might suggest that censorship of the printed word was intended to ban anything of which any powerful member of the establishment disapproved on the grounds that, to cite Foucault, "society must be defended" (Foucault, 1997[55]) against any tendency to immorality. In its current form, Australian censorship translates Foucault thus: *society must be defended against material that transgresses "the standards of morality, decency and propriety generally accepted by reasonable adults"*. Inherent in this is, perhaps, an establishment belief that: "We cannot expect the Blessing and Goodness of Almighty God", to whom we pray daily at the start of parliamentary business "without a religious Observance of God's Holy Laws".[56]

54 It is also of some interest in the context of recusancy that Berkeley's father, Maurice, "was inclined toward those Anglicans who wanted to purge the Church of England entirely of its Romish habits" (Billings, 2004, p.4); an interesting example of the long-lasting establishment antipathy to Catholicism.

55 This is the book title for a collection of "Lectures at the College de France 1975-1976". My copy is the 2003 edition.

56 The quote is from King George III's Proclamation, cited above.

"BETTERING" AUSTRALIANS; THE CORNERSTONE OF CENSORSHIP

When one studies the history of censorship generally, and if one takes Devlin as a leading establishment figure of his time, it becomes clear that the betterment of morals is a very high priority for the establishment, even to the point of enforcing morals. This is not the place to enter a discourse in respect of the Devlin *versus* Hart[57] argument; it will suffice to say that history has, in some important respects, overtaken them both, especially with the tolerance (some would hesitate to say acceptability) of homosexual behaviour. A new line has been drawn and censorship of morality has been relaxed (see the chapter immediately following). Nevertheless, there still exists among the establishment a will to ban certain arts-media (*i.e*. refused classification material), in the name of decency and morality. Indeed, in concluding one of his speeches, a former Director of *The Board*, Des Clark, said: "From my perspective, having viewed many images of child pornography and sexual violence, I am confident that the model of censorship we have in Australia does indeed make for a more decent society" (Clark, D., 2005). Thus, censorship was perceived as a moral "betterment", or at least as making Australians more decent, therefore better than they would have been in the absence of censorship. Mill, *On Liberty*, argued against betterment for betterment's sake, stating that society cannot compel a person to do something, or refrain from doing something that is harmless because it would be better for him; one can educate, cajole or plead, but not compel. Censorship overcomes Mill's objection by suggesting that access to certain material is, or can be, harmful. An item might have literary or artistic merit (*The Act* s.11(b)), but if it does not conform to the reasonable adult's standards, the item must be refused classification; it being implied that acceptable material is not harmful. The betterment of Australians, then, is the cornerstone of censorship.

CENSORSHIP, LIKE THE POOR, IS ALWAYS WITH US

The thesis position is: if it is right to censor arts-media, there might be better means than the current system of achieving censorship's ends, which, in one form or another, has been with us since the First Fleet of English convicts made landfall at Sydney Cove in January, 1788. In smuggling a letter out of Sydney Cove in November that year, a female convict wrote to the recipient: "All our letters are examined by an officer, but a

57 Devlin was for enforcing morality while Professor H. L. A. Hart held to the Millian principle that harm was the only reason for the law's interference in a person's actions.

friend takes this for me privately".[58] Whatever censorships then existed in England (and there were many, particularly blasphemy and sedition) were to be maintained in New South Wales.

When Australia's first newspaper *The Sydney Gazette*, was introduced on March 1, 1803, the Governor-approved editorial proclaimed: "We open no channel to Political Discussion, or Personal Animadversion".[59] One historian, writing about *The Sydney Gazette*, states: "the newspaper could hardly have enjoyed independence even if it had not been kept at Government House, and printed on a government press with government ink on government paper, as it was in fact" (Walker, 1976, p. 3).

Further evidence of early pre-publication censorship can be found in the Historical Records of Australia (HRA). In April 1808 when Captain John Macarthur was on trial "for exciting hatred and ill-will" against Governor Bligh this question was put to his prosecutor: "Q. During the time the Sydney Gazettes were published, was not the Proof Sheet always brought to Gov't House to be corrected and approved? —A. Yes" (HRA I VI, p. 323). Nearly 20 years later, Governor Ralph Darling introduced the Newspaper Regulating Act, which became effective on May 1, 1827.

> An Act for preventing the Mischiefs arising from the printing and publishing Newspapers and Papers of a like nature by persons not known and for regulating the printing and publications of such Papers in other respects and also for restraining the Abuses arising from the publication of Blasphemous and Seditious Libels (HRA I XIII, p. 854).

That Act contained twenty-two clauses, one of which included harsh penalties (£100 fine) for failing to deliver a copy to the Colonial Secretary, for which that officer would pay the "ordinary price" (HRA I XIII, p. 854). In possibly the first major difference between government and the legal profession in Australia, Chief Justice Forbes, who was not without his reservations about allowing too much liberty to former convicts, could not agree with all the clauses in Darling's edict.

Both Darling and Forbes wrote to Earl Bathurst on the matter in strong, though not

58 A letter from a female convict dated "14th November 1788", in the British Museum Papers. Cited in HRNSW, Vol. II at page 747.

59 *The Sydney Gazette*, Vol.1. Number 1, p. 1, March 5, 1803. The paper's banner carried the *imprimatur* "Published with Approval". State Library of NSW facsimile edition 1963.

intemperate terms. The point at issue goes to the heart of censorship, namely, what should be censored and why so. Forbes acknowledged that Darling's bill was framed:

> . . . in conformity with instructions from your Lordship [. . .] the instructions were intended as a sanction to the Governor to *propose* [italics added] such a measure, leaving it to the local authorities to exercize [*sic*] their own judgment as to the propriety of certifying or passing it. (HRA I XIII, p. 289).

Forbes concluded his long letter to Bathurst, with an observation that contains the sentiment of present day censorship.

> . . . how far, in a mixed population like that of New South Wales, it may be proper to allow the same unrestricted freedom of the press, as by law is established in England. This is an important question; but it is one which I apprehend Parliament only can effectually decide. (HRA I XIII, p. 297).[60]

The allusion here is to allowing the free (or upper) class of persons certain liberties, but not the convict underclass. It was, however, the upper class that was responsible for the: "Abuses arising from the publication of Blasphemous and Seditious Libels". Even now, when classifying arts-media material, *The Board* is required to take into consideration "the persons or class of persons" for whom the censorable item is intended. (*The Act* s.11(d)).

CENSORSHIP POST-FEDERATION

When Australia became a federation of its member states on January 1, 1901, it carried censorship with it. For example, the *Customs Act 1901* (Cth) was only the sixth piece of legislation enacted by the new, national parliament. Customs officials were then and for some time afterwards, Australia's *de facto* censors for, as Herbert Pratten (MHR) observed in 1927: "There is no distinct act of Parliament authorising a censorship of

60 Details of the struggle between Darling and the Colonists for a free press can be gleaned from HRA I XII, XIII and XIV. See also, Michael Pollack 1990 on Edward Smith Hall, one of Darling's chief antagonists. See also Walker, R. B., 1976, Chapter 2: The Darling Necklace.

films. The present censorship derives its authority from section 52g [*sic*] of the Customs Act, which is the section giving authority to prohibit the importation of goods"; this included certain films.[61] Pratten elaborated:

> The [*Customs Act* 1901] regulations state, that, no film shall be registered which, in the opinion of a censor, is: (a) blasphemous, indecent, or obscene; (b) is likely to be injurious to morality or to encourage or incite to crime; (c) is likely to be offensive to the people of any friendly nation; (d) depicts any matter, the exhibition of which is undesirable in the public interest. The Commonwealth Film Censorship has set up certain standards for the examination of films in connexion with the above-mentioned regulations. (*HRH* September 24, 1927).[62]

Act number 12 of the new Federal parliament, the *Post and Telegraph Act* 1901 (Cth), gave censorship powers to post office staff. In June, 1901, the newly appointed Postmaster-General, James Drake, speaking to the bill, informed the Senate that: "Clause 41 gives the Postmaster-General, or his deputy, power to destroy any postal article having anything "profane, blasphemous, indecent, obscene, offensive, or libellous, written, or drawn on the outside thereof" (*SH* June 6, 1901).[63]

On July 8, 1903, some eighteen months after federation, Mr Spence, MHR for Darling NSW, (named for the former Governor) asked the Minister representing the Postmaster-General if a paragraph, which appeared in the *Australasian Typographical Journal* of June 19, 1903, had any truth to it. The paragraph read:

> Do the Federal labour members know this: Every telephone message during the currency of the railway strike sent by Secretary Scorer from the office in the district in which he lives was first forwarded to the private residence of a high official in the Postal Department. The latter is

61 I found no such clause, but s.50 of the *Customs Act* 1901 (Cth) refers to the importation of prohibited goods. The transcriber might have mis-read 50.9.

62 At this time the Customs department was in charge of film censorship; see Ina Bertrand's *Film Censorship in Australia*, University of Queensland Press, 1978.

63 The Bill was amended in several places before the *Post and Telegraph Act* 1901 received royal assent on November 16, 1901; the clause became s.40(d). The right to destroy material is in s.29(4): "Any posted newspaper found to contain indecent or obscene matter may be destroyed by order of the Postmaster-General". http://www.austlii.edu.au/au/legis/cth/num_act/pata190112o1901232/

> a Federal Department. Had the State Cabinet any right to censor telephone, telegraphic, or written messages through a sympathetic official? (*HRH*, July 8, 1903).

The Postmaster-General had not previously seen the paragraph and, after making inquiries, had ascertained there was no truth in the statements. If there was any truth in the statements, one might think such activity an early form or variation of phone-tapping, which is now considered an objectionable practice, even where it is, in certain instances, lawful.[64] The *Hansards* of the early 20th century indicate that some politicians adopted, if not an anticensorite[65] attitude, then a watchful one. For example, on August 4, 1909, William (Billy) Hughes said:

> . . . we know that the Treasurer has arrogated to himself the right to say what shall appear in reprints from Hansard of speeches made by honorable members, and we are now told by the honorable member for Parkes that the Library Committee would not refuse to add to the Library any proper book or newspaper. Are we now to have a literary censorship, of which the Treasurer is to be the uncrowned king? I am glad that the right honorable gentleman is not a member of the Library Committee. It is bad enough that he should criticise our speeches, and it would be intolerable if he had to decide what we ought to read (*HRH* Aug 4, 1909).

In the year following, when a government-subsidised news agency was mooted, Albert Palmer MHR, the member for Echuca, asked:

> Are we to set up a sort of Government censorship, and, if so, will the news, when censored, be likely or unlikely to be coloured by whatever party for the time being is in power? I am inclined to think that if the present Government commenced to censor the news sent out, it would

64 For example, the *News of The World* illegal phone-tapping. Lawful phone-tapping in Australia appears to be increasing, see Civil Liberties Australia article: "Phone tapping being used to enforce fines" at http://www.cla.asn.au/0805/index.php/articles/articles/phone-tapping-being-used-to

65 I acknowledge Laura Wittern-Keller, (2008), for the convenient "censorite" device.

> be largely the kind of news which they desire to give, and not information embodying all shades of opinion, which the public would have a right to expect (*HRH,* August 18, 1910).

During the First World War (1914-1918), there was much debate in parliament about press censorship, the most relevant point for our purpose being the banning of news items that were not banned in England. For example, Joseph Cook MHR queried whether the instructions to censors "were being so interpreted as to lead to the censoring of news and criticisms—reasonable, useful criticisms—such as are published in the newspapers every day in England?" (*HRH*, May 21, 1915).

These restrictions exceeded the necessity for military censorship in wartime and furthermore had no bearing on whether access to the information might tend to deprave or corrupt impressionable minds. The Postmaster-General, like the Treasurer of 1909, had "arrogated to himself the right" to censor. Nevertheless, it is clear from the *Hansards* that, even during wartime, press censorship was not something the government could take for granted. For example, Senator Edward Millen, while not wanting "any party attack on the Government", spoke to what he regarded "as a serious misuse of those powers of censorship" and an "abundant need of watchful and candid criticism" (*SH,* May 22, 1915).

However, after the war, in dealing with matters of morals, relatively few voices were raised against misuse of the "powers of censorship", some even went so far as to imply that not enough censorship power was being used, as the following paraphrased exchange concerning a sexually suggestive movie would indicate.

> The Minister for Trade and Customs was asked about the merits of the picture "Flaming Youth" and whether such sexually suggestive scenes were an insult to the intelligence of the average Australian. The Minister thought censorship should not express an opinion on the merits of a picture, "but as to its fitness for exhibition only". Impressions to be gained from the film, as amended by the censor, need not be harmful, although it was not a picture for the young mind. He did not consider it desirable to express an opinion as to whether "Flaming Youth" was an

> insult to the average intelligence but pictures could not be ruled out on that ground under the censorship regulations (*HRH*, May 7, 1924).

That exchange contained the seedlings of what was to become (although not without some growing pains) the regime of censorship now in force.[66]

TOWARDS THE CURRENT CENSORSHIP REGIME

Dissent from the censors' rulings continued through the 1930s, by which time the governance of morals had become increasingly the enforcement of morals. Furthermore, censorship extended to politics, particularly material that was sympathetic to Communism. The Book Censorship Board was established in 1933 and Harcourt's *Upsurge*, which in 1934 "introduced social realism as a new point of departure in Australian literature", was the first Australian novel to become the subject of police prosecutions (Harcourt 1986, p. xii). Richard Nile's introduction to the 1986 edition of *Upsurge* includes the following. "The novel was of grave concern for commonwealth and state censors because it challenged almost every social moré of the period from the status of the judicial system and existing legal practices through to industrial and sexual relations" (Harcourt, 1986, p. xxi).

In 1948, Robert Close was sentenced to three months jail by the Supreme Court of Victoria (R v Close [1948] VLR 45), for having written an "obscene libel": the book, *Love Me Sailor*. Ten years later, in Federal parliament, Fred Daly MHR linked Close's work with other censored books: "*The Catcher in the Rye*, *Love Me Sailor*, and *The Keys of St. Peter*. The Government did not want those books circulated because it considered that they might poison the minds of the people" (*HRH*, March 26, 1958).

In June 1969, *The Age* asserted: "Guarding other people's morals is not just an official passion, it is a national disease. It is time to bury the notion that Australians are less worthy of being treated as adults than their fellows in Europe and America" (Eric Williams in Dutton and Harris, 1970, p. 52). In September 1969, Senator Reginald Turnbull (Tasmania) said:

66 Moore, N., (2012) offers further food for thought on the history of Australian censorship at pages 28 to 30.

> It is a fact that in Australia we now have a form of censorship which makes us appear to be ludicrous in the eyes of the world. This is not a question of party politics, whether one is a member of the Australian Labor Party, the Liberal Party of Australia or the Australia Party; it is a question of public opinion. [. . .] I believe that all censorship should be abolished" (*SH*, September 16, 1969).

Senator Gordon Davidson (South Australia) disagreed and in responding to Turnbull said: "I hope that we will always have a censorship board which will look at these matters and ban books and films whenever necessary. I will continue to adopt this policy" (*SH*, September 16, 1969).

From studying the records, one is led to an opinion (in which one is far from being alone; see Dutton and Harris, 1970) that by 1969 a formal debate was becoming necessary, perhaps even urgent. It is likely that the High Court, in *Crowe-v-Graham* (1968) 121 CLR 375, provided policymakers with some impetus when ruling that the tendency of obscene material to deprave and corrupt would no longer be a reason to prosecute the maker, distributor or possessor of censorable material. Any new censorship system would have to base its criteria on the reasonable adult's understanding of morality, decency and propriety; these would then become classification standards and take into account "community concerns" (see the *NCC* principles in the chapter immediately following). However, in 1994, the year leading to debates on *The Act* itself there was a vigorous debate on the *Human Rights (Sexual Conduct) Bill* 1994 (Cth) that demonstrated the ambivalence of politicians (on both sides) to the standards.

The debate was important because classification standards were to be upheld on the one hand, while sexual privacy was to be protected on the other. Homosexuality caused considerable difficulty for many speakers.[67] For example, John Bradford, MHR (Liberal, QLD), had to say. He identified himself "as the Secretary of the Australian Parliamentary Christian Fellowship" who took "a fairly strong pro-family stance" and said that his remarks on the Bill were "made in that context". He concluded:

67 In brief, the Bill, introduced by Labor and opposed by the conservative parties, was to give adult Australians the right to be homosexuals if they so desired and consented, while preserving protection against other sexual offences such as incest and child sex abuse.

> This law is essentially a bad law and it fails many tests. Ultimately, it founders on the rock of political expediency. It is an indication of how far this [Labor] government will go to score a few points at the expense of the best interests of the nation. I am quite sure that, in the end, we as individuals and as a nation will reap what we sow. History has shown that to be the case, and I believe it will be the case again.
>
> In coming to my decision here today [to vote against the Bill], I make clear that I do not condone homosexuality. I do not believe that, in the end, I should accept the responsibility for what individuals do in the privacy of their own bedrooms. I prefer to take the view that I should do everything I can in this place to draw the line (*HRH,* October 13, 1994, p. 1955).

The impending debate leading to the introduction of *The Act*, was to be as rigorously debated as was the *Human Rights (Sexual Conduct) Bill* 1994 (Cth) as lines were drawn on what was to be allowed, banned, for and from whom, and at what age.

CHAPTER 2: A MORE LIBERAL CENSORSHIP

If history were to pinpoint a date on which the movement for a change to current censorship law began, it would be June 11, 1970. On that day, the Minister for Customs, Don Chipp, rose in the House of Representatives to make a statement that a generation later led to the passing of *The Act*, which, as previously stated, became effective on January 1, 1996. Chipp began his address thus: "The concept of censorship is abhorrent to all men and women who believe in the basic freedoms. As a philosophy censorship is evil and is to be condemned." Implying that a consideration of the matter was well overdue, Chipp reminded both Houses [68] that his was:

> . . . the first major statement on censorship to be made in this chamber since 1938, although there have been very occasional statements made in the Senate. It would be trite for me to observe and to enlarge on the observation that we have seen great social changes in the past 32 years. [Then, considering rapidly changing public attitudes. . .] we must face reality and we must examine censorship and, indeed, all social and cultural matters affecting the community at large, against conditions and attitudes as they are, at the particular time (*HRH*, June 11, 1970).

Despite the urgency in Chipp's tone, 25 years would elapse between that speech and the introduction of *The Act*. In that quarter-century some changes were made, but they were not of great significance. For example, the Film Censorship Board (FCB) began publishing its reasons for arriving at censorship decisions, *via* the Film Censorship Bulletin, which operated from May 1970 until January 1973.[69] In January the following year (1974) a meeting between the Commonwealth and ministers of all States except Queensland agreed that Commonwealth censors should classify publications. Queensland had its own censorship laws: "the *Objectionable Literature Acts*, 1954 to 1967

68 He spoke to the paper ("Censorship—Ministerial Paper" before presenting it, as is customary. A copy of the paper was tabled in the Senate by Chipp's colleague Senator Bob Cotton the day following, see *SH*, July 12, 1970.

69 I have yet to find a reason for ceasing publication. Whitlam became Prime Minister in December 1972, and it could be that his government had much more important matters to consider. For example, in 1973 alone, more that

200 Acts of Parliament were gazetted.

and the *Film Review Act* of 1974" controlled "what Queenslanders may read and see—a control that is tighter than in any other Australian state" (Fitzgerald, R., 1984, p. 348). Against such resistance to a national code, it is not surprising that the important changes hoped for by Chipp did not eventuate. The delay in setting up a national, more liberal and liberating censorship scheme appears peculiarly odd because the opposition supported Chipp's (Liberal) view as this extract from a speech by Bill Hayden MHR (Labor), delivered on the same day as Chipp's, indicates.

> I find censorship today in Australia a mass of confusing and conflicting laws, and of censorship bodies. I have doubts about the qualifications of many people who are censors. I find that there is much inconsistency in the way in which censorship practices are applied [. . .] I think that by now my attitude on censorship is reasonably clear (*HRH*, June 11, 1970).

It is observed here that Hayden represented the Queensland electorate of Ipswich, which raises the question of who, in Queensland and elsewhere, stood between the "mass of confusing and conflicting laws" and the apparent desire for change? This is not the place for considering that question in detail because we are, in this chapter, examining the current regime of censorship; the question will be addressed in Chapter 6: Communities and Standards. It will suffice to state, for now, that the conservative elements in Australia (*i.e.* Christian groups, church leaders and some politicians) organised a strong and long-running campaign against any relaxation of censorship criteria. Within weeks of Chipp delivering his statement, the Federal parliament began receiving identically worded petitions (as follows) from electors who were:

> . . . gravely concerned at what they consider to be the adverse effect on moral standards in the Australian community of the increasing portrayal and description of obscenity, sexual licence, promiscuity and violence in films, books, magazines, plays and, to a lesser extent television and radio programmes [. . .] obscenity and indecency are contrary to the teachings of Christianity which is the acknowledged religion of more than 80% of Australians. [The petitioners sought] to ensure that Commonwealth legislation bearing on censorship of films,

> literature and radio and television programmes is so framed and so administered as to preserve sound moral standards in the community" (*HRH*, August 28, 1970).

In 1972, Dr John Court, a Baptist preacher and leading morals campaigner, published a monograph that carried an encouraging foreword by the Governor-General Paul Hasluck, in which Court stated:

> It is assumed that, while the intellectual is clamouring for freedom to choose, the average man in the street has neither the intellectual resources nor inclination to make selective choices for himself and his family. However regrettable this may be, until it proves otherwise, it lies with those in authority to assist him". (Court, J. H., 1972, p. 41).

Here again we have an allusion to an underclass, which topic is examined in Chapter 6: Communities and Standards. For now, it is more important to note that well-positioned individuals were expressing their views of what sort of arts-media material should be tolerated and what discarded. Gilbert Duthie, MHR for Wilmot (TAS), registered a protest similar to that of Davidson (above), saying:

> I am a censorship man, am proud of it, and I intend to stay that way [. . .] Honourable members know what is done with sewage, it goes deep underground. I put these films at the same level. We are crying out about the pollution of cities, harbours and beaches, and are making a great outcry for action. But the apologists for the ending of censorship, condone the pollution of man's mind, and that is far more serious than the pollution of a few cities. (*HRH*, April 22, 1970).

The Rev Fred Nile, whose name has been a household word in the policing of Australians' morals, was elected to the NSW Legislative Council in 1981. His first speech reads like an autobiography followed by an expression of his intentions to reform the morals of his State; for example: "I shall seek to expose [. . .] all forms of organized crime and vice in this State, especially in matters of drugs, prostitution, pornography and gambling, as well as any other corruption that may be occurring". In

that speech Nile (1981) leaned on the work of Devlin's book *The Enforcement of Morals*. Citing Devlin, he said: "Morals and religion are inextricably joined. The moral standards generally accepted in western civilizations being those belonging to Christianity". In closing, Nile said: "I believe sincerely in the separation of church and state. But I do not accept the separation of faith and state. Finally, I would seek to build a caring and responsible society based on the Judeo-Christian ethic of the Bible, the Ten Commandments and the Beatitudes" (Nile, 1981).[70]

The trio of Christian religious: Court, Duthie (a Methodist Minister[71]) and Nile represent some of the powerful voices that spoke out against any relaxation of censorship laws following Chipp's "major statement on censorship". Among the many other Christians were John Bradford (Secretary of the Australian Parliamentary Christian Fellowship—see previous chapter) and, Senator Brian Harradine, himself a devout Roman Catholic, subscribed to "a Labor tradition, which, in earlier times, once found a coexistence with a philosophy of social action based on religious beliefs " (*SH*, December 7, 1993, p. 4014).[72] All of this would support Fitzgerald's assertion that: "Censorship reflects the nature of [. . .] moral traditionalism, and the identification of a populist political elite with Christian fundamentalism and other 'conservative' ideologies" (Fitzgerald, p. 348). Although Fitzgerald referred to Queensland, the expressions of Court (South Australia), Nile (NSW) and Duthie (Tasmania), would indicate a national similarity.

CENSORSHIP AND THE X-RATED "VIDEO BOOM"

About two years before Chipp introduced into Federal parliament his plans for changes to arts-media censorship, the High Court of Australia decision in *Crowe-v-Graham* (1968) (121 CLR 375), nullified the tendency to deprave and corrupt susceptible minds as a reason for censorship. This reduced the censors' power inasmuch as any

70 It is interesting that in his speech Nile said: "my election has restored an earlier precedent whereby in 1825 the Archdeacon of the Colony of New South Wales was appointed a member of the first Legislative Council under the Governor Lt-Gen. Ralph Darling (Nile, 1981). Nile is in error here. Governor Thomas Brisbane (not Darling) appointed the Council by Royal Warrant dated December 1, 1823. Archdeacon, the Rev Thomas Hobbes Scott, was appointed by warrant dated December 1, 1824 to replace Surveyor John Oxley (HRA. I XI, p. 197, 424). Nile's obvious pleasure would indicate that his belief coincided with a desire for integration, not separation of church and state.

71 Maddox, M., 2001, p.9, notes that Duthie "in 1946 had to resign from the Methodist ministry in order to begin his 29-year service as Member for Wilmot (Tas)."

72 A valedictory to Senator Condon Byrne who, like Harradine had been a member of the DLP, the breakaway Catholic "wing" of the ALP.

prosecution had to be tried on other grounds, such as the material being offensive to the reasonable adult and unacceptable by community standards. Whether a considerable amount of sexually oriented material, freed from the censors' disapproval, arrived or was produced in Australia, as a result of what might be called a hiatus in arts-media regulation is not immediately apparent. In researching for this thesis, no direct evidence in support of such a hypothesis was found, but there would appear to be little doubt that some agency had led to an increase in arts-media material that had a sexual emphasis. Some members of parliament went so far as to suggest the government had lost control. In debating the availability of the large increase in censorable material, Senator Harradine said: "The community has suddenly become alarmed that the video boom is out of control. The purveyors of pornography and violence are exploiting the boom and making their millions at the expense of the community" (*SH*, April 4, 1984, p. 1168).[73]

Later that day (April 4, 1984), and following Harradine's speech, Senator Walters said:

> The regulations and ordinances brought down by the Government have created a complete shemozzle in the States. [. . .] The situation now is that the States find it difficult to do anything about dealing with the literature and publications—that includes videotapes—entering those States. (*SH*, April 4, 1984, p. 1221).

Negotiations began with the aim of rectifying the "shemozzle in the States" and arriving at a national code in which classification standards were to become the basis of the new censorship system (see next subhead).

At the time of the X-rated "video boom", the FCB, which was created in 1928, was as yet responsible for accepting or rejecting filmic material.[74] Under the direction of Chief Censor, Janet Strickland, many X-rated movies were passed for private viewing. Attorney-General Gareth Evans observed that these decisions did not find favour with "Senator Walters, Senator Harradine and others, the Festival of Light and, it also

73 The force or forces driving the increase might become a useful area of study at another time.

74 The Royal Commission into the motion picture industry recommended such a board, and an appeal board. Prime Minister Stanley Bruce so moved, and the motion was agreed to. *HRH*, September 6, 1928.

seems, the militant ends of the feminist movement" (*SH*, April 4, 1984, p. 1179).

Public opposition to X-rated movies was so sufficiently aroused that during the negotiations among the several governments for a uniform classification code, many similarly worded petitions were delivered to the Federal parliament, on this occasion praying "that the members of the Film Censorship Board be replaced" (see, for example, *HVP*, August 22, 1986).

TWO BOARDS BECOME ONE

As a result of negotiations between the States' and Federal governments, it was not the FCB members who were replaced, but the system itself. The FCB and the Literature Classification Board were combined in 1988 and renamed the Office of Film and Literature Classification (OFLC). That regime appeared satisfactory but there remained some difficulties in understanding the classification criteria. These difficulties led to an inquiry into classification (ALRC1991) which itself had difficulty in making recommendations, for example:

> A number of submissions the Commission received expressed concern about the agreed policy [between States, Territories and Federal governments]. Many regarded the existing classification criteria as too vague, with too many loopholes, and suggested that all forms of child pornography, child abuse, incest, sexual violence, bestiality and drug promotion be prohibited. [. . .] These submissions seemed to proceed on the basis that it is the subject matter of a film or publication that makes it offensive, rather than the way the subject matter is treated in the work. As the terms of reference do not extend to the criteria, the Commission cannot comment on this point (ALRC1991, no page).

In short, even though the OFLC was an improvement on the earlier censorships, "Australia's censorship laws [were] in an unsatisfactory state". Eventually, the bill for *The Act* was "prepared in consultation with the states and territories, following the recommendations in the [ALRC1991] report" (Lavarch, Attorney-General, *HRH*, September 22, 1994, p. 1381).[75]

75 The Bill for *The Act,* second reading speeches, starting at *HRH* page 1381 are enlightening

After much discussion through the 1995 sitting year, the Bill became *The Act* and came into effect on January 1, 1996, 96 years after the federation of the States and a few weeks short of 208 years since Governor Arthur Phillip arrived at Sydney Cove, bringing with him, among all the other laws of England, a regime of censorship.[76]

CURRENT CENSORSHIP: ITS PURPOSE AND POWERS

Simply stated, the overriding purpose of *The Act* is to give *The Board* the authority to ban any item of arts-media that contravenes the establishment's standards of morality, decency and propriety as set out in the *Guidelines. The Act* particularly replaced the *Customs* (Cinematograph Films) *Regulations of the Commonwealth* and the *Classification of Publications Ordinance* 1983 of the Australian Capital Territory (*The Act*, s.3). Further, for all practical purposes *The Act* replaced the States' censorship, although some subsidiary functions, such as "dealing with the consequences of not having material classified" and "the enforcement of classification decisions are to be found in complementary laws of the States and Territories" (a note appended to *The Act*, s.3). Also, the States have other censorship laws, such as the prohibition of the sale or hire of X 18+ movies, even though they may be lawfully purchased from the ACT. More recently, NSW amended child pornography law, independently of the other States (*Crimes Amendment* (Child Pornography And Abuse Material) *Act*, April 2010 (NSW). The *Customs Act* 1901 (Cth) works in conjunction with *The Act*, against the importation of "Pornography and other objectionable material", which includes:

> . . . computer games, computer generated images, films, interactive games and publications that 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 (*The Act, s.29).*

The average Australian can never have an informed opinion about banned arts-media because it is unlawful to access them. (Although they can be, and are, often accessed *via*

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inasmuch as one gains an insight into the MPs various opinions on arts-media censorship.

76 *vide*, Phillip's Commission dated April 2, 1786 in HRNSW 1 Part 2, 61 *et seq*.

the Internet.) Nevertheless, for all other purposes, anyone can find what is banned and what classifications are given to any item of arts-media, by searching *The Board's* website at http://www.classification.gov.au.

It can be seen from the above that *The Board* is not an independent body but, rather, a functionary of governments (Federal and State), which retain overall control of arts-media, even when the material is no longer banned, as the following example illustrates.

The Censor's Library (to use Nicole Moore's book title) comprises thousands of books still under government control. This "library" of "publications removed from readers, sellers and importers [is contained in]: Seven-hundred and ninety-three boxes, perhaps 12,000 titles, perhaps more" [dating] from about 1927 and stretches to 1988 [were passed] on to the Australian National Archives" (Moore, 2012, p. x), where they remain, "seven stories underground [in] the basements of the NSW [Customs] branch in western Sydney" (Moore, 2012, p. ix). Thus, although "adults should be able to read, hear and see what they want", governments only allow this liberty "as far as possible"(see subhead **AIMS OF *THE ACT***, below). There is provision in *The Act,* for applications to be made to *The Board*, for re-classifying arts-media material, but until that is done, it is an offence to access refused classification material. It is not quite clear why material that is no longer banned, such as the 12,000 or more books are not made available to the public.[77]

However, while State police might accuse a person of contravening *The Act*, by accessing refused classification material, the allegedly offensive material must be given to *The Board* for classification before charges can be laid. If the material is judged to have contravened *The Act*, it is the State, not the Commonwealth, which institutes legal proceedings. The same procedure applies to any censorable material that is seized by the Customs Department, or is downloaded from the Internet. Nobody but *The Board* is empowered to classify contentious material; *The Act* s.4, states:

> *The Board*, the Review Board, the Director and the Convenor may exercise powers and perform functions relating to the classification of

77 "By the end of 1973 the banned list was reduced to zero" (Moore, N., 2012), p.16). I would argue that so archiving the material is as effective a censorship as any; one is reminded of Kendrick's *The Secret Museum* (1987).

> publications, films and computer games that are conferred on them under an arrangement between the Commonwealth and a State or the Commonwealth and the Northern Territory.

The Act, then, is largely an administrative instrument that sets out responsibilities, requirements and procedures.[78] The evaluative functions of *The Board* are contained in three documents that are complementary to *The Act*, namely, the *National Classification Code (NCC*), *Guidelines for the Classification for Films and Computer Games* (*Guidelines F*) and *Guidelines P for the Classification of Publications*.

In sum, with exceptions for professional, religious, sporting and similar material,[79] all films, computer games and publications that contain contentious elements are to be submitted for classification (*The Act*, s.5B). Contentious elements relate to: any level of violence, sex, language, drug use, nudity and terrorism. Items containing contentious themes are given classification ratings in accordance with the *NCC* and *Guidelines*. If an item is not contentious, it is released without restriction. The following four subheads afford a brief summary of *The Act's* purposes and function.

AIMS OF *THE ACT*

The aims of *The Act*, although not specifically stated, can be gleaned from the wording of its various parts. For example, the *NCC*, which consists of four principles, is set down thus:

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

78 All documents cited are available for download at http://www.classification.gov.au

79 The NSW Classifications Enforcement Act of 2001 is typical of all States. The exemptions are to be found at Schedule 4 Section 4 (2) as: business, accounting, professional, scientific, educational, current affairs, hobbyist, sporting, family, live performance, musical presentation, religious and community or cultural films and business, accounting, professional, scientific and educational computer games. A film is not an exempt film if it contains material that would be likely to cause it to be classified M or higher (that is, it must fall within the G or PG classification). A computer game is not an exempt computer game if it contains material that would be likely to cause it to be classified M (15+) or higher. Films and computer games are also not exempt if they contain an advertisement for an unclassified film or computer game, an advertisement that has been refused approval or an advertisement for a film or computer game classified M or MA (15+), respectively, or higher. Under Division 6 of Part 2 of the amended Commonwealth Act, the Classification Board can also issue certificates stating that unclassified films and computer games are exempt films or computer games.

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

The *NCC* is, in a sense, subordinate to the provisions of *The Act*; that is to say an item must first be acceptable under s.11, which sets out:

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

In 2007, an extra section was added to *The Act*, namely, matters that affect national security and terrorism.[80] It might be said, then, that *The Act* aims to keep Australia morally decent; to prevent people being exposed to offence; to prevent minors being harmed by exposure to material that is inappropriate for their age; and to enhance national security by eliminating terrorist material. The classifying system is designed to achieve those ends. There is a fifth point, which, while not specifically mentioned in

80 Section 9A, amendment 179 added September 28, 2007.

The Act, has been established by separate laws; to prevent children being sexually abused in the making of pornographic material.[81]

THE MORE THINGS CHANGE . . .

The operative part of *The Act*, s.11, indicates that in essence, little has changed since 1788 when that convict woman wrote: "All our letters are examined by an officer". As Campbell and Whitmore observe, Australian censorship law is "based upon attitudes and definitions formulated in the 19th century and before" (1966, p. 145). Under the present system, *The Board* is required to examine arts-media materials before Australians are allowed to access them. Where there has been significant change, we find it in the substantial apparatus of censorship regulation now as compared to the handful of officers *circa* 1788 and the immediately post-federation customs officers. It would appear as Arrback suggested, that any new means of providing information or imparting knowledge must first be viewed with suspicion,[82] then, in Australia's case, categorised as prescribed by s.11 of *The Act*. This general approach to censorship is much the same as it was in 1938, when Senator Hattil Foll, Minister for Repatriation, decided to censor:

> . . . books [that] are usually published in luridly attractive covers, and frequently a table of contents is printed on the cover. Frequently, this includes a title or titles of a suggestive nature. The books are retailed at prices as low as 3d. and 4d. a copy. [. . .] in the interests of the community, the sale of undesirable literature of the type under consideration should be prevented, and to this end approval has been given to the issue of a regulation under section 52.9 of the Customs Act, prohibiting the importation of literature which, in the opinion of the Minister for Trade and Customs, unduly emphasizes matters of sex or crime, or is calculated to encourage depravity, whether by words or by picture, or partly by words and partly by picture. It should be stated

81 See, for example, NSWLA *Hansard* NSW Attorney-General Bob Debus' second reading speech Novemoarber 17, 2004.

82 See the quote from Arrback's speech at the end of the Introduction to this thesis.

> that there is no intention to interfere with reputable detective or crime stories which have definite literary merit. (*SH*, May 12, 1938).

The regulation under section 52.9 of the *Customs Act* appears to have been the result of "strong agitation by a large section of the community, and vigorous protests by various public and religious bodies". This "large section" was not agitating for censorship of obscene and indecent publications (those aspects of arts-media were already prohibited) but, rather, they sought and succeeded in effecting the censorship of publications that were "of an undesirable character" (*SH*, May 12, 1938).

This addition to Australia's then existing censorship criteria has its counterpart in the *Guidelines*, which in a sense allocate depictions and descriptions of crime, cruelty, violence or abhorrent phenomena to different classifications. For example, violence in movies classified PG, "should be mild and infrequent, and be justified by context"; there are no constraints on violence in movies classified R 18+, but no violence is permitted in movies classified X 18+. Depictions of "abhorrent" activity are banned, and materials containing such depictions or descriptions are refused classification.[83]

Those *Guidelines*, and the criteria for allowable depictions of sex, drug use, language and nudity are established by agreement between the Attorneys-General of all States, Territories and Federal governments. Because *The Board* is bound to classify material according to the *NCC* and *Guidelines*, and in the absence of any other definition of acceptable standards, one would suggest that the *Guidelines* represent imposed community standards, which became the classification standards at the implementation of *The Act*. From such a conclusion, it could be argued that Australian censorship remains essentially what it was, a governance of morals, where individuals are permitted access only to those arts-media materials of which the establishment approves, or more accurately, of which it does not overtly disapprove.

83 The *Guidelines* are not paginated. These examples are taken from part 2 under the respective classification headings.

CHAPTER 3: APPOINTMENTS TO AND ACTIVITIES OF *THE BOARD*

INTRODUCTORY

This chapter focuses, not on the minutiae, of *The Board's* day to day workings, but on the processes by which members are appointed, and on the effect of *The Board* as a whole on what Australians are allowed to read, watch and hear. As was outlined in the immediately preceding chapter, *The Board* is required to classify, or refuse to classify (censor), all material required by *The Act* to be submitted to it. This thesis distinguishes between the two and considers the differences in Chapter 12: Classification and Censorship Unbound.

The chapter begins by first examining the criteria for selecting *Board* members during the period 1997-2012, and then analyses *The Board's* membership in detail to determine whether those appointed were "broadly representative of the Australian community" as determined by *The Act* s.48(c). However, before proceeding, there are several preliminary points to make.

1. Merit based selection. During the course of study for this thesis, some significant changes to *The Act* were made. These changes affected both the composition of *The Board* and the required qualifications of applicants for positions as members of *The Board*. One major change resulted from a review of public service procedures generally.

> Selection processes for Members of the Classification Board will be consistent with the *Merit and Transparency: Merit-based selection of APS agency heads and statutory office holders* (*Merit and Transparency)* procedures issued in February 2008 by the Australian Public Service Commission (*Guidelines For The Selection of Members of The Classification Board* 2008) (GSM).

2. A blending of information. As a result of the changes, some of the information in this chapter is a hybrid of all the regulations that span the period under review, *i.e*. from January 1, 1996 to June 30, 2012. For example, in 2008, the initial term for members was increased from three to five years (GSM paragraph 14).

3. Change of Federal Government. Because a change of government, from a Liberal-National Party coalition to Labor occurred in the reporting year 2007-2008, the analysis

is divided into two sections (Tables 2 and 7). An all-inclusive membership for the entire period under review is included at the end of the chapter as Table 10. The data provide the basis for the analysis of all but temporary members. Temporary members are considered separately, starting under the subhead: ***THE BOARD* UNDER LABOR GOVERNMENT.**

4. The Classification Review Board (RB). Because the chapter immediately following considers the RB in some depth, it is here only necessary to make some basic points. First, Part 7 of *The Act* ss.74 to 85, sets out the requirements for appointing members: their functions, duties and administrative procedures. Second, *The Act* as it relates to the RB is much the same as for *The Board*. For example, regarding appointments, s.74 has an almost identical wording to s.48. Third, the RB is a part-time, as-needed, group which does not affect the argument that (supposing censorship to be necessary) the current system might be replaced by something equally as effective but more financially and practically efficient. Fourth, as it is with *The Board*, the RB is required to work to the *Guidelines*; thus, its review decisions amount to no more than varying the weight of censorable elements portrayed or depicted in an item of arts-media (*e.g.* too much sex for an M 15+ classification and re-classifying the item R 18+).

5. Charts and Tables. There are two Charts, both attributed, and ten tables, which were created by the author.

DISCRETIONARY AND IMPERATIVE LANGUAGE

> In appointing members, regard is to be had to the desirability of ensuring that membership of the Board is broadly representative of the Australian community (*The Act*: s.48(2)).

The evidence adduced in this chapter would indicate that the law, as written, did not intend *The Board* to be broadly representative of all Australians. Had that been the intention the wording of *The Act* s.48(2) would have contained the imperative **must** and the equivocating phrases "regard is to be had" and "the desirability of ensuring" omitted. One must question, then, whether s.48(c) fulfils the purpose and intention of the parliament as a whole.

Looking at the wording of *The Act* s.48(2), one need not be an expert grammarian to recognise it as a discretionary rather than imperative requirement. Elsewhere, the legislation contains the imperative **must**, for example, in the clause immediately following, i.e. s.48(3) "The Minister **must**, [emphasis added] before recommending the appointment of a member" *etc.*, and further, regarding terrorist material: "The Board **must** [emphasis added] classify, or refuse to classify", etc. (*The Act*. Regulation 9, subsection (2)). The imperative even applies for advertising arts-media: "(4) *The Board* must refuse to approve an advertisement if, in the opinion of the Board, the advertisement" (*The Act* s.29(4)(a).

Of particular relevance to the members themselves, *The Act* at s.51(3) reads: "A member *must not* [italics added] hold office as a member for a total of more than 7 years". From these examples, there would appear to be no immediately obvious reason why s.48(2) could not have been drafted thus: Persons appointed as members of The Board must be representative of all Australians. That s.48(2) does not contain such an imperative leads one to question whether the policymakers sincerely intended The Board to represent all Australians. The phrase, "broadly representative of the Australian community" would appear designed to be accepted as the fact of the matter but the members are expected to possess a particular kind of acumen or discernment that many Australians might not have. That is to say, members of *The Board* must have the ability to identify what may be fine points of difference between acceptable and unacceptable, images, speech and writing. On this point, it is observed that *The Board's*

objective number three is to establish itself "*as a principal source of expert advice*" [italics added] and information on classification issues for Government" (CBR97-98, p. 1).

As was demonstrated in the previous chapter, the policymakers created an apparatus that, on its face, appears to be a genuine attempt to allow Australians to read, hear and see what they want, but which liberty is circumscribed by the requirement that the material conform to "the standards of morality, decency and propriety generally accepted by reasonable adults" (*The Act* s.11(a)). Because *The Act* contains neither description nor definition of those standards, one must resort to closely examining the language and terms used in framing the law. For example, it is clear that some sort of community standard is envisaged because *Board* members are required to take into account an item's "literary, artistic or educational merit (if any)" *(The Act* s.11(c)). However, this requirement raises the question of exactly what "(if any)" means. Whatever is meant, the broadly representative Australian is expected to classify arts-media on some sort of scale between merit and no merit at all, according to standards that reasonable adults generally acceptable. One would argue that, even if the acceptable standards were defined (which they are not), the critical assessment of merit is the province of experts working in their respective fields of interest and research.

CENSORS AND CLAIMS OF ELITISM

One would not demean or disparage the typical Australian (or, indeed, the typical individual of any other nation) to suggest that assessing the merit of art and literature is not a quality possessed equally by all. Australia's policymakers were aware of this, hence the parenthetic qualifier "(if any)". Thus, the "desirability" of broadly representative members could only mean that the selection must be made from among those who, among other skills, possess the level of critical assessment that *The Act* s.11(c), requires.

Indeed, some individuals believe the censors are not broadly representative but, rather, an elite group. One respondent to an academic survey said *The Board* "is not a realistic cross-section of Australian society" (McKee, *et al., 2008,* p. 92). Such criticism is not confined to Australia, a similar comment was made with regard to the British Board of Film Classification (BBFC), by a columnist in The Guardian, who wrote: "censorship is driven by a deeply elitist outlook" and is "the pastime of a distrustful

elite" (O'Neill, December 19, 2007).[84] However, as far as is known, the evidence has not been tested by a reliable survey of public opinion. In a personal email to this author, John Davis, Group Account Director of Newspoll, states: "I am not aware of anything that has been done in relation to public perceptions of 'elitism' in public positions—and I suspect it would be a diabolically difficult thing to measure" (August 19, 2013).

The Act neither specifies nor requires the criteria for defining the "broadly representative" Australian, which considering the "desirability" of the censors being such, one would think a necessary pre-requisite to the selection and appointment of *Board* members. Without such criteria one might hold representativeness to include physical attributes and sexual orientation, such as left-handers, blondes, brunettes, red-heads, lesbian/gay, those with disabilities, those born overseas, and so on, but as is shown herein, appointment is merit-based on other than purely physical qualities (GSM), which basis for appointment we now examine.

THE SELECTION OF APPOINTEES TO *THE BOARD*

This is a paraphrased interpretation of the main points set out in the amended GSM, which became effective in June 2008. (The criteria for selecting members prior to June 2008 are set out in the subhead immediately following.)

> The previous Guidelines for the Selection of Members of the Classification Board, issued after consultation with Censorship Ministers, have been amended to incorporate the Merit and Transparency procedures. Other minor changes have been made to reflect that the Minister for Home Affairs is now the Commonwealth Minister responsible for Censorship and to remove references to the Office of Film and Literature (GSM, 2008, paragraph 2).

The amendments address matters of "Merit and Transparency" which arose from an examination of public service appointments policy generally (GSM paragraph 1). The next, and very important point is this: the States and Territories provide lists of names, from which a short list of candidates is selected. *The Act*, however, "does not specify or

84 http://www.guardian.co.uk/commentisfree/2007/dec/19/bbcpoguemahone. The cited quotes are at paragraphs five and six respectively.

require a particular process to be followed when selecting people for consideration" (GSM, paragraph 6). Thus, although the selection process would comply with the GSM, the candidates put forward by the States and Territories need not necessarily be broadly representative, which is the "overriding principle when making recommendations for appointment" (GSM, paragraph 8). Further on this point, temporary members do not compete for positions but are appointed by "the Minister" (*The Act* s.50). Temporary members are revealed as an important component of *The Board* from 2007 and on (see Table 4, below).[85]

Candidates for appointment are assessed on merit using a competitive process during which their work-related qualities are compared against similar qualities, as they would apply to the duties they are required to perform, and to their capacity to achieve outcomes related to those duties. Currently, "work-related qualities that may be taken into account" include skills, qualifications, relevant personal qualities and the ability to contribute to team performance (GSM, paragraph 10). The effect of these requirements tend to reinforce the claims of elitism as it is unclear how, say, a bus driver or bricklayer or a full-time mother of three young children would have relevant work-related qualities similar to those required of an arts-media classifier.

Following the assessment of candidates for appointment to *The Board*, the Minister for Home Affairs (or whomsoever has responsibility from time to time), in consultation with the State and Territory Censorship Ministers, makes recommendations to the Governor-General regarding appointments. It is observed that in 2008, the competitive aspect of assessment replaced the purely State and Territory nominated system by advertising for expressions of interest in the public media.[86] By whichever process candidates are put forward or come forward their assessment as to suitability for membership of *The Board* is the primary consideration in making the decision to appoint or not—and suitability, it is argued, equates with elitism.

However, for the most part of this study, the older system for selecting candidates was in place. In the subhead that follows, the older criteria for selecting candidates are used, but as will be gleaned from comparing Tables 2 and 7, no significant changes to

85 "The Minister for Justice and Home Affairs is required to consult on appointments with State and Territory Censorship Ministers before making a recommendation. Recommendations on Board appointments are made by the Minister for Justice and Home Affairs to the Governor-General." http://www.classification.gov.au/About/Pages/Classification-Board.aspx#4

86 This change did not prevent States and Territories from nominating candidates for positions.

members' personal attributes during the entire period under review (financial years 1997 to 2012) are observed.

MEMBERS APPOINTED BEFORE JUNE 2008

These members were selected using the Guidelines for the Selection of Members of the Classification Board, 2005. Members would have demonstrated the ability to clearly articulate their views orally and in writing, to appreciate and contemplate the views of others and, in light of the statutory requirements for decision-making, make decisions that are good in law Those members would possess maturity and balance, and the ability to apply reason, common sense and sensitivity in the performance of their duties. As part of the assessment process, members would satisfy background checks including criminal record checks. In particular, *Board* members would have demonstrated involvement in the community and the ability to reflect broad community standards and also to have an understanding of the value to the community of the classification system. A demonstrated high level of communication skills and the ability to debate difficult issues within the decision making process were essential requirements, as was the ability to work intensively and under pressure as part of a small team. No formal qualifications were required. When selecting temporary members, a broad experience in community life, and experience with children was regarded highly. These requirements were set out in an information package that was made available to all applicants for selection as members of *The Board*. (This document is no longer available from the classification website.)

REQUIRED SKILL LEVELS OF APPLICANTS

In 2004 some 54% of females and 48% of males, aged between 15 and 64 had no non-school qualifications compared to 20% females and 18% males who held the degree of bachelor or higher.

> In May 2004, of the 13.2 million people aged 15-64 years, 6.7 million (51%) had at least one non-school qualification. These comprised 2.5 million whose level of highest non-school qualification was a bachelor degree or higher, 1.0 million whose highest was an advanced diploma or diploma, 2.0 million whose highest was a certificate III or IV and 0.8

> million whose highest was a certificate I or II. Among those without a non-school qualification, 34% had completed Year 12, while for 31%, their highest year of school completed was Year 10 (ABS 1301.0 - Year Book Australia, 2006).

There is some difficulty with this. 2.5 million is ~19% of 13.2 million but 20% females and 18% males aggregates to 38%. (See *fn* 90 *infra* for an explanation re statistics) Omitting the under-21s, who (generally) would not have had the opportunity to earn a bachelor degree, could help resolve the difficulty. No information was separately available for Australians aged between 15 and 21 but working with 25s and over proved useful. Although any adult could apply to be a *Board* member, it might be argued that the "maturity and balance" would be lacking in younger persons.[87]

Allowing for that possibility, the population statistics were reassessed by omitting those under the age of 25 years. In May 2004, there were 10.4121 million Australians aged between 25 and 64 years. Of those, 57.5% (5.9835 million) had non-school qualifications, while 42.5% (4.4286 million) lacked non-school qualifications. Of the 5.9835 million who had non-school qualifications, 2.2814 million (~22% of 10.4121) held Bachelor degrees or higher. In any event, however one manages the arithmetic, it would appear that the selection criteria would rule out a very large minority of Australians who would probably not have the "high order" of required communication skills.

Further support for this probability can be gleaned from a survey of literacy skills published in 2007. The survey, which measured *Adult Literacy and Life Skills* (ALLS) indicates that nearly half (47%) of adult Australians (ages 16-74) fall well below the "high order" of some skills that would be required of members and a further 37% were not as highly skilled as is desirable (ALLS, 2007). This leaves 17% (all percentages rounded out), or a little more than one-sixth who would meet the "high order" standard, which is only a little less than the percentage of Australians who hold the degree of Bachelor or higher.

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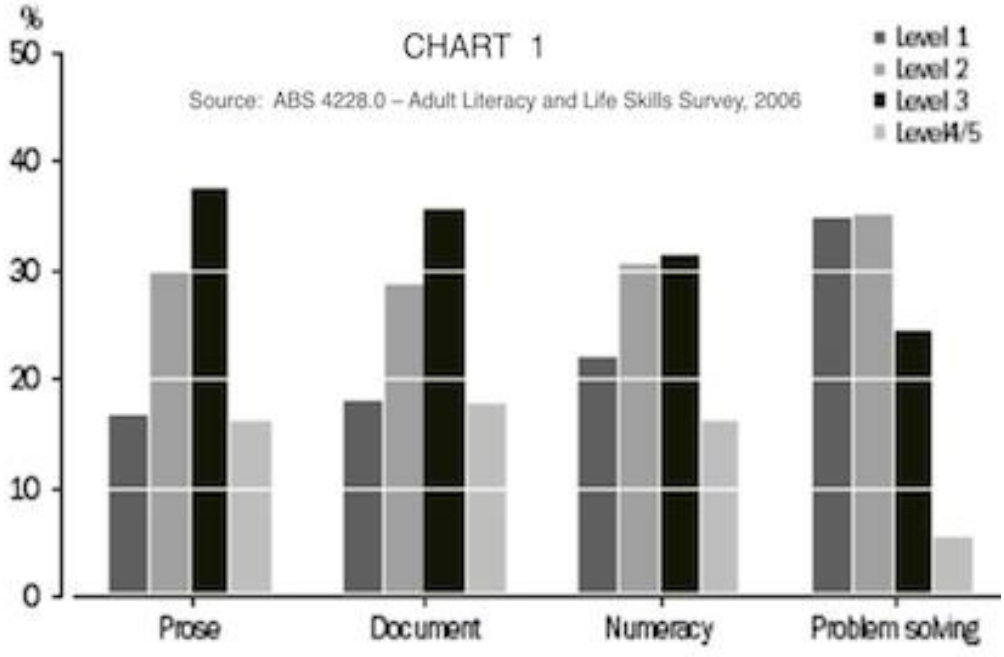
87 This is difficult because maturity is not a value that one can demonstrate by filling in a form and not all applicants are interviewed. Nevertheless, the exercise was useful in finding that if the under-25s were omitted, more than 200,000 university-educated young Australians would have been ruled ineligible. Perhaps under-25s who lack a degree are more broadly representative of Australians than are their graduate fellows?



The ALLS, 2007 survey augments ABS statistics of 2006 (Chart 1) that provides information on knowledge and skills in the following four domains, thus:

> **Prose literacy**: the ability to understand and use information from various kinds of narrative texts, including texts from newspapers, magazines and brochures.
>
> **Document literacy**: the knowledge and skills required to locate and use information contained in various formats including job applications, payroll forms, transportation schedules, maps, tables and charts.
>
> **Numeracy**: the knowledge and skills required to effectively manage and respond to the mathematical demands of diverse situations.
>
> **Problem solving**: goal-directed thinking and action in situations for which no routine solution is available (ABS 4228.0 – Adult Literacy and Life Skills Survey, 2006.)

Chart 1 and the explanatory notes on the measures of life skills would appear to confirm the observation that relatively few Australians have high levels (Level 4/5) of the skills required for "written communication [. . .] within the decision making process" (*InfoPack)*. In the four domains, the percentages of Australians in the 4/5 levels are: prose 17, understanding documents 18, numeracy 16, and problem solving five per cent. By that measure, a maximum of only 18% of applicants would possess the level of

skill required of *Board* members, and only two or three of those would be good problem solvers. Clearly, such a small percentage of acceptable applicants, based on the high skills requirement, would not be "broadly representative of the Australian community".

It is assumed that those who do apply, at least have sufficient literacy to read the newspaper in which the advertisement was placed; read the advertisement itself and feel that they meet the criteria for being appointed a member of *The Board*. In other words, all genuine applicants think they are worthy of consideration. However, even if the application is not considered to be of the high standard required, it is representative of a large number of Australians who would be aware that they do not have the communication skills of, say, a successful radio presenter, or an award winning journalist. Therefore, in order to be truly representative, *The Board's* selectors would have to lower the communication skills standard to accommodate some of the applicants. Appointing only those who enjoy Level 4/5 status and who are, as has been shown, clearly not representative of all Australians, does not comply with the intention of *The Act* s.48(2). Thus, one would argue that the appointments, and or criteria do not conform to "the legislative context" of *The Act*, s.48(2) (see Kirby, 2009, p. 4).

LIMITATIONS AND EXCLUSIONS

Whereas a lack of educational and other required skills would preclude some Australians from being appointed members of *The Board*, other more personal matters could deter individuals who might otherwise apply. For example, appointment to *The Board* as a full-time member is, initially, for three years (which can be extended to seven years), during which time a member is not permitted (except in special cases) to engage in any other paid work. Australians in regular employment who considered their existing employment secure for the long term might think carefully before considering such a relatively short term of employment. Furthermore, members must re-locate to Sydney; those outside Sydney, in secure employment, with children at school, with social and family ties would need to think very carefully before applying. The over-representation of members from NSW and the ACT could be seen as evidence supporting these conjectures (see the analysis, below). (The initial term was extended to 5 years in 2008, see item **2 in** the Introductory to this chapter.)

Others, who might be obviously ineligible for selection, would include deaf mutes,

unless some special arrangements were made. Some would-be applicants who think they lack "oral and written communication skills of a high order and the ability to debate difficult issues within the decision making process" might prefer to save their own time and that of the selection panel by not applying for a position. Even so, there is strong competition for a place on *The Board.* A report in *The Age* of July 22, 2002 states: "reading and watching pornography are part of the job, which perhaps helps explain why 3000 people inquired when a job [as a *Board* member] was advertised recently."

The process from application to appointment is daunting in itself. A selection panel interviews applicants and transmits details of those who are acceptable to the applicant's State Attorney-General. A selection is then made from that list and transmitted to the Federal Attorney-General who, in turn, makes a selection, which is then delivered to the Governor-General who approves and makes the appointment.[88] In the case of 3,000 applicants, some might not be interviewed, as is forewarned here: ". . . it is important to understand that an applicant may meet all the selection criteria and yet not be interviewed when there are large numbers of applicants, some of whom have been able to demonstrate stronger claims against the selection criteria."[89]

While on the one hand it would appear unfair that some might not be interviewed, on the other hand a certain amount of culling is understandable. There is nothing unusual about prospective employers culling applications but it must be remembered that, ideally, *The Board* should be broadly representative of all Australians—an unusual if not unique part of any job specification. It could be argued that, unless all the applicants are interviewed one will never know if those omitted might have proved better representatives of all Australians than those who were eventually selected. That, however, is not the strongest of arguments because it could be as reasonably argued that there are even better possibilities among those who did not apply. A stronger argument would be that, by placing advertisements nationally, all Australians are afforded the opportunity to apply.

Nevertheless, from the foregoing it could be argued that the qualifications and

88 This procedure has changed a little, the Minister for Home Affairs is now in charge of the Classification Board, having been deputised by the Attorney-General, but the procedure was generally as described at the time of this writing (March 6 2015).

89 Information Package for Intending Applicants for Appointment as Members of the Classification Board, 2005. Henceforth *InfoPack*

requirements militate against many Australians becoming members of *The Board*. The selection criteria are generally biased against (a) those who lack non-school qualifications; (b) who are considered low in literacy, therefore, low in written communication skills and (c) who do not take part in community activity.

METHODOLOGY

The claim that *The Board* "is not a realistic cross-section of Australian society" (McKee, *et. al*, p. 92) was taken as a working hypothesis and tested against what was known of *The Board* members who served during the years 1997-2012.

The Board's composition was examined in two chronological parts: 1) from the operation of *The Act* on January 1, 1996 to the June 30, 2007 (under the Liberal-National Party coalition). 2) From July 1, 2007 to June 30, 2012 (effectively under the Australian Labor Party).[90] The criteria against which members are selected were taken as benchmark data. *The Act* requires *The Board's* Director to submit a Classification Board Report (CBR) each year to both houses of the Federal Parliament. The members' personal data contained in those reports were compared, as closely as possible, with the benchmark data and also compared with similar qualities among Australia's population as at the 2006 national census. Other ABS data were consulted and are cited in context as the occasions to do so arise. Both periods, *i.e.* 1996-2007 and 2008-2012 were analysed using data from the CBRs. It was not considered necessary to arrange interviews with any *Board* members because (a) this work is an analysis of *The Board* as a whole and not of its members as individuals and (b) the analysis concerns the given (CBR) skill levels and personal details of members compared to those of the Australian public at large. Thus, each report was examined for members' personal data relating to age, education, occupation and gender. Where an individual had more than one occupation, the last immediately preceding appointment to *The Board* was selected. The collected data were arranged in ten tables, which appear *in situ* as evidence is presented for a particular event or process (the two charts do not represent members' personal data). Table 10 affords an overall picture of members from 1996 to 2012 and is placed at the end of this chapter.

90 The Labor Party was not elected to govern until the federal election of November 2007.

FINDINGS FROM ANALYSIS OF THE 1997-2007 REPORTS

In 1996, 8 of the 11 members (~73%) were university educated (Table 1); this proportion did not change significantly when the current system became operational: ~70% (30/43).

TABLE 1

Name	Age	Sex	Education	Occupation	State	96-97	97-98	98-99
Dickie, J. Director	47	M	University	Public Service	ACT	01-Feb-88	continuing TE	
Edsall	37	M	N/S	Public Servant	TAS	22-Dec-95	continuing	continuing TE
Green-Gibson, V.	34	M	University	Law	NSW	19-Mar-97	continuing	continuing TE
Morton, S.	50	F	N/S	Various	VIC	19-Mar-97	continuing	continuing TE
Power, D.	23	M	University	Law	TAS	17-Oct-94	continuing TE	
Rae, J.	35	F	University	Education	NSW	01-Aug-93	continuing	continuing R
Stockwell, S.	34	F	University	Psychology	N/S	8-Aug-94	continuing TE	
Thorowgood	35	M	University	Social work	NSW	19-Mar-97	continuing	continuing TE
Webb, S.	41	M	N/S	Arts	N/S	01-Aug-94	continuing	continuing
Williams, P.	52	F	University	Barrister	NSW	19-Mar-97	continuing	continuing
Wright, A.	45	F	University	Arts	N/S	01-Feb-86	continuing TE	
Total Members						11	11	9
	Average	F5	Uni 8	TE = Term expired			TE4	R 1, TE 4
	39.36	M6	Not stated 3	R = Resigned				

This would indicate that, although the censorship system changed, the intellectuals rather than a representative cross-section of Australians continued to make classification decisions. The average age of all members 1996 to 2007 was just less than 40 years.

Before proceeding, it is noted that in 2006, *The Board* became less independent by being transferred to the Attorney-General's Department. The *Board's* Director stated:

> The policy and administrative functions provided by the OFLC have been transferred into the new Classification Policy and Classification Operations Branches of the Classification, Native Title and Legal Services Division of the Attorney-General's Department (AGD). This process was undertaken in accordance with the new administrative arrangements for the Classification Board, announced by the Australian Government in February 2006. The OFLC ceases to exist as of 1 July 2007 (CBR06-07, p. 3).

It should be immediately added that in the analytical process nothing overt in respect of changes to *The Board's* function after its absorption into the Attorney-General's department was discovered; there were changes but they concerned administration and not arts-media assessment. Although Clark appeared determined that: "The independence of the Classification Board will be steadfastly maintained under this integration" (*ibid*), one could argue it would be naïve to suppose that *The Board's* loss of complete independence had no effect on its classifying operations. (Consider Leibniz' *Principle of Sufficient Reason*.)

The findings, generally, would appear to support an argument that members of *The Board*, from its inception, were not, and have never been "broadly representative of the Australian community". For example, CBR05-06 shows that, Des Clark *The Board's* Director, besides being university educated, was once the Lord Mayor of Melbourne; *The Board's* Deputy Director held a Master of Business Administration and two of the four Senior Classifiers held law degrees, while another held a Bachelor of Arts degree and the fourth graduated as a Bachelor of Applied Science. Of the remaining 10 Board members, six held at least one degree of Bachelor or higher (see Table 2). This represents a university-educated component of 75% against a national average of 12.5% of all Australians—an over-representation of 6 : 1.[91] This over-representation, although the job requirement states: "no formal qualifications are required".

The claim of elitism is further enhanced when the occupations of Board members is compared with those of the population at large. At the June 30 2006 census there were 8,662,584 Australians over the age of 15 in the workforce. Prior to their being appointed members of *The Board* the identifiable occupations of the 16 censors were. Arts/Media: 6, Social work: 3, Arts/Law: 3[92], Public servant: 1, Lecturer: 1, Urban Planner: 1 and Sailor (Royal Australian Navy): 1. From the census, it is difficult to ascribe some of *The Board* members' occupations, for example, public servants are not listed as such, but there are three groupings that can be reasonably compared. The census discloses that those in the workforce who gave their occupations as arts and recreation services, numbered 122,891 or 1.42% of the total workforce, those working in information media

91 ABS 2006 census. Total population 19,855,288. Bachelor degree or higher 2,482,311. The disparity between the above-mentioned 20% males and 18% females and the 12.5% here is accounted for by a difference in statistical accounting method. The 2004 survey includes diplomas among the degrees, while the 2006 census does not.

92 Psychiatrists are included in social services.

and telecommunications, numbered 172,823 or 2% of the workforce and those in health care and social assistance, numbered 926,463 or 10.7%. Therefore, we can deduce that 75% of *Board* members (12 of 16) were drawn from 14% of the workforce. If we add the registered nurse to the health care and social assistance group, 13 of 16, or 81% of *The Board*, fell into those three groupings.

TABLE 2

BOARD MEMBERS BY EDUCATION, GENDER AND OCCUPATION 1997-2007												
A	B	C	D	E	F	G	H	I	J	K	L	M
	97-8	98-9	99-00	00-1	01-2	02-3	03-4	04-5	05-6	06-7	Total	%
THE BOARD												
Members	11	9	13	13	11	16	10	10	16	20	129	92
Part-time	4	4	3								11	8
EDUCATION												
B.A. or High	9	5	7	8	8	10	8	8	12	16	91	65
% Grads	82	56	54	62	73	62	80	80	75	80	avge 70%	
GENDER												
Male	6	4	6	6	6	7	5	5	9	12	66	47
Female	5	5	11	11	8	9	5	5	7	8	74	53
OCCUPATION												
Arts/Media	5	3	6	8	5	6	3	3	6	7	52	37
Social Work			4	4	4	4	2	2	3	2	25	18
Pub Service	2	2	1	1	1				1	3	11	8
Teacher	1	1	4	1					1	1	9	6.5
Arts/Law	2	3	2	2	3	3	3	3	3	4	28	20
Accounting	1			1	1	1	1	1			6	4.5
Nurse						2	1	1		1	5	4
Urban Planner									1	1	2	1
Sailor									1	1	2	1

When considered year-by-year, the preponderance over time of the Arts/Media/Law groups (an aggregated 57%) could have had a chilling effect on the decisions of others. For example, the Sailor could have been overwhelmed by the opinions of arts/media and arts/law members, but there is no evidence that those members voted *en bloc*. Nevertheless, although limited, the members' personal information, as reported in the annual CBRs is helpful in assessing the critical "weight" of *The Board* as a whole, which leaned heavily to "white-collar" rather than equally with "blue-collar" occupations.

Indeed, throughout the 10-year period, there were no representatives of farmers, foresters, fishermen, miners, factory-workers, building trades, wholesale trades or retail trades. Nor were hospitality, transport, postal and warehousing workers represented. (Although some members had some experience in some of these occupations.) The numbers of these classifications of workers at the 2006 census

amounted to, 4,370,424 (50.45%) of the total workforce. Non-working Australians at the 2006 census numbered 11,192,704; these were mostly children under 15 years of age, retirees and those employed on home duties. Nobody from this class of persons was a *Board* member during the 1997-2007 period. However, those who appear not to be among the university educated had other skills, which were seen to balance and broaden *The Board's* deliberations (Table 2). For example, Sarah Morton was "a braillist at the National Library for the Blind (UK)" (CBR97-8, p. 18). Several others had been teachers, which indicates at least one non-school certificate and, possibly, an unstated degree or diploma. Nevertheless, the combination of tertiary-education and predominantly "while collar" occupations of members makes the claim of elitism more difficult to refute.

Looking at the composition of *The Board* by gender, there were 22 males and 22 females, although from July 1999 to June 2001, females outnumbered males by 11: 6 in both reporting periods. It cannot be stated whether this imbalance of gender was significant in making classification decisions because no public records of *The Board's* voting patterns are available. If we omit those aged 0-14 years who numbered 3,937,206 (19.83% of the population) there remain 15,918,082 potential consumers of restricted material (*i.e*. MA15+, R18+ and X18+). Of this number 8,140,173 (51.14%) were female and 7,777,909 (48.86%) male. Thus, membership of *The Board* by gender was evenly balanced from 2002 to 2007.

Of more importance to the elitism claim was the increase in university-educated members in the last four reporting periods, 2003-2007. In three of the reports 80% of members were stated as being university-educated, and 75% in the fourth. This disparity is particularly noticeable when compared with the four reports 1998-99 to 2001-2002 when the average was 63%. Even so, there could be others who are more highly educated than average, among those whose education level is N/S (not stated), for example, Stephen Dunham, who was a member from 2006 to 2009. Dunham's biography discloses: "He stood successfully for the Northern Territory Legislative Assembly in the 1997 general election, and was appointed Chairman of the Public Accounts Committee. Later he was appointed to Cabinet and held the portfolios of Health and Essential Services" CBR 05-06, p. 18)

POLITICAL INTERFERENCE IN THE SELECTION PROCESS

On the evidence so far, it would appear that there is some substance to the McKee *et. al.* respondent who said *The Board* "is not a realistic cross-section of Australian society". However, as previously observed, *The Act* s.48(2) does not *demand* a realistic cross-section, but to have regard "to the desirability of ensuring" that its members are broadly representative of the Australian community. Thus, s.48(2) being discretionary, the Federal government may appoint whomsoever it pleases, always provided appointments to *The Board a*re made from a list presented to it by the States and Territories (s.48(3)) and from respondents to advertisements seeking expressions of interest from the public. (Except, as has been stated, for temporary members.) The inclusion of relatively few men in the street, to borrow Dr Court's phrase (*e.g.* the Sailor), would put even the "desirability" of broad representation in doubt. This doubt came publicly to light in May 1999 when journalist David Marr reported Senator Brian Harradine as demanding: "Where were the ordinary people?"[93] Marr continued:

> The Howard Government [. . .] demanded the Office of Film and Literature Classification find more "ordinary" Australians to appoint as censors. In an unprecedented move, apparently to placate the morals campaigner Senator Brian Harradine, Cabinet has rejected an entire list of OFLC candidates for censorship positions and demanded fresh names more representative of the community. [. . .] OFLC recommendations are not usually considered by Cabinet. For an entire list to be rejected is unprecedented" (*SMH* May 8, 1999).

This is not the first reference to a Harradine trade-off, as this exchange indicates.

> Senator SCHADT—Senator Alston, I never accepted the fact that this would be other than a pork-barrelling exercise to pay off Senator Harradine, in particular, to get the vote to get the legislation through the parliament.
>
> Senator ALSTON —Preposterous.

93 *SMH*, May 8 1999. "Cabinet X-rates new censor list". Article by David Marr.

> Senator SCHADT —Well, when we look down at the state allocation, guess which state gets the most money.
>
> Senator ALSTON —Because of the formula that was applied.
>
> Senator SCHADT—The fixed formula that you used to make sure that Tasmania would get more money than any other state.
>
> (Senate Estimates Committee February 26, 1998, page 114.)

Differing somewhat from Marr's view, Marion Maddox opines that it was Harradine's balance of power, not his religious attitude that gained concessions, which balance "could have been held by anyone, of any religious persuasion or none" (Maddox, 1999, p. 29). Tasmanian historical and biographical records align with Maddox in taking religion out of the question: "Harradine used his pivotal *independent status* [italics added] to win key concessions from government, such as securing extra funding for the Tasmanian environment and telecommunications in return for his support for the one-third sale of Telstra" (Rimon, 2006). [94]

The evidence, then, would suggest that Harradine used his balance of power for the benefit of his home State. In this case, on October 11, 1999, seven full-time and four part-time members were appointed to *The Board*: eight female and three male. Of the eleven, four of the initially rejected candidates were appointed: Chan and Williams full-time, Healey and Shirley part-time (Table 3). Also, Shirley was then (October 1999) acting as a temporary member of *The Board*. The Board then consisted of 10 females and seven males; one female was seconded from New Zealand on exchange.

TABLE 3

FULL-TIME MEMBERS APPOINTED ON OCTOBER 11 1999					
Banfield, W.	36	Female	University	Law	QLD
Chan, Y.	30	Female	University	Law	ACT
Griffiths, D.	51	Male	Not Stated	Various	VIC
Reidy, K.	37	Female	University	Education	NT
Sanderson, R.	25	Male	University	Accountant	NSW
Townsend, L.	56	Female	University	Social Work	TAS
Williams, R.	31	Female	University	Arts	QLD
PART-TIME MEMBERS APPOINTED ON OCTOBER 11 1999					
Clancy, M.	50	Female	University	Education	NSW
Healy, B.	43	Female	Not Stated	Social Work	NSW
Shirley, G.	50	Male	Tertiary	Arts	N/S
Smith, K.	44	Male	Tertiary	Social Work	TAS

94 Rimon, W., 2006. *The Companion to Tasmanian History*. Centre for Tasmanian Historical Studies. http://www.utas.edu.au/library/companion_to_tasmanian_history/H/Brian%20Harradine.htm

BOARD MEMBERSHIP AS AT THE OCTOBER 11, 1999 APPOINTMENTS

According to Marr, Prime Minister Howard had to "placate" Senator Harradine, upon whose vote he depended to successfully get his Goods and Services Tax (GST) through the Senate (see *fn* 92). From the details in Table 3, it is observed that of the seven rejected candidates, four were eventually appointed: Chan and Williams full-time, Healey and Shirley part-time. Also, Shirley was then (October 1999) a temporary member of *The Board.* It is also observed that one full-time member (Townsend) and one part-time member (Smith, K.) were from Harradine's home State, Tasmania. The geographical distribution of *Board* members in set out in Table 4, where columns B and C ("New Members") represent the October 19, 1999 intake, and "D and E ("Other Members") the distribution among States and Territories of the 41 members who had served during the period 96-97 to 06-07. "Aggregate %" is the combined percentage totals of *Board* members by State and Territory. (This excludes the exchange member and *The Board's* Director, Kathryn Paterson, who died shortly after her appointment.)

Looking at Table 4, it can be seen that Tasmania appears over-represented compared to some of the more populous States (*e.g*. Victoria and Queensland) but this is too simplistic view; other attributes, such as occupation, gender and age must be considered before any claim can be made to Harradine-favouritism. Using the data in Table 10 (pages 94-5), the new members' personal in formation in Table 3 can be compared with the 41 other members who served for the period 96-97 to 06-07.

TABLE 4

NEW AND OTHER MEMBERS BY STATE AND TERRITORY 1996 -2007

A	B	C	D	E	F
State/ Territory	Members	New % New	Members	Other % Other	Aggregate %
ACT	1	9.09	5	9.76	11.54
NSW	3	27.27	15	36.58	34.62
NT	1	9.09	2	4.88	5.77
QLD	2	18.18	4	9.76	11.54
SA	0		1	2.44	1.92
TAS	2	18.18	4/5*	10.98	12.50
VIC	1	9.09	4/5*	10.98	10.58
WA	0		3	7.32	5.77
Not stated	1	9.09	2	7.32	5.77
Total	11	99.99	41	100.02	100.01

* One member spent six months in each State.

Age. The average age of the new full-time members was 38, and the four part-time, 47. The average age of other members was 38.83. The aggregated average age of full-

time members was 38.42. The CBRs disclose no details of part-time members before the October 11, 1999 appointments were made.

Gender. There were seven female (63.63%) and four male (36.36%) new members. This compares to *The Board's* overall composition for the years 97-98 to 06-07 of 22 female (53.65%) and 19 male (46.34%) When aggregated, the gender distribution is 29 female (56.86%) and 22 male (34.14%)

Education. Of the 11 new appointees, at least seven (63.64%) held university degrees. This compares to 75.61% of existing members. When aggregated, the overall proportion decreases to 73.08%. Of the seven full-time new members, six (85.71%) held university degrees.

Occupation. There was a greater variety of pre-appointment occupations among the new members but one would hesitate to call it significantly different from the composition of the existing members, in the sense that the greater majority of new and existing members might be described as "white collar" workers.

It would have been interesting to have comparative details for the three rejected candidates and so round off the personal information analysis. What we know of them, according to Marr (1999), is as follows. **Andrew Harvey**, 31, Sydney. Social worker in the intensive care unit at the Royal Prince Alfred Hospital. **Cathy Johnstone**, 39, ACT. Officer in the Department of Foreign Affairs and Trade; **Peter Epifano**, 33, from regional Victoria, parent and teacher.

In sum, the average age of the five youngest new members (31.8) was much lower than that of existing members (38.83), while the average age (49) of the other six was significantly higher. The gender difference was also significantly higher than the national difference, where the female to male population was 50.24 to 49.76 (see Table 5, next page). Whether university educated or not stated (N/S) all eleven new members were well- or highly-educated and their occupations were in the "white collar" category. It is also observed that average the age (34.3) of the above-named three who were not appointed, more closely fitted the national median age of 34.6 years (Table 4). On this point, *The Board*, whether new members or existing, has never comprised "persons of a reasonable spread of ages" (GSM paragraph 22 iv.). For example, there have only ever been two individuals, both male law graduates, aged less than 25 on *The Board*, namely Power (23) and Gamieldien (24). Furthermore, Power was appointed in 1994 and it was to be nearly 15 years before the 24-year-old Gamieldien was appointed

(see Table 10). In 2009 there were 1,082,661 females and 1,150,787 males below the age of 25 years, in Australia. The total, of 2,233448), being 10.2% (21,875,000 of the total population at June 30, 2009 (ABS 3201.0 June 2009). It is of some interest that in 2008 the Review Board recruited 22-year-old Irina Kolodizner who "brings her youthful perspective to the review Board" (CBR08-09: 70). One would question why a proportionate "youthful perspective" was not included on *The Board*. When it is considered a reasonable spread of ages is a requirement for selecting members of *The Board*, one might suggest that 10.2% of the population, by age, is too large a minority to be so disproportionately represented.

WAS SENATOR HARRADINE "PLACATED"?

There is some evidence that the October 11, 1999 appointments to *The Board* worked in Harradine's favour in at least two ways. First, as a result of the appointments it appears his home State, Tasmania, was substantially over-represented on *The Board*.

TABLE 5

AUSTRALIAN POPULATION BY STATE 1998											
	Units	Year	NSW	VIC	QLD	SA	WA	TAS	NT	ACT	AUST
Population	'000	1998	6,342	4,661	3,456	1,487	1,831	472	190	308	18,751
Male	'000	1998	3,151	2,304	1,731	735	922	233	100	154	9,330
Female	'000	1998	3,191	2,357	1,726	752	910	239	90	155	9,421
Median Age		1998	35.0	34.8	33.9	36.3	33.6	35.6	28.3	32.1	34.6

Source: Australian Bureau of Statistics Catalogue Number 4102.0 - Australian Social Trends, 1999.

TABLE 6

State	% Popn.	Members	% Members	Ideal Proportion.
A	B	C	D	E
ACT	1.64	2	12.50	0.26
NSW	33.82	4	25.00	5.41
NT	1.01	1	06.25	0.16
QLD	18.43	2	12.50	2.95
SA	7.93	0	0	1.27
TAS	2.52	2.5*	15.63	0.41
VIC	24.86	2.5*	15.63	3.98
WA	9.76	1	06.25	1.56
Not stated		1	06.25	

* One member spent six months in each State.

The over-representation was calculated by taking the ABS statistics of Australia's 1998 population by State and Territory (Table 5) and using those statistics to produce a table

of percentages of *Board* members by State and Territory following the October 11, 1999 appointments (Table 6).

In Table 6, column **B** represents the percentage of Australians by State and Territory (*cf* Table 5). Column **C** represents all 16 members as at October 11, 1999. Column **D** is the proportion of members by State and Territory. Column **E** is the ideal composition of the 16-member Board, *if all Australians were proportionally represented by State and Territory*. Looking at column **E**, an ideal distribution, based on population, would be one member each for ACT, NT, SA and TAS; two members for WA; three for QLD; four for VIC and five for NSW, making 18 in all. *The Act* makes provision for 20 members, which, with the addition of two new members, would have satisfied the ideal of proportional representation by State and Territory.[95] There is no explanation as to why the imbalance was not addressed when the October 1999 appointments were made. The imbalance would appear to conflict with the requirement that *The Board* should comprise "persons from different geographical locations within Australia" (GSM paragraph, 22 iii.) combined with the desirability of representing all Australians.

THE BOARD UNDER LABOR GOVERNMENT

Prime Minister Howard was defeated at the polls in October 2007, but he had earlier replaced *The Board's* retiring Director, Des Clark, with Donald McDonald, effective May 1, 2007. It was of some interest to examine whether *The Board's* composition changed when a Labor Attorney-General became responsible for a Liberal-National appointed *Board*; the more so as Prime Minister Howard was described as "a close friend of McDonald" (Michelle Grattan, *SMH*, May 30, 2002).

We now examine the composition of *The Board* with McDonald as Director, *i.e*. from 2007 to 2012 (Table 7 pages 92-3 *infra*). Details of members for this period were analysed as for the period 1997 to June 30, 2007, thus the methodology is not repeated here. There were changes, but the evidence does not reveal them as being political. The most significant changes relate to the co-opting of temporary members to serve on *The Board*. An assessment is made (below) of the weight of temporary members' participation in decision-making.

There appears to have been several departures from the previous regime, for

[95] This is not quite so simple; it raises questions of other attributes, as in the example of age, or gender; one male, one female, one white collar, one blue and so on.

example, McDonald, presumably with the agreement of Labor's Attorney-General, altered *The Board's* balance in favour of more university educated members from an average over time of 70% to an average of 79.41%. In the last years, 90% of members were university educated (Table 7 pages 92-3). The period also saw more male members than female (from M=47%, F=53% to M=57% and F=43%, which latter runs counter to Australia's national gender numbers, see Table 5 (above). However, when temporary appointments were taken into account, the gender mix was M=42.2% and F=57.8%.

With McDonald as Director, 20 temporary members, some of whom effectively worked as part-time members, were appointed to *The Board*, (hours worked by each member for the years 09-10 to 11-12 were recorded (Table 7). There is no requirement for a competitive process for the appointment of temporary members—the power to appoint being given to "The Minister" under *The Act* s.50(1). This arrangement, especially considering the relatively large intake of temporary members, could have the effect of giving the Minister and/or the Director control of all submitted material.

The main purpose in appointing temporary members is, if in the Minister's opinion, "it is necessary to do so for the efficient dispatch of the Board's business" (*ibid*). However, when comparing *The Board's* workload under McDonald's direction, with the last two years of Clark's term, it does not appear that so many temporary members were "necessary". For example, McDonald reported that: "The workload of the Classification Board has remained relatively stable over the last two reporting periods"(CBR07-08, p. 15). As can be seen in Table 8, the workload for years 06-07 and 07-08 varied little. Table 8 also reveals that in 05-06, (Clark's last full year as Director) the 16-member Board made decisions on 9,425 items compared to 6,943 in 07-08 with McDonald's Board of 16 plus 15 temporary members. The need for more classifiers, when throughput was reduced by 26.33%, might be partly explained by the "popularity of television series box-sets [of DVDs that] involves long viewing hours" (ibid), but this was offset by a new, industry self-classification scheme. "The scheme has been a success in informing the decisions of the Classification Board while reducing the amount of viewing time for extra features such as directors' commentaries" (*ibid*). This scheme is considered as part of the final chapter of this thesis.

MCDONALD AND THE CONTRIBUTIONS OF TEMPORARY MEMBERS

"There are those who say McDonald's appointment was political", wrote Michael Shmith (*sic*) in *The Age* of April 6, 2003. The reference was to Prime Minister Howard's appointment of McDonald as Chairman of the ABC. Almost exactly four years later, on April 14, 2007, *The Age* reporter, Peter Ker, wrote: "A close friend of Prime Minister John Howard will get the job as Australia's chief censor at the expense of a recommended candidate. [. . .] But the move angered state attorneys-general meeting in Canberra, with Victoria's Rob Hulls saying it was a case of 'jobs for the boys' ".

From such criticism, one would have thought McDonald's term as Director of *The Board* might have been as turbulent under a Labor government as was his time at the ABC where one of his co-directors, "couldn't stomach him" and another called him "elitist" (Shmith, 2003). The records reveal, not only evidence of co-operation with the Labor government, but also his being given more powers. For example, McDonald states: "I have been delegated by the Minister the power to appoint temporary Classification Board members" (CBR07-08: 15). When the numbers of all members are re-balanced to take account of time-expired, resignations and appointments, a pattern of management emerges. Tables 8 and 9 (next page) represent respectively, the raw and re-balanced figures.

Incomplete details of temporary members (such as education and profession) preclude a comparative analysis as for other members of *The Board,* but some useful facts emerge from what information is available. For example, when assessing individuals for temporary duties: "A broad experience in community life, and experience with children will be regarded highly" (*InfoPack*). While no personal information regarding temporary appointments was given in CBR08-09, the CBRs for years 09-10, 10-11 and 11-12 indicate that the temporary appointments were, indeed, in conformity with the "community life" expectation.

The imbalance of females to males (as noted above) is partially corrected, for example, by there being eight female temporary members who worked an aggregate of 476 hours in 2009-10, compared to 124 hours worked by three men.

(Note: Table 7, being a full spread, is taken in at pages 92-3.)

TABLE 8

Year CBR*	Applications Received	Decisions made	Temp	Board Members	Total	% Temps
05-06	9730	9425	none	16	16	0
06-07	6939	6693	none	16	16	0
07-08	7143	6943	15	16	31	48.90
08-09	7036	6799	7	19	26	26.92
09-10	7302	7178	8	14	22	36.36
10-11	6718	6635	10	13	23	41.48
11-12	6231	6263**	7	12	19	36.84

* CBR refers to the CBR for each of the years, from which reports the tabulated information was retrieved.
** The discrepancy between decisions and receipts is likely to be material carried over from 10-11.

TABLE 9

PERSONNEL CHANGES BY YEAR 07-08 TO 11-12						
A	B	C	D	E		F
Year CBR*	New Members	Time Expired	Resigned	The Board		% Temps
				Members	Temps	
07-08	1	0	2	15	15	50.00
08-09	5	5	0	19	7	26.92
09-10	0	3	3	8	8	50.00
10-11	6	0	1	12	9**	42.86
11-12	0	0	1	11	7	38.90

CBR refers to the CBR for each of the years, from which reports the tabulated information was retrieved.
** Temporary member Andersen was confirmed as a full-time member on January 31, 2011.

The average age on first appointment of the 11 temporary members, whose ages are stated, was 48.73, significantly higher than the average and median ages of the entire 16-year study of *The Board*, which were 39.58 (females) and 37 (males) (see Table 10, p. 94-5). Also, the age of temporary members was even more significantly higher than the median age of Australia's population as a whole, which ranged from 32.1 (ACT) to 36.3 (SA), in 1998 with an Australia-wide median of 34.6 (Table 5).

The impact of the temporary appointments can be immediately gleaned from Table 8, where there were initially almost as many temporary members as others. There are no details of the temporary members' workloads but, considering the classification decisions made, it is not unsafe to conclude that all worked in equal proportion. That picture changes somewhat when we consider the data in Table 9. After taking into account the changes in personnel, by reporting period CBR11-12 *The Board* comprises many new members and an array of temporary members, many of whose statutory maximum 3-month terms (*The Act* s.50(2)) must have been constantly renewed—although the CBRs make no mention of that formality.

McDonald's power to appoint temporary members did not preclude his selecting

members of his own administrative staff as classifiers. For example, Emma Bromley (Table 7) was recruited from within the Board's establishment. In 1999, she was a member of the Policy Unit (CBR99-00: 52); ten years later, she was appointed a temporary classifier. Of her appointment, McDonald reported: "She also held a number of positions within the then Office of Film and Literature Classification" (CBR09-10, p. 24). Paul Tenison (Table 7) was a member of the Business Support Unit in CBR97-98; Business Manager (CBR99-00, p. 56) and in CBR07-08, p. 26), he is listed as a temporary member, but no other details are given. Under Clark's direction, there were instances where Board membership preceded employment as a staff member. For example, Meg Clancy was appointed as a part-time classifier with the intake of October 11, 1999 (CBR00-01.2, p. 45), after her time expired she became *The Board's* Classification Education officer (CBR04-05: 9). Kathryn Reidy was appointed a full time member with the same October intake and, after her time expired, was given the position of Education and Communications Manager (CBR03-04.2, p. 56). Clark's arrangements are not questionable, whereas, while McDonald's temporary appointments might be in keeping with the law, they would not, one would argue, conform to *The Act*: s.48(2)

THE "MAN IN THE STREET" NOT WELL REPRESENTED

The requirements for appointment to *The Board* virtually exclude Court's idea of "the man in the street" because not only is he likely to be less well educated, but also not so financially well off.

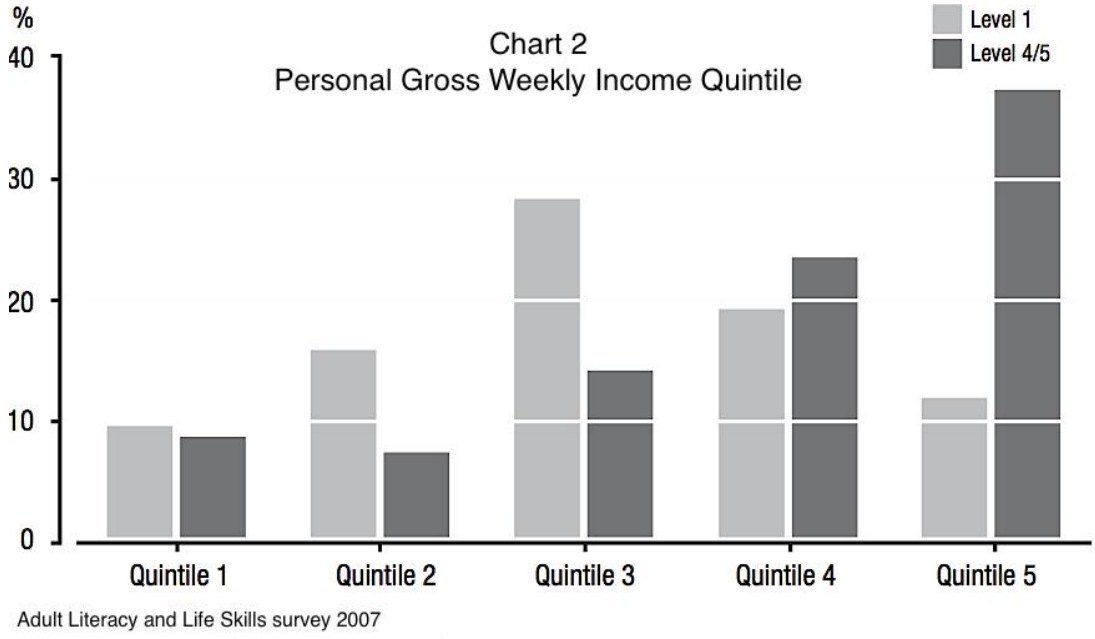


Chart 2 was extracted from the *Adult Literacy and Life Skills* survey 2007; it divides weekly earnings of employed persons into quintiles that compare income with life skills. The median personal gross weekly income reported in the survey for Australia was $600. The median weekly income for those who attained literacy scores at Level 3 on the prose scale was $695. For those who attained literacy scores at Level 4/5 on the prose scale, the median weekly income was $890.

Individuals who attained scores lower than Level 3 on the prose scale, had a median weekly income less than $504. Of employed people at Level 1 on the prose scale, 32% received a personal gross weekly income in the highest two quintiles (4 and 5), compared to 59% for those with prose scores at Level 4/5. The results on the document scales were similar, with 31% of employed people with scores at Level 1 and 60% with scores at Level 4/5 receiving a personal gross weekly income in the highest two quintiles. It would appear, then, that as well as being better educated than average, persons appointed as members of *The Board*, were also financially better-off than average.

From the evidence, it could be argued that the opinions of Dr John Court and his supporters, as well as that of Senator Harradine, appear to have succeeded in influencing authority to assist the man in the street in making "selective choices for himself and his family".

CONCLUSION

If there is any difference between the Liberal-National and Labor governments, it is that under Labor, McDonald, as Director of *The Board* made use of *The Act's* provisions for appointing temporary members. In the period 2007-08 to 2011-12, there were 45 Board members, of which number, 17 were temporary members. Meanwhile, if it was intended that all Australians were to be represented, appointments ought to have been made from a wider cross-section of Australia's population. It is noted that there is no suggestion that *The Board* members are "distrustful" as persons, but rather, the system was designed with a particular purpose in mind. That is to say, criteria for appointment to *The Board* were so framed that all Australians could not be broadly represented. Furthermore, the policymakers, despite protests to the contrary, clearly did not intend broad representation; had it been their intention the wording of *The Act* s.48(2) would have contained the imperative **must** and the equivocating phrases

omitted, thus as previously stated: *The Board* must be broadly representative of all Australians, and that this imperative be accompanied by either a fair definition of the typical Australian, or specify that *The Board* be composed of members based the relative quantities and qualities of Australians as disclosed in the national census from time to time. Given all the circumstances, one could argue that it might have been more honest of the policymakers to acknowledge that members of *The Board* would need to have more expertise in appraising arts-media than would other Australians.

There is a precedent for opting for expertise over broad representation. Nearly sixty years ago, when Canberrans wanted local representation in respect of further development of their city, Senator Norman Henty (TAS) could have pretended to have a broadly representative committee, but he did not do so, instead, he said:

> . . . the committee to be elected is not a broadly representative committee to convey to the Government points of view on matters of policy. It is, in fact, an expert committee set up to deal with the highly technical points of planning, architecture, engineering and general development (*SH*, September 3, 1957).

The Board operates in a highly technical area of communications and its value to the "broadly Australian community" is, one could argue, derived from the functions of "an expert committee". *The Board* comprises such persons as possess the ability to make qualitative judgments on portrayals of violence and sex to the point of deciding that some images and descriptions are acceptable and others not. The members' expertise could be intuitive, as is possessed of those who know a good work of art when they see it, or it could be learned, such as becomes a literary or art critic. However, it is difficult to deny that Court (with Governor-General Hasluck's encouragement) has prevailed and *The Board* acts for "the man in the street" who lacks the "intellect" to make his own choices. This is not without its subjective/objective difficulties but *The Act* allowed for this by establishing the Classification Review Board (RB) that would consider appeals from parties aggrieved by *The Board's* decisions.

TABLE 7

	Age	Sex	Education	Occupation	State	07-08	08-09	09-10	10-11	11-12
Apel, A.	44	F	N/S	Sport	NT		3-Apr-09	cont	cont	cont
Andersen, M. B.*	39	F	University	Broadcasting	NSW	no details	no details	114	31-Jan-11	cont
Booyar, O.	39	F	University	Broadcasting	NSW	23-Jul-07	cont	cont R		
Bradley, G.*	61	M		Various		no details	no details	104	106	70
Brill/Traise, S.	30	F	University	Education	ACT		3-Apr-09	cont	cont R	
Bromley, E.*	36	F	University	Education		no details	no details	38	44	30
Bryant, S.	45	F	N/S	Various	NSW	cont	cont TE			
Burdon, T.	29	F	University	Psychology	TAS				31-Jan-11	cont
Butler, L.	36	M	University	Logistics	VIC				31-Jan-11	cont
Chalier, C.*	49	F	University	Education	ACT	cont	cont TE	79	75	
Davis, M.*		F				no details				
Doratis, D.*	60	F	University	Psychology	NSW	no details	no details	110	117	56
Dridan, G.	37	F	University	Broadcasting	VIC	cont	cont	cont	cont	cont
Dunham, S.	49	M	N/S	Politics	NT	cont	cont TE			
Eades, T.*	45	F	University	Psychology	NSW	no details	no details	90	87	
Fenton, J.	36	M	University	Journalism/ Broadcast	NSW	cont	cont	cont TE		
Gamieldien, Z.	24	M	University	Law	NSW		18-May-09	cont	cont	cont
Geraghty, G.*	57	M			NSW		no details	20	26	15
Glasson, M.	53	F	University	Education	WA		6-Apr-09	cont	cont	cont
Greene, A.	30	F	University	Law	QLD	cont	cont	cont R		
Guthrie, J.	25	M	University	Law	QLD				31-Jan-11	cont R
Hazel, R.*		F				no details				
Hennessy, S.*		F				no details				
Jakob, S.	36	F	N/S	Education	SA				31-Jan-11	cont
Lake, C.*		F				no details				
McDonald, D.	71	M	University	Arts	NSW	cont	cont	cont	cont	cont
Mearing, C.*		F				no details				
Mlikota, J.	39	M	University	Arts	NSW	cont	cont	cont TE		

Nagy, C.*	38	F	University	Law	NSW				58	8
Nickols, D.	34	M	University	Social work	NSW	cont R				
Oberdorf, R.	51	F	University	Child welfare	OLD	cont	cont	cont TE		
O'Brien, L	41	F	University	Publisher ABC Books	NSW				31-Jan-11	cont
O'Mara, D.*		F				no details				
Pak Poy, A.	45	M	University	Urban Planner	QLD	cont	cont TE			
Robinson, C.*		F				no details				
Scott, G.	27	M	Secondary	Sailor (RAN)	NSW	cont	cont	cont	cont	cont
Simon, D.	36	M	University	Arts	NSW	cont	cont TE			
Smith, R.	37	M	N/S	Journalism	TAS	cont	cont	cont R		
Tenison, P.*		M				no details				
Venkataraman, R.	35	M	University	Science	ACT	cont R				
Villar, C. Del.	33	M	University	Education	NSW		3-Apr-09	cont R		
Wells, S.*	47	M	University		NSW				63	
Wilson O'Connor, L.*	37	F	N/S	Education	N/S				112	100
Wright, M.*		M				no details				
Zelinka, S.*	60	F	University	Law	NSW	no details	no details	62	48	23
Total Members 45				Members		16	19	14	13	12
Temp Members* 20				Temporary Members		15	7	8	10	7
Sex, Education	M19	F26	University 27							
(Members)				Percent temps		48.9	26.92	36.36	43.48	36.84

Details of Board members under the directorship of Donald McDonald, showing the inclusion temporary members

TABLE 10	Age	Sex	Edu	Occupation	State	96-97	97-98	98-99	99-00	00-01
Apel, A.	44	F	N/S	Sport	NT					
Andersen, M. B.	39	F	Uni	Broadcasting	NSW					
Banfield, W.	36	F	Uni	Law	QLD				11-Oct-99	cont
Booyar, O.	39	F	Uni	Broadcasting	NSW					
Brill/Traise, S.	30	F	Uni	Education	ACT					
Bryant, S.	45	F	N/S	Various	NSW					
Burdon, T.	29	F	Uni	Psychology	TAS					
Butler, L.	36	M	Uni	Logistics	VIC					
Carroll, M-L.	33	F	Uni	Law	WA					
Carthew, T.	45	F	Uni	Nursing	QLD					
Chalier, C.	49	F	Uni	Education	ACT					
Chan, Y.	30	F	Uni	Law	ACT				11-10-99	cont
Clancy, M. (PT)	50	F	Uni	Education	NSW				11-10-99	cont PT
Clark, D.	54	M	Uni	Arts	VIC				17-04-00	cont
Dickie, J.	47	M	Uni	Public Service	ACT	01-Feb-88	contTE			
Dridan, G.	37	F	Uni	Broadcasting	VIC					
Dunham, S.	49	M	N/S	Politics	NT					
Edsall	37	M	N/S	Public Servant	TAS	22-Dec-95	cont	cont		
Fenton, J.	36	M	Uni	Journalism	NSW					
Gamieldien, Z.	24	M	Uni	Law	NSW					
Glasson, M.	53	F	Uni	Education	WA					
Green-Gibson, V.	34	M	Uni	Law	NSW	19-Mar-97	cont	cont		
Greene, A.	30	F	Uni	Law	QLD					
Griffiths, D.	51	M	N/S	Various	VIC				11-Oct-99	cont
Guthrie, J.	25	M	Uni	Law	QLD					
Healy, B. (PT)	43	F	N/S	Social work	NSW				11-10-99	cont PT
Hunt, P.	32	M	Uni	Local Govt	WA				01-06-00	cont
Jakob, S.	36	F	N/S	Education	SA					
McDonald, D.	71	M	Uni	Arts	NSW					
Mlikota, J.	39	M	Uni	Arts	NSW					
Morton, S.	50	F	N/S	Various	VIC	19-Mar-97	cont	contTE		
Nickols, D.	34	M	Uni	Social work	NSW					
Oberdorf, R.	51	F	Uni	Child welfare	OLD					
O'Brien, L	41	F	Uni	Publisher	NSW					
Olarenshaw, J.	33	F	N/S	Various	#			30-06-98	cont	cont
Pak Poy, A.	45	M	Uni	Urban Planner	QLD					
Paterson, K.	44	F	Uni	Law	NSW			11-01-99	Died	
Power, D.	23	M	Uni	Law	TAS	17-Oct-94	cont			
Rae, J.	35	F	Uni	Education	NSW	01-Aug-93	cont	contR		
Reidy, K.	37	F	Uni	Education	NT				11-10-99	cont
Sanderson, R.	25	M	Uni	Accountant	NSW				11-Oct-99	cont
Scott, G.	27	M	2ndary	Sailor (RAN)	NSW					
Shirley, G (PT)	50	M	3rdary	Arts	N/S				11-Oct-99	cont PT
Simon, D.	36	M	Uni	Arts	NSW					
Smith, K (PT)	44	F	Tertiary	Social work	TAS				11-10-99	cont PT
Smith, R.	37	M	N/S	Journalism	TAS					
Stockwell, S.	34	F	Uni	Psychology	N/S	8-Aug-94	cont			
Thorowgood	35	M	Uni	Social work	NSW	19-Mar-97	cont	cont		
Townsend, L	56	F	Uni	Social work	TAS				11-Oct-99	cont
Trotter, S.^	NS	F	N/S	Arts Archivist	NZ				03-Feb-00	contR
Venkataraman, R.	35	M	Uni	Science	ACT					
Villar, C. Del.	33	M	Uni	Education	NSW					
Webb, S.	41	M	N/S	Arts	ACT	01-Aug-94	cont	cont	cont	cont
Williams, P.	52	F	Uni	Barrister	NSW	19-Mar-97	cont	cont	cont	cont
Williams, R.	31	F	Uni	Arts	QLD				11-Oct-99	cont
Wright, A.	45	F	Uni	Arts	N/S	01-Feb-86	contTE			
Total Members						11	11	9	17	17
^ Exchange NZ	39.6	F31	Uni 41				TE 2	R 1, TE 2	R 1, PT 4	R 1 PT 4
	Avg	M25	Tertiary 2							

01-02	02-03	03-04	04-05	05-06	06-07	07-08	08-09	09-10	10-11	11-12
							3-Apr-09	cont	cont	cont
									31-Jan-11	cont
cont	cont	cont	cont	cont	contTE					
						23-Jul-07	cont	contR		
							3-Apr-09	cont	contR	
				03-Apr-06	cont	cont	contTE			
									31-Jan-11	cotinuing
									31-Jan-11	cotinuing
		19-Feb-04	cont	cont	contTE					
	28-May-03	cont	contR							
				03-Apr-06	cont	cont	contTE			
cont	contTE									
cont	contTE									
cont	cont	cont	cont	cont	contTE					
				03-Apr-06	cont	cont	cont	cont	cont	cont
				03-Apr-06	cont	cont	contTE			
	29-May-03	cont	cont	cont	cont	cont	cont	contTE		
							18-May-09	cont	cont	cont
							6-Apr-09	cont	cont	cont
	28-May-03	cont	cont	cont	cont	cont	cont	contR		
cont	contR									
									31-Jan-11	contR
cont	contTE									
cont	cont	cont	cont	cont	contTE					
									31-Jan-11	cont
					01-May-07	cont	cont	cont	cont	cont
					13-Dec-06	cont	cont	contTE		
					19-Mar-07	contR				
					13-Dec-06	cont	cont	contTE		
									31-Jan-11	cont
				03-Apr-06	cont	cont	contTE			
cont										
cont	cont	cont	cont	contTE						
				03-Apr-06	cont	cont	cont	cont	cont	cont
cont	contTE									
				03-Apr-06	cont	cont	contTE			
	28-May-03	cont	cont	cont	cont	cont	cont	contR		
cont	cont	cont	cont	contTE						
					03-Apr-06	contR				
							3-Apr-09	contR		
cont										
cont	cont									
cont	contTE									
14	16	10	10	15	19	16	19	14	13	12
	R 1, TE 5		R 1		TE 4	R 3	TE 5	R 4, TE 3	R 1	R 1

CHAPTER 4: APPOINTMENTS TO AND ACTIVITIES OF THE REVIEW BOARD

> MARGARET POMERANZ [movie critic]: But your job [Convenor of the RB] wasn't advertised, was it?
> MAUREEN SHELLEY: I mean, I wouldn't know whether it was or not. I was contacted by the Attorney-General's department regarding this position.
> TONY JONES [ABC]: The Federal Attorney-General's department?
> MAUREEN SHELLEY: That's correct.
> TONY JONES: Do you see yourself as representing a new push to represent Australian standards or bring them into line?
> MAUREEN SHELLEY: We simply do our job, which is to apply the law.
> (ABC *Lateline*, July 3, 2003.)

INTRODUCTORY

The main purpose of this chapter is to demonstrate that because its members are bound by the same *Guidelines* as for *The Board*, the RB does nothing of any real consequence. Had there been no RB, some Australians might have been displeased by or dissatisfied with *The Board's* decisions, but hardly more so than were displeased by or dissatisfied by the RB's decisions. Of the 161 items reviewed in the period 1997-2012, the RB confirmed about half (n=83, or 51%) of *The Board's* decisions. Furthermore, 61 appeals (38%) related to unrestricted items, access to which would more appropriately be left to parents (and guardians) "who are expected to interpret the marking, find the consumer advice and supervise their children accordingly" (Maureen Shelley, CBR07-08, p. 63).

The RB is the first line of appeal for any who are aggrieved by *The Board's* decisions (*The Act* s.42) The Federal Court is the second line of appeal, under the Administrative Decisions (Judicial Review) Act 1977 (Cth).[96] At whatever level of classification, the same criteria apply (*i.e. The Act*, s.11, the *NCC* and the *Guidelines*).

In this chapter, the 26 members who served on the RB from 1997-2012 are

96 Interestingly, an appeal to the Federal Court against that perennial bone of contention, the movie *Salo*, was lodged on June 16, 2010—this time the DVD version—which the RB had confirmed R 18+. The matter, brought by Family Voice Australia (FAVA) in which the RB the Minister for Home Affairs and Justice were respondents, was heard nine months later on March 4, 2011, at which time, Justice Margaret Stone, reserved her decision. On August 11, 2011, Justice Stone found in favour of the respondents—thus, once more, *Salo* was unbanned (CBR11-12, p. 76).

identified, and their educational, occupational and social backgrounds are given; which, as will be seen, supports the argument that any claim to their being broadly representative of the Australian community, as is desired by *The Act* s.74(2), cannot be sustained.

The information herein is taken from *The Board's* annual reports to Federal parliament: CBRs 1997-2012, starting with the short biography of each member as published in the CBRs. Consideration was given to editing these biographies but the impact or flavour of members' attributes was somewhat diminished by doing so, thus the CBR version was preferred. However, the biographies are cited only at the first instance of membership.

After identifying members year-by-year, there follows a summary of the RB's activity for the year, with the inclusion of some relevant additional comments. Charts and tables in this chapter were reconstructed from data published in the CBRs.

The chapter then considers the value of work carried out by the RB, the real value of which, as will be demonstrated, amounts to not very much at all. In the 16 years analysed (1997-2012), the 161 items reviewed represent an average of one item every five weeks.

Note: To avoid an excess of referencing by citing individual web pages, all reports on decisions by the RB are to be found at *The Board's* website:

http://www.classification.gov.au/About/Pages/Review-Board-Decisions.aspx

RELEVANT LEGISLATION AND SOME INITIAL COMMENTS

Part 7 of *The Act* lays down the establishment (ss.72-76), convenor's powers (ss.77, 77A) and procedure (ss.78 and 79) relating to the RB. Of importance is the requirement that: "For the purpose of performing its functions, the Review Board is to be constituted by at least 3 of its members who are to be nominated for the purpose by the Convenor" (*The Act* s.78). This would indicate that there exists the possibility of careful selection of members, in order to achieve a particular outcome. While this work does not demonstrate that achieving a particular outcome was or is the case, *The Act*, by its wording leaves room for doubt. This doubt is enhanced where the appellants are government ministers, for example, the Attorney-General (or such other Minister), to whom *The Board* and RB are directly answerable. If there were a prepared roster of reviewers who would review items of arts-media as the need arose, any doubt created by the phrase "nominated for the purpose by the Convenor" might be dispelled. Furthermore allowing that membership is part-time (*The Ac*t s.75), any change to the roster because of a member's prior commitment elsewhere would not be entirely unacceptable. However, as will be seen, some decisions reached by the RB cannot be said to be entirely above suspicion in this regard. The quote that opens this chapter is taken from an on-air discussion of the movie *Ken Park* and Shelley was one of only three on the reviewing panel. The movie was refused classification on a majority vote.

The Act (s.74(2)) desires the RB to be "broadly representative of the Australian community", as for *The Board* itself. From the evidence adduced thus far, it is clear that *The Board* is not representative of all Australians (not even if one were to allow the term, "the Australian community"). From the records, the RB would appear to be even more carefully selected than is *The Board*, even to the point of publicly evading the truth. Shelley's: "I wouldn't know", would appear to have been less than forthright in answering Pomeranz' question, because, at that time (July, 2003) she must have known there was no competition for places on the RB. In her own report of 2004-2005, Shelley stated: "The appointment process for members of the Classification Review Board was restructured this year with *vacancies being advertised*" (italics added) (CBR04-05, p. 83).

Such a response as Shelley made to Pomeranz could create an impression that there was something to hide; that until 2004-2005, membership of the RB was entirely within the Attorney-General's gift. Indeed, as one reads their short biographies, appointees do not appear to conform to the spirit or the apparent intention of *The Act* (s.74(2)).

1997-1998: MEMBERS' BIOGRAPHICAL DETAILS FROM CBR97-98

Seven individuals served as members of the RB in 1997-1998, as follows:

Barbara Biggins OAM, 60. Appointed Convenor of the RB on June 27, 1994. A recipient of the Medal of the Order of Australia, and a Churchill Fellow, Barbara Biggins has had a long and distinguished record of community service. A graduate of the University of Adelaide and of the University of South Australia, and a mother, Barbara has a deep and abiding concern for the wellbeing of children and young people. She has made a lifetime study of the impact of the media on children. She was a member of the Australian Broadcasting Tribunal's Children's Program Committee, which advised on the classification of, and standards for, children's programs, from 1982 to 1991. During the 1980s, Barbara convened the South Australian and National Advisory Councils of the Australian Broadcasting Corporation.

She has recently been a consultant to the Australian Law Reform Commission on Children and the Legal Process. She is currently President of the Australian Council for Children's Films and Television, and Honorary Executive of Young Media Australia.

In addition to her role as a parent, grandparent and community advocate, Barbara has been part- time Senior Librarian with Child and Youth Health, South Australia's statewide community preventative health service, since 1981. She is a member of the Australian Film Institute, the Communications and Media Law Association, and the South Australian Association for Media Education. Barbara is the editor of small screen, Australia's only news review of developments in children's media.

Dr Brent Waters, 46. Appointed Deputy Convenor of the RB on April 13, 1994.

A practising child psychiatrist with qualifications from the University of Ottawa and Monash University, Dr Brent Waters has a distinguished medical and academic career and is a respected expert in his field. He is a Fellow of the Royal Australia and New Zealand College of Psychiatrists. Dr Waters has extensive experience within the

hospital sector having been Director of Psychiatric Services at St Vincent's Hospital, Sydney, and Head of the Psychiatry Department at Sydney Children's Hospital. He has specialist expertise working with children and adolescents and for seven years held the position of Professor of Child and Adolescent Psychiatry at the University of New South Wales.

Father Michael Elligate 48. Appointed to the RB on January 1, 1995.

Originally an Arts/Education graduate from La Trobe University, Michael Elligate is an educator, media commentator and Catholic priest. Ordained a priest in 1973, Fr Elligate served in four diverse Melbourne parishes prior to being appointed Chaplain to the University of Melbourne and Parish Priest of the University Parish of St Carthage's in 1987. Fr Elligate served on the Film and Literature Board of Review between 1988 and 1993. The demands of ministering to parish and campus congregations has required a strong faith and high level counselling skills. It has provided Fr Elligate with detailed insights into many of the day-to-day problems, concerns and values people face in coping with community and family life. An active member of the church, Fr Elligate is Dean of the Archdiocese of Melbourne West Central Deanery, is a Member of the University of Melbourne Human Research Ethics Committee, and is a Member of the Walter and Eliza Hall Institute for Medical Research Ethics Committee.

Robyn Harvey, 39, was appointed to the RB on December 18, 1997.

Ms Harvey, a psychologist, has worked extensively with young children displaying emotional and behavioural problems. She has also lectured in the areas of child development, behavioural management and the development of effective communication skills. Recently she has been involved in the development of the Western Australian curriculum and learning guides for the Diploma of Social Science (Child Care) and the National Child Care Curriculum primarily in the

area of behaviour management. Her published work is widely used by a range of child care and training bodies. Ms Harvey is currently working as a part-time consultant for the Resource Unit for Children with Special Needs and for the Western Australian Department of Training. She is also completing her PhD in the Psychology Department of the University of Western Australia.

Ross Tzannes, 57, was appointed to the RB on December 18, 1997

A senior partner in the Sydney law firm, Pryor Tzannes and Wallis, Mr Tzannes has a long and impressive record of over twenty years' involvement in community affairs. He has served on many boards and councils, notably in the area of ethnic affairs, the environment and the arts. He is currently Senior Deputy Chairperson of the Federation of Ethnic Communities Councils of Australia, a commissioner with the Ethnic Affairs Commission of New South Wales and a board member of the Australian Conservation Foundation and the Australian Multicultural Foundation. He has been Vice Chair of the Film, Radio and Television Board of the Australia Council, past president of the Sydney Film Festival and board member of the Museum of Contemporary Art in Sydney.

Glenda Banks, 60, was appointed to the RB on December 18, 1997

A director of a consultancy advising clients in health, education and law on corporate and media communication, Ms Banks has an extensive media background as a columnist, editor and broadcaster, and has written six books on social issues as they impact on families. She has served on a number of boards and committees and is currently a member of the Australian Council on Healthcare Standards and the Mentor Committee for Guides Victoria. She has three adult children and this year (1998) completes a Master of Communications at Swinburne University, specialising in globalisation of the media and the social impact of new media technology.

Joan Yardley was 66 when appointed to the RB on December 18, 1997.

> Ms Yardley is Chairman of Clemenger/Concept Brisbane, a division of Clemenger BBDO, having formerly been Chairman and co-proprietor of Concept Australia. A respected member of the Brisbane business community, Joan co-founded the Brisbane agency which eventually became Monahan Dayman Adams and later Mojo. She has served on the boards of Queensland Rail and the Queensland State Library, and is currently a member of the University of Queensland Senate and the board of the Queensland Institute of Medical Research Trust. Having four daughters and several grandchildren, Joan brings to the Review Board an ongoing familiarity with changing community attitudes and an acute sensitivity to their subtleties.

Note: Biggins, Waters and Elligate carried over from the Film Censorship Board when *The Act* came into operation on January 1, 1996.

One could argue that the reasonable adult, upon whom *The Act* relies for making other judgments, would not consider these members "broadly representative of the Australian community" within any acceptable meaning of *The Act*, s.74(2).

WHAT THE RB DID DURING 1997-1998

During 1997-1998 the RB was convened to examine six movies for cinema; six publications; four videos and one advertisement—17 items in all. As a result of the RBs reviews and deliberations, challenges to three movies were upheld and three dismissed; four challenges to videos were upheld and two dismissed; challenges to three publications were upheld and one dismissed, and the challenge to the advertisement was upheld. (Henceforth the style, *e.g.* 3-3 meaning three upheld and three dismissed will be used.)

While it is desirable for all members to attend, it is not always possible but at least three members are required for a quorum (a review board). The RB met on July 18, 1997 (3 members); July 23, 1997 (3 members); September 17, 1997 (3 members); November 7, 1997 (3 members); January 15, 1998 (5 members); February 13-17, 1998 (6 members); March 20, 1998 (four members) May 25, 1998 (5 members) and June 26, 1998 (6 members).

In reading the reports this writer was struck by the importance of classification ratings to film-makers and publishers, all of whom sought wider audiences than *The*

Board's ratings would allow. For example, the distributors of the movie *Primary Colors* objected to the original M 15+ rating, which effectively barred 15+ teens from viewing the movie unless accompanied by an adult. The RB (four members) re-classified it M but added consumer advice "Adult Themes" to *The Board's* advice "Medium Level Coarse Language" (All information under this subhead is adapted from CBR97-98, Appendix Two, p. 128 *et seq*).

Worthy of note: the R 18+ classification for the movie, *Salo* (*Salo o le 120 Giornatedi Sodoma*) was challenged by the Queensland Attorney-General and Minister for Justice, the Hon Denver Beanland, *via* the Federal Attorney-General, Daryl Williams. The RB, by a majority decision, set aside *The Board's* classification and banned the movie (RC) (CBR97-98, p.144) *Salo* was to come before the RB on other occasions after this).

WHAT THE RB DID DURING 1998-1999 (CBR98-99)

The RB comprised the same members as for the previous year with the exception that Father Elligate's time expired during that year.

This was a relatively quiet year for the RB with only 9 items to consider: seven movies (3-4) and two publications (0-2). The RB convened on four occasions: August 21, 1998 (5 members); October 23, 1998 (4 members); February 19-25, 1999 (4 members) and April 9, 1999 (6 members)

Of special interest, "a consortium of community groups from Western Australia" challenged *The Board's* R 18+ rating of the movie *Lolita* (1997 version). These groups were deemed not to have standing as "persons aggrieved" by *The Board's* decision, therefore no action was taken. Persons aggrieved are identified in *The Act*, s.42(1)(d), which especially excludes individuals and groups whose objections are based on a single item, rather than on the generality, in this case, of child protection. In any event, the groups had not paid the prescribed fee (s.43). All six members of the RB viewed the movie and appear to have made a unanimous decision (CBR98-99, p. 148).

Another item of general interest, a publication titled *Indoor Marijuana Horticulture*, was confirmed as refused classification by a five-member panel. A statement in the publication: "do not tell anyone of the indoor garden and install dead bolt locks on all outside doors" (CBR98-99 p. 132) was likely a telling factor.

It is also of interest that *The Board's* rating of R 18+ for *Saving Private Ryan* was downgraded to M 15 + by a majority of the 5-member RB. The movie contains lengthy

battle scenes "(around 30 minutes each) at the beginning and end [as well as] the scene at 89 minutes where one of Miller's unit dies of multiple wounds" (CBR98-99, p. 136). This downgrading demonstrates that depictions of violence in the media are not considered nearly so problematical for the establishment as is sex. (See the subhead **SEX -V - VIOLENCE** in Chapter 8: There's No Harm In Looking).

1999-2000: MEMBERS AND THEIR ACTIVITY (CBR 99-00)

The RB comprised the same members, namely: Biggins (Convenor), Waters (Deputy Convenor), Banks, Harvey, Tzannes and Yardley. A new member, Jonathan O'Dea was appointed on February 20, 2000. His biography reads as follows:

> Jonathan O' Dea, 34, is married with two young children. He holds Bachelor Degrees in Arts/Law and a Master of Laws Degree from Sydney University and has authored a number of seminar papers and articles. He is currently studying towards an MBA (Technology Management) from Deakin University.
>
> Employed at Royal & Sun Alliance since early 1994, Jonathan is currently a senior insurance manager. Prior to moving into management, he worked as a lawyer for five years, including at one of Australia's leading law firms.
>
> Jonathan has been a director on the Board of HCF, a major NSW health insurer, since 1995. He also has past experience as an office–holder of various community based organisations, including as a former local government Councillor.

He was subsequently (2007) elected the NSW Legislative Assembly as Liberal member for the electorate of Davidson. At this writing he was chair of the NSW Parliament's Public Accounts Committee. (see *SMH* April 29, 2014)

During the year, the RB considered 18 challenges to *The Board's* ratings: 17 movies (6-11) and one publication (0-1). The RB met on nine occasions during the year: July 9, 1999 (5 members); July 23, 1999 (4 members); August 13, 1999 (3 members); September 10, 1999; October 20, 1999; December 10, 1999; January 18, 2000; January 28, 2000; May 26, 2000

Of interest here, John Dickie, *The Board's* immediate past Director, appeared before five members of the RB in support of an application to vary *The Board's* PG rating of *Tarzan*, to G, which had been given "in all countries to date" but that was "irrelevant to the Review Board's consideration against Australia's classification guidelines" (CBR99-00, p. 132).

The RB's review of the movie *The General's Daughter* is of particular interest to this work's Chapter 9: Minors and Scary Stuff. The applicant for review, who argued that the movie should be downgraded from R 18+ to M 15+ stated, inter alia, that:

> a) the adult themes can be coped with by those aged 15 to 17 years;
> b) the rape scene was not a realistic depiction;
> c) the film shows that sexual violence damages women;
> d) the film does not dwell on the (*sic*) Elisabeth's involvement in sadomasochism;
> e) the film was consistent with the public's expectations of an "MA15+" level of content (CRB99-00, p. 139).

The RB agreed that a), b) and d) were "valid"; that "c) is true but not necessarily relevant"; that "e) has been judged to be so" *(ibid*). The RB agreed with the applicant and downgraded the movie rating from R 18+ to M 15+ (*ibid*).

2000-2001: MEMBERS', AND NEW MEMBERS' BIOGRAPHICAL DETAILS (CBR 00-01)

Biggins had been re-appointed in 1994 and so continued her function as Convenor. Waters was now time-expired and the newly appointed O'Dea took his place as Deputy Convenor. Harvey, was the only other member who continued; Banks, Tzannes and Yardley were all time-expired on December 17, 2000. Towards the end of the year, June 18, 2001, three new appointees were added; their details, from CBR00-01, were as follows:

Kathryn Joy Smith, [age 45. See CBR00-01, p.21].

> Kathryn Smith, a Sydney mother of three and former member of the Classification Board, has lived in Tasmania for most of her life. She has had wide community contact, having worked as a social worker,

TAFE teacher and Employee Assistance Counsellor. She has also been involved in volunteer and community activities as a telephone counsellor for the Samaritans Inc. and the Tenants' Advisory Service, and as a committee member of the Launceston Family Day Care and Launceston Creche Inc. Kathryn is currently at home caring for her family and studies part-time in a graduate Diploma of Counselling course.

Jan Taylor, 51. Appointed June 18, 2001. (Her age was stated in CBR01-02).

Jan Taylor has extensive experience in the public and private sectors, both in Australia and overseas. Formerly Queensland's Commissioner for Consumer Affairs, Jan is now Managing Director of a corporate consultancy which provides services in community consultation, land management, corporate communications and organisational change.

Jan is a Director of the Royal Automobile Club of Queensland, and Ports Corporation Qld. She is the National Credit Union Ombudsman, and a Member of the Queensland Competition Authority, and is also a Director (and the Immediate-Past National Chair) of the Australian Council of Businesswomen, and President of Epilepsy Queensland Inc.

She is President-elect (Queensland) of Women Chiefs of Enterprises International, a Trustee for the Committee for Economic Development of Australia, a Fellow of the Australian Institute of Management, and a member of the Queensland Advisory Committee of the Committee for Economic Development of Australia.

Dawn Grassick, 39. Appointed June 18, 2001.

Dawn Grassick, 39, is a scientist with extensive experience in the communication of complex science issues to the general community.

She holds a Bachelor's Degree in Microbiology and a Graduate Diploma in Sciences Communication and has worked as a professional scientist for nearly twenty years.

Dawn is currently an industry representative on both the

Therapeutic Goods Advertising Code Council and the Complaints Resolution Committee of the Complementary Healthcare Council of Australia. She is a member of Australian Science Communicators and an associate member of the Australian Medical Writers' Association.

Dawn has experience as an office holder in community-based organisations, including Australian Junior Chamber. She also has experience in conducting adult education classes in public speaking.

WHAT THE RB DID DURING 2000-2001

This was to be Biggins' last year as Convenor; she had served seven years in her capacity first, as a member of the Film Censorship Board and then at the RB Convenor. Biggins described the year as "exceptionally busy, with a total of 21 titles reviewed over eight meetings: 19 movies (10-9) and two publications (1-1) (CRB00-01, p. 71). The relevant dates were July 9, 1999 (5 members); July 23, 1999 (4 members); August 13, 1999 (3 members); September 10, 1999; October 20, 1999; December 10, 1999; January 18, 2000; January 28, 2000 and May 26, 2000. This adds to nine meetings but likely the January meetings were interspersed with Australia Day's long weekend.

Biggins noted that the revised *Guidelines* for X 18+ material was introduced in September 2000. "One impact of the implementation", she wrote, "was the receipt of an unusually large number of videotapes for review which had been classified RC by the Classification Board" (CBR00-01, p. 71).[97] It is worth noting that 5 of 11 videotapes originally refused classification were re-classified X 18+. (See the subhead on the "video boom" in Chapter 2: A More Liberal censorship.)

Also worthy of note: the movie, *Hannibal* was raised from MA 15+ to R 18+ and Mapplethorpe's book *Pictures* was raised from Unrestricted to Category 1—Restricted (meaning, not accessible to minors).

The customary provision of reasons for or against changes to *The Board's* ratings are absent from this report (and from here on); no reason is given for that being so. One is left to speculate whether lack of assistance from *The Board's* clerical staff, or a central policy change was responsible, but the researcher is put to greater endeavours if an examination of the RB's considerations are to be analysed. Details of the 21 items

97 Until that time, arts-media that contained actual sex scenes were banned. Parliament had considered a new category of "Non-violent Erotica" (NVE) but opted, instead for the X 18+ category.

reviewed can only be accessed individually by title at T*he Board's* website. Checking up to 21 items by this process is, one would argue, unnecessarily onerous. The CBRs are made available to members of the Federal parliament in order that they might have a single referencing point for the work done by the RB. To go hunting through *The Board's* website, provided one knows what title(s) one seeks is (as this writer discovered) time consuming and unsatisfactory as it also fails to provide those interested in the workings and perhaps the mindset of the RB with an overview of why appeals are made and of the reasons for lodging the appeals.

(http://www.classification.gov.au/About/Pages/Review-Board-Decisions.aspx)

One final comment for this year: it is observed that Kathryn Smith was first appointed to *The Board* itself on October 11, 1999 (the "placated Harradine" intake, see page 84, *supra*). She resigned on December 5, 2000, to take up her appointment on the RB, where she served, with some breaks, from June 18, 2001 to August 31, 2008 (*vide* CBR08-09, p.71).

2001-2002: THE RB UNDER MAUREEN SHELLEY'S LEADERSHIP (CBR 01-02).

Maureen Shelley was appointed Convenor of the RB on October 11, 2001, initially for four years to October 10, 2005 but later extended to October 10, 2008. It is of some relevance that Shelley was a Liberal Party candidate for Federal election, unsuccessfully contesting former Prime Minister Paul Keating's seat of Blaxland in 1998.[98] In 2007, she unsuccessfully challenged "Liberal stalwart Bronwyn Bishop" as Party candidate for the Federal seat of Mackellar; Bishop[99] 70 votes, Shelley 17 (*SMH* June 17, 2007). Her biography at the time of her appointment to the RB reads as follows:

> Maureen Shelley, 46, is married with adult and pre-school aged children. She holds a Bachelor of Arts majoring in English from Curtin University, a Graduate Diploma and a Masters in Equity and Social Administration from the University of New South Wales and is studying for a Graduate Diploma in Law (Tribunal Procedures) at Monash University. She has authored and published many

98 O'Dea was also a Liberal Party member, as were several others, during the Howard years.

99 At this writing (February 12, 2015), Ms Bishop is the Liberal Government Speaker of the House of Representatives.

> government reports, seminar papers and articles.
>
> Employed as a sub-editor with The Daily Telegraph (*sic*), Maureen has a distinguished record of community service. She was a member of the NSW International Year of the Family advisory committee, the NSW Disability Council, and a member of the National Small Business Forum. She lives in Sydney.

O'Dea, Deputy Convenor, Grassick, Harvey, Smith and Taylor completed the RB of six members.

WHAT THE RB DID DURING 2001-2002

This was a relatively quiet year for the RB whose members reviewed only eight items: 7 movies (2-5) and one computer game (0-1). It is of interest that the computer game was *Grand Theft Auto III* and the first to be reviewed under the provisions of *The Act.*

Again, no reasons for the RB's decisions are included in the CBR for the year. Instead of providing relevant information, the RB stated: "During the reporting year it was decided to place full reports of the Review Board decisions made since 1 July 2000 on the OFLC website". The lack of direct information regarding the RB's decisions is unfortunate especially where an item evokes considerable public interest. The report on the movie *Baise Moi*, is a case in point, where the RB confined itself to the following statement:

> Baise-Moi was refused classification by the Review Board following an application for review by the Attorney-General. Media commentators and some members of the public engaged in vigorous debate concerning the classification scheme following this decision. However, the Review Board was unanimous in its decision that the film should be refused classification given the provisions of the Classification Act, the Code and the classification guidelines. Detailed reasons for the decision were published to the OFLC website (CBR01-02, p. 77).

Although the published online decisions are satisfactory, one would argue that consigning them to an archive diminishes the importance of the review. Further, *The Act* states "the Convenor must give to the Minister a report [annually] of the

management of the administrative affairs of the Review Board" (s.85(1)) which is required "to be laid before each House of the Parliament" (s.85(2)). Thus, one would argue *a la* Kirby (2009, p. 4) "the legislative context" of s.85 intends that MPs are to be informed at first hand of the details leading to, and the reasons for arriving at, contentious classification decisions. Politicians are entitled to know who lodged an appeal and how many members of the RB reviewed the item. Using *Baise Moi* as an example, CBR01-02 discloses that the then Attorney-General (Daryl Williams) required the review, but no information is provided as to how many members constituted the review panel. A search of *The Board's* website discloses that both Shelley and O'Dea (Convenor and Deputy Convenor) were two of a four-member panel, the others being the long-serving Harvey and Smith (K). One would argue that reviews of items referred by the Attorney-General, or any other Minister, should appear in full in the CBR for the year. This, the more so since, for *Baise Moi,* the Liberal Attorney-General required the review and both Shelley and O'Dea were Liberal Party political aspirants appointed to their positions by the Liberal Party Attorney-General. Also, in convening a panel of only four, Shelley held a casting vote if the review resulted in an evenly split decision. Although Shelley claimed a unanimous decision (above) the report on *The Board's* website does not state whether this was so or otherwise. There is room for doubt about the RB's underlying reason for banning the movie, and the lack of immediate information does nothing to assist in safely assessing the RB's impartiality.

2002-2003: REPORTING IMPROVES, WORKLOAD DECLINES (CBR02-03)

Membership of the RB remained effectively the same as the previous year, namely, Shelley, O'Dea, Grassick, Harvey, Smith and Taylor. The information provided improved this year; it included tables showing which members attended how many meetings, and also which members formed a quorum for each review. While the inclusion of tables is useful for research they are more impressive than substantial; the RB's workload, in fact, amounted to very little. To quote Shelley:

> The year started quietly with only one application for review lodged between July 2002 and December 2002. The remaining six applications were lodged January to June 2003. This year a summary of the decisions,

> and the members attending each panel, is provided later in this report in table form (CBR02-03, p.82).

All seven applications for review were for movies (3-4) but the three changes were minor. *Great Moments in Science,* originally PG was changed to G and *The Board's* advice: "low level violence" was deleted. There were two movies originally rated MA 15+, these were changed to M 15+ and *The Board's* consumer advice in one of them *(Phone Booth)* amended from "Medium level coarse language" to read "Frequent coarse language, medium level violence" (CBR02-03, p.91). The variations resulted from changes to the *Guidelines* that came into effect on March 30, 2003, when the new category M 15+ was introduced.

The feature of the year was the movie that gave rise to the quote at the head of this chapter: *Ken Park*, which had been refused classification by *The Board* and confirmed as such by two of only three who reviewed it; the reviewers were Shelley, O'Dea and Smith.[100] Shelley had more to say on this, starting with: "Media commentary regarding the film commenced in May 2003 and continued until late September. Media Monitors Australia reported that *Ken Park* was the fourth most mentioned item in the media across Australia for the period June 30 to July 6" (CBR02-03, p. 82). Shelley's report does not refer to there being only three but, rather: "*The Review Board* [italics added] met twice in relation to the film *Ken Park*.[101] It determined issues of standing and jurisdiction concerning an application from the Sydney Film Festival before dealing with an application for review of the Classification Board's *Ken Park* sale or hire decision" CBR02-03, p.90).

In the annual report (CBR02-03, Shelley echoed Biggins' thoughts regarding co-dependence on *The Board* to the point of citing her predecessor and adding:

> I concur with Ms Biggins' view of the importance of independence and the need for separate financial accounting for Review Board expenditure. For example, because there is no separate financial

100 It is of interest that in 2001-2002, the movie *Baise Moi* was also reviewed by the same three, with the addition of Harvey (CBR02-03, p.92).

101 This is technically correct (*vide The Act,* s.78) but it does camouflage the reality, especially when Shelley's *Lateline* disclaimer is taken into account..

> structure, the Review Board obtains the approval of the Director of the OFLC before seeking written legal advice.
>
> Some of the concerns regarding independence can be traced to the administrative framework supporting the Review Board. While the Review Board is an independent decision making body, the Review Board is not administratively independent from the OFLC, which provides support to both the Classification Board and the Classification Review Board. This dual role does not assist the public in appreciating the independent nature of the workings of the Review Board (CBR02-03, p. 84).

Shelley's extension of Biggins' complaint appears to have been motivated particularly by media criticism arising from the *Ken Park* review, as is evidenced here:

> Some of the issues discussed in the media, relating to Ken Park, concern the perceived independence of the Review Board. These issues were also raised during the debate surrounding the Baise-Moi decision. Whilst these controversies arise infrequently, and consumer research by the OFLC states that 95 per cent of Australians are satisfied with the classification system, they highlight concerns of the public. It is important that the Review Board is completely independent and is seen to be independent.
>
> As the OFLC has an educative role, and works closely with industry, it is the body that is known by the media and the film industry. Some media commentators don't seem to be able to make the distinction between the work of the Classification Board, the Review Board and the OFLC. Accordingly, some of the reporting confuses the boards and their roles. Further, some media commentators seem unable to understand the difference between classification and censorship (CBR02-03, p. 84).

This thesis addresses that lack of understanding in Chapter 12: Classification and Censorship Unbound.

While Shelley's inclusion of tables is welcome, the shift in providing unfettered

information about RB deliberations, findings and decisions is, as was stated above, a retrograde step, as reports on each item must be searched one at a time instead of being incorporated in the CBR's annual return. From the RB statement, it would appear interested members of the public must request a copy of a report: "Full reports of Review Board decisions for which reasons *have been requested* [italics added] are available on the OFLC website" (CBR02-03, p. 84).[102]

The report on *Ken Park* discloses that all references in the report are to the RB's findings, rather than to the two RB members who confirmed *The Board's* refused classification decision. While the term Review Board is technically correct (there was a quorum of three), one's confidence in Shelley is not enhanced by her failure, either in the report, or in public discussions to tell the entire truth (it might have been she who voted against banning the movie). However, during the *Lateline* broadcast, from which the quote at the head of this chapter is taken, Shelley said: "It was the review board's decision". Regardless of its being banned, *Ken Park* can be downloaded or watched online at http://downloadmoviea.com/Ken%20Park, which, as this thesis continues to argue, renders *The Board* and the RB, impotent.

There is, however, an interesting reference to former RB member Ross Tzannes, who, acting for NSW Council for Civil Liberties, was at odds with Shelley when reviewing *Ken Park*, which makes one wonder what might have been the outcome had Tzannes been a member of the reviewing panel, since Shelley as Convenor, would have had a casting, as well as deliberative vote. This, and the evidence of, former *Board* Director, John Dickie, supports a point made in Chapter 7: Everyone wants to be a Censor—"everyone believes they would make better decisions" (McDonald, 2007).

2003-2004: TWO HIGH RANKING LAWYERS APPOINTED (CBR03-04)

Members of the RB in 2003-2004 were, Shelley (Convenor), Grassick, Harvey, Shilkin, Smith and Taylor. Two new members were added: Trevor Griffin, appointed 22 April 2004, and Rob Shilkin appointed 6 November 2003.

The Hon K Trevor Griffin, 63, is married with two adult children and holds a Master of Laws from the University of Adelaide. Admitted as a

102 I am not quite sure what "requested" means; reports are available at *The Board's* website, by simple search. My objection is having to search instead of reading the reports in the CBRs.

> barrister and solicitor in 1963, Trevor retired from the South Australian Parliament in 2002, following almost 24 years as a member of the Legislative Council. For a considerable period of that time, Trevor was the State Attorney-General, and also held a number of other ministerial offices. Trevor lives in South Australia (CRB03-04, p. 86).

Rob Shilkin, 28, is a senior associate in a leading Australian law firm.

> He advises primarily on the application of the consumer protection and competition law provisions of the Trade Practices Act 1974. He also lectures in competition law at the University of Sydney. Rob completed degrees in economics and law (with Honours) at the University of Western Australia in 1997 and is admitted to practise in the Supreme Courts of Western Australia, Victoria and New South Wales. He has published a number of legal articles, papers and Opinion-Editorial columns in a variety of publications including both academic journals and newspapers. Rob has previously been an office holder of numerous community associations including the Law Society of Western Australia and the UWA Guild of Undergraduates. He lives in Sydney.

This writer has been unable to discover from the records quite how, after all the screening process, one could conclude that Griffin was, or ever could be, "broadly representative of the Australian community".

To a lesser extent, although still very important, the choice of Shilkin could also be criticised for being unrepresentative (*vide The Act*, s.74(2)). Both appointees were however, known and respected members of the Liberal Party.

"A FLURRY OF ACTIVITY"

RB Convener Shelley, began her report for the year 2003-0204 thus:

> In contrast to last year, this year started with a flurry of activity that at times stretched the resources of the Review Board. For the three months from November 2003 to January 2004 the Review Board considered six

> applications for review – in 2002-2003 it considered eight applications during the whole year. The Review Board *then* [italics added] received four further applications, during the balance of the year (CBR03-04, p. 82).

One has some concerns about the accuracy of reporting, because something does not quite add up here. First, O'Dea's time expired on September 30, 2003 but, according to Shelley's tables of attendances and of work completed (next page), O'Dea attended four meetings and reviewed four items, *post his time expiry date*. No mention is made of O'Dea being re-appointed as a member of the RB. Perhaps the qualifier "then" in Shelley's last sentence is misplaced. If that were so, however, it would mean either no applications were received between February and June 30, 2004, or there were lengthy delays between receipt of applications and review of items. However, as is shown below, Griffin, who was not appointed until April 2004, attended thee meetings: one in May 2004 and two in June 2004. If Shelley's statement is correct (*i.e.* "the balance of the year" being February to June 30, 2004), the "lengthy delays" suggestion stands.

It was possible that O'Dea's four attendances were in the months July-September 2003 (*i. e*. before his time expired); in order to clarify the information in Shelley's report, *The Board's* website was accessed and the RB's reports on some of the items reviewed during 2003-2004 were extracted. The items reviewed by O'Dea in company with others were: *Thirteen* (leading a panel of three as Deputy Convenor, November 6, 2003), *One Perfect Day* and *McLeod's Daughters* (video version, with Shelley and two others, December 5, 2003), T*he Sexualisation of Girl Children and Adolescents on the Internet* (with Shelley and three others December 18, 2003) and *Haunted Mansion* (O'Dea leading a panel of three as Deputy Convenor, January 15, 2004). O'Dea undertook all of these reviews *after* his time on the RB had expired. While Shelley thanks him for his help that year, she makes no mention of time expiry but refers to him as "past" and Griffin as "current" Deputy Convenor (CRB03-04, p. 84).

Griffin reviewed *Troy* (with Shelley and K. Smith) on May 10, 2004, *Harry Potter and the Prisoner of Azkaban* (leading a panel of four as Deputy Convenor, June 8, 2004) and *Irreversible* (with Shelley and four others, June 30, 2004). *Troy* and *Irreversible* were majority decisions but Shelley had a casting vote for *Irreversible*.

Looking at the list of attendances at meetings, Griffin's review times fit with the

time of his appointment, but in the absence of information to the contrary, it would appear that O'Dea operated outside his warrant, which one would argue must be viewed as a serious matter for two reasons. Not only was O'Dea acting without warrant, but also, he viewed child pornography as *The Sexualisation of Girl Children and Adolescents on the Internet* was found to be, and, it not being part of his duty, he was **not** permitted to do so under the defence provisions of s.91G of the Crimes Act, 1900 (NSW) and its Commonwealth counterpart.[103]

REVIEW BOARD MEMBERS' ATTENDANCE AT MEETINGS 2003–2004

(MS) Maureen Shelley, Convenor,	NSW	7
(TG) Trevor Griffin, Deputy, (app. 22 April 2004)	SA	3
JOD) Jonathon O'Dea, former Deputy	NSW	4
DG) Dawn Grassick, member,	QLD	3
(RH) Robin Harvey, member,	WA	3
(RS) Rob Shilkin, member, (app. 6 November 2003)	NSW	4
(KS) Kathryn Smith, member,	NSW	8
(JT) Jan Taylor, member,	QLD	4

Adapted from Table 21 CRB03-04, p. 91

Considering the total of 10 applications of which two were ruled out of order, one could argue that not everyone would be inclined to describe the review of seven movies (5-2) and a computer game (1-0) in a 12-month year as "a flurry of activity".

2004-2005: WORKLOAD HIGHEST EVER (CBR04-05)

The highest workload recorded, both in number (29 applications received) and complexity, coincided with the time expiry of four members. However, two of the expirees (Grassick and Taylor) were available until April 30, 2005, Harvey's time expired on December 17, 2004, and K. Smith accepted a three-year extension to her term which began on May 1, 2005, the day following her original time expired date. Two new appointments were made: Anthony Hetrih and Gilliam Groom. The following two paragraphs are copied from CBR04-05, pp. 86 and 87 respectively.

103 This could be a serious matter. It is to be hoped that it was an oversight in Shelley's reporting.

Gillian Groom, 61, is from Tasmania and has been working as a self-employed consultant occupational therapist and as a clinical university tutor for the last twenty years. She is the mother of six adult children and has been involved in many professional associations, the arts, sporting and charity organisations throughout her life.

Anthony Hetrih, 35, is from Victoria. The father of a young child, he has a background in marketing and communication and holds a Bachelor of Education, majoring in design and has a demonstrated and long-standing professional interest in the effects of computer games on children. He has been a regular contributor to a number of high profile publications since 1998 and is currently researching for a guidebook for parents on the subject of computer games.

It is noted that Gillian Groom was the wife of Tasmania's former Liberal Premier Ray Groom (1992-1996); she joined Shelley, O'Dea, Griffin and Shilkin as known Liberal Party personalities.[104]

The RB's composition for the most part of the year, consisted of continuing members Shelley (Convenor), Grassick, Harvey, Shilkin, Smith and Taylor. New appointees Groom and Hetrih served for two months of 2004-2005. During the year the RB reviewed 11 movies (5-6), 2 DVDs (0-2)), 1 computer game (1-0), 1 advert (1-0)

Again, Shelley complains of a lack of independence from *The Board*, thus:

> The Classification Review Board has no control over, nor input into, its funding or the funding or administration of the secretariat that provides its registry function. Accordingly, financial reporting requirements and reporting against relevant outputs and outcomes are unable to be separated from those of the Classification Board. Reference should be made to the report of the Classification Board in this regard.
>
> This year has seen a tripling of the workload for the Classification Review Board. It has received more applications for review (29) than in

104 One is tempted to suggest a political influence on desired outcomes. For example, the banning of *Baise Moi* and *Salo* on appeal from conservative politicians Federal Attorney-General Daryl Williams and Queensland Attorney-General Denver Beanland, but I have not researched for this.

> any previous year and has had more complex matters for consideration (reflected in up to three days being set aside for Classification Review Board meetings in some cases). At times, the workload has stretched the resources of the members and of the secretariat staff (CBR04-05, p. 80-1).

In the context of her work, Shelley had a point but as this thesis argues for a better way of achieving censorship's stated ends, the RB's difficulties lean towards reinforcing that argument; if there were no *Board,* there would be no problems with secretariat and financial arrangements. That stated, however, the case for the current system is enhanced by items that have "pushed the boundaries" *(ibid)* begging the question of what might happen if there were no censorship. Shelley cites, in particular, *Shadow Theatre's* high-level sex scenes, *Anatomie de L'enfer* and *9 Songs* actual sex scenes "and those canvassing the issue of paedophilia *Tras El Cristal and Palindromes" (ibid).*

In January and February 2005 "whilst on a family holiday overseas", Shelley visited review bodies in the USA, Canada, the Netherlands, the UK and Singapore. Shelley attended "classification meetings in these countries" and "noted with interest" that of "around 180 classifiers in the Netherlands, which has a population of 16 million) 167 are employed by private industry" (CBR04-05, p. 83). This observation is taken up in Chapter 12: Classification and Censorship Unbound.

MEMBERSHIP OF THE RB OPEN TO COMPETITION

Following Shelley's public admission in 2003 that she was invited by the Attorney-General to accept her position, vacancies for membership of the RB were, for the first time, advertised. "An order of merit was developed", but there is no information on how the order was established, nor is there an indication of the criteria used in arranging the points of merit. Processing the 51 applicants took "some considerable time" but, eventually, new members "were appointed by the Governor-General". (CBR04-05, p. 83).

2005-2006: STEADY AS SHE GOES (CBR05-06)

This year was the start of a three-year run with the same members, something unprecedented to date. The RB consisted of Shelley (Convenor), Griffin, (Deputy

Convenor), K J Smith, Shilkin, Groom, Hetrih and new appointee, Anne Stark (April 26, 2006), whose biography is given, below.

> Ann Stark, 53, is a registered psychologist and mother of two adult children, residing in Hobart. Ann currently works in private practice specialising in couple and family therapy. She has served as an expert reporter in the Family Court and Federal Magistrates Court on issues relating to the welfare of children. She is currently the Chairperson of the Tasmanian Psychologists Registration Board. Ann holds a part time appointment at the University of Tasmania lecturing in counsellor education, grief and trauma, and family and couple therapy. She has extensive involvement in a number of community organisations.

> Stark was appointed "after an extensive search and recruitment process that took more than a year to complete", wrote Shelley, who was "also delighted when my appointment as Convenor was extended for a further three years (CBR05-06, p.83).

WHAT THE RB DID DURING 2005-2006

"Four applications were carried over from the previous reporting period and 21 applications were received in the 2005-06 period, relating to 15 titles" (CBR05-06, p. 87).

Fourteen decisions were made: 10 movies (5-5), two computer games (1-1) and two publications (0-2) (CBR05-06, p. 94). However, this would appear to understate the work done by the RB. Of the 14 items submitted for review, only five came from the entertainment industry; the nine related to Islam and were submitted by the Attorney-General. The RB considered these items during five meetings, during which, reviews of only two publications were finalised (CBR05-06, p. 94). Shelley explains some of the difficulties on these matters thus: "These reviews centred on whether the products promote, incite or instruct in matters of crime. This required examination of 22 pieces of legislation dealing with terrorism, in particular the terrorism offence provisions in Chapter 5 Part 5.3 of the Criminal Code Act 1995 (CBR05-06, p. 88).

THE MOVE TO COMPLETE INDEPENDENCE THWARTED

In February 2006, the Attorney-General directed *The Board's* functions to come under his office's direct purview (*vide* chapter 3, *supra*). This put on hold a "Memorandum of Understanding that had been the subject of negotiation between the Attorney-General's Department, the OFLC and the Review Board [. . .] pending the restructure of the Sydney-based secretariat supporting the Classification Board and the Classification Review Board" (CBR05-06, p. 94). Shelley expressed the hope that the RB might receive a more favourable outcome "during the next reporting period".

The records of attendances attest that RB members had a busier than usual year.

ATTENDANCES OF MEMBERS 2005-2006

Review Board member	State	Meetings	Days
(MS) Maureen Shelley, Convenor	NSW	10	20
TG) Trevor Griffin, Deputy Convenor	SA	8	8
(RS) Rob Shilkin, member	NSW	12	22
(KS) Kathryn Smith, member	NSW	11	17
(GG) Gillian Groom, member	TAS	9	12
(AH) Anthony Hetrih, member	VIC	10	15
(AS) Ann Stark, member	TAS	2	2

Adapted from Table 23 CRB05-06, p. 95

In this period we begin to see the push for an R 18+ classification for computer games coming to a head. The game, *Getting Up*, originally classified MA 15+, was refused classification following a review required by the Attorney-General. Interestingly, the review panel consisted of four members and was decided by a majority, which means Shelley used her casting vote as Convenor to refuse classification (CBR05-06, p. 94).

The unusually high numbers of meetings and meeting days is accounted for in large part by the Federal Attorney-General's request for the RB to review eight publications and a movie sympathetic to Islam. (The movie title is indicative of content: *Jihad or Terrorism.)* By financial year's end, the RB had met for five days on each item but had reached a decision on only two, both of which supported *The Board's* "Unclassified" category. The Federal Attorney-General was responsible for half (11) of the 22 items listed for review (CBR05-06, p. 94).

2006-2007: LISTENING, LEARNING, ADAPTING AND ADOPTING (CBR06-07)

In 2006-2007, the same members continued with Griffin and Shilkin's terms being extended for a further 3 years each; extra-mural work featured prominently:

> Apart from decision making, four members of the Review Board attended the International Ratings Conference* held in Sydney. Anthony Hetrih presented a paper as a panel member. Six members of the Review Board also attended the Australasian Institute of Judicial Administration conference in Melbourne on 7 and 8 June 2007. As Convenor, I attended the Coalition of Australasian Tribunals Leadership Workshop in Rotorua, New Zealand. Six members of the Review Board also undertook refresher training in the classifiable elements of sex and violence on 14 May 2007 and all seven members participated in Administrative Law training on 11 December 2006 (CBR06-07, p. 70).

* The ratings conference was that attended by the Swedish Chief Censor, Gunnel Arrback, whose closing remarks from his speech at the conference are quoted at the end of the Introduction to this work. While one would hope that at least some of the four RB attendees listened to Arrback, there is no indication in Shelley's report that any of them agreed with or differed from him, or whether anything was learned from his 25-years' experience as a censor.

The integration of *The Board* and RB into the Attorney-General's department required RB members to participate in a number of meetings and briefings where they learned of the Attorney-General's "Statement of Expectation in regards to the work of the Review Board and the Convenor signed a Statement of Intent regarding the standards of the work of the Review Board" (CBR06-07, p. 71).

This year, the RB considered something entirely different from sex and violence: suicide and Islam. On appeal from The Right To Life association and the Federal Attorney-General, all seven members of the RB assembled and, over two days decided to refuse classification for the publication, *The Peaceful Pill* Handbook. In its "Reasons for Decision" under the sub-head, "8. Summary", at paragraph 175, the RB stated:

> The Review Board in a unanimous decision classified the publication 'RC' (Refused Classification) as it instructs in matters of crime relating to the manufacture of a prohibited drug (barbiturates), including the attempt to manufacture a prohibited drug (barbiturates); the storage of

> substances being used for the manufacture of a prohibited drug (barbiturates); and gives instructions enabling individuals to "take part in" the manufacture of a prohibited drug (barbiturates). [105]

The RB's reasons read much more like a court judgment, than the review of a small book. Indeed, parties to the review included Philip Ruddock, the Federal Attorney-General, Mr Terry Tobin, QC, the Australian Government Solicitor, The Hon Keppel Enderby QC, among its party interested in the proceedings. Whether an examination, which was as lengthy and complicated as was consideration of *The Peaceful Pill Handbook,* is a proper function of arts-media reviewers is considered in Chapter 12: Classification and Censorship Unbound. One can only speculate on what might have been the outcome if *Lady Chatterley's Lover* had been considered, not by a judge and jury at the Old Bailey, but in circumstances similar to those relating to *The Peaceful Pill Handbook.*

There were six Islam publications carried over from 2005-2006, two of which were refused classification and four were confirmed as "Unrestricted". The movie *Jihad or Terrorism* was also confirmed as PG.

2007-2008: THE SHELLEY ERA ENDS — ALMOST (CBR07-08)

Although this was Shelley's final year as a member/Convenor of the RB, she did not become time expired until October 10, 2008. Thus, she continued as Convenor into financial year 2008-2009. During this period, Shelley presided over five reviews, including the animated movie, *Holy Virgins,* which was refused classification. Details of all five are included in the 2008-2009 overview.

The same team, as for the previous two years, worked together in 2007-2008 and into 2008-2009. The workload was light with only four items—three movies (0-3) and one DVD (0-1)— finalised. The applicant for review of a fifth item was deemed not a person aggrieved, therefore there was no review. Of great moment, because of the public debate that had been going on, a review of Bill Henson's alleged child pornography photographs was withdrawn. This is noted in CBR08-09, p. 73. In the introduction to that report Shelley made some observations that link in with the tenor of this thesis, particularly where using age as a marker lays down rigid rules to the

105 http://www.classification.gov.au/About/Pages/Review-Board-Decisions.aspx

detriment of some young people. (See Chapter 9: Minors and Scary Stuff of this thesis). Shelley wrote:

> As parents, we know there is a big difference between an 8-year-old and a 13-year-old but as far as classification markings are concerned they are treated in the same way. Parents are expected to interpret the marking, find the consumer advice and supervise their children accordingly. I think it's time we made it easier for parents and gave them a system that they could use even when there's a glitch and the consumer advice isn't readily available (CBR07-08, p. 63).

An important event, not directly connected with the work of classification occurred on July 1, 2007. In the words of Des Clark, *The Board's* Director, on this date: "The OFLC ceases to exist" (CBR06-07, p. 3). On that date, Donald McDonald, who was appointed on May 1, 2007, took up his position as Director (CBR07-08, p. 18).

2008-2009: A NEW CONVENOR (CBR08-09)

Victoria Rubensohn was appointed to the RB as Convenor on February 6, 2009, four months after Shelley's term ended, meanwhile Griffin as Deputy Convenor was in charge, assisted by Stark, both of whom had had their terms as members extended; Griffin until April 21, 2011 and Stark until April 25, 2012. According the CBR08-09:

Victoria Rubensohn holds a Master of Arts and a law degree and has been a Member of the Order of Australia since 2004. She has worked in radio and television in Australia and the USA, and more generally in communications, especially communications regulatory policy for most of her professional life. Victoria has been a member of the Australian Broadcasting Tribunal, a Member of the Immigration Review Tribunal and Chairman of the National Film and Sound Archive. She has chaired Federal Government committees in the communications and intellectual property areas. Victoria chairs the Telephone Information Services Standards Council and runs and international communications consultancy, specialising in regulatory policy CRB08-08, p. 68).

With the exception of Griffin and Stark, Rubensohn found herself working with an inexperienced team. Shilkin had resigned; Smith, Hetrih and Groom were time-expired, although all three stayed on as acting members until August 2008. (CBR08-09, p.71). There were two newcomers: Brook Hely, and Irinia Kolodizner, both appointed September 1, 2008. The short biographies of both (below) are copied from CRB08-09, p.70.

Brook Hely, 33, is a senior lawyer with the Australian Human Rights Commission and is also a part-time lecturer with the University of New South Wales in discrimination law.

He holds a Bachelor of Arts (Hons) and Bachelor of Laws (Hons) as well as a Master of Laws with a specialisation in human rights and social justice.

Brook has also volunteered for several years with a number of community legal services, is a former Board member of the Victorian Council to Homeless Persons and has written several articles and papers on issues relating to discrimination and human rights. He also has a keen interest in film-making and has written and directed several short-films. Whilst he has lived most of his life in Melbourne, he currently resides in Sydney.

Irina Kolodizner is an undergraduate student, who is currently completing a combined Bachelor of Economics and Social Sciences (Hons) Bachelor of Laws (Hons) at the University of Sydney. While undertaking her studies, she works as a part time paralegal and tutors in the field of labour law and industrial relations at the University of Sydney. Irina has strong community links, having coached and adjudicated high school debating for a number of years and volunteered for a number of charitable organisations. At 22 years of age, Irina brings a youthful perspective to the Review Board.

There is nothing in the CBR that explains the selection process adopted for either, but one feels the new appointees were a stop-gap. *The Act*, at s.84(3) allows the Minister to "appoint a person to act in the office of a member [. . .] (a) during a vacancy in the

office". Both Hely and Kolodizner were appointed for only one year, but why this was so, other than s.84(3), is not explained; neither Hely nor Kolodizner were offered extensions to their short tour of duty when their time expired on August 31, 2009.

The record reveals that 2008-2009 was not a busy year for the RB, with only 10 items reviewed, namely: six DVDs (2-4) three movies (1-2) and one computer game (1-0). Half of the reviews were undertaken by panels headed by Shelley, while Rubenson, herself, took no part in any review during the year.

Most of the work was run-of-mill, upgrading or downgrading *The Board's* classifications and/or consumer advice. The exception was the animated movie *Holy Virgins,* which was sent for review by "The Hon Robert Debus, Minister for Home Affairs" after being classified R 18 +. The other DVDs from the same producer were also referred by Debus and for all four the: "Interested parties included the Australian Family Association (AFA), NSW Council for Civil Liberties (NSW CCL). The summary of reasons for the *Holy Virgins* decision reads:

> The Review Board, in a 5-1 majority, determined that the impact of the sex scenes involving the blonde novitiate are exploitative and as she is depicted as a child under 18 years that the depictions are likely to cause offence to a reasonable adult. As such the film must be refused classification under section 1(b) of the Code.

The classification of the other three DVDs was unchanged at R 18 +. *Holy Virgins* can be bought for $16.75 plus shipping cost to Australia of $8.99; a total $25.74

2009-2010: RUBENSOHN AND THE FAMILY VOICES (CBR09-10)

Rubensohn (Convenor), Griffin (Deputy Convenor) and Stark continued members of the RB. Hely and Kolodisner served until on August 31, 2009,their terms expired. Three new members were appointed; their details are copied immediately below from CRB09-10, pp. 61 and 62).

> Helena Blundell has a Bachelor of Arts and a Bachelor of Laws awarded by the University o f Queensland. She has worked as a Senior Investigation Officer for the Commonwealth Ombudsman in both

Sydney and Darwin. She spent a number of years as an adventure tour guide in the Northern Territory's Top End. Ms Blundell has worked for the North Australian Aboriginal Legal Aid Service as a policy lawyer and is currently employed with the NT Legal Aid Commission as a Criminal Barrister and Solicitor. Helena is in her third year as a board member of the Darwin YWCA and is on the Youth Justice Advisory Committee, which is a body set up pursuant to the Youth Justice Act in the Northern Territory.

Alan Wu, born in Shanghai, is completing a Bachelor of Arts / Bachelor of Laws course at the University of Melbourne. He has previously served as the youngest and longest-serving Chair of the Australian Youth Affairs Coalition, and with a variety of other community organisations, including the ABC Advisory Council and the Melbourne Journal of International Law. Internationally, Alan has served as Special Envoy for Young People to the United Nations Environment Programme (UNEP) and as the only young person on the Australian National Commission for UNESCO. Alan was amongst the youngest invitees to the Prime Minister's Australia 2020 Summit, and is a recipient of a Young People's Human Rights Commendation, awarded by the Australian Human Rights Commission.

Melissa de Zwart is an Associate Professor in Law at the University of South Australia. She has a PhD in law (which examined the law of fair dealing) and a Bachelor of Arts (Hons). Melissa has practised as a lawyer in both private practice and government, having been Legal Manager at CSIRO. She has published numerous articles on legal and social issues affecting copyright, particularly in the digital and popular culture context, convergence technologies, social networking and virtual worlds. In 2008 she contributed to the ENISA (European Network and Information Security Agency) Virtual Group of Experts on Security Issues in Virtual Worlds and Gaming (EU).

As the mother of two small children, Melissa has served as the

> president of a community childcare centre and has a keen interest in children's entertainment as both a parent and consumer. In her recreational time, she enjoys books, manga, movies and computer games, and exchanging views on these with her students, extended family and friends both face-to-face and via social networking. Melissa lives in Adelaide.

WHAT THE RB DID IN 2009-2010

Rubensohn's appointment coincided with what would appear to be a campaign by family groups to ban or further restrict certain media. Following the previous year's protests against four DVDs, the Australian Family Association (AFA), Family Voice Australia (FAVA), returned (*via* The Hon Brendan O'Connor MP, Minister for Home Affairs) for another assault on *Salo*. The RB considered submissions from a number of interested parties including Shock Records (the original applicant for classification), Australian Family Association (AFA), Family Voice Australia (FAVA), NSW Council for Civil Liberties (NSWCCL),and Flinders University Film Animation Comics and Television Society (Flinders FACTS).

Salo, produced in 1974, had been the subject of bannings and unbannings for some years (*vide* Des Clark speech, 2005). Also note the RB's comment immediately below.

> The Review Board notes that the original film incorporated in this modified version of Salo in DVD format has experienced a varied and lengthy classification history in Australia, a previous version of the film having most recently been refused classification in July 2008. From 1993-1998, the film was classified and shown in Australian cinemas.

The RB makes a statement that accords with this writer's argument regarding assessing a subject's youthful age by appearance:

> The submission of Family Voice Australia claims that one of the actors playing a young male was under the age of 18 at the time the film was made, citing a website as a source. However, the submission of the film's distributors, Shock Records, states that the actors are over the age

> of 18. Further information has not been available to the Review Board on this matter. In terms of whether the actors playing young males and females 'appear' to be under 18, the Review Board observes that this is a subjective judgement and notes that all the relevant actors are clearly sexually mature.

As if appearance is not arguable enough, the commentary continued: "The Review Board does not consider that the latter part of this provision requires that the actors appear to be mature adults, rather, it requires that they neither be under 18 nor appear to be under 18". But if appearance is subjective, what are we to make of RB's interpretation? This will be considered at length in Chapter 10: Children and Adolescents.

In any event, the RB decided by a majority vote that R 18+ was sufficient. A minority of members opted for a refused classification outcome citing *NCC*(1)(b) regarding underage sex "a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not)". That argument was supported by some apparent facts

> . . . no facial hair on the young males' faces; at approximately 11 minutes the boy victims, being lined up, have trousers pulled down and shirts up, displaying youthful genitalia; repeated references to the victims as 'boys and girls 'and addressing them as such; reference at approximately 16 minutes to a young female victim as a girl taken from a convent school; young naked female victims consistently showing pink nipples as opposed to the darker, developed nipples of a mature woman are some of the features which, in the opinion of the minority, involve depictions of a person who is or appears to be under the age of 18 years.[106]

106 Pink and darker nipples? According to one source : "Nipples come in many shapes, sizes and colours". See www.breastcancercare.org.uk/breast-cancer-information.

Parts of this sort of assessment is deplored by Dr James D Tanner, author of the Tanner Scale for identifying early and late maturers and is considered in Chapter 10: Children and Adolescents (see Rosenbloom and Tanner).[107]

Five members served as a panel for the *Salo r*eview, Rubensohn, Griffin, Stark, de Zwart and Wu. In all (*Salo* included), the RB convened for seven days to review eight items: four movies (3-1), 1 DVD (0-1) two computer games (1-1 and 1 publication (0-1). Three movies were downgraded from the original classification.

2010-2011: A VERY QUIET YEAR (CBR10-11)

The RB was reduced to four members for the last two months of the year. Griffin's extended time expired on April 25, 2011, and Wu resigned on May 18, 2011. This left Rubensohn (Convenor), Blundell and De Zwart, with Stark, whose extended time expired on April 25, 2011 re-appointed as and acting member until July 25, 2012.

Only two applications for review were received this year, both for computer games (0-2) and neither classification was changed. The RB met for two days (CBR10-11, p.65).

2011-2012: CENSORING THE CENSORS' DECISIONS (CBR11-12)

Three new members joined Rubensohn, Stark, Blundell, and De Zwart. Fiona Jolly was appointed Deputy Convenor, with two new appointees: Jane Smith and Peter Attard. All were appointed on December 6, 2011.

Fiona Jolly resides in Wamboin NSW [about 20km north-east of Canberra] and works in the ACT. She is currently the Chief Executive Officer of the Advertising Standards Bureau and previously held numerous positions with a number of Commonwealth Government agencies. Fiona has also held positions on numerous Boards including as Director of the Australian Business Volunteers (current), the Ministerial Advisory Council for Women (ACT), Majura Primary School Board and as National President of the Young Women's Christian Association (YWCA) of Australia.

Fiona holds a Bachelor of Laws and a Bachelor of Arts (ANU) and

[107] Pediatrics. 1998 Dec; 102(6):1494.

> a Master of Laws (Melbourne) specialising in communications and international trade law. She is a graduate of the Australian Institute of Company Directors. Fiona is the parent of four children aged four to 12 years and has been actively involved in her local community through her children's school and sporting commitments as well her volunteer work with the YWCA over a period of 15 years (CBR11-12, p. 71).

Jane Smith lives in Coogee, New South Wales. She is currently the Director of

> the shinyshinyworld pty ltd [*sic*], a company providing strategic advice on a range of ICT, business and creative industries issues. It also creates artwork and projects that express concern for the environment and human interaction. Jane's previous positions include senior roles with the ABC from 1990 to 1997, Chief Executive Officer with the NSW Film and Television Office from 1997 to 2006 and Vice President of Seed Productions, a film production company in 2007 owned by actor Hugh Jackman. Jane was the inaugural Head of the Centre for Screenwriting at the Australian Film Television and Radio School 2009–10.
>
> Jane is currently a member of the Digital Media Thought Leadership Group for the Australian Centre for Broadband Innovation. She recently chaired the Committee for Revision of Mobile Premium Services (MPS) Codes. She has also represented on a number of other Boards including Ausfilm, Screen Finance Group, the Australian Children's Television Foundation, and the Broadcasting Council. Jane holds a Bachelor of Arts (Flinders) majoring in psychology and history and a Post Graduate Diploma in Criminology (Melbourne). She is actively involved in the community through her extensive career in both the public and private sectors as well as her involvement in the arts and film community (CBR11-12, p. 73).

Peter Attard lives on the Mornington Peninsula, Victoria. He is the Director of

> Sound 4 Your Space Pty Ltd, a company that designs and supplies in-store music solutions to businesses and industries throughout Australia. He has created and taught media, visual literacy, visual arts and photography curriculum in both secondary and TAFE education, as well as serving as coordinator of these studies at various colleges in Victoria. Peter has been a committee member of the Australian Teachers of Media (ATOM), judged ATOM student film awards and is a member of the Victorian Institute of Teaching.
>
> Peter holds a Bachelor of Education (Visual Arts) from the University of Melbourne. He is the father of three teenage children, is a regular user of social media and is actively involved in his local community through his children's school and sporting commitments as well as through his work as director of his own company (CBR11-12, p. 73).

Eight items were reviewed during the year: seven movies (7-0) and one computer game (1-0). Two of the movies contentious: *A Serbian Film* and *The Human Centipede II* (Full Sequence). Both were reviewed at the request of the Federal Minister for Home Affairs and Justice; both had their original classifications changed from R 18+ to refused classification. The decision reached on *A Serbian Film* cannot be directly accessed because:

> The reasons for the decision contain offensive and confronting descriptions. The report should not be read by minors. Nonetheless, as is the Review Board's practice, the reasons are publicly available. If you would like a copy of the reasons, please contact the Classification Branch of the Attorney-General's Department.

Regarding *The Human Centipede II* (Full Sequence):

> . . . the Review Board determined that the film must be Refused Classification on the basis of gratuitous, exploitative or offensive depictions of violence with a very high degree of impact or which are

> excessively frequent, prolonged or detailed; cruelty which has a high impact; sexual violence and also on the basis of gratuitous, exploitative or offensive depictions of sexual activity accompanied by fetishes or practices which are offensive or abhorrent (*ibid).*

Further to the *Salo r*eview, in her report for 2011-2012, Rubenson writes:

> On 16 June 2010, an application was made to the Federal Court regarding the Review Board's decision to classify the modified version of the film *Salo o le 120 Giornate di Sodoma* (*Salo*) in DVD format, R 18+ with the consumer advice 'scenes of torture and degradation, sexual violence and nudity'. On 31 August 2011, the judgment was delivered by Justice Stone in favour of the respondents, the Review Board and the Minister for Home Affairs and Justice, that the application be dismissed. Justice Stone found that the Review Board directed itself correctly as to the application of the Classification (Publications, Films and Computer Games) Act 1995, the National Classification Code and the Guidelines without error of law CBR11-12, p. 76).

One might hope that this is the end of the matter—from 1974 to 2011—37 years, one would suggest, is a long time for a dispute over a movie.

EFFECTIVENESS OF THE REVIEW BOARD

The RB would appear to be dependent on *The Board* for its day-to-day operation, which arguably could tend to deprive its members of access to necessary resources. The RB's first Convenor, Barbara Biggins, hinted broadly at the difficulty of co-dependency, in her final report (2000-2001): "The independent Review Board is provided with administrative, including financial, support by the OFLC. It has been argued for a number of years (but unsuccessfully) that the provision of a separate allocation to the Review Board, for basic travel and legal advice, would enhance this independence [. . .] The independence of the Review Board must continue to be jealously guarded." (CBR00-01, p. 73).

One would agree that if there is to be a Review Board it should be "completely

independent and is seen to be independent" (CBR02-03, p. 84). There is no evidence that the RB became entirely independent after its absorption (with *The Board*) into the Attorney-General's department in February 2006. Indeed, when Ministers who are responsible for censorship matters become involved, the RB's independence must be questioned. Furthermore, unless O'Dea's activity in reviewing movies after his time as a member had expired is satisfactorily explained, the RB's integrity becomes questionable, especially as O'Dea viewed child pornography.

Thus, the over-riding question is not simply one of independence, which was of concern to both of the RB's long-serving convenors Biggins and Shelley but, rather, considering its composition, workload and lack of independence, whether the RB is worthy of whatever public expense it incurs. During the 16-year period (1997-2012), the RB expended most of its energies reviewing 161 items at an average of about 10 items every year. Of these, it reviewed 128 (80%) already classified items (*i.e.* in the range of G to X 18+*)* and confirming or re-classifying 33 (20%) banned items.

The RB like *The Board* is bound by the provisions of *The Act* and, as Shelley said: "We simply do our job, which is to apply the law". Put another way, the RB and The Board itself, applies the law as is laid down in the *NCC* and *Guidelines*.

CHAPTER 5: INSTRUCTIONS TO *THE BOARD* AND THE REVIEW BOARD

INTRODUCTORY

Note: The analysis and arguments in this chapter apply equally to both boards, thus no distinctions are made.

The Act is an administrative instrument; it contains no details of how *The Board* and the Review Board are to carry out their classification functions. These details are embodied in the *NCC* and the explanatory *Guidelines*, *F* and *P*. In essence, the *NCC* sets out the bones, as it were, of classification criteria and the *Guidelines* flesh them out; they are *The Board's* working rules. Generally, the rules allow some flexibility and are open to interpretation within certain limits. For example, if a movie contains a high level of violence and bloodshed *The Board,* taking account of the item as a whole, could classify it either M15+ or R18+; the latter classification would prohibit the movie being shown to minors. There is no discretion, however, for arts-media materials that contain: "Fetishes such as body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting". These and other "abhorrent" activities "are not permitted" (*Guidelines*). Thus, while it has some discretion, *The Board* cannot work outside the *NCC* and *Guidelines*, as Maureen Shelley said: "We simply do our job, which is to apply the law" The law states: "*The Board* is legally required to apply both the Code and the *Guidelines* when making classification decisions. The role of the *Guidelines* is to amplify the criteria set out in the *NCC*. Because *The Board* is so bound, one would expect the *Guidelines*, not only to amplify the *NCC*'s criteria, but also to be consistent with them. It will be argued herein that the *NCC* and *Guidelines* are sometimes at odds and further, the *NCC* is selective in its stated aims.

THE NATIONAL CLASSIFICATION CODE (*NCC*)

The terms of the *NCC* are set out in Chapter 2: A More Liberal Censorship (*supra*) but for convenient reference they are repeated here.

> Classification decisions are to give effect, as far as possible, to the following principles:
> (a) adults should be able to read, hear and see what they want;

(b) minors should be protected from material likely to harm or disturb them;

(c) everyone should be protected from exposure to unsolicited material that they find offensive;

(d) the need to take account of community concerns about:

(i) depictions that condone or incite violence, particularly sexual violence; and

(ii) the portrayal of persons in a demeaning manner.

These clauses are, however, not as straightforward as they might appear. With the exception of (b), which is considered in Chapter 9: Minors and Scary Stuff, each clause will be examined in turn. However, before doing so, we must first question the overarching clause "as far as possible". It is argued that this clause can only be interpreted as a constraint, *i.e.* certain liberties cannot possibly be allowed. As will be shown, when each sub-clause is preceded by "as far as possible", in practice only (c) offers any real liberty to access arts-media.

Thus, looking at (a), the sub-clause is taken to be *as far as possible, adults should be able to read, hear and see what they want*. However, whether or not with the prefix, there is a difficulty with the language. The point is, adults *can* and *are* able "to read, hear and see what they want"; it is the classification system that prevents them from doing so. For example, people in two cinemas had paid to see the movie *Baise Moi* but as it had been banned, the police entered the cinemas and prevented the movie being shown. The difficulty for policymakers who want to govern morals is this: if clause (a) were to stand alone, the word "able" renders the clause no more than a statement of fact. However, taking the prefix into account clause (a) is intended as a constraint, that is to say adults should be permitted access, provided the material does not contravene any part of *The Act* s.11, which is set out in Chapter 2: A More Liberal Censorship but like the *NCC* (above) it is repeated here for convenient reference.

Matters to be taken into account in making a decision on the classification of a publication, a film or a computer game:

(a) the standards of morality, decency and propriety generally accepted by reasonable adults; and

(b) the literary, artistic or educational merit (if any) of the publication, film or computer game; and

(c) the general character of the publication, film or computer game, including whether it is of a medical, legal or scientific character; and

(d) the persons or class of persons to or amongst whom it is published or is intended or likely to be published.

Adults, then, are permitted "to read, hear and see what they want" if *The Board*, following the requirements of *The Act* s.11, approves.

CLAUSE (C): EVERYONE SHOULD BE PROTECTED FROM EXPOSURE TO UNSOLICITED MATERIAL THAT THEY FIND OFFENSIVE

The first point to be made about *NCC*(c) is it does not protect everyone, but will only do so "as far as possible". Just how far is "as far as possible"? The *Guidelines* answer that question by stating that some material falls into an unrestricted category, thus: "The 'Unrestricted' classification encompasses a wide range of material. It is not likely to include material that offends a reasonable adult to the extent that it should be restricted". For example, religious tracts are handed to people at their front doors and/or deposited in letterboxes. Some find the tracts offensive but they are not protected from the offence because religious material, as well as being generally exempted, falls into the unrestricted category of arts-media.

It seems to be implied here that an adult would be unreasonable to be offended by material that "is not likely to be included" in the unrestricted classification. By way of example, let us assume two "reasonable adults": A is a devout Christian who arrives at B's front door and hands B a picture of a bloodied and battered Jesus hanging on a cross. B is offended, perhaps outraged and makes his feelings clear. A thinks B's reaction unjustified. B arrives at A's front door and hands him an X-rated DVD. A is offended, even outraged and makes his feelings clear. B thinks A's reaction unjustified. There is no law that prevents either A or B doing what they did.

We are here entering a peripheral subject, *i.e*. the giving and taking of offence, which, although important to arts-media censorship, is considered here only inasmuch as it is necessary to question who has the right to decide what is offensive. In the example, both A and B are offended by the material they receive but neither is

offended by the material they give to the other. It could be argued, furthermore, that the A and B material would not offend everybody, while any handout, whatever its content, might offend others including both A and B. Thus, whether a religious tract, X-rated DVD or any advertising material, some would and some would not be offended. It is a personal matter.

The question then is: What is the basis for deciding that A's handout is "unrestricted" and B's handout is classifiable? Wilson and Cowell (1989) observe: "We all have our passions and prejudices, our likes and dislikes, and of course we are entitled to these, but that is merely to say we have a moral or political right to them, not that they are themselves right or reasonable" (p. 39). The entitlement of which Wilson and Cowell write is demonstrated in many ways by those who condemn what is offensive to themselves. For example, complaints are often made that radio and television programmes contain "unrestricted" material that offends listeners and viewers. Many of the complainants believe the material should be restricted because they, the complainants, find the material offensive. The Australian Communications and Media Authority (ACMA) report of February 2010 stated that: "Just over a fifth of all radio listeners indicate they have heard something that caused them concern or offence on radio over the preceding 12 months". It further states: "These results are very similar to those reported in the 2003 ABA study."(*Community attitudes to radio content*: Research report prepared for the Australian Communications and Media Authority, February 2010, p.3)[108] Thus, a little more than 20% of Australians actively complained, while nearly 80% did not. This disclosure does not assign right or wrong; it simply means that some individuals were concerned while others were not.

We might, then, say offence is in the eye or ear of the beholder. The one has as much right to feel offended as the other has *not* to feel offended. Offensive material, to borrow from Geoffrey Robertson (who wrote regarding obscenity), "is not about truth

108 Statistically, this was a good survey of 1,537 individuals aged from 15 and above. From my reading, it showed older people were more concerned about offensive material than were younger people—approximately what Arrback had to say of his 25-year experience (see Introduction to this thesis).

Reading another ACMA report, I noted that former member of *The Board*, Olya Booyar was head ACMA's Content, Consumer and Citizen panel, which included a sub-group labelled "Unsolicited Communications". Booyar appears to have resigned her position as a member of *The Board*, to join ACMA. Also in that report, I note Andree Wright, who was formerly a member of *The Board* and, for some time its Acting Director (ACMA Annual Report 2009-10, p. 30.) One is tempted to think there is a certain clubiness about appointments to positions in government controls of arts-media. If no study has been done on this aspect of-media governance, it might prove worth the effort to do so.

or falsity, but which of two plausible opinions is to be preferred" (Robertson, 1991, p.197). The operative terms in Robertson's statement are "plausible opinions" and "to be preferred", not established facts, not truth or falsity. [109] Thus, while devout Christians might believe that images of a bloodied and battered Jesus hanging on a cross are inoffensive (Fig. 5.1), others would disagree and equally as plausibly argue that they are offended by such images. Conversely, Christians would likely be offended by an image of Jesus holding a lighted cigarette in one hand and a beer can in the other (Fig. 5.2), while others would think it a joke (Source: Google commons). Similarly, Muslims would likely be (were in fact) offended by jokes about Muhammad (see the Danish cartoons p 141 *infra*).

It is argued, then, that nobody can rightfully decide what is offensive to other than the self. Nobody other than the subject person can know the depth or degree of offence felt, or the reasonableness of being offended. Further, nobody can say of another that it is unreasonable to find unsolicited religious (or any other) material offensive, and yet this is precisely the effect of the *Guidelines* by which *The Board* must assume pre-ordained levels of offence. Thus, when classifying arts-media, *The Board's* "plausible opinions" are "to be preferred", not because they are right or wrong, but because that is the law.

Paradoxically, much arts-media material that does not offend a reasonable adult, or is not offensive enough to a large majority is restricted. At a Senate Committee hearing before the commencement of *The Act*, John Dickie, then Director of *The Board* said:

109 In context, the sentence reads: "Obscenity cases call for decisions, not about truth or falsity, but which of two plausible opinions is to be preferred."

> There was a survey done by the Australian Bureau of Statistics in 1994 which sampled people's view about sex in R films and in X films, and that seemed to give an indication that two-thirds of people did not seem to have any problem with the levels of sex in R or X films. (Senate Committee Transcript, November 27, 1995, p. 11).

From that, we deduce that "two-thirds of people" watch, or have watched, strong violence and pornography and have no problem with it.[110] The same proportion might apply to unsolicited religious material, that is, perhaps two-thirds of people do not have any problem with it. However, we do not know what percentage of people would have no problem with banned movies because, with the exception of *The Board*, nobody may lawfully view them—not even reasonable adults who might not be offended. We do know, however, that many who hold religious beliefs are offended by what they consider inappropriate images and words.

If everyone were to be protected, as *NCC*(c) states, one would expect all arts-media material that might give offence to be treated equally. One could argue that either all arts-media should be assessed without exception or exemption, or none should be assessed. Thus, if other arts-media are required to be assessed, religious material ought not be exempted from the censors' scrutiny simply because it is religious. There would appear to be, then, a conflict between *NCC*(c) and the *Guidelines* where "offensive" means:

> Material which causes outrage or extreme disgust. The *Guidelines* distinguish between material which may offend some sections of the adult community, and material which offends against generally accepted standards, and is therefore likely to offend most people[111]

110 I was unable to source any research that indicates the percentage of individuals who are offended by handouts of religious or any other unsolicited material. That there are several types of "NO JUNK MAIL" labels affixed to letterboxes all over the country would indicate that objectors to handouts of any sort are offended by the practice of delivering unsolicited material. In my experience, unsolicited religious material that is handed to people at their front doors is often less than politely received, and often refused.

111 Guidelines for the Classification of Publications 2005 as amended made under section 12 of the *Classification (Publications, Films and Computer Games) Act* 1995 This compilation was prepared on March 19, 2008 taking into account amendments up to Guidelines for the Classification of

This does nothing to enlighten us. As was disclosed above, the *Guidelines* list themes such as sex, drugs and so on, but what of other material that causes outrage or extreme disgust? Three examples: many Christians were so outraged and disgusted by *Piss Christ*[112] that the matter was taken to Australia's High Court for judgment; *The Satanic Verses* so outraged and disgusted Muslims that the Islamic clergy ordered the author to be executed.[113] In 2005 the Danish newspaper *Jyllands-Posten* published a series of cartoon jokes (the Danish cartoons) broadly based on atrocities connected with Muslims. One of the cartoons depicted Muhammad with a bomb inside his turban; this was particularly offensive to Muslims and caused considerable outrage, including death threats.[114] None of the cartoons was officially censored in Australia because, one must presume, those arts-media did not offend "most people", and yet they gave "offence to every Muslim in the world" (*The Brussels Journal*, October 22, 2005).

The question, then, is: What is the basis for categorising material that is "likely to offend most people" or not likely to offend enough people? The answer, according to *The Act*, is that whether the material offends, or does not offend against "the standards of morality, decency and propriety generally accepted by reasonable adults"—which standards, it will be demonstrated in the chapter immediately following do not exist. Furthermore, from John Dickie we learn that R and X rated material does not offend a large majority, although it may offend some. This is where, one might argue, the law appears to contradict itself. Given that classifiable material is that which is "likely to offend most people" and the available evidence indicates that "two-thirds of people did not seem to have any problem with R and X rated material", one can only conclude that such material does not offend against the "generally accepted standards" that policymakers have (or had) in mind.

When drafting *The Act*, the lawmakers knew from Dickie's testimony, that most

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Publications Amendment 2008 (No. 1) Prepared by the Office of Legislative Drafting and Publishing, Attorney-General's Department, Canberra.

112 Interestingly, in October 1997, there were two Serrano exhibitions in Melbourne; his photographic *History of Sex* was showing at the Kirkcaldy Davies Gallery while the National Gallery of Victoria was holding a Serrano retrospective, which included *Piss Christ*. Unlike *Piss Christ*, the sex exhibition caused no controversy in Melbourne, but ten years later (October 2007) in Lund, Sweden, the sex photographs were attacked by vandals.

113 Kenan Malik wrote and insightful article on *The Satanic Verses* headlined "A Marketplace of Outrage", in *New Statesman*, March 12, 2009.

114 A report in *The Brussels Journal* of Oct 22, 2005 read in part: The publication led to outrage among the Muslim immigrants living in Denmark. 5,000 of them took to the streets to protest. The responsible cartoonist, Kurt Westergaard survived an axe attack in his own home.

people had no problem with R and X rated material. By extrapolation, that material would offend "some sections of the adult community", but not "to the extent that it should be restricted" because R and X rated material does not "offend most people". On that evidence, one could go so far as to argue that consistency would require R and X rated material to be unrestricted, that is, exempted from classification as are religious, business and sporting items of arts-media because those categories do not offend enough people enough. That such is not the case would indicate there are other forces at work, which lead to unequal treatment of arts-media material. The begged question from all this is: Why, in the face of evidence to the contrary, did (and do) the lawmakers include R 18+ and X 18+ material in the censorable group while excluding religious material that could be offensive? David Marr touched obliquely on this when he wrote:

> Australia is a live and let live, secular, modern society. So why are the politics of censorship heading off in quite another direction? The answer, discovered mid-decade [1990s] by the pollsters of both Labor and the Coalition parties, is that it's not the confident, relaxed, 70% of Australia that decides who is in power, but the anxious, at times vindictive, often militantly Christian 30%. (*SMH* June 21 1999.)[115]

In respect of sex and violence in censorable material,[116] it is observed that Marr's 70 percent closely matches Dickie's two-thirds, and further, R and X rated material is not a cause of "outrage or extreme disgust" for a large majority of Australians.[117] It is also observed that there is a chronological consistency in the accepted standard; Dickie cited a 1994 survey, Marr mid-1990s and Gunter, who stated: "By the end of the 1990s [. . .] nearly three out of four viewers (72%) did not usually find sex on television offensive, compared to one in four (24%) who did" (Gunter, 2002, p. 51).

Nevertheless, "some sections of the adult community" (perhaps as much as a one-

115 I have not seen the polls to which Marr refers. Although, as a respected journalist and author, he no doubt had access to the parties' researchers; thus, I accept his assertion with that reservation. On religious influence, see also, Hunter, J.D., 1991.*Culture Wars*: the struggle to define America, Basic Books, New York.

116 The *Guidelines* set out censorable themes including sex, drug abuse and violence.

117 Images of child sexual abuse are neither R nor X rated, but refused classification, and are considered in Chapter 11: Images of Minors. (infra)

third minority) might need protection from material that offends them. If *NCC*(c) is to have any consistent meaning, it might be better worded thus: *everyone should be protected from exposure to all unsolicited material (without exception) that they would find offensive*. However, given that anyone could find something offensive in arts-media, clause (c) would become impossible to administer. (See Chapter 7: Everyone Wants to be a Censor.)

At present, where censorable arts-media material give more than a little offence to "some sections of the adult community", it is left to *The Board* to decide to what degree the minority would be offended. *The Board's* members might well be offended in their own right, but their function is to be a little offended, or highly offended, or not offended at all, on behalf of reasonable others.

In that situation, *The Board* members might divide (they often do divide), as would society, between a little offence, much offence and no offence, based on their own reactions as well as on what the law, through the *Guidelines* and the *NCC,* requires of them. This raises a question that will is considered below in the consideration of clause (d)(ii), in which the question is asked: Can *The Board* (or anyone else) be justifiably offended, or not offended, on behalf of others?

From all the foregoing, we might now conclude that *NCC*(c), as it is intended to operate, does not, and cannot, protect everyone from exposure to unsolicited material that they find offensive. It is, therefore, in this context, an unworkable clause. If people are to be protected, the answer lies in correct and informative labelling (consumer protection) and not in classifying and censoring, which often depends on a majority decision among from three to (rarely) 20 government appointed Australians (*The Board*). An alternative to the present system is suggested in Chapter 12: Classification and Censorship Unbound.

NCC (D)(I) THE NEED TO TAKE ACCOUNT OF COMMUNITY CONCERNS ABOUT DEPICTIONS THAT CONDONE OR INCITE VIOLENCE, PARTICULARLY SEXUAL VIOLENCE

Looking at clause (d)(i) of the *NCC* concerning depictions that condone or incite violence. Here again, *The Board* is required to distinguish between the types and levels of violence, and then decide how much of what type will cause concern to most people. It is not known how this assessment is made, although Clark asserts: "In my view, community standards appear to be fairly rigid around sexual violence and sex more

broadly" but he precedes the assertion by stating the community standard "has not been formally tested" (2005). He does, however support his view by adding: "Recent controversy over TV programs such as *Big Brother* and the film *9 Songs* suggest that sections of the community at least, are strongly opposed to nudity, actual sex and negative portrayals of women" (*ibid*).

Note here that Clark referred to "sections of the community" and, as such, neither *Big Brother* nor *9 Songs*, could offend against the *Guidelines'* generally accepted standards because they do not offend most people. The *Big Brother* scene included two males slapping a female with their penises, the incident, therefore, can only have been one of sexual violence. However, according to *The Age*, the female stated:

> I wasn't offended as such but I did think they took it a little bit too far but, you know, we laughed it off.
> [. . .] I think as soon as I said enough's enough, it stopped. I've known these guys for a while and we were just mucking around.[118]

The peak audience for *Big Brother* was assessed as 1.7million Australians (2003)—a large number but still a small minority, which presumably included the objectors. Thus, one would argue, those "sections of the community", while they might have been outraged or extremely disgusted, fall outside the protection of the *Guidelines*, which require *The Board* to "distinguish between material which may offend some sections of the adult community, and material which offends against generally accepted standards, and is therefore *likely to offend most people*" (italics added).

There appears to be no question but that some sections of the community are offended by depictions of violence, particularly sexual violence, however, judging from submissions to the Senate Community Standards Committee (SCSC) and tabled in July 1998, relatively few are offended enough to formally object. The following is a summary of the SCSC's report.

> The existing [1995] *Guidelines* and a draft of revisions for discussion were sent to:
> 1. All 800 members of Commonwealth, State and Territory Parliaments.

118 *The Age*, July 3, 2006

2. 403 members of the film and related industries
3. 338 members who had responded to the advertisements
4. 67 previously recorded complainants to the Office of Film and Literature Classification (OFLC)
5. 30 community organizations (*SH*, July 2, 1998, p. 4767).

Submissions were to be sent to *The Board* (OFLC). In all, about 1,640 *Guidelines* and draft revisions were sent out, from which 146 submissions from members of the public, community groups and industry bodies, were received. Two submissions were received from members of the NSW Parliament and a joint submission from the SCSC. Less than 10% responded to the mailout; when the SCSC's report is analysed we learn that:

98 submissions expressed concerns about the portrayal of violence
78 submissions expressed concerns about the portrayal of violence and sex on television
30 submissions expressed support for the work of the Board
22 submissions expressed the view that standards had become too lax
12 submissions expressed the view that standards had become too strict.

Statistically, the figures tell us nothing about Australian standards on which Clark, or anyone else, could claim Australians' attitudes to be "fairly rigid around sexual violence and sex more broadly". Indeed, according to Newspoll: "From the information provided [by the SCSC], the feedback process is not based on a random sample of the population. Therefore, inferences about the opinions of the total population cannot be reliably made on the basis of the process described."[119]

Still on *NCC* clause (d)(1), in Australia (and elsewhere) it is unlawful for anyone to knowingly and deliberately incite violence; furthermore, any arts-media material that contains: "Detailed instruction or promotion in matters of crime or violence" is banned. If, however, an incitement to violence is cleverly presented, as in Marc Antony's valedictory to Caesar, *The Board* would have to choose between literary merit and

119 A personal email from Peter Collinridge at Newspoll, October 20, 2010.

incitement.[120] The same might be said of "condone", such as (staying with Shakespeare) Henry V's speech before Harfleur in which he both condoned and incited violence, when exhorting his troops to teach the French "how to war". One would argue that incitement to violence, by whatever means of communication, is a matter for the police, not *The Board*.[121] (*e.g.* cell phone instructions to commit crime are police matters.)

The law, however, has in mind the here-and-now and, as with arts-media that give offence, almost anyone can incite others to violence. Even the warnings on commonly used chemicals, for example, can be used for violent acts. The instructions on a typical swimming pool cleanser read in part: "Do not mix with other chemicals. May cause fire on contact with other chemicals or flammable materials such as paper".[122] Similarly, one may quickly learn how to cause harm by accessing lawfully available arts-media materials. These materials range from chemistry syllabi to a handbook published by a man who spent 30 years as a fire fighter, which time included six years working with explosives in the US Air Force. The author's preface is directed to an intended audience of emergency service personnel and their "lack of knowledge about explosives" (Pickett, p. ix). Pickett's chapter 1 identifies "some common commercial explosives" and lists them all, including "detonating caps" and "blasting agents"(p. vii).[123] This is a handbook for both proper and improper use.

What if a terrorist were to have a copy of this book? Suppose the terrorist were to make a movie teaching basic chemistry to like-minded others and, in the process give an express and detailed warning of the dangers of mixing certain materials for fear they would become explosive. Suppose, also, the terrorist were to add a further warning that if the materials were mixed, the compound should be handled extremely carefully and on no account be taken into a public place, such as a shopping centre, where an explosion could occur and cause considerable damage, injury and death. How, for practical purposes, is that different from the handbook cited above? In other

120 A civil war almost immediately followed that speech (*vide*, Plutarch's *Lives*). Also consider Lady Macbeth and Iago and their respective incitements to violence.

121 We ask as with child pornography: Does antiquity make a difference? This question remains unanswered, while modern incitements to violence are illegal. Henry V's speech can be as effective today as it was in October 1415. Consider the exhortations to military action by, for example Al Qaeda's website that is "Working to expel the infidels from the lands of the Faithful, unite Muslims and create a new Islamic caliphate". https://twitter.com/alqaeda.

122 Poppit® Chlorine-free oxidizer.

123 Pickett, M., 2005. *Explosives Identification Guide*, (second edition) Thomson Delmar Learning, New York.

words: Can one, besides explicitly teaching violence, also incite to violence by appearing to warn against the possible consequences of taking action? Those who are bent on harming persons and/or their property could interpret the information that way, but for others the instructions and warnings would be intended for the proper use of the materials; for the class of persons for whom the publication is intended (*vide*, *The Act*, s.11(d)).

It is argued in the final chapter of this thesis that where society is to be protected from those who would use lawfully available materials and knowledge for anti-social purposes, *The Board* is not the appropriate functionary; they are matters for police and other security forces. The same applies to arts-media that promotes crime. As to portrayals of sexual violence, there is no substantial evidence to support any claim that it is a major concern for the majority (*vide* SCSC report above). Furthermore, the *Guidelines* "are revised from time to time, with extensive community input" (*Guidelines*, 2008) but there is no mention of increased community concern in respect of portrayals sexual violence in the latest update of December 10, 2012 (revised *Guidelines for the Classification of Films 2008*).

NCC (D)(II) THE NEED TO TAKE ACCOUNT OF COMMUNITY CONCERNS ABOUT THE PORTRAYAL OF PERSONS IN A DEMEANING MANNER

The AOD defines demean as: "lower the dignity of" persons. Taken in its literal meaning, it is difficult to imagine why the reasonable adult (whom the *Guidelines* mentions eight times) needs to be protected from only some images of persons portrayed in a demeaning manner. And yet, although X 18+ material allows "real depictions of actual sexual intercourse and other sexual activity between consenting adults" (*Guidelines*):

> It does not allow sexually assaultive language. Nor does it allow consensual depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers. Fetishes such as body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting are not permitted (*ibid*).[124]

124 Did the *Guidelines* teach me these things? And who taught the people who wrote the *Guidelines*?

Such depictions are banned, even though the activity takes place between consenting adults. The *Guidelines* state: "Films that exceed the R 18+ and X 18+ classification categories will be Refused Classification [RC]".

It is here that the law and the AOD part company. Whereas the AOD gives 'demean' a broad meaning, the *Guidelines* narrow the meaning to: "A depiction or description, directly or indirectly sexual in nature, which debases or appears to debase the person or the character depicted". In other words, *The Act* appears to have no concern for those who are demeaned in non-sexual ways. Thus, the first point of argument made against *NCC*(c), above, also applies to (d)(ii)—a lack of consistency in application. The inconsistency in (d)(ii) will now be illustrated.

At the outset, it should be understood that there is an important difference between voluntary and compulsory demeaning; a person might volunteer to appear demeaned, such as "the clown, with his pants falling down"[125] and one might use authority to demean another. Indeed, the authority of *The Act* is, in itself, demeaning and gratuitous in banning depictions of sexual activity that includes: "Gratuitous, exploitative or offensive depictions of: (i) activity accompanied by fetishes or practices which are offensive or abhorrent; (ii) incest fantasies or other fantasies which are offensive or abhorrent".

One might ask: Ought the incestuous works relating to Hamlet, Oedipus and Electra be banned? Some who read Shakespeare, Freud and Jung, along with some who watch the plays and movies, might enjoy the fantasies. Is that really of any concern to a government? We might also ask: What "other fantasies" are offensive or abhorrent, and to whom? Sexual fetishes do not appear offensive and abhorrent to the millions worldwide who subscribe to web sites such as *collarme.com*, *fetlife.com* and *altlife.com*, to name a few.[126] Membership of these sites is free and those involved make it very clear that they want "the body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting" that the law finds so abhorrent.

Clearly, then, banning such images has nothing to do with protecting the public from offence or abhorrence and all to do with the governance of sexual morality. This, in turn militates against the first of the four principles set out in the *NCC* namely:

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125 From the song: *That's Entertainment*, by Arthur Schwartz and Howard Dietz, performed in the 1953 MGM musical, *The Band Wagon*.

126 There are some very interesting depictions on these sites, one views at one's own risk.

adults should be able to read, hear and see what they want.

In the sort of media material examined by *The Board*, any "demeaning manner" is usually part of (perhaps entirely) the story being told; it is questionable whether this should be any of the community's concern (if, indeed, it is—there appears to be no research on this). The persons portrayed in the banned images are willing participants whereas many examples of unwilling persons being demeaned can be regularly viewed on televised news broadcasts and other media. [127] As was the case with offence (above), so it is argued that nobody except the person involved can be demeaned. [128]

> In our [USA] culture, ordering African Americans to the back of the bus is conventionally understood as denigrating. This is not because there is something worse about the back of the bus, however. Teenagers covet that spot. Ordering blacks to the back of the bus is dramatically different because it is *blacks* that are ordered to the *back* and because of the history of racial segregation and much else in this country. In addition, the fact that one *orders* blacks to the back makes a difference in what one does—ordering (rather than requesting, for example) has a greater potential to demean ((Hellman, D., 2008, p. 27).

One might also add that a black teenager who coveted the back seat, but was ordered out of it, would also be demeaned (see next page). If Hellman's example were a scene in a movie, the African American would be portrayed in a demeaning manner but, likely, *The Board* would classify the movie and allow it to be shown publicly, provided the movie when viewed as a whole, justified the scene. But what if the movie were a series of scenes, all of which showed, without commentary, different African Americans being ordered to the back of the bus? One person might think the movie was intended to make others aware of the injustice whites impose on blacks but others might enjoy watching blacks being denigrated. There might be a body of opinion in the

127 www.bdsm.com for examples. TV images of persons arrested are almost always demeaning.

128 An exception would be if *The Board* (or government) has information that the person(s) portrayed was forcibly or involuntarily demeaned. This raises the question of bad taste, which is sometimes demeaning. For example, some of the sketches in *A Chaser's War on Everything* were criticised for bad taste; the sketch about children dying from cancer was in very bad taste, but it was not demeaning. Prince Harry was criticised for a prank in which he wore a Swastika armband; a sketch impersonating the Jackson five, shown after Michael Jackson's death was criticised by USA performer Harry Connick. Both were probably bad taste but not demeaning.

community, such as: *It is demeaning but at least it brings it to the attention of a wider public and that may lead to the elimination of the practice*. For a concerned community, that is a good, rather than a bad, and on that ground it would be an acceptable portrayal of persons being demeaned. A recent version of Mark Twain's T*he Adventures of Huckleberry Finn* has been bowdlerised by replacing all instances of "nigger" with "slave".[129]

The question then arises as to whether the same sort of thinking should be applied to portrayals of sexual activity. If people are demeaned in pornographic portrayals, might we not also say it calls the community's attention to a practice that should be eliminated?[130] If, however, we accept the one and not the other, we must ask: Why is one sort of demeaning unacceptable and other sorts not so? What is the reasoning?[131] There would appear to be a presumption by some that what appears offensively demeaning to them must be considered as offensively demeaning by others—as though others must necessarily agree. Even so, can one feel demeaned on another's behalf?

Let us look again at Hellman's blacks to the back of the bus example. If black teenagers covet that spot, being ordered *out* of the back seat, when other whites board the bus, would be demeaning; again, it is not the position on the bus, but being *ordered* out of it by a person in authority that is demeaning. Whites might look at such a scene and feel for the oppressed blacks but what do the blacks, themselves, feel about all this. Consider this example:

> A little over a year ago, I was discussing with a white woman a portrait of a famous black figure, painted by a black artist. Now, this woman is a vocal progressive who views herself as a champion of equality. She sniffed at the image, which I was quite fond of. She said she found the artist's portrayal stereotypical, that the subject's features were exaggerated and—this is the part that really got me—that any black person who saw it would be offended. Except that I am a black person

129 Gribben, A., (ed), 2011.Mark Twain's *Adventures of Tom Sawyer and Huckleberry Finn*: The New South Edition. Montgomery, Alabama. The editor's Introduction explains this and much more.

130 In Chapter 8: There's no Harm in Looking, some argue in favour of banning pornography, but without their having viewed pornography they would never have known such material existed.

131 As to the first question, I can only guess that the lawmakers have an aversion to sexual activity that is not establishment-acceptable: as to the second, moral enforcement, perhaps.

> and saw nothing offensive. I bristled at the woman's privileged arrogance—that she would presume to lecture me on what black people think. [. . .] I recall every time a non-black editor has changed my use of "black" to African American, "because 'black' is offensive" [. . .] I recall every time I have been challenged, overruled and lectured about the feelings of my own community in particular and people of color in general. [132]

The writer concludes by asking: 'Am I right? Or, can I be offended on someone else's behalf?' If we consider something demeanist in the same way we now consider something racist, then, yes there can be many differing interpretations and opinions, and one can find demeanist behaviour in almost any thing.[133] What to some is a sport, spoof, or joke can be seen as demeaning the subjects, but only the subjects can properly say whether the portrayals demean them. Others, one might suggest, can only speak of their personal objections, or from a position of "privileged arrogance" because, just as "black" is not offensive to that black writer, demean might not be offensive to those who others consider demeaned.

Taking a broader view, it might be argued that by lowering the dignity of any one person, the dignity of humanity itself is lowered. Johann Friedrich Vigilantius (1757-1823), a lawyer and student of Immanuel Kant, wrote:

> . . . the bestial vices also demean man the most, in that partly they make him equal to the beast, e.g. drunkenness and gluttony [. . .] and partly they bring him even lower than the beast, e.g., the *crimina carnis contra naturam,* which are called unmentionable vices, because they so demean humanity that even to name them produces horror, and we are ashamed that a man can stoop to them (Kant, 2001, p. 420).

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[132] Article: *May I be offended on your behalf?* In: http://www.racialicious.com/2008/08/11/may-i-be-offended-on-your-behalf/

[133] I recall, for example, the licensee of a Queensland hotel being interviewed by Mike Willessee some years ago about dwarf-throwing contests, which was demeaning of dwarfs. When asked why not use people of normal size, the publican replied that dwarfs go further. In the movie clip that was aired, the dwarfs involved appeared to be enjoying themselves. Wikipedia has some interesting observations on this "sport".

This is much the same in principle as is now the case; Vigilantius speaks for "we" as though his group lived up to the generally accepted standard of the time; his was a reformist view.

One could argue that censorship law today appears to speak for "we" as though all reasonable adult Australians adhere to a common standard; that each of us is concerned about portrayals of demeaning sexual activity. This work argues that only the person portrayed can feel demeaned, therefore, unless a person is forcefully demeaned, it is not a community concern. However, the *NCC* and *Guidelines* require classifiers to take account of unstated community concerns, so one might have thought policymakers and members of *The Board* are at one on this, but that would appear not to be so, as this extract from the Senate Legal And Constitutional Legislation Committee would indicate.

> **Mr Clark**—[for The Board] the actual film, as it is made, does not demean the victim because it is a fictional narrative that is being portrayed on film.
>
> **Senator McGauran**—So, I take it you believe that that rape-murder scene is not demeaning.
>
> **Mr Clark**—In the context of this film, the board did not find that the scene was a demeaning portrayal, because it is a fictional portrayal in the context of a film which has high impact.
>
> **Senator McGauran**—Most of the films [. . .] are fictional, aren't they?
>
> **Mr Clark**—The majority of public exhibition are fictional.
>
> **Senator Grieg**—Has there been any difficulty in determining what is meant by the terminology of 'demean'?
>
> **Mr Clark** —There has not been, no.

After some further differences of opinion as to when demeaning is demeaning, Senator McGauran said: "Well, we may as well revoke the whole thing if that is the case. If that is how you are going to judge it—by whether it is a documentary or a film—we may as well get rid of this. It is a joke!" (Senate Legal And Constitutional Legislation Committee, May 24, 2005, pp. 149-151).

SUMMING UP

When carefully considered, the *NCC's e*ffect on what adults are able to read, hear and see is to control rather than liberate. It has been shown that the phrase "as far as possible" allows only a narrow interpretation of the stated "principles" and militates against a range of adult choices and preferences. It has been shown that (c) is not intended to protect everyone from exposure to unsolicited material that they find offensive. It has also been shown that depictions that condone or incite violence are acceptable when authority approves, but otherwise not so. Furthermore, there is no substantial evidence that the majority of the community has concerns about depictions of sexual violence. Lastly, principle (d)(ii) is not concerned with the portrayal of persons in a demeaning manner, but only those portrayals that, in one way or another, involve sex. Read together with the *Guidelines*, the *NCC* is not about allowing access to what adults are able to read, hear and see; for the most part, it is prevention of access to very particular kinds of sexual activity. On this matter, one must ask, as did Dr Katherine Albury: "Is it really the role of the Australian government to legislate against extremes of consensual sex and fantasy?" Five years earlier, Duncan Kerr (as Labor Minister for Justice) had asked a question along similar lines: "What place is it for the criminal law in our country to create that climate of oppression and fear amongst a group of our community for expressing their sexual preference in the privacy of their own bedrooms?" (*HRH*, 19 October, 1994, p. 2273.)

Those and associated questions (*i.e.* banned material) will be considered throughout the rest of this thesis, but now we turn our attention to the notion that Australia is a single community, which lives by a particular set of standards, and which, by inference, those who disagree with the standards are unreasonable. This is not to deny that certain standards are held in common but it is questionable whether Australians, generally, are concerned with (or have some sort of right to be concerned with) the personal and private matters of others' "consensual sex and fantasy".

CHAPTER 6: COMMUNITIES AND STANDARDS

> 'Community' is one of those words – like 'culture', 'myth', 'ritual', 'symbol' – bandied around in ordinary, everyday speech, apparently readily intelligible to speaker and listener, which, when imported into the discourse of social science, however, causes immense difficulty. Over the years it has proved to be highly resistant to satisfactory definition in anthropology and sociology (Block, 2008, p. 8).

Chapter 2: A More Liberal Censorship, closed by stating: Because *The Board* is bound to classify material according to the *NCC* and *Guidelines*, and in the absence of any other definition of acceptable community standards, it would suggest that the *Guidelines* represent imposed rather than agreed "standards of morality, decency and propriety generally accepted by reasonable adults". At first reading, *The Act*, s.11(a) appears to include all Australians as a single community. However by confining acceptability to "reasonable adults" the difficulty alluded to by Block (above) is increased, begging questions such as: Who, in the community, are unreasonable when applying the standards? Is it unreasonable to differ from the *Guidelines* or *The Board's* assessment of standards? What is a reasonable adult's standard? *The Board* finds very little submitted material that is unacceptable (less than 1%, see p. 17, *supra*) and what is judged unacceptable is often robustly disputed, for example, the movies *Ken Park*, *Salo* and *Baise Moi*.

In this chapter, we demonstrate some of the difficulties created by combining "community" with "standards" as though they are understood and accepted by all Australians as being inseparable and immutable. One might add to Block's observation that moral standards in particular, for the purpose of arts-media censorship, are also "highly resistant to satisfactory definition". This is, perhaps, most important where community is taken to be all Australians. In February 1971, eight months after Don Chipp made his statement to parliament, he summed up the understanding of community standards thus:

> One of the interesting things about the speeches [regarding censorship reform] has been the divergence of views and how each of them

> represents a community. There have been some criticisms of the community standards test which my Department and I are applying to censorship now. The criticism is valid if it means that I am saying there is only one community standard. This very debate has shown that there is in fact a plurality of community standards, that there are many standards and many communities in the one Australian community (Don Chipp, Minister for Customs. *HRH*, 23 February, 1971).

A further intimation that community does not necessarily equate with the entire national population is found in a speech delivered by, Des Clark, as Director of *The Board*, thus: "Recognising the legitimate interests of certain groups (for example the Arts community) in potentially controversial, high impact material that may not otherwise be seen in Australia, our system includes the Film Festivals Exemption scheme" (Clark, 2005). In other words, *The Act* provides for a standard that is not necessarily "generally accepted"; thus, if it is supposed that Australia is a single community, then, film festival and other groups can be seen as communities within the Australian community. Taking the point a stage further, the film festivals could subdivide into other communities, for example, those whose only interest is war movies, or sex in movies, or art movies, to the exclusion of those outside of their preferred genre. The arts, as a discipline can be similarly divided into sub-communities such as, "visual" and "performing", and even they can be further divided; two examples of each are painters and sculptors, and stage and film, respectively. It is unlikely, however, that policymakers had sub-communities of that sort in mind, but by making a special allowance for film festivals, they have shown that, in respect of arts-media, Australia is not a single community to be governed by one immutable rule.

Might we then suggest that the film festival community is part of the greater Australian *society* rather than *community?* Reasoning along those lines would allow all the different communities to be united under the one flag, so to speak; not unlike the structure of an army where sections combine into platoons; which combine to make companies, which combine to make battalions, and so on. There are general orders for all, but functions vary, for example, the catering corps does not build bridges and infantry do not drive tanks. Drawing on the military analogy, censorship law is to be obeyed by all ranks and any exceptions (such as film festivals) must have prior

approval from the responsible officer(s). Finally (in democracies like Australia), the army is, itself, subordinate to the government.

COMMUNITY AND SOCIETY

It could be argued that the policymakers' concept of Australians as a single community is the foundation upon which *The Act i*tself depends because, as was shown in Chapter 2: A More Liberal Censorship, the underlying aim of *The Act* is to prevent harm and offence to the unwitting and unwary, while at the same time allowing Australians as much lawful access to arts-media "as far as possible" (*The Act*, s.11). Without a perception of preventable harm and offence, from which Australians should be protected, policymakers would have no just grounds for imposing censorship. However, since a censorship is imposed, it can be taken that policymakers perceive there are some risks, but not everyone is at risk, or is likely to cause harm. For example, 17-year-olds are perceived to be at risk from exposure to R 18+ and X 18+ movies, whereas 18-year-olds are not. Thus, 17-year-olds are not allowed to enjoy the special privilege afforded to film festivals that contain "potentially controversial, high impact material" (Clark, 2005). Whether the risks are real or supposed is the subject of Chapter 8: There's No Harm In Looking but whatever the risks, they are perceived not to adversely affect everyone.

For our purpose, then, we observe at least two *communities of interest, i. e.* film festival attendees and researchers, who can be exempted from the law that otherwise governs all Australians. There are, however, other communities of interest in Australia that do not need approval from governments for example, Jews, Muslims and Christians while being *religious communities* might also have members who are film festival attendees or researchers and therefore share in two (perhaps more) *communities of interest*. From the examples provided here, one cannot avoid the conclusion that community does not mean all Australians.

If it was intended that all Australians are one community, it might have been more accurate to instruct *The Board* on the need to take account of *society concerns* rather than community concerns "about: (i) depictions that condone or incite violence, particularly sexual violence; and (ii) the portrayal of persons in a demeaning manner" (*NCC*(d)). However, that would suggest community and society are different concepts and/or constructs; furthermore, not all Australians have any concern: consider the interest in

the sexually violent movie, *Baise Moi*. Thus, the *concerned community* consists of some individuals that policymakers have in mind.

Society and community are abstractions and, perhaps for this reason, are often used interchangeably when referring to the population as a whole, but as we have seen, communities are separate parts of the whole. Thus, it could be argued that a community is part of a national population that exists within a national society. In his 2005 speech, Des Clark, speaking as *The Board's* Director referred to the "arts community", "community values" and "the Australian community", but he also said: "the model of censorship we have in Australia does indeed make for a more *decent society*" (italics added).

Is there, then, any real difference between society and community? Of the ten definitions of society in the AOD, that of "**3b** the customs and organisation of an ordered community" suggests that society can be less than a national population. This interpretation is supported by definition: "**8** an association of persons united by a common aim or interest". Both of these definitions are consistent with Clark's understanding of "community" (above). Not all of Australian society (as a nation) has the same customs; the wedding ceremony, for example, differs among and between religious and secular communities. If we allow that society and community are interchangeable, the only collective term that can be applied to everyone in the country is "all Australians". (A similar difficulty caused by failure to use the collective term all Australians was considered in Chapter 3: Appointments to and Activities of *The Board*.)

A COMMUNITY IS BOTH LESS THAN AND MORE THAN AN ENTIRE NATION

The customs and organisation of a community informs others of how its members wish to be identified; thus a *community of interest* and a *local community* wish to be identified respectively as such (although those sharing a community of interest might well be members of the same local community). In one sense, then, a community can represent a number of individuals who share an interest in common, or a group of persons who live in a particular geographic area (neighbourhood), of which a typical "community hall" and a *Neighbourhood Watch* would be symbolic. At the same time, the community would not (generally) deny its loyalty and sense of belonging to the same nation.

However, a sense of community might know no boundaries. For example, Muslim women in Australia abide by the customs of their worldwide community and cover

their heads. At the other end of the scale, activity at Returned Servicemen's League (RSL) clubs customarily ceases for a few moments at nine o'clock each night to remember servicemen and women killed in war, but this occurs only within the confines of a club and wherever that club is situated.

Similarly, all Australians, wherever in the world they happen to be, will remember Anzac Day, but being *widespread* does not make it *worldwide*. All three groupings belong to imagined communities "because the members [. . .] will never know most of their fellow-members [. . .] yet in the minds of each lives the image of their communion" (Anderson, B. R. O'G., 1991, p. 6). Examples of other imagined communities are, one might say, almost limitless; besides national and religious international communities, there are worldwide communities of the various sports, arts and hobbies, to name a few. Many of these communities of interest label themselves as societies, examples being: *The Society of Jesus*, *The Society of Manufacturing Engineers.*

As has been shown, "customs and organisation" vary between communities, and even within local communities. As it affects local communities, for example, in Kalgoorlie, Western Australia, the brothels and the police station are located in the same street (Hay Street), with the Anglican Church only a short walk away. The police and prostitutes are of particular of interest because here we have an example of opting out of a community. Elaine McKewon (2005) explains that the police objected to being in the same street as the prostitutes and lobbied to have their part of the street renamed; it is now Brookman Street. Within this local community, sex-workers, law-enforcers and God's workers all have their different customs and organisation. The same intermix of customs and organization can be found in communities such as Sydney's Kings Cross, where there are sex workers, the Wayside Chapel and a police station. What is important here is, although all three groups are in the same locality, they are separate communities in that their particular community of interests differ. *We might, then, say it is how individuals choose to associate that distinguishes a community from a national society.* Whereas a national society can and does impose its will on all subject communities and individuals, it cannot deny an individual's interest in any thing. For example, a common interest in prayer could render a Hay street prostitute and a policeman part of the same Sunday church community in Kalgoorlie. Interestingly, in this situation, neither could deny he other the right to belong.

All of this demonstrates the difficulty of assigning abstract values to a physical

population. Provided communities have customs and organisations that are both harmless to others and are approved of by, and confined to, the subject community, and even though their standards might not be agreeable to or in conformity with the standards of other communities, it is difficult to envisage anything that might be censurable or censorable. Thus, it is argued, one could imagine a grouping of many different communities and individuals, each with their own interests, recognising themselves as a national society. Society, then, although not entirely accurate, would appear a more appropriate term for the whole of a national population, as being the sum of its communities and individuals.

In confining the meaning of society to that which is necessary for the purpose of this work, the old notion of society and social order as a nation is recognised. Seligman (1995), for example, offered representations of the old order, where, for the Greeks, society was the *polis* where real human existence was deemed to reside; Aquinas posited that human means (*i. e.* society) served godly ends; Calvin had his altruistic community of saints.

Durkheim differed from the Aquinas and Calvinist altruism and opted for " 'the duality of human existence,' that is, the existence of both interest-motivated and altruistic-idealistic sources for social action." (in Seligman, 1995, p. 29). This thesis, however, prefers the Durkheim concept of duality—of self-interest and altruism—as that which drives the differences of opinion regarding arts-media censorship. In this respect, we can say that Australia is, for the purpose of arts-media censorship, a single society where the duality of procensorites is opposed by the duality of anticensorites, each of which may be said to have both self-interest and altruism in mind.

Finally, we have the imagined community that policymakers had (and still have) in mind when deciding that there exist standards of morality, decency and propriety to which *The Board* is bound to adhere.

DECENT AND INDECENT

When used in conjunction with each other, as in *The Act*, s.11, the three standards connote puritanism, but what is allowed under the provisions of the *Guidelines* can hardly be considered pure in the procensorite mind. (Strict moralists likely would not consider movies classified X-18+ as pure.) Decent and its antonym, indecent connote respectively acceptable behaviour and a degree of waywardness from an accepted

standard (the adverbs, *quite* and *very*, setting lesser and greater degrees). One need not question by whose or what standard decency is measured because the answer is given in the same clause as being "generally accepted by reasonable adults" (*The Act*, s.11(a)).

To some, a movie that portrayed simulated sex would be *quite*, and to others, *very* indecent but such portrayals are allowed in R 18+ materials. Furthermore, portrayals of actual sex are allowed in X 18+ material, presumably these would be *very* indecent and, in Australia's states, they are banned from sale. If such portrayals are thought an acceptable degree of decency, one is bound to question what is so wrong with banned material. We find the answer to that question in the *Guidelines*: "Fetishes such as body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting". These and other "abhorrent" activities "are not permitted". All portrayals of intimate sexual activity are abhorrent to some, many portrayals of violence are also abhorrent, but *The Act* does not explain why there should be a difference between acceptable and unacceptable arts-media that contain these elements. (Those observations do not include portrayals of minors, which are considered in Chapter 11: Images of Minors.)

Allowing that there is a difference, if only because the law so states, we must presume policymakers had in mind a standard of decency that does not degenerate into indecency. In other words, while some arts-media material might be less than decent in the opinion of some, there exists other material that, to the greater majority of Australians would be considered unquestionably indecent. Images of child sexual abuse would come into this category. However, there would appear to be no legal definition of decent or indecent, but in the UK law states: "The word 'indecent' has not been defined by the *Protection of Children Act* 1978, [UK] but case law has said that it is for the jury to decide based on the recognised standards of propriety".[134]

An American law dictionary, considered the best of its kind, has no definition for decent or decency, but it defines indecency as: "An act against good behavior and a just delicacy".[135] An English law dictionary also offers no definition for decent or decency, but it does give examples, as does the American, of indecency; a disorderly house is: "A brothel or a place staging performances or exhibitions that tend to corrupt or

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134 http://www.cps.gov.uk/legal/h_to_k/indecent_photographs_of_children/

135 A Law Dictionary, Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union (6th edition, 1856), by John Bouvier

deprave and outrage common decency". (Martin, E. A., 2006, p. 171).

In contrast, the AOD offers several meanings of decent, namely: "1 (a) conforming with current standards of behaviour or propriety. (b) avoiding obscenity. 2 respectable. 3 acceptable, passable; good enough. 4 kind, obliging, generous". Taken together the dictionaries do nothing except to describe in a vague kind of way what is decent and, by extension, what is indecent. They do, however, connote an approval or acceptance of witnesses to the behaviour. However, because that which is not decent by any of those descriptors is not necessarily indecent, the term "non-decent" will be used to distinguish between that which is less than decent, but not indecent. Consider, for example, the act of stealing; it is an "act against good behaviour", therefore, not decent but it is not usually described as an indecent act. Non-decent, then, denotes something that is harmful or offensive to others but is not indecent as the word is commonly understood.

Let us imagine that the drinkers in a pub are singing a bawdy song while worshippers in a church across the road are singing hymns. In both situations the behaviour is acceptable. But if the churchgoers and drinkers were to swap their situations, the behaviour of both groups, in order to be acceptable, must adapt to the changed situations. If the hymn were to be sung in the pub, the singers might be shouted down but, while unacceptable, perhaps offensive to some, the act would, likely, not be what is generally understood to be indecent by the UK definition; it would be non-decent. If, however, the bawdy song were sung in church it might be offensive, unacceptable and most likely thought indecent. Taking the point further, an indecent act can only be so if it is carried out intentionally where others cannot avoid witnessing, or taking part in, it. (a "flasher" at the beach, or a person who is sexually assaulted, for example). In short, it is the intention and the situation, not the act itself, which sets the standard of acceptable behaviour.[136] Thus, it could be argued that an act that might be thought indecent, indelicate or non-decent by some and in some situations is only so if it causes direct offence to others.

Taking the point further, an act that might "corrupt or deprave and outrage common decency" would be indecent whether in public or in private but with no

136 As it relates to images of minors, the circumstances and motive of the defendant are not relevant to the question of indecency, although they may be relevant to the question of whether the photograph was deliberately taken or made, R v Graham-Kerr 88 Cr App R 302 CA.

others present there is a question of whether there can be direct offence even though the act might be indirectly offensive. This question is further considered in Chapter 12: Classification and Censorship Unbound.

Indecency is often used as the antonym of decency and is now most usually associated with sexual activity of some sort; for example, indecent exposure, indecent photographs, indecent language and something "for the jury to decide"; it is, thus, a moral judgment of an action or speech. *The Act* s.11(a) suggests that decency and morality are linked as in: "the standards of morality, decency and propriety", as though a person who disagrees, espouses indecent values or is not a "reasonable adult".

In volume two of his four-part work: *The Moral Limits of Criminal Law,* Feinberg (1987) states: "there are two concepts of decency and indecency, one of which is moral and the other charientic" (p. 107). Feinberg also explains the linguistic roots of decency and indecency and gives examples of their use (pp. 109-111). None of this is of much help in seeking to understand decency as a standard for assessing items of art-media until he introduces a third kind of indecency:

> Indecency of the third, or purely moral kind is a very special way of being immoral whether one's objectionable behavior occurs in public or in private. The Victorian husband who always keeps up appearances in public but bullies his helpless wife mercilessly in the privacy of their home is not a "decent fellow" (p. 111).

Although objectionable, the bullying of one's wife was not entirely unacceptable social behaviour in Victorian (and earlier) times:

> During the 1800s wife beating was extremely common and only caused outrage if it was exceptionally brutal or endangered life. There was a widespread belief among ordinary people, male and female, that it was every man's 'right' to beat his wife so long as it was to 'correct her' if she did anything to annoy or upset him or refused to obey his orders.

> The editor of the Hull Packet (7 Oct 1853) remarked that wife-beating was 'being accepted as the habit of the nation'.[137]

Wife-bullying or beating, therefore (up to a point), conformed "with current standards of behaviour", thus, by the AOD definition, the husband was a 'decent fellow'. The Victorians, however, only carried on a tradition that probably went back to Adam blaming Eve for the trouble they were in; women, generally, had been suppressed throughout history. In 1835, two years before Victoria became England's queen, a Canadian woman, one Ellen Fitzgerald, pleaded to William IV thus:

> Since the return of my husband from Toronto, where he was, as well as here, imprisoned for a supposed murder, I have not had one day's peace with him often beating and abusing me in a shameful way. That on Sunday last he beat and abused me out of all character as a wife and on Monday he beat, kicked and took one of my hands and held it in the fire until it was severely burnt [. . .] I have made [. . .] applications to several magistrates to bind him over to keep the peace all of which proved fruitless (Chambers, 1997, p. 28).

The treatment that Mrs Fitzgerald received could hardly be decent and yet, by the present day use of the term "indecent", Mr Fitzgerald was not so. That Mrs Fitzgerald's pleadings "proved fruitless", is a further indication that even "exceptionally brutal" wife-beating was not entirely unacceptable behaviour.

During much of the 19th century, societal decency appeared to be a class concept; that is to say, the upper classes had different standards of decency from those in the lower classes. Michael Mason offers many facts and figures about differences between classes in chapter three of his work *The Makings of Victorian Sexuality*. He writes of changing and differing concepts of decency, thus:

> . . . it is clear that the face of upper-class sexual recreation became much more refined, especially from the early 1830s. [. . .] one satirical

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137 http://www.historyofwomen.org/wifebeating.html The author attributes this and the information on the following page to "Sources: British regional and national newspapers; *Hansard* (transcripts of British parliamentary debates)."

> commentator who wrote accounts of London in 1800 and again in 1820 was struck [. . .] especially by the dwindling numbers of 'worthless [. . .] and profligate individuals among our nobility'. By 1855 the really debauched peerage was said to be 'fortunately extinct', and from the mid-century on [. . .] slumming it in low dives—as 'members of both Houses, the pick of the Universities and the bucks of the Row' had recently been wont to do—was no longer the fashion (Mason, 2003, pp. 110-111).

The elite, in other words, were either more decent, or less indecent, depending on one's personal view. Wife-beating, too, was no longer the fashion among the elite, but it appeared common among "the lower classes":

> The majority of perpetrators were labourers, ex-policemen, miners, brickmakers, grave-diggers, dockworkers, costermongers and hawkers. According to The Examiner (15 June 1872): 'The habit of beating women was once as common as swearing or drinking in the high circles; it is now chiefly confined to the lower classes' (see *fn*137).

Both of Feinberg's behaviours are evident here, where indecency is represented by the act and charientic is represented by the thought of the act. The Victorian husband in Feinberg's example would be a "decent fellow" to some of his colleagues who could, at the same time, think of wife-beating as non-decent. There is something of a parallel in all this as it concerns art censorship, a person who accesses illegal arts-media for private use but "keeps up appearances in public is not a decent fellow" for having broken the law.

For those who are offended by certain acts, it is not necessary for the behavior to occur; the very thought of it is offends. It is the thought, one might suggest, that caused Australia's censors to ban images of fetishes. The censorious mind conceives certain acts, such as "golden showers", "bondage" and "fisting" to be "objectionable behavior", whereas the participants in these acts find pleasure in them. To the moral censorious they are horrid thoughts. Similarly, one might be offended by the thought of Glassen's examples: "chewing gum, making scenes, picking one's nose, etc." (in

Feinberg, 1985, p.107).[138] The key to deciding a standard of decency would appear to be what one thinks of as "objectionable behavior", which in turn prompts the banning of such portrayals.

However, thinking that an act is indecent does not make it so, but if the word "currently" were deleted, one might suggest that: *decent is behaviour that is both harmless to others and acceptably appropriate to the situation*. Such behaviour might include the singing of bawdy songs in an appropriate setting, where care is taken to avoid offending against the sensitivities of those present. By this reasoning, if there is no harm, there is neither non-decency nor indecency.[139] Thus, it would seem that harm to others is key to any definition of non-decent and indecent—whether indecent is used in the moral/sexual sense, or in its broader sense.

Interestingly, Margalit (1998) posits that a decent society is one whose citizens do not humiliate one another and whose institutions do not humiliate the people under their authority. The *NCC* requires *The Board* to take into account "community concerns" about persons being portrayed as sexually demeaned, which, on Margalit's reasoning would not be decent except where individuals give willing consent to being so portrayed. In the chapter immediately following, some examples are offered where no such consent was given, but one cannot make a decision on willingness from looking at the image(s).

PROPRIETY, IMPROPRIETY, MORALITY AND IMMORALITY

> When you're lying awake with a dismal headache
> And repose is taboo'd by anxiety
> I allow you can you use any language you choose
> To indulge in without impropriety. (Gilbert: *Trial by Jury).*

Propriety and **morality** are, for arts-media censorship, extensions of decency and, as such, add very little (if anything at all) to the supposed standards. For example, if an

138 Feinberg (1985) p. 298 cites Peter Glassen: "Charientinc Judgments" in Philosophy 1958, April, pp 138-46.

139 This does not prevent people who know what is going on from thinking the unwitnessed behaviour is indecent, but the participant(s) in the behaviour cannot be held responsible for what another person thinks.

act is not socially decent, it can hardly be proper or moral: consider theft.[140] Also, as with decency, if the act has no adverse effect on others, and provided it is carried out in private (as in Gilbert's example), it is neither socially improper, nor socially immoral (religiously so, perhaps).

Under the preceding subhead, we referred to portrayals of simulated and actual sex. Are not these portrayals immoral in the minds of those who are morally pure? One is reminded here of the old saw of being "only a little bit pregnant"; one either is, or is not pregnant. Similarly, one might argue that morality cannot be compromised; an act is either moral by one's standards, or it is not. While we might assume (for lack of surveyed evidence) that murder and robbery are not "generally acceptable", these crimes adversely affect others, therefore, are not decent (and clearly neither proper nor moral). Yet, R 18+ material appears to fall within the standards of decency, morality and propriety. One would argue that policymakers have compromised their assigned standards by allowing such portrayals as those classified R 18+ and X 18+ to be accessed by adults. If that is so, there would appear to be something hypocritical (perhaps illogical) about being *only a little bit* immoral but drawing an arbitrary line where accessing a refused classification item of arts-media that contains *a little bit more* immorality becomes a criminal offence. (See also, the subhead **ACCEPTABLE MATERIAL** in Chapter 8: There's No Harm In Looking.)

Words and actions that might be considered improper and/or immoral in public, can only be equally so in private; thus, as was stated above with regard to decent and indecent, what is proper and improper depends on the situation. In Gilbert's quatrain privacy is indicated, therefore, he could indulge without impropriety. It is argued that an immoral act in private, that does no harm to another or another's interests, is not offensive. It is the intention to offend combined with the act that creates an offence; it is not the act itself, even though the thought of the act might give an unpleasant feeling. This leads us to the question of why what happens in private should be of any concern to any non-participating individual or to the community at large.

140 One could argue that Robin Hood's theft was decent, proper and moral. The short-lived *Workers Party*, founded by advertising executive John Singleton held that "taxation is theft".

COMMUNITY CONCERN

We have demonstrated agreement with Block's observation that the introduction of community "causes immense difficulty", and have also shown that all Australians are not like-minded. Indeed, were all Australians like-minded, there would be no dispute about censorable material. (See Chapter 7: Everyone Wants to be a Censor.) As Chipp noted (p. 154, *supra)* "there are many standards and many communities in the one Australian community".

However, what Chipp, as Minister for Customs said in 1971, appears to have been set aside so that in more recent times, "community" is taken to mean that all Australians have the same standards. Considered in this light, the inclusion of "community concern" among the reasons for restricting or banning arts-media only adds to the difficulty of identifying what is meant by the term. For example, *The Board* is instructed to take into account: "community concerns about (i) depictions that condone or incite violence, particularly sexual violence; and (ii) the portrayal of persons in a demeaning manner" (s.11(d)).[141] These sub-clauses suppose or presume that all Australians are concerned about how individuals are portrayed in the media. While some might be concerned, there would appear to be no studied evidence that any widespread concern exists. It is arguable, but likely, that Australians generally have no idea that these sub-clauses form part of *The Act*—if, indeed, they know much at all about arts-media censorship beyond knowing that some movies are banned and others are rated. (An academic study along these lines might prove instructive.) On this point, the following extract from a 1990 speech by Senator Flo Bjelke-Petersen, offers an insight into policymakers' thinking in the years leading up to the passage of *The Act.*

> Up to now television stations have been feeding the Australian community a steady and constant diet of violence and tasteless entertainment. This is not only in their normal programming but also in their so-called news and current affairs programs. Indeed, sometimes if one watches half of the television news all one has seen is violence. It has been estimated that by current standards an average viewer will see some 45,000 murders or attempted murders on television by the age of 21 years. This standard diet of violence is not only desensitising the

[141] Statements like this beg the question: Which community is concerned?

> community, and young people in particular, to violence, but also is encouraging an acceptance of violence as a norm of behaviour. It is no wonder that the incidence of violent crimes is increasing.
> [. . .] *Houston Nights*, with 36 acts of violence in an hour, promotes the consumption of large quantities of alcohol, casual sex, revenge and the concept that good will win through violence (*SH*, August 22, 1990, p. 1991).

Senator Bjelke-Petersen's assertion that violence was increasing at that time is at odds with Samantha Bricknell's findings. In her 2008 research paper, Bricknell reported "the homicide rate has remained relatively stable since it peaked in the 1970s". She concludes: "If homicide is the yardstick by which the level of violence in society is measured, then the belief that violence is increasing in Australia cannot be substantiated". (Bricknell, S., 2008. *Trends in Violent Crime*, Australian Institute of Criminology, June 2008). There would appear to be a perception of increasing violence rather than proof of it; a perception shared by Des Clark, who said: "Although it has not been formally tested, in my view, community standards appear to be fairly rigid around sexual violence and sex more broadly due to increasing concerns over the sexual abuse of children" (Clark, 2005).

From all the foregoing, it would appear that the abstract notions of community and community concerns mean one thing to policymakers and quite another in reality. One would argue that it is this sort of perception that leads to the belief that harm is done, or is caused, by looking at certain images. One would further argue that, in order to be of value, those who are of the opinion that there are community standards should be more precise in explaining their understanding of the standards. The following statement by ALRC2012 is not very helpful on this point.

> 11.58 With respect to the current classification cooperative scheme, it is important to note that the community standards criterion does not exist in a vacuum but, rather, must be read in light of the principles in cl 1 of the Code [*i.e.* the *NCC*]. The ALRC sees no reason to abandon the notion of community standards at this time and has identified 'community standards' as a guiding principle for reform of the classification scheme.

> Specifically, the ALRC proposes that communications and media services available to Australians should broadly reflect community standards, while recognising a diversity of views, cultures and ideas in the community.
>
> 11.59 The argument that 'community standards' should be abandoned as a relevant concept in classification would require, at the very least, strong evidence of significant changes in community attitudes over time. This Inquiry has not identified any empirical evidence of such a shift (ALRC2012, p. 272).

On 11.58, the commission appears to be stating that: Everyone should be allowed to watch, read and hear what they want provided the material conforms to the standards of morality, decency and propriety generally accepted by reasonable adults (the *status quo*). However, on 11.59, one has some difficulty understanding what ALRC2012 means by a seeming lack of "empirical evidence" of changing community standards. Even the establishment's own standards have recognised shifts; for example, the introduction of an X 18+ category for movies and an R 18+ category for computer games.[142]

In this writer's submission to ALRC2012, it was stated that:

> . . . the more one considers the conjunction of s.11 of the Act, the *Guidelines* and the *NCC*, the more it becomes apparent that the law has in mind particular standards of morality and propriety. There is no generally agreed "community standard", nor has there ever been. (Appendix 1, *infra*).

These assertions were not challenged by ALRC2012, except in the broad sweep of 11.59. The most likely explanation is the conflation of protection and suppression.

142 Re computer games: In December 2009, the Attorney-General issued a discussion paper titled: *Should the National Classification Scheme Include an R18+ Classification Category for Computer Games.* Resistance to adult computer games can be gauged from this extract: "The Australian Government has been discussing the adult classification of computer games with its State and Territory counterparts *for some time* [italics added]. The Ministers responsible for censorship have considered the issue of an adult classification for computer games on a number of occasions. Before these Ministers consider the matter further, it is timely to consider the views of the community." R18+ computer games were finally allowed in 2012.

Thus, in the ideal of protecting the general public, that which does not accord with the reasonable adult's view of the standards is suppressed. The approval of adult computer games, following many years of discussion, provides a useful example of what might be called demand suppression. The event was of such importance that *The Board's* Director, Donald McDonald, highlighted the event in a breakout to his CRB *Overview*, it read: "One of the most significant developments during 2011-12, was the passage of legislation through Federal Parliament to introduce an R 18+ category for computer games." Also: "The R 18 + category for computer games will commence on 1 January 2013."(CBR11-12, p. 21).

Regarding suppression, consider community standards as they affected *Lady Chatterley's Lover* in the 1960s. As one reflects on the evidence and outcome of the trial for publishing an obscene book, it would seem that the establishment perceived a community standard, which was shown by the trial not to exist. Rather, as was learned from the substantially increased sales of Lawrence's book, it is more likely that the real community standard (*i.e.* the desire to read that which was hitherto prohibited) was quite different from the one the establishment had in mind. It could be said that, where no regulating authority prevents adults doing so, they become their own censors in arts-media entertainment, much as is done when choosing to watch (or not watch) a sporting event, or having a preference for one code of football over another. Such choices would accord with "a diversity of views, cultures and ideas in the community" which would suggest a "plurality of community standards" (Chipp, p. 154, *supra*). We might then conclude that one sort of community standard exists in the minds of some reasonable adults, while other sorts of community (or individuals) standards exist in the minds of other reasonable adults.

Nevertheless, even if one were to concede a singularity, it remains open to question that such a community standard should impinge on what people do to entertain themselves in private. To reflect again on Dr Katherine Albury's question, if adults wish to entertain themselves with "consensual sex and fantasy", one would argue it is not a matter of concern to anyone but the parties themselves.[143] One would find it as difficult to justify a reason for the Australian government to legislate against personal, private and harmless-to-others activity, as it would to justify legislation against

143 I am reminded here of the 1920s jazz piece "Ain't nobody's business if I do" see Herzhaft, G., 1992. Encyclopedia of the Blues. University of Arkansas Press.

swimming. Indeed, nothing was found in the records of policymakers stating a reason for legislating against "consensual sex and fantasy" other than a condemnation of it, as in Nile's (1991) "Sexploitation" speech, part of which is cited on page 201, *infra*.

From all this, one can only deduce that when ALRC2012 observed no change in standards, the reference was not to representations of physical activity, but to the classification categories G, PG, M, *etc*.

MINORS ARE A VERY IMPORTANT BUT SEPARATE CONCERN

While it is conceded that the law should be concerned with images that depict the actual sexual assault of minors, the physical act of assaulting minors and producing images of that assault is a matter for law enforcement, not *The Board*. If a child is sexually abused but no pictures are produced, *The Board* is not involved. If pictures are produced, they form part of the *evidence*; but they are not the crime any more than is a knife that inflicts bodily harm. It is for the prosecutor and the court to consider any law enforcement action as a whole. In short, one need not have high levels of literacy and numeracy, or be especially trained in arts-media evaluation to decide from the pictorial evidence that the subject child had been sexually assaulted.

However, questions arise when some individuals argue that non-sexual images are child pornography or child sexual abuse; indeed, censorship law itself takes that position. This aspect of censorship is addressed in Chapter 11: Images of Minors. Opinions about what arts-media should and should not be allowed (not only in the name of protecting minors) are so wide and varied, that it would appear everyone wants to censor something that others would appreciate or enjoy.

CHAPTER 7: EVERYONE WANTS TO BE A CENSOR

> The issue of censorship is one about which everybody in the community has definite views; very often they don't coincide with each other or with other vocal and influential groups within the community. It is therefore the source of considerable tension between points of view that compete for ascendancy with much energy and enthusiasm (Williams, D., Speech, 1997)
>
> The differences of opinion and the associated emotions they generate is mirrored in the correspondence I receive as Director of the Board. Everyone has a view, everyone believes they would make better decisions and everyone would more accurately reflect the views of the community! (McDonald, D., Speech, 2007).[144]

This chapter argues that, as conceded by both Williams and McDonald, everyone would, had they the power to do so, censor something of which they disapprove.[145] There is an echo of Customs Minister Chipp's "many standards and many communities" here, which becomes apparent when one studies the reasons given for disapproving of a particular item of arts-media. Indeed, it is this fundamental difference of opinion that, from the policymakers' viewpoint, would appear to justify the retention of *The Board.* This thesis argues the other way, that the wide-ranging differences between consumers of arts-media would indicate that only the consumer, armed with sufficient information about the product, can decide what is acceptable—and only for the self and minors in their care.

ARTS-MEDIA ENTERTAINMENT IS A PERSONAL MATTER

As can be seen above, ten years after Attorney-General Daryl Williams made his point, about what could be called widespread differences of opinion, *The Board's* Director,

144 "Sense and Censorbility" (sic), Currency House, Sydney, September 26 2007.

145 "Everybody" and "Everyone" are to be taken figuratively in the context of Williams' and McDonald's observations. *The Act* at s.42 sets out the standing of a person who may appeal a classification, but there is no limit to anyone sending a petition to parliament, praying that an item should be banned or unbanned.

Donald McDonald was saying much the same thing. But what is the reason for their apparent discontent with public reaction to censorship? The short answer is, policymakers have set out a regime of what they suppose Australians want and do not want but many Australians (over time) express disagreements and disappointments with policymakers' assumptions. The core of this diversity of opinion is censorship's attempt to define the indefinable. For example, "strong language", "fetish" and "abhorrent" (as in the *Guidelines*), represent nothing more than the opinions of those who know what the words mean to themselves but others have different opinions.[146] Even so, whatever general opinions are expressed, whether pro- or anti-censorship, as Williams observed, they "very often they don't coincide with each other".

One would argue that censorship law, at least in Australia, misses the point that arts-media entertainment is a personal matter that has nothing to do with the community—whether community means the entire population, or one's family. Some individuals would prefer opera, others hip-hop and others, outright pornography, or even all three and more. Only the individual would know—and each might scorn the others for their choices.

THE POWER TO CENSOR

Yet even in scorning another's choice, people become censorious, while in other ways they often act as censors. A parent who prevents a child reading a particular book; a husband who deliberately fails to collect a hired DVD for his wife because he disapproves of its content; a news broadcaster who excludes important information that would run counter to a preferred line of argument are, in their own ways, censors. The examples at first reading suggest three forms of censorship namely, active, passive and selective. They are all linked, however, to the same fundamental source: *the power to censor.* This power, in varying strengths, is exercised against individuals who want to read, watch, hear or learn something of interest to them. We might argue, then, that arts-media censorship in any and all of its forms fits Sue Curry Jansen's concept, which is the title of her book, *Censorship*: The Knot that Binds Power and Knowledge (1991).

However, whereas for Curry Jansen the "knot", (generally) is tied by the politically

146 During my researches, I came across a blog in which a man stated the only way he could enjoy sex was to be chained and whipped—and a woman who quite agreed, as long as she did the chaining and whipping. This was, for both of them, "normal" sex.

and financially powerful, we depart from her broader view and consider censorship from the position of individuals who arrogate to themselves the power to censor arts-media. Alan Hunt might call such activity "moral regulation from below": individuals, or self-appointed groups who take repressive, even punitive action against others; for example revealing the addresses of presumed child molesters (Hunt, A., 2009, p.5). We eventually meet again with Curry Jansen at the point where the combination of sufficiently influential individuals coalesces to create "the knot that binds".

FAMILY-PROTECTIVE CENSORSHIP

In seeking examples of individuals who censor what is otherwise available to the public at large, this writer found nothing that better fitted the "everyone" concept than the statistics assembled by the American Libraries Association (ALA), which records challenged (*i.e.* censorable) books for the period 1990-2010. Its importance to Australia (and anywhere else) lies in the fact that there always will be those of whom Doris Lessing wrote: "Truly, we cannot stand being free. Mankind—humankind—loves its chains, and hastens to forge new ones if the old ones fall away" (Lessing, 2005, p. 77)[147]

The ALA's list offers a detailed insight into who wants to censor what, and for what reasons. The best Australian equivalent for books might be Nicole Moore's *The Censor's Library* (2012), but while the ALA's list is for the most part, based on the objections of a wide variety of individuals, Moore's work discloses a broad censorship based on the opinions of relatively few individuals: the censors for the time being.

The result of examining book censorship should confirm the Williams-McDonald observations that "everyone" wants to be a censor and also leave one with little doubt but that the religious and morals campaigners in both countries are at one and their reasons for wanting censorship are closely aligned. This becomes more clearly evident when one reads the arts-media and sexual morality goals of the American Family Association (AFA) and Family Voice Australia (FAVA).

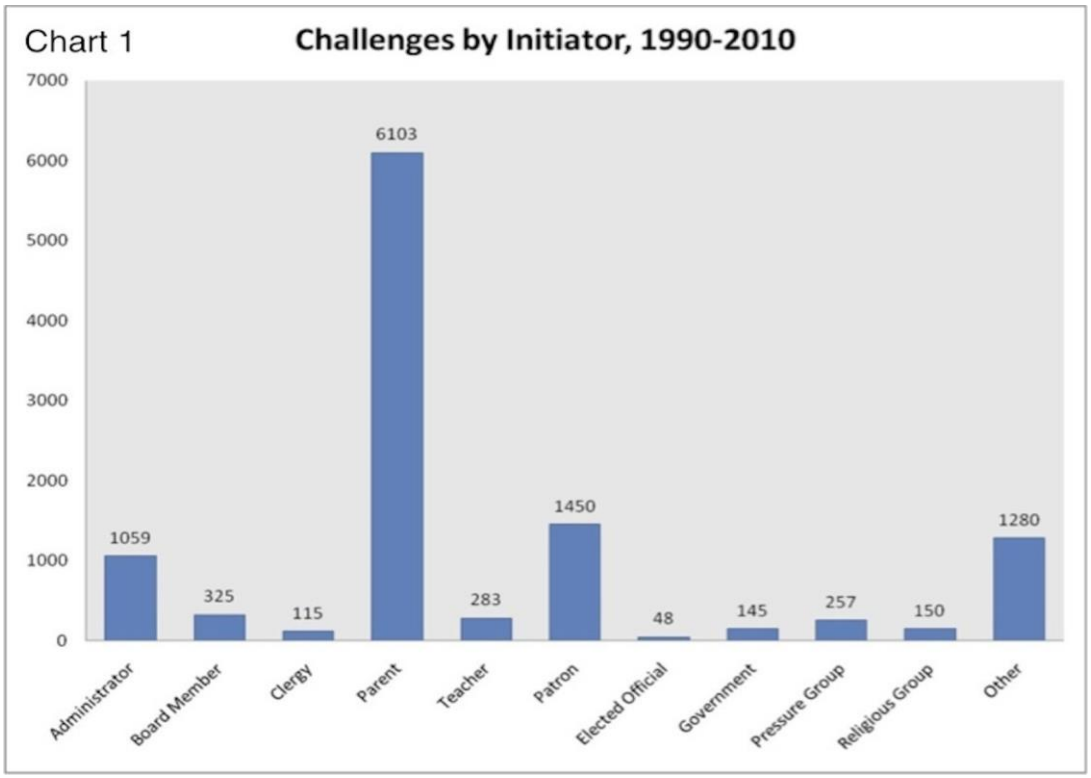
When studying the histories of USA and Australian censorships, one is struck by the similarities between the two countries. The major difference being that Australia still employs "an analog piece of legislation in a digital world" (p. 17, *supra*) that is

147 Some of Lessing's overview of "Censorship" (pp. 72-78) considers "Political Correctness". One suspects that the adding the afterthought "humankind" while allowing "Mankind" to stand is a deliberate jibe at political correctness.

government funded and controlled. By contrast, the USA has no national equivalent of *The Board*, instead, parents decide what books are appropriate for their children and the Motion Picture Producers and Distributors of America (MPPDA), as an industry body, classifies movies. This thesis suggests that Australia could usefully adopt practices similar to those if the USA, namely industry self-classification and informed parental choice of arts-media; thus satisfying all four principles of the *NCC* (see p. 61, supra).

IN THE USA EVERYONE CHALLENGES EVERYTHING

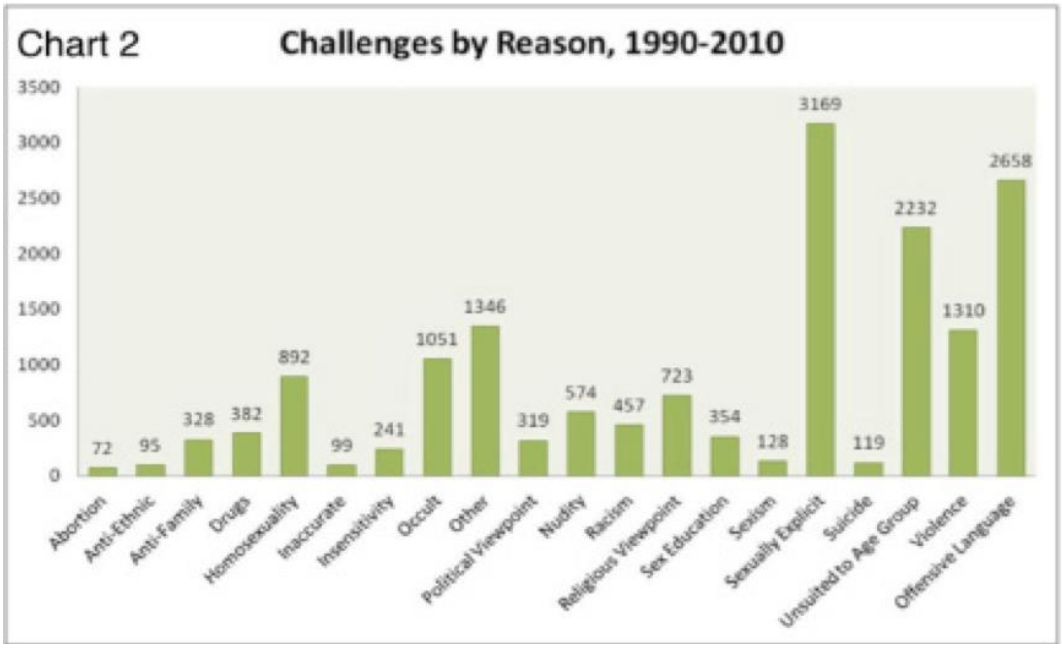
Lessing's observation (cited above) finds support in the ALA statistics of challenged books. The statistics are presented in three charts: by initiator, by reason, and by institution respectively.



The charts cover a period of 21 years during which time 10,676 books were challenged.[148] By connecting some of the data from all three charts, a picture begins to emerge as to who loves censorship's "chains".

Looking at Chart 1 we note that there were 11,215 initiators of challenges to the 10,676 books; an average of 1.05 challenges per book. Parents accounted for 57.14% of challenges {(6,103 x 1.05) /11,215 x 100}.

148 The ALA notes that some books were challenged for more than one reason, see Chart 2.
Note: I added "Chart" and number; this detail is not on the original. The charts are made available here. http://parisjc.libguides.com/content.php?pid=272805&sid=2249238



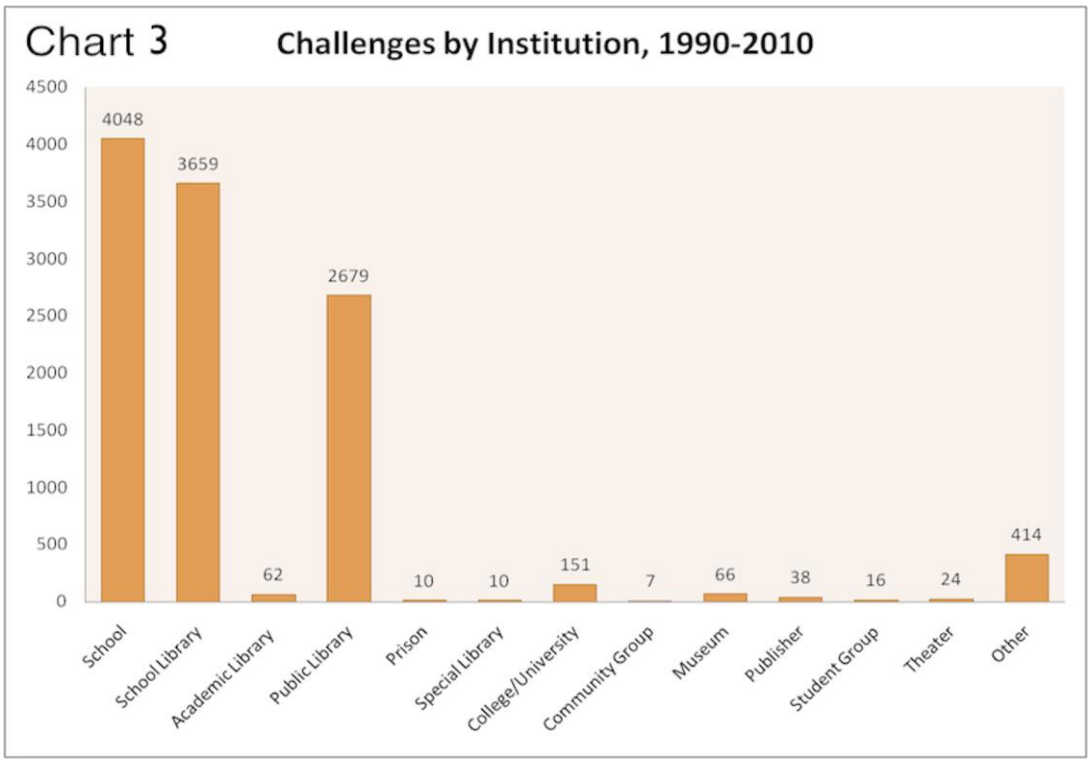
Looking now at Chart 2, there were 16,549 reasons given for the 10,676 challenged books, or an average of 1.55 reasons per book. We can turn that equation into something more manageable by stating that two books out of every three (65%) were challenged for more than one reason. We might now suggest that parents, acting as parents (one imagines many other initiators were parents too) were responsible for 9,932 or 60% of the 16,549 reasons given for challenging books (9,932/16,549 x 100). This is not unreasonable given that parents are more likely to challenge for reasons of "sexually explicit" (19.15%), "offensive language" (16.06%), "unsuited to age group" (13.49%), "violence" (7.9%) and "sex education" (2.14%), which together account for 58.74% of all reasons.

Either way, whether by number of challenges (6,103) or by reasons (9,932), parents (as parents) would appear to be largest group of Lessing's censorship "chain" lovers in the USA. Strong support for this claim is found in Chart 3, in which challenges by institution are shown.

Chart 3 displays an aggregate of 11,184[149] challenges of which 7,707 (69.13%) emanated from schools and their libraries. If we allotted all 6,103 parental challenges (Chart 1) to books in schools and their libraries, there would remain 1,604 (7,707 minus 6,103) challenges made by others than parents as parents. While it is possible that parents challenged only those books in schools and their libraries, one cannot rule out

[149] The difference of 31 between 11,215 in Chart 1 and 11,184 in Chart 3 is not explained but in compiling statistics of this nature, small errors sometimes occur. The discrepancy is not significant.

their challenges to books in public libraries, colleges and other institutions. The ALA statistics indicate that parents are vigilant with respect to books they think inappropriate for their children.



However, by challenging books in school libraries, parents would appear to be acting for *all* children in the school and not just their own children. One reflects here on Elizabeth Esther (Chapter 9: Minors and Scary Stuff) whose sons knew "to avert their eyes every time we pass [*Victoria's Secret*] store", not because Esther disliked lingerie but because she was enforcing "a zero porn policy"; one presumes she did not demand that boys other than hers should avert their eyes. It is observed that Esther "banned *Victoria's Secret* catalogs from *my home*" (italics added), not from the store. Although from the tone of her remarks, one suspects a store ban would have pleased her but, lacking the necessary power in that regard, the store was free to continue trading. Banning the library books (if the challenges were successful) would have the affect of the objecting parents acting for the whole, rather than for only their children.

ANALYSIS OF THE CHARTS

When we analyse the information contained in the ALA statistics, it can be seen that many individuals challenge books that others would like to read, and they do so for any number of reasons. Linking all data in and deduced from, the charts, we might

reasonably suggest that 60% of all challenges originated with parents as parents. Thus, we conclude that the 40% who did not challenge as parents, consists of all the categories of persons shown in Chart 1 who would control what others want to read.

The variety of reasons (Chart 2) is collected into 19 categories, plus "other" (1,346 or 8%). The lowest number in any category is 72 ("abortion"); therefore we may assume that no other category within the 1,346 others has a number greater than 72, or it would have been in a category of its own. Let us presume there are different categories of reasons within the 1,346 others, none of which reasons amounts to more than 71 challenges/challengers. If we divide 1,346 by 71, we arrive at a minimum of 19 more categories of reasons than those given in Chart 2, making a total of 38 reasons in all.

If we use the same reasoning and arithmetic for Chart 1, taking 47 as the highest possible score among the 1,280 initiators, we arrive at a further 27 initiators and a total of 37 categories of persons. Finally, dividing the 414 "other" institutions by 6 (the highest possible score before being categorized) we add 69 to the 12 listed institutions—a total of 81.[150]

From these calculations it could be argued that up to 37 categories of people, from as many as 81 institutions, lodged at least 38 reasons for objecting to 10,767 books.[151] Although not literally "everyone", any more than is McDonald's broad reference, the statistics fall within his meaning of everyone having a view.

DIFFERING VIEWS AND OPINION[152]

The quotes at the opening of this chapter are particularly informative; they indicate (a) that Australians have differing views of what should be censored and (b) whatever their views, Australians often do not agree with others who hold views similar to their own. Leaders and shapers of Australian opinion also hold differing views concerning what should be censored. For example, when the Minister for Home Affairs required

150 Of course, there could be 1,346 different categories, or any number between 1,346 and 19, but I lean to a more conservative estimate. Also, any arithmetical regression from the simple dividend would produce an even greater number than 19. For example, taking the 1,346 and reducing it by 71, then by 70, 69, 68, 67 and so on, would produce 23, and not 19 additional categories. The point is: individuals each appear to have their own reasons for imposing a censorship.

151 Further details are available on the ALA website at:
http://www.ala.org/bbooks/challengedmaterials/reporting which advises as follows:
"To report a challenge, please submit an Online Challenge Database Form. Alternately, you can print the Challenge Database Form (PDF), complete it, and fax it to the Office for Intellectual Freedom, at 312-280-4227."

152 http://www.amelkovich.com/ One wonders how some will view the images here.

the RB to review the movie *Holy Virgins*, the Australian Family Association and the NSW Council for Civil Liberties presented opposing views. (The movie, which had been classified R 18+, was banned by the RB (CBR08-09 p. 67 and p. 73).

It is how one perceives an image that affects one's judgment of it. For example, in the case of a man charged with making a pornographic film of a child, the prosecutor argued: "Zooming in on the area where the child has her legs spread, in my submission, is depicting the sexual parts of the child". The judge disagreed and said: "there is filming of where the sexual parts of a child might be, but, it is no more or less so than if the child was fully clothed (R v Thompson [2009] ACTSC 23). (The full quote in context is included in the subhead **INNOCUOUS IMAGES AND THE PAEDOPHILE'S GAZE** in Chapter 11: Images of Minors).

In another example, Hetty Johnston (founder of the child protection group, *Bravehearts*), in 2008 instigated police action against Bill Henson's photographs of naked minors aged 12 and 13. In justifying her action she said "I'm entitled to my view" so are the "hundreds of thousands of Australians" entitled to their views (ABC *Stateline,* June 15, 2008). It is not clear on what evidence Johnston relied for the "hundreds of thousands" sharing her view; in any event *The Board* had a different view and classified the images PG.

The dispute, however, is not to the entitlement of a view, but to the claim that one view should take precedence over another. The difficulty in the Henson matter is that both Johnston and the Rev. Fred Nile referred to the Henson images as pornography being passed off as art; in which case one would have thought it incumbent upon them to explain how the one differs from the other, which they did not, or were unable to do. Yet an unexplained, undefined separation of pornography and art now renders the one illegal and the other acceptable.[153] One is reminded of USA Supreme Court Judge Potter Stewart's: "I know it when I see it in *Jacobellis v Ohio* 378 U.S. 184 (1964)". Stewart was referring to an allegedly obscene movie, which Ohio's State Supreme Court had found to be so. An important part of Stewart's judgment included: "I imply no criticism of the Court, which, in those cases, was faced with the task of trying to define what may be indefinable". It is also relevant to the difficulty of assessing what may be unacceptable to a community that the USA Supreme Court was not unanimous

153 But see Christy Mag Uidhir (2009) *Why Pornography Can't Be Art*. Philosophy and Literature 33(1), pp. 193-203.I found the argument interesting though not convincing.

in its judgment; it was decided by six (including Stewart) to two, to reverse Ohio state court's guilty decision.

Nile carried his private view that he could differentiate between pornography and art (without defining either) into the NSW Legislative Council where, speaking to the *new law* in 2010[154] he said: "the change in the legislation arose out of the controversy concerning Bill Henson's photographs of full frontal nudes [of minors] that were displayed in a Sydney art gallery, particularly the full frontal photo of a 12-year-old boy that displayed his genitalia" (NSWLC *Hansard*, April 20, 2010). It is of interest the boy was mentioned because during the debate on the new law Prue Goward MLA made reference to *The Bathers* (see Fig 6. in Chapter 11: Images of Minors). There is no record in the NSW *Hansard* that Nile suggested Lambert's painting be submitted to *The Board* for classification.

If nudity equates with pornography, then, by that reasoning, all the full frontal images of minors that have been painted, sketched, filmed and photographed over the centuries are child pornography and those who possess them should be as liable to prosecution as Nile and Johnston considered Henson should have been. Indeed, to be consistent, all the images should be seized by the police (as was the case with Henson) and classified or refused classification by *The Board*. That such action is not taken would indicate a tolerance of nudity at least for artistic purposes but raises questions, not of the subject's age, but that of the work itself. Does an image cease to be pornographic as it acquires longevity? Or was it never pornography in the first place?

In Chapter 11: Images of Minors, this thesis presents a different view and argues that the elements of pornography or child sexual abuse can be seen in the item and not in what one imagines. Nile and Johnson could have argued that the very existence of the Henson images means that the children must have been abused in the making of the images; they could have argued that the children's parents procured the children for the making of pornographic images, but they chose neither course. Their argument was the passing off of pornography as art, which comes down to a matter of opinion. The difficulty in presenting a view that runs counter to a puritanical opinion can be summed up in the words of a then serving member of the NSW Legislative Council, Dr

154 *NSW Crimes Amendment (Child Pornography and Abuse Material) Act* 2010, which took effect in April 2010. Conveniently the *new law* because unlike the old law it excludes artistic merit as a defence against alleged child sexual abuse/pornography images.

Arthur Chesterfield-Evans, who, said:

> Sadly, when someone tries to inject a sensible, objective point of view into the debate he is in danger of being labelled as a deviate and a pervert. There is almost a prohibition on speaking about any matters sexual, which says little about the maturity of our nation and our Parliament. It is like the Marxist attack mechanism of critical theory where political opponents use personal, outrageous, vicious, hateful and unending criticisms to destroy an opponent by criticising everything about the opposing person or political party with no requirement to offer a positive alternative. (NSWLC *Hansard,* October 26, 2004, p. 11092)

During that debate[155] Nile claimed that adult DVDs introduced by fellow MLC member Peter Breen, were "child pornography". Breen argued it was his understanding the subject had to be prepubescent in order for the material to be refused classification, but he would be guided by Nile "who obviously knows more about these things than I do" (*ibid*). Breen's understanding coincides with Interpol's as explained in Chapter 11: Images of Minors. An opportunity existed then (in 2004) to amend the old law as was done six years later, in 2010, when the *new law* was passed. Perhaps the law was considered adequate at the time because we observe from CBR04-05 that *The Board* had to examine a large amount of suspected child pornography captured by the police in Operation Auxin; more material than any year before, or since. Nevertheless there was some confusion because many of those charged with possession of proscribed material were acquitted. This might not be so surprising when set against a concurrent (2004) difference of opinion between Nile and Breen. While both agreed the DVDs were pornographic, they differed on the apparent age of the subject. To Breen, the subject appeared child-like but post pubescent "19 or 20", with which point Nile had no argument, and yet both thought the subject's apparent age was problematic. This confusion was to be compounded with the introduction of the *new law* in which "sexual posing" as well as "implied" appearance were added to the definition of child abuse material. (See Chapter 11: Images of Minors.)

155 *Classification (Publications, Films And Computer Games) Enforcement Amendment (Uniform Classification) Bill (NSW*). This is perhaps illustrative of Curry-Jansens' observation that "the powerful control the power to name". Jansen, 1991, p. 6.

CONFUSION AND IGNORANCE LEAD TO UNSOUND OPINION AND ACTION

If it is allowed that child abuse material is at once the most difficult and dominant feature of censorship, not only in Australia, but in many other countries, one would think it incumbent upon governments to explain, clearly (and perhaps repeatedly), what censorship is attempting to do, and why so. Sensation-seeking press stories have not been shown to improve public understanding of what is and what is not child abuse imagery and, therefore, what is actual child abuse. Sensation-seeking news reports sometimes appear to depend on a general public ignorance for a successful outcome to their revelations.

Sometimes this shaping or moulding of a public view leads to unfortunate results. For example, on August 10, 2000, *The Telegraph* (UK) ran a story headed: "Innocent families driven out as paedophile protest continues"; it was the "seventh consecutive night of vigilante action". The story continued: "The protesters admitted that they had no concrete evidence for most of the names on their hit list, conceding that it was compiled from word of mouth, information on the internet (*sic*), local knowledge and by eavesdropping on police radio messages." (The irony in all this is: "The list was drawn up in the wake of the News of the World's campaign to name child abusers."(A discredited UK newspaper.) On August, 30, 2000, *The Guardian* (UK) reported that "self-styled vigilantes attacked the home of a hospital paediatrician [. . .] Dr Yvette Cloete, a specialist registrar in paediatric medicine after apparently confusing her professional title with the word 'paedophile'."

Furthermore, confusion stems from a conflation of nudity and pornography; in denouncing Henson's photographs, Johnston did just that. Nile claimed he was able to separate pornography and art; Taylor and Quayle (2003 p. 32) include normal images of children at play as a type of child pornography. While each have their qualified reasons for their opinions, they do nothing to assist the general public in understanding, or of coming to grips with, child sexual abuse. Some examples of public ignorance of the problem include: "1 in 6 (16%) of respondents were unclear about whether or not sex between a 14 year old and an adult would constitute sexual abuse". "90% of adults surveyed believed that the community needs to be better informed about the problem of child abuse in Australia". "Unless they come face to face with the issue, collectively Australians rate petrol prices, public transport and roads as issues of greater concern than child abuse" (Tucci *et. al.*, 2010).

Becoming better informed could begin with governments explaining why they consider censorship of certain images necessary; the sort of opinion that emerges in court cases is instructive, but few among the general population read the evidence and judgments. The subject is not much talked about, except when news media make claims that they hope will add to their making. Whereas one often views and reads government advertising about the dangers of driving too fast, or over-indulging in alcohol, one never reads or views advertising that might help raise concern for child protection to a level above petrol prices.

> The agenda for our community—and the government which represents us—should be clear. The prevention of child abuse should be a priority. We have education campaigns which respond to problem gambling, speeding drivers, illicit drug use and drink-driving. Yet there has been no equivalent effort, at state or Federal level, to prevent child abuse (Saunders, B.J., Goddard, C., 2002. *The role of mass media in facilitating community education and child abuse prevention strategies.* Australian Institute of Family Studies).

While advertising would be commendable, one would argue that governments first remove ambiguity from their child protection laws. Meanwhile, *The Act* appears to concentrate on the wrongness of looking, which personal activity, one would argue is in itself harmless. Without a clear understanding of what the law intends, "everyone" is likely to make up their own minds and act as they see fit.

Considering *Salo* as an example, in a media release dated April 14, 2010, T*he Board's* Director, Donald McDonald stated: "*Salo* has had a complex and controversial classification history in Australia and a number of different versions of the film have been submitted for classification over a long period of time". The banning and unbanning of *Salo* over time (since 1974) would tend to support a conclusion that "everyone" has a view.

Paradoxically, it would seem, it is because everyone wants to be a censor that policymakers are provided with a reason for appointing a group of individuals to act for everyone. *The Board,* then, becomes "the knot that binds" Australians into a population that compromises (however grudgingly) on a set of classification standards

that reasonable adults, understanding that everyone cannot be pleased or satisfied all the time, ought to accept. This is reinforced by the outcomes of appeals to the RB that result in an almost 50-50 success/failure split, and also foreshadows the argument to be made in Chapter 12: Classification and Censorship Unbound that everyone has their own acceptance/rejection levels of arts-media, which, it is argued, is as far as arts-media censorship should go.

CHAPTER 8: THERE'S NO HARM IN LOOKING

> "Nobody can't blame a person for lookin'." (Steinbeck, J. *Of Mice and Men*, 1979 (1937), p.32.[156]

Note: Rather than stating *The Act's* terms: read, watch and hear, on every occasion it is more convenient to use look and looking as a collective reference for all three. Further, the information cited herein from the *Guidelines for the Classification of Films* 2008 is collectively referenced because the document is not paginated. Also, item numbering *e.g.* **Crime or Violence**. 1), is used instead of repeating the *Guidelines* version in full.

INTRODUCTORY

A warning: some quotes in this chapter, taken from two reports of inquiries into the effects of accessing pornography, are quite distressing. The reports are: *Final Report of the Attorney General's Commission on Pornography* (McManus, M. J., 1986) and *Pornography: The Longford Report*, Coronet Books/Hodder. Also known as the "Committee Investigating Pornography (UK)" Lord Longford, 1972. For simple referencing, the quotes are cited as Meese and Longford respectively.

This chapter is not intended to be a discourse on gaze. It is an examination of why policymakers allow individuals to access some arts-media and ban other material. The emphasis on the effects of pornography herein (perceived and real) is necessary to an understanding of the procensorite position, which, as will be seen, means more than "quibbling over the definition" (Kimmel, 2005, p. 83) and their arguments are supported with quantitative research.

In this chapter we examine the perceived harms that emanate from reading, watching and listening to arts-media material, especially that which is refused classification and attempt to discover why it is problematical. In sum, we are largely dealing with sexual depictions and a secondary concern respecting violent arts-media material that contravenes the *The Act's* perceived standards of morality, decency and propriety.

It is immediately observed, however, that *The Act* makes no direct mention of harm

156 Curley's wife after "Lennie's eyes moved down over her body" (page 32). The page number might not be the same in other editions.

and *NCC*(b) refers to it only in regard to the protection of minors, which is considered in the next chapter (Chapter 9: Minors and Scary Stuff). For adults, then, any perceived harms, not being defined, are implied. (If neither defined nor implied, what is censorship's purpose?) However, protection from offence is positively stated in *NCC*(c). The question, then, is: why nominate offence but only *imply* harm, when: "Harm, of course, is a more serious thing than mere offense" Feinberg, 1985, p. 36). Offence differs from harm in that it does not (usually) involve physical injury to others; also the risk of harm is, one might say, universal but the risk of offence is particular.[157] To illustrate: the risk of harm from putting a hand in a fire applies to everyone, whereas what might offend one might not offend another. As it applies to arts-media, one might consider, for example, *Piss Christ* and the Danish cartoons. This thesis argues that, if informed by sufficient labelling on arts media products, a consumer could avoid possible emotional harm. However, to cite Feinberg: "determining the reasonableness of emotional reactions [is] a dangerous power indeed in a democracy" (Feinberg, 1985, p. 35).

This chapter begins by first setting out which materials are acceptable and to or for whom, and which are unacceptable. The variety of harms associated with censorable arts-media materials are then identified. The harms listed are based on the instructions and inferences of *The Act*, the *NCC* and, particularly, the *Guidelines*, as were considered in: Chapter 5: Instructions to *The Board* and the Review Board. The source for the *Guidelines* comes from quality research submitted to the Federal government; for example, the *Guidelines* for *The Act* were drawn up following submissions from the public which were assessed with and assistance from Professor Peter Sheehan and language specialist Judith Bowen, both from the University of Queensland. (See John Dickie's evidence to the *Senate Select Committee On Community Standards Relevant To The Supply Of Services Utilising Electronic Technologies*. November 27, 1995.)[158]

157 Conceded: A severe shock from seeing something offensive can be physically harmful. Severe shock is a known cause of heart failure.

158 The *Guidelines* were amended in 2012 and became effective on January 1, 2013. See Chapter 5: Instructions to *The Board* and the Review Board

ACCEPTABLE MATERIAL

What follows under this subhead is extracted from part two of the *Guidelines for the Classification of Films* 2008, which was agreed to by the participating Ministers of each State and Territory. The *Guidelines*, as was always the case, form part of the *Classification (Publications, Films and Computer Games) Act* 1995 (Cth.).

To begin, the fact that *The Board*, instructed by the *Guidelines*, classifies R 18+ and X 18+ material means that policymakers are satisfied that adult individuals cannot be harmed, or likely to cause harm by accessing the material. It is what *is not* classified that is believed to be in some way, harmful. Yet even governments cannot agree on this because the States' policymakers deem X-18+ rated material to be harmful, and it is an offence to sell such material within the States' boundaries. Classification becomes even more complicated when one understands that the States cannot prevent individuals importing the material from the territories (the ACT and NT). [159] This inconsistency in censorship need not concern us here but it does indicate the conflicting views on which *The Board*, in a very real sense, must adjudicate.

From the *Guidelines*, it would appear that portrayals of sex and violence are, to a considerable degree, acceptable. Beginning with material classified **M**—which is not recommended for those under the age of 15— the *Guidelines* set the following standards.

- **Themes** are defined as social issues such as crime, suicide, drug and alcohol dependency, death, serious illness, family breakdown and racism. Themes may have a moderate sense of threat or menace, if justified by context.
- **Moderate violence** is permitted, if justified by context; this refers to both acts of violence and threats of violence.
- **Sexual violence** should be very limited and justified by context.
- **Sexual activity** should be discreetly implied, if justified by context.
- **Coarse language** may be used. Aggressive or strong coarse language should be infrequent and justified by context.
- **Drug use** should be justified by context.
- **Nudity** should be justified by context.

159 The Australian Constitution at s.92 requires trade within the commonwealth to be free.

There are no legal restrictions on access to M classified material it being not recommended for those below the age of 15. However, as will be seen in the chapter following, minors as young as 10 years of age, regularly view movies that contain the classifiable elements for M-rated material. Material classified M 15+ is a restricted category and may be legally viewed only if accompanied by an adult. This category allows for stronger sex and violence portrayals than does M rated material, but again, as will be seen in the chapter following, under-15s view this material unaccompanied by an adult.

R 18+ is the first of two classification categories expressly forbidden to minors; furthermore, it is accepted that some adults might find some of its classifiable elements offensive. Except for certain sexual activity, there are virtually no restrictions on content. For example, sexual activity may be realistically simulated, but actual sex is not allowed in this category. X 18+ allows depictions of real sexual activity between consenting adults. There are, however, a number of content restrictions, which are considered under the subhead following.

UNACCEPTABLE MATERIAL

Policymakers could, if they so desired, identify the risks of harm that arts-media poses for adults and include references to them in *The Act*, thus justifying their reasons for imposing the censorship. This is not done and the perceived harms might best be interpreted from the *Guidelines*, which state the following:

> No depiction of violence, sexual violence, sexualised violence or coercion is allowed in the [X 18+] category.
>
> It does not allow sexually assaultive language. Nor does it allow consensual depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers. Fetishes such as body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting are not permitted. [This paragraph is conveniently re-stated here: see p. 146, *supra*]
>
> As the category is restricted to activity between consenting adults, it does not permit any depictions of non-adult persons, including those aged 16 or 17, nor of adult persons who look like they are under 18

> years. Nor does it permit persons 18 years of age or over to be portrayed as minors.
>
> Such material is to be refused classification.
>
> Note: Films that exceed the R 18+ and X 18+classification categories will be Refused Classification.

The *Guidelines* continue, pointing to what is deemed to transgress acceptable parameters. Films will be refused classification if they include or contain any of the following:[160]

Crime or Violence. 1). Detailed instruction or promotion in matters of crime or violence. 2) Gratuitous, exploitative or offensive depictions of violence with a very high degree of impact or which are excessively frequent, prolonged or detailed. 3) Cruelty or real violence which are very detailed or which have a high impact. 4) Sexual violence.

Child sexual abuse. 1). The promotion or provision of instruction in paedophile activity. 2). Descriptions or depictions of child sexual abuse or any other exploitative or offensive descriptions or depictions involving a person who is, or appears to be, a child under 18 years.

Sex. 1) Depictions of practices such as bestiality. 2) Gratuitous, exploitative or offensive depictions of activity accompanied by fetishes or practices, which are offensive or abhorrent. 3) Incest fantasies or other fantasies which are offensive or abhorrent.

Drug use. 1). Detailed instruction in the use of proscribed drugs. 2). Material promoting or encouraging proscribed drug use.

HARMFUL PORTRAYALS OF SEX AND VIOLENCE

Most procensorite arguments relate to harm caused by exposure to pornography and to extreme, especially sexual, violence. Other than that (and child pornography, which is considered separately in Chapter 11: Images of Minors), very little else is regularly debated; specific examples of occasional protest being artistic works such as *Piss Christ* and tobacco use in movies.[161] Thus, we will concentrate here on the main subjects of

160 This adaptation is compressed but contains all the rules. I found it easier to follow this way.

161 http://www.nytimes.com/2007/10/01/business/media/01smoke.html "More Hollywood Studios Say 'No Smoking' "

arts-media censorship—portrayals of sex and violence—and look at both direct evidence and considered opinions that some material is, for a number of reasons, considered harmful to others and to the self. Under that heading, there would appear to be eight major reasons[162] for censoring arts-media material, they fall into two groups and may be summarised as follows:

Group 1: Direct harm to others.

Children are harmed in the production of child pornography.

Viewing child pornography leads to sexual abuse of children.

Women are harmed in the production of pornography.

Depictions of violence and sexual violence lead to similar real life activities.

Group 2: Indirect harm to others and harm to the self.

Exposure to violent and/or sexual images harms young people.

Pornography incites lust, which sins against God's law.

Pornography lowers the dignity of the human person

Pornography is harmful to interpersonal relationships.

Violent, offensive arts-media desensitise people against brutality.

However, it is not sufficient to merely assert that arts-media are harmful or offensive, since the same may be asserted of much that is not censored.[163] Thus, the case for art censorship must elaborate on the what, why and how of harm and/or offence. To do this, we must look at the reasons for art censorship by the effect exposure to arts-media has on others and the self (whether perceived or real). If we regroup the reasons given above by the effect on individuals, the focus for art censorship becomes clearer.

Group (a) Child protection: three of the eight reasons aim to protect children against violence and/or emotional harm.

Group (b) Risk of violence: three reasons suggest that real life violence follows exposure to depictions of violence.

Group (c) Moral/religious: two reasons.

162 There is one other reason: terrorist activity, which being a national security matter, is not considered here, see: *The Act*, s.9A.

163 As examples: a smoker inhaling tobacco smoke; an obese person eating fatty food both of these harm one's body. Olfactory senses are often "offended" in confined spaces such as elevators.

Group (d) Sexual activity: is included in seven of the eight reasons.

As can be seen from the re-grouping, the portrayal of sexual activity particularly as pornography, is, above all else, the main reason given to justify art censorship. To procensorites, pornography has a broad meaning generally, and for minors in particular, which latter is considered in Chapter 11: Images of Minors. Thus one may allow all the likely definitions, which, taken together make up the majority of sexually objectionable material. For example, some deem certain depictions of nakedness pornographic.[164] Procensorites most often refer to objectionable material as either harmful or offensive, sometimes both.

THE PERCEIVED HARMS CONSIDERED

Group (a) Child protection. The three harms in this group are, as set out above: (1) Children are harmed in the production of child abuse imagery, and viewing the images leads to sexual abuse of children. (2) Exposure to violent and/or sexual images harms young people. Item (2) is considered in Chapter 9: Minors and Scary Stuff.

Much research has been done on the connection between looking and offending, which is a thesis topic in itself: see, for example, Carr, 2006, and Taylor and Quayle, 2003. What we are considering here, we might call an associated harm that follows from showing existing sexual abuse images to children in an attempt to persuade them that adult-child sex is a natural, rather than an offensive, act. This is known as "grooming" the child although any sexual activity that takes place is not necessarily recorded, and so pornographic images might not be generated. Nevertheless, at Meese p. 138, a diagram illustrates the viewing-to-sexual-activity cycle that often leads to the making of child pornography. By outlawing the possession, as well as manufacture, of child sexual abuse images, it is hoped that children will be less likely to be sexually harmed as perpetrators are caught and, consequently, the market for this material diminishes. Both of these aspects of child sexual abuse are the subjects of a very extensive literature.

One needs look no further than the evidence before Meese to learn how widespread was (perhaps is) pornography-fed child sexual abuse. Chapter 16, of that report: "Victim Testimony", gives many examples of young people aged five to 16 being

164 The airing of the ABC two-part movie, *Paper Giants* (aired April 17 and 18, 2011), reminded me that *Cleo* magazine was called pornographic for, among other things, its centrefolds of naked men, but especially its sealed sections..

abused by pornography consumers (Meese, pp. 119-219). For example: "Michelle, 11, [was] sexually abused by her father and stepfather who were pornography consumers". Also: "Debbie, 13, [was] sexually abused by her father and stepfather who were pornography consumers" (Meese, p. 465). They are by no means the worst accounts of child sexual abuse as the following evidence from Meese illustrates.

> How does a three and a half year old girl learn to cope with gonorrhea of the throat and a painful vagina, stretched many times its normal size because her father used her for sexual gratification. This father was another pornography addict (Meese, p. 209).

Lanning and Burgess offer similar evidence, confirming the claim that when adults view pornography, any children in their care are at risk of sexual molestation, assault and rape. "In some cases their own parents took the pictures or made the children available for others to take the pictures" (Zillman and Bryant, 1989, p. 238). Those authors cite:

> Langevin and Curnoe (2004) [who] found that sex offenders against children (21%) were more likely to use pornography than rapists (8%) as part of their sexual offenses; offenders against unrelated children (26%) were more likely to use pornography than incest offenders (17%). Among the sex offenders against children who used pornography, approximately one half showed pornography to their victims during the offenses (*ibid*).

Furthermore, intrafamilial child sex abuse, was/is not confined to older family members who use pornography.

> Kaufman *et. al.* (1998) examined the impact of the offender–victim relationship on both adolescent and adult modus operandi. Specifically, they found that adolescent intrafamilial offenders adopted strategies

> consisting of exposing victims to pornography to gain their cooperation (Leclerc, *et. al.*, 2008).[165]

Eric Beauregard and Roxanne Lieb (2011) add an extra dimension to adolescent offending, again citing Kaufman *et. al.* (1998), thus: "findings show that younger offenders (adolescents) use a broader range of strategies as well as more violence than adult offenders to gain victims' compliance and maintain their silence following abuse". Beauregard and Lieb suggest that their finding can be explained by the special status of the older offender. For example, an offending father would use his authority as a child's parent to require compliance with his wishes, thus there was no need "to adopt coercive strategies as often as adolescent offenders" (cited in Wilson and Petersilia (eds.) p. 351). There is an example of this stratagem in Meese, where evidence was given by a woman whose father sexually abused her from age three.

> I have had my hands tied, my feet tied, my mouth taped to teach me big girls don't cry. He would tell me I was very fortunate to have a father that would teach me the facts of life. Many of the pictures he had were of women in bondage, with their hands tied, feet tied and their mouth taped (Meese, p. 207).

Article 3 of the United Nations Convention on the Rights of the Child (1989) requires that: "In all actions concerning children [. . .] the best interests of the child shall be a primary consideration". For this convention to be conscientiously administered, procensorites could argue that access to pornography should be denied to adults who, in whatever capacity, have the care of children. When one considers all the evidence that the use of pornographic images is often a part of child sexual abuse, the combination of pornography and child-care is not in the best interests of the child. It would be conceded, however, that as it is not reasonable to remove all children from

165 The reference is to Leclerc, B., Proulx, J., Beauregard, E., 2008. *Examining the modus operandi of sexual offenders against children and its practical implications*. Citing, Kaufman, K. L., Holmberg, J. K., Orts, K. A., McCrady, F. E., Rotzien, A. L., Daleiden, E. L., et al. 1998. *Factors influencing sexual offenders' modus operand*i: An examination of victim–offender relatedness and age. Child Maltreatment, 3, 349–361.

their carers, an amendment to existing child pornography law could make it an offence for child carers to access or possess pornography.[166]

Group (b) Risk of violence**.** Looking at the (very large) body of literature, one is struck by research that shows a connection between viewing violent scenes and real acts of violence, and which shows an increasing disregard for the suffering of others. This is not a recent discovery. Writing in 1961, Bandura *et. al.* (1961) referred to evidence from Miller and Dollard research 20 years earlier that indicated "imitative behaviour" following exposure to aggressive acts. In 1955, Himmelweit, *et al.* conducted a survey (sponsored by the Nuffield Foundation) into the effects of television on 10 to 14 year-old children in the UK. The results, published in 1958, indicated that viewing portrayals of violence leads to real-life violence (Himmelweit, H. T., Oppenheim, A. N., Vince, P., 1958.) Five years later, a further study confirmed the 1958 finding, reinforcing a hypothesis that cartoon violence produced as much aggressive behaviour as did violent acts portrayed by humans (Bandura, A., Ross, D., Ross, S. A., 1963). The theory that portrayed violence leads to real violence has continued to gain acceptance for the more than the half-century since the 1955 study—even if the violence is for good reason. "In fact," writes one researcher, "a recent metanalysis of 217 media studies documents that a justified portrayal of violence can enhance aggressive behavior among viewers". This applies to adults as well as children (Hamilton, J. T., 2000, p. 32). In short, violent, offensive arts-media has been found to desensitise people against brutality, which is summed up this way: ". . . exposure to extensive violence, either within a single [research] program or across several programs, produces decreased arousal and sensitivity to violence in both children and adults. This is the desensitization effect." (Hamilton, J. T., 2000, p. 34).

Imitative behaviour (copy-cat) crimes in real life are attributed to accessing violent movies, as researcher-journalist Tim Purtell discovered. In an article published in *Movie News* on January 27, 1995, Purtell lists a number of examples; here are some of them

166 To my limited knowledge this suggestion has not been made in so many words. However, Dr Janet Stanley of Monash University stated: "It is contended that national leadership is needed to fund a research agenda to oversee national-level legislative and policy development and a criminal justice response; and to drive the development of prevention and intervention measures, in order that the Internet is not used as a vehicle for the abuse of children. Given the dramatic growth in Internet usage in Australia, it is imperative that safeguards be put in place now, rather than in a decade's time, when it may well be too late".
http://www.aifs.gov.au/nch/pubs/issues/issues15/issues15.html

(paraphrased). *Natural Born Killers* (1994) triggered Nathan Martinez allegedly to shoot and kill his stepmother and half sister after seeing the movie at least six times. *A Clockwork Orange* (1971) Criminal Act: Young hoodlums rape and bludgeon a woman while one sings "*Singin' in the Rain*". Copycat Crime: British youths raped a young woman while singing "*Singin' in the Rain*". *Magnum Force* (1973) Criminal Act: A pimp forces a prostitute to drink *Drano*. Copycat Crime. William Andrews and Pierre Dale Selby forced five people to drink *Drano* during a holdup before shooting all five, killing three. *Taxi Driver* (1976) Criminal Act: A Vietnam vet plots to assassinate a presidential hopeful. Copycat Crime: John Hinckley shot President Ronald Reagan to impress *Taxi Driver* co-star Jodie Foster. *First Blood* (1982) Criminal Act: A Vietnam vet sets booby traps to escape from redneck cops. Copycat Crime: Richard Miller allegedly shot and killed his former boss, reportedly after seeing the movie approximately 20 times. A psychologist at Miller's trial testified, "He believes Rambo gives us approval to kill people." He was found not guilty by reason of insanity.[167] If portrayals of non-sexual violence can be confused with reality, as was found in the Himmelweit and subsequent studies (and supported by Purtell's examples), then, it could be argued, sexual violence would, likewise, confuse:

> . . . as, for instance, in the rape scene of *Straw Dogs* [1971] or the orgiastic hysteria in *The Devils* [1971]. This, we believe, is the logical outcome of liberationist theories that would abolish all forms of legal and other sanctions on entertainment—rape and hysteria, in whatever artistic guise, combine sexual and violent stimulatory techniques, and we submit that no one who cares for the future of the entertainment media will be likely to accept a diet of exploitative and contemptuous manipulation of a vast public. [. . .]
>
> The painful irony of the present situation is that the young—those who claim to be the most disturbed by the *public* violence they read about in the press—are precisely those who are, above all, being conditioned to accept, and to participate in, *private* violence such as we have

167 http://www.ew.com/ew/article/0,,295900,00.html (Purtell)
The Village Voice (New York) ran a similar story headed: "The Movies Made Me Do It" on May 4 1999 and gave several more examples. http://www.villagevoice.com/content/printVersion/215758

> described—the sadistic and brutal hardcore of pornography (Longford, p. 56).

In Western/Christian countries, the brutality of the early 1970s, that was given in evidence before Longford, continued through the 1980s (the Meese Commission began in May 1985) and into the present, for example, *Baise Moi* was banned for sexual violence in 2002.

> I am not seeking to impose my moral standards on the community but unless we take a stand against the clear contravention of guidelines that have been established for, and with the general consent of, the community, we will quickly slide into allowing anything and everything to appear on our television and film screens.
> Some say there would be no harm in this. I do not agree. There is enough evidence available to demonstrate the negative effects that extremely violent films have on certain individuals, especially those depicting graphic sexual violence (Trish Draper, *HRH*, May 30 2002, p. 2843).[168]

The testimony given in Meese indicates how sadistic and brutal pornography-fed sexual violence can be. For example:

> One woman before the Commission described how women and young girls were tortured and suffered permanent physical injuries to answer publisher demands for photographs depicting sado-masochistic abuse. When the torturer/photographer inquired of the publisher as to the types of depictions that would sell, the torturer/photographer was instructed to get similar existing publications and use the depictions for instruction. The torturer/photographer followed the publisher's instructions, tortured the women and girls accordingly, and then sold

168 Mrs Trish Draper, was Liberal MHR for Makin, SA, from 1996 to 2007. It would appear from her response to an interjection from Kelly Hoare, MHR for Charlton, NSW, that Draper had not seen the movie (*Baise Moi*).

> the photographs to the publisher. The photographs were included in magazines sold nationally in pornographic outlets (Meese, p. 205-6).

That account is by no means an exception; many other women gave evidence to the effect that they were injured and abused resulting from the abuser's exposure to sexual violence.

> Other studies have shown that people who have witnessed certain types of violent media (e.g., depictions of sexual violence) are more likely to report they would use violence in interpersonal situations (Malamuth and Check 1981). There is also evidence to suggest that being primed with aggressive thoughts often leads to aggressive acts. Carver *et al*. (1983) showed that men who were induced to have aggressive thoughts delivered the most intense electric shocks to other men. Other studies (*e.g*., Worchel, 1972) have shown similar results. (Hamilton, J. T., 2000, p. 20).

Carver's and Worchel's were laboratory tests, whereas Malamuth and Check undertook fieldwork. The violence-following-exposure theme in real life was expounded upon in Meese, where it was stated that:

> In an attempt to approximate a "real world" situation, Malamuth and Check (1981) had male and female subjects view full-length features as part of campus cinema showings. The films—*Swept Away* and *The Getaway*—represented sexually violent films whereas control subjects viewed a nonviolent feature film. Dependent measures were obtained after a week in a questionnaire presented as a separate sexual attitudes survey. These measures included rape myth acceptance measures
> [. . .] Results showed that exposure to sexual violence increased males subjects' acceptance of interpersonal violence against women (Meese, p. 273).

Overall, the results of the "real world" study generally coincided with the laboratory results. Meese, however, went further and concluded that negative effects were

demonstrated; the evidence showed harmful effects in all types of pornography whether simple nudity or sexually violent materials. The harmful effects included: 1. Acceptance of Rape Myths: 2. Degradation of Class/Status of Women: 3. Modeling Effect: (and damage to) 4. Family. 5. Society Furthermore, the Commission found moral, ethical and cultural harm (Meese, p. 290) which cited research by Check and Gulolen that revealed:

> . . . high-frequency pornography consumers were more accepting of rape myths and violence against women, more likely to endorse adversarial sex beliefs, reported a greater likelihood of raping and forcing women into unwanted sex acts, and were more sexually calloused than low-frequency pornography consumers. Thus, pornography consumption was associated with a number of antisocial attitudes and inclinations regarding sexual aggression [. . .] the sexual behavior of high-frequency pornography consumers was also more likely [to] be affected by exposure to pornography (in Zillman and Bryant, 1989, p. 175).

The day before his execution for murdering several women, Ted Bundy (Ted, below) asked to talk with the President of the Southern Baptist Church, the Rev. James C. Dobson. Bundy admitted to Dobson "for the record" that he killed "many women and girls", then Dobson asked: "How did it happen. Take me back."

> **Ted**: As a young boy of 12 or 13, I encountered, outside the home, in the local grocery and drug stores, softcore pornography [. . .] The most damaging kind of pornography—and I'm talking from hard, real, personal experience—is that that involves violence and sexual violence. The wedding of those two forces—as I know only too well—brings about behavior that is too terrible to describe.[169]

169 The quote is acknowledged, as requested through hyperlink
http://www.tldm.org/news6/bundy.htm Copyright © These Last Days Ministries, Inc. 1996 - 2005

Bundy acknowledged that pornography did not make him kill the women and girls, but that it "contributed and helped mold and shape the kinds of violent behavior" (*ibid).* This contributory factor is supported by Barongan and Hall, who reported: "participants who viewed the sexual-violent stimuli indeed felt sexually violent towards women, even having thoughts of raping and abusing women" (Barongan and Hall, 1995, p. 200). Other researchers link looking at images to the likelihood that viewers will act out what they see.

> In another important study, Mary Koss conducted a large national survey of over 6,000 college students selected by a probability sample of institutions of higher education (Koss, Gidycz, and Wisniewski, 1987). She found that college males who reported behavior that meets common legal definitions of rape were significantly more likely than college males who denied such behavior to be frequent readers of at least one of the following magazines: *Playboy, Penthouse, Chic, Club, Forum, Gallery, Genesis, Oui and Hustler* (Koss and Dinero, 1989).

Cooper-White (1995) takes Koss' point a stage further and estimates the numbers of readers. Chapter two of her book is headed *Images of Women*: Pornography and the Connection to Violence, in which she links magazines and rape.

> It is all the more frightening, then, to learn that the combined circulation of the top six "adult" magazines (*Playboy, Penthouse, Chic, Gallery, Oui* and *Hustler)* is 10,385,000. When counting pass-along readership this number grows to approximately 52,000,000. This still does not account for numerous smaller and underground publications. The circulation of just *Playboy* and *Penthouse* combined is twice that of *Newsweek* and *Time* combined (Cooper-White, 1995, p. 57).

Cooper-White precedes this calculation by observing the offhand, even indifferent or callous, attitude of adult magazine consumers to rape. "In a *Penthouse* cartoon, a rapist is shown leaving the scene of a rape, and a bruised, naked woman, presumably his victim, cries after him, "Encore"!" (Cooper-White,1995, p. 56).

Besides physical harm, procensorites argue that the production and dissemination of pornography causes emotional harm to women. However, as "pornography scholar" Diana Russell argues: "There's nothing wrong with arousal [. . .] The issue isn't about being against arousal, it's arousal to degrading material that is so destructive". She notes, "the mainstream media have readily adopted much that she would categorize as erotica—sex scenes in R rated movies" (Paul, 2005, p. 123).

Group (c) Moral/religious. The late New York University Professor, Irving Kristol [170] wrote on "Pornography, Obscenity, and the Case for Censorship" (chapter nine in Muller, 1997)[171]). He particularly stressed a social point in favour of censorship, which he put "as bluntly as possible: If you care for the quality of life in our American democracy, then you have to be for censorship" (p. 369). (Australia's procensorites would agree, see Nile on "sexploitation" below.) Kristol emphasized the personal moral reasons for censorship:

> [. . .] The sexual pleasure one gets from pornography and obscenity is autoerotic and infantile; put bluntly, it is a masturbatory exercise of the imagination. Now, people who masturbate do not get bored with masturbation, just as sadists do not get bored with sadism, and voyeurs do not get bored with voyeurism. [. . .] In other words, infantile sexuality is not only a permanent temptation for the adolescent or even the adult—it can quite easily become a permanent self-reinforcing neurosis (p. 366).
>
> [. . .] We have no problem in contrasting *repressive* laws governing alcohol and drugs and tobacco with laws *regulating* (*i.e*. discouraging the sale of) alcohol drugs and tobacco [. . .] We have not made the smoking of cigarettes a criminal offense [. . .] The idea of restricting individual freedom, in a liberal way, is not at all unfamiliar to us (p. 369).

170 My respects. Professor Kristol died during my researches for this thesis. September 18, 2009.

171 Kristol, I., in Muller, J. Z. ed. (1997), Conservatism: an anthology of social and political thought from David Hume to the present, Princeton University Press. Kristol, I. Pornography, obscenity, and the case for censorship.

While Kristol argued for censorship on a for-his-own-and-society's-good basis, Alan Sears, Legal Counsel, who acted as Executive Director to the Meese Commission, makes out a "legal case for restricting pornography". He claims: "The American people have a legal and constitutional right to stop the abuse of society and its individual members by the pornographers." His claim appears to rest on: "national surveys on public opinion [which] found that 72% of the American people demand a crackdown by the government on the problems of pornography".[172] Sears does, however, cite the alternative of private civil action, which was included in the Commission's findings:

> For example, citizens can organize pickets and economic boycotts against producers, distributors and retailers of pornographic materials. They can also engage in letter writing campaigns and media events designed to inform the public about the impact of pornographic materials on the community (Zillman and Bryant, 1989, p. 323-4).

Although none of Australia's censorship legislation refers specifically to the human spirit, sexual morality, decency and God appear to be the underlying reasons for much of Australia's and others' art censorship. In Australia, it could be fairly argued that the religious ideals favouring censorship are represented by the Reverend Fred Nile.

From his election to the Legislative Council of the New South Wales Parliament in 1981 until now (January 2015), Nile has been a consistent and persistent advocate for the abolition of arts-media material that runs counter to the teachings of the *Bible. "*I believe sincerely in the separation of church and state", Nile said, in his first speech (1981). "But I do not accept the separation of faith and state." Here, he implied that the State and Christianity are one and, therefore, the State must base its laws on Christian morality and ethics. He reinforced the point by quoting from Lord Devlin's book, *The Enforcement of Morals:* "Morals and religion are inextricably joined. The moral standards generally accepted in western civilizations being those belonging to Christianity." The State had already accepted the oneness of "faith and state" relating

172 In Zillman, D. and Bryant, J. (1989.) at page 323, Sears appears to err in stating that William French Smith, as Attorney-General, established the Commission. This is probably due to Meese having taken over from Smith immediately after President Reagan's decision to form the Commission.

to matters sexual, at least in part, because, upon taking his seat on the Council, Nile was "pleased to commend the Minister for Education [. . . for having] an obscene homosexual publication *Young, Gay and Proud* banned from all New South Wales State schools." (The quotes are from NSW Legislative Council *Hansard*, November 25, 1981.)

Ten years later, in May 1991, Nile adopted a tolerant Christian-neighbourly view of those he considered immoral. The following is part of his opening remarks at a conference on the sex industry in 1991.

> If Christians are to put away sin and prove to be neighbours to others, then as we care for their souls, we must not disregard their minds and bodies. Rather, we must marshal our arguments for serious rational and spiritual confrontation with evil, so that we may both counter the prevailing destructive impact of pornography and replace the attitudes which foster it with those loving, caring responses which alone can eliminate the hunger for such material . . . Actively countering such a [destructive] force, therefore, is positive. We need not apologise when we proclaim love not lust, and reject anything less than the best for men and women made in God's image (Nile, 1991).

In his 1991 "sexploitation" speech, Nile asserted that pornography, besides being anti-God is: anti-life, anti-relationship, anti-family, anti-human, anti-woman, anti-children, anti-sex, anti-social anti-environment, anti-community, anti-culture and anti-conscience.

> In particular, pornography is anti-relationship and thus anti-family. Through its obsession with sexual function, pornography carefully avoids any recognition of the value of family relationships. Marriage is ridiculed, promiscuity promoted, homosexual relationships glamorised and group sex endorsed. Sexuality is integrally related to the family unit and its use for non-relational gratification is wrong. One modest benefit arising from the flood of pornography is that, against the sharp alternative of the pornographic society, the value of biblical family ideals is even more clearly evident (*ibid*).

There are more seriously studied opinions than that immediately above, among them, Susan Griffin's work: *Pornography and Silence*, in which, like Harradine, she separates erotica from pornography thus: "We have even been used to calling pornographic art 'erotic' (Griffin, S., 1981, p. 1). Nevertheless, the force of Nile's arguments in favour of a Christian morality, have supported him to the extent that he has been at this writing, a continuously serving member of the NSW Legislative Council for more than 30 years; thus his assertions carry considerable weight among the voters of New South Wales.

The studies and opinions cited above, and many more like them, contain some well-reasoned pornography-causes-harm arguments, while others amount to no more than expressions of prejudice, which merely imagine some sort of risk.

> Our review of the empirical and rhetorical literature in the debate about pornography, and the empirical analysis of the aggregate relationships between pornography consumption and rape rates leads to one conclusion: Just as legalizing pornography has not, and, we believe, will not lead to an increase in rape rates, banning pornography will not lead to a reduction in rape rates. Efforts to ban pornography will continue, to be sure. But we are convinced that they will be motivated, as they have always been motivated, less by a concern for the welfare of women that by a moralistic fear of erotic expression. (Kimmel, 2005, p.123).

It could be argued that all the objections, aside from any personal prejudices, arise from either conflating cause and effect, or failing to understand the connection between cause and effect. Taking a simple example from Professor Kristol, who states: "Now, people who masturbate do not get bored with masturbation, just as sadists do not get bored with sadism, and voyeurs do not get bored with voyeurism." Here he conflates intrapersonal gratification, with extra-personal gratification; masturbation derives pleasure from the self, for the self, while the others derive pleasure from others than the self. Conceded, the one looks at images, but that is no more than looking at a football game; the pleasure is there to be enjoyed without interfering with the rights, liberties and privacy of the other. On the other side of the argument, Spring Shenoa Cooper, and Antony Santella (University of Sydney), claim "masturbation has many health benefits", also, "there are plenty of additional benefits from orgasms generally,

including reduced stress, reduced blood pressure, increased self-esteem, and reduced pain".[173]

BOARD MEMBERS IMMUNE TO HARM

If there were any causal effect from looking at, even the worst of the worst pornography, one would expect members of *The Board* to be among the most frequent, depraved and violent offenders.

The annual CBRs provide a source of reliable evidence that those who access banned arts-media material suffer no harm from looking at and listening to arts-media. *The Board* regularly and often examines material, such as child pornography and sexual violence that is refused classification, but we are here confronted with a paradox, thus: If the prevention of harm were the underlying reason for censorship, one would expect members of *The Board* to be harmed or to act harmfully, because on that reasoning, they could not examine the material and remain unaffected by it. This does not appear to be the case, even though many members serve terms of up to seven years (*The Act* s.51(3).[174]

In this respect, it is relevant to observe that although Australia's censorship system offers a counselling service to Board members should they become distressed by the duties they are required to undertake, there is no mention of harm in any of *The Board's* annual reports for the 16 years from 1997 to 2012.[175] The reports do, however, make mention of the "special purpose group sessions", at which members of *The Board* can talk about any difficulties they might have in examining some of the more unpleasant (to themselves) aspects of arts-media. Nevertheless, however daunted the members might feel about the grisly, gory or sexual elements of arts-media they are required to assess, it does not appear to cause members of *The Board* any reportable harm. For example, a typical annual report states: "[T]here were no accidents or dangerous occurrences arising out of the conduct of OFLC's undertakings" during the reporting period, in this case (CRB99-00, p. 62).

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173 http://theconversation.com/happy-news-masturbation-actually-has-health-benefits-16539

174 *The Act*, s.51 when read as a whole would suggest that even after seven years, an individual could be seconded as a "temporary member". Note the wording here: "(3) A member *must not hold office as a member* [emphasis added]. for a total of more than 7 years". S.50 provides for temporary members to be appointed for a maximum period of 3 months.

175 [*The Board*] provides a range of support facilities for staff in frequent contact with the more confronting material [. . .]These include [. . .] regular group debriefing sessions facilitated by a professional psychologist and individual confidential counselling. CBR04-05 Pt 2 p. 75).

Furthermore, members of *The Board* take up gainful employment after their terms of service expire. For example, in March 2012, Des Clark, who, during his seven years as The Board's Director, "viewed many images of child pornography and sexual violence", (Clark, D., 2005) was appointed to the board of the Melbourne Recital Centre.[176] Board member Lyn Townsend completed a Master of Arts degree during her term of service (see bibliography) and Sharon Stockwell now heads her own psychology consulting practice. This would seem to demonstrate that despite significant exposure to what are perceived as harmful materials, *Board* members are resilient and, after serving terms of from three to seven years, they become, once again, useful and contributing members of, rather than a danger to, society. It is worth observing further that very few would see as much legally unacceptable sexual and violent material as do members of *The Board* during seven years of service.

From the foregoing, it could be argued that not everyone who accesses censorable material is harmed, perhaps no more than being offended or disgusted by some of what is seen or heard; nor, it would appear, do those who examine the material cause harm to others. Indeed, as previously stated, by the current classification system, arts-media censorship presumes that at age 18, no individual will be harmed or cause harm by watching, reading or listening to, any material that is released by *The Board* for public consumption.

Members of parliament also view banned material but appear to remain unaffected by exposure to it. For example, on November 26, 2003, *The Age*, published an article "Chipp of the old block" in which Don Chipp reports:

> A group of MPs—almost all conservative Liberal Party members—regularly spent hours leafing through the most recently banned pornography, declaring disgust and insisting they owed it to their constituents to be informed.
>
> Chipp dubbed them the "dirty dozen". They loved viewing porn, he says.[177]

176 Appointed March 3 2012, *vide* Melbourne Recital Centre, Annual Report Part 2. Page 1.
177 Moore, 2012, notes "request after request" by MPs wanting access to banned books, p.348.

Others who appear unharmed by exposure to banned material include police and magistrates. Against this we must ask: If MPs, and members of *The Board* are not adversely affected by arts-media that is refused classification, who is likely to be adversely affected? The short answer is: it is "them"—the majority of Australians. Even so, many of "them" could qualify to become ""us", while "us" on retirement become "them", as is demonstrated under the two subheads immediately following.

THE THIRD PERSON EFFECT (TPE)

What is it about "them" that they are likely to be adversely affected by what they see, while *The Board* and other privileged individuals remain unaffected. Indeed, MPs and *The Board*, by reason of their functions, might be said to be a class above "them", for MPs as policymakers, instruct *The Board* (*via The Act)*, to assess all arts-media material. It is clear that the policymakers trust members of *The Board* to examine the worst as well as the best of arts-media without risk of its members acting in an anti-social way following exposure to the material. However, as policymakers in effect instruct *The Board*, one might suggest that there are three classes of people here: "me" the policymakers, "you" *The Board* and "them" the majority of Australians. We might call this censorship stratification of the population a variant on Davison's theory of the "third person effect" (TPE) (Davison, W. P., 1983) here.

> The third person effect is an individual's perception that a message will exert a stronger impact on others than on the self. The "third-person" term derives from the expectation that a message will not have its greatest influence on "me" (the grammatical first person), or "you" (the second person), but on "them"—the third persons (cited in Zillman and Bryant, 2002, p. 490).

In the variant of Davison's theory now proposed, it is assumed that certain arts-media has its greatest negative influence on the potential consumer ("them") but not on policymakers ("me") or *The Board* ("you"). *The Board*, not being influenced as "them", is required to refuse classification of any arts-media that falls short of the community standard and to classify the rest as appropriate for pre-determined classes of "them" (*e.g*. for under 15s or over 18s as required by the *Guidelines*). Plato had something of

this sort in mind for the general good governance of his *Republic* where, according to Sian Lewis: "The guiding principle of Plato's work is the oligarchic belief that the mass of the citizens are not fit to govern themselves, but require leadership from an intellectual and moral elite" (in Jones' *Encyclopedia of Censorship,* p. 1875).

Court (1972) echoes the Platonic argument when referring to "them" (his "the man in the street") as being incapable of making the right choices of arts-media and, in effect, the "me" and "you" must choose for "them". When first publishing his theory, Davison observed that the TPE "appears to be related to the phenomenon of censorship in general: the censor never admits to being influenced; it is others with 'more impressionable minds' who will be affected". In publishing his theory, Davison included: "Four small experiments that tend to support this hypothesis".

It is observed here that the TPE hypothesis pre-dates both of Australia's recent models of censorship (1985 and 1995), so one might have expected some consideration to be given to the TPE in 1995, while preparation was being made for the commencement of *The Act.* According to Gunther:

> There is plentiful empirical evidence of the tendency to perceive greater media influence on others than on the self. People have exhibited this phenomenon in judgments about the miniseries *Amerika* (Lasorsa, 1989), coverage of apartheid demonstrations Mutz, 19891), product advertising (Gunther & Thorson, 1992; Gunther & Mundy, 1993), political advertising (Rucinski & Salmon, 1990), defamatory news articles (Cohen, Mutz, Price & Gunther, 1988; Gunther, 1991) and broadcasts about Middle East conflict (Perloff, 1989; Vallone, Ross & Lepper, 1985) (Gunther, A.C., 1995, p. 27-8).

When reading the debates leading to the introduction of *The Act*, one seeks in vain for policymakers' references to the studies cited by Gunther; the general tenor of those debates concerned what should be included as censorable, and what would satisfy certain MPs' particular desires. For example, see Duthie, MHR for Wilmot, TAS: "I am a censorship man, am proud of it, and I intend to stay that way" (*HRH*, April 22, 1970).

WHEN "ME" AND "YOU" ARE "THEM"

When applying the TPE to art censorship some interesting anomalies arise. First, with some exceptions relating to their work, policymakers (the "me" here) must observe and obey *The Act*. Thus, *The Board* as "you" examines arts-media material before MPs are allowed to access it, in effect, an MP ceases to be "me" and, instead, becomes one of "them"—although they would likely claim the status of "you" as privileged consumers. Second, before a person is appointed to *The Board*, he or she is one of "them" but on appointment becomes one of "you" and is then deemed not adversely affected by "material which causes outrage or extreme disgust" (*Guidelines*) and also assumes the capacity to make the right choices of which he or she was deemed incapable as one of "them". Third, when a *Board* member has served a maximum of seven years, that person retires from being one of "you" and, once again, becomes one of "them". During the seven years as a member, that person might have seen considerably more banned (RC) material; more "sexual violence and sex more broadly" and "many images of child pornography" (Clark, D., 2005); more violence, blood and gore, than most of "them" would ever see, and yet remained impervious to the material's anti-social influences.[178]

However, as one of "them", that same person, after retirement from *The Board*, is deemed incapable of making the right choices and must rely, instead, for the advice and guidance of an elite corps (*The Board*) of which he or she was recently a member. Finally, if the real intention of *The Act* (s.48) is that *The Board* be broadly representative, then, all adult Australians, now "them", are potentially one of "you" and could also become one of "me".[179]

It appears, then, that while they hold their positions as policymakers and *Board* members, the "me" and "you", are deemed not influenced by whatever it is that adversely affects others of "more impressionable minds" but on vacating their positions, they are included, once again, among the impressionable "them". On this reasoning one can tentatively conclude that either Davison's hypothesis fails, or the policymakers' foundation upon which *The Act* is constructed is unsound.

178 My research found no *Board* member, was ever convicted of an offence against *The Act.*

179 MPs ("me") are not required to possess high levels of communications, or problem solving skills as are members of *The Board.*

COMPARING THE TPE AGAINST *THE ACT*

For the assumption that "they" will react negatively to be true, "me" and "you" must demonstrate that the community has proper cause for concern but the evidence would appear to work against such an assumption. For example, *Baise Moi* is a sexually violent movie; it was unclassified in the USA, where it was shown in cinemas for 15 months. During that time, it earned less than half-a-million dollars—not a very impressive result.[180]

At this writing (January 2015), the uncut version on DVD can be bought at Amazon for less than $US20. The movie is not highly rated by reviewers. Yet, for all its ready availability, there does not appear to be a negative, criminal response to viewing the movie; that some dislike or are ambivalent about sexual violence is not, one would think, a reason for banning the movie on the basis that it might cause others to act out what they see. The same may be said of *Salo* and *9 Songs*, two other movies named by Clark (2005) for sexual violence. However, even if as many as 5% of those who access arts-media cause harm resulting from that access (and no reliable evidence was found for such an assumption), one would argue that, when debating the introduction of *The Act* (and in making amendments to the *Guidelines* since), it would be part of the policymakers' work to discover why the 95% did not offend. That there is no evidence of any such consideration by policymakers tends to support the findings of McLeod *et. al*. which posited that "paternalistic attitudes" were the reasons for banning arts-media material.[181]

In 2001, McLeod, *et al*., reported on their investigations, which "related to two types of judgments that make up the third-person perception: media effects on others and effects on self"; they discovered: "Both models showed that paternalistic attitudes were the strongest predictor of support for censorship". A paternalistic attitude might even go so far as to suggest that *Board* members, being unaffected by what they see, proves the case for denying access to "them" who would, without censorship's constraints, be adversely affected. One would argue that if the policymakers honestly intended that adults could read, hear and see what they want (*NCC* (a)) there would be no need for (adult) restrictions, but as the restrictions appear to be prompted by a lack of sound

180 http://boxofficemojo.com/movies/?id=baise-moi.htm

181 McLeod, D. M., Detenber B. H., and Eveland, W P., Behind the Third-Person Effect: Differentiating Perceptual Processes for Self and Other. In Journal of Communication, Vol. 51 Issue 4, pages 678-695, 2006.

reasoning and research, one must question the underlying motive for arts-media censorship.

One could argue that "them" are no more or less likely to be harmed by exposure to arts-media, that are "me" or "you". Thus, all things considered, the paternalistic attitude believes it must draw a line somewhere between open access and restricted access for reasons other than the risk of harm. That line is represented by material that does not conform to the "standards of morality, decency and propriety generally accepted by reasonable adults" (*The Act* s.11(a)). It was argued in Chapter 6: Communities and Standards, that no such standards exist or have ever existed, but supposing they do exist (ALRC2012 at 11.58 and 11.59 believes they do) it could be argued that all three of *The Act* s.11's remaining, dependent clauses are paternalistic:

> (b) the literary, artistic or educational merit (if any) of the publication, film or computer game; and
> (c) the general character of the publication, film or computer game, including whether it is of a medical, legal or scientific character; and
> (d) the persons or class of persons to or amongst whom it is published or is intended or likely to be published (*The Act* s.11).

Potential consumers could choose to access the material judging by their own standards of acceptability, which might contrast sharply with an expert opinion. Consider, for example Patrick White's Nobel prize-winning work, *The Tree of Man*. Here is what an ABC arts producer had to say about the author in the programme: "Why Bother with Patrick White?"

> Patrick White was a great writer and an Australian. He is the only Australian writer yet to have won the Nobel Prize for literature. Many Australians though have not even heard of him and his work seems to have been pushed back into the unreachable shelves of bookcases [. . .] People still think Patrick White is a British writer and a boring one at that. (Radio National, 1988.)

Opinions on merit vary considerably but perhaps no more so than in these two quotes, regarding *The Tree of Man*. White's "London agent however could not understand the point of the book", while his American publisher sent a telegram: "Viking congratulates you on beautiful profoundly impressive fulfillment of expectations" (*ibid*). The reader and potential consumer would assess the merit of White's and any other arts-media item by their own standards.

The Act, s.11(c) has no relevance to the potential consumer, who knows better than anyone whether or not the general character of an item will appeal. Furthermore, if clause (d) is not paternalistic one wonders exactly what is meant by it. The potential consumer knows whether he or she is in the class of persons for whom the item is intended. For example, if the item were about Chinese cooking, it would hardly be of much interest to a person who disliked Chinese food. If the item were entirely pornographic, it would not appeal to the person who condemns pornography.

The same reasoning could be applied to the *NCC*, with the exception of "(b) minors should be protected from material likely to harm or disturb them", which is considered in Chapter 9: Minors and Scary Stuff. Adults should be able to read watch and hear what they want and informative labels would protect everyone from offence (*NCC* (c)) It was argued in Chapter 5: Instructions to *The Board* and the Review Board, that *NCC*(d)(i), regarding incitement to violence, was a matter for the police, not for *The Board*; (d)(ii) "a demeaning manner"—it was argued that only the subject can be demeaned and, unless the subject is coerced, it is not a matter for community concern.

This comparison of TPE and *The Act*, although necessarily limited, would tend to support McLeod that art censorship is predicated on paternalistic attitudes, especially where censorship, citing community concern, does not allow actors to consent to being depicted as demeaned. Furthermore, potential consumers make up their own minds about the remaining sub-clauses of s.11, which, one might argue, appear to be included as supplements to the supposed standards. That is to say, if an item of arts-media is of sufficient merit, is of an acceptable standard and designed for the appropriate class of people, it will be classified. Otherwise, it will be refused classification. It could be argued that we watch what we watch because the subject matter interests us and we allow ourselves time to watch instead of doing something else. What we watch as one of "them" might not be to everyone's taste—indeed, "me" and "you" might think it abhorrent—but provided "they" do no more than watch, there is a good argument for

allowing adults the unfettered freedom to watch whatsoever they choose and, instead, concentrate the scarce law enforcement resources on tracking down physically harmful wrong-doers.[182]

This last suggestion forms an important part of the argument set out in Chapter 12: Classification and Censorship Unbound.

HOW EFFECTIVE, IN REAL TERMS, IS *THE BOARD*?

To be effective, any plan must accomplish what it sets out to do. Basically, *The Act* aims to allow Australians to read, watch and hear whatsoever they choose provided the material conforms to or complies with community standards, and it is *The Board's* job to decide whether the material submitted to it meets the standards set out in *The Act* (s.11), the *NCC* and the *Guidelines*. Herein lies a difficulty for *The Board's* real effectiveness because it can only assess material that is submitted for classification and other material that is submitted through a law enforcement initiative. One of these initiatives involves items that have not been classified but, on discovery (by police or other appointed official), are "called in" for classification. At page 18, *supra*, an example was given of unclassified material (*i.e*. the TV series *Breaking Bad*) being downloaded from the Internet in substantial numbers. Most of the 500,000 downloads were made by Australians. However, if we ignore the "most of" and settle instead for 25%, there were 125,000 downloads of unclassified material in this instance alone, which represents more than the entire number of classified items covered by the 16-year period of this study, but that is only one item from one source of access to unclassified material.[183]

Also at page 18, *supra* Ms Tankard Reist is quoted as giving evidence to a Senate Committee that: "Distributors of pornography have shown complete contempt for the system . . . They have ignored hundreds and hundreds of call in notices". On the same page, ALRC2012 endorses Reist's assertion. While all of this reflects on the effectiveness of *The Board* itself, the following exchange at a Senate committee inquiry

182 An ABC radio news report included the following statement: "The Police Association secretary Greg Davies says Frankston [VIC] needs more than 100 extra officers, but the Government needs to boost police numbers across the board". February 15, 2010.
One often hears complaints about under-manning. Two years later (February 28, 2012), the *SMH* reported: "The president of the NSW Police Association, Scott Weber, said police welcomed the need for more police"—as recommended by a report into police activity and numbers.

183 An educated guess; average 7,500 classifications a year. The CBRs do not always give precise numbers.

is perhaps more revealing than any.

> **Senator BARNETT** —[. . .] what you have delivered to us today [October 19, 2009] verbally is confirmation that we have a system error where into the community is being put pornography, filth, offensive material, which you have called in with, in the case of 368 call ins, nil response and then you indicated 441 call ins and another nil response. This material is getting into the community with no comeback. We have a system error. At estimates in May I said to you and to the department that we have a system failure. Yet it seems that as at today we have not got our systems together and we are not on top of it because this filth is still out there in the community.
>
> **Mr D McDonald** —Firstly, as to the figures and the apparent growth in them it may be that I am more aggressive in my call in than some of my predecessors. Calling in is I think in the minds of some people an administrative pain in the neck, you have to put advertisements in the Commonwealth Gazette and all the rest of it. As far as I am concerned it is the only legal power available to me, so it may look as though it is ineffective, but I have no other way to start the process. Whether we have a system failure I think the 'we' has to be then viewed as all of the states and territories and the Commonwealth. Ours is not merely a cooperative legislation that we operate under, but it is legislation that requires cooperation at the enforcement end {. . .] but of course at the extreme end people who are producing material that is likely to be refused classification are therefore unlikely to willingly enter the system. (*SH* Senate Legal and Constitutional Affairs Legislation Committee, October 19, 2009, p. 93)

CENSORSHIP AND ADULTS: A SUMMARY

It has been demonstrated that arts-media censoring of adult material serves no useful purpose; material which *The Board* regularly classifies requires only adequate consumer labelling in order to prevent inadvertent exposure to images that would otherwise

offend; that which is refused classification and other material "likely to be refused classification" is easily accessed via the Internet. Thus, on the first point *The Board* is unnecessary and on the second point, impotent. Furthermore, there are no generally acceptable standards of morality, decency and propriety; individuals have their own standards and/or preferences. In any event, the fear of harm to the self or others (the apparent basis for censorship) has been shown to be unfounded. Statements such as was made by Draper, MHR in support of a ban on *Baise Moi* that: "There is enough evidence available to demonstrate the negative effects that extremely violent films have on certain individuals, especially those depicting graphic sexual violence" are not helpful. We might more effectively say of the licence to drive a motorised vehicle that there is enough evidence of the negative effects on certain individuals therefore driving should be banned for all. Draper, and others who make similar assertions argue against academically supported evidence that runs in exactly the opposite direction. Research by D'Amato (2006) demonstrated that in areas where more pornography was accessed, rape crimes were reduced, perhaps suggesting that pornography has a cathartic effect. Other researchers, having examined claims that pornography causes rape, conclude "that it is time to discard the hypothesis that pornography contributes to increased sexual assault behaviour" (Ferguson and Daley, 2009, p. 323) The authors further state:

> Considered together, the available data about pornography consumption and rape rates in the United States seem to rule out a causal relationship, at least with respect to pornography availability causing an increase in the incidence of rape. One could even argue that the available research and self-reported and official statistics might provide evidence for the reverse effect; the increasing availability of pornography appears to be associated with a decline in rape. Whatever the explanation is, the fact remains that crime in general, and rape specifically, has decreased substantially for the last 20 years. Concurrently, availability of pornography has increased steadily in the last 20 years (Ferguson and Daley, 2009, p. 328).

This work would argue that if a crime is committed, for whatever reason, it is the offender who should be sanctioned and not the public as a whole. In concluding his chapter: "The Question of Harm", Harry White states:

> To justify censorship for the stated purpose of securing individuals from harm is a bogus claim not only for the reason that there is no evidence that expression can produce actual harm, but because it is not to protect individuals from harm that judges, or preachers, or feminists seek to censor. What they seek is to protect from attack the particular moral system they value and which perhaps is the basis of their power and authority (White, 1997, p. 100).

This chapter tends to support White's contention, as does the information in Chapter 1: The Governance of Morals. Ultimately regarding arts-media entertainment, one would argue that what people do in private, provided they do no harm to others, should be of no more concern to "judges, or preachers, or feminists", or to the community at large than is saying one's prayers in private.[184]

184 It would be interesting to learn what the outcome might be if the claimed community concerns were extended to include praying to the devil, whether in public or in private. This can be very harmful, perhaps more so than indulging in the fetishes, images of which are banned. *The Australian* of August 3, 2009, reported a 16-year-old as having killed his father and seriously wounding his mother in response to instructions from Satan.

ARTS-MEDIA CENSORSHIP IN AUSTRALIA:

Doing The Right Thing The Wrong Way

PART 2: CENSORSHIP FOR MINORS

PREFACE TO PART 2

Whereas it would appear from all the foregoing that censorship for adults amounts no more than the governance of morals, censorship for minors is much more than that. Indeed, it could be argued that censorship for minors is the only remaining supportable reason for imposing arts-media censorship.

Minors are to be protected from (1) "material likely to harm or disturb them" *NCC*(b) and (2) the sexual predations of adults (child pornography and sexual abuse). Were it not for (2), it would be a relatively simple matter to decide if censorship for minors is doing the right thing the right way or the wrong way. However, as will be seen, censorship for minors cannot be considered without taking into account some aspects of minors' sex, sexuality and sexual activity. Censorship laws, against all the evidence, would appear to be in a state of denial that minors indulge in sex, even though "children" (those below the age of 18) may lawfully consent to sex. This official attitude leads to complexities in censorship relating to minors. For example, a 16-year-old may consent to sexual activity with others but it is an offence if that same individual makes images of the occasion (or even an imaginary situation); or, indeed, draws pictures or describes a sexual event in text.

Taken together, the three chapters in this part of the work are intended to demonstrate that not all minors are in need of either emotional or physical protection under the provisions of *The Act*. It is suggested that the definition of "child" image-making, distribution and possession purposes be amended to conform to Interpol's criteria (p. 285, infra). This, it is argued will afford protection for the vulnerable while freeing under-18-teens from the adverse consequences of a law that is designed to protect them.

Working with Interpol's criteria has two advantages: (1) Law enforcers are relieved of a Henson-like duty (p. 265, *infra*), therefore free to do other work, and (2) the courts, not *The Board* would decide the gravity of any child pornography or sexual abuse offence.

CHAPTER 9: MINORS AND SCARY STUFF[185]

> News headlines about children being brutalised and abused have contributed to the climate of anxiety that surrounds new technology and created a fiercely polarised debate in which panic and fear often drown out evidence. The resultant clamour distracts from the real issue and leads to children being cast as victims rather than participants in these new, interactive technologies (Byron, T., 2008, p. 1).

INTRODUCTORY

A minor in Australia (and many other countries) is a person who is less than 18 years of age. This chapter addresses the concerns of *NCC(*b) that "minors should be protected from material likely to harm or disturb them". Policymakers perceive that, broadly speaking, minors need protection from exposure to depictions of sex and strong violence; thus, material classified R 18+ and X 18+ is restricted to adults. There is also a concern regarding minors and sexual activity, which while not directly a matter for *The Board*, cannot be separated from access to arts-media. For example, while the age of consent is 16 or 17 depending on where in Australia sexual activity takes place, self- or mutually-taken sexual images of that activity are illegal, see the subhead **"SEXTING",** p. 253, *infra*. In respect of what minors read, watch and hear, it is argued that neither parents nor *The Board* can prevent them reading adult magazines, watching scary movies or listening to theme- and language-censorable musical recordings. Furthermore, the ease of access to adult material, such as adult-only DVDs, or pornography *via* the Internet, renders *The Board's* work ineffective in the first instance and irrelevant in the second.

For all that, the reliable assessment of arts-media material is important in assisting parents and guardians to make choices they consider appropriate for their charges, but this is no more so than, say, *Choice Magazine* (April 2008) comparing laundry liquid detergents, to assist householders in deciding which of the brands is best for their circumstances. The difference between the two advisory bodies is that *Choice Magazine* represents the results of reliably tested research whereas *The Board* classifies material

185 The title was inspired by the website http://www.scaryforkids.com/, which encourages minors to access scary pictures, movies, games and stories.

according the *Guidelines* put in place by policymakers, who in turn depend on opinions that, even if reliably tested, are countered by similarly reliable evidence that reflects the opposite view.

Much of what is restricted contains portrayals and depictions of sexual activity, suggesting that minors would be harmed or disturbed if exposed to such material; that exposure to it leads to the "stimulation of premature sexual activity" (Benedek and Brown, 1999, p. 238). Other research indicates that minors need no encouragement to indulge in sexual activity. See, for example, Marjorie Heins (2007). "More than a million teen pregnancies annually and 600,000 live births [USA]. (p. 141). Heins argues this is due to the lack of information, a result of censorship. Minors "need to access information precisely because they are in the process of becoming functioning members of society" (p. 12).

Similarly, research that indicates exposure to violence leads to aggressive behaviour, is challenged by other research that disagrees. The reason for restricting access is, if one may borrow from Foucault, "to act upon the possibilities of action" of minors; and more directly: "To govern, in this sense, is to structure the possible field of action" of minors. (cited in Hunt, A., 2009, p.4). Indeed, the Australian Institute of Family Studies (AIFS) advice refers only to consensual "sexual acts with another person", tacitly conceding underage auto-sexual activity.

As will be shown, it is difficult to structure the actions of minors with regard to accessing arts-media that might be sexually stimulating, or even disturbing to them. We examine evidence from, among others, the qualitative research by Worth et al, (2008), and quantitative research by Byron (2008) and Sauers (2007). Based on the findings from those researches and that of others, it is argued that the classification system, while useful in advising the content of arts-media, does nothing to prevent minors accessing, or being exposed to, restricted and even refused classification material.

The exposure of minors to arts-media material is a huge subject, as is the matter of minors and the effects of violence in the media, but our first purpose here is limited to considering whether *NCC*(b) has any real meaning other than requiring *The Board* to take those matters into consideration when making classification decisions. Our second purpose considers the relationship between arts-media and minors' sexual activity.

***NCC* "(B) MINORS SHOULD BE PROTECTED FROM MATERIAL LIKELY TO HARM OR DISTURB THEM".**

> [My son was] 11 and he was a mad Simpsons fan [. . .] He was sitting at home saying, 'I want to watch *The Simpsons*. I cannot watch them because it is regulated so I can't watch it until 7.30, but I can watch it on another channel over there now or I can go and download it on the internet [*sic*].' Children have been driving the changes, not the other way around, in all of this (Julie Flynn, CEO, Free TV Australia. Evidence to the Senate Legal And Constitutional Affairs Legislation Committee April 7, 2011).

"In all of this", Flynn was referring to changes to *The Act* that her industry considered necessary because children were deciding for themselves what they wanted to watch and when; the inconsistencies in the classification system placed different restrictions on the same item, depending on the means of delivery (delivery platform). Thus, *The Simpsons* was "regulated" on free-to-air TV by programmer's choice, yet still in children's time (4pm to 8.30pm); this was not *The Board's* doing.[186] However, videotapes, DVDs and the Internet were available at any time. *The Board's* website discloses that 115 versions of *The Simpsons* were classified between October 24, 1991 and October 22, 2013; most were DVDs. (Search "*The Simpsons*" at http://www.classification.gov.au)

Flynn's son would appear representative of many the 1,927 respondents to a 2012 survey of 10- and 11-year old children, which was undertaken by the AIFS. The survey into how children were engaged during the four hours immediately after school, revealed that:

> TV viewing was the most common activity in which children were engaged after school, with 59% [n=1136] of all children reported spending some time in front of the TV. The figure was highest for

[186] Briefly: TV broadcasters were/are required to allot at least 390 hours a year to children's programming (7.5 hours a week). Programming was to occur in a "C band" on weekdays between 7am and 8.30am and between 4pm and 8.30pm. At weekends "C band was 7am to 8.30pm. Therefore, broadcasters could choose any of these times in which to comply with the Children's Television Standard 2009 provided they allotted the required minimum of 390 house a year. (*vide*, *Broadcasting Services Act 1992* (Cth) as amended and updated to January 3, 2012.

> children who were supervised by other adults (63%) [n=716] and those who were unsupervised at home (61%) [n=693] (The Longitudinal Study of Australian Children, Annual statistical report 2012. Australian Institute of Family Studies, p. 89).[187]

The authors of that study reported that 545 of the 1,136 (48%) watched TV while unsupervised elsewhere than at home but not in school. Also, "29% [n=557] of all children played computer games after school", of whom 31% [n=173] were unsupervised at home and 30% [n=167] were unsupervised elsewhere but not in school (ibid). Thus, at one time or another, during the four-hour period immediately after school, many of the 1,927 children surveyed, were unsupervised while watching TV and/or playing computer games.[188]

It would appear that the children were not surveyed for time spent on the Internet. It will be shown later that a large percentage of children deliberately access minor-restricted material and that they do so by whatever delivery platform is available to them. Furthermore, depictions of sexual activity and violence are the two most restricted subjects, and these appear to be the most commonly accessed.

PARENTAL AWARENESS, TOLERANCE, DISAPPROVAL AND CONTROL

Flynn appears to have been aware that her son made his own decision regarding *The Simpsons* but she did not disapprove; not all parents are so tolerant. Parents have a range of reactions to what their children want to read, watch and hear, irrespective of how the material is classified. For example, a survey of 2,000 adults disclosed that:

> . . . one in five parents has scrapped old classics such as *Snow White and the Seven Dwarves* and *Rapunzel* in favour of more modern books.
> One third of parents said their children have been left in tears after hearing the gruesome details of *Little Red Riding Hood*.

187 This was a snapshot of 10- and 11-year-olds' activity during the four-hour period immediately post-school, the important factor being "some time in front of the TV", meaning the subject children usually took part in a number of activities within the period. Hence, the percentages do not sum.

188 Because of the way in which the data were assembled in the report's Table 6.6, (p. 89) I was unable to deduce the exact number of individuals. What can be extrapolated from the data is, there were 1,693 instances of children watching TV and/or playing computer games, of which 1,574 (93%) instances were unsupervised during the four-hour period.

> And nearly half of mothers and fathers refuse to read *Rumplestiltskin* to their kids as the themes of the story are kidnapping and execution. Similarly, *Goldilocks and the Three Bears* was also a tale likely to be left on the book shelf as parents felt it condones stealing (*The Telegraph* (UK) February 12, 2012)

As was shown in Chapter 7: Everyone Wants to be a Censor, parents in the USA, appear to be vigilant controllers of their children's reading. From this and *The Telegraph* sort of evidence it would appear that parents allow or prevent access to arts-media as they see fit for their own children. However, as will be seen in the results from Worth's study, they are not quite so successful in controlling access to movies, see the subhead: **A RIGOROUS STUDY QUESTIONS THE RATINGS SYSTEM,** *infra.*

A substantial amount of research has been undertaken on the effects at differing conclusions, for example Professor Joanne Cantor's research (1998) indicates that harm done in childhood can persist for many years. Drawing on her own experience, Cantor writes: " I remember the terror I felt every time I saw the Wicked Witch of the West in *The Wizard of OZ* and how uneasy listening to Peter and the Wolf on my record player made me feel." (Cantor 1998, p. 7) Opposing that view, Gerard Jones, in *Killing Monsters* (2002) believes children need fantasy and make believe violence in order to overcome their fears and prevent harmful effects. Benedek and Brown (1999) carried out a study, which title speaks for itself: *No excuses: televised pornography harms children.* However, that authors' disclaimer is revealing: "Much more research is clearly needed on this topic. Because of the ethical and procedural problems surrounding research on children exposed to pornography, ideal research designs may never be possible." Karen Sternheimer (2003) asserts: *It's not the Media* that harms children. Sauers suggests that 97% of minors have seen pornography by the time they are 15 (Sauers, 2007, p. 80). This argument might be like many other conflicting views where the truth lies somewhere in between. It is possible that Hara Estroff Marano (2008) found the middle ground in her book, *A Nation of Wimps*: The High Cost of Invasive Parenting, in which she holds that children need to be protected but not over-protected. This raises the question of where one would draw a line between appropriate constraint or restraint and over-protection. For example, Elizabeth Esther, mother of five, columnist for the *Orange County Register,* and other print media makes this point.

> I've banned *Victoria's Secret* catalogs from my home. Not because I dislike lingerie but because I enforce a zero porn policy. And maybe that sounds harsh but that's exactly what a *Victoria's Secret* catalog is: soft-porn.
>
> It's difficult enough at the mall—my sons know to avert their eyes every time we pass that store—without bringing it home. I know I'm not alone. I know there are thousands (perhaps millions?) of mothers out there trying to raise their children with a sense of courtesy, respect and morality. I'm sorry, *Victoria's Secret*, but I will not allow blatantly objectified images to shape my child's sexuality.[189]

Magazines aside, it could be argued that her sons "know to avert their eyes every time we pass that store" is being a little over-protective in a world where at school, knowledge is disseminated in and out of the classroom. Nevertheless, one would accept that it is the mother's prerogative to allow or disallow what she considers inappropriate for her children. This touches on the right of one person to control the use of another's eyes; a point that was considered in Chapter 8: There's No Harm In Looking.

ARTS-MEDIA DEEMED UNSUITABLE FOR MINORS

When one comes right down to it, *NCC*(b)'s attempt to protect minors from exposure to material considered unsuitable for them, although well-intentioned, depends on the vigilance of parents and guardians. *The Board* can only advise; indeed, it makes no claim other than that it offers advice and, in effect, recognises three groupings of individuals by age:

> 1). Under-15. G classification material is suitable for everyone. PG and M are not recommended for children under 15, although parental discretion is suggested. Those in this age group may not legally access MA 15+ material except in the company of an adult. Material classified R 18+ and X 18+ may not be lawfully accessed.

189 http://www.elizabethesther.com/2010/01/why-ive-banned-victorias-secret-catalogs-from-my-home.html

> 2). From 15 to 18. Those in this grouping may lawfully access G, PG, M and MA 15+. Material classified R 18+ and X 18+ may not be lawfully accessed.
> 3). Over-18 *i.e.* adult. This grouping may lawfully access any and all material classified by *The Board* (see http://www.classification.gov.au for all these points.

From 1), it would appear that anyone of any age could lawfully view a movie classified M 15+ that "may contain classifiable elements such as sex scenes and drug use that are strong in impact" (*ibid*) provided the parents or guardians so approve. Thus, a child of five or any other aged under 14, could lawfully view, for example, *Curse of Chucky* that contains "strong horror, violence, blood and gore" *(The Board's* consumer advice). There is no latitude or discretion for parents and guardians in respect of material classified R 18+ and X 18+, which is restricted to adults only; the former "may contain classifiable elements such as sex scenes and drug use that are high in impact " and the latter "shows actual sexual intercourse and other sexual activity between consenting adults" *(ibid).*

It would appear, then, that minors may be lawfully allowed to access material that contains "strong horror, violence, blood and gore", sex scenes and drug scenes that are "strong in impact" but not those "high in impact". Sometimes, it is difficult to understand how *The Board,* via the classification guidelines, decides those levels of impact. For example, while members of *The Board* are trained to distinguish between strong and high impact material as set down in the *Guidelines* even they cannot agree, as this example from a Senate Select Committee hearing would indicate.

> **MR DICKIE —** Disclosure was one [movie] which was given an R classification on a 6 to 5 vote of the board.
> **SENATOR TIERNEY —** As opposed to MA.
> **MR DICKIE —** Yes. I think that that was a good borderline case. For all sorts of different reasons it just scraped into R. Another one on at the moment, Seven, is, in our view, clearly within R and clearly a film to be viewed by people aged 18 and over.

> **SENATOR TIERNEY** — It absolutely terrified my 19-year old daughter. I have not yet seen it but, on that basis, you have made me curious so I might go and see it. (*SH*, November 27, 1995).[190]

In that example, because *Disclosure* "just scraped into R" as "opposed to MA", under-18s were denied access to it, and yet, a 19-year-old was "absolutely terrified" by it—and her father had "not yet seen it". Does this not suggest that the effect of a movie depends on tolerance of its content rather than on the individual's age?

Consider the generality of classifications: PG and M classified materials are not recommended for those below 15 years of age but they may access the material with parental approval. Then, for reasons that are not clear, at age 15 minors may lawfully watch everything except R 18+ and X 18+ that was directly denied them one year earlier. The lawful age-limit restrictions are further complicated when one considers the *Children's Television Standard* 2009 (CTS), which forms part of the *Broadcasting Services Act* 1992 (Cth.): "children means people younger than 14 years of age" (CTS 5 Definitions, p. 5). Thus, 14-year-olds can watch whatever is presented on television during adult viewing times, which, one would suggest, could include adult-only movies such as are aired on SBS.[191]

This difficulty arises (one continues to argue) from legislating by age rather than by consequences. That is to say, the purpose of laws relating to young people is to prevent harm to themselves and/or to others. On reflection, there would appear to be something odd about a small group of adults (*The Board*) watching a movie and then deciding that none of Australia's under-15s should view it—simply because they are under 15—in case they are harmed by the experience (Foucault's possibility of action). One would further argue that the possibility of harm depends on the individual's tolerance to exposure of sex and/or violent scenes. (It begs the question that if a 19-year old was "absolutely terrified", we should make the cut-off point 20. Then, what if a 20- or 25-year-old were also terrified?[192])

From all this, we have at least two divisions within the age group identified as

190 John Dickie was then Director of the OFLC and proposed new Guidelines were being considered by the Senate Select Committee On Community Standards Relevant To The Supply Of Services Utilising Electronic Technologies.

191 This is an example of age of child as "child" being a flexible commodity.

192 This point is argued in Chapter 10: Children and Adolescents (*infra*).

children for the purpose of censorship law: those under 15 and those from 15 to 18. The law supposes that the second group is unlikely to be harmed or disturbed by arts-media that adversely affects the first group. Of course, one could say the same for the almost-15s as for the almost-18s; one does not become suddenly mature enough to see M rated movies unsupervised on attaining one's 15th birthday. The question, then, is how are young people harmed or disturbed that is different from harm or disturbance in any other facet or part of their young lives?

WHAT SORT OF HARM?

Newspapers are not presented to *The Board* for classifying and yet they are, sometimes, believed to harm and disturb young people. In December 2010, *The Guardian* (UK).[193] reported that Norwegian child psychologist:

> **Professor Magne Raundalen** told a seminar organised by the Irish press council of Ireland on children and the media that "children can perceive frightening front pages in a way that is harmful to them."
>
> Raundalen, of the Centre for Crisis Psychology in Bergen, said newspapers were made for adults by adults, but the front page was read by children. They were frightened by startling headlines, particularly those involving child death, he said. Children who had suffered traumas in their lives could be particularly susceptible to long-term reactions "after seeing only one frightening front page".
>
> Raundalen claimed that front page headlines which scared children could be in breach of article 17 of the UN convention, which recognises the effects of the media on children (*The Guardian*, December 7, 2010)

If Professor Raundalen is right, consistency would require newspapers to be classified, perhaps even more so than other materials because they are all but impossible for young people to avoid.[194]

Whatever the perceived harm to children, it more often than not comes down to accidental exposure to pornography and language, which is, perhaps, why mass print

193 http://www.guardian.co.uk/media/greenslade/2010/dec/07/children-newspapers.

194 The opposing argument would suggest that because children are so unavoidably exposed, those in authority should do even more to prevent avoidable exposure.

media's harmful effects are of little or no concern.[195] On this point Benedek and Brown (1999) list some forms of harm but they do no more than suggest the *possibility* of harm.

> The main possible effects of televised pornography that must concern us as clinicians, educators, and parents are modeling and imitation of language heard and behaviors observed in televised pornography; negative interference with children's normal sexual development; emotional reactions such as nightmares and feelings of anxiety, guilt, confusion, and/or shame; stimulation of premature sexual activity; development of unrealistic, misleading, and/or harmful attitudes toward sex and adult male-female relationships; and undermining of family values with resultant conflict between parents and children (Benedek and Brown, 1999, p. 238).

The authors do not mention violence but the mention of undermining family values in this context would appear selective since many other youthful activities are likely to result in conflict, perhaps more harmful than the result of watching pornography. If the researchers mean by "undermining family values with resultant conflict" that the children are at fault, it is an unfortunate assumption that arguably contains an undercurrent of Christian religiosity. Research indicates that "serious arguments with parents" lead to minors deliberately self-harming (DSH) (de Leo and Heller, 2004, p.141). One can understand that parents could have sound reasons for objecting to their children accessing pornography; therefore, they could explain those reasons and try to convince rather than attempt to coerce. Tori DeAngelis, writing in the *American Psychological Association Journal*, cites:

> Jochen Peter, PhD, a communications researcher at the University of Amsterdam [. . .["When teenagers are old enough to be interested in sex, they are competent enough to find ways to access Internet porn" [. . .] "our research is motivated by educating young people rather than protecting them", he says. (November, 2007, Vol 38. No. 10, p. 50).

195 The sheer quantity and daily production militates against official censorship anyway.

SEX AND HARM

Regarding "stimulation of premature sexual activity": Is the reader to understand that young people are not naturally sexually stimulated from an early age? While Benedek and Brown would appear to answer in the affirmative, others offer evidence to the contrary.

> Adults are not inclined to believe that children are sexual or that they should be sexual in any of their behaviors. Although it is difficult to generalize in a pluralistic society, there is typically no permission for normal child sexual experiences. [. . .] Confusing societal expectations contribute to dysfunctional sexual attitudes and behaviors (Ryan, *et. al.*, 2010, p. 31)

According to Ryan, *et. al.*, "bodily exploration and autoeroticism" is evident "in the first year of life". Those authors continue, on the same page, to make several important points:

> (1) during the first year of life, infants explore all parts of their bodies, including the genitals.
> (2) many boys begin genital play at six or seven months
> (3) many girls begin genital play by ten or eleven months
> (4) genital play is often discouraged by caregivers
> (5) genital play subsides with repressive or punitive messages from caregivers (Ryan, *et. al.*, 2010, p. 36).

Desmond Morris offers a natural explanation for childhood sexuality and takes us right back, almost to the moment of conception:

> If we are to understand the many curious and often strongly inhibited ways in which we make physical contact with one another as adults, then we must start by returning to our earliest beginnings, when we were no more than embryos inside our mothers' bodies. It is the intimacies of the womb, which we hardly ever consider, that will help us to understand the intimacies of childhood, which we tend to ignore

> because we take them so much for granted, and it is the intimacies of childhood, re-examined and seen afresh, that will help us to explain the intimacies of adult life, which so often confuse, puzzle and even embarrass us (Morris, 1997 (1971), p 14).

What psychologists call "premature" is "normal" to zoologists and anthropologists. Morris' inhibitions and puzzles, especially if they relate to sex, are taught; they do not evolve naturally (*vide Ryan et. al.,* previous page). It would appear, then, that in one form or another, adults exert preventive (as opposed to instructive) control over the individual's natural sexuality from birth until 18—not only interpersonally, but via access to arts-media, vicariously. On this latter, it would appear that policymakers' "harm to minors" extends to masturbation. If so, Ryan *et. al.* have a different view; if adults were to take an instructive position they might find, for example, that: "Teaching children rules FOR masturbating instead of all the prohibitions is not hard to do" (presumably the authors have erotic rather than explicit images in mind) (Ryan, *et. al.,* p. 395). On this reasoning it could be argued that it is a form of child abuse for parents and others to impose their sexual views on natural child sexuality. Continuing that line of reasoning, one could further argue that the millions of children who were told the wrongs of masturbation were sexually abused. See the following quote where masturbation is considered "immoral sexual conduct". For Catholics, masturbation is a mortal sin[196] and to die in that state is to be condemned to "the eternal death of hell" (Catechism number 1861). Against this sort of attitude, one could argue that children being taught masturbation is sinful and, in some circumstances, punishable by eternal hell, is both orgasm control and emotional cruelty. [197]

> The Church has consistently taught that parents are the principal and first educators of their children (Catechism, no. 1653). According to natural law and the Church's moral teachings, schools must be subservient to parents, particularly in the area of sex education. School programs must not violate a child's innocence. Even with adolescents, classroom programs must not include the more intimate aspects of

196 One of a long list of mortal sins against the sixth commandment: Thou shalt not commit adultery.
197 I viewed sex-fetish movie clips that included "orgasm control"—an anti-masturbation variety of bondage, discipline, sadism, masochism (BDSM), which "fetish" is banned under the *Guidelines.*

> sexual information [. . .] It should be emphasized that a chastity education program does not have to legitimize immoral sexual conduct, such as masturbation.[198]

Like Ryan, Phil Rich (2002) argues against catholic teaching. He posits that:

> . . . sexual development and sexual play are natural and healthy processes in children, from toddlers through childhood and into adolescence.
> [. . .] children touch, fondle, and rub their own genitals throughout childhood, but they begin to more clearly masturbate during this time, developing clearer patterns into and beyond puberty (Rich, 2002, p.27).

The sorts of harm that are attributed to arts-media appear to be predominantly associated with exposure to sexual imagery in one form or another. Pornography researcher Jerry Ropelato offers these details for the USA: The average age of first exposure to pornography is 11; 80% of 15-17 year olds have multiple hard-core exposures. A total of 90% of children aged 8-16 have viewed pornography online (most while doing homework[199]

Ropelato's statistics on this and several other analyses of pornography appear impressive but as he offers no substantive supporting evidence, the figures must be viewed with caution.[200] Nevertheless, it is not inconceivable that a large number of minors seek distractions from homework that could include visiting pornography sites on the Internet. According to Sauers (2007, p. 80) a great majority of Australia's minors (97%) has seen pornography by age 15. Then, if Australia's youthful population is as distracted (or nearly) during homework time as are their USA counterparts, it only adds to the argument that *The Board's* restrictions are ineffective. Against that, as Sauers discovered, that 75% girls and 88% boys "thought sexy films, music or advertising" either always or sometimes encouraged them to have sex. Although pornography was not specifically mentioned in that context, it could be argued that looking at sex on the Internet would offer similar encouragement.

198 http://www.cuf.org/2004/04/chastity-begins-at-home-parental-rights-and-chastity-education/
199 http://internet-filter-review.toptenreviews.com/internet-pornography-statistics-pg5.html
200 Ropelato cites TV and Radio networks as his sources but they, in turn, offer no tested evidence

However, Judith Levine (2003, pp. 55-58) argues that: "sex is not *ipso facto* harmful to minors; and America's drive to protect kids from sex is protecting them from nothing. Instead, it is often harming them" (*ibid*. xxxiv). These assertions appear to find support in statistics presented in Chapter 10: Children and Adolescents, under the subhead: **THE SEXUALLY ACTIVE CHILD**. One might argue, too, on the strength of Joan Sauers research (next chapter) that *The Act's* drive, to protect Australian minors (through *The Board*), even if effective, is protecting them from nothing. The real need is for protection from online predators, over which activity, *The Board* has no control.

A RIGOROUS STUDY QUESTIONS THE RATINGS SYSTEM

In 2003, Keilah Worth *et. al.,* 2008, led a team of researchers (hereinafter Worth), in "a random digit-dial survey of 6522 US adolescents aged 10 to 14" in order to study "exposure among young US adolescents" to violent movies rated R, for violence. The study found widespread exposure of young US adolescents to movies with extreme graphic violence from movies rated R for violence and raises important questions about the effectiveness of the current movie-rating system" (Worth, 2008, p. 1).

A second finding, although not precisely stated by Worth, could be that parental oversight of their children's access to movies is also ineffective. "However, many aspects of the modern media environment work against adequate parental oversight. With the advent of DVDs, movie channels, pay-per-view channels, and even Web-based movie downloads, adolescents have unprecedented access to adult media" (p. 5).

Reference is made to a "significant challenge to parents" who "may not be aware" and "often shocked" when shown the violent scenes in the movies their children have viewed (p.6). Worth cited the: "Joint statement on the impact of entertainment violence on children: Congressional Public Health Summit," dated July 26, 2000, as stating that "at this time, well over 1000 studies…point overwhelmingly to a causal connection between media violence and aggressive behavior [*sic]* in some children". Presumably this includes a study undertaken by the Brock University, Ontario, which was mentioned in the Introduction to this thesis (see *fn* 23, *supra*).

However, one of that study's limitations, which the authors acknowledged, was: "we assessed only exposure to movie violence, not the effects of such exposure" (p. 6). Thus, while we now know that, for example, up to 48.1% of 10- to 14-year-olds residents of the USA watched *Scary Movie* in 2003, we do not know if they were

adversely affected by the exposure. If one could extrapolate from the July 2000 submission (above), it would not be out of the question that "some children" might have had an adverse *(i. e*. anti-social) reaction. Indeed, the main arguments for censorship protection from scary stuff have more to do with the longer-term effects of exposure. For example, Worth notes: "Experimental work has demonstrated that video game violence can lead not only to changes in attitudes and behavior but also to physiological desensitization, such that after playing violent video games, participants were less aroused by watching scenes of actual violence"(Worth, *et. al*., 2008, p. 2).

For the purpose of this thesis, the important point is that the Worth study produced reliable findings, not to the causal connection, but to the ease of access to media violence, including sexualised violence "which occurs in the context of a sexual act". For example, *The General's Daughter,* which includes a gang-rape episode "was seen by 8.7% of adolescents in our sample" (p. 3). (The RB downgraded the movie from R 18+ to M 15+, *vide*, p.105, *supra*.) Results of experiments that point to a causal connection would suggest that not only do official censorship efforts fail, but also that parents and guardians might do more to manage the perceived risks of harm and of causing harm. Harvey (2008) suggests better educating parents and minors:

> Having considered the evidence I believe we need to move from a discussion about the media 'causing' harm to one which focuses on children and young people [. . .] At a public swimming pool we have gates, put up signs, have lifeguards and shallow ends, but we also teach children how to swim (Harvey, 2008, p. 2).

All sorts of experiences can be dangerous for children, but teaching, without undue emphasis on any danger would assist in making the experience pleasurable. According to Ryan *et. al:* "Children are not taught to understand their sexual experiences or to anticipate sexual experiences as enjoyable. Rather, they are taught to be wary of most sexual experiences, both interpersonally and intraphysically" (Ryan, *et. al.,* 2010, p. 31).

CONSENSUAL SEX IN PRIVATE

However one considers it, "an intimate consensual sexual relationship, including one between minors, is private business" (Levine, 2003, p. 142). In part two of her book,

Levine explains how adults might do better for minors than make what is already a scary enough process, even more scary by attempting to ban sex-related arts-media, rather than teach them how to manage their sexually intimate lives.

In other facets of their lives, minors are taught how to do many potentially harmful things that, would appear more dangerous than watching X 18+ movies. For example, at 16, a minor may drive a motor vehicle on public roads, or sail solo around the world;[201] one may forsake the parental home at 14[202]. Nevertheless, the law perceives there exists a problem of some sort in minors accessing certain arts-media material and has made it an offence for an individual under the age of 18 to be given access to R 18+ and X 18+ movies.

At what is apparently a magical number: 18, everything is supposed to change; what was dangerous at bedtime is tamed by the dawn of one's 18th birthday. That is not the way the transformation from minor to adult is officially expressed, but it is nonetheless the fact, according to censorship and anti-child abuse law. For example, this quote from an Australian government paper: "Whether the sexual interaction between an adult and a person under the age of consent appeared consensual is irrelevant, *as the laws determine that* children and *young people do not possess the maturity to consent to sex* with an adult" (italics added).[203]

Note here the separation between children and young people (which is the subject of the chapter immediately following). While one could agree with "under the age of consent", to suggest that "young people" (above the age of consent) "do not possess the maturity" would appear to be an academically unfounded assumption.

Having reached 18, a person may nominate for, and be elected to, a State or Federal Parliament.[204] If knowledge and experience are necessary qualities for lawmakers in a

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201 Jessica Watson, 16, completed her 8-month solo voyage around the world in May, 2010 http://www.theguardian.com/world/2010/may/15/jessica-watson-sailed-world-home See also,Zac Sutherland, 16 from California. http://www.abc.net.au/news/stories/2008/09/18/2368434.htm

202 For example, in Tasmania: "A young person who has attained the 'age of discretion' (14 years for a boy, 16 years for a girl) who has left home, cannot be forced to return home against their wishes". http://www.legalaid.tas.gov.au/factsheets/Under%2018s.html

203 See: Kaestle, et. al., 2002. This interesting study of teenage females and sex with adult male partners is inconclusive, but nonetheless rewarding reading. If anything (and with some reservations), the study points to the females being very aware of what they do.

204 In Canada, Claude-André Lachance was first elected in the July 8, 1974 general election at the age of 20 years and 3 months. See: http://www2.parl.gc.ca/ParlInfo/Compilations/ElectionsAndRidings/TriviaMembersOfParliament.aspx?Language=E#3 In Australia, the youngest person elected to any Australian Parliament was William Neilsen (ALP, Franklin) who was elected to the Tasmanian Legislative Assembly on 23

democratic society, the maturity and attitudes of Members of Parliament must come into the reckoning.[205]

The point is, society cannot have it both ways; either young people become suddenly mature enough to make informed decisions at the midnight of their 18th birthdays, or they remain children until then and, by extension, unable to make up their own minds. The protective nature of arts-media censorship would indicate the latter, but common sense (although perhaps legally and academically unacceptable) would indicate otherwise. One would argue, with Harvey, that teaching, explaining and convincing—the role of parents and guardians—is perhaps the better way of preventing the harm that the classification system fears. As one young person who responded to Byron's research stated:

> Kids don't need protection we need guidance. If you protect us you are making us weaker we don't go through all the trial and error necessary to learn what we need to survive on our own…don't fight our battles for us just give us assistance when we need it. (Byron, 2008, p. 13)

Sauers states: "It seems that around 58% of girls and 87% of boys are turned on by pornography, which is another reason that parents and educators should help them sort through what's acceptable and what's not" (Sauers, 2007, p. 83).

"KIDS ARE NOT SUPPOSED TO DO THAT"

The quote is from an impromptu discussion of this thesis at a dinner party (for eight) at this author's home. The inevitable and often-asked question: "What about kids accessing porn on the net?" came up for discussion. The questioner had a 13-year-old son who, she was as "certain as you could be" that he did not watch porn in any format. While it was generally agreed (at the table) that children were not supposed to

November 1946 aged 21 years 2 months and served until his resignation on 1 December 1977. It must be remembered that 21 was the age of maturity (majority) in those times. Thus, Neilsen was only just an "adult". See:
http://www.utas.edu.au/library/companion_to_tasmanian_history/N/Neilson.htm//www.aph.gov.au/library/Pubs/rn/1997-98/98rn42.htm
William Pitt, the Younger (28 May 1759 – 23 January 1806) became England's Prime Minister at age 24.The Federal Parliament in 2010 included a 20-year-old.

205 As an aside: one wonders how an 18-year-old elected to Parliament would be well-enough informed to vote on a Bill dealing with either the effects of alcohol or X-rated movies on the young, never having had (lawful) experience of either.

be "doing that" (*i.e.* accessing pornography), there was general agreement (including the mother) that they were and are "doing that". [206]

The subhead quote would also fit those who argue(d) against installing condom vending machines in high school, about which, some years ago, there was also robust discussion. Based on Sauers' research, the use of condoms would be more than desirable because first, about 33% of minors had their first sexual experience while below the legal age of consent and second, an additional 21% of girls and 32% of boys had their first experience while still minors but at or above the age of consent (Sauers, 2007, p. 55). Thus, whether accessing adult arts-media or having sexual experience with others, what adults think kids are not supposed to do is quite different from what the kids actually do. Against all this, the combined efforts of religious groups, lawmakers, policymakers and *The Board* might be achieving no more than preaching to a minority (less than half) of the already sexually and Internet enlightened minors.

Kids are not supposed to do many things they do. As for watching movies, about 65 years ago, Henry Gullett, MHR, complained in parliament about: "*The Snake Pit*.[207] I saw it recently in Melbourne. There were many children in the audience. No one seems to be responsible for preventing children from seeing films that the censorship regards as unsuitable for them to see" (MHR *Hansard*, October 11, 1949). One might suggest it was ever thus; in his time Plato tried "to structure the possible field of action" and prevent children gaining access to material of which he disapproved:

> Shall we simply allow our children to listen to any stories that anyone happens to make up, and so receive into their minds ideas often the very opposite of those we think they ought to have when they are grown up? No, certainly not. It seems, then, our first business will be to supervise the making of fables and legends, rejecting all which are unsatisfactory; and we shall induce nurses and mothers to tell their children only those which we have approved (Cassirer, 1974, p. 72).[208]

206 This is an example of TPE by proxy: "my son" is not doing it but "they" are (see p. 205 supra).

207 The movie was made in 1948, remade as *The Torture Chamber of Dr Sadism* in 1967, and further remade as *The Forgotten* in 1973. A videotaped version was classified PG in. January 1996.

208 This translation of *The Republic* differs from Jowett's 1894 version in words but not in substance. At p.49 Jowett's paragraph begins: "And shall we just carelessly allow children to hear any casual

However, as has been shown, the "fables and legends" of more recent times (movies) are controlled by *The Act*, but kids, as they always have done, find the ways and means of circumventing their elders' constraints. It could be argued that teaching would work better than attempting to control the behavior of minors.[209] As Daniel J. Travanti observed in his video-recorded talk: *How to Raise a Street Smart Child* (Released January 1, 1988) "Ignorance scares a child more than knowledge does."

Nevertheless, some of the younger children need protection from likely harm. The question is: Who are they? It is to that question that we now turn our attention.

tales which may be devised by casual persons and so receive into their minds ideas for the most part the very opposite of those which we would wish them to have when they are grown up?" The Waterfield version is more modern in its conversational style, *cf* p.71. The important point being that from the earliest times adults have set out to control and regulate young people's access to knowledge.

[209] I remember watching a BBC interview with Spike Milligan on his 80th birthday in which he said: "When I was 14, my father caught me masturbating. He said 'don't do that, or all your children will be thin' ".

CHAPTER 10: CHILDREN AND ADOLESCENTS

> [A] question like "What is a Child?" already contains a set of assumptions about the world and about language. It suggests to us that the world is divided into classes of objects—some human and some not—and those classes have names, labels. It suggests that we could make mistakes when we apply these names that we could get into rows about demarcation. What name applies to which object? Is *this* person a child or not? Can a mother be a child—even if she's only 14? Is a schoolboy of 18 who can vote a child or not? At what age can people watch "adults only" films? (Holland *et. al*.,
>
> Can the same 15-year-old be both a "child" and an "adult" in the criminal-justice system? (Lanning, 1994, p. 54).

INTRODUCTORY

Note: Where a particular reference to age is part of the law, the age will be cited, but for a more convenient general reference, *teens* that are legally minors will be separated into two groupings: under-13s (children) and under-18-teens (adolescents).

In the immediately preceding chapter, some evidence was offered to support a view that where matters of arts-media and sex are concerned, minors do what adults do. In this chapter we look at the sorts of questions raised by Holland *et. al*., but in particular: Is *this* person a child or not? It is argued that some minors are as capable as adults and separating the one from the other by age can lead to unfair and even unjust outcomes.

In Australia and many other countries, the legal definition of a "child" is generally accepted as being a person below the age of 18, but when applied to images the age of a subject can become problematical. If presented with two real persons who are aged respectively 17 and 18, one would likely have difficulty deciding who was the elder. The difficulty would likely be enhanced rather than diminished if making the decision from images, but this is what *The Board* is required to do when making assessments of what are alleged to be illegal images of minors.

There are no criteria except "appears to be" and "implied to be" by which *The Board*

can reach an age-based decision, and yet the making and possession of child sexual abuse images of the 17-year-old is a crime, while depictions of sexual activity involving the 18-year-old is not. It is also a criminal offence to write descriptions of sexual activity and state the age of a fictional character, as being is less than 18 years. "The [censorship] offence provisions [. . .] include fictional characters in text" (Krone, 2004, p. 2). Taken together, it would appear that we have criminal law, which on the one hand could be unsafe for justice (*i.e*. guessing an age from an image) and on the other hand protects fictions from harm. One would argue, that neither of these represents the law's intentions; that is to say the law does not intend to be unjust, nor would it countenance what would appear to be the absurdity of protecting a fictitious character from physical or emotional harm. The evidence, however, suggests otherwise, not only in Australia but also in other countries: the USA and UK, for example.

In this chapter, it will be argued that a division could be made so that under-13s are children and under-18-teens are adolescents. Even so, laws in Australia, and other countries sub-divide the two groups, often as under-10s and under-16s. (In the chapter following this, the child pornography law of NSW refers to a person "under the age of 16", not under 18.) The laws' sub-divisions would suggest that policymakers acknowledge a need for different levels of protection within the age group of those designated as children. Further, because we are dealing with images, the visible signs of puberty are useful in distinguishing (albeit not perfectly) between young children and adolescents. (See the subhead **THE APPARENT CHILD**, below.)

Finally, although this is not a thesis on law, anti-child-sex laws and art censorship law sometimes overlap, thus some interlinking is necessary to answering the question begged by the title of this chapter: What is a child and what is an adolescent? A consequence of this overlap means that much of this discourse on "child" and "children" will relate to sexual activity.

WHAT IS A CHILD?

> The recognition of childhood as a special time of life, separate from adulthood and a preparation for it, emerged gradually from the end of the Middle Ages to enter the consciousness of all strata of Western society only in the eighteenth century (Veerman, 1992, p. 4).

As can be gleaned from Veerman, childhood is, historically speaking, a relatively recent concept but "What is a child?" is not a new question; for example (and for the purposes of this chapter), in 1986 Patricia Holland asked: "how exactly [do] we define who is a child? And which images of female children are less innocent or more sexual than others?"(cited in Jobling 2006, p. 117). Alisdair Gillespie spends some time attempting to distinguish between "child" and other young people, first by stating "there is no agreed definition of a 'child' perhaps because the concept of childhood itself is vague" (Gillespie, 2011, p. 13). From there, the author considers puberty, which "marks the point at which a body is capable of sexual reproduction" (*ibid*) but on the next page he reminds us of "evidence that the age of puberty is decreasing in the developed world" (p. 14)[210] Gillespie, however, is concerned with what should be classified as child pornography and if it is true that the age of puberty is decreasing, "then it would mean that basing child pornography on puberty could mean that it would protect a reducing number of children" (*ibid*).

This thesis meets Gillespie part of the way by suggesting that, although classifying by age is not without its problems, pre-teenage might be a more suitable description of a child. As Maureen Shelley, Convenor of the RB, stated: "As parents, we know there is a big difference between an 8-year-old and a 13-year-old" (CBR07-08, p. 63). Thus, under-13s (sub-teens, pre-teens) could be used to distinguish children from adolescents, but the law considers 18s and 19s adults, thus, the reference here is to under-18-teens.

Holland's questions of 1986 (above) still remain unanswered well into the second decade of the 21st century. It could be argued that the same difficulties of definition remain because policymakers continue to legislate by age and not by harm inflicted on a victim. It could be further argued that for the purpose of anti-child-sex law, non-

210 I read an article here: http://www.dailymail.co.uk/femail/article-473584/Girls-entering-puberty-age--drugs-answer.html that girls are entering puberty at age six.

consensual, therefore physically harmful, sexual activity should define the crime, whether the victims are minors or adults. However, as will be seen, minors engaging in consensual sexual activity with other minors, is viewed as rape. It would appear, then, that age and not well-being is the driving force behind anti-child-sex law; it is difficult to imagine the level of distress caused to a minor who is charged with the rape of a consenting friend.

THE INTERNATIONAL DEFINITION OF A CHILD

The Inaugural Session of the Advisory Council of Jurists, held at Rotarua in August 2000, and hosted under the auspices of the Asia Pacific Forum of National Human Rights Institutions, dealt with the twin issues of child sexual abuse and child pornography (particularly Internet pornography). The final report of that conference begins by asking the same questions that are addressed in this chapter.

> In defining a child, the Council notes the definition in Article 1 of the Optional Protocol to the Convention on the Rights of the Child which defines a child as a person . . . *below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.*
>
> In many countries this definition means that the threshold age at which a child is protected against exploitative use in pornography is determined by the age of consent. The Council believes that the standard should apply to all children under the age of 16, regardless of the age of consent.
>
> The Council recommends that, in determining the age of a child for the purposes of child pornography, the standard in the Convention is accepted as the general rule subject to there being no exception for children who are, or appear to be, under the age of 16 years (p. 2-3 in *Reference on Child Pornography on the Internet Final Report,* December 2000).

Australia and all States have adopted the protocol that includes all who are, or appear to be, under the age of 18 years to accord with Article 1 of the United Nations' Rights of a Child. Thus, adults who have young faces and bodies are taken to be children for the

purposes of child pornography law.[211] Art censorship law, and age of consent laws place post-pubescent teenagers aged 13 to 15 years in the difficult position of either totally abstaining from consensual sex, or putting themselves and their partners at risk of committing statutory rape. The finding that: "Over the past 30 years, the median age at first intercourse in the UK has dropped from 16 to 14 years for females and from 15 to 13 years for males" (Wellings and Field, 1996, p. 132) has not changed statutory rape law.

Setting aside the under-16s for a moment if over-16s may lawfully indulge in sexual activity by mutual consent, there would appear to be something illogical about it being an offence to capture images of the activity when there is no comparable offence with respect to recording over-18 sexual activity. Thus, the question: Which children are to be protected, and from what? It is not difficult to understand why young children must not be raped but with the exception that they are young and, therefore, likely to be more helpless at the hands of a rapist, there is no other difference—rape is the offence; the age of the victim is an aggravating circumstance.

As to age of consent, two stories of sexual assault that illustrate some of the confusion that can be caused by age difference were published in Australia's *The Sunday Telegraph* of March 8, 2009. One story concerned a 17-year-old female, the other a 17-year-old male. Under Commonwealth law, both alleged victims being below the age of 18, were children; it is of relevance here that the female lived in New South Wales and the male in South Australia. In New South Wales, the female being above 16 years of age was also above the age of consent, thus, in her case, the allegation was of "sexual assault" not "child sexual assault", which would be the more serious charge. The age of consent in South Australia is 17 and so there was no allegation of child sexual assault in that case. However, that allegation of sexual assault was made against a person who, at the relevant the time, was a teacher at the complainant's school. In that case the teacher allegedly offended under the provision of being in a "position of trust", where, for that purpose, the age of consent is set at 18 (South Australia: Criminal Law Consolidation Act, 1935 s.49(5)). This provision is not unique to South Australia, other states and countries (Denmark and France, for example) have similar provisions.

211 Young women, especially, of 19 and 20 can appear younger. Our daughter had difficulty getting into M 15+ movies unaccompanied and hiring R 18+ movies when she was 18-20 plus. This is not an unusual situation.

As can be seen, neither of the accusers could claim age of consent as the determining factor; the female claimed harm, while the male claimed a breach of trust but not non-consensual sex. Furthermore, in the case of the male, we do not know how far he was past his 17th birthday at the time of the consensual sex.

THE LEGISLATED CHILD (*DE JURE*) [212]

> Ultimately, childhood cannot be contained, the boundaries will not hold. The relationship between childhood and adulthood is not a dichotomy but a varety of fluctuating states, constantly under negotiation (Holland, 2006, p. 16).

While one can understand the point Holland makes, it is probably fair to suggest that adults know what they mean by "child"; one might imagine a toddler, a pre-schooler or even a primary-schooler. If asked to describe a child (not define in law), it is likely that a 17-year-old mother or a 12th-grade pupil of nearly 18 would not be one's first suggestion. The concept of a biological process from birth to puberty is probably why academic studies on children take it for granted that there is a general understanding of what "child" means. For example, in her paper on *Child Abuse and Neglect*, Marianne James does not define a child; she, understandably in her context, takes it as a given that readers know what she means (James, 2000, n.p.) Taylor and Quayle (TQ), without defining a child, offer an insight into the child pornography collector's ideal child: "White blond boys and girls aged between 9 and 12 seem to be the preferred ethnic background and age" (TQ, 2003, p. 194). Here, TQ hint at pre-pubescence and pre-teenage. However, when the law defines a child, the definition becomes rather more complicated or blurred. Thus, although an individual is a child *de jure* until 18, it is arguable that the general concept of "child" would include 16s and almost 18s.[213]

Commonly used terms such as teenager, juvenile, adolescent and young adult

212 A person deemed to be a child under the provision of any law.

213 I was unable to find any survey of this question but two points emerged from my own straw polling: (1) young people of those ages did not think of themselves as children; (2) parents were sometimes hesitant but conceded that their teenagers (16-18) were not children in the way it is usually understood. The ends of the straw "bell-curve" had an entire high-school rugby team adamant that they were in the not-child category, while, at the other end, a mother became quite angry at the prospect of her 17-year-old daughter being other than a child. She added that only paedophiles and perverts would want to change the law (which, incidentally, I had not mentioned).

testify to there being at least one other grouping between child and adult. A good example may be gleaned from the statements of court of appeal judges in the USA, where they stated at paragraph 6: "All of the magazines contain numerous photographs of nude persons, including adult males and females as well as nude minors and nude teenagers". At paragraph 22 the judges state: "In this case, each of the two hundred sixty-four Magazines at issue contains numerous photographs of nude children and juveniles". At footnote 8 of their judgment, the judges refer to "partially and fully nude children and adolescents". All of which indicates that the judges observe a separation of child from young adult.[214] One could argue from this sort of judgment that there exists a practical distinction between children and not children. This would find some support at the Royal College of Psychiatrists, which advises that: "By the age of 17, they'll be young men and women who may be bigger than their parents and capable of having children themselves".[215]

The Australian examples (above) draw attention to some of the inconsistencies and anomalies that arise when age alone defines a child; what we have is a "child *de jure*" because it does not relate to a level of maturing or maturity, but to the date of birth. In Australian law, the age of consent is: Commonwealth 18, South Australia 17, and New South Wales 16, ACT, NT, VIC, WA and QLD 16, TAS is 17. Queensland excludes anal sex (sodomy), which is only legal after age 18.[216] Furthermore, the *legislated age* of individuals changes as they move around the country, but not so their birth dates. Thus, if a sexually active 16-year-old in Sydney, moved to Adelaide and continued to be sexually active before turning 17, the partner would be offending under South Australian law. Australia is not alone in having a confusion of age-related child laws.

The child *de jure* is protected until 18 in the USA but ages of consent vary between 14 (e.g. Iowa) and 18 (e.g. Wisconsin); nevertheless, USA Federal child pornography law, like Australia's, proscribes depictions of those under the age of 18 engaged in sexual activity. In the UK, the age of consent is 16, except for Northern Ireland, where it is 17, but as with Australia child pornography law is relevant to all images of minors

214 230 F.3d 649 (3rd Cir. 2000) USA–v -Various Articles Of Merchandise, Schedule No. 287; Alessandra's Smile, Inc., Appellant No. 00-5124. United States Court Of Appeals For The Third Circuit Argued: Friday, September 22, 2000 Filed October 23, 2000.

215 http://www.rcpsych.ac.uk/healthadvice/parentsandyouthinfo/parentscarers/adolescence.aspx

216 http://www.aifs.gov.au/nch/pubs/sheets/rs16/rs16.html

who are not only, but also appear to be, or implied to be under the age of 18Countries with the lowest ages of consent (which is 12) include Colombia and Peru. There is no age of consent in Iran because sex outside marriage at any age is an offence, but as the "marriageable age" for males is 15 and for females 13, the *de facto* consensual age agrees with that of many other countries. (Before 2002, the marriageable age for Iranian females was nine years.) [217]

While any country may set its age of consent or majority as it pleases, or to accord with Article 1 of the Optional Protocol to the Convention on the Rights of the Child, it does make child protection law difficult for justice where the making and possession of images of lawful consent to sexual activity in one country is a punishable offence in another. However, according to Article 1 (above) in their own countries, 12- to 15-year-olds to be in Colombia and Peru can lawfully give consent to sexual intercourse but cannot lawfully make images of such an occurrence: "there being no exception for children who are, or appear to be, under the age of 16 years". Thus, while age defines a child *de jure* and the law prohibits portrayals of sexualised images of that child, real life sexual activity is legalised by age of consent, which is generally lower than the child pornography age. In respect of alleged sexual activity, the child *de jure* presents no difficulty—a child's age can quickly be ascertained from a birth certificate, which would support age of consent or otherwise. However, the censors are presented, not with a real child, but with images, and unless the child is known to them, the censors can only guess at the portrayed child's age. [218]

THE APPARENT CHILD

The phrase "appears to be" is given legal weight as evidence in child pornography (criminal) matters. We need not delve further into the difficulty for justice, which that phrase creates, except to observe that criminality must be proved beyond reasonable doubt. The question is: Can we tell by looking? The answer is sometimes, yes, if the

217 Of 47 countries with a one-state law, the lowest age of consent was (age/n): 12/4, 13/3, 14/14, 15/9, 16/11, 17/2, 18/4. (n=47). Age 15 is the median and also the average. USA, UK, and Australia are higher than average. More specific information can be found at http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/ For my purpose here, I need go no further than I have done.

218 When researching I came across disclaimers as this: "18 U.S.C. 2257 Record Keeping Requirements Compliance Statement. All models appearing on this website are over the age of 18. Which would indicate the "appears" and "implied" of Australian law, do not apply in the USA.

individual is obviously very young. In an age when looks can be deceiving, an 11-year-old girl can pass as an adult. Kincaid gives this example:

> Blaire Ashley Pancake, daughter (I'm not making this up) of Dr. Bruce and Debbie Pancake [. . .] is good at what she does, having won ninety beauty contests, including "Little Miss Hollywood Babes". Her pictures make her look—am I sounding like Humbert Humbert?—glamorous. Not "pretty", exactly, but more like Zsa Zsa Gabor or Sharon Stone, both of whom, come to think of it, look much like eleven-year-old Blaire Pancake, which is probably the point (Kincaid, 2000, p. 103).

On the page following that quote, Kincaid publishes a picture, which he captions thus: "Blaire, piling years on herself cosmetically, looks alarmingly like actresses in their thirties, who slice away years by the same means". In the body text, Kincaid observes: "designers dress little girls as adults [. . .] and disguise adult women as little girls" (p. 104). At page 106, he displays images of male models dressed younger.

I took this picture of a typical liquor store display poster. When I queried: Why 25? The store manager said it was: "Just to be on the safe side. Some kids have beards and they're only 17. Others are 20 or older and we don't want to knock back business."

One cannot always decide what is a child by looking at a picture, and sometimes not even when looking at the individual. When considering images, and since more than the face is visible in suspected pornography, the censors look at the entire presentation and ask, in effect: Does the depicted individual look like a child? A child in art censorship is what "appears to be" or is "apparently" or is "implied" to be a child, which, for all its ambiguities is a phrase that in some respects, offers a more accurate definition of "child" than does the "child *de jure*". Which is why proof of age is sometimes required.

> Some girls develop breasts at a very young age but have no other signs of sexual development. A few children have pubic and armpit hair long before they show other signs of sexual growth.
>
> In most cases, early puberty is just a variation of normal puberty . . . a young girl develops breasts and pubic hair before 7 or 8 years of age and [. . .] a young boy has an increase in testicle size and penis length before 9 years of age.
>
> Sometimes a medical reason causes delayed puberty, but sometimes not. For example, malnutrition (not eating enough of the right kinds of food) can cause delayed puberty. Puberty may be late in girls who have the following signs:
>
> * No development of breast tissue by age 14
> * No periods for 5 years or more after the first appearance of breast tissue.
>
> Puberty may be late in boys who have the following signs:
>
> * No testicle development by age 14
> * Development of the male organs isn't complete by 5 years after they first start to develop.[219]

If the subject were smiling, the teeth would hold clues to an individual's age.[220] As it is a "common characteristic of child pornography that the subject is generally smiling" (TQ, 2003, p. 22) this could be useful as evidence in a court where a child pornography charge is heard. However, establishing age by tooth development would not generally apply to individuals who are older than 12.[221] Without such a clue it is possible to

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219 http://familydoctor.org/online/famdocen/home/children/parents/parents-teens/445.html
First accessed on April 16, 2009, however, when accessed March 10, 2015. A different page was presented but it contains the same information. "For parents: What to expect when your child goes through puberty."

220 Muller-Bolla, M. *et. al. Age estimation from teeth in children and adolescents Journal of Forensic Sciences, Volume 48 Issue 1, January* 2003. "Data were collected from the 5848 patients' charts that included an orthopantomography. This permitted the observation of emerged teeth and agenesis. Bar charts were used to indicate the dental formula according to age. There was no significant difference in the emergence pattern of both controlateral maxillary and mandibular teeth. Only the anterior tooth emergence significantly differed according to the maxillary. The lower central incisor was the lone tooth with a median age earlier than others; the remaining teeth had an age equivalent to those of previous estimates."

221 "Around age six the permanent teeth begin to appear and teething will continue on and off until about age twelve. At that point all the permanent teeth with the exception of the wisdom teeth are

mistake an image of someone older as that of a child; or one might mistake an image of a young person for someone older. James D Tanner, MD, designed a scale of growth patterns in juveniles (the Tanner Scale), which is often given as evidence in child pornography prosecutions where the age of a depicted individual is uncertain. However, Tanner and his colleague, Arlan Rosenbloom point to the misuse of this scale in courtroom procedure.

> In these cases the staging of sexual maturation (Tanner stage) has been used not to stage maturation, but to estimate probable chronological age. This is a wholly illegitimate use of Tanner staging: no equations exist estimating age from stage, and even if they did, the degree of unreliability in the staging, the independent variable, would introduce large errors into the estimation of age, the dependent variable. Furthermore, the unreliability of the stage rating is increased to an unknown degree by improperly performed staging, that is, not at a clinical examination but through nonstadardized and, thus, unsuitable photographs. Therefore, we wish to caution pediatricians and other physicians to refrain from providing "expert" testimony as to chronological age based on Tanner staging, which was designed for estimating development or physiologic age for medical, educational, and sports purposes, in other words, identifying early and late maturers. The method is appropriate for this, provided chronologic age is known. It is not designed for estimating chronologic age and, therefore, not properly used for this purpose.[222]

From this it is possible that images of late-maturing 18-year-olds could appear to represent individuals who are much younger. Even if that were not so, it would be difficult, if not impossible, to swear in a child pornography prosecution, that the image of a naked individual is definitely that of a 15-, 16- or 17-year-old and not of an 18-year-old. While it might be apparent that an image portrays a child who is substantially less

present." http://www.dishekimim.com/en/Child_dentistry.htm. First accessed April 28 2009. On March 10, 2015, the site was not found.

222 Rosenbloom, A. L. and Tanner, J. in Pediatrics Vol. 102 No. 6 December 1998, p. 1494. *Misuse of Tanner Puberty Stages to Estimate Chronological Age.*

than 18, and clearly younger than the average age of puberty (10 for girls, 11 for boys)[223] there is no other certainty on which a successful prosecution could proceed. Keeping in mind that it is an indictable offence to be in possession of child pornography, a successful conviction cannot be made on the balance of probability.

In the face of such difficulties in guessing (for, no matter how well informed, it can only be a guess) it is proper to question whether the twin goals of child protection and justice are served if a person is charged with the possession of images that, to *The Board*, "appear to be" of a individual of the proscribed age. If there are images that, unarguably, appear to be of pre-pubescent children, the apparent age might be close to the legislated, therefore proscribed, age for the purposes of censorship and the possession of child pornography. However, as the relevant laws are promulgated to protect children from harm (being exploited), questionable media material must be shown to be in contravention of that purpose. It was argued in the previous chapter, that in placing undue emphasis on material that is arguably (sometimes patently) not pornographic, neither child protection nor justice is well served by existing child protection law.

So far, it can be generally accepted that a child is one who has not reached puberty. As it affects censorship, explicitly sexual images portraying sub-teen children must be refused classification, not because children of that age are necessarily innocent (see Sauers immediately below), but because images of them in sexual situations are more likely than not to be classified as child pornography. The question is: why under-18-teens (children *de jure*), should still be called children for the purposes of censorship and child protection, when they, on the available evidence, clearly understand what they are doing sexually.[224]

One final point on appearance: because it is so difficult to guess an individual's legislated age by sight alone, governments introduced proof of age legislation. As this is much more than a tacit admission that mistakes are made in real life, how much more the risk that similar mistakes are made when judging age from an image. The

223 See, for example: http://www.drpaul.com/adolescent/pubertygirls.html "In girls puberty begins on average at age 10. However pubertal changes can develop as early as 8 years or as late as 13 years old. Puberty generally starts earlier for girls than it does for boys. This is why many girls are taller and may act more mature than boys for a few years until the boys catch up", but see fn. 166.

224 Results of Sauers' work, indicates that minors appear to understand what it means to make sexual images of themselves. See, also "Sexting".

consequences for an individual charged with child pornography offences are too serious not to allow the benefit of any reasonable doubt in this regard. (As this was being re-typed on ANZAC eve, April 24, 2014, ABC television featured a story of a 15-year-old who lied about his age and was killed at Gallipoli. Either the authorities could not recognise his youth, or his lie was conveniently accepted.)

THE SEXUALLY ACTIVE CHILD

According to Joan Sauers, (*Sex Lives of Australian Teenagers*, 2007, Random House), 97% of girls surveyed and 93% of boys had had some sort of sexual experience with someone else by the time they were 17. Furthermore, 30.5% of girls and 31.5% of boys had had their first extra-personal experience, although not always entirely sexual. When asked: "How old were you when you had your first sexual experience with someone else? many thought of early childhood instances of childhood games like 'doctors and nurses' while most described their first post-puberty kiss" (p. 38).

One in three girls (33%) and nearly one in four boys (23.5%) had their first sexual experience between ages 11 and 13. By age 14 more than a quarter of boys and girls had had oral sex (p. 46) and "one-third of all respondents had had sexual intercourse before the legal age of consent" (p. 55). Of those girls aged 14 to 16, one third (33.5%) had had sexual experience (not necessarily intercourse) with a partner; of boys in the same age group, 38% had had a similar experience (p. 37). Sauers' findings equate with those Leslie Kantor vice-president, Planned Parenthood of New York. "The vast majority of adolescents in America and across the globe enter into sexual relations in their teen years" (cited in Levine, 2003, p. 104). Both of these findings are supported by a 2007 survey undertaken in the USA where about 33% of Grade 9 students (13- to 14-year-olds) "who have had sex at least once"; and the numbers increased as ages rose to nearly 63% in grade 12 (17- to 18-year-olds).[225] David Walsh looks at youth sex a different way; suggesting it is adults who are misguided.

> American parents fear that if teachers talk to teens about sex in a classroom, the information will somehow trigger their interest in it—as

225 The National Campaign to Prevent Teen and Unplanned Pregnancy: Centers for Disease Control and Prevention. (2008). Youth risk behavior surveillance – United States, 2007, *Surveillance Summaries*. MMWR 2008:57(No.SS-4). Whether the increase by age is in real terms or simply the same people moving through the grades is not shown.

> if teens have not heard about sex before taking a health class. Having bought into this misguided notion that information would promote sexual promiscuity, U.S. senators have spoken on the floor of the Senate against funding for sex education. [. . .]
> Talking about it will not *make them interested. They are already interested*. (Walsh, D., 2004, p. 130).

At the bottom of that page, Walsh cites a National Survey of Adolescent Males, according to which, "53% of American teenage boys have been masturbated by a girl and 49% have received oral sex from a girl" (*ibid).*[226] There is a further point: it would be surprising if under-18-teens 'across the globe' thought of themselves as children. (They might own to being their respective parents' children, but that use of the word is not what child protection and censorship law is taken to mean.) To borrow from Sue Curry Jansen, they are called children because those in authority say so, and authority has the power to name. (See the subhead, **THE EXPEDIENT CHILD** next page). However, as it bears on censorship law, images of 17-year-olds in sexual situations are considered child pornography. Thus, even though great numbers of under-18-teens may lawfully consent to sex and, by reasonable extension, consent to their activity being recorded as images, they would be in breach of child pornography law should they manufacture, distribute, possess or access the images (see "**SEXTING**", p. 253, *infra*). [227]

THE EXPEDIENT CHILD

It will now be proposed that under-18-teens are called "expedient children", and the representative child the "expedient child"; this is the only reasonable term that can describe the expedient and/or ambivalent attitude of authority towards young people. The "expedient child" is not the same as the "child *de jure*"; the latter refers to the

226 I recall the condoms in high schools debate. There was considerable opposition then, from parents, churchmen and politicians, along the lines that Walsh writes about. "They're doing it!" I recall the speaker for the affirmative arguing his point: let us make it safe for them and prevent pregnancies and the transmission of diseases through sex. There was also a popular song around that time which included the line: "When will they ever learn" (*Where Have All The Flowers Gone*? by Pete Seeger).

227 Research into "children" is somewhat hampered by the inclusion of all "teens" in many statistics. The ABS brackets 15- to 19-year-olds; Walsh's cited USA survey, likewise. Perhaps statisticians could be persuaded to draw a line at under-18-teens, which would help researchers make a direct comparison between "children" and sex.

individual's age, while the former describes how the relevant authority uses the individual's age as it considers fit.

Consider this view of a young child's capacity for understanding: "If a judge feels that the child is too young to understand the meaning of the oath, he can still come to the opinion that she knows right from wrong and allow her to give evidence" (Smart, 1989, p. 57). It is difficult to imagine anything more straightforward than swearing to tell the whole truth. Even so, in this situation a judge could say: *It means you mustn't tell lies, not even little fibs*, which any child who knows right from wrong would clearly understand. (The child would have to be very young indeed; one might question why one so young should face the trauma of a courtroom trial. This question falls outside the scope of this work.[228])

What we have here is an example of two separate concepts, namely the capacity to understand and the knowledge of right and wrong. A very young child would not necessarily know right from wrong; this understanding comes a little later. When young persons reach a certain age, society expects them to have a good understanding of right and wrong and of the effects of their actions. One would expect a seven- or eight-year-old to understand what telling the truth meant, but the child might be incapable of understanding the implications of telling untruths in a court setting; however, by age 10 a young person would be capable of such understanding. Nobody would reasonably doubt that a typical human from birth to 10 years of age is a child and the expediency in the Smart instance (above) was both warranted and practical.

At age 11 or 12 children typically move up from primary school to secondary school. This age was presumably arrived at after some careful consideration of the child's ability to absorb greater amounts of knowledge. In arriving at that sort of conclusion, society, if it acknowledges nothing else, recognises a level of maturing in children such that they are deemed capable of a greater understanding of life and learning.[229] The law also recognises that at 11 years children are aware of the effects of their actions. Until age 10 children in Australia and some other countries are deemed incapable of understanding what a crime is; from 10 and up to age 14, a child is deemed responsible for almost all of its actions and can be charged with committing all

228 When preparing this chapter, I read up on this question at: http://www.alrc.gov.au/publications/14-childrens-evidence/child-witness-courtroom

229 For example, any examination at the end of primary school demands much from students. I looked up the UK requirements here: http://www.elevenplusexams.co.uk/epapers/index.php

but criminal offences, which, according to law, they are incapable of committing *(doli incapax)*.[230]

Age 14 would appear too high when once considers the following example, in which a 12-year-old boy poisoned his grandfather.

> He watched the household's rats being poisoned by arsenic and realised he could use this to get rid of his [grandfather]. He added the white powder to the sugar bowl, knowing that his grandfather craved sweet foods.
>
> Over the ensuing week, every adult in the house became increasingly ill, vomiting violently. [The grandfather] was the worst affected as he added sugar to so many of his drinks and meals [. . .] After six days spent in increasing agony, he died (Davis, 2004, p. 41).

Without entering into the rights and wrongs of the case, those two paragraphs demonstrate how the boy contrived, (his motives aside) to achieve the desired effect. Thus contrary to what the law states, he was criminally capable at age 12 and his motive and method might have been something akin to a battered wife who similarly disposes of a cruel husband.

At age 11 individuals are deemed no longer helpless or innocent. Magid expresses his concern regarding culpable young killers this way: "At an alarming rate in this country [USA] more and more children are becoming hard-hearted killers" (Magid, 1989, p 27). Regardless of the individual's culpability, at age 14 the law makes a clear-cut division between criminally incapable and criminally capable individuals, and while still providing the benefit of *doli incapax* to inder-14s, the rule is rebuttable in court if it can be proved that a person knew the wrongness of the action taken. This is because the general public considers the actions of individuals aged between 10 and 14 years to be knowingly criminal. In Britain the government argued in favour of abolition of the [*doli incapax*] presumption on the basis that: "the notion that the average 10-14 year old does not know right from wrong seems contrary to common sense in an age of compulsory education from the age of five, when children seem to develop faster both

230 Australian Institute of Criminology Crime Info Fact Sheet No 106, September 13 2005. *The age of criminal responsibility*. There are some suggestions that this age should be reduced from 14 to 12.

mentally and physically". (Loveless, L., 2008. *Complete Criminal Law*: Text, Cases and Materials, Oxford U.P. p. 384).[231] The same "common sense" argument has been expressed in Queensland and in New South Wales. During the debate on the Criminal Code Amendment Bill in Queensland it was stated that:

> I believe it would be a difficult task to find a child aged 10 to 14 years who does not know the difference between right and wrong according to what the community would find reasonable, especially in a time when it is clear that the incidences of children, sometimes younger than 10, being involved in serious crime are definitely on the increase.[232]

Argument about *doli incapax* is not part of this thesis except insofar as it relates to the expedient official attitude to young people who offend, see the subhead: **THE CRIMINAL CHILD** p. 254, *infra*).

Child sexual abuse laws already make some distinctions between the different age groups; for example, the law deals more harshly with those who harm children below the age of 10 compared to harm done to those who are older. There is another division, usually at 16, where consent to sexual intercourse may be lawfully given. There are also laws about the age difference between sexually active, consenting partners.[233] In the USA: "The minimum age difference required for a felony offense ranges from three to seven years [. . .] The median age difference appears to be five years (Lindberg, *et. al.,* p. 61). (Non-consensual sex is impermissible at any age.)

In contrast, however, art censorship law makes no distinction about age; most legal definitions of child pornography state it to be the portrayal of a person who is, or appears to be, below the age of 18 years, engaged in sexual activity. Legally, child abuse material differs from child pornography in that sexual posing and torture are included among the defining terms. (*vide Crimes Legislation Amendment (Telecommunications Offences and Other Measures)* Bill (No. 2) 2004 (Cth.)}

231 Loveless cites Consultation Paper 1997, p. 6

232 Crofts, T., *Doli Incapax*: Why Children Need its Protection at http://www.murdoch.edu.au/elaw/issues/v10n3/crofts_text.html Accessed July 8 2009. On March 11, 2015, it was necessary to follow the links. I did not do so.

233 In brief: Australian age-difference law varies between States and Territories. The ACT is 2 years, in some cases; TAS has 5 and 3 years depending on the victim's age; VIC 2 years; WA 3 years. N SW, QLD and NT have no age-difference law. http://www.aifs.gov.au/nch/pubs/sheets/rs16/rs16.html

"SEXTING"

Murder, when committed by a young person, is both obviously and lawfully wrong, but not always criminal (*doli incapax). There is, however, a practice commonly known as "***sexting"*** which is not so obviously criminal. "Sexting" is a process by which nude and semi-nude images are transmitted by cell phones to other cell phones. Where the individuals who make and receive the images are under 14, the law is presented with some difficulties. If *The Board* were to deem the images child pornography, the subjects would have committed a serious offence. From the following quote, it would appear that in respect of "sexting" young people understand what they are doing.

> A recent study released by The National Campaign to Prevent Teen and Unplanned Pregnancy in the United States concluded that **one in five teens** had sent or posted a nude or semi-nude picture or video of themselves via text message or the Internet. *Two in five teens* [emphasis added] had also sent a sexually suggestive text message, email or instant message.
>
> While it is easy to dismiss the behavior as stupid or unthinking, the study also showed that those who sent images had a detailed understanding of the personal and professional risks associated with electronically transferring naked images, suggesting that increased education alone is unlikely to curb the trend. In fact, some teenagers surveyed chose to send images precisely because of the thrill they received from engaging in such dangerous, taboo behavior.
>
> For six teenagers in Greensburg, Pennsylvania the gamble did not pay off. Recently three teenage girls took naked photos of themselves before sending them to three male friends. After authorities were alerted, the girls responsible for taking the photos were charged with manufacturing, disseminating and possessing child pornography and the boys were also charged with possession of child pornography. (Nina Funnell: *On Line Opinion,* April 7, 2009*.)*

Even though the Greensburg girls were 13 at the time,[234] *doli incapax* would be rebutted if they "had a detailed understanding" that the images were proscribed under the relevant child pornography law. In Australian law, as typified by New South Wales legislation: "A person who, for illicit sexual purposes, uses, causes, procures or having care of the child, consents to the use of, a child under 16 may be imprisoned for up to 14 years".[235] (Note: Procuring *etc.* does not exclude the self, nor does it mean a person of a particular age.)[236]

WHEN IS A CHILD NOT A CHILD?

All of the foregoing discourse on what is a child points to the problems that arise from defining a child by age when, for all other purposes, under-18-teens are not children. To define a child for selected purposes and not all purposes is not helpful to the dual causes of child protection and justice for all. It should be clear from the examples given that under-18-teens are not children except that the legislated age deems them so. Perhaps by reversing the question we might have more success at defining the upper age limit of "child", thus: When is a child *not* a child? Andy Worthington asked that question on October 21st, 2008 when he wrote:

> When is a child not a child? Apparently, when he is Omar Khadr, a 15-year-old Canadian who was shot in the back after a firefight in Afghanistan in July 2002. Omar has been in U.S. custody ever since, first at a prison at Bagram airbase in Afghanistan, and for the last six years in Guantánamo. Disturbingly, he has never received any treatment befitting his status as a juvenile – someone under the age of 18 when the crime he is accused of committing took place – even though the United States is a signatory to the Optional Protocol to the UN Convention on the Rights of the Child (on the involvement of children in armed conflict), which stipulates that juvenile prisoners "require special protection." [. . .] US Secretary of Defence, Donald Rumsfeld, when referring to Khadr and others at a press conference in May 2003, after

233 CBS News March 27 2009. http://www.cbsnews.com/stories/2009/03/27/earlyshow/main First visited June 18 2009, but on March 10, 2015, it was necessary to login. I did not.

235 NSW Crimes Act 1900 No 40 Section 91G.

236 As this work was being written up (May, 2014), Monash Univerity released some results of its findings into a study of youth sexuality.

> the story first broke that juveniles were held at Guantánamo [said]: "This constant refrain of 'the juveniles', as though there's a hundred children in there – these are not children," and Gen. Richard Myers, the chairman of the Joint Chiefs of Staff, added that they "may be juveniles, but they're not on the Little League team anywhere. They're on a major league team". [237]

In sum, young detainees were treated at least as harshly as were adult detainees. The Parliamentary Assembly of the Council of Europe, by Resolution 1433 (2005) called on the USA to cease its cruel treatment that was "inhuman or degrading" and a "direct result of official policy, authorised at the very highest levels of government". In another article Worthington stated that, Khadr was one of a number of adolescent young men held in Guantanamo. He cited, in particular "Mohammed El-Gharani, who was just 14 when he was captured in October 2001".[238] In his book on Guantanamo's inmates Worthington states: "Omar Khadr . . . was persistently refused painkillers for the wounds received in Afghanistan, and that, on one occasion, when he was "very badly ill" in an isolation cell, the medics "said they couldn't see him because the interrogators had refused to let them" (278).

It might be that the military felt justified in treating Khadr as they would an adult under the provision of the law that allows "a child of thirteen who commits a violent crime [to] be tried as an adult in many jurisdictions".[239] Thus, we have a situation in which American (like Australian) youngsters are "children" until 18, but adults at 13 when it is expedient for the authorities to treat them so.

THE CRIMINAL CHILD

Policymakers, one would argue, cannot in justice have it both ways. Policymakers must either consider every alleged offence perpetrated by or on a young person on its merits, or redefine the age of a child *for all purposes,* which includes matters of a sexual nature.

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237 http://www.antiwar.com/worthington/?articleid=1361 Andy Worthington is a historian based in London. He is the author of *The Guantánamo Files*, the first book to tell the stories of all the detainees in Guantanámo. I haven't read the book.

238 www.andyworthington.co.uk/2008/04/24/guantanamos-forgotten-child/

239 This is not to suggest that such treatment for adults is acceptable. Furthermore, one wonders how Rumsfeld and Myers might have responded had some of their own 14- and 15-year-olds received similar treatment in Iraq or Afghanistan.

If a 13- or 14-year old is to be protected, as a child, from the abuse of pornography and sexual activity, then the same child should be protected against the abuse as in the Khadr example. However, Khadr understood what he was doing (which is not an endorsement of the treatment he received). Similarly children de jure, who commit crimes against property and persons, know what they are doing, and they are by no means an isolated few.

> There are currently about seventy million Americans under the age of 18, or a quarter of the total US population. Juvenile crime statistics report that 2.3 million juveniles were arrested in 2002. This accounts for 17% of all arrests and 15 to 25 percent of all violent crimes. According to juvenile crime statistics, murder accounted for five percent of violent crimes committed by juveniles, 12 percent for rape, 14 percent for robbery, and 12 percent for aggravated assault. [. . .]
> According to juvenile crime statistics, one million juvenile crime cases are processed through the juvenile court system each year and 200,000 are processed through the adult legal system.[240]

Australian juvenile crime statistics indicate that:

> Juvenile offender rates have generally been twice as high as adult ones.
> The offender rate of juveniles [. . .] increased in 2005–06, and again in 2006–07, to 3,532 per 100,000.
> The adult offender rate [. . .] In 2006–07 [. . .] was 1,492 per 100,000, the lowest rate recorded.[241]

It is unfortunate for the purpose of this sub-section that crime statistics bracket 15- to 19-year-olds, rather than, say, under-18-teens. Nevertheless, it can be assumed that a large number of children *de jure* commit adult offences. It can be also assumed that the young offenders understand what they are doing. The boy poisoner and the "sexting" girls also understood what they were doing. Clearly neither was a child in the sense

240 http://www.onlinelawyersource.com/criminal_law/juvenile/statistics.html There is no dateline on this page but the authors claim copyright from 2001 to 2010.
241 http://www.aic.gov.au/statistics/criminaljustice/juveniles.aspx

that their innocence and safety had to be protected, which are the reasons generally given for child protection legislation in its various forms.[242]

THE SPORTING CHILD

The purpose of including the "sporting child" is to illustrate further the maturity of young people who are not children in a physical way, and to add weight to the concept of the expedient child. When teenage sporting heroes are written up in the media, they are not described as children (see footnote 242), although, they are children *de jure*.

The sporting child competes at a national and international level in adult events. For example, three 15-year-olds have won the women's tennis championship at Wimbledon: Lottie Dodd, 1887, Kathy Rinaldi 1981 and Martina Hingis[243], who also won the doubles, 1996. Boris Becker was only 17 when he won the men's title at Wimbledon in 1985. Bob Mathias was 17 when he won the decathlon at the Olympic games in 1948. In that same year, 17-year-old Ian Craig represented Australia against England as a member of Don Bradman's cricket team. In the 2009 one-day cricket series, 17-year-old Ahmed Shehzad opened the batting for Pakistan against Australia. International swimming features many teenage "children", among them, American Amanda Beard, who won two silver medals and one gold at the 1996 Olympics, when she was 14 years old. In February 2008, Ellyse Perry played international cricket for Australia just two months after her 17th birthday and 16-year-old Jessica Watson returned home safely to Sydney in May 2010 after sailing solo around the world.

There are children *de jure* everywhere who are capable of competing at an adult level and national teams are selected from among them. Thus, to assert that such

242 For Australians: "The role and scope of child protection activity is primarily prescribed by the principal child protection Acts in each Australian jurisdiction. The principles embedded in legislation formally represent the philosophical underpinnings of child protection practice. Together with policy frameworks, which depict the nature, extent, and fashion in which services and interventions are to be provided, legislative principles reflect the service goals to which governments aspire. Legislation also provides the legal framework pursuant to which governments can intervene to protect children." (Australian Institute of Family Studies, January 2009).

243 "After her extraordinary junior career, Martina [Hingis] turned pro at the grand old age of 14". http://tennis.about.com/od/playersfemale/ss/girlstarsphotos_4.htm. This means that after being a junior, she became a professional on the women's (not girls') tennis circuit. Interestingly, the images on that site of: Anna Kournikova, age 8, 10 and 12, Martina Hingis, age 12, Steffi Graff age 16, Jade Curtis age 16, Tracy Austin, age 17, Caroline Wosniacki, age 15, Gabriela Sabatini, age 14 and Jennifer Capriati age 14 (after turning pro), being a "collection", would fit into the Taylor and Quayle (2003, p. 32) typology but would the collection show a sexual interest in children? If not, why not?

individuals who not only compete in an adult world, but also best them, are children is, if not an oxymoron (as in "mature children" or "adult children"), a contradiction in terms. (*E.g*. this "child" won the "men's" championship.)

None of this is to suggest that competing in an international event entirely negates the concept of "child", for example: "The youngest [Olympic Games] winner has never formally been recognised, in fact he doesn't even have a name. He was a 7 year old who replaced a man deemed too heavy to compete in the rowing event in 1900. The team he stood in to claimed the gold."[244]

Thus, the sporting child, like the expedient child, is whatever one wants to make of it. Which is particularly true of female gymnasts who are generally not only young but also look young—their appearance and competition clothing, that some suggest pleases paedophiles.[245]

THE CHILD: A SUMMARY

The difficulty in defining "child" by age has been demonstrated in the argument presented thus far, but this news item of August 2, 2009 highlights that difficulty: "A 14-year-old boy has been indicted in connection with the rape of an eight-year-old [girl]". The 14-year-old, however, did not act alone. "Police say four boys [. . .] restrained her and took turns sexually assaulting her". The other boys were aged 9, 10 and 13. The 14-year-old was charged as an adult, the others charged as juveniles.[246] The age-range here suggests that effects (on victim and by perpetrator) might be a better means of determining offence and harm; whether 8 or 80, rape is rape and age is an aggravating factor.

While it is true that teenage bodies have some growing ahead of them, under-18-teens are sufficiently aware of what is right and what is *seriously* wrong to be held responsible for offences, but this can be said of everyone. In the "sexting" matter, what

244 http://www.nzs.com/new-zealand-articles/sports/olympic-medals.html

245 Neilsen Media Research ratings for the 2008 Olympic Games ranked gymnastics as the third most watched event (behind swimming and basketball). "The '34-55-year-old men who live in their parents' basements, haven't had girlfriends in over ten years, and fit the FBI's profile of child sex offenders' demographic really boosted ratings for the gymnastics events," said a high-ranking member of the Nielsen Media Research group.
http://www.seriousssportsnewsnetwork.com/2008/08/womens-gymnastics-top-rated-program-among-men-34-55-fitting-fbi-pedophile-profile.html

246 http://www.azcentral.com/community/phoenix/articles/2009/07/23/20090723abrk-phxsexassault23-ON.html

was 'stupid or unthinking' behaviour, to Funnell, was 'sexual abuse of children' or 'open lewdness' to a Pennsylvania district attorney, who also reminded us 'ignorance of the law is not a defense'. Teenagers might not know all the *musts* and *must nots* of law, but they are not alone in this. Society in general is caught in a bind between what is *seriously* wrong and what is wrong at law (*vide* Feinberg, below). If we all knew all the law in all its detail and complexity, there would be no need for courts of appeal, or the High Court. (Even so, it is not unusual for the Australian High Court to split 4-3 in its judgements.)

The sexting youngsters did no immediate harm to each other because they willingly made images of themselves and sent them to others who were willing to receive them, thus, the maxim *volenti non fit injuria*, applies.[247] If the person is not harmed, there is no offence, except that a law has been transgressed. Feinberg explores this point in the final volume of his four-part work *Harmless Wrong-doing* (The Moral Limits of the Criminal Law). It is only the "harm and offense principal considerations [that] are always good reasons for criminalization" (Feinberg, 1990, p. 324).

From the foregoing it is apparent that a more equitable re-grouping of young persons would classify the under-13s as children and apply only to that group the laws that now apply equally to the under-18-teens.[248] It could be argued that if society is unable or unwilling to decide who is a child in need of protection (from all harms), there is something amiss with the social system, not with young people. For example, there is no logical reasoning in applying the same protective rule to a 1-year-old toddler and a near-18-year-old. If children *de jure*, such as Khadr have adult status for the expeditious purpose of treating them as adults, then, one would argue, it is the law that is seriously wrong and, by extension, guilty of some form of child abuse. As Kenneth Lanning, a former FBI investigator of sex crimes against children points out:

> The ability to make these explanations, however, is being undermined by the fact that children at an age when they cannot legally choose to have sex with an adult partner can choose to have an abortion without their parents' permission or be charged as adults when they commit

247 Approximately: a person is not wronged by that to which he or she consents.

248 There could still be the aggravated circumstance of much older adults persuading, or bribing the young person.

> certain crimes. Can the same 15-year-old be both a "child" and an "adult" in the criminal-justice system? (Lanning, 1994, p. 54).

SO! WHAT IS A CHILD?

At law, a child is an elastic social construct that can be expanded and contracted as it suits the changing whims and desires of adults. However, without the benefit of legal definitions, under-18-teens are not children, except in the advisory sense of referring to our own offspring, who are always our children. Under 18-teens are adolescents or young adults whereas the people we generally think of as children are those who are not old enough to start school and those who attend primary school.

As was stated previously, young people do not suddenly become adult overnight, they, as it were, graduate to that status; Australia's major banks recognise the gradation by offering self-managed bank accounts thus: "If you're 16 or 17 years old, open an account for yourself and earn bonus interest for saving" (Commonwealth Bank signage). Traffic and sex laws recognise this gradation in their own ways. It is relevant to question whether a person who can lawfully drive a car, self-manage a bank account, give consent to having sex and sail around the world solo, is a child. To borrow from Veerman, teenage is a special time of life, separate from childhood. It could be argued that if the law were to recognise this and amend existing laws to remove teenagers from children *de jure* status, the cause of justice would be advanced in respect of child images; particularly where under-18-teens produce and disseminate self images. This does not mean abandoning protective legislation, but rather it means giving all, from teenage up, the same protection under the law as it affects use and abuse of the person and the persons interests, while retaining the extra protection for those below teenage. Such changes to the law would also involve changes to child pornography/child abuse laws (see the next chapter).

While it can be argued that lowering the legislated age of "child" might amount to nothing more than retaining the same problems at the lower level, at least the under-18-teens would be removed from the problems associated with the protection of under-13s. In any event, "discipline and punish", as Foucault would say might be replaced by education, which could prove more effective. It is worth repeating here part of the quote attributed to Peter Jochen cited in the previous chapter: "our research is motivated by educating young people rather than protecting them".

CHILD PROTECTION AND *THE BOARD*

The information presented in this chapter would suggest that the legal definition of "child" is inconsistent with the reality of "child". In that sense, one would broadly agree with Helene Cixous who describes a child as "an imaginary species, invented by a certain type of psychological literature" (cited in Nelson and Vallone, 1994, p. 162). We are, however, considering the reality of child protection law and not that 17-year-olds play test match cricket for Australia, or that 16-year-olds sail single-handedly around the world; now matter how accomplished, such individuals are legally children and supposed to need protection against arts-media related harm and (particularly sexual) offence .

As part of this protection of the child *de jure* (below the age of 18), *The Board* is required to undertake certain procedures, which we might say fall into two parts. The first part is to prevent children accessing arts-media material that could emotionally harm them *(NCC* (b)). This was considered at some length in Chapter 9: Minors and Scary Stuff and needs no further explanation here. The second part concerns *The Board* looking at certain images of children and deciding (a) whether the image does in fact represent a child *de jure* and, if so, (b) does the image represent the sexual abuse of a child *de jure,* or (c) if the image is not of not of sexual abuse, whether the image is pornographic.

This part of *The Board's* work is not without its difficulties, particularly when we ask: what is the purpose of all this. For example (and this is hypothetical) suppose *The Board* were required to classify a number of images which were produced by a male and a female "sexting" each other. Suppose the male had grown a full beard and the female appeared to be like any other well-developed young female one might see on the beach. Suppose both were known to be 17 years of age (which is why the images were submitted to *The Board* in the first place) and both had consented to exchange their images. Clearly, the images conform to (a) but whether they also conform to (b) or (c) is arguable and would depend on what the subjects were as doing. In this case, one would argue, the law aimed at protecting the subject children from sexual offence (which is the main reason for child sexual abuse laws) fails in its purpose; *The Board* cannot protect the "children", nor can it prevent the activity. Thus, in both senses, *The Board* is impotent. If the (hypothetical) ages were not known, it would be (arguably) difficult for *The Board* to assert that the subjects "appear to be" below the age of 18

years. Then, the offence of "sexting" would come within the Crimes Act 1914 (Cth); section 85ZE makes it an offence for a person knowingly or recklessly to use a carriage service supplied by a carrier (in this case two cell phones) in such a way as would be regarded by reasonable persons as being, in all the circumstances, offensive.

Crimes are matters for the police, not *The Board*, but see p. 178, *supra*, where *The Board* decided the Henson images were not offensive; this followed complaints that the images were pornographic. This thesis challenges the cart-before-horse arrangement in which *The Board* acts as judge and jury before an accused in tried. It is argued that he Public Prosecutor might more conveniently decide if a case should be made against the maker and distributor of what are deemed censorable images, especially images of children.

In the next chapter some of the difficulties in deciding what reasonable persons would regard in all the circumstances as being offensive are demonstrated.

The term "children" is replaced by "minors" based on the suggestion offered in this chapter that (except in the present legal sense) individuals aged 13 and above are no longer children.

CHAPTER 11: IMAGES OF MINORS

> I raise questions about the censorship imposed by child pornography laws. I argue that these laws, intended to protect children from sexual exploitation, threaten to reinforce the very problem they attack. The legal tool that we designed to liberate children from sexual abuse threatens to enslave us all, by constructing a world in which we are enthralled—anguished, enticed, bombarded—by the spectacle of the sexual child (Law Professor Amy Adler, 2001, p. 209).

INTRODUCTORY

Until recently (2010), inappropriate images of minors were all but universally referred to as "child pornography", but changes to the law "generally substitutes the term "child abuse material" for the term "pornography" (NSWLA *Hansard* March 17, 2010, p. 21573). The relevant laws being: amendments to the *NSW Crimes Act 1900* No 40, Division 15A: Child Abuse Material, and *NSW Crimes Amendment (Child Pornography and Abuse Material) Act* 2010, which took effect in April 2010. The NSW amendments approximate the definitions of "child abuse material" and "pornography" in the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures)* Act (No. 2) 2004 (Cth). There are some differences between the two descriptors but generally they are much the same. Thus, to avoid confusion, the longer-established term, "child pornography", will be used throughout, unless the context requires otherwise. Because several other laws were amended in conjunction with the creation of "child abuse material", references herein will be to the *new law*.

The information presented in this chapter goes to core of Australia's censorship system and of justice inasmuch as *The Board* acts as a jury that delivers its verdict before an accused is given a chance to offer a defence. The fact is: if *The Board* refuses to classify an item of arts-media, it deems to be child pornography, the possessor of that item can be charged with and found guilty of an offence.

In this chapter it is argued that there is no need for *The Board* to decide if an image is pornographic according to either the *new law* or Australian law (above). Individuals can see for themselves whether a child is being sexually abused (child pornography), but other images are classified in the eye or mind of the beholder. The task in this

chapter is to examine child imagery, in order to discover what elements constitute child pornography and child sexual abuse.

Note: All images shown in this chapter are publicly available at various Google references, only one of which, Fig 11.4 (credit *Sydney Weasel),* requests acknowledgement.

A WAY OF SEEING

Child pornography is arguably the most contentious and perhaps confusing topic of art censorship debate. Part of the confusion arises from the concepts of "child" and "pornography", which combine into "child pornography" and "child abuse material" which includes, torture, cruelty sexual and other physical abuse (see p. 265 infra). These latter terms came into sharp focus when, in May, 2008, a troop of police raided a Sydney art gallery and seized a number of large photographs, the work of artist photographer Bill Henson. Many considered the pictures high quality art, but Hetty Johnston, founder of the child protection group, *Bravehearts*, declared them child pornography, thus, instigating the police raid. It was then disclosed that Henson had taken a number of photographs of naked 12- and 13-year-olds (see Marr, 2008, *The Henson Case*); this incident is further considered below. As will be seen in this, and the chapter immediately following, what is imputed to an image depends on who makes what of what they see.

It is generally accepted that, in order to understand art, we must bring something of ourselves to it. While abstract art, obscure poetry and 20th-century music, for example, might require a little more effort than a self-explanatory landscape, a limerick or a waltz tune, most of us who lack a special expertise, nevertheless understand what we read, watch and hear. There is, however, often more to an image that at first strikes the eye and if we are sufficiently interested, we will spend some time and effort seeking out the not-so-obvious meaning. Consider, for example, the worldwide, online store:

The logo looks simple enough: big company, big river, but what do we make of the arrow? A big river flowing seaward, possibly, but when looking at the head and tail of the arrow we note it begins at A and ends at Z. Thus, some might read into the image that amazon.com caters for everything from A to Z. The important point here is, in this understanding of the image nothing tangible has been added to it; there are no pointers or explanatory notes attached, we simply report what we see and attempt to justify our reasoning. The *Mona Lisa's s*mile is probably the best-known, meaning-challenging

work of art.[249] Here again, no matter how many interpretations, the image remains the same. It is we, the viewers, who differ among ourselves depending on what we see, or believe we see, in images.

> Every image embodies a way of seeing. Even a photograph. For photographs are not, as is often assumed, a mechanical record. Every time we look at a photograph, we are aware, however slightly, of the photographer selecting that sight from an infinity of other possible sights. This is true even in the most casual family snapshot. The photographer's way of seeing is reflected in his choice of subject . . . Yet, although every image embodies a way of seeing, our perception or appreciation of an image depends also upon our own way of seeing (Berger, 1977, p. 10).

This difference in perception, as it pertains to art censorship, becomes evident when two parties of differing attitudes or beliefs look at images of minors. For example, to Bill Henson and the admirers of his work, the pictures of his 13-year old subject were photographic art; Hetty Johnston of *Bravehearts* disagreed

> What parent in their right mind would allow their 12- or 13-year-old to strip off naked and display themselves all over the internet? That's not in the interests of the child. What's happening here is that the arts community have felt that they've been able to get away with this under the guise of art for a number of years. (*SMH,* May 24, 2008.)[250]

As this chapter proceeds, thirteen child images are considered which, according to some interpretations of the law, could be described as "child abuse material". It depends more on the state of our imaginations and minds, than on our eyes, whether or not the subjects have been abused. In brief, the *new law* describes (not defines as

249 The last I read on this had something to do with which part of the painting first caught which part of the eye! This causes the viewer to see the smile in different ways. "The new discoveries have been made by scientists at Laboratoire du Centre de Recherche et de Restauration des Musees de France and the European Synchrotron Radiation Facility". Daily Telegraph UK August 22 2010.

250 *Bravehearts* is an Australian organization; its "key purpose is to educate, empower and protect Australian kids from sexual assault" (http://www.bravehearts.org.au).

claimed) child abuse as: (1) a child victim of torture, cruelty or physical abuse; (2) a child engaged in or apparently engaged in a sexual pose or sexual activity (3) a child in the presence of another person who is engaged or apparently engaged in a sexual pose or sexual activity; (4) the private parts of a person who is, appears to be or is implied to be a child (see p. 275 *infra* for the full description). Depending on who looks at them, all the images in this chapter could fit in one or more of the first three descriptors; (4) clearly has pornographic connotations.

EMOTIVE RESPONSES TO VIEWING IMAGES OF MINORS

When one looks at images of minors, especially those that are in some way contentious, it could be argued that the way they are interpreted makes a difference between what are and are not acceptable portrayals.


Fig. 11.1

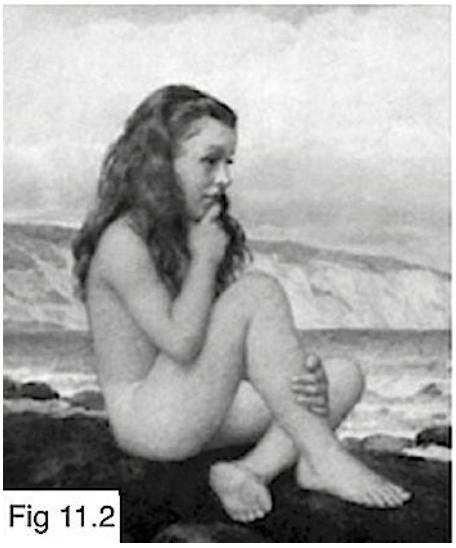
Fig 11.2

For example, the picture Fig.11.1 (left), published as the cover image in Art Monthly Australia, Issue 211, July 2008, drew comments from three leading politicians and it was also criticised by religious leaders. Referring to the picture, Kevin Rudd, as Australia's Prime Minister, was reported as saying "we should be about maximising the protection of children [. . .] Frankly, I can't stand this stuff". (*Herald Sun* July 7, 2008). The Premier of New South Wales, Morris Iemma, "described the [same] images and others of the girl as 'disgusting' " (*The Daily Telegraph* July 07, 2008). The responsible Minister in New South Wales, Kevin Greene "argued strongly" at a meeting of his State counterparts for a tightening of *The Act* "to see measures put in place that protect children" *(SMH*, July 24, 2008).

Each of these politicians looked at the image in a way that was very different from

that of the photographer (the child's mother) and the art magazine's editor. Furthermore, Rudd said: "A little child cannot answer for themselves [sic] about whether they wish to be depicted in this way" (The Age, July 7 2008). Hetty Johnston of *Bravehearts* reportedly concurred with Rudd: "Ms Johnston said that the child was six and could not have possibly given informed consent" (Herald Sun July 7, 2008). Perhaps Rudd and Johnston were unaware that the image, with Dover's white cliffs in the background, imitated Lewis Carroll's Beatrice Hatch? (Fig. 11.2). (There is more to add about the Rudd and Johnston statements regarding a child's choices in the chapter immediately following this.)

In January 2011, another item of art caused some controversy. As with the six-year-old girl on the Art Monthly cover, the eight-year-old boy's mother took the picture (Fig. 11.3 below left). Proceeds from an art show that was to include the picture, were to go to the Sydney Children's Hospital but the picture was rejected because of what were reported as sexual overtones. There is just one more image needed to complete this short review of the emotion that children in arts-media evoke. (Fig. 4, credit: *Sydney Weasel*).

Fig. 11.3

Fig 11.4

The exhibition that was to include Fig.11.3 was then cancelled altogether (ABC *News*, January 5, 2011). (It is important to note that the hospital did not say the work was pornographic but it is unclear what was meant by sexual overtones.[251]) The boy's mother, Del Kathryn Barton, it should also be noted, has a reputation such that she

251 It was not considered part of this work's function to inquire into what was meant by sexual overtones but I can't see anything of the sort in that image. But, as Berger said (above) "Every image embodies a way of seeing".

won the Archibald Prize for portraiture in 2008 and again in 2013. In Fig.11.4, note the child's facial expression and the way the adult hand grips the child's. This picture is not part of the typology of child pornography in TQ 2003, p. 32, because such images do not indicate a possible interest in adult-child sexual abuse. However, the law is not concerned only with sexual abuse; besides the Guidelines' instructions to The Board there is also a legal definition of child abuse material that proscribes depictions or descriptions of a person, or a representation of a person, who is, or appears to be, or is implied to be under 18 years of age; and is, or appears to be, a victim of torture, cruelty or physical abuse (italics added). This, however, depends on what reasonable persons would regard as being, in all the circumstances, offensive The same legislation defines child pornography material but the only provision that could fit the first three of the four images presented here is "engaged in, or appears to be engaged in, a sexual pose or sexual activity (see page 276, infra for the complete wording).

If Rudd, Iemma, Greene and Johnston as reasonable people were offended by Fig. 11.1 and the complainants regarding the Sydney Childrens' Hospital picture, Fig. 11.3, were also reasonable people, then, if consistency is to be applied under the *new act* all should be offended by Fig. 11.4. Indeed, it is difficult to envisage how Fig. 11.4 can be other than child abuse material; it portrays a child who "appears to be, a victim [if not] of torture, [then, of] cruelty or physical abuse". However, (as far as is known) the image has not been called "disgusting", nor do the laws that "protect the most vulnerable members of our society" proscribe it. In short, it would appear that any collector of images such as Fig.11.4 would not come under suspicion as having a sexual interest in children. However, Fig. 11.1 and Fig. 11.3 have been the cause of some concern.

BELIEVING ONE'S OWN EYES

On the evidence in Fig. 4, one can conclude that the child is unhappy, but how it came to be unhappy is not known. From the detail, the hand-grip, the firearm, the bandana, one might assume the unhappiness relates to being an unwilling soldier, but that is as far as that assumption can go. For all we know, the child might have had a nasty fall; and the adult has given him the firearm and bandana hoping to pacify the child. One can only take the evidence presented in the image and believe one's own eyes; how one interprets the image is something for the mind. For example:

> We had a complaint about a full colour double page ad *The Womens Weekly* ran for a brand of carpet. There was a naked baby, sitting on the carpet. In the background a door, slightly ajar, led to another room in the house. The woman said it was clear that a paedophile was peeping from behind that door, looking at the naked baby. There was no sign of anyone else, not even the shadow of a person behind the door or anywhere else, in the picture.[252]

That said, a portrayed child's appearance cannot be taken to mean the child was not abused in making the image, but that is not the same as seeing the abuse. Referring to images of minors sexually engaged with adults, Sanderson stated that "typically" the children are smiling and "appear to lovingly embrace" the adult as though enjoying the abuse (see the immediately preceding chapter).

Fig. 11.5

Fig. 11.6

When viewing images that portray a child smilingly embracing an adult, and no evidence that the child was being abused, there could be no reason to think any differently than the child is happy. What Sanderson means is something like this: My own eyes tell me what I see is a wrongful act; therefore, the child is being abused. In cases like this, we bring part of ourselves to the image and apply our knowledge or belief to what we see. There is, however, only one relevant feature in Sanderson's picture: an adult is sexually engaged with a child. From that, we make two

252 My wife, Jennifer Rowe, gave me this quote for attribution. She was the magazine's editor from 1988 to 1992.

assumptions; the child cannot have given informed consent, thus, the child is being sexually abused. Taken together, what we see and the conclusion we draw from the seeing are the elements on which we base our judgment.

Whether an adult or a child is portrayed as engaged in sexual activity, the elements remain the same. It is argued, however, that neither the effect, nor the way one looks at a picture are part of its content; this holds true, whether for a Picasso or the crudest images.

Thus, the art student would look at, for example, Bronzino's[253] *Allegory of Lust* (Fig. 11.5) or Lambert's *The Bathers* (Fig. 11.6), in their entirety and consider the construction, subject, technique and so on. Conversely, a person with a sexual interest in children might see little else than the naked juveniles.

Ewing offers an interesting example of looking at an image in order to find something that fits with one's personal understanding or interpretation, rather than what one actually sees. An accused agreed with the district court's finding that the image of a boy was pornographic. However, the accused did not agree that the image "was sadistic, masochistic or otherwise violent" and took the matter to appeal. The Court of Appeals agreed with the district court on the following pictorial evidence:

> The Image depicted a boy wearing a leather strap around his torso and holding his hands behind his back. The [district] court found that both the leather strap and the placement of the boy's hands behind his back gave rise to an inference that the boy's hands were bound. Thus, the district court did not clearly err in finding the image sadistic, masochistic or violent. Thus, there was no procedural error in defendant's sentencing [which for that and the possession of other illegal child images, was confirmed at 35 years jail] (Ewing, 2011, p.134.)

To scrutinise an image for invisible sexual, sadistic, masochistic or violent content or connotation, whether child-protector or potential paedophile, is not to believe one's own eyes, but rather, to imagine something that is not part of the image. In the case cited one would be equally justified to imagine the boy was holding the ends of the leather strap, or holding a stopwatch to time how long he could hold his breath in his

253 Bronzino's birth name was Agnolo di Cosimo, (1503-1572).

situation. One would argue that the courts' assumptions are as insupportable as are the alternatives, but the alternatives (*sans* sadism) would not have resulted in so harsh a sentence.

SEEING WHAT IS AND IS NOT THERE

Fig. 11.4 also gives "rise to an inference", indeed, as does any image; we might infer from Fig. 11.5 that Bronzino used live models and had them embrace in an incestuous pose since his picture is of a mother and son. One might further infer that Lambert (Fig. 11.6) was a beach pervert who hoped to catch glimpses of undressed little boys. If courts are to decide by inference what makes an image more or less offensive, what is one to infer from Fig. 11. 7.

Fig.11.7

Fig.11.8

Consider the elements: the man has his left arm around the child; his hand is on the child's left thigh and knee; the child's right leg is between the man's legs, perhaps even making contact with the clothing covering his genital area. Note also, the direction of the child's gaze—averted from the man; also the child seems unsure of what its right hand should be doing. One need not be a psychologist to suggest that this appears to be an awkward, perhaps confusing situation for the child who, it might be argued, does not recognise the man as its father, or any other adult male known to the family. One might even read a hint of "stranger danger" into the picture. Applying the same sort of scrutiny to Fig 11.3, one could suggest that the heavy crease in the boy's pants suggests the outline of a penis, perhaps even an erect penis. It would be surprising if this is what "reasonable persons would regard as being, in all the circumstances, offensive", but some apparently found it offensive. With regard to Fig 11.3, which was

the cause of the exhibition being abandoned: "The Sydney Children's Hospital deemed that one work could be interpreted by some members of the community as inappropriate as part of a fundraiser for a children's hospital charity" (ABC *News*, January 5, 2011). Those "members of the community" saw something in the image that is not visible.

Adler, perhaps, explains why some see what is not in the image. She, in effect, posits that we now cannot believe our own eyes, but must instead look through the paedophile's eyes. One is entitled to ask if the judge in the case cited by Ewing did just that, because, as Adler notes:

> Child pornography law has changed the way we look at children. I mean this literally. The [USA] law requires us to study pictures of children to uncover their potential sexual meanings, and in doing so, it explicitly exhorts us to take on the perspective of the pedophile (Adler, 2001, p. 209).

Seeing, or inferring what is not there often becomes believing what is not there and then presenting one's belief a statement of fact. This does not only apply to images of minors, there would appear to be a general denial that individuals can have honest intentions and opinions on matters sexual. Mary Roach, (2008), refers to attitudes similar to the alleged "sham" of child-image discussion, she states. "The unspoken assumption [of physiologist John Levin's work] was that he was somehow deriving an illicit thrill from calculating the ion concentrations in vaginal fluids. That people study sex because they are perverts" (Roach, M., 2008, p. 12). Such statements are unfortunate; there is more than enough evidence in the *Hansards* to apply Roach's observations to Australia's politicians. Consider, just one example, the three volume: *Report on the Joint Committee on Video Material* (April 1998) runs to 815 pages of editorial and was largely a study of portrayals of sex in the media.[254] One would think it less than fair to label as perverts all those involved: committee members and those who made submissions.

254 Volume 1 is recognized as Parliamentary Committee Report 59007; Volume 2 part 1 as 259015; Volume 2 part 2, as 259026).

IT'S ALL IN THE MIND

This sort of thinking is how, Adler argues, we must now view images of minors—to be sure that nothing gets past the censorious eyes of those whose business it is to prevent children being sexually harmed. Adler had this to say after reading criticisms of a Calvin Klein advertisement (Fig. 11.8) in the *New York Times Magazine.* She first went back and looked (as was done here) at the subject image of two young boys in underwear:

> One of the little boy's underpants seem baggy as he jumps in midair. Is that an outline of his genitals I wondered? It was then, as I scrutinized the picture of the five-year-old's underwear, that I realized I was participating in a new order, a world created and compelled by child pornography.
>
> I do not believe that thirty years ago people would have seen the photograph the way we do now. Our vision has changed. I think that child pornography law is part of the reason we have come to think about the picture this way, searching for signs of sex in a "very ordinary image" of children. (Adler, 2001, p. 208)

SUGGESTION, INNUENDO AND INFERENCE

All that said, procensorites do have a case for subjecting images of minors to scrutiny. If it is allowed that we cannot assume inappropriateness of images by reading into them what is not there, may we then consider the more obvious suggestions, innuendoes and inferences? A student handout from the Media Awareness network of Canada takes up the Calvin Klein matter.

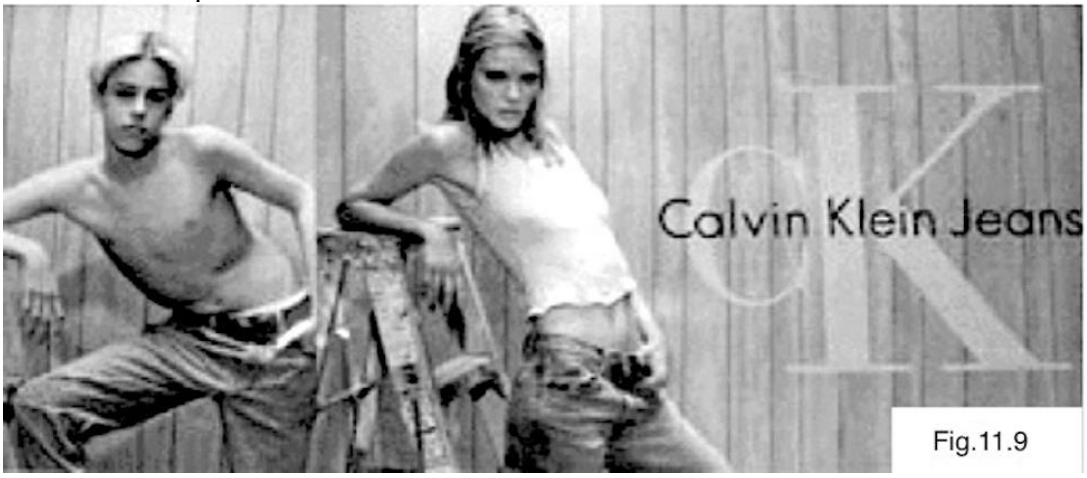

Fig.11.9

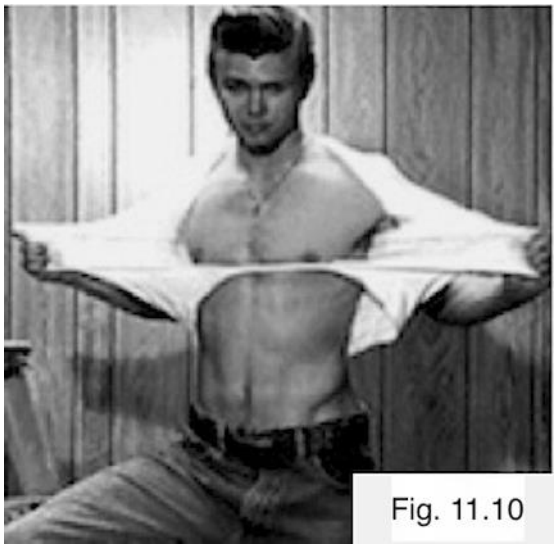
Fig. 11.10

With reference to the images labelled Fig.11. 9 and Fig. 11.10, the Canadian Media, student handout commented, quote:

> The advertising campaign—which used images of models who were reportedly as young as 15—was meant to mimic "picture set" pornography of the '60s. In the magazine ads, young models posed suggestively in a sleazy suburban "Rec Room", complete with cheap panelled walls, a paint splattered ladder, and purple shag carpeting. The TV spots left little doubt that the images intended to imitate pornography. In one of these ads, the camera focused on the face of a young man, as an off camera male voice cajoled him into ripping off his shirt [Fig.11. 10], saying "You got a real nice look. How old are you? Are you strong? You think you could rip that shirt off of you? That's a real nice body. You work out? I can tell." In another, a young girl is told that she's pretty and not to be nervous, as she begins to unbutton her clothes.[255]

ILLEGAL IMAGES UNDER CHILD ABUSE LAW

One could argue that Figs. 11.8, 11.9 and 11.10 were intended to evoke sexual responses, and they would also reasonably fit TQ's "Level 4" category which consists of: "Deliberately posed pictures of children fully, partially clothed or naked (where the amount, context and organisation suggests sexual interest". Indeed, there is room to argue, as might the writer of the Canadian Media handout, that the images might be "Level 5 Erotic Posing", thus: "Deliberately posed pictures of fully, partially clothed or naked children in sexualised or provocative poses" (TQ, 2003, p. 32). If that definition were allowed, many images would be illegal, such as the 16-year-old "prom" girl in Fig.11.11, who appears willing to be seen in that dress and happy to pose for the

255 http://www.mediaawareness.ca/english/resources/educational/handouts/ethics/calvin_klein_case_study.cfm Acessed May 31 2011. Unable to access on March 20, 2015.

picture [face shield added]. The Calvin Klein advertisement in Fig 11.12 clearly confronts TQ's "underwear" argument. Both models could be described as being under the age of 18; the model in Fig 11.13 clearly is quite young.

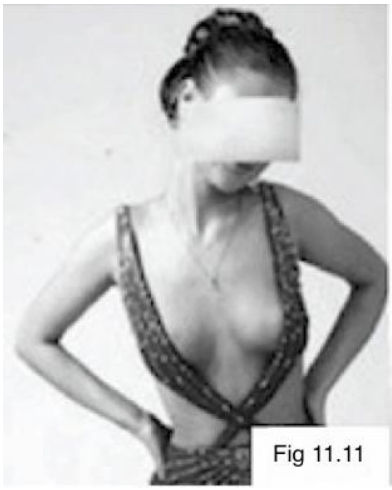

Fig 11.11

Fig 11.12

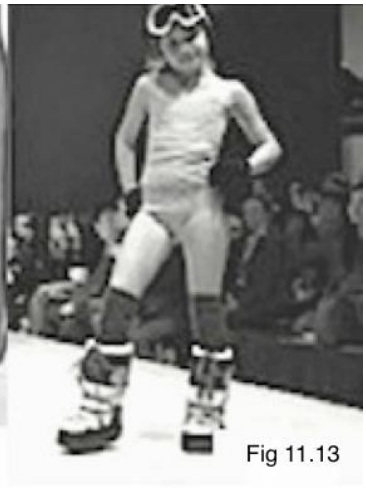

Fig 11.13

Fig 11.13a

Fig 11.14

Fig. 11.13a offers a wider view of Fig 11.13. Both are from a colour video that appeared to be sponsored by an Australian Government "Quit Smoking" advertisement. Fig 11.14 is 12-year-old model Madison Gabriel on a catwalk, concerning whom, John Howard as Prime Minister is reported as having said: "We do have to preserve some notion of innocence in our society" (*SMH*, September 14, 2007). Kevin Rudd, then Opposition Leader said: "I have real concerns about littlies that young going out there doing that sort of thing" (*The Age*, September 16, 2007).

Depending upon who the reasonable person is, such images *could* appear to be illegal under the NSW *new law:*

> The new provisions, which are modelled on the Commonwealth provisions, specifically extend to a greater range of material, including material that depicts or describes the private parts of a child. The material concerned will now be referred to as child abuse material. "Child abuse material" is defined as material that depicts or describes in a way that reasonable persons would regard as being, in all the circumstances, offensive: first, a person who is, appears to be or is implied to be, a child as a victim of torture, cruelty or physical abuse; second; a person who is, appears to be or is implied to be, a child *engaged in or apparently engaged in a sexual pose* [italics added] or sexual activity, whether or not in the presence of other persons; third, a person who is, appears to be or is implied to be, a child in the presence of another person who is engaged or apparently engaged in a sexual pose or sexual activity; or, fourth, the private parts of a person who is, appears to be or is implied to be a child (NSWLA *Hansard,* March 10 2010, p. 21195).

INTERPRETATIONS OF CHILD ABUSE MATERIAL/PORNOGRAPHY

What is wrong with the images that Rudd, Iemma and Greene found so disturbing? Are images only inappropriate if they are photographs? None of the images presented here is consistent with the typical definition of pornography but perhaps they *could* be classified as CAM according to the new law. In the chapter immediately following we examine the extent to which CAM differs from child pornography. For now, we consider what some two immediate lines of opposing reasoning. First, it could be argued that the provisions of the new law (above) are so vague that, taken together with TQ typology of child pornography, no picture of any child in any circumstance could escape suspicion—the unwilling boy soldier included (see the subhead **INOCCUOUS IMAGES AND THE PAEDOPHILE'S GAZE**, page 280, *infra*). Indeed, by that reasoning, all images in this chapter are suspect. Second, the opposite could be true—the phrase "in all the circumstances" could let all non-sexual images of minors out of

the section because there is no definition of what constitutes a "sexual pose"; that being so, it might be instructive here to list the first five levels of TQ's ten "different kinds of child pornography".

> 1. Non-erotic and non-sexualised pictures showing children in their underwear, swimming costumes, etc. from either commercial sources or family albums; pictures of children playing in normal settings, in which the context or organisation of pictures by the collector indicates inappropriateness
> 2. Pictures of semi-naked children in appropriate nudist settings and from legitimate sources.
> 3. Surreptitiously taken photographs of children in play areas or other safe environments showing either underwear or varying degrees of nakedness.
> 4. Deliberately posed pictures of children fully, partially clothed or naked (where the amount, context and organisation suggests sexual interest).
> 5. Deliberately posed pictures of fully, partially clothed or naked children in sexualised or provocative poses (TQ, 2003, p. 32).

Depending on the content, level 5 might include images that fit a more general understanding of pornography, but levels 6 -10 are images that depict sexual activity (including 10: bestiality and a child). To include levels 1 to 4 as types of child pornography does not assist in distinguishing images of the sexual abuse of children from other images. Photographers like Henson, Sturgess, Mann, Mapplethorpe and Leibovitz have all taken many pictures that would be classed as level 4, but to extend that description to suggest those artists on that account alone had a sexual interest in children would be unfair to say the least.

TQ, 2003, p.32, level 10(b) unarguably fits the more general understanding of pornography: "Pictures where an animal is involved in some form of sexual behaviour with a child" but 10(a) does not fit the usual understanding of pornography: "Pictures showing a child being tied, bound, beaten, whipped or otherwise subject to something that implies pain", although it cannot be other than child abuse (TQ, 2003, p. 32). On

TQ and the *new law's* reasoning, all images of the kind used in this chapter, if collected and arranged in any quantity, could be classed as "different kinds of child pornography". Or, if not in a collection, an individual could fall foul of the *new law's* "child abuse" definition.

This brings us to the point of distinction between "child abuse material" and abused children. It is some concern for justice that a strict liability applies to child abuse material; an accused would have no defence if the new law were enforced literally. In speaking to that law, Nile made this quite clear:

> The bill will change the law as it relates to child pornography, which will now be referred to as child abuse material, so that the defence relating to material produced for child protection, scientific, medical, legal, artistic or other public benefit purposes will no longer be available.

Taken together with some of TQ's types of child pornography (child abuse) almost any image of a child could, in some circumstances, be suspect, however, those opinions are countered by a requirement in the *new law* that "reasonable persons would regard [an image] as being, in all the circumstances, offensive". It could be argued that in taking or collecting pictures of children as described by TQ's typology could seen as "procuring" the children for sexual purposes and, thereby, abusing them, but one would like to think such an argument would be stretching an already elastic law to breaking point.

INNOCUOUS IMAGES AND THE PAEDOPHILE'S GAZE

Adler believes we have reached the point where, according to child protectors, no image of a minor is innocuous; to those people:

> . . . it is essential to the definition of child pornography for us to understand that pedophiles see differently. Once we understand this, however, we have to take another step: We must look at pictures as a pedophile would. Consider the argument made to the Supreme Court in Knox by *amici*:

> "Because lasciviousness should be examined in the context of pedophilic voyeurs, this Court should view visual images of young girls in playgrounds, schools, and swimming pools as would a pedophile. Pedophiles associate these settings with children, whom to pedophiles, are highly eroticized sexual objects. It therefore follows as a matter of course that viewing videocassettes of the genitalia of young girls in these settings permits the pedophile to fantasize about sexual encounters with them" (Adler 2001, p. 209).

Adler observes that the videocassettes referred to did not "actually represent sexual parts". In an Australian case, a man (Thompson) was charged with making a video recording of naked children. He was found not guilty.

> 4. The real point here is whether the film actually represents the sexual parts of a child. In my view, having viewed the video, I cannot see any representation of any sexual part of a child. Certainly there is filming of where the sexual parts of a child might be, but, it is no more or less so than if the child was fully clothed. For that reason I think that the Crown has failed to make out an essential element of this particular charge (R v Thompson [2009] ACTSC 23).

Amici in Knox asserts that certain innocuous images feed a paedophile's fantasies. What should follow from this is, not only paedophiles but also *amici* and others who hold similar views, have one way of looking at and deconstructing images of minors (the paedophile's gaze), whereas others view them for what they represent, namely innocent children going about their ordinary daily lives. It also follows that TQ's typology is arguable on the grounds that at least levels 1 to 4 have no place in a list of pornographic images. The suggestion that the quantity and order of images transforms otherwise innocuous images into pornography cannot be sustained; as far as is known to this author, no generally accepted definition of pornography includes quantity and order among its descriptors. Further, the claim that the collector of such images (types 1 to 4) might have a sexual interest in children is irrelevant to the argument as to what is and is not an inappropriate image of a child. It is observed here that TQ admit to

having a collection of 150,000 images of minors, which the authors claim, is to assist in identifying sexually abused children (TQ, 2003, p. 151).

It is worth repeating Berger here that: "although every image embodies a way of seeing, our perception or appreciation of an image depends also upon our own way of seeing" (Berger, 1977, p. 10). Thus, one person sees something in the *Mona Lisa's* smile that another might not see, and one sees in an innocuous image of a child what others might not see; it all depends on how much of ourselves we bring to the image. The remarks of politicians, Rudd, Iemma, Greene and Nile, would indicate that they looked at the pictures on which they commented as a paedophile would. Which, one might suppose, is another way of looking at images of minors.

This work continues to argue that looking at images does not change their contents, and looking as a paedophile would does not make images either pornographic or child abusive. (See the quote re the *Womens Weekly* picture of the baby on the carpet p. 268 *supra*). Furthermore, this work re-asserts that if the image of an adult, whether naked, semi-naked, partially or fully clothed is neither pornographic nor abusive of the subject, then, by the same judgmental standard, a similar image of a child is neither pornographic nor evidence of abuse. It is conceded, however, that the law being imprecise can lead to differing interpretations of images that, while clearly not pornographic, are contentious.

THE DIFFICULTY OF IMPRECISE LAW

It could be argued imprecise terms, such as "appear to be" open the way to avoidable errors in law enforcement decisions, making police the judges rather than being the enforcers. By omitting such words as "exploitation", lawmakers would have to state exactly what they mean when setting out their descriptions of minors for arts-media classification and contingent criminal law purposes. This would require a careful and difficult blending of child protection law and arts-media censorship, especially so as Australia, through Interpol, is party to a code of international co-operation regarding inappropriate images of minors. For instance, in 2004, the USA's Federal Bureau of Investigation (FBI) provided Australia's law enforcers with information that led to the arrest and conviction of several hundred Australians for possession of child pornography images. Paul Neville, MHR, gave us an idea of scale and extent when he said:

> As at the beginning of November [2004], 708 suspects had been identified and 469 warrants had been executed Australia wide, resulting in 228 arrests or summonses. A total of 2,260 charges have been laid. Those are incredible figures. The fact that the porn ring had links to organised crime groups in Russia and eastern Europe meant Operation Auxin had wide-ranging and cross-jurisdictional aspects to its nature, involving the Australian High Tech Crime Centre, the Australian Federal Police and state and territory police agencies (*HRH,* December 1, 2004, p. 171).

A lack of clarity, however, led to nearly a quarter of those charged in NSW (23%) being acquitted. "Police documents obtained by *The Sun-Herald* show prosecutors won 79 of the 102 cases that have been through the courts" (*SMH*, March 19, 2006). It is argued herein that the time, expense and inconvenience to all concerned could be eliminated if there were a clear and unambiguous definition of child pornography/child sexual abuse, images of minors.

MANIPULATED AND FICTITIOUS IMAGES OF MINORS

One argument in support of the elimination of (according to some) doubtful or suspect images suggests paedophiles would be aroused by them (at least by Henson's images), of which Hetty Johnston said: "You're talking about the distribution and dissemination of images over the internet [*sic].* [. . .] You can call it art. You can call it whatever you like. It's going to stimulate paedophiles—bottom line" (ABC *Stateline* June 15, 2008).

If we allow Johnston's argument and the risk of paedophiles accessing images *via t*he Internet, or, indeed by any other distribution platform, it is relevant to question whether the same argument can be applied to one's imaginary characters kept for purely personal reasons. Alan John McEwen had images of *The Simpsons'* children *(Bart* and *Lisa*) on his computer. In the magistrate's court he was found guilty of possession of child pornography and appealed to the NSW Supreme Court. While Judge Adams, on appeal, found that McEwen had no criminal intentions (the images were not distributed by McEwen), he did find that *The Simpsons* were "persons" within the meaning of *The Act* and, on that ground, dismissed McEwen's appeal against his conviction. Adams, however, took more than 6,000 words to explain why the images

were representations of persons and ruled that each side pay its own costs, which, one would argue, indicates that the matter was not beyond reasonable doubt.[256] (McEwen v Simmons & Anor. [2008] NSWSC 1292).

Manipulated images that portray sexual abuse or sexual posing of minors are also prohibited. Again, such an image is not that of an abused or posed minor but either a lifelike representation drawn from the creator's imagination or a collage of several images assembled in such a way that it represents a real person.

The question is: Would cartoon characters "stimulate paedophiles"? If so, one could argue that many Japanese *anime* characters would do so. Perhaps that is the case. Then the real life Jodie Foster (age 13) in *Taxi Driver*, and Brooke Shields (age 12) in *Pretty Baby* might be considered even more tempting than *Bart* and *Lisa*. In *The Virgin Suicides* (1999), there are five daughters aged between 13 and 17. "Lux", age 16, was played by Kirsten Dunst who was, herself, 16 and "at once a blond icon of girlish suburban innocence and an emblem of womanly eroticism. Like Sue Lyon in Stanley Kubrick's 'Lolita,' with her lollipop and her heart-shaped sunglasses, Ms. Dunst turns Lux's every glance and gesture into an ambiguous provocation" (Scott, A. O., *New York Times* Movie Review, April 21, 2000). It is argued in Chapter 12: Classification and Censorship Unbound that the consequences of any activity (in this case downloading, watching, possessing images) rest with the individual concerned. Thus, one would argue, if no consequential criminal activity follows exposure to actors Foster, Shields and Dunst, and cartoon characters, *Bart* and *Lisa Simpson*, there is no need to call anyone to account. On representations of entirely fictitious characters, Suzanne Ost (2010) concludes:

> It is extremely difficult to find a legitimate basis for criminalising the possession of fantasy [non-photographic pornographic images of children] NPPIC through a reasoned application of the harm principle [. . .] it seems that the legislature is either relying on harm without any proof or reasoned analysis of harm, and/or has deemed that legal moralism provides sufficient grounds to warrant criminalisation. [. . .] The questions that should be asked are whether criminal law's escalating intervention is likely to offer any better protection to children,

256 This becomes clear when one reads the entire judgment.

> and how far we are prepared to move away from the persuasive classical liberal harm-based rationale of criminalising images of real child pornography (Ost, S., 2010, pp. 51-52).

This researcher found no comment by *Bravehearts*, or its founder, Hetty Johnston on any of this. It is possible, however, to settle the matter of illegal child images by using Interpol's criteria. One final point on this: the amendment to the new law creates the singularly curious proposition that an artist, film-maker or photographer must first create the image and then, pay the prescribed fee and submit it to *The Board* for classification.[257] Only then will the image's creator know if it is acceptable. If it were refused classification, the creator would risk being charged with offence(s) in respect of child pornography/sexual abuse law.

INTERPOL CENSORSHIP EXPLAINED

Provided they are defined as such, images of child sexual abuse are prohibited in the same way as are illicit drugs, and the possession of firearms and knives; therefore matters for law enforcement and not classification.[258] Perhaps Interpol offers the best solution to all these difficulties of interpretation. When a web browser attempts to access a site that is known to contain child pornography/abuse material, the computer operator is confronted by this message (above left) that begins with "Your browser has tried to contact a domain that is distributing child sex abuse material. Access to this domain has been blocked by your Access Service Provider [ASP or ISP] in co-operation with Interpol".

The message on page 285 covers the entire Internet browser page and the international "no go" bar sign is unmistakable. The sign appears when an Internet user is directed to a website that is (or is suspected of) distributing child pornography/child sexual abuse. One of the links at the right side of the message (the black panel) reads:

257 There is no particular fee for a one-off artwork but it would probably be covered under publication fees that (at the time of writing) are set at a minimum of $420 for "0-76 pages". http://www.classification.gov.au/Industry/Journey/Pages/Pub/Step3.aspx

258 Firearms are unambiguously so and if the law were to include crossbows, it would state so. This is so where the law against possession of knives includes screwdrivers and scissors.

"Criteria". These criteria, [displayed on a separate page], include the following:

- The domains entered into in the "Worst of"-list of domain contain images and movies which fit the following criteria:
- The children are "real". Sites containing only computer generated, morphed, drawn or pseudo images are not included.
- The ages of the children depicted in sexually exploitative situations are (or appear to be) younger than 13 years.
- The abuses are considered severe by depicting sexual contact or focus on the genital or anal region of the child.

The criteria state that: "In most countries a child is anyone younger than 18, and images or films of persons defined as a child in a sexual context is punishable to possess, distribute and sometimes view. Hence, domains that are not blocked by the "worst of" list are not necessarily legal to access in your country."

In the Introduction to this thesis it was explained that unwanted pages popped up even though the browser was configured otherwise and illegal images are hidden inside classifiable, (X 18+ type) pages. Interpol is aware of this, stating: "Illegal content may not be immediately visible (it could be hidden with the exact location communicated only to certain individuals), making the blocking appear to be wrongful" (*ibid).*

By this process, Interpol, in co-operation with Australian police, among others, has overcome the difficulties of separating child pornography/abuse images from other images of minors. In November 2012, ABC news informed its audience that Communications Minister Conroy had issued ISPs "with orders to block websites listed on Interpol's 'worst of' database" (ABC News *Government abandons plans*, November 9, 2012)[259] While this does not mean other images are, thereby, legalised, it would appear illogical that Internet browsers can access images of minors that are not on the 'worst of' list and yet are still, by the Nile-Johnston standard, neither of child sexual abuse nor child pornography. Furthermore, Interpol has separated Taylor and Quayle's 10-point taxonomy of different kinds of child pornography into two groups in which images at levels 1-5 are not considered, but 6-10 are pornography/abuse images (2003, p.32).

Would it not then be safer for justice to work with the Interpol criteria and concentrate police resources on preventing the sexual abuse of actual prepubescent minors?[260] One would argue on the basis of recent experience, that to include all images alleged to be "pornography being passed off under the guise of art" (Nile, 2008), could be using scarce resources where they are more urgently needed to capture child sex offenders. Referring again to Interpol's solution to the difficulties of censoring the Internet, by blocking only the 'worst of', Senator Conroy told the ABC: "We've just announced that we've successfully negotiated banning child pornography, child abuse material. We have the industry supporting it. And I think that's a very good outcome" (ABC *AM*, November 9 2012). In other words, Conroy accepted the Interpol standard.

This thesis argues that the pictures themselves are not the crime, any more than is looking at young swimmers in *Speedos*, or splashing in the surf, or playing on the beach. Nor is it evidence of a crime that men look at young gymnasts (*vide* p. 257. *supra*). If, however, looking at images is a crime because it might lead to real crime, then all the real life examples just stated must, in a similarly logical sense, be crimes. However, an image that portrays the sexual assault of a child is evidence and any person who withholds evidence of criminality from police can be charged with that

259 http://www.abc.net.au/news/2012-11-09/government-abandons-plans-for-internet-filter/4362354

260 One imagines 13 to be an accepted age of puberty but research indicates early onset is now commonplace and "the mean age of puberty in girls in Western populations has been falling for the last 150 years". Pierce, M. and Hardy, R., (2012). Commentary: The decreasing age of puberty—as much a psychological as a biological problem. International Journal of Epidemiology, February, 2012; 41(1): 300-302

offence. In other words, people who possess child sexual abuse images can be brought before the court on that charge where everything about the making, distribution and possession of the images will be brought to light. Conversely any image that is not *evidence* of a crime ought be of no concern to law enforcement or censors; always provided it is unarguably clear as to what constitutes the crime of which the image is evidence.

None of this would preclude a person being charged with some sort of involvement in child sexual abuse images, which could range from making to distribution and possession. If we take stealing as an example, there is the alleged thief, perhaps an accomplice who might keep watch, then a receiver who knows the goods to have been stolen, and finally, perhaps a re-seller. Thus, as it is with stealing, child sexual abuse images, as well as euthanasia instructions and terrorist material, are matters for the police, and not *The Board.*

ARTS-MEDIA CENSORSHIP IN AUSTRALIA:

Doing the right thing the wrong way

PART 3: SUGGESTIONS FOR CHANGE

CHAPTER 12: CLASSIFICATION AND CENSORSHIP UNBOUND

> There is no censorship worth noting in Australia. Is anyone seriously arguing that we live in an era of sexual repression? As if our culture were not awash with erotic imagery and sex talk? As if our society did not allow a vast smorgasbord of sexual practices catering to almost every taste? Does anyone believe we should be more preoccupied with sex than we are now? (Clive Hamilton, ABC *Stateline,* June 15, 2008.*)*

Clive Hamilton's opinion would appear to be supported by the statistics derived from *The Board's* annual reports (CRBs) *The Board* classifies all but ~1% of all material submitted by the entertainment industry.[261] This is supported by *The Board's* Director, Donald McDonald (2007-2012), who referred to: "The very small number of decisions annually which attract controversy" (McDonald address, September 26, 2007).

Those two statements perhaps sum up censorship in Australia as it has been for some the 16 years covered by this study (1997-2012): thus separating *classification* and *censorship* into two categories of considerably unequal size and quantity. In 2004, for example, nearly 7,000 items were classified and only 37 (0.54%) were censored (refused classification; *vide* CBR04-05). In 2007, the year of McDonald's speech, of the 5,040 movies submitted only 54 (1.07%) were refused classification. Of the 255 publications submitted, only three (1.17%) were refused classification (CBR06-07).

Refused classification material usually involves portrayals of sex. Indeed, the researcher into censorship develops an inescapable impression that, as Hamilton suggested (above), we are "preoccupied with sex". One perceives an inordinate amount of time and effort as being devoted to regulating what is, arguably, the least harmful (if at all) of pastimes, namely, the access to and use of, arts-media. (Notwithstanding the ancient warnings contained in Foucault's three-volume work on *The History of Sexuality* and "The Spermatorrhea Panic" described by Rosenam 2003, p. 16*ff*).) One wonders why the effort to control consensual sex, or in this case, images of consensual sex, is not put into reviewing regulations surrounding demonstrably harmful entertainments such as any of the popular sports, any of the adventures or any

261 The CBRs for 1997-2012 give details of outputs. The ~1% does not include material submitted by law enforcement agencies.

of the apparently crazy stunts in which people participate; hospital and other records disclose a considerable amount of injury and often death among them.[262] There are, however, no appropriate Boards that classify; no appropriate Acts that ban those pastimes. By contrast, arts-media are not only stringently controlled, but also are subject to rapidly changing laws and regulations, as with the *new law* on child imagery, amendments to the *Guidelines* (2005, 2008 and 2012), and changes to *The Board* itself (*e.g*. the initial term of service was changed from three years to five years).

This chapter makes three suggestions that dispenses with *The Board* and yet still achieves censorship's ends, thus:

1. Allowing adults to make their own choices would convert censorship to consumerism.

2. Classifying arts-media material to be undertaken by the entertainment industry, saving taxpayers' funds. This would become, in effect, a user pays system because any cost to industry would be incorporated in the retail price of those who chose to buy.

3. Images of sexual abuse of children are evidence of crimes and are prohibited; like all other prohibited items: firearms, knives and illegal drugs, prohibited images are matters for the police, not *The Board*.

While these suggestions, if put into practice, would not reconcile the differences between pro-and anticensorites, they would reduce the overseeing Minister's departmental workload in respect of censorship. In Chapter 7: Everyone Wants to be a Censor, former Attorney-General Daryl Williams and *The Board's* Director, Donald McDonald complained that everyone had an opinion of what should be censored. Similar sentiments can be gleaned from a paper titled *Everyone Has an Opinion* by Phil Archer of the Family Online Safety Institute (FOSI) (International Ratings Conference, December 6, 2007). Personal opinions vary so widely that sometimes people do not agree with themselves, as in this example, when debating the consequences of the police raid and seizure of Bill Henson's photographs.

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262 For example: "In the United States, about 30 million children and teens participate in some form of organized sports, and about 3.5 million injuries occur each year". Also: "About 20 percent of children and adolescents participating in sports activities are injured each year, and one in four injuries is considered serious".
http://www.childrenshospital.org/az/Site1112/mainpageS1112P0.html See also Peterson and Renstrom, 1986,. " . . . injuries are one of sport's drawbacks" page 12.

> HETTY JOHNSTON: . . . So, all I'm saying to you is that there needs to be a check and balance around this and the arts community needs to be responsible.
> JULIAN BURNSIDE: And if the check and balance is there and if the result turns out to be identical photographs taken by the same Bill Henson, you'd be content?
> HETTY JOHNSTON: I would be. I wouldn't like 'em. I still don't like 'em. I have to tell you, I think they're creepy. I think they're - I don't like them at all. (ABC *Stateline*, June 15, 2008.*)*

Whatever the disparity of views, when taken together they amount to a rejection of any assertion that unspecified community standards be retained "as a guiding principle for reform of the classification scheme" (ALRC2012: 11.59). It is now clear there is no broad consensus on the standards of morality, decency and propriety among the Australian public. The standards held by individuals will likely have a religious basis, or a libertarian basis, and whether religious or libertarian, as Williams observed, they might not find agreement among themselves.

None of these criticisms is to suggest that pictorial or textual *evidence* of criminal activity should be ignored. The use of CCTV cameras in tracking down lawbreakers (although despised by many as spying) has shown how valuable pictorial evidence can be to police and prosecutors. Such pictures are, however, merely *evidence* of a crime, they are not *the* crime. It could follow, then, that complaints about arts-media ought only be entertained if the item were clear *evidence* of criminality. Other than that, as has been demonstrated in Chapter 8: There's No Harm In Looking, nothing is harmful, not even to members of *The Board* who access the worst of censorable material during their three to seven years of service. It was further noted that following their terms, members of *The Board*, proved capable of continuing their previously professional lives. Thus, the question: Is it not time we cast aside the unfounded fears of harm?

UNFOUNDED FEARS

The Introduction to this thesis closed by reproducing part of a 2007 speech delivered by Gunnel Arrback to a symposium of international arts-media classifiers. It will be remembered that, in 2007, Arrback had been Sweden's chief censor for 25 years.

(Evidence that even long-term looking does no harm.) The title of that speech was: *Challenges for Classification in a Global Environment - What Can We Learn from History?* The author was

> . . . genuinely convinced that such an historical perspective [of censorship] can be very useful for understanding today and tomorrow".
> I would like to concentrate on two kinds of historical perspectives. The first being the reasoning around the very phenomenon of moving images from the day it appeared among us. The second being our own history, so to speak, the international discussion and dialogue among us film classifiers.
> Movies appeared over a hundred years ago. The grown-up world started to worry about this new medium and its possibly harmful effect particularly on children and young people. But certainly that was not the first time in the history of mankind that parents and other adults have worried about what their kids see or hear or read. Old Plato in ancient Greece had some very strong opinions about what kind of stories should be read to children, there were those that were edifying and others definitely destructive (Arrback, 2007).

The burden of Arrback's address to his fellow classifiers was that the fear of media is unfounded: "more than a century ago, it was decided that film could have harmful effects on both children and adults" (*ibid*). This led to the introduction of standards that were set as a foundation for public taste and public morality. "It is no coincidence that very many of the films that were prohibited for public showing in Sweden in those first years of the 1910s were so with regard to a criterion in our new legislation that mentioned "what could corrupt public morals" (*ibid*). Here we have perhaps the truth of censorship: the establishment's fear of moral corruption. Even when, in Australia's case, the *Crowe v Graham* (1968) judgment did away with the corruption of morals, that requirement is still included as the first item of censorship regulation. It is as though censorship found a way around the corruption of morals judgment and simply changed the wording. What difference real is there between banning material that might *tend to corrupt* morals and banning material than *does not conform* to the

establishment's standard of morality? If morals do not conform to a preconceived notion of morality, then surely they are, in that sense, "corrupted". Are they not? Gareth Griffith's briefing paper would appear to raise other questions:

> 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 regarded 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.[263]

If we accept that there are reasonable adults among all classes of persons, as former Attorney-General Williams appears to believe, it is difficult to envisage how an item intended for one class of persons would offend another class of persons unless the other class chose to be offended.

> . . . the "reasonable adult" test acknowledges that individuals may have different personal tastes. In other words, although some reasonable adults may find the material offensive, and thus justify a restricted classification for it, others may not. They should be allowed to have access to the material if they wish (Williams, D., 1997).

ALRC2012, at 11.58 aligns itself with Griffith, stating: "the community standards criterion does not exist in a vacuum but, rather, must be read in light of the principles in cl 1 of the Code [*i.e.* the *NCC*]", *then, "adults should be able to read, hear and see what they want"*.[264] This liberty, however, is curtailed by the clause "as far as possible", which harks back to Chapter 7: Everyone Wants To Be a Censor. Why *The Board* is required to allow access to arts-media only "as far as possible" remains unexplained, unless one presumes it to mean as far as *The Board's* interpretation of the *Guidelines*

263 Griffiths was a member of the Film Censorship Board from 1990 – 1993.

264 I take it ALRC2012 at 11.58 means clause "(a)" and not "cl 1". The four principles of the *NCC* are not enumerated as such.

allows. If one may use an imaginary example, the argument then becomes circuitous, thus:

> You are able to read hear and see what you want, except for material we won't allow you to access.
> *Why am I not allowed access?*
> Because the material does not conform to community standards.
> *What are the standards?*
> The standards generally accepted by reasonable adults.
> *Are you saying I'm not reasonable because I don't accept the standards?*
> No, I'm only quoting from *The Act.*
> *But The Act says I am able to read hear and see what I want.*
> Yes. But you're not allowed access to material that is prohibited by law and does not conform to community standards. It's all in the *Guidelines*.

The only circuit breaker here would be to specify unambiguously why it is not "possible" to allow access. Consider, for example, the banning of firearms: following an incident in Tasmania's historic Port Arthur, when 35 people were killed and 23 wounded, the Federal government introduced laws banning the possession of firearms and gave its reasons for doing so (See Norberry *et. al. Current Issues Brief 16*, 1995-96: Federal Government). Similarly, the carrying of knives was declared unlawful in Australia, the UK and other countries, and the bans supported by statements of reason.[265] Certain images of children have been banned and reasons for doing so given. Contrasted with all this, no reasons are given other than the banned adult material does not conform to the standards generally accepted by reasonable adults—which, as has been shown, is no reason at all because there are no generally accepted standards.

Therefore, in the absence of good reason for banning items that portray consensual sex and fantasy (which is the main reason given for refusing to classify adult-only material), one would hold to the Millian principle that government interference with

265 These are general remarks only; conditions are attached to the various laws that allow possession *etc.* in certain conditions and circumstances.

an individual's choice of entertainment is unwarranted.[266]

RETAIN CLASSIFICATION CATEGORIES

While arguing that government interference is unwarranted in respect of adult material, one would also argue in favour of retaining classification. This is in line with Dr Jeffrey Brand's advice of 2001 in which, after conducting a review of public opinion about the guidelines he reported to the federal government that:

> It is clear that uniform symbols and markings are supported, indeed promoted, by most members of most constituencies. These should contain more advice about classifiable elements than they do at present. A single, consistent set of classification symbols will make understanding the categories and guidelines much easier for consumers. Given this "logic" of symbol convergence, there are some in the community (but not all) who also believe that behind the symbols should be consistent classification categories for all media.[267] To achieve this consistent guidelines are required. While the present Draft Combined *Guidelines* are clearly too complex and unworkable, the review process should progress with the aim of combining the *Guidelines*, categories and symbols; however, the result should NOT [Brand's emphasis] be a more restrictive classification environment.
> (*A Review Of The Classification Guidelines For Films And Computer Games:* Assessment Of Public Submissions On The Discussion Paper And Draft Revised *Guidelines* (Brand, 2002, p. 42)

Surveys undertaken by *The Board* have shown that Australians generally understand the classification system, but the *Guidelines* have been disputed in the dozen years since Brand considered public submissions. (Hence *Guidelines* 2005, 2008 and 2012.) However, it is argued there is no need for *The Board* to classify arts-media because *The Act*, *via* the *NCC* and *Guidelines* dictates what elements contained in an item should be classified, and at what level; thus, for example, an item is recognised from the

266 While this is an old argument, I argue its longevity does not render it any the less valid.
267 This is what it was hoped ALRC2012 would achieve and has been recommended.

Guidelines' descriptors as PG and not X 18+. The *Guidelines* are available at no cost to all who want a copy. This means that, armed with their copies, those in the entertainment industry could, by following the *Guidelines*, label their products as required by law just as easily as can *The Board*. Indeed, Director, Donald McDonald, agrees that the bulk of *The Board's* work is very much run-of-mill classifying. He said:

> The very small number of decisions annually which attract controversy (comparative to the large number of decisions made by the Board) indicates that we may be getting the balance right between sense and censorbility [*sic*] (McDonald, speech, 2007).

Amendments to the current system included a provision for licenced assessors to do some of *The Board's* work, but only as sub-contractors, so to speak, to *The Board* (*The Act*, s.17(5) and Schedule 1. 18). One would argue that industry, not the taxpayer, should not only be entirely responsible for its own labelling but also give a more detailed description of the product than is presently the case. Ultimately, the government is the real censor, but the suggested change to censorship retains the classification categories and, except for child sexual abuse images, dispenses with refused classification material. The argument is consumer-informative standards of labelling would allow all adult material to be accessible to (or refused by) all adults. Shoppers make decisions of choice every day.

At present the system fails the *NCC's* offence and harm principles because the law requires the inclusion of only a minimal description of content such as "nudity", "sex scenes", "drugs" and so on. This does not necessarily satisfy the aim of protecting persons from material that may offend them, nor does it prevent minors from harm that the law perceives exists. Some are shocked and offended when violence, sex scenes and the like are more graphic than the item's classification label had led them to believe (which is why Daryl Williams and Donald McDonald received so much conflicting correspondence). While some "nudity" *etc*. might not be offensive to those of sensitive mind, other portrayals might be very offensive to them. A detailed description of contents in the labelling/advertising material would, therefore, be helpful. For example, suppose, instead of "sex scenes", the description of a movie included something like this: "The (named) leading actors are portrayed naked, having

real (not simulated) sexual intercourse in a variety of positions". The difficulty is, too much description might enhance demand among those who would otherwise be expressly denied access.[268] Perhaps something less descriptive might be better. For example, the sort of warning on adult videos, as illustrated here.

On reading either the suggested descriptive label, or the general warning label, individuals who might have tolerated less explicit images but not those so graphic, would know to avoid the movie. There would then be no "unsolicited" or inadvertent exposure, thus, that principle of the *NCC* would be satisfied. There is nothing new in this, the requirement that industry include descriptions of what a packaged item contains has been part of consumer law for a long time; it is suggested here that arts-media be treated the same as any other consumable. Indeed, ALRC2012 would appear to agree with what is already consumer law in practice.

> **Recommendation 7–12** The Classification of Media Content Act should provide for civil and administrative penalties in relation to improper classification decision making. The Regulator should be enabled to:
>
> (a) pursue civil penalty orders against content providers;
>
> (b) issue barring notices to industry classifiers; and
>
> (c) revoke the authorisation of industry classifiers.

268 On this, I was reminded of Orwell's 1984, in which Julia worked for "Pornosec, the subsection of the Fiction Department which turned out cheap pornography for distribution among the proles. [. .] There she had remained for a year, helping to produce booklets in sealed packets with titles like Spanking Stories or One Night in a Girls' School, to be bought furtively by proletarian youths who were under the impression that they were buying something illegal." The page number varies with editions.

An example of redress against misleading representation was resolved in favour of the consumer in *Australian Competition and Consumer Commission –v- Teracomm Ltd* NSD 59 of 2009, where the company "made false representations with respect to the quality of the content services being advertised". Among the reasons for judgment, reference was made to the Trade Practices Act 1974 No. 51, 1974 (Cth): **Misleading or deceptive conduct.** Section 52. "(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive." In concluding his reasons for judgment, Judge Moore made this important point: " . . . the ACCC has a broad regulatory role in both enforcing consumer protection legislation and educating both the public and the business community to promote future compliance with that legislation" (*ibid*).

One would argue that a system is already in place for the protection of consumers that would encourage the entertainment industry to label its products honestly. This appears to be working well elsewhere. During her travels in January and February 2005, Maureen Shelley "noted with interest" that of "around 180 classifiers in the Netherlands, which has a population of 16 million) 167 [93%] are employed by private industry" (CBR04-05, p. 83). There is also a financial reward for all here; in classifying its own material industry would be spared the *Board's* fee (around $750 or so per item) and the taxpayer would no longer have a *Board* to support. Thus, it is argued that if the industry labelled its own products, any dispute regarding the advertised content could be resolved by consumer affairs departments that would rule on the question of whether a package contained sufficient information as would allow the potential user to make an informed choice. With these suggested processes and procedures in place, both *The Board* and the RB could then be abolished.

ALTERNATIVE COMMUNITY STANDARDS ARE REPRESSED BY AUTHORITY

Decisions made by *The Board* must be seen in the light of the government's *Guidelines* for classifying arts-media materials. *The Board* is far from free to make up its own mind on controversial matters. It cannot lawfully act against the *Guidelines*, as Maureen Shelley (Convener of the Review Board) confirmed when refusing to classify the movie, *Ken Park*. Thus, "guidelines" is a euphemism for "requirements"—*The Board* being required to act in a particular way. The *Guidelines* state what must be refused classification (RC) and *The Board* is bound to obey. Shelley's chief objection to *Ken Park* was a 2-minute masturbation scene, which, she observed, the actor was enjoying. One

has some difficulty understanding what the actor's enjoyment (in this movie) has to do with society's self-protection. The movie, *Baise Moi*, the banning of which caused NSW Premier, Bob Carr, to refer to the "bad old days", was first released and then its rating revoked, after an appeal to the RB lodged by Attorney-General Daryl Williams, because some people objected to it. *Ken Park* and *Baise Moi* are two examples of a "very small number" of controversial movies, but they need not be controversial if, again using Mill, it is accepted that each individual is the best judge of his or her own interests. It is not sufficient, one would argue, that some scenes are too violent, or there is too much sex, to ban arts-media. Correct and detailed labelling, as suggested above, would spare those who object, the offence of viewing such scenes.[269]

As to a "generally acceptable" standard, consider *The Trial of Lady Chatterley's Lover*, during which it is understood the words fuck and cunt were heard for the first time in London's Old Bailey: "These matters are not voiced normally in this Court" (Rolph. C. H., 1990, p. 20). From the establishment's standpoint, these and other words and descriptions were not considered appropriate community standards, hence the reason for the trial. However, a different (or realistic) community standard became evident when Penguin's entire stock (200,000 copies) of *Lady Chatterley's Lover*, was sold on the first day of publication, following the trial. A spokesman for Selfridges said his store sold 250 copies in minutes and could have sold 10,000 if they had had them. Within a year, the book "had sold two million copies, outselling even the Bible" (BBC News: *On This Day*, November 10, 1960). Might one deduce from this that the more acceptable community standards, those that were generally accepted by the two million book buyers, were repressed by the imposition of the establishment's community standards? The alternative would be to suggest that community standards change following a court's findings, which would be akin to suggesting that water becomes popular following a drought.

NO COST-BENEFIT STUDY UNDERTAKEN

If it can be shown that the offences of child sexual abuse and sexual violence are reduced as a result of art censorship, it could be argued that, in those respects art censorship is worth the cost. However, as far as research for this work has taken us, nobody has measured the outcome of art censorship, such as one might measure the

269 This writer's personal gripe is against vomit scenes, but the *NCC* offers no protection here.

outcome of random breath testing of drivers by comparing the pre- and post-law numbers of injurious and fatal road accidents. Furthermore, there has been no measure of cost effectiveness.[270] Taken together, these omissions from the body of research add up to a lack of relevant standards measurement that probably constitutes the most important gap in the literature. Some years ago, a serving Tasmanian Auditor-General raised a similar point:

> Why do we measure things? First of all, statistics are not only lies and damned lies; statistics are useful in order to inform public debate. You cannot have a decent debate [. . .] without knowing some statistics. You know what your own [. . .] experience is, but you cannot know the totality of experience. You cannot know that without there being some practical, consistent collection of statistical material upon which to base decent public policy [. . .] It abstracts from the individual case to the general case. That is why we measure things, but the problem with measuring things [. . .] is that frequently we have to make do with outputs rather than outcomes. [. . .] There is a very great problem with the fact that we only sometimes measure outputs, and that sometimes we do not know the proper linkage and the strength of the linkage between outputs and outcomes.[271]

Although taken from a paper on education, the argument is not diminished on that account because the same can be said of arts-media censorship. Allowing that the real value of any good or service rests on what one receives for what one pays (the product being worth the price), then, the benefits of censorship should justify the cost.

CBR06-07, p. 100, lists "Revenue from Government" as "$8,103,373", of which "$7,023,260" was recovered in fees paid to *The Board* (p. 106). No detailed costings were recorded in subsequent years—following *The Board's* transfer to the Attorney-General's department. Thus, CRB07-08, at page 8 reports simply: "Revenue from classification fees for 2007-08 is $7.311m"; likewise, CBR08-09 at page 12 reports: "Revenue from

270 There are surveys done but their purpose is to measure the general understanding of the ratings system (see, for example, Chapter 6: Communities and Standards.

271 Dr. Arthur McHugh, Tasmanian Auditor-General addressing the Federal Joint Committee of Public Accounts and Audit, February 6, 2001. *Hansard* (Cth.).

classification fees for 2008–09 is $6.888m". From the CBR06-07 accounting, it is not unsafe to assume that government funding subsidised *The Board* each year thereafter by an amount equal to that year's shortfall.[272] Money, however, is not the only cost; a point illustrated by this part of a submission made by the Victorian Government to ALRC2012.

> Treating identical entertainment media differently based on the media platform on which it is viewed or played (*i.e* .creating different regulatory obligations for a film that is rented from the local video shop compared to a film that is downloaded and viewed on a mobile tablet device) creates confusion, inconsistencies and inefficiencies [. . .] Because the National Classification Scheme (NCS) primarily aims to regulate media content in a commercial context, most industry bodies captured by the NCS distribute, sell or exhibit material nationally. Jurisdictional differences have the effect of creating significant compliance burdens on such industry groups that are then required to comply with eight different regulatory frameworks. Unnecessary complexity inevitably leads to higher rates of non-compliance and increases costs to business (ALRC2012, 2.50).

A government usually requires a cost-benefit analysis before approving funds for a project, but no record was found in the *Hansard* of any such analysis.[273] In its Handbook of Cost-Benefit Analysis,[274] the Federal Government identified: "Utility: [which means] Consumer happiness, welfare, happiness, or well-being" as an important criterion. There is no lawful way the general public can know whether refusing to classify arts-media items is an outcome of benefit to community happiness or well-being because it would be a criminal offence to access them. In any event, much of this might be academic because many find their own consumer happiness or well-being by accessing arts-media *via* the Internet. According to an ABS survey, in 2012-13,

272 In 2006-07 financial year, *The Board* and Review Board were absorbed into the Attorney-General's department (Feb, 2006). See CBR06-07, p.3.

273 The debates leading up to the introduction of the present model of censorship 1993-1995. *The Board* is, however, required to recover its costs (vide CBR97-98).

274 *Handbook of Cost Benefit Analysis,* January 2006. Commonwealth of Australia.

83% of Australia's 8.795 million households (7.3 million) had Internet connection of which 6.789 million households (93%) had Internet connection *via* broadband. The occupants of 3.938 million of these households (58%) listen to music and/or watch movies online. (ABS publication 8146.0 - Household Use of Information Technology, Australia, 2012-13). *The Board's* classification regime is thus circumvented in very large measure by Internet access; in short, the current system is no longer effective in regulating access to unclassified arts-media material, thus, *The Board* has no control over the prevention of *The Act's* perceived harms. To quote Simon Bush, the Chief Executive of the Australian Home Entertainment Association (AHEDA) *The Act* "is an analog piece of legislation in a digital world" (see p.17 *supra*). While one might not go so far as did Bill Hayden in 1970, that: "censorship today in Australia a mass of confusing and conflicting laws, and of censorship bodies" (p. 53, *supra*), there would appear to be some confusion as to what is allowable and what is not, as will be demonstrated under the subhead immediately following.

THE COST OF INQUIRIES

The amount of time and money spent with (sometimes concurrent) inquiries into governance of the media is an important factor in considering whether arts-media censorship is doing the right thing the wrong way. "Since 2010, there have been a significant number of inquiries and reviews covering matters related to the [ALRC2012] Inquiry" (ALRC2012, 1.6). ALRC's list of inquiries and reviews is as follows:

- B O'Connor (Minister for Home Affairs and Minister for Justice), 'Draft R 18+ Computer Game Guidelines Released' (Press Release, 25 May 2011);
- B O'Connor (Minister for Home Affairs and Minister for Justice), 'Agreement on R 18+ Classification for Computer Games' (Press Release, 22 July 2011).
- Department of Broadband, Communications and the Digital Economy, *Outcome of Public Consultation on Measures to Increase Accountability and Transparency for Refused Classification Material* (2010).
- Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011).
- Joint Select Committee on Cyber-Safety—Parliament of Australia, *High-Wire Act: Cyber-Safety and the Young: Report* (2011).

- House of Representatives Standing Committee on Social Policy and Legal Affairs, *Reclaiming Public Space: Inquiry into the Regulation of Billboards and Outdoor Advertising: Final Report* (2011).
- Department of Broadband, Communications and the Digital Economy, *Convergence Review: Terms of Reference* (2010).
- Department of Broadband, Communications and the Digital Economy, *Convergence Review: Interim Report* (2011).
- Department of Broadband, Communications and the Digital Economy, *Independent Media Inquiry*
- Department of the Prime Minister and Cabinet Office for the Arts, *National Cultural Policy Discussion Paper* (2011).
- Australian Government Attorney-General's Department, *Final Report on the Public Consultation on the Possible Introduction of an R18+ Classification for Computer Games* (2010). (This review received over 58,000 submissions, of which 98% favoured the introduction of an R 18+ classification for computer games ALRC2012: Introduction, *fn* 1).

On this information alone one could be forgiven for concluding that arts-censorship in Australia is not working. Furthermore, it would appear that the government itself is not satisfied with the current system. However, the inquiries appear suggest something even more complicated than is the current system . For example:

> It may be that some media content providers will choose to have in-house classifiers, while others will continue to have their content classified by the Classification Board [*The Board*]. All industry classifiers will be required to be authorised by the Regulator, and industry participants will therefore need to consider training costs and economies of scale in determining who classifies their content (ALRC2012, 1.38).

NO EVIDENCE OF HARM IN ALLOWABLE MATERIAL

In Chapter 8: There's No Harm In Looking, it was established that, by classifying (therefore allowing) adults to access R 18+ and X 18+ material, *The Act* acknowledges

that consumers of this material pose no risk either to themselves or others. However, ACMA states: "Content that is classified [. . .] X 18+ is prohibited. [. . .] Content that has not been formally classified by the National Classification Board, but has been determined by the ACMA as likely to be prohibited, is termed 'potential prohibited' content under the BSA". ACMA, in effect, pre-empts any classification decision that *might* be made by *The Board*. (Perhaps another example of everyone wanting to be a censor.) ACMA's censorship is not dissimilar *in principle* from Johnston's being a censor in declaring Henson's photographs "pornography", an opinion with which *The Board* disagreed.

If R 18+ and X 18+ movies, and frontal nudity of minors are acceptable (as in Henson and *The Bathers*, it follows that refused classification material is, in some degree, or by some means, considered a likely cause of harm. If looking at the worst of *classifiable* material does no harm, one would seek other reasons for refused classification material being banned.

This takes us to Davison's "Third Person Effect" (TPE), which in turn exposes a problem of rational deduction regarding banned material. If the high levels of skill or quality possessed by individuals who become members of *The Board* immunises them against harmful effects, which on *The Board's* own records (the CBRs) it appears to do, then, logically, they should be allowed access to banned material (if they so wish) when they are no longer members. This is not the case; time expired members would be as guilty as anyone else would be for the offence of accessing and or possessing banned material. If, however, it is not the case that possessing high levels of skill immunises against exposure to banned material, then, one would expect to find evidence among *Board* members of the deleterious effects of exposure. None, except for the distressing effects of examining the material, has been found. The same argument may be made concerning police, judges and juries who act in matters of illegal arts-media material; nobody is lawfully allowed access to banned material except in the context of their authorised work.[275] Images might be disturbing, distressing, abhorrent and revolting, but there is no reliable evidence of harm to others directly caused by looking at images. (A subject for independent and rigorous academic research, perhaps.)

275 "After viewing many [child pornography] scenes, [Maureen Shelley] went to the nearest pub and downed a double vodka to help her stop shaking" (*SMH.* January 9, 2006.)

PROSCRIBED OR PROHIBITED IMAGES OF CHILDREN

Australian laws proscribe or prohibit the making, distribution and/or possession of certain objects and acts; these include firearms, knives, drugs and sexual abuse. Contraventions of these laws are matters for police. One need not be university educated to recognize a firearm, or knife, but perhaps a little more knowledgeable about illicit drugs. Sexual abuse of anybody by another or others is a serious crime and even more so if the victim is a child who is abused by an adult.

When members of *The Board* look at images of child sexual abuse, what they see is evidence of a crime and, other than refusing to classify it, *The Board* has no further part in any prosecution of an alleged offender. It could be argued that *The Board* is redundant here because the evidence of the crime is in the image, much the same as the evidence of a firearm is in the object. One need not be a university-educated expert to recognise the one any more than to recognise the other. Where expert evidence is needed, say, when a leafy substance it thought to be marijuana, the police might consult a plant biologist for an assessment of the material, but they do not consult a "Board" as such. The evidence provided by the expert would either form the basis of an alleged offence, or would resolve the matter.

Images, one would argue, are not so easily identifiable as is marijuana; this was evidenced by the outcome of the Henson matter. What we have learned from that incident might usefully be carried into child protection legislation. First, there appears to be a tendency to lose sight of the purpose of child-image legislation, the nub of which is to protect children from harm. Arguing that Henson-type images are pornography passed off as art, does not, of itself, assist in achieving that end. Indeed, in Marr, 2008, we learn of harm done to the subject child by her images being called pornography. Nakedness, not even full frontal nakedness is not *per se* sexual abuse and members of *The Board* are no better equipped than anyone else to decide if such images are offensive or otherwise.

In the cause of protecting children from sexual abuse, The Rev Nile appears to have taken the courts out of the question. When speaking to the new law he said: "the defence relating to material produced for child protection, scientific, medical, legal, artistic or other public benefit purposes will no longer be available". This is a strict liability provision, which prompts a question of legal priority. Generally, where state and Commonwealth laws disagree on a particular subject, the court will find the

Commonwealth law to be superior. *The Act*, which is Commonwealth law, requires artistic merit to be taken into account (s.11(b). Can NSW law, therefore, take artistic merit out of the question?

One would argue that strict liability is not appropriate for "artistic merit". How does one disprove an allegation that an image lacks artistic merit? Again, this difficulty can be overcome by using the Interpol criteria of child sexual abuse images. If the intention of censorship law, including anti child sexual abuse law, it to protect children from harm, then, one would argue, is quite the wrong way of doing the right thing—which is to protect minors from harm.

NOTE

Some of the text in this chapter was first published in *Online Opinion* on January 11, 2011 (http://forum.onlineopinion.com.au/thread.asp?article=11459&page=0).
The full text of that article appears as Appendix 2, following the Conclusion.

CONCLUSIONS

> There is evidence of considerable, and growing, non-compliance with laws concerning the distribution of incorrectly marked adult content, unclassified adult content and X 18+ classified content. In particular, there is concern about the refusal on the part of distributors to submit such content to the Board for classification or to comply with call in notices. It has also been noted that current resources have been insufficient to effectively investigate and prosecute breaches (ALRC2012: 2.51, see p. 18, *supra*).

> Senator **BARNETT**: [. . .] we have a system error where into the community is being put pornography, filth, offensive material, which you have called in with, in the case of 368 call ins, nil response and then you indicated 441 call ins and another nil response. This material is getting into the community with no comeback. We have a system error. At estimates in May [2009] I said to you and to the department that we have a system failure. Yet it seems that as at today [October 2009] we have not got our systems together and we are not on top of it because this filth is still out there in the community (see p. 211, *supra*).

The aim of this work was to question whether Australia's system of arts-media classification and censorship is necessary, and if so, whether its ends could be achieved by other means.

First, on *The Board* itself: it has been shown that successive governments have not adhered to the "desirability of ensuring" that members appointed to *The Board* and the RB are "broadly representative" of Australians. In respect of *The Act*, s.48(2), page 64, *supra*, and s.74(2), p. 96, *supra*, the government has consistently failed to observe "the meaning of words from the *legislative context* [italics added] in which those words appear (p. 22-3, *supra*). Both boards are elitist and are effectively tools of the government (*vide* Shelley: "We simply do our job, which is to apply the law" p. 96, *supra*). As to what the boards do: from the evidence it is clear that, except for classifying or re-classifying submitted material, the current system of censorship is

ineffective where it most matters (controlling banned material), although McDonald opines that it may merely "look as though it is ineffective" (p.212, *supra*). The evidence, however, appears to differ from McDonald's view, as the following points attest.

- The industry increasingly fails to comply with the law's requirements and does so with impunity, as can be gleaned from the two quotes heading these conclusions.
- It is clear from the number of enquiries that were undertaken in 2010 and 2011 that the government itself thought (or thinks) the system is not working as it would like (see pages 302-3, *supra*).
- "Unnecessary complexity inevitably leads to higher rates of non-compliance and increases costs to business" (see p. 301, *supra*).
- Ms Tankard Reist's submission to ALRC2012 represents some of the Australian public who "believe the system has failed and needs a complete overhaul" (see p. 18, *supra*).
- By requiring ALRC2012 to examine the current system, the government conceded (however tacitly) that something needed to be done to make censorship more workable.
- The ALRC2012's findings and its recommending yet another system (the *New National Classification Scheme*, p. 8, *supra*), supports a view that the current system is not the best means of achieving censorship's ends.

This thesis would accord with the government's and ALRC2012's sentiments that the system is not working, but we differ, however, on what needs to be done. One would suggest that either considerably more time, effort and money must be put into enforcement of the law or the system must be simplified.

Recommendations made by ALRC2012, amount to doing the same thing as it now does but in a more expanded and complicated way. That is to say, instead of *The Board* being responsible for submittable material, a "Regulator" would have oversight of all arts-media, electronic, radio, television, smart phones and so on. However, as was demonstrated regarding the television series, *Breaking Bad* (p. 18, *supra*), and Senator Conroy's best efforts to control the Internet (p. 27, *supra*), a Regulator would likely have no greater success at controlling what Australians read, watch and hear, than does *The*

Board.

The arguments put forward in this work lead to a conclusion that instead of investigating and prosecuting those who breach *The Act*, for reading, watching and listening to that which the law forbids, any new law concerning arts-media should aim to detect and prosecute harm-doers—as is the case with every other aspect social life, from overstaying a parking meter to homicide. (Always provided that the harm is clearly defined as both wrong and harmful to others.[276])

This line or reasoning (that any legislation must include harm to others) exposed a fundamental fact, which helped shape the thesis; censorship's rules for adults differ substantially from censorship rules for minors in that, under the provisions of *The Act*, sexual offences against adults are not tied to accessing arts-media, whereas there exists a connection between arts-media and sexual offences, sexual preferences of minors. The thesis was thus divided accordingly and the conclusions (herein) stated separately.

CENSORSHIP AFFECTING ADULT ACCESS TO ARTS MEDIA

Policymakers are satisfied that it is safe for adults to be exposed to material that contains depictions of strong violence (R 18+) and actual sex (X 18+); this is supported by the evidence that members of *The Board* are neither harmed, nor cause harm, as a result of their work. The effect of the policymakers' presumption is that about 99% of all material submitted for classification is deemed harmless. As to the remainder, the refused classification material, one can only assume that policymakers believe it to be harmful or likely to cause harm. However, members of *The Board* examine the banned 1% or so of material, and likely see more of it than the majority of the population ever would, and yet they are neither harmed nor cause harm. Indeed, it was observed that during his seven-year term as *The Board's Director,* Des Clark: "viewed many images of child pornography and sexual violence"; after his term ended he was appointed to the board of the Melbourne Recital Centre.

Thus, it is arguably safe to conclude that no correlation exists between accessing arts-media and harm to others. Where claims of a correlation are made, it might be better stated as those who cause harm *also access arts-media.*

Staying with censorship for adults, it is clear that the risk of harm is not the reason for censorship but as Dr Katherine Albury asked: "Is it really the role of the Australian

276 I refer again to Feinberg, 1990, *Harmless Wrong-doing*. The entire work is on this very point.

government to legislate against extremes of consensual sex and fantasy?" (p.153, *supra*). John Bradford MHR (Liberal), while opposed to homosexuality, said: "I do not believe that, in the end, I should accept the responsibility for what individuals do in the privacy of their own bedrooms" (p. 51, *supra*). On the Labor side, Minister for Justice, Duncan Kerr asked: "What place is it for the criminal law in our country to create that climate of oppression and fear amongst a group of our community for expressing their sexual preference in the privacy of their own bedrooms?" (p.153, *supra*). Sexual preferences, and the proscribed fetishes ("golden showers" etc.), provided they are indulged in by consenting adults and conducted in private need be of no concern to the particular section of the community that finds the practices abhorrent.

This writer was surprised to read that such a learned and influential group, as was ALRC2012, should have persisted in the notion that there is a single set of community standards of morality, decency and propriety relating to arts-media. ALRC2012 further argued that there was no evidence of any change to the standards. That the commission found no evidence of changes to community standards in respect of arts-media is not surprising, since there never has been a single set of accepted or acceptable standards. One can but conclude that the commission had a general, rather than particular set of standards in mind: standards that relate to harm to others (murder, theft, child molesting, etc.) and applied them to censorship. Thus, those who would uphold the standards, on which *The Act* is based, have not changed their opinions. However, as Don Chipp said in the debates leading to the introduction to the current system: "This very debate has shown that there is in fact a plurality of community standards, that there are many standards and many communities in the one Australian community". Here, ALRC2012 would also appear to be at odds with Des Clark's (2005) opinion when, speaking as *The Board's* Director, he said community standards had "not been formally tested", but whatever they were, they "shift over time". One final point, the outcome of the trial of Lawrence's *Lady Chatterley's Lover* would point to a suppression of an acceptable standard, which did not coincide with the establishment's standard.

As arts-media censorship affects what adults may read, watch and hear, this study would indicate that when all other reasons for censorship are removed, that which remains is a governance of morals; or as Harry White stated, what censors seek "is to protect from attack the particular moral system they value".

ARTS MEDIA CENSORSHIP AFFECTING MINORS

> John Dickie, *The Board's* immediate past Director, appeared before five members of the RB in support of an application to vary *The Board's* PG rating of *Tarzan*, to G, which had been given "in all countries to date" but that was "irrelevant to the Review Board's consideration against Australia's classification guidelines" (p.105, *supra*).

To argue that watching *Tarzan* (of all characters) needs parental guidance, as did the RB, demonstrates two points. First: "As parents we know there is a big difference between an 8-year-old and a 13-year-old but as far as classification markings are concerned they are treated in the same way". Second: "I think it's time we made it easier for parents and gave them a system that they could use" if no official advice were available (for both quotes see p. 124, *supra*). The simple answer is consumer labelling combined with parental oversight.

But what is more important, in that statement, the RB's Convenor, Shelley, recognised a clear separation of children and adolescents—*i.e.* "under-13s" and "under-18-teens". It was demonstrated that the very young are vulnerable to sexual abuse by adults, and, indeed, by other "children" (under-18-teens). An alternative approach was suggested that, for the practical purpose of distinguishing images of child sexual abuse from other images would coincide with Interpol's definition. Were this course to be adopted, it would eliminate the flexibility that led to nearly a quarter of those charged in NSW (*n*=708 or 23%) for possession of child pornography being acquitted. It would also remove what Nile gave as his reason for introducing amendments to child pornography/abuse law "because of the confusion over whether the defence of artistic purposes would apply in Bill Henson's case". This is especially so when one considers that the only harm done was inflicted by those who saw "the subject matter [as] offensive, rather than the way [it was] treated in the work" (ALRC1991), we might say that far from making "the matter more black and white", as Nile claimed, the situation is now worse for clarity. The "defence relating to material produced for child protection, scientific, medical, legal, artistic or other public benefit purposes will no longer be available" (p. 280, *supra*). It is now unclear exactly what images one may lawfully make of any person who is below the age of 18 years.

It is argued by law enforcers that possession of certain images of minors fuels a desire for more of the same, which in turn causes more children to be sexually abused. That could be true if (a) the images were purchased by the possessor, and (b) if the images are of sexual abuse as defined by Interpol. However, images can only ever be evidence of crimes and the possessor, who was not present at the scene and commission of the crime, and did not pay for the evidence, cannot be, on that information, a child sex abuser. It is worth repeating that one needs no special skill to view an image and conclude it is evidence of child sexual abuse. Child sexual abuse is a crime and any evidence, from whatever source, should be for the police, not *The Board*, to investigate.

Based on the information and arguments presented in this work, one would argue that governments might better expend their finances and energies tracking down those who commit offences against vulnerable minors.

THE GOVERNANCE OF "BEDROOM BEHAVIOUR"

The euphemism: "bedroom behaviour", would appear to be broadly understood as being private and consensual sexual activity (*vide* pages, 51, 152 and 309, *supra*). Under the current censorship regime, consenting adult individuals may become photographic models of a generous range of, but not *all* sexual behaviours. While they may indulge in a multiplicity of sexual fantasies, they are not permitted to make recordings of certain sexual fetishes for the enjoyment of others (*vide* p. 28, 146 and 187, *supra*). Thus, for example, access to images of real sex is allowed, but not if a participating individual is whipped, bound with ropes, chained or urinated upon as part of the process. From this, one questions what the actor's (participants') enjoyment has to do with society's protection. However, such a question is anticipated by the *NCC,* which states, in effect, that there are community has concerns about sexual fetishes, and also about violence, and demeaning sexual portrayals.

This brings us, once again, to the unknown community standards. *The Board's* commissioned research appears to conflate community standards and community acceptance of arts-media classification (p. 31, *supr*a). At the introduction of *The Act*, the responsible Minister acknowledged that there was "in fact a plurality of community standards" (p. 153-4, *supr*a), and yet, other than the reasonable adult's understanding of the unknown community standards, neither *The Act* nor its supporting documents

set out why certain material must be refused classification. It has been established herein that harm is not the reason for banning the material—there being no reliably tested evidence that harm is done; but even if as many as 5% of those who access arts-media cause harm resulting from that access (and no reliable evidence was found for such an assumption), the 95% should not be denied access. By analogy, the law does not ban the driving of motorised vehicles because many more than 5% of drivers cause harm; the same may be said of alcohol and its over-indulgence or abuse. Arts-media censorship aims to protect everyone "from exposure to unsolicited material that they find offensive"; it was argued that informative labelling, affixed by the industry, would satisfy that requirement. This is no different from all other consumable products.

Thus, when one eliminates the various reasons for censorship all that remains is the governance of individuals' sexual morality or the governance of what consenting individuals do in the privacy of their bedrooms, in which, for arts-media purposes, (those on both sides of politics agree) the government should have no part.

By persisting in the censorship of bedroom behaviour for adults, policymakers beg a huge question that we cannot examine here, but which might be worthy of study at some other time: What exactly do Australians understand by morality, decency and propriety as applied to arts-media?

Lacking such a study, perhaps the conclusion to the current system of censorship in Australia might be more accurately summarised by stating that: *The Act* decides a level or quantum of allowable immorality, indecency and impropriety. But since we do not lack "the intellectual resources" (p.55, *supra*), each of us can decide an acceptable level for ourselves. Furthermore, we are entitled to be treated as reasonable adults unless proved otherwise, we have no need for *The Act* to require *The Board* to make assumptions in this regard. On this, one would agree with Feinberg's conclusion that:

> . . . if there is personal sovereignty anywhere, then it exists everywhere, in traditional societies as well as in modern pluralistic ones. Liberalism has long been associated with tolerance and caution, but about this point it must be brave enough to be dogmatic (Feinberg, 1990, p. 338).

APPENDIX 1

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11 July 2011

To Professor Terry Flew, Commissioner
Australian Law Reform Commission
Canberra

Submission to the Censorship and Classification Inquiry

1. My name is Robert John Ryan I am a Ph.D. candidate at Macquarie University; my subject is arts-media censorship. I have finished my major research and am now writing up my thesis. I believe my findings to be relevant to the Commission's terms of inquiry and, accordingly, make the following submission. I will keep my observations brief in this instance but will elaborate, should the Commission think it desirable.

2. The Issues Paper. My first observation goes to the issues paper itself; my work, in one form or another, addresses all 29 questions. The Issues questions generally indicate that government has in mind a modification (if considered necessary) of a taxpayer-funded classification system: questions 1 – 11. Arts-media are consumables and my thesis suggests content labelling by industry, as is required for all other consumables.

3. Arts-media materials are consumables. My overriding conclusion is that the Board could be dissolved without loss of protection to anyone who might be harmed or offended. Oversight of arts-media materials would then go to Consumer Affairs. I, here, briefly state three of several reasons for reaching this conclusion. (1) The immediate past Director of classifying, Des Clark, and the current head, Donald Mc Donald, have emphasized how little of classified material becomes a matter of contention. Clark cited 37 out of nearly 7000 items in 2004. (2) If one considers the arts-media entertainment industry as a whole, censorable material is now only a fraction of what people read, watch and hear; the Board does not (routinely) vet material available *via* the Internet, which now provides the bulk of viewing and hearing entertainment (see note at the end of 5, below). (3) The Act, the NCC and

277 The name and date refer to the ARLC2012 filing system for submissions.

Guidelines are available to anyone who wants a copy; armed with their copies, the industry can as easily do what the Board does. The current rating labels would be retained, but M and MA15+ replaced with a new label M15. Labels would include more detailed consumer advice than is now most often the case. (Illegal material is considered below.) Industry self-labelling, as with all other consumables, will release taxpayers' funds while not imposing any greater financial burden on industry—this goes to question 18.

4. The Board. According to the criteria for appointing members, the Board could never have been, is not now, and is unlikely ever to be "broadly representative of all Australians" (s.48 of the Act). The persons who are appointed to the Board are, by definition, among the elite of Australians. My researches on this matter are quite extensive and lead to the conclusion that being "broadly representative" and matching the classifiers' job profile are mutually exclusive requirements. The Review Board, likewise, is not, nor can it be, broadly representative. The result of this is, one group of better-educated, more communicative people decides for another group, not so well educated, nor communicative, what is allowable. This is not appropriate in Australia's classless society. McDonald is on record as having said, "everyone thinks they can do a better job than we do". In respect of people knowing what they like and dislike, that is true. Thus, if labelled with sufficient information, those who would otherwise be offended will avoid material they dislike, leaving others free to enjoy it.

5. The National Classification Code (*NCC*) and Guidelines. The Board can only act in accordance with the NCC's principles and Guidelines. While, at first reading, the NCC would appear to be an enabling instrument, on closer study it becomes apparent that, especially when taken together with the Guidelines, it is both selective and restrictive. For example, where everyone is supposed to be protected from material that offends them, religious material is excluded; the Danish cartoons, Rushdie's *The Satanic Verses* and the contentious *Piss Christ*, were, among many others, excluded from classification, and yet, they caused more offence that many other items (e.g. the banned movie *Baise Moi* or the off-on-off-on *Salo*) ever did. Religious people hand out their tracts at the front doors of private houses, or leave them in mailboxes; this is offensive to some. How would the religious people feel if others handed them pornographic images in return? This is not a frivolous question; the NCC states "everyone" should be protected. People being demeaned, is another area that has no part in classification, except to warn potential consumers of content; my research uncovered millions who want to be demeaned. The Act is, essentially, to use Devlin's words *The Enforcement of Morals*; indeed, the more one considers the conjunction of s.11 of the Act, the Guidelines and the NCC, the more it becomes apparent that the law has in mind particular standards of morality and propriety. There is no generally agreed "community standard", nor has there ever been. (This goes to Q23.) Again, with access to material that never reaches the classifiers, people are setting their own standards. It is time for us to recognise that the Board sees only a small fraction of what is watched, read and heard*, and it is also time to consider other possibilities for the protection of the unwary, unwitting and unwilling. (*If, for example, cash-purchase transactions for viewing pornography represent 4-5 percent of all similar electronic transactions—which run to the millions—the number of items viewed far exceed the few thousands classified by the Board.)

6. **Illegal material**. Allowing that the law can make anything illegal, the twin concepts of liberty and justice can sometimes be incompatible; in this respect, we have not been as careful as we might have been to avoid the ill-consequences of uncertain censorship law (see examples in 7, below). Nevertheless, it is fair to ask: What would happen to child pornography if there were no censorship? This, of course, is probably the most serious of all questions one might ask on censorship. The answer is, nothing would change but we must first separate pornography from other images and also re-define a child for the purposes of child sexual abuse. (For example, at present a 17-year-old consenting to sexual activity is considered sexually abused and any images portraying that activity, child pornography.) I argue that we must get back to basics and re-state the purpose of child pornography legislation, which is to reduce the risk of defenceless, non-consenting children being sexually abused in the production of child sexual abuse images. That is its purpose. We do not need a Board to look at images and decide that a child has been sexually abused in the making of those images. The abuse will be self-evident where the subject is clearly a child. But what of the consenting 17-year-old example, above? My findings indicate serious difficulties in this area of censorship law.
7. **Non-sexual child images**. Where there is no direct evidence of a child (up to 18 years) being sexually abused, a clearer definition of what constitutes an illegal image is needed. For example, the only abuse of Bill Henson's subject came from the people who caused the fuss over the images, and they made the fuss because they understood the images to be child pornography. (See David Marr's book.) The image of a six-year-old girl, posed naked on the cover of an art magazine that Kevin Rudd, as Prime Minister, said was "disgusting", only added to the blurring of the line between child sexual abuse and non-abuse images. Fred Nile referred to that image as child pornography being passed off as art and moved to change New South Wales' legislation to prevent similar material being produced and published. The result is now even more confusing legislation that will do nothing to prevent children being sexually abused. One final example, Justice Adams, in the NSW Supreme court held that images of *The Simpsons* children (while clearly pornographic) were "persons" and, therefore, the possessor of those images was in breach of child pornography law. I have many other examples of injustices and inconsistencies arising from lack of clarity in defining child abuse portrayed in images.
8. **Terms of reference.** I respectfully submit that my observations in 6 and 7, above, can be included in the terms of reference because child protection and justice are fundamental to any decent society. While we do not need a Board to decide whether or not a child has been sexually abused, we do need a healthy and open debate on "child" and "child images"; this consideration goes in varying degrees to Issues questions 25 to 29. I would hope that such a suggestion might be included among the Commissions recommendations. Furthermore, the Board acts as a jury before a trial in that if it deems an item RC, the maker, possessor and distributor are ipso facto, guilty of an offence. I am not a lawyer, but I would have thought the verdict follows the trial it does not precede it. My thesis considers the abuses that arise from this.

9. Although my thesis is, as yet, a work in progress and will not go out for peer review until early 2012, there are passages that fill out the topics listed above, which the Commission might find helpful and informative. Should the Commission wish access to those passages, I would seek permission from Macquarie University to release the material to the inquiry.

10. In closing, it is appropriate to the Commission's deliberations to ask and answer the question: Why we watch, read and hear, what we watch read and hear? We do so because we have (a) the time (b) the inclination and (c) the means to afford it. The Board's classification deliberations are irrelevant on these fundamentals. But ban it, and everyone wants it!

My kind regards and best wishes to the Commission and Staff.

Bob Ryan
Ph.D. candidate at Macquarie University.

APPENDIX 2

ONLINE OPINION

Australia's e-journal of social and political debate

CENSORSHIP: NO! LABELLING: YES!

By Bob Ryan
Posted Tuesday, 11 January 2011

After considering all aspects of arts-media censorship in Australia I cannot be other than opposed to it. Furthermore, censorship contravenes the fundamental principle of Mill's great essay *On Liberty*, which is worth re-stating:

> "That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection".

At the outset, it should be understood that the prosecution of criminal activity involving arts-media is not censorship, provided we are clear on what constitutes a crime. Thus, child abuse, euthanasia and terrorist material, although included in censorship law, are not considered here, but are the subjects of a separate opinion.

With regard to censorship, Mill's principle should be the benchmark for determining how much (if any) interference with an individual's choice of entertainment is warranted. Australia is a free and democratic nation based on, we are often reminded, the folklore principle of a fair go for all. This, more than anything else, means we accept the Millian principle as having been part of our culture since we hacked off the convict shackles.

On January 26 this year [2011], we will celebrate the founding of English Australia for the 223rd time. That much of our history is known to most of us, but few are aware that censorship, which came out with the First Fleet, will also have its 233rd birthday. "I send this by a friend", wrote a female convict in November 1788, "they read everything here".

To begin, it must be fairly said that since the 1980s, what Bob Carr once called the "bad old days" of censorship have gone. Nevertheless, I believe it is now time "they" stopped "reading everything" and let Australians choose the arts-media entertainment they prefer. In fact, to paraphrase the National Classification Code (NCC), adults should be able to read, hear and see what they want provided minors are protected from material likely to harm or disturb them and everyone is protected from exposure to unsolicited material that they find offensive. Those provisions fall within the Millian concept, but censorship law doesn't stop there.

RETAIN THE RATINGS

Before proceeding to the more profound argument, which concerns the censors' contentious decisions, I should state that I am not advocating abolition of the classifications (ratings), which are now well established as consumer advisories. The law includes guidelines as to how the Board should implement the NCC. These guidelines are available at no cost to all who want a copy. This means that, armed with their copies, those in the entertainment industry could, by following the guidelines, label their products as required by law just as easily as can the Board. Indeed, a current director Donald McDonald appears to agree that the bulk of his Board's work is very much run-of-mill classifying. He said

> The very small number of decisions annually which attract controversy (comparative to the large number of decisions made by the Board) indicates that we may be getting the balance right between sense and censorbility.

I argue that industry, not the taxpayer, should do its own labelling work and further, the label (and/or advertisement where appropriate) should give a more detailed description of the product than is presently the case. At present the system fails the NCC's offence and harm principles because the law requires the inclusion of only a minimal description of content such as "nudity", "sex scenes", "drugs" and so on. This does not necessarily satisfy the self-protection aim of protecting persons from material that may offend them, nor does it prevent minors from harm that the law perceives exists.

Some are shocked and offended when violence, sex scenes and the like are more graphic than they had been led to believe by the rating. While some "nudity" etc. might not be offensive to those of sensitive mind, other portrayals might be very offensive to them. A detailed description of contents in the labelling/advertising material would, therefore, be helpful. For example, suppose, instead of "sex scenes", the description of a movie included something like this: "The (named) leading actors are portrayed naked, having passionate sexual intercourse in a variety of positions". On reading that, the person who might have tolerated less explicit images but not those so graphic, would know to avoid the movie. There would then be no "unsolicited" exposure and that principle of the NCC would be satisfied.

The requirement that industry include descriptions of what a packaged item contains has been part of consumer law for a long time; what I am suggesting here is that arts-media be treated the same as any other consumable. There is also a financial reward for all here; industry would be spared the Board's fee (around $750 or so per item) and the taxpayer would no longer have a Classification Board to support.

But that doesn't account for the "very small number of decisions annually which attract controversy".

CENSORSHIP'S HIDDEN AGENDA

Controversy arises from those parts of the law that have not yet been mentioned, namely section 11 of the censorship act and clause (d) of the NCC. They are as follows:

> Section 11.
> Matters to be taken into account in making a decision on the classification of a publication, a film or a computer game.
> (a) the standards of morality, decency and propriety generally accepted by reasonable adults; and
> (b) the literary, artistic or educational merit (if any) of the publication, film or computer game; and
> (c) the general character of the publication, film or computer game, including whether it is of a medical, legal or scientific character; and
> (d) the persons or class of persons to or amongst whom it is published or is intended or likely to be published.

> The NCC.
> (d) the need to take account of community concerns about:
> (i) depictions that condone or incite violence,
> particularly sexual violence; and
> (ii) the portrayal of persons in a demeaning manner.

It can be immediately seen that, with the possible exception of NCC (d)(1), all the above provisions run counter to the Millian principle of self-protection, as I will now demonstrate. Dealing with the possible exception first, there is a law against inciting violence and those who do so, by whatever means, including arts-media, are charged and tried on matters of fact. No need for censors there. As for sexual violence and (d)(ii), this is only relevant where there is an unwilling victim, but the censors have no way of knowing that. The evidence, given by victims, to the (USA) Meese commission on pornography (1986) makes disturbing reading but those days are over; even so, from that evidence, the theme of pornography then was sex, not violence. As to sexual violence, one need only look at web sites such as collarme.com, alt.com phonehumiliation.com and hundreds of others, to understand that millions of people want to be sexually abused and demeaned. However, because nobody but the person concerned can be demeaned, it is no business of others if that person wishes to be demeaned and to be ptrayed so.

It is, perhaps, the provision of (d)(ii) that points up most clearly a hidden agenda. Censorship might be partly for self-protection but for the most part it appears to be for the protection of a set of standards to which those in authority aspire.

MYTHICAL STANDARDS

Looking at community standards, there is the acceptance of a myth here that the "reasonable adult" is synonymous with whatever those standards are. Section 11(a) might just as well come right out and say, if you don't agree with these standards, you are unreasonable. Former Federal Attorney-General Daryl Williams took a different approach when he said:

> the "reasonable adult" test acknowledges that individuals may have different personal tastes. In other words, although some reasonable

> adults may find the material offensive, and thus justify a restricted classification for it, others may not. They should be allowed to have access to the material if they wish.

The fact is: no government has ever had any idea what the standards are. (In discussions with Newspoll, I was advised that, to their knowledge, no survey had ever been done and such a survey would be complex and very expensive.) Donald McDonald's immediate predecessor as chief censor, Des Clark, added weight to the myth when he said: "I am confident that the model of censorship we have in Australia does indeed make for a more decent society". It is not known how Clark could come to this conclusion when there has never been a censorship-free period in Australia; so there is no way of knowing what the level of decency might have been without censorship. The best that can be said is censorship maintains the *status quo* of decency - whatever level that might be. So, it would seem, those of censorious bent have a target in mind; that of making Australians conform to some unspecified levels of morality, decency and propriety.

This has nothing to do with self-protection in the Millian sense; the same may be said of the rest of section 11. The quality, character and intended audience of arts-media are not matters of self-protection. Furthermore, the parenthetic "if any" in 11(b) indicates a degree of snobbery, especially as anything can be art. It is not for a few people to decide what is, and is not art; as Franny Moyle observed in her work, *Desperate Romantics*, "art was in the domain of the people now, and the people were its judge". Many other art critics take the view that anything can be art, and yet, to paraphrase Moyle, a few of the old guard still try their hand at separating art from non-art - hence the law includes "if any" when requiring the Board to take "merit" into account. Clearly, the lawmakers have in mind something other than self-protection.

LAWMAKERS ARE THE REAL CENSORS

Decisions made by the Board must be seen in the light of the government's guidelines for classifying arts-media materials. *The Board* is far from free to make up its own mind on controversial matters. It cannot lawfully act against the guidelines, as Maureen Shelley (Convener of the Review Board) confirmed when refusing to classify the movie, *Ken Park.* Thus, "guidelines" is a euphemism for "requirements" – the Board being

required to act in a particular way. The guidelines state what shall be refused classification (RC) and the Board is bound to obey. Shelley's chief objection to *Ken Park* was a 2-minute masturbation scene, which, she observed, the actor was enjoying. One might question what the actor's enjoyment has to do with society's self-protection, but the law believes it should interfere in such matters and so bans the showing of it. The movie, Baise Moi, the banning of which caused Bob Carr to refer to the bad old days, was first released and then its rating revoked because some people objected to it.

Ken Park and *Baise Moi* are two examples of many more than a "very small number" of controversial movies, but they need not be controversial if, again using Mill, it is accepted that each individual is the best judge of his or her own interests. It is not sufficient, I would argue, that some scenes are too violent, or there is too much sex, to ban arts-media. Correct and detailed labelling, as suggested above, would spare those who object, the offence of viewing such scenes. (My personal gripe is against vomit scenes, but the NCC doesn't protect me from them.) The fact is, those who object want movies banned or heavily restricted because they object to them - they set themselves up as their brothers' and sisters' keepers. There is no "generally acceptable" standard. Thus, controversy arises every time one side thinks something is released that should be banned and vice versa, banned but should be released. This is why former Attorney-General Daryl Williams was moved to say:

> The issue of censorship [. . .] forms a significant part of the correspondence I receive as the responsible Minister. These letters either upbraid me for not stemming the tide of distasteful films, videos and publications coming into the country, or chide me for not allowing people to make absolute choices about what they wish to read, hear and see.

Donald McDonald, who took over as chief censor in 2007, seemed to echo Williams when referring to the correspondence the Board receives: "Everyone has a view, everyone believes they would make better decisions and everyone would more accurately reflect the views of the community!"

McDonald cannot act against the law that leans so heavily on unspecified and unstated community standards that are the cause of so much controversy. The four

people who sat as a Board of Review that banned *Baise Moi* did not act for everyone, but on an interpretation of the guidelines. The 50,000 or so Australians who saw the movie before it was banned had no problem with it (the few complainants excepted). If "everyone" would make a better censor, let everyone censor for themselves and their dependent youngsters. There is no community view on consumables but, rather, an aggregation of individual views that happen to coincide. Some approve of an item, some disapprove, some don't have an opinion; communities are like that - opinions differ.

My opinion favours labelling over censorship. *The Board* would become unnecessary if arts-media items were required to include descriptions of contents, as do all other packaged consumables.

A FINAL NOTE

The Attorneys-General from all States and Territories were to meet with the Federal Attorney-General a week before Christmas to discuss the controversial R-rated video games issue. I wrote to the Federal Attorney-General, in time for that meeting, on the matter of labelling arts-media and transferring oversight of it the consumer affairs department. I had already written to NSW Premier, Keneally some weeks earlier on this subject; she, in turn passed my letter to Mr Hatzistergos, New South Wales Attorney-General. In my letter to the Federal A-G, I told him of my letter to Keneally-Hatzistergos and hoped those gentlemen would find a moment or two to discuss it. At the time of this writing, and although the video games issue was settled at that meeting, neither of the gentlemen has yet found the time to reply.

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- Unless otherwise stated, all sites listed were accessed between February 26, 2015 and March 16, 2015.
- *The Board's* website: www.classification.gov.au was accessed constantly throughout this work. To avoid unnecessary repetition the reader is directed to the site's search menu.

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CHAPTER 2: A MORE LIBERAL CENSORSHIP

http://www.classification.gov.au

CHAPTER 3: APPOINTMENTS TO AND ACTIVITIES OF *THE BOARD*

The Board's website was accessed separately for each of the 16 years under review
http://www.classification.gov.au/About/Pages/Classification-Board.aspx#4
http://www.classification.gov.au/www/cob/classification.nsf/Page/ClassificationinAustralia_Whoweare_ClassificationBoard_ClassificationReviewBoardMembers
http://www.guardian.co.uk/commentisfree/2007/dec/19/bbcpoguemahone
http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3201.0Jun%202009
http://www.utas.edu.au/library/companion_to_tasmanian_history/H/Brian%20Harradine.htm

CHAPTER 4: APPOINTMENTS TO AND ACTIVITIES OF THE REVIEW BOARD

The Board's website was accessed separately for information on membership and decisions of each of the 16 years under review
http://www.classification.gov.au/About/Pages/Review-Board-Decisions.aspx

http://www.classification.gov.au/www/cob/classification.nsf/Page/ClassificationinAustralia_Whoweare_ClassificationBoard_ClassificationReviewBoardMembers
http://downloadmoviea.com/Ken%20Park,
1 http://www.cduniverse.com/productinfo.asp?pid=8943792&style=ice

CHAPTER 5: INSTRUCTIONS TO *THE BOARD* AND THE REVIEW BOARD

WARNING: The sites marked * may contain hardcore pornographic images.
http://www.ecq.qld.gov.au/voting.aspx?id=94
* www.bdsm.com
* www.collarme.com Content changed from July 2014 but see http://www.femdommesociety.com
* www.alt.com
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http://parisjc.libguides.com/content.php?pid=272805&sid=2249238
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(http://www.classification.gov.au/Pages/Results.aspx?q=The+Simpsons&t=lfc
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http://www.utas.edu.au/library/companion_to_tasmanian_history/N/Neilson.htm//www.aph.gov.au/library/Pubs/rn/1997-98/98rn42.htm

CHAPTER 10: CHILDREN AND ADOLESCENTS

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http://www.rcpsych.ac.uk/mentalhealthinfoforall/youngpeople/adolescence.aspx
http://www.aifs.gov.au/nch/pubs/sheets/rs16/rs16.html
http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/
http://familydoctor.org/online/famdocen/home/children/parents/parents-teens/445.html
http://www.dishekimim.com/en/Child_dentistry.htm
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