Reformers aim for uniform legislation

The Classification (Publications, Films and Computer Games) Act *(1995) offers what is essentially a new regime operating under the old anxieties.*

The introduction of the *Classification (Publications, Films and Computer Games) Act* (1995) ('the Act') as law in Australia is a significant event in the history of censorship procedure and culture. With this legislation operating at a federal level, and the support of complementary enforcement legislation at a state and territory level, there now exists a new censorship order which is aimed at being uniform and exhaustive.

Little has been written on the legislation since its enactment so we will attempt to canvass the general principles of the Commonwealth Act and the nature and content of the state and territory legislation as a starting point to identify the anxieties and concerns that have dominated public and government debate about censorship in Australia.

The Act consolidates a national code for the classification of publications, computer games, films and any other future electronic media. Following a discussion paper and report, the Australian Law Reform Commission, in conjunction with the Office of Film and Literature Classification (OFLC) produced draft legislation that provided the model for the new Act. The objective of the suggested reforms was to establish a complementary federal scheme to replace the complicated, 13-piece network of legislation that had regulated film censorship since the late 1970s.

The result was the enactment of Commonwealth legislation that dealt with the structure and functions of the OFLC and with classification issues and principles, and legislation at the state and territory level that dealt with enforcement. The enforcement legislation was intended to be "mirror" and in line with the federal regime. Predictably, the states and territories came up with various types of legislation, though they all are closely connected with the Commonwealth Act.

The *Classification Act* came into force at a time when reforms to censorship law and procedure, implemented in the 1970s, were beginning to be re-examined in the public sphere. The Parliamentary debate on the *Classification Bill* (1995) (passed through both Houses virtually uncontested) tells us much about the nature of this "re-examination". Well-worn predictable anxieties about, for example, new technological forms, child pornography, and sexual violence, emerged in these debates, inspired and sustained by anecdotal evidence and political point-scoring.

For example, after the second reading of the Bill, Senator Boswell (Qld, Nat) raised concerns about the fact that a seven-year-old child was photographed in a local newspaper pointing out "explicit information" at a government-sponsored science fair in Brisbane. The senator asked: "How can we expect this bill to solve the problem if the government is prepared to be party to the display of pornographic material to minors?" Senator Herron (Qld, Nat), then a member of the influential Senate Select Committee on Community Standards, raised concerns about a government-funded safe sex publication sold with *Cleo* magazine, which he said "spread lies" about the widespread activity of anal sex in the heterosexual community (*Cleo* said 40-60%, he said five per cent).

The publication advocated lesbianism, sadomasochism and other deviant behaviour, he said. He argued that the Bill was defective because it didn't cover this kind of material, which he asserted should be banned.

Similar debate occurred in the House of Representatives. Members expressed their concerns about child pornography, bestiality, sexual violence, drug taking, terrorist activity, copycat crimes and the use of pornography by murderers and child rapists. One member, Mr Filing (WA, Ind) opposed the Bill, calling it flawed – "a Clayton's piece of legislation" – because it failed to adequately control children's access to violent and sexually explicit material through the Internet.

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To individuals even vaguely familiar with the history and content of censorship debate in Australia and elsewhere, the concerns and fears expressed by these politicians are predictable, even hackneyed. Indeed, this type of debate continued in the wider public sphere once the Bill became law. These tensions and concerns are predictable, not just because censorship arguments rarely change over time, but also because they are embedded in the legislation itself.

The National Classification Code, as it appears in the Schedule to the Commonwealth legislation, contains what

comes closest to being a statement of general principles for classification in Australia. All states either implicitly or explicitly incorporate these principles in their legislation.

The first "principle" is that "adults should be able to read, hear and see what they want". This consumer right is of course limited. Section 11 of the Commonwealth Act states that such a right is limited by various considerations to be taken into account in the classification process, in particular "the standards of morality, decency and propriety generally accepted by reasonable adults". More specifically, the code highlights those "matters" of particular importance to the standards of the "reasonable adult".

One of the first "matters" to be taken into account by classifiers is the principle that "minors should be protected from material likely to harm or disturb them". But the legislative scheme as a whole goes beyond enforcing the classifications, in other words making sure 14-year-olds don't get to see R-rated films. For example, the Tasmanian and Western Australia Acts each devote an entire section to "child pornography". The definition of a "child abuse product" in these Acts is extremely broad: a film, publication or computer game "that describes or depicts a person (whether engaged in sexual activity *or otherwise*) who is, *or who looks like*, a child in a manner that is likely to cause offence to a reasonable adult" (emphasis added). These products are almost always refused classification under the various jurisdictions.

Connected with child protection is what then Attorney-General Michael Lavarch referred to during the first reading of the Bill as a "new principle" in censorship law: "the need to take account of community concerns about depictions that condone or incite violence, particularly sexual violence". Since the mid-1980s, the Commonwealth, State and Territory Attorney-Generals have instructed the OFLC to tighten up on depictions of sexual violence in the adult categories of MA and R.

This "classification" consideration or limitation on the general right is connected to another "new principle" in the Schedule, the need to take into account depictions that "portray persons in a demeaning manner". The word "demeaning" has long been used in traditional obscenity law and some modern feminist work on pornography. It has more recent legal origins in the Canadian case of *R.* v. *Butler* in which the Supreme Court of Canada considered whether pornographic material, attracting a penalty under its *Criminal Code,* should be protected by its *Charter of Rights of Freedoms*.[1]. Chief Justice Sopinka held that pornography was hate-literature, and therefore not protected by the *Charter.*

Furthermore, he held that material that may be said to exploit sex in a "degrading and dehumanising" manner will necessarily fail the "community standards" test, not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly women.[2]

The final limitation on the general right to see, hear and read is that "everyone should be protected from exposure to unsolicited material that they find offensive". The classification system functions along consumer guidelines for this very purpose: to give the consumer pre-warning of the contents of a film or publication. Explicitness or "gratuitousness" is in effect the organising principle in the Cinema and Video Ratings system. The open category G allows for "discreet references to sex" and "minimal, mild and incidental" violence with a heavy emphasis on context, justification by narrative. In contrast the adult category of R allows "implied or simulated" sex and "highly realistic and explicit violence" as long as it is not "unduly detailed or relished".

The more extreme, realistic and explicit the image, the higher the classification and the smaller the audience, and, presumably, the greater the risk of harm to children and offence to adults. But a particularly impactful image can be "saved" under section 11 of the Commonwealth Act if it has artistic or educational merit, scientific purpose or a particular target audience i.e. an authorised film festival.

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These classification principles and considerations are reflective of long-standing political and public anxieties about, in particular, non-traditional and child sexuality, explicit imagery and the power of the visual media. The new regulatory scheme not only determines the practice of censorship law but also the outcome of censorship procedure, namely the various classification decisions made by the OFLC, which have been increasingly stringent since the unbanning of Pier Paolo Pasolini's *Salo* in 1994.

This is a version of a paper presented by Rebecca Huntley and Jane Mills, Head of Screen Studies at the Australian Film, Television and Radio School, at the Cultural Crossroads Conference, November 25, 1997. Rebecca Huntley is an editor of *Halsbury's Laws of Australia* and a member of Watch on Censorship. You can contact the Watch on Censorship Committee on (02) 9660 3844.

1. *R* v *Butler* [1992] 1 SCR. 452, [hereinafter *Butler*].
2. *Butler* at 454.