OFFICE of
PUBLIC PROSECUTIONS
VICTORIA

565 Lonsdale Street
Melbourne VIC 3000
PO Box 13085
Melbourne VIC 8010

www.opp.vic.gov.au

4 March 2011 Our Ref:
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Ms Julie Dennett
Committee Secretary
Standing Senate Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Secretary

Submissions to the Inquiry into the Australian film and Literature Classification Scheme

I refer to your letter of 29 November 2010 inviting submissions to the above inquiry.

The Office of Public Prosecutions provides the following submissions relating to two items within the Terms of Reference:

(c) the enforcement system, including call-in notices, referrals to state and territory law enforcement agencies and follow up of such referrals; and

(e) the application of the National Classification Scheme to works of Art and the role of artistic merit in classification decisions.

These submissions relate to the prosecution process for offences created by the Victorian Classification (Publications, Films and Computer Games)(Enforcement) Act 1995 (the state Act).

Prosecuting offences under the state Act

1. Cost of Obtaining Classification and Certificates

The state Act sets up a system whereby prosecution of an offence against the state Act in relation to a film, publication or computer game that is unclassified at the time of the offence cannot commence until the film, publication or computer game the subject of the offence is classified by the Classification Board. There is also a 12 month limitation period on commencement of a prosecution from the date the item is so classified.

Pursuant to s.78 of the state Act in any proceeding for an offence against the Act a certificate or a copy of a certificate signed by the Director or the Deputy Director of the Classification Board stating that a film, publication or computer game is evidence of and in the absence of evidence to the contrary, proof that an item is classified or unclassified amongst other things.

The cost of obtaining classification and the evidentiary certificates may be an obstacle to prosecution for some offences. It is noted that in recent times in New South Wales the limit of 100 free classifications for law enforcement agencies has been exceeded and the costs of having films classified risen to such an extent that in 2010 the New South Wales parliament enacted the Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2010(NSW). That Act inserted s.58A into the Classification (Publications, Films and Computer Games) Enforcement Act 1995 (NSW) that provided for a procedure whereby the Prosecution can give notice to the accused which invites him or her to agree that on a specified date the publication, film or computer games the subject of the alleged offence was classified at the specified classification or if unclassified, it would have been of the specified classification. A notice so signed by the accused is evidence of, and in the absence of evidence to the contrary is proof of the matters contained within it. Thus a means is provided whereby where the accused consents the Prosecution can avoid the necessity and expense of obtaining classification by the classification board. If the Accused does not sign the notice and he or she is subsequently convicted the cost of the fee for classification of the item is recoverable from the accused.

The limit of 100 free classifications has not to date been exceeded in Victoria. The Office of Public Prosecutions has prosecuted very few cases in the higher courts in recent years. Figures as to the number of prosecutions by police prosecutors are not available to the writer however, the Victoria Police website (www.police.vic.gov.au) publishes figures as to the number of offences recorded by them in the last 10 years. Perusal of those figures reveals that during the period 2000 to 2010 that there were only 11 offences of Possessing an unclassified or RC film with intent to sell in a commercial quantity and 1 offence of Copying an unclassified film with intent to sell in a commercial quantity recorded. The state Act contains very few indictable offences. With respect to both of the above offences none have been recorded in the last five years.

During the same time period 30 offences of Possessing an X rated film with intent to sell or exhibit, 18 offences of Possessing an unclassified film, 45 offences of Selling an unclassified film, 6 offences of Selling a Refused Classification film and 29 offences of Selling a film classified X are recorded. Many of the less serious offences under the state Act are recorded as also having very few or no offences recorded.

In relation to some offences although the number of offences is higher only one, two or no offences have been recorded in the last four or five years. For e.g. no offences have been recorded of Selling an unclassified film or Selling a Refused Classification film for the last 4 and 5 years respectively. The statistics do appear to reveal an emphasis or concentration of effort on the offences contained in Part 6 of the state Act relating to on-line information services. There are 104 offences of Using an On-line Information Service to publish Child Pornography and 39 of those occurred in 2009/2010. The statistics do not reveal whether any of these matters were referred to Victoria Police by the Classification Branch of the Commonwealth Attorney- General's office.

As to the reasons for the small number of reported offences it is unclear whether this is due to factors such as the complexity of the state Act, the lack of a specialised unit within Victoria Police specifically to deal with such matters or a change in resourcing priorities by Victoria Police. The small number of indictable matters prosecuted by the OPP may be due to the fact that the majority of offences created by the state Act are summary offences prosecuted by police or that many offences overlap with and are charged under the Child Pornography provisions of the Crimes Act 1958.

It is submitted that if increased resources and expertise are made available to police to more actively investigate offences under the state Act the costs of obtaining the necessary classification and certificates may also rise substantially and it may be necessary to consider the introduction of consent provisions similar to those introduced in the New South Wales Act. The Classification Branch of the Commonwealth Attorney –General's Department have advised that in 2008-2009 there were 29 enforcement applications submitted for classification and 85 such applications in 2009-2010 from Victoria. No figures are available to the writer to indicate how many of such applications result in prosecutions.

It should be noted that the cost of obtaining classification certificates might also substantially outweigh the penalties imposed on convicted offenders. Section 82 of the State Act provides for the recovery of those costs from the offender however, the costs of pursuing such an order may simply result in the exercise not being cost effective. Where few offenders are prosecuted, penalties are low and profits high, there is little deterrent to offenders not to repeat the offences and the high costs of prosecuting such matters does not alleviate that situation.

2. Random Sampling

Another obstacle to prosecution of offences under the state Act is that where very large amounts of material are seized particularly in matters which are characterised as child pornography the state Act does not provide for a sample of the material to be analysed by an expert and then used as evidence of the nature or classification of the remainder of the seized material. If the Defence do not admit the nature of the material then the process of examining large quantities of material by investigating police officers, prosecutors. Judges and juries can create delays and cause distress to those required to examine the material.

A random sampling process has recently been introduced in New South Wales with respect to offences of Producing, Disseminating or Possessing Child Pornography by the Crimes Amendment (Child Pornography and Abuse Material) Act 2010 NSW. It is submitted such a random sampling process would improve the prosecution process with respect to classification offences under the state Act particularly where large quantities of images and material have been seized.

3. Changes to Technology

Technological change is proceeding so quickly that legislation has not kept up with those changes. Part 6 of the state Act contains offences relating to the use of the Internet to publish or transmit objectionable material, which includes material that would be classified X18+ or RC by the Classification Board but is not restricted to such material. It does not cover content provided through a carriage service, which comes under the provisions of offences contained in the Commonwealth Crimes Act. These include chat

rooms and some text messages. The seizure of material in many formats leads to complexity in the prosecuting process particularly where matters fall within both the state Act offences and Commonwealth Crimes act offences.

Artistic merit as a factor to be taken into account.

Section 11 Classification (Publications, Films and Computer Games) Act 1995 Cth (the Commonwealth Act) provides that when making a decision as to the appropriate classification of publications, films and computer games the members of the Classification Board are required to take into account the literary, artistic or educational merit of that publication film or computer game. Publication is defined as including "any pictorial matter".

The difficulties of determining when a piece of work is considered to have artistic merit are well known. A review of the cases including the recent controversy over the police seizure of photographs of children created by Bill Henson and exhibited in a gallery in Sydney illustrate the conceptual difficulties in defining what is art and whether a particular work of art has artistic merit.

Some of the offences under the state Act incorporate the concept by providing a defence where such items have been classified by the Classification Board, which entails the board in taking artistic merit into account in the classification process pursuant to s11 of the commonwealth Act.

In Victoria s70 (2) Crimes Act 1958 provides a defence to a prosecution for Possession of Child Pornography if the film, publication or computer game "possess artistic merit" however, the act further provides that the defence of artistic merit cannot be relied on in a case where the child depicted is actually under the age of 18 years.

It is noted that the defence of artistic merit is somewhat difficult for the Prosecution to negative. In New South Wales the Crimes Amendment (Child Pornography and Abuse Material) Act 2010 amended the Crimes Act 1900 NSW to remove artistic merit as a defence to the offence of Producing, Disseminating or Possessing child Pornography however, it has become a factor to be considered in determining whether the material is offensive and therefore within the definition of child Pornography.

It has long been a tradition in the law that artists should not be treated in the same way as those who create films and images purely for base commercial purposes. However, it has to be acknowledged that works of art may have artistic merit and still be considered offensive by the standards of morality and decency held by reasonable adults. Section 11 of the Commonwealth Act allows a balancing of those two factors.

It is submitted that artistic merit should remain a factor to be taken into account by the Classification Board pursuant to s11 of the Commonwealth Act although it should not be elevated above the other factors that the board are required by that section to take into account. In that way a measure of protection is afforded to genuine artists for their work and consistency is maintained between the Commonwealth Act and the provisions of the

state Acts that also incorporate the concept.

Yours faithfully.

Jenny Combes
Senior Solicitor
Policy & Advice Directorate
Office of Public Prosecutions