



Submission to the
Select Legal and Constitutional
Committees

Inquiry into the Australian Film and
Literature Classification Scheme



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About the Authors

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About Bravehearts Inc.



Founded in 1997 by Hetty Johnston, Bravehearts Inc. has evolved into an organisation whose purpose is to provide therapeutic, support and advocacy services to survivors of child sexual assault. We are also actively involved in education, prevention, early intervention and research programs relating to child sexual assault.

Bravehearts operates at a National level, from our Head Office on the Gold Coast, advocating and lobbying across the country, with a physical presence in three States: Queensland (Gold Coast, Brisbane and Cairns), New South Wales (Sydney and Shoalhaven) and Victoria (Shepparton). Our branch in Cairns is funded by the Commonwealth Government to deliver our proven child sexual assault prevention and early intervention programs to the Indigenous children and communities of FNQ. The programs success is achieved by Bravehearts working in collaboration with the Royal Flying Doctors and others to travel into North Queensland's most remote Indigenous communities.

Bravehearts makes a difference in child protection by:

- Assisting children and their non-offending family members to recover from the trauma of child sexual assault through therapy, advocacy and support;
- Raising awareness via initiatives such as the 'White Balloon Campaign' - a public awareness and child protection initiative;
- Protecting survivors and providing them with avenues of redress through projects like the 'Sexual Assault Disclosure Scheme' (SADS) – a means for anonymous yet official disclosure of assault;
- Providing and developing effective education and prevention programs (Ditto's Keep Safe Adventure) to empower children and young people and increase their resiliency to child sexual assault;
- Provision of professional training and workshops; including specialised training for therapists and professional development for organisations that work with, or who's core business involves children;
- Advocating for survivor's rights through participation in legislative review and reform (successful campaigns include: the introduction in Queensland, New South Wales, Western Australia, Victoria and South Australia of Continuing Sentences for dangerous paedophiles; the closure of Queensland's Department of Family Services; the introduction of Section 189, the right for children and their families to speak publicly; the introduction of the Amber Alert system in Australia; the instigation of various formal Inquiries; and successful amendments to legislation);
- Proactive involvement in cyber-safety initiatives, including a presence on the Federal Government's Cyber-Safety Consultative Working Group;
- Raising community awareness through participation in public debate and in the accumulation, production and dissemination of relevant research material; and
- Supporting the work of other agencies (government and non-government) and individuals in their work around child sexual assault.

Bravehearts' Submission



While we are aware the issues raised being considered in the current Inquiry into the Australian Film and Literature Classification Scheme are far wider and have far broader implication than those confined to the recent Bill Henson debate, we have never the less used the Henson situation as the basis for our feedback. I think it is fair to say that it was this debate that sparked this legislative reform agenda and that as a result, our position in using the Henson situation as our example is not unreasonable.

In doing so we are aware that we are canvassing the questions of the creation (in Australia) of this type of material and not the possession and/or dissemination of such material that has origins outside Australia.

We would also like to note that of concern to us are the processes and guidelines involved in the decision making process of the Classification Board. It would appear that both in current and proposed legislations, despite the illegality of taking images of naked and semi-naked children in Australia, a simple G, PG rating by the Classification Board will (and has) render, by virtue of its rating, images of naked children as inoffensive *'in all circumstances'* to *'reasonable'* persons and therefore legal. This is a dangerously powerful and (by our advise) unconstitutional position for a Board to hold.

Deferring such critical decisions to a panel of selected individuals in a separate process is, in our view, not only unfair and unwise - it is dangerous. The Henson debate proved that.

Bravehearts Recommendation One

That the processes and powers of the Classification Board be reviewed to properly reflect the legal implications and limitations affecting the rating of images of naked or semi-naked children in 'artistic material'.

Bravehearts Recommendation Two

That 'artistic merit' is deleted as a consideration and/or defence in matters before the Courts in relation to material depicting naked or semi-naked children and that the definition of what constitutes 'the public benefit test' be clearly articulated to omit 'artistic merit'.

Artistic Merit Defence

We support the examination of how to remove the 'artistic merit' defence without infringing on the rights of journalists and artists (and presumably scientists and educators) to depict valid situations involving children.

Images of naked or semi naked children that are designed, produced, manufactured, posed or created images should remain illegal. Images of children that may well hold artistic merit but that are real life depictions of un-orchestrated true events, fall into

another category. The determination of the motivation for taking the photo and the context of the image is critical.

The scrapping of the defence of 'artistic merit' in the use of child pornography images is welcomed. Most determinations of what is, and what isn't, child pornography is abundantly clear and logically assessable. For matters such as these we believe the changes will bring clarity, certainty and brevity to the system.

However, in many instances the determination of what is, and who decides what is, and what isn't, child pornography remains the vexed question. The removal of artistic merit as a defence only has direct implication for what are clearly child pornography images and does not provide the same clarity in circumstances such as that which arose during the Bill Henson debate.

This lack of clarity around the Henson images took place despite the fact that the taking of the photos in question was and remains illegal.

Taking images of naked or semi naked children, manufactured and created for the purposes of 'art' is illegal in NSW – end of argument. As such, there is no place for any consideration of 'artistic merit'. There should be no further opportunity in law, either by the allowance of the introduction of 'expert evidence' or by a rating obtained from a 'Classification Board' or by any other means or individual - or group of individuals - that would weaken that position.

Proposed adoption of the Commonwealth Legislation

In terms of future legal arguments such as the Henson matter, 'artistic merit' appears to remain alive and well as an admissible consideration before the court under Commonwealth legislation.

Our concern remains that 'artistic merit' can still be argued at all and further, that testimony from an 'art expert' or Classification Board will have the same weight in the decision making process as is currently the case despite the fact that the taking of these images is illegal.

Our understanding is that the tests to be used under Commonwealth law in determining whether the images are offensive are:

- the ***generally accepted standards*** of morality, decency and propriety
- what a ***'reasonable person'*** would regard as being, ***'in all the circumstances'***, offensive.



However we are concerned that there remains no unambiguous guidance on what actually constitutes these terms.

What are the *'generally accepted standards of morality, decency and propriety'* – Which of us reflects most commonly *'a reasonable person'*? Who decides?" Is it Bill Henson or Hetty Johnston? Is it the Prime Minister or the 'Art expert'? Is it the Classification Board or our Religious leaders?

Each State and Territory in Australia places varying prohibitions or restrictions on the engagement of children in employment while the majority, NSW, Vic, Qld and WA specifically prohibit the use of naked or semi naked children in art.

In the case of another instance such as the Henson matter for example, one could argue that it is the enactment of these legislative restrictions that set the scene for what reflects the 'generally accepted standards of morality, decency and propriety' and therefore the images would fail the artistic merit test. Images of naked children can not be taken legally so how could they be morally acceptable?

However, the Classification Board rated the Bill Henson photo as 'G' – General viewing, no more offensive than images of Mickey Mouse or Donald Duck - and they did this despite the fact that the taking of the photos was in fact illegal. In this case, the Henson images passed the artistic merit test.

State Child Employment Laws		FAILS the test of morality
Classification Board Decision		PASSES the test of morality

At the same time, despite the 'G' Rating, as far as we are aware, there were no television or print media who showed the image without black bands covering the breast and vaginal areas.

Is this then evidence of the media self regulating to avoid an expected consumer backlash if they did otherwise. Was this the media not wanting to offend the public by breaching what they perceive as generally accepted standards of community morality, decency and propriety? Is this then the best measure of 'generally accepted community standards'?

The fact that the taking of photos of naked or semi naked children for artistic purposes is already illegal in NSW and other jurisdictions, is, in our view, the truest reflection of what a *'reasonable adult', 'in all the circumstances'* would find *offensive*.

Breaking of the law should, *in all the circumstances*, be offensive to *reasonable* people. If the behaviour were not offensive then the behaviour should not be illegal. If the behaviour is illegal by Statute in the States and/or Territories, it should not be possible for an external Classification Board or an 'expert opinion' to then over-ride that legislation and make it permissible.

The Australian Council for the Arts acknowledged true community expectations and standards when they too made the taking of photos or film, for artistic purposes, of naked or semi naked children unacceptable and made artists accountable to the laws governing them in the States and Territories.

So what do the legislative reform proposals recommended by the CPWP do to improve the potential to overcome these inconsistencies?

That the NSW definition of child pornography, the factors that determine whether material is offensive, and the defences that are available be amended to reflect the existing Commonwealth legislation and that the definition be renamed to refer to 'child abuse material'.

Definition of child pornography

We prefer '**child exploitation material**' as a definition in preference to child pornography. While some images may not be 'pornographic' in the way the term is generally understood, (i.e.: sexual) they may still be exploitative of the child by virtue of many other factors including that they may be breaking the laws in NSW in relation to the taking of photos of naked or semi naked children for art.

We agree with the Commonwealth differentiation between child abuse material and child pornography (exploitation) material.

Bravehearts have long argued the difference between child abuse and neglect and child sexual assault. We have recently been successful in attaining national acknowledgement and agreement in this differentiation during the development and outcome (6) of the COAG Agreement - The National Framework for the Protection of Australian Children 2009-2020.

Child abuse and neglect are very different to child sexual assault – both are equally unacceptable and damaging but they are different. The offenders are different, the motivation (or lack thereof) is different, and the behaviour is different (see Attachment 1).

Failure to acknowledge this in any new legislative reform would, in our view, represent a regressive step.

Factors that determine whether the material is offensive

Presently NSW legislation allows for the Classification Board to over-ride the intention of it's own child employment laws which prohibit the taking of photos of naked or semi naked children for the purpose of art.

We object strenuously to this situation and believe there should be no consideration of 'artistic merit' as being of more importance or demanding greater consideration than that of the enforcement of child protection laws.

The Commonwealth law provides that matters to be taken into account in deciding....."whether reasonable persons would regard particular material....as being, in all the circumstances", offensive include:

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

- (b) the literary, artistic or education merit (if any) of the material; and
 - (c) The general character of the material (including whether it is of a medical, legal or scientific character).
-
- (a) Again the question of whose ‘standards of morality, decency and propriety do we accept as generally applicable to ‘reasonable adults’. It is not clear that material created illegally (such as the Henson images) would not still be permitted under this legislation.
 - (b) Bravehearts oppose any inclusion of ‘artistic merit’ as a legitimate exemption to the laws protecting children from exploitation.

In addition, the Commonwealth legislation provided for the introduction of ‘expert opinion’ to argue the Propriety of the material. Again, we object to any incursion into the illegality of the taking of the images in the first place. It would be unacceptable for a person or persons (art expert or Classification Board) to, by expressing an opinion, change what was illegal, to legal.

As such, we would object strenuously to the verbatim adoption of these conditions.

The defences that are available

We support the adoption of the defence provisions under the Commonwealth Code which include the public benefit test but where determination is a question of fact (and does not include artistic merit).

We also support the approach where all other ‘public benefit possibilities’ require that prior written approval from the Minister has been received for the purposes of conducting scientific, medical or educational research - (but that artistic merit can not recognised as a ‘public benefit’ possibility).

We take this opportunity to thank you for the opportunity to participate in this vital community debate.

Yours sincerely,



Hetty Johnston
Founder and Executive Director

Attachment 1



How Does Child Sexual Assault Differ from Child Abuse and Neglect?

Bravehearts believe that the issue of child sexual assault and those of child abuse and neglect are discernibly different and require discernibly different responses. This view is borne out by the increasing number of reports, conferences and studies that deal exclusively with the issue child sexual assault in isolation of 'child abuse and neglect'.

We do recognise the equally damaging effects of child abuse and neglect but we believe that bundling 'child sexual assault' in the suite of matters referred to collectively as 'child abuse and neglect' is actually harming efforts to prevent child sexual assault. We believe this occurs in many areas including that of 'child abuse' data collection. This in turn thwarts the development of clear understanding and therefore appropriate responses to the issue.

Terminology:

- The term 'abuse' portrays an extension of a given right or privilege ie: discipline gone too far.
- Neglect suggests the failure to provide basic care and protection.
- Sexual assault is commonly neither of these. The only thing they have in common is that they both involve the harming of children.
- It is interesting to note that an attack against an adult is commonly referred to as an 'assault' but an attack against a child is more commonly referred to as 'abuse';
- The criminal law refers to attacks against both children and adults as 'assaults'. It is telling to note that the Queensland Criminal Code does not include the term 'abuse' in its Code and does not list the term 'abuse' within Schedule 5 – The Codes Dictionary. Child sexual assault is the crime – not child sexual abuse.

Differences in Offending:

- 1(a) Acts of **child abuse and neglect** are generally unplanned, re-active and are generally aligned with socio-economic and family dysfunction issues and are comparatively predominant in areas of social disadvantage.
- 1(b) **Sexual assaults** against children are almost always pre-meditated, involving predatory acts of grooming, manipulation, self gratification and exploitation, and occur widely across the various socio-economic areas.
- 2(a) **Child abuse and neglect** more commonly involve the infliction of pain, violence and aggressive force.
- 2(b) **Child sexual assault** more commonly involves manipulation, intimidation and unwanted sexual contact.
- 3(a) **Child abuse and neglect** are generally always perpetrated by a parent, more commonly the female, (parent is the offender in an estimated 90% of cases).

3(b) **Child sexual assault** is generally:

- * Perpetrated by a male (in excess of 95% of cases).
- * More likely to be perpetrated by someone known to the child or their family (research varies but commonly finds between 80 and 85% of the time) BUT
- * Of those offenders known to the child, most commonly the offender is NOT living with the child (between 70 and 75%).

4(a) **Child abuse and neglect** offences are almost always intra-familial.

4(b) **Child sex assault** offences are commonly extra familial as well as intra-familial.

5(a) **Child abuse and neglect** is a domestic issue that can involve criminality.

5(b) **Child sexual assault** always involves criminality and further, involves potential for networking, official corruption and monetary motivations (as per drugs).

Definitions:

Assault

- An unlawful threat or attempt to do bodily injury to another.
- The act or an instance of unlawfully threatening or attempting to injure

Etymology: Old French *assaut*, literally, attack, ultimately from Latin *assultus*, from *assilire* to leap (on), attack. **1:** the crime or tort of threatening or attempting to inflict immediate offensive physical contact or bodily harm that one has the present ability to inflict and that puts the victim in fear of such harm or contact another.

Abuse

- To use wrongly or improperly; misuse: *abuse alcohol; abuse a privilege.*
- To hurt or injure by maltreatment; ill-use.

Source: *The American Heritage® Dictionary of the English Language, Fourth Edition*
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Bravehearts believes that the offences of child abuse and neglect are different in nature, motivation and victimisation than offences of child sexual assault and that while both are incredibly traumatic for children, their differences dictate they should be addressed separately.