CHAPTER 7

Artworks, film festivals and 'advocating terrorism'

7.1 This chapter deals with a range of issues raised in the course of the inquiry with respect to the National Classification Scheme, including:

- application of the National Classification Scheme to artworks, and particularly the role of artistic merit in classification decisions (term of reference (e));
- film festival classification exemptions (term of reference (o)); and
- section 9A of the *Classification Act 1995*, relating to the advocacy of terrorism (term of reference (o)).

Classification of artworks

7.2 Term of reference (e) relates to the application of the National Classification Scheme to works of art and the role of artistic merit in classification decisions. The committee received a substantial amount of evidence on this issue.

7.3 The Arts Law Centre of Australia's (Arts Law Centre) submission noted that the requirement to classify a work prior to public exhibition under the federal *Classification Act 1995* does not traditionally extend to works of art that are exhibited in gallery spaces.[1] The *Classification Act 1995* may apply, however, by virtue of the nature of the media included in the artwork.

7.4 This section of the report considers the circumstances in which the National Classification Scheme does apply to works of art, and outlines issues raised during the inquiry in relation to the application of the National Classification Scheme to works of art. The discussion centres around two aspects of 'artistic merit', namely:

- the role of artistic merit in classifying works of art; and
- the role of a defence of artistic merit with respect to child pornography, child exploitation and the production of child abuse material offences under Commonwealth, state and territory legislation.

Application of the National Classification Scheme to artworks

7.5 In its submission, the Arts Law Centre noted that the *Classification Act 1995* may apply to artwork where it contains classifiable material such as film or video:

> This would include multimedia works such as installation art which frequently incorporates a video element, and are exhibited in gallery spaces.

1 Arts Law Centre of Australia, *Submission 33*, p. 6.

> Such pieces have been increasing in popularity with the rise of digital technology as contemporary art...[2]

7.6 While noting the exemptions for classification of films listed in section 5B of the *Classification Act 1995*, the Arts Law Centre argued:

> It is unlikely that films such as those used in multimedia works of art are exempt from the classification requirement…Some multimedia art films may be exempt as a musical presentation or record of a hobby or live performance, however these would be required to wholly be a documentary record of that hobby or live performance. A film used in a work of art that exists as a piece of art, not a documentary record, would not be automatically exempt from the classification requirement. More importantly, for many artists their artistic activities are a professional activity, not a hobby activity.[3]

7.7 The Arts Law Centre noted that the fee for classification of a film for public exhibition, currently $990 for a 0-60 minute film, may be beyond the means of many artists using films in their works of art.[4]

7.8 The Arts Law Centre set out the circumstances when the *Classification Act 1995* would apply to photography or visual artworks:

> Under the *Guidelines for the Classification of Publications* bona fide artworks are not usually required to be submitted [for] classification as they are not generally considered to be 'submittable publications'.
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> ...
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> 'Publication' is defined in the Act to include any 'pictorial matter', not including a film, computer game or advertisement for a film or computer game. As such, visual artworks such as photographs are publications under the Act, and if they contain certain depictions or descriptions, may be considered submittable for classification.[5]

7.9 The submission from the Attorney-General's Department (Department) highlighted that the Director of the Classification Board may also play a role in judging material to be submittable in the context of calling-in publications for classification as authorised under state and territory enforcement legislation.[6] The Department gave the example of the issuing of a call-in notice for the July 2008

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2 Arts Law Centre of Australia, *Submission 33*, p. 6.

3 Arts Law Centre of Australia, *Submission 33*, p. 6.

4 Arts Law Centre of Australia, *Submission 33*, pp 6-7. The Arts Law Centre also noted that an additional fee of $400 applies where priority processing is required. See also the Australian Government Classification website, *Fees for classification – Public exhibition films* at: http://www.classification.gov.au/www/cob/classification.nsf/Page/Industry_FeesforClassification_FeesforClassification-PublicExhibitionFilms, (accessed 27 May 2011).

5 Arts Law Centre of Australia, *Submission 33*, pp 7-8.

6 Attorney-General's Department, *Submission 46*, p. 8.

edition of the magazine *Art Monthly*, which contained reproductions of Bill Henson photographs, as demonstrating that arts publications and reproductions of artworks may be submittable publications requiring classification under the National Classification Scheme.[7]

7.10 The fee for the classification of a 0-76 page publication is $520.[8]

7.11 While there are limited circumstances in which the *Classification Act 1995* may apply to artworks, a number of submissions noted that an artist whose work contains contentious material may seek to have their work classified as a 'preventative measure' to 'ensure against any controversy'.[9]

7.12 The National Association for the Visual Arts (NAVA) noted that decisions about whether to have works classified is a dilemma for artists:

> For artists who explore sensitive or controversial material it presents a real and tangible dilemma. Do they pay the extensive costs of having their work classified, even when it is not likely to need classification, or do they defend their right to freedom of expression and risk prosecution or censorship?[10]

Role of 'artistic merit' in classification decisions

7.13 Section 11 of the *Classification Act 1995* provides that, in making a decision on the classification of a publication, film or a computer game, one of the matters to be taken into account is the 'literary, artistic or educational merit (if any) of the publication, film or computer game'.[11] The Arts Law Centre noted that 'artistic merit' is not defined in either the *Classification Act 1995*, the *Guidelines for the Classification of Publications 2005* or the *Guidelines for the Classification of Films and Computer Games*:

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7 Attorney-General's Department, *Submission 46*, p. 9. This issue of *Art Monthly* was ultimately classified Unrestricted with the inclusion of consumer advice recommending that the publication was unsuitable for readers under 15 years of age. The works of Bill Henson, and the issues surrounding his works, are considered later in this chapter.

8 See the Australian Government Classification website, *Fees for classification – Publications and Serial Declarations* at: http://www.classification.gov.au/www/cob/classification.nsf/Page/Industry_FeesforClassification_FeesforClassification-PublicationsandSerialDeclarations, (accessed 27 May 2011).

9 Arts Law Centre, *Submission 33*, p. 8. See also Associate Professor Robert Nelson, *Submission 68*, p. 16; National Association of Visual Artists, *Submission 64*, p. 10.

10 National Association of Visual Artists, *Submission 64*, p. 10.

11 Other matters to be taken into account under section 11 are: the standards of morality, decency and propriety generally accepted by reasonable adults; the general character of the publication, film or computer game, including whether it is of a medical, legal or scientific character; and the persons or class of persons to or among whom it is published, or is intended or likely to be published.

> It may be impliedly taken into context, which is emphasised in the Guidelines as being crucial in determining whether a 'classifiable element' is justified by the storyline or themes, however this is unclear...[12]

7.14 The Arts Law Centre's submission provided a detailed analysis of certain Classification Review Board decisions it has undertaken by it since 'the amount of weight artistic merit has in classification decisions is only known in [Review Board] decisions'.[13] The Arts Law Centre provided the following conclusive view based on its analysis:

> ...'[A]rtistic merit' was crucial in the Review Board's decision to ultimately grant a rating to works...that but for artistic merit, could have been refused classification...
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> However, artistic merit alone is insufficient to ensure classification, with some works (again, usually film) [having] been refused classification and therefore banned in Australia despite acknowledgments of artistic merit...[14]

7.15 Submissions and witnesses commented that the term 'artistic merit' involves a subjective element. For example, Mr Bruce Arnold and Dr Sarah Ailwood submitted:

> Classification decisions should be based on content (eg the intensity and gratuitousness of violence) rather than on measures of artistic merit such as the deftness of the screenwriter or the brilliance of the cinematographer. It should not be the function of the [Classification Board] to articulate and implicitly enforce a particular aesthetic.[15]

7.16 Mr Paul Hotchkin from Media Standards Australia criticised the term as too broad and vague, arguing that '[a]nyone can justify artistic merit'.[16] Salt Shakers expressed the view that artistic merit should play a limited or non-existent role in relation to the classification of artworks.[17]

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12 Arts Law Centre of Australia, *Submission 33*, p. 11.

13 Arts Law Centre of Australia, *Submission 33*, p. 11. The Arts Law Centre noted that its analysis is based on decisions of the Classification Review Board in relation to films but also some publications. Classification Review Board decisions are published on the government's classification website at http://www.classification.gov.au/www/cob/classification.nsf/Page/Classification_in_AustraliaWho_we_areClassification_Review_Board_Decisions, (accessed 11 June 2011).

14 Arts Law Centre of Australia, *Submission 33*, pp 11-12.

15 Mr Bruce Arnold and Dr Sarah Ailwood, *Submission 37*, pp 4-5. See also Australian Council on Children and the Media, *Submission 44*, p. 4; Associate Professor Robert Nelson, *Submission 68*, p. 5.

16 *Committee Hansard*, 7 April 2011, p. 41.

17 Salt Shakers, *Submission 23*, p. 11.

7.17 The Office of Public Prosecutions Victoria (OPP) submitted that there needs to be a 'balancing' of the matters set out in section 11 of the *Classification Act 1995*:

> ...[A]rtistic 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...are required by that section to take into account.[18]

7.18 One proposal put forward to address the concern in relation to artistic merit was for any assessment of the literary or artistic merit of a work to take into account the views of highly regarded arts professionals who are specialists in the medium being assessed.[19] Associate Professor Robert Nelson suggested that artistic intentions should be the key criterion in all matters of classification:

> [I]n the law, intention is always a critical factor; and however difficult it may be to establish artistic intention, it is much safer and more reliable than merit. In all other circumstances, the law makes decisions about the intentions of a suspected felon; and no one is found guilty unless he or she [possesses] an evil mind (*mens rea*) over the evil deed. I cannot see how art and its legal or classificatory evaluation operate differently and see no basis for appealing to artistic merit as some kind of moral disclaimer.[20]

Works featuring children

7.19 The issue of works featuring children and, in particular, naked children has been the subject of considerable attention, and concern, in recent years. Whether such works constitute 'art' or 'child pornography' is the subject of heated debate between various groups in the community.

Bill Henson case

7.20 One specific issue considered in the course of this inquiry was the differing treatment of the defence of 'artistic merit' in relation to child abuse or child pornography offences contained in Commonwealth and state and territory criminal law.

7.21 The most well known case in relation to this issue is the work of Mr Bill Henson, and the debate which surrounded an exhibition of his work in a Sydney gallery in 2008. In May 2008, an exhibition of Mr Henson's photographs was due to open at the Roslyn Oxley9 Gallery in Sydney, featuring images of naked

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18 Office of Public Prosecutions Victoria, *Submission 14*, p. 4.

19 Government of Western Australia, *Submission 39*, p. 1. See also National Association of Visual Artists, *Submission 64*, pp 12-13, which suggested that experts could be drawn from senior curators at major art institutions, art academics, well-established artists and reputable gallery owners.

20 Associate Professor Robert Nelson, *Submission 68*, p. 5.

children, aged 12 and 13.[21] The National Association of Visual Artists' submission summarised what ultimately occurred:

> The exhibition...was raided by police on the day it was to open, the works were confiscated by police and the artist and gallery were threatened with legal proceedings. On request, the police received advice from the Public Prosecutor...[22]

7.22 At the time, the *Crimes Act 1900* (NSW) (NSW Crimes Act) defined 'child pornography' as material that depicts or describes in a manner that would cause offence to a reasonable person, a person under (or apparently under) the age of 16 years:

(a) engaged in sexual activity; or

(b) in a sexual context; or

(c) as the victim of torture, cruelty or physical abuse.[23]

7.23 The NSW Crimes Act, at the time, set out three relevant offences in relation to child pornography:

(a) producing or disseminating child pornography, with a maximum sentence of 10 years imprisonment;[24]

(b) possessing child pornography, with a maximum sentence of five years imprisonment;[25] and

(c) using or causing or procuring a child, or consenting or allowing a child under the care of the off ender, to be used for pornographic purposes, with a maximum sentence of 14 years imprisonment where the child is under the age of 14 years and 10 years imprisonment where the child is of or above that age.[26]

7.24 The NSW Crimes Act also provided for the following specific defences to these child pornography offences, including:

> ...that, having regard to the circumstances in which the material concerned was produced, used or intended to be used, the defendant was acting for a genuine child protection, scientific, medical, legal, artistic or other public

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21 Paul Bibby, 'Henson exhibition shut down', *Sydney Morning Herald*, 23 May 2008, p. 3.

22 National Association of Visual Artists, *Submission 64*, p. 25.

23 See NSW Sentencing Council, *Penalties relating to sexual assault offences in New South Wales*, Volume 1, August 2008, p. 78.

24 *Crimes Act 1900* (NSW), ss. 91H(2). See NSW Sentencing Council Report, p. 78.

25 *Crimes Act 1900* (NSW), ss. 91H(3). See NSW Sentencing Council Report, p. 78.

26 *Crimes Act 1900* (NSW), ss. 91G(1) and ss. 91G(2). See NSW Sentencing Council Report, p. 78.

> benefit purpose and the defendant's conduct was reasonable for that purpose...[27]

7.25 The NSW Police sought advice from the NSW Director of Public Prosecutions (DPP) in relation to whether Mr Henson should be charged with child pornography offences. The DPP determined that the Henson photographs in question would not cause offence to the reasonable person. The DPP's advice noted that the models in the pictures were naked, but that in and of itself was not sufficient to cause offence to reasonable persons. Further, the DPP concluded that the models in the pictures were not depicted in a 'sexual context'. Again, the DPP's advice noted that the models were nude, but stated that '[m]ere nudity is not sufficient to create a "sexual context"'. On this basis, the DPP concluded that the offence was not made out and that the case should not be prosecuted.[28]

7.26 Despite being of the view that the offences were not made out in the Henson case, the DPP also considered whether the defence of 'artistic merit' would be successful. The DPP concluded that such a defence 'could well be established on the balance of probabilities'.[29]

7.27 On the day of the exhibition opening, photographs from the exhibition were posted on the Roslyn Oxley9 Gallery's website, but removed a few hours later. The removal of the images occurred before any complaint was made to the Australian Media and Communications Authority (ACMA) for investigation.[30] The ACMA received a complaint, however, in relation to one of the Henson images posted on another website.[31] The ACMA referred the complaint to the Classification Board and the image was later classified PG.

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27 *Crimes Act 1900* (NSW), ss. 91H(4). See NSW Sentencing Council Report, p. 79.

28 D. Marr, *The Henson Case*, The Text Publishing Company, Melbourne, 2008, pp 122-123.

29 D. Marr, *The Henson Case*, p. 123. The committee also notes that, following the decision by the NSW Police to close the Henson exhibition in Sydney, the Australian Federal Police (AFP) also examined Henson images in the National Gallery of Australia in Canberra. The AFP concluded that no breaches of ACT law relating to child pornography could be established: see N. Towell and L. Minion, 'Our turn: police inspect NGA's Henson works', *Canberra Times*, 30 May 2008, p. 1; D. Marr, *The Henson Case*, p. 120.

30 D. Marr, *The Henson Case*, pp 7 and 18-20. The ACMA investigates complaints in relation to online content and determines whether content is 'prohibited content'. This is discussed further in Chapter 8.

31 D. Marr, *The Henson Case*, pp 117-118. The image was hosted on a blog discussion. The AMCA also received a number of complaints about the Henson photographs which appeared on media websites with black bars covering the child's breasts and genitals. The ACMA referred the images in these complaints to the Classification Board, which determined that all the images should be classified G: see D. Marr, *The Henson Case*, pp 116-117.

Retaining 'artistic merit' as a defence

7.28 Following the Henson case, the NSW Crimes Act was amended in 2010 to remove 'genuine artistic purpose' as a defence to the offences of production, dissemination and possession of child abuse material.[32] The amendment was introduced because:

> ...the inclusion of the defence of artistic merit amongst the child pornography offences may, somewhat unhelpfully, lead to the impression that material that would otherwise constitute child pornography is acceptable if the material was produced, used, or intended to be used whilst acting for a genuine artistic purpose...[M]aterial that is otherwise offensive because of the way in which it depicts children should not be protected because its creator claims an overriding artistic purpose for it.[33]

7.29 As part of the amendments, references to 'child pornography' were also changed to 'child abuse material'.[34] In determining whether material is 'child abuse material', the test is whether the material depicts or describes a child, or the private parts of a child, in a way that a reasonable person would regard as being offensive.[35] Subsection 91FB(2) of the NSW Crimes Act provides that the 'literary, artistic or educational merit (if any) of the material' must be taken into account in determining whether a reasonable person would regard the particular material as being offensive.

7.30 The NSW Crimes Act still provides that classification of material under the *Classification Act 1995* (other than material that has been Refused Classification) is a defence to an offence of production, dissemination and possession of child abuse material.[36] This defence is not available, however, for offences relating to the use of a child for the production of child abuse material.[37]

7.31 The *Criminal Code Act 1995* (Cth) provides for offences in relation to the use of a carriage service for child pornography material or child abuse material.[38] The *Criminal Code Act 1995* (Cth) does not provide for a defence of 'artistic merit' in relation to these offences.[39] Considerations of artistic merit, however, form part of the

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32 *Crimes Amendment (Child Pornography and Abuse Material) Act 2010*, Schedule 1, item 9.

33 The Hon. Michael Veitch MLC, Parliamentary Secretary, Second Reading Speech, Crimes Amendment (Child Pornography and Abuse Material) Bill 2010, 20 April 2010. The initial recommendation for the removal of the defence of artistic merit was made by the NSW Sentencing Council: see NSW Sentencing Council Report, p. 111. See also NSW Department of Justice and Attorney-General, *Report of the Child Pornography Working Party*, January 2010, p. 25.

34 *Crimes Amendment (Child Pornography and Abuse Material) Act 2010*, Schedule 1, item 6.

35 *Crimes Act 1900* (NSW), ss. 91FB(1).

36 *Crimes Act 1900* (NSW), ss. 91HA(7).

37 *Crimes Act 1900* (NSW), s. 91G.

38 *Criminal Code Act 1995* (Cth), Schedule 1, Part 10.6, Division 474, Subdivision D.

39 *Criminal Code Act 1995* (Cth), s. 474.21 and s. 474.24.

decision-making process in determining whether a reasonable person would regard the relevant material as offensive. Section 473.4 of the *Criminal Code Act 1995* (Cth) provides:

> The matters to be taken into account in deciding for the purposes of this Part whether reasonable persons would regard particular material, or a particular use of a carriage service, as being, in all the circumstances, offensive, include:
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> ...
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> (b) the literary, artistic or educational merit (if any) of the material...

7.32 The amendments to the NSW Crimes Act in 2010 are intended to reflect the Commonwealth provisions.[40]

7.33 Despite the changes to the NSW legislation, a number of state jurisdictions still retain the defence of 'artistic merit' in relation to the production and possession of child pornography. For example, subsection 70(2) of the *Crimes Act 1958* (Vic) provides that it is a defence to a prosecution for an offence of possession of child pornography if the relevant film, photography, publication or computer game possesses artistic merit or is for a genuine, medical, legal, scientific or educational purpose. However, as the Office of Public Prosecutions Victoria (OPP) advised in its submission this defence cannot be relied on in a case where the child depicted is actually under the age of 18 years.[41]

7.34 The National Association of Visual Artists noted that the NSW Attorney-General tried unsuccessfully to convince other state Attorneys-General to excise the

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40 The Hon. Michael Veitch MLC, Parliamentary Secretary, Second Reading Speech, Crimes Amendment (Child Pornography and Abuse Material) Bill 2010, 20 April 2010.

41 Office of Public Prosecutions Victoria, *Submission 14*, p. 4; *Crimes Act 1958* (Vic), ss. 70(3). See also: *Criminal Code Act 1899* (Qld), Schedule 1, Criminal Code, ss. 228E(2) which provides that conduct for a genuine artistic purpose where the person's conduct was, in the circumstances, reasonable for that purpose, is a defence to a prosecution for the offences of involving a child in the making of child exploitation material (s. 228A), making child exploitation material (s. 228B), distributing child exploitation material (s. 228C), and possessing child exploitation material (s. 228D); *Criminal Code Act 1924* (Tas), Schedule 1, Criminal Code, paragraph 130E(1)(b) which provides that if conduct is for a genuine artistic purpose it is a defence to the offences of involving a person under 18 years in production (s. 130), production (s. 130A), distribution (s. 130B), possession (s. 130C) or accessing (s. 130D) child exploitation material; *Criminal Code Act Compilation Act 1913* (WA), Appendix B, Criminal Code, paragraph 221A(1)(c) which provides that if the material is of recognised artistic merit it is a defence to the offences of involving a child in child exploitation (s. 217), the production (s. 218), distribution (s. 219), or possession (s. 220) of child exploitation material; and *Criminal Law Consolidation Act 1935* (SA), s. 63C which provides that where the production, dissemination or possession of material constitutes part of a work of artistic merit no offence is committed in relation to the production or dissemination of child pornography (s. 63), the possession of child pornography (s. 63A), and procuring a child to commit an indecent act (s. 63B). Relevant legislation in the Northern Territory and the ACT does not provide for artistic merit defences.

artistic defence from their respective legislation, and to tighten other laws about creating images of children and making them publicly available.[42]

7.35 As the National Association of Visual Artists explained in its submission, the artistic merit defence is:

> ...based on an understanding that art, science and education can be interrogative and serve special purposes that are intended for the public good, even though the material may at times go against what, in another context would be regarded as problematic.[43]

7.36 However, the committee received evidence which supported the sentiment behind the NSW amendments, and argued that artistic merit should not be used to justify the lower classification of material which would otherwise be Refused Classification:

> Commonwealth classification law could be further clarified to ensure that any offensive material of this nature that would normally be classified Refused Classification does not receive a lower classification rating on the basis of 'artistic merit'. The Classification Act, Code and Guidelines should state that any depiction or description of a minor under the age of 18, including the promotion or instruction in the creation of child abuse material, that is considered offensive and would receive a Refused Classification rating, cannot receive a different rating because of artistic merit. Artistic merit should never excuse content in breach of the Guidelines.[44]

7.37 Ms Melinda Tankard Reist of Collective Shout put her argument more bluntly:

> We need to get rid of this idea of artistic merit, because why is a pornographic image of a young girl okay just because you slap the word 'art' on it?[45]

7.38 The Family Council of Victoria asserted that 'artistic merit should not be allowed to be a scapegoat for pornography'.[46]

7.39 In their joint submission, the Hon. Nick Goiran MLC and Mr Peter Abetz MLA from the Western Australian Legislative Council and the Western Australian Legislative Assembly (respectively), argued that the NSW legislation at the time of

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42 National Association of Visual Artists, *Submission 64*, p. 26.

43 National Association of Visual Artists, *Submission 64*, pp 8-9.

44 Australian Christian Lobby, *Submission 25*, p. 5. See also Australian Council on Children and the Media, *Submission 44*, p. 4.

45 *Committee Hansard*, 27 April 2011, p. 27.

46 Family Council of Australia, *Submission 22*, p. 10.

the Henson case indicated that the law did not provide adequate powers for the police to prosecute Mr Henson:

> In this case it was clear that the community, as demonstrated by the outrage expressed, did not find it acceptable to use children in art in a way that could be used as pornography...[47]

Protocols for working with children in art

7.40 A number of submissions noted the introduction of the Australia Council's *Protocols for working with children in art* (Protocols).[48] The Protocols set out the requirements for recipients of Australia Council funding, specifically in relation to obtaining consent where an artist is working with a child under the age of 15. The Protocols note that state laws may prohibit working with a child under the age of 15 who is fully or partly naked.[49]

7.41 In its submission, Bravehearts noted the restrictions put in place by state employment laws:

> 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.[50]

7.42 Bravehearts argued that state employment laws should prevail over classification decisions:

> 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.[51]

7.43 Associate Professor Robert Nelson's submission noted that, until the introduction of the Protocols, many artists had not considered the impact of employment laws:

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47 Hon Nick Goiran MLC and Mr Peter Abetz MLA, *Submission 36*, p. 9.

48 The Australia Council's *Protocols for working with children in art* (Protocols) came into effect in January 2009 and were reviewed in 2010. See further: http://www.australiacouncil.gov.au/__data/assets/pdf_file/0016/44314/Working_with_children_in_art_protocols_May_2010.pdf, (accessed 28 May 2011). See also Associate Professor Robert Nelson, *Submission 68*, p. 3; National Association of Visual Artists, *Submission 64*, p. 26.

49 *Protocols for working with children in art*, p. 4.

50 Bravehearts, *Submission 66*, p. 4.

51 Bravehearts, *Submission 66*, p. 4.

> ...[V]isual artists (like photographers and painters who exhibit in galleries) did not believe that state child employment laws had application to art, because they had never thought of themselves employing the people in their pictures.[52]

7.44 The Protocols also state:

> If you have any concerns about the content of any images or artworks being exhibited, we strongly suggest you obtain a rating classification from the Classification Board and follow any requirements the Classification Board may impose.[53]

7.45 In this context, the committee notes the evidence it received from the Arts Law Centre in relation to Mr Henson applying for the classification of his works prior to exhibition.[54]

7.46 The Protocols also provide that an artist working with anyone under the age of 15 is required to obtain the consent of the child's parent or guardian prior to commencing their artwork.[55]

7.47 Professor Elizabeth Handsley set out for the committee the concerns she has in relation to the giving of parental consent in a situation such as the Henson case:

> My main concern with [the Henson] photos has been the question of how consent was gained for those children to appear in material that would be widely published, and published for the rest of their lives. There are many matters where we do not allow children under our legal system to give consent to certain kinds of activities and experiences, and there are some matters where we do not allow parents to give consent on behalf of children. One example that the committee might be aware of is the one that is based on Marion's case...where it was decided that parents cannot give consent on behalf of their intellectually disabled children to an irreversible sterilisation operation. I would liken the experience of having your naked body plastered all over websites for the rest of your life to be something akin to an irreversible sterilisation operation, perhaps not as bodily invasive, but certainly something that could affect your life quite profoundly.
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> I think the main point is that it is irreversible. I would suggest that, on that sort of analysis, there would be a basis for saying that parents cannot give

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52 Associate Professor Robert Nelson, *Submission 68,* p. 3.

53 *Protocols for working with children in art*, p. 4. This statement is made specifically in respect of exhibition and performance funded by the Australia Council for contemporary images of fully or partly naked children.

54 Arts Law Centre of Australia, *Submission 33*, p. 8. See also Arts Law Centre of Australia, answer to question on notice, received 15 April 2011, which notes that the works exhibited in the Roslyn Oxley9 gallery in 2010 were classified 'Unrestricted – M, Not recommended for Readers under 15 years'.

55 *Protocols for working with children in art*, p. 3.

> consent on behalf of their children to having naked pictures taken, irrespective of the artistic merit. I am not terribly happy about the idea of leaving it the way that it appears to be at the moment, where as long as the artist or the photographer can get some sort of consent from someone, then what that person does with the photographs afterwards is completely out of their hands.[56]

No featuring of children in artworks

7.48 Some submissions argued that a consequence of the Henson case has been that children are no longer being featured in artworks. For example, NAVA noted:

> ...[C]ertainly artists and the public media are much more reluctant to get involved in any form of representation of children, whether clothed or unclothed. This fear being engendered around the representation of children is rendering them invisible.[57]

7.49 NAVA's submission also outlined some examples where images of children have attracted media attention. Sydney artist Del Kathryn Barton's photograph 'Eye Land of Kell' depicted her son wearing only jeans standing in front of a floral display with decorative elements superimposed on his face and torso. The photograph was part of a fundraising exhibition for the Sydney Children's Hospital. NAVA noted that, while the photograph was outside the scope of the Protocols, the Sydney Children's Hospital decided to withdraw from the event:

> ...[T]he hospital adopted the most cautious possible position and decided not to continue its partnership as charity recipient from the art exhibition stating that some members of the community might find the image inappropriate as part of a fundraiser for a children's hospital charity.[58]

7.50 Ms Susan Reid noted the historical use of children in art, such as in religious images, and referred to community fears about children in the media prompting 'knee-jerk calls for broader censorship laws and tighter restrictions on content providers, broadcasters and publishers'. Ms Reid also referred to certain comments by media academic Professor Catharine Lumby, who has warned that 'the trouble begins when we start looking at every image through the lens of a paedophile'.[59]

7.51 Bravehearts, however, drew a distinction between the use of naked children in art and other situations. Bravehearts argued that it is possible to remove the artistic

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56 *Committee Hansard*, 25 March 2011, pp 69-70. Professor Handsley is President of the Australian Council on Children and the Media; however, she prefaced these comments with the statement that her thoughts on this subject arise from her consideration of the issue in her capacity as a professor of law and also from her personal perspectives as a former child model.

57 National Association of Visual Artists, *Submission 64*, p. 17.

58 *Submission 64*, pp 16-17.

59 Ms Susan Reid, *Submission 4*, pp 1 and 3.

merit defence without infringing on the rights of journalists and artists 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.[60]

Exempting artwork from classification

7.52 The committee received submissions that argued for exemptions for artworks from classification. NAVA argued that classification should not be mandatory for artworks, and that galleries and art spaces 'seem an obvious zone for exemption from classification, especially as it is the industry's standard to use signage and explanatory panels to alert the public to potentially challenging content'.[61]

7.53 Similarly, the Arts Law Centre recommended that there should be an explicit exemption to classification for works of art exhibited in a gallery space, and that the requirements for 'submittable publication' for classification should apply only if the work of art is to be communicated or distributed to the general public.[62]

7.54 NAVA also suggested that classification for artists be done either without charge if they bring the works to the Classification Board themselves, or with the cost being borne by the complainant if they are called-in as the result of a complaint.[63]

7.55 Conversely, the committee received submissions which strongly argued against the exemption of artworks from classification. The Catholic Women's League of Australia recommended that the National Classification Scheme apply to works of art.[64] Similarly, Salt Shakers recommended that all artworks should be classified.[65]

7.56 The Hon. Nick Goiran MLC and Mr Peter Abetz MLA recommended that the public display of artwork should be included in the National Classification Scheme, with all works to be displayed in galleries or exhibitions to be classified in order to inform viewers of the likely content, as well as any potentially offensive material. Further, the display of artwork that is suitable for adults only should be limited to restricted areas.[66]

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60 Bravehearts, *Submission 66*, p. 2.

61 National Association of Visual Artists, *Submission 64*, p. 10.

62 Arts Law Centre of Australia, *Submission 33*, p. 8.

63 National Association of Visual Artists, *Submission 64*, p. 11.

64 Catholic Women's League Australia, *Submission 11*, p. 7.

65 Salt Shakers, *Submission 23*, p. 6.

66 Hon Nick Goiran MLC and Mr Peter Abetz MLA, *Submission 36*, p. 9.

Exemptions for film classification

7.57 Under the National Classification Scheme, films are subject to compulsory classification before they can be exhibited, sold or hired out. Thirteen types of film, however, are exempt from the requirement for classification: business, accounting, professional, scientific, educational, current affairs, hobbyist, sporting, family, live performance, musical presentation, religious, and community and cultural films.[67]

7.58 In addition, films screened at film festivals may also be exempted from classification under provisions in state and territory enforcement legislation.[68]

7.59 The National Film and Sound Archive (NFSA) noted that all state and territory enforcement legislation allows for 'approved organisations' to seek exemptions allowing them to screen unclassified films:

> [Exemptions] can be granted by the Classification Board or, in Queensland and South Australia, by the relevant minister. An approved organisation is one authorised by the Classification Board to apply for exemptions, having regard to matters such as the extent to which it engages in medical, scientific, education, cultural or artistic activities, and its reputation for screening films.
>
> There are different types of exemptions, some of which are not available in all jurisdictions. The most common type—which is available in all jurisdictions—is a festival exemption. This allows approved organisations to screen particular unclassified titles at a specific event or festival. The exemption works as a temporary classification, although conditions may be set for screening particular titles (e.g. a requirement to show background material with a film to contextualise it).[69]

7.60 The NFSA informed the committee that a significant amount of material held within its collection is unclassified, meaning that the NFSA often relies on film festival exemptions to screen archived material. Ms Ann Landrigan from the NFSA described the nature of this material:

> As you can appreciate, with material in our collection that dates back to the earliest days of moving image production, we have a significant number of titles that have never been classified. They might be Indigenous titles, ethnographic material, home movies and filmed oral histories, for example;

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67 *Classification Act 1995*, ss. 5B(1).

68 See, for example, *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic), Part 8; *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (NSW), s. 51.

69 National Film and Sound Archive, *Submission 27*, pp 2-3. For an example of this exemption see: *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic), s. 64, s. 66 and s. 66A. See also Arts Law Centre of Australia, *Submission 33*, p. 7, which refers to the Victorian legislation in relation to this exemption.

> and, as you are aware, we must apply for festival exemptions for each event at which we plan to screen these films.[70]

7.61 These exemptions, however, present administrative difficulties for the NFSA, given the frequency with which it has to apply for an exemption. Additionally, because the exemption is granted under state and territory enforcement legislation, the NSFA often has to apply to multiple jurisdictions to facilitate national tours.[71]

7.62 Due to the difficulties arising from the NFSA's large unclassified collection, it proposed the inclusion of a blanket exemption for cultural institutions which would allow them to screen unclassified material.[72] The NFSA expected that, under such a provision, the relevant institution would self-classify material in a manner similar to that adopted by television broadcasters, and could be subject to oversight by the Classification Board.[73]

'Advocating terrorism'

7.63 Section 9A of the *Classification Act 1995* provides for the refusal of classification for publications, films or computer games that advocate terrorist acts.[74]

7.64 Material is considered to advocate the doing of a terrorist act if:

(a) it directly or indirectly counsels or urges the doing of a terrorist act; or

(b) it directly or indirectly provides instruction on the doing of a terrorist act; or

(c) it directly praises the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3 of the *Criminal Code*) that the person might suffer) to engage in a terrorist act.[75]

7.65 However, a publication, film or computer game is not considered to advocate the doing of a terrorist act if it depicts or describes a terrorist act, but the depiction or description could reasonably be considered to be done merely as part of public discussion or debate, or as entertainment or satire.[76]

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70 *Committee Hansard*, 27 April 2011, p. 2.

71 National Film and Sound Archive, *Submission 27*, p. 2.

72 National Film and Sound Archive, *Submission 27*, p. 2.

73 National Film and Sound Archive, *Submission 27*, p. 3.

74 *Classification Act 1995*, s. 9A.

75 *Classification Act 1995*, ss. 9A(2).

76 *Classification Act 1995*, ss. 9A(3).

7.66 The committee received three submissions relating to section 9A. Each submitter recommended the repeal of section 9A from the *Classification Act 1995*.

7.67 Professor George Williams from the Gilbert and Tobin Centre of Public Law argued against section 9A on a number of grounds, including that it removes discretion from the independent Classification Board and Classification Review Board, pre-empting the decision at a political level.[77] In particular:

> [Section 9A] is inconsistent with the principle that the Boards' classification decisions should be discretionary, as part of the guided balancing of complex, unquantifiable values. Section 9A eliminates the [Classification] Boards' discretion as to what classification to give in certain circumstances. If they find that material advocates a terrorist act, they must classify it 'RC'.[78]

7.68 Similarly, Professor Williams noted that the provision was introduced without the support of all states and territories, undermining the cooperative, uniform nature of the National Classification Scheme.[79]

7.69 Professor Williams also argued that the application of section 9A is overly broad, by virtue of the test established in paragraph 9A(2)(c):

> Many publications, including innocuous and valuable publications that concern past liberation struggles like that of Nelson Mandela against apartheid in South Africa, could be considered to laud a terrorist act. If that objective purpose could be made out, what s 9A(2)(c) would then require is simply proof that the publication could possibly have a malign effect on one member of a very large class of people. And that class includes people (the mentally ill and the young) who are likely to be far more susceptible to such effects than the ordinary adult. This is the nub of the problem with the amendments. It will be difficult for the courts to construe s 9A(2)(c) so that it does not do too much.[80]

7.70 Dr Katharine Gelber expressed a similar view, noting that the test established in paragraph 9A(2)(c) is a significant departure from the 'reasonable person' test that characterises most other aspects of the National Classification Scheme.[81]

7.71 Dr Gelber submitted that other provisions could be used to refuse classification to material that promotes, incites or instructs in matters of crime or

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77 Professor George Williams, *Submission 1*, p. 2.

78 Professor George Williams, *Submission 1*, Attachment 2, p. 3.

79 Professor George Williams, *Submission 1*, p. 2.

80 Professor George Williams, *Submission 1*, Attachment 1, p. 15.

81 Dr Katharine Gelber, *Submission 7*, p. 1. The Queensland Council for Civil Liberties, *Submission 43*, p. 6, also advocated the repeal of section 9A.

violence, meaning that section 9A adds nothing of benefit to the classification of material that could realistically lead people to commit terrorist acts.[82]

7.72 Finally, both Professor Williams and Dr Gelber submitted that section 9A inhibits academic research. Professor Williams noted that two publications that had been bought by the University of Melbourne for a course on jihad were removed in response to the section 9A provisions.[83] Dr Gelber recommended that, if section 9A is not repealed in its entirety, it should at least be amended so as to allow an exception to permit scholarly research.[84]

82 Dr Katharine Gelber, *Submission 7*, p. 1.

83 Professor George Williams, *Submission 1*, Attachment 2, p. 21.

84 Dr Katharine Gelber, *Submission 7*, p. 2.