POSTGRADUATE PAPER SUBMITTED FOR:

SUBJECT 730-815 THE MEDIA AND THE STATE

TITLE:

Critically evaluate the current (Australian) regulation of the broadcast and publication of violent material. Giving reasons for your proposals, what reforms do you consider should be made to the current law?"

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1.0 INTRODUCTION

"Before the children's greedy eyes, with heartless indiscrimination, are presented night after night terrific massacres, horrible catastrophes. All who care for the moral well-being and education of the child will set their faces like flint against this form of excitement"[1]

[The Times, Editorial on cinematography and the child, 12 April 1913]

Concerns over possible adverse effects that the availability and exhibition of violent material may have on the community is a not only phenomena of the last twenty years. Indeed as the quote from *The Times* eighty years ago illustrates, each new technology may bring disquiet about the impact it may have on us as homo sapiens, particularly during our formative years.

In recent times this disquiet has been heightened, not only by the proliferation of improved entertainment access technologies like the videocassette recorder, but also by the nature and magnitude of societal change occurring, particularly in Western countries. In searching for a rationale for the breakdown of the traditional family unit, the drift from religion, growing homelessness, and the seemingly inexorable rise in drug abuse and crime, it is perhaps not surprising that the media and broadcasting in particular, are seen by some as key forces driving these changes. This is because it is these same media that report this breakdown to us daily, in both news and fictional dramas.

Nonetheless if one accepts that "violence is part of reality and must be adequately reported in news as well as explored and debated in drama"[2] then the questions are: What is violent material? What are the permissible bounds for the broadcast and publication of violent material? What frequency of violence should be permitted? Clearly, it is difficult to be absolute in answering these questions particularly in a society as diverse and pluralistic as Australia's. We need to formulate an approach that strikes a balance between the important right of individual to watch what he or she chooses and "the tendency of the matter ... to deprave and corrupt"[3].

In assessing the current regulation of violent media, this essay must chart the development of obscenity law in Australia and abroad, detail the common law tests for obscene material (including violent material), analyse both the adequacy of the current regulatory framework for the dissemination of this material (including the broadcasting codes of practice) and the ability of the current framework to encompass technological change. Implicitly, this essay appraises whether the censorship of violent material is in the public interest, acting as it does, as a restriction on freedom of expression. It finds the current system of regulation to be ad hoc, backward looking and segmented according to the technology used to deliver the program content.

The essay then proposes a new generic model of regulation. Under the proposed system, the level of restriction able to be exercised by regulators, under either a classification system or self-regulatory codes, would be dependent on three criteria,

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[1] *The Times*, 12 April 1913, quoted by G Robertson in his address *Violence and The Law* to the British Broadcasting Corporation Seminar on Violence and the Media, 2 December 1987. Reproduced in *Violence and the Media*, British Broadcasting Corporation, London 1988, page 30

[2] M Checkland, *Postscript* to the British Broadcasting Corporation Seminar on Violence and the Media, 2 December 1987. Ibid, page 55

[3] The test established by Cockburn C J in *R v Hicklin* (1868) LR 3 QB 360 at 371

namely the *level* of violence, the *pervasiveness* of the particular media and the *intensity* of the particular media. It will be argued such an approach is consistent with the proportionality test established in the *Australian Capital Television*[4].

It should noted that this essay while embracing the regulatory frameworks that apply to both film and printed matter places more emphasis on the regulation of material in film or video form. This is because so much of the current debate centres around the influence of broadcasting and other visual media like videogames.

2.0 THE PROBLEM OF DEFINITION

The terms "***broadcast***", "***publication***" and "***violent***" are all problematic.

The term ***broadcast*** has a number of different meanings in the Oxford English Dictionary including to scatter (seed etc) abroad with the hand or to scatter or disseminate widely. In recent times it has taken on a new technical meaning, consistent with the old, "to disseminate (a message, news, a musical or dramatic performance or any audible or visual matter) from a radio or television station to the receiving sets of listeners and viewers."[5] This definition has been used as basis for the definition of "broadcasting service" in the *Broadcasting Services Act 1992*. It defines "broadcasting service" as a service that delivers television or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or combination of those means, but as not including a service that provides no more than data, or text or a service that makes programs available on demand on a point to point basis, including dial up services[6]**.** However, the exclusion of point to point and dial up services would, by implication, exclude recorded information or entertainment services that use or will use telecommunications technologies, like for example '0055' and dial up video libraries.

There are three reasons why the limited definition of broadcasting within the *Broadcasting Services Act* is inadequate. Firstly, the future of broadcasting, like that for telecommunications, is in the provision of customised services and products to individual consumers. Not accepting the new technical realities will mean a very unequal playing field for technologies offering similar consumer products. Secondly, excluding point to point services would fly in the face of the high degree of parliamentary scrutiny of this area which reflects community concerns.[7] Lastly, taking the regulation of program content as a given - what is the conceptual difference between the radiated transmission of a program reaching 100 subscribers versus a dial up video library with 1000 subscribers, of which 100 are watching the same program?

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[4] *Australian Capital Television v Commonwealth* (1992) 108 ALR 577

[5] *The Oxford English Dictionary* (2nd Ed), Clarendon Press, Oxford 1989

[6] s.6 *Broadcasting Services Act 1992. This definition was strongly influenced by the recommendation for a technology nuetral definition in To Pay or Not to Pay , Pay Television and Other New Broadcasting-Related Services, report from the House of Representatives Standing Committe on Transport, Communications and Infratsructure, November 1989, AGPS Canberra, recommendation 1 and paragraph 2.1- 2.9*

[7] Refer to the Senate Select Committee on *Community Standards relevant to the Supply of Services utilising Telecommunications Technologies, Final Report June 1992* and the Committee's continuing activities.

Broadcasting is now used in distinction to narrowcasting, a usage that reinforces the implicit centrality of the notions of reach and pervasiveness - a key concept to which we will return. Consequently, the preferred definition of broadcasting in this essay encompasses both point to point and point to multi-point "broadcasts".

Publication has been defined as "the issuing or offering to the public of a book, map, engraving photograph, piece of music or other work of which copies are multiplied by writing, printing or any other process"[8]. This definition is broadly consistent with the model *Classification of Publications Ordinance 1983* (ACT)[9] which states that "publication means any book, paper, magazine, film or other written or pictorial matter that is made available, or is intended to be made available, for exhibition, display, sale, letting on hire or distribution to the public". As a subset, film is defined as "includes a cinematograph film, a slide, video tape and video disc and any other form or recording from which a visual image can be produced"[10].

The Australian Law Reform Commission's report *Censorship Procedures*, identified four other products which had caused community concern and where submissions suggested they be included within the definition of publication. These products were clothing, computer games, Telecom Services and audio material namely, tapes, records and CDs.[11] The Commission recommended that clothing and computer games should be included within the definition of publication because the principles behind the classification of publications applied equally to these products (ie material that offends against community standards should be banned, access of children to material which may harm them should be restricted and warnings should be provided to consumers as to contents). In relation to Telecom Services, the Commission recommended that if some regulation were required, then the same criteria for films and publications should be used to assess the suitability of these services. In contrast, the Commission was not persuaded that there was a problem in relation to audio material but noted that if it became a problem it should be included within the definition of publication.[12]

The proposals of the Commission to extend the definitions are sensible even though distinctions between audio and audiovisual material will be difficult to sustain in a "digital world". Support for the Commission's recommendations is not, however, absolute. Unfortunately, in its draft Classification Bill, the Commission not only retained separate definitions of film and publications but also amplified the distinctions between the definitions.[13] Section 6 argues that artificial distinctions between films and publications and different regimes for broadcasting and publications are not sustainable.

The Oxford English Dictionary defines ***violent*** as "acting or using physical force or violence, especially in order to injure control or intimidate others; committing harm or doing destruction in this way"[14]. Violence in broadcasting and publications is not

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[8]*The Oxford English Dictionary* (2nd Ed), op cit

[9]This model Ordinance was made by the Governor-General, not by the ACT Legislative Assembly. It is an attempt to provide some guidance to State legislatures enacting censorship procedures.

[10]s.3(1) *Classification of Publications Ordinance 1983* (ACT); *Customs (Prohibited Imports) Regulations* regulation 4A(1)

[11]ALRC Report No.55 (1991), paragraphs 3.20*ff*

[12]The *Classification of Films and Publications Act 1990* (Vic) at s.3 already includes audio material in its definition of publication.

[13]ALRC Report No.55, s.3 Classification Bill 199? at page 71

[14]*The Oxford English Dictionary* (2nd Ed), op cit

prohibited *per se* but rather controlled or classified. Instead of attempting, and probably failing, to exclude violence from all literary works, pictures and films, what has instead been developed, is a classification system that classifies the material available to the public according to certain criteria including violence. This classification system, which differs for broadcast and other material, is described more fully in Section 5.

3.0 THE DEVELOPMENT OF CENSORSHIP LAW

To understand how the regulation of violent material has developed it is necessary to examine the evolution of obscenity laws. This is because prohibitions on violence and the classification systems restricting violence material reflect their common law origins in obscene libel. Also, in general the common law remains good law.

The laws censoring the publication of obscene material appear to be a recent creation of the nineteenth century linked, one suspects, to new technologies and services emerging at this time in the United Kingdom that permitted the wide dissemination of material to the masses like newspapers, the penny post, the Mechanics Institutes and circulating libraries. This is not to say that there were not earlier cases dealing with the issue[15] but there was little interference in publication until the promulgation of the *Customs Consolidation Act 1853 (UK)* prohibiting the importation of pornography and the *Obscene Publications Act 1857 (UK)* regulating obscene material. This legislation followed the period of the late eighteenth and early nineteenth centuries when Bowdler and his followers opposed the free dissemination of knowledge.

In 1868, the Court of King's Bench in *R v Hicklin*[16] "reinvented" the common law crime of obscene libel. In a case concerning the distribution of a pamphlet entitled "The Confessional Unmasked" attacking the Roman Catholic Church, Cockburn CJ established a test which still remains the standard in Australia. He stated that: "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall"[17]. Further, the Court held that an intention to break the law must be inferred from an infraction of the law. Consequently, the criminal character of the publication is not affected or qualified by there being some ulterior object[18] and even a person unaware of the obscene nature of the material is still liable.

The *Hicklin* text was adopted in 1888 in Australia in the case of *Ex parte Collins*[19] when the Full Court of New South Wales adjudicated that a birth control pamphlet was not obscene. Following *Bremner v Walker*, Australian Courts also assess

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[15]Three notable cases have been reported. In *R v Sidley* (1663) 82 ER 1036 and 83 ER 1146 the Court found that Sidley's actions were profane and were against all morality and not only against Christianity but against all modesty. In *R v Read* (1708) 92 ER 777 the Court expressed the opinion that the crime of obscene libel did not exist. Lastly in *R v Curl* (1727) 93 ER 849, the Court finally established the common law crime of "obscene libel". Probyn J stated at 851 that the publication was "punishable at common law, in tending to weaken the bonds of civil society, virtue and morality".

[16](1868) LR 3 QB 360

[17]Ibid at 371

[18]Ibid at 370

[19](1888) 9 LR (NSW) 497 per Darley CJ at 503-504

whether the material is offensive or indecent in the sense that it outrages public decency[20].

Until the end of the 1930's obscenity was concerned mainly with depravity and sexual behaviour in defiance of notions of Christian ethics. In 1938 this changed. New Commonwealth Statutory Rules were gazetted amending the *Customs (Prohibited Imports) Regulations 1934* to extend the schedule of goods which could not imported without the consent of the Minister of Customs to "... literature which in the opinion of the Minister (a) unduly emphasises matters of sex, or of crime or (b) unduly emphasises depravity"[21]. As R G Fox points out "... although this amendment was not an express attempt to extend the common law definition of obscenity, it had that practical effect because previously the only legislative authority for the customs control of the importation of obscenity lay in s.52(c) of the *Customs Act 1901* which imposed an absolute prohibition on obscene publications."[22] Victoria and Queensland also amended their state legislation to widen the definition of obscene to include unduly emphasising matters of sex or crime.

The definition of obscene was widened again in the 1950's to encompass publications that unduly emphasised matters of horror, cruelty and violence. The ostensible reason for this extension, and the earlier extensions of the late 1930's, was to catch the horror and crime comics of this period.[23] One of the most famous comics of the time, Dragnet was to be the subject of a prosecution in Queensland in 1955.[24]

The legislative amendments of the 1950's would have been unnecessary if the thinking behind the 1964 case of *John Calder (Publications) Ltd v Powell*[25] existed in Australia. In this case the decision of a lower court that a book concerning the life of drug addict in New York was obscene was upheld. The Court held that "... there is no reason whatever to confine obscenity and depravity to sex [as] there was ample evidence upon which [to] hold that this book was obscene."[26] This produced some debate with one commentary on the decision stating that: "While it clearly establishes that obscenity is not confined to sexual depravity it gives no indication of what are the limits of its operation... The difficulty of extending the idea of obscenity beyond sexual immorality is that it is not apparent where we now stop, that uncertainty is introduced into a field of law which should be as certain as possible and that there is here scope for infringement of the liberty of expression."[27]

The continued application of the *Hicklin* test in Australia is in spite of it being rejected by the United States courts in 1934 in *United States v One Book entitled "Ulysses"*[28] and

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[20](1885) 6 LR (NSW) 276 per Martin CJ at 281 and *Ex parte Collins*, ibid per Windeyer J at 512-513 and . This view has been supported in *R v Close* [1948] VLR 445 per Fullager at 463

[21]*Commonwealth Statutory Rule No.49* (1938)

[22]R G Fox, *The Concept of Obscenity*, Law Book Company, Melbourne, 1967, page 79

[23]The United Kingdom Parliament also enacted the *Children and Young Person (Harmful Publications) Act 1955* to restrict the distribution of publications containing stories detailing the commission of crimes, or acts of violence or cruelty or incidents of a repulsive or horrible nature.

[24]*The Literature Board of Review v Invincible Press* [1955] QSR 525

[25][1965] 2 WLR 138

[26]Ibid per Lord Parker CJ at 143-144

[27]Anon, *Obscene Publications* [1965] Crim LR 110 at 111

[28](1934) 72 F (2d) 705. In this case Augustus Hand J at 708, stated that "... the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past if its ancient, are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant

the criticisms by a number of Australian legal commentators over the years including H Whitmore, R G Fox and Dr J J Bray - a Chief Justice of South Australia,

In the early 1960's H Whitmore argued that "The existing definitions [the *Hicklin* test] of "obscenity" have proved virtually unworkable. The statutory extensions to the ... test have only increased the "fictional nature" of the test."[29] In his major book on the obscenity law in 1967, R G Fox stated that "The *Hicklin* rule, based as it is upon the tendency of the publication to deprave and corrupt, leaves out of account publications which are widely regarded as obscene in the sense that they affront the current standards of decency in the community by shocking and disgusting readers without necessarily causing other social harm."[30] Further, in 1972, Dr J J Bray contended there is a paradox in the *Hicklin* test so that a sociological work written in cold, technical and unimpassioned language advocating complete sexual promiscuity would pass the test while a book in defence of the strictest principles of chastity outside marriage in which sexual functions were described in "four letter" words may fail.[31]

Judicially, the *Hicklin* test has also been criticised. In *R v Close*[32], Fullager J considered that the passage quoted from Cockburn CJ in *Hicklin* "... was not propounding a logical definition of the word "obscene", but was merely explaining that particular characteristic which was necessary to bring an obscene publication within the law relating to obscene libel. The tendency to deprave is not the characteristic which makes a publication obscene but is the characteristic which makes an obscene publication criminal... There is no obscene libel unless what is published is *both* offensive according to current standards of decency *and* calculated or likely to have the effect described in *R v Hicklin*."[33][His emphasis]

In the subsequent High Court case of *Crowe v Graham*[34] Windeyer J considered that the "deprave and corrupt test" had fostered much misunderstanding, was unsuitable as a definition of obscenity and had only survived because it and its implications have been ignored. His Honour went on the state that the Courts have not asked first whether the tendency of a publication is to deprave and corrupt but rather whether it transgresses the bounds of decency and is properly called obscene. If it transgresses these bounds, its evil tendency and intent is presumed.[35] Of further interest to us is that two of the High Court Justices in *Crowe* (Barwick CJ and Kitto J) accepted the majority formulation of the New South Wales Court of Appeal that indecency was the offending of the ordinary ***sexual*** modesty of the average man.[36] In contrast, Windeyer J and Owen J both thought it unnecessary to form an opinion as to whether the word "indecent" (and obscene given the construction of the *Obscene and Indecent Publications Act 1901-1955* (NSW) was limited to sexual

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for their existence than their obscene content". This has now been replaced by the test in *Miller v State of California* (1973) 413 US 15.

[29]H Whitmore, *Obscenity in Literature: Crime or Free Speech*, (1963) 4 Syd L R 179

[30]R G Fox, *The Concept of Obscenity*, op cit, page 78

[31]J J Bray, *The Juristic Basis of the Law Relating to Offences Against Public Morality and Decency*, (1972) 46 ALJ 100 at 104

[32][1948] VLR 445

[33]Ibid at 463

[34](1968) 121 CLR 375

[35]Ibid per Windeyer J at 392

[36]Ibid per Barwick CJ at 379 and Kitto J at 387

matters.[37] If Barwick CJ and Kitto J's proposition had been accepted by the High Court, at least at common law, obscenity would have been limited to sexual matters.

An important observation to make is that there seems to be a correlation between major restructuring in communications markets and major changes in the formulation of the law relating to obscenity (eg as in the 1850's and 1950's). Essentially technological innovation and changing cost structures facilitate new forms of distribution and new markets, extending the pervasiveness, accessibility and intensity of communications media. History indicates that community concerns, rational or otherwise, about the impact of these new forms of communication results in pressure on the legislature to control or restrict the new technologies. Changes to the legal framework are also required to the embrace the new technology. Extrapolating this observation to the present day then the current major restructuring in communications markets driven by convergence will, in all probability, necessitate regulatory change. The challenge is to ensure that any new scheme of regulation is coherent, integrated and relates to the impact on the audience rather than the particular delivery technology. It must also flexible enough to accommodate the shortening product cycles.

4.0 RATIONALES FOR THE REGULATION OF VIOLENT MATERIAL

No examination of the regulation of violent material and proposals for its reform would be complete without at least a brief examination of the intellectual underpining of this restraint on freedom of expression. While it is perhaps beyond the scope of legal analysis, the perceived link between violence in society and media violence is intrinsic to the debate about whether violent material should be regulated and the degree of that regulation. It may also have legal significance in relation to liability for criminal or tortious acts.[38]

Research undertaken by the Australian Broadcasting Authority and its predecessor the Australian Broadcasting Tribunal indicates a high degree of concern in the community about the level of violence on Australian television and strong support for the view that violence on television is linked to violence in society.[39] This is consistent with surveys in other countries.

This link between television violence and real life violence is cited as the principal reason why violence in the media should be restricted on toned down. However,

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[37]Ibid per Windeyer J at 306 and Owen J at 405

[38]S J Berman, *View at Your Own Risk: Gang Movies and Spectator Violence*, (1992) 12 Loy. LA Ent LJ 477 at 481. See also *Yakubowicz v Paramount Pictures Corporation* (1989) 536 NE 2d 1067 where a motion picture portraying the violent adventures of juvenile gang, but which did not overtly advocate or encourage unlawful or violent activity on part of viewers, was protected by the free speech clause of First Amendment and was therefore not unprotected "incitement".

[39]Australian Broadcasting Authority and The Office of Film and Literature Classification, *Classification Issues - Film, Video & Television, Monograph 1,* Sydney 1993, page 25-26. Nearly two-thirds (65%) of respondents agreed with the statement "A lot of violence in society today is caused by what people watch on television". Kathryn Paterson and Milica Loncar, *Sex, Violence & Offensive Language - Community Views on Classification of TV Programs, Monograph 2,* Australian Broadcasting Tribunal, Sydney 1991, pages 9-14. Some 29 percent of the respondents were concerned about violence. This was also confirmed in a recent survey in *The Australian*, 9-10 October 1993, page 12. The International Barometer survey recorded that 70 percent of Australians were worried about violence and personal safety. This was the second highest of the twelve countries surveyed.

the evidence of a causal link between media violence and violent activity in society is inconclusive.

In his paper to the Censorship Conference 1990, Dr Stephen Juan from the University of Sydney after a lengthy summary of the findings of correlational studies stated that "... they indicate that viewing television violence is related to aggressive behaviour and crime even after controlling for the effects of variables such as socioeconomic status, class race and education level. Furthermore, variables such as identification with aggressive television characters, belief in the reality of the programs, and violence in the home may effect this relationship."[40] However, these conclusions were not supported by an earlier speaker Dr Kevin Durkin, from the University of Western Australia who considered that there is surprisingly little evidence of effects.[41]

Likewise, in his paper *Reflections on the Screen* to the BBC Seminar on Violence in the Media, Dr Bernard Williams after reviewing the laboratory experiments, field studies and correlational studies states that the evidence is negative or at best inconclusive. He considered that this does not mean television has no influence on people but rather we have to understand the influences in a more complex way and further that the blank category of "violence" is not very helpful. He notes that other kinds of studies notably in educational and media studies "emphasise that the influence of television depends on what its images are taken to mean, and what they mean depends on their context. The 'context' includes both the context *in* the programme - the way in which actions are presented - and the context *of* the programme, the relation of programmes to viewers lives, beliefs and circumstances."[42][His emphasis]

While the lack of causal connection is consistent with the views of the Australian Institute of Criminology they agree with the proposition that "... exposure to media violence may numb the ability of the viewer to fell empathy, or may reduce the viewer's capacity to be emotionally aroused at the sight of violence - a process commonly referred to as desensitisation."[43]

In its major study *TV Violence in Australia*, the Australian Broadcasting Tribunal found that consensus has not been reached as to whether the association between television watching and violence reflects a cause-effect relationship.[44] Instead it put forward a concept of "community perceptions" of violence[45] to attempt to take

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[40]S Juan, *Children and Television Violence: Lessons from Research*, Paper presented to *Censorship Conference 1990: Into the Nineties*, Office of Film and Literature Classification, Sydney 1990, page 40

[41]K Durkin, *Turtle Trauma: Lay Fears, Media Hype and Research Finding concerning the effects of Superhero Cartoons upon Young Viewers*, Paper presented to *Censorship Conference 1990: Into the Nineties*, ibid, page 29

[42]B Williams, *Reflections on the Screen*, British Broadcasting Corporation Seminar on Violence and the Media, 2 December 1987. Op cit, page 24

[43]Stephen Nugent et al, *Sex Violence and 'Family' Entertainment: An Analysis of Popular Videos*, Australian Institute of Criminology, Canberra 1987, page 37. See also P R Wilson, *Crime, Violence and the Media in the Future*, 49 Media Information Australia, August 1988, page 53. For an Australian study on this issue see C G Cupit, *Kids and the Scary World of Video*, South Australian Council for Children's Films & Television Inc, Adelaide 1986, particularly at page *8ff*

[44]Australian Broadcasting Tribunal, *TV Violence in Australia, Volume I: Decisions and Reasons*, Report to the Minister for Transport and Communications, January 1990, page 90

[45]Communications Law Centre, *Communications Update, June 1990*, page 11

account of the variations in audiences and their differing perceptions of violence.[46] The Tribunal also found that degree of realism and question of identification were important factors in the perception of television violence by viewers.[47]

On the issue of the degree of realism, it could be argued that restrictions on the "realism" of violence (ie blood etc) and the aftermath of violence shown on television may be having the opposite impact to that intended. This is because as, a major study examining the portrayal of violence on British television found "[t]he injuries caused by violence reveal a curious pattern. In nearly two third of cases (61%) the victim either escaped unscathed or died. Injuries as such were remarkably rare. Pain was shown in nearly 16% of cases but it was impossible to discern any injuries caused. Thus weapons fired tend to kill or to miss: they do not wound or maim."[48] Thus violence is glamorised by creating invincible heroes and martyrs. In contrast, the successful Transport Accident Commission road safety advertisements have focused on the medium term impacts of road trauma.

In summary then, while the jury is still out on the impact of media violence, there is a high risk that such a relationship does exist particularly given the impact of television has on other aspects of our lives.[49] This risk has meant Governments and regulators not only in Australia have and will continue to place restrictions on the broadcast and publication of violent material.[50]

5.0 CURRENT CENSORSHIP AND CLASSIFICATION OF VIOLENT MATERIAL

In analysing the current framework for the restraint of violent material we must ask ourselves a number of questions: Is it appropriate to categorise violent material as obscene or indecent behaviour? Is the framework certain for those operating within it (ie producers, importers, broadcasters, the public etc)? Is the framework appropriate for a multicultural Australia? Is the framework efficient? Are the regulations biased or technology neutral towards different media (ie is material in one medium classified in the same way as similar material in a different medium)? And lastly, is the scheme able to accommodate technology change (ie is it forward looking or wedded to the past)?

The current regulations that restrict or prohibit the broadcast and publication of violent material can be categorised under five headings:

- the Common Law offences;

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[46]See B Gunter, *Dimensions of Television Violence*, Gower, Aldershot 1985 and B Gunter and M Wober, *Violence on Television - What the viewers think*, John Libbey, London 1988

[47]For a summary of the ABT data see P W Sheehan, Perceptions of Violence on Television, a paper presented to *Censorship Conference 1989: Media Violence, Censorship and the Community*, Office of Film and Literature Classification, Sydney 1989, page 53 at 76

[48]G Cumberbatch et al, *The Portrayal of Violence on British Television - A Content Analysis*, Aston University, 1987, page 3

[49] For example, television educates through programs Play School and Open Learning, it creates soap stars and teen idols and advertising on it prompts and amends purchasing decisions.

[50]Overseas examples include *Broadcasting Act 1990 (UK)*, s.7(a), *Freedom of Communication Act (France)* Article 15, *Publications Act 1974 (South Africa)* s.47 and South African Broadcasting Corporation Licence conditions 2 and 3(a) and (b) promulgated in terms of s.12(2) of the *Broadcasting Act 1976 (South Africa)*. Restrictions are also recognised in international law see Article 19 of the International Covenant on Civil and Political Rights (1966)

- Regulations of General Application, typically made under Federal legislation
- Classification Schemes for Film and Video Material;
- Classification Schemes for Printed Material; and
- Regulation of Other Material.

The current Australian regulations reflect the international trend to classification rather than censorship. The principles behind the classification of publications are threefold - material that greatly offends against community standards should be banned, children should have restricted access to material which may harm them and classifications should act as a warning to contents. Otherwise adults in a free society should be able to see, hear and read what they wish.[51] Internationally the trend towards classification has been underpined by arguments about freedom of expression. In Australia this push has been strengthened by the need to accommodate the diverse views of the different ethnic groups in our community as to what is obscene. By classifying material and labelling it rather than censoring it, the lowest common denominator test that might otherwise limit the availability of material need not apply.

Classification schemes for films and video are also broadly consistent with other consumer protection measures for other industries (for example, the labelling of food ingredients). The general approach is for the consumer to have enough information on which to make rational and intelligent choices about the product he or she wishes to consume. Outside certain prohibitions it is a case of the buyer beware rather than Governmental rules dictating choice.

5.1 Common Law

The common law position is that the *Hicklin* "deprave and corrupt" test of obscenity is good law in Australia. It has however, been supplemented by the test in *Bremner v Walker*[52]as to whether the material is offensive or indecent on a level that outrages public decency. Whether the material is offensive or indecent is not however, classified in the abstract. The question is whether the material offends community standards of decency in the circumstances and in the manner in which it is presented.[53] As the court cases (and decisions!) indicate this will vary from time to time and from place to place.

However what is meant by the term "community standards" and to which "community" does it refer? The Courts have had considerable difficulty in defining what is meant by this term. In *Norley v Malthouse* the Court considered that "... the standard ought not to be estimated according to any "elegant or dainty modes or habits" of thought but according to "plain and sober and simple notions" among the community in question.[54] In contrast, in *Attorney-General v Huber*, Bray CJ contends that the manner and circumstances of its publication may be all important and given the unresolved question of which is the applicable community standard, material published for and to a closed group of sexual deviates might be properly judged by

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[51]Office of Film and Literature Classification and Film and Literature Board of Review, *Reports on Activities, 1991-92,* AGPS, 1992, page 7 and s.34 *Classification of Publications Ordinance 1983* (ACT)

[52](1885) 6 LR (NSW) 276

[53]S Walker, *The Law of Journalism in Australia*, Law Book Company, Melbourne 1989, page 242

[54][1924] SASR 268 per Napier J at 270

the standards of that group and not by the standards of others.[55] Further, in *Chance International Pty Ltd v Forbes*, Helsham J considers that while the standard of contemporary morality is not a shifting standard perhaps the standard is not transgressed by the fact that a publication is only made to a limited class of persons.[56] These difficulties are compounded by a realisation even by judges that perhaps their views may not represent the community standards on such issues.[57]

Given these factors, it is apparent that the test has a high degree of uncertainty and in the words of one commentator involves a legal fiction as the test assumes that offensive material has a tendency to deprave and corrupt those who are exposed to it[58]. This uncertainty is unacceptable for a criminal offence of strict liability.[59]

5.2 Regulations of General Application

The censorship powers of the Commonwealth derive from s.51(1) of the *Australian Constitution* which permit the Commonwealth to regulate the importation of goods into Australia. In accordance with this head of power, the *Customs Act 1901* has been enacted, where *inter alia* goods may be absolutely prohibited from importation.

The Commonwealth has prescribed that certain violent material should be absolutely prohibited. The *Customs Regulations (Prohibited Imports) Regulations* prohibits "... publications, other than films that are registered under the *Customs (Cinematograph Films) Regulations*, that ... contain detailed and gratuitous depictions in pictorial form of acts of considerable violence or cruelty, or explicit and gratuitous depictions in pictorial form of sexual violence against non-consenting persons or ... promote, incite or instruct in matters of crime or violence"[60] The Regulations also prohibit "... any other goods that depict, express or are otherwise concerned with matters of ... crime, cruelty, violence ... that is likely to cause offence to a reasonable adult person to the extent that they should not be imported."[61]

The Commonwealth has also created the Film Censorship Board and the Film and Literature Board of Review. Established under the *Customs (Cinematograph Films) Regulations* both of these boards are serviced by the Office of Film and Literature Classification ('OFLC') a non-statutory agency within the portfolio responsibility of the Attorney-General. The Chief Censor of the Film Censorship Board is the chief officer of the OFLC.

5.3 Classification Schemes for Film/Video and Broadcast Material

5.3.1 Film and Video

The Film Censorship Board established by the *Customs (Cinematograph Films) Regulations* is responsible for controlling the importation of films and videos in

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[55][1971] 2 SASR 142 at 168. For a strong rejection of this proposition see *Director of Public Prosecutions v Whyte* [1972] AC 849.
[56][1968] 3 NSWLR 487 at 490
[57]*Romeyko v Samuels* (1972) 19 FLR 322 per Zelling J at 335-6
[58]S Walker, op cit, page 239
[59]R G Fox, *The Concept of Obscenity*, op cit, page 172-3
[60]*Customs Regulations (Prohibited Imports) Regulations (Cwlth)*, regulation 4A(1A)(a)
[61]*Customs Regulations (Prohibited Imports) Regulations (Cwlth)*, regulation 4A(1A)(b)

Australia. All films must be registered (ie classified) before they are able to leave Customs.

While each State and Territory has its own laws for the classification of film and video material[62], the OFLC administers a national classification scheme for publicly exhibited films and videotapes sold or hired for home use. It does so in accordance with agreements between the Commonwealth, the States and the Northern Territory.[63] The Regulations empower the Board to refuse to register a film imported for public exhibition if in the opinion of the Board the film or its advertising matter:

- is blasphemous, indecent or obscene;
- is likely to be injurious to morality, or to encourage or incite crime; or
- depicts any matter the exhibition of which is undesirable in the public interest.[64]

If in the opinion of the Board the film does not fall within one of the above proscribed categories the film is classified into one of six categories - General ('G'), Parental Guidance ('PG'), Mature ('M'), Mature Adult ('MA'), Restricted ('R') and Sexually Explicit ('X')[65]. Column 1 of Table 1, details what level of violence is permissible under each of the classifications. Distributors unhappy with the Board's classification may appeal to the Film and Literature Board of Review.[66] The Sexually Explicit category is available only for videos and then only for sale in the Australian Capital Territory and the Northern Territory. However, constitutional prohibitions on restrictions on free trade between the States permit individual State laws to be bypassed by video mail order businesses operating in the Territories. This is one example of why a national regulatory scheme is desirable.

5.3.2 Broadcast (Television and Radio)

With the passage of the *Broadcasting Services Act 1992*, the previous regime of Australian Broadcasting Tribunal ('ABT') devised standards by which commercial television and radio classified programs and advertisements was to be replaced by self-regulatory codes of practice except in relation to children's programs and Australian content.[67] Self-regulatory Codes as well as being consistent with the deregulatory flavour of the new Act were designed to allow industry to devise flexible and responsive approaches to meet community needs and demands. Nonetheless if the codes have failed or have not been developed the Australian

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[62]*Film Classification Act 1971* (ACT), *Classification of Publications Ordinance 1983* (ACT), *Publications Control Act 1989* (ACT), *Classification of Films and Publications Act 1990* (Vic), *Film and Video Tape Classification Act 1984* (NSW), *Classification of Films Act 1991* (Qld), *Classification of Films for Public Exhibition Act 1971* (SA), *Classification of Publications Act 1974* (SA), *Films Act 1971* (Tas), *Censorship of Films Act 1947* (WA), *Videotapes Classification and Control Act 1987* (WA) and *Classification of Publications and Films Act 1985* (NT)

[63]Office of Film and Literature Classification and Film and Literature Board of Review, *Reports on Activities, 1991-92,* op cit, page 3

[64]*Customs (Cinematograph Films) Regulations (Cwlth),* regulation 13

[65]In accordance with s.25 *Classification of Publications Ordinance 1983* (ACT) and other State legislation

[66]In accordance with *Customs (Cinematograph Films) Regulations (Cwlth),* regulations 35- 39D and s.30 *Classification of Publications Ordinance 1983* (ACT)

[67]*Broadcasting Services Act 1992* s.122 and s.123

Broadcasting Authority ('ABA'), the new industry regulator has the power to impose program standards.[68]

Over the period May to August 1993, Codes of Practice were devised by the commercial television and radio industries. Both have received approval from the ABA. The Australian Broadcasting Corporation ('ABC') and the Special Broadcasting Service ('SBS') have also developed Codes of Practice which have received endorsement.

Columns 2 and 3 of Table 2 respectively, detail the new Commercial Television Industry Code of Practice and the old ABT Standard as they relate to violent material. The main features of the new Code are the replacement of the Adults Only ('AO') television category with a Mature ('M') classification and new Mature Adult ('MA') category with a later starting time of 9.00pm. Brief consumer advice will also be broadcast at the start of M and MA classified programs. As the table indicates with recent changes there is now in place a similar classification scheme for television, films and videotapes modelled closely on the OFLC Film and Video Classification Guidelines. These changes are consistent with recommendations that flowed from surveys undertaken by the ABA and OFLC.[69]

Table 2 also illustrates how the level of violence - one of the three variables of the new generic test for determining the level of restriction of violent material detailed in Section 6 - could be graduated.

The Commercial Radio Industry Code of Practice agreed to by the ABA on 17 May 1993, provides that a licensee shall not broadcast a program which may incite, encourage or present for their sake violence or brutality.[70] This does not differ from the old ABT Radio Program Standard (RPS) 2.

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[68]Ibid, s.125

[69]Australian Broadcasting Authority and The Office of Film and Literature Classification, *Classification Issues - Film, Video & Television, Monograph 1*, op cit, page 9

[70]*Federation of Australian Radio Broadcasters Codes. Code of Practice 1* clause 1.1(a)

Table 1: Guidelines with respect to Violence in Films and Television

CLASSIFICATION	OFFICE OF FILM AND LITERATURE CLASSIFICATION (OFLC) CLASSIFICATION GUIDELINES[71]	COMMERCIAL TELEVISION INDUSTRY CODE OF PRACTICE[72]	OLD AUSTRALIAN BROADCASTING TRIBUNAL STANDARD[73]
General ("G") - (suitable for all ages)	Minimal. mild and incidental depictions, provided they are justified by the context.	Depictions of physical and psychological violence and the use of threatening language, weapons or special effects must not be likely to cause alarm or distress to children, must be strictly limited to the context or story line of the program, and must show violent behaviour to be acceptable or desirable.	Physical and psychological violence, violent or assaultive language may not be presented in such a manner as to cause alarm or distress to children. References must be strictly limited to the context or story line of the program
Parental Guidance Recommended ("PG") - (parental guidance recommended for persons under 15 years)	Depictions of violence must be mild in their impact, and/or presented in a stylised or theatrical fashion, or in an historical context.	Any violence depicted must be inexplicit, discreet or stylised and appropriate to the storyline or program context. No overly realistic, bloody or horrific depictions of violence are permitted.	Inexplicit, discreet stylised representations only, which must be appropriate to the storyline or program context. Overly realistic, bloody or horrific depictions not permitted.
Adults Only ("AO")	n/a	n/a	May be realistically depicted if appropriate to the storyline or program context; not unduly bloody or horrific, and not presented as desirably in its own right.
Mature ("M") - (recommended for mature audiences 15 years and over)	Realistic violence of low intensity may be depicted if contextually justified.	May be realistically depicted only if it is not too frequent or impactful, appropriate to the storyline or program context, and not unduly bloody or horrific.	n/a

[71] *Guidelines for Classification of Films and Videotapes*, May 1993, Office of Film and Literature Classification

[72] *Commercial Television Industry Code of Practice*, Federation of Australia Commercial Television Stations (FACTS), August 1993

[73] Australian Broadcasting Tribunal, *TV Violence in Australia, Volume IV: Conference and Technical Papers*, Report to the Minister for Transport and Communications, January 1990, page 128*ff*

Mature Adult ("MA") - (restrictions apply to persons under the age of 15 years)	Realistic violence of medium intensity may be depicted, but violent depictions with a high degree of realism or impact are acceptable only if contextually justified.	No sustained, relished or excessively detailed acts of violence. Violence occurring in a sexual context is to be assessed more stringently. Depictions with a high degree of realism or impact must be brief and contextually justified. Violence may not be presented as desirable in its own right.	n/a
Material Not Suitable for Television	n/a	Sustained, relished or excessively detailed acts of violence	Explicit and gratuitous depictions, unduly bloody or horrific depictions, sexual violence
Restricted ("R") - (restricted to adults 18 years and over)	Highly realistic and explicit depictions of violence may be shown, but not if unduly detailed, relished or cruel. Depictions of sexual violence are acceptable only to the extent that they are necessary to the narrative and not exploitative.	n/a	n/a
Sexually explicit material ("X") - (restricted to adults 18 years and over)	No depiction of sexual violence is permitted.	n/a	n/a
Refused Classification	Unduly detailed and/or relished acts of extreme violence or cruelty; explicit or unjustifiable depictions of sexual violence against non-consenting persons and detailed instruction *or* encouragement in matters of crime or violence.	n/a	n/a

5.4 Classification Schemes for Printed Material

Each State and Territory in Australia has laws that classify printed matter according to a number of criteria including violence.[74] Like the arrangements applying to the classification of films, the OFLC operates a uniform scheme for the classification of printed material, although in this case only on behalf of Victoria, New South Wales, South Australia, the Australian Capital Territory and the Northern Territory. This means that Queensland, Western Australia and Tasmania each operate their own schemes.[75]

The guidelines for uniform scheme conform to the principles set out in the model *Classification of Publications Ordinance 1983* (ACT). In having regard to the standards of morality, decency and propriety generally accepted by reasonable adult persons the principles that (a) adult persons are entitled to read and view what they wish and (b) that all persons are entitled to protection from exposure to unsolicited material that they find offensive must be given effect to by the OFLC. The OFLC must also have regard to any literary, artistic or educational merit of the publication including whether it is of a medical, legal or scientific character.[76]

The guidelines establish four categories of classification which apply to books, magazines and other publications namely, Unrestricted, Restricted - Category 1, Restricted - Category 2 and Refused Classification. Table 2 details their application to violent material. As the scheme is voluntary only a percentage of publications are submitted for classification. Vendors who offer unclassified publications for sale must observe the requirements that would attach to such a publication if classified. Failure to meet those requirements would constitute an offence.[77]

In deciding which classification should be given a publication, if any, the OFLC has regard to the persons or class of persons to whom it is aimed and the conditions, if any, to which the publication should be subject.[78] A decision to classify a publication in a restricted category or to refuse classification may be reviewed by Film and Literature Board of Review.[79]

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[74]*Classification of Publications Ordinance 1983* (ACT), *Publications Control Act 1989* (ACT), *Classification of Films and Publications Act 1990* (Vic), *Indecent Articles and Classified Publications Act 1975* (NSW), *Classification of Publications Act 1991* (Qld), *Classification of Publications Act 1974* (SA), *Classification of Publications Act 1984* (Tas), *Indecent Publications and Articles Act 1902* (WA)

[75]Office of Film and Literature Classification and Film and Literature Board of Review, *Reports on Activities, 1991-92,* op cit, page 6

[76]*Classification of Publications Ordinance 1983* (ACT) s.34(1), s.34(2) and s.34(3)

[77]Ibid. Part IV of the *Classification of Publications Ordinance 1983* (ACT) (s.37-s.46) provides for Offences

[78]*Classification of Publications Ordinance 1983* (ACT) s.34(4)

[79]*Classification of Publications Ordinance 1983* (ACT) s.22

Table 2: Guidelines with respect to Violence in Printed Matter

CLASSIFICATION	OFFICE OF FILM AND LITERATURE CLASSIFICATION PRINTED MATTER GUIDELINES[80]
Unrestricted - (No restriction as to sale or display)	Encompasses a wide range of material that may be suitable for children, or adolescents, or adults but does not offend adults to the extent that it should be restricted.
Restricted - Category 1 - (Sale restricted to persons 18 years and over, to be displayed in a sealed wrapper)	• Photographs of realistic and explicit violence, or its aftermath, may be accommodated in a publication that exploits violence, except in a sexual context, or if extremely cruel or violent. • Publications including exploitative novellas which contain exploitative, realistic and gratuitous descriptions of violence will warrant this classification. They will not include relished or detailed descriptions of gratuitous acts of cruelty, or detailed and unjustifiable descriptions of sexual violence against non-consenting persons
Restricted - Category 2 - (Sale restricted to persons 18 years and over, only to be displayed in premises restricted to persons over 18 years)	• Exploitative novellas may [not] contain relished or detailed descriptions of gratuitous acts of cruelty, or detailed and unjustifiable descriptions of sexual violence against non-consenting persons
Refused Classification - (May not be sold or displayed)	• Publications which promote, incite or instruct in matters of crime or violence • Photographs which depict extremely cruel or dangerous practices, especially those which show apparent harm to the participants • Photographs which show sexual violence against the consent of a participant. This will also apply when the non-consent is established from text which relates to a photo sequence • Exploitative novellas which contain relished or detailed descriptions of gratuitous acts of cruelty, or detailed and unjustifiable descriptions of sexual violence against non-consenting persons. This guideline will not apply to works of genuine literary merit.

5.5 Regulation of Other Material

In 1991, following public concern about the availability of sexually explicit and offensive material over the telephone and the absence of any legislative measures to control the content of these information and entertainment services, a Senate Select Committee was formed to investigate the issue.[81] As a result of the inquiry, new arrangements and a self-regulatory code were developed to regulate material provided via telecommunications technologies. To administer these arrangements the Telephone Information Services Standards Committee ('TISSC') was created, funded initially by Telecom. While TISSC has no legislative backing the contracts between service providers and Telecom Australia require service providers to comply with the TISSC codes.

Since its establishment, TISCC has formulated separate codes for '0055', the generally available audiotext service and '0051', the closed user access service[82]. In addition to restrictions of sexually titillating material the codes provide for:

[80]Office of Film and Literature Classification, *Printed Matter Classification Guidelines, July 1992*
[81]See Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Telecommunications Technologies, *Interim Report on Telephone Services, December 1991, Report on Telephone Message Services, May 1992* and *Final Report, June 1992.*
[82]A closed user access service where access is restricted by use of a Personal Identification Number

- a complete ban on services which are the equivalent of 'R' or 'X' rated films or videos on both the '0055' and '0051' services[83];

- strict conditions on '0055' services requiring them not provide information which is indecent, obscene or offensive. Further, given the general access to these services '0055' services must not be provided if they contain material that reasonable parents would not want their children to hear without parental guidance[84]; and

- a prohibition on '0051' services containing material dealing with violence, brutality or cruelty among other things if it is "... likely to be offensive to a reasonable adult person having regard to the nature and restricted availability of the service"[85].

While the codes are self-regulatory, complaints about breaches of the TISSC codes must, in the first instance be directed to the Telephone Information Services Arbiter. The Arbiter deals with all complaints except those relating to a breach of community decency which are referred to the OFLC. If a service provider is found by either the Arbiter or the OFLC to have breached the TISSC codes then a graduated system of penalties can apply ranging from termination of the service to an order to rectify the breach. The service may also be temporarily suspended as a penalty. Service Providers dissatisfied with the adjudication of either the Arbiter or OFLC may appeal to an Appeal Adjudicator.[86] International audiotext services offered in Australia must also comply with the Australian codes of practice.

The Senate Select Committee is continuing to examine the issue of information and entertainment services delivered by telecommunications technologies.[87] It has recently widened its brief to include videogames.

5.6 Conclusions

Measured against the questions we asked in section 5.1 the current framework for the restraint and classification of violent material displays a number of deficiencies that make it unlikely for it to survive in its current form following the frenzied restructuring of communication markets.

In addition to the confusion, uncertainty and inefficiency that results from different censorship regimes at the Commonwealth and State level, the current system of regulation is both wedded to the past and incapable of adjusting to encompass new

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was created in response to the recommendations of the Senate Select Committee.

[83]Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Telecommunications Technologies, *Report on Telephone Message Services, May 1992*, recommendation 3(a)

[84]Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Telecommunications Technologies, Ibid, recommendation 1(b)

[85]Telephone Information Services Standards Committee, *Code of Practice Relating to 0051 Services, Part 1, January 1993*, clause C1.1. Clauses A1.4 and C1.4 relating to '0055' and '0051' services respectively provide the message shall not contain material which incites violence or brutality against any person or group.

[86]Ibid, Part B, Complaints Procedure, clause 8

[87]Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Telecommunications Technologies, *Report, May 1993*

technologies. Its inability to accommodate new technologies results from its retention of the common law definition of obscenity and the different treatment of broadcasting and publications. This means that it takes a segmented rather than an integrated view of the marketplace and applies different restrictions to each communications technology. These difficulties are compounded because the community does not, it is submitted, link violence with obscene material. This makes enforcement and the assessment of community standards that much harder.

There are, however, some positives. The current system of classification is flexible enough to accommodate the differing attitudes to violent and obscene material of Australia's multicultural and diverse society. It is to be preferred to a system of censorship that takes a low common denominator approach by prohibiting material.

6.0 PROPOSALS FOR REFORM

6.1 Factors Motivating Reform

In devising any proposals for reform, it is important to acknowledge that the enforcement of program control standards is going to get harder rather than easier in the future. While the reasons for this are varied, there are four main factors that will impact on our ability to restrict and classify violent material.

The first reason is technological change. While new technologies and media bring their own well-known compliance problems[88], technology innovation particularly in broadcasting and telecommunications technology is rapidly shrinking the world. Transborder broadcasting, for instance makes national boundaries irrelevant; the corollary of which is that national classification systems will become unworkable[89]. This means that for countries to exert any control over broadcast standards regional program standards and classification systems based on negotiation and consensus between nations will need to be devised. In such an environment having eight different State and Territory laws in a country of 17 million people would be unsustainable.[90]

In addition to the difficulties that transborder broadcasting poses for the national regulation of material for a country like Australia (and this is a greater problem for many Asian countries[91]) the rapid development of telecommunications technologies could mean that affordable international dial up access to video and printed material before the end of the century. Given the potential for sovereign country bypass, bilateral arrangements between telecommunications carriers like those that apply currently for audiotext services ("0055") seem one of the few regulatory tools available.

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[88]For example, the well known difficulties of editing live news broadcasts as well as classifying videogames, CD-ROM software and live answer audiotext services.

[89]A good example is the transmission of child pornography via international bulletin boards see Phillips Business Information Inc, *US Customs Closes Network Transmitting Worldwide Pornography*, Global Telecom Report, Vol 3, No.6, March 1993

[90]It is acknowledged that this is not currently the case with broadcasting. However, if there was departure from the current interpretation of s.51(v) of the *Australian Constitution*, then the point made would be valid.

[91]For example, The Australian Financial Review, *Beijing moves to limit spread of satellite TV*, 11 October 1993, page 12 but the South China Morning Post (16/17 October) points out that this decree from the Government will be hard to enforce.

The second and related reason is that the information age we are in the process of entering seems to have as one of its key elements the free availability of knowledge and information. In such an environment, the intrusion of censorship will be problematic given both the seamless nature of information transfer (ie it is location and media independent) and people's expectations that this transfer of information should occur for the greater benefit of society, even if there is a small downside. The law in seeking to provide a framework for the transfer of information may need to be blind to its content, not only because of the difficulties ascribed later to categorising information but also its speed and volume. The sheer volumes suggest that a classification system, with enforcement through sampling, may be the only viable form of regulatory intervention.

The third difficulty in restricting violent material is that, as has been discussed previously, no research has conclusively established a link between media violence and violent offences. The lack of a clear cut clausal link calls into question the restriction and level of restriction placed on the dissemination of such material. This is because while obscene material has not been traditionally accorded protection by the courts, the High Court in *Australian Capital Television v Commonwealth*[92] held it is extremely difficult to justify restrictions imposed on free communication which operate by reference to the character of the ideas or information[93]. Further, as generally supported by High Court and specifically by Brennan J, "... a law which (being otherwise within power) forbids the publication of ... obscene material, ... is a valid law provided the restrictions imposed by the law are proportionate to the interest which the law is calculated to serve."[94] Put another way, restrictions to the freedom of expression should be limited to the minimum necessary to achieve the parallel purpose that is in the interest of the community. The restriction should never go beyond that which is necessary having regard to the purpose which used to invoke the limitation nor extend beyond that which is sufficient in itself to meet the purpose.

The proportionality test in *Australian Capital Television* may at some stage be used to examine the restrictions placed on indecent and violent material and while current restrictions are, it is submitted, likely to meet the test, future laws that unduly restrict material, particularly in relation to news coverage, may be unconstitutional.

The last factor that complicates our enforcement of program content standards is that the basis on which we are evaluating material is either outdated or representing sectarian interests. Definitions of obscenity to which violence are linked are based on Christian ethics and morality of another time and in Australia's case a very different society then the one of today. The difficulties in defining the relevant community by which to judge standards of decency have already been alluded to. These problems will be compounded in a regional or global sense when formulating standards for program content.

Given that our legislators wish to continue to exercise control over program content the approach to this type of regulation needs to be re-thought even with the most "positive"[95] of technology innovations.

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[92](1992) 108 ALR 577

[93]Ibid per Mason CJ @ 598

[94]Ibid, per Brennan J @ 603

[95]The new United States Federal Communications Commission (FCC) digital television standard still under development is likely to facilitate that use of so-called "V-Chips" that block, by

6.2 A New Consolidated Federal Classification Act

In the first instance, a consolidated legal framework should be devised rationalising the current mosaic of Commonwealth, State, and Territory laws detailed in Table 3. Consistent with Recommendation 2 of the ALRC Report on *Censorship Procedure*[96] it should take the form of Federal Act establishing a national Classification Board, a Classification Review Board and detailed procedures and classification criteria for classifying films and publications. State and Territory laws should adopt the classifications made under the Federal Act.

The new Federal Act should supersede the common law, remove the *Hicklin* rule from the statute books and provide a higher degree of certainty to the public and the industry about what is prohibited violence for each of the bands of classification. It would attempt to clarify the test of community decency by specifying which is the relevant community under particular circumstances. In doing so it would remove the significant differences that still exist between State and Territory legislation in relation to classification markings and consumer advice, reclassification, standing to have decision reviewed and most importantly, uniform classification of publications.[97]

Such an approach would have the additional benefit of allowing Australia to be treated as a single market for producers and distributors of product. This would be consistent with the micro-economic reform processes occurring in other sectors of the Australian economy.

6.3 New Determinants for Restrictions on Violent Material

In replacing these old concepts a new Federal Act should, consistent with the philosophy behind the *Broadcasting Services Act*, provide for a new system of regulation that is technology neutral, so that, for instance, an electronic newspaper would not be subject to the same restrictions as video material. This essay proposes a generic test whereby the level of restriction (censorship) would relate to three variables - the *level of violence*, the *pervasiveness* and *intensity* of the media in question instead of the current *sui generis* rules for broadcast and printed matter.

6.3.1 Level of Violence

The first variable is the *level of violence.* This would be measured against consolidated guidelines formed as an amalgam of the current broadcasting codes of practice and the OFLC Film and Video and Printed Matter guidelines[98] so that for instance, realistic violence would be rated higher then mild depictions. In substance, the end result would not differ greatly from the current standards (see Figure 1). The gain, however, as illustrated by Table 3, would be in consistency and clarity of purpose.

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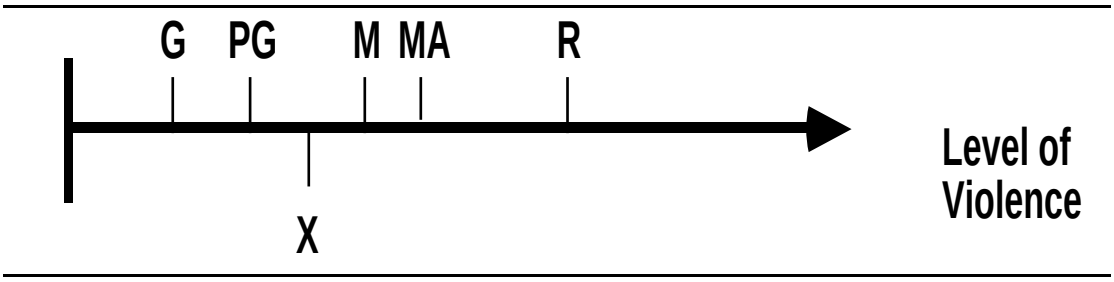
blanking the screen, violence and/or sexual nudity etc in program material as set by user. However, this raises an issue as to whether this is an unnecessary infringement on the film director's freedom of expression.

[96]ALRC No.55

[97]Ibid, paragraph 1.11

[98]It is not suggested that nature of these guidelines change. For broadcasters they would still be self-regulatory codes of practice. The word "guidelines" is used to distinguish the two.

Figure 1: Increasing level of violence in the current OFLC Film and Video Classifications



6.3.2 Pervasiveness of the particular media

The second suggested variable is that of *pervasiveness* of the media in question. That is the degree to which the particular media has the capacity to spread and permeate though society. According to M Baumann "Pervasiveness is the concept of intrusiveness of media. Radio is pervasive because it is, to some degree, unavoidable in our society. Conversely, a movie is not pervasive because one must seek out a theater, pay for a ticket, and enter a theater before being exposed to a film."[99]

This concept is explained in *FCC v Pacifica Foundation*[100], a case concerning a satiric humorist's 12 minute monologue entitled "Filthy Words" broadcast by radio. The United States Supreme Court held (Burger CJ and Stevens, Rehniquist, Blackmun and Powell JJ) per Stevens J that: "We have long recognised that each medium of expression presents special First Amendment problems. And of all forms of communications, it is broadcasting that has received the most limited First Amendment protection... The reasons for distinctions are complex but two have relevance to the present case. First, the *broadcast media have established a uniquely pervasive presence* in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. Because the broadcast audience is constantly tuning and out prior warnings cannot completely protect the listener from unexpected program content... Second, *broadcasting is uniquely accessible* to children, even those too young to read." The Court goes on to state: "The content of the program in which the language is used will also effect the composition of the audience and differences between radio, television and perhaps closed circuit transmissions, may also be relevant."[101]

In a separate judgement in *Pacifica,* Powell and Blackmun JJ, find that a physical separation of the audience (like for the exhibition of motion pictures) cannot be accomplished in the broadcast media and this is why a different treatment is justified.[102]

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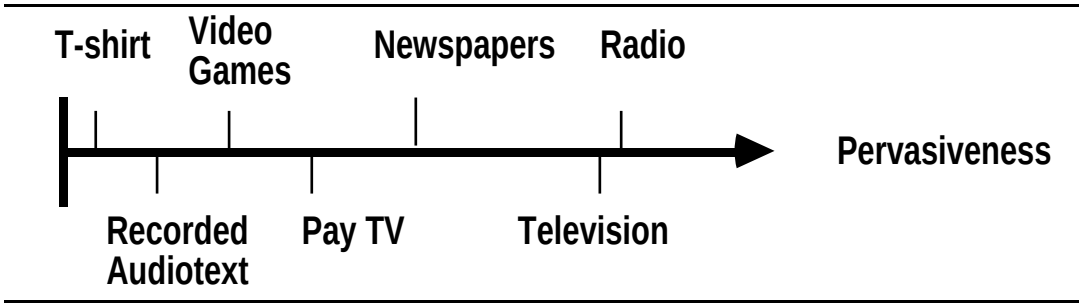
[99]M Baumann, *This is the Picture - If you don't like it, turn it off: The futility of setting cable specific obscenity standards*, (1990) 8 Cardozo Arts and Ent. 611 at 614
[100](1978) 438 US 726
[101]Ibid at 749-750
[102]Ibid at 758- 759

Drawing these threads together, the measure of pervasiveness of the media would be one of the determinants of the level of control by regulatory authorities. Current free to air television and radio would be at the highest level of the scale. Pay television, while delivered by broadcast media such as satellite transmission is a discretionary and non-pervasive service analogous to watching a film at the cinema.[103] Under the new proposed regulatory regime it would therefore be subject to differential rules than free to air commercial television, all other things (level of violence and intensity) being equal. To illustrate the differential impact, Figure 2 details the increasing level of pervasiveness of selected media.

Figure 2: Increasing level of pervasiveness of Selected Media



6.3.3 Intensity of the particular medium

The last variable is the *intensity* of the medium. The inclusion of this variable is an acknowledgment of the disparate impacts of different publications technologies and media. It takes a technology neutral stance that evaluates output rather than presuming the specific output from the disseminating technology. This means if a program is broadcast via television the law currently presumes a more intense impact on the population than the reading of a book. While this is in all probability true, how do you treat hybrid media where for example a *Quicktime* movie is embedded in the text of a document? It is contended that the current law is focussed on input technology rather output quality because the law primarily has used very simple analogies to formulate the legislative and judicial tests.[104] The adoption of the approach in this paper would be a explicit concession that the community's concern is not with how material is published but rather its impact on the audience.

The inclusion of an intensity variable also accommodates new technologies and their impact on publications and broadcasting as we now know them. New media like that of virtual reality would rank highest on this scale[105] (below reality of course) so "publications" with even a lower level of violence where the viewer becomes a participant may need to be highly regulated (see Figure 3). As a guide, the level of

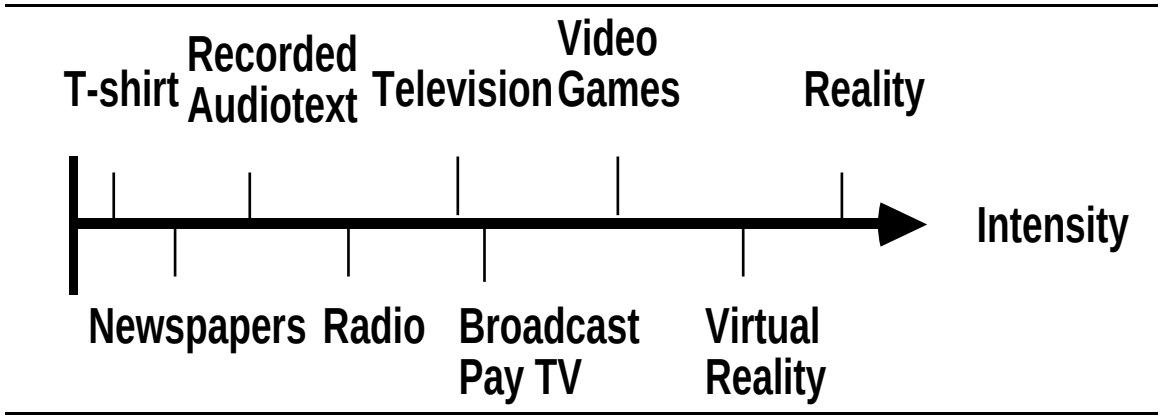
[103]See M Baumann, op cit, 614-615

[104]This is a general criticism of Australian Courts (and legislatures) who look for simple analogies when devising ways to treat new technologies. For example, the ALRC recommended computer software be included within the definition of publication (ALRC Report No.55). This perpetuates the arguable inconsistency of treating software like literature (another example being the copyright protection of software as a literary works). Clearly, computer software and printed matter are entirely different media with one would argue different impacts on the viewer. Treating them in precisely the same way is not consistent with the goals of classification.

[105]The author of this paper can personally vouch that even a rudimentary virtual reality simulator is an intense experience.

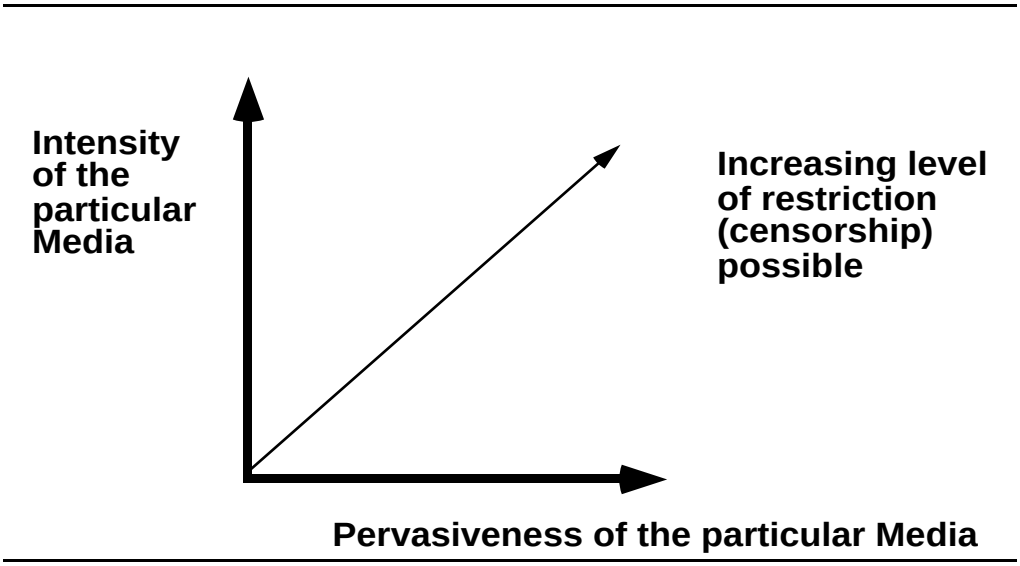
interactivity (ie the interaction between consumer and the medium) would be a key determinant of intensity.

Figure 3: Increasing level of Intensity of selected Media



Taking the level of violence as a constant the relationship between pervasiveness and intensity which gives the proportionate level of restriction possible can be represented graphically in Figure 4.

Figure 4: Relationship of Pervasiveness and Intensity to the degree of restriction possible



7.0 CONCLUSION

Like the 1950's, when technology innovation brought broadcast television and the paperback book within reach of the general community, censorship is again on the agenda. Unlike the 1950's, when legislative prohibitions were placed on the dissemination of material around the world it is hoped that community support for freedom of expression will not see a more restrictive regime put in place in Australia.

Nonetheless, changes to Australia's censorship procedures are a necessity and perhaps, given history, a foregone conclusion. The restructuring of the world and Australian communications markets will undoubtedly stress the current framework for regulating violent material. These stresses will find our censorship regime based on old notions of Christian ethics - out of touch with contemporary Australia. The regime is also segmented by both jurisdiction and delivery technology - a state incompatible with the regional censorship procedures that will develop.

In attempt to suggest a more flexible and technology neutral approach this essay proposes a new test for determining the level of restriction of violent material based on the *level of violence*, the *pervasiveness* and *intensity* of the particular media within the structure of a single uniform censorship code. Putting forward a new model is, however, but the first step in a long process to achieve censorship reform that will require community consultation and will engender much debate.

During this debate three things should be remembered. The first is that the "democratisation of information", that is, the trend of allowing the public increased access to information which started in the 1850's has a momentum that cannot be stopped. It is likely that attempts to restrict information of value to society are doomed to failure. Secondly, it is impossible to prevent the corruption of one individual. Given this, our laws should not try to regulate for the exception but rather formulate models which provide for individual responsibility and increased community utility. The third thing to be remembered is that violence, regrettable though it may be, is part of our world. In censoring violence, particularly in news coverage we, like the British Broadcasting Corporation, "... must ask ourselves whether we are now in danger of diluting the violent images of our own world to an extent that we mask from our own audience the truth of how that world really is."[106]

[106]R Neil, *Reporting the News for Television*, British Broadcasting Corporation Seminar on Violence and the Media, 2 December 1987. Op cit, page 52