



Australian Government
Classification Review Board

1 August 2005

**23-33 MARY STREET
SURRY HILLS, NSW**

MEMBERS: Maureen Shelley (Convenor)
The Hon. Trevor Griffin (Deputy Convenor)
Rob Shilkin
Kathryn Smith
Gillian Groom
Anthony Hetrih

APPLICANT: The Hon. Philip Ruddock MP, Commonwealth
Attorney-General, upon request of the South Australian
Attorney-General, the Hon Michael Atkinson MP - not
represented.

**INTERESTED
PARTIES:** Hopscotch Films (Hopscotch) as the original applicant for
classification, represented by: Mr Troy Lum (Managing
Director); Ms Raena Lea-Shannon (Solicitor, Michael Frankel
& Co, Solicitors); Mr Douglas Stewart (Expert Classification
Witness); and Ms Margaret Pomeranz (Expert Film Witness).

The Australian Family Association (AFA) represented by Mr
Anthony Tudehope.

The Festival of Light Australia - not represented.

**INDEPENDENT
EXPERT WITNESS:** Dr Robin Harvey (Child Psychologist)

BUSINESS: To review the Classification Board's decision to classify the
film *Mysterious Skin* (the film) R 18+ with the consumer
advice "Adult Themes, Strong Sexual Violence, Medium Level
Sex Scenes"

DECISION AND REASONS FOR DECISION

1. Decision

The majority of the Classification Review Board (the Review Board) determined that *Mysterious Skin* was to be classified R 18+ with the consumer advice “High-level child sexual abuse themes, High-level sexual violence, Paedophile themes”.

2. Legislative provisions

2.1 The Act

The *Classification (Publications, Film and Computer Games) Act 1995* (the Act) governs the classification of films and the review of classification decisions. Section 9 of the Act provides that films are to be classified in accordance with the National Classification Code (the Code) and the *Guidelines for the Classification of Films and Computer Games 2005* (the Guidelines).

Section 11 of the Act requires that the matters to be taken into account in making a decision on the classification of a film include:

- (a) the standards of morality, decency and propriety generally accepted by reasonable adults;
- (b) the literary, artistic or educational merit (if any) of the film;
- (c) the general character of the film, including whether it is of a medical, legal or scientific character; and
- (d) the persons or class of persons to or amongst whom it is published or is intended or likely to be published.

2.2 The Code

The Code sets out various principles to which classification decisions should give effect, as far as possible. The four principles under Item 1 of the Code are:

- (a) adults should be able to read, hear and see what they want;
- (b) minors should be protected from material likely to harm or disturb them;
- (c) everyone should be protected from exposure to unsolicited material that they find offensive;
- (d) the need to take account of community concerns about:
 - (i) depictions that condone or incite violence, particularly sexual violence; and
 - (ii) the portrayal of persons in a demeaning manner.

Relevantly, the Code under the heading ‘Films’ provides:

1. Films that:
 - (a) depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or
 - (b) describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or
 - (c) promote, incite or instruct in matters of crime or violence

(are to be classified) RC (Refused Classification);

and

3. Films (except RC films and X 18+ films that are unsuitable for a minor to see) (are to be classified) R 18+.

2.3 The Guidelines

Section 12(1) of the Act provides that:

The Minister may, with the agreement of each participating Minister, determine guidelines to assist the Board in applying the criteria in the Code.

Three essential principles underlie the use of the Guidelines, determined under section 12 of the Act:

1. The assessment of impact;
2. The importance of context; and
3. The six classifiable elements – themes, violence, sex, language, drug use and nudity.

2.3.1 Impact - Under the heading ‘Assessing Impact’, the Guidelines state that impact may be higher where a scene:

- (i) contains greater detail, including the use of close-ups and slow motion;
- (ii) uses accentuation techniques such as lighting, perspective and resolution;
- (iii) uses special effects, such as lighting and sound, resolution, colour, size of image, characterisation and tone;
- (iv) is prolonged;

- (v) is repeated frequently; or
- (vi) is realistic, rather than stylised.

In relation to the R 18+ (Restricted) classification, under the “Impact test”, the Guidelines state:

The impact of material classified R 18+ should not exceed high . . .
Note: . . . some material classified R 18+ may be offensive to sections of the adult community.

2.3.2 Context - The Guidelines state:

Context is crucial in determining whether a classifiable element is justified by the story-line or themes. In particular, the way in which important social issues are dealt with may require a mature or adult perspective...

2.3.3 Classifiable elements - The Guidelines relating to the R 18+ category state:

- (i) Themes - there are virtually no restrictions on the treatment of themes.
- (ii) Violence - violence is permitted. Sexual violence may be implied, if justified by context.
- (iii) Sex - sexual activity may be realistically simulated. The general rule is “stimulation, yes - the real thing, no”.
- (iv) Language - there are virtually no restrictions on language.
- (v) Drug use - drug use is permitted.
- (vi) Nudity - nudity is permitted.

In relation to the RC (Refused Classification) category, the Guidelines provide:

Note: films that exceed the R 18+ and X 18+ classification categories will be Refused Classification. Films ... will be refused classification if they include or contain any of the following:

Crime or Violence

- Detailed instruction or promotion in matters of crime or violence;
- The promotion or provision of instruction in paedophile activity;
- Descriptions or depictions of child sexual abuse or any other exploitative or offensive descriptions or depictions involving a person who is, or appears to be, a child under 18 years; or

- Gratuitous, exploitative or offensive depictions of:
 - (i) violence with a very high degree of impact or which are excessively frequent, prolonged or detailed;
 - (ii) cruelty or real violence which are very detailed or which have a high impact;
 - (iii) sexual violence.

The word “offensive” is defined in the Guidelines as “*material which causes outrage or extreme disgust*”.

“Exploitative” is defined in the Guidelines as “*appearing to purposefully debase or abuse for the enjoyment of others, and lacking moral, artistic or other values.*”

3. Procedure

The Review Board convened on 1 August 2005, to determine the validity of the application for review and review the classification for the film *Mysterious Skin*.

The Review Board, Dr Robin Harvey and Mr Anthony Tudehope viewed the film.

The Convenor of the Review Board met with Mr Anthony Tudehope and Ms Raena Lea-Shannon to discuss an issue in respect of Item 3(1)(b) of the Code, which provides for films that “*describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not) (are to be classified) RC*”. The use of the term “a reasonable adult” differs from the phrase “reasonable adults” found in Item 3(1)(a) of the Code. Legal advice from the Australian Government Solicitor has stated that a description or depiction would fall within Item 3(1)(b) if the description or depiction is likely to cause offence to a single reasonable adult. The Convenor asked for submissions on whether, if the description or depiction causes offence to a single member of the Review Board, the Review Board must as a matter of law classify the film RC, on the basis that each member of the Review Board must be considered a reasonable adult. Ms Lea-Shannon and Mr Tudehope both rejected this approach and submitted that members of the Review Board must make their own determination about what a reasonable adult's approach to the film would be, and make a classification decision on that basis, rather than on the assumption that each member of the Review Board is a reasonable adult.

The Convenor confirmed that both the AFA and the Festival of Light had withdrawn their applications for review of the film, but that the AFA would be appearing as an interested party and that the Festival of Light asked that its written submission be considered.

The Convenor informed the members of the Review Board that she had only circulated parts of the written submission provided by Hopscotch to the Review Board. The Convenor advised she had made a determination that the balance of the submission was not relevant to the Review Board's decision and, that time constraints prevented the distribution and consideration of all material to the Review Board. The Convenor agreed that Hopscotch would be permitted to summarise the relevant parts

of the written material which had not been provided to members of the Review Board during their oral submissions.

The Review Board heard oral testimony from Dr Robin Harvey and asked questions in relation to her testimony.

The Review Board heard oral submissions from Hopscotch.

The Review Board heard oral submissions from Mr Anthony Tudehope of the AFA.

The Review Board addressed questions to both the AFA and Hopscotch.

The Review Board met in camera to deliberate and make its decision on the classification of the film.

4. Evidence and other material taken into account

In reaching its decision, the Review Board had regard to the following:

- (i) The application for review from the Australian Attorney-General including a letter from the South Australian Attorney-General;
- (ii) Hopscotch's written submission. This included a letter to the Review Board from Troy Lum (Managing Director of Hopscotch), Mary Jane Skalski (Producer of *Mysterious Skin*), Mary Corbet (mother of lead child actor in *Mysterious Skin*), Dr Cathy Kezelman (Chairperson, Advocates for Survivors of Child Abuse);
- (iii) Hopscotch's oral submission;
- (iv) The AFA's written submission;
- (v) The AFA's oral submission;
- (vi) The Festival of Light's written submission;
- (vii) The testimony of Dr Robin Harvey;
- (viii) The film *Mysterious Skin*;
- (ix) The relevant provisions in the Act;
- (x) The relevant provisions in the Code;
- (xi) The Guidelines; and
- (xii) The Classification Board's report.

5. Synopsis

Brian Lackey, aged 8, wakes up to find himself beneath his house with a bloody nose and no recollection of how he got there. Following this incident, he becomes afraid of the dark, wets his bed and is plagued by nightmares. After watching a television show, he starts to believe that he has been abducted by Aliens. As Brian gets older, he begins to recall more about that fateful evening and more specifically, the recollection

that another boy had been with him. That other boy, Neil McCormick, turns out to be a boy deeply affected by the fact that he was sexually abused by his Little League coach when he was 8 years old. Neil has become a reckless, troubled “rent” boy. Brian sets out to find Neil, and upon tracking him down, Brian learns of the terrible act that had transpired that evening.

The movie takes place in different periods through time, from Neil and Brian as 8-year-olds, to Neil as a 15-year-old, and then to Neil and Brian as 18-year-olds. The boys, as 18-year-olds, often have flashbacks to their experiences as 8-year-olds.

6. Findings on material questions of fact

The Review Board found that the film contains aspects and scenes of importance, under various classifiable elements:

Themes - “Themes” is defined in the Guidelines as “*social issues such as crime, suicide, drug and alcohol dependency, death, serious illness, family breakdown and racism*”.

The main theme of this film is child sexual abuse. The film unambiguously condemns child sexual abuse and portrays the impact of that abuse from the victim's perspective. This theme permeates the entire film. Some instances in which this theme is evident include:

(i) In a scene from approximately 9 minutes to 13 minutes, the relationship between the 8-year-old Neil and his coach is presented. Neil is depicted as having a crush on the coach (When Neil, as a young boy, sees the coach, the 18-year-old Neil states in voiceover “desire sledge-hammered me”). The coach takes Neil to a “slasher” movie, records Neil's voice on a tape recorder, puts his finger on Neil's mouth, touches Neil's knee, throws cereal in the air and tells Neil “I like you so much” and places his head on Neil's stomach.

(ii) In a scene at approximately 53 minutes, 18-year-old Brian walks up to a dead cow with his friend Avalyn. Avalyn explains how aliens have removed the cow's organs and encourages Brian to feel the inside of the cow. Brian puts his arm inside the cow. This act implicitly reminds him of his sexual abuse as a child. He has a very brief flashback of a human hand touching him, with Neil's 8-year-old voice also present in the flashback. Brian's nose bleeds.

(iii) At approximately 71 minutes, the 18-year-old Neil states how the coach was “a huge part of me”. He states that “he really loved me” and “I was his true love”. This scene depicts the mistaken recollections of a young boy who naively mistook the Coach's predatory actions as love and affection. Dr Harvey noted that this was a realistic response by victims of child sexual abuse. However, she also noted:

At no time did we have a sense of (Neil) being happy with what was going on but he felt powerless. And I think the film portrayed that for me very clearly. His facial expression, his body language certainly gave no sense that he was a willing participant.

(iv) At approximately 95 minutes, the 18-year-old Neil leads Brian to the house where the coach had abused them. Neil recounts to Brian what had taken place

when they were 8-year-olds. The scene is presented in flashback. Brian is crying as Neil describes the events. There are discrete flashbacks to the boys as 8-year-olds. Brian, as a young adult, is crying and shaking upon hearing what took place. His nose bleeds. The scene portrays the horrors of child sexual abuse and the lasting impact it had on the two boys who, as young adults, state that the experience of abuse has made them just “want to disappear”. (This scene is discussed further under “violence” below)

This theme is evident in other scenes, described in further detail under “sex” and “violence” below.

The film also deals with the theme of prostitution. As a disturbed and detached young man, Neil becomes a sex worker. His clients are mainly older men. Some of the scenes in which this theme is explored include:

- (i) At approximately 27 minutes, 15-year-old Neil informs Wendy that he has a lump on his penis resulting from a customer who was too aggressive in performing oral sex.
- (ii) In a scene at 55 minutes, Neil's friend Eric impliedly looks at 18-year-old Neil's penis and informs him “you've got crabs”.
- (iii) At approximately 63 minutes, Wendy implores 18-year-old Neil to be safe in his sexual activities.
- (iv) In a scene at approximately 67 minutes, an older man takes his shirt off and is seen to have red marks on his chest and back, presumably AIDS-related Kaposi sarcoma marks.

This theme is also explored through a number of scenes detailed below under “sex” and “violence”.

Sex - There is implied sexual activity in the film in the following scenes:

- (i) In a scene of approximately 30 seconds commencing at around 7 minutes, Neil watches his mother having sex with another man. She is seen to undo his belt. Neil, through an adult voice-over, recollects how as an 8-year-old he had masturbated, while watching his mother's boyfriend being sexually aroused. There is no nudity in the scene.
- (ii) In a scene commencing at approximately 23 minutes, Neil, as a 15-year-old rent boy, is taken to a motel room by an older man. The older man rubs Neil's pants and pulls them off, places his hands on Neil's chest and face and implicitly performs oral sex on Neil (out of shot). Neil's head is seen lying on the bed, upside down, throughout the scene. His face seems to contort and he says “I'm gonna come”. There is a swallowing sound. There is no nudity in the scene.
- (iii) In a scene at 48 minutes, Neil, as an 18-year-old, is commentating for a baseball game. Underneath the table, another person is implicitly performing oral sex on Neil, although this person is not visible. Neil is fully clothed.
- (iv) In a scene commencing at approximately 61 minutes, Brian's friend Avalyn unbuttons 18-year-old Brian's pants on his bed in a sexual manner. Brian is

disturbed by this action. He pushes her away. There is no nudity in this scene. She apologises for her actions and leaves the room, embarrassed.

(v) In a scene commencing at approximately 62 minutes, 18-year-old Neil is with a customer. The customer takes Neil's shirt off. The client states "fuck me up the arse with your teenage cock". He tells Neil to put on a condom. The customer's back is visible and he is groaning as Neil implicitly has anal sex with him. The sexual activity is implicit.

Violence - There are three scenes of violence and sexual violence in the film:

(i) In a scene at approximately 18 minutes, Neil and Wendy as 8-year-olds kidnap a boy with an apparent intellectual disability, who wears glasses. Neil puts fire crackers into the boy's mouth and lights them. The fire crackers explode and are seen to cause cuts and marks on the boy's face. Remnants of the fire crackers protrude from his face. Neil, as an 8-year-old, apparently realises that he has done a terrible thing. Neil says that he knows how to make things "all better". He is implied to take the boy's pants down, and his head disappears below the screen, implicitly in the region of the boy's groin. There is no further visual detail or sound effects. The camera pans to Wendy's shocked face. The scene ends quickly. The scene, coming shortly after it is revealed that Neil has been molested by the coach, demonstrates the impact of the abuse on Neil. Neil is shown as a troubled and disturbed boy who has been corrupted by his own experience of child sexual abuse. Dr Harvey provided expert testimony that this type of conduct was common in victims of child sexual abuse who can lose their sexual perspective and behave highly inappropriately (aggressively and sexually) towards other children. Dr Harvey stated in relation to this scene that:

There is enough research to be saying that (victims of child sexual abuse learn) inappropriate ways of seeking comfort, intimacy, and you saw that with the portrayal of him with the boy with intellectual disability, and he had lost a sense of what was invasive and what wasn't invasive, and, for some people, that tends to keep going.

and

Certainly I've had clients through our clinic that often have been reported for sexualised behaviour with younger children at school, for example, and it's often a clinical sign of sexual abuse.

(ii) In a sequence commencing at approximately 81 minutes, Neil, as an 18-year-old, is with a customer who behaves in a very aggressive manner. The customer forces Neil to snort a substance and demands that Neil strip. The customer states "open wide and suck it". Neil performs implicit fellatio on the man. The customer grips Neil's head and pulls him towards what is implicitly his groin area. The customer spits on Neil's face. Neil races to the toilet and latches the door. The man cuts upon the latch and enters the bathroom. He hits Neil across the head with a metal implement. Neil falls into the bath. The man grabs Neil's legs and screams "you're getting fucked slut, whether you like it or not". The man hits Neil in the head a number of times with a shampoo bottle.

Neil starts bleeding in the bath. The scene cuts between Neil's head and the implicit anal rape. The rape is implicit and contains no nudity. Afterwards, Neil is shown lying outside on the pavement. Later, at approximately 85 minutes, he is shown injured in his own bathroom, covered in blood and bruises. He cries. There is brief buttock nudity during this scene. The scene is depicted as the nadir of Neil's life and, for the first time, Neil is confronted with the reality that he is not in control of his own life. The sequence is powerful and distressing.

(iii) The final scene in the film, at approximately 95 minutes, comprises verbal descriptions of child sexual abuse. The 18-year-old Neil and Brian are sitting in the Coach's old house as Neil recounts the story of what happened when they were 8-year-olds. The visuals of the boys as 8-year-olds are presented in flashback and are inter-cut with depictions of the young adults discussing the events. 18-year-old Neil recounts that he put his tongue in Brian's mouth and how the Coach kissed Brian “watching big lips sucking your face ... going to swallow your head whole”. 18-year-old Neil describes that Coach's mouth was “around your dick, balls and everything ... I tried to do it, but my mouth was too small”. At approximately 98 minutes, the Coach is shown looking back over his shoulder at the camera. The top of his back is seen to be uncovered. The 18-year-old Neil recollects: “I ran my little fist up his arse, all the way to the elbow ... His whole body trying to suck me in.” The adult Brian then recollects: “Then I did it, too.” The 18-year-old Brian’s nose starts to bleed. He starts crying and shaking. The only visuals of the 8-year-old boys in this sequence are of their faces. There is no nudity in the scene. The 8-year-olds are never in the same scene as the coach in the flashback. The depictions are overwhelmingly verbal, and the visual descriptions are brief. The scene is powerful and tragic.

Drug use - At approximately 46 minutes, Eric smokes a marijuana pipe. At approximately 52 minutes, Neil takes what appears to be an LSD tablet. At 81 minutes, Neil is forced to snort a powder substance, presumably representing cocaine. There are other scenes of characters smoking and drinking in the movie.

Language - Course language is used in the film. In the rape scene at approximately 81 minutes, there is aggressive coarse language.

Nudity - There are only brief depictions of nudity in the film. There is adult male buttock nudity in the scenes described above at 62 minutes, and 85 minutes.

7. Reasons for the Decision

Review Board's unanimous position on the role of the Guidelines

The AFA submitted that the film fell within Item 3(1)(b) of the Code because it described or depicted “*in a way that is likely to cause offence to a reasonable adult, a person “who is, or appears to be, a child under 18 ... “.*

The AFA noted that that the Guidelines for the RC classification provides that films “*will be refused classification if they include or contain ... descriptions or depictions of child sexual abuse or any other exploitative or offensive descriptions or depictions involving a person who is, or appears to be, a child under 18 years”*

The AFA submitted that this provision of the Guidelines was prescriptive and that all and any depictions or descriptions of child sexual abuse must therefore be refused

classification. The AFA submitted that the effect of the Guidelines is that any film containing such a description or depiction is deemed to “*cause offence to a reasonable adult*” and therefore must be classified RC under the Code.

In response to questions from the Review Board, the AFA submitted that this prescriptive rule would apply equally to all descriptions of child sexual abuse, including a documentary film description by a real-life survivor of child sexual abuse, about the acts of abuse that were perpetrated against them. The AFA submitted that the operation of the Guidelines required that all such descriptions of child sexual abuse must be refused classification.

The Review Board unanimously rejected this submission for the following reasons:

- The Review Board noted the wording of the Guidelines provides that films must be refused classification if they include “*descriptions or depictions of child sexual abuse or any other exploitative or offensive descriptions or depictions involving a person who is, or appears to be, a child under 18 years*”. Without question, all child sexual abuse is, by its nature, exploitative and offensive (as those terms are defined in the Guidelines). However, the Review Board held that as a matter of common sense, it was possible for a description or depiction of such conduct to not be offensive or exploitative (for example, a real life survivor's testimony, or a piece of serious film-making which condemns child sexual abuse and in which the depictions and descriptions are discrete and largely verbal in nature eg *Mystic River*). The use of the words “*or any other exploitative or offensive descriptions or depictions*” in this part of the Guidelines, in the Review Board's unanimous view, means that this part of the Guidelines presupposes that only those descriptions or depictions of child sexual abuse which are offensive or exploitative in nature are to be refused classification.
- In any event, section 12 of the Act provides that the Guidelines are “*to assist the Board in applying the criteria in the Code.*” The Guidelines themselves state that they are a “*tool for classifying films...*”. It is the criteria in the Code that must be applied by the Review Board in determining classifications. While weight and full consideration must be given to the Guidelines in applying the Code, the Guidelines cannot operate to foreclose proper consideration by the Review Board of the criteria in the Code. The Guidelines must be read in such a way as to co-exist sensibly with the Code. Any ambiguity in the Guidelines must be resolved in favour of a reading that promotes consistency with the Code.

Majority decision on classification

The majority of the Review Board considered the following relevant matters under section 11 of the Act:

- (i) The majority found that *Mysterious Skin* has a very high degree of artistic merit. The film's artistic merit stems from the tight and restrained direction, the evocative use of music and imagery, strong character development and dialogue, as well as the fine acting and the film's emotional impact and integrity. The majority considered the film to be a serious artistic work which was a genuine and legitimate exploration of a disturbing and confronting, often

taboo, topic. The majority noted that the film has received almost unanimous critical acclaim from reviewers and has been supported by organisations such as Advocates for Survivors of Child Abuse as well as by Father Peter Malone, an Australian Catholic priest who resides in the Vatican and who selected the film for the Interfaith category of the Brisbane Film Festival.

(ii) The majority of the Review Board found that the film has significant educational merit in informing adults of the consequences of child sexual abuse and powerfully exposing it as a vile crime. The film presents a realistic depiction of the horrors of this crime and demonstrates the serious consequences and loss of innocence of children who fall victim to such criminal activities. The film also exposes as a lie the myth that children can in some way be complicit in the act of child sexual abuse. In forming these conclusions the majority considered the testimony of Dr Harvey, who gave evidence that:

developmentally and clinically the film is very accurate. The portrayals are certainly not gratuitous or over the top from the point of view of (the boys') psychological being.

The majority of the Review Board also noted the relevant general principles under the Code including:

- (i) adults should be able to read, hear and see what they want;
- (ii) everyone should be protected from exposure to unsolicited material that they find offensive; and
- (iii) the need to take account of community concerns about depictions that condone or incite violence, particularly sexual violence. The majority found that any suggestion that *Mysterious Skin* promoted child sexual abuse or provided a “how-to” manual for paedophiles was misguided and incorrect. It was the opinion of the majority that any reasonable adult who had viewed this film would reject any submission that the film provided instruction in paedophile activity. The majority of the Review Board found that there is no such instruction or guidance provided, and the film condemns child sexual abuse in unambiguous and clear terms. Quite apart from being a “how-to manual”, the film demonstrates, in a sensitive way, the awful consequences of child sexual abuse and the impact that it has on victims' lives.

The majority considered whether the film “*depict(s), express(es) or otherwise deal(s) with matters of ... cruelty (or) violence ... in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults*” or “*describes or depicts in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 ...*” and must therefore be refused classification under Item 3(1) of the Code.

To assist it in applying these criteria, the majority considered the Guidelines, including the impact test, the importance of context and the classifiable elements, as well as the specific matters referred to under the Guidelines for RC classifications.

In relation to the theme of child sexual abuse, the depictions and descriptions of acts of child sexual abuse, and of persons under 18 in the film, the majority view was that

while child sexual abuse is by its nature an abhorrent crime, the treatment of these scenes in the film was handled in a sensitive way and from a victim's perspective. The film demonstrates the lasting psychological damage to victims in a careful and restrained manner, largely through verbal flashbacks. The film does not seek to glorify, justify, normalise or otherwise condone child sexual abuse in any way. In addition, the film makes it clear that no child can give consent to sexual abuse. The film was both confronting and distressing, but the treatment of the central theme was handled with restraint and great sympathy for the victims. The majority concluded that the film describes an appalling crime in a careful and discreet manner.

Specifically in relation to the contentious scenes:

(i) At approximately 7 minutes Neil describes how he masturbated while watching his mother have sex with her boyfriend. This scene involved no visual detail and comprised verbal descriptions only. The depiction was not exploitative, offensive or gratuitous and would not cause offence to a reasonable adult.

(ii) The sequence starting at approximately 9 minutes involving the coach and Neil was visually discrete. There was no visual detail of any abuse, and no verbal description of what took place. The sequence was in context as it depicted an authority figure taking advantage of a child's innocence in a sinister way. While it goes without saying that the acts of abuse were reprehensible, the depiction was not exploitative, offensive or gratuitous and would not cause offence to a reasonable adult. The majority rejected arguments that the film depicted Neil as consenting to the abuse, or being a willing participant. In the majority view, no reasonable adult would interpret the sequence as showing Neil as a consenting partner in the sexual abuse. The majority accepted the submission of Ms Pomeranz who stated:

In no way was there an implication that he was, at that age, after [seeking] a sexual relationship with this man.

and

I don't think you ever get the impression that this child, Neil, at eight is consensual or desiring sex with the coach.

(iii) The majority found that the scene at approximately 18 minutes, involving the cruel violence towards, and implied sexual abuse of, the boy with intellectual disability by the 8-year-old Neil was not explicit and featured no nudity. Although undeniably a very cruel act, the impact of the firecrackers was shown fleetingly. The majority accepted Dr Harvey's interpretation of the scene as a depiction of child bullying by Neil without fully understanding the consequences.

Often kids become very aggressive and you don't see the sexualised violence. Often you just see aggressive behaviour, and you often get this contrast between the outwardly aggressive child, say, at school and their overly dependent nature at home ...Eight-year-old kids don't actually have a great understanding of consequences as such. I think it was just a general mis-attempt at bullying for him.

There was no visual, verbal or aural detail of the inappropriate sexual act. It was implied and only very briefly. Wendy was shocked by Neil's actions. The majority accepted Dr Harvey's evidence that the type of inappropriate sexual conduct by Neil is often a clinical sign of abuse and therefore the scene was in context.

The majority felt that the focus of the scene was the portrayal of the disturbed nature of the young Neil within the context of the film, rather than the brief depiction of the reckless cruel act perpetrated on the child with a disability, or the implied inappropriate sexual act, by the 8-year-old Neil. The depiction of violence and implied sexual violence was not exploitative, offensive or gratuitous and would not cause offence to a reasonable adult. However, the impact of this scene was high.

(iv) The scene of a customer performing fellatio on Neil as a 15-year-old at approximately 23 minutes involves no visual detail, is entirely implied and Neil's face is upside down throughout. This substantially mitigated the impact of this scene. The impact did not exceed high. The depiction was not exploitative, offensive or gratuitous and would not cause offence to a reasonable adult.

(v) In relation to the climactic scene at approximately 95 minutes, the majority view was that this scene provides a powerful, tragic conclusion to the film and is presented in a very discreet, restrained manner. There was no nudity, no physical contact between adult and child, and no physical contact between the child actors. The scene was overwhelmingly verbal. The majority noted the Guidelines provide assistance in this regard, stating that:

Impact may be lessened where reference to a classifiable element is verbal rather than visual. For example, a verbal reference to sexual violence is generally of less impact than a visual depiction.

Further, in the context of a film which is about the evils of child sexual abuse, the scene was highly relevant and justified by context. The scene depicts the true horror of this crime without revealing any visual detail. Accordingly, while the impact of this scene was undeniably high, the majority did not consider this to be a gratuitous, exploitative or offensive depiction or description. Further, the majority considered the depiction and description would not cause offence to a reasonable adult.

The rape scene in the bathroom at approximately 85 minutes was undoubtedly a scene of implied sexual violence which was of high impact. However, it was relevant in the context of the film and represented the low point of Neil's spiral downward and also the point at which he finally realised that he had lost control of his life. There was no nudity or explicit sexual detail and the actual impact of the blows to Neil's face were not seen - rather the aftermath of the blood in the bath was depicted. While rape is a horrific crime, the depiction of rape in this scene was justified by context, and demonstrated both the horror of the crime and the vulnerability of Neil. Accordingly, while the impact of the scene was high, the majority did not consider the depiction to be gratuitous, exploitative or offensive. The majority also did not consider that the depiction was one that offended against the standards of morality, decency and propriety generally accepted by reasonable adults.

The majority concluded that:

- (i) the impact of the film did not exceed high;
- (ii) the sexual violence was implied and justified by context;
- (iii) the film did not contain descriptions or depictions of child sexual abuse or any other exploitative or offensive descriptions or depictions involving a person who is, or appears to be, a child under 18 years.
- (iv) the film did not contain gratuitous, exploitative or offensive depictions of:
 - (i) violence with a very high degree of impact or which are excessively frequent, prolonged or detailed;
 - (ii) cruelty or real violence which are very detailed or which have a high impact; or
 - (iii) sexual violence.

Assisted by the Guidelines, and by its consideration of the matters under item 3(1)(a), (b) and (c) of the Code, the majority determined that the film did not fall within Item 3(1) of the Code and should therefore not be refused classification.

The majority considered that the film was unsuitable for a minor to see and should therefore be classified R 18+.

Minority decision on classification

Whilst noting that the film had significant artistic merit, the minority of the Review Board believed that *Mysterious Skin* contained depictions that could not be accommodated in the R 18+ (Restricted) classification.

Of particular concern to members in the minority were the scenes involving the cruelty toward and sexual abuse of the boy depicted with an intellectual disability, the implied rape scene in the bathroom and the scene involving 15-year-old Neil and a male client, which the minority viewed as a scene of child sexual abuse.

It was the view of the minority that these scenes were of very high impact and could not be accommodated by an R 18+ (Restricted) classification. Further there were a number of scenes of child sexual abuse or offensive depictions of children that could not, in the minority view, be accommodated at R 18+. Whilst there were other scenes of concern, those that follow were of particular concern.

(i) The scene at approximately seven minutes of 8-year-old Neil impliedly masturbating is an offensive depiction. The boy is seen apparently masturbating (off screen), his face is contorted with concentration. He appears to “climax” and the voice-over of his 18-year-old self says: “Juice squirted out of my dick”. The implied masturbation and the descriptive voice-over combine to ensure that the scene is one that is offensive to a reasonable adult.

(ii) At approximately 15 minutes, 8-year-old Neil lies on the floor. The coach puts his head on Neil’s stomach. The voice-over of the coach says: “This is how I

show them how I feel.” The sound of Neil whimpering is then heard. Neil’s 18-year-old voice-over is then heard saying: “It happened. After that the taste of coach’s tongue is seared in my mouth”. A visual of the 8-year-old Neil is shown, he looks distressed. The visuals and the verbal child sexual abuse references combine to ensure that the scene is one that is offensive to a reasonable adult.

(iii) At approximately 19 minutes the scene of Neil physically and sexually abusing a boy with an apparent intellectual disability is depicted. The duration of the scene is approximately two minutes. Neil’s manner and language are aggressive throughout to both the boy with a disability and to Neil’s friend Wendy. Neil is seen tugging the boy along by the hand, ordering the boy to lie on the ground, the boy’s face is shown to be stressed and he is apparently fearful. Neil shouts: “Lie down retard, open your mouth”. Neil shouts at Wendy: “Give me the damn matches”. Neil then lights firecrackers in the mouth of the boy with a disability. The boy’s face is shown bloodied and dirty, with streaks of blood around the boy’s mouth and with pieces of skin flaking off. Neil says he knows what boys like and pulls down the pants of the injured boy. He then impliedly performs fellatio on the boy. The injured boy looks vulnerable and bemused. Wendy, who is watching, looks horrified. The scene is prolonged, detailed and gratuitous. In the minority view it is an offensive depiction of both the boy with a disability and of Neil. In the view of the minority the scene of violence and sexualised violence involving two such young children is of very high impact.

(iv) At approximately 24 minutes is the scene of Neil as a 15-year-old involved in a sex scene with an older male client. The man starts rubbing Neil’s legs. Neil goes to pull down his pants. The man says: “let me”. The man implicitly caresses Neil’s groin area. Neil puts the man’s finger in his (Neil’s) mouth. There is a flashback to the 8-year-old Neil with fruit loops cereal on his head as he and the coach are playing in a precursor to a scene where the coach sexually abuses 8-year-old Neil. 18-year-old Neil screws up his face and says: “I’m gonna come”. Neil’s face is shown as going red, his arms are straining, there are sounds of the man climaxing. At approximately 25 minutes the scene ends as Neil catches his breath. The man then discusses with Neil how the sex that they have had is “not safe” but that Neil is “only a kid”. The minority concluded that the juxtaposition of the 8-year-old Neil and the 18-year-old Neil in a sexualised setting was a scene of child sexual abuse. The impact of the scene was very high. Additionally, the scene was an offensive depiction of a person who is or appears to be under 18.

(v) In a three-minute scene commencing at approximately 81 minutes the violent rape of Neil is shown. The man orders Neil to snort a powder: “Do it”, he shouts “Again” and Neil snorts powder a second time. The man snorts powder and then orders Neil to “strip”. He throws Neil on the bed and hits him. The man says: “What are you waiting for slut? Take it deep.” The man spits on Neil’s face. The man says: “Slut knows what’s coming next”. Neil goes to the bathroom and the man forces open the lock and the door slams back. The man says: “You’re going to get fucked whether you like it or not”. The man grunts, he is beating Neil, blood is shown on Neil’s face. The man says: “Here it comes” and brutally (off screen and impliedly) rapes Neil. Neil’s head is banged against the bath during the scene, his blood starts running down the sides and bottom of the bath, it mixes with the water from the shower that is spraying into Neil’s face. There are sounds of the man’s grunts, sounds of Neil’s head banging on the bath. Neil’s face is shown all bloodied and bruised. Neil

is on the ground outside the man's apartment. He is next shown in his own bathroom, he is shown with blood on his face and T-shirt, his shoulders, arms and chest are all bruised. He removes his trousers and sits on the floor next to the toilet. His face is all bloodied, he holds his clothing to his nose and sniffs. Neil cries. The cumulative impact of the preceding scenes of sexual abuse and violence to Neil as a child, ensure that the extended scene is of very high impact. It is prolonged, detailed and violent.

It was the view of the minority that the depictions outlined above are depictions of persons under 18 that would be offensive to a reasonable adult and the film should be refused classification.

In coming to this determination, the minority took particular note of section 11 (a) of the Act whereby a matter to be considered in classification is

“the standards of morality, decency and propriety generally accepted by reasonable adults”.

It may be that *Mysterious Skin* could be accommodated by this provision within the Act. However, the minority noted that in the application of the Code one requirement is to give effect as far as possible to the principle concerning “the need to take account of community concerns about:

- (i) depictions that condone or incite violence, particularly sexual violence; and
- (ii) the portrayal of persons in a demeaning manner.”

A number of scenes portray child sexual behaviour, child sexual abuse, under-age sex, sexual violence, and in the case of the boy with an intellectual impairment, sexualised violence. The minority view was that such scenes were demeaning. It should be noted that the Guidelines defines “demean” as

“a depiction or description, directly or indirectly sexual in nature, which debases or appears to debase the person or the character depicted.”

It was the minority view that the masturbation scene of 8-year-old Neil was one such scene, as was the scene with Neil as a 15-year-old participating in sex with an older man, whilst experiencing flashbacks to scenes of his sexual abuse as a child.

Further, in the Code it states in 1(c) that films are to be classified RC (Refused Classification) where they

“describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not)”.

It was the view of the minority that the scenes outlined above fit this requirement and, accordingly, the film must be refused classification. It is noted that the test in relation to depictions of persons under 18 years has a lower threshold than that concerning depictions of adults. The test in 1(b) refers to “a reasonable adult” whereas the test in regard to adult persons refers in 1 (a) to “standards of morality, decency and propriety generally accepted by reasonable adults”. Presumably, it would be easier to determine that “a reasonable adult” would find a depiction offensive than to determine that the same depiction would be offensive to “reasonable adults”. The second term indicates a class of persons or possibly even a majority of such persons.

The minority considered the significant artistic merit of the film and its general character as being one that clearly condemns child sexual abuse. However, it was the view of the minority that these considerations did not outweigh the clear requirement to refuse classification to films that contain offensive depictions of persons under 18 or where the cumulative impact exceeds high.

8. Summary

The Review Board, by a majority of 4-2, determined that *Mysterious Skin* should be classified R 18+ with the consumer advice “High-level child sexual abuse themes, High-level sexual violence, Paedophile themes”.

It was the view of the minority that the film contained scenes that could not be accommodated in the R 18+ (Restricted) classification and that it contained depictions of a person under the age of 18 that would be offensive to a reasonable adult and should be refused classification.