—a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence—

This bill substitutes in its place a definition of an "obscene thing". As is evident, an obscene thing includes any explicit representation or detailed description of a sexual act and any pictorial representation tending to solicit partners for a sexual act.

The so-called objective basis for assessing whether or not an act is sexual is said to be ascertainable by determining whether or not the act in question involves (a) masturbation, (b) any act of sado-masochism, or (c) any act of anal, oral or vaginal intercourse, whether alone or with or upon another person, animal, dead body or inanimate object, and includes an attempted or simulated sexual act.

Notwithstanding the desires of the author of this bill to limit and define obscenity with reference to objectively demonstrable acts, the descriptions and representations sought to be covered by the legislation are such that they will nevertheless be discoverable only by reference to a multitude of subjective considerations.

It is open to serious doubt that a workable standard of obscenity can in fact be an "objective standard". In an excellent "Study Paper on Obscenity" prepared for the Law Reform Commission of Canada by Professor Richard G. Fox, the following comments appear at page 3:

There is no tangible or verifiable reality corresponding to the label "obscenity". It is an expression of opinion rather than of fact. It is a value judgment based upon the emotive responses of individuals or groups to stimulation by exposure to tabooed materials. The emotions expressed are usually those of disgust, anger and indignation, but the elicitation of these responses is always relative, subjective and variable—

Professor Fox goes on to note that obscenity is an "inescapably subjective phenomenon." He also notes that one of the difficulties with the epithet "obscene" is that for some it "encompasses popular erotica such as the glamour of a pin-up magazine, while for others it is confined to written or photographic portrayals of bizarre sexual or scatological behaviour." Previous attempts which have been made to identify and categorize under the heading "obscenity" vary in approach. Some focus on format while others tend to examine content. Approaches of this nature usually suffer from the deficiency that they do not identify obscene material in a sufficiently distinct form to warrant their use as a basis for differentiating licit from illicit publications. The provisions of Bill C-211 suffer from this shortcoming as well.

It is quite clear that phrases such as "tending to solicit partners for a sexual act" or "detailed description of a sexual act" are vague enough in terms of the phraseology employed to ensure that subjective considerations will enter into the decision making process and thus render the intent of the legislation nugatory.

Before leaving this issue of the subjective nature of determinations of obscenity one should be aware that section 159(3) is untouched by Bill C-211. That subsection provides that no person shall be convicted of an offence under section 159 if he is able to establish that the "public good was served by the acts that are alleged to constitute the offence, and that the acts alleged did not extend beyond what served the public good". Therefore, notwithstanding the absence of the term "undue exploitation", there seems little reason to believe that such matters as "literary and artistic merit" and "contemporary community standards" will fall by the wayside in the event that Bill C-211 should become law. The bill impliedly retains and endorses both concepts. In the result it seems quite clear that the provisions of Bill C-211, which seek to replace section 159(8), hold little promise of providing a more manageable, more objective, or more effective basis for guiding judicial determinations on the question of obscenity.

Furthermore, if one contrasts the provisions of the proposed subsection (8) against those in the present section 159(8), it is clear that certain matters presently potentially included within the definition of obscenity will conceivably be excluded by the new proposals. Apart from the reference to "sado-masochism" there is no express concern in Bill C-211 for the undue exploitation of violence, crime or horror.

With respect to the provisions contained in Bill C-211 concerning child pornography, this ministry is in agreement with the intent of the proposals but not with its specifics. Bill C-51 which was tabled in the last session of parliament addresses the issue of child pornography in a somewhat different fashion. As hon. members are aware, the proposals in Bill C-51 were the result of the labours of the Standing Committee on Justice and Legal Affairs and those proposals first appear in the committee's unanimous final report to parliament on this subject. I would point out that the hon. member for Provencher was a member of that committee and had a tremendous input into what the report contained.

While the government expressed the caveat, in tabling the legislation, that the provisions of Bill C-51 were to be subject to possible future change as a result of public discussion and debate, it has nevertheless clearly signalled its intention to move in this area with new, provocative and far-reaching legislation. Certainly constructive suggestions for change, even to the proposed provisions of Bill C-51 dealing with obscenity, are welcomed by the government. Such suggestions for change, if meritorious, can easily be incorporated into the legislation at the committee stage once Bill C-51 is reintroduced during this session of the House.

One may also question the degree of punishment which has been selected for the new offence of child pornography contained in clause 2 of Bill C-211. That section creates a dual offence whereby the prosecutor can either proceed by indictment, which results in liability to imprisonment for two years, or on summary conviction, which carries liability only for a fine in the discretion of the court. The punishments which have been selected are therefore, to a certain extent, lesser punishments than those which are presently available under the general obscenity provisions of the Criminal Code.

The indictable offence punishable under the Code by section 165 possesses liability to imprisonment for two years—the same as Bill C-211—while the summary conviction penalty provided for by the Code results in possible liability to impris-