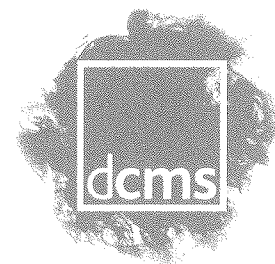


Our Ref: CMS 123775



department for  
culture, media  
and sport

Keir Starmer QC  
Director of Public Prosecutions  
50 Ludgate Hill  
LONDON  
EC4M 7EX

24 August 2009

Dear Keir Starmer QC

I am writing to inform you about an issue that has arisen in relation to the Video Recordings Act 1984 ('the Act'). It has come to light that offences under the Act are unenforceable and, accordingly, all affected current prosecutions under the Act should be discontinued and future prosecutions should not be undertaken. The problem has arisen because the offences under the Act and the related regulations under the Video Recordings (Labelling) Regulations 1985 ('the Regulations') are technical regulations which should have been notified under the Technical Standards Directive 83/189/EEC. The Act and the Regulations have not been notified and the failure to do so renders them unenforceable against individuals.

The Department for Culture, Media and Sport (DCMS) has policy responsibility for the Act and the Regulations and we have sent this letter to the representative associations of local trading standards officers throughout the UK (who conduct the majority of the prosecutions under this Act), and the other prosecution authorities, advising them to discontinue current prosecutions and not to undertake any further prosecutions under the Act until the situation has been rectified.

The detailed reasons why the offences under the Act are unenforceable are as follows. It is clear that sections 9 and 10 of the Act and the Regulations are technical regulations which should have been notified to the European Commission under Article 8(1) of the Technical Standards Directive 83/189/EEC. The European Court of Justice has held (see *CIA Securities C-194/94*) that a breach of this obligation to notify renders the technical

regulations concerned inapplicable so that they are unenforceable against individuals. It is also considered that the other offences in the Act (under sections 11 To 14) constitute technical regulations and that these offences are similarly unenforceable against individuals.

**To reiterate all the offences under the Act are unenforceable because of a failure to notify the Act and the Regulations under the Technical Standards Directive 83/189/EEC. Any existing prosecutions under the Act should not be continued and no new prosecutions should be brought until the issue is rectified.**

In relation to past prosecutions, it is our understanding that there would be no positive obligation on the Government to re-open these; however we would value any comments you may have in this regard.

I should be grateful if you, as prosecuting authorities, would inform my Department of any ongoing prosecutions under the Act and to liaise with my officials on how you propose to deal with such prosecutions and any current appeals. The DCMS contact is Thalia Baldwin (policy), [thalia.baldwin@culture.gsi.gov.uk](mailto:thalia.baldwin@culture.gsi.gov.uk), 020 7211 6435 or Richard Dayle (legal), [richard.dayle@culture.gsi.gov.uk](mailto:richard.dayle@culture.gsi.gov.uk), 020 7211 2235.

DCMS is currently considering how to best rectify the situation. In any case, the consolidated Technical Standards Directive 98/34/EC will require a notification of draft legislation and the observance of a three month standstill period before the new legislation can be brought into force. This will result in an unavoidable gap in the enforceability of the Video Recordings Act 1984. I am particularly concerned that advantage may be taken of this lacuna to flood the market with unclassified DVDs. I therefore ask you to consider carefully what reasons are given to the court in relation to any discontinuations.

The Government is also concerned about the wider impact of the failure to notify criminal offences which are technical regulations under the Technical Standards Directives. In particular, we are concerned that there may be issues of unenforceability of any offence relating to industrially manufactured products which require a prior authorisation before they can be supplied or used. We recommend that you, as prosecuting authorities, consider whether

there are any offences in your respective areas which may be technical regulations that should have been notified under these directives. Cabinet Office Legal Advisers and my office will be happy to assist.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Barbara Follett', written in a cursive style.

**BARBARA FOLLETT MP**  
**Parliamentary Under Secretary**