

RESPONDING TO THE CHALLENGES: RECENT DEVELOPMENTS IN CENSORSHIP POLICY IN NEW ZEALAND

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Abstract

Advances in technology over the past decade have created new challenges for New Zealand censorship authorities. In 2002 an article in this journal outlined some of those challenges and recommended changes to address them. In 2005 Parliament made significant amendments to New Zealand's censorship laws. This paper examines those amendments and considers them in light of the earlier recommendations.

INTRODUCTION

In 2002 I wrote a paper, published in this journal, titled "Censorship in New Zealand: The Policy Challenges of New Technology" (Wilson 2002). In that paper I highlighted some of the challenges faced by those who make decisions under, or enforce, censorship law. I also recommended that a number of censorship issues be further considered in light of modern technology, particularly the advent of DVDs and widespread private Internet access. In the four years since the paper was published censorship laws, especially as they relate to child pornography, have undergone considerable change. Penalties have been massively increased, some classification criteria have been made more precise and the application of censorship law to the Internet has been clarified. This article examines how the legislation has changed and how these changes have addressed earlier concerns about censorship law.

The 2002 article raised the following issues for consideration:

- whether the law required amendment in light of changes in technology
- whether the penalties for censorship offences were adequate
- whether the current offence regime reflected the nature of censorship offending, given the widespread use of the Internet
- whether child pornography should be treated differently from other types of objectionable material
- whether depictions of rape or torture should be treated differently from other types of objectionable material

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- whether additional investigative powers were required to detect censorship offending
- whether an extension of investigative powers would be desirable and proportionate to the problem
- whether Internet service providers (ISPs) have any liability for content to which they provide access
- the status of new types of material, such as live web broadcasts and streaming video.

This article outlines how those issues were addressed and the other significant features of recent censorship law changes.

In December 2003, the Films, Videos, and Publications Classification Amendment Bill was introduced to Parliament by the Minister of Justice. In March 2004 it was referred to the Government Administration Committee, which had previously inquired into the operation of the principal Act.² The Committee received 30 submissions and heard evidence from 18 witnesses. It appointed the Ministry of Justice, Department of Internal Affairs and Office of Film and Literature Classification as advisers, representing the agencies with policy, enforcement and classification responsibilities respectively. The committee reported back the Bill on 30 August 2004 and recommended some important changes to it.

ADEQUACY OF PENALTIES

Historically, penalties for censorship offending had been low. The maximum penalty for possession of objectionable material was a \$2,000 fine. Under the same legislation, the maximum penalty for selling a legal publication that was not correctly labelled was a fine of \$3,000. The penalty for distributing or supplying objectionable material, knowing that it was objectionable (the most serious offence under the Act), was a maximum of one year's imprisonment. There had been calls for change, to toughen penalties and align them with overseas jurisdictions (ECPAT 2003, Department of Internal Affairs 2002a).

In March 2003 the Minister of Justice stated that the penalties were "clearly inadequate and fail to reflect the fact that the production of child pornography involves the actual abuse of children". The new penalties were to be a maximum of 10 years' imprisonment for supply and distribution of child pornography and a maximum of two years' imprisonment for possession of child pornography (Goff 2003). These penalties would apply only in cases where the offender knew, or had reasonable cause to believe, that the publications were objectionable. In practice, the nature of the images over which people are charged is usually clearly objectionable and their status is seldom challenged.

2 Films, Videos and Publications Classification Act 1993.

The select committee heard a submission from child abuse campaigners Stop Demand Foundation and ECPAT advocating a higher penalty for possession offences. These groups argued that the possession offence should be treated as seriously as the supply offence since the demand for child pornography led to child abuse. Although the select committee did not recommend that the penalties be amended, lobbying of Ministers and MPs by the Stop Demand Foundation led to a late revision of the possession penalty (Stop Demand Foundation 2005). The maximum penalty was increased to five years' imprisonment, a significant increase over the original \$2,000 fine.

SENTENCING SINCE THE PASSAGE OF THE BILL

Since the Bill was passed the Department of Internal Affairs has prosecuted 41 people for offences involving objectionable material, and 20 have been imprisoned as of 15 December 2006. Though an increase on previous years, the proportion being imprisoned (49%) remains relatively low. This is because the courts are still sentencing for some offences committed before the law change and may only sentence in accordance with the law at the time of offending.³ Subsequent years are likely to see a significant increase in penalties across the board since all historical offences will soon have been dealt with. Seventeen people have been prosecuted for offences committed since the Act was amended and 13 of them have been imprisoned. The average prison sentence imposed for offences committed since the law changed is 16 months for those convicted of distribution offences and seven months for those convicted solely on possession charges (personal correspondence with the Department of Internal Affairs 2006).

It appears that even before the enactment of the Bill, courts were beginning to sentence more harshly. In the years 1996 to 2002 only 8% of people prosecuted for offences involving objectionable material were imprisoned. In 2003 and 2004, following the announcement of the proposal to increase penalties and widespread condemnation of child pornography, 33% of offenders were imprisoned (Department of Internal Affairs 2004).

LAW CHANGES TO REFLECT CHANGING TECHNOLOGY

The maximum penalty for supply and distribution of objectionable material was increased to 10 years' imprisonment. The definition of the offence of distribution was brought up to date to take account of developments in technology and patterns of offending. The Act originally had required elements of monetary or material gain in order to prove a distribution charge. However, New Zealand experience showed that very few "traders" in objectionable material aimed to do anything other than increase the size, or range, of their collection of objectionable material by exchanges with other "traders".

3 s. 6(1), Sentencing Act 2002.

The Act was amended so that “distribution” included delivering, giving, offering or providing access to a publication. Many offenders send objectionable material to others through chat rooms, in return for new material. Others operate passive distribution systems such as “file-servers” or “peer-to-peer” networks where folders on computers can be opened by other people to take material without the need for the possessor of the material to actively transmit it. Peer-to-peer networks appear to be growing in popularity among offenders (Ferraro and Casey 2005, Koontz 2003). The Department of Internal Affairs found that between profiling research carried out in 2004 and 2005 there had been a distinct movement away from chat rooms towards peer-to-peer applications. The most recent profiling report showed that 60% of recent convictions involved peer-to-peer applications (Wilson and Andrews 2004, Sullivan 2005). A smaller number of offenders posted images or links to images in newsgroups, or operated websites from which people could download material. These activities were caught by the broader definition of “distribution”, particularly in terms of providing access to objectionable material.

Some submitters to the select committee, including ISPs and the Internet Society of New Zealand, were concerned that “providing access to” objectionable material could be taken to apply to businesses that provide the networks through which material is distributed, such as ISPs and postal services. The Bill was amended to specifically exclude such services.

Although the courts had recognised computer files as “publications” within the meaning of the Act, the definition was amended to make specific reference to such files.⁴ Electronic files comprised 73% of all the publications classified as objectionable by the Office of Film and Literature Classification in the 2004/05 financial year (Office of Film and Literature Classification 2005a).

WHETHER SOME OBJECTIONABLE MATERIAL SHOULD BE TREATED DIFFERENTLY

Much of the debate over changing New Zealand’s censorship laws has focused on child pornography. It was a natural focus since few subjects evoke such universal revulsion as child sex abuse. Most censorship law enforcement activity focuses on child pornography because the making of such material inevitably involves the sexual abuse of children.

New Zealand censorship laws, historically, had not differentiated between types of objectionable material in setting penalties. Some submissions to the select committee requested that the higher penalties should apply only to child pornography and not to other types of objectionable material,⁵ while another submission argued that only

⁴ *Goodin v Department of Internal Affairs*, 24 July 2002 (AP 11/01).

⁵ Submissions of Stephen Bell and the New Zealand Law Society.

material that was a recording of an actual crime should be considered objectionable and subject to prosecution.⁶ However, the select committee rejected this approach in favour of continuing New Zealand's unified censorship approach with one set of classification criteria for all publications. The committee explained:

We consider that creating distinct child pornography offences would detract from this approach and may introduce unnecessary complexity to the law. In our view it would be wrong in principle for other "extreme" objectionable material to be treated as significantly less serious. (Government Administration Committee 2005:7-8)

Though it did not support a separate offence regime for child pornography, the committee considered that the legislation should specifically denounce such material. It supported the Bill's treatment of child pornography as an aggravating factor in sentencing. Under this provision, all offences involving objectionable material attract the same maximum penalties, but those offences involving child pornography will be likely to increase the sentence, up to the same maximum.

ADDITIONAL SEARCH POWERS

Under the 1993 Act, the only offences for which a search warrant was available were those involving making, supplying or exhibiting objectionable material. These offences were punishable by imprisonment, which is usually regarded as the appropriate threshold for a search warrant to be available. The new offence of possession of objectionable material, knowing it to be objectionable, is punishable by a term of imprisonment and, as such, qualifies for search warrant powers. The 2005 amendment to the Act introduced a more stringent and complex process for obtaining a search warrant to investigate this offence than for most other criminal offences. The process requires the applicant to satisfy a judge that there are reasonable grounds for believing that material being used to commit an offence, or evidence of the offence, is located in a particular place. In addition to applying this usual standard for the issue of search warrants, the judge must have regard to:

- the nature and seriousness of the alleged offending
- any information provided by the applicant about the importance, to the investigation of the offence, of the issue of a warrant
- any other matter the judge considers relevant.

The provisions also require the applicant to apply to a District Court Judge, if one is available, rather than a Justice of the Peace, Community Magistrate, or Registrar. These other judicial officers may issue search warrants for almost any other offence under general criminal law, or under censorship law, but can only issue search warrants to

6 Submission of Libertarianz.

investigate cases of possession of objectionable material if no judge is available. The preference for having judges issue search warrants reflects a conservative approach by the government to granting new search powers that will mainly apply to new technology such as digital images.

Ministry of Justice papers on the amendment bill set out the rationale for the more stringent search warrant provisions. The Ministry noted that the majority of offences to which a search warrant already applied involved the importation, distribution or public exhibition of objectionable material. In such circumstances, the offender's expectation of "privacy" was greatly reduced by the public nature of the activity. Accordingly, fewer restrictions were required for the exercise of these search powers. However, the Ministry considered that possession offences involved activity that does not bring an individual's actions within the public arena and, therefore, greater restriction should be placed on obtaining a search warrant for these offences.

Knowingly supplying or exhibiting age-restricted material to an under-age person could also attract a maximum three-month term of imprisonment, but the Act did not provide for the issuing of search warrants for the investigation of this offence. The Department of Internal Affairs sought an amendment to provide for such search warrants after it had been unable to investigate cases in which adults sent sexually explicit images to children and young people to groom them for future sexual offending. The select committee agreed to the request, but applied the same stringent process for obtaining search warrants as it had for warrants in respect of suspected possession of objectionable material. This requirement was to ensure that search powers are not used "where an intrusion would be clearly disproportionate to the offending" (Government Administration Committee 2005:10).

NEW ZEALAND'S LAW IN THE INTERNATIONAL CONTEXT

Amendments to the offence and search warrant provisions place New Zealand at the forefront of efforts to combat child pornography and other objectionable material. The maximum penalties for offences involving this material are similar to those in the United Kingdom, Australia, Canada, Ireland and the United States.

A recent international report on child pornography laws rated New Zealand's legislative regime highly, faulting it only for not requiring mandatory reporting of offences by ISPs. Only six countries in the world have this requirement and thereby meet all of the standards set by the report's authors (International Centre for Missing and Exploited Children 2006). A requirement to report crime is not a normal feature of New Zealand criminal law. However, ISPs cannot lawfully retain objectionable material hosted on their servers if they are aware of its existence since

they would be committing a possession offence.⁷ The Department of Internal Affairs (2002b) reports that ISPs willingly remove objectionable content found on their servers. Given the growing number of child pornography offenders using peer-to-peer applications (which bypass ISP servers) to obtain objectionable material, it is questionable how much difference a mandatory reporting requirement would make in the New Zealand context.

New Zealand's child pornography laws are broader than in many other countries and enable a wide variety of material that promotes or supports child sexual abuse to be classified as objectionable. This includes works of fiction, cartoons, computer-generated ("morphed" or "pseudo") images and images depicting sexualised nudity.

DEFINITION OF OBJECTIONABLE

Central to New Zealand's censorship legislation is the definition of what is "objectionable" or banned. Section 3(1) of the Films, Videos, and Publications Classification Act 1993 provides that:

... a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good.

Under section 3(2) of the Act, publications are automatically objectionable if they promote or support, or tend to promote or support:

- the sexual exploitation of children or young persons
- sexual violence
- sexual conduct with the body of a dead person
- the use of urine or excrement in degrading, dehumanising, or sexual conduct
- bestiality
- acts of torture, extreme violence or extreme cruelty.

Publications that do not promote or support any of the matters listed above may be classified as objectionable or restricted, depending on the extent, manner and degree to which they:

- deal with matters such as torture, sexual violence or child sex
- degrade, demean or dehumanise any person
- promote or encourage criminal acts or acts of terrorism
- represent a particular class of persons as inferior to others by reason of a prohibited ground for discrimination.

7 Case law has determined that the offence of possessing objectionable material has two elements – knowledge that the material is in one's possession and the ability to control the material.

THE *LIVING WORD* CASE AND LIMITS ON CENSORSHIP

The application and limits of the definition of “objectionable” have been a matter of considerable debate since the Court of Appeal decision in the so-called *Living Word* case.⁸ The case involved two videos imported from the United States by Living Word Distributors Limited. The videos were titled *Gay Rights/Special Rights: Inside the Homosexual Agenda* and *AIDS: What You Haven’t Been Told*. The videos opposed awarding equal rights to gay, lesbian, bisexual and transgendered individuals, and blamed homosexuality for the spread of HIV and AIDS.

The Office of Film and Literature Classification classified the videos as R18. That classification was challenged by the Wellington-based Human Rights Action Group, which sought to have the videos banned. The Film and Literature Board of Review classified the videos as objectionable, reasoning that they dealt with “matters such as sex” (in the form of sexual orientation and sexual behaviour) and represented particular classes of persons as inferior to others by reason of a prohibited ground for discrimination. Living Word Distributors Limited appealed to the High Court, which upheld the legal process followed by the Board. The distributor then appealed the High Court decision to the Court of Appeal. The Court of Appeal took a different view and determined that:

The words “matters such as” in context are both expanding and limiting. They expand the qualifying content beyond a bare focus on one of the five categories specified. But the expression “such as” is narrower than “includes”, which was the term used in defining “indecent” in the repealed Indecent Publications Act 1963. Given the similarity of the content description in the successive statutes, “such as” was a deliberate departure from the unrestricting “includes”.

The words used in s3 limit the qualifying publications to those that can fairly be described as dealing with matters of the kinds listed. In that regard, too, the collocation of words “sex, horror, crime, cruelty or violence”, as the matters dealt with, tends to point to activity rather than to the expression of opinion or attitude.

The Court considered that the subject matter provision was intended to limit the reach of censorship laws to activities involving sex, horror, crime, cruelty or violence. It called this the “subject matter gateway”. The decision threw doubt on the ability of censorship authorities to classify some types of material that did not depict activity but were likely to be injurious to the public good. Examples included:

- sexualised images of naked children where no sexual activity was depicted
- covert pictures of naked adults

8 *Living Word Distributors v Human Rights Action Group (Wellington)* [2000] 3 NZLR 570.

- material that represents a particular class of persons as inferior to others by reason of a prohibited ground for discrimination but did not depict activities involving sex, horror, crime, cruelty or violence (so-called “hate speech”)
- offensive language
- dangerous imitable stunts
- self-harming behaviour.

In order to address any possible deficiency in the coverage of censorship law, the government proposed to specifically address each of the examples listed above in preference to broadening the subject matter gateway. Covert filming and hate speech were expressly excluded from the ambit of censorship law (Minister of Justice 2004). Both issues were referred to the Law Commission for further study. In November 2006 the Crimes (Intimate Covert Filming) Amendment Bill was enacted to outlaw intimate covert filming in any situation in which a person had a reasonable expectation of privacy.⁹ The Bill amended the Crimes Act 1961 to create offences for making, distributing or possessing “intimate visual recordings”. The Government Administration Committee began an inquiry into hate speech in 2004 but it has not yet reported its findings.

CHILD NUDITY

The Films, Videos, and Publications Classification Amendment Bill specified that child nudity was a “matter such as sex”, which therefore fell into the subject matter gateway of material that could be restricted or banned. One submission opposed this move on the ground that it was too open to subjective interpretation and “risks trapping innocent family pictures”.¹⁰ However, the image in question has to be “reasonably capable of being regarded as sexual in nature” to be considered a matter of sex under the law. A classification decision relying on this provision would have to show how the image could be reasonably regarded as sexual in nature and, as with any other decision, the image could be reviewed and reclassified by the Film and Literature Board of Review.

NEW GROUNDS FOR RESTRICTION

In order to address concerns about other types of harmful material not covered by the Act, following the *Living Word* decision the select committee recommended an amendment to allow the Classification Office to restrict, but not ban, specific material to prevent harm to children and young people. The material included portrayals of suicide, body modifications, dangerous imitable stunts, reckless physical behaviour,

⁹ Crimes (Intimate Covert Filming) Amendment Bill.

¹⁰ Submission of Stephen Bell.

images that are degrading or demeaning, and use of offensive language. For language to be considered offensive it had to be highly offensive to the public in general such that its availability was likely to cause serious harm to young people (Ministry of Justice 2004b).

Some MPs and organisations opposed these amendments, arguing that they were a covert prohibition on purported “hate speech”. ACT MP Stephen Franks argued that the new provisions would enable censors to ban speech that might cause someone to feel demeaned or degraded (Franks 2005). The Society for the Promotion of Community Standards, a small conservative lobby group and frequent critic of the Classification Office, argued that the Office would “have the power to classify publications as hate speech” (SPCS 2005). In fact, the legislation preserved the right to free speech by focusing on the depiction of activities rather than the expression of opinion. For language to be deemed offensive it had to be highly offensive to the general public, rather than to a section of the public or individuals. The amendment targeted swear words generally accepted as being highly offensive rather than words that might cause someone to take offence. The opponents of the provisions appear to have either misunderstood or overlooked this part of the Bill.

CHANGES TO THE LIST OF MATERIAL DEEMED AUTOMATICALLY OBJECTIONABLE

The Bill proposed the removal of the provision that deemed as objectionable publications promoting the use of urine or excrement in degrading, dehumanising or sexual conduct (section 3(2)(d)). The provision would, instead, be a matter to be given “particular weight” when classifying a publication under section 3(3) of the Act. The policy rationale for the amendment was that the matter described was not a criminal offence, unlike all other matters deemed to be automatically objectionable by section 3(2). It was difficult to place it in the same category as material that promoted rape, torture or child sex abuse. The provision had not featured in the original proposal for censorship legislation released for comment in 1990 by the Minister of Justice but was present in the Films, Videos and Publications Classification Bill introduced to Parliament in 1992 (Minister of Justice 1990).

The Government was criticised for proposing to amend section 3(2)(d). New Zealand MP Peter Brown asked “who does the Minister believe will benefit from this type of legislation? Who will be rubbing their hands with glee – the weirdos or wonder boys, or the average New Zealander? Does the Minister agree that the average New Zealander will be appalled by this amendment to the legislation?”¹¹

11 Questions for Oral Answer [11514], Wednesday, March 3, 2004.

The select committee accepted the policy rationale for the amendment but reported that “we consider it in the public interest for a publication to be deemed objectionable if it contains a matter or matters in the existing section 3(2)(d)” (Government Administration Committee 2005:6). There was no opposition to the committee’s recommendation and section 3(2)(d) remained unchanged. The retention of the provision has had at least one notable result. In 2005 the Police investigated officers who were alleged to have downloaded objectionable material on Police computers. The Police subsequently submitted 13 of those images to the Office of Film and Literature Classification. Five of the images were classified as objectionable because they promoted or supported the use of urine or excrement in sexual conduct.

REDUCING THE WORKLOAD IMPACT OF NEW MEDIUMS ON THE CLASSIFICATION OFFICE

In my previous paper I outlined the significant addition to the workload of the Office of Film and Literature Classification brought about by the advent of DVDs. The Films, Videos, and Publications Classification Regulations 1994 required the Office to classify every version of a film as a new publication if it were not identical to an already-classified version. Because DVDs usually contain additional material, such as deleted scenes, directors’ commentaries, theatrical trailers and still images, many had to be classified again even though the additional material was innocuous and unlikely to change the original classification. The regulations were amended shortly after the amendment Bill was passed to enable any subsequent version of a film to be given the same classification as the version originally classified if the additional material would not result in it being given a higher classification (Ministry of Justice 2004a). This “cross-classification” is carried out by the labelling body, an industry organisation authorised by the Minister of Internal Affairs to rate unrestricted films, and issue classification labels.¹² Since the law was amended the labelling body has “cross-classified” 970 videos and DVDs (as at 15 December 2006) that would otherwise have to have been viewed and classified by the Classification Office (personal correspondence with the Film and Video Labelling Body Inc 2007). This change saved the Classification Office time and saved submitters money, since cross-classification costs \$27 while a DVD classification costs \$1100.

CLASSIFICATION OF COMPUTER GAMES

The Classification Office currently classifies computer games that are likely to be restricted or banned. They are deemed to be films under the Classification Act. Unlike other types of films, such as videos, DVDs or cinematographic films, unrestricted video games are not required to be labelled before they are supplied to the public.

12 The current labelling body is the Film and Video Labelling Body Inc, based in Auckland.

Section 8(1)(q) of the Act exempts them from labelling. As a result, approximately 90% of all video games available in New Zealand carry foreign, usually Australian, classification labels. Research conducted by the Classification Office found that the presence of foreign rating labels on unrestricted computer games was a source of confusion for the public (Office of Film and Literature Classification and UMR Research 2005).

The Office considers that unrestricted computer games should also be brought into the unified labelling regime to reduce public, and particularly parental, confusion (Office of Film and Literature Classification 2005b). Unrestricted video games are the only type of moving images under the jurisdiction of the Classification Office that do not have to be labelled prior to being released to the public. The 2005 amendments to the Act required non-film publications restricted by the Office to carry classification labels. These amendments aimed, in part, to ensure that the classification regime was up to date and able to cover emerging technology. It is curious that unrestricted video games, which have existed as an entertainment medium since before the 1993 Act was passed, remain beyond the reach of censorship laws. Remediating this anomaly would lead to a more comprehensive and cohesive system of classification and provision of consumer information.

CONCLUSION

The recent changes to censorship law in New Zealand were described by the Chief Censor as heralding a “fresh new era for New Zealand’s classification system” (Office of Film and Literature Classification 2005a:5). They mark a significant toughening of laws against objectionable material and bring clarity and certainty to classification provisions that were thrown into doubt by the *Living Word* decision.

It is difficult for legislation to keep pace with the rapidly changing nature of technology, since law-making is usually a slow and deliberate process. The recent amendments to New Zealand’s censorship law have enabled it to keep pace with the changing nature of “publications”, especially those produced and disseminated on the Internet. It has been amended to clarify the boundaries of censorship, in response to the doubts raised by the *Living Word* decision. The law has introduced more flexibility in dealing with DVD versions of already classified films. As the moves to address hate speech and intimate covert filming show, attempts to regulate forms of communication media are likely to be ongoing. Those charged with developing and implementing censorship policy will need to continue to monitor the environment in which they operate to ensure their practices, and the law under which they operate, take into account the changing nature of technology.

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