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Public Submission on the Films, Videos, and Publications Classification Amendment Bill

List of contents

Introduction

A) The Amendment Bill

1. Penalties for Possessing 'Objectionable' Material

B) Context and Background

1. Purpose of this Submission
2. Questioning the Impartiality of the OFLC
3. Cultural Context: Public Opinion of Restricted Films on Television
4. The Purpose of Censorship

C) Amendment of Regulations

1. The 'Cross-rating' of Overseas Classifications
2. Cross-rating Features with DVD Extras (urgent)
3. The Rating of Trailers
4. Classification of Television Programs

D) The Future of Censorship in NZ

1. Cross-rating '18' and the Streamlining of the OFLC

E) Summary

1. Overview of Amendments

Introduction

Thank you for the opportunity to make a submission on the proposed Amendment Bill.

We make this submission in our capacity as a retail video library, and as a representative of our colleague libraries in the other main centres, dedicated to artistic, historical, indigenous and international culture.

While we are generally supportive of the proposed amendments, we have a single point of issue, presented in Section A of this document, that relates specifically to the proposed Bill.

We are thus far relieved that many of the recommendations that we opposed in the Report of the Government Administration Committee (Report I.5A, Mar 2003) have not been incorporated into the Bill.

However it appears that it is the Regulations pertaining to the Act, and not the Act itself, that affects the daily operation of our business and that of the film and video industry at large. It is the Regulations, and their interpretation, that have been patently inadequate in addressing the needs of the industry and the will of the film-going public.

The remaining sections are dedicated to amendments sought in the drafting of the Regulations that accompany the amendment of the Act.

Section (A) The Amendment Bill

1) Penalties for possession of 'objectionable' publications

Clause 29(1) of the Amendment Bill inserts new section 131A, that "create[s] a new offence, punishable up to two years imprisonment, of possession of an objectionable publication, knowing or having reasonable cause to believe that it is objectionable."

We wish to express our concern that the meaning of "objectionable publication" extends to those publications (films) that have been certified by the OFLC as "objectionable" with qualifying provisions, such as "objectionable [unless] restricted for the purpose of study in a tertiary institution" or "objectionable [unless] for the purpose of exhibition in a [specified] film festival.

It is our understanding that this new offence has been created largely to crack down on child and illicit pornography, and not controversial legitimate feature films that have been sanctioned by the OFLC to have some artistic merit.

Such is the shape and fluidity of the market, that it would not be unusual for an individual film enthusiast to procure "objectionable" publications well before they are certified as such by the OFLC. The publications in question are not procured via the 'black market', but are readily available 'over-the-counter' at main street retailers and e-tail websites in foreign territories like the UK.

In the case of restricting use to tertiary institutions, it would seem problematic that a film can be freely exhibited in an 'academic' context, but a member of the general public in possession of the same film could be subject to a two year jail term, as prescribed in the proposed Amendment.

While we acknowledge that the double standard imposed in such cases may be a practical compromise, we would like to point out that in respect of the market reality, the law should provide for a distinction between film publications that are outright 'objectionable' (or banned) and publications that are 'objectionable - with a qualifying provision', especially those that have been formally classified by a recognised overseas classification authority, such as the BBFC.

Section (B) Context and Background

Vision Statement of the OFLC (Annual Report 2003)

“A society which fairly balances the need to protect and encourage freedom of expression and the need to limit any social harm caused by the availability of material which is injurious to the public good.”

1. Purpose of this Submission

The express aim of this submission is to bring the Government’s attention to the fact that the film and video industry in **needlessly over-regulated** when considered in the context of the prevailing media environment.

The simple fact is that too much material is currently obliged by law to pass through the OFLC. In the areas we’ve highlighted, the process of classification is costly, superfluous, ineffectual, and ultimately disadvantages the consumer.

This submission proposes initiatives that we believe will restore commonsense to the Regulations without jeopardizing or compromising the above “Vision Statement” of the OFLC.

2. Questioning the Impartiality of the Chief Censor

We respect the Chief Censor's integrity and his rigorous administration of the law as written. However, certain aspects of the legislation are faulty.

That they are faulty is not necessarily a cause for concern for the Chief Censor if it does not affect his operation. In his annual report he goes to some length to raise issues which *are* of concern to his office and its operation. Many of the changes he suggests are understandable and have our endorsement.

As evidenced by the Amendment Bill before us, he has the authority and influence to ensure that these issues are accommodated in any changes made to the legislation.

It is perhaps understandable that the Report of the Government Administration Committee was dominated by the voice of the Chief Censor and the OFLC, however, it was symptomatic of an acute bias that *our* extensive submission to the Committee was entirely ignored.

Our trade in the intervening years has found it very difficult to work with rigid legislation that does not consider the profoundly altered media and cultural landscape. We have found it even more difficult for our voice to be heard in its consistent call for change.

As retailers, we regularly have had to explain to customers why they cannot access certain films locally because of anomalies in the law. We are in direct service to the public of New Zealand, and wish to ensure change in their interest as well as our own.

By contrast, we would assert that the OFLC are accountable chiefly to the edicts of the Government of New Zealand and not directly to the public of New Zealand.

It is clear that the "purpose of this submission" (Section B.1) challenges the operational scope of the OFLC. We feel aware that it is not 'politically correct' to do so and it must be said that, historically, legislative change that has come from the industry 'coal face' has traditionally met with the approval of the establishment (ie. the Chief Censor of the time) in order to be sanctioned by policy makers.

We sincerely trust that this time round, our relatively small but authoritative voice is afforded comparable weight to the views of the Chief Censor.

3. Cultural Context: Public Opinion of Restricted Films on Television

The clearest indicator available of general public opinion with regard to contemporary 'standards' is surely through the complaints mechanism operated by the Broadcasting Standards Authority. The mechanism functions as a reasonable gauge of the temperament of the New Zealand viewing public.

Though specifically governed by the Broadcasting Act, it is prudent to consider this information for the purposes of the Film, Videos and Publications Act, as feature films are now customarily broadcast as identical (ie. unexpurgated) versions to those released theatrically and on video. Hence, we are for the first time in the evolution of electronic media able to compare 'apples' with 'apples'.

We have been informed by TVNZ programming that they aired approximately 700 feature films on TV2 alone for the period of July 2002 to June 2003. While the figures were not available across the other three channels, we could safely double that figure for a total. An estimated 30% of those films are classified by the OFLC as restricted.

For the same period, there were a mere six complaints laid with the Broadcasting Standards Authority¹.

None of the complaints pertained to the content *per se*, but were instead based on what the complainants felt were inappropriate screening times that may expose the films to an unsuitably young audience.

None of the complaints were upheld by the BSA, except in respect of one criterion for the film, "Scream".²

The TV3 network did confirm for us that their office received two complaints pertaining to feature films (incl. "Scream") in 2002, and none at all in 2003!

This evidence would seem to support the idea that most people are not phased by sexually frank, violent or profane material **if** it is marked appropriately for adult audiences. They clearly do not see this level of material as being "injurious to the public good". And yet in many cases the exposure of such material well exceeds the exposure gained via the tightly regulated theatrical and home video platforms.

A significant number of the broadcasted films were subject to full censorship compliance costs at the OFLC. Whether or not their classifications were imposed by the OFLC or the BBFC or the FCBA, and whether their classification was an

¹ Source: The Broadcasting Standards Authority website, www.bsa.govt.nz

² Ref No: 2002-120, upheld in respect of a breach of Standard 9 of the Television Code, requiring broadcasters to consider the interests of child viewers during their normally accepted viewing times.

M, or R16, or R18 becomes all but irrelevant in the context of broadcasting and in the minds of the general public.

This information is telling and key to the principle of this submission. It gives us a clear cultural context from which to assess the appropriateness of the function of the OFLC.

4. The Purpose of Censorship

Given the profound technological and cultural changes that have occurred in the decade since the Act was last revised, it was unfortunate that the Government Administration Committee did not take the opportunity to inquire into the fundamental purpose of censorship.

We can presume that this is because it was not considered necessary, and therefore not raised, by the main benefactor of the inquiry, the OFLC.

Can we remind the Committee that the mandate of the Act, and thence the function of the OFLC should be reflect the will of Government, which in turn should reflect the society to which it serves. Therefore the interests of the OFLC should reflect, and not preside over, the will of the people.

The average New Zealander would probably concur that censorship in the modern age is principally imposed to:

- a) protect minors from unsuitable material
- b) to protect society from “objectionable” material
- c) to provide consumer guidance.

Serving the purpose: The Labelling Body and the OFLC

The legislation clearly sets up two bodies, The Office of Film and Literature Classification and the Film and Video Labelling Body for the governance of these objectives. However, we believe that there is a prevailing imbalance in the designated roles of the FVLB and the OFLC.

While the OFLC is instrumental in meeting objective (b), and shares its capacity with the FVLB for objective (c), it is the Labelling Body that emerges as the more suitable body to ensure that objective (a) is carried out.

In most cases it is a mere formality to protect minors from unsuitable material. If it is treated as anything more than a formality, it inevitably impinges on the viewing rights of adults. The law should provide for the protection of minors without the effect of treating adults like children.

Evidence contained in this submission (Section B3) qualify the preposition that New Zealanders are not concerned about ‘adult’ content if it is marked appropriately for adult audiences. The Labelling Body are in the business of ‘marking appropriately’. What follows deserves to be left up to the consumer.

Section (C) Amendment of Regulations

1. The 'Cross-rating' of Overseas Classifications

As the **cornerstone argument** of this submission, we feel it that it is imperative that Regulations 9 and 12 of the Act be amended to allow The Film & Video Labelling Body (FVLB) to assign a rating or classification to (or 'cross-rate') those films classified as "15" by the BBFC in the UK.

That 'rating' would be an equivalent existing New Zealand classification – either an "M" (as was customary practise between 1987 and 1999) or an "R" (aka "RP16"): Restricted to persons 16 years of age and over unless accompanied by a parent or guardian.

Further to this we would strongly recommend that provision be made to allow the Labelling Body to 'cross-rate' film publications classified as MA (15+) by the FCBA in Australia to the NZ equivalent, "R" (aka "RP16").

In practical terms, we ask that all films that have been previously classified by a recognized OCA (overseas classification authority) as not higher than a restriction to persons of 15 years and over be made available to mature film audiences in NZ without having to go through a superfluous and exorbitant (re)classification process at the OFLC.

The Labelling Body had been 'cross-rating' films classified as BBFC "15" to the NZ equivalent ("M") from 1987 until 1999, when the regulations governing this practice was 're-interpreted' by the new Chief Film Censor. Specifically, he stressed that the BBFC 15 certificate, unlike the NZ (and Australian) 'M', was a *restriction*, and not a recommendation, and therefore could not condone the practice of such 'cross-rating' as prescribed by the law.

We challenged this 'interpretation' in correspondence to the Chief Censor in August of 2000, expressing that it had a negative impact on our business and consumer choice.

In his correspondence of 16 Oct 2000, Mr. Hastings suggested that "the way forward would be to seek an amendment to the regulations".

Unfortunately, the amendment we sought was apparently not supported by the Chief Censor on evidence of his comment in Recommendation 19 of the Report (I.5A), where he stated that "the threshold for the submission of films to the OFLC be lowered from Australian 'MA' to 'M'."

We regard this suggestion as alarmist and untenable, and contrary to all indicators that consider the global evolution and local media and cultural environment we have outlined extensively in this submission.

The Chief Film Censor asserts in the Report that the statutes of the Australian and English classification systems differ to those operating in New Zealand. We are dismissive of that argument on the grounds that any differences are entirely negligible when considered in the practical environment under which the statutes must operate.

We fear that Mr. Hastings comments may instead indicate that he does not support a change to “raise the threshold” because it would result in a reduction of remittances to his office. Simply put, it is not in the interest of the OFLC for this regulation to be amended, and therefore I do not believe the OFLC or the Chief Film Censor to be necessarily **impartial**.

We understand that both of these recommendations are rigorously supported by the FVLB.

In summation, we purport that there is no evidence whatsoever that films that have been classified / rated as ‘15’ or MA (15+) in their respective overseas territories are a potential source of “injury to the public good”.

Therefore, we believe strongly that it is a waste of resources and indeed inappropriate for them to be subject to mandatory examination at the OFLC.

Benefits at a glance

- Offer much greater freedom of choice to the consumer.
- Encourages spending within NZ, increasing prosperity and tax take.
- Promote a leaner and much more efficient OFLC.
- Reduces the burden of ‘fee-waivered’ publications at the OFLC
- Reduces obligations to remit previously broadcast television programs
- Congruent with contemporary media and cultural trends
- Uphold a fundamental function of censorship – to protect minors from unsuitable material.

2. The 'cross-rating' of features with DVD extras

It is now customary (and often obligatory) for DVD editions of films to include extra material, which in some cases can run well in excess of the running time of the main feature.

We believe that the Labelling Body should not be required to remit DVDs to the OFLC in the instance where the extra material consists of either **trailers**, **interviews** or **documentary** material.

Regulation 18 is unworkable

Pre-dating the advent of the DVD format by some years, the current Regulations make no provision for the inclusion of extra material on DVD editions of "main features" that have been previously classified by the OFLC. This is because the governing regulation (Regulation 18) is erroneous in conception, and faulty in application.

It is in fact so faulty that Labelling Body have had no choice but to regularly forgo compliance with the regulation in order to practically serve the industry and the demands that the ubiquitous DVD format has placed on them. Why this issue has not been addressed as a matter of urgency is a mystery.

Regulation 18(2) On receiving an application under subclause (1) of this regulation, the labelling body, if it is satisfied that the film in respect of which the application is made is identical in content with the film in respect of which the label was originally issued, shall, on payment of the fee set by the labeling body for such application, issue such number of copies of that label as may be required by the applicant.

We appeal that an amendment be made to Regulation 18 that replaces the word "film" in both instances with the words "main feature" so as not to preclude any video or DVD of a classified feature from containing extra material.

3. The rating of trailers

The other constraining factor for applicants of DVD ratings and the Labelling Body is the issue of the trailers themselves.

There is a considerable backlog of titles that cannot be released to the market because the Regulations are intolerant of any trailers that are not, by the prescribed 'meaning' (in Regulation 3), "consistent in character".

It is this 'meaning' that must be amended to allow the Labelling Body to function in a commercial and cultural environment that has undergone significant change since the Act was passed. The public's attitude and exposure to trailers has changed accordingly.

In considering how the Regulations should treat the inclusion of trailers on main features, the following facts need to be considered:

- DVD is a non-linear delivery mechanism, requiring the viewer to actively enable trailer content, as opposed to having to 'fast-forward' through videotape if one does not wish to view it. Subsequently, the trailer content gains a fraction of the exposure that it once enjoyed on video.
- DVDs are manufactured overseas and cannot be locally edited, thus having to 'inherit' the censorship practice of the overseas territory.
- Free-to-air television regularly advertises trailers for classified theatrical releases and television premieres without restrictions to general audiences.
- Free-to-air television regularly advertises trailers for television programs plainly 'not suitable' for general audiences.
- Pay-television operators broadcast trailer content for feature films (regardless of classification) around-the-clock and across multiple channels.

Trailers and censorship

Mature audiences (ie. children excepted) need not be 'protected' from film trailers. We know of not a single instance where a trailer for a legitimate feature film has approached being "injurious to the public good".

It is therefore entirely appropriate, and well within the competence of the Labelling Body to determine "consistency in character" across the spectrum of ratings and classifications, when trailers are presented as extra material on DVDs.

It would seem that complaints made by members of the public about trailers (shown theatrically) deal exclusively with parental concerns at G and PG rated features.

The Regulations should make a distinction between this G and PG rated fare and all other fare aimed at mature audiences. Public concern about trailer content for mature audiences is apparently immaterial, as this evidence would suggest:

For the 2002 and 2003 years combined, there were only two specific complaints lodged with the Broadcasting Standards Authority regarding trailers for feature films shown on television.³ Both complaints did not relate to the content *per se*, but rather pertained to the appropriateness of the timeslot and the "effect of the broadcast on children". Neither of these complaints were upheld.

Rating trailer 'content'

Additionally, a clear distinction needs to be made between the rating of a trailer and the rating of the feature film that the same trailer advertises. (ie. a trailer for

³ The Waterboy (BSA ref: 2002-036) and American Beauty (BSA ref: 2003-014). Source: The Broadcasting Standards Authority website, www.bsa.govt.nz

a R18 film may be rated as 'M'). This is current practice in the UK, and allows greater flexibility in terms of trailers being coupled to feature film programs.

This would accommodate for the proliferating DVD editions of classified films (sourced from all over the world) that contain trailers for films never to be released in our small market.

Documentary and 'non-fiction' extra material

Interviews and documentary featurettes should be exempted from censorship considerations, a status that such material enjoys when it is a "main feature".

Deleted scenes and extended versions

The status quo (referral to the OFLC) may be appropriate in the instance of deleted scenes, but we suggest that this should only be applied where the extra material has not been classified by an OCA.

4. Classification of television programs

The proliferation of television programming being released on DVD format is yet another significant shift that has occurred in the marketplace since the Act was passed.

This is another instance of where the two governing Acts are (working paradoxically) at odds with each other.

Under this current legislation, the OFLC is obliged to classify all DVDs and videos that have been previously classified by an overseas classification authority (OCA), including programs that have already been broadcast on network television.

We believe that the Labelling Body should be authorized to assign a classification to programs that have previously aired on NZ television with the equivalent of its classification by an OCA.

The OFLC is currently in the practise of granting fee waivers to previously-broadcast television programs where a waiver is requested by the applicant.

The Chief Censor cites the reasons for granting this waiver to be that “prior broadcast may reduce the pool of potential purchasers of the DVD making them less profitable” and “the content of shows is also unlikely to be a source of risk of injury to the public good.”

He does not, however, cite the most obvious reason being that there is a glaring paradox at work. The process is a pure formality, and executing formality is the job of the Labelling Body and not the OFLC.

According to the OFLC Annual Report 2003, the cost to the industry in 2003 was \$42,625 in classification fees. The cost to the OFLC of granting these waivers in the same year was \$72,325.

There is significant cost, and no benefit. The process of classifying previously broadcast (and previously classified) TV shows results in an outcome that is either already known or is of arbitrary difference to the public (see section B3).

In many cases, compliance costs (even with waivers) still inhibit the release of television programs on DVD and video format. “Auf Weidesehn Pet” and “Cold Feet (series 2-4)” are two salient examples that remain in limbo.

Section (D) The Future of Censorship in NZ

1. Cross-rating '18' and the Streamlining of the OFLC

There is a serious case to be made for the Labelling Body to deal with all publications which have been previously classified by an OCA, by using an across-the-board 'cross-rating' mechanism, and for the OFLC to be dedicated to solely dealing with material that has not been previously classified by an OCA.

There is a strong philosophical case to suggest that adults in New Zealand should have the choice to watch/rent/purchase film culture without the intervention or approval of the state, unless the film contains material which, according to the Act, meets criteria that is deemed potentially 'objectionable' (eg. sexual violence, bestiality, necrophilia, etc.)

As progressive as this might sound, this is exactly what is happening in our competing media streams - pay television, web media and the private importation of films via the web.

Neither would it mean a 'free-for-all', as the State would still be able to monitor and control the compliance of material through the mechanisms of the Labelling Body, who would maintain their role as 'gate-keepers'.

If this scenario were to be adopted it would result in a palpable downsizing of the OFLC, and we accept that this scenario is unlikely to be seriously considered at this juncture.

But, given the reality of hyper-communication, escalating global interdependence, and the homogenisation of global culture, it is surely inevitable that in the not-too-distant future, the classification office will have to radically adapt in order to maintain its relevance.

Bearing out this argument, albeit indirectly, the Law Commission suggested the idea of "confining the Act to the two areas that really matter, namely sex with children and sex plus violence."⁴

In the meantime we are content to move the legislation a little more along the continuum, in our appeal for contemporary, relevant law that will command respect and encourage compliance.

Section (E) Summary of Proposed Amendments

As detailed in Section (A), we appeal to Government and policy-makers to make the following amendment to the proposed Amendment Bill:

⁴ P59, *Report of the Government Administration Committee, March 2003 (I.5A)*

Provide for a distinction to be made between film publications that are outright 'objectionable' and publications that are 'objectionable - with a qualifying provision', especially for those that have been formally classified by a recognised overseas classification authority, such as the BBFC.

As detailed in Section (C), we appeal to Government and policy-makers to make the following amendments to the Films, Videos, and Publications Classifications Regulations 1994:

1. Regulations 9 and 12 be amended to allow the Labelling Body to assign a rating or classification to those films classified as "15" by the BBFC in the UK.
 - 1a. In addition, that Regulations 9 and 12 be amended to allow the Labelling Body to assign a rating or classification to those films classified as "MA 15+" by the FCBA in Australia.
 2. Regulations 18 be urgently amended to allow the Labelling Body to assign a rating or classification to those films previously classified, either by the OFLC or an OCA, that also contain extra features (particularly trailers and documentary material).
 3. Regulation 3 (Meaning of "consistent in character" with main feature) be amended to provide a flexible rating mechanism for the infinite trailer-feature permutations that are offered by the DVD presentation format.
 4. An additional clause to be added to Regulation 12 allowing the Labelling Body to assign a rating or classification to programs that have previously aired on New Zealand television with the equivalent of the classification assigned by an OCA.
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As detailed in Section (D), we appeal to Government also to consider:

Designating the FVLB to be the gate-keepers of all prior classified publications in New Zealand, and for the OFLC to deal exclusively in non-classified material.