Injuring the Public Good? Censorship and Libraries in New Zealand

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Abstract

Government censorship of films and other publications has been a part of New Zealand life since 1916. Early censors were expected to ban anything "contrary to public order", but today the Office of Film and Literature Classification may only restrict or ban a publication if it is "likely to injure the public good". What is injury, and what is the public good? This paper looks at the history, law and debates around censorship in New Zealand, particularly as they relate to libraries.

Introduction

The Office of Film and Literature Classification (Office) is an independent Crown entity which classifies 'publications' that are likely to be restricted or banned. It employs 30 staff and is based in Wellington. Although partly funded by the government, the Office caries out its statutory functions independent of the government and this independence is enshrined in law.

The First Indecent Publications Act

The Indecent Publications Act was passed in 1910 and not amended until 1954. It incorporated provisions from the Offensive Publications Act 1892, and strengthened the law allowing the searching of premises and the seizure of "indecent" and "obscene" material.

While the Act used the word "indecent", it did not define what it meant. It was left up to judges to decide if something was indecent or not, which lead to highly inconsistent decision making. The older Offensive Publications Act had targeted material of an "indecent, immoral or obscene nature", words which probably formed the basis for judges' decisions under the newer Act.

Certain publications were deemed to be indecent, however. It was a summary offence to make available "any document or matter which relates or refers ... to any disease affecting the generative organs of either sex, or to the complaint or infirmity arising from or relating to sexual intercourse, or to the prevention or removal of irregularities in menstruation, or to drugs, medicines or appliances, treatment, or methods for procuring abortion or miscarriage or preventing conception".

For the first time, "literary, scientific, or artistic merit or importance" were included as mitigating factors in the classification of a publication, something which is still a factor today.

The Cinematograph Films Act 1916

Around the same time, concerned citizens were agitating for a system of film censorship, in order to protect the morals of children. The Government decided to act, not just to protect children from the effects of sex, violence, crime and headaches brought on by watching too many films, but to deal with the effects of war films on the New Zealand public. The drafter of the legislation, William Jolliffe, became the first Film Censor and Registrar of Films in September of 1916. At the end of his first year in office, he commented to the Evening Post:

> "It is difficult to formulate principles which will apply to every case, but matter coming within the following classes is not allowed to pass:-(1) The commission of crime in a manner likely to be imitated, especially by the young, or to give information as to methods to persons of a criminal tendency; (2) indecency in the matter of dress; (3) the treatment of religious subjects in an irreligious or irreverent manner; (4) matter likely to promote disloyalty to the King and country, or to adversely affect friendly feeling towards our Allies; (5) matter likely to effect class hatred." (Evening Post 17 September 1917)

Mr Jolliffe's legislation stated that the censor should not approve films which "depict any matter that is against public order and decency, or the exhibition of which for any other reason is, in the opinion of the censor, undesirable in the public interest." This gave the censor incredibly broad discretion, which however, censors used very cautiously, preferring to make cuts in films rather than ban them outright. However, the reasons given for banning films under this Act sound ludicrous 90 years later:

- "Too much suggestiveness in the talk. The conversation about the hen, egg and rooster lends itself to suggestion" (1929).
- "Wildness of young people and their extravagant escapades as shown not desirable in the public interest" (1929).
- "Sly and improper reference to the Prince of Wales" (1930).

The Indecent Publications Act 1963

Increasing dissatisfaction with the censorship of printed publications led to a thorough rewriting of the Indecent Publications Act in 1962. It was felt that judges, who would only rarely have tried a case relating to indecency, lacked the expertise to make good decisions on the character of a publication. For this reason, the new Act established an expert body, the Indecent Publications Tribunal, as an independent arbiter of indecency.

It is safe to say that librarians were horrified. In the submissions to the Government during the legislative process, librarians and academics made strong representations against censorship, perhaps not realising the nature of the publications the Tribunal would spend most of its time examining. The first few decisions of the Tribunal were on famous books – *Another Country* by James Baldwin, *Lolita* by Nabokov, and *Dead Fingers Talk* by William Burroughs – and none of them were restricted or banned. However, the reasons given for not banning the Burroughs are a great example of the sensibilities of the Tribunal:

> "In this linguistic porridge some of the lumps are inevitably unpalatable. The author's manner of writing has so effectively restricted his potential reading public that in our opinion no further restriction seems called for."

This Act was the first in which indecency was defined. A publication which "describes, depicts, expresses or otherwise deals with matters of sex, horror, crime, cruelty, or violence in a manner that is injurious to the public good" was considered to be indecent. This is the exact wording which exists today, except that the concept of indecent has been replaced by objectionable.

At the end of his time as first chair of the Tribunal, Sir Kenneth Gresson commented:

> "The dominant consideration is that freedom of expression must be restrained when the welfare of the public so demands. The Tribunal established by the Act (the Indecent Publications Act 1963) has the difficult task of determining, in a particular case, the line which must not be overstepped. Many factors are relevant – the age of the prospective reader, the quality of the writing, the apparent purpose of the writer, race, tradition, philosophy, religion, education, morality and the opinion and sentiment of the community so far as ascertainable. Of necessity the decisions of the Tribunal must be the judgment of the members subjectively regarding the particular publication (or sound recording) which the Tribunal has to consider. … It remains to be seen whether the new legislation (*the Indecent Publications Act was two years old at the time of writing*) will be regarded as an advance. So far there seems to be a disposition on the part even of those who are opposed to any censorship at all to accept the decisions of the Tribunal as the conscientious discharge of a difficult task, though inevitably there are critics of such decisions as have been given."
> *The Indecent Publications Tribunal: a Social Experiment* by Stuart Perry (Wellington: Whitcombe and Tombs,1965)

While Gresson's words suggest a weighty deliberation on serious texts, the Tribunal soon found itself swamped in puerile sexual material. The Office of Film and Literature Classification holds the complete collection of publications classified between about 1969 and 1975, and with few exceptions there is nothing of literary, educational or social merit to be found, except perhaps *Down Under the Plum Trees* and *The Little Red Schoolbook*.

The Films Act 1976 and 1983

Alan Highet, Minister for Internal Affairs, on introducing this bill, said that he hoped it would "move towards the maturity of attitude whereby the abolition of censorship for adults can eventually become a reality". The New Zealand Film Society, with support from Jonathan Hunt, pushed for film societies and festivals to be exempted from film classification.

However this proposal was voted down, and the 1976 Act picked up the Indecent Publications Act definition of indecent, bringing the censorship of films and print publications into alignment for the first time. In 1983, the law was changed to include videos, just beginning to arrive in New Zealand.

The Video Recordings Act 1987

Videos, with their ability to be played in the home, stopped and started, and out of the public arena, gave the film censor some trouble. A film played in a cinema could be controlled, at least at the point of ticket sale, but a video once in the home, was out of sight. Lobbying by the Society for the Promotion of Community Standards, among others, led to the passing of a new act designed to police what was seen as a dangerous new medium.

However, the provision for the film censor to classify videos was not immediately removed from the Films Act, and the result was somewhat of a nightmare for enforcement, the public, and the government. The Film Censor was routinely passing videos that the Video Recordings Authority was cutting or banning. The Society for the Promotion of Community Standards took the Film Censor to court over two sexually explicit videos, raising the profile of this issue to a point where it could not be ignored.

The Ministerial Inquiry Into Pornography

The government formed a committee to make a thorough investigation into censorship in New Zealand in late 1987. The terms of reference were to investigate:

1. the existing censorship legislation and whether or not it should be changed
    a. the criteria for restricting or banning material
    b. the types of restrictions that might apply to different types of materials
    c. what body or bodies should carry out the restriction and banning duties
2. whether non-legislative means could be used to deal with the issue
3. the development of communications and other technology and the implications of these developments on the transmission of such material across international boundaries
4. whether live performances, or exhibitions of indecent material in liquor outlets should result in the suspension of the operator's license.

The Committee received over 700 submissions from individuals and over 100 from organisations. When the Committee reported back to the Minister of Justice in 1989 they noted:

> The written and oral submissions received by the Committee reflected the many divisions of opinion about pornography and related matters. At one extreme was the moralist response which placed great faith in censorship and coercive legislation to cleanse New Zealand. Maori and Polynesian opinions also had a strong moral basis but with major cultural differences that sit uneasily with many Pakeha attitudes and practices. At the other extreme were the libertarian views which see little merit or utility in censorship or coercion, preferring to trust education and the good sense of individuals to make a pluralistic society. Only a few, however, held this position unequivocally; many more admitted exceptions and qualifications.

They also noted the essential dichotomy of censorship in a free society:

> Philosophy and politics converge when decisions are made which require a balance among competing opinions, tastes and beliefs. As we have discovered in our inquiry into pornography, one of the most difficult balances to strike is between freedom and control. What behaviour and material may the law seek to prohibit or punish and in what circumstances? what are the limits of tolerance for differences? …
>
> As our inquiry proceeded we became sure of one thing: the answers to problems about pornography cannot be just legal answers. They must be found where they reside – in the institutions, values and traditions of the general social order.

The major results of the Inquiry were the decisions to amalgamate all censorship under a single Act, to standardise the criteria under which all publications would be examined, and to establish a single expert body to make classification decisions.

The Films, Videos, and Publications Classification Act 1993

The Act gives the Office of Film and Literature Classification jurisdiction over a wide variety of publications. The range of publications the Office has dealt with since 1994 includes, films, videos, DVDs, CD-ROMs, computer games, computer files, books, magazines, information brochures, billboards, t-shirts, playing cards, photographs and a jigsaw. The Office classifies films, videos, DVDs and computer games before they are released to the public. It can only classify books, magazines, music CDs, and other 'publications' when they are submitted to it by members of the public, law enforcement agencies or the Courts.

In spite of the broad coverage of the Act, not all mediums are treated the same way by the law. The Act requires that films, videos and other moving image mediums are labelled before they are made available to the public, and the label must sport the rating or classification for that publication.

Other types of publications that do not have moving images, such as books, magazines and computer files with still images, are not subject to this pre-release labelling system. The onus is placed on people making and distributing these to ensure they comply with the law, though they may seek a classification if they wish.

Although the Office classifies a wide range of material, most of the material classified is sexually explicit. About a fifth of the publications classified are banned, and they are almost all images of child pornography.

Since libraries supply books, magazines, music, videos and DVDs to the public, they are required to comply with censorship law. The main requirements of the law, relevant to libraries are:

- All films, videos and DVDs must carry a New Zealand rating or classification label
- Restricted material (e.g. R13, R16) may not be supplied to people under the age of the restriction
- Libraries may not possess or supply objectionable (banned) material

It is a criminal offence not to comply with these requirements, which can lead to fines or imprisonment. The Office restricts only a small number of publications each month that libraries are likely to hold, so it is important that libraries know what these publications are.

Classification criteria

Section 3, which explains the meaning of the word "objectionable," is critical to understanding how publications are rated and classified. The staff of the Classification Office spend most of their days thinking and writing about it in order to provide decisions that are soundly based on the law.

Section 3(1) gives a very high level definition of what Parliament determined "objectionable" should mean. This section is referred to by the Office as the "gateway" provision, because it defines the gateway through which publications must pass before they can be classified.

3. Meaning of "objectionable" –(1) For the purposes of this Act, 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.

Sections 3(1A) and 3(1B), which were added to the Act in February 2005, add a specific rider to the "such as sex" provision which deals with images of child nudity. It specifies what images of naked children will attract classification – so family photographs of small children in the bath are excluded, except where the photos are clearly sexual in nature.

(1A) Without limiting subsection (1), a publication deals with a matter such as sex for the purposes of that subsection if— (a) the publication is or contains 1 or more visual images of 1 or more children or young persons who are nude or partially nude; and (b) those 1 or more visual images are, alone, or together with any other contents of the publication, reasonably capable of being regarded as sexual in nature.
(1B) Subsection (1A) is for the avoidance of doubt.

Sections 3A and 3B were also added to the Act in March 2005. They deal with restricting publications containing high-level offensive language or material relating to self-harm and suicide. Offensive language is one of the most frequent reasons people complain to the Office. Material relating to suicide was not able to be classified prior to this change as it was deemed not to fall within the gateway. These sections relate specifically to the possibility of restricting publications, rather than banning them.

The rest of Section 3 attempts to define what will cause injury to the public good. It is laid out in a hierarchy of most to least important matters to consider. Section 3(2) contains a list of activities, which if portrayed in a publication in such a way that they support or promote those activities, or tend to, will automatically mean that the publication will be banned. With one exception, the activities listed in (d), these activities are all crimes in their own right.

The words "promotes or supports, or tends to promote or support" are very important in this subsection. Under Section 23 of the Act, the Office can restrict a publication in a number of ways. There is no sliding scale or set of guidelines governing what will be acceptable at a particular age, and each publication is examined on its own merits. For example a film featuring drug use (which would be considered under the crime heading) might show someone injecting heroin but have any one of the following purposes: to show people how to take heroin; to show them how to take heroin safely; to educate them on why not to take heroin, or simply as a habit of one of the main characters in the film. In each case the portrayal will be different, and the film will be classified accordingly. The same is true for portrayals of the other criteria specified in Section 3(1): horror, cruelty, sex and violence.

Section 3(3) contains a second list of activities, which at first look, seems very similar to the list in 3(2). However, the opening paragraph states that the important thing to consider with this list is the "extent and degree" to which the activities are described, depicted or otherwise dealt with. When the Classification Office classifies publications, it must always give the lowest possible classification possible without injury. This means that even if a film contains very violent scenes, for example a war film like *Saving Private Ryan* or *Black Hawk Down*, the violence may be entirely justified in the context of the story and may only take up a small part of the film. Or a child might be naked, but that is because she is running away from her mother after having a bath. For these kinds of reasons, violence, nudity and sex are not automatically restricted or banned.

Section 3(4) lists matters which must be taken into account when classifying a publication. If a publication is going to be made objectionable under section 3(2), these matters are not considered but if a publication is going to be restricted then they must be.

Classification decision-making

In general, Classification Officers examine publications, sometimes individually and sometimes with others. After considering the criteria set down in the Act, they recommend the most appropriate classification to their managing SCO. The SCO will where necessary discuss the recommendation with the CC or DCC. Publications that are more complicated or more contentious are likely to be discussed higher up the chain of decision-makers.

This system ensures that all classification decisions are made following input from three or more members of the Classification Unit. It also ensures that it is not possible for any one person to examine, classify and sign out the decision in respect of any publication. Often there will be several staff involved in decision-making on a publication, and on some occasions all Classification Officers may participate in the decision of one publication.

More parties will inevitably be involved where the team needs to discuss and/or debate the significance or the potential harm of the publication's content. In the case of films where the content may be controversial and where challenging social issues are raised, the Office may choose to consult people beyond the Office staff, including experts and panels of ordinary New Zealanders chosen to be representative of the public as a whole.

Case Studies relevant to libraries

***Gordius* novel classified R18**

Following a complaint from a member of the public, an Inspector from the Department of Internal Affairs submitted the novel *Gordius* to the Office for classification. The complainant had borrowed the book from their public library and was concerned about its violent and sexual content.

The publication describes sexual violence, childhood abuse, unusual sexual practices, and relationships between adults and young people. The Office classified the book R18. In doing so it determined that a high level of maturity was necessary to avoid the reader being unduly disturbed. A restriction to adults was required to limit the detrimental impact this type of material is likely to have on the development of positive sexual attitudes and sound relationships among young people.

The classification means it is illegal to allow a person under 18 years of age to read or borrow the book. The book must also carry a R18 classification label. Classification labels are available from the Film and Video Labelling Body in Auckland (Ph: 09 361-3882). Any library holding the book will need to take steps to ensure they cannot be viewed or borrowed by anyone under 18. The Office understands the book is held at relatively few libraries.

***100 Most Infamous Criminals* book classified R13**

The Office classifies relatively few books and most that are classified are either sexually explicit or provide instructions on drug or gun manufacture. Recently, it classified the book *100 Most Infamous Criminals* as R13.

The book was submitted by Inspectors from the Department of Internal Affairs, following a complaint from a member of the public. The book is a compilation of infamous crimes and their perpetrators. A restriction on the availability of the publication to people aged 13 and over is necessary due to the sensationalised and detailed manner in which matters of sex, horror, crime, cruelty and violence are dealt with. Descriptions of murder, torture, and sexual violence are likely to disturb and shock younger readers and cause them to be unduly anxious about their personal safety. Prevalent sexual references of an often prurient nature are likely to have a detrimental effect on children's developing sense of what is acceptable and appropriate sexual behaviour. Copies of the full written decision are available to anyone who would like one.

The classification means it is illegal to allow a person under 13 years of age to read or borrow the book. They must also carry a R13 classification label. Any library holding the book will need to take steps to ensure they cannot be viewed or borrowed by anyone under 13.

Further information

Anyone who would like to know more about the work of the Office or how to submit a publication can contact the Information Unit:

Ph: 0508 CENSOR (236 767)
Email: information@censorship.govt.nz
Web: www.censorship.govt.nz