

Pornography: freedom v censorship?



Robert Stevens of Cairns Slane explains the current New Zealand system of censorship and proposals for reform

Formalised censorship as a legal restriction upon what may be published in our media must by its nature move with the times. It must move to capture the changes in media technology and distribution patterns, for example the development of the rental and purchase of video recordings for private use. It must also recognise the elastic but inescapable link between the standards applied by the censorship powers and the standards in the community which those powers are meant to serve.

The legal structures for censorship in New Zealand are concerned with standards of 'decency' and they work generally by prohibiting and punishing the publication of material which is considered 'indecent' by some authority empowered to make such judgments. There are presently at least four Acts of Parliament which empower various bodies to make those judgments and the different bodies empowered to make these decisions are distinguished by the particular medium or technology involved.

Print media and documents

The oldest of the present censorship acts is the *Indecent Publications Act* (1963). It covers books, magazines and newspapers and it also catches sound recordings and any published 'document' not separately covered by other legislation. Thus until July 1987 this act covered (as 'documents') video recordings for home use. It sets up and empowers an Indecent Publications Tribunal

to cover books, magazines and sound recordings and empowers the District Courts to deal with other 'documents' including newspapers published at intervals of less than a month.

'Indecency' is the test and it is given a non-exhaustive definition, including 'describing, depicting, expressing, or otherwise dealing with matters of sex, horror, crime, cruelty, or violence in a manner that is injurious to the public good'. Thus magazines giving information on the manufacture of bombs or other weapons can be and have been ruled indecent. More recent case law has stressed that material cannot be found indecent unless it is found to be 'injurious to the public good' even though the wording of the Act has previously been thought capable of finding indecency without such injury.

Film and broadcasting

The *Films Act* (1983) deals with films intended for public exhibitions and provides a system of prior approval and classification through the office of the Chief Film Censor and a Films Censorship Board of Review. The censorship test under this Act is 'whether the exhibition of any film is or is not likely to be injurious to the public good' and the Act goes on to spell out matters to be considered in answering that question. There are various classification options available to the Chief Censor including approval for exhibition at a film festival only.

In 1987 it had become apparent that there was some disparity between the treatment of

video recordings for home consumption under the *Indecent Publications Act* and those for public exhibition under the *Films Act*, and neither system was coping satisfactorily with the rapidly growing numbers of video recordings coming into the country. The *Video Recordings Act* (1987) set up a system of classification using an industry labelling body for the initial rating and a Video Recordings Authority which examines and censors those recordings which have been given a restricted classification by the industry. The test for indecency is the same as that found in the *Indecent Publications Act*.

The *Broadcasting Act* (1989) fixes responsibility for program standards on the broadcaster concerned, so that the standards 'are consistent with ... the observance of good taste and decency'. A Broadcasting Standards Authority may set and approve codes of broadcasting practice and it hears complaints where a complainant has not been satisfied by the broadcaster concerned. The Authority has some interesting powers such as punishing a broadcaster by ordering a period of broadcasting without advertisements, but it does not have the power of prior restraint.

Applying community standards

All of these censorship structures operate by applying current community standards as more or less explicit criteria. Whether the censorship authority sees that community standard coming through in the test of what is 'injurious to the public good' or in what constitutes 'good taste and decency', it is probably there in some form or other and is applied by well-meaning individuals ranging from the judges through professional censors to lay members of an individual tribunal. Their decisions are decried by vocal elements on all sides as being too restrictive, too liberal or irredeemably sexist. One may be excused for thinking that this indicates that the balance is about right. New Zealand is the country which is reputed to have cut a violent scene from the *Muppet Movie* and where *Anal Angels* plays at a cinema in central Auckland. Very explicit non-violent heterosexual and homosexual material is in most neighbourhood video rental shops and the Broadcasting Standards Authority still considers complaints about four-letter words in televised films.

The different censorship authorities are specialised by the media with which they deal. They make their decisions in the context of the technology and the distribution systems of the medium concerned. A magazine could

be found indecent for printing a still picture from an approved video, and there is not necessarily any inconsistency between the two decisions. Nevertheless the decisions are made by different authorities applying different statutes, and a perceived disparity between the criteria or the decisions of the various censorship structures presents an easy target for the disaffected of any persuasion. It is easy to see why the Minister of Justice is now advocating a new and unified Classification of Publications bill to combine under one Act and structure the censorship of films, video recordings, books and magazines.

making its assessments. The proposed new Classification Office will be able to classify material on its own motion and it will receive and process complaints from members of the public.

The Minister proposes that the Classification Office will also have an information unit with the dual function of carrying out research to assist the censorship officers and acting as an information centre for members of the public. The Minister of Justice released the draft bill and a commentary paper in October 1990, saying that it is the policy of the Government "to

introduce new legislation on censorship just as soon as a bill can be drafted". The attempt to specify more clearly the type of material which should be outlawed by the new censorship authority may encounter difficulties in reaching a consensus. The more detailed legal criteria are likely to be less capable of moving with the times than those 'fairly general terms' presently used by the several censorship authorities.

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Reform

The proposed test to be applied in all cases is whether the availability of the material 'is likely to be injurious to the public good'. The test is apparently intended to take account of the likely distribution of the item concerned. The new bill includes a short list of features which will be treated by definition as injurious to the public good and a far longer list of factors or considerations to which the censorship authority is to have particular regard in

John Dickie, Australia's Chief Censor, explains the Australian system of classification

Pornography is one of those topics, like religion or politics, that is mentioned at peril at the dinner table - or any gathering. Everyone has a view about pornography which is put forward with great passion and conviction. Some believe that it sows the seeds of degrading attitudes in the treatment of

women by men. Some believe it is responsible for the disintegration of society or that it is a major motivating factor in violent crimes. Some enjoy watching it, though such revelations are seldom publicly proclaimed.

Yet while all of these different groups in the community have decidedly firm ideas about the dangers and effects of pornography, it is a safe bet that none of them could get to first base on agreeing what constitutes pornography.

At the Office of Film and Literature Classification, we receive correspondence from some people who believe that they are subjected to pornography in film, video and literature. A greater number are concerned that the rest of the population is being exposed to it. A substantial number of correspondents believes that the entire Office is made up of pornographers or perverts or both.

When we are asked to censor or classify material, we do not have to face the difficult task of deciding what is pornographic. Federal and state legislation sets out what kind of material is allowed into the country and what kind of material, and under what conditions, films, videos and literature can be sold, displayed or hired throughout Australia. Each year, about 800 cinema films and between 3,500 and 4,000 videos are submitted for classification.

The Office of Film and Literature Classification, which incorporates the Film Censorship Board, classifies material on behalf of State governments. The power to do this is contained in Federal legislation under the Customs Regulations (Cth), the Acts and Ordinances of the Australian Capital Territory and the Acts of the State and Northern Territory parliaments.

The requirements of these statutes are further refined in guidelines which are used by members of the Office when making classification decisions.

The guidelines expand on the legislative

CLASSIFICATION OF PRINTED MATTER IN AUSTRALIA

Unrestricted

Contents Pictorial representations: discreet nudity, implied and discreet depictions of sexual acts; artwork, cartoons etc. depicting non-realistic nudity or sexual activity.

Written descriptions: some descriptions of sexual activity involving adults in a publication not overwhelmingly dedicated to sexual matters.

Covers No offensive wording, discreet nudity (no genitalia), no pictorial depictions of sexual acts.

Restricted - Category 1 (18 years and over, to be displayed in a sealed wrapper)

Contents Pictorial representations: explicit nudity, implied depictions of sexual acts, mild fetishes, artwork, cartoons, etc. depicting explicit nudity and sexual activity.

Written descriptions: realistic and gratuitous descriptions of violence, relished descriptions of sexual activity involving adults.

Covers No offensive wording, discreet nudity (no genitalia), no pictorial depictions of sexual acts.

Restricted - Category 2 (18 years and over, to be sold only on restricted premises)

Contents Pictorial representations: explicit sexual acts, fetishes including sado-masochism and bondage if not extreme.

Written descriptions: descriptions of sexual activity including activity between humans and animals or sexual cruelty.

Covers No proscription as material confined to restricted area.

Refused classification (Not to be sold or hired)

Pictorial representations: bestiality, child pornography, extreme cruelty and dangerous practices.

Written descriptions: promotion, incitement or encouragement to drug abuse including 'do it yourself' and growers manuals, gratuitous description of sexual activity involving persons under 16 years of age, promotion, incitement or instruction in matters of crime or violence.

requirements and incorporate the accumulated experience of the Board together with input from the community. They are based on the principle that adults should be allowed as far as possible to read, see and hear what they wish provided that offensive material is not foisted upon them and that minors are protected from material likely to harm or disturb them.

The guidelines reflect what the Office believes to be current community attitudes and they are revised periodically to take account of any perceived changes in those attitudes. Any changes to the guidelines have to be approved by the Ministerial Council on Censorship Matters made up of the appropriate Federal, State and Territory ministers.

Classification

Aside from problems associated with defining pornography, there is widespread confusion about what can be contained within the two restricted categories, 'R' and 'X', and what is refused.

Films and videos which are given an 'R' rating may contain realistically implied or simulated sexual activity. This may range from a legitimate film with adult audiences in mind to edited versions, generally in video form of more explicit material. The Office applies strictly the parameters of sexual violence. Any film which dwells on sexual violence longer than necessary to establish the storyline will be refused classification. It does not go into the 'X' classification. It is not allowed to be shown in the country.

There is no 'X' category for cinema films. The 'X' category applies only to videos. Videos given an 'X' category are available legally in the Australian Capital Territory and the Northern Territory, but are not legally available for sale or hire in any of the States. Material in the 'X' category, while being sexually explicit, does not contain any violence. A video which contains violence associated with explicit sexual activity is refused classification. There are no rapes, no incest films, no bestiality, no torture or humiliating treatment of women. All videos containing material of this kind are refused as are videos where there is coercion or non-consent.

The 'Refused' category is spelled out unambiguously in the guidelines, which are applied strictly by the Office. The fact that the number of films and videos refused classification in comparison with the number submitted (one per cent of film and three per cent of videos) is due to the industry's recognition that such material is not tolerated and not worth importing.

John Dickie is the Chief Censor with the Film Censorship Board

CLASSIFICATIONS OF FILMS AND VIDEOS IN AUSTRALIA

- 'G'** General, suitable for all ages. Children should be able to view this material without supervision.
- Language: The mildest expletives, only if infrequent and used in exceptional and justifiable circumstances.
- Sex: Very discreet verbal references or implications, provided they are justified by the narrative or the context.
- Violence: Minimal mild and incidental depictions, provided they are justified by the context.
- 'PG'** Films may contain adult themes or concepts which, when viewed by those under 15, require the guidance of a parent or guardian.
- Language: Low level coarse language acceptable provided it is not excessively used.
- Sex: Discreet verbal and/or visual depictions and references.
- Violence: Depictions must be mild in impact and or presented in stylised or theatrical fashion or in historical context.
- Other: Discreet informational or anti-drug references. Mild supernatural or 'horror' themes. Minimal nudity if justifiable in context.
- 'M'** Recommended for mature audiences 15 years and over. Material with this classification is considered likely to disturb, harm or offend those under 15.
- Language: Crude language may be used but not when excessive, assaultive or sexually explicit.
- Sex: Sexual activity may be discreetly implied or simulated.
- Violence: Realistic violence of medium intensity but depictions with a high degree of realism or impact are acceptable only if contextually justified.
- Other: Drug use may be depicted, but not in an advocacy manner. Supernatural and 'horror' effects usually warrant this classification.
- 'R'** Restricted to adults 18 years and over. Material considered likely to be harmful to those under 18 years and possibly offensive to some sections of the adult community warrants an 'R' classification.
- Language: There are virtually no restrictions.
- Sex: Sexual intercourse or other sexual activity may be realistically implied or simulated. Depictions of sexual violence are acceptable only to the extent that they are necessary to the narrative and not exploitative.
- Violence: Highly realistic and explicit depictions of violence may be shown but not if unduly detailed, relished or cruel.
- Other: Drug abuse may be depicted but not in an advocacy manner. Extreme 'horror' effects usually warrant this classification.
- 'X'** Contains sexually explicit material (restricted to adults 18 years and over). No depiction of sexual violence, coercion or non-consent of any kind is permitted in this classification. Material which can be accommodated in this classification includes depictions of sexual acts between consenting adults and mild non-violent fetishes.

'Refused Classification'

Any film or video which includes any of the following will be refused classification:

- depictions of child sexual abuse, bestiality, sexual acts accompanied by offensive fetishes or exploitative incest fantasies;
- unduly detailed and/or relished acts of extreme violence or cruelty; explicit or unjustifiable depictions of sexual violence against non-consenting persons; and
- detailed instructions or encouragement in matters of crime or violence or the abuse of proscribed drugs.

Joscelyne Scutt discusses rights of action against those involved in pornography

The debate on pornography most often degenerates into a diatribe against those who speak out against it, on the ground that anyone deploring pornographic representation must be: against free speech, sexually repressed, desiring to sexually repress everyone else, right wing, self-styled agents of God, censors or God's police. Alternatively, it falls into the well worn groove of those speaking in favour of pornography being cast into a mould of sex-libertarians, immoral, amoral, supporters of child molesters and worse.

It is sad (though surely predictable) that this is so, because the debate is too important to be allowed to be taken over and manipulated by two camps; those who are crudely 'for' and those crudely 'against'.

Freedom of Speech

It is odd that the mantle of 'freedom of speech' is so often, and so protectively, drawn about 'pornography'. Freedom of speech does not extend to large proportions of society, but it surely extends with a vengeance to the peddlers of pornographic magazines, films and video. It is also odd that proposals by women, and particularly feminists, to redress the balance are so often distorted as being 'against' freedom of speech.

There is no legal definition of pornography. Rather, obscenity is defined in law as 'appealing to the prurient interest' or as that which 'we wouldn't want our social inferiors to look at - they might be corrupted (or get ideas)'. When feminists speak out against pornography, they are not concerned about patriarchal notions of obscenity, which are founded in ideas of what some should or shouldn't see. Rather, feminists are concerned about the right of women to be human, to be regarded as equally important as the rest of humanity, and not to be thrust into some subhuman category. One does not find men's bodies dehumanised in the way women's bodies are dehumanised through pornographic representations. And of course 'representations' is in many ways the wrong word; pornography in film is made out of real women's bodies, distorted into difficult, painful, humiliating poses.

Andrea Dworkin and Catharine Mackinnon in the United States have proposed a definition of 'pornography' as sex discrimination, to be incorporated into law. A woman who wishes to argue that a film made of herself 'participating' in particular acts is discriminatory would be entitled to bring an action for damages against the maker,

distributor or person showing the movie. A woman who considers she has been raped as a consequence of particular depiction of women in film could also bring an action against the maker, distributor or person showing the movie. A woman who has been forced by some other person to look at this material could similarly bring an action. Any woman, on behalf of all women, could bring an action on the ground that the particular film is sex discriminatory.

Access to courts

Rather than this approach being 'censorship', it is crucially based on the notion of giving those who have no freedom of speech precisely that. Although courts are not often 'woman friendly' they nonetheless provide a forum where two sides can be argued, with some inbuilt possibility of the sides being evenly balanced. Certainly the purveyors of pornography would be in a position to employ Queens Counsel, where it is unlikely the woman or women would be able to do so. Nonetheless, Queens Counsel do not alone have legal expertise or ability. The argument would also be better balanced than it is at present, where the only 'speech' of women who are exploited in pornographic movies is

the false lines they are obliged to speak in the course of making the films, or interviews set up to project the notion that women enjoy being exploited in these films and videos.

Some consider the crucial issue in the pornography debate is whether or not it can be shown (beyond a reasonable doubt, it seems) that pornography leads to, or causes, violence against women. This is a red herring. First, pornography is violence against women, in and of itself. It is not helpful to the issue to spend time and resources on investigating whether or not it 'leads to rape'. The expenditure would also prove pointless.

The notion that men (any man) should be prevented from having access to the pornography they want is so firmly embedded in the dominant psyche, that the harm done to women is deemed irrelevant.

Both the so called freedom of speech argument (which is really about the powerful reserving to themselves the continuing right to speak regardless of anyone else) and the pornography leads to/doesn't lead to rape argument are trotted out to prevent the reality of women's lives being given regard. 'Pornography' itself is not a useful word; to define it as sex discrimination would enable those engaged in the debate to know what it is they are talking about. This at least would be a start.

Dr Joscelyne Scutt is a lawyer and author and was formerly the Deputy Chairperson of the Victorian Law Reform Commission

Tony Katsigiannis of the Free Speech Committee argues that censorship is incompatible with a free society, and creates more problems than it solves.

The generally liberal attitudes that prevail in this country in relation to censorship came about because people were prepared to agitate for the right to read, view and listen to material of their own choice. It is only by placing the censorship of X-rated videos within this historical context that its importance becomes obvious. It is a question of the extent to which our society is prepared to accept government regulation of its private viewing habits.

As in the past, those who support the censorship of a particular category of goods, in this case X-rated videos, confer upon those goods the power to cause untold damage to society. X-rated videos are said to have the capacity to degrade individuals, undermine the family and destroy western values. The fact that pornography has been around for

thousands of years and has not been able to accomplish any of those things hardly matters.

What the proponents of censorship conveniently forget is that once you start banning things, you drive them underground. Illegal markets are created which are extremely difficult to control, which have a corrupting influence on law enforcement agencies, and which usually end up by promoting goods which are far more offensive than the originals.

Wowzers will argue that X-rated means extreme hard-core porn. Nothing could be further from the truth. Child pornography, the depiction of bestiality, and material of an extremely sexually violent or cruel nature are not legally available in Australia. Moreover, the X-classification specifically excludes violence or coercion of a non-consensual kind.

Pornography's effect

Despite considerable research, sociologists have not been able to establish any conclusive evidence of harm to the viewer from X-rated videos. X-rated videos may shock and offend some people, but the research evidence does not support the view that they lead people to commit sexual crimes or crimes of violence. Violence is a product not of pornography, but of other violence, inequality and the availability of firearms in our society. In fact, Professor Berl Kutchinsky, a sociologist, conducted a study of sex crimes in Denmark between 1959 and 1970, and concluded that the availability of hard-core porn was responsible for the decrease in child molestation rates over that period.

In recent years, some feminists have attacked pornography for what they consider is its dehumanisation and degradation of women. However, the view that by banning pornography you will help to change attitudes towards women is simplistic. The question of the dehumanisation and degradation of women is a broad social issue, which will not be solved by removing pornography from the public arena. Moreover, there is ample scope within the existing X-classification for depictions of equal status incorporating the notions of 'caring' and 'sharing'. Whether consumers will show any interest in such a products is another matter.

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Professor Brent Waters of the Prince of Wales Childrens' Hospital argues the potential harm of viewing non-violent erotica can be countered more efficiently by education than regulation

While studies, mainly from Scandinavian countries, conclude that availability of non-violent erotica does not increase the rate of violent crimes such as rape and may indeed help to diminish them, violent sexual crimes may not be the only measure of the potential harm of erotica. They may be just one form of victimisation.

There is an important distinction between erotica and pornography. Feminists have long held that pornography is a male invention designed to dehumanise women. Erotica has been distinguished from pornography in that it conveys a sense of intimacy and desire between equals. However in the video market place designating certain videos as "erotica" may be no more than a marketing device - a semantic sanitization of what is really pornography.

Types of harm

Opponents claim the majority of non-violent erotica available in Australia does not convey any sense of equality between the sexes, and to the extent that women are generally portrayed as objects, the less tangible sexual stereotyping harms which concern feminists may often be realised.

Behavioural science is only now beginning to chart harms reflected by more subtle measures than crime statistics. In the case of non-violent erotica, I believe an unexplored domain of harm will be found in the consequences of tilting the power balance in sexual relationships even more in favour of men, although this need not overflow into rape and other sexual crimes. There is no doubt that many children and adolescents watch non-violent erotica intended for an adult audience. The harms of this are not well documented, but presumably they include kick-starting inegalitarian attitudes by boys towards women and sexuality.

Sanitizing the video product range by strict censorship is undesirable, impractical, and will be ineffective. Governments have a poor record of setting and enforcing socially derived standards and the danger of prohibition is the well known risk of creating an illicit industry.

A more constructive policy approach is a three-way share of regulatory responsibility. Legislators have a responsibility to set

broadly framed standards. The video industry has a responsibility not to promote products which are harmful - a challenging notion if the tobacco industry's attitude to the harms of smoking is any indication. The third and largely neglected player, is the audience.

Regulation or education?

Creating an audience with discerning attitudes towards non-violent erotica and pornography is a long-term enterprise. Since life values and expectations are laid down in childhood, and families have a poor record of mediating their childrens' viewing, it is obvious that the family is the place to start. It is the responsibility of families to help children to become discerning consumers of non-violent erotica. Both boys and girls need to be more discerning about accepting male powerful - female powerless stereotypes and as they grow older to be able to distinguish pornography 'in a lamb's skin' from non-violent erotica.

The problem is that while parents have a reasonable grasp of conventional parenting tasks they are largely bereft of skills to teach their children how to become discerning about media products.

The media itself should provide leadership in audience education. What better way to influence the attitudes of heavy media consumers than through the media they are consuming. Legislation or incentives should be directed towards those industries which it is believed may lead to some social or health harms. These industries should contribute substantially to a parent education program through the electronic media which will train parents to help children become discerning media consumers. The non-violent erotica industry could demonstrate responsibility by fostering and contributing to parent media education programs so parents will get better at raising children with discerning patterns of television and video consumption.

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