THE REFORM OF NEW ZEALAND'S CENSORSHIP LAWS: 'FEMINIST' ARGUMENTS AND THE FREEDOM OF EXPRESSION

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It is not the purpose of this paper to assess the relative merits or demerits of the various 'feminist' arguments. Instead, this paper will assess how these arguments can best be taken into account by censors applying statutory criteria which seem on face value not to espouse any particular ideology. My thesis will be that unless a legislature uses a 'shopping list' approach, it does not really matter what the criteria for classification, censoring or banning are. Words normally used in New Zealand to censor videos and printed material ('injury to the public good') and films ('likely to be injurious to the public good') are capable of supporting many different meanings. The meaning selected and applied to any given video, film or publication is based on a conscious policy decision, such as 'depictions of sexual violence intended for male sexual arousal are injurious because they encourage the victimisation, potential or actual, of a vulnerable segment of society'. If statutory criteria are to be given meaning from policy decisions, it is important that those policy decisions are based upon the best available evidence and argument. As important as, or more important than, the statutory criteria is how censorship decisions get made and the powers the censors are given by the legislature to reconcile competing interests. In New Zealand, how censorship legislation is drafted, and how the finished legislation is
implemented by censors, is controlled to some extent by the Bill of Rights Act 1990 which came into force on 25 September 1990.

**The Statutory Criteria and Procedures used by the Chief Film Censor, the Video Recordings Authority and the Indecent Publications Tribunal**

Both the Video Recordings Act 1987 and the Indecent Publications Act 1963 require censors to classify material according to its level of indecency. Indecency is defined in s. 2 of both Acts as ‘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’. Section 13(2) of the *Films Act 1983* requires the Film Censor to determine whether the exhibition of any film (not the film itself) ‘is or is not likely to be injurious to the public good’. Each of the three bodies is given criteria which must be used to determine injury to the public good.

The Indecent Publications Act (which is rather unfortunately named because its title seems to presume that publications are indecent before the tribunal even sets eyes on them) requires a consideration of a publication’s dominant effect, whether it has artistic or literary merit, the persons to whom it is to be distributed, its price, whether it is likely to corrupt a reader, and finally, whether it displays an honest purpose and honest thread of thought or whether its content is ‘merely camouflage designed to render acceptable any indecent parts of the book or sound recording’.

The Video Recordings Act similarly requires an assessment of dominant effect, merit and likely viewers. It does not require an assessment of price, likelihood of corruption or honesty of purpose. Instead it substitutes three different factors: the manner in which the video depicts antisocial or offensive behaviour; the manner in which it depicts denigration by reference to colour, race, ethnic origins, sex, or religious beliefs; and the purpose to which the video will be put.

The Films Act echoes the dominant effect, artistic merit and denigration factors of the Video Recordings Act. It broadens the ‘manner in which antisocial behaviour is depicted’ criterion to include depictions of cruelty, violence, crime, horror, sex, indecent language and indecent behaviour, most of which are found in the definitions of ‘indecent’ in the other two Acts. The Films Act also has a basket clause of ‘any other relevant circumstances relating to the proposed exhibition of the film, including the places and times at which or the occasions on which the film is intended or is likely to be exhibited’.

Some of these criteria are clear. Price, for example, is objectively ascertainable. Others are clear but require some subjective input. Dominant effect, for example, is ascertainable, but will differ from viewer to viewer. Indeed, the very act of viewing a film has a subjective element in it. Literary merit is perhaps also ascertainable, but is open to much more of a subjective interpretation.

Finally, the ultimate test—whether the manner in which something is depicted is injurious to the public good—is virtually incapable of being applied because it has no appliable meaning of its own. Can anyone say what this means? What is ‘the public good’? When is it injured? We know it is something which the legislature has said is injured only by the manner in which sex, horror, crime, cruelty and violence are depicted, rather than by the depictions themselves of these things, but does this help in determining injury to the public good? If one segment of society is ‘injured’ by the way, sex, for example, is depicted, does this mean that the ‘public good’ has been injured, or do all segments of society have to be injured? And how is the public good injured by a two-dimensional depiction or written description of a rape for example? Is it via the fact that this manner of depiction is simply available, in which case it is unknown to the vast majority of people? Is it via the readers whose attitudes
towards women could be, or are, worsened, in which case, they might be injured but not others who do not read the depiction? Is it via the fact that someone might copy the described act, in which case the censor bans everything on the basis that someone, somewhere, could be 'triggered' by the manner in which something is depicted?

It is this criterion which is the most important one for all New Zealand censors, but it is also the criterion which is the least capable of being applied because it has no obvious or ascertainable meaning. To give effect to the statutes, the phrase must be given meaning through conscious policy decisions. It is, therefore, important to examine the procedure whereby these decisions are made.

The Department of Internal Affairs administers the Video Recordings Authority and the Film Censor, the Department of Justice administers the Indecent Publications Tribunal. Even though the decision-making thought patterns with respect to videos, films and magazines are very much the same exercise—applying legal criteria to visual depictions to reach a reasoned judgment—the procedures involved in censoring each medium are very different.

Only the Indecent Publications Tribunal, as its name implies, sits as a court or as a commission of inquiry would sit. All five members of the Tribunal, some of whom must be experts in literature, education and the law, read every publication submitted to the Tribunal. After public advertising, a hearing is then held in which written and oral submissions are received. The process is partly adversarial, in the sense that counsel often appear to present argument and to examine and cross-examine witnesses.

Some argue that this is the best way to test the probative value of any given piece of evidence. The process is also partly inquisitorial, in that members of the Tribunal often question the parties (which include anyone who can demonstrate an interest and who apply to be joined), counsel and witnesses, and can subpoena witnesses and evidence. Members of the public may attend hearings.

The members of the Tribunal then retire to consider the publications and the submissions on them, after which they must issue written reasons for each decision. The Film Censor and the Video Recordings Authority do not hold hearings, nor are they required to issue written reasons, although the Video Recordings Authority does keep written reasons for public perusal.

Of the two procedures, which is the best way to obtain the evidence upon which the policy decisions are based, upon which in turn the statutory criteria are based? There are points in favour of each. The 'Internal Affairs' approach (Film Censor and Video Recordings Authority) is possibly cheaper. Public hearings and counsel are expensive. Writing reasoned decisions is time consuming and expensive. The Internal Affairs approach is probably administratively more efficient. A video is taken from the locker and watched. A book is passed around, read, discussed, argued over by counsel and exposed for public comment. In addition, the Internal Affairs approach is free of the submissions of interested parties and counsel, and can thus decide on the basis of whatever evidence it chooses to examine. There is no danger of being 'led down garden paths' by counsel.

The 'Justice' approach has one great strength—it is an 'open shop'. Public accountability is the necessary consequence of public hearings and written, published reasons. Censorship is seen to be conducted in a public forum. The Justice approach also ensures that the evidence upon which censorship policy decision-making is based is openly tested in a manner used by courts for centuries. The best available evidence is therefore brought into the decision-making process. Finally, the Justice approach operates as a two-way education service, where the censors are kept aware of public attitudes and the public are kept aware of the reasons why their freedom of expression is affirmed or limited. The public also have a real opportunity to participate in the censorship process, thereby at least procedurally giving the 'public good' meaning.
While the Justice approach might seem preferable, this is not to say that censors using the Justice approach 'get it right all the time'. It is simply that there is a better chance that they will get it right more often. An example of how the Internal Affairs approach got it wrong, and how the Justice approach could have got it right but missed the chance is demonstrated by two cases concerning the 'feminist viewpoint'. Note that none of the statutory criteria explicitly mention anything which could be called a 'feminist viewpoint'. Denigration of a class of people by reference to their sex comes close, and it is this criterion which has caused censors difficulties in New Zealand.

Difficulties Censors have had with Feminist Argument

Feminist argument in New Zealand has tended to be presented as a 'rights'-oriented argument. It is argued first of all that women have a right not to be exposed to sexually explicit material in places such as convenience stores, where images of female naked bodies are available to be purchased along with grocery items. The second argument is that women have a right not to be portrayed as available commodities. It is argued that this is degrading and humiliating. The third argument is that these portrayals harm them, and society, by the way they influence people to think about women. The application of these arguments to depictions of naked women lactating is of growing concern to pressure groups such as Women Against Pornography, who have recently made submissions on the subject to the Indecent Publications Tribunal. Some of these submissions are discussed below.

Depictions of pregnancy

The prevalence of depictions of naked pregnant and/or lactating women in sex magazines

This type of depiction occurs only rarely in publications intended for male heterosexual titillation. The relative scarcity of these depictions of course does not affect the question of their indecency, but it is useful to put them in context so that future policy-making is based on a firm empirical foundation.

There seem to be only two quantitative studies which have attempted to categorise the imagery in what could be called sex magazines (magazines intended to sexually arouse their readers). In Dietz and Evans (1982), the authors classified the covers of 1,760 heterosexual sex magazines from four retail shops in New York. They found images of pregnancy in only four magazines. This represented 0.2 per cent of the total. The authors concluded that 'the extremely low prevalence of imagery specifically limited to women fighting, leather garments, rubber garments, exaggerated shoes and boots, and pregnancy suggests that an extremely small audience depends on these specific images for sexual arousal'. The value of the study is limited for two reasons. Articles available in New York are not necessarily representative of what is available in New Zealand, and only the covers of each magazine were classified, rather than the whole magazine as is required by New Zealand law.

The second study was conducted for the 1986 US Attorney General's Commission on Pornography, but was not analysed and published until 1987 in Dietz & Sears (1987-88). This study suffers from exactly the same limitations as the 1982 study but, unlike that study, it attempts to assess the impact of various depictions on those who view them according to the degree to which the depictions are degrading or humiliating.

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1 The views presented in this paper should not be taken to represent the views of the Indecent Publications Tribunal or any member of the Tribunal. The Tribunal has not yet made a decision on some publications which contain some of the following depictions under the heading 'Difficulties Censors have had with Feminist Argument'.
The Reform of New Zealand's Censorship Laws

The 1987 Dietz & Sears study shows an increase in the depictions of pregnant women on the covers of magazines, books and films. These images were found on the covers of 1.6 per cent of magazines, 0.1 per cent of books and 0.3 per cent of films, for a total of 1.2 per cent of all media surveyed. The authors attempted to categorise the images according to three views of 'degrading or humiliating imagery'.

The first—sexually traditional—view regards any depiction of 'a person as an object of purely sexual interest or (exposure) to public view portions of the body that are customarily concealed' as degrading or humiliating (Dietz & Sears 1987, p. 30). The authors say that 100 per cent of the material surveyed, on this view, would be degrading or humiliating.

The second—sexually moderate—view of degradation or humiliation 'accepts that depictions of the body and of sexual activity can occur without degradation or humiliation but finds degrading or humiliating all those sexual activities that are regarded as deviant or shameful according to traditional values' (ibid, pp. 30-1). The authors found that 52 per cent of the material surveyed—including depictions of pregnancy and 'engorged breasts with milk production'—would be degrading or humiliating on this view. Traditional values were defined to include those which 'regard sexual activity during the third trimester of pregnancy and the immediate postpartum period as taboo' (ibid, fn. 54, p. 31). Most New Zealanders would be somewhat more enlightened with respect to sexual activity during pregnancy.

The third—sexually liberal—view of degradation or humiliation would limit the use of these terms to depictions of activities that are considered shameful even by those who have by and large accepted the changes in social behavior that accompanied the sexual revolution of the 1960s (ibid, p. 32). Depictions of pregnant women were not included within the scope of degrading or humiliating depictions on this view. Thus, the sexually traditional and the sexually moderate would find depictions of pregnant women degrading or humiliating. The sexually liberal would not.

The arguments

Women Against Pornography (WAP) have this to say about one of the pregnancy magazines:

*Pretty Pregnant*: the condition of pregnancy sexualised for men's pleasure. Pregnant women are presented as sexual objects and as sexual objects who enjoy pain and humiliation. One particularly woman-hating caption reads: 'This girl can't wait to deliver her nine-pound mistake before it splits her apart'. The woman is portrayed as a reluctant victim of pregnancy and as one experiencing violence. The same woman is shown as masochistic: 'My breasts have gotten so big and heavy, they hurt when I move and I have to wear a bra all the time to hold them up. They feel real sexy though'. Women's pain is clearly being sexualised here.

Another caption targets all pregnant women for sexual assault: 'Everything about the pregnant woman is inviting and seductive. She exudes sexuality. Her body begs for sex'. The clear message is being given that pregnant women are necessarily sexual, that their bodies' condition makes them sexually available, regardless of their real needs and feelings.

Andrea Dworkin's *Pornography: Men Possessing Women* (1989) was used by WAP to support their argument. Dworkin discusses 'the pornography of pregnancy':

In the male sexual system, the pregnant woman is a particular sex object: she shows her sexuality through her pregnancy. The display marks her as a whore. Her belly is her sex. Her belly is proof that she has been used. Her belly is his phallic triumph. One does not abort his victory. The right wing must have its
proof, its triumph; she, a woman of sex, must be marked. The pregnant woman is the sexual obsession of the right-wing male sexual mentality: that obsession kept secret but acted on in public policy that forbids abortion. The pregnancy is punishment for her participation in sex. She will get sick, her body will go wrong in a thousand different ways, she will die. The sexual excitement is in her possible death—her body that tried to kill the sperm being killed by it. Even in pregnancy, the possibility of her death is the excitement of sex.

Three points are being made by WAP and Dworkin:

- the condition of pregnancy and possible consequential discomfort is 'sexualised' by these depictions;
- the condition of pregnancy is portrayed as the moral price to be paid for sexual activity; and
- the sexualisation and moralisation of pregnancy, created by the manner in which pregnancy is depicted in this magazine, lead to the sexualising of violence against, and the subordination of, women generally.

The factual basis upon which these arguments are made is objectively often true. Kitzinger (1983, p. 203) states:

The pressure on the genital organs from about the fourth month is so great for some women that they say they feel 'randy', like Jane, who admits 'I can't wait for my husband to get home, poor man!' or Rosie, who says I couldn't get through the day without masturbating, I felt so sexy. I thought I must be very peculiar till I talked to my sister-in-law about it who'd had a baby last year and she said she felt just the same'.

These statements are not too dissimilar to some of the greater number of more positive, or at least neutral, statements in Pretty Pregnant, although the context is admittedly different: and it is the context, or manner of the depiction, to which WAP objects. Kitzinger (1983) continues:

A woman who is feeling super-charged like this can be aghast to discover that her partner does not want to have intercourse or that he cannot get or maintain an erection. Many men are anxious that they can hurt the baby. This concern may have very good effects, because they become more thoughtful and considerate about lovemaking than before. But a man who is really frightened may refuse even to touch the woman. Some men have told me that they were terrified of breaking the bag of water. Others have believed that they could damage the baby. Others that if they let themselves go everything can get out of hand and labour may start forthwith. It is almost as if they feel that to keep themselves under restraint will help make the pregnancy go well; as if their self-control will somehow 'guard' the pregnancy. These beliefs are remarkably similar to those held in Third World societies, where taboos are enjoined on a father in order to ensure the well-being of a baby while it is still in the uterus.

This description of male response to pregnancy is the exact reverse of WAP's view. Far from being influenced to sexual violence, Kitzinger (1983) seems to argue that some men will be more considerate in their sexual relations with pregnant women, and that some men will not want to have sexual relations with pregnant women simply because of their pregnancy. The least that can be said is that the male sexual response to pregnancy is varied.
It could be argued that to suppress depictions of pregnant women simply because they are pregnant could actually promote the subordination of women. In *American Booksellers Association v. Hudnut* 771 F.2d 323 (7th Cir. 1985), aff’d, 475 US 1001 (1986), the Feminist Anti-Censorship Taskforce (FACT), among others, successfully challenged the well-known MacKinnon/Dworkin Ordinance relied on by WAP in their argument. It had been enacted by the city of Indianapolis. The FACT brief has been published in Hunter & Law, 'Brief amici curiae of Feminist Anti-Censorship Taskforce, et al., in *American Booksellers Association v. Hudnut*’ (1987-88).

Subordination is the central concept of Women Against Pornography’s definition of pornography. The FACT brief argued (1987-88, pp. 108-9):

If a subjective interpretation of 'subordination' is contemplated, the ordinance vests in individual women a power to impose their views of politically or morally correct sexuality upon other women by calling for repression of images consistent with those views. The evaluative terms—subordination, degradation, abasement—are initially within the definitional control of the plaintiff, whose interpretation, if colorable, must be accepted by the court. An objective standard would require a court to determine whether plaintiff's reaction to the material comports with some generalised notion of which images do or do not degrade women. It would require the judiciary to impose its views of correct sexuality on a diverse community. The inevitable result would be to disapprove those images that are at least conventional and privilege those that are closest to majoritarian beliefs about proper sexuality.

FACT reached a conclusion as to the effect of pornography on men which differs from WAPs conclusion. When depictions which did not involve the use of physical force to coerce a woman to perform sexual acts were studied, FACT submitted that:

no effect on aggression against women has been found; it is the violent, and not the sexual, content of the depiction that is said to produce the effects. Further, all of the aggression studies have used visual imagery [WAP based much of their submission on Pretty Pregnant on the captions beside the pictures; none has studied the impact of only words. Finally, even as to violent ‘aggressive pornography,’ the results of the studies are not uniform. (ibid, p. 113).

There was no violent pictorial imagery in this magazine. The least that can be said by way of conclusion here is that there is no evidence of a negative psychological effect produced by depictions of naked pregnant women, without violence, on men, according to FACT.

FACT (1987-88) also argued that there were fundamental definitional problems with WAPs approach, which had the potential of undermining the very object they sought to achieve:

The ordinance presumes women as a class (and only women) are subordinated by virtually any sexually explicit image. It presumes women as a class (and only women) are incapable of making a binding agreement to participate in the creation of sexually explicit material. And it presumes men as a class (and only men) are conditioned by sexually explicit depictions to commit acts of aggression and to believe misogynist myths.

Such assumptions reinforce and perpetuate central sexist stereotypes; they weaken, rather than enhance, women's struggles to free themselves of archaic notions of gender roles. In treating women as a special class, it repeats the error of earlier protectionist legislation which gave women no significant benefits and denied their equality.
Finally, it is valid to argue that depictions of pregnant women designed for male sexual arousal could contribute to an atmosphere in which women are disadvantaged. Many other depictions could do this. But would banning all material which has this effect add to the deterrent value of laws which already punish the acts which WAP say are caused by ‘pornography’? Again, the FACT brief (ibid, p. 134) stated:

Individuals who commit acts of violence must be held legally and morally accountable. The law should not displace responsibility onto imagery. Amicus Women Against Pornography describe as victims of pornography married women coerced to perform sexual acts depicted in pornographic works, working women harassed on the job with pornographic images, and children who have pornography forced on them during acts of child abuse. Each of these examples describes victims of violence and coercion, not of images. The acts are wrong, whether or not the perpetrator refers to an image. The most wholesome sex education materials, if shown to a young child as an example of what people do with those they love, could be used in a viciously harmful way. The law should punish the abuser, not the image.

The Indecent Publications Tribunal has found depictions of sexual violence, depictions of the victimisation of vulnerable segments of society consisting of those who cannot or would not consent to the depicted sexual activity, and depictions which dehumanise women to a severe degree by placing undue and contrived emphasis on female genitalia to be injurious to the public good, and thus unconditionally indecent. Do depictions of pregnant women in sex magazines do these things? While the depictions are degrading or humiliating to many people, we must ask is this necessarily an indicator of injury to the public good on the basis of the statutory criteria and the Tribunal’s policy as it has evolved in past decisions? It is always open however for people to argue and evidence to be adduced that depictions which have this effect could come within the meaning of ‘injury to the public good’.

Depictions of awkwardly posed single naked women

Appeals from the ‘Justice’ approach used by the Indecent Publications Tribunal

The application of feminist arguments to depictions of single naked female models—sometimes bent over and photographed from behind, other times photographed lying down spreading their labia—was attempted by a minority of the Indecent Publications Tribunal in Re ‘Fiesta’ and ‘Knave’ (1986) 6 NZAR 213. The decision (representing the Justice approach) was appealed to the High Court where the minority decision was disapproved of by Jeffries J in Comptroller of Customs v. Gordon & Gotch (1987) 6 NZAR 469, [1987] 2 NZLR 80. Jeffries J’s criticism was both substantive and procedural. Much of the substantive criticism was limited to the perceived illogicality of the question posed for the Court: ‘whether the representational view of women which denigrates all women is indecent within s. 2 of the Act’ (His Honour's emphasis). His Honour stated that:

In my view to attempt to link pictorial or verbal representation of women to denigration of all women is to go too far . . . To avoid as far as possible misunderstanding I affirm that if a publication is of such a character it gravely concerns the Tribunal over classification then they must decide whether it is injurious to the public good of which women constitute approximately one half (1987, p. 94).
There are at least three possible interpretations of this statement. Does it mean that if a publication is injurious to only one sector of society, it does not injure the public good because it does not injure everyone? Or does this statement mean that one cannot link a denigrating representation of women in a publication to all women, but if one could prove such a link, the publication would still not be injurious because it does not injure the whole public? Or if one could prove such a link, that the publication would be injurious to the public good because it denigrates half of the public?

The opening sentence of the quotation probably qualifies the final sentence. His Honour emphasised that it was possible for the Tribunal to find that the manner in which some nude female models were depicted could warrant a finding that the depictions were 'injurious to the public good'. It was just that such a finding could not be based on 'representational grounds'. His Honour could not have meant that a depiction which did present an injurious view of a group of persons could never be injurious to the public good. Surely such a depiction could be injurious if it could be demonstrated that its effect was to injure the public good. For example, it may well be true that a publication which depicts women in a degrading manner does not per se degrade all women in society. If it could be shown that that same publication has an injurious effect on society, whether it is because it could reinforce negative stereotypical attitudes towards women amongst its readers (potentially endangering women and negatively colouring male attitudes), or any other demonstrable reason which indicates a negative impact on society as a whole, then Jeffries J's comment would not prevent a finding of injury to the public good. Useful here are the examples of grounds upon which the freedom of expression may legitimately be limited in Canada under the Canadian Charter of Rights and Freedoms (very similar to the New Zealand Bill of Rights) which were set out in *R v. Butler* (1990) 50 CCC (3d) 97 (Manitoba Court of Queen's Bench). They were the protection of people from involuntary exposure to pornographic material, the protection of vulnerable segments of society, such as children, and the prevention of material which dehumanises or treats as unequal men or women, especially material which mixes sex with violence.

The thrust of Jeffries J's criticism was directed towards the absence of evidence or grounds for the minority's finding of injury to the public good; it was not directed towards the finding of injury to the public good itself which His Honour (1987, p. 94) stated to be a legitimate finding if it were supported.

Jeffries J did not preclude consideration of a 'feminist' viewpoint, or any other viewpoint for that matter, as long as certain *procedural and evidential* conditions were met. His Honour stated that it was 'right in jurisdiction for the Tribunal' to find that a magazine dealt in matters of sex in a manner injurious to the public good 'because of the manner in which the female nude form is depicted' (1987, p. 94). It was the basis of the minority decision, not the decision itself, which His Honour queried:

... the feminist viewpoint had not been argued and apparently there had been no disclosure to the parties that it would be a controlling influence in their decision... By no stretch of the imagination could the feminist viewpoint be described as a fact, as that word is known in law. Also the feminist viewpoint is hardly in the category of facts for which official notice could be taken. Neither would the viewpoint come within the definitions of legislative or judgmental facts as previously mentioned in this judgment. There is no attempt to support the adoption of the feminist viewpoint by reference to any body of scientific or expert research. There is no citing of any authority for the propositions (1987, p. 95).

It could be argued that it is the duty of censors to take into account feminist viewpoints, along with other viewpoints, in light of the New Zealand Bill of Rights' requirement to justify in terms of 'a free and democratic society' any limitations created on the freedom of
expression. Regardless of the Bill of Rights argument, the *Gordon & Gotch* case represents a missed opportunity. The Justice approach, with its open hearings and receptiveness to evidence and argument, was very suited to overcoming Jeffries J's main objection to the minority’s attempt at feminist argument. All that was needed to carry the day was evidence, tested at a hearing, upon which the minority could have based their decision.

**Appeals from the 'Internal Affairs' approach used by the film censor**

On the other hand, McGechan J in *Society for the Promotion of Community Standards v. Everard* (1987) 7 NZAR 33 viewed the film *Pretty As You Feel* and acted as a censor himself. Procedurally this was because the case came to him as an application for judicial review of the decision of the Chief Film Censor to classify the film R18. Nonetheless, it is possible to argue that the Society would have been much less likely to succeed if the film censor had had the advantages of the Justice approach. Because the Internal Affairs approach makes it very difficult to hear argument on the 'feminist' viewpoint, and impossible to test the evidence on which the argument is based, it is hard to see what else His Honour could have done. It was argued that the film 'denigrated' women as a class (this is one of the film censor's criteria). His Honour stated (1987, p. 63) that:

> There is no dispute—nor could there be—that at least in theory women are a class of the public and are capable of being denigrated as such. Traditional reference to women drivers might be an example . . . In the end, the view that the film denigrates women rather amounts to a general proposition that a film showing certain women undertaking exotic sexual practices blackens all women. I do not accept that proposition. If it is to be censorship policy, with the repercussions which could follow, parliamentary action is required.

Would His Honour have objected so much if 'censorship policy' (he too realises that the statutory criteria must be filled with meaning by policy decisions) had been based on evidence rather than 'general proposition'? Would he have objected so much, or at all, if the Film Censor had heard argument and evidence which proved that this film denigrated women? Yet it is the very nature of the Internal Affairs approach which makes this difficult, even impossible, to do. *Everard* then does not represent so much a missed opportunity, as an opportunity which was impossible for the censor to take because of the procedure under which he operated.

**Conclusion**

To get back to the purpose of this paper, which is to discuss law reform, it is probably by now obvious that the reform of censorship law should take account of not only classification criteria but the procedures used by censors to give meaning to, and to apply, those criteria. If censors are supposed to take into account the views of all segments of society and try to find some middle ground, then legislation must be drafted with the following principles in mind:

(a) The legislation should be administratively clean. The decision-making process should not be cluttered up with bureaucratic procedures and forms. A single independent tribunal to which any film, video or publication could be submitted by any person or government organisation would be administratively clean.
The legislation should provide for a censorship procedure which allows maximum public opportunity to make submissions and arguments on any given film, video or publication.

The legislation should provide for procedures which ensure that the best evidence is brought to light so that censorship decisions are based on well-informed policy. There is no better procedure to satisfy both (b) and (c) than an open public hearing.

The legislation should give censors enough powers to enable them to reconcile as many opposing viewpoints as is desirable in a free and democratic society. Censors should not be hamstrung by a lack of power, say, to order that a magazine be displayed in a place restricted to people over the age of 18 years, if that would be the best way to reconcile the right not to be exposed to sexually explicit magazines with the right to be able to read what adult people want.

The legislation should make censors publicly accountable for their decisions. A requirement of written reasons for decisions goes some way to meeting this need. Open public hearings also go some way towards satisfying this need. And of course, the reverse is true: public hearings and written reasons go some way to keeping the public informed of current censorship policy and the evidence on which that policy is based.

Whatever the merits of 'feminist' arguments and counter-arguments, it is submitted that they must be taken into account by censors. Law reform must ensure that the procedures exist for a proper testing of these, and any other, arguments.

References


