Films, Videos and Publications Classification Amendment Bill

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Attorney-General

Legal Advice
Films, Videos and Publications Classification Amendment Bill
Consistency With The New Zealand Bill Of Rights Act 1990

1. We have considered the Films, Videos and Publications Classification Amendment Bill (PCO5406/13) ("the Bill") for consistency with the New Zealand Bill of Rights Act 1990 ("NZBORA") and are pleased to advise that, after some consideration, the Bill does not contain any provisions that appear to be inconsistent with NZBORA. Nonetheless, a number of issues arose which required fuller analysis in order to be able to establish NZBORA consistency, viz, (1) provisions allowing for search and seizure; (2) the expansion of offence provisions that exclude mens rea defences; (3) provisions restricting expression or providing for forced expression.

Outline of the Bill

2. The Bill amends the Films, Videos and Publications Classifications Act 1993 ("the Act") to address changes that have occurred in the nature and scale of offending, largely as a result of the world-wide proliferation of child pornography via the internet. In summary, the Bill:

2.1 extends the "trading or commercial" offences in the Act to include importing and exporting objectionable material for the purposes of supply or distribution (clauses 23, 24, 26);

2.2 ensures that relevant provisions of the Customs and Excise Act 1996 relating to importation and exportation of objectionable publications are aligned with the Act (clauses 37-42);

2.3 increases the maximum penalties for making, trading and distributing objectionable material (including child pornography) to 10 years imprisonment (cl 25 and 27);

2.4 creates a new offence, punishable by up to two years imprisonment, of possession of an objectionable publication, knowing or having reasonable cause to believe that it is objectionable (clause 29);

2.5 requires a Court, when sentencing for an offence involving an objectionable publication, to take into account, as an aggravating factor, the extent to which the publication is objectionable because it contains child pornography (clause 30);

2.6 gives District Court Judges power to issue search warrants in connection with the suspected commission of the new possession "with knowledge" offence (clause 21);

2.7 removes any doubt that nude or partially nude images of children that can reasonably be considered sexual in nature are publications that deal with "a matter such as sex", as required by s 3(1) of the Act, and can therefore be examined and classified as "objectionable" by the censors (clause 4);

2.8 introduces a specific provision to permit a publication which would otherwise be classified as "unrestricted", to be classified as "restricted to persons of a specified age", if the publication contains offensive language and exposure to the publication would be harmful to persons under that age (clause 8);

2.9 amends existing classification criteria so that the use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct will not result in a publication being deemed "objectionable", but will instead be a factor that must be given particular weight in reaching a classification decision (clause 4);

2.10 includes provisions dealing with extraterritorial jurisdiction in respect of New Zealand citizens, extradition, and mutual assistance in criminal matters, to ensure compliance with the Optional Protocol to the United Nations Convention on the Rights of the Child (UNCROC) on the Sale of Children, Child Prostitution and Child Pornography (clause 32).

Clauses 21 and 22 - Search and seizure powers

3. Clause 21 repeals s 109 of the Act and substitutes new sections 109 to 109C, which relate to search warrants. New s 109 re-enacts the power of a District Court Judge, Justice, Community Magistrate, or Registrar to issue a warrant in respect of specified publication offences. New s 109A and 109B enable search warrants to be issued in connection with the suspected commission of the new offence of possession of an objectionable publication knowing, or having reasonable cause to believe, that the publication is objectionable (new s 131A). While new s 109A(1) gives a District Court Judge a discretion to issue search warrants under the Act in connection with the suspected commission of the new offence, new s 109B enables a Justice, Community Magistrate, or Registrar to issue a warrant in respect of the new offence if all reasonable efforts have been made to obtain a warrant from a District Court Judge, but a District Court Judge is not available, and a delay would create a real risk of the purpose of the search being frustrated.

4. Clause 22 inserts a new s 118A which states that specified sections of the Customs and Excise Act 1996 apply in relation to offences against the Act concerning the "importation" or "exportation" of objectionable publications.

5. Clauses 21 and 22 of the Bill raise issues under s 21 NZBORA (the right to be secure against unreasonable search or seizure). To pass muster under s 21 NZBORA, search powers should generally only be exercisable pursuant to warrant, granted by a neutral magistrate, based on reasonable grounds to believe that offending has occurred and that evidence of that offending (or tending to prove that

offending) will be found. Against that test, the new search powers are consistent with s 21.

6. The State has a legitimate interest in preventing the importation, exportation or distribution of "objectionable" publications. The requirement that there be reasonable grounds to believe that a specified offence is being committed ensures that these search powers will be used only in pursuit of suspected offending and where a neutral magistrate can be persuaded that objective grounds exist for the belief that offending has occurred and evidence will be found. We also note that the majority of specified offences involve the importation, exportation, distribution or public exhibition of objectionable material. In such circumstances, the expectation of "privacy" by the accused individual or company is greatly reduced by the public nature of the activity. Accordingly, fewer restrictions are required for the exercise of these search powers.

7. In contrast to the above, new ss 109A and 109B place greater restrictions on the obtaining of a search warrant when dealing with the new offence relating to knowing possession of objectionable publications (new s 131A). This is in recognition of the fact that the simple possession offence will include activity that does not bring an individual's actions within the public arena.

8. We consider that the search and seizure powers provided in clauses 21 and 22 of the Bill are not inconsistent with the fundamental rights and freedoms set out in the NZBORA.

The expansion of offences that exclude mens rea defences

9. The Bill contains provisions that expand and/or amend ss 123, 127 and 129 of the Act. These offence provisions all contain the following exclusion:

"It shall be no defence to a charge under … this section that the defendant had no knowledge or no reasonable cause to believe that the publication to which the charge relates was objectionable."

Although this exclusion of a specific mens rea element makes the offence a hybrid between "absolute" and "strict" liability, s 123 is specifically recognised in its title as being a "strict" liability offence and this label can also be applied to s 127(1) and s 129(1).

Rejection of retrospectivity arguments

10. We note that previous advice from this Office (given in 1992) on the original Films, Videos and Publications Classification Bill suggested that the strict liability possession offence (enacted as the current s 131 of the Act) imposed a retrospective liability (contrary to s 26 NZBORA) because it criminalised possession of the disputed material prior to the material's classification as "objectionable".

11. We wish to take this opportunity to clarify that the Crown Law Office would no longer maintain this position for the following reasons:

11.1 It is clear that the Act envisages that publications are "objectionable" and in breach of the standards set out in s 3 even though the particular publication may not have been officially classified as such. For example, s 3(2) deems particular types of publications objectionable per se.

11.2 The right to be free of retrospective criminal penalties does include the concept that an offence must be clearly defined in law. However, it has been accepted that this condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the Court's interpretations of it, what acts and omissions will or are likely to make him or her liable.[1]

11.3 The criticism of these strict liability offences is not founded on any sense of "vagueness". Rather, it is a concern that the offence will capture individuals who lack the appropriate mens rea for the offence (i.e: the provision unfairly captures people who are not blameworthy); that is not an issue to which s 26 NZBORA is addressed.[2]

The presumption of innocence issue

12. Given the pivotal role that the "objectionable" nature of the publication plays in these offences, it may be argued that the exclusion of mens rea defences will raise an inconsistency with the right to be presumed innocent until proved guilty according to law under s 25(c) NZBORA. In summary, there are generally three arguments put forward in support of this proposition:

12.1 The right under s 25(c) NZBORA has three components. First, it allocates the burden of proving guilt to the State. Second, it requires that guilt be proved beyond reasonable doubt. Third, the matter to be proved is guilt, suggesting that offences not be defined by the legislature, nor construed by Courts, so as to permit the criminalisation of conduct that involves no moral fault.

12.2 The phrase "according to law" means that guilt must be proved in accordance with both the procedural and substantive rules of the legal system. The expression "law" in s 25(c) denotes a law meeting the "normative" standard demanded by the right to be presumed innocent, viz, that only the demonstrably guilty should be criminally punished. This high standard of proof discourages prosecutions being mounted when sufficient evidence is not available.

12.3 That it is consistent with the Court's approach to the interpretation of other types of strict liability offences to consider whether the offences in the principal Act are inconsistent with s 25(c) NZBORA. In other words, if the Courts can say that a criminal offence infringes the right to be presumed innocent because a defence exists but is too restrictive, they must surely be able to say in an appropriate case that the right is likewise infringed if no knowledge defence exists at all.

Proponents of this view draw support from common law jurisprudence[3] as well as decisions under the European Convention[4] and the Canadian Charter[5]. Finally, with respect to New Zealand case law, it should be noted that in *Hamilton City Council v Fairweather Baragwanath* J [6]made the following obiter statement:

"[I] incline to the view that not only s 25(c) of the New Zealand Bill of Rights Act 1990 - the presumption of innocence until proven guilty (see R v Rangi [1992] 1 NZLR 385, 389 (CA)) - but also s 27(1) - the right to observance of the principles of natural justice - point against absolute liability on the part of one who is without fault."

13. However, we consider that s 25(c) is a "procedural" right only. We have reached this conclusion for the following reasons:

13.1 The presumption of innocence, as traditionally understood, is linked to the concept of "fair trial" and does not imply substantive criteria of criminal liability; these criteria are, instead, to be found in the substantive criminal law, which spells out the detailed requirements of individual offences, as well as establishing general principles and conditions for imposing criminal liability.

13.2 The presence of such a substantive criterion in s 25(c) NZBORA would force both legislators and the judiciary to make complex and strained distinctions in order to classify an offence as "regulatory" rather than "criminal"[7].

13.3 There is a significant difference between (a) reading down strict liability offences by limiting the onus being placed on the accused to disprove a required mens rea element in the offence; and (b) redrafting or redefining the substance of various criminal offences by adding a mens rea element to avoid liability.

13.4 The doctrine of "proportionality" is sufficient to address the absence of appropriate mens rea elements in an offence, if that offence breaches or infringes one of the substantive rights or freedoms in the NZBORA.

14. Although proponents of the broader "substantive" interpretation of s 25(c) NZBORA rely on the European Court of Human Rights ("ECHR") decision in Salabiaku, the comments of the court were not conclusive and in any event indicated that States would have a relatively wide margin in defining the role, if any, for mens rea[8]. It should also be noted that a recent decision in the High Court of Justice, Queens Bench Division has directly addressed an absolute liability offence. In Barnfather v London Borough of Islington Education Authority [2003] EWHC 418 the Honourable Justice Kay and the Honourable Justice Elias considered whether s 444(1) of the Education Act 1996 (as interpreted by the higher Courts prior to the enactment of the UK Human Rights Act 1998) was compatible with the provisions of the European Convention on Human Rights. In rejecting the argument that this offence was contrary to Article 6(2) of the European Convention, Justice Kay made the following observation (at paragraph 18):

"In *Salabiaku* the Strasbourg Court emphasised the words ‘proved guilty according to law’ in Article 6.2 and held that the ‘law’ in question is not to be construed exclusively with reference to domestic law. However, the question is whether Article 6.2 provides a criterion against which the substance of a domestic offence can be scrutinised or whether it is confined to procedural matters in the way in which such an offence may be proved. I have no doubt that the issue in Salabiaku was of the latter rather than the former kind. It related to the method of proof of the customs offence and the deployment of a presumption, akin to a reverse burden, in that regard."

15. While the Supreme Court of Canada may have taken a restrictive approach to *absolute liability* offences under s 7 of the Canadian Charter, the simple answer in the New Zealand context is that there is no equivalent general "*fundamental justice*" right in the NZBORA. Of course, proponents of the *substantive view* could argue that, like Baragwanath J, the Court of Appeal might take a broader interpretation of s 25(c) NZBORA. However, we do not consider that the constitutional status of the NZBORA would support such a progressive interpretation by the Court of Appeal. Of course this does not mean that these types of issues will not be relevant if an offence provision as seen as raising issues under other substantive rights such as freedom of expression.

Are these strict liability offences a breach of freedom of expression?

16. Given the nature of the censorship legislation, most of the offences in the principal Act will be *prima facie* inconsistent with the right to freedom of expression under s 14 NZBORA. The issue becomes whether these *prima facie* inconsistencies can be viewed as demonstrably justifiable limitations under s 5 NZBORA. It will be argued by some, that those offences in the Act that exclude the possibility of a mens rea defence, are disproportionately severe and therefore fail to meet the test under s 5 NZBORA.

17. However, given the nature of "objectionable" material under the Act, and the absence of any penalty of imprisonment for the strict liability offences, we consider these offence provisions to be both reasonable and proportionate in terms of s 5 NZBORA. Indeed, we note that the offences in ss 123, 127(1) and 129(1) relate to distribution and public exhibition of objectionable material. The emphasis must be on ensuring that those individuals and companies involved in distribution of such material take steps under the censorship legislation to ensure that the material they distribute to the public is not "objectionable" and in breach of the law. In this context then the fines available for such offences can be seen as comparable to similar fines available in other regulatory areas.

Other freedom of expression issues

18. It is not surprising that several provisions in the Bill raise *prima facie* inconsistencies with the right to freedom of expression under s 14 NZBORA. These provisions either restrict the individual’s ability to produce or distribute particular "objectionable" images or other publications or, alternatively, the Bill contains provisions that provide for "forced expression" in the terms of compulsory labelling of restricted material or public notification that a classification has been sought under the Act.

19. Once again, the nature of "objectionable" material under the Act would justify these provisions. We consider that there are sufficient procedural restrictions and penalty levels to ensure that these provisions are both proportionate and reasonable in terms of s 5 NZBORA. Accordingly, we consider that these provisions are not inconsistent with the rights and freedoms contained in the NZBORA.

Conclusion

20. While the Films, Videos, and Publications Classification Amendment Bill (PCO 5406/13) raises some *prima facie* human rights issues, we consider that the provisions of the Bill are not inconsistent with the New Zealand Bill of Rights Act 1990.

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Footnotes

1. See Kokkinakis v Greece (1994) 17 EHRR 397; G v France (1995) 21 EHRR 288; SW & CR v United Kingdom (1995) 21 EHRR 363; Reference Re ss 193 and 195.1(1)(c) of the Criminal Code [1990] 1 SCR 1123; United Nurses of Alberta v Alberta (Attorney-General) [1992] 1 SCR 901.
2. The Canadian jurisprudence has indicated that we should be cautious in viewing concerns regarding the over broad capture of any particular offence as being an issue of "vagueness" or "unforeseeability". This is viewed as an issue of "proportionality" under s 1 of the Canadian Charter (or alternatively, s 5 NZBORA). See R v Sharpe [2001] 1 SCR 45; R v Fisher (1994) 88 CCC (3rd) 103 (Ontario Court of Appeal).
3. See Gammon (Hong Kong) Limited v Attorney-General of Hong Kong [1985] AC 1 (PC); R v Lambert [2002] 2 AC 545 (HL).
4. Salabiaku v France (1988) 13 EHRR 379.
5. Re B. C. Motor Vehicle Act [1985] 2 SCR 486; R v Hess [1990] 2 SCR 906, 917.
6. [2002] NZAR 477.
7. See the discussion of the Canadian Courts' approach to absolute and strict liability in P W Hogg's Constitutional Law of Canada (loose-leaf ed) Volume 2, p 44.22.
8. See also App No 5124/71 v United Kingdom 19 July 1972, 42 Coll 135; and Hansen v Denmark App No 28970/95, 16 March 2000.