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Report of the

# ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act  
1990 on the Films, Videos, and Publications  
Classification (Prohibition of Child  
Pornography) Amendment Bill

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*Presented to the House of Representatives pursuant  
to Section 7 of the New Zealand Bill of Rights Act  
1990 and Standing Order 260 (2) of the Standing  
Orders of the House of Representatives*

I have considered the Films, Videos, and Publications Classification (Prohibition of Child Pornography) Amendment Bill (the "Bill") for consistency with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). I have concluded that clause 4 of the Bill appears to be inconsistent with section 14 of the Bill of Rights Act, and does not appear to be justified in terms of section 5 of the Bill of Rights Act. As required by section 7 of the Bill of Rights Act (and Standing Order 260) I draw this to the attention of the House of Representatives.

### **The Bill**

The Bill attempts to address a perceived deficiency in the Films, Videos, and Publications Classification Act 1993 (the "Classification Act") relating to child pornography arising from the Court of Appeal's decision in *Moonen v Film and Literature Board of Review*. According to its explanatory note, the Bill addresses the perceived problem so that "[w]here children are involved, and the Office and the Board judge material to be pornographic, no further inquiry ... under the New Zealand Bill of Rights Act" will be required.

### **The law currently prohibits child pornography**

Section 3(2) of the Classification Act currently provides that where a publication "promotes or supports or tends to promote or support ... the exploitation of children, or young persons, or both, for sexual purposes" it is deemed to be objectionable. In *Moonen*, the Court of Appeal found that, in the censorship context, some limit on freedom of expression is inevitable. In considering the meaning of the words "promotes or supports" in section 3(2), the Court found that the combined effect of sections 5 and 6 of the Bill of Rights Act is that section 3(2) should be given a meaning that prohibits child pornography while infringing freedom of expression as little as possible.

### **The Bill of Rights Act issue in the Bill**

Clause 4 of the Bill would insert a new subsection (1A) into section 3 of the Classification Act. Paragraph (a) of new subsection (1A) would deem to be objectionable, any material "dealing with" sexual conduct by children or young persons, irrespective of the material's intentions or effects, or the manner in which the conduct is dealt with in the particular publication. All manner of academic, literary, scientific, medical, artistic, or other works that discuss the sexual conduct of children or young persons would be considered "objectionable" in terms of new subsection (1A). This would include, for example, sex education materials or a documentary exposing the sexual exploitation of children.

Paragraph (c) of new subsection (1A) would deem to be objectionable material that "exploits the nudity of children, or young persons, or both." The word "exploits" raises the possibility that any material dealing with the nudity of children or young persons, which provides some benefit to the person promoting the material (be it financial, academic recognition, etc.) will be deemed to be objectionable. This prohibition may, for example, mean that commercial advertising that uses images of nude children (such as nappy advertisements) is "objectionable" under new subsection (1A).

Clearly, because the Bill sets out new criteria for censoring publications, it is a *prima facie* limit on the right to freedom of expression affirmed by section 14 of the Bill of Rights Act. The more important question is whether that limit can be said to be "reasonable and justified" in terms of section 5 of the Bill of Rights Act.

The Bill's explanatory note states that it will "restore the fullest protection for children in New Zealand's censorship legislation". The explanatory note also emphasises the importance of "the [Classification Act] operat[ing] efficiently to prohibit and protect child pornography." Accordingly, the broad objective of the Bill seems to be the prevention of harm caused by pornographic portrayals of children and young persons. I have concluded that this broad aim is "important and significant" and that it substantively justifies some limits on freedom of expression.

However, in terms of section 5 of the Bill of Rights Act, I must also consider whether there is a rational and proportionate connection between the Bill's objective and the measures proposed to effect that objective. In the case of this Bill, the inquiry is whether the proposed new subsection (1A) implements the objective of preventing harm arising from pornographic portrayals of children and young persons in a rational and proportionate manner that impairs the right to freedom of expression as little as possible.

The prohibition of material that promotes or supports the sexual exploitation of children can be described as rationally and proportionately connected to the objective of efficiently preventing harm arising from pornographic portrayals of children and young persons. However, it is difficult to argue that prohibiting material that describes sexual conduct for non-sexual purposes, and in a manner that neither promotes nor supports the sexual exploitation of children, is rationally and proportionately connected to this objective. Thus, in order for any measure aimed at preventing harm arising from pornographic portrayals of children and young persons to be considered rationally and proportionately connected to that objective, it would need to be narrowly focused on the material most likely to give rise to such harm.

In my view, on its face, new subsection (1A) is not narrowly focused. As I have noted above, new subsection (1A) would appear to cover a range of publications with academic, literary, scientific, artistic, medical, educational, or other merit. Whether or not such publications have the overall effect of promoting or supporting the sexual exploitation of children and young persons, subsection (1A) would require that they be given an objectionable classification, merely because they deal with sexual conduct with or by children or young persons.

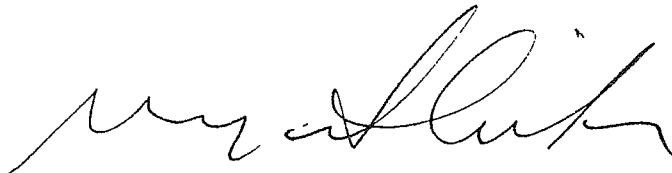
I have also considered whether existing sections 3(3), 3(4) and 23 of the Classification Act would allow new subsection (1A) to be interpreted so as not to classify publications as objectionable in circumstances unrelated to the Bill's aim. If this was so, this would mean that subsection (1A) could operate consistently with the Bill of Rights Act. I have concluded, however, that while existing sections of the Classification Act may mitigate the effect of the Bill to some extent, it is unlikely that they will completely obviate the disproportionate effect of the Bill.

## Conclusion

I conclude that clause 4 of the Films, Videos, and Publications Classification (Prohibition of Child Pornography) Amendment Bill appears to be inconsistent with section 14 of the New Zealand Bill of Rights Act 1990, and does not appear to be justified in terms of section 5 of the Bill of Rights Act.

I wish to stress that, although clause 4 of the Bill expressly excludes consideration of the Bill of Rights Act in the classification of objectionable material under new subsection (1A), it is not this exclusion that raises the most significant issue in assessing the rationality and proportionality of the Bill's restriction on freedom of expression. Rather, it is the broad coverage of new subsection (1A) and the range of material that would be found to be objectionable under this subsection that lead me to conclude that the Bill fails to meet the "reasonable limits" test imposed by section 5 of the Bill of Rights Act.

I also wish to stress that the Classification Act already sets out criteria for the classification of child pornography as objectionable and that these criteria are clearly reasonable limits on the right to freedom of expression in terms of the New Zealand Bill of Rights Act 1990.



Hon Margaret Wilson  
Attorney-General