AN OBJECTIONABLE OFFENCE:

A CRITIQUE OF THE POSSESSION OFFENCE IN THE FILMS, VIDEOS, AND PUBLICATIONS CLASSIFICATION ACT 1993

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This article examines the strict liability offence of the possession of objectionable publications in s 131 of the Films, Videos, and Publications Classification Act 1993 ("FVPCA"). The use of strict liability in relation to the possession offence was criticised during the passing of the FVPCA. This article explores fully the criticisms that can be made about the use of strict liability generally and, specifically in the context of censorship legislation.

I THE FVPCA SCHEME

A. The Offence Provisions

The FVPCA contains several offences which enforce the censorship regime. The first group of offences cover the making and supply of objectionable and restricted publications. Sections 124 and 127 require that a defendant have knowledge of or reasonable cause to believe a publication which she supplies is objectionable.[1] Sections 123 and 126 also cover the supply of objectionable publications but these offences are strict liability in the sense that it is no defence that the defendant had no knowledge or no reasonable cause to believe

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[1] Objectionable publications: s 124; restricted publications: s 127.

that the publication was objectionable.[2] The possession offence in s 131, however, is only phrased in terms of strict liability:[3]

> s131 **Offence to possess objectionable publication—**
>
> (1) Subject to subsections (4) and (5) of this section, every person commits an offence against this Act who, without lawful authority or excuse, has in that person's possession an objectionable publication.
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> (2) Every person who commits an offence against subsection (1) of this section is liable to a fine not exceeding,--
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> (a) In the case of an individual, $2,000:
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> (b) In the case of a body corporate, $5,000
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> (3) It shall be no defence to a charge under subsection (1) of this section that the defendant had no knowledge or no reasonable cause to believe that the publication to which the charge relates was objectionable.

The effect of s 131(3) is that the Crown need prove only that a person is in possession of a publication. If that publication is determined by the censorship bodies to be objectionable then that person will be convicted. It is not necessary that a person be convicted of an offence before a publication can be confiscated. There is an independent power to seize and destroy publications which are determined to be objectionable.[4]

B What is Objectionable?

Section 3 of the FVPCA defines when a publication is objectionable:

> s3 **Meaning of "objectionable" —**
>
> (1) For the purposes of this Act, a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good.
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> (2) A publication shall be deemed to be objectionable for the purposes of this Act if the publication promotes or supports, or tends to promote or support,--

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2 Objectionable publications: s 123; restricted publications: s 126. These offences carry a lessor penalty than those involving knowledge.

3 Sections 131(4) - 131(8) omitted.

4 Sections 107, 108 and 116.

(a) The exploitation of children, or young persons, or both, for sexual purposes; or

(b) The use of violence or coercion to compel any person to participate in, or submit to, sexual conduct; or

(c) Sexual conduct with or upon the body of a dead person; or

(d) The use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct; or

(e) Bestiality; or

(f) Acts of torture or the infliction of extreme violence or extreme cruelty.

(3) In determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) of this section applies) is objectionable or should be given a classification other than objectionable, particular weight shall be given to the extent and degree to which, and the manner in which, the publication--

(a) Describes, depicts, or otherwise deals with--

(i) Acts of torture, the infliction of serious physical harm, or acts of significant cruelty:

(ii) Sexual violence or sexual coercion, or violence or coercion in association with sexual conduct:

(iii) Other sexual or physical conduct of a degrading or dehumanising or demeaning nature:

(iv) Sexual conduct with or by children, or young persons, or both:

(v) Physical conduct in which sexual satisfaction is derived from inflicting or suffering cruelty or pain:

(b) Exploits the nudity of children, or young persons, or both:

(c) Degrades or dehumanises or demeans any person:

(d) Promotes or encourages criminal acts or acts of terrorism:

(e) Represents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of members of that class, being a characteristic that is a prohibited ground of discrimination specified in section 21 (1) of the Human Rights Act 1993.

> (4) In determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) of this section applies) is objectionable or should be given a classification other than objectionable, the following matters shall also be considered:
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> (a) The dominant effect of the publication as a whole:
>
> (b) The impact of the medium in which the publication is presented:
>
> (c) The character of the publication, including any merit, value, or importance that the publication has in relation to literary, artistic, social, cultural, educational, scientific, or other matters:
>
> (d) The persons, classes of persons, or age groups of the persons to whom the publication is intended or is likely to be made available:
>
> (e) The purpose for which the publication is intended to be used:
>
> (f) Any other relevant circumstances relating to the intended or likely use of the publication.

The Film and Literature Board of Review ("the Board") and the High Court have recently examined how this section operates.[5] The Board considered that s 3(1) is a governing or umbrella definition of objectionable. A publication is objectionable if it deals with matters of sex, crime, horror, cruelty or violence in such a manner that the availability of the publication is likely to be injurious to the public good. The words "injurious to the public good" are retained from the previous censorship legislation,[6] although the Board considered that a new interpretation of this phrase was required because "Parliament has signalled a departure from the old regime".[7]

The Board noted the FVPCA "creates an entirely new method of discerning when the public good is likely to be injured."[8] The Act provides for a two-tiered system of determining whether a publication is objectionable.

Publications which contain any of the characteristics listed in s 3(2) are deemed to be objectionable. That is, if any publication "'promotes or supports, or tends to promote or

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5 *New Truth & TV Extra (4 November 1994 issue)* (1996) 3 HRNZ 162, *News Media Ltd v Film and Literature Board of Review* Unreported, 11 June 1997, High Court, Wellington Registry, AP197/96, McGechan & Goddard JJ.

6 Indecent Publications Act 1963, s2 (repealed); Films Act 1983, s13 (repealed); Video Recordings Act 1987, s2 (repealed).

7 *New Truth* above n 5, 169.

8 *New Truth* above n 5, 169.

support" any of the activities in s 3(2) then Parliament has deemed that the availability of the publication is likely to be injurious to the public good and the censor is obliged to classify it as objectionable.[9]

The censor is not permitted to consider whether availability of the publication would in fact be injurious to the public good, as subs 3(3) carves out an automatic deeming provision from the umbrella definition in subs 3(1). The censor is also not permitted to consider the contextual criteria provided subs 3(4), such as the dominant effect of the publication as a whole.

The High Court confirmed this approach to the automatic deeming provision. It did note, however, that there may be some 'coincidental overlap' of the first and second tiers. The Court said that when enquiring into whether a publication tends to promote or support any s 3(2) activity, "it cannot be done without considering the extent, degree and manner in which the publication deals with the activity".[10] It may also be necessary to consider the impact of the medium. The Court did qualify this by saying this coincidental applicability is only to determine whether a publication tends to support the activities in s 3(2), does not raise up the full range of s 3(3) and (4) factors, and the greater or lesser degree of coincidental common ground will depend on the particular circumstances of the case.[11]

If a publication does not fall within the absolute prohibition carved out by subs 3(2), then the second tier criteria must be considered. Under the second tier a publication may be classified as unrestricted, objectionable, or objectionable except in certain circumstances.[12] In this way a publication may still be determined to be objectionable even if it survives the subsection 3(2) criteria. The Board noted this was the intention of the Minister of Women's Affairs' when she introduced the Bill to Parliament.[13] Sections 3(3) and (4) simply provide

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9 *New Truth* above n 5, 169. The Law Commission considers that generally the word 'deems' creates a legal fiction. It makes something in law that which it is not: The New Zealand Law Commission *Legislation Manual: Structure and Style - Report 35* (Wellington 1996) 42. This is what is achieved by s 3(2), as the availability of publications which promote or support those activities are regarded as being injurious to the public good, whether or not they actually are.

10 *News Media*, above n 5, 12.

11 *News Media*, above n 5, 12.

12 A publication that is objectionable except in certain circumstances is referred to as a restricted publication, and may, for example, be restricted to persons over a specified age, restricted person or class of person (such as the particular importer), or restricted to a specified purpose (such as a particular Film Festival or academic research); see s 23 FVPCA. If a publication is restricted it is not covered by the possession offence in s 131.

13 *New Truth* above n 5, 6, citing Hon Jenny Shipley, MP 532 (1992) NZPD 12 760.

the criteria for deciding whether the availability of a publication is likely to be injurious to the public good under the governing subsection.

Section 3(3) requires that particular weight be given to the extent, degree, and manner in which a publication deals with certain violent and sexual acts, exploitation of young persons, degradation of people, promotion of criminal activity, and representation of classes of people as inferior. Section 3(4) provides for other factors that must also be considered, such as dominant effect and artistic merit. The section (3)(4) does not, however, require that 'particular weight' be given to these factors as compared to the factors in the subsection (3).

These criteria provide the framework in which the censor determines whether the 'availability' of a publication is injurious to the public good. Although the phrase 'likely to be injurious to the public good' is familiar from previous Acts, 'availability' is not. Even though the rewording is subtle, the focus has changed from whether the publication *itself* is injurious to the public good, to whether its *availability* is injurious to the public good.[14]

C The Process for Deciding Whether a Publication is Objectionable

Where the character of a publication arises in a civil or criminal proceeding, the Office of Film and Literature Classification ("the Office") has sole jurisdiction to determine whether a publication is objectionable.[15]

In a proceeding where the publication in issue has already been classified, the subsisting decision of the Office is conclusive proof of whether a publication is objectionable.[16] A person who is charged with an offence can apply under s 41(2)to have an earlier decision reconsidered if the decision was made more than a year earlier.[17]

In a criminal proceeding where the publication has not been classified, or the accused wishes to challenge an existing decision under s 41(2), the Court must refer the matter to the Office for determination. All parties to the proceeding have the right to make a written submission to the Office in respect of the classification of that publication.[18] Also entitled to make written submissions are the Secretary for Internal Affairs, people with an interest in the publication such as owner, maker, distributor, or publisher, and any other people who

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14 *New Truth* above n 5, 170.

15 Section 29(1).

16 Section 41(1); this is subject to the resolution of any reviews or appeals allowed under ss 42, 47, and 58. A copy of the register recording that decision and certification from the Office that the decision is still in force is sufficient proof of that decision: s 29(3).

17 Reconsideration of a decision by persons other than someone charged is only permitted if the decision was made three years earlier, and the Chief Censor gives leave to do so: s 42.

18 Section 20(2).

satisfy the Chief Censor that they are likely to be affected by the publication.[19] Otherwise there is no general right to appear before, or to be heard by the Office. The Office may, however, consult persons that it considers may be able to assist it in its decision.[20] It is not necessary for the Office to hold a hearing.[21]

The Office will then examine the publication and classify it under s 23(2) as either unrestricted, objectionable, or objectionable. The Office reports its finding to the court,[22] and must publish particulars of the decision in a monthly list of decisions.[23] A decision takes effect 30 working days after the classification has been recorded in the list of decisions, unless an application for review has been made in that time.[24] Any party to the related court proceeding may apply to the Board for a review of the decision.[25] The owner, maker, publisher, or authorised distributor of the publication also has a general right to seek review.[26] The Secretary of Internal Affairs may give leave to any other person to seek the review of the decision.[27]

The review by the Board is by way of re-examination of the publication without regard to the decision of the Office.[28] The applicant for review, parties to the related proceeding, and any other person who satisfies the Board that they are likely to be affected have a right to make written submissions.[29] The Board has the same power to consult other people who may assist it in making its decision as the Office. The Board may also consult the Office, and is obliged to invite the Office to make a submission if other people have made written submissions or the Board has decided to consult any other person.[30] The Board may hold a hearing, at which people entitled to make written submissions or people consulted by the

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19 Section 20(1).

20 Section 21.

21 Section 22.

22 Section 30.

23 Section 40.

24 Section 31.

25 Section 47(1)(c).

26 Section 47(1)(d).

27 Section 47(1)(e).

28 Section 52(2); The Board, in *Re D. P. Women* Board of Review Decision 1/95, 2, noted that it classifies the publication as if it had never been classified: "fresh and unencumbered by any knowledge of the reasons for the Classification Office's decision".

29 Section 53.

30 Section 54.

Board have a right to be heard.[31] The Board will then assign the publication one of the classifications available under s 23(2). When the Board classifies a publication, the previous classification of the Office is deemed to be cancelled.[32] The decision of the Board may be appealed to High Court or Court of Appeal on questions of law only.[33]

The classification process only allows an accused a very limited right to be heard about a decision which has a significant effect on them. The accused may only make written submissions to the Office or the Board. An accused does not have the opportunity to make oral submissions unless the Board, on review, choses to hold a hearing. This is significantly less than if the issue was decided in court. Further, parties which otherwise would not have a right to participate in a criminal trial have the right to make submissions to the censorship bodies, while the bodies may also choose to consult any person they wish. In this way, conviction may be influenced by people who have no direct link to the criminal proceeding or offence.[34]

D. Possible Safeguards

There are two potential safeguards or checks that may have been intended to limit how s 131 is applied.

First, a search warrant can only be obtained under the FVPCA in relation to ss 123, 124, 127 or 129.[35] These offences deal broadly with the supply of objectionable publications, exhibition to persons under 18 and public display of objectionable publications. There must be reasonable grounds for believing that there is an objectionable publication being kept with the purpose of being so dealt with, that there is any thing which is intended to be used for such a purpose, or that there is any thing which is evidence of such dealing.

There is no general power to obtain a warrant for a search in relation to the possession offence. An Inspector or member of the Police cannot seize a publication without a warrant unless it is seized in the course of carrying out his or her lawful duties.[36] Restricting the method in which the offence can be discovered may restrict the scope of application of the

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31 Section 53(3).

32 Section 55(3).

33 Sections 58 and 70.

34 See JF Kobylka *The Politics of Obscenity: Group litigation in a time of legal change* (Grenwood Press, Westport, 1991) for a discussion of how the participation of interest groups, both libertarian and proscriptionist, as amicus curiae appears to have affected the decisions of the US Supreme Court when deciding obscenity cases.

35 Section 109.

36 Section 108.

offence and may also prevent the possession offence being used as a tool to target certain groups.[37]

Even if this is accepted, there is still scope for the discovery of the offence in the lawful exercise of law enforcement duties. The possession offence can be discovered where a warrant is legitimately obtained for supply reasons or other unrelated criminal offences, or where members of the Police happen on a publication while undertaking routine tasks.

Regardless, a procedural restriction should not be seen to divert attention away from the potential injustice of a substantive provision. If the substantive provision is unjust, it is qualitatively no less unjust because it is applied against fewer people.

The second safeguard that may have been intended to narrow the application of the offence is the provision of enhanced prosecutorial discretion. Leave of the Attorney-General is required under s144 for any prosecution under the Act. If the discretion is exercised sparingly, in cases of worst offending, and if the accused cannot be convicted of a supply offence, the possession offence could take a residual role. This may prevent the offence being instigated against less blameworthy people who possess, often innocently, publications which fall within the grey area of what is objectionable.

This purported safeguard is illusory. This power may be delegated to the Commissioner of Police in respect of offences concerning any particular class of publications.[38] The Commissioner may then delegate this power to any member of the Police, of a rank not less than Inspector.[39] In effect, the provision can provide no more protection against arbitrariness than the ordinary prosecutorial discretion. The exercise of the prosecutorial discretion is already subject to much criticism and regarded as providing very little protection against injustice.[40]

Concerns about the exercise of the prosecutorial discretion were raised in *Police v Quinlan*[41] in the context of censorship legislation. The defendant had been charged with the sale of indecent publications under ss 21(1)(a) and (2) of the Indecent Publications Act 1963. The offence was expressed as strict liability; the Police, however, could have charged the defendant under s 22 which required that the defendant had knowledge of or reasonable

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37 See H Lapsley (1993) 197 Broadsheet, who suggests that there is the "potential for using the [FVPCA] legislation during more a repressive regime, to search for pornography in gay men's or lesbians' houses for example, as has happened in the past."

38 Section 144(2).

39 Section 145(1).

40 See for example, A Ashworth *Principles of Criminal Law* (Claredon Press, Oxford, 1991) ch 2.2.

41 Unreported, 28 February 1994, District Court at Auckland, Judge CJ Rushton.

grounds for believing that the publication was indecent. The classification of the publication as indecent was borderline and the Indecent Publication Tribunal noted its concern at the exercise of the prosecutorial discretion:[42]

> The Tribunal has considerable sympathy with the defendant's position. In this case where it would have been extremely difficult for a defendant to have known that these unclassified publications were indecent, it would have been more appropriate to have charged the defendant under s 22 ... [W]e are uneasy about how appropriate it is to proceed under [s 21] in these circumstances.

II CRITIQUE OF THE POSSESSION OFFENCE

A General Objections

1 Legislation Advisory Committee

The Legislation Advisory Committee expressed concern about the imposition of criminal liability on a person without knowledge of or reasonable cause to believe that a publication is objectionable. The Committee questioned the purpose of the offence and queried how the offence would operate when blameless people were convicted:[43]

> [H]ow is a Court ... to determine a penalty appropriate to condemn behaviour which is blameless and to deter the recurrence of that blameless behaviour by the individual offender and others?

The fairness of the strict liability offences was questioned, particularly in situations where there are swift changes in public opinion or where new kinds of publications receive consideration by the classification bodies.[44] The Committee expressed unease that a person could be liable for possession of an unclassified publication where there is no certainty about the future determination of the Office.[45]

The Committee suggested that it should be a defence:[46]

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42 *Re High Times (Edition May 1993 No 213)* Indecent Publications Tribunal Decision, IND 6/94, 2.

43 Legislation Advisory Committee Submission on the Films, Videos, and Publications, Classification Bill to the Internal Affairs and Local Government Select Committee, 24 February 1993, 1; see also Legislation Advisory Committee *Issue of Principle - Report No 8* (Wellington, 1993) 35-40.

44 Above n 43, 1.

45 Above n 43, 2.

46 Above n 43, 2.

that the publication had not, at the relevant time, been considered by a classification agency, and that there were no grounds for believing that the classification agency would find the publication objectionable.

The Committee believed this would enhance respect for the law in this area as is would ensure that convictions would only be possible in conjunction with fault, and accord with the tenor of the concerns raised in the Attorney-General's report to Parliament.[47]

2 *Indecent Publications Tribunal*

The Indecent Publications Tribunal also criticised the strict liability provision and suggested that such convictions could be extremely unfair. [48] The Tribunal said that "to specifically remove the requirement of a 'guilty mind' violates the most fundamental principle of the criminal law".[49] It also thought the offence was unfair as it "will often depend on an exercise of discretion by the censors based on the vague and often subjective words of clause 3."[50] The Tribunal considered that it may be impossible to predict the exercise of this discretion, and any resulting conviction may therefore be perceived as a lottery.

3 *The New Zealand Law Society*

The New Zealand Law Society condemned the absence of any mental element in the offence.[51] The Society was concerned that a possessor may be successfully prosecuted for possession of a publication even though they reasonably believed that the publication was not objectionable, they had checked the register to ensure the publication was not objectionable, and the publication had not been classified at the time of the offence.[52]

4 *Department of Justice*

The Department of Justice considered that the offence was "unnecessarily harsh."[53] The Department considered that such a broad sweeping offence without safeguards had the potential for substantial injustice and was out of step with other areas of the law. It also

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47 Above n 43, 2.

48 Indecent Publications Tribunal, Submission on the Films, Videos, and Publications, Classification Bill to the Internal Affairs and Local Government Select Committee, 23 February 1993, 26.

49 Above n 48, 26.

50 Above n 48, 26.

51 New Zealand Law Society, Submission on the Films, Videos, and Publications, Classification Bill to the Internal Affairs and Local Government Select Committee.

52 Above n 51, 2.

53 Department of Justice, Submission on the Films, Videos, and Publications, Classification Bill to the Internal Affairs and Local Government Select Committee, 24 May 1993, 20.

expressed concern that in many situations prohibited publications are close to the margin and there can be no real certainty about the status of such publication.[54] The Department suggested that the offence might not needed to have covered all publications if the primary goal was to prohibit child pornography or hard-core material.

B Bill of Rights

The possession offence is inconsistent with a number of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990. Although any inconsistent legislation must prevail under s 4, the Bill of Rights provides an appropriate background for discussing the injustice of the provision. The decision of Parliament to override these rights and freedoms was taken, in part, on the basis of a report by the Attorney-General to Parliament under s 7 of the Bill of Rights. The Attorney-General's report was based on a mistaken interpretation of the Bill and the protection against retroactive penalties in the Bill of Rights. The report was also inadequate in its consideration of the impact of the Bill on other rights.[55]

1 Retroactive Penalties - Attorney-General's Report to Parliament

The Bill is one of only three government Bills the Attorney-General has reported to Parliament under s 7 of the Bill of Rights as being inconsistent with the rights and freedoms contained in the Bill of Rights.[56] The report to Parliament focused only on the strict liability offence of possession. The Attorney-General considered that the offence:[57]

> ...has the effect of imposing criminal liability on a person, who, at the time which the charge relates, possessed the publication that was not then objectionable - by that, I mean objectionable in law - in respect of which it is no defence to prove that the defendant did not know or have reasonable cause to believe that it was objectionable.

He then advised that the section was inconsistent with s 26(1) of the Bill of Rights which protects against retroactive penalties. This opinion was delivered on the mistaken premise that a publication only becomes objectionable when it has been ruled by the classification

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54 Above n 53, 22.

55 It appears that a failure to report or incorrect reporting does not create any judicially enforceable remedies; see *Mangawaro Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451 andG Huscroft "The Attorney-General, the Bill of Rights and the Public Interest" in G Huscroft and P Rishworth (eds). *Rights and Freedoms* (Brookers, Wellington, 1995) 145-147.

56 *Rights and Freedoms* above n 55.

57 (1992) 532 NZPD 12764.

office to be objectionable; if there was no such ruling at the time to which the prosecution charge refers the offence operates retrospectively.[58]

This point was clarified by the Legislation Advisory Committee in its report on the Bill.[59] It submitted that the section does not infringe the principle of retrospectivity, despite the determination of whether a publication is objectionable after the alleged offence. This is not saying that the publication was not objectionable at the time of possession:[60]

> The offence ... looks to the objectionable character of the publication *at the time of possession*. If there is no existing classification and the character of the publication is disputed then ... the body making the relevant decision makes it after the event. But that is a determination of guilt (or innocence) according to the law in force at the time of the facts constituting the alleged offence.

The Legislation Advisory Committee report is consistent with the opinion of the Indecent Publications Tribunal in *Re High Times*[61] where the Tribunal considered a submission that the previous legislation violated the Bill of Rights. The defendant had been charged with possession for sale of an indecent document and Judge Rushton referred the question of whether the book was indecent to the Tribunal which had exclusive jurisdiction to determine that question.[62] The Tribunal determined that handbooks on how to grow marijuana were indecent. The Tribunal noted that although the determination of whether the ingredients of the offence were satisfied was decided before two different bodies, the offence was not retrospective and consistent with ordinary criminal procedure.[63]

2 *Freedom of expression*

The freedom of expression enshrined in the Bill of Rights includes the right to seek, receive and impart information and opinions of any kind in any form.[64] The Indecent Publications Tribunal in *Re "Penthouse (US)" (Vol 19, No 5)*[65] considered that the freedom

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58 Above n 57, 12 764.

59 Legislation Advisory Committee *Issue of Principle Report No 8* above n 43.

60 Legislation Advisory Committee, above n 43, 37 (emphasis in original).

61 Above n 42.

62 Above n 41.

63 *Re High Times* above n 42, 3.

64 New Zealand Bill of Rights Act 1910, s14. Similar protection is found in the International Covenant on Civil and Political Rights, art 19(2).

65 [1991] NZAR 289.

of expression does cover sexually explicit material.[66] The Tribunal relied on the decision of *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors*[67] where the Ontario High Court held that "all forms of expression, whether they be oral, written, pictorial, sculpture, music, dance or film, are equally protected by the Charter."[68]

This protection, however, is not absolute; section 5 of the Bill of Rights permits justifiable limitations on the freedom of expression.[69] Censorship of publications is permissible if the censorship is a reasonable limit demonstrably justified in a free and democratic society.[70] This accords with the approach taken by the Canadian Supreme Court in *R v Butler*[71] under the Canadian Charter on Rights and Freedoms. The Court considered that sexual and pornographic expression is protected by the freedom of expression, but reasonable limits on that freedom are permissible under the s 1 limitation section.

The starting point then is that the censorship regime under the FVPCA prima facie violates the freedom of expression. The statutory regime, however, must prevail because of section 4 of the Bill of Rights. The critical question becomes whether the interpretation and application of the statutory discretion by the censorship bodies can be challenged. Section 6 of the Bill of Rights requires that where an enactment can be interpreted consistently with the rights and freedoms in the Bill of Rights, that meaning is to be preferred. Section 5 permits reasonable limits on the protected right. Tipping J in *Waverley* considered that

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66 *Re "Penthouse (US)"* above n 65, 318; it would seem to follow that publications which are not sexually explicit but 'objectionable' for others reasons would also be covered.

67 (1983) 41 OR (2d) 583.

68 *Re Ontario Film* above n 73, 590; this view was affirmed by the Canadian Supreme Court in *R v Keegstra* (1990) 61 CCC (3d) 1; see also *Re Information Retailers Association of Metropolitan Toronto Inc and Municipality of Metropolitan Toronto* (1985) 52 OR (2d) 449, 468: "Non-obscene "adult books and magazines", no matter how tasteless or tawdry they may be, are entitled to no less protection than other forms of expression; the constitutional guarantee extends not only to that which is pleasing, but also to that which to many may be aesthetically distasteful or morally offensive; it is indeed often true that 'one man's vulgarity is another's lyric'."

69 Compare with International Covenant on Civil and Political Rights which expresses the limit directly in article 19(3) which includes "restrictions ... necessary ..for the protection of ... public health or morals."

70 New Zealand Bill of Rights Act 1990, s 5. Most discussion on the interface between the Bill of Rights and censorship legislation focuses on whether a censorship decision is a reasonable limit: see, for example, WK Hastings "The New Zealand Bill of Rights and Censorship" [1990] NZLJ 384 and *Re "Penthouse (US)"* above n 65.

71 [1992] 1 SCR 452.

limits imposed by the censors under the Indecent Publications Act *might* be justified in a free and democratic society.[72]

Decisions of the censorship bodies may be susceptible to challenge under the Bill of Rights. Where there is an ambiguity the FVPCA must be given an interpretation consistent with the freedom of expression, under s 6. If not, the interpretation and its application is reviewable. Where the application of the FVPCA limits the freedom of expression, but that limit is justifiable under s 5, then its application is not reviewable. Where the statute is clear and no interpretation is consistent with the freedom of expression then the application of the FVPCA is not reviewable because of s 4 of the Bill of Rights.

A challenge to a decision of the censorship bodies is most likely under s 3(3) where a censor exercises a very broad discretion. There is less scope for challenging decisions of the bodies in applying s 3(2) of the FVPCA, as this section deems certain things to be objectionable. The subsection is not discretionary and is an inconsistent limit imposed directly by Parliament through statute, which cannot be challenged because of s 4 of the Bill of Rights.[73]

Although a decision to ban a publication may be a justified limitation, the inclusion of the possession offence may not. The imposition of criminal liability without any requirement that a person know the publication is objectionable will have a chilling effect on the freedom of expression. Rishworth noted that the Attorney-General could have reported this inconsistency to Parliament: [74]

> The Attorney-General could have reported that the strict liability offence was inconsistent with the guarantee of freedom of expression, in that it would result in self-censorship beyond that which was necessary to comply with the law, in order to avoid committing an offence based on a mistake as to the boundaries of 'objectionable' publications.

Undoubtedly any rigid boundary that defines illegality creates a chilling effect because people are reluctant to publish or possess items in the grey area around this boundary. The FVPCA, however, exacerbates this chilling effect in two main ways. First, the position of the boundary is unclear because of the vague or nebulous definition of objectionable. It is extremely difficult to predict how the criteria will be applied in particular situations.

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72 *Society for the Promotion of Community Standards Inc v Waverley International (1988) Ltd* [1993] 2 NZLR 709, 727 (under Indecent Publications Act 1963). The Board accepts that limits imposed by decisions of the Office and Board are prescribed by law: see *Re D P Women* above n 28.

73 There is some scope for arguing that ambiguities exist in the meanings of the prohibited activities and whether a publication 'tends to promote or support' these activities and that, accordingly, a similar s 6 argument is still available.

74 *Rights and Freedoms* above n 55, 167 footnote 55.

Secondly, the absence of a no-fault defence means people will be compelled to dispose of any publication anywhere near the boundary because if they are charged with the possession offence they will not able to argue that they possessed the publication in good faith. Dugdale illustrates the point effectively:[75]

> So to avoid the risk of committing a criminal offence under this section a New Zealander must burn any book in his or her possession that might strike the Classification Office or the Film and Literature Boards of Review as objectionable. To hell with that.

3 *Presumption of Innocence*

The presumption of innocence is guaranteed by s 25(c) of the Bill of Rights.[76] The doctrine is regarded as one of the central pillars of the criminal justice system, although it is essentially a product of the common law.[77] The House of Lords in *Woolmington v DPP*[78] said that it was the "one golden thread" of the criminal law.[79] The New Zealand Court of Appeal in *R v Rangi*[80] acknowledged that s 25(c) reflects the "basic principle of criminal law [that] the onus of proof remains throughout on the Crown."[81]

The presumption of innocence is, more precisely, a compendium of several legal principles. The Canadian Supreme Court in *R v Oakes*[82] considered the nature of the right under the Canadian Charter.[83] It decided the 'minimum content' of the right was that an individual must be proven guilty beyond reasonable doubt, that the State must bear the burden of proof, and that criminal prosecutions must be carried out in accordance with lawful procedures and fairness. In addition, the Court in other cases has indicated the right requires that the elements necessary to constitute an offence in law ought to be sufficient to constitute moral guilt.[84]

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75 Above n 62, 17.

76 A similar provision is found in the International Covenant on Civil and Political Rights, art 14(2).

77 Robertson (ed) *Adams on Criminal Law* (Brooker's, Wellington, 1992) Ch10.16.01.

78 [1935] AC 462.

79 *Woolmington*, above n 78, 481.

80 [1992] 1 NZLR 385.

81 Above n 80, 389.

82 (1986) 26 DLR (4th) 200; 24 CCC (3d) 321.

83 Canadian Charter of Rights and Freedoms, s 11(d).

84 *R v Sault Ste Marie* (1978) 85 DLR (3d) 161; *R v Wholesale Travel Group Inc* (1991) 84 DLR (4th) 161.

An offence of absolute liability or strict liability[85] prima facie abridges the presumption of innocence because a person is convicted without proof of any fault element which, on general criminal law principles, would be required for a finding of guilt. The critical issue is whether this is a reasonable limit on the presumption of innocence. The Canadian Supreme Court in *Reference re s 94(2) of the Motor Vehicle Act*[86] held absolute liability could not be a reasonable limit except in exceptional conditions like natural disasters or war.[87] In general it is difficult to see any limit imposed by absolute liability on the presumption of innocence can be reasonable when a reverse-onus offence is a less intrusive or more proportionate way of achieving the objective of easing the Crown's burden of proof.[88]

The status of the reverse-onus offence under the Bill of Rights is less clear. The reverse-onus offence describes an offence with no express fault element which appears on its face to be absolute liability, but where the courts imply a defence of absence of fault into the offence. [89] Therefore on proof of the actus reus, guilt is presumed unless the defendant proves, on the balance of probabilities, an absence of fault.

In *Wholesale Travel Group,*[90] the Canadian Supreme Court was divided over whether a reverse-onus offence could be successfully challenged under the Charter. Two judges decided the reverse-onus offence did not prima facie breach the presumption of innocence,[91]

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85 In this article, strict liability is used to describe an offence which does not allow a defence of lack of fault. This is consistent with its use in the FVPCA. Absolute liability is the more familiar term for an offence with excludes proof of fault. Strict liability, however, is often used to describe offences, like those in *Civil Aviation Department v McKenzie* [1983] NZLR 78 and *Sault Ste Marie* above n 84, where proof of the actus reus prima facie imports guilt unless the defendant can exonerate herself by proving an absence of fault. To avoid confusion, these offences are referred to as 'reverse-onus' offences, rather than strict liability.

86 [1985] 2 SCR 486.

87 *Reference re s 94(2)* above n 86, 518.

88 Proportionality or the existence of a less intrusive alternative is critical to whether a decision is a justified limitation, *Oakes* above n 82; adopted by the New Zealand Court of Appeal in *Ministry of Transport v Noort* [1992] 3 NZLR 260. The Ontario Court of Appeal used a similar approach when they rejected absolute liability in favour of the reverse-onus offence in *Metro News Ltd* (1986) 29 CCC (3d) 35, although the issue arose in the context of fundamental justice not under the presumption of innocence.

89 *MacKenzie* above n 85; *Sault Ste Marie* above n 84. The Court in *MacKenzie* drew a distinction between true crimes and public welfare regulatory offences; there is a presumption that silent offences which are truly criminal require the Crown to prove mens rea, while it is permissible with public welfare regulatory offences to require the defendant to bear the burden of proof.

90 *R v Wholesale Travel* [1991] 3 SCR 1521.

91 Cory and L'Heureux-Dubé JJ.

three judges decided that it prima facie breached the presumption of innocence but was a reasonable limit,[92] while the remaining four judges concluded that it prima facie infringed the right and could not be saved under the limitation section.[93] The ultimate result was that reverse-onus regulatory offences are permissible under the Charter. The same result appears likely under the New Zealand Bill of Rights.

The possession offence in the FVPCA limits the presumption of innocence as it provides for guilt irrespective of the accused's state of mind. As noted in *Adams on Criminal Law*:[94] "Guilt is therefore possible despite 'moral' innocence." The no-defence provision cannot been seen to be a justifiable limit because a reverse-onus offence provides a more proportionate response to enforcement in this area, in that it adequately alleviates any difficulty in proof for the Crown, but still requires some element of moral culpability.

C *Criminal Law Criticisms of Strict or Absolute Liability*

Strict or absolute liability is criticised as a tool in criminal law on two grounds: it is unjust and it is ineffective. An appropriate starting point is Packer, who is one of the strongest critics of strict liability:[95]

> To punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy.

The deterrence aspect of punishment will not be effective unless a person is aware of the factors which make the offending wrong. It is impossible to deter people who are acting under a mistaken factual belief that their conduct complies with the law. People should not be marked as requiring punishment or reform because they are mistaken as to the facts of their offending. Moral blameworthiness is taken to mean knowledge that what one is doing is wrong but choosing to continue that conduct.[96]

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92 Iacobucci, Gonthier and Stevenson JJ.

93 Lamer CJC, La Forest, Sopinka and McLachlin JJ.

94 *Adams* above n 77, Ch 10.16.05.

95 HL Packer "Mens Rea and the Supreme Court" (1962) Sup Ct Rev 107, 109.

96 This paper does not wish to challenge the validity of the appropriate threshold of censorship generally. The analysis in this paper accepts that those publications which are objectionable under s 3 are correctly prohibited. Publications which are not prohibited, however, are seen as

The classic subjective approach of requiring mens rea and rejecting the use of absolute or strict liability is the dominant thinking in criminal law jurisprudence. One of the leading writers, Hart, strongly asserts the value of punishment rests on the fundamental tenet of subjective responsibility, that "unless a [person] has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties should not be applied."[97] The no-defence provision in the FVPCA is directly in conflict with this. The strict liability possession offence may punish people who have no opportunity to comply with the law because they are not aware of the contents of a publication, or do not know that a publication is considered to be objectionable.

D Inconsistency with Application of Similar Provisions in the Criminal Law

The Draconian nature of the strict liability clause can be illustrated by examining similar offences, both in New Zealand and overseas, where the courts have interpreted offences according to generally accepted criminal principles, fundamental justice, and the basic protections contained in Bills of Rights. The disparity between the approach adopted by the courts and the approach dictated by Parliament through the no-defence provision demonstrates the severity of such a provision and the degree to which it departs from accepted understandings of fairness in criminal law.

1 Mens rea should apply to all elements of the actus reus

The notion of 'possession' at law has clearly developed to include knowledge of the characteristics of restricted object. The approach is consistent will the general theory if mens rea is required for an offence it should be applied to all elements of the actus reus.[98]

If the general approach is applied to possession of objectionable materials, then the actus reus of the offence can be separated into two limbs: the first is possession of a thing; the second is that the thing is an objectionable publication. The Crown must prove that the accused had mens rea toward the first limb of possession.[99] Secondly, the mens rea must also apply to fact that the publication is objectionable. The difficulty is that the second limb of the possession offence, that a publication is objectionable, is more like a question of law than a question of fact.[100] The no-defence provision in the FVPCA, however, does not require proof of the mens rea with respect to the second limb.

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legal, legitimate, and morally acceptable.

97 HLA Hart, *Punishment and Responsibility* (Clarendon Press, Oxford, 1968) 81.

98 *R v Howe* [1982] NZLR 619; *Police v Waaka* [1987] NZLR 753.

99 Mens rea is generally regarded to include intention, knowledge, and reckless (knowingly taking an unreasonable risk).

100 See discussion below part IV F.

The possession of drugs offences under the Misuse of Drugs Act 1975 provide a similar situation to obscenity offences — where the physical and metal components are more itemised because possession is a state of affairs. Mathias notes that the courts require not only knowledge about possession but also a complex state of mind called 'guilty knowledge'. If a defendant does not know a drug is prohibited, it must be shown that they know the characteristics of the drug, plant, or seed.[101]

A similar approach with obscenity offences would require for a conviction that a defendant also did not know that a publication was prohibited, at least had knowledge of the content of the magazine which lead to its prohibition, that is, knowledge that it depicts necrophilia or dehumanises women.

E Inconsistency with Application of Other Obscenity Offences

1 *New Zealand under previous regimes* - R v Ewart

The defendant in *R v Ewart*[102] had been charged under s 3 of the Offensive Publications Act 1892 for selling written matter which was indecent, immoral, or obscene. The Court of Appeal considered whether the offence required the Crown prove only that the defendant was selling a newspaper which was indecent, or whether the Crown also had to prove that the defendant knew or had reason to know the contents of the newspaper before he could be found guilty. The majority concluded that the commission of the act of selling prima facie meant that an offence had been committed, but that that could be rebutted by the defendant if he could prove the absence of a guilty mind.[103]

This case is regarded as the seminal case in New Zealand on the judicial classification of offences which are silent as to any mens rea requirement. The decision is the precursor to the reverse-onus category which has been widely accepted since *Sault Ste Marie* and *Mackenzie*.[104] *Ewart* has also been frequently cited in overseas jurisdictions with approval in decisions which insisted on mens rea or some form of scienter in respect of the obscenity element of offences.[105]

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101 D Mathias "Guilty Knowledge About Drugs" [1991] NZLJ 280.

102 (1905) 25 NZLR 709.

103 *Ewart*, above n 102, 737, Edwards, Williams and Chapman JJ; Stout CJ and Cooper J dissenting.

104 See discussion of reverse-onus offences in text at n 84.

105 For example: *Smith v California* 361 US 147 (1959); *Metro News Ltd* above n 88; *R v Wampfler* (1987) 11 NSWLR 541. 'Scienter' refers to the degree of knowledge that a publication is obscene or objectionable.

The later decision of *Fraser v Beckett and Sterling Ltd*[106] appears anomalous to the approach in *Ewart*. The Court of Appeal was required to consider the appropriate fault requirement in s 46 of the Customs Act 1913 which prohibited the importation of indecent document. The majority concluded that the offence was absolute liability and mens rea was not required to whether the document was indecent.[107] The majority indicated that there is a strong presumption is favour of mens rea. The courts are however, obliged to impose absolute liability, though, if it is the clear and plain intention of Parliament to impose absolute liability. The presumption of mens rea could not apply in *Fraser* because several factors indicated Parliament's clear intention that the offence was absolute liability, including the fact that an identical offence expressly required knowledge, and conviction was required before the illegal goods could be confiscated.

2 *Comparative analysis*

(i) Canada

The Canadian Supreme Court in *R v Jorgensen*[108] recently considered the scope of the knowledge requirement for sale of obscene materials. The defendant was charged with knowingly selling obscene materials after three video tapes depicting explicit consensual sex were purchased from his Adults-Only video store.[109] The video tapes were determined to be obscene at trial because of the combination of sex and violence.[110]

The Court held that the Crown must show not only that the accused was aware that the material had as it dominant characteristic the exploitation of sex, but also that the accused knew of the specific characteristics which make the material obscene in law.[111] Sopinka J demonstrated the application of this rule:[112]

> If, for example, the offensive part of the video was that which showed a male spanking the female and forcing her to have sexual relations, then ... it must be shown that the retailer was

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106 [1963] NZLR 480.

107 Above n 106, North and McCarthy JJ, Gresson P dissenting.

108 [1995] 4 SCR 55.

109 *Criminal Code* RSC 1985 c C-46, s 163(2): "knowingly ... sells exposes to public view or has in his possession for such a purpose any obscene ... thing whatever."

110 *Jorgensen* above n 108, 105. The specific reasons for each determination were: *Bung Ho Babes*: "[equates] sex and punishment in the context of subordination"; *Made in Hollywood*: "coupled sex and violence"; and *Dr Butts:* "the woman is coerced into sexual relations and that the violence and her position of subordination are legitimized".

111 *Jorgensen* above n 108, 106.

112 *Jorgensen* above n 108, 106.

> aware or wilfully blind that the video being sold contained this scene. There may of course be cases where the obscenity results for the overall character of the film. This may occur where a video portrays women in positions of subordination, servile submission or humiliation without any verbalisation or other express reference to this depiction as a theme in itself. ... In such instances, if the court is unable to specify any particular scene but still concludes that, overall, the film is obscene in law, then it only makes sense that sufficient proof be offered to show that the retailer was aware of the 'overall' obscene nature of the film.

The Court did, however, note that this does not extend to proof the accused knew that the materials were obscene in law because ignorance of the law is no excuse. Thus if an accused viewed the videos and observed the spanking or noticed the underlying degradation but thought that it was harmless and inoffensive, then he would be guilty.[113] Sopinka J also noted that knowledge did not have to be obtained by viewing the videos and that the blameworthy state of mind could be inferred without proving that the defendant actually viewed the videos, by proof for instance of surreptitious behaviour by the defendant, or warnings and directions from external enforcement agencies.[114] Equally, the Court considered that a person who is wilfully blind to the contents satisfied the knowledge requirement because a suspicion, which the person deliberately omits to turn into certain knowledge, requires some degree of initial knowledge.[115]

The Supreme Court also approved the decision in *R v Metro News Ltd*[116] that an absolute liability offence of distributing obscene matter was unconstitutional.[117] In *Metro News Ltd* the offence expressly provided that it was no defence that the accused was ignorant of the presence or nature of the thing that was obscene. The Court said that provision was a prima facie breach of the Charter as it infringed right to fundamental justice contained in s 7. It held that this infringement could not be justified under s 1 of the Charter because it impairs the right more than is necessary to achieve the objective of easing the Crown's difficulty in proving guilt, and accordingly struck the provision down as constitutionally invalid.[118] The Court recognised there was a substantial argument that such a provision also violated

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113 *Jorgensen* above n 108, 107.

114 *Jorgensen* above n 108, 108.

115 *Jorgensen* above n 108, 110.

116 Above n 88.

117 *Jorgensen* above n 108, 95.

118 *Metro News Ltd* above n 88, 53. The Court noted that the objective of the no-defence provision was "relieving the Crown of the burden of proof with respect to guilty knowledge on charges of distributing obscene matter because of the alleged difficulty or virtual impossibility in the circumstances of discharging that burden."

the freedom of expression contained in s 2(b) of the Charter, but did not find it necessary to decide whether the provision was constitutionally invalid on that basis.[119]

As the Court had struck down the no-defence provision, the Court considered what category of fault should be implied into the offence. It rejected the idea that mens rea of the obscene matter was required and decided instead that the act of distribution prima facie imported the offence, but the accused could avoid criminal liability by showing that he had acted under an honest and reasonable mistake of fact.[120] The possibility of mistake of fact was limited to the presence and character of the matter alleged to be obscene and not to the obscenity test of whether the matter exceeds community standards of tolerance. The Court considered that relieving the Crown of the burden of proving mens rea in this manner did not offend the right to fundamental justice and the presumption of innocence contained in ss 7 and 11(d) of the Charter.[121]

(ii) United States

The United States Supreme Court in *Smith v California*[122] held that a statute that imposed absolute liability for the possession of obscene books was unconstitutional.[123] The lower courts had convicted a bookstore owner of possession of a book that was later determined to be obscene. The offence included no knowledge element. The bookseller was liable even though he may have had no knowledge of the contents or character of the books.

The Court was unanimous that the absence of a scienter element violated the Due Process Clause of the Fourteenth Amendment.[124] The Court reasoned that, although obscene speech and writings are not constitutionally protected,[125] the absolute liability provision created a chilling effect that would limit non-obscene expression:[126]

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119 *Metro News Ltd* above n 88, 54.

120 *Metro News Ltd* above n 88, 63. For true crimes the accused need only raise a reasonable doubt that in the absence of a guilty mind because of this mistake.

121 *Metro News Ltd* above n 88, 62.

122 361 US 147 (1959).

123 Municipal Code of the City of Los Angeles, §41.01.1; the appellant was charged with possession of an obscene or indecent writing or book in any place of business where books are sold or kept for sale.

124 The Fourteenth Amendment prohibits states from infringing the First Amendment: *Smith* above n 122, 149.

125 *Roth v United States* 354 US 476 (1957).

126 *Smith* above n 122, 153.

> The bookseller's limitation in the amount of reading material with which he could familiarise himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public ... [T]he distribution of all books, both obscene and not obscene, would be impeded.

Accordingly the provision was struck down as being unconstitutional. It was not necessary for the Court to decide the appropriate level of scienter, although it noted that options included full mens rea, subjective or objective recklessness, and allowing a defence of honest mistake.[127]

In the later case of *Hamling v United States*,[128] the Supreme Court considered it was constitutionally sufficient to require proof of knowledge of the contents of the materials and knowledge of the character and nature of the materials.[129] The Court was unwilling to insist on proof of a defendant's knowledge of the actual legal status of the materials as this would allow a defendant to avoid prosecution by "simply claiming that he had not brushed up on the law".[130]

Similarly in *United States v X-Citement Video*[131] the Supreme Court decided that with an offence of transportation of child pornography, the knowledge requirement "extends both to the sexually explicit nature of the material and to the age of the performers."[132]

(iii) Australia

In *R v Wampfler*[133] the defendant was charged with publishing an indecent article.[134] The New South Wales Court of Criminal Appeal held that an offence, which was silent as to any mens rea element, allowed a defence of honest and reasonable mistake in innocence. Street CJ considered that *Ewart*[135] was directly applicable, because the New Zealand

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127 *Smith* above n 122, 154.

128 418 US 87 (1974).

129 *Hamling* above n 128, 123.

130 *Hamling* above n 128, 123.

131 (1994) 130 L Ed (2d) 372.

132 Above n 131, 385

133 C M V Clarkson and H M Keating *Criminal Law: Text and Materials* (3 ed Sweet and Maxwell, London, 1994) 199.

134 Indecent Articles and Classified Publications Act 1975, s6(1).

135 Above n 102.

legislation was informed by the same policy considerations as the New South Wales legislation in the case.[136]

(iv) England

The House of Lords took a different approach from other jurisdictions when it approved the imposition of strict liability in a criminal action for blasphemous libel. In *R v Lemon*,[137] Gay News had published a poem and drawings describing and depicting acts of sodomy and fellatio on a crucified body of Christ. The defendant had claimed that although he had knowingly published the poem and drawings, he had no mens rea as to its blasphemous nature.

The majority held that it was sufficient the Crown prove that the accused intended to publish the magazine and that mens rea was not required with respect to whether the magazine was a blasphemous libel.[138] It has been suggested the majority implicitly applied the approach advocated by Baroness Wootton, that the justification for absolute liability is the existence of harm, regardless of the moral culpability of the accused.[139]

The minority strongly dissented despite their personal outrage at the material.[140] Their Lordships said the offence also required proof that the accused had intended the blasphemous libel, that is, the accused had intended to produce shock and arouse resentment among believing Christians. Lord Diplock said that classifying the offence as absolute liability was "a retrograde step which could not be justified by any considerations of public policy."[141]

The classification of this offence appeared difficult for the House of Lords. Even Lord Scarman accepted that the arguments of the minority had "great persuasive force".[142] This was the first time the House of Lords was required to classify an offence of this nature. Furthermore, their Lordships only had two discrete options, either mens rea was required towards the blasphemous libel element, or the offence was absolute liability; the intermediate reverse-onus category had not been accepted at that time. The majority opinion

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136 *Wampfler* above n 133, 548.

137 [1979] AC 617.

138 Lord Russell, Lord Scarman and Viscount Dilhorne.

139 Above n 133, 103, 104.

140 Lord Diplock and Lord Edmund-Davies.

141 *R v Lemon* above n 137, 638.

142 *R v Lemon* above n 137, 664.

has been strongly criticised by commentators.[143] The failure of the House of Lords to consider the intermediate possibility of reverse-onus offence and the fact that the result is at odds with all other jurisdictions means the English position is of limited persuasive value.

3 *Summary - what do all these cases mean?*

The authorities from overseas and New Zealand prior to the express no-defence provision, emphasise an insistence on some proof of culpability towards whether an item is objectionable, indecent or obscene. Absolute liability in this context places an unjustifiable limit on rights protected by constitutional documents. England is alone in allowing absolute liability for obscene publications, although the decision was controversial.

The courts have recognised the problems of proof for the Crown if it has to prove a mens rea, but have overcome this by classifying silent offences as reverse-onus offences. That is, guilt is prima facie imported on possession but the defendant can exonerate herself by proving a mistake of fact or lack of a guilty mind. If mens rea is required, however, proof is required of mens rea towards the essential characteristic that makes a publication obscene. The courts are clear, though, that they will not allow mistakes as to law. Defences such as mistake or no reasonable grounds for belief may only be applied to the contents of a publication, not to whether it is obscene or indecent. The corollary of this is that a successful defence under a reverse-onus offence can be asserted not only where the defendant is mistaken to the general nature of a publication, but also where she is mistaken as to the specific characteristic which makes it objectionable.

In the absence of s 131(3) these authorities would allow at least a defence of mistake of fact or lack of reasonable grounds for belief. The characteristic of which the defendant could be mistaken could include any of the listed activities in s 3(2) that deem a publication objectionable under that subsection, or the factor or factors under s 3(3) that operate to make a publication objectionable. A mistake as to the general test under s 3(1) of whether the availability of a publication is likely to be injurious to the public good would not excuse the defendant because this is a mistake of law. If alternatively mens rea is required then the Crown would need to prove that the defendant knew, was reckless or wilfully blind to all of those characteristics.

F *Mistake of Fact, Value Judgment, or Mistake of Law?*

One of the difficulties with applying the rule against mistake of law is that there is much less certainty with the law in censorship than with other areas. Mistake of law is easily applicable to murder, traffic regulations, or whether a particular drug is prohibited because

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143 See for example JC Smith "Case and Comment: *R v Lemon and Another*" [1979] Crim LR 312.

there is no doubt about the law. Doubt, however, is inherent in the definition of objectionable.

The rule that ignorance of the law is no excuse is based on the presumption that everyone knows the law. The justification for not permitting a defence of ignorance is founded on four key points: it would involve the courts in insurmountable evidential problems; it would encourage ignorance where knowledge is socially desirable; people would be laws unto themselves, infringing the principle of legality and contradicting the moral principles underlying the law; and ignorance of the law is blameworthy in itself.[144] The rationale for the rule generally is not wholly convincing:[145] the evidential problems are not more difficult than those faced with proving mens rea; the rule ignores the circumstances of and difficulties in achieving knowledge of the law; a individual defence of ignorance of the law does not erode the principle of legality or that it is for the courts to determine what the law is; and blame for ignorance should not import blame and punishment for greater offences.

The courts are beginning to depart slightly from the rule. Some jurisdictions have begun operating a general defence of reasonable mistake of law on similar terms to mistake of fact.[146] Other jurisdictions have allowed a defence of mistake of law where it is impossible for a person to know the law. The development of this exception has been rather ad hoc and confined to situations where the law has not been published or is otherwise not accessible.[147]

It is arguable by analogy that a where the law is so unclear that it is intelligible, a person should not be convicted under such a law, because it is impossible for her to comply with it. Fuller asserts that where a statute or the application of a statute lacks clarity it should not be enforced by the courts.[148] He regards clarity in the law as "one of the most essential ingredients of legality".[149] He argues that if there is a duty of citizens to obey the law, then there is a corresponding duty that the legislature make the law clear and understandable; if it is not, then the legislature has failed to make a law.[150] Vaughan CJ in

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144 D Stuart *Canadian Criminal Law* (2 ed, Carswell Company Ltd, Toronto, 1987) 274.

145 See Stuart above n 144, 273-278 for an extensive critique of the rationale for the rule.

146 South Africa: *De Blom* (1977) 3 SA 313; Germany: Penal Code of Federal Republic of Germany § 17; see G Fletcher *Rethinking the Criminal Law* (Little & Brown, Boston, 1978) 749.

147 *Re Michelin Tires Maufacturing (Canada) Ltd* (1975) 15 NSR (2d) 150, *R v Ross* (1944) 84 CCC 107, *Burns v Nowell* (1880) 5 QBD 444, *Lim Chin Aik v R* [1963] AC 160.

148 LL Fuller *The Morality of Law* (Yale University Press, New Haven, 1964) 63.

149 Fuller above n 148, 63.

150 Fuller above n 148, 43.

Thomas v Sorrell[151] said that "a law which a man cannot obey, nor act according to it, is void and no law: and it is impossible to obey contradictions, or act according to them."

The difficulty with asserting that mistake of law is no excuse in the FVPCA is that the law lacks clarity. Although the legislature has provided an extensive definition of what is objectionable, the operation of the determination is unpredictable.[152] Even if a person is fully aware of the contents of a publication and of the statutory definition, their desire to comply with the law may be thwarted because of this lack of clarity. The accused may still be convicted despite making no mistake as to the law and taking all steps to comply with it.

Glanville Williams regarded questions, such as whether a publication is objectionable, as value-judgments which are intermediate between questions of fact and questions of law.[153] He recognised that on current law defendants' failure to foresee the decision of the court or tribunal does not excuse them. Williams had no problem with this value-judgment when it concerns whether something is reasonable as the approach is accepted and predictable, but he wrote that serious problems arise with the nebulous nature of the obscenity question because the value-judgment becomes highly speculative.[154] The exercise of the value-judgment by the Office and Board confirm these concerns, as the overall pool of decisions show a disturbing lack of consistency and predicability.

G Vagueness in Definition and Inconsistency in Application

1 Meaning of 'tends to promote or support' is unclear

The Board of Review in *New Truth* considered the phrase 'tends to promote or support' in the context of whether a newspaper tends to promote or support the contents of an advertisement promoting prohibited activities.[155] The Board mentioned synonyms such as 'encourage', 'support actively', 'publicise and sell', 'speak in favour of' and 'be actively interested in'. A publication that publishes and sells a service contained in an advertisement clearly supports that service. The very nature of advertisements are to promote or sell those activities and, because the editor has the choice of whether to accept

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151 (1673) Vaug 333.

152 It is disappointing that the decisions of the Office and Board are not reported in widely available law reports and this failure exacerbates the difficulty of citizens knowing and predicting the censorship law.

153 G Williams *Textbook on Criminal Law* (2 ed Stevens & Sons, London, 1983) 141; These are sometimes referred to 'mixed fact and law' questions: E Colvin *Principles of Criminal Law* (2 ed, Carswell, Toronto, 1991) 165; *Thomas v R* (1937) 59 CLR 279.

154 G Williams, above n 153, 145.

155 *New Truth* above n 5.

the advertisement or not, a publication containing those advertisements also tends to promote or support those activities.[156]

The High Court, however, removed any subjective element. It suggested that the approach is fully objective, and does not need reference to a publisher's state of mind.[157]

It is unclear how this test is to be applied to other situations, particularly in the like of the different approaches suggested by different censors. For example the Classification Office decided that the Mapplethorpe collection did not tend to promote the use of urine in association with sexual conduct, or sadomasochism, despite graphic and positive depictions of such activity. The Office said that "it is the art of Mapplethorpe that is being supported, rather that the [prohibited activity]".[158] Stanish ponders whether "a book about a charming, erudite, and much loved politician who is also a necrophiliac" might be regarded as promoting or supporting necrophilia because it presents an unworthy character or activity in a favourable light.[159] Was the film *Romper-Stomper* promoting or supporting the brutal activities in the film by presenting the leader of the Nazi-worshipping street gang as a charismatic and engaging leader?[160] Does Metro Magazine promote or support criminal activity by including heroine addiction in the month's list of what is 'hot'?[161]

The Indecent Publications Tribunal described the words as a "wild card" that could be used to ban publications such at *Lolita*, *Last Exit to Brooklyn*, Hitler's *Mein Kampf*, *American Psycho*, and *Male Malificaruium*, the handbook of the Spanish Inquisition, despite these publications having accepted merit.[162] The Tribunal also suggested that it could prohibit scholarly discussion of unpleasant topics, such *Urban Aboriginals* which was an account of the psychological and sociological explanations and effects of sadomasochistic practices.[163] The Department of Justice is correct in noting that a "publication does not have to expressly advocate" an activity in order to tend to promote or support it, but it is difficult to agree

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156 *New Truth* above n 5, 15.

157 *News Media*, above n 5, 175.

158 *Jim & Tom, Sausalito, 1977* OFLC Ref 9501765.

159 G Stanish "The Films Videos and Publications Classification Act 1993" (1994) AULR 719, 722.

160 Above n 159, 722.

161 *Metro Magazine*, Auckland, New Zealand, September 1996, 36; this question though does not arise under s 3(2) because promoting criminal activity is not a prohibited activity, but is instead considered under s 3(3)(d).

162 Above n 48, 11.

163 Above n 48, 12.

with its belief that "serious works of literature and drama, documentary material and professional publications" would necessarily stand outside that definition.[164]

The phrase 'promotes or supports, or tends to promote or support' still appears equivocal and brings a lack of clarity to the operation of the automatic deeming provisions.

2 *Inconsistent application by Office*

A survey of the decisions of the Office over the past two years shows a disturbing lack of consistency. This blurs the border-line between publications which are objectionable and those which are not, and exacerbates the injustice of the possession offence by making it almost impossible to predict a classification.

The magazine *Open Door 17*,[165] which presented explicit images of women engaged in sexual activity with men, was determined to be objectionable under s 3(3) of the FVPCA. The publication degraded, dehumanised, and demeaned women by presenting graphic displays of women's vaginas, and images of women being penetrated and ejaculated over. Magazines of similar content and nature, however, have received different classifications. For example *Expose*,[166] was determined to be objectionable except if restricted to persons over 18,[167] while *Ribald No 404*[168] was determined to be objectionable unless its availability was restricted to the owner. The use of the restricted classification also makes the objectionable question ambiguous. Some of the decisions have classified publications as objectionable unless restricted to a particular event or person. Examples include movies restricted to a gay and lesbian film festival,[169] video documentary with frank depictions of sadomasochism but of a personal nature restricted to the importer,[170] a personal letter depicting cruel sadomasochistic images of women restricted to the owner,[171] and a magazine depicting explicit sexual material that degrades women restricted to the owner as part of a

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164 Above n 53, 8.

165 OFLC Ref 9400983; See similar decisions: *Sexasianal! No 2* OFLR Ref 9400987.

166 OFLC Ref 9400982.

167 The effect of this classification is to exclude the publication from the ambit of the possession offence; offences of supply and display of restricted publications are covered by ss 126, 127 and 130.

168 OFLC Ref 9400514.

169 *Hustler White*, OFLC Ref 9600476, *Blood Sisters*, OFLC Ref 9600588, and *Bittersweet*, OFLC Ref 9600591.

170 *From Wimps to Warriors*, OFLC Ref 21.

171 *Letter "Dear Slave Sue"* OFLC Ref 9500355.

large personal collection.[172] The difficulty caused by classifying similar publications differently is that decisions merely restricting publications may provide a person with a legitimate belief that such a publication is not objectionable. An example of this is where a person views a restricted movie at a film festival. The fact that a publication is restricted to an event or publication is not always obvious. From this a person can sensibly form the opinion that the movie is being shown with the approval of the censorship bodies and that similar such movies are not objectionable. If charged for possession of similar movies, however, that person cannot assert this rational justification for the possession.

The classification of publications that deal with sexual violence or the infliction of pain has also blurred the border-line of what is objectionable. Many publications were determined to be objectionable because of the sadomasochistic nature of the publications or the use of violence in a sexual context.[173] Similar publications, however, received only a restricted classification: sadomasochistic activity is contrived and consent is clear,[174] sadomasochistic paraphernalia only presented for effect,[175] high-depictions of infliction of serious physical harm upon a male's genitals acceptable,[176] and depiction of vaginal fisting presented in a 'gentle manner'.[177] Again these classifications provide the public with little consistency with which to predict the potential classification of a publication.

There is a particular problem with the interpretation of the clause relating to exploitation of children or young persons under s 3(2)(a). This provision is being applied very liberally to ban short stories that describe a woman seducing a 16 year old boy,[178] stories that state that a male participant is 18 but is referred to as 'boy' and coerced into sex,[179] video slicks that depict youthful-looking males,[180] videos showing two teenage boys of slight physiques engaged in self and mutual masturbation,[181] publications depicting consensual heterosexual teenage sex,[182] and publications of females portrayed as youthful

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172 *Ribald* above n 168.

173 See for example *Bondage Landlord*, OFLC Ref 874, *Caged Fury*, OFLC Ref: 9502174.

174 *Bizarre Fetish and Fantasy Issue #4*, OFLC Ref 9400567.

175 *Die Rufung* OFLC Ref 9400952.

176 *Atlars (Mapplethorpe)* OFLC Ref 9501800.

177 *Hot Afternoon* OFLC Ref 9500671.

178 *The Mother Loves to Fuck: AST00040.TXT*, OFLC Ref 9500947.

179 *Honcho October 1995*, OFLC Ref 9600250.

180 *Gero Gay Extra 9 Handmerker Burcher*, OFLR Ref 9501543.

181 *Golden Boys Video 36*, OFLC Ref 9501092.

182 *Screening Purpose Only*, OFLC Ref 9501152.

because they have pig-tails .[183] A CD-ROM that depicted young models, however, was not considered objectionable.[184] It is also significant that the Board decided in *New Truth* that advertisements for sexual services that used phrases like 'school girl or boy', 'student' or 'students/virgins' tended to promote the exploitation of young persons regardless of whether an age is contained in the advertisement.[185] Personal advertisements of 16 year old boys were also regarded as exploitative and objectionable.[186] These determinations make it impossible to rely on the age of the model in predicting whether a publication is objectionable and demonstrate that the threshold for exploitation of young persons is more complex than the legislation indicates on its face.

The decision of the office to prohibit advertising hoardings on Karangahape Rd which depicted cartoon paintings of women was controversial and unexpected, although it was later overturned by the Board.[187] The signs were considered to be part of the social and cultural background of the area but the signs were banned because some people were offended by and concerned about the signs. Decisions like this illustrate the difficulty in predicting how the s 3 criteria will be applied by the censorship bodies.

3 *Disparity between decisions of the Office and Board*

Predicability is also reduced by the current disagreement over interpretation of s 3 between the Office and the Board. In the fifteen decisions that have been issued by the Board a different classification has resulted on 12 occasions. The disagreement in approach appears to be over the operation of the s 3(2) automatic deeming provision,[188] and the consideration of what activities are 'degrading, dehumanising, and demeaning'.[189]

Given that the censorship bodies cannot reach agreement about what is objectionable, it is most unfair to expect the public to predict accurately the appropriate classification.[190]

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183 *Sweet Chick 7*, OFLC Ref 9400816.

184 *Hot Hungable Hunks*, OFLC Ref 9501273.

185 *New Truth* above n 5, 15. See also *Ravers (Vol 1 Nos. 1, 2, 3 and 4)* Board of Review Decision 6/96.

186 The Office and the Board appears to have interpreted children or young persons to mean persons under 18. Arguably, the age of 16 would have been a more appropriate threshold as this would be consistent with the criminal laws which relate to the age at which a person may consent.

187 For example *"The Vegas Girl" Sign on Karangahape Road* OFLC Ref 9600068; "Vegas Girl" billboard Board of Review Decision 1/97.

188 See *New Truth* above n 5.

189 See for example *Australian Penthouse Hot Shots No 1* Board of Review Decision 2/95.

190 A person can be convicted of an offence even where she relies on the decision of one body only

4 *General problems*

The decisions of the censorship bodies do not appear wholly consistent. The difference in classifications appear to be a function of minute fine-line distinctions. This approach may be appropriate where the question is whether a publication should be confiscated or prohibited from the country, but is not appropriate where criminal sanctions are imposed. Under the old regime a person was convicted for selling a handbook on how to grow marijuana which was unconditionally indecent because it promoted criminal activity, yet a similar publication advocating law reform and social advocacy of a certain marijuana lifestyle was classified as restricted.[191] It was practically impossible for the defendant to predict the distinguishing features of the publications, or their consequences.

Despite an extensive attempt to clarify what is objectionable, Parliament has not removed the ambiguity from the definition of what is objectionable. The impreciseness of the definition is noted in *Adams on Criminal Law:*[192]

> The critical phrase 'injurious to the public good' is open textured and will require interpretation and application to particular cases. Expression in films, videos, and publications will fall in a continuum as regards its potential impact on the public good. The point at which it becomes 'injurious' will not be marked by any bright line.

It may be suggested that this ambiguity is simple because a new regime has been instigated and that this uncertainty will diminish as a pool of decisions and rules are accumulated. This may be so of the interpretation of other legislation, but the interpretation of censorship legislation is peculiarly variable. Kobylka notes that the decision about whether a publication is objectionable is as much a function of the membership of court or tribunal, people making application or submissions, parties joined to a proceeding as amicus curae, and public opinion, as it is with the content of the publication.[193] Under previous regimes, New Zealand has seen a high degree a variability in decisions, caused by extrinsic factors, for example, the homosexual law reform which necessitated a different approach to interpretation of the censorship legislation.[194]

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to have the opposite view taken by the other body. Even in the absence of s 131(3), it is unclear whether the doctrine of officially induced error is available in New Zealand in such a situation: see *Adams* above n 77, CA25.08, N Cameron *Defences and the Crimes Bill* (1990) 20 VUWLR Mono 3 66; See *Jorgensen* above n 108 for a discussion of whether the defence might be available in the obscenity cases.

191 *Quinlan* above n 41.

192 *Adams* above n 77, Ch 10.6.08.

193 Kobylka above n 34.

194 *Society for the Promotion of Community Standards v Evrard* (1988) 7 NZAR 33.

The strict liability offence operates so that a person cannot argue that they did not know that a publication had certain characteristics that make it objectionable. Thus many thousands of people who possess the November 4th edition of the *New Truth & TV Extra* may be successfully prosecuted. A person may be convicted if they receive a file over the internet which later is classified as objectionable despite the fact the file may have been unsolicited or remained "zipped", or not decompressed, on the hard drive.

Equally, if a person is aware of the very characteristics of a publication and seeks legal advice about whether it is illegal or not, they will have no defence to a charge. The legal advice may be extremely cogent and may rely on strong precedents from the censorship bodies.

The objections to the possession offence may be equally applicable to supply offences which are strict liability. It is arguable, however, that this is less of a concern because supplying publications places a greater duty on the person to ascertain whether their conduct is legal. Suppliers will be expected to have a greater knowledge of the rules governing their industry; they may be able to liaise with enforcement authorities, seek legal advice, or submit publications to the censorship bodies if they are unsure about their classification.[195] These options are not usually available to a person who simply possesses a publication.

The supply offences are not, though, confined to persons in the trade. It is possible, and increasingly common because of current technology, for an individual to casually supply publications. Such a person could blamelessly supply publications only to be later convicted under a strict liability offence.

III CONCLUSION AND CALL FOR REFORM

This article has explored the criticisms of strict liability in the context of censorship legislation and found them justified. Section 131 is inconsistent with the Bill of Rights and Parliament's choice to override the Bill of Rights was based, in part, on incorrect and inadequate advice from the Attorney-General in his report to Parliament. The strict liability offence appears to be out of line with the widely accepted criminal law jurisprudence which requires a subjective approach to guilt. Section 131 also operates inconsistently with how the offence would be applied, in the absence of the no-defence provision, according to accepted principles of criminal law and fairness. This is further illustrated by the comparison with similar obscenity offences in overseas jurisdictions, where the use of strict or absolute liability has been rejected. This lack of clarity in censorship law makes a compelling argument that the rule that ignorance of the law is no

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195 Department of Justice above n 53, 21.

excuse should not apply as rigidly in this area. The lack of predicability of decisions under the FVPCA makes the imposition of criminal sanctions, in the absence of some scienter requirement, for the possession of an objectionable publication wholly unfair. It follows that the FVPCA should be amended to remove the no-defence provision and replace it with an appropriate scienter element.

The United Nations Human Rights Committee has also identified the FVPCA as a principal area of concern.[196] The Committee routinely reports on New Zealand's implementation of the International Covenant on Civil and Political Rights.[197] In considering New Zealand's Third Report to the committee, it commented that:[198]

> In relation to the right of freedom of expression, the Committee expresses its concern over the vagueness of the term 'objectionable publication' and the fact that Section 121 of the Films, Videos and Publications Classification Act makes the 'possession of any objectionable publication' a criminal offence, even if the person concerned has no knowledge or reasonable cause to believe that the publication is considered as objectionable.

The Committee recommended the amendment of the FVPCA by including a more specific definition of 'objectionable publication' and by removing criminal liability for possession without knowledge of or reasonable cause to believe in the objectionality of the material.[199]

The Board in *New Truth* acknowledged the report and the criticisms that can be made about the censorship regime. It noted, however, that it is obliged to apply the FVPCA as it is clear that Parliament intended that it be applied in that manner, despite the fact that the law cannot be justified in a free and democratic society.[200]

The most appropriate reform of the legislation would be the replacement of the no-defence provision with a defence that, at the time of possession, the defendants had no knowledge or reasonable cause to believe that the publication was objectionable.[201] This

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196 The 1393rd to 1395th meetings of the Committee (CCPR/C/SR.1393 to SR.1395) considering New Zealand's third periodic report (CCPR/C/64/Add.10 and HRI/CORE/1/Add.33); Comments published in New Zealand Ministry of Foreign Affairs and Trade *Human Rights in New Zealand* (Information Bulletin No 54, June 1995).

197 The protection in the International Covenant on Civil and Political Rights is similar to the protection in the Bill of Rights.

198 Above n 197, 69.

199 Above n 197, 70.

200 *New Truth* above n 5, 176.

201 This was similar to the alternative favoured by the Department of Justice in its submission on the Bill, see above n 53, 22.

would mean that defendants could exonerate themselves by proving that they lacked knowledge of the nature or presence of an objectionable publication. This accords with the approach taken in overseas jurisdictions.

The Defendants could also prove that they had no reasonable grounds for believing that the publication would be determined to be objectionable if the publication had not been classified by the censorship bodies at the time of the possession. This allows a slight erosion of ignorance of the law is no excuse rule as defendants could successfully assert that they could not comply with the law because they could not predict the determination of the censorship bodies.

This lack of reasonable belief would appear to operate on two levels. First, proof that the accused was aware of the characteristics of a publication under s 3(2) would seem to automatically give the accused reasonable grounds for believing that the publication is objectionable and thus no defence is available. Conviction would not be too difficult and this accords with the apparent intention of Parliament to crack down on hard-core pornography and violence. Secondly, proof of knowledge of the characteristics under s 3(3) would not be enough in itself to obtain a conviction; the accused could also argue that the decision of the censorship body was unpredictable. If, however, the publication or publications with very similar content had been determined to be objectionable, she would not be able to assert the defence. An accused may also assert some other basis for reasonably believing that the publication was not objectionable. This deals with the concerns at the imposition of criminal sanction in the grey area of what is objectionable. Basically there must be a very strong likelihood of classification under s 3(3) at the time of the possession before an accused is found guilty. This allows people who deliberately flout the law to be convicted, but does not convict morally blameless people who, through no fault of their own, are not aware that the publications they possess are objectionable.

In summary, the replacement of the no-defence provision with a defence of no knowledge or reasonable cause to believe that a publication is objectionable will enhance the law by incorporating basic principles of fairness into the FVPCA, but will still allow for the effective enforcement of the censorship regime.