4 May 2001

SUBMISSION

To the Inquiry of the Government Administration Committee into the operations of the Films, Videos and Publications Classification Act 1993 and related issues

Introduction

1. This submission is from the Screen Producers and Directors Association of New Zealand (SPADA).

2. SPADA is the foremost screen production industry organisation representing film and television producers and directors in New Zealand. We have over 250 company and individual members. Our mission statement is to be *the leading advocate for a robust screen production industry which strives to enhance the diversity of screen culture in New Zealand*. An operating arm of SPADA is Film New Zealand, which markets New Zealand offshore as a filming location for foreign producers.

3. This submission has been approved by SPADA's Executive, a board annually elected by its members. SPADA's Chief Executive Jane Wrightson and President Karen Soich wish to appear before the Committee.

Comment

4. Our interest in this inquiry derives from many of SPADA's members being involved in the production and distribution of New Zealand films and the interest of all our members in a thriving film culture in this country.

5. As a general comment, we are very concerned that an Inquiry with such far-reaching implications has been launched with virtually no publicity or an adequate briefing document. With respect, we trust that if the Select Committee makes any significant conclusions or recommendations, a full public information and consultation process plus a detailed position paper will follow. Our comments are relatively brief because the terms are so broad that in-depth research is not feasible at this stage.

6. We wish to make submissions on nine points in the terms of reference:

6.1 *The adequacy of the complaint procedure under the Act…….. and whether the procedure for lodging a complaint about a publication is adequate given that the present Act requires a citizen to make a complaint to the Office before the Chief Censor can act*.

6.2 We submit that the status quo is perfectly adequate. The requirement for a member of the public to gain leave of the Chief Censor before lodging a complaint is a sensible compromise which is both practical and democratic. Namely, a member of the public has direct access to the Censor's office (a freedom not included in some previous censorship legislation) but the Chief Censor is able to make a preliminary judgment as to whether the resources of the OFLC should be deployed to address the matter (namely if the publication is likely to be restricted or banned). As a safeguard, the Chief Censor is required to give written reasons for his decision and a consequent approach to the Ombudsman is possible if the member of the public remains dissatisfied.

6.3 We also note that the Chief Censor is free to require a publication to be submitted. Therefore we submit that the current processes and procedures are adequate.

6.4 The definition of "objectionable" as set out in s3 of the Act, to determine whether the Court of Appeal's narrow interpretation of the words "matters such as sex, horror, crime, cruelty or violence" in Moonen v FLBR adequately carry out the intent of the Act.

6.5 The three-stage approach of the 1993 Act was carefully planned and the overall intent deliberately confined to 'matters such as sex, horror, crime, cruelty or violence'. There was debate at the time about whether the ambit should be wider and Parliament deliberately chose to keep the range narrow. This is a proper approach in a free democracy.

6.6 If further broad concepts emerge which are to be considered objectionable, we submit that these should be the subject of extensive public information and consultation. If there is a broad consensus, we further submit that such concepts should be included in legislation, thus being subject to full parliamentary debate, for maximum transparency and clarity.

6.7 Whether or not the Bill of Rights Act 1990 should apply to all matters prescribed in s3(2) of the Act or whether s3(2) of the Act should state that, notwithstanding anything in the Bill of Rights Act 1990, publications that promote the matters in that section are 'objectionable'

6.8 We submit that the Bill Of Rights Act provides a reasonable safeguard in relation to the powers of the Chief Censor. Those powers are sweeping and the punitive implications of being found in possession of objectionable material (which tends to be classified as such **after** possession is taken) are severe. Thus we see considerable benefits in requiring the OFLC to take into account the provisions of the Bill of Rights Act. This does not hinder the OFLC in determining that a publication is to be classified as objectionable; it simply requires a clear and transparent process in coming to a classification decision. This enhances the likelihood of good decision making.

6.9 The *Living Word* judgment now provides a clear application of the process to be followed in considering the Bill Of Rights Act with the Act. We do not believe that further statutory amendment is necessary. We concur with the sentiments expressed in *Handyside v UK* as cited in the *Living Word* case on p20:

> *Freedom of expression constitutes one of the essential foundations of a [democratic] society…. Subject to Article 10(2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.*

6.10 Thus we submit that the Bill Of Rights Act should apply to all matters relating to the application of the Act.

6.11 The issues to emerge from the Court of Appeal's decision in Living Word Distributors Ltd v Human Rights Action Group

6.12 Regarding the proposition that s3(3)(e) should be linked to a gateway to s3(1), we believe that such an amendment would fundamentally change the intent of the Act and should not be recommended. In a modern democratic society, censorship (if permitted at all) should be narrowly confined to areas which are clearly set out by statute and which have been exhaustively researched and debated in public. This was the case with the 1993 Act as argued above.

6.13 Thus, neither do we support the second proposition that a 'hate speech' provision be included in the 1993 Act. The Act is not designed - and should not be designed - to censor ideas. It is designed to censor physical expressions of very specific ideas, generally (and most commonly) related to sex, horror, crime, cruelty or violence.

6.14 We support the view that, no matter how unpalatable, expression of free speech is a fundamental right. The most appropriate forum for any sanctions would seem to be the Human Rights Act. However this issue is complex, emotional and requires widespread information, education and consultation before fair and meaningful decisions can be made. With respect, we do not believe that this Inquiry is the appropriate forum to make recommendations, in the absence of a substantial public briefing paper or similar. Should the issue be viewed as sufficiently important, we believe that this Inquiry should recommend that the best way to explore the technicalities would be a small committee of inquiry, along the lines of the 1989 Ministerial Committee of Inquiry Into Pornography, which used a preliminary discussion paper to inform debate.

6.15 *Whether quantity, quality and timeliness measures for the Board of Review be included in a Memorandum of Understanding or in legislation and if an inquiry into the means of 'maximising the efficiency and effectiveness of the Act' should be extended to all three bodies involved in rating and classification.*

6.16 The Board of Review has separate statutory authority. We assume that any efficiency measures would be inter-related with the servicing of the Board by the Department of Internal Affairs. Given that the Board meets as and when required, and in the absence of evidence that there is a problem, we do not see any material gain by including such provisions. Imposing a rigid time frame could also add to the Crown's costs and constrain due process. If there is an overwhelming argument to do so, it should certainly not be a legislative matter but an operational one.

6.17 In 1993 Parliament deliberately devolved classification of unrestricted films and videos to the industry. The Film & Video Labelling Body carries out its functions as permitted by statute and the industry which pays its costs (thus providing a saving to the Crown) is best placed to determine whether the FVLB is carrying out its activities promptly and well.

6.18 We submit that monitoring of the FVLB is therefore not a Crown activity and certainly not one for legislation. We also submit that monitoring of the Board of Review is an operational matter and not one for legislation.

6.19 The definition of 'broadcasting' in the Broadcasting Act 1989 in relation to the definition of 'publication' in the Act

6.20 This is a complex area and requires a public issues paper before any meaningful input can be expected.

6.21 The concept of legislating that trailers shown before a feature film should be for films rated no higher than the following feature

6.22 We presume that the reason for raising this issue is a concern to protect children from unsuitable images. Children cannot be protected from knowing that restricted films exist given the extensive advertising campaigns in other domestic and international media (print, radio, television etc). Therefore we submit that the current system is perfectly adequate, namely that **the content of the trailer itself** must be the same or a lower rating than the feature it is accompanying.

6.23 If the reason is not related to protecting children from unsuitable images, we cannot think of any scenario sufficiently robust to impose such a restrictive approach. Distributors select their marketing targets carefully and tend to place trailers of relevant audience interest with each feature. Not all lower-rated films are specifically targeted at children and the ability of distributors to promote new titles should not be constrained in such a heavy-handed manner as the terms of reference implies. If there is substantial evidence of serious

community concern (we are not aware of any), the only logical move is for the Chief Censor to have power to act on individual cases.

6.24 Therefore we submit that the status quo for the screening of trailers should prevail.

6.25 The potential for a cross-rating system and the desirable characteristics of such a system

6.26 We assume this refers to ratings and classifications from the OFLC and the FVLB being applied to broadcasts of a film? If not, we would appreciate further information and time to make additional submissions on this point.

6.27 If our assumption is correct, we presume it is being mooted that a film which receives an R16 classification from the OFLC, for example, should be labelled as R16 upon broadcast rather than the current AO television rating. This is not a practical option. A broadcaster has no power to restrict, as does a cinema or video outlet through preventing admission or hire. Television ratings can only be guidelines for audiences.

6.28 As well, the version of a film which screens on television may be a modified version from the cinema version (namely the reasons for the OFLC restriction may be diluted or removed and the film may be substantially altered meaning it is, in legal terms, a different 'publication').

6.29 We submit that there is no potential for a workable or meaningful cross-rating system.

6.30 The viability of creating one media regulatory agency

6.31 We assume this refers to the possibility of merging the OFLC and the Broadcasting Standards Authority and perhaps the Advertising Standards Authority. If not, we would appreciate further information and time to make additional submissions on this point.

6.32 The BSA makes decisions after broadcast. It is not a pre-release censor like the OFLC. Pre-release classification activities are undertaken by the broadcasters themselves, which are legally responsible for any breaches or errors. Editorial freedom of broadcasters is another hallmark of a healthy democracy.

6.33 The OFLC, or indeed an outside organisation like the Film & Video Labelling Body, could not perform pre-release classification tasks adequately or with any particular knowledge. Indeed these bodies **must** not do this. The cost and practical implications would be enormous and provide no obvious benefit or improvement.

6.34 Neither could the OFLC perform the tasks of the BSA in dealing with post-broadcast complaints. The two entities inhabit different worlds and deal with different statutory concepts. The OFLC is concerned with protecting New Zealanders from objectionable material and providing protection and guidance

with material which may not be suitable for children. The BSA, in the context of self-regulation, is concerned with receiving and determining complaints, issuing advisory opinions relating to broadcasting standards and ethical conduct in broadcasting and encouraging the development and observance by broadcasters of codes of broadcasting practice. The complaints process deals with post-broadcast matters, so in this regard, the BSA is more akin to the Film & Literature Board of Review. The Review Board structure is completely different to the BSA and is not appropriate as a model either.

6.35 The Advertising Standards Authority is an industry self-regulated body funded by the industry and dealing with a further, very different element of screen regulation. We are unaware of any serious concerns about its operation and there seems no logical reason to change this structure.

6.36 All these offices are relatively small and there would be few, if any, operational cost savings. While broadcast television (and radio) remains the most widely accessed medium and particularly while free-to-air television remains the dominant broadcast medium, we submit that the special nature of broadcasting demands a separate regulatory and ratings regime.

6.37 Therefore we submit that a single media regulatory agency is not at all viable.

Summary

7. We are very concerned that a subject as complex and emotive as censorship should be dealt with in this manner. As we note above, there do not seem to be any major flaws in the current system, or none which cannot be resolved through normal processes. We are also very concerned that broadcasting has got caught up in this discussion. However it is impossible to evaluate these issues properly without a full discussion paper outlining current practice, significant issues and posing structured questions for the public to consider with the benefit of detailed information.

8. We respectfully submit that, should the Inquiry determine there are serious issues which may require an amended statutory framework, that it recommends that a discussion paper be prepared and a formal - and informed - public consultation process be undertaken.

Yours sincerely

Jane Wrightson
Chief Executive