Knowing Where to Draw the Line: Assessing the Protection of Fine Art from Censorship in New Zealand

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Introduction

Censorship is often associated with oppressive and tyrannical regimes. However in reality censorship is a commonly occurring practice throughout the world. New Zealand's censorship regime is provided by the Films, Videos, and Publications Classification Act 1993 (FVPCA). The FVPCA's jurisdiction covers most fine art disciplines. In this dissertation, fine art shall be used to refer to traditional artistic media such as painting, drawing, and sculpture, but also other disciplines such as photography, installation art, video art, and printmaking. The FVPCA shall be examined to assess whether it adequately protects fine art from censorship in New Zealand. In exploring this question, focus will be directed towards the Film and Literature Board of Review (FLBR), as the last appellate body capable of assessing the merits of a publication without being limited to points of law.[1]

Chapter One will provide a brief background on the development of fine art. This background shall demonstrate the way in which art, as a reflection of broader society, contains political content. The incorporation of this political content helps one to understand the value of art and why it is necessary to ensure it is adequately protected.

Chapter Two shall examine the right to freedom of expression and the role of the New Zealand Bill of Rights Act 1990 (BORA) in censorship. The relationship between the FVPCA and the BORA will be examined. This will entail considering how fine art is included within the right to freedom of expression. Focus will then be directed at whether the FLBR's application of BORA in their decisions is sufficient to ensure that fine art receives adequate protection when examined pursuant to the FVPCA.

Chapter Three will then evaluate key aspects of the FVPCA to assess whether the statutory regime provides an appropriate framework to enable the protection of fine art. The exclusion of sculpture from the jurisdiction of the Act shall be highlighted as an inconsistency in the Act. The statutory test established for assessing whether a publication is objectionable per s 3 will also be scrutinised. This shall demonstrate that the successfulness with which the FVPCA can provides protection for fine arts is extremely dependent on the FLBR applying s 3 with the requisite expertise. This Chapter will also highlight that although the FVPCA provides a relatively use framework for the protection

[1] Films, Videos, and Publications Classification Act 1993, ss 47, 52.

of fine art, the fact that the FLBR has in the past failed to exercise adequate expertise suggests that fine art is potentially exposed to undue censorship.

Chapter Four will set out recommendations for changes to the FVPCA that seek to resolve the current weaknesses in the regulation of fine art. It shall be suggested that sculpture should be included within the definition of publication in s 2. Additionally, s 3(2) should be amended so that s 3(2)(d), the "promotion or support" of "the use of urine or excrement with degrading or dehumanising conduct or sexual conduct", is and instead placed as matter to be given consideration under s 3(3).[2] Finally, the FLBR should be subject to a mandatory requirement to consult with experts before applying s 3.

[2] Section 3(2)(d).

Chapter One: Art as a Reflection of Societal Context

Fine art has been in a state of what might seem like perpetual flux for many years. It has been succinctly noted that "since the rise of the avant-garde, only art viewed from an historical distance has appeared to have direction and coherence, while the present always seems clouded in confusion."[3] Naturally, a comprehensive attempt to resolve this is not necessary for present purposes, but a brief canvassing of the development of fine art and its place today shall offer insight into its political context

Art has always been, and will continue to be, political. It should be noted that here 'political' is used in a loose sense. Art is in that is always a product of a broader societal context. It is therefore political as it is defined by its relationship to historical and social circumstance. Even if not always a promotion of societal ideas and values, art has often both incorporated and fought against such ideals. Avant-garde works, those that seek to push boundaries, often entail a decisive rejection of these very same ideas and values.[4] Thus, no matter whether supporting or deriding, art finds itself defined by the ideas and values which ground it in a wider context. These ideas inevitably involve political content.[5] One can track this phenomenon throughout history quite simply. Leaving aside concerns regarding stylistic development, a consistent reflection of societal ideals and values can be demonstrated by reference to a number of works (naturally this shall be severely limited, and with a western focus, lest this become an art history dissertation).

Turning to Greek art and more specifically sculpture, one can immediately note the political content. Thus, in the statute *Laocoön and His Sons,*[6] the three figures' tragic deaths amidst the coils of divine serpents, there are layers of meaning that emerge.[7] Firstly, this representation captures the ephemeral and delicate nature of human mortality before the immense power of the immortal gods. Secondly, despite the calamitous event presented, the work impressively demonstrates aesthetic ideals in the form and balance of this piece.

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[3] Julian Stallabrass *Contemporary Art: A Very Short Introduction* (eBook ed, Oxford University Press, 2006) at 121.

[4] Nikos Stangos "Preface" in Nikos Stangos (ed) *Concepts of Modern Art: From Fauvism to Postmodernism* (3rd ed, Thames & Hudson, London, 2006) at 8-9.

[5] Mary Devereaux "Protected Space: Politics, Censorship, and the Arts" in David EW Fenner (ed) *Ethics and the Arts: An Anthology* (eBook ed, Taylor and Francis, New York, 1995) at 45.

[6] Agesander, Athenodorus, and Polydorus *Laocoön and His Sons*, c100 BC, 208 x 163 x 112 cm.

[7] Andrew Delahunt and Sheila Dignen "Laocoön" in *The Oxford Dictionary of Reference and Allusion* (3rd ed, eBook ed, Oxford University Press, 2016).

Thus, the political content emerges as this sculpture reflects a Greek understanding of both humankind's relationship to the gods, and also a glimpse of societal and artistic conventions of beauty.

Jumping forward many hundreds of years one again finds this same tradition apparent in the royal courts of Europe. In the 17th century one can see the recurrent theme of regal power and authority consistently embodied in the works of Diego Velázquez, whose canvases convey the pre-eminence of Spanish royalty.[8] This period perhaps most overtly demonstrates this concept of art as forcefully incorporating political content. In the opulent and commanding representations of the royal family and their attendants one finds a very real embodiment of 17th century European ideas about the place and importance of royalty, and the exercise of regal power. Underlying much of the painting in this era is the notion of property and wealth as a fundamental cultural signifier of status.[9]

With the advent of what is often referred to as avant-garde art in the late 19th and early 20th centuries, one can see a departure from the direct incorporation of political content. This occurred as art quickly began to move away from naturalistic representation and thereby lost its capacity to literally incorporate symbolic content. In this period one finds the rise of such movements as Impressionism, Fauvism, and Cubism.[10] All of these celebrated movements at their core embody a new focus on the nature of representation in art.[11] Compelled by the advent of photography, they questioned how art should portray experience and existence and challenged the presumptive dominance of naturalistic representation. They form part of what the critic Clement Greenberg noted to be a gradual evolution of modernist art towards a formalist purity.[12] Formalism, as promoted by Greenberg, is the concept of ridding all content from art, leaving only its formal, compositional, and material elements. The fruition of this ideal was found convincingly in the paintings executed by Jackson Pollock in the 1940s and 1950s where the flatness of the canvas and the materiality of the paint are the central and indeed only real content of the paintings. In this sense there is a departure from the art historical cannon, a deliberate decision to strip art of anything but its formal qualities, including stripping political

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[8] See Dawson W Carr *Velázquez* (National Gallery, London, 2006).

[9] John Berger *Ways of Seeing* (Penguin Books, London, 1972) at 103.

[10] "Modern Art" Britannica Academic < http://academic.eb.com/levels/collegiate>.

[11] Stangos, above n 4, at 8.

[12] Clement Greenberg "Modernist Painting" in Charles Harrison and Paul Wood (eds) *Art In Theory: 1900-1990: An Anthology of Changing Ideas* (Blackwell, Oxford, 1993).

content.[13] However, it is crucial to note that this proposition, the removal and rejection of political content in art is itself a political stance about what art *is* and what it *should be*. Thus Pollock's paintings are again merely reflective of a different expression of societal ideals and values.

The fact that formalism represents yet another political perspective on art is particularly notable due to the vigorous reaction this theoretical approach would experience. Soon the pre-eminence of Greenberg's formalism was attacked, perhaps most directly by the arrival of Pop Art, its "explicit refutation".[14] At this point art generally began to engage itself as a form of political activism, explicitly seeking to highlight social issues. This was most prominent in the wave of art that critiqued involvement in the Vietnam war and the growing importance of Feminist art throughout the 1970s.[15]

Within the art world the rise of Conceptual Art, linked to critical theory, saw an examination of institutional structures and practices. Following this period of overt political content, art can perhaps most properly be said to exist in a "period of quite perfect freedom".[16] That is to say, the contemporary landscape of fine art is almost universally permissive. Importantly for the purposes of this dissertation, this permissive atmosphere provides an ample and readily used opportunity for engagement with political content. Art continues to define itself in contrast to mass culture and maintains a level of elitism by its frequent art historical references and in-jokes, but that is not to say that it does not continue to engage with prevalent social issues.[17] For example, in a recent work by Ai Weiwei the utilisation of 14,000 life jackets brought to the heart of Berlin a direct commentary on the refugee crisis that is an enormous political issue in Germany and Europe more generally.[18]

To sum up, it is clear that political content, in the sense of a representation of social values, has a long pedigree in fine art. This can be traced as a continuous element from its classical heritage to the present day. It is crucially important that this social value of art is understood. This incorporation and more recently, critique of societal ideas and values is

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[13] Charles Harrison "Abstract Expressionism" in Nikos Stangos (ed) *Concepts of Modern Art: From Fauvism to Postmodernism*, (3rd ed, Thames & Hudson, London, 2006) at 181.
[14] Stallabrass, above n 3, at 121.
[15] Christopher Reed "Postmodernism and the Art of Identity" in Nikos Stangos (ed) *Concepts of Modern Art: From Fauvism to Postmodernism*, (3rd ed, Thames & Hudson, London, 2006) at 275-277.
[16] Stallabrass, above n 3, at 133.
[17] Stallabrass, above n 3, at 135.
[18] Ai Weiwei *Untitled (Kontzerhaus Installation)*, 2016; "Ai Weiwei covers Berlin venue with 14,000 life jackets" (14 February 2016) Aljazeera <www.aljazeera.com>.

perhaps one of the most valuable aspects fine of art. In light of this, it is appropriate to move to an assessment of freedom of expression in New Zealand and a review whether the FVPCA and the FLBR provide adequate protection for fine art in New Zealand.

Chapter Two: Freedom of Expression

A The Right to Freedom of Expression in New Zealand

In New Zealand freedom of expression has been recognised as part of the common law.[19] It is a central, fundamental political right,[20] and its status is confirmed treaties such as the International Covenant on Civil and Political Rights.[21] The primary source of the right to freedom of expression in New Zealand is s 14 of the New Zealand Bill of Rights Act 1990 (BORA):

> 14. Freedom of expression — Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

Section 14 of the BORA represents an attempt to define the right more explicitly by stating it includes the "freedom to seek, receive, and impart information and opinions of any kind in any form". This stands in contrast to many other rights contained within the BORA in which the drafters did not seek to elaborate further.[22] Significantly, the use of "including" demonstrates this elaboration is not exhaustive and the actual scope of activity protected by s 14 may be even broader. This combined with the words "of any kind in any form" further suggests that no expressive act or utterance is beyond the ambit of the section.[23] The BORA is subject to the general limitation in s 5, but s 14 does not list specific limitations for freedom of expression.

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[19] See *Attorney-General v Butler* [1953] NZLR 944 (SC) at 946, "the public interest requires that free speech should not be restricted except where circumstances require it".

[20] *Handyside v United Kingdom* (1976) 1 EHRR 737 (ECtHR) at 754, cited with approval in *Living Word Distributors Ltd v Human Rights Action Group (Wellington)* [2000] 3 NZLR 570 (CA) per Richardson P.

[21] The International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), Art 19.

[22] See New Zealand Bill of Rights Act, ss 8, 9, 10.

[23] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ, Wellington, 2015) at 13.7.2; Grant Huscroft "Freedom of Expression" in Paul Rishworth (ed) *The New Zealand Bill of Rights* (Oxford University Press, New York, 2003) at 312.

It is worth noting the wording of s 14, which includes the right to "seek", "receive", and "impart" information and opinions. This means that the section protects both the content of expression, the means of expression, and the reception of the expression.[24] [25]

The Court of Appeal in *Moonen v Film and Literature Board of Review* [*Moonen 1*] held that s 14 is "as wide as human thought and imagination".[26] This broad encapsulation was seemingly directed at the term "expression",[27] although the prospect of applying such an expansive approach has been met with some hesitancy by the lower courts.[28] More recently, the Supreme Court has confirmed this broad interpretation of expression in s 14 and has stressed the use of s 5 to provide limitation rather than reading down the ambit of s 14 itself.[29] Thus attention shall now be directed to the limitation on freedom of expression.

B Limitations on Freedom of Expression

Freedom of expression is not an absolute right in New Zealand. The interaction of the BORA with other statutes is elaborated by ss 4, 5, and 6:

> **4 Other enactments not affected**
> No court shall, in relation to any enactment (whether passed or made before or after the commencement of the Bill of Rights),—
> (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
> (b) decline to apply any provision of the enactment —
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.
>
> **5 Justified limitations**
> Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **6 Interpretation consistent with Bill of Rights to be preferred**
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

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[24] Butler and Butler, above n 23, at 13.7.42.

[25] Huscroft, above n 23, at 311.

[26] [2000] 2 NZLR 9 (CA) at [15].

[27] Butler and Butler, above n 23, 13.7.4.

[28] *Thompson v Police* [2012] NZHC 2234 at [74]-[75].

[29] See *Morse v Police* [2011] NZSC 45; *Brooker v Police* [2007] NZSC 30.

A full discussion on the role of these three sections is not necessary for present purposes. The most pertinent focus relates to s 5, which indicates the rights contained in the BORA may be subject to limitations. In *Society for the Protection of Community Standards v Waverly International (1988) Ltd,* the Full Court of the High Court heard an appeal under the Indecent Publications Act 1963, now repealed, which was a precursor to the FVPCA.[30] In this case, the court held that the Indecent Publications Act's limitation on the right of freedom of expression was "not inconsistent with the rights and freedoms contained within the Bill of Rights 1990 and can be demonstrably justified in a free and democratic society".[31] As the essential effect of FVPCA is the same as the Indecent Publications Act, one can likely regard the FVPCA as a justified limitation on Freedom of Expression. Despite this, the decision of the Full Court has come under criticism, and it is crucial to remember that the BORA must be used as an interpretive tool in the application of the FVPCA.[32] However, in *R v Spark,* the Court of Appeal affirmed that "to the extent that the provisions of [the FVPCA] impinge upon rights contained in BORA, that has to be taken as being an outcome consistent with Parliament's intent".[33] This clearly acknowledges the FVPCA's limitation on BORA freedoms, even if it does not go so far as to explicitly state that they are demonstrably justified in a free and democratic society.

C Freedom of Expression and Art

Building on the earlier discussion of s 14 of the BORA under A, it must be noted that artistic expression is not explicitly included in the scope of expression. This stands in contrast to some instruments such as the International Covenant on Civil and Political Rights, which expressly includes: [34]

> the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, *in the form of art*, or through any other media of his choice (emphasis added)

As earlier argued, it can be demonstrated that art at some level always contains some communicative political content. Under this line of reasoning, the political content in art

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[30] *Society for the Protection of Community Standards v Waverly International (1988) Ltd* [1993] 2 NZLR 709 (HC).

[31] At 727.

[32] *Moonen 1,* above n 26, at [27].

[33] *R v Spark* [2009] NZCA 345 at [33].

[34] Above n 21, Art 19.

means it can derive protection under general consequentialist theories such as the promotion of both truth, [35] and democracy because of its ability to communicate ideas.[36] In this sense, art can have a very real value in its ability to enable the viewer to be "temporarily alienated from the safety of [their] common preoccupations and embark on questioning what has been previously accepted".[37]

However, Frederick Schauer has noted that a problem may arise if this concept of art is rejected and art is viewed as something other than "mere communication".[38] Thus, even if art is seen as something falling outside "information and opinions", despite the fact it is not an exhaustive definition.[39] If this approach is taken, some other justification for the protection of art within 'freedom of expression' for the purposes of s 14 is necessary. However, this problem fades if the principle behind freedom of expression is understood as focusing not on the nature of the thing being censored but rather on the motive behind the censorship.[40]

If one focuses on the possibility of censorship under the FVPCA, this problem does not arise. This is because the reason behind the censorship of art is almost universally an attempt to prevent the public viewing or interacting with art and consequently being negatively influenced by it.[41] In New Zealand this can clearly be seen in that the motivation behind censorship is a concern that otherwise the publication might be "injurious to the

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[35] See John Stuart Mill *On Liberty: and Considerations on Representative Government* (B. Blackwell, Oxford, 1948) at 14-15 "[The] peculiar evil of silencing the expression of an opinion is, that it is the robbing of the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

[36] See *R v Secretary of State for the Home Department, ex parte Simms, Steyn LJ* [2000] 2 AC 115 at 126 "freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country".

[37] Paul Kearns *Freedom of Artistic Expression: Essays on Culture and Legal Censure*, (eBook ed, Hart Publishing, Portland, Ore., 2013) at 14.

[38] Frederick Schauer *Free Speech: A Philosophical Enquiry* (Cambridge University Press, Cambridge, 1982) at 110.

[39] New Zealand Bill of Rights Act, s 14.

[40] Schauer, above n 38, at 111.

[41] At 111.

public good".[42] Therefore, the protection of the right to freedom of expression is triggered when censorship is aimed at the communicative impact of the art, whether the art itself is understood as merely another form of communication.[43] This means that even where doubts are raised as to whether a specific art work communicates content (and thus whether it falls under s 14), if censorship is contemplated, this fact in itself demonstrates that the right to freedom of expression applies, because of its impact on the right to receive information.

Art often involves an aesthetic element. John Finnis has suggested that aesthetic experience is a basic human good, a matter of fundamental importance equal to that of knowledge or play.[44] Thus a valuable experience can be found in the "creation and/or active appreciation of some *work* of significant and satisfying form".[45] This suggests that benefit can be found in both the act of contributing to a work of art, and enjoying a work of art, which entails receiving in some sense. In light of this, freedom of expression in art can be alternatively justified as a consequence of its ability to contribute to this aesthetic experience. Such an approach is tenable once again relying on the inclusive definition offered for "expression".[46]

Related to this idea of aesthetic experience as an intrinsic good, is the proposal that freedom of expression merits protection because of its role in human development and self-fulfilment. The *White Paper* proposal for the BORA itself cited this as one of the central aims of protecting freedom of expression.[47] In its commentary the *White Paper* cited Justice Brandeis' dictum in *Whitney v California* that "the final end of the State [is] to make men free to develop their faculties."[48] It is worth noting that this justification suggests that art should be protected as a creative output.

D The Role of the BORA in FLBR Decisions

The right to freedom of expression can be seen to be implicated in any act of censorship. This right has particular relevance to art, as a form of expression. It thus is necessary to examine how the BORA is applied by the FLBR.

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[42] Films, Videos, and Publications Classification Act, s 3(1).
[43] Schauer, above n 38, at 111.
[44] John Finnis, *Natural Law & Natural Rights* (2nd ed, Oxford University Press, New York, 2011) at 87.
[45] At 88.
[46] New Zealand Bill of Rights Act, s 14.
[47] *A Bill of Rights for New Zealand: A White Paper* (Government Printer, Wellington, 1985) at 75.
[48] *Whitney v California* (1927) 274 US 357 at 357.

1 Moonen 1 & Hansen

The Court of Appeal in *Moonen 1* interpreted the effect of ss 4, 5, and 6 in relation to the FVPCA.[49] In interpreting the words "promotes or supports or tends to promote or support" in s 3(2) of the FVPCA, the Court suggested a five step approach for BORA analysis. The first step is to identify the different interpretations of the words that are properly open.[50] If more than one meaning is available, then the second step is to identify the meaning which constitutes the least possible limitation on the right or freedom in question, and adopt that meaning.[51] The third step is to identify the extent, if any, to which that meaning limits the relevant right or freedom.[52] The fourth step is to consider whether the extent of any such limitation, as found, can be demonstrably justified in a free and democratic society in terms of s 5.[53] The fifth step is for the Court to indicate whether the limitation is or is not justified.[54] The court stresses that because of s 4, statutes inconsistent with the BORA must nevertheless be given effect.[55] It is important to note that in *Moonen v Film and Literature Board of Review (No. 2)* [*Moonen 2*] the Court of Appeal declined to revisit the approach set out in *Moonen 1,* but did underline that that approach was not intended to be prescriptive, and that other approaches are open.[56]

The Supreme Court's decision in *Hansen v R* has overtaken the *Moonen 1* as the leading case for ss 4, 5, and 6.[57] However, in *Hansen,* it was made clear that different approaches to rights consistency are available and the *Moonen 1* methodology was distinguished, as opposed to being overruled.[58] This distinction was based on the fact that in *Hansen*, the words "until the contrary is proved" were capable of bearing two conceptually distinct interpretations.[59] In contrast, the words at issue in *Moonen 1*, "promotes or supports",[60] were "conceptually elastic" and the court was called to find the appropriate point on a

[49] *Moonen 1,* above n 26 at [15].
[50] At [17].
[51] At [17].
[52] At [17].
[53] At [18].
[54] At [19].
[55] At [18].
[56] [2002] 2 NZLR 754 (CA) at [15].
[57] [2007] NZSC 7.
[58] At [94] per Tipping J, at [61] per Blanchard J, at [192] per McGrath J.
[59] At [93].
[60] *Moonen 1,* above n 26, at [27]; Films, Videos, and Publications Classification Act, 3(2).

"possible continuum of meaning".[61] This means that in relation to the FVPCA, *Moonen 1* will likely remain the most persuasive authority. This is supported by the fact that in *R v Spark*, the Court of Appeal confirmed that the Classification Office was right to turn to *Moonen 1* for guidance in applying the FVPCA.[62]

2 The FLBR's Application of the New Zealand Bill of Rights Act

The mechanical way in which the FLBR applies the BORA is apparent in its decisions. It is notable that while Claudia Elliot was the President of the FLBR in its discussion on the relevance of the BORA the Board repeated the exact same seven or nine paragraphs, depending on whether the publication called for just three or all five of the steps in *Moonen 1* to be applied.[63] In these paragraphs the FLBR sets out that per *Living Word Distributors Ltd v Human Rights Action Group (Wellington)* [*Living Word*],[64] an interpretation of s 3 of the FVPCA must be infused with BORA considerations.[65] The Board sets out how the *Moonen 1* approach is not prescriptive but is still useful, and then works through each of the steps described above.[66] In these decisions the only change in these seven or nine paragraphs is the name of the publication in question.

In the more recent decisions made while Don Mathieson was President, the FLBR has moved away from this formula. The Board now expresses more succinctly that it has considered the BORA, that its decision impacts upon freedom of expression, but that the application of s 3 constitutes a necessary limitation.[67] Although these decisions are less strictly formulaic, in essence they represent a similar approach to the BORA by the FLBR.

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[61] *Hansen,* above n 57, at [94].
[62] *R v Spark,* above n 33, at [29].
[63] *Doing it with Betty* (Film and Literature Board of Review), 21 April 2009 at [98]-[105]; *Untitled 'bedroom scene' – cell phone video* (Film and Literature Board of Review), 8 September 2008, at [53]-[61]; *End of the Spear* (Film and Literature Board of Review), 2 July 2008, at [80]-[88]; *Grand Theft Auto IV* (Film and Literature Board of Review), 17 September 2008, at [95]-[103]; *Apolcalypto (Decision 3)* (Film and Literature Board of Review), 12 June 2007, at [83]-[92]; *Schofield Application Pt 2* (Film and Literature Board of Review), 29 June 2006, [142]-[150]; *Fox, May 2005* (Film and Literature Board of Review), 17 March 2006, at [78]-[86].
[64] [2000] 3 NZLR 570.
[65] *Doing it with Betty,* above n 63, at [98].
[66] At [100]-[105].
[67] *Hopgood Application* (Film and Literature Board of Review), 16 August 2010, at [12]; *Peter John Hartley Review* (Film and Literature Board of Review), 5 December 2011, at [19]; *Takinori Sato* ((Film and Literature Board of Review), 23 April 2010, at [15]; *Front Issue 163 (magazine)* (Film and Literature Board of Review), 10 August 2012, at [24].

This could more aptly be described as entailing a lack of any substantive analysis. This mechanical approach demonstrates that the FLBR operates from the essential assumption that because the limits of the FVPCA can be justified generally, any decision made in accordance with its terms must benefit from the same justification.[68]

This approach is deeply unsatisfactory in that it fails to live up to the basic requirements that the BORA imports into the assessment of publications under the FVPCA. It is crucial to remember the direction in *Living Word*, that "the balancing required by s 3 must be infused by due consideration of the application of the Bill of Rights".[69] The perfunctory analysis of BORA considerations during the Presidencies both Claudia Elliot and Don Mathieson demonstrates a lack of meaningful analysis. These two approaches differ in form but not so much in substance. Both suggest that the FLBR pays mere lip service to the BORA when making their assessment of a publication. This failure to adequately address the BORA is problematic for present purposes because of the protection that art can derive from freedom of expression generally. Thus, a failure to meaningfully take into account the importance of s 14 brings a real danger that art, along with other publications, will not get adequate protection when assessed by the FLBR. Although it is perhaps too early to tell, under the new President, Kate Davenport QC, no great improvement is in sight.[70] In *Don't Breathe*, the FLBR mentioned the fact that restriction must be balanced against the right to freedom of expression but did not offer any real analysis of what this might mean.[71] This lack of analysis suggests that there is no imminent prospect of fine art benefiting from the full protection that the BORA should offer.

[68] *Society for the Protection of Community Standards v Waverly International (1988) Ltd,* above n 30.

[69] *Living Word,* above n 64, at [40].

[70] Department of Internal Affairs "Appointments to the Film and Literature Board of Review" (press release, 30 November 2015).

[71] *Don't Breathe* (Film and Literature Board of Review), 19 September 2016.

Chapter Three: The Legislative Regime

A An Overview of the FVPCA

This section presents a brief overview of the FVPCA. A more in depth consideration of the provisions shall follow in Part B. Censorship in New Zealand is generally controlled by the FVPCA. The FVPCA applies to publications, a definition of which is provided in s 2. If the art in question falls within the definition of publication, it could then be subject to censorship.[72] Any publication may be submitted to the Classification Office for review by the chief executive of the New Zealand Customs Service, the Commissioner of Police, the Secretary for Internal Affairs,[73] or any other person with leave of the Chief Censor.[74] The Chief Censor may also by their own motion determine whether a publication should be classified. [75] Where a question arises in civil or criminal proceedings as to whether a publication is objectionable, the court must refer the question to the Classification Office for a decision.[76]

In examining a publication, the Classification Office must reach a decision as to whether the publication will be unrestricted, objectionable, or objectionable except in certain circumstances.[77] The central point of inquiry in this task is the definition of objectionable provided by s 3(1), the test being whether the availability of a publication is "likely to be injurious to the public good".[78] Section 3(2) provides that a publication shall be deemed objectionable if it "promotes or supports, or tends to promote or support" certain specific acts.[79] Sections 3(3) and 3(4) provide factors to be considered when assessing whether a publication is objectionable under s 3(1). Deciding whether a publication is objectionable is a matter for the expert judgment of the Classification Office or the FLBR and evidence or proof is not essential to a determination.[80] A decision of the Classification Office is subject to review by the FLBR.[81] This review is de novo, without recourse to the decision

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[72] Section 23(1).
[73] Section 13(1).
[74] Sections 13(1)(c), 15.
[75] Section 13(3).
[76] Section 29.
[77] Section 23(2).
[78] Section 3(1).
[79] Section 3(2).
[80] Section 4.
[81] Section 47(1).

of the Classification Office.[82] There is an additional right of review to the High Court and Court of Appeal but this is limited to points of law.[83]

The Classifications Office consists of the Chief Censor and the Deputy Chief Censor.[84] The FLBR consists of nine members, one of whom is appointed to be President and must have held a practicing certificate as a barrister or solicitor for at least seven years.[85] These positions are by appointment of the Governor General on the recommendation of the Minister of Internal Affairs, acting with the concurrence of the Ministers of Women's Affairs and Justice.[86]

It is a strict liability offence to make, to make a copy for supply, to import for supply, to supply, to possess for the purpose of supply, or to exhibit for payment, an objectionable publication.[87] These offences are punishable by a fine of up to $10,000 in the case of an individual, and $30,000 in the case of a body corporate.[88] Moreover, any person who commits one of these offences knowing, or having reasonable cause to believe, that the publication is objectionable, is liable to imprisonment for a term not exceeding 14 years in the case of an individual,[89] and to a fine not exceeding $200,000 in the case of a body corporate.[90]

Key provisions of the FVPCA will now be considered in more detail.

B The Meaning of Publication

'Publication' is defined in s 2 of the FVPCA:

> Publication means —
> (a) any film, book, sound recording, picture, newspaper, photograph, photographic negative, photographic plate, or photographic slide:
> (b) any print or writing:

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[82] Section 52(2).
[83] Sections 58, 70.
[84] Section 79.
[85] Section 93(4).
[86] Sections 80(1), 93(2).
[87] Section 123(1).
[88] Section 123(2).
[89] Section 124(2)(a).
[90] Section 124(2)(b).

> (c) a paper or other thing that has printed or impressed upon it, or otherwise shown upon it, 1 or more (or a combination of 1 or more) images, representations, signs, statements, or words:
> (d) a thing (including, but not limited to, a disc, or an electronic or computer file) on which is recorded or stored information that, by the use of a computer or other electronic device, is capable of being reproduced or shown as 1 or more (or a combination of 1 or more) images, representations, sign, statements, or words

This expansive definition will cover many traditional artistic media such as paintings, prints, drawings, photographs, video footage, as well as electronic files. A notable exception to this is sculpture, which does not fit within the exhaustive definition. The only slight possibility would come from the suggestion that it is a "thing that has shown upon it 1 image" (para (c)). However, this proposal stretches the wording uncomfortably. Sculpture is best understood as an independent object or 'thing', whether carved or moulded. If one were to carve a piece of marble (or any other material) it could not subsequently be described as having been 'printed or impressed upon'. Moreover, "otherwise shown upon it" suggests the process of adding to the "thing" in question. Additionally, the meaning of "thing" itself is likely coloured by "paper" and therein indicating something two dimensional, thus excluding sculpture. Therefore, it could only fit this definition if one were to subsequently add an image, representation, sign, statement, or word to it.

If only sculpture is excluded, an artificiality is introduced into the divide between what is covered as a publication and what is not. If the scope of the FVPCA is going to include so many traditional artistic media, the lone exclusion of sculpture is hard to justify. One possible justification for its exclusion is the relative difficulty of mass producing sculpture as opposed to books, films, or images generally. This may be true of sculptures produced by hand but it should be remembered that sculpture could rightly cover mass produced objects created in factories out of a range of materials. Moreover, although uncertain, the potential of 3-D printing is also worth considering in its potential to produce a variety of objects with relative ease.[91] Thus it is hard to see why potential concerns about paintings, drawings, or photographs could not equally translate to sculptures.

[91] Nick Bilton "Disruptions: On the Fast Track to Routine 3-D Printing" *The New York Times* (online ed, New York, 17 February 2013).

A curious result might eventuate if an attempt were made to determine whether a work of installation art would fall within the definition of publication. Installation art is a term used to:[92]

> …describe a construction or assemblage conceived for a specific interior, often for a temporary period, and distinguished from more conventional sculpture as a discrete object by its physical domination of the entire space.

Installation art can come in an innumerable variety of forms and often involves a range of discrete media that contribute to the work as a whole. In *News Media Ltd v Film and Literature Board of Review*, the Full Court of the High Court held that the fact that certain advertisements were objectionable meant that the entire newspaper, as the vehicle for those advertisements, was inevitably objectionable.[93] This approach has since been adopted by the FLBR.[94] The Court in *News Media* was of the view that "the forbidden advertisements would infect the whole, with the risk-taking publisher having only itself to blame for the loss of the whole publication".[95] Additionally, the Court held that "Bill of Rights considerations do not take the matter further", and made it clear that the FVPCA, as a limitation freedom of expression was justified and made predominant by virtue s 4 of the BORA.[96] It is worth noting that this decision predates the *Moonen 1* analysis, mentioned in Chapter Two, where the Court of Appeal expressly stated that the Full Court's interpretation that the Bill of Rights had no part to play is wrong.[97] *Moonen 1,* however, did not address the point of whether an individual publication is enough to taint a larger work taken as a whole, so the question remains open.

An installation could incorporate photographs, writing, and paintings - all publications per s 2- but also sculptures and objects that would fall outside this definition. [98] This raises issues as to whether certain aspects of an installation that fit the definition of publication, if objectionable, could taint the installation as a whole or whether each constituent piece would fall to be judged independently. This would raise novel issues; in *Keith Haring* where the FLBR decided to treat a work as a whole, all of the individual elements (pictures)

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[92] "Installation" in *Grove Art Online* (Oxford University Press, Oxford).

[93] *News Media Ltd v Film and Literature Board of Review* [1997] BCL 701 (HC), at 713.

[94] *Front Issue 163*, above n 67, at [16].

[95] At 713.

[96] At 714.

[97] *Moonen 1,* above n 26, at [29].

[98] Paragraphs (a), (b), and (c) of the definition of "publication" in s 2 of the Films, Videos, Publications and Classifications Act 1993.

in question also fell within the definition of a publication.[99] This lack of comprehensiveness in the jurisdiction of the FVPCA is obviously an issue. Although the FVPCA's regulatory focus is primarily art, it has jurisdiction over the majority of forms of artistic content, and thus uniformity in application is a necessity.

Where something falls within the definition of publication provided in the FVPCA, it is expressly excluded from the application of s 124 of the Crimes Act 1961.[100] Thus, because sculpture does not fit within the definition of "publication" provided by s 2, s 124 of the Crimes Act 1961 could apply.[101] This provision could similarly be applied to the other major artistic medium not covered by the FVPCA: performance art. However, performance art's exclusion is to be contrasted with that of sculpture as the art is in the *act* of the artist, as opposed an *object* created by the artist, and thus is of a fundamentally different character. Section 124 of the Crimes Act provides:

> (1) Everyone is liable to imprisonment for a term not exceeding 2 years who, without lawful justification or excuse,-
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> (a) sells, exposes for sale, or otherwise distributes to the public any indecent model or object; or
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> (b) exhibits or presents in or within view of any place to which the public have or are permitted to have access any indecent object or indecent show or performance; or
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> (c) exhibits or presents in the presence of any person in consideration or expectation of any payment or otherwise for gain, any indecent show or performance.

Sculpture could clearly be regarded as either a "model or object" for the purposes of s 124(1)(a). The Crimes Act does not define 'indecent", but in *R v Dunn*, the Court of Appeal confirmed that it should be given its "ordinary and popular meaning".[102] Whether something is indecent is an objective question assessed from the viewpoint of "right-thinking members of the community".[103] In Australia it has been noted that applying this standard may be complicated "in a multicultural, partly secular, and largely tolerant, if not permissive society".[104] Indecency is to be "judged in light of the time, place and

[99] *Keith Haring* (Film and Literature Board of Review) 4/99, 1 July 1999 at 5.
[100] Crimes Act 1961, s 124(6).
[101] Section 124(1).
[102] *R v Dunn* [1973] 2 NZLR 481 (CA) at 483.
[103] *R v Annas* [2008] NZCA 534 at [56].
[104] *Pell v National Gallery* [1998] 2 VR 391 (SC), at 395.

circumstances”,[105] and whilst it is a lesser standard than ‘obscene’, it must still be more than trifling.[106] It is a defence to a charge under s 124 if the defendant can demonstrate that “the public good was served by the acts alleged to have been done”.[107] It is a question of law, whether in the circumstances, this defence might succeed, and a question of fact whether the public good was served.[108] The BORA would also likely play a role favouring an interpretation that reflects the commitment to freedom of expression.[109]

To summarise, because sculpture falls outside the ambit of the s 2 definition of publication, recourse must be had to s 124 of the Crimes Act if there is to be any attempt to censor it. As shall be elaborated on later, s 3(1) of the FVPCA provides that a publication is objectionable if it meets a subject matter gateway test, and the availability of the publication is likely to be injurious to the public good. This test stands in contrast to the test for ‘indecency’ pursuant to s 124 of the Crimes Act, which bears its common meaning, is objective, is analysed from the perspective of a right-thinking member of society, and requires something that is more than trifling.

These differing legal tests underline the lack of consistency which results from the exclusion of sculpture from the definition of “publication”. The arbitrariness of sculpture’s exclusion in this manner suggests a failure to properly recognise the jurisdiction that the FVPCA has over fine art. This piecemeal approach to different media is without apparent justification and as demonstrated earlier, could lead to unclear application where artistic practices such as installation use a combination of different media, not all of which could fall within the scope of FVPCA.

Thus, the failure to include sculpture within the definition of “publication” in s 2 means that an unjustifiable distinction is drawn between sculpture and other fine art media. This creates an anomaly as sculpture could be regulated pursuant to s 124 of the Crimes Act, rather than the FVPCA. This inconsistency undermines the ability of the FVPCA to provide adequate protection to sculpture as a fine art.

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[105] *R v Dunn*, above n 102, at 484.
[106] At 483.
[107] Section 124(2).
[108] Section 124(3).
[109] New Zealand Bill of Rights Act 1990, ss 6, 14.

C Section 3(1) Objectionable

Section 3(1) of the FVPCA provides the central test for deciding whether a publication is objectionable:

> 3 Meaning of objectionable
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> (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

1 The Subject Matter Gateway

In *Living Word* the Court of Appeal stressed that the first step in applying s 3(1) to assess whether a publication is objectionable is to consider whether the publication in question goes through the "subject matter gateway".[110] The subject matter gateway is defined by the wording "such as sex, horror, crime, cruelty, or violence".[111] If a publication does not pass through the gateway there is no jurisdiction to censor it. In *Living Word* this meant that the FVPCA did not have the jurisdiction to censor videos containing factual inaccuracies and that denigrated groups based on their sexual orientation.[112] The Court viewed "such as" as less broad than "includes" yet as expansive in that it goes "beyond a bare focus on one of the five categories specified".[113] The Court of Appeal also noted that the wording here "tends to point to an activity rather than to the expression of opinion or attitude".[114]

The subject matter gateway should essentially be understood as a jurisdictional requirement on the application of s 3(1). Only those publications that can pass through this gateway are capable of being objectionable. This process has value in that it screens publications from consideration without requiring further analysis. It is valuable because it imposes a general limit on the scope of the Classification Office and FLBR in censoring publications and in this manner allows the flexibility present in the application of s 3(1) come without the danger of an expansive censorship regime.

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[110] *Living Word,* above n 64, at [29].

[111] Films, Videos, and Publications Classification Act Section 3(1).

[112] *Living Word,* above n 64.

[113] *Living Word,* above n 64, at [27].

[114] *Living Word,* above n 64, at [28].

The subject matter gateway is not likely to screen out many of the more challenging and provocative types of art works that raise the spectre of censorship as they may touch upon matters such as sex, horror, crime, cruelty, or violence. The fact that such art engages with these categories will often be the motivation behind a challenge under the FVPCA. Thus, although the application of the subject matter gateway will often not prove to be decisive in what might be called marginal cases, it is effective in at least helping to identify which publications require further scrutiny. The decision in *Living Word* was criticised for creating a paradox whereby material that would have previously been classified as objectionable may no longer be able to be classified as objectionable.[115] This report recommended that the FVPCA be amended to remove the subject matter gateway, however this proposal was not accepted.[116] Parliament instead inserted ss 3(1A) and 3(1B), which provide guidance on what is meant by "matters such as sex".[117] This demonstrates Parliament's desire to maintain the subject matter gateway as a jurisdictional limit on the FVPCA, while ensuring that the Act is still capable of adequately addressing the problem of child pornography.[118]

2 Injurious to the Public Good

As the FVPCA does not provide any guidance for what "injurious to the public good" means, the FLBR habitually turn for guidance to two cases decided under older legislation. Firstly, in *Collector of Customs v Lawrence Publishing Co Ltd,* referring to injury to the public good, Woodhouse P stated that "the statutory concept requires demonstration that any relevant material has a capacity for some actual harm in order to justify the contemplated censorship".[119] Secondly, in *Society for the Promotion of Community Standards Inc v Everard*, commenting on the "likelihood of injury to the public good" McGechan J stated:[120]

> … discernible injury and capacity for some actual harm do not impose a procedure or evidential necessity for actual evidence to that effect. They are matters which an expert body can establish from its own judgment if necessary…. When one considers the likelihood of injury to the public good, one looks for a likelihood sufficiently real to

[115] "Inquiry into the operation of the Films, Videos, Publications and Classification Act 1993 and related issues" [2003] AJHR I.5A at 17.
[116] At 21.
[117] Films, Videos, and Publications Classification Amendment Act 2005, s 4.
[118] Films, Videos, and Publications Classification Act 1993, s 3(1A)(a).
[119] *Collector of Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404 at 409.
[120] [1987] 3 NZAR 3 (HC).

> be discernible or actual. Mere paranoid possibilities do not suffice… in the end indecency and within that concept any necessary prerequisites of injury to the public good to a large extent are less matters of fact than of judgment. While not quite in the league of the search for love, beauty, and/or the meaning of life, the search for injury to the public good in the end involves a very considerable message of value judgment.

The somewhat poetic end to McGechan J's statement here highlights the lack of practical guidance on the interpretation of "injurious to the public good". These cases provide some guidance about how likely this injury must be, but fail to offer guidance about what exactly might constitute an injury to the public good.

In *DP Women*, citing *Howley v Lawrence Publishing Co*,[121] the FLBR adopted the definition that an injury to the public good is "anything which interferes with the social contract in a way that upsets harmony or equality, and mutual respect for others, or the sanctity of life, or physical or mental freedom or health".[122] This definition at least attempts to address what could constitute an injury, as opposed to focusing on the likelihood of the injury occurring. Notions of "harmony or equality, and mutual respect for others" again demonstrate the fact that it will very much involve the censor making a value judgment as McGechan J illustrated.

In many respects the idea of harmony and mutual respect for others is reminiscent of John Stuart Mill's harm principle.[123] This conception of injury to the public good might therefore mean that censorship, as a limitation on liberty, is only permitted if a publication would do or risks doing harm to others (including a failure to show mutual respect for others). It is important to note, however, that no subsequent FLBR decisions have been found that also cite the *Howley* dictum.

The lack of any consistent approach to the concept of injury to the public good is potentially troubling for fine arts. The fact that the FLBR does not employ a constant interpretive approach to injury to the public good means there is an inevitable flexibility in the

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[121](1986) 6 NZAR 193 (HC).

[122] *DP Women* (Film and Literature Board of Review) 1/95, 26 December 1995, at 12.

[123] John Stuart Mill, *On Liberty: and Considerations on Representative Government* (B. Blackwell, Oxford, 1948) at 8 "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant".

application of this test. This flexibility can be seen as presenting a threat in that a wide interpretation could enable the possibility of overly zealous censorship.

However, it is important to remember that the FVPCA does not regulate art alone. This means care must be taken as the Act's wide jurisdiction demands a certain versatility. Perhaps one of the most important applications of the FVPCA is to child pornography. The FVPCA is the principal piece of legislation for the control of this kind of material. It is important that the FVPCA can effectively restrain the proliferation of such publications. In many respects it is the versatility of the Act that greatly contributes to ensuring it can be effectively employed in this manner. This flexibility is necessary because of the extreme nature of the potential harm of publications, such as child pornography.

The only realistic manner of investigation into an elusive concept such as injury to the public good inevitably involves value judgments by the censor. The prospect of inserting specific guidance as to what content might constitute a potential 'injury' or what in fact deserves protection as a 'public good' would likely not achieve the desired result. Rather than hamstringing the discretion contained within this broad wording by the insertion of more specific phrases, greater benefit would in fact be gained by ensuring that the decision making process is carried out with the greatest possible expertise. Some works of fine art may need to be censored, and a flexible test such as injury to the public good, is an appropriate way to achieve this. This approach enables adequate protection for fine art because the flexibility allows the exercise of expertise with reference to ss 3(3) and 3(4), but does not reduce the scope of s 3 generally.

3 Availability

It is necessary to highlight the fact that the wording of s 3(1) requires that "the *availability* of the publication is likely to be injurious to the public good" (emphasis added). However, this wording is read down. In *Belles-Bottom Boys* the FLBR stated that the Applicant's claim that the publications were intended only for himself did not affect their view that the availability of the publication was likely to be injurious to the public good.[124] The Court of Appeal in *R v Spark* also accepted that s 3(1) "does not require that the publications are in fact made public, and in fact cause injury to the public good".[125] The focus thus remains on the likelihood of injury, and the Court confirmed that intending to reserve a publication for private use alone does not prevent its availability from being injurious to the public

[124] *Belles-Bottom Boys* (Film and Literature Board of Review) 1/2001, 29 March 2001 at [16].
[125] *R v Spark,* above n 33, at [23].

good.[126] An alternative construction of availability dependent on intent would mean that material could fluctuate between being objectionable and not, depending on who possessed it.[127]

This interpretation is important in that it has potential impact for art. It means that artists would commit an offence if they were to make an objectionable publication, even if this were done in circumstances where there was no possibility that it would ever be seen by anyone else.[128] One can see how this could stifle artistic experimentation as artists would be limited not only in what they could publicly display but also in their actual creative process. Works of art in this sense could be limited even when their existence was merely collateral to the expressive urge of an individual.

As addressed earlier, art often involves pushing at boundaries and societal values. One could see how this might easily involve the production of a publication that could fall within the definition offered by s 3 of the FVPCA. However it does not follow that the creation of such content would be injurious to the public good unless it is exhibited. Unfortunately, the current interpretation of "availability" in s 3(1) does not require the publication to be actually available. This thus leaves artists potentially exposed to s 123.

The complication to this point is that given the jurisdiction of the FVPCA exceeds merely fine art, an interpretation that requires literal availability to the public could have definite negative consequences. For instance, the publications in question in *R v Spark* broadly speaking were child pornography (images, explicit chat-logs, stories).[129] If availability were a requirement for publications to be objectionable per s 3(1), then (provided they were not deemed so by the operation of s 3(2)) there might be real difficulty in restricting such publications.

Thus, on balance the current interpretation of "availability" strikes the correct balance between these two opposing arguments. A restriction is likely placed on the ability of artists to freely explore content that might be considered objectionable. Some limitations on expression are inevitable in the FVPCA regime. It should thereby be conceded that the slim prospect of this limitation actually having a real impact on artists means it is warranted in the greater scheme.

[126] At [24].
[127] At [25].
[128] Section 123(1)(a).
[129] *R v Spark,* above n 33, at [7].

D Section 3(2)

Subsection 3(2) sets out that:

> (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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> (a) the exploitation of children, or young persons, or both, for sexual purposes; or
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> (b) the use of violence or coercion to compel any person to participate in, or submit to, sexual conduct; or
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> (c) sexual conduct with or upon the body of a dead person; or
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> (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

Subsection (2) operates to deem a publication objectionable. Once deemed objectionable, it is removed from the discretion of the censor in applying s 3(1). Thus s 3(2) is designed to apply to the potentially more harmful publications. This distinction is important as it means that considerations such as artistic merit (s 3(4)(c)) are irrelevant if a publication falls within the terms of s 3(2). This is particularly important because the intention of the publisher or creator of the publication is not a relevant consideration.[130] Thus, a publication that overall might be assessed as unlikely to be injurious to the public good could be deemed to be objectionable by the operation of this subsection. This is precisely because the contextual matters relevant to an assessment under s 3(3) and particularly s 3(4) such as artistic merit, the intended purpose, or the medium of the publication would be irrelevant considerations beyond the point where there is "coincidental overlap".[131]

1 Promotes or supports, or tends to promote or support

Crucially for s 3(2) to apply, depicting one of the listed actions is not enough. Instead, s 3(2) applies where a publication "promotes or supports, or tends to promote or support" one of the listed activities. This requirement for more than mere depiction puts an important restriction on the scope of s 3(2). The Court of Appeal in *Society for the Protection of Community Standards Inc v Film and Literature Board of Review* [*Visitor Q (CA)*] considered that:[132]

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[130] *Moonen 1,* above n 26 [29].

[131] *News Media Ltd v Film and Literature Board of Review,* above n 93, at 711.

[132] [2005] 3 NZLR 403 (HC), at [100].

> the phrase "tends to" in the s 3 test was designed to provide a sliding scale so as to ensure that it was not necessary for the classifying authority to come to the view that the publication's effect was definitely to promote or support the specified activities. The standard is therefore not absolute but something less.

The Court also considered a number of possible synonyms for 'tends to', and concluded that the most suitable synonym is "be likely".[133] In *Visitor Q* (*CA)* the Court also confirmed that the ruling in *Moonen 1* "would require the adoption of the meaning which impinges the least on freedom of expression," and confirmed if it is marginal whether or not a publication is objectionable, then freedom of expression must be favoured.[134] The Court remarked that specifying a more precise definition of 'likely' is not helpful as "the exact shade of meaning required in a particular matter is…a matter for the expert classifying body to assess".[135] Notably, the Court accepted the submission that "a publication which portrays in an absurdly magnified way the moral corruption of individuals can still tend to promote or support a particular activity".[136] This suggests that even absurd, satirical depictions of the activities listed in s 3(2) could be regarded as promoting or supporting such activities. Although it predates *Moonen* and *Visitor Q (CA)*, in *Keith Haring* the FLBR in assessing an exhibition catalogue said that what was required to promote, support, or tend to promote or support was "some element of titillation, provocation or excitement, a suggestion of 'grooviness' even".[137]

The notion that "grooviness" could constitute promotion or support suggests a worrying expansion of the scope of s 3(2). The fact that a more restrictive interpretation is to be followed per *Moonen 1* means s 3(2) is likely more limited than *Keith Haring* suggests. This is important because significant protection for art (and other publications) can often be derived from an examination of how it conveys content, and the specific medium used (factors considered under ss 3(3) and s 3(4)). Thus, anything more than a narrow interpretation of whether a publication promotes or supports or tends to promote or support per 3(2) brings certain risks. If a more expansive approach is taken, signalled perhaps by the notion of 'grooviness', then the ambit of s 3(2) could dramatically increase. This could

[133] At [103].
[134] At [102].
[135] At [105].
[136] At [108].
[137] *Keith Haring*, above n 99, at 5.

result in the mechanical censoring of publications where, if recourse were had to a broader range of factors, they might not be held to be objectionable.

A curious interpretation was offered by the Classification Office when assessing two of Robert Mapplethorpe's photos that were to be shown at the City Gallery in Wellington.[138] The Classification Office decided that these photos, which dealt with aspects of a gay and sado-masochistic sexual subculture, did not fall within the terms of s 3(2). This was because while they included content that fell into s 3(2)(d) and s 3(2)(f), "it is the art of Mapplethorpe that is being supported" rather than the use of urine in association with degrading and dehumanising sexual conduct or the act of torture or the infliction of extreme cruelty depicted.[139] Such an approach to s 3(2) is highly unusual and can perhaps be seen as a demonstration of the Classification Office's reluctance to capitulate to the rigid deeming provision prescribed by s 3(2). Criticism may be levelled at s 3(2) and the way that it deems publications objectionable without recourse to other considerations. However, Classification Office's interpretation of "promotes or supports" completely undermines the purpose of s 3(2) as it currently stands. The fact that the Classification Office resorted to this contrived and rather flimsy interpretation of promote or support demonstrates clearly the potential danger that mechanical nature of s 3(2) poses to fine art in New Zealand.

2 The use of urine or excrement

It is worth noting that s 3(2)(d) deems objectionable any publication that "promotes or supports or tends to promote or support" "the use of urine or excrement with degrading or dehumanising conduct or sexual conduct". This paragraph stands in stark contrast to the other paragraphs which list actions such as the sexual exploitation of children, coercive sex, necrophilia, bestiality and torture. Section 3(2)(d) is thus unique in that the acts described would not independently be illegal. Moreover, the relatively important place of urine and excrement in art practice means that this paragraph is of potential concern.

Urine and excrement have been central to many controversial pieces of modern and contemporary art. In 1961 Piero Manzoni created *Merda d'Artista*,[140] packed tin cans, each filled with 30g of his own excrement which he put up for sale, priced by weight at the

[138] "Robert Mapplethorpe" <www.citygallery.org.nz>.
[139] *Jim and Tom, Sausalito, 1977 (X Portfolio)* (Office of Film and Literature Classification) 9501766, 18 December 1995*; Untitled Photograph (X Portfolio)* (Office of Film and Literature Classification) 9501767, 18 December 1995.
[140] Piero Manzoni *Merda d'Artista,* 1961.

market rate for gold.[141] More famously Andres Serrano in 1987 photographed *Piss Christ,*[142] which depicted a plastic crucifix submerged in his own urine.[143] Finally, in 1996, Chris Ofili painted *The Holy Virgin Mary,*[144] which used elephant excrement and cut-outs of genitalia from pornographic magazines in the composition.[145]

These examples provide insight into fine art's long standing relationship with the use of excrement and urine. Such works have provided valuable insights about what makes something art, and the place of religion in society. Without doubt they are intentionally provocative. This element of provocation itself challenges cultural taboos by highlighting the significance placed on urine and excrement, questioning whether it is in fact justified. Obviously not all of these implicate degrading or dehumanising conduct or sexual conduct, but that potential is there, particularly when one considers the implications of Ofili's work (there being no limitation on s 3(2)(d) limiting it to only human excrement).

The FVPCA's specific restriction on such use of urine and excrement is anomalous in that any such act outside the scope of the FVPCA would not be illegal. It can be seen that this may in fact have some ramifications for art specifically. Some concerns might be voiced that the promotion of the use of urine or excrement in relation to degrading or dehumanising conduct or sexual conduct merits this perhaps heavy handed approach despite this risk. However, it should be stressed that any such promotion could still be held to be objectionable under the general test provided in s 3(1). This suggests the inclusion of s 3(2)(d) goes too far and it would be better relegated to a matter for consideration under s 3(3).

E The Role of s 3(3)

Sections 3(3) and 3(4) provide guidance for assessing whether a publication is objectionable where s 3(2) does not operate to deem it so:[146]

[141] Gerard Silk "Myths and Meanings in Mazoni's Merda d'Artista" (1993) 52 *Art Journal* 65 at 65.
[142] Andres Serrano *Piss Christ*, 1987, 152 x 102 cm.
[143] Angelique Chrisafis "Attack on 'blasphemous' art work fires debate on role of religion in France" (18 April 2011) *The Guardian* (online ed, London, 18 April 2011).
[144] Chris Ofili *The Holy Virgin Mary*, 1996, 243 x 183 cm.
[145] Carol Vogel "Chris Ofili: British Artists Holds Fast to His Inspiration" (28 September 1999) *The New York Times* (online ed, New York, 28 September 1999).
[146] Films, Videos, and Publications and Classification Act 1993, ss 3(3) and s 3(4).

> (3) In determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) applies) is objectionable or should in accordance with section 23(2) be given a classification other than objectionable, particular weigh 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 dehumanizes 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.

S 3(3) provides a list of matters that must be given "particular weight" when determining whether a publication is objectionable per s 3(1). Focus is directed at "the extent and degree to which, and the manner in which, the publication" engages with the matters listed in s 3(3)(a) to s 3(3)(d). In this way, s 3(3) can be contrasted with s 3(2) which allows no discretion to the censor once the publication has been found to promote or support or tend to promote one of the matters listed in ss 3(2)(a)-3(2)(f).

For example, were a video art work to focus on trafficking people for sex work, the content would pass through the subject matter gateway, and s 3(3)(a)(ii) would apply. In this instance, the censor, when considering whether the publication is objectionable per s 3(1), is required to give particular weight to the extent, degree and the manner in which the artwork described depicted or otherwise deals with "sexual violence or sexual coercion, or violence or coercion in association with sexual conduct". An assessment of the "extent and degree to which" the video work deals with this is likely to be somewhat quantitative. That is to say how much of the artwork directly depicts for example violence or coercion in

association with sexual conduct. The assessment of the "manner in which", however, may require greater subtlety.

The wording the "manner in which" suggests that an assessment would have to be made of tone and style in which the video describes, depicts or otherwise deals with violence or coercion in association with sexual conduct. Building on the general expertise required for an assessment of the likelihood of an injury to the public good, this illustrates how the proper application of s 3(3) requires a high level of expertise. When applied to fine arts, where there are often stylistic complexities and deliberate art-historical references, this requirement for expertise becomes absolutely essential for and adequate application of s 3(3).

In *Visitor Q (FLBR)*, the FLBR applied s 3(3).[147] In its assessment, the FLBR focused its assessment on the extent and degree to which the possible matters for consideration under s 3(3) arose in the film. There was no detailed examination of the manner in which the film portrayed these matters. The FLBR noted that "the extent and manner in which acts of sex, violence, and cruelty are dealt with are extensive throughout the publication".[148] It also goes on to say that "the manner in which the items are dealt with highlight these events in the publication".[149] One can see that this in reality reflects more an assessment of the "extent and degree" rather than the "manner" in which the publication explores these topics. In the Court of Appeal's review of the FLBR's decision, *Visitor Q CA,* while approving the Board's application of s 3(3) it focused on the Board's assessment of the extent and degree to which the publication dealt with the matters listed in s 3(3) with apparent approval.[150]

The failure to properly take into account the "manner in which" the publication deals with the listed matters in s 3(3) is of definite concern. It can be seen as a consequence of a lack of artistic expertise that might enable a more comprehensive assessment of the tone and style of the work in its treatment of these matters. Although the publication in this instance was a film, one can recognise the similar challenges that any artwork is likely to pose.

Thus one can see that by requiring "particular weight" be given to the "manner in which" a publication deals with the matters listed in s 3(3), the section provides the framework

[147] *Visitor Q* (Film and Literature Board of Review) 3/2002, 18 July 2002 at [83]-[96].
[148] At [85].
[149] At [90].
[150] *Visitor Q CA*, above n 132, at [50] and [51].

necessary to protect fine arts from undue censorship. However, this framework can only be adequately utilised where the FLBR has the relevant artistic expertise that will enable it to engage with such questions as the "manner in which" a publication deals with the matters listed in s 3(3).

F Artistic Merit Under s 3(4)(c)

Subsection (4) offers further matters to be considered as part of the s3(1) test of whether the publication is likely to be injurious to the public good. These factors are perhaps best regarded as contextual considerations as opposed to subsection (3) which broadly requires further consideration of the publication itself. Of particular interest is s 3(4)(c).

Section 3(4)(c) requires that the censoring body, when considering whether a publication is objectionable, must take into account "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". However, it can be demonstrated that when assessing this element, a rather shallow interpretation of artistic merit, value or importance, is all that is offered by the FLBR.

The FLBR's focus when assessing artistic merit is almost exclusively directed at whether the publication, or the creator of the publication has been generally recognised as having merit, value, or importance. The FLBR described *8 Mile* as having artistic merit.[151] The Board said it is a "high quality film by a well-respected American director" but the only justification given for this was that it provided a "revealing view into a sub-culture that we do not normally see".[152] It is worth noting here how artistic merit is asserted, particularly on the basis that the director is well respected without offering a genuine analysis of the character of the publication in question.

A similar tendency can be seen in the *Keith Haring* decision where s 3(4)(c) was assessed broadly as implicating a regard for "the whole framework of the artist's life and work, as set out and depicted in the book".[153] Although unique in that this extra information about the broader recognition and context of the artist was included in the publication itself, the focus is still the same. Rather than examining the character of the publication as directed

[151] *8 Mile* (Film and Literature Board of Review) xxx, 26 March 2003, at [66].
[152] At [66].
[153] *Keith Haring*, above n 99, at 6.

under s 3(4)(c), the FLBR relied on a broader context of fame and recognition of Keith Haring as an artist as enough to support the assertion there was artistic merit.

Finally, in *Holiday Snapshots*, the FLBR after expressing that the “publication is technically of good quality”, immediately mentioned the fact that they were produced by a “world ranked photographer”.[154] Although this factor of artistic merit was ultimately overridden by other considerations, it still demonstrates the FLBR’s approach.[155] It is not to be suggested that reference to the reception of a specific publication or the reputation of the creator is incorrect. Such a consideration could easily be seen as included within the scope of “importance”. However, focus on importance alone is not enough and at best is only a partial assessment. Failure to take into account artistic or merit and value in conjunction with this does not reflect an adequate assessment of the character of the publication as required by s 3(4)(c).

This almost exclusive recourse to the general reputation of the artist (or director) brings with it a definite danger that art works produced by unknown artists would not be afforded protection under s 3(4)(c). Works by unknown artists should be able to have their character including artistic merit, importance, and value assessed on a broader basis. The FLBR’s failure to take this approach risks censorship of avant-garde works, yet unrecognised, but potentially important and worthwhile. One can envisage such censorship stifling the development of certain art works that if exhibited could garner enough support to eventually mark the photographer as a recognised figure, ‘well recognised’ or perhaps even ‘world ranked’.

An assessment of whether a particular publication has artistic merit, importance or value is neither an objective nor particularly easy question to answer. However, the difficulty inherent in this task does not in any sense lessen the requirement that it be duly performed. Moreover, the FLBR, as an expert body should in theory be able to meet this challenge.

G A Matter for Expert Opinion of the Classification Office or FLBR

Section 4 of the FVPCA is a crucial section:

> 4 Classification of publications a matter of expert judgment

[154] *Holiday Snapshots* (Film and Literature Board of Review), 29 July 2004, at [42].
[155] At [44].

> (1) The question of whether or not a publication is objectionable or should in accordance with section 23(2) be given a classification other than objectionable is a matter for the expert judgment of the person or body authorised or required, by or pursuant to this Act, to determine it, and evidence as to, or proof of, any of the matters or particulars that the person or body is required to consider in determining that question is not essential to its determination.
> (2) Without limiting subsection (1), where evidence as to, or proof of, any such matters or particulars is available to the body or person concerned, that body or person shall take that evidence or proof into consideration.

This section is of fundamental importance when one is considering the nature of censorship and the role of the FLBR in New Zealand. It should be recalled that decisions of the FLBR can only be reviewed on points of law.[156] In *Re Vixen Digital Ltd* Durie J outlined how s 4 settles three important matters:[157]

> The first is that the question of whether or not a publication is objectionable is a matter for the Board's expert judgment. The second is that evidence or proof is not essential in respect of any of the matters or particulars that the Board is required to consider. The third is that where evidence or proof is nonetheless available to the Board the Board is required to take it into account.

The FLBR, despite not being required to provide proof or evidence, must give reasons for its decisions,[158] and Durie J interpreted s 4 as not putting a gloss on this requirement.[159] Durie J stated that the reasons provided "must be sufficient to enable anybody with a power of review to understand the process of thought whereby a conclusion was reached".[160] Finally, Durie J set out that:

> …often the exercise of judgment in a values laden area will not require much more than the assertion of the Board's collective view. Nonetheless the Board must be able to demonstrate, by a sufficient description of its thinking, that it did not take into account irrelevant considerations, that it took into account considerations that it was obliged to consider and there was a sufficient consideration of the facts as to meet the standards of Wednesdbury reasonableness or those set out in Edwards (Inspector of Taxes) v Bairstow [1956] AC 14.

[156] Films, Videos, and Publications Classification Act, ss 58, 70.
[157] [2003] NZAR 418 (HC) at [20].
[158] Films, Videos, and Publications Classification Act, s 55(1)(c).
[159] *Re Vixen Digital Ltd,* above n 157, at [39].
[160] At [43].

Thus although there is still a requirement to provide reasons for their decisions, ultimately, s 4 means that the FLBR still has considerable evaluative scope when applying the legislation to publications. It has been demonstrated that the appropriate exercise of this expertise is essential to the protection of fine art in New Zealand. The restriction of appeals to points of law stands in contrast to superseded censorship legislation that provided for general rights of appeal.[161] Indeed in this "values laden" area, it is fitting that the judiciary is restrained from superimposing its own judgment regarding whether a publication is objectionable. The judiciary of course has considerable expertise in the application of legislation, but would likely lack the broader contextual knowledge about fine art required for a meaningful engagement with ideas such as artistic merit or value. Such questions are better left to the expertise of specific bodies such as the FLBR.

Assessing publications, whether images, films, books, paintings or sculptures for a likelihood to be injurious to the public good is inevitably a complex task. It will involve assessment of subtleties in tone and treatment across a variety of media. Such matters quite quickly go beyond the expertise and machinations of a court of law. The adversarial system generally does not lend itself easily to such determinations. Indeed the fact that the Board is not required to provide evidence or proof in itself indicates that the nature of the inquiry may not easily translate to a court designed for testing and assessing evidence.[162] As recognised in *Visitor Q CA*, "views can legitimately differ" on whether certain restrictions will remove the likelihood of injury to the public…. [and] the [Classification] Office, and the Board, as expert bodies, are best suited" to such an assessment.[163]

However, the desirability of the FLBR being the main decision-maker depends on its ability to exercise the necessary expertise. This requires a focus on the composition of the FLBR.

H Composition of the FLBR

The Classification Office, formed by the Chief Censor and the Deputy Chief Censor, are unlikely to represent as broad a range of backgrounds and expertise as the nine member FLBR.[164] Furthermore, the FLBR's supervisory role as the last appellate body capable of assessing the merits of a publication means its membership deserves careful consideration.

[161] Indecent Publications Act 1963, s 19.
[162] Films, Videos, and Publications Act, s 4(1)
[163] *Visitor Q CA,* above n 132, at [122]
[164] Section 79(1).

There is a statutory requirement that the President must have been a practicing lawyer for at least seven years.[165] Moreover, the statute places a limit on the Minister in recommending appointments to the FLBR in that he or she:[166]

> shall have regard to the need to ensure that the membership of the Board includes persons with knowledge of, or experience in, the different aspects of matters likely to come before the Board.

However, when one looks to the current members of the FLBR, one can quickly ascertain that this has not actually been achieved. Of the nine current members, there is no one with expertise in fine art.[167] As the last appellate body making decisions on matters of fact, it is crucial that the Board has the appropriate expertise to be able to carry out their statutory function. Without this one cannot be confident that the FLBR is actually able to meaningfully engage in the application of s 3. One can see how this lack of expertise can have a devastating effect on the potential protection that the FVPCA can provide for fine art. Sections 3(1), 3(2), 3(3), and 3(4) provide the framework within which New Zealand can ensure fine art is adequately protected. However, this framework can only be effectively utilised by an expert body able to live up to that requirement for expertise.

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[165] Section 93(4).

[166] Section 93(5).

[167] Department of Internal Affairs "Appointments to the Film and Literature Board of Review" (press release, 22 September 2011); Department of Internal Affairs "Appointments to the Film and Literature Board of Review" (press release, 30 November 2015).

Chapter Four: Improving the Protection of Fine Art from Censorship

Having explored how well the FVPCA provides protection to fine art, it is worth examining briefly how some of the more serious concerns raised could be resolved.

A The Role of the BORA in FLBR Decisions

Any act of censorship imposes a limit on the right to freedom of expression in the BORA. It is thus important that when assessing whether a publication is objectionable, the FLBR makes due consideration of this when applying s 3.[168]

There is, however, a real issue with the method the FLBR uses when considering the BORA in their decisions. It has been demonstrated that under the presidency of Claudia Elliot and subsequently Don Mathieson, the FLBR engaged with the BORA in different ways, but both were perfunctory and lacking any thorough analysis. It will be interesting to note how the FLBR proceeds under direction of the new President, Kate Davenport QC.[169] However, given the recent decision *Don't Breathe* there is perhaps not much reason for great hope. In *Don't Breathe* there was only a somewhat token reference to the BORA.[170] The fact that the FLBR is not required to rely on evidence or proof in its consideration is not enough to defend this lack of analysis in light of the requirement that they give reasons for the decisions.[171]

In conclusion, it is crucial that in the future the FLBR redirects itself and properly engages in a meaningful analysis of BORA considerations when assessing a publication under s 3. Failure to do this strips fine art and publications generally of the important protection that the BORA provides.

B The Definition of Publication

The fact that the current definition of "publication" does not include sculpture is an obvious oversight with a relatively simple solution. As it is not suggested that fine art be removed entirely from purview of the FVPCA, consistency requires an extension of the definition of publication to incorporate sculpture. Sculpture is, however, not an easy term to precisely

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[168] *Living Word,* above n 64, at [40].
[169] Department of Internal Affairs, above n 70.
[170] *Don't Breathe,* above n 71, at [22] and [32].
[171] Films, Videos, and Publications Classification Act, s 4(1).

define. The evolution of sculpture in modern art means that substantial difficulties can arise in determining how it might be differentiated from any other three dimensional object. When the definition of sculpture was at issue in a copyright case, the English Court of Appeal noted:[172]

> Sculpture, like painting (however good or bad it may be), does connote the work of the artist's hand and the visual purpose attributed to it by the judge in this case. Put simply, it has, broadly speaking, to be a work at least intended to be a work of art.

The fluidity of modern sculpture means that a pragmatic response would likely be to merely insert the word 'sculpture' into para (a) of the s 2 definition of publication. Such a definition would obviously lack precision, but a comprehensive definition is more likely to obfuscate the matter rather than provide any real guidance. Crucially, this imprecision could adequately be tempered by the use of expertise in an assessment of whether or not a particular thing is a sculpture, and thus a publication for the purposes of the FVPCA.

C *Objectionable per s 3*

1 Sections 3(1), 3(3), and 3(4)

A fundamental theme arises when one considers whether or not the FVPCA currently provides adequate protection for fine art in New Zealand. This is that the FVPCA does provide a generally adequate framework for such protection, but its ability to function properly in this manner is conditional on the censor having the knowledge, expertise and ability to make decisions with regard to fine art.

Deciding whether a work of fine art is objectionable per s 3 requires the use of artistic expertise to ensure it can receive the protection which the FVPCA provides. When considering s 3(1), and especially the concept of injury to the public good, the importance of this expertise is paramount. This must be done with reference to ss 3(3) and 3(4). It has been demonstrated that a consideration of the "manner in which" an art work engages with one of the listed matters in s 3(3) will require recourse to artistic expertise regarding style, tone and treatment. Similarly, a meaningful engagement with s 3(4)(c) and the assessment of artistic "merit, value, or importance" will demand this same artistic expertise. The concerns raised regarding the FLBR's assessment of these sections can thus be addressed by ensuring that the FLBR has adequate expertise.

[172] *Lucasfilm v Ainswoth* [2010] 2 All ER (Comm) 1101 at [71].

2 Section 3(2)

Section 3(2) is a notable exception because once a publication falls within its parameters, it excludes any discretion on the part of the censor. It is this element of discretion which imports the ability to use expertise and so provide the necessary protection to fine arts in s 3 generally. Thus, because it ousts this discretion, s 3(2) poses a problem for fine art. The discomfort with this rigid application of s 3(2) to fine art is what lead to the Classification Office's distortion of "promotes or supports" in regard to Mapplethorpe's photos.[173]

The removal of s 3(2) acting as a deeming provision would be a possibility, but the clear Parliamentary intent that some things are to be categorised as objectionable is hard to ignore. Again, expertise in the consideration of the BORA as an interpretive tool regarding the meaning of "promotes or supports or tends to promote or support" can largely limit the impact that s 3(2) might otherwise have on the censorship of fine art in New Zealand.

A line should be drawn, however, in regard to s 3(2)(d) and its focus on the use of "urine or excrement with degrading or dehumanising conduct or sexual conduct". This poses a specific risk for art due to the tradition of incorporating excrement and urine into works. In light of the anomalous fact that the conduct described by s 3(2)(d) is not independently illegal, it would be better if this paragraph were instead a matter listed in s 3(3). As part of s 3(3) it would be given "particular weight" and still treated with adequate seriousness. This would also enable the censors to examine "the manner in which" the publication engages with such conduct. This examination, when carried out with relevant artistic expertise, would provide adequate protection for fine art. This is necessary because the combination of fine art's predisposition to using urine and excrement together with its tendency to be self-referential means that without reference to the "manner in which" this is done, fine art would be exposed to potentially overzealous censorship.

D The Composition and Expertise of the FLBR

As expertise is so essential to the FLBR being able to adequately provide protection to fine art under the FVPCA, some changes are necessary to ensure that the FBLR does in fact have this expertise. The membership of the current FLBR shows that it does not have the

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[173] *Jim and Tom, Sausalito, 1997 (X Portfolio),* above n 139; *Untitled Photograph (X Portfolio)*, above n 139.

breadth of expertise to deal with fine art censorship issues that could arise before it.[174] Ideally, in having regard to the need to ensure "that the membership of the Board includes persons with knowledge of, or experience in, the different aspects of matters likely to come before the board", the Minister would appoint someone with expertise in fine art. However, even this would not guarantee that such expertise would always be available due to the FLBR's ability to sit in divisions of three members together with either the President or Deputy President.[175]

The small number of potential publications requiring artistic expertise for classification means it is not desirable to have a mandatory requirement that one member has to have specific expertise in fine art. Very real practical problems might be found in ensuring such a position is always filled due to the relatively small population of New Zealand and consequently, the number of resident fine art experts.

The FLBR per s 54(1) has the same ability to consult as is granted to the Classification Office.[176] Section 21 allows the Classification office to show the publication to any person who may be able to assist, to invite submissions, to obtain information and to make inquiries as it thinks fit. Because of the fundamental importance of expertise in assessing whether a publication is objectionable per s 3, this power to consult should in fact be changed to a requirement to consult any person with the relevant expertise. This would not be an unduly onerous requirement as in the last 10 years, the FLBR has only reviewed 26 publications, and thus would in no way be overwhelmed by this requirement.[177] These experts would not have to be from New Zealand and thus such a proposal would avoid any potential difficulties arising from a lack of available experts.

A definition of 'expert' would not be particularly helpful as it could unintentionally restrict the ability of the FLBR to obtain the necessary expertise for adequately assessing a publication. An interpretation of expert in its ordinary meaning, "one who is expert or has gained skill from experience" or would suffice.[178]

This requirement that the FLBR consult with experts would enable them properly assess a publication with the expertise that the s 3 requires. As demonstrated, fine art is especially

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[174] Department of Internal Affairs, above n 70.

[175] Films, Videos, and Publications Classification Act 1993, 101.

[176] Section 21.

[177] "Film and Literature Board of Review Decisions" Department of Internal Affairs <www.dia.govt.nz>.

[178] "expert, n.". Oxford English Dictionary Online, online edition <www.oed.com>.

reliant on the FLBR using expertise in making its determination. Thus, this requirement for consultation with experts would be of great value in ensuring fine art receives adequate protection from censorship in New Zealand.

Conclusion

This dissertation has demonstrated that the FVPCA provides a relatively robust framework for the protection of fine art from censorship in New Zealand. However, it has been shown that the FLBR is failing to adequately apply the BORA when assessing publications under s 3 of the FVPCA. This means that fine art, and other publications, are not receiving the full protection that they should derive from s 14 of the BORA. Moreover, a lack of expertise crucially undermines the FLBR's ability to properly apply the FVPCA when assessing publications per s 3. As a result, the protection that the FVPCA provides is in fact limited. To ensure that fine art receives adequate protection from censorship in New Zealand, several changes are necessary. Firstly, sculpture should be included within the definition of publication provided in s 2. Secondly, s 3(2)(d) should be removed and "the promotion or support of the use of urine or excrement with degrading or dehumanising conduct or sexual conduct" should instead be added as a matter to be given "particular weight" in s 3(3). Thirdly, the FLBR should be required to consult with experts when assessing a publication under s 3. This will ensure they are able to correctly apply the statutory criteria and thus ensure that art is afforded appropriate protection by the FVPCA.

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