

## ***Turn That Game Back On: Video Games, Violence and the Myth of Injury to the Public Good***

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### **I INTRODUCTION**

On 24 February 2013, it was reported that a New Zealand gamer had been charged with the murder of his cyber rival after losing a battle against him in an online fantasy world game.<sup>1</sup> While the particulars of the case were left ambiguous, the article incited wide online debate regarding the existence of a link between video games and real world violence. As one blogger argued, “[a]nyone [who] thinks games turn people into a murderer is a self centered and ignorant moron.”<sup>2</sup>

This debate has brought New Zealand to the forefront of international discussion on the potential for video games to negatively impact players’ real-life social interactions. Similar concerns were recently raised in the United States of America when a “trove” of video games was discovered in the basement of 20-year-old Adam Lanza.<sup>3</sup> Lanza killed 20 children and six teachers in a violent school shooting on 14 December 2012 in Newtown, Connecticut. On 22 July 2011, in what have been called “the deadliest [attacks] on Norwegian soil since World War II”,<sup>4</sup> 32-year-old Anders Breivik killed 77 people on Utøya Island. While on trial, Breivik described how he had trained for these attacks by using the computer game *Call of Duty: Modern Warfare*.<sup>5</sup> And, on 29 April 2014, the Daily Mail reported that a 15-year-old male, accused of stabbing his teacher to death, “was a fan of online video games”.<sup>6</sup> A serious question therefore emerges: is there a link between violent media and real-life social ills? If there is, how should the law respond?

This article presents a case study of how video games are governed by the New Zealand’s Films, Videos, and Publications Classification Act 1993 (FVPC Act). The first section of this article will consider censorship

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\* BA/LLB(Hons) [expected]. I am extremely grateful to Rosemary Tobin for all of her patience and guidance throughout the writing of this article. I would also like to thank Emma Sherratt, Andrew Steele and Hannah McQueen for their helpful comments on my early drafts. And to my parents, Laura and Dave, who did not understand most of this article, but read it nonetheless.

1 Rob Kidd “Accused killer first lost cyber-battle” *stuff.co.nz* <www.stuff.co.nz> (online ed, Wellington, 24 February 2013).

2 Comment by ‘Rekuja’ in “GW2 implements IRL permadeath” (GP Forum, 24 February 2013) *Gameplanet* <www.gpforums.co.nz> at 2 as cited in Claudia Herron “Psycho Nerd Goes on One-Man Killstreak” *Critic* (online ed, Otago, 3 March 2013).

3 Ryan Jaslow “Violent video games and mass violence: A complex link” *CBS News* (online ed, New York, 18 February 2013).

4 Elisa Mala and J David Goodman “At Least 80 Dead in Norway Shooting” *The New York Times* (online ed, New York, 22 July 2011).

5 Helen Pidd “Anders Breivik ‘trained’ for shooting attacks by playing Call of Duty” *The Guardian* (online ed, London, 19 April 2012).

6 Martin Robinson “Schoolboy, 15, accused of stabbing teacher was ‘loner’ who played online video games Dark Souls and Grand Theft Auto” *Daily Mail* (online ed, London, 29 April 2014).

and its place within New Zealand's current legislative framework. The second and third sections will reflect on video games in particular and the specific dangers that may make them worthy of censorship in New Zealand. The fourth section will consider the issues that arise where video games are considered under the FVPC Act. The final section will address possible legislative change.

Ultimately, this article will argue that there is no substantive scientific evidence linking violent media to aggressive or antisocial behaviour. However, the FVPC Act has given the Office of Film and Literature Classification (the Office) the power to rely on presumed harms as justification for the censorship of violent materials. As a result, legislative change is required. Against the backdrop of the New Zealand Bill of Rights Act 1990 (NZBORA), presumed harms do not provide a suitable basis for the Office to tamper with the fundamental freedom of expression.

## II CENSORSHIP AND ITS APPLICATION UNDER NEW ZEALAND LAW

### Definition of Censorship

Censorship can be defined as the suppression of "particular words, images, sounds, and ideas".<sup>7</sup> It operates when the state restricts access to certain materials because they are considered "dangerous, disruptive, immoral, or otherwise objectionable".<sup>8</sup> Difficulty arises because censorship infringes on the right to freedom of expression, a right enshrined in NZBORA.<sup>9</sup>

In light of this conflict, censorship under New Zealand law requires careful balancing of the competing elements that see freedom of expression necessarily restrained in the interest of the public good.

### The Traditional Ground for Censorship

Traditionally, the notion of morality has served as the justification for censorship. The concept originates from ancient Rome, "where the government appointed officials to supervise public morals".<sup>10</sup> However, censoring on the basis of morality is highly controversial. It has been argued that the government should not enforce moral or religious beliefs, which assert censorship on the grounds that material is "evil, bad or wrong".<sup>11</sup> This stems from the opinion that the decision to enjoy particular materials is a

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7 Chris Watson and Roy Shuker *In the Public Good? Censorship in New Zealand* (Dunmore Press, Palmerston North, 1998) at 12.

8 Eran Guter *Aesthetics A-Z* (Edinburgh University Press, Edinburgh, 2010) at 37.

9 Section 14.

10 Watson and Shuker, above n 7, at 12.

11 Victor B Cline "Where Do You Draw the Line? An Introduction" in Victor B Cline (ed) *Where Do You Draw the Line? An Exploration into Media Violence, Pornography, and Censorship* (Brigham Young University Press, Provo (Utah), 1974) 1 at 6.

private morality and not the place for “governmental intrusion or interference”.<sup>12</sup>

The legislature appears to have intended that the FVPC Act exclude morality as a basis for censorship. In reporting to Parliament from the Select Committee on the Bill that would become the FVPC Act, the Rt Hon Jenny Shipley emphasised:<sup>13</sup>

[T]he Government has undertaken a major shift in its philosophy on censorship, away from moral indignation ... towards concern about the likely impact of ... material on our community, and, in particular, on our young people.

Such direction by Parliament appears logical on the basis that New Zealand, as a democratic nation, must respect and encourage the freedom of its citizens. To take a liberal approach, moral panic and opinions should not have a place in restricting what people can view.<sup>14</sup> The legislative intent for censorship to move away from moral considerations to those of demonstrable harm should guide interpretation of the FVPC Act.<sup>15</sup>

### Films, Videos, and Publications Classification Act 1993

The FVPC Act was enacted in an effort by the legislature to establish a single encompassing framework to govern the classification of all publications in New Zealand.<sup>16</sup>

The Office is the government body responsible for the censorship and classification of publications in New Zealand.<sup>17</sup> It has been assigned a number of functions.<sup>18</sup> The first and most prominent is to classify any submitted publication as “unrestricted”, “objectionable” or “restricted”.<sup>19</sup> Decisions by the Office may be challenged and made subject to a right of review by the Film and Literature Board of Review.<sup>20</sup>

#### 1 *Censorship under the FVPC Act*

Section 23(2) of the FVPC Act gives the Office the power to classify publications as unrestricted, objectionable or restricted.<sup>21</sup> Additionally, under

<sup>12</sup> Cline, above n 11, at 6.

<sup>13</sup> (22 June 1993) 536 NZPD 15989.

<sup>14</sup> Stephen Kline “Moral panics and video games” (2002) Media Analysis Lab: School of Communication – Simon Fraser University <www.sfu.ca/media-lab/> at 2.

<sup>15</sup> *Re Society for the Promotion of Community Standards Inc (No 2)* [2002] NZAR 897 (HC) at [29].

<sup>16</sup> *Society for the Promotion of Community Standards Inc v Film and Literature Board of Review* [2005] 3 NZLR 403 (CA) at [21]. See also Films, Videos, and Publications Classification Act 1993, long title [FVPC Act].

<sup>17</sup> FVPC Act, s 77.

<sup>18</sup> Section 77.

<sup>19</sup> Sections 77(a) and 23.

<sup>20</sup> Section 47.

<sup>21</sup> Section 23(2). A restricted publication is objectionable except where its availability or use is restricted (ss 23(2)(c) and 23(3)). In deciding what classification to give a publication under s 23(2), the Office must have regard to the matters set out under ss 3–3D. Under s 23(2)(c), a publication may be restricted by imposing age restrictions (s 23(2)(c)(i)), restricting its availability to specified

s 23(3) the Office has a further discretion to classify as restricted an otherwise “objectionable” material.<sup>22</sup> The question of whether publications are objectionable is a matter of expert judgement.<sup>23</sup> This judgement has been left to the Office and the Board of Review.<sup>24</sup> Parties wishing to appeal a classification decision beyond the Board of Review can only do so on the basis of an error on a point of law.<sup>25</sup> This means that a classification cannot be challenged substantively in court.

## 2 What is “Objectionable”?

Section 3(1) of the FVPC Act sets out the meaning of “objectionable”, providing the general test for when a publication is objectionable:<sup>26</sup>

[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.

Section 3(1) has come to be known as a “gateway” provision.<sup>27</sup> This standard must be satisfied before a publication can be found objectionable. Only matters akin to those listed in s 3(1) will be considered.<sup>28</sup> Moreover, the publication must *deal with* the matter, in the sense of presenting an activity rather than simply expressing a judgement or opinion on it.<sup>29</sup> Section 3(1) also sets out the test of “injurious to the public good”. In *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)*, this test was described as the “yardstick” for determining whether a publication would be found objectionable under the FVPC Act.<sup>30</sup> Former Chief Censor Bill Hastings has made it clear that:<sup>31</sup>

[T]he question is not whether the film will injure those people likely to see it — the question is ... how will making this film available to any group in society be likely to injure society as a whole?

A publication may be found objectionable through a balancing of s 3(3) and s 3(4) factors. A publication might also be deemed objectionable under s 3(2).

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persons or classes of persons (s 23(2)(c)(ii)) or specifying the purpose or purposes for which it can be used (s 23(2)(c)(iii)).

22 This may be for educational, professional, scientific, literary, artistic, or technical purposes.

23 FVPC Act, s 4.

24 Sections 77(1)(a) and 92. See also ss 23(1) and 55(1)(a).

25 Sections 58 and 70(1).

26 Section 3(1).

27 *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 (CA) at [71].

28 At [71].

29 At [28].

30 At [25].

31 Bill Hastings “Availability and Injury to the Public Good” (Video, 9 November 2009) Censorship in New Zealand <[www.censor.org.nz](http://www.censor.org.nz)>.

## (a) Objectionable as Determined under s 3(3) and s 3(4)

Section 3(3)(a) lists a range of antisocial activities.<sup>32</sup> The Office must take into consideration the extent to which a publication “describes, depicts or deals” with any of these listed activities.<sup>33</sup> The Office must also consider the extent to which the material exploits the nudity of children or young persons, dehumanises or demeans any person, promotes criminal acts, or includes discriminatory material contravening s 21(1) of the Human Rights Act 1993.<sup>34</sup>

This is balanced against s 3(4), which sets out mitigating factors that may convince the Office to allow a publication to be accessible, such as its merit, value or importance.<sup>35</sup> Generally, s 3(4) factors are ones that might be regarded as making a publication less “injurious” to the public good.<sup>36</sup> However, the potential exists in these factors to weigh against the release of a publication as well.

## (b) The Deeming Provision of s 3(2)

Beyond the balancing test of s 3(3) and s 3(4), the FVPC Act provides an absolute requirement as to when publications *must* be deemed objectionable. It applies when a publication “promotes or supports, or tends to promote or support” any of the activities set out in s 3(2).<sup>37</sup> The Court of Appeal in *Moonen v Film and Literature Board of Review* explained that “[t]he concepts of promotion and support are concerned with the effect of the publication, not with the purpose or the intent of the person who creates or possesses it”.<sup>38</sup> As s 3(2) is applied automatically when a publication “promotes or supports” any of the factors listed in s 3(2), “promotion and support” must be read as having an unassailable link to the public injury requirement of s 3(1).

When setting the threshold for “promotion and support”, the Court of Appeal in *Moonen* concluded:<sup>39</sup>

There must be something about the way the prohibited activity is described, depicted or otherwise dealt with, which can fairly be said to have the effect of promoting or supporting that activity.

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32 These activities include torture, sexual violence, physical conduct of a degrading or dehumanising nature, sexual activity by or with children and sadomasochism.

33 Section 3(3)(a).

34 Subsections 3(3)(b)–(e).

35 Section 3(4) directs the decision-maker to consider any merit, value or importance of the publication, as well as the dominant effect of the publication as a whole, the impact of the medium in which the publication is presented, the likely or intended audience, the purpose for which the publication is intended to be used, and any other relevant factors relating to the intended or likely use of the publication.

36 For example, a publication will usually be age-appropriate for its target consumer.

37 These activities include the exploitation of children for sexual purposes, sexual coercion, necrophilia, the use of excrement in association with dehumanising or sexual conduct, bestiality and acts of torture or extreme violence.

38 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [29].

39 At [29].

The Court of Appeal in *Society for the Promotion of Community Standards Inc v Film and Literature Board of Review* confirmed the *Moonen* approach, stating that a “[m]ere depiction or description of these activities is not sufficient”.<sup>40</sup>

### (c) Sections 3A and 3B

Sections 3A and 3B were inserted by s 5 of the Films, Videos, and Publications Classification Amendment Act 2005. As a result of this amendment, a publication may now be age-restricted if it contains highly offensive language.<sup>41</sup> A publication may also be age-restricted where it contains material that includes certain activities or images and is likely to be injurious to the public good if it is not age-restricted.<sup>42</sup> The reasoning behind these sections is a fear that the lower emotional and intellectual development and maturity of persons under a certain age increases the likelihood of harm to those persons.<sup>43</sup> Both of these sections need to be read in the light of the mitigating factors of s 3(4).<sup>44</sup>

### New Zealand’s Bill of Rights Act 1990

There is a tension between the right to censor or restrict publications under the FVPC Act and the legal status that has been afforded to freedom of expression. Under NZBORA, every person in New Zealand has the right to freedom of expression.<sup>45</sup> This includes the right to “seek, receive, and impart information and opinions of any kind in any form”.<sup>46</sup> Censorship impinges this right as it prevents access to certain information.

In determining the relationship between the two Acts, s 4 of NZBORA maintains that where no other possible meaning or application is available, NZBORA does not invalidate other legislation, even if it is unjustified or unreasonable. Therefore, censorship under the FVPC Act is not undermined despite its inherent conflict with the freedom of expression.

On the other hand, s 6 of NZBORA dictates that, wherever possible, an enactment should be given a meaning consistent with the rights and freedoms contained in NZBORA. In *Moonen*, the Court of Appeal held that the censorship provisions of the FVPC Act must be interpreted to constitute the least possible limitation on the freedom of expression.<sup>47</sup> The Court rejected the approach of the High Court in *News Media Ltd v Film and*

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40 *Society for the Promotion of Community Standards Inc v Film and Literature Board of Review*, above n 16, at [24].

41 FVPC Act, s 3A. Section 3A(2) limits the application of s 3A to publications containing highly offensive language to such an extent or degree that the availability of the publication would be likely to cause serious harm to persons under a certain age.

42 Section 3B. These activities include self-harm, conduct that may cause harm to others if imitated and physical conduct of a degrading or dehumanising or demeaning nature.

43 Section 3B(4). See also (8 February 2005) 623 NZPD 18428.

44 Section 3C.

45 Section 14.

46 Section 14.

47 *Moonen*, above n 38, at [23] and [27].

*Literature Board of Review*, which held that the restrictive provisions of the FVPC Act would always prevail against s 14, by virtue of s 4 of NZBORA, and the directions in s 6 do not apply.<sup>48</sup>

A reading of the FVPC Act consistent with the *Moonen* test requires the FVPC Act be read to “impinge” as little as possible on the freedom of expression.<sup>49</sup> As the test under s 3(1) is “likely to be injurious to the public good”, a *Moonen*-consistent reading would suggest that censorship should only be imposed against those actually at risk of injury from the publication. Practically, this may be applied under s 23(2)(c), which allows the Office to confine censorship to persons or classes of persons, presumably those identified to be particularly at risk from the material.<sup>50</sup> Because this option has been left for the Office, it follows that to justify an imposition of full censorship the game must be “injurious” to all members of society.

### III THE PLACE OF VIDEO GAMES WITHIN NEW ZEALAND’S STATUTORY FRAMEWORK

#### Treatment of Video Games under The Films, Videos, and Publications Act 1993

Section 2 of the Act defines “video game” as “any video recording that is designed for use wholly or principally as a game”. This definition casts a broad net that incorporates games through various video and computer mediums, including newer gaming devices such as Wii and Xbox. The definition of “video game” limits its application to those in the form of a video recording, which is also defined under s 2.<sup>51</sup> Because the definition of “film” in s 2 also includes “video recordings”, video games are treated as films under the FVPC Act.<sup>52</sup>

This treatment has one exception. Video games of an unrestricted level are not required to undergo New Zealand classification and labelling.<sup>53</sup> This is in contrast to unrestricted films, which are “cross-rated” through a process of verification from Australian labels to ‘G’, ‘PG’ and ‘M’ New Zealand labels by the Film and Video Labelling Body.<sup>54</sup> The practical effect

48 *News Media v Film and Literature Board of Review* (1997) 4 HRNZ 410 (HC) at 420. The Court of Appeal in *Moonen* instead found that while censorship may prevail, “the existence and extent of such censorship may indeed be matters to which s 6 [of NZBORA] is relevant”: *Moonen*, at [23].

49 *Moonen*, at [27].

50 See also FVPC Act, ss 3A, 3B and 23(3).

51 “Video recording” is defined as “any disc, magnetic tape, or solid state recording device containing information by the use of which 1 or more series of visual images may be produced electronically and shown as a moving picture”.

52 Office of Film and Literature Classification “Classifying video games” (2010) Censorship in New Zealand: Information For Students <www.censor.org.nz>.

53 FVPC Act, ss 8(1)(q) and 8(3).

54 Office of Film and Literature Classification and Colmar Brunton Research Agency “Guidance and Protection: What New Zealanders want from the classification system for films and games - A qualitative study” (July 2011) Office of Film and Literature Classification <www.classificationoffice.govt.nz> at note 2.

of this is that unrestricted video games are left bearing an unregulated assortment of classification labels from various jurisdictions.

Since the Office need not consider unrestricted video games, the central question for the Office regarding video games is whether or not they are objectionable. As of 11 July 2013, 869 games had been considered by the Office of Film and Literature Classification.<sup>55</sup> Of this number:

- 765 games had received a restricted status.<sup>56</sup> Any person who supplies, distributes, exhibits, displays, or deals with a restricted game other than in accordance with its classification commits an offence under the FVPC Act.<sup>57</sup>
- Seven games have been found objectionable.<sup>58</sup> Anybody found knowingly in possession of an objectionable game is liable to five years imprisonment.<sup>59</sup> Any person found in possession of one of these games without knowledge may be liable for a fine.<sup>60</sup>

This large number of restricted video games is worthy of reflection in light of the freedom of expression owed to every New Zealand citizen. As *Moonen* has made clear, the right to freedom of expression should not be easily impinged.<sup>61</sup> The question remains: what danger do these games pose that necessitates their censorship for the protection of New Zealand society?

### Video Games as a Protected Medium

Video games have received international recognition as publications that enjoy the protection of freedom of expression. The United States Supreme Court noted:<sup>62</sup>

Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices ... and through features distinctive to the medium ...

55 Office of Film and Literature Classification “All games classifications to 11 July 2013” (15 July 2013) <[www.classificationoffice.govt.nz](http://www.classificationoffice.govt.nz)>. For the most recent data, see Office of Film and Literature Classification “Classification Office newsletters and updates” <[www.classificationoffice.govt.nz](http://www.classificationoffice.govt.nz)>.

56 Office of Film and Literature Classification, above n 55.

57 Sections 125 and 126. Section 125 is a strict liability offence, while s 126 requires knowledge. Under s 126(2)(a), liability for an individual may include a term of imprisonment for a term not exceeding three months or a fine not exceeding \$10,000 (s 126(2)(a)). Under s 126(2)(b), a body corporate may be liable for a fine not exceeding \$25,000.

58 Office of Film and Literature Classification, above n 55.

59 FVPC Act, s 131A.

60 Section 131.

61 *Moonen*, above n 38, at [27].

62 *Brown v Entertainment Merchants Assoc* 131 SCt 2729 (2011) at 2733.



A similar rationale appears to have been adopted in New Zealand. When exercising its power to restrict video games, the Office has consistently paid homage to s 14 NZBORA.<sup>63</sup>

Despite this treatment, the question remains as to whether video games deserve the same level of protection afforded to other mediums. The traditional rationale behind freedom of expression was that truth, democratic self-government, autonomy and self-fulfilment would be safeguarded.<sup>64</sup> Video games, on the other hand, are arguably “just games”. They rarely include the type of expression that broaches these traditional topics.

Nevertheless, to dismiss the value of the “expression” contained within video games is to ignore the growing recognition that protected expression can be “information and ideas of any kind”.<sup>65</sup> Moreover, it would be contrary for the law to decide what type of expression is worthy of protection when the freedom itself aims to protect against governmental influence. Thus the “medium-neutral” approach to freedom of expression that appears to have been adopted both internationally and by our courts appears appropriate.

### Something Unique about Video Games?

Video games contain a number of unique features. First, they are animated. This separates them from most films and videos, as their settings are often fantastical and detached from the “real world”. It has been accepted that their animated nature generally reduces the impact of the images.<sup>66</sup> However, video games have a unique interactive nature. This feature causes the concern that games have a potential to influence players in a way that other mediums, such as television, do not.<sup>67</sup> Evidence of such concern was raised in a recent study conducted by the Office.<sup>68</sup> Participants in the study connected levels of desensitisation to the unique features of video games where the player has varying degrees of control over the actions occurring.<sup>69</sup>

Special concern exists in regard to violent video games. Concern has arisen on the basis that in order to succeed in violent video games, players must personally choose and implement violent strategies.<sup>70</sup> A 2011 study by the Office saw participants express the belief that video games have a

63 See, for example, Office of Film and Literature Classifications “Manhunt” (11 December 2003) NZ Register of Classification Decisions <[www.censorship.govt.nz](http://www.censorship.govt.nz)>.

64 Human Rights Commission “The right to freedom of opinion and expression” Human Rights in New Zealand Today <[www.hrc.co.nz](http://www.hrc.co.nz)>.

65 Toby Mendel “Restricting Freedom of Expression: Standards and Principles” (March 2010) Centre for Law and Democracy <[www.law-democracy.org](http://www.law-democracy.org)> at 4.

66 Sally McKechnie “Censorship and video games” [2004] NZLJ 153 at 154.

67 Bonnie B Phillips “Virtual Violence or Virtual Apprenticeship: Justification for the Recognition of a Violent Video Game Exception to the Scope of First Amendment Rights of Minors” (2003) 36 Ind L Rev 1385 at 1396 and 1398.

68 Office of Film and Literature Classification and UMR Research Ltd “Public Perceptions of a Violent Video Game: *X-Men Origins: Wolverine*” (August 2009) Office of Film and Literature Classification <[www.classificationoffice.govt.nz](http://www.classificationoffice.govt.nz)>.

69 At 6.

70 Jeanne B Funk and others “Violence exposure in real-life, video games, television, movies and the internet: is there desensitization?” (2004) 27 Journal of Adolescence 23 at 24.

stronger impact than films. This was believed to occur because players control the action of the game and so become more “immersed and invested” in what happens on screen.<sup>71</sup>

Further difficulty emerges from the immeasurable extent to which opinion has been shaped by sensationalist media. Media articles, such as those identified in the introduction of this article, have significantly swayed public opinion in favour of the assumption that video games do affect behaviour. As Day and Hall have suggested, the media’s use of video games to “explain the horrific actions of infamous criminals” is effectively an application of the “Werther effect”.<sup>72</sup> However, Day and Hall question the causal relation between media violence and the cases of resulting behavioural violence, including select cases of video game-related violence, suggesting that such cases at most evidences only a potential correlative effect.<sup>73</sup>

Moreover, it is problematic that in making their reports, the media focuses on minority examples and extreme situations. While such cases may “highlight a potential correlation between media violence and action,” they do not effectively prove causation.<sup>74</sup> Ferguson suggests that “[w]hen tragedies such as the Columbine High School shooting occur, it is tempting to look for ‘scapegoat’ answers” to complex questions.<sup>75</sup> Unfortunately, this may “distract the scientific community and the general public from the real biological, social and family influences on violent behavior”.<sup>76</sup>

#### IV INJURY TO THE PUBLIC GOOD

For material to be objectionable, it must be “likely to be injurious to the public good”.<sup>77</sup> Section three of this article discussed the unique features of violent video games, which have raised public concerns as to their impact. This section evaluates those public fears against scientific literature examining the link between violent video games and real-life aggression. Other grounds for video game censorship are also considered.

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71 Office of Film and Literature Classification and Colmar Brunton Research Agency, above n 54, at 19.

72 Terri R Day and Ryan CW Hall “Déjà Vu: From Comic Books to Video Games: Legislative Reliance on Soft Science to Protect Against Uncertain Societal Harm Linked to Violence” (2010) 89 Or L Rev 415 at 426. The Werther effect is a controversial model commonly used to link behaviour, such as suicide, with works of fiction or news coverage: see Day and Hall at 421. For more information on the Werther effect, see also David P Phillips “The Influence of Suggestion on Suicide: Substantive and Theoretical Implications of the Werther Effect” (1974) 39 American Sociological Review 340.

73 Day and Hall, at 426.

74 At 427. Results of correlation rather than causation were also recorded as a limitation in a 2012 Swedish experiment into the connection between profanity and media; see Sarah M Coyne and others “Profanity in Media Associated With Attitudes and Behavior Regarding Profanity Use and Aggression” (October 2011) Pediatrics <pediatrics.aappublications.org> at 5.

75 Christopher J Ferguson “Evidence for publication bias in video game violence effects literature: A meta-analytic review” (2007) 12 Aggression and Violent Behaviour 470 at 481.

76 At 481.

77 FVPC Act, s 3(1).

## The Censorship of Video Games on the Basis of Violence

The belief that violent video games pose danger to the public good is indivisible from the “causal links” theory. This theory attests that there is a causative relationship between playing violent video games and real world aggressive or antisocial behaviour. The injury is the direct behavioural shift of the individual. It follows that there is an indirect injury to society when this behavioural shift causes a player to interact negatively with his or her community.

Considering the value that society places on freedom of expression, it stands to reason that the freedom should only be restricted when there is scientific support for the existence of a causative relationship between video games and public injury.<sup>78</sup>

### *1 Scientific Evidence in Favour of the Causal Links Theory*

In a report before the New York State legislature in 1999, Lieutenant Colonel Grossman expressed his professional view, as an expert in the field of “killology”, that video games are “firearms training devices at best, and murder simulators at worst”.<sup>79</sup> Grossman argued that video games were the latest type of operant conditioning, a method of stimulus-response indoctrination developed during World War Two to teach soldiers to kill.<sup>80</sup> He argued that 75 to 80 per cent of killing on the modern battlefield is a result of these simulators.<sup>81</sup> Grossman’s views have been portrayed as evidence that violent “shooter” games in particular should be restricted to military or law enforcement training only.<sup>82</sup>

Grossman does not stand alone. Anderson and Dill published the foundational report on this topic in 2000.<sup>83</sup> Their report is structured around an application of the General Aggression Model to video games.<sup>84</sup> Dill and Anderson’s study concluded that the effect of violent video games is cognitive in nature, resulting in short-term effects on aggression through priming of aggressive thoughts.<sup>85</sup> Long-term effects, while not tested, were hypothesised to be more likely as the player “learns and practi[s]es new aggression-related scripts”, accessible in real-life conflict.<sup>86</sup>

78 See Office of Film and Literature Classification and UMR Research Ltd, above n 68, at 24.

79 Dave Grossman “Statement of Lt Col [D]ave Grossman” (October 1999) The Free Radical <www.thefreeradical.ca> at 1.

80 Dave Grossman and Gloria DeGaetano *Stop Teaching Our Kids to Kill: A Call To Action Against TV, Movie and Video Game Violence* (Crown Publishers, New York, 1999) at 72–75.

81 Dave Grossman and Gloria DeGaetano, above n 80, at 74.

82 Katechon “Dave Grossman: First-Person Shooter Videogames Should be Banned” (5 January 2013) Free Republic <www.freerepublic.com>.

83 Craig A Anderson and Karen E Dill “Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life” (2000) 78 *Journal of Personality and Social Psychology* 772.

84 At 773. The General Aggression Model (also called the General Affective Aggression Model) suggests that there is “a multistage process by which personological ... and situational ... input variables lead to aggressive behavior”: at 773.

85 At 788.

86 At 788.

Bushman and Anderson furthered the General Aggression Model findings in 2002 by conducting fresh research into whether exposure to violent video games produces a hostile expectation bias.<sup>87</sup> They theorised that playing violent video games might make hostile knowledge structures “chronically accessible”, contributing to the development of an aggressive personality.<sup>88</sup> Their experiment, involving 224 participants playing a mixture of violent and non-violent video games, demonstrated that playing a violent video game for just 20 minutes could significantly increase the player’s expectation that conflict situations will involve aggression.<sup>89</sup> These findings were reconfirmed by a 2007 report that applied modern first person shooter games against the General Aggression Model.<sup>90</sup>

## 2 *Opposition to the Causal Links Theory*

Strong opposition contests the argument that video games may lead to societal harms. Perhaps the most influential dissent is that of Ferguson and Kilburn, who have engaged in ongoing debate with Anderson and his application of the General Aggression Model. Ferguson and Kilburn assert that the controls used in Anderson’s model are unreliable because he did not include non-standardised aggression measures in his experiment.<sup>91</sup> Boyle and Hibberd echoed this criticism in a 2005 report, noting that Anderson’s approach relies heavily on laboratory experiments that are not based in the real world.<sup>92</sup>

Ferguson and Kilburn further argued that Anderson neglected a fundamental piece of evidence. As violent video games have become more popular, violent crime rates have plummeted. Their research showed a dramatic decrease in youth violence in particular, with a correlation coefficient of -0.95. This is a “near-perfect correlation in the wrong direction”.<sup>93</sup> Ultimately, Ferguson and Kilburn suggest that the weak effects of violent video games are not seen in context and that this “exaggerated focus ... distracts society from more important causes of aggression,

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87 A hostile expectation bias is “the tendency to expect others to react to potential conflicts with aggression”: Brad J Bushman and Craig A Anderson “Violent Video Games and Hostile Expectations: A Test of the General Aggression Model” (2002) 28 *Pers Soc Psychol Bull* 1679 at 1680.

88 At 1680.

89 At 1681 and 1683.

90 Christopher P Barlett, Richard J Harris and Ross Baldassaro “Longer You Play, the More Hostile You Feel: Examination of First Person Shooter Video Games and Aggression During Video Game Play” (2007) 33 *Agg Beh* 486 at 494–496.

91 Christopher J Ferguson and John Kilburn “Much Ado About Nothing: The Misestimation and Overinterpretation of Violent Video Game Effects in Eastern and Western Nations: Comment on Anderson et al (2010)” (2010) 136 *Psychological Bulletin* 174 at 175–176. The authors critique Anderson’s exclusion of third variables from his research, such as the correlation of aggression with any male-dominated activity, including violent video games: at 177.

92 Raymond Boyle and Matthew Hibberd “Review of Research on the Impact of Violent Computer Games on Young People” (March 2005) Stirling Media Research Institute <<http://dera.ioc.ac.uk>> at [3.4].

93 Ferguson and Kilburn, above n 91, at 176.

including poverty, peer influences, depression, family violence and Gene X Environment interactions”.<sup>94</sup>

### *3 Reflection on the Scientific Debate*

There are strong arguments on either side of the debate. However, on balance, the case against the causal links theory is stronger at its core. An unresolved issue arises when linking violent video games to real world violence: “hundreds of thousands of ... young people play the same violent video games without ever committing a violent crime”.<sup>95</sup> This obstacle has yet to be overcome by any causal links arguments.

One exception to this may be in regards to children. Recent findings in the field of neuroscience state that infants are particularly vulnerable to cognitive influence, as the portion of the brain involving judgement and inhibition is still developing.<sup>96</sup> But more research is required to definitively link this vulnerability to a likelihood of antisocial manipulation by video games.

Clearly, further research is required to prove the “causal links between game playing and various social ills”.<sup>97</sup> Doing so would allow the Office to accurately balance the causal link threat against other considerations in s 3(4) of the FVPC Act, such as the game’s dominant effect, merit, purpose and other relevant considerations. However, based on the existing trend of scientific scholarship, the claim that violent video games may cause aggression or antisocial behaviour in players is speculative at best.

## **Other Grounds for Censorship**

Violence is not the only video game genre that has caused apprehension. Pornographic and discriminatory video games have also raised alarm. Another concern is child protection. While also falling under causal links concerns, these categories have their own grounds for censorship.

### *1 Pornography*

Pornography is the explicit description or exhibition of sexual subjects or activity in publications, intended to stimulate erotic feelings.<sup>98</sup> Pornography

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<sup>94</sup> At 177.

<sup>95</sup> Daniel King and Paul Delfabbro “Should Australia have an R 18+ classification for video games?” (2010) 29 Youth Studies Australia 9 at 15.

<sup>96</sup> Kevin W Saunders “A Disconnect Between Law and Neuroscience: Modern Brain Science, Media Influences, and Juvenile Justice” [2005] Utah L Rev 695 at 710–711.

<sup>97</sup> Office of Film and Literature Classification and UMR Research Ltd, above n 68, at 24.

<sup>98</sup> Hilary Kincaid “Which is more of a threat — Pornography or its Censorship?” (1998) 23 Alt LJ 6 at 6.

was at the focal point of governmental concern when enacting the FVPC Act.<sup>99</sup>

For the same reasoning as between violence and real-life crime, it has been contended that consumption of pornographic material may lead to real-life recreations. This is of special concern when dealing with pornographic material depicting sexual crimes, such as rape or child molestation. However, the same issues undermining causal links theory regarding violent materials are applicable here. Indeed, as one expert has noted:<sup>100</sup>

[G]iven that the vast majority of consumers of sexually explicit materials do *not* commit crime, there could even be said to be a *negative* correlation between exposure to such material and criminal acts ... [suggesting that] exposure to sexually explicit material is cathartic ...

Because causal links science is so uncertain, the extent to which fear of pornography may encourage impositions on NZBORA must be controlled.

Beyond the causal links theory, pornography can create a risk of “social evil” that may justify regulation.<sup>101</sup> A strong feminist argument has maintained that pornography “maintains inequality between the sexes by reinforcing the commodification of women’s bodies”.<sup>102</sup> This view draws close to morality, but has a sharper edge in its possible ramifications for New Zealand society. If access is allowed to material that consistently subjugates a vulnerable class of persons, namely, women and children, it is possible that making these classes of persons feel demeaned and dehumanised might constitute injury to the public good.<sup>103</sup>

On the other hand, the objectivity of this argument is less certain upon consideration of women who willingly participate in the creation of such materials. In fact, many “‘intelligent, self-confident women have chosen to work in this lucrative industry’”.<sup>104</sup> It is also worth noting that some pornography portrays women in dominating roles, which could be seen as empowering.<sup>105</sup> Is it fair that these women be cast as too crippled to escape male exploitation? Or is the hegemonic fear of disrespect to the female body impossible when women are willing participants? The line

99 Department of Justice “A Summary of: Pornography - Report of the Ministerial Committee of Inquiry into Pornography” (February 1987) <www.censorship.govt.nz>. It was this ministerial inquiry that prompted the formation of the FVPC Act.

100 Bede Harris “Censorship: A Comparative Approach Offering A New Theoretical Basis For Classification in Australia” (2005) 8 Canb LR 25 at 41. See also: Anthony D’Amato “A New Political Truth: Exposure to Sexually Violent Materials Causes Sexual Violence” (1990) 31 Wm & Mary L Rev 575.

101 Bede Harris, above n 100, at 41. Harris referred to *United States v O’Brien* 391 US 367 (1968), which included obiter comment that expression in the form of “nonspeech” may be regulated so long as it is regulated because an important social consequence and not because of its message (at 376–377).

102 Kincaid, above n 98, at 6 (footnotes omitted).

103 FVPC Act, s 3.

104 Kincaid, above n 98, at 7

105 At at 8.

between these competing arguments is hard to draw, but it could undoubtedly be argued that certain material would go too far in demeaning vulnerable classes of persons in a way psychologically injurious to members of society. However, as this argument falls precariously close to a moral assertion of hegemonic ideals, only extreme circumstances would justify its valid application.

A final area of concern regarding pornography is the danger of injury to persons harmed in the making of the material. Indeed, strong arguments exist in New Zealand for complete censorship of material that is the product of actual sexual misconduct. However, such concerns are not relevant to this article because video games, as animated publications, do not require people to be victimised for the purposes of their creation. Of course, should this change due to further developments in video game technologies, future attention would be required.<sup>106</sup>

## 2 Discrimination

The legislature intended that discrimination be included as a ground for censorship in New Zealand.<sup>107</sup> The banning of discriminatory material aimed at subjugating certain minority groups clearly demonstrates a desire, by parliament, to uphold its international human rights obligations.<sup>108</sup>

Like pornography concerns, discrimination concerns are not entirely based on the causal links theory. Instead, the state appears to be consciously attempting to avoid the circulation of materials that degrade and disrespect a certain class of persons. This is to protect the dignity of vulnerable classes of persons by preventing the spread of materials that might make them feel demeaned. Similar to pornography, the question is: at what point will a publication go too far in targeting particular persons or identifiable groups? And at what point will this justify an imposition on the freedom of expression?

It could be argued that material specifically discriminating against a particular person or a relatively small group of persons is more worthy of control than materials that target a larger class of people. Video games, which rarely include representations of specific people, may skirt the line on just what might be justifiably circulated in New Zealand's modern multicultural society. These concerns would likely go to an analysis based on s 3(4) as to the dominant effect or purpose of the game.<sup>109</sup>

## 3 Child Protection

Child protection is clearly at the forefront of the causal links debate. They are vulnerable due to their immaturity and susceptibility to influence as their

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106 For example, if a video game was to include a scene of "real life" violence, which required people to be victimised for the purposes of its creation.

107 FVPC Act, s 3(3)(e).

108 Human Rights Act 1993, long title and s 21.

109 FVPC Act, ss 3(4)(a) and (e).

brains develop.<sup>110</sup> Section 3B(3)(a)(ii) reflects these concerns by allowing the Office to restrict materials that depict activities that may cause harm if “imitated”.<sup>111</sup>

However, other grounds for the restriction of violent video games from children need to be recognised. This includes documented reactions by young persons to media, including “generalized anxieties, specific fears, unwanted recurring thoughts, and disturbances in eating and sleeping”.<sup>112</sup> Heightening these concerns is the general inability of young persons to responsibly choose material that is appropriate for their personal maturity level. With this in mind, ss 3A and 3B could be regarded as restricting materials that are likely to shock and upset persons under a certain age.

This purpose is reflected in s 3B(4) in particular. Section 3B(4) makes clear that s 3B is concerned with age-restricting materials for the purpose of preventing distress and preventing young persons from regarding themselves or others as being degraded or dehumanised.<sup>113</sup> While not express, similar concerns might be seen as the rationale for s 3A, which applies to publications containing highly offensive language to such an extent that they may cause “serious harm” to persons below a certain age.<sup>114</sup>

## V ISSUES THAT ARISE UNDER THE FVPC ACT

The issues that emerge under the FVPC Act, following the discussion in section four of this article, will now be considered.

### The Power to Classify Violent Video Games as Objectionable

Violent video games are censorable in New Zealand only when they are “injurious to the public good”.<sup>115</sup> But because injury to the public good is not defined under the FVPC Act, discretion has been left to the Office. This has seen the Office operate on the basis of presumed harms.

#### *1 What are the Presumed Harms?*

From the discussion in section four, it is apparent that there is no clear causative link between video games and real world aggression or antisocial behaviour. However, the Office has consistently operated on the basis that such causal links do exist.

<sup>110</sup> Saunders, above n 96, at 710–712, 726, 728 and 741.

<sup>111</sup> FVPC Act, s 3B(3)(a)(ii).

<sup>112</sup> Joanne Cantor “Fright Reactions to Mass Media” in Jennings Bryant and Dolf Zillman (eds) *Media Effects: Advances in Theory and Research* (Lawrence Erlbaum Associates, Mahwah (New Jersey), 2002) at 290.

<sup>113</sup> It is only s 3B(4)(b) that evokes causal theory concerns, through reference to “the risk of [persons under the specified age] ... causing serious harm to, themselves, others, or both”.

<sup>114</sup> Section 3A(2). “Serious harm” might be distress emerging from exposure to “highly offensive language”.

<sup>115</sup> FVPC Act, s 3(1).



This can be seen in the classification decisions for each of the seven video games that have received full censorship in New Zealand:

- In finding *Manhunt* objectionable, the Office noted “the game immerses the player in violent gameplay” that “has the potential to inure players to brutal violence generally”.<sup>116</sup> It concluded that *Manhunt* encourages an “antisocial attitudinal shift”.<sup>117</sup>
- This concern of an “antisocial attitudinal shift” was repeated in the *Manhunt 2* decision.<sup>118</sup>
- With regards to *Postal 2 Demo Game* and *Postal 2 Share the Pain*, the Office produced near-identical statements expressing concern that the player has the “ability to elect the amount, type and speed with which the violence is escalated into extreme cruelty”, which “requires an antisocial attitudinal shift”.<sup>119</sup>
- In the *Reservoir Dogs* decision, the Office argued that there is a direct link between the way the game encourages the player to perform “extreme forms of violence and brutality” and promotes and supports the infliction of violence and extreme cruelty generally.<sup>120</sup>
- As to *Three Sisters’ Story* and *RapeLay*, the Office was concerned that the games legitimised sexual violation in a way that was intended to “arouse” the player.<sup>121</sup> This focus on arousal is clearly driven by the causative fear that playing these games might inure a player to sexually violent acts generally.

What all of these examples have in common is a focus by the Office on the threat that the games pose to player behaviour. Repeated reference to an “attitudinal antisocial shift” is a good example of this focus.<sup>122</sup> But in its decision, the Office has failed to include the scientific foundation upon which they based their assumptions of causation.

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<sup>116</sup> “Manhunt”, above n 63.

<sup>117</sup> “Manhunt”, above n 63.

<sup>118</sup> Office of Film and Literature Classification “Manhunt 2” (12 June 2008) NZ Register of Classification Decisions <[www.censorship.govt.nz](http://www.censorship.govt.nz)>.

<sup>119</sup> Office of Film and Literature Classification “Postal 2 Demo Game” (14 February 2005) NZ Register of Classification Decisions <[www.censorship.govt.nz](http://www.censorship.govt.nz)>; and Office of Film and Literature Classification “Postal 2: Share The Pain” (24 November 2004) NZ Register of Classification Decisions <[www.censorship.govt.nz](http://www.censorship.govt.nz)>.

<sup>120</sup> Office of Film and Literature Classification “Reservoir Dogs” (7 July 2006) NZ Register of Classification Decisions <[www.censorship.govt.nz](http://www.censorship.govt.nz)>.

<sup>121</sup> Office of Film and Literature Classification “RapeLay” (1 June 2010) NZ Register of Classification Decisions <[www.censorship.govt.nz](http://www.censorship.govt.nz)>; and Office of Film and Literature Classification “Three Sisters’ Story” (11 September 2009) NZ Register of Classification Decisions <[www.censorship.govt.nz](http://www.censorship.govt.nz)>.

<sup>122</sup> See, for example, “Manhunt”, above n 63.

It should be made clear that this is not ultra vires of its power. The FVPC Act does not require the Office to base its decisions on any scientific foundation. Presumption of harm has been “built into the legislation” and it is left to the classifiers, in explaining their imposition on freedom under NZBORA, to articulate the nature of the harm in individual decisions.<sup>123</sup>

## 2 The Result of these Presumptions

### (a) A Return to Morality?

The practical result of the discretion left to the Office by the FVPC Act is that decisions concerning the censorship of violent video games in New Zealand may be based on moral concerns. Indeed, without the foundation of a scientific threshold, the application of censorship law in New Zealand appears to be an arbitrary process.

For example, it was the threat of “realism” that saw the Office find both *Postal 2 Share the Pain* and *Postal 2 Demo Game* objectionable. The Office’s reports for these games show a focus on the “ordinariness of the everyday settings and circumstances” that makes the game “more likely to influence the player’s real-life interactions”.<sup>124</sup> But in complete contrast to this apparent focus on realism, the Office censored *Reservoir Dogs* under s 3(2) despite recognition that the game involves clearly “fictional, animated characters”.<sup>125</sup> The Office recognised no other contributing factors that might replace realism as a reason for deeming the game objectionable. It simply noted distaste for the requirement that the player torture and execute members of the police force and public.<sup>126</sup> The approach towards these games ranges from a quasi-scientific focus on realism to a simple expression of moral disquiet at the content of the specific game. There is no consistency in what the Office regards as likely to be injurious to the public good or what that injury might be.

Another example comes from the classification of *Manhunt*. Here the Office noted an additional reason for finding the game objectionable, beyond a causative link to antisocial behaviour: the game’s “potential to adversely affect young people and adults alike, who may find the constant focus on inflicting injury or death in a brutal and callous manner disturbing and distressing”.<sup>127</sup> Concerns of distress may be relevant when dealing with children and young persons.<sup>128</sup> But to restrict the access of adult citizens to a video game on the same grounds is a moral imposition. Adults should not be treated like children. They should be left to decide for themselves what material they will or will not access, whether it is distressing or not.

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123 Ursula Cheer “New Zealand media law update: Recent developments – defamation, censorship and contempt” (2004) 9 MALR 237 at 243.

124 “Postal 2 Demo Game”, above n 119; and “Postal 2: Share The Pain”, above n 119.

125 “Reservoir Dogs”, above n 120.

126 “Reservoir Dogs”, above n 120.

127 “Manhunt”, above n 63.

128 FVPC Act, s 3B(4)(a).

Moreover “may” cause distress does not necessarily meet the requirement of “likely” injury set out in s 3(1).

### (b) Open and Frank Discussion

The focus so far has been on the discretion that allows the Office to find materials objectionable without proof of a likely injury to the public good. But, in truth, it is unknown as to whether the Office has been utilising this discretion. As the expert on film and literature classification in New Zealand, it is unlikely that the Office is oblivious to scientific discussion on this topic. As a result, the Office may be basing its decisions on some hereto-undisclosed groundwork.

The problem is that the Office is not required to publicise this information alongside its classification decisions. It is unacceptable that any scientific evidence relied upon by the Office is not made public for free and frank discussion. Moreover, access to the evidence relied on by the Office would help dispel the morality concerns raised in this article, as it would render examinable the logic behind otherwise seemingly arbitrary decisions.

### (c) Reflection on the Presumptions

As *Moonen* makes clear, the FVPC Act should be read in a way that least imposes on the protected right.<sup>129</sup> This requirement supports the assertion that “likely” injury in s 3(1) needs to be read to have a higher threshold than “presumed” injury in order to fall in line with a *Moonen* reading of the NZBORA.

For the Office to impose the full censorship of video games without actual evidence of injury is an unjustifiable imposition on the freedom of expression. Indeed, in the words of Cheer, reference to the NZBORA has come to be a “meaningless recitation” by the Office when it presumes that a particular game may be damaging to society.<sup>130</sup>

Alternatively, if the Office is basing its decisions on a scientific foundation that supports the causal links theory, it is unacceptable that this evidence is not subsequently made available for academic review.

## Unrestricted Video Games

This subsection addresses a collateral issue surrounding the labelling of unrestricted video games. This issue emerges out of the original purpose of the FVPC Act: to consolidate the law relating to the censorship of publications under a single statutory framework.<sup>131</sup>

Despite this purpose, the Act is inconsistent in dealing with unrestricted materials. An unrestricted film must not be supplied or offered for supply to the public unless a label has been issued in respect of that

<sup>129</sup> *Moonen*, above n 38, at [23].

<sup>130</sup> Cheer, above n 123, at 242.

<sup>131</sup> FVPC Act, long title.

film.<sup>132</sup> However, under s 8 of the FVPC Act, this rule does not extend to unrestricted video games. David Wilson, the Information and Policy Manager for the Office, has noted such an exception to be “curious” and out of date in modern New Zealand society.<sup>133</sup> This is especially so since the labelling of these unrestricted video games would not impeach the freedom by which the general public may access the materials.

Against the backdrop of a functional film labelling system, the lack of consistency regarding video games has left a serious hole in New Zealand’s classification system. Video games that contain unrestricted content make up the majority available on the market. In effect, this has left “approximately 90% of all video games available in New Zealand carry[ing] foreign, usually Australian, classification labels”.<sup>134</sup> International classifications are “substantially variable”.<sup>135</sup> The issue that emerges from this exception in New Zealand’s labelling system is that many members of the public are unaware that the omission exists. This has led to confusion in the New Zealand public, as was confirmed in research conducted by the Office.<sup>136</sup>

## VI SUGGESTIONS FOR LEGISLATIVE CHANGE

In light of the issues covered in section five of this article, this section will outline possible legislative changes to improve the management of censorship and classification in New Zealand.

### A Finding of “Objectionable” Under the FVPC Act

It should be made clear that this article does not suggest video games be treated separately under the FVPC Act. It is clear that the legislature intended for the FVPC Act to cover all forms of publication with a uniform approach.<sup>137</sup>

This causes difficulty, as changes to s 3 of the FVPC Act will impact the censorship of all publications in New Zealand. But this problem is not insurmountable. The immediate aim of this article was to present a case study of a unique medium exemplifying the threat of the causal links theory. If the causal links theory is questionable in video games, it is likely to be similarly contentious regarding film or literature. Therefore, the following changes are proposed with all forms of publication in mind.

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<sup>132</sup> Section 6(1)(a).

<sup>133</sup> David Wilson “Responding to the Challenges: Recent Developments in Censorship Policy in New Zealand” (2007) 30 Social Policy Journal of New Zealand 65 at 76.

<sup>134</sup> David Wilson, above n 133, at 76.

<sup>135</sup> Office of Film and Literature Classification “Comparing Classifications: feature films and video games 2010 & 2011” (May 2013) <[www.classificationoffice.govt.nz](http://www.classificationoffice.govt.nz)> at 7.

<sup>136</sup> Office of Film and Literature Classification and UMR Research “Underage Gaming Research” (September 2005) Office of Film and Literature Classification <[www.classificationoffice.govt.nz](http://www.classificationoffice.govt.nz)> at 17.

<sup>137</sup> Wilson, above n 133, at 69.

Nonetheless, the following proposal for legislative change is suggested on the evidence of this article. Should amendment to the FVPC Act be considered, further research will undoubtedly be required as to the suitability of the following changes to literature and film. Unfortunately, such considerations are beyond the scope of this article.

### *1 What Change Might be Appropriate?*

A tighter control on the Office's power to censor violent materials needs to be introduced to the FVPC Act. The question follows: what should this control be?

#### *(a) The United States Approach*

There is no federal law governing the censorship of violent video games in the United States and the United States courts have consistently refused to uphold state legislation purporting to censor violent publications.<sup>138</sup> In *Brown v Entertainment Merchants Assoc*, for example, the Supreme Court made it clear that a California state law intending to ban the sale of violent video games to minors imposed an unconstitutional restriction on access to protected expression.<sup>139</sup> The legislation was invalid unless it could pass a test of strict scrutiny.<sup>140</sup> The test requires that the law is "justified by a compelling government interest" and is "narrowly drawn" so as to serve that interest.<sup>141</sup> It was held that the Californian Act could not meet that standard, primarily because California could not show a direct causal link between violent video games and harm to minors. At best, all that could be shown was a correlation.<sup>142</sup>

#### *(b) Potential Application in New Zealand*

The protection for freedom of expression as enshrined in the United States Constitution is far greater than that afforded by NZBORA. Specifically, there is no qualification to the power as exists in NZBORA under s 4.<sup>143</sup> This difference might be grounds for arguing that the United States approach is unsuitable for adoption in New Zealand. Indeed, it is impractical to think that the FVPC Act could be thrown out and a system of self-regulation be implemented in New Zealand instead.

However, a requirement that the Office base its decisions on a scientific foundation for "injurious" seems reasonable. Incorporating such a

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138 *Brown v Entertainment Merchants Assoc*, above n 62; *Brandenburg v Ohio* 395 US 444 (1969); and *American Amusement Machine Assoc v Kendrick* 244 F 3d 572 (7th Cir 2001). Violent publications are instead controlled through a process of self-regulation under the Entertainment Rating Software Board: see *Brown v Entertainment Merchants Assoc*, above n 62, at 2740–2741.

139 *Brown v Entertainment Merchants Assoc*, above n 62.

140 At 2738.

141 At 2738.

142 At 2738–2739.

143 Although, obscene materials have been held to be an exception to this otherwise unwavering stance: see *Ginsberg v New York* 390 US 629 (1968) at 635.

control into the FVPC Act would ensure that the censorship of violent media only occurs when there is a real risk of injury to the public good. This would bring the FVPC Act into greater alignment with NZBORA under the *Moonen* test.

Therefore, the following amendments to s 3 of the FVPC Act are proposed:

- That “injurious to the public good” must be based upon a reasonable scientific foundation when the Office is arguing a causative link between access to a certain publication and antisocial or aggressive behaviour. This foundation must show that injury is “likely” to occur.<sup>144</sup>
- That the Office is required to publicise this scientific foundation alongside its classification decision for the purposes of critique. This possibility for assessment will keep the Office accountable to the public.

All other operations under s 3 should remain the same.

#### (i) Impact on Violent Publications

The main concern around violent publications is that exposure to such material may result in aggressive or antisocial behaviour. This amendment does not remove the ability of the Office to find a publication “objectionable” on that basis. It simply adds a new threshold to the already existing requirement of injury to the public good under s 3(1).

#### (ii) Impact on Pornographic or Discriminatory Materials

Pornography and discriminatory materials proffer additional dangers beyond the causal links theory, as was outlined in section four of this article. A finding of “objectionable” may still be appropriate on those grounds.

For example, *RapeLay* and *Three Sisters’ Story* were found objectionable under ss 3(2)(a) and (b) of the FVPC Act on a causal links argument of player arousal.<sup>145</sup> The implication is that a player could become inured to sexual crime generally. Under the proposed amendment, such a claim would require a basis of scientific evidence that shows that such injury to the public is “likely”.

However, the Office could instead have considered the potential injury caused by these games in making females or children feel demeaned or dehumanised. The portrayal of under-age females being sexually violated in a titillating manner is an affront to the dignity of a vulnerable class of persons. A finding that these games are “objectionable” on this basis may still be appropriate under s 3(3)(c).

<sup>144</sup> FVPC Act, s 3(1).

<sup>145</sup> “*RapeLay*”, above n 121; and “*Three Sisters’ Story*”, above n 121.

(iii) Impact on Age Restrictions

Sections 3A and 3B of the FVPC Act are not just concerned with the threat that violent media may result in antisocial activity. Unease also emerges from the premature exposure of young persons to materials that might cause them distress, alarm or make them feel dehumanised. Age restrictions on these grounds will remain unchanged by the proposed amendment.

(iv) Right of Appeal

Should the above amendments be effected, a person wishing to appeal a decision would still be bound to matters of law under ss 58 and 70(1) of the current FVPC Act. In other words, any appeal would be unable to challenge the scientific foundation provided by the Office. This could be seen to obstruct the benefit of the proposed amendment.

On the other hand, it seems unreasonable to expect New Zealand courts to make judgments in place of the Office who is the expert body in this area.<sup>146</sup> As established in section four of this article, the causative links between video games and injury is an area without consensus. The Office has a greater knowledge of debate in this area and it is uncomfortable to think that the court could substitute its own decisions over that of the experts. For this reason, the present restrictions on appeal should remain. While change may be required in the future, for now it seems sufficient that the Office be held accountable through public critique alone.

## The Classification of Unrestricted Games

The labelling of unrestricted video games needs to be brought under the existing cross-rating system of the Film and Video Labelling Body. This would prevent confusion in consumers who are unaware of the discrepancies between international labelling systems. It would also ensure that unrestricted games are dealt with to a standard that is specific to New Zealand society.

This change may be resisted on the basis that the exemption for unrestricted video games classification is cost-effective. But the intent of the FVPC Act is to ensure the protection of young people. A 2013 study by the Office found that 62 per cent of New Zealanders “pay at least some attention” to classification labels in determining what to show to under-age people.<sup>147</sup> This percentage seems large enough to suggest that a more cohesive labelling scheme would have benefit. Age-appropriate labels consistent with New Zealand standards and on par with the classification of unrestricted films would be a great aid to parents deciding what material their children should have access to.

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<sup>146</sup> FVPC Act, s 4.

<sup>147</sup> Office of Film and Literature Classification “Attitudes towards Classification Labels” (February 2013) <[www.classificationoffice.govt.nz](http://www.classificationoffice.govt.nz)>.

## VII CONCLUSION

The focus of the FVPC Act is the likelihood of harm.<sup>148</sup> It is not about “prudishness, moral paternalism, or restrictions on information about sexuality”.<sup>149</sup> Through a case study of video games, this article has shown that despite the clear legislative intent behind the FVPC Act, the discretion left to the Office under s 3 has seen this purpose unfulfilled. Despite the lack of substantive scientific evidence linking violent media to aggressive or antisocial behaviour, the Office has the power to presume that such harms exist. This discretion is too arbitrary to be a justifiable limitation on NZBORA, particularly on the freedom of expression.<sup>150</sup> Without the evidence of a scientific foundation to support its decisions, the Office could be suspected of classifying publications on the basis of inappropriate moral considerations.

This article proposes that change is necessary for the FVPC Act. As it stands, s 3 of the FVPC Act is not capable of holding the Office accountable to the public when classifying video games as “objectionable”. Particular amendments need to be made to overcome this oversight. When censoring a video game on the basis of a causative link between violent media and antisocial behaviour, the Office should first be required to establish a strong scientific foundation showing that a sufficient likelihood of injury exists, which justifies the restriction of public access to that video game. The FVPC Act should also be amended to require that this scientific foundation be made open for public review. New Zealand citizens should be aware of when their essential freedom to information has been trespassed upon and they should be able to critique the grounds upon which such intrusive measures have been administered. The effect of these amendments to s 3 of the FVPC Act would be to keep the Office accountable, ensuring that censorship is only employed to combat “injury” rather than unsubstantiated moral fears.

This article also proposes that the FVPC Act be amended to bring unrestricted video games under New Zealand’s existing cross-labelling system. As this article has shown, there is an unsatisfactory level of consumer confusion as to the exclusion of unrestricted video games from the existing cross-rating system of the Film and Video Labelling Body. Public dissatisfaction clearly shows that the current system does not fulfil its major purpose: consumer protection. This is especially alarming when one considers that the group most affected by the hands-off approach of the Labelling Body to unrestricted games is children. Consumer protection cannot be realised so long as children and their families are left unguided as to the content and age-appropriateness of unrestricted games. It is unacceptable that unrestricted video games are allowed to circulate, wearing international labels unspecific to New Zealand society.

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148 Section 3(1).

149 (22 June 1993) 536 NZPD 15989.

150 Section 14.