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**OFFENSIVE LANGUAGE AND SERIOUS HARM:
APPLICATION OF THE FILMS, VIDEOS, AND
PUBLICATIONS CLASSIFICATION ACT 1993**

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Abstract

Section 3A of the Films, Videos, and Publications Classification Act 1993 allows age-restriction of a publication if it contains highly offensive language that is likely to cause serious harm. The Office of Film and Literature Classification and the Film and Literature Board of Review have failed to apply this section consistently. They have categorised the same word as both offensive and not offensive and the same harm as serious and not serious throughout their reports. They have also avoided substantive consideration of the New Zealand Bill of Rights Act 1990. An analysis of social science research provides a solid grounding on which the requirements of the section could be applied. Additionally, a more thorough analysis of the severity of harm could be reached through a comprehensive application of the New Zealand Bill of Rights Act 1990. Harms should be balanced against the merits of the publication and the importance of freedom of expression in order to determine whether it is serious enough to justify a restriction. This approach would lead to fewer restrictions under s 3A and consistency throughout future decisions.

Key Words: offensive language, swearing, harm, freedom of expression

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I Introduction

In today's society we are surrounded by offensive language: in books and films, displayed on posters, and in everyday conversations. It affects different people in different ways, with some members of society actively avoiding foul speech and others openly embracing it. The presence of offensive language in publications is undeniable. New Zealand's classification process allows for publications to be restricted for a number of reasons, including on the basis of offensive language. Since 2005, offensive language in a publication that is deemed to cause serious harm to young people can result in restriction of the publication on the basis of age, through s 3A of the Films, Videos, and Publications Classification Act (FVPC Act).¹ Enforcing the Act brings up a number of issues surrounding offensive language use and when it is acceptable to restrict it. This paper aims to identify the issues that have arisen from assessment of whether restrictions are justified under s 3A, and make suggestions on how to improve application in the future, with emphasis on social science research and more thorough application of the New Zealand Bill of Rights Act 1990 (NZBORA).

This paper first analyses the application of s 3A by both the Office of Film and Literature Classification (the Office) and the Film and Literature Board of Review (the Board) and identifies the irregularity with which the level of offensiveness and level of harm are identified in classification reports, as well as the inconsistency with which the NZBORA is applied. It then suggests a more thorough and balanced approach through consideration of social science research into what makes language more and less offensive, as well as possible harms that could result from the use of offensive language. Finally, it shows that a more comprehensive application of the NZBORA to s 3A will lead to a more consistent and thorough assessment of what harms are serious enough to justify a restriction of freedom of expression under the Act.

¹ Films, Videos, and Publications Classification (FVPC) Act 1993, s 3A.

II The Films, Videos, and Publications Classification Act 1993

Publications in New Zealand are classified under the FVPC Act. A publication can be any number of things from a can of energy drink to a campervan.² Films generally require a label reflecting a rating of some form under the FVPC Act, with a number of exceptions.³ Books and any other publications are only classified upon request of certain persons, including any person with the leave of the chief censor and the chief censor himself.⁴ The FVPC Act sets up the Office⁵ whose role it is to classify any publication submitted to it.⁶ The Office can give a publication a classification of unrestricted, objectionable, or objectionable except under certain circumstances (including age restriction).⁷ A decision made by the Office can be reviewed by the Board,⁸ and matters of law can be appealed to the High Court and Court of Appeal.⁹

The main discussion of whether a publication is objectionable occurs under s 3 of the FVPC Act. Section 3(1) defines a publication as objectionable if it “describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence” in a manner that is likely to injure the public good. Under the original legislation this was the sole “gateway” provision: if the relevant publication did not deal with material under the s 3(1) definition, then that publication could not be deemed to be objectionable. Once a publication fell within the gateway, however, it could be classified in any way which was permitted under s 23 (and still can be today). Section 3(2) provides a number of circumstances under which a publication will definitely be classified as objectionable.¹⁰ If

² Section 2. See for example OFLC 1101242 – *Miss Svenson's Classroom Detention* (Can); OFLC 1600209 – *Wicked Camper DZQ882* (campervan).

³ FVPC Act s 6. Labels are given by the labelling body but when they have trouble classifying a publication it will be referred to the Office of Film and Literature Classification (Office). Exceptions are in s 7 and 8 and include government sponsored and general educational films, for example scientific or religious films.

⁴ FVPC Act s 8(2), 13.

⁵ Section 76.

⁶ Section 77.

⁷ FVPC Act s 23.

⁸ Section 47.

⁹ Sections 58 and 70.

¹⁰ Section 3(2)(a).

a publication does not fall under any of the s 3(2) headings, the classification must be considered with particular weight given to matters in s 3(3) which include sexual and physical violence and criminal acts,¹¹ and with a lesser level of consideration given to the matters in s 3(4) which include the dominant effect of the publication and the target audience.¹² Under s 4 of the FVPC Act, the Office and Board do not have to take into account any evidence or proof relating to the matter at hand, but should take it into account if it is available.

A *Impact of Living Word*

The case of *Living Word Distributors Ltd v Human Rights Action Group (Living Word)* concerned the classification of a video addressing the “gay agenda”.¹³ There was an issue with the video fitting within the gateway provision in s 3(1) of the FVPC Act. The Office initially classified the videos as R18, stating that although the videos did not depict specific matters of sex, horror, crime, cruelty, or violence they could be brought within the definition of “objectionable” under the Act.¹⁴ The Board classified both videos as objectionable.¹⁵ The Court of Appeal, however, found that the qualifiers under s 3(1) restricted the gateway solely to subjects listed in the statute.¹⁶ Moreover, the publication would have to depict actions of those subjects, not merely opinions concerning them.¹⁷

This judgment significantly narrowed the gateway provision of s 3(1) and sparked debate about how far the powers of the Office and Board could really extend. A publication could no longer be classified unless it dealt specifically with one of the five topics under s 3(1). A Government Administration Committee inquiry into the legislation after *Living Word* expressed concern about uncertainty of the jurisdiction of the OFLC in areas concerning

¹¹ Section 3(3)(a) and (d).

¹² Sections 3(4)(a) and (d).

¹³ *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 at [2].

¹⁴ *Living Word*, above n 12, at [4], [22].

¹⁵ *Living Word*, above n 12, at [6].

¹⁶ *Living Word*, above n 12, at [27].

¹⁷ *Living Word*, above n 12, at [28].

nudity, offensive language, invasion of privacy, or mental illness.¹⁸ Ultimately there was a review of the legislation.

The Films, Videos, and Publications Classification Amendment Act 2005 contained a number of provisions which clarified some of the areas where *Living Word* had created confusion. Among the new additions to the FVPC Act was s 3A:

3A Publication may be age-restricted if it contains highly offensive language likely to cause serious harm

- (1) A publication to which subsection (2) applies may be classified as a restricted publication under section 23(2)(c)(i).
- (2) This subsection applies to a publication that contains highly offensive language to such an extent or degree that the availability of the publication would be likely, if not restricted to persons who have attained a specified age, to cause serious harm to persons under that age.
- (3) In this section, highly offensive language means language that is highly offensive to the public in general.

There is an element of discretion here: once the relevant body is satisfied there is highly offensive language, to such an extent or degree that it is likely to cause serious harm, it “may” age-restrict the publication. Even if the threshold is met, there is still an option to not place any restriction on the publication. However, the decision cannot be made arbitrarily: discretion ought to be exercised responsibly and in the public interest.¹⁹ The Office and Board, when exercising this discretion, should therefore also consider the public interest in the publication and its availability alongside the public interest in reducing the harms to society stemming from language use.

Alongside s 3A, the amendment introduced ss 3B-3D. Section 3B allows age restriction of a publication for specific reasons such as content detailing self-harm or degrading physical

¹⁸ Government Administration Committee *Inquiry into the Operation of the Films, Videos, and Publications Classification Act 1993 and related issues* (March 2003) at 16.

¹⁹ Timothy Endicott *Administrative Law* (3rd ed, Oxford University Press, Oxford, 2013) at 242.

conduct.²⁰ The legislation was passed with the intent of avoiding the narrowly interpreted gateway provision of s 3(1). When the amendment was first introduced into Parliament it was framed in the context of clarifying doubts raised by *Living Word* and extending the subjects under which the Office and Board could restrict a publication.²¹ Section 3D clarifies this by stating that ss 3A and 3B are not limited by s 3.

III Approach of the Office

The approach of the Office to the application of s 3A has been somewhat inconsistent since the section was introduced.²² There is a lack of regularity in which words are considered highly offensive, and which harms are deemed serious, and the NZBORA is not so much applied as mentioned in passing. The decisions themselves are reasonably similar in their layout. The Office begins with a synopsis of the publication, and moves on to consider the publication under the s 3(1) gateway and, if applicable, the matters under s 3(2), and then with respect to ss 3A and 3B. The Office will then usually consider the relevant matters under s 3(4), and in an overall conclusion weigh up the total potential harms of the publication and the likelihood of injury to the public good in order to reach a final decision on the rating. It undertakes a much more detailed analysis with books and other miscellaneous mediums than with films.

A Interpretation of “highly offensive”

When applying s 3A, the Office must first establish whether there was use of highly offensive language. The Office's decision will usually identify the relevant offensive language and give some examples, most commonly “fuck” and its derivatives. The reasons behind the classification of the language as “highly offensive”, however, vary. In the

²⁰ FVPC Act s 3B (3)(a)(i), (iii).

²¹ (2 March 2004) 615 NZPD 11457.

²² Information for this section was gathered by looking at reports from the Office on age-restricted publications, as well as some which were objectionable. The research covered decisions from 2008 to the present on the online database of decisions found at <www.classificationoffice.govt.nz/find-ratings/find-ratings.html>. A selection of 30 films were reviewed, with an aim to include a proportionate amount of age restrictions and years. All books containing an age restriction and/or an offensive language warning were reviewed, as well as other miscellaneous publications which were likely to discuss issues s 3A.

documentary *Pearl Jam Twenty*, the word “fuck” was considered to be “offensive in nature”, indicating that no matter where it is used it will be considered to qualify as highly offensive language under 3A.²³ Similarly, in its review of the book *Down Under the Plum Trees*, the Office stated that the use of words such as “fuck” and “cunt... have never been fully accepted as legitimate in material intended for public consumption”, which is further evidence that the Office may consider such words as naturally highly offensive.²⁴

However, there have been a few rare cases where the Office does not consider the use of such words as highly offensive. Despite previous indications that words such as “fuck” are offensive in their very nature, the Office takes a different route and considers other factors which could change whether the words used were highly offensive to the public in general. In *The Message*, a spy thriller film containing multiple torture scenes, the Office held that the use of the word “fuck” was not highly offensive, as its use under the circumstances was not “particularly unwarranted” – it is not unreasonable to expect offensive language when a person is being tortured.²⁵ In that case, the Office appeared to take into account the context in which the word was used as a contributing factor to how offensive it would be. Similarly, in the book *Bloody Mama*, which concerned the life of a criminal matriarch and the exploits of her family, the word “fuck” was only referred to as “coarse language” and was “not likely to... be considered ‘highly offensive’” because it was used infrequently.²⁶ In that case the OFLC seemed to find the language less offensive because it was used less often, despite the fact that the word itself could be deemed to be offensive in its own right according to some of its previous statements.

What appears to be happening in these anomalous cases is a confusion between what is relevant when assessing whether language is highly offensive. Is it necessary to refer only to individual words and phrases which, regardless of the context, could be considered offensive in their own right? Or should there be an examination of the context in which the

²³ OFLC 1100878 – *Pearl Jam Twenty* at 1.

²⁴ OFLC 1400241 – *Down Under the Plum Trees* at 9.

²⁵ OFLC 0901368 – *The Message* at 2.

²⁶ OFLC 1101225 – *Bloody Mama* at 7.

language is used? The Office has taken both approaches at various points in time, although it seems to prefer the first.

B Investigation of harm

More inconsistencies appear when the Office addresses the issue of harms arising from use of highly offensive language. The language must be used to “such an extent or degree” in the relevant publication that it would be likely to cause “serious harm” to a viewer under the recommended age.²⁷ However, the Office does not always address the issue of harm.

In some cases, the Office will identify highly offensive language in the publication but will not go on to consider the harms that could result from the use of the language. There may simply be a statement that the use of highly offensive language supports a restriction.²⁸ In some reports, there is a mention of the context in which the language is used that indicates “extent and degree” analysis – such as the frequency with which the language is used, whether it is used aggressively, threateningly, sexually, or humorously, or the general impact of the language – but there is no mention of whether there is any possible harm resulting from the extent or degree of use.²⁹ In some reviews, the Office conducts a general discussion of harm in the conclusion of their findings, but does not always mention harm specifically as it relates to highly offensive language. For instance, in the report of the film *Fifty Shades of Grey*, the harm discussion does not refer to offensive language – only to sexual activity, despite the Office finding that there was some use of highly offensive language. Thus the requirements of s 3A are not always fully discussed.

There are a number of cases in which the Office does identify harms that arise from the frequent use of offensive language. In most cases, the harms identified are inuring children

²⁷ FVPC Act, s 3A(2).

²⁸ See for example OFLC 1000074 – *The Book of Eli* at 2; OFLC 1200173 – *The Grey* at 3; OFLC 1500948 – *Grimmsby* at 3.

²⁹ See for example OFLC 1200609 – *Fifty Shades of Grey* (book) at 8; OFLC 1100868 – *TT3D: Closer to the Edge* at 1-2; OFLC 1600044 – *Deadpool* at 3; OFLC 0802501 – *Revolutionary Road* at 2.

to offensive language and encouraging its use.³⁰ In some cases the harms go further, stating that if children become desensitised they could use the language inappropriately, leading to alienation or a damaging impact on socialisation.³¹ When offensive language is used particularly in an aggressive or threatening manner, the Office has identified a harm of disturbing children or causing distress but does not cite any research in its reports.³²

Moreover, the level of harm which the Office attributes to consequences varies. Occasionally it states the possible consequence of the language use in the film without identifying how serious the harm really is.³³ In some cases, the desensitisation of young people to offensive language and resulting emulation is called an “adverse effect” rather than an outright harm.³⁴ This could be the Office simply substituting one term for another, but “adverse effect” does not really indicate that the consequence is of the same severity as a “serious harm”.

In other reports, the Office has referred to normalisation of highly offensive language as a harm that is not serious enough to warrant an age restriction.³⁵ But in several reviews, the Office explicitly identifies normalisation and encouragement of use of highly offensive language, or the alienation or intimidation which could result from this, as a “serious harm”.³⁶ The reason behind these conflicting reports could be connected with the type of publication that the Office is classifying. When a publication contains material such as violence or sexual themes alongside offensive language, the use of offensive language could be associated with that material and result in the perception that there is quite significant harm attached to the normalisation of using offensive language in general.

³⁰ See for example OFLC 0901410 – *Zombieland* at 3; OFLC 1201057 – *The Master* at 2; OFLC 1001135 – *Predators* at 2.

³¹ See for example OFLC 1400246 – *American Psycho* at 7; OFLC 1200347 – *The Dictator* at 2; OFLC 1500092 – *Unfinished Business* at 2.

³² See for example OFLC 1500517 – *Southpaw* at 2; *American Psycho*, above n 30, at 7.

³³ See for example OFLC 1200424 – *Safe* at 2; OFLC 1500108 – *Ex Machina* at 2; OFLC 1500142 – *Slow West*, at 2.

³⁴ OFLC 1300573 – *The Bling Ring* at 2; *Southpaw*, above n 32, at 2.

³⁵ OFLC 1100691 – *Go the Fuck to Sleep* at 6; *Pearl Jam Twenty*, above n 23, at 1.

³⁶ See for example *Zombieland*, above n 30, at 3; *Unfinished Business*, above n 31, at 2; *The Master*, above n 30, at 2.

However, when a publication contains offensive language without other offensive or harmful material, the idea of normalising the language does not seem quite as serious.

For example, in *Go the Fuck to Sleep*, a book for adults presented as a children's bed-time story, the only complaint was the frequent (but comedic) use of highly offensive language.³⁷ It was rated unrestricted. The Office identified the use of highly offensive language and the possibility of children or young people being inured to it, but considered the harm mitigated by the responsibility of parents and caregivers to control the content viewed by children. However, reports which identified emulation as a serious harm also usually had content warnings for various combinations of violence or graphic violence, sexual references, nudity, and drug use.³⁸ Thus the offensive language was used more often or in a more threatening, aggressive or derogatory way than if it was only used casually or humorously. Any consequences from emulating this kind of language could seem harsher as a result.

The many different ways in which the Office classifies harm leads to some confusion – for instance, desensitisation to and encouragement of highly offensive language sometimes considered a serious harm and sometimes something less. The approach that the Office takes towards categorising the level of harm resulting from desensitisation or emulation should remain constant.³⁹

C Application of the NZBORA

The Office did not discuss the NZBORA in its classification of films until around 2013.⁴⁰ However, it has always been referred to when considering other publications. Usually the relevant provisions of the NZBORA (ss 14, 5, and 6) are set out and any discussion is in

³⁷ See *Go the Fuck to Sleep*, above n 35; *Pearl Jam Twenty*, above n 23.

³⁸ See for example *The Dictator*, above n 31; *The Master*, above n 30; *Unfinished Business*, above n 31; *Zombieland*, above n 30.

³⁹ *American Psycho*, above n 31, at 7.

⁴⁰ In the film titles reviewed there was no mention of the Bill of Rights until 2013, but since only a selection of titles was examined the Bill of Rights could have been considered earlier. Given the relative consistency of reports this seems unlikely.

the form of one or two sentences in the general conclusion once all the relevant factors have been considered under s 3, 3A and 3B of the FVPC Act.

The sentences have varying phrasing but all tend to indicate that the Office has decided that the restriction is justifiable (or not, as the case may be).⁴¹ Sometimes it will mention weighing the protections under the NZBORA against the harms resulting from the publication,⁴² or that to place a certain restriction would be an unnecessary limit on the freedom of expression.⁴³ Usually these sentences will come immediately before or after a discussion of whether the publication can be injurious to the public good.

Occasionally the Office has stated that their restriction is inconsistent with the freedom of expression contained in the NZBORA, but is justified because it is consistent with s 3 of the FVPC Act, the publication being injurious to the public good.⁴⁴ Essentially the Office is stating that it does not have to consider freedom of expression because the restriction is allowed by s 3. This reasoning moves the Office away from balancing harms with the benefits of freedom of expression as it is required to do under the NZBORA and ignores the discretion given to it under the FVPC Act.

When the Office does mention the NZBORA it does so in a very general manner – there is usually only one short discussion which encompasses the harms of all three sections under which a publication can be restricted. This means that it becomes unclear whether a publication is restricted under ss 3, 3A, or 3B. Most often it appears to be a combination of multiple sections, particularly ss 3 and 3A. However, these sections have slightly different tests: s 3 requires a test considering whether the publication is likely to be injurious to the public good, while s 3A requires the publication to cause serious harm to younger viewers. Each provision has a slightly different purpose and requires a slightly different approach under the NZBORA, or at least clarification as to how the relevant restriction was being

⁴¹ See for example *Go the Fuck to Sleep*, above n 35, where a restriction was not justified with mention of the Bill of Rights, and *American Psycho*, above n 31, where a restriction was justified.

⁴² OFLC 1400235 – *Last Exit to Brooklyn* at 12.

⁴³ *Down Under the Plum Trees*, above n 24, at 11.

⁴⁴ See for example *Slow West*, above n 33, at 2.

justified. In its most recent decisions concerning *Wicked Campers*, the Office has moved towards this kind of discussion. In its conclusion it makes specific reference to s 3A and states a restriction would “be neither reasonable nor justified” under that specific section.⁴⁵ This approach appears to be unique to the *Wicked Campers* series of decisions, but if it were more widely adopted could improve the quality of decisions produced by the Office and the Board.

IV Approach of the Board

The Board’s approach to applying s 3A has changed with its leadership.⁴⁶ Until 2010, the Board’s decisions were laid out under headings relating specifically to each part of the legislation. In many cases where s 3A was irrelevant it would not be included in reports.⁴⁷ After a change of leadership in 2010 the Board’s approach became less formally structured, meaning that at times it is unclear which section of the legislation is being addressed. When it does discuss s 3A, the Board identifies language but rarely refers to harms that result from it. The NZBORA is not consistently discussed in more recent decisions.

A Discussion of s 3A

When it discusses s 3A, the Board has with relative consistency identified certain words as “highly offensive” in a similar manner to the Office, mainly “fuck” and its derivatives.⁴⁸ In some reports the language is commented on as being offensive, but is not mentioned in the context of s 3A and no further analysis is undertaken.⁴⁹ The Board does not call any word inherently offensive, but it also does not enter into a discussion of whether context

⁴⁵ *Wicked Camper DZQ882*, above n 2, at 11.

⁴⁶ The president of the Film and Literature Board of Review (Board) changed to Dr Don Mathieson in 2010 (<www.beehive.govt.nz/release/new-appointments-film-and-literature-board-review>). All decisions involving offensive language from 2008 to present were examined, accessed via <www.dia.govt.nz>.

⁴⁷ See for example Film and Literature Board of Review decision regarding *End of the Spear* (2 July 2008), a film with no offensive language and no mention of s 3A in the report.

⁴⁸ See for example Film and Literature Board of Review decision regarding *Two Little Boys* (14 September 2012) at [10].

⁴⁹ See for example *Two Little Boys*, above n 48, at [10].

makes a word more or less offensive. This could indicate that the board is taking “fuck” and its derivatives to be inherently offensive, similar to the main approach of the Office.

The Board’s discussion of harm has been almost non-existent. In two decisions it has restricted a publication under s 3A and neither contain a discussion of harm. In the first, the game *Grand Theft Auto IV (unedited version)* was classified R18 based on the term “mother fucker” as well as other expletives being highly offensive and likely to cause serious harm.⁵⁰ When identifying harm, the Board referred to the Office’s research as authority for the fact that the term “mother fucker” was of limited social acceptance, but did not further explain any form of potential serious harm.⁵¹ In the second decision, the film *Black Mass* was classified R16. This decision was somewhat unique as the Board stated that it was unnecessary to apply the entirety of the law since s 3A and s 3B both clearly applied.⁵² However, the Board merely identified the word “fuck” and its derivatives as highly offensive and stated that they were used to express anger and intimidate.⁵³ No serious harms were discussed at all.

B Application of the NZBORA

In its pre-2010 decisions, the Board included at the end of their decision a lengthy boilerplate passage describing the decision and five-step test laid out in *Moonen v Film and Literature Board of Review*.⁵⁴ Essentially the Board laments the difficulty of applying the test but attempts to do so anyway. What results is a brief discussion of the importance of freedom of expression and purpose of the FVPC Act to protect the general public, finished with a statement that the restriction placed by the Board is justified. It appears to be a more long-winded version of the Office’s interchangeable statements concerning consideration of the NZBORA: an attempt to make it clear that there has been application,

⁵⁰ Film and Literature Board of Review decision regarding *Grand Theft Auto IV (Unedited Version)* (17 September 2008) at [94].

⁵¹ *Grand Theft Auto*, above n 50, at [94].

⁵² Film and Literature Board of Review decision regarding *Black Mass* (12 October 2015) at [9], [11].

⁵³ *Black Mass*, above n 52, at [10].

⁵⁴ See for example *Grand Theft Auto IV (Unedited Version)*, above n 50, at [95]-[103]. The test can be found in *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 9 (CA) at [17]-[18].

but no in depth analysis. Additionally, this systematic approach does not consider the separate sections but the legislation as a whole, which is (as mentioned above) a failure to recognise the different standards set by the sections of the legislation.

In decisions after 2010, the Board has been sporadic in its mentions of the NZBORA, moving more towards the approach of the Office. When classifying the film *Two Little Boys* the Board did not mention the NZBORA.⁵⁵ The film *The Girl with the Dragon Tattoo* received its R16 rating under s 3B with the Board “having regard to” freedom of expression.⁵⁶ This shows that the Board at least considered the importance of the NZBORA in their decision, although it is unclear as to how.

However, in its decision in *Black Mass* the Board stated that while it was “conscious of” rights under the NZBORA, section 3A “plainly applies and limits that right”.⁵⁷ Similarly to the Office, the Board occasionally mentions the NZBORA as though it is expressly overridden by s 3A (or the FVPC Act in general), but as previously stated this approach ignores the balancing required by the NZBORA and the discretion of the Board.

C Summary and comparison

Overall the approach of both the Board and the Office to the application of s 3A has been reasonably inconsistent. In some cases, especially in decisions of the Office, certain words are considered naturally offensive and in others the same words are not. Sometimes there is no discussion of the extent and degree of the language, or there is no discussion of harm. While the Office at times gives very detailed discussion of highly offensive language and the harms thereof, it also often fails to do so adequately, or in a manner that is consistent and predictable. The Board often fails to discuss harm in any manner whatsoever. While the NZBORA is usually always considered (with a few exceptions by the Board), the way it is applied does not always have the same level of consistency and it is occasionally

⁵⁵ *Two Little Boys*, above n 48.

⁵⁶ Film and Literature Board of Review decision regarding *The Girl with the Dragon Tattoo* (10 February 2012), at [17].

⁵⁷ *Black Mass*, above n 52, at [12].

ignored completely by both the Office and the Board when they state that its inconsistency with the FVPC Act effectively binds their decisions.

The approaches of the Office and Board raise a number of issues. There is much consistency to be desired of their approach to interpreting offensive language and serious harm, and the application of the NZBORA is minimal. However, if the Office and Board recognise relevant research and take a more in-depth approach to the NZBORA, it is suggested that the considerations and balancing this requires could lead to an approach that is more regulated and predictable.

V Research Surrounding Highly Offensive Language

In order to properly and consistently assess whether an age restriction is justified under s 3A, the Office must have an accurate understanding of what constitutes highly offensive language.

A Offensive language

The analysis of harm under s 3A is only triggered once there is use of “highly offensive language”. However, most scholars accept that language in general has no inherent moral meaning.⁵⁸ Words are simply words: yet in our society some words cause more offense than others. It is not the words themselves that are offensive, but the ideas that they convey, which we learn through socialisation.⁵⁹

Since socialisation plays such a large part in the level of offensiveness attached to a word, culture is a major factor in whether a word is found offensive. Research by New Zealand’s Broadcasting Standards Authority (BSA) assesses the level of offensiveness attached to

⁵⁸ Timothy Jay “Do Offensive Words Harm People?” (2009) 15 Psychol. Public Policy law 81 at 81; Christopher M Fairman “Fuck” (2007) 28 Cardozo L Rev 1711 at 1724; Melanie C Burns “Why We Swear: The Functions of Offensive language” 6 MULP 61 at 61; Dale L Cressman, Mark Callister, Tom Robinson and Chris Near “Swearing in the Cinema: An Analysis of Profanity in US Teen-Oriented Movies” 3 J Child Media 117 at 119.

⁵⁹ Cressman, Callister, Robinson and Near, above n 588, at 120; Burns, above n 54, at 66

words in New Zealand, and their report is a good starting point for assessing their acceptability in publications.⁶⁰ From this report it can be seen that in New Zealand the most offensive terms are usually ethnic slurs and sexual language, while religious and excretory profanity are more acceptable.⁶¹ In recent years, audiences have become more tolerant of offensive language.⁶² However, social science research indicates that there are a number of factors which impact the offensiveness of language beyond its social acceptability.

B Aggravating and mitigating factors

Various amounts of social science research have shown that different words have different levels of offensiveness, and even the same word can be more or less offensive depending on particular circumstances.

Swearing can be intentional or unintentional, and it is intentional swearing which has the highest potential to be offensive.⁶³ Swearing that is unintentional – for example, as a response to pain – is less likely to offend and more likely to be seen as an emotional outburst.⁶⁴ In contrast, swearing which is intentional can be purposefully polite or impolite, and so have a more definite impact on the level of offense caused.⁶⁵ Therefore the offensiveness of a taboo word depends on how intentional its use was.

When taboo language is used intentionally, its level of offensiveness can vary depending on the situation. One major factor in the level of offense is in the social setting. Taboo language can be used in group settings to include or ostracise people, and there are certain situations where it will be far less suitable to use: for instance, one is more likely to hear

⁶⁰ See Broadcasting Standards Authority *What Not to Swear: The Acceptability of Words in Broadcasting* (Broadcasting Standards Authority, 2013). This and previous reports can be found at <www.bsa.govt.nz>.

⁶¹ Broadcasting Standards Authority, above n 62.

⁶² *Litmus Testing 2016* (Nielsen, June 2016) at 41.

⁶³ Timothy Jay and Kristin Janschewitz “The Pragmatics of Swearing” (2008) 4 *Journal of Politeness Research* 267 at 270.

⁶⁴ Jay and Janschewitz, above n 63, at 270.

⁶⁵ Jay and Janschewitz, above n 63, at 270.

taboo words in a relaxed setting at a pub than in an office environment.⁶⁶ An environment where parties are more relaxed and socially equal is an environment where taboo language is less offensive.⁶⁷ Additionally, ethnicity is also closely linked to the acceptance of particular words. One study has found that the already highly offensive racial slur “nigger” was even more offensive when used by a white person.⁶⁸ The social environment in which the swearing takes place including social class and ethnicity also has an impact on offensiveness.

Intentional swearing can also be more offensive when it is used to be purposefully impolite. When it is used to attack or bully someone or to gain power over another person, it can be seen as more offensive than if it is used to describe something positive.⁶⁹ Thus the situation and context of the event in which the swearing takes place can make the use of language either more or less offensive: for instance, hitting someone while saying “fuck you” is more offensive than describing a meal as “fucking brilliant”.

C Implications

Currently the Office and Board both lean towards identifying some words, mostly “fuck” and its derivatives, as inherently highly offensive. This is an approach which is not supported by the current research. While some words are definitely not socially acceptable to New Zealanders – and some more offensive than others – there are a number of factors which should be taken into account when a word is being defined as meeting the threshold of “highly offensive”.

When analysing the language in a film, the Office and Board could first look to the research of the Broadcasting Standards Authority to discern whether any of the language could be considered offensive by New Zealand Standards. Then they should further

⁶⁶ Burns, above n 58, at 64; Jay and Janscewitz, above n 63, at 273.

⁶⁷ Jay and Janscewitz, above n 63, at 273.

⁶⁸ Lora Jacobi “Perceptions of Profanity: How Race, Gender, and Expletive Choice Affect Perceived Offensiveness” (2014) 16 N Am J Psychol 261 at 261.

⁶⁹ Jay and Janscewitz, above n 63, at 270.

investigate whether that language could truly be considered “highly offensive to the public in general” by looking to the context in which the language was used.

Language will be less offensive if used involuntarily as an expression of emotion, in a positive or humorous manner, or in a casual setting between equals. It will be more offensive if used intentionally in a setting where there is a level of formality or social inequality, or in a manner which is violent, degrading, or dominating. A word which is considered more naturally offensive may not need as many aggravating factors to be considered offensive, while a word that is relatively socially acceptable may need to meet a higher threshold to be considered highly offensive under the Act.

The Office has already undertaken this approach to an extent in some of its decisions, including some of its 2016 reports on *Wicked Campers*.⁷⁰ However, the Board continues to classify words as “highly offensive” despite their context – for instance, they term “wankers” as highly offensive even though its use in *Into the River* was amongst a group of schoolboys, a casual setting where such language is common.⁷¹ A proper discussion of the context of the language would help to align the decisions of the bodies and make them more accurate.

VI Research surrounding serious harm

While the Board has neglected to address harm in almost every case, the Office has identified some forms of harm such as encouraging increased use of offensive language and becoming shocked or disturbed. These harms have not been identified as serious consistently. A closer observation of research surrounding the harms resulting from highly offensive language could result in better understanding of what really constitutes serious harm and what would not be a harm capable of justifying a restriction. There are a number of possible harms that can result from the use of offensive language both for those who are hearing the language and for those who are using it for themselves.

⁷⁰ See for example *Wicked Camper DZQ882*, above n 2, at 8.

⁷¹ Film and Literature Board of Review decision regarding *Into the River – majority decision* (2013) at [33].

A Increased use of offensive language

The Office frequently identified increased use of offensive language as a harm in and of itself resulting from exposure to highly offensive language.⁷² Research indicates that increased exposure to a practice or idea in the media could result in the viewer echoing that behaviour. Cultivation theory suggests that heavy exposure to media messages will help to shape a person's view of reality, while social learning theory suggests that humans learn not only through personal experience but through observation of external sources, including the media.⁷³ Since young people are still developing behavioural constructs, they can be particularly vulnerable to media messages, including use of highly offensive language.⁷⁴ They can especially become desensitised to the use of such language and increase its use in their own personal lives.⁷⁵

However, the use of offensive language is not always harmful in and of itself. Research has shown that it can even be beneficial at times. Swearing is linked to a separate part of the brain than ordinary language and is strongly tied to emotional responses.⁷⁶ It can be used to communicate emotions that cannot be expressed with regular language.⁷⁷ A verbal outlet of emotion can also be a preferable alternative to physical expression of frustration.⁷⁸ There is even evidence to suggest that swearing heightens a person's pain threshold under certain circumstances – although this only works for those who do not swear frequently already.⁷⁹

⁷² See for example *The Master*, above n 30; *The Dictator*, above n 31.

⁷³ Cressman, Callister, Robinson and Near, above n 58, at 118.

⁷⁴ Sarah M Coyne, Laura A Stockdale, David A Nelson and Ashley Fraser "Profanity in Media Associated with Attitudes and Behaviour Regarding Profanity Use and Aggression" 128 *Pediatrics* 867 at 868.

⁷⁵ Coyne, Stockdale, Nelson and Fraser, above n 74, at 868

⁷⁶ Timothy Jay "The Utility and Ubiquity of Taboo Words" (2009) 4 *Perspect, Psychol. Sci.* 153 at 155; Burns, above n 54, at 67.

⁷⁷ Jay "The Utility and Ubiquity of Taboo Words", above n 76, at 155.

⁷⁸ Jay "The Utility and Ubiquity of Taboo Words", above n 76, at 155.

⁷⁹ See Richard Stephens, John Atkins and Andrew Kingston "Swearing as a Response to Pain" (2009) 20 *Neuroreport* 1056; Richard Stephens and Claudia Umland, "Swearing as a Response to Pain – Effect of Daily Swearing Frequency" (2011) 12 *J. Pain* 1274.

In addition, children do not learn swearing solely from media. Societal “rules” for swearing are also learned through socialisation from an early age, and from adult speech patterns.⁸⁰ The influence of media may be negated by these more prevalent sources.

Use of offensive language in general is not necessarily harmful in and of itself, but increased swearing could lead to a number of other harms. The question is whether these harms are enough to justify any restriction.

B Social embarrassment

When s 3A was passed in 2005, the Office conducted its own research to determine the level of harm that might occur from the use of highly offensive language. It surveyed members of the public to determine potential harms, and the general consensus was that offensive language was capable of causing harm to the young people that used it, but it was mainly an issue of public image.⁸¹ If young people were heavily exposed to offensive language in the media then it could become normalised and lead to more frequent use by young viewers, which could in turn lead to inappropriate use of the language.⁸² According to the participants, this could lead to embarrassment or a lack of respect for the young person using the language.⁸³ They observed that it was important for children to learn when it was and was not appropriate to use offensive language, and showed particular concern where offensive language was used to attack or degrade others as opposed to when it was used casually or in humorous circumstances.⁸⁴

Scholars have identified the possible interpersonal costs of increased swearing including speaker credibility and prejudice stemming from use of offensive language in inappropriate circumstances.⁸⁵ However, it is questionable as to whether this harm is “serious” enough to warrant restriction.

⁸⁰ Melanie C Burns, above n 58, at 66.

⁸¹ Office of Film and Literature Classification and UMR Research Ltd *Public Perceptions of Highly Offensive Language* (Office of Film and Literature Classification, November 2007) at 10.

⁸² Office of Film and Literature Classification and UMR Research Ltd, above n 81, at 10.

⁸³ Office of Film and Literature Classification and UMR Research Ltd, above n 81, at 10, 26-27.

⁸⁴ Office of Film and Literature Classification and UMR Research Ltd, above n 81, at 63.

⁸⁵ Jay “The Utility and Ubiquity of Taboo Words”, above n 76, at 160; Burns, above n 54, at 67.

C Emotional distress

While there is no evidence of emotional harm from the use of conversational or cathartic swearing, there is a possibility that some emotional distress could be caused by harassment, discrimination, or other forms of offensive language which are aimed directly at a person.⁸⁶ Verbal aggressiveness can cause psychological pain, embarrassment, and feelings of despair and inadequacy, but it is important to note that verbal aggressiveness is not necessarily limited to offensive language – it can also include hurling insults and making threats which do not include language that would necessarily be classed as highly offensive.⁸⁷ In such cases the film could probably be classified under the “cruelty” gateway of s 3.

All research in this area has been undertaken in situations where there is direct communication between an abuser and a victim.⁸⁸ Therefore the harm that could result from a young person feeling victimised by a message that they see in a publication may not be as distinct or serious as if they were being personally abused. At this point research in this area is lacking, primarily because of the difficulty of gathering any information in an ethical manner.⁸⁹

D Physical aggression

There has been one study which loosely links an increased exposure to highly offensive language to relational and physical aggression. The study involved a survey of 223 middle school students in the United States of America, and found correlation between increased levels of offensive language in media and more casual views about offensive language in general.⁹⁰ This in turn was linked to an increase in use of offensive language, which was

⁸⁶ Jay “Do Offensive Words Harm People?”, above n 58, at 93.

⁸⁷ Dominic A Infante, Bruce L Riddle, Cary L Hovarth and S A Tumlin “Verbal Aggressiveness: Messages and Reasons” 40 *Commun Q* 116 at 116; Annette R Pejic “Verbal Abuse: A Problem for Pediatric Nurses” 31 *Pediatr Nurs* 271 at 271.

⁸⁸ In Jay “Do Offensive Words Harm People?” above n 58, Jay focuses on offensive telephone calls; in Infante, Riddle, Hovarth and Tumlin, above n 87, focus is on interactions between students; in Pejic, above n 87, focus is on interactions between nurses and patients.

⁸⁹ Cressman, Callister, Robinson and Near, above n 58, at 121.

⁹⁰ Coyne, Stockdale, Nelson and Fraser, above n 74, at 868-869.

finally linked to increased instances of physical and relational aggression.⁹¹ The results found no proof of causation, however, and there do not appear to have been many other studies in this area to either confirm or deny the results.⁹² Still, the possibility of increased aggression as a result of offensive language could be one that may become more relevant in the future, and physical aggression could propose a more serious harm to be taken into consideration.

E Implications

The Office has identified nearly all of the listed harms in its reports. However, it sometimes does not mention harm at all and the Board even less so, despite the requirement of “serious harm” in the legislation.⁹³ Additionally, the seriousness that the Office attaches to any harm tends to fluctuate. It is suggested that by incorporating the relevant research into their reports, the Office and Board can come to more consistent conclusions surrounding the harms resulting from offensive language.

When discussing harm, the Office and Board could look to both the frequency and context of the offensive language. If a publication has a large amount of offensive language in it, children will be more likely to emulate the language. However, this on its own is probably not enough to be considered “serious harm”. Something more is needed, such as social embarrassment or emotional harm. If the language used is mostly in socially inappropriate situations such as formal outings or when threatening someone, it is more likely to be emulated in an improper way so could cause more social embarrassment than if it were used in more acceptable conditions such as in a casual situation. Similarly, if language is used in a way that could cause a viewer to feel personally attacked, such as when aimed towards a specific ethnic or religious group, it would be more likely to cause emotional harm than if it was aimed at a particular character or used as an expression. The higher the frequency of language specific to these harms, the more serious the potential overall harm.

⁹¹ Coyne, Stockdale, Nelson and Fraser, above n 74, at 869.

⁹² Coyne, Stockdale, Nelson and Fraser, above n 74, at 871.

⁹³ FVPC Act s 3A.

Deciding whether a harm is a serious one is not a straightforward consideration, especially when publications can have other content which might cause injury to the public. As well as considering the frequency with which the particular language causing the harm arises, the Office and Board could consider the effect that social conditioning and parental control have on curbing any harm. Finally, the Office and Board should take a more detailed and consistent approach to the NZBORA in order to determine whether a harm is serious enough to warrant a restriction of rights.

VII Significance of the NZBORA

Given the nature of its powers and its ability to restrict the freedom of expression, the Office and Board must consider the NZBORA. A proper discussion could also assist in reaching decisions that have a more in-depth and consistent discussion of harm.

A Applying the NZBORA

The NZBORA applies to bodies in the performance of any public function, power or duty that is conferred or imposed by law.⁹⁴ The Office and Board make decisions under authority given to them by statute, which brings them within the scope of the NZBORA.⁹⁵ When making a decision to restrict a publication under s 3A, the Office and Board restrict the freedom of expression of the creator of the publication, as well as the ability of the general public to access, analyse, and discuss it. Such rights and freedoms are protected under s 14 of the NZBORA.⁹⁶

Section 6 of the NZBORA requires that enactments should be read, where they can, as having a meaning consistent with the freedoms contained within the Act. In the past this has been used in situations such as *Moonen* where there are multiple interpretations of the

⁹⁴ New Zealand Bill of Rights Act 1990 s 3.

⁹⁵ The Office and Board were created by ss 76 and 91 of the FVPC Act respectively. See also *Moonen v Film and Literature Board of Review*, above n 54, at [28]; the pre-2010 boilerplate used by the Board: see for example *Grand Theft Auto IV (Unedited Version)*, above n 50, at [96]-[97].

⁹⁶ Section 14 states “[e]veryone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions in any kind in any form”.

FVPC Act available and the Office and Board must choose which one to apply.⁹⁷ However, s 6 also requires more generally that statutes ought to be read subject to the NZBORA unless it is clear from the context that they cannot.⁹⁸ This means that it applies not only to interpretation of words in the legislation, but to the decision making process undertaken when classifying publications, which is often an assessment of degrees of infringement rather than comparing distinct definitions.⁹⁹

No right is absolute under the NZBORA.¹⁰⁰ When assessing whether there is infringement in its decision making, the Office and Board should consider whether their decision is consistent with the right as reasonably limited, rather than the absolute right.¹⁰¹ Only if the right cannot be reasonably limited should any kind of inconsistency be addressed. The test adopted in *R v Hansen* to determine whether a right was reasonably justified has been criticised as overly technical and difficult for administrative tribunals to apply.¹⁰² It has been suggested that it should be dropped in favour of a less complex balancing of values underlying the relevant right and relevant statute.¹⁰³ In terms of the FVPC Act, this would involve a balancing of the values behind the freedom of expression with the values behind the statute itself, as they relate to the specific publication.

⁹⁷ Moonen, above n 54, at [28]. See also *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

⁹⁸ Claudia Geiringer and Steven Price, “Moving from Self-Justification to Demonstrable Justification – the Bill of Rights and the Broadcasting Standards Authority” in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation* (LexisNexis, Wellington, 2008) 295 at 302-303. The research in this chapter refers specifically to the Broadcasting Standards Authority, but the reasoning is useful when considering administrative bodies in general, including the Office and Board.

⁹⁹ Geiringer and Price, above n 98, at 302-303.

¹⁰⁰ New Zealand Bill of Rights Act 1990, s 3.

¹⁰¹ *R v Hansen*, above n 97, at [88] and [91] per Tipping J; Meredith Webb “Applying the Bill of Rights in the New Zealand Context” (2007) 13 Auckland U L Rev 217 at 218; Geiringer and Price, above n 98, at 303.

¹⁰² Geiringer and Price, above n 98, at 316. The Board of Review have also frequently expressed their difficulty in applying the similarly technical *Moonen* test – see for example *Grand Theft Auto IV (Unedited Version)*, above n 50, at [98].

¹⁰³ Geiringer and Price, above n 98, at 316. Also see for example *Television New Zealand Limited v West* [2011] 3 NZLR 825 (HC) at [98] where the High Court held that the Broadcasting Standard Authority’s process should not be “excessively judicialise[d]”.

B Freedom of Expression

An understanding of the purpose of the freedom of expression is vital in order to determine whether a restriction is justified. The NZBORA states that “[e]veryone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions”.¹⁰⁴ This right is “as wide as human thought and imagination”.¹⁰⁵

Freedom of expression is widely accepted as being deserving of protection for a number of reasons. The most common justifications are that protection provides society with a way to search for the truth, to participate fully in a functioning democracy, and to be a healthy and functioning individual.¹⁰⁶ An alternative conception of the freedom of expression asserts that allowing circulation of information encourages development of characteristics which are desirable for a fully functioning society.¹⁰⁷ Excessive censorship actively discourages discourse, but allowing freedom of expression encourages people to engage with opposing viewpoints, check and challenge facts and authorities, and compromise.¹⁰⁸ A person who readily engages in these practices becomes more inquisitive and creative, and is able to take initiative, question authority, and adapt to change.¹⁰⁹ Freedom of expression fosters the development of traits which are beneficial to wider society and can create informal checks and balances on false or harmful information, rather than requiring the intervention of the law.¹¹⁰

This social value must be balanced with the purposes of the FVPC Act when a publication is being classified, in order to properly discuss the NZBORA.

¹⁰⁴ New Zealand Bill of Rights Act s 14.

¹⁰⁵ *Moonen v Film and Literature Board of Review*, above n 54, at [15].

¹⁰⁶ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 523; Geiringer and Price, above n 98, at 320.

¹⁰⁷ Vincent Blasi “Free Speech and Good Character: From Milton to Brandeis to the Present” in Lee C Bollinger and Geoffrey R Stone (eds) *Eternally Vigilant: Free Speech in the Modern Era* (University of Chicago Press, Chicago, 2002) 61 at 62.

¹⁰⁸ Blasi, above n 107, at 67, 85-88.

¹⁰⁹ Blasi, above n 107, at 83-84.

¹¹⁰ Blasi, above n 107, at 94.

C Implications

Currently, the Office makes regular references to the NZBORA in its decisions, while the Board does so less regularly. Both the Office and the Board should strive to apply the NZBORA more consistently. Additionally, a balancing of the merit of the publication and the purpose of the FVPC Act could assist in a more thorough and consistent discussion of seriousness of harm.

When making decisions, the Office and Board should first consider whether the form of expression that is taking place is a significant one. If the publication aligns with the values behind the freedom of expression, such as communicating valuable social or political commentary or promoting discourse in the wider public, it will be less appropriate to restrict. Next, the purpose of the legislation should be assessed. While the FVPC Act in general purports to prevent harm to the public good by restricting access to harmful publications, ss 3, 3A, and 3B all have slightly different purposes and could justify a restriction in their own right. Section 3 focuses on general likelihood of injury to the public, while s 3A refers to serious harm to young persons. The NZBORA analysis should be directed at the sections individually so that each purpose can be fully discussed, but also to ensure that they are not confused. This would prevent the current situation where offensive language is often discussed along with s 3 material under a general injury test.

Finally, the merits of the publication should be weighed against the purpose of s 3A to determine whether a restriction is justified. The process is based on judgment rather than strict legality: if the publication has significant merit, there will have to be a significant level of harm caused to justify a restriction.¹¹¹ If the publication's language is likely to cause serious harm, there must be considerable merit to avoid restriction. This would particularly assist in determining what constitutes "serious harm" for the purposes of the legislation. Harms labelled "serious" in the past, such as using offensive language in inappropriate settings, are far less likely to be considered serious when balanced with the importance of protecting significant speech.

¹¹¹ Geiringer and Price, above n 98, at 335.

For example, the film *My Name is Joe* concerns life in the lower class in Scotland and depicts difficult decisions and consequences faced by those trapped in their way of life.¹¹² It depicts issues of drug and alcohol addiction and relationships through this lens and communicates a different version of reality to viewers. As such it is a piece with considerable artistic merit and causes the public to grapple with social issues.

The film was rated R16 by the Office in 2000 based on its extensive but realistic use of offensive language combined with the drug use and violence in the film.¹¹³ At the time, s 3A was not in effect and offensive language was analysed under the “injurious” standard along with other issues such as drug use and violence, but it remains an example of the analysis of offensive language in publications under the FVPC Act. When the film is analysed under the proposed approach, it could well result in a lesser restriction. Language is often used in ways that would not be considered highly offensive, such as among friends or team mates. When it is used in more highly offensive situations involving anger or violence, or threatening others, it presents the harms of being emulated in a way which may cause social isolation or embarrassment.

However, the publication is quite a valuable form of communication as it encourages discussion and consideration of difficult topics. The swearing, violence, and drug use are not gratuitous but realistic. It seems less justified to restrict such a film to those aged 16 years or older when the possible harms are weighed against the social importance of the film. The violence and drug use may, under the current legislation, be considered for a restriction in their own right, but an R16 restriction under s 3A is very unlikely.

Overall, it appears that the Office and Board should be very cautious before deciding that there is a serious harm created by the use of highly offensive language in a publication. It should not be influenced by the presence of other apparently harmful considerations under s 3, such as violence or nudity, and focus on the harm that is caused by the language itself, with the importance of freedom of expression acting as a measuring stick for consistency.

¹¹² *My Name is Joe* (1998).

¹¹³ OFLC 9003086 – *My Name is Joe* at 3.

The Board has observed the threshold of harm set by s 3A as a high one, and the relevant research supports that finding.¹¹⁴

VIII Conclusion

Section 3A of the FVPC Act has been applied constantly, but not consistently, since it was introduced in 2005. Both the Office and the Board have trouble identifying whether words can be considered to be highly offensive, and what harms are serious enough to warrant a restriction. Any application of the NZBORA is usually done in a bulk conclusion, creating confusion as to which part of the legislation has justified a restriction and neglecting to take into account the purpose of s 3A.

The Office and Board could both benefit from the research surrounding both offensive language and the harms it can cause. But a separate consideration of the NZBORA, and a measuring of those harms against the relative importance of the freedom of expression, would provide a more consistent way for both the Office and the Board to identify which harms are actually serious enough to result in a restriction. This could result in fewer restrictions under s 3A, and more clarity when it does become relevant. The majority of decisions may continue to be made in relation to the main gateway of sex, horror, crime, cruelty and violence, but more certainty in the law surrounding s 3A will lead to better understanding both for those enforcing the legislation and those seeking to abide by it.

¹¹⁴ *Into the River* – majority decision, above n 71.

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