

IN THE MATTER OF

The Films, Videos, and Publications
Classification Act 1993

AND

IN THE MATTER OF

an application under s47 by Sony
Pictures (NZ) Limited for a review
of the publication entitled:

Don't Breathe

SUBMISSION OF THE OFFICE OF FILM AND LITERATURE CLASSIFICATION

1. Tena koutou, tena koutou, tena tatou katoa. Kia piki te ora i roto i nga whakatua o te ra

The law

2. Section 3(1) of the Films, Videos, and Publications Act 1993 states that 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.
3. Section 3(2) of the Films, Videos, and Publications Classification Act 1993 provides that publications dealing with certain types of content are deemed to be objectionable.
4. In respect of publications which are not deemed to be objectionable in terms of s3(2) of the Act, it is submitted that to be objectionable a publication must first describe, depict, express, or otherwise deal with matters such as sex, horror, crime, cruelty, or violence. If it does not describe, depict, express, or otherwise deal with such a matter the publication cannot be objectionable. The Court of Appeal described this as the 'subject matter gateway'. (*Living Word Distributors v Human Rights Action Group (Wellington)* [2000] 3 NZLR 570; (2000) 6 HRNZ 29).
5. Section 14 of the New Zealand Bill of Rights Act 1990 states that everyone has "the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. Under s5 of the same Act, this freedom is subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Section 6 of the Act states that "[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning".

The Publication at issue

6. *Don't Breathe* is a film from the United States, 88 minutes and 22 seconds long. It is a horror/thriller about three young thieves who break into a blind military veteran's house to steal settlement money he obtained after his daughter was killed in a car accident, and discover that he isn't as helpless as he seems. The three thieves are Alex, whose father runs a home security company, Rocky, a young woman who wants to escape dysfunctional family life with her younger sister, and Rocky's boyfriend Money. Shortly after breaking into the veteran's home the veteran kills Money by shooting him in the head. Rocky and Alex become trapped inside the veteran's home and while trying to escape via the basement discover a young woman chained up in what seems to be a sex dungeon. Her name is Cindy, and she is revealed to be the driver of the car that killed the veteran's daughter. Alex and Rocky try to rescue her but Cindy is shot and killed. A game of cat and mouse ensues, with Alex and Rocky trying to escape the veteran's fortified house with the stolen settlement money, but meeting obstacles at every turn.

Application of the law to the publication at issue – gateway criteria

7. The publication deals with matters of concern to s3(1) of the Films, Videos, and Publications Act 1993.
8. The publication deals with matters of crime, in particular murder, rape, kidnapping, burglary and assault.
9. The film deals with violence. Throughout the film there are frequent graphic depictions of violent acts by the veteran on Alex and Rocky, and by them on him. The veteran shoots Money in the head at point blank range early in the film, and later also shoots and kills Cindy.
10. The film deals with sex. It is revealed that the veteran has impregnated his captive Cindy, and he ties up Rocky and cuts through her clothing to allow him to sexually violate and impregnate her too. Early in the film Money and Alex are arguing and Money accuses Alex of masturbating over photos of Rocky.
11. The film also deals with cruelty. The veteran's confinement and treatment of Cindy is extremely cruel, as is his cold blooded execution of Money.
12. The film also deals with horror. The film has many horrific scenes such as the execution of Money, showing the blood and brain splatter on the wall behind his head when he is shot. Another scenes is of Rocky being chased through a

ventilation duct by a savage dog, a suspenseful pursuit scenario common to the horror genre. The veteran folds Cindy's dead body up and puts her in a cavity under the basement floor, and then covers her in what appears to be oil. The lingering shot of the oil creeping up over her face emphasises the horrific nature of her disposal.

13. It is therefore submitted that the publication at issue in this case can be properly construed as describing, depicting, expressing, or otherwise dealing with matters such as sex, horror, crime, cruelty, or violence.
14. It is therefore necessary to consider whether the publication is objectionable or ought to be restricted in terms of s3(2) or s3(3) and s3(4) of the Films, Videos, and Publications Classification Act 1993.

Is the publication deemed objectionable – s3(2)?

15. Section 3(2) of the Films, Videos, and Publications Classification Act 1993 provides that a publication which promotes or supports or tends to promote or support inter alia the exploitation of children or young people for sexual purposes is deemed to be objectionable.
16. In *Moonen v Film and Literature Board of Review (Moonen I)*, the Court of Appeal stated that the words "promotes or supports" must be given "such available meaning as impinges as little as possible on the freedom of expression"¹ in order to be consistent with the New Zealand Bill of Rights Act 1990. The Court then set out how a publication may come within a definition of "promotes or supports" in s3(2) that impinges as little as possible on the freedom of expression:

"Description and depiction ... of a prohibited activity do not of themselves necessarily amount to promotion of or support for that activity. 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."²

17. It is submitted therefore that a publication must advance, encourage, uphold or strengthen, rather than merely depict, describe or deal with, one or more of the matters listed in s3(2) for it to be deemed to be objectionable under that provision.

¹ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at para 27.

² Above n2 at para 29.

18. It is further submitted that s6 of the New Zealand Bill of Rights Act 1990 requires s3(2) of the Films, Videos, and Publications Classification Act 1993 to be construed in the manner most consistent with the right to freedom of expression recognised in s14 of the New Zealand Bill of Rights Act 1990. The most consistent construction of that provision is one which sets a high bar for the application of the presumption embodied in s3(2) of the Films, Videos, and Publications Classification Act 1993.
19. *Don't Breathe* certainly deals with sexual violence. After Cindy is killed the veteran reveals that she was pregnant with his child. He explains that because she took away his daughter, Cindy needed to repay her debt by supplying him with a replacement child. Because Cindy is dead the veteran plans to impregnate Rocky instead. He has her tied up in handcuffs and restraints, and uses a pulley to suspend her in mid-air. This makes it impossible for her to mount any effective resistance. The veteran then calmly uses scissors to neatly cut away the clothing over her genitals. He then uses a turkey baster to collect a large quantity of semen from a jar and explains that he intends to sexually violate her with the turkey baster to impregnate her. The scenes focuses heavily on Rocky's extreme distress and helplessness. It has only marginal value to the plot (if any at all) and is in that sense significantly gratuitous.
20. It also deals with acts of extreme violence and extreme cruelty. The veteran's treatment of Cindy, and his proposed treatment of Rocky is extremely cruel, and some of the acts of violence such as when the veteran shoots Money in the head at point blank range splattering his blood and brain over the wall behind him, are extremely violent. Similarly, the veteran stabs Alex with gardening shears. Although it later turns out it was Money's dead body not Alex who was stabbed, the stabbing and the sequence of high impact violence which preceded it is extreme. After Rocky escapes from the veteran she repeatedly kicks him extremely violently and rams the semen filled turkey baster hard into his mouth.
21. The treatment of sexual and extreme violence certainly engages consideration of s3(2)(b) and (f). However, the film does not promote or support or tend to promote or support the veteran's actions. They are depicted as the actions of a man deranged by grief and perhaps by his wartime experiences. It is therefore submitted that the high bar set for the application of the presumption of objectionability in s3(2) is not met in this case, and that it cannot be concluded that *Don't Breathe* promotes or supports or tends to promote or support any of the matters detailed in s3(2) of the Films, Videos, and Publications Classification Act 1993, in particular the use of violence or coercion to compel someone to submit to sexual conduct, or the depiction of acts of extreme violence.

Is the publication nevertheless still objectionable or should it be restricted – s3(3) and s3(4)?

22. Section 3(3) of the Films, Videos, and Publications Classification Act 1993 states that in determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) applies) is objectionable or should in accordance with s23(2) be given a classification other than objectionable, particular weight shall be given to the extent and degree to which, and the manner in which, the publication—

- (a) describes depicts, or otherwise deals with -
 - (i) acts of torture, the infliction of serious physical harm, or acts of significant cruelty:
 - (ii) sexual violence or sexual coercion, or violence or coercion in association with sexual conduct:
 - (iii) other sexual or physical conduct of a degrading or dehumanising or demeaning nature:
 - (iv) sexual with or by children, or young persons, or both:
 - (v) physical conduct in which sexual satisfaction is derived from inflicting or suffering cruelty or pain:
- (b) exploits nudity of children, or young persons, or both:
- (c) degrades or dehumanises or demeans any person:
- (d) promotes or encourages criminal acts or acts of terrorism:
- (e) represents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of members of that class, being a characteristic that is a prohibited ground of discrimination specified in s21(1) of the Human Rights Act 1993.

23. It is submitted that the violence in the film is high impact. The scene in which the veteran shoots Money in the head is particularly graphic and high impact but much of the other violence while not reaching the same extremity, is also very vicious. Rocky repeatedly beats the veteran in the head with a crow bar, the veteran violently struggles with Alex, sits astride his dazed or unconscious body, punches him violently in the face several times and then uses two hands to stab him in the stomach with a pair of gardening shears. Although it turns out to be Money's dead body not Alex who is stabbed this is not revealed until later and does not undermine the impact of the stabbing. Rocky's kicking of the veteran after escaping his attempt to sexually violate her is very vicious and she is directly shown ramming the turkey baster of semen into the veteran's mouth. Alex hits the veteran in the head with a hammer.

Cindy is shot in the face while she is still gagged and bound, and her blood is shown seeping through the gaffer tape over her mouth.

24. It is further submitted that the violence in the film is extensive. The opening scenes providing character and outlining the essential plot lines contain limited violence but from the time the three young burglars enter the veteran's house, and particularly following Money's execution, the level of violence throughout the remainder of the film is relentless.
25. The sexual violence in the film is particularly disturbing. As discussed above it is very cruel and the scene involving Rocky is significantly gratuitous. While the film does not promote or support or tend to promote or support the infliction of sexual violence, and does portray his imprisonment of Cindy and plans for Rocky as horrific, elements of his character are treated with some sympathy; he is clearly deranged but he has been disabled in the service of his country, he has lost his daughter and it appears that the justice system has failed to give him any meaningful redress (at least in his own assessment) for his loss. And at least until Cindy is discovered in the basement he is clearly defending his home from three young armed intruder's intent on stealing his money. While the film therefore certainly does not promote or support sexual violence, and stops short of justifying it, it does not leave the viewer entirely unsympathetic to some elements of the perpetrator's character either. This extra layer of complexity requires a significant level of maturity to process.
26. The film does not promote or encourage criminal acts per se, but does present the three thieves as sympathetic by turning them into victims. Rocky's desire to help her younger sister escape a dysfunctional home life also makes her into a sympathetic character, and Alex clearly cares for Rocky. As noted above there are elements of the veteran's character which elicit some degree of sympathy and may challenge particularly younger viewers with less well established moral frames within which to contextualise the film. Although none of the criminal acts depicted are without consequence (quite the opposite) by the end of the film the veteran has not been held to account for kidnapping, sexually violating and killing Cindy, or for his conduct towards Rocky. Similarly, Rocky has successfully got away with \$300,000 in cash enabling her to establish a new and happy life in California. Both she and the veteran are bound by mutual self-interest to leave the truth of what happened concealed.
27. Section 3(4) of the Films, Videos, and Publications Classification Act 1993 states that in determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) applies) is objectionable or should in accordance with s23(2) be given a classification other than objectionable, the following matters shall also be considered:

- (a) the dominant effect of the publication as a whole:
 - (b) the impact of the medium in which the publication is presented:
 - (c) the character of the publication, including any merit, value, or importance that the publication has in relation to literary, artistic, social, cultural, educational, scientific, or other matters:
 - (d) the persons, classes of persons, or age groups of the persons to whom the publication is intended or is likely to be made available:
 - (e) the purpose for which the publication is intended to be used:
 - (f) any other relevant circumstances relating to the intended or likely use of the publication.
28. *Don't Breathe* is a taut, suspenseful and well-made horror/thriller. It is to be shown in cinemas and is likely to appeal to young adults as well as to a more mature audience. It is designed to entertain and has no particular literary, artistic, social, cultural, educational, or scientific merit.
29. Section 3A of the Films, Videos, and Publications Classification Act 1993 states that a publication may be age-restricted if it contains highly offensive language likely to cause serious harm.
30. The film contains a moderate extent of highly offensive language in the form of "fuck" and its derivatives. While these are mostly used as expletives and in a manner appropriate to the context, their presence in the film does support restriction.
31. The Films, Videos, and Publications Classification Act 1993 requires that a publication's availability be restricted if it is likely to cause injury to the public good. This goes against the presumption of the right to freedom of expression as articulated in the New Zealand Bill of Rights Act. However rights can be limited where it is reasonable and demonstrably justifiable to do so.
32. The public good is likely to be injured if this film is made available to children or to young people in their lower or mid-teens. The violence which peppers the film is high impact, cruel and extensive. It is likely that the repeated depictions of this brutal violence will inure younger people to violence. The impact of depictions of violence has been thoroughly researched and it is now well established that repeated exposure to such material by younger people will lead to an increasingly violent society over time³.

³ See for example *Desensitizing Effects of Violent Media on Helping Others*, Brad J. Bushman^{1,2} and Craig A. Anderson³ PSYCHOLOGICAL SCIENCE 2009.

33. The sexual violence is cruel and dominates the latter part of the film. It is not without complexity and is significantly gratuitous. Both the scene in which it is revealed that Cindy has been impregnated and particularly the scene where the veteran terrorises Rocky are likely to greatly shock and disturb children and teenagers. The sustained focus on Rocky's distress as she is helpless and about to be sexually violated with a turkey baster is gratuitous and harrowing to watch. It is submitted that to so shock and disturb young people would constitute an injury to the public good.
34. The conflicting moral messaging in the film is also challenging for younger viewers. All of the protagonists are criminals but all of them (except Money) are given some character traits which elicit viewer sympathy. Their criminal acts are not without consequence but neither are they entirely resolved with any satisfactory degree of legitimacy. These leaves a level of moral ambiguity over the story. Adults will have the maturity and experience to view the stronger violent and cruel elements of the film in the context of an intense survival thriller without being negatively affected. Younger people though with less experience and a greater incapacity to deal soundly with moral nuance are likely to find the film's moral ambiguity hard to reconcile. It is submitted that adding such confusion to the already complex lives of young adults would constitute a further injury to the public good.
35. It is therefore submitted that the Office of Film and Literature Classification was correct to classify *Don't Breathe* as objectionable except if the availability of publication is restricted to persons who have attained the age of 18 years, and to require a descriptive note reading "Contains violence, sexual violence and offensive language", and that such a restriction is consistent with the right to freedom of expression in the New Zealand Bill of Rights Act 1990.



Dr Andrew R Jack
Chief Censor

13 September 2016