

The Ombudsman on the role, functions and policies of the Board of Film and Stage Classifiers

KRS Film Distributors Limited lodged a complaint with the Office of the Ombudsman in connection with the decisions and policies of the Board of Film and Stage Classifiers, previously known as the Board of Film and Stage Censors.

In view of the interest of this case to the public at large, the Ombudsman secured the approval of the complainant to publicize this grievance together with his final recommendations.

1. The complaint

1.1 Complainant premised that KRS Film Distributors has been established for many years and has released around 13,000 films since its inception in 1946. These were all presented for examination to the Board.

1.2 Complainant explained that when films are received by the company from suppliers, the Chairperson of the Board is notified so that an appointment is arranged and the films viewed and examined in the company's preview theatre, on a date and at a time when the cinema and the projectionist can be made available. He added that for over 60 years, the Board used the practice that once the film is viewed, KRS management would be informed of the rating given to the film and a discussion would follow if the company disagrees with the rating given by the Board. This policy was however stopped in November 2006, following disagreement that occurred between the Board and the company over the rating of a film in regard to which a certificate had already been issued by the Police.

1.3 Complainant contends that the company is suffering as a result of the ratings given by the classifiers under the current Chairperson. He elaborated that in 2010, over 28% of the films released locally were given a higher rating than in the UK. The Company seldom appeals the initial decision of the Board because the film is reviewed by members of the same Board and the chance of a rating being amended is very slim. In fact, since 2006 out of the 17 decisions appealed only 6 ratings were revised. Moreover, according to complainant, recourse to the Administrative Review Tribunal is not practical from the company's point of view since this is too lengthy a procedure and time is of the essence in this business.

1.4 Complainant further maintained that in the past the company had been provided with the guidelines utilised by the previous Board when taking its decisions, guidelines which indicated details as to what would be

objectionable in respect of classifications. On the other hand, the current Board did not provide the company with any guidelines – a practice which complainant believes is not legitimate.

1.5 Complainant thus requested the intervention of the Ombudsman so that the Board amends existing policies and particularly so that –

i) local theatrical film classifications be brought in line with those in the UK with the introduction of the 12A classification in addition to those already in use; this, also in view of the fact, that DVDs do not require classification;

ii) classifiers should discuss the rating awarded with KRS management as was the practice before 2006 and as happens in every democratic country;

iii) the company is provided with a report on every film giving details regarding the classification awarded;

iv) film classifications should carry consumer advice with brief details;

v) a separate appeals board, independent of the Board of Film and Stage Classifiers be set up; and

vi) separate guidelines are made available to KRS management.

2. Correspondence exchanged

2.1 This Office sought the reactions of the authorities and received a joint reply from the Board and the Office of the Permanent Secretary within what previously was known as the Ministry for Justice and Home Affairs stating that:

a) The Board does not discuss a film with KRS management before rating it since the classifiers feel it is important not to be influenced by external factors, including the opinions of the distributor, before watching and rating any film. Each film is assessed exclusively on the basis of its content. Moreover, the Cinema and Stage Regulations (SL 10.17) place no obligation on the Board to undertake any such consultation;

b) The Board provides a report clearly illustrating the reason for a specific classification whenever this is requested by complainant – a report need not be issued once the classification is not being contested. Moreover, there would be no added value, either for the Board or for film distributors, if the Board were to consult film distributors prior to, or

pursuant to, the rating process. The Board does not have a policy whereby a specific rating is given subject to the condition that certain scenes are not screened – films are assessed in their entirety and rated accordingly;

c) The Board has drawn up guidelines in line with Regulation 42(2) but these have not been given to complainant. The Regulations do not require the Board to publish or distribute the said guidelines and the Board does not consider the submission of the guidelines necessary given that:

- these guidelines are intended for the Board’s internal use;
- they are only meant to provide an indication as to the classification of individual films; and
- complainant is provided with a report, on request, as to why a film is given a particular rating.

In view of the above considerations, the Board has always acted in accordance with its legal obligations. Moreover, by providing complainant with a report, it has provided him with information beyond the scope of its legal obligations;

d) Every effort is made to ensure that appeals are addressed within the shortest time-frames possible. Films are in most cases reviewed within days of the appeal being lodged. In all cases, the time frame set out in Regulation 47(6) for the second examination of the film to be carried out, is always respected. Moreover, the appeal is carried out as provided by the Regulations, that is, that the film cannot be reviewed by the classifiers responsible for the first examination. The fact that there were a number of instances where the rating given initially was reviewed on appeal, attests that there is fairness and transparency; and

e) The current classification system indicated in Regulation 45 of the Legal Notice is adequate.

2.2 Following an enquiry made by this Office on whether the guidelines could be passed on to complainants, this Office was informed that “...*the Ministry would not recommend transmission of the guidelines to Mr Pace.*”

2.3 In a subsequent reply,¹ complainant argued that:

- the company is requesting the reinstatement of a policy which had been in place for many years, where discussion occurred following the viewing of a film;
- while the law does not require the Board to publish or distribute the guidelines, it does not state that guidelines should not be made

¹ Letter dated 22 November 2011.

available to interested parties. This document would assist film distributors to better assess if the classifications given are justified and compatible with the Board's Guidelines and if need be, enable them to contest this classification;

- in some countries similar guidelines are available on the internet;
- appeals should be dealt with by individuals who are independent of the Board, as in other European countries; and
- the Board should not be allowed to operate with so much secrecy in a democratic country.

3. The Board's position

3.1 A meeting was also held with the Chairman of the Board of Film and Stage Classifiers to discuss this complaint and the procedures followed by the Board in the classification of films.

3.2 The Chairman explained that the law did not require the Board to forward its guidelines to any person – whether it is the public or an applicant. She added that the guidelines are internal to the Board, are general in their terms and merely indicate what the Board should look at within each category. Thus, they are flexible. She stated that the Board sends complainant a report specifying the reasons why a film is classified in a particular category whenever this is requested by KRS management. Problems generally arise when films are violent or contain scenes of violence. The Chairman insisted that a proper set-up is required, since the Board watches the films at complainant's offices. She emphasised that discussion on the film content with KRS management should be avoided before the film is rated and even after the classifiers have seen the film. This avoids arguments arising with KRS management, particularly because films are viewed at complainant's offices. The Chairperson explained that each film is assessed by the classifiers exclusively on the basis of its content and when an appeal is lodged other members of the Board view and rate the film.

3.3 The Chairperson expressed her view that before any guidelines are made available to the general public and to complainant, a more detailed document should be prepared by the Board, after it has consulted with the relevant authorities and individuals whose experience can be of help in the preparation of a more comprehensive document.

3.4 A second meeting was also held with KRS Management, also because Government had meanwhile announced that it was introducing a change in current legislation and a three-week consultation process was launched.

4. Current legislation

4.1 From an overview of our current legislation it transpires that every film has to be classified before it can be shown in local cinemas. A motion picture rating system is designated to classify films with regard to suitability for audiences in terms of issues such as sexual content, violence, substance abuse, profanity, imprudence or other types of mature content.

4.2 At the moment the classification of films and stage productions is regulated by the Cinema and Stage Regulations, enacted under the Criminal Code (SL 10.17). The Regulations provide for the setting up of a Board of Film and Stage Classification, appointed annually by the Minister responsible for the Police. In terms of the Regulations, the Board is composed of a chairperson and between five to fifteen members appointed by the Minister. Every film must be classified by at least two members of the Board.²

4.3 Regulation 42(2) provides that films and stage productions are classified on the basis of guidelines to be drawn up by the Board which are based on the following main criteria:

- “(a) the standards of morality, decency and propriety generally accepted by reasonable adults; and*
- (b) the literary, artistic or educational merit, if any, of the production; and*
- (c) the general character of the production including whether it is of medical, legal or scientific character; and*
- (d) the person or class of persons to whom it is intended or by whom the production is likely to be viewed.”*

4.4 In terms of the Cinema and Stage Regulations, if the person who has applied for the film to be examined does not agree with the classification awarded by the Board or is aggrieved by its decision, he may, within 10 days of that decision, apply in writing to the Chairperson for a second examination of the film. This second examination is carried out by three classifiers, all of whom must not have participated in the initial examination of the film. Moreover, if the Chairperson had not been involved in the initial examination, he/she must be present for the second examination of the film. This latter decision can then be reviewed by the Administrative Review Tribunal.³

5. The proposed amendments to the law

² Regulation 42(4).

³ Regulation 47(2).

5.1 During the investigation of this complaint, the newly appointed Minister for Tourism, Culture and the Environment announced Government's intention to carry out an overhaul of the laws regulating stage performances and films. In fact, in mid-January the Ministry launched a three-week public consultation process and made government's proposed amendments to existing legislation available on the Government's internet portal.

5.2 A review of these amendments indicates that the legislation itself will no longer be within the realm of local police legislation but will move to the law regulating the Malta Council for Culture and the Arts (Chapter 44 of the Laws of Malta).

5.3 In the case of film classification, which is the area relevant to this complaint, the proposed legislation abolishes the Film and Stage Classification Board and creates a separate Board of Film Age-Classification, with similar functions to those possessed by the existing Board. In terms of the proposed regulations, the Film Board will consist of a chairperson and a number of members (not being less than 3 and not more than 7) who are appointed by the Minister for Tourism, Culture and the Environment. It is interesting to note that the proposed regulations, just like the current ones, are silent on the expertise required of the persons to be appointed on the Film Board. On the other hand the Theatre Guidance Board Rule 18(1) specifically states that the members of the Board, also appointed by the Minister, **shall consist of:**

- a) The Chairman of the Malta Council for Culture and the Arts ex officio, who shall be the Chairman of the Guidance Board;*
- b) One person with expertise in the sector nominated by the Ministry responsible for Culture;*
- c) One person who has the appropriate knowledge and working experience in the industry of dramatic and stage productions;*
- d) A person appointed after consultation with the Children's Commissioner."*

6. Comments on proposed amendments

a) Composition of the Board

One should consider adopting the above approach regarding the composition of the adjudicating body also in the case of the Film Board, ensuring that the persons appointed broadly represent the Maltese community. It is my opinion, that the Board should include a mixture of men and women with as close to a gender balance as possible,

incorporating persons of different ages so that there is a reasonable spread of age amongst the members. They should include persons that can assess equality issues and the concerns of vulnerable persons and persons with special needs. At least one of the members should be well versed in issues affecting children and young people, either as parent or through his previous employment or other activities he is involved in. One could appoint this member following consultation with the Commissioner for Children, as is being proposed in the Theatre Guidance Board. Finally, Board members should be able to articulate their views, appreciate the opinions of others and be flexible enough to change their views following discussion with the other classifiers.

b) Publicity of guidelines and notices

The proposed regulations, like those currently in force, mention that the classification of films is to be carried out in accordance with guidelines to be drawn up by the Film Board but the draft legislation is silent on whether these should be made available, not only to applicants but also to the general public.

On the other hand, in terms of the proposed amendments the Film Board may decide to discuss the film to be classified with the applicant prior to the certification of the film by the Board. Regulation 6(2) provides that:

*“In examining a film submitted for age-classification the Film Board **may** call upon the person presenting the film for classification and discuss the age-rating to be given to the film with them”*

The new rules also require the Film Board to issue, concurrently with the classification, notices to the public containing additional information as to the content of the films classified – a practice which is already in place in many countries and which is indispensable since it enables consumers to know which classifiable elements (e.g. coarse language, violence, drug use, nudity etc) have led to the classification decision.

c) Film categories and appeals

The draft law also envisages a change in two other aspects – the film categories currently in use and appeals from decisions of the Board – issues which complainant raised in this complaint. In terms of the draft legislation:

- an additional age classification - 12A - is to be introduced locally; and

- a review of the classification decisions of the Film Board, following a request from the original applicant for classification, will be carried out by a separate board created specifically for this purpose. This is the Classification Appeals Board, whose decision can then be appealed in front of the Administrative Review Tribunal.

7. Certification system in other countries

7.1 *Diverse systems of certification*

7.1.1 A quick glance at the legislation and procedures adopted in a number of countries in connection with the certification of films shows that some European countries and Australia have bodies or regulators, some self-financed and non-governmental like the British Board of Film Classification (BBFC) in the UK and others created and regulated by Government, like the Classification Board in Australia, which classify films before these are made available to the public. On the other hand, in the United States, films are rated by industry committees with little official government status. In a number of countries, the functions of the entity is not limited to films intended for cinematograph exhibition, but also to DVDs and other home entertainment formats, publications and computer games. However, even if the film rating system has no legal consequence, and a film has not explicitly been restricted or banned, laws forbidding certain films or preventing minors from viewing the same, are usually in place.

7.2 *The guidelines used by the classifiers*

7.2.1 The basis of the classification are guidelines drawn up by the board or entity, many of which are regularly updated and published. Some are also available on internet.

7.2.2 In the UK, the guidelines are updated every four years to take into consideration existing legislation and the developments occurring in the sector. The current guidelines were published in June 2009 and were the product of extensive public consultation, research and the accumulated experience of the BBFC over several years. In Australia, the Guidelines for Films and Computer Games, also available on the government internet portal,⁴ contain descriptions of the categories, indicating the most suitable audience of the film or computer game, in terms of age and legal restriction. Each classification category includes a list of criteria used by the Board when making classification decisions.

⁴ The Classification Website.

7.2.3 This situation clearly does not reflect the position in Malta where the current legislation – and the proposed draft law – only mention the **existence** of guidelines which are to be drawn up by the Board and which are based on the following main criteria:

- “(a) the standards of morality, decency and propriety generally accepted by reasonable adults; and*
- (b) the literary, artistic or educational merit, if any, of the production; and*
- (c) the general character of the production including whether it is of medical, legal or scientific character; and*
- (d) the person or class of persons to whom it is intended or by whom the production is likely to be viewed.”*

These however, are internal to the Board and not available to the general public or to the person applying for a film to be classified.

8. Considerations

8.1 Some issues already addressed

8.1.1 It must be premised that some of the issues raised with this Office by complainant have been addressed by the amendments which Government is proposing to the existing Regulations, which were published some days ago, and consequently will not be dealt with in this report. These are:

- the issue regarding the second examination of a film by the same Board – in terms of the proposed amendments an Appeals Board will be created;
- the introduction of the 12A Classification Category – it is being proposed that this category will in fact be added to the existing categories. It is noted that category classification is a matter for regulation by the competent authority. It is a legislative process that would, as a rule, fall outside the remit of the Ombudsman who can only exceptionally inquire into its appropriateness;
- complainant’s proposal that a classification should carry consumer advice with brief details, since this is envisaged by Rule 6(3) which obliges the Film Board to *“together with the classification, issue, whether in electronic or other form, notices to the public containing additional information as to the content of the films so classified.”*

8.2 Three issues still to be considered

8.2.1 Complainant’s other grievances concern three issues which I propose to tackle jointly, namely:

- ❑ the request that the Board provides KRS management with a report on every film, giving details on the classification awarded;
- ❑ that the Board resumes the practice utilised before 2006 and discusses the film and its contents with KRS management after it has viewed the film;
- ❑ that guidelines should be provided to the person who applies for a film to be examined by the Board.

Currently there is a practice that complainant is given a report by the Board on a particular film it has viewed **if** he requests this report, that is, when complainant disagrees with the Board's decision and intends to contest it, even if the Board is not required to do so by law. This report is forwarded to complainant shortly after the classifiers (i.e. the Board members assigned to rate the particular film) have viewed the film at the company's office.

Discussion should be at the Board's discretion

Complainant insists that the Board should discuss its opinions with KRS management after viewing the film, that is, before it classifies it. He states that this was the practice before 2006. The Chairperson of the Board on the other hand, insisted with this Office that the Board does not consider it proper to discuss the Board's opinions regarding the film viewed with complainant, and discussing this could give rise to members feeling unduly pressured into changing their initial decision.

I am of the opinion that discussion with the distributor, whether before the viewing or following the review of a film by the Board, should not be mandatory. It is indispensable for the Board members, who have been appointed because of their expertise and knowledge, to be allowed to decide on a rating without being influenced by external factors, such as the opinions of the local distributor of the film. Discussion on the part of the classifiers with any third parties – whether it is an applicant or any other person they deem can be of assistance to them in carrying out their task diligently and conscientiously – should be left within the discretion of the Board, as envisaged by Regulation 42(5) of the present Cinema and Stage Regulations. Applicant will not be prejudiced by this absence of dialogue, provided he is given the possibility of making submissions, verbal or in writing, following the first decision of the Board. Should applicant still not be in agreement with the report of the classifiers, he may appeal and ask for a second examination of the film.

This is also reflected in the draft law drawn up recently, which in addition to the scenario envisaged in Regulation 42(5) provides that –

*“In examining a film submitted for age-classification the Film Board **may** call upon the person presenting the film for classification and discuss the age-rating to be given to the film with them”⁵*

Need for open and transparent procedures

On the other hand, the rules of good administration require that entities in the public sphere operate in as open and transparent manner as possible, giving reasons when taking decisions. This is reflected in Article 41 of the Charter of Fundamental Rights of the European Union which deals with the citizens’ right to good administration and provides that –

“1. Every person has the right to have his or her affairs handled impartially and fairly within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

... The obligation of the administration to give reasons for its decisions.”

Public entities are in duty bound to justify their conduct and should be open, truthful and credible when accounting for their decisions and actions. They should clearly state the criteria on which their decision making was based and communicate their reasons to the parties concerned in due time, even in the case of an adverse decision.

Report motivating classification compulsory

It is in the light of these principles that one should look at complainant’s request for the Board to provide KRS Management with a report following every classification and complainant’s suggestion that the guidelines, which are the rules which guide the Board in taking a decision, should be understood.

Although the Board is not required by the law in force at the moment to provide a report as to why a film was given a particular classification, the basic values of transparency, accountability and fair-decision making suggest that the Board - and the legislator - should adopt a policy whereby **a brief report** indicating the key grounds which led the Board to decide in favour of a classification, is made available without delay to the person requesting certification. When applicant is not contesting the classification

⁵ Rule 6(2).

of the Board this brief report is sufficient, provided it gives a clear motivation for the decision reached.

However, **an additional report** ought to be provided by the Board when an applicant is not in agreement with the decision and requests more detailed explanations on how the Board came to its conclusion. This latter report should contain enough information to enable applicant to appeal from the initial classification. This more so in the light of the proposals being made to the legislation now in force, where the second examination of the film will be carried out by an Appeals Board which is completely distinct from the first Board.

Publicity of reports

As stated above, the principles of transparency and accountability dictate that the guidelines used by the Board should not only be made available to applicants, but also to the general public. Public authorities are expected to have a policy of openness and transparency in relation to what they do, how they do it and the results achieved. They are required to inform the public in general what parameters are used in the decisions taken. This approach will demonstrate fairness and will in turn increase public confidence and should be followed despite any risk that this might expose weakness.

The publication of guidelines, not necessarily those used presently by the current Board, will help people understand clearly how films are reviewed and why a film has been classified within a category and not another. It will further enable parents to decide whether a movie, even if rated within a specific category is suitable for their children since guidelines generally, not only describe each of the classification categories but the limits of material suitable for each category in more detail.

Guidelines are tools not binding instruments

This having been said, one must emphasise that guidelines are tools, they are not binding legal documents and should be interpreted in the spirit of what is intended, as well as what is written. Consequently, any guidelines indicated cannot be exhaustive – guidelines are parameters which help the Board decide and it is the Board, who has been delegated with its functions by the administration, who interprets and applies them and finally comes to a decision. This decision is generally binding subject to the normal considerations of fairness and reasonableness.

9. Further reflections

These considerations lead to further pertinent reflections.

Marked shift in policy

The proposed Legal Notice to be issued under the Malta Council for Culture and the Arts Act, setting up a new regime for the regulation of cinema and stage showings, underscores a marked shift in policy from one exclusively based on censorship to one where the emphasis is on self-regulation, which necessarily presumes an adult audience, mature enough to assess the content of a theatre production or a film and to decide accordingly, whether or not to attend the performance. The proposed regulations effectively do away with censorship altogether for theatre productions but retain a measure of control over the showing of films through their pre-viewing by a board whose function is to classify their content according to the age of the audience. Through this classification, a measure of censorship can be enforced, primarily as a protection for children and vulnerable persons, as well as for the common good. Even in the case of the showing of films, there has been a recognition that society has "*matured*" as a result of its exposure to the inevitable globalisation of mass-media and the technological advance in the means of communication, coupled with the realisation that the fundamental rights of freedom of expression and the right to impart and receive information can only be subjected to the most basic and essential limitations.

Today, there is no longer a sense of duty of the State to impose in absolute terms its own standards of morality or conduct on adults. Rather than on censorship, the emphasis of the new regulations should therefore be to provide an objective assessment that will serve more as a guidance to help create an informed audience to make a choice, rather than an unwanted, imposed protection, forcibly limiting the adult's freedom to choose.

This shift of emphasis is in line with the approach being adopted in most European countries - an approach that might be welcomed by most, but contested by others. It remains however, a policy decision that reflects a change in mentality and way of life. Some would call it progress, others regression but essentially the proposed Legal Notice reflects the political will of the legislator.

Function of the Ombudsman

It is not the function of the Ombudsman to inquire whether such a policy is valid or opportune. He can only express an opinion on whether the regulation is to be considered to be unlawful, unjust, unreasonable, oppressive or improperly discriminatory. An issue that at this stage does not arise. It is however the function of the Ombudsman to inquire and

determine whether administrative procedures are just and respect the basic rules of a fair hearing.

The complainant contests the procedures presently followed by the Board of Film and Stage Classifications which in his opinion, violates the principles of fair hearing and prejudice his right as a film distributor to successfully contest the Board's classification on appeal. I have already considered that the refusal of the Board to publish the guidelines drawn up by it on the basis of criteria established by the Regulations and which determine the classification given, cannot be justified. This refusal not only undermines the transparency of the procedures of the Board but also goes against the basic principle of a fair hearing since the parties are entitled to a decision that is well motivated, on predetermined and well publicised grounds and that allow the possibility of an appeal before the competent tribunal.

Right of the public to know

It need also to be said that when exercising its functions to determine a classification, the Board not only defines the right of the distributor to exhibit the film but also determines what section of the public, if any, will be precluded from viewing it. It is therefore not only the distributor who has the right to know what the guidelines drawn up by the Board are. The general public too has the right to be informed how the board evaluated the criteria set out by law, what were the guidelines which determined classification, and in what circumstances would the board justify its decision to limit, in an absolute or relative manner, the fundamental right to freedom of choice and expression. The refusal to publish the guidelines also runs counter to the declared intention of the legislator to promote a system based on information, education and freedom of choice by a mature audience rather than on imposed censorship.

Loosening state control on censorship not equated to decriminalisation

It should be noted that, though there is a marked and welcome change in the direction of concretely loosening the control of the State on what film and theatre productions an adult audience should or should not see, the proposed regulations do not completely decriminalise their breach. Actions violating the new regulations could still be considered, in certain circumstances, an offence punishable at law. The Court of Magistrates can impose fines on conviction. Moreover, the Commissioner of Police still retains the ultimate right to order a suspension of any exhibition and the closure of any cinematograph building, for a period not exceeding fifteen

days “for reasons of public order or morality or for non-compliance with any of these Regulations”.⁶

It should be stressed that the fact that the State chooses to loosen its laws on censorship, in no way means that there will no longer be restrictions on the fundamental right of freedom of expression. These restrictions are considered necessary in varying degrees in all countries, to protect vulnerable people, children, the security of the State and the common good. It is for this reason that the European Convention on Human Rights permits the limitations of this right for a number of reasons including, among others, “for the prevention of disorder or crime, for the protection of health and morals”. Similar limitations are also imposed through other international instruments including the Convention on Civil and Political Rights.⁷

Classifying a film or theatre production by age through a Board decision or self assessment, in no way exempts the exhibitor or producer from liability, if the film or theatre production is unacceptable from a criminal law point of view and violates statutory laws on the vilification of religion, offences against decency or morals, contraventions affecting public order, obscene libel and others. Age classification therefore, will not in itself exempt the exhibitor or producer from liability. It will however provide not only a yardstick as to the suitability of a film or production for viewing by persons within a given age bracket - but also a certificate, and in a way a first line of defence, to exhibitors, that they conform to existing legislation. It is also for this reason that it is vital that the guidelines, on which the Board bases its judgement, be publicised and subjected to public scrutiny.

Standards accepted by reasonable adults

There is one further point that needs to be made. The new proposed regulations, like the previous ones, provide that it shall be the function of the Film Board to classify films on the basis of guidelines to be drawn up based, *inter alia*, on “the standard of morality, decency and propriety generally accepted by reasonable adults”. The inference, is that if the Board judges the film not to conform with these standards, it could prohibit or restrict its viewing. Clearly notions of morality, decency and propriety do not lend themselves to univocal definition. They are, in a way, generic, undefined concepts that require a subjective assessment to translate into a concrete reality. Similarly it is difficult, if not impossible, to determine or objectively establish what is generally accepted by reasonable adults. Any judgement in this respect has necessarily to be conditioned by the personal convictions and background of those entrusted with taking a

⁶ Rule 16 of the proposed law and Regulation 59 of SL 10.17.

⁷ Article 19, paragraph 3.

decision. The definition of “*reasonableness*” and even more of the level of maturity of adults can be illusive. That is precisely why the regulations trust this delicate task in the hands of a selected group of competent persons who the Romans would call “*probi viri*” – in this case the masculine to include the feminine.

It is also for this reason, that it is imperative that the guidelines that the Board is bound to draw up and apply should be made public. As already stated, they should not only be provided to the person who applies for a film to be examined by the Board, but also to the general public that has every right and interest to be informed of the principles governing the classification of films and how these are interpreted and applied in practice. Moreover, it should be incumbent on the Board when classifying a film, to draw up its decision in the light of these guidelines, identifying the reasons for the classification given, within their parameters. This will ensure transparent procedures and allow for a fair review of the Board’s decision on appeal, in the interest of the film distributor, the exhibitor, the cinema patron and the public in general.

10. Recommendations

In the light of the above considerations I recommend that:

i) the guidelines, which the regulations require the Board to draw up and apply in the certification of films, are published and thus made available not only to the person requesting the classification, but to the public in general for the reasons explained above. It is suggested that the Administration and the Board co-operate in the formulation of the guidelines so that the new guidelines will reflect not only the accumulated experience of the members of the Board, but also the opinion of the public in general, research available and the legal expertise required in the drafting of the guidelines;

ii) in the interests of transparency, accountability and fair decision-making and so as to ensure that the rights of distributors are not prejudiced, the obligation of the Board to provide a report motivating its decision should be mandatory. As explained in more detail in this report, a brief initial report indicating the key grounds which led the Board to classify any film submitted to it within a category, should be made available to applicant, without delay. An additional report should be provided on request when applicant is not in agreement with the decision.

iii) the motivation in the latter report should be adequately comprehensive so as to enable the person who applied for the examination of the film to properly appeal before the Appeals Board if he feels

aggrieved by the classification given.⁸ Once the regulations provide for the right of a further appeal before the Administrative Review Tribunal, established under the Administrative Justice Act, to “*any interested person from a decision of the Appeals Board*”,⁹ it is even more imperative that the motivation of this latter Board is not only comprehensive but also made known to the general public. It is therefore advisable that the regulations should provide that the decisions of the Appeals Board be posted electronically. Any term for the filing of an appeal before the Administrative Review Tribunal should start running from the date on which they are available online;

iv) the approach adopted in the draft legislation in regards to the appointees on the Theatre Guidance Board should be adopted in the case of the Film Board. Authorities should ensure that the persons appointed, broadly represent the Maltese community and that individuals of different ages are appointed. There should also be a mixture of men and women with as close to a gender balance as possible. Finally, it is imperative that one of the members is well versed in issues affecting children and young people. In this latter case, I recommend that this appointment is made following consultation with the Commissioner for Children;

v) it is further suggested that the newly set up Board be provided with the tools necessary to carry out its functions appropriately. Premises should possibly be provided for the Board to meet and to review the films which it is requested to classify. The Board should also be provided with an administrative support system and legal advice, where necessary. Discussions should be held with the Board and interested parties to establish whether it is necessary or advisable to have film viewing at facilities not under the control of the distributor. In this respect, it has been mooted that, for example, facilities at St James Cavalier might be utilised if available. It is understood that utilising independent facilities, even if desirable, might not be possible possibly due to prohibitive, financial considerations.

J Said Pullicino
Ombudsman

February 2012

⁸ Regulation 8 (1).
⁹ Regulation 8 (4).