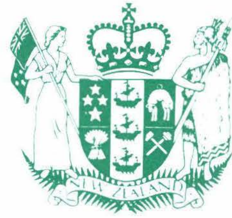

The New Zealand Gazette

WELLINGTON: THURSDAY, 2 MAY 1991

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Using the Gazette

The *New Zealand Gazette*, the official newspaper of the Government of New Zealand, is published weekly on Thursday. Publishing time is 4 p.m.

Notices for publication and related correspondence should be addressed to:

Gazette Office,
Department of Internal Affairs,
P.O. Box 805,
Wellington.
Telephone (04) 738 699
Facsimile (04) 499 1865

or lodged at the Gazette Office, Seventh Floor, Dalmuir House, 114 The Terrace, Wellington.

Closing time for lodgment of notices at the Gazette Office is 12 noon on the Tuesday preceding publication (except for holiday periods when special advice of earlier closing times will be given).

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The *New Zealand Gazette* is available on subscription from GP Publications Limited or over the counter from GP Books Limited bookshops at:

Housing Corporation Building, 25 Rutland Street, **Auckland.**

33 Kings Street, Frankton, **Hamilton.**

25–27 Mercer Street, **Wellington.**

Mulgrave Street, **Wellington.**

E.S.T.V. House, 4185 Queens Drive, **Lower Hutt.**

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Cargill House, 123 Princes Street, **Dunedin.**

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Commercial Edition—Published weekly on Wednesdays.

Customs Edition—Published weekly on Tuesdays.

Special Editions and Supplements—Published as and when required.

Government Notices

Commerce

Electricity Amendment Act 1983

Proposed Australian Electrical Safety Standards

The Secretary of Commerce invites submissions on the technical aspects of 2 Australian Safety Standards listed in the Schedule to this notice.

It is proposed that the standards be inserted into New Zealand Electrical Code of Practice for the Electrical Safety of Apparatus and Materials (NZECP3:1989) by amendment to the code, pursuant to Part IIIA of the Electricity Act 1968 (as inserted by section 6 of the Electricity Amendment Act 1983).

After consideration of submissions, and after the outcome of consultations with such persons as may be affected by the amendment, the Secretary intends to apply for the approval of the Minister of Energy to the resulting amendment to NZECP3:1989.

Copies of notes for commentators relating to the standards are available from the office of the Chief Electrical Inspector, Energy and Resources Division, Ministry of Commerce, P.O. Box 2337, Wellington.

All submissions should be made by the 7th day of June 1991.

Schedule

Australian Electrical Safety Standards Proposed for Inclusion into NZECP3:1989

AS 3014—1991: Electrical Installations—electric fences.

AS 3015 (Int)—1991: Electrical Installations—extra low voltage (d.c.) power supplies in public telecommunications networks.

Dated this 22nd day of April 1991.

P. J. MORFEE, for Secretary of Commerce.
go4499

Conservation

Reserves Act 1977

Appointment of Member to Lake Rotoiti Scenic Reserves Board

Pursuant to sections 18, 19 and 20 of the Maori Purposes Act 1931 and section 31 of the Reserves Act 1977, the Minister of Conservation hereby appoints

Taingaru Whata

to be a member of the Lake Rotoiti Scenic Reserves Board for the balance of the board's 7 year term (expiring 8 September 1997).

Dated at Wellington this 9th day of April 1991.

DENIS MARSHALL, Minister of Conservation. 2
go4508

Crown Law Office

Judicature Act 1908

Appointment of Temporary Judge of High Court

Pursuant to section 11 of the Judicature Act 1908, Her Excellency the Governor-General, in the name and on behalf of Her Majesty the Queen, has been pleased to appoint

John David Rabone, District Court Judge

to be a Judge of the High Court for a period commencing on the 29th day of April 1991 and expiring on the 19th day of July 1991.

Dated at Wellington this 21st day of April 1991.

PAUL EAST, Attorney-General.
go4493

Health

Psychologists Act 1981

Membership of Psychologists Board

Pursuant to section 3(2) (g) of the Psychologists Act 1981, I hereby appoint

Helen Ann Cull

to be a member of the Psychologists Board for a term of office expiring on 4 November 1993.

Dated at Wellington this 23rd day of April 1991.

KATHERINE O'REGAN, Associate Minister of Health.
go4506

Inland Revenue

Income Tax Act 1976

Notice to Make Returns of Land Under the Land Tax Act 1976

Pursuant to the Land Tax Act 1976, the Commissioner of Inland Revenue hereby gives notice as follows:

(1) A return of land held as at noon on 31 March 1991 is required from every person and every company, whether a taxpayer or not, being the owner of land in New Zealand within the meaning of the Land Tax Act 1976, if the total land value of land owned as at noon on 31 March 1991 exceeded $10,000 and the land is not any of the classes specified in section 27 of the Land Tax Act 1976.

(2) The principal classes of land exempted from land tax under section 27 of the Land Tax Act 1976 are:

(a) Land which is used, or can and is intended to be used, as the site of any residence provided the residence is not used for temporary accommodation. Temporary accommodation includes hotels and motels but excludes boarding houses, hostels and holiday homes.

(b) Land used solely or principally for the purposes of:

(i) Farming (including hobby farming).

(ii) Animal husbandry (including poultry and bee keeping and the breeding of horses).

(iii) Growing fruit, vegetables and other crops, horticulture, viticulture or forestry.

(c) Sports grounds and racing tracks.

(d) Land owned and used by charities (except where the land is used for commercial purposes).

(e) Land used for the purposes of schools and universities.

(f) Land which is the site of a historic building classified as "A" or "B" by the New Zealand Historic Places Trust.

(3) Returns may be furnished by posting them to Inland Revenue, preferably to the Upper Hutt processing centre or by delivering them to the nearest Inland Revenue office. Returns are due not later than 7 May 1991.

(4) Return forms are available at all district offices of the Inland Revenue Department.

(5) Any person or company failing to furnish a return within the prescribed time commits an offence. Section 58 of the Land Tax Act 1976, provides for a fine of not more than $2,000 for the first such offence, $4,000 for the second such offence and $6,000 for each subsequent offence.

Dated at Wellington on this 1st day of May 1991.

D. HENRY, Commissioner of Inland Revenue.
go4482

Notice to Make Returns of Income Under the Income Tax 1976

Pursuant to the Income Tax Act 1976, the Commissioner of Inland Revenue gives notice as follows:

(1) Returns of income for the year ended 31 March 1991 (or other approved balance date) are required from:

(a) Every person who received income over $20,000.

(b) Every person who received income over $9,500 which included income from employment and more than $1,500 interest.

(c) Every person who received income, from business, rents or any other income from which tax was not deducted.

(d) Every person who received income from Withholding Payments.

(e) Every person who received Guaranteed Retirement Income (National Superannuation) and their total other income was more than $6,006.

(f) Every person and, where applicable, the partner of that person within the meaning of section 374A of the Income Tax Act 1976, where either the person or the partner was issued with a Family Support Certificate of Entitlement under Part XIA of that Act.

(g) Every person who received any income which did not have tax deducted at the correct rate as it was earned or received.

(h) Every person who used a Special Tax Code IR23, or the special shearers codes 'SSH' or 'SHR'.

(i) Every incorporated and unincorporated body which derived assessable income.

(j) All companies, all partnerships, all persons in business (including farming) or in a profession, all persons in partnership, all trustees, executors and administrators, even if by reason of a loss being incurred for the year or carried forward from a previous year, no taxation is payable.

(2) Returns may be furnished by posting them to Inland Revenue, preferably to the processing centre where the client's records are held or by delivering them to the nearest Inland Revenue office.

(3) Due dates for furnishing returns of income for the year ended 31 March 1991.

(a) In all cases where income has had tax deducted at the time it was earned or received (income from salary, wages, benefits, pensions, interest and dividends) and no other income whatsoever was derived, returns are due on 7 June 1991. The return to use is the IR5 (green print).

(b) In all other cases, returns are due on 7 July 1991, or within 2 months of balance date, whichever is the later.

The returns to be used are:

- IR3 (grey print) for Individuals.
- IR4 (blue print) for Companies.
- IR6 (pink print) for Estates and Trusts.
- IR7 (brown print) for Partnerships.
- IR8 (gold print) for Maori Authorities.
- IR9 (olive print) for Clubs and Societies.

(4) Any person requiring a return form can obtain one from their local Inland Revenue office.

(5) Any person or company failing to furnish a return within the prescribed time is liable to a fine, when convicted, of:

- on the first occasion, not exceeding $2,000 for each offence,
- on the second occasion, not exceeding $4,000 for each offence,
- on every other occasion, not exceeding $6,000 for each offence.

(6) Any person who is not required under paragraph (1) to furnish a return and who has derived income from employment may choose to furnish a return using form IR5. A tax refund may arise, if for example:

- additional rebates or exemptions were not included in the tax code during the year; and or
- employment was only for part of the year.

Dated at Wellington on the 1st day of May 1991.

D. HENRY, Commissioner of Inland Revenue.
go4483

Justice

Criminal Justice Act 1985

Confiscation of Motor Vehicle

Pursuant to section 84 (2) of the Criminal Justice Act 1985, an order was made in the District Court at Christchurch on Thursday, the 28th day of March 1991, against **Earl Kingsley Ritani**, for the confiscation of the following motor vehicle:

Mazda 929. Registration No. IF 6878.

C. J. HEATH, Deputy Registrar.
go4480

Indecent Publications Act 1963

Decision No. 4/91
Reference No.: IND 35/89 and 23/90

Before the Indecent Publications Tribunal

In the matter of the Indecent Publications Act 1963, and in the matter of an application by the Comptroller of Customs for a decision in respect of the following *Penthouse* magazines published by Penthouse International Ltd.: *Penthouse,* January 1988, Vol. 19, No. 5; *Penthouse,* May 1988, Vol. 19, No. 9; *Penthouse,* June 1988, Vol. 19, No. 10; *Penthouse,* July 1988, Vol. 19, No. 11; *Penthouse,* August 1988, Vol. 19, No. 12; *Penthouse,* September 1988, Vol. 20, No. 1; *Penthouse,* October 1988, Vol. 20, No. 2; *Penthouse,* November 1988, Vol. 20, No. 3; *Penthouse,* December 1988, Vol. 20, No. 4; *Penthouse,* January 1989, Vol. 20, No. 5; *Penthouse,* February 1989, Vol. 20, No. 6; *Penthouse,* March 1989, Vol. 20, No. 7; *Penthouse,* July 1989, Vol. 20, No. 11; *Penthouse,* September 1989, Vol. 21, No. 1:

Chairperson: P. J. Cartwright.

Members: R. E. Barrington, W. K. Hastings, K. A. R. Hulme and S. C. Middleton.

Hearing at Wellington on the 20th, 21st and 27th day of November 1990.

Appearances: W. Akel assisted by H. K. Wild for the publisher, Penthouse International Ltd. ("Penthouse International"); G. F. Ellis for Gordon & Gotch (NZ) Ltd. ("Gordon & Gotch") the representative of Penthouse International in New Zealand; Lowell P. Goddard, Q.C., senior Crown counsel representing the Comptroller of Customs ("the Crown"), assisted by Anthony Shaw; A. D. Ford for Society for Promotion of Community Standards Inc. ("the society").

Decision

Introduction

The 11 issues of the U.S. edition of *Penthouse* magazine *(Penthouse (U.S.))* contained in IND 35/89 came before the Tribunal for consideration at a hearing on 4 October 1989. At that sitting Mr Ellis asked for and was granted an adjournment of the determination of the classification of these publications. Such adjournment was granted on the basis that further consideration and a detailed review of these publications would be made at a future special sitting of the Tribunal at a date and a time to be fixed.

Consideration of the 3 issues of the U.S. edition of *Penthouse* magazine *(Penthouse (U.S.))* contained in IND 35/90 stands adjourned *sine die* by virtue of decision No. 23/90 which was delivered on 19 July 1990.

The Parties

Penthouse International has standing before this Tribunal under section 14 (5) and (6) of the Indecent Publications Act 1963 ("the Act").

Gordon & Gotch has standing before this Tribunal under section 14 (5) and (6) of the Act, as has been recognised by the Tribunal in numerous earlier hearings considering *Penthouse* publications.

The publications in both applications were seized by the Collector of Customs following private importations in 1989 and 1990. In her opening address Ms Goddard made it clear that whilst she and Mr Shaw nominally appeared to represent one of the Crown's Law Offices, viz. the Comptroller of Customs, that her role in these proceedings was primarily that of counsel assisting the Tribunal. The Tribunal accepted that that was an appropriate role.

The society has standing before this Tribunal as the result of a joinder application which was granted by the Tribunal in decision No. 62/90 delivered on 14 November 1990. In that decision it was noted that the society was "a legitimate participant in the public debate concerning indecent material" as was recognised by the Chief Justice in the preliminary hearing of *The Society for the Promotion of Community Standards* v. *Everard* 7 NZAR 33.

The Cases for the Parties

For Penthouse International Mr Akel submitted that the magazines should be classified as indecent only in the hands of persons under 18 years of age pursuant to section 10 (b) of the Act. He indicated that the publisher did not seek to make the magazines available to persons under 18 years of age because they were designed for adult readers.

If this submission was upheld by the Tribunal, or it classified with an age restriction any 3 issues published within a 12-month period, Mr Akel requested a serial restriction order pursuant to section 15A of the Act for 2 years from the date of the decision, restricting publication of all issues to persons 18 years and over.

If it would assist the Tribunal in giving an R18 serial restriction order, Mr Akel said that the publisher would provide a solicitor's undertaking to the Tribunal that it would seal all copies of *(Penthouse (U.S.))* which were imported into New Zealand pursuant to the serial restriction order.

For Gordon & Gotch Mr Ellis indicated his client's support for Penthouse International in its application for an age restriction classification and serial restriction order pursuant to section 15A of the Act.

For the Crown Ms Goddard indicated her agreement with Mr Akel that the considerations to which the Tribunal would need to turn its collective mind in determining the classification of these publications were:

1. The contents of the magazine—sexual, literary and artistic.
2. The validity in 1990 of the "tripartite test".
3. Whether in fact *(Penthouse (U.S.))* is injurious to the public good in New Zealand.
4. The indications of contemporary levels of tolerance and acceptability of sexual explicitness within the community in New Zealand.

For the society Mr Ford submitted "that the particular 14 editions of *(Penthouse (U.S.))* now before the Tribunal should again all be classified as unconditionally indecent."

Brief History of Penthouse *and* Penthouse (U.S.) *before the Tribunal*

Until 1984 *(Penthouse (U.S.))* was distributed in New Zealand by Gordon & Gotch. With some exceptions, the title was distributed under an R18 age restricted classification and covered by serial restriction orders under section 15A of the Act. The title has been considered by the Tribunal on numerous occasions since 1966, including major hearings in October 1976 and November 1983 when Penthouse International was represented by independent counsel. Gordon & Gotch also appeared and was represented in those

proceedings and in other cases counsel for Gordon & Gotch appeared also to represent the interests of the publisher. In decision 13/84 released in April 1984 the Tribunal classified issues of *Penthouse (U.S.)* unconditionally indecent. Since that time it is understood that importation of *Penthouse (U.S.)* by Gordon & Gotch has been suspended. In the meantime Gordon & Gotch has imported and distributed *Penthouse* from Australia and has not sought to import the regular *Penthouse (U.S.)* title, although it has continued to distribute other titles from *Penthouse (U.S.)*, including *Penthouse Forum.* The subject issues in these proceedings (as indicated earlier) were private imports and Gordon & Gotch brought to the attention of the international publisher their seizure and referral to this Tribunal. Gordon & Gotch continues to distribute *Penthouse* titles sourced from Australia. The Australian title has consistently been classified R18 in recent Tribunal decisions and is distributed under a section 15A serial restriction order currently renewed for a further 2 years.

Decision No. 881 dated 23 December 1976 noted that *Penthouse* magazine had been before the Tribunal on 6 occasions, namely 1966, 1969, March and October 1972, 1974 and June 1975. The Tribunal noted that the English editions had generally fallen within the classification of indecent while the American editions had been held to be suitable for those over 18 years.

The Tribunal in decision 881 found the 2 editions of *Penthouse (U.S.)* then before it indecent in the hands of persons under 18 years.

In decision 883 dated 2 June 1977 the Tribunal again classified 3 issues of *Penthouse (U.S.)* as indecent in the hands of persons under the age of 18 years and made a 2-year restriction order.

In decision 936 dated 21 December 1979 the Tribunal classified the 3 editions of *Penthouse (U.S.)* which were before it as indecent in the hands of persons under the age of 18 years and made another 2-year restriction order.

In decision 1038 the Tribunal classified the May and June 1980 editions ("Caligula" editions) of *Penthouse* indecent. In doing so the Tribunal drew attention to 2 particular features (referred to at pages 4 and 5):

"(a) A 13-page portfolio in June 1980 featuring lesbian love scenes, described as 'grossly explicit' and 'having no literary or artistic merits' in the context in which they appeared; and

(b) In the May 1980 issue—the sex and violence depicted in the 'Caligula' excerpts described as 'pictures shown out of context' and as 'highlights from a film that itself in the finish lacks honesty of purpose'."

It should be noted that the "Caligula" portfolios depicted numerous scenes of an orgiastic nature with themes of rape, incest, violent abuse of women (and men) in the position of slaves.

In decision 1033 the Tribunal considered *Penthouse (U.S.)* of September, October and November 1981. In addition to those sections featuring explicit genital detail the Tribunal noted the emergence of pictorial sequences with 2 or more models as "another major step forward in the kind of photographs it is presenting to its readers" (page 2). In the Tribunal's view the November 1981 issue "crossed the line" with a pictorial article using a *James Bond—From Russia With Love* scenario. The scenes described in that issue the Tribunal found "not only offensive and tasteless, but also that they are injurious to the public good because:

(a) Of the mixture of sex and violence depicted;

(b) Of the needless multiplicity of models and the degree of intimacy among them;

(c) Of the lesbian and prurient aspects of sex presented."

This marked the origins of the "tripartite" test. The 3 limbs of this test were cumulative in relation to the picture sequence in the November 1981 issue. Not all of the "multiple model" scenes were considered indecent (i.e., September and October issues). Apparently none of the separate elements alone were regarded as sufficient to condemn the September and October issues of that year (nor earlier issues considered by the Tribunal in decision 881 in 1976).

In decision 1053 the Tribunal considered 12 consecutive issues of *Penthouse* for that year. At page 2 of the decision, in referring to a portfolio of photographs entitled "The Bank Robbery" in the August 1982 edition, the Tribunal reiterated the formulation of the test which had been stated in decision 1033. That formulation was applied to scenes from the August 1982 edition in relation to which it was said:

"Mr Heron initially submitted that none of the 1982 publications had the aggressive element combining violence and lesbianism which the November 1981 had but conceded, when asked to comment on this particular portfolio (a male and 2 female models in various settings as a bank robbery) that it appeared to fall within that category".

In other of the 1982 issues, the Tribunal found a variety of heterosexual scenes depicting various degrees of intimacy, some of which were described as "explicit" but still with "some restraint" while others were described as "so offensive as to be injurious to the public good".

Much of decision 1053 was then devoted to the convenience and administrative practicality of section 15A serial restriction orders and the usefulness to both Customs and importers of some guidelines which would signal particular issues which might require referral for classification. Stressing (at page 7) that it hesitated "to lay down hard and fast rules" the Tribunal went on to say that the danger of an unconditionally indecent classification was present "when the normal content of *Penthouse* is embellished by:

1. Scenarios involving more than 2 models, and in which sex and violence and intimacy and/or deviant aspects of sex are depicted among the models;
2. Multiple model scenes which depict lesbian acts;
3. Heterosexual scenarios in which there is a high degree of intimacy (e.g., fellatio or cunnilingus or intercourse) depicted in the couple's actions."

The Tribunal stressed (as it had earlier) that such a "test" could never be enough on its own and that the Tribunal must refer to the criteria in section 11 of the Act.

In the last significant Tribunal decision on *Penthouse* (decision No. 13/84) the Tribunal reviewed the origins of what by then was referred to as the "tripartite test". It said that in decision 1053 it expressly refrained from laying down hard and fast rules. In decision 1054 the Tribunal said it described the tripartite test as setting broad guidelines, expressly because of what was said in the judgment of Jeffries J in the High Court in *Waverley Publishing Co* v. *Comptroller of Customs* (1980) 1 NZLR 631. It concluded:

"Because the 3 issues before us contain multiple scenes they are classified as indecent."

Central Issues

In Mr Ellis' view *Penthouse* material is not indecent *per se*, a view with which we are in substantial agreement. Mr Ellis reminded the Tribunal that, historically in New Zealand, the majority of *Penthouse* material, including that in *Penthouse (U.S.)* , has not been considered indecent except in the hands of persons under the age of 18 years. We agree with Mr Ellis that this is an important starting point for these proceedings because, so far as we are aware, the present editorial policy, publishing standards, graphic and textual quality, dominant theme and philosophy of *Penthouse* are the same internationally. Apparently what varies from country to country is the degree of explicitness in the sexual content. We uphold Mr Ellis' submission that the sole distinguishing feature

between *Penthouse (U.S.)* and *Penthouse Australia* is that the U.S. edition regularly includes pictorial representations of non-violent, consexual, sexual intimacy between adult models. We agree with Mr Ellis that the central issue requiring determination by the Tribunal in these proceedings is whether such representations in the context of these magazines are indecent in New Zealand in 1990. This being the case it will not be necessary in this decision to traverse the overall content of *Penthouse (U.S.)* magazine other than for the purpose of measuring them against the criteria contained in section 11 (1) of the Act.

The Legislation

Section 2 defines indecent as follows:

> " 'Indecent' includes describing, depicting, expressing, or otherwise dealing with matters of sex, horror, crime, cruelty, or violence in a manner that is injurious to the public good."

The functions of the Tribunal are set out in section 10 of the Act:

> "**10. Functions of Tribunal**—The functions of the Tribunal shall be—
>
> (a) To determine the character of any book or sound recording submitted to it for classification:
>
> (b) To classify books and sound recordings submitted to it as indecent or not or as indecent in the hands of persons under a specified age or as indecent unless their circulation is restricted to specified persons or classes of persons or unless used for a particular purpose, as the case may be:
>
> (c) To hear and determine any question relating to the character of a book or sound recording referred to it by a Court in any civil or criminal proceedings (including proceedings under section 25 of this Act), and to forward a report of its findings to that Court."

The matter to be taken into consideration by the Tribunal in classifying or determining the character of any book are set out in section 11 (1) and (2) of the Act:

> "**11. Matters to be taken into consideration by Tribunal or Court**—(1) In classifying or determining the character of any book or sound recording the Tribunal shall take into consideration—
>
> (a) The dominant effect of the book or sound recording as a whole:
>
> (b) The literary or artistic merit, or the medical, legal, political, social, or scientific character or importance of the book or sound recording:
>
> (c) The persons, classes of persons, or age groups to or amongst whom the book or sound recording is or is intended or is likely to be published, heard, distributed, sold, exhibited, played, given, sent, or delivered:
>
> (d) The price at which the book or sound recording sells or is intended to be sold:
>
> (e) Whether any person is likely to be corrupted by reading the book or hearing the sound recording and whether other persons are likely to benefit therefrom:
>
> (f) Whether book or the sound recording displays an honest purpose and an honest thread of thought or whether its content is merely camouflage designed to render acceptable any indecent parts of the book or sound recording.
>
> (2) Notwithstanding the provisions of subsection (1) of this section, where the publication of any book or the distribution of any sound recording would be in the interests of art, literature, science, or learning, and would be for the public good, the Tribunal shall not classify it as indecent."

Section 21 (1) of the Act lists a number of activities which constitute offences under the Act. It is provided in subsection (2) of section 21 that it shall be no defence to a charge under subsection (1) that the defendant had no knowledge or no reasonable cause to believe that the document to which the charge relates was of an indecent nature. The particular activity which we wish to emphasise in the classification of these magazines is that which is contained in section 21 (1) (f):

> "**21. Offences of strict liability**—Every person commits an offence against this Act who—
>
> . . .
>
> . . .
>
> (f) Sells, delivers, gives, exhibits, or offers to any person under the age of 18 years any document or sound recording which is indecent in the hands of a person of the age of the person to whom it is sold, delivered, given, exhibited, or offered;"

The Bill of Rights Act also has application to these proceedings. The parameters and tenets of section 2 of the Act, as judicially defined, are not inconsistent with the rights and freedoms contained in the Bill of Rights Act 1990. Given the relevance of the latter statute to the Act reference to the relevant provisions in the Bill of Rights Act will be made later in this decision.

What follows are brief summaries from the viva voce and affidavit evidence and the submissions of counsel for the parties. These summaries do not purport to be a complete coverage of all the evidence and submissions presented at the hearing. A total of 28 affidavits and statements were submitted on behalf of Penthouse International. With the exception of Inspector Kerr, Professors Mullen, Donnerstein and Linz and Dr Court there was no cross-examination. The society's case is based largely on the evidence of 1 witness only, Dr J. H. Court, a psychologist. To ensure that the society's case receives treatment in balance with the volume of evidence presented on behalf of Penthouse International our summary of Dr Court's evidence, and the conclusions we have drawn from it, will be fuller than the individual summaries of the evidence of the other witnesses.

Viva Voce Evidence

David Benjamin Kerr, a Chief Inspector of Police at Legal Section in Police National Headquarters. Inspector Kerr explained that one of his responsibilities was to monitor police inquiries and prosecutions under the Indecent Publications Act 1963 and the Video Recordings Act 1987 because both Acts require the leave of the Attorney-General to commence prosecutions. Inspector Kerr described a police computer programme, the "Sex Offender Report", which between April 1988 and June 1990 built up information received from records relating to 53 alleged offenders in respect of 71 victims of sexual crimes where the alleged offender had been accused of or had admitted using sexually explicit material before or during the crime. From the information gathered Inspector Kerr explained that only 2 propositions could be supported. The first proposition was that there are a number of sexual crimes committed each year in which either prior to or during the offence the offender has used pictorial material some of which is sexually explicit. Inspector Kerr's second proposition was that a significant factor in the figures are the number of adult offenders (34) in the 30–80 year range using such material before committing sexual offences with young persons in the age range from 4–15 (56). Inspector Kerr emphasised repeatedly, in his evidence and under cross-examination by Mr Akel, that the figures were "link" only and "I am making no claim to causation in my figures" (page 2 of transcript). In many of the cases reported there was some previous relationship between the offender and the victim. Inspector Kerr also testified that there is no guarantee that the use of such material would be discovered by the investigating officer or, if it was, that it would be entered into the data base.

Paul Edward Mullen, Professor and Chairperson of the Department of Psychological Medicine at the University of Otago Medical School. In Professor Mullen's view material which is potentially injurious to the public good is that which encourages actions which are either illegal or potentially damaging to the health of the reader, or could induce the reader to commit acts which put others at risk. Furthermore, in Professor Mullen's view, the coupling of certain kinds of sexual behaviour notably that exploiting sadistic or paedophiliac activities with erotically arousing images, could encourage injurious acts. In addition, in his view, the coupling of aggression and sexuality has considerable potential for harm, in part because of the ease with which sexual excitement can translate into aggressive arousal and the ease with which belligerence and dominance can become sexualised. In Professor Mullen's view the link between sexuality and aggression is all too readily established. Professor Mullen expressed the caution that the contribution of pornography, if any, to the complex social factors which are contributing to increased crime rates, including sexual assaults, must remain highly speculative. In his opinion there is no coupling of erotic images with either sadistic or paedophiliac material in *Penthouse (U.S.)*. Nor, in his view, does *Penthouse (U.S.)* couple aggression and sexuality. Professor Mullen concluded that the *Penthouse* magazines examined by him in these 2 applications, though they would be considered by some to be offensive, are not likely to be injurious to the public good. Professor Mullen disputed any suggestion that the several displays of buttocks in photographs in *Penthouse (U.S.)* magazines are associated with anal intercourse. Furthermore he rejected all suggestions that *Penthouse (U.S.)* is trying to convey messages about pre-pubescent women through depictions of partly shaved genitalia. Finally Professor Mullen conceded the existence of the subtle argument which posits that the extraction sexuality from human relationships and the presentation of women as pure objects of desire "denigrates women and by making them appear as mere objects to gratify male sexuality, pre-disposes to male sexual aggression". Professor Mullen felt constrained to add the rider that if this type of degradation is felt sufficient to establish injury to the public good, then its equitable application to all other forms of advertising and entertainment media will have far reaching consequences.

Edward Donnerstein, Professor and Chair of Communication University of California, Santa Barbara, California. Professor Donnerstein explained that the purpose of his evidence, presented in the form of a report prepared in association with Daniel Linz, Associate Professor of Communication at the University of California was to provide a "state of the art" summary of evidence from scientific studies which bear on the question of whether there is a causal connection between exposure to *Penthouse (U.S.)* magazine and anti-social conduct among adults (18 years or older) and whether exposure is "injurious to the public good" or has the "capacity for some actual harm or discernible injury". Professor Donnerstein explained that attempts by social scientists and policy-makers in the United States to categorise *Penthouse* magazine have tended to place it outside of the realm of so-called "pornography". From laboratory studies Professor Donnerstein said that the types of depictions commonly found in *Penthouse* magazine would not influence aggressive behaviour because they do not have a message of violence, only of sexual stimuli. There is no causal influence on behaviour from these types of magazines, Professor Donnerstein said. In conceding the possibility that some of the depictions in *Penthouse* may act as a trigger mechanism, because some studies indicated that possibility, Professor Donnerstein was of the view that the vast majority of studies indicated that no such trigger mechanism or capacity existed. Also it was conceded by Professor Donnerstein that there could be "problems" with images both in terms of the impact on behaviour, and attitudes, when messages of violence and sex are combined, but not when there is just sexual explicitness by itself. Professor Donnerstein was unequivocal in his view that a fusion of violent and sexually explicit material is required to produce violence *per se*. Furthermore Professor Donnerstein was of the view that greater sexual explicitness, multiplicity of models and female-to-female sexually explicit activity, do not have any effect by themselves. Professor Donnerstein agreed that there are a few studies which indicate that pornography, in not portraying sex acts in a "caring" or "committed" way, may negatively affect subsequent judgments about women, sexuality and intimate relationships. However, he explained that these findings must remain tentative because studies have not been replicated. Professor Donnerstein disagreed with the findings of the United States Attorney-General's Commission on Pornography that suggested that there was a causal relationship between exposure to some pornography and sexually aggressive behaviour. Any reasonable review of the research literature, said Professor Donnerstein, would not come to the conclusion reached by the Attorney-General's commission that exposure to non-violent but degrading pornography conclusively results in anti-social effects. Finally specific depictions of the anal region do not seem to indicate any changes in specific attitudes about women or acceptability of violence against women, said Professor Donnerstein. He said people do not change their sexual patterns from exposure to sexual material. Professor Donnerstein knew of no research which suggested that men with a sexual interest in adult women with shaved genitalia had therefore any interest in children. He disputed any such association.

John Hugh Court, Psychologist. Professor of the Graduate School of Psychology at Fuller Seminary, Pasadena, California. This position was taken up in 1989. Previously he was the Director of the Spectrum Psychological and Counselling Centre, Cumberland Park in South Australia. Dr Court holds high academic qualifications and is the author of a number of works on the relationship between pornography and sexual offending.

As indicated earlier, the evidence of Dr Court, and our view of it, will be covered in some depth.

Dr Court presented a research report (November 1990) prepared "For the 1990 Indecent Publications Tribunal Wellington, New Zealand" by Judith A. Reisman, PH.D. ("the Reisman report") as evidence of:

(a) The degree to which *Penthouse* contains a mixture of sex, horror, crime, cruelty or violence in a manner which is injurious to the public good, and

(b) The degree to which *Penthouse* is a picture story book likely to be read by children.

The report was described as a "content analysis of 14 *Penthouse* magazines" which provides "objective measures" of these 2 categories. A point of clarification should be made here to establish a relationship between the Reisman Report and an earlier report written by Dr Reisman in 1986. Dr Court explained to Mr Akel that substantially the Reisman Report was the work of Dr Reisman but that he had rewritten parts of it. Dr Court informed us that much of the Reisman Report was based on an earlier report which Dr Reisman had prepared for the U.S. Department of Justice in 1986 "Images of Children, Crime and Violence in *Playboy, Penthouse* and *Hustler*" ("the earlier report"). In making 1 copy of the earlier report available Dr Court said that he did not wish to refer to it directly but that its availability would assist the Tribunal in understanding the research background of the Reisman Report. The Reisman Report found major changes in *Penthouse* from the research contained in the earlier report, Dr Court said. Under cross-examination by Mr Akel, Dr Court conceded that he was aware that funding of the earlier report to the extent of $734,371 had been cut back to $200,000 because of severe criticisms of it by the Justice Department. As a result the Justice Department decided not to publish the

earlier report. Subsequently Dr Court said that the earlier report was revised and published as a book in 1990 by Huntington House, a publishing house in Louisana. It may be noted that no application was made by Mr Ford to recall Dr Court to dispute Professor Linz's ascertain that the manner of presentation of the earlier report in its 1990 published form was a cleverly disguised attempt to pass it off as an official document sanctioned by the U.S. Department of Justice (which quite clearly from the evidence we conclude it was not).

(i) **The Values in *Penthouse***—Dr Court described *Penthouse* as "on a collision course with national heterosexual values of committed, marital, private, human love". He argued that the 14 subject issues provided "examples of sex, exploitation and violence towards women and children and other undesirables". He said *Penthouse* implicitly claims that women's public exhibition of their genitals and buttocks or anus to millions of unknown children and adults is an expression of normal female sexuality.

Dr Court described *Penthouse* as denigrating marriage, the family and heterosexuality. As an example he referred to a cartoon in the November 1988 edition as offering a rare picture of what appeared to be a married couple in an often repeated theme of "marriage is related to the blind and crippled".

Penthouse was described by Dr Court as encouraging sodomy. He said that in the Reisman Report 175 buttock displays were counted. Dr Court argued that this encouraged sodomy and the resulting spread of sexually transmitted diseases: "Since AIDS has emerged as a fatal disease, any shift from the ... whole human focus to an anal focus may be defined as a toxic endorsement" (page 10 of transcript).

Under questioning by Dr Middleton (page 54 of transcript) Dr Court stated that the researchers had coined the term "heterophobic" to mean "espousing a fear and resentment towards family, religion, children, male/female love ...".

he continued (page 54 of transcript): "... we don't find significant numbers of representations of heterosexual intimacy ...".

In our view the above statements suggest that Dr Court's criticisms are based on a personal moral stance. They appear to be based on an overall disapproval of sexual promiscuity, homosexuality and any sexual behaviour which deviates from monogamy within heterosexual marriage. Depictions of moral codes which differ from those of an individual or group cannot in a western-style democracy be used as the basis for the prohibition of materials. Moreover distaste in itself, is an insufficient ground to classify *Penthouse (U.S.)* as unconditionally indecent.

(ii) ***Penthouse* as a Picture Book**—*Penthouse* was described by Dr Court as a "picture book" on the grounds that only 1 page "out of the whole lot boasted a 2-page only eyespan with text only on both sides ... *Penthouse* resembles a child's picture book more than it may be said to resemble an adult book". We believe this assertion fails to take into account the difference between books and magazines. It would be difficult to find any adult magazine with a 2-page spread without pictures. A perusal of several issues of the following showed: *New Zealand Womens Weekly* (no 2-page pictureless spreads); *Vogue* (1 pictureless 2-page spread—the "shopping guide" at the back); *Cosmopolitan* (none). Using Dr Reisman's and Dr Court's criteria, all adult "glossy" magazines are more like children's picture books than adult books. In our view this contention is not valid.

(iii) **Availability to Children**—Dr Court argued that erotic magazines are easily purchased by children—by subscription and in second-hand book sales. In our view this argument is unrealistic. The high cost of a subscription to *Penthouse* would make it well beyond the price-range of most New Zealand children. The subterfuge involved in having a magazine come through the mail would also deter most children from subscribing.

(iv) **The Fusion of Sex and Violence**—Dr Court described the neurological manner in which pictures are processed by the brain. He argued that: "The consumer experiences a rush from the viewing of sadosexual photos, illustrations and cartoons. Such a rush has been compared to a drug high". Under cross-examination Dr Court elaborated: "perhaps 50 percent, namely the male population, who, I hope, are not potentially criminal by definition, but a large percentage of men are potentially in this direction because of the nature of the sexual arousal mechanism of the male towards combining sexuality and aggression. But it will normally be held in check under all reasonable circumstances". (Page 16 transcript). On the other hand Professor Mullen under cross-examination by Mr Ford disagreed with Dr Court's statements on "arousal": "If you wanted to couple those images, you really would have to go from one to the other. I mean you would have to flick back from one to another". Professor Mullen said that his answer was based on his own research using "electrical measurements from the brain". It is our assessment that the evidence of "fused images of sex and violence" does not hold unless both messages are combined in the one image.

Dr Court agreed that a magazine could not in itself form a person's sexual attitudes, since these were established at a young age. Under cross-examination by Ms Goddard, Dr Court said that "explicit sexual material on its own is associated with increased levels of aggression ... women are battered by men using non-aggression pornographic materials." However, later, under cross-examination by Mr Akel, he said:

Akel: "Do you say that there is no causal or link between non-violent erotica and sexual crimes?"

Dr Court said: "No, I don't say that ... what I am saying is that we do not have evidence that there is such a causal link. I cannot sustain it from my data and I don't know anybody who can."

Under questioning by Mr Hastings, Dr Court admitted that a "copy-cat" argument underlay his submissions.

We find Dr Court's statements on links and causation very confused. He does not present evidence that *Penthouse (U.S.)* is in itself a cause of sexually violent behaviour. Dr Court's contention that *Penthouse* fuses images of sex and violence, and that this fusion is a cause of sexually violent behaviour, on the evidence before us, is unfounded.

(v) **The Impact on the Models**—Dr Court argued that the *Penthouse* models are vulnerable "to family and community ridicule and contempt". He said that they are often coerced by photographers into participation in "lesbian scenes". Such coercion may take the form of promises that such work "is a necessary stepping-stone to stardom of the centrefold". Dr Court argued that such participation can lead heterosexual women to have "later problems with homosexuality and other dysfunctional activity". He argued under questioning by Mr Hastings that "one of the elements in this presentation of sexuality is men looking at women being ashamed and embarrassed". The impact on the models is an issue which the members of the Tribunal consider that they must take into account. We must be vigilant to ensure that our decisions in no way condone the exploitation of models. We do not have any evidence that *Penthouse* models have done anything other than choose their occupations freely. The voluntary performance of sexual acts for money is a kind of prostitution. This may offend some people's sense of morality, but it is not illegal.

(vi) **The Methodology and Credibility of Dr Reisman's Report**—Dr Court agreed that 2 terms were "invented for the purpose of the study": "Sadosexual" and "child magnets". Sadosexual was defined by Dr Court as:

"A body of imagery and text which uses a class of people as sexual entertainment for another class of people ... [it] is

further defined as any sexual entertainment which would put at risk the model, the actor, the person or class described as causing shame, humiliation, anger, fear and especially possible physical harm".

Mr Ellis put it to Dr Court that: "the methodology had been first to create your own definitions, sadosexual, child magnet, etc, then to instruct your coders to look for the elements so defined, not to instruct the coders to look for any positive elements and then simply to analyse the material on the basis of the elements ... found by those definitions". Dr Court agreed: "We didn't instruct them to look for the good qualities in the magazines because the brief that we had was to address ourselves to the New Zealand publication laws that refer to things like indecency and harm, etc. We weren't attempting to quantify the positive qualities of the magazines".

Mr Ellis reminded Dr Court that the Act requires the Tribunal to look at "the dominant effect" of the magazines. Ms Hulme stated her concern that nowhere in Dr Court's submission could she find a distinction between an advertisement which would constitute a child magnet and one that wouldn't. Mr Hastings shared Ms Hulme's concern about some of the emotive language used in Dr Court's report. Sadosexual was one of them, toxic was also a word which was used quite often. Dr Court replied that these words although "descriptive" were not "emotive". Dr Middleton asked Dr Court what criteria were given to the coders for the categorisation of images as "violent". He replied that violent general circulation advertisements were not included. The 'reading' of images in *Penthouse* raised considerable debate during the hearing on specific images, such as the picture gargoyles in the September 1988 issue of *Penthouse* — they were the subject of cross-examination and questioning by several counsel and Tribunal members which explored the existence of a connection between them and sexually violent effects.

We have serious doubts as to the credibility of the Reisman study arising out of apparently biased instructions and categories given to the coders. We comment that the coining of new terms is not in itself a ground for rejection of the study — social scientists need to devise new concepts all the time as the social world, and the theories used to study it, change. It is not the fact that new terms were coined which concerns us but rather the slanted nature of the categories. In our view the coders were looking for negative, not negative and positive messages.

Mr Akel questioned the bias of the "7 adult female Caucasian coders" employed by Dr Reisman. It was noted that they were all her regular employees. Professor Linz (who gave evidence immediately after Dr Court) explained in detail under cross-examination how he checks for "coder-bias" in his own content analysis studies. Psychological tests are given to see which applicants for coding jobs have strong opinions on ;the issue. These people are not employed. Only those who do not have such biases are selected. Reliability indices are devised to determine "the percentage of agreement among coders about a particular category". Apparently steps such as these were not taken to ensure coders impartiality in the Reisman study. In our view the fact that the coders were all employees of Dr Reisman would not have mattered if the precautions described by Professor Linz had been carried out. That there is no evidence that they were so tested is implicit in Dr Court's response to Mr Akel (page 25 of the transcript): "I don't know anything about their personal biases or inclinations to the data." This must cast further doubt on the scientific credibility of the Reisman study.

Mr Akel questioned Dr Court about the nature and funding of his and Dr Reisman's employing bodies. it was noted that Dr Reisman was self-employed. The fact that Dr Reisman is self-employed does not in itself discredit the quality of her work. The fact that her Institute can find enough work may, rather, testify to its quality. No association between Dr Court's institution and particular groups or "moralist organisations" was established. This was not particularly relevant, in any case, since the report itself was what was at issue.

Professor Daniel Linz concluded that Dr Reisman's report was seriously flawed for a number of reasons. First he said there was no control set of material against which the American *Penthouse* editions were evaluated (e.g. a comparison of *Penthouse* presently available in New Zealand against American *Penthouse* would have been an excellent test). Secondly there was no evidence to determine whether the coders were pre-disposed to particular points of view. Thirdly the content categories were not clearly identified, nor was there any corresponding index of reliability. There were no examples of the coding instruments used in the report. Fourthly content analysis, of itself, can tell us absolutely nothing about the effects of material on human behaviour. Finally he said that the report presumes a view of human information processing which is now discredited. What humans do is to organise material within context. This report presumes that the basis of information processing is either that of a completely reactive individual who just responds to stimuli, or that the general ambience of a magazine produces a psychological effect.

Dr Linz outlined a number of findings based on his own research. In his view levels of aggression after exposure to mild erotica (e.g. *Penthouse (U.S.)*) decrease relative to control material. With respect to case studies it has not been established if the materials presented caused that person to be violent, or that an already violent individual is drawn to violent materials that reaffirm existing attitudes or pre-depositions. In fact many studies have found, Dr Linz explained, that following prolonged exposure to extremely sexually exciting stimuli there are lowered levels of aggression and there is the corollary that the individual with less exposure actually behaves in a more violent fashion than the person with more exposure. Professor Linz conceded that people who are exposed to slasher films can become desensitised to violence against women. But correspondingly people exposed to sexually explicit materials (of a non-violent nature) for extended periods of time are unaffected in their judgments about women, he said. The same effects have been found from written stimuli rather than pictorial, and from audio-visual material rather than pictorial, Professor Linz explained. With respect to the various elements in the tripartite test Professor Linz stated that research is not clear on the effects of depictions of multiple actors and whether such depictions suggest a greater level of coercion. In his view it was questionable that the number of, or the relative number of, male/female actors, was in itself an index of implied coercion. And, Professor Linz concluded, he had never been able to get coders to agree on whether the number of actors was a factor in the assessment of a depiction as being coercive.

In summary, from the evidence of Professors Mullen, Donnerstein and Linz we conclude that a combination of violence and sexuality has considerable potential for harm. The evidence of these 3 witnesses has satisfied us that single and multiple model sexual explicitness, by itself, in the manner pictorially depicted in the subject publications, will assist us in the final analysis to classify them as indecent only in the hands of persons under a specified age. Conversely we conclude that the evidence presented by Dr Court does not justify the classification of the subject publications as unconditionally indecent.

Affidavit/Written Statement Evidence

A large number of affidavits and written statements were filed in support of Mr Akel's submissions that these magazines be given an age restriction classification and serial restriction order pursuant to section 15A of the Act. With the exception of the evidence given by Inspector Kerr, Dr Court and Professors' Mullen, Donnerstein and Linz, there was no cross-examination. In summarising the affidavits and statements, albeit briefly, we

shall do so in the alphabetical order in which they were presented at the hearing.

Professor Eric Barendt, Professor of Media law, London University, also a barrister of Gray's Inn, was very critical of the tripartite test. On a literal application of the test he considered each issue might be suspect though they would not be if the Tribunal took the view that all episodes ought to be found in a particular publication for the test to be applicable.

Louis Jacques Blom-Cooper, a Queen's counsel who took silk in March 1970 and was Chairman of the Press Council in the U.K. from January 1989 to December 1990, was of the opinion that the magazine would not be injurious to the public good.

Dr Guy Cumberbatch, Director of the Communications Research Group, Aston University, Birmingham, U.K., an Associate Fellow of the British Psychological Service and a publisher of over 50 research monographs, regarded *Penthouse,* while explicit, as being "soft" core. He considered such material to have no real effect other than temporary sexual arousal and that such material might even assist sex education.

Karen DeCrow, Attorney at Law, is in practice in New York State where she appears in both Federal and State Courts, specialising in constitutional law and sex discrimination.Active in the feminist movement since 1967, Ms DeCrow made it clear that she is totally opposed to censorship. She said it is not known if sexually explicit materials could cause harm. In commenting that President Johnson's commission found no link between crime and sexually explicit material, or violence and sexually explicitly materials, Ms DeCrow said that more recent research indicates the same lack of connection.

Professor Ronald Dworkin is Professor of Jurisprudence at Oxford University and also holds a Chair in Law at New York University. His opinion was expressed most succinctly in these words:

> "The crucial distinction to respect . . . is a distinction between actual harm and offence. *Penthouse* undoubtedly and understandably offends many people. But it does not harm them in the way the statute must be understood to require before a publication may be banned."

John Evans, company director, a British subject and President of the International Division of General Media (*Penthouse* being one of General Media's publications) informed us that the magazine is available at most international airports around the world. However, the U.S. edition of *Penthouse* is banned in Saudi Arabia, Iran, Iraq (and occupied Kuwait), Pakistan and is not distributed on economic grounds in most of Africa. It is not distributed in Great Britain or the Republic of Ireland due to contractual agreements with the British edition of *Penthouse*. Mr Evans indicated that *Penthouse (U.S.)* is also distributed in Canada in accordance with Canadian customs guidelines. These guidelines prohibit the depiction of bestiality, incest, coprophilia, violence, degradation, use of juveniles, coercion or bondage. The publisher is concerned to reflect a healthy and forward looking attitude to sex integrated with other facets of modern living.

Hans Jurgens Eysenck, Professor Emeritus of Psychology at the University of London, a publisher of some 950 articles and 70 books, was the recipient of the Distinguished Scientist Award of the American Psychological Association in 1988. The pictorial section scenarios involving more than 2 models, in which sex and intimacy are depicted among them, are in his opinion not explicit but mostly suggest a high degree of intimacy. In his view the tripartite test, as it affects *Penthouse* pictorials, is arbitrary and inappropriate as a general rule. In his opinion a test requiring the indiscriminate infringement of one of its limbs or even requiring the infringement of all 3 limbs in the same publication, is inappropriate and should be discarded.

John Gardner, a Fellow of All Souls College, Oxford, and a barrister of the Inner Temple, teaches comparative human rights and jurisprudence in the Law Faculty at Oxford. He has published work concerning the moral limits of the criminal law and the moral foundations of civil rights. In his affidavit he expressed the belief that the magazines in question are, in their sexual content, harmful to women. However, Mr Gardner is of the view that there can be no "injury to the public good" arising from the sexual material in *Penthouse* once the values of toleration in general and respect for particular people are taken into account.

Dr Lionel Richard Charles Haward, a clinical psychologist of Chichester and a Fellow of the British Psychological Society, said he knows of no scientifically acceptable evidence which proves that pictures of the kind published in *Penthouse* can be harmful. To the contrary he believes there is positive evidence that such pictures are associated with beneficial effects both to the individual and to society.

Berl Kutchinsky is Professor (Docent) of Criminology and Director of the Institute of Criminal Science at the University of Copenhagen. Professor Kutchinsky states that he has published about 200 books and articles in 7 languages, many on the subject of pornography. His affidavit concluded that:

> "Older as well as the most recent evidence suggests that adverse effects of the availability of Penthouse, in the form of detriment to the behaviour, attitudes or mental health of intended or unintended readers, to the position of women in society, or to society in general, are not to be expected."

Sara Louise Maitland, a writer and theologian for the past 12 years, has a B.A. (Hons.) in English Language and Literature from Saint Anne's College, Oxford. Between 1985 and 1987 she was a member of the Archbishop of York's Working Party on Values in Contemporary British Society. While Mrs Maitland acknowledges that some women and particularly feminists are convinced that there is a connection between the *Penthouse* type of publications and the actual physical abuse of women, she says, along with many of other feminists, that she is not so convinced and that best sociological material supports this contention. Mrs Maitland referred also to the feminist view that the models themselves were being demeaned and exploited. Mrs Maitland disagreed. While conceding that the models were being demeaned, in a sense, she was of the view that they were certainly not being exploited and that they were better paid than most women.

Brian Neil Middleton of Auckland, managing director of Special Investigations & Security Limited of Auckland, stated that he had retired as a detective superintendent of the New Zealand Police in December 1986 after 30 years in the force. Mr Middleton's 3½-page affidavit concluded with his opinion that the 3 magazines read by him, the issues of May, July and 1988, were "not injurious to the public good".

John William Money born in Morrinsville, New Zealand on 8 July 1921, states that he is Emeritus Professor of Medical Psychology and of Paediatrics at the Johns Hopkins University School of Medicine and Hospital in Baltimore, U.S.A. Leaving New Zealand (for higher education) in 1947 after graduating from the University of New Zealand with an M.A. in Philosophy and Psychology (1943) and an M.A. in Education (1944), Professor Money's speciality became and still is psychoendrocrinology and sexology. Last visiting New Zealand in 1987 Professor Money sites that he maintains interest in social and political developments in New Zealand. Professor Money considers that the Indecent Publications Tribunal, as a democratic institution, "has an inescapable obligation to pay attention to the rights of New Zealand's indigenous Polynesian population". In his view the Pakeha culture of New Zealand "has absolutely no right whatsoever to impose on Maori culture its own criteria of what is and what is not sexually indecent. The New Zealand Indecent Publications Tribunal ought to consult New Zealand's Maori on whether the

aforementioned 14 issues of *Penthouse* are or are not indecent in Maoridom".

Professor Money postscripted his affidavit with the observation that "visual erotica of the type found in *Penthouse,* when used as a masturbation accessory, is of exceptional value as a positive protection against exposure to the AIDS virus".

Bernard F. Norman, M.A. Senior Clinical Psychologist, New Zealand Registered, in a report addressed to the Tribunal which is dated 12 November 1990 stated, *inter alia* "With respect to all the pictorials viewed I found nothing depicting violence, crime, cruelty or horror. Nor did I find any sexual content that could be construed to be injurious to the public good".

Rosalind Mary ("Tuppy") Owens of London deposed on oath that she has an honours degree in zoology and a diploma in human sexuality from London University and is the Founder of the Outsiders Club, a self-help group for physically and socially handicapped people looking for friends and partners. She said her experience with people with disabilities is that they very much enjoy magazines such as *Penthouse* although they prefer more hard core magazines. She said it is a wonderful thing for people with disabilities to be able to look at sexy pictures, the private parts and to see bodies being enjoyed as they would like to enjoy their own.

Christine Alice Margrit Pickard of London is a general medical practitioner with a particular interest in social gynaecology. Dr Pickard's 8-page affidavit concluded with her belief that she could not think of any harm that might accrue from *Penthouse* magazines which would require their being banned.

Joseph Raz of Oxford, England, is Professor of the Philosophy of Law at the University of Oxford and a Fellow of Balliol College. He has published extensively on legal and social philosophy. Having examined the May, June, July and September 1988 issues of *Penthouse* magazine Professor Raz said there was no doubt in his mind that there was nothing indecent (within the meaning of the term in New Zealand law) in those issues of *Penthouse.* He said he found it hard to concede that anything in these issues is likely to corrupt or cause any specific harm to anyone. He found no portrayal of any horrors, crimes, cruelty or violence in these issues of the magazine. Some of the material in the issues examined by Professor Raz, tended, in his opinion, to encourage attitudes which he regards as flawed and against the public good. However, taking into account the values of pluralism and autonomy, Professor Raz considers that the issues examined by him are not injurious to the public good.

Tom Scott of Wellington, well known cartoonist and writer in this country, presented a submission. A certain reticence precludes us from reproducing some of the more humorous asides from Mr Scott's submission. Suffice to say that he views *Penthouse* as being primarily a male masturbatory aid. He does not consider the U.S. editions of *Penthouse* examined by him as being indecent within the definition in the Act. In the particular editions read by him, Mr Scott said he could see nothing injurious to the public good. He could not see how anyone could be corrupted by them.

Michael Schofield of London is the holder of a masters degree in psychology from Cambriddge University and has worked as a social psychologist, specialising in social research. Having read the March, May and June 1990 issues of *Penthouse* Mr Scholfield concluded that no one is likely to be harmed or corrupted by them nor were they in any way injurious to the public good. In some circumstances Mr Schofield considers that they would have some beneficial effects. In his view erotic feelings in themselves are quite innocent. They become injurious only when they are mismanaged or directed towards anti-social ends.

Gwendoline Smith of Auckland, psychologist states she has been in practice for 9 years as a clinical Psychologist with a wide range of experience in the mental health area. Having studied 4 copies of *Penthouse (U.S.)* magazine she states that there is not at this time any empirical evidence that shows a casual relationship between exposure to sexually explicit material and acts of sexual violence. Although comprehensive international studies suggest that pornography may be offensive to the value systems of some members of the community, Ms Smith said it has not been possible to show that it is harmful/injurious to the public good. Particularly she said there is no evidence to suggest that the use of consenting female adults in multiple model scenes is enough to injure the public good.

Edward Chad Varah Obe, of the City of London, has been a priest in the Church of England for 54 years, Rector of the Lord Mayor of London's Parish Church for 37 years, holds a Masters Degree from the University of Oxford and has been providing sex therapy since 1935. In 1953 the Reverend Varah started the Samaritans, now a worldwide organisation with 183 branches including 7 branches in New Zealand. In his view it cannot be said that these magazines cause, or are even likely to cause harm and injury, or to corrupt or deprave.

Graham Michael Vaughan of Auckland, professor of psychology at the University of Auckland, in his affidavit concluded from a study of 6 issues of *Penthouse (U.S.),* May, August, September, October and November 1988 and February 1989 editions, that none of the content in any of themes depicted in a manner which is injurious to the public good. The summary of a report attached to Professor Vaughan's affidavit sites "On the whole, there is no evidence in the research literature pointing to harmful effects of non-violent erotica, as such, upon males".

Desmond Bruce Williams, a professional photographer of Auckland, attested in general terms to his belief that the photos in the subject magazines are of a much higher standard than what appears in most fashion magazines.

Glenn Daniel Wilson of London, Senior Lecturer in Psychology at the University of London, Institute of Psychiatry and Adjunct Professor of Psychology with the University of Nevada, Reno, deposed, inter alia:

> "A great deal of research has been done on the effects of erotica on the likelihood that the viewer will commit rape upon or assault women. While the case is still open with respect to certain types of pornography (in particular those which promote sexual aggression towards women with justifications to the effect that women are worthless whores, or that they enjoyed being raped, or eventfully get around to enjoying it), there is no evidence that the softer, good-humoured type of erotica, such as *Penthouse* is harmful in any way."

Colin Rhodri MacTaggart Wilson of North Hampton, England is a consultant psychiatrist specialising in the area of acute mental illness, group and individual psychotherapy and marital and psychosexual counselling. Having studied the *Penthouse (U.S.)* issues of January, March, June and August 1989, he said he saw no evidence whatsoever that the material contained in those magazines would be of any harm to anybody who read them.

Affidavits or statements in writing were received from a total of 29 witnesses. With the exception of Professors Donnerstein, Linz and Mullen and Dr Court their evidence was not tested under cross examination. With the exceptions noted Mr Akel indicated that application had not been made to cross examine any of these witnesses. It should be noted that section 6 of the Act permits the Tribunal to receive in evidence any statement, document, information or matter that may in its opinion assist it to deal effectively with any matter before it relating to the character of a document, whether or not the same would be otherwise admissible in a court of law. It can be appreciated, then, that the procedure of the Tribunal, by contrast to the process of a court of law, is less formal with the rules of evidence being relaxed in almost all cases. Nevertheless the

weight to be given to the evidence is a matter for the Tribunal to decide. The function and approach of the Tribunal was commented on by the High Court in *Gordon and Gotch* especially in the judgment of Jefferies J at page 92, line 22 and following:

"The Tribunal, it could be said, is driven to search the whole range of its collective experience as well as any evidence which might be placed before it, but most certainly it is not limited to the evidence and the absence is not itself to be determinative. In reaching a decision on possible injury to the public good the Tribunal could hardly be said to be deciding, or resolving, a fact. Injury to the public good is in the same category as public interest which is nearly entirely judgmental. I do not exclude the value of evidence on injury if it is tendered, but if there is no evidence that condition does not, in my view, immobilise the Tribunal, or force it as a matter of law to act in any particular way."

Internationally recognised experts on the effects of pornography have provided evidence for this sitting of the Tribunal. Their views on the subject warrant respect. All their evidence has been considered in full. Many of the witnesses conceded that *Penthouse* "undoubtedly and understandably offends many people" but, in general terms, their unanimous conclusion was that the manner in which sex is dealt with in *Penthouse (U.S.)* is not injurious to the public good because there is no discernible harm or injury to the public as a result.

A Summary of Counsels' Submissions

Detailed written and oral submissions were received from counsel on behalf of the parties. Without exception all submissions were helpful, relevant and carefully constructed. No disrespect is intended by the brief summaries which follow.

Submissions of Counsel for Penthouse International

1. The tripartite test was developed as a cumulative test, and its shift to a 3-stage alternative test was not as a result of any conscious decision by the Tribunal.

2. On the authority of the *Everard* decision alone the tripartite test, developed in 1982, with each limb applied in isolation, no longer reflects the limits of acceptability of the New Zealand community as a whole. At page 57 and 58 McGechan J stated:

"... any immutable rule that explicit displays of sexual intercourse are injurious to the public good does not usually fit in with the combined elements of all arms of the section 2 definition and the section 11 criteria in the Indecent Publications Act 1963."

3. Changes in society on homosexuality (Homosexual Law Reform Act 1986) should be reflected by the Tribunal. It is unfair and discriminatory to single out lesbian acts from others.

4. Useful indications as to what is "injurious to the public good" are given by:

(a) The report of the Ministerial Committee of Inquiry into Pornography (the "Morris report", which includes views expressed by the Maori Women's Welfare League), together with the Justice Department paper entitled "Censorship and Pornography: Proposals for Legislation" (October 1990).

(b) Reports and findings of overseas committees of inquiry into pornography:

- Report of the Committee on Obscenity and Film Censorship (the "Williams report") 1979.

- Pornography and Prostitution in Canada

- Report of the Special Committee on Pornography and Prostitution (the "Fraser report") 1985.

(c) Judgments of Courts in New Zealand and decisions of specialist Tribunals, in particular:

- *Society for the Promotion of Community Standards Inc v Everard* (1987) NZAR 32 (High Court).

- *Comptroller of Customs v Gordon & Gotch (NZ) Limited* (1987) 2 NZLR 80 (Full Court of High Court).

- *Howley v Lawrence Publishing Co Ltd.* (1986) 6 NZAR 193 (Court of Appeal).

(d) Expert opinion as to the injuriousness or otherwise to the public good of the material.

(e) Other evidence from within the community as to what is acceptable.

On the basis of the above materials (some of which are referred to in more detail later in this decision) Mr Akel submitted that there is no evidence that the availability of the type of erotic material in *Penthouse* magazine causes any type of harm to the extent that a general prohibition is warranted.

5. The issue of whether something is demeaning is not one of there criteria that the Tribunal can take into account (refer decision 28/90 *Private Lives,* Vol. 1, Issues 2, 5 and 6). Although the magazine is targeted at men, there is nothing in it that suggests male superiority. Each multiple pictorial essay illustrates the importance of mutual affection and joint satisfaction in a caring fantasy relationship. It is impossible to apply the question of the demeaning effect or degradation universally to women as a group and as such to perceive it as injurious to the public good (reference Gordon & Gotch and Everard). There is a fundamental difference between men and women's sexuality. A characteristic of men's sexuality is that it is much more immediate and direct. Male arousal is caused chiefly through vision, whereas women are aroused primarily by sense of touch.

6. Section 11 criteria:

(a) The dominant effect of the magazine is more appropriately described as "lifestyle" rather than sex.

(b) The photos in the magazine are of the highest artistic quality. Some of the world's most prestigious writers have published works in *Penthouse.* On previous occasions the Tribunal has recognised the very high literary standard of the magazine. Both politically and socially the magazine is in the forefront of the news.

(c) The magazine is targeted at middle and upper income men between the ages of 23 and 35. It is not targeted at perverts or people who would not, for any reason, be considered to have normal and healthy sexual behaviour. The magazine is not designed to have any special appeal for children, persons of low intelligence or particularly vulnerable groups in society. The Tribunal has previously recognised that the magazine is directed at adult readers.

(d) It is envisaged that the price will be at least and probably more than that of Australian *Penthouse*, which is on the market at present for $8.95. This price is sufficiently high to ensure that the magazine is bought only by those adults who really wish to read it.

(e) The expert evidence has established that the pictorial representations such as in *Penthouse*, (which lack any element of violence), result in no negative effects, and certainly no corruption.

(f) The publishers have an honest purpose. They aim to cater for all reasonable expectations and interests of men, recognising their sexual requirements as well as their intellectual, political, social and other lifestyle interests. The intellectual and lifestyle articles are not mere camouflage in the sense envisaged by the Act. The publication of the magazine and its contents is conducive rather than injurious to the public good.

Submissions of Counsel for Gordon & Gotch

1. Community standards of acceptability, or otherwise, have changed significantly in the last 4–5 years. Such rapid changes in community standards have been witnessed by reference to the tolerance of individual freedoms in matters of sexuality, e.g. the Homosexual Law Reform Act 1986; the screening in

cinemas of the Caligula film and the proliferation of video rental outlets catering to "adult" tastes.

2. It is not enough for the Tribunal to say, as it has said frequently, that because material is "grossly explicit" or "patently offensive" or "concentrates on explicit depictions of genitalia" or is "lewd", "prurient", "salacious", "gross", or "obscene" that it is therefore injurious to the public good. This is a quantum leap which requires reasoned argument and empirical demonstration. It has been rare for the Tribunal to attempt such reasoning. There is no such attempt at reasoning in the "tripartite test" cases. With reference to the "lewdness or prurience" approach, no such reasoning is possible. There has never yet been an adequate answer to the question why material concentrating on genitalia, contrived sexual poses and non-violent explicit sexual intimacy between adults, should necessarily be injurious to the public good even when restricted to adult readers in limited numbers at a substantial price. None of the Tribunal decisions which have applied the tripartite test attempt any reasoning for a finding of injuriousness other than that there has been a breach of one element only of such 3 element test. Counsel's argument to the Tribunal on previous occasions (acknowledged in decisions 66/89, 67/89, 87/89 and others) has been that a breach of one limb only of the "tripartite test" should not alone result in a finding of unconditional indecency. The "tripartite test" as historically framed and as precedently applied in its various forms, whether cumulatively or limb-by-limb, is now a dead letter and should be abandoned.

3. The High Court (*Gordon & Gotch*) has said that if the Tribunal has evidence before it, it may act upon it, but in the absence of specific evidence it is entitled to draw on its collective experience. It must be emphasised, however, that this approach does not authorise the substitution of personal options or preferences of members of the Tribunal. Where the Tribunal acts on its collective professional expertise, it must be satisfied that such expertise does itself provide the causative link between the material complained of and the discernible injury to be proved.

4. The Morris Report, which was delivered in January 1989, was not able to conclude that non-violent pornography was causative of injury to the public good. Having reviewed a variety of submissions (some conflicting) about the effects of non-violent pornography it concluded that "the effects of non-aggressive yet degrading pornography are not yet well studied".

5. While recognising that the *Everard* decision was concerned with interpretation of the Films Act 1983, the approach taken by McGechan J must be particularly persuasive for the Indecent Publications Tribunal in view of the learned Judges' extensive review of the earlier Court decisions (particularly *Lawrence* and *Gordon & Gotch*) and of the proper approach to be taken by a censorship body applying its governing legislation. At page 60 the learned Judge said there must be identification of:

> "... mandatory criterion of likely injury to the public good. Nothing else will do. There must be a *likelihood*, not a mere 'perhaps'. The likelihood must be one of 'injury'. Mere neutrality is no offence: It is not an objection that nothing good is achieved. The injury must be likely to be 'discernible' or 'actual', not in a requirement for proof, but in a quantum sense."

The Tribunal must consider the material in each publication before it anew having regard to such evidence as is offered and, in the absence of evidence, relying upon its own collective professional expertise.

6. It has been established, from the sources and authorities referred to in this submission:

(a) That there is no justification for classification of any of these magazines as indecent simply because they may be said to contain elements deemed objectionable by the "tripartite test".

(b) That no conclusive evidence has been accepted by any of the most recent public inquiries in Britain, Canada, the United States and in New Zealand (or at this hearing) that non-violent, non-coercive, explicit depictions of sexual activity between adults cause injury to the public good.

(c) That in the face of such public inquiries, reflecting as they must the most current statement of standards of community tolerance, the Tribunal cannot impose its own intuitive views as to what is likely to be injurious, by reference to precedent or otherwise.

(d) That unless there is before the Tribunal conclusive evidence that the material in the *Penthouse (U.S.)* issues before the Tribunal is likely to cause discernible injury to the public of New Zealand (which injury will not be cured or lessened by the factors in section 11) it cannot classify them unconditionally indecent.

Submissions of Counsel for the Crown

It is not necessary to provide a summary of the detailed, thorough and extremely helpful submissions made by Ms Goddard throughout the course of this decision to some of the submissions advanced by Crown counsel. The Crown submissions dealing with the Bill of Rights Act were particularly helpful and will be discussed later in this decision.

Submissions of Counsel for the Society

Mr Ford's submissions relied heavily on the evidence of Dr Court which has been dealt with in some detail earlier. The following is merely a summary of Mr Ford's detailed written submissions:

1. It appears that every edition of *Penthouse (U.S.)* submitted to the Tribunal since at least June 1983 has been classified as unconditionally indecent. An analysis of the decisions reveals that the magazine has steadily deteriorated over the last decade.

2. In past decisions the Tribunal has noted the decline in standards of the magazine, its lack of honesty of purpose, the need to either increase the serious articles or reduce or change the nature of the pictorial sections and finally, the lack of any improvement in the format of the magazine. Having regard to these observations the Society would have thought that the publisher would have applied for a reclassification only if it was able to demonstrate that the format or content had changed in some significant way from the format or content of the publications which had been before the Tribunal on previous occasions. The publisher had not taken that approach.

3. Although *Gordon & Gotch* approved the use of the tripartite test as a broad guideline by the Tribunal, it is clear from that decision and others that the Tribunal must always make its decisions in the end having proper regard to the statutory criteria..

4. There is no onus on any of the parties (in the context of this case, the Crown or the Society) to present conclusive evidence of capacity for discernible injury or some actual harm (reference McGechan J en *Everard* at the foot of page 56).

5. The evidence given by Dr Court, as is the case with the other expert evidence tendered, and like the tripartite test itself, can act only as a guide to the Tribunal.

6. It would be open to the Tribunal to accept any of the reasons advanced by Dr Court as to why the publications would be injurious to the public good.

7. It would be open to the Tribunal to find that the publications in question are injurious to the public good because that would be an interpretation consistent with the rights and freedoms protected by section 19 (1) of the New Zealand Bill of Rights Act 1990 (the discrimination provision). Dr Court in his evidence provided ample examples of how the publications

discriminate against more than one of the categories encompassed in section 19 (1), racism and bigotry towards the handicapped being 2 examples.

THE BILL OF RIGHTS

Throughout the hearing, a great deal of discussion took place on the impact of the Bill of Rights. Not all counsel were agreed on all points. The Crown submitted that generally, the Bill of Rights affects the Tribunal's decisions in 2 ways:

1. It imposes certain principles of interpretation upon the Indecent Publications Act, and
2. It "provides wider parameters for gauging community standards and assessing the public good." (Closing Submissions for the Crown, page 53).

The second submission is based upon the reference in section 5 of the Bill of Rights to the needs of a free and democratic society. In general, the principles of interpretation are that the freedom of expression is to be construed broadly. Any limitation of it made by the Tribunal applying the definition of indecency in section 2 of the Act, the criteria in section 11 and any other Tribunal-made guideline such as the tripartite test, must be a narrow one which meets the 3 conditions imposed by section 5. The conditions are that the limitation must be reasonable, prescribed by law, and demonstrably justified in a free and democratic society.

The first matter for our determination is whether the Bill of Rights applies to decisions of the Indecent Publications Tribunal. The Bill of Rights applies to acts done by "the legislative, executive or judicial branches of the government of New Zealand" (section 3 (a)) and to acts done by "any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law" (section 3 (b)). Decisions of this tribunal to classify and censor can easily be called "acts done" by a body in the performance of a public function. The tribunal exercises powers and has duties imposed "pursuant to law" by the statute which creates it. There is consequently little doubt that the Bill of Rights applies to decisions of the Indecent Publications Tribunal. Moreover there is little doubt that the Bill of Rights applies to our decision as to the proposed classification of these magazines, even though they were seized before the Bill of Rights came into force. This is because the Tribunal determines the indecency or otherwise of material at the date of hearing, rather than at the date of seizure (*Robson* v. *Hicks Smith and Vary Ltd.* [1965] NZLR 111, 1125). and section 3 of the Bill of Rights applies to "acts done" by the Tribunal, one of which is our decision on the classification of these magazines, obviously taken after the coming into force of the Bill of Rights.

Section 6 of the Bill of Rights provides that:

> "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."

The implication of this is that if there are provisions of the Indecent Publications Act which are capable of more than one meaning, the Tribunal must give those provisions a meaning which is consistent with the freedom of expression. The Tribunal must therefore construe the freedom of expression in section 14 along with section 5 which permits limitations of the freedom. This requires first of all an assessment of whether the freedom of expression would be violated by our decision to classify these issues of *Penthouse* R18. If, and only if, the freedom of expression has been violated,the next step will be to examine whether the violation is saved by section 5, which states that:

> "Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The second stage of the assessment requires a threefold examination:

> Is the freedom of expression subject to a "reasonable limitation?";
>
> Is the limitation "prescribed by law?"'
>
> Can the limitation be "demonstrably justified in a free and democratic society?"

Does the proposed decision to classify these issues of *Penthouse* R18 violate the freedom of expression? Section 14 defines the freedom of expression in the following terms:

> "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."

This follows very closely the wording of article 19 (2) of the International Covenant on Civil and Political Rights, ("the covenant") which provides that:

> "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

The international covenant can of course be used to interpret the Bill of Rights because the Bill of Rights is said in its preamble to "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights". Section 2 (b) of the Canadian Charter of Rights and Freedoms ("the Canadian charter") states it more simply:

> "Everyone has the following fundamental freedoms: ...
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;"

The freedom of expression as stated in the Bill of Rights and the covenant includes the right to receive information in any form. The subject matter of the Indecent Publications Act is "information", "opinion" and "expression" all of which are covered by the freedom of expression in section 14. The Ontario High Court said in *re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983) 41 OR (2d) 583 at 590 that "[i]t is clear to us that all forms of expression, whether they be oral, written, pictorial, sculpture, music, dance or film, are equally protected by the charter." Books, magazines, and sound recordings as defined in the Indecent Publications Act seem to be protected by section 14 of the Bill of Rights.

This does not mean that sexually explicit material cannot bear a classification of conditional, or even unconditional, indecency. The Crown referred us, *inter alia,* to the case of *R* v *Butler* (1990) 50 CCC (3d) 97 (Manitoba Court of Queen's Bench) to provide us with a useful summary of Canadian case law on whether the freedom of expression covers what is referred to in Canada as "obscene publication". Until 1989, there were some *obiter dicta* in the Ontario Court of Appeal where it was tentatively concluded that the freedom of expression did not protect sexually explicit material (page 119 of *Butler*). In 1989, the Supreme Court of Canada in a commercial expression (rather than obscene expression) case, set out guidelines as to the correct interpretation of the scope of the freedom of expression: *Irwin Toy Ltd* v. *Attorney-General for Quebec* (1989) 58 D1R (4th) 577; [1989] 1 SCR 927. The *Butler* Court adopted this test and held it was applicable to obscene expression as well. The Supreme Court of Canada stated (at 613-4 DLR) that:

> "Activity which (1) does not convey or attempt to convey a meaning, and thus has no content of expression or (2) which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct."

Applying this test in *Butler,* the Manitoba Court of Queen's Bench decided that sexually explicit magazines convey a

meaning, and that magazines are obviously not a violent form of expression like picketing or rioting might be. They were consequently protected by the freedom of expression, even though their meaning was "offensive and disgusting to many people (page 117)". The Crown also referred us to the European Court of Human Rights decision to the same effect in *Handyside* v. *United Kingdom* 58 ILR 150, 1 EHRR 737. We conclude that the freedom of expression in New Zealand does indeed cover sexually explicit material of the kind before us in the present applications. These magazines convey, or attempt to convey, meaning, and they are not a violent form of expression. That, however, does not end the matter. As will become apparent we have decided to classify these publications as indecent in the hands of persons under the age of 18 years. Therefore we must also decide whether our restriction of these publications in this manner meets the 3 conditions of section 5 of the Bill of Rights.

Is our proposed classification demonstrably justifiable in terms of section 5 quoted above? Section 1 of the Canadian charter is identical to the operative part of section 5 of the Bill of Rights. Article 19 (3) of the International Covenant on Civil and Political Rights states that:

"The exercise of the right provided for in paragraph 2 of this article [the freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (order public), or of public health or morals."

The European Convention for the Protection of Human Rights and Fundamental Freedoms contains no less than 10 limitations on the freedom of expression. Indeed, a limitation based on "morals" is common to the European and American conventions and the international covenant. The freedom of expression is generally limited to protect information which is contrary to public morals, or in the words of section 2 of the Indecent Publications Act, "injurious to the public good".

When deciding whether our classification is "reasonable", *Butler* again provides guidance. In interpreting the almost identically worded provision in the Canadian charter, the Supreme Court of Canada has interpreted 2 of the 3 section 5 factors together. In *R* v. *Oakes* (1986) 26 DLR (4th) 200 the Supreme Court set out what was necessary "[t]o establish that a limit is reasonable and demonstrably justified in a free and democratic society (at page 227)". The *Butler* court conveniently summarised these criteria (at page 119) as follows:

"(a) The onus of proof to justify the application of section 1 [our section 5] is on the Crown."

"(2) The civil standard of proof by a preponderance of probabilities applies."

"(3) These requirements should be applied vigorously and will generally but not always require supportive evidence that should be cogent and persuasive."

"(4) The objective sought to be achieved by the impugned legislation must relate to concerns which are pressing and substantial in a free and democratic society."

[In the present case, in view of section 4 of the New Zealand Bill of Rights, the words "proposed classification" must be substituted for "impugned legislation"].

"(5) The means utilised must be proportional or appropriate to the objective. In this connection there are 3 aspects:

(i) The limiting measures must be carefully designed or rationally connected to the objective;

(ii) they must impair freedom of expression as little as possible;

(iii) their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the restriction of freedom of expression."

In New Zealand the point may have been left open by McGechan J in *Gordon & Gotch* where his Honour stated at 57 "requirements for discernible injury and capacity for some actual harm do not impose a procedural or evidential necessity for actual evidence to that effect."

The *Butler* Court went on (at page 121) to give examples of more precise bases upon which the freedom of expression can be limited. These examples are very useful and support our creation of new guidelines below:

(1) The protection of people from involuntary exposure to pornographic material;

(2) the protection of the vulnerable, for example children, from either exposure or participation;

(3) the prevention of the circulation of pornographic material that effectively reduces the human or equality or other charter rights of individuals. This may arise, and often will arise, in material that mixes sex with violence or cruelty, or otherwise dehumanises women or men.

The application of these criteria is somewhat limited in New Zealand by the inability of a court or tribunal to refuse to apply a statutory provision "by reason only that the provision is inconsistent with any provision of this Bill of Rights" (section 4). Nevertheless, it is possible for a court or tribunal to make a finding that such a provision is inconsistent, but then go on to apply it. The *Oakes* test, therefore is of relevance to the Tribunal's interpretation of section 5. The criteria numbered (1) to (3) are procedural and evidential, and were easily met in these proceedings (see below under the heading "Guidelines" and above under the headings "Viva Voce Evidence", "Affidavit/Written statement Evidence" and "A Summary of the Submissions"). The criteria numbered (4) and (5) and the *Butler* examples, are substantive, and are also met by our proposed classification applying the statutory criteria and Tribunal-made interpretations of those criteria. There is little doubt that the regulation of sexually explicit depictions are "pressing and substantial" concerns in New Zealand; We are, of course, somewhat limited by section 10 as to the types of classifications we can give, but our classification is carefully designed in the sense that it is within the scope of section 10 (b) and is squarely based on the evidence of the effects of sexually explicit depictions at the hearing. The classification is therefore rationally connected to the statutory objective of regulating material that is in some way "indecent". By not stretch of the imagination can it be said that the classification "trenches" on any individual's or group's rights to the extent that it unjustifiably violates the freedom of expression, and in this regard, we have limited the freedom of expression only to the extent necessary to protect society from the injurious effects of allowing this material to be in the hands of those under the age of 18. Our classification is consequently reasonable and demonstrably justified in a free and democratic society.

Does our classification meet the third condition of section 5, that of "prescribed by law"? The classification is a decision made under a statutory power, and is one which applies statutory criteria. In this sense, it is clearly one that is "prescribed by law". There was some disagreement between Mr Akel and Ms Goddard as to whether the tripartite, or any other Tribunal-made test, was "prescribed by law". In Ontario where legislation can be struck down by the courts if it violates the Canadian charter, the provision in the Ontario Theatres Acts which gave the Ontario Censor Board the power simply to "censor" was held to violate the freedom of expression because it was not a reasonable limit "prescribed by law". The information guidelines issued by the censor Board and used to ban the film *Amerika* were held in *Re Ontario Film* to:

"have no legislative or legal force of any kind. Hence, since

they do not qualify as law, they cannot be employed so as to justify any limitation on expression, pursuant to section 1 [the equivalent of our section 2] of the charter (at 592).

Similarly, Mr Akel submitted that the tripartite test was simply a "guideline" and therefore not "prescribed by law". Ms Goddard on the other hand argued that the words "prescribed by law" were interpreted in the *Sunday Times Case* 58 ILR 490 at 523-4 by the European Court of Human Rights to require simply that "the law must be adequately accessible" and that "a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct". The Crown concluded that since the criteria contained in the tripartite test "are neither vague nor [im]precise, they possess the hallmarks of uniformity and objectivity and, in that sense, accessibility and foreseeability, that the tripartite test was consequently "prescribed by law". The Tribunal sees merit in both arguments. Given that the *Sunday Times Case* concerned court-made law on contempt of court, rather than Tribunal-made guidelines on indecency, we are inclined to the view that the tripartite test may well not be "prescribed by law". On the other hand, it could be argued that the tripartite test is merely an interpretation of, and therefore based on, statutory criteria, and is consequently a test "prescribed by law". This is supported by dicta in the *Gordon & Gotch* case to the effect that the Tribunal has the legal power to make and apply such a test as long as the original statutory criteria are not lost sight of. In any event, it is not the tripartite test which must be demonstrably justified and prescribed by law in a free and democratic society; it is our classification decision which must meet the section 5 conditions. Any classification which invokes the tripartite test alone may not be a reasonable limitation "prescribed by law". It would be equivalent to the Ontario Censor Board's *Amerika* decision. It could also be challenged for ignoring the statutory criteria prescribed in section 11 of the Indecent Publications Act 1963. If however the reasoning upon which a classification is based invoked the section 11 statutory criteria, with or without invoking the tripartite test or similar guideline, there is no doubt that the decision could be characterised as a reasonable limitation prescribed by law, simply because it is based, in whole or in part, on reasonably precise statutory criteria. Further, the fact that the Indecent Publications Act contains express criteria which we must take into account when reaching a classification decision means that the statute itself is, unlike the Ontario Theatres Act, relatively immune from a finding that it is inconsistent with the Bill of Rights. Our classification is therefore "prescribed by law" because it is based on statutory criteria and the new guidelines, both of which are accessible and precise.

We conclude therefore that our classification of these issues of *Penthouse* may well violate the freedom of expression, but that the classification is a reasonable limitation prescribed by law and demonstrably justified in a free and democratic society.

GUIDELINES

As has already been indicated, the Tribunal is in agreement with counsel for *Penthouse* and Gordon & Gotch that these issues of *Penthouse* are not indecent *per se.* Such a finding could be based on a consideration of the definition of "indecency in section 2, the criteria contained in section 11 (1) and an application of the current tripartite test as the cumulative test it was originally intended to be. These issues do not contain in any one depiction a combination of multiple models, sexual violence and a "high degree of intimacy" to quote from decision 1053. Indeed, as stated above, it was Crown counsel's submission that the tripartite test is consistent with the Bill of Rights, and in view of its usefulness as a guide for Customs in particular, that there may be no need to depart from it. Whether or not the tripartite test continues to reflect society's standards is of course for the Tribunal to decide in the light of the evidence adduced at the hearing and authoritative publications of which the Tribunal may take official notice. It is therefore necessary to consider first of all whether the tripartite test is consistent with current community standards.

Current community standards must be assessed in a manner consistent with the Tribunal's functions under the Act. The Tribunal is charged with the task of preventing injury to the public good. Not only therefore must the Tribunal assess what current community standards are with regard to the material in this hearing, but it must also ascertain what sorts of depictions will injure the public good and whether these depictions occur in these magazines. Evidence of community standards or tolerances, in the Crown's submission, may be ascertained from consideration of views which are authoritatively published and which are representative of groups. These publications include the Report of the Ministerial Committee of Inquiry into Pornography (the "Morris Report", which includes views expressed by the Maori Women's Welfare League), the Justice Department paper entitled "Censorship and Pornography: Proposals for Legislation" (October 1990), and the provisions concerning public morals in the Crimes Act. Evidence of differing probative value which is relevant to the sorts of depictions likely to injure the public good is found largely in the expert testimony of Drs Donnerstein and Linz, Dr Court, Dr Mullen and Inspector Kerr. This evidence has been summarised above under the heading "Viva Voce Evidence". The Tribunal has concluded that the gist of this evidence, very simply put, is that purely sexual depictions are not harmful *per se;* it is only when coercion or violence is combined with a sexual depiction that the depiction, according to some studies, could be harmful. This evidence alone of course is not enough; the Tribunal must go on to consider what sorts of depictions go beyond the borderline defined by community standards.

With respect to evidence of what sort of material offends against community standards, the Morris Report contains the most authoritative analysis of community standards to date in this country. In addition to a survey the committee itself commissioned, no fewer than 4 other studies were considered (section 3.2.1 of the report). Not surprisingly, there was little agreement on what sort of material should be regulated or "banned". Many of the surveys seemed to founder on how the questions were framed, and on the word "pornography", which meant different things to different people. The survey commissioned by the committee concluded that both "men and women stressed the need for some censorship of violence, bestiality and exploitive sex." (page 194 of the report). It was the Crown's submission (in these hearings) that the context "considered most appropriate for censorship is violence, sex and sexual violence" (page 56 of the closing submissions for the Crown). Generally, beyond agreement on the regulation of depictions of sexual violence, these surveys support the proposition that women, older people and Maori have a broader definition of pornography which tends to focus on the manner in which sexual activity is depicted (the most commonly repeated words being "exploitive", "demeaning" and "dehumanising"), and support greater regulation of it, while men have a narrower definition of pornography which tends to focus on the content of sexual activity rather than the manner in which it is depicted. Men generally do not support as much regulation of pornography as women, older people and Maori. The Morris Report was also careful to consider the views of sexual minorities who expressed concern that a rational pluralistic society must overcome misogyny and homophobia (at page 25). All of these groups of people constitute parts of "the community", of whose standards we are meant to be cognisant.

We also have had regard to the poll introduced by Miss Bartlett for the Society for the Promotion of Community Standards. While noting the results contained in the poll, the Tribunal is inclined to treat it as relatively less probative than the other evidence because its questions were confined to depictions of sexual activity in films and video recordings, and

because the questions themselves appear both leading and ambiguous.

Is the tripartite test consistent with the psychological evidence adduced at the hearing, and with current community standards summarised above? The first element of the tripartite test was stated in decision 1053 to be "scenarios involving more than 2 models, and in which sex and violence and intimacy and/or deviant aspects of sex are depicted among the models". There was no psychological evidence adduced which indicated that sexual depictions involving more than 2 models were harmful. Nor is there any evidence that the community would not tolerate such depictions being restricted to adults. There is of course a danger that coercion or violence is implicit in any depiction of multiple model sexual activity. Under questioning from the Tribunal, Professor Donnerstein acknowledged that "there will be differences of opinion" over whether some multiple model scenes depict coercion. Whether or not this is so in any given depiction is of course difficult to ascertain, difficult to test for, and requires a certain degree of subjective judgment. It is however a valid concern. There was a great deal of evidence to the effect that the combination of sex and violence in one depiction is harmful, and this evidence is also consistent with the submissions on community standards. The sexual violence aspect of this branch of the tripartite test is therefore supported by the psychological evidence and by evidence of community standards. The meaning of "intimacy and/or deviant aspects of sex" has been the object of some comment in past submissions to the Tribunal. Again, there is no evidence that depictions of "intimacy" *per se* are harmful or inconsistent with community standards. If by "deviant aspects" is meant bestiality, paedophilia, necrophilia, coprophilia, urolagnia and sexual violence, then there is evidence in the Morris Report (and in the Crimes Act) that depictions of these activities are not tolerated by the community.

The second element of the tripartite test was stated in decision 1053 to be "multiple model scenes which depict lesbian acts". Our comments with respect to depictions of multiple model activity in the first branch of the test are relevant here. While the "lesbian acts" referred to are probably more accurately called "woman-to-woman sexual activity" because most of these depictions are intended for a male heterosexual market rather than a lesbian market, there is no evidence to support a differentiation between homosexual and heterosexual depictions.

The third element of the tripartite test was stated in decision 1053 to be "heterosexual scenarios in which there is a high degree of intimacy (e.g. fellatio or cunnilingus or intercourse) depicted in the couple's actions". There is no psychological evidence to support the proposition that harm can be caused by depictions of these activities alone, i.e. in the absence of sexual violence. There are some groups in the community however which would want some attention paid to the manner in which these activities are depicted.

Finally, it was submitted by Mr Ellis that the tripartite test is cumulative, in that it was only meant to be used as a guide relevant to depictions which contained every aspect of the test. It is the Tribunal's experience that such depictions, if they exist at all; must be extremely rare, and would be made suspect by the inclusion of violence alone.

Some of the tripartite test is therefore consistent with the psychological evidence and with evidence of community standards. Some however is not. The Crown was careful to emphasise that if the Tribunal was to develop a new test, it should be aware of the needs of Customs for clarity and ease of application. In particular, Customs "do not wish to become involved in subjective value judgments themselves on a day to day basis" (Closing Submissions of the Crown page 62). The Tribunal is aware of Customs' needs. The Tribunal is also mindful of its primary, overriding requirement to reflect prevailing society standards and to prevent injury to the public good. The Tribunal proposes the following guidelines, which are best seen as an evolution of, rather than a complete departure from, the previous tripartite test. They are guidelines based on a careful consideration of psychological evidence and evidence of community standards. They combine both content and context. Customs may not be comfortable with the latter aspect of the guidelines, but our main concern, as stated above, is to reflect as accurately as possible, community standards and psychological evidence concerning harmful depictions. We emphasise also that they are guidelines only, and are meant simply to "assist [the Tribunal] to a conclusion as to whether a document is injurious to the public good" (*Comptroller of Customs* v. *Gordon & Gotch* [1987] 2 NZLR 80, 83 per Quilliam J). The guidelines are as follows:

1. Depictions of violence, sexual violence, paedophilia, necrophilia, coprophilia, urolagnia and bestiality, which are not treated seriously and are intended as sexual stimuli are indecent:

   By "seriously" we mean a scholarly, literary, artistic or scientific work.

2. Depictions of sexual activity which demean or treat as inherently inferior or unequal any person or group of persons, which are not serious treatments and which are intended as sexual stimuli, are indecent (by way of example, this would include magazines the dominant content of which is the depiction of single models spreading their labia, magazines the dominant content of which is the close-up depiction of genitalia or other body parts, and other depictions which reduce a person to her or his sexual parts);
3. Depictions of individuals or sexual activity which do not fall into the above categories are conditionally indecent or not indecent, depending on our application of the factors in section 11 (in this regard we emphasise matters of availability or distribution) and the definition of indecency in section 2.

Members of the Tribunal are deeply concerned that a possible consequence of the application of these guidelines, the section 11 criteria and the definition of indecency in section 2, is that sexually explicit, non-violent material which has been restricted to persons 18 years of age and over could end up displayed in retail outlets such as dairies across New Zealand. Whilst section 11 (1) (c) of the Act directs the Tribunal to consider, *inter alia,* the age groups amongst whom the publication is likely to be distributed, the Act does not give the Tribunal the power to order that a publication's distribution be limited to places to which persons under the age of 18 years are denied access. We are aware however of a powerful argument to the effect that persons have a right to be free from exposure to sexually explicit material. Indeed, many of the examples given in the *Butler* case of bases upon which the freedom of expression could be limited are phrased in terms of protection from involuntary exposure to sexually explicit material. Mr Ford argued that *Penthouse (U.S.)* violated the right to freedom from discrimination in section 19 (1) of the Bill of Rights, although both Mr Akel and Mr Shaw disagreed, primarily on the basis that a depiction *per se* cannot discriminate; it is only to an act of discrimination that section 19 (1) directs itself. There is nevertheless merit in the "freedom from exposure" argument, independent of section 19 (1) of the Bill of Rights. This is especially true in New Zealand society, which is arguably more sensitive to exposure to sexually explicit material than say American society where many of the expert witnesses have conducted their studies. In order to address this concern, the Tribunal reminds distributors, retailers and enforcement bodies that every person commits an offence under section 21 (1) (f) of the Act who " exhibits ... to any person under the age of 18 years any document or sound recording which is indecent in the hands of a person of the age of the person to whom it is ... exhibited". In other words, retailers break the law if they display, in a

place to which any member of the public has access, a publication which the Tribunal has classified R18. The penalty for this offence is a fine of up to $500. In *London Bookshop in Kirkcaldies Ltd* v. *Police* [1980] 1 NZLR 292, the Court of Appeal interpreted section 21 (1) (f) and held that the display of R18 books on a table in a shop fell within the ambit of "exhibits", and that mere supervision of the table by staff was insufficient to prove a defence of "no immoral or mischievous tendency". If section 21 (1) (f) of the Act is enforced, (and we are aware that difficulty in enforcing a classification is not a matter the Tribunal can take into account when classifying a publication: *Secretary for Justice* v. *Taylor* [1978] 1 NZLR 252), persons will be free from involuntary exposure to sexually explicit material which the Tribunal has classified R18, and the freedom of expression will be preserved subject to this reasonable and justified limitation.

The Tribunal must now assess whether it is legally capable of altering the tripartite test in this manner to reflect the psychological evidence and evidence of community standards, especially in light of binding High Court precedent. It should be stated at the outset that it was the Crown's view that the Tribunal's application of a test such as the tripartite test was consistent with the Bill of Rights, but that equally the Tribunal had to decide whether community standards had changed to the extent that the existing tripartite test no longer adequately reflected them. The High Court has commented on the tripartite test and on the duty of members of the Tribunal to use their own expertise in reaching a decision. With respect to the tripartite test, Quilliam J in *Gordon & Gotch* stated at 83-84:

> "For myself I see no objection to the establishment by the Tribunal of criteria which are designed to assist it to a conclusion as to whether a document is injurious to the public good. I do not accept that there can properly be any slavish adherence to a formula in such matters. The danger of using a formula is that it tends to become in itself the test without reference to the principle which alone can be the proper basis of a decision. I therefore consider that the use by the Tribunal of the tripartite test is not itself wrong in principle, but that the use made of that test could become wrong in principle, but that the use made of that test could become wrong if it is not appropriately adapted to the particular case or to changing standards and attitudes within the community."

Clearly, then, guidelines such as the tripartite test are appropriate. The caution against slavish use of guidelines is consistent with that the Tribunal has done in this case. We have adapted the guidelines to match what we perceive to be changed community standards. We emphasise again that they are merely guidelines as to the current meaning of the words "injurious to the public good" in the definition of "indecency" in section 2 and are no substitute for the statutory criteria in section 11.

With respect to the ability of the Tribunal to draw on the expertise of its members in creating guidelines which assist in determining whether material is injurious to the public good, it is worth noting that section 3(2) of the Indecent Publications Act requires at least 3 or the 5 members of the Tribunal to have special qualifications in the law, literature and education respectively. Jeffries J in *Gordon & Gotch* stated that one of the consequences of this special membership provision was that:

> "Any member of the Tribunal would be entitled to give the exact evidence on injury to the public good in the law of indecent publication before any other Court or tribunal, in this country or outside it, if called as an expert ... It is surely undesirable for members of the Tribunal to remain oblivious of their own experience and knowledge which put them on the Tribunal in the first place." (at 90).

His Honour stated further at 92 that:

> "The Tribunal, it could be said, is driven to search the whole range of its collective experience as well as any evidence which might be placed before it, but most certainly it is not limited to the evidence and the absence is not of itself to be determinative."

Greig J made similar comments at 98:

> "the membership of the Tribunal has a continuity but also a slow change. There is thus at any time a depth of cumulative experience, together with an inflow of fresh thought and experience. The Tribunal, therefore, is able to reflect the change in the community at large. The Tribunal in this country takes the place of the judge and jury which is the corresponding situation in other parts of the Commonwealth in indecency legislation. But it still represents the community in the exercise of its function to determine and classify the books and other documents before it. It is to apply its specialised expertise and its collective community knowledge and experience in its deliberations."

The membership provisions of the Act therefore qualify the Tribunal to decide what is injurious to the public good on the basis of its own members' expertise (excluding of course subjective personal preference) and on the basis of evidence placed before it. The new guidelines set out above are supported by the evidence adduced at hearing, but authoritative publications to which the Tribunal was directed by counsel, and by the "whole range of collective experience" of all the current members of the Tribunal. Further it was Greig J who said in *Gordon & Gotch* at 99 that the public good "is a concept whose boundaries are always changing as society itself changes". We have endeavoured to reflect as accurately as possible the current boundaries of "the public good". In this respect we have considered the views of a broad spectrum of society as well as those of experts. We have noted views which express a liberalising trend consistent with freedom of expression as well as views which reflect a more conservative, or hardening, trend towards justifiable limitations of the freedom of expression. The new guidelines are an attempt to balance these views and to mould them into a workable test. Their application may well produce results different from those produced by the old tripartite test; equally, their application could in many cases produce the same results. There will inevitably be a "shakedown" period, but this cannot deter us from our basic task of accurately reflecting the public good.

Finally, it could be perceived that the second limb of the new guidelines is an attempt by the Tribunal to incorporate a feminist viewpoint of the kind attempted by the minority decision in *Re Fiesta and Knave* (1986) 6 NZAR 213, and disapproved of by Jeffries J in *Gordon & Gotch.* A careful reading of His Honour's decision in *Gordon & Gotch* demonstrates, however, that this would indeed be a misperception. The criticism of Jeffries J was both substantive and procedural. Much of the substantive criticism was limited to the perceived illogicality of the question posed for the Court: "whether the representational view of women which denigrates all women is indecent within section 2 of the act" (page 94). No submission before the Tribunal in this case relied on this argument. His Honour did state however that:

> "In my view to attempt to link pictorial or verbal representation of women to denigration of all women is to go too far. ... To avoid as far as possible misunderstanding I affirm that if a publication is of such a character it gravely concerns the Tribunal over classification then they must decide whether it is injurious to the public good of which women constitute approximately one half." (page 94).

There are at least 3 possible interpretations of this statement. Does it mean that if a publication is injurious to only one sector of society, it does not injure the public good because it does not injure everyone? Or does this statement mean that one cannot link a denigrating representation of women in a

publication to all women, but if one could prove such a link, the publication would still not be injurious because it does not injure the whole public? Or if one could prove such a link, that the publication would be injurious to the public good because it denigrates half of the public? We are inclined to the view that the opening sentence of the quotation qualifies the final sentence. His Honour emphasised that it was possible for the Tribunal to find that the manner in which some nude female models were depicted could warrant a finding that the depictions were injurious to the public good. It was just that such a finding could not be based on "representational grounds". His Honour could not have meant that a depiction which did present an injurious view of a group of persons could never be injurious to the public good. Surely such a depiction could be injurious if it could be demonstrated that its effect was to injure the public good. For example, it may well be true that a publication which depicts women in a degrading manner does not *per se* degrade all women in society; on this we give no opinion. But if it could be shown that the same publication has an injurious effect on society, whether it is because it could reinforce negative stereotypical attitudes towards women amongst its readers (potentially endangering women and negatively colouring male attitudes), or any other demonstrable reason which indicates a negative impact on society as a whole, then Jeffries J's comment would not prevent a finding of injury to the public good. Useful examples of grounds upon which the freedom of expression may legitimately be limited were set out in the *Butler* case. They were the protection of people from involuntary exposure to pornographic material, the protection of vulnerable segments of society, such as children, and the prevention of material which dehumanises or treats as unequal men or women, especially material which mixes sex with violence. The thrust of Jeffries J's criticism was directed towards the absence of evidence or grounds for the minority's finding of injury to the public good; it was not directed towards the finding of injury to the public good itself which His Honour stated at page 94 to be a legitimate finding if it were supported. We leave it upon as to whether a depiction which has a negative effect on one segment of society *per se* injures the public good in the absence of expert evidence to that effect. Some members feel that philosophically this must be right. But this reasoning does stray very close to the representational argument criticised by His Honour as an illogicality and we consequently do not rely on it.

Further, Jeffries J did not preclude consideration of a "feminist" viewpoint, or any other viewpoint for that matter, as long as certain procedural and evidential conditions were met. His Honour stated that it was "right in jurisdiction for the Tribunal" to find that a magazine dealt in matters of sex in a manner injurious to the public good "because of the manner in which the female nude form is depicted" (page 94). It was the basis of the minority decision, not the decision itself, which His Honour queried:

> "... the feminist viewpoint had not been argued and apparently there had been no disclosure to the parties that it would be a controlling influence in their decision. ...By no stretch of the imagination could the feminist viewpoint be described as a fact, as that word is known in law. Also the feminist viewpoint is hardly in the category of facts for which official notice could be taken. Neither would the viewpoint come within the definitions of legislative or judgmental facts as previously mentioned in this judgment. There is no attempt to support the adoption of the feminist viewpoint by reference to any body of scientific or expert research. There is no citing of any authority for the propositions." (page 95)

We have no doubt that whether or not the second limb of the new guidelines is seen as an expression of a feminist viewpoint, it is amply supported by evidence adduced at the hearing and made available to all parties, by the authoritative publications to which counsel referred, and by the members' own expertise in gauging what is injurious to the public good. It, along with the other 2 limbs, meets Jeffries J's concern that the Tribunal "be most meticulous in the maintenance of procedural fairness and adherence to the governing statute (page 94)". Indeed, we would go further and agree with the Crown's submission that it is our duty to take into account feminist viewpoints, along with other viewpoints, in the light of the Bill of Rights' requirement to justify in terms of a "free and democratic society" any limitations we create on the freedom of expression. this we have done.

Decision

We have reached the conclusion that these issues of *Penthouse (U.S.)* are not indecent in the hands of persons over the age of 18 years. We have reached this conclusion by considering all the evidence summarised above, and by applying the new guidelines. These new guidelines are based on this evidence and are meant to be of assistance in ascertaining whether these particular publications are injurious to the public good in view of the requirements imposed by the Bill of Rights. We have considered the meaning of "injurious to the public good" in the light of the requirement set out by the Court of Appeal in *Customs* v. *Lawrence Publishing Co Ltd.* [1986] 1 NZLR 404 that there be "discernible injury" or a "demonstration that any relevant material has a capacity for some actual harm (page 409)". We have also reached this conclusion by considering the factors set out in section 11. The magazines contain none of the images referred to in the first limb of the guidelines, nor can they be said to demean or treat as inherently unequal any particular person or group of persons in a manner injurious to the public good. The magazines do contain writings and relatively tasteful photographs of apparently consensual adult sexual activity. The depictions include single models who are generally portrayed as whole persons rather than simply the sum of one or more of their parts. There are also depictions of woman-to-woman sexual activity, and multiple model sexual activity containing male participants. Again though, the depictions are of apparently consensual adult sexual activity and are not demeaning. The Tribunal notes that the dominant effect of the magazines is sexual, but this is balanced to some degree by writings concerning non-sexual matters and writings which put sex in a broader context. The magazine has received recognition for its editorial, literary and photographic content (Affidavit of John Evans, president of the international division of General Media, the publishers of *Penthouse*). The magazine is intended for an adult male heterosexual market. There was a great deal of evidence to the effect that a person's views are established by the time they are 18-years-old, and that a magazine such as *Penthouse* is no more likely to affect those views than any other sector of the print or electronic media. Adults are therefore unlikely to be corrupted by reading these editions of *Penthouse (U.S.)*. Finally, some of the writing in these magazines does attempt to deal with matters of serious concern. Since the photographs themselves are only conditionally indecent, the writing cannot be said to be "merely camouflage designed to render acceptable any indecent parts".

Initially the Tribunal was reluctant to grant a serial restriction order at this time. This reluctance arose from what might be considered by some to be the "landmark" nature of this decision and the caution we believe should be exercised in the establishment and application of new guidelines concerning indecency. Mr Akel's offer to have the publisher provide a solicitors undertaking to seal all copies of *Penthouse (U.S.)* imported into New Zealand was linked to the granting of a serial restriction order. The Act does not give the Tribunal power to order that publications be sealed, although it directs us to consider matters of distribution in section 11 (1) (c) which have been re-emphasised in the third of the new guidelines. Consequently, because the sexual content of *Penthouse (U.S.)* goes beyond what has previously fallen into the R18 classification, Mr Akel's offer is of considerable

assistance and is accepted and relied upon in the making of the classification and order which follow.

The issues of *Penthouse (U.S.)* in the applications before us are classified as indecent only in the hands of persons under the age of 18 years. Further, the Tribunal is satisfied that there is a consistency of format and content in respect of the publication *Penthouse (U.S.)* that a serial restriction order be granted classifying it as indecent only in the hands of persons under the age of 18 years. Such serial restriction order is made accordingly.

The *Penthouse* hearing, like all Tribunal hearings, was a public hearing. All the parties had maximum opportunity to argue the case for and against. Interested members of the public could see the process by which decisions affecting their freedoms are made. The importance of this type of public hearing cannot be underestimated.

Dated at Wellington this 28th day of March 1991.

P. J. CARTWRIGHT, Chairperson.

Indecent Publications Tribunal.
go4318

Justices of the Peace Act 1957

Justice of the Peace Resignation

It is noted for information that

Daniel Trevor Enright of Beach Road, Omokoroa, R.D. 2, Tauranga

has resigned his appointment as Justice of the Peace for New Zealand.

Dated at Wellington this 30th day of April 1991.

D. OUGHTON, Secretary for Justice.
go4497

Labour

Labour Relations Act 1987

Temporary Judge of the Labour Court Appointed

Pursuant to section 291 (1) of the Labour Relations Act 1987, Her Excellency the Governor-General has been pleased to appoint

Jack Raymond Poppleton Horn of Wellington

to be a temporary Judge of the Labour Court, commencing on the 1st day of May 1991 and ceasing at the end of the 9th day of August 1991.

Dated at Wellington this 29th day of April 1991.

W. F. BIRCH, Minister of Labour.
go4502

Authorities and Other Agencies of State

Broadcasting Standards Authority

Broadcasting Act 1989

Broadcasting Standards Authority—Decision No. 10/91, 11/91, 12/91 and 13/91

Pursuant to section 15 of the Broadcasting Act 1989, notice is hereby given that the Broadcasting Standards Authority has made the following decisions on complaints referred to it for investigation and review.

(i) In Decision 10/91, the Authority declined to uphold a complaint by Leonard Burbridge of Wellington that the broadcast by Television New Zealand Limited of an advertisement for Sudafed on 11 July 1990 breached the responsibility placed on broadcasters by section 4 (1) (a) of the Act to maintain standards consistent with good taste and decency, or the responsibilities placed on broadcasters to be truthful and accurate on points of fact and to show balance, impartiality and fairness in dealing with political matters, current affairs and questions of a controversial nature.

(ii) In Decision 11/91, the Authority declined to uphold a complaint by G. A. Town of Wellington that the broadcast by Television New Zealand Limited of an interview with a man wanted for questioning by police about bird smuggling on the *Holmes* programme on 25 June 1990 breached the responsibilities placed on broadcasters by section 4 (1) (a) and (b) of the Act to maintain standards consistent with good taste and decency and the maintenance of law and order.

(iii) In Decision 12/91, the Authority declined to uphold a complaint by J. E. Tregurtha of Hastings that the broadcast by Television New Zealand Limited of a repeat of an episode of *Ever Decreasing Circles* on 5 July 1990 which had been reduced in length by editing from the episode as originally broadcast breached the responsibilities placed on broadcasters to take into consideration currently accepted norms of decency and taste in language and behaviour, and to respect the principles of law which sustain our society.

(iv) In Decision 13/91, the Authority declined to uphold a complaint by C. L. Robertson of Thames that the broadcast by Television New Zealand Limited of an item on the *Holmes* programme on 24 July 1990 about the introduction of the Bill of Rights legislation into Parliament breached the responsibility placed on broadcasters by section 4 (1) (d) that, when controversial issues of public importance are discussed, reasonable efforts are made or reasonable opportunities are given to present significant points of view, or the responsibility placed on broadcasters to be truthful and accurate on points of fact.

Copies of decisions may be purchased from the Broadcasting Standards Authority, P.O. Box 9213, Wellington at the price of $5 each or by annual subscription of $100.

Dated at Wellington this 23rd day of April 1991.

G. POWELL, Executive Officer.
au4481

Land Notices

Conservation

Conservation Act 1987

Declaring Conservation Land to be a Reserve

Pursuant to section 8 (1A) of the Conservation Act 1987, the Minister of Conservation hereby declares that the conservation land in the Schedule hereto shall be set apart as a reserve subject to the Reserves Act 1977 and classified as a recreation reserve subject to the provisions of the latter Act.

Schedule

Otago Land District—Queenstown-Lakes District

8100 square metres, more or less, being Section 32, Block V, Mid Wakatipu Survey District. S.O. 20783. Document 642511 (Part).

1.30 hectares, more or less, being Section 33, Block V, Mid Wakatipu Survey District. S.O. 20784. Document 642511 (Part).

5400 square metres, more or less, being Section 34, Block V, Mid Wakatipu Survey District. S.O. 20785. Document 642511 (Part).

5700 square metres, more or less, being Section 35, Block V, Mid Wakatipu Survey District. S.O. 20785. Document 642511 (Part).

1.20 hectares, more or less, being Section 36, Block V, Mid Wakatipu Survey District. S.O. 20786. Document 642511 (Part).

1.30 hectares, more or less, being Section 37, Block V, Mid Wakatipu Survey District. S.O. 20787. Document 642511 (Part).

1.36 hectares, more or less, being Section 38, Block V, Mid Wakatipu Survey District. S.O. 20788. Document 642511 (Part).

1.33 hectares, more or less, being Section 4, Block XII, Mid Wakatipu Survey District. S.O. 20779. Document 642511 (Part).

8150 square metres, more or less, being Section 5, Block XII, Mid Wakatipu Survey District. S.O. 20780. Document 642511 (Part).

1.03 hectares, more or less, being Section 6, Block XII, Mid Wakatipu Survey District. S.O. 20781. Document 642511 (Part).

1.09 hectares, more or less, being Section 7, Block XII, Mid Wakatipu Survey District. S.O. 20782. Document 642511 (Part).

4900 square metres, more or less, being Section 8, Block XII, Mid Wakatipu Survey District. S.O. 20783. Document 642511 (Part).

5.3900 hectares, more or less, being Section 9, Block XII, Mid Wakatipu Survey District. S.O. 21393, S.O. 21394, S.O. 21395, S.O. 21396, S.O. 21397. Document 653494 (Part).

4.9150 hectares, more or less, being Section 37, Block XIII, Mid Wakatipu Survey District. S.O. 21374, S.O. 21374, S.O. 21376, S.O. 21377, S.O. 21378, S.O. 21379. Document 653494 (Part).

2.1310 hectares, more or less, being Section 39, Block XIII, Mid Wakatipu Survey District. S.O. 21379. S.O. 21380, S.O. 21381. Document 653494 (Part).

8.5150 hectares, more or less, being Section 4, Block X, Glenorchy Survey District. S.O. 21381, S.O. 21382, S.O. 21383, S.O. 21384, S.O. 21385, S.O. 21386, S.O. 21387, S.O. 21388, S.O. 21389. Document 653494 (Part).

Dated at Wellington this 3rd day of December 1990.

DENIS MARSHALL, Minister of Conservation.

(DOC H.O. RRC 1745; R.O. 8/3/238) 2
ln4484

Declaration That a Conservation Area Shall be a Reserve and Classification of Reserve for Historic Purposes and Declaration That the Reserve be Part of the Katiki Point Historic Reserve

Pursuant to the Conservation Act 1987, and to a delegation from the Minister of Conservation, the Regional Conservator, Otago Conservancy, Department of Conservation declares the conservation area, described in the Schedule hereto, to be a reserve under the Reserves Act 1977, and to have a classification for historic purposes and further pursuant to the Reserves Act 1977, declares the said land to form part of the Katiki Point Historic Reserve.

Schedule

Otago Land District—Waitaki District

2.78 hectares, more or less, being Sections 54 and 55, Block II, Moeraki Survey District. S.O. 21358. DOC No. 771157/1.

Dated at Dunedin this 22nd day of April 1991.

J. E. CONNELL, Regional Conservator.

(DOC RO HIS 19) 2/1
ln4490

Declaring Land to be Held for Conservation Purposes

Pursuant to section 7 (1) of the Conservation Act 1987, the Minister of Conservation and the Minister of Lands, being the Minister responsible for the Department of State that has control of the land, jointly declare that the land described in the Schedule is held for conservation purposes.

Schedule

Hawke's Bay Land District—Tararua District

2580 square metres, being Section 2, S.O. 9742, situated in Block VI, Norsewood Survey District (part *New Zealand Gazette,* 1989, page 3617). Proc. 515423.1.

Dated at Wellington this 19th day of April 1991.

DENIS MARSHALL, Minister of Conservation.

W. ROB STOREY, Minister of Lands.

(DOC H.O. LAN 0071; R.O. 7/3) 1/1
ln4491

Land Act 1948

Reservation of Land

Pursuant to the Land Act 1948, the Minister of Conservation with the consent of the Minister of Lands, hereby set apart the land, described in the Schedule hereto as a scenic reserve subject to the provisions of the Reserves Act 1977.

Schedule

Otago Land District—Queenstown-Lakes District

1354 hectares, more or less, being Section 1, S.O. 22360; situated in Blocks IV, V, VI, and XII; Mid Wakatipu Survey District. All document 756112/1.

1186 hectares, more or less, being Section 39, Block V, Mid

Wakatipu Survey District. S.O. 21822. Part document 753917/1.

Dated at Wellington this 19th day of April 1991.

DENIS MARSHALL, Minister of Conservation.

(Cons. H.O. LAN 0035; C.O. CML 13/98) 2

ln4485

Reservation of Land

Pursuant to the Land Act 1948, the Minister of Conservation with the consent of the Minister of Lands, hereby set apart the land, described in the Schedule hereto as a scenic reserve subject to the provisions of the Reserves Act 1977.

Schedule

Otago Land District—Queenstown-Lakes District

5.8949 hectares, more or less, being Section 2, Block XII, Mid Wakatipu Survey District. S.O. 21399. Part document 753917/2.

5.5460 hectares, more or less, being Sections 53 and 54, Block IV, Mid Wakatipu Survey District. S.O. 21888. Part document 753917/2.

Dated at Wellington this 19th day of April 1991.

DENIS MARSHALL, Minister of Conservation.

(Cons. H.O. LAN 0035; C.O. CML 11/64) 2

ln4486

Reserves Act 1977

Corrigendum

Declaration That Land is a Reserve

South Auckland Land District—Taupo District Council

In the notice dated 13 March 1991 and published in the *New Zealand Gazette* of 21 March 1991, No. 43, page 970, in the Schedule for "38A/144" read "28A/144."

(Cons. C.O. REL 006)

ln4507

Revocation of Reservation Over Part of a Reserve

Pursuant to the Reserves Act 1977, and to a delegation from the Minister of Conservation, the Regional Conservator, Otago Conservancy, Department of Conservation, hereby revokes the reservation over that part of the Waikouaiti Recreation Reserve described in the Schedule hereto.

Schedule

Otago Land District—Dunedin City

441 square metres, more or less, being Section 1, S.O. Plan 23479, situated in Block VI, Hawksbury Survey District. Part *New Zealand Gazette,* 1957, page 825.

Dated at Dunedin this 22nd day of April 1991.

J. E. CONNELL, Regional Conservator.

(DOC C.O. REC42) 1/2

ln4501

Landcorp

Land Act 1948

Land in Canterbury Land District Forfeited

Pursuant to section 146 of the Land Act 1948, notice is hereby given that Landcorp Investments Limited at Wellington with the approval of the Minister of Lands, has by resolution declared the lease described in the Schedule hereto forfeited, and that the land is thereby reverted to Landcorp Investments Limited.

Schedule

Tenure: Renewable Lease, RLF 103.

Description: Rural Sections 37654, 37655 and 37656, situated in Block XVI, Spaxton, Block IV, Westerfield and Block VII, Corwar Survey Districts.

Area: 158.0297 hectares.

Certificate of Title: 541/51.

Lessee: Ronald Mathew Molloy of Lauriston, farmer.

Date of Forfeiture: 31 July 1989.

Dated at Wellington this 1st day of September 1989.

G. McMILLAN, Managing Director, Landcorp Investments Limited.

ln4496

Survey and Land Information

Local Government Act 1974

Transfer of Unformed Legal Road in Blocks I, II and IV, Meyer Survey District—Waimate District

Pursuant to section 323 of the Local Government Act 1974, and to a delegation from the Minister of Lands, the District Manager, Department of Survey and Land Information, Christchurch, hereby declares that the land described in the Schedule hereto, has been transferred to the Crown by the Waimate District Council, pursuant to the said section 323, and on the publication of this notice the said land shall be deemed to be Crown land subject to the Land Act 1948.

Schedule

Canterbury Land District—Waimate District

Area ha	Adjoining or passing through
11.3030	Lot 5, D.P. 2081, Run 320 and Lot 4, D.P. 2043, situated in Blocks I, II and IV, Meyer Survey District; shown "A" on S.O. Plan 18467.

Dated at Christchurch this 15th day of April 1991.

N. T. KERR, District Manager.

(DOSLI H.O. Lds 10/9; D.O. Lds 8) 1CL

ln4492

Public Works Act 1981

Road Realignment State Highway 2—Woodville District

Pursuant to section 20 (1) of the Public Works Act 1981, and to a delegation from the Minister of Lands, the District Solicitor, Department of Survey and Land Information, Napier, declares that, an agreement to that effect having been entered into, the land described in the Schedule is acquired for road and shall vest in the Crown on the date of publication in the *Gazette* and pursuant to section 60 (1) of the Transit New Zealand Act 1989, shall form part of State Highway No. 2 on vesting.

Schedule

Hawke's Bay Land District

965 square metres, being part Lot 1, Deposited Plan 5392, Block XI, Woodville Survey District; marked "C" on S.O. 10152, held in the office of the Chief Surveyor at Napier.

Dated at Napier this 24th day of April 1991.

P. H. GRAHAM, District Solicitor.

(DOSLI Na. D.O. 28/807)
ln4498

Land Acquired for State Primary School in Rodney District

Pursuant to section 20 (1) of the Public Works Act 1981, and to a delegation from the Minister of Lands, the Manager, Lands and Property, Department of Survey and Land Information, Auckland, declares that, agreement to that effect having been entered into, the land described in the Schedule is acquired, subject to the memorial that memorandum of easement in gross endorsed on D.P. 84140, relative to the land herein, which when created, will be subject to section 37 (1) (a) of the Counties Amendment Act 1961, for a State primary school and shall vest in the Crown on the date of publication in the *Gazette*.

Schedule

North Auckland Land District

Area m^2	Being
9454	Part Allotment M125, Parish of Oruawharo; shown marked "A" on S.O. Plan 64090.
418	Part Lot 3, D.P. 84140; shown marked "B" on S.O. Plan 64090.

Shown on the plan marked as above mentioned and lodged in the office of the Chief Surveyor at Auckland, and

792 square metres, being Lot 2, D.P. 84140. All certificate of title 40B/1067, North Auckland Land Registry.

Dated at Auckland this 29th day of April 1991.

G. A. DAWSON, Manager, Lands and Property.

(DOSLI Ak. D.O. 23/489/0/1) ICL
ln4500

Land Declared to be Road and Land Severed by Road to be Taken at Dillons Hill, State Highway 5, Hawke's Bay District

Pursuant to Part VIII of the Public Works Act 1981, and to a delegation from the Minister of Lands, the District Solicitor, Department of Survey and Land Information, Napier:

(a) Pursuant to section 114 (1), declares the land described in the First Schedule to be road and vested in the Crown and that such road pursuant to section 60 (2) of the Transit New Zealand Act 1989 forms part of State Highway 5.

(b) Declares the land described in the Second Schedule to be taken under section 119 (1).

First Schedule

Hawke's Bay Land District

Area m^2	Being
400	Part Bed of Maungakopikopiko Stream; marked "E" on S.O. 10135.
4940	Part Lot 1, D.P. 10696; marked "F" on S.O. 10135.

Second Schedule

Hawke's Bay Land District

Area m^2	Being
252	Part Lot 1, D.P. 10696; marked "N" on S.O. 10135.

S.O. 10135 is held in the office of the Chief Surveyor at Napier.

Dated at Napier this 20th day of April 1991.

P. H. GRAHAM, District Solicitor.

(DOSLI Na. D.O. 28/690)
ln4487

Land Held in Connection With a Road Set Apart for Limited Access Road in the Franklin District

Pursuant to section 52 (1) of the Public Works Act 1981, and to a delegation from the Minister of Lands, the Manager, Lands and Property, Department of Survey and Land Information, Auckland, declares the land described in the Schedule to be set apart for a limited access road, whch becomes road, limited access road, and State highway.

Schedule

North Auckland Land District

2697 square metres, being part Lot 1, D.P. 54687; as shown marked "E" on S.O. Plan 61023, lodged in the Chief Surveyor at Auckland.

Dated at Auckland this 30th day of April 1991.

G. A. DAWSON, Manager, Lands and Property.

(DOSLI Ak. D.O. 72/1/2A/0/343) ICL
ln4495

Land Acquired for State Primary School in the Rodney District

Pursuant to section 20 (1) of the Public Works Act 1981, and to a delegation from the Minister of Lands, the Manager, Lands and Property, Department of Survey and Land Information, Auckland, declares that, agreement to that effect having been entered into, the land described in the Schedule is acquired for a State primary school and shall vest in the Crown on the date of publication in the *Gazette*.

Schedule

North Auckland Land District

1457 square metres, being part Lot 2, D.P. 40873. All certificate of title No. 70A/981, North Auckland Land District.

Dated at Auckland this 30th day of April 1991.

G. A. DAWSON, Manager, Lands and Property.

(DOSLI Ak. D.O. 94/24/2/26/0) ICL
ln4494

Transport

Harbours Act 1950

Sale of Wanganui Harbour Land

I, William Robson Storey, Minister of Transport, having obtained the concurrence of the Minister of Finance, pursuant to section 143A (3) of the Harbours Act 1950, hereby approve, pursuant to section 143A (1) (a) and section 143C (1) (b) (i) of the Act, the sale of land referred to in the Schedule below by The Wanganui District Council and I specify that my approval is effective from the date of this notice.

Schedule

All that parcel of land containing 3055 square metres, more or less, situate in the City of Wanganui, being Lot 1 on Deposited Plan 62704 and being all of the land comprised and described

in certificate of title, Volume 31B, folio 671 (Wellington Registry).

Dated at Wellington this 10th day of April 1991.

W. ROB STOREY, Minister of Transport.

(MOT 43/16/6)
ln4505

Maori Affairs Act 1953

Declaring Land in a Roadway Laid Out in Block XIV, Rotoiti Survey District, South Auckland Land District to be Road

CATHERINE A. TIZARD, Governor-General

A PROCLAMATION

Pursuant to section 421 of the Maori Affairs Act 1953, I, Dame Catherine Anne Tizard, the Governor-General of New Zealand, hereby declare the land described in the Schedule hereto and comprised in a roadway laid out by the Maori Land Court by order dated the 1st day of November 1956, to be a road.

Schedule

South Auckland Land District

All that piece of land known as Part Whakapoungakau 15B6 Roadway, containing 142 square metres, more or less, situated in Block XIV, Rotoiti Survey District, South Auckland Land District, as is more particularly delineated on M.L. Plan 21329.

Given under the hand of Her Excellency the Governor-General of New Zealand, and issued under the Seal of New Zealand, this 8th day of April 1991.

CATHERINE A. TIZARD, Governor-General.

W. ROB STOREY, Minister of Transport.

[L.S.] GOD SAVE THE QUEEN!
ln4488

Regulation Summary

Notice Under the Acts and Regulations Publication Act 1989

Pursuant to the Acts and Regulations Publication Act 1989, notice is hereby given of the making of regulations as under:

Authority for Enactment	*Title or Subject-matter*	*Serial Number*	*Date of Enactment*	*Price Code*	*Postage and Packaging*
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ps4504

PUBLISHED BY AUTHORITY OF DEPARTMENT OF INTERNAL AFFAIRS:
GP PRINT LIMITED, WELLINGTON, NEW ZEALAND—1991

ISSN 0111-5650
Price $3.00 (inc. G.S.T.)