

A STATE'S INCREASING ROLE IN MONITORING EXPRESSION:

NEW ZEALAND'S NEW CENSORSHIP REGIME

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I. INTRODUCTION

In New Zealand, following an important censorship decision made under a new legislative regime in 1996, distributors of the overseas magazines 'Knave', 'Ravers' and 'Two Blue' now employ individuals whose soul task is to examine such magazines after they enter the country, in order to carefully obscure with black felt pen identified harmful words contained within certain advertisements. This censorship decision is somewhat surprising, and it and others merit detailed examination.

On 1 October 1994 New Zealand's new censorship regime became operational. On that date a previous tripartite system of classification of films, videos, and books and magazines was replaced by a streamlined, comprehensive classification system enforced and administered from one office (hereafter the Office), under the empowering legislative umbrella of the Films, Videos and Publications Classification Act 1993 (hereafter the Act). The Office has now been operating for over two years. This article examines the first twenty-four months of operation of the new regime to 1 October 1996. This period must be acknowledged as somewhat unusual because not only have our censors been engaged in the first year in the routine of classification, including attempting to clear a backlog of material, but also in effectively setting up the Office itself, together with its administrative and management systems. A separate Board of Review, the body which can reclassify material classified by the Office on application by interested parties, has also been established. This article outlines the main concerns expressed prior to the instigation of the new regime and attempts to discern whether those concerns were justified. First, the initial appointments of censorship officers and members of the Board of Review are examined to determine what sort of appointees now undertake the task of censorship in New Zealand. Second, a selective study of important decisions of the Office and of the Board is presented to determine the manner in which both bodies are carrying out their duties.¹ Finally, the impact of the Bill of Rights on

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1 Unless indicated, the summary of reasons for the decision on the Register has been used for analysis of decisions of the Office. Reg 35(1)(i) of the Films, Videos, and Publications Classification Regulations 1994 (Reg 1994/189) requires a summary to be included where the Act requires reasons to be given for a decision. Section 38 of the Act requires reasons where a publication has been submitted to the Office under ss 13 or 42 of the Act. This means that the only case where a summary of reasons is not given is where a film is submitted by the Labelling Body (which rates films at the unrestricted end of the spectrum) because it has already been restricted overseas, or because the Body is having difficulty in deciding on a rating. Reg 35(1)(k) allows any other particulars to be included in the

these censorship decisions is analysed. It will become apparent that there has been an increase in material which is being banned or restricted by our censors. The Act has undoubtedly resulted in greater regulation of expression in New Zealand.² However, not all of this regulation can be justified under the Act. I conclude by offering some suggestions for reform.

II. BACKGROUND

New Zealand now has a censorship regime which centers on a finding that material is 'objectionable'. S 3 of the Films, Videos, and Publications Classification Act 1993 provides:

Meaning of "objectionable"- (1) For the purposes of this Act, a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good.

(2) A publication shall be deemed objectionable for the purposes of this Act if the publication promotes or supports, or tends to promote or support,-

(a) The exploitation of children, or young persons, or both, for sexual purposes; or

(b) The use of violence or coercion to compel any person to participate in, or submit to, sexual conduct; or

(c) Sexual conduct with or upon the body of a dead person; or

(d) The use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct; or

(e) Bestiality; or

(f) Acts of torture or the infliction of extreme violence or extreme cruelty.

(3) In determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) of this section applies) is objectionable or should be given a classification other than objectionable, particular weight shall be given to the extent and degree to which, and the manner in which, the publication-

(a) Describes, depicts, or otherwise deals with-

(i) Acts of torture, the infliction of serious physical harm, or acts of significant cruelty;

(ii) Sexual violence or sexual coercion, or violence or coercion in association with sexual conduct;

(iii) Other sexual or physical conduct of a degrading or dehumanising or demeaning nature;

(iv) Sexual conduct with or by children, or young persons, or both;

(v) Physical conduct in which sexual satisfaction is derived from inflicting or suffering cruelty or pain;

(b) Exploits the nudity of children, or young persons, or both;

(c) Degrades or dehumanises or demeans any person;

(d) Promotes or encourages criminal acts or acts of terrorism;

(e) Represents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of members of that class, being a characteristic that is a prohibited ground of discrimination specified in section 21(1) of the Human Rights Act 1993.

(4) In determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) of this section applies) is objectionable or

Register as the Office considers necessary or desirable. The Office includes additional information where it considers the matter is of significant public interest. In all cases where Board of Review decisions are referred to, the full decision has been used.

2 It is not the intention of this article to examine or comment on the prior question of whether a censorship regime is desirable at all. The literature on this topic is both extensive and scholarly. For a sample see *Freedom, Rights and Pornography: A Collection of Papers by Fred R Berger* (ed Bruce Russell: 1991); Richard A Posner, *Sex and Reason* (1992); Nadine Strossen, *Defending Pornography. Free Speech, Sex and the Fight for Women's Rights* (1995).

should be given a classification other than objectionable, the following matters shall also be considered:

- (a) The dominant effect of the publication as a whole:
- (b) The impact of the medium in which the publication is presented:
- (c) The character of the publication, including any merit, value, or importance that the publication has in relation to literary, artistic, social, cultural, educational, scientific, or other matters:
- (d) The persons, classes of persons, or age groups of the persons to whom the publication is intended or is likely to be made available:
- (e) The purpose for which the publication is intended to be used:
- (f) Any other relevant circumstances relating to the intended or likely use of the publication.

S 2 defines 'publication' as:

- (a) Any film, book, sound recording, picture, newspaper, photograph, photographic negative, photographic plate, or photographic slide:
- (b) Any print or writing:
- (c) Any paper or other thing-
 - (i) That has printed or impressed upon it, or otherwise shown upon it, any word, statement, sign, or representation; or
 - (ii) On which is recorded or stored any information that, by the use of any computer or other electronic device, is capable of being reproduced or shown as any word, statement, sign, or representation:

The promotional material of the Office states that it is responsible for the classification of a wide range of material, including films, videos, magazines, computer discs, video games, CD-ROMS, T-shirts, posters and playing cards. Publications which promote or support, or tend to promote or support, the behaviours described in s 3(2) of the Act are automatically deemed to be likely to be injurious to the public good. Any other publications must be considered giving particular weight to other factors set out in s 3(3), which are the manner, extent and degree to which the publication describes, depicts or deals with matters such as torture, physical cruelty, acts of sexual violence, sexual acts with children, acts of a degrading or dehumanising nature or of a sado-masochistic character, or which represent a particular class of persons as inherently inferior. Not only are these indicators specified to assist our censors, but considerations which typically reflect liberal concerns about what 'good' things should shape our society must also be taken into account under s 3(4). Thus the character of the work, including any merit, value, or importance that the publication has in relation to literary, artistic, social, cultural, educational, scientific, or other matters, will be assessed. So too will the overall effect of the publication as a whole, the impact of the form in which the publication is presented, the likely or intended audience, and the purpose for which the publication is intended to be used.

The Office has power to prohibit publications. It may also restrict a publication, to those of a certain age, to a special class of users, (such as a Film Festival audience), to a named individual, or for a specified purpose. It may require material to be cut for restricted or unrestricted release, or may classify the publication as unrestricted. It may impose conditions on public display of any publication using a 'likely to cause offence' test. There is a right of review by the Film and Literature Board of Review, and a right of appeal to the High Court on a point of law and on the same grounds then to

the Court of Appeal. Part VIII of the Act provides for offences of non-compliance, possession and supply, some of which are strict liability. Individuals may be fined or imprisoned and corporate bodies may be fined.

The new classification regime is more specific, and hence recognised as being more prescriptive and stringent, than any of the three systems of control it replaced.³ The existence of strict liability offences was noted by the Minister of Women's Affairs on the introduction of the new legislation as significant in having a deterrent effect by requiring customers to think very carefully about the material they might purchase or possess.⁴ Whatever hopes opposing parties may hold about the regime must center on s 3 and its all-important classification criteria with their apparent focus on fetishist activity. Despite the greater specificity of the section, it contains at the same time key elements which are imprecise, as is the nature of any censorship legislation. The question of imprecision is considered below, but it should be noted first that this feature has also placed some emphasis on the character and experience of the personnel involved in administering the new classification system, because it is these public servants who must interpret the legislative provisions.

III. QUALIFICATIONS AND EXPERTISE

There is no doubt that s 3 of the Act creates a number of statutory discretions in our censors, who could have considerable ability to exercise personal judgment in relation to phrases such as 'likely to be injurious to the public good', 'promotes or supports or tends to promote or support', and 'degrading or dehumanising or demeaning'. Such judgment could also enter into decisions about the character of publications and whether or not they have merit, value or importance in relation to literary, artistic, social, cultural, educational or scientific matters. One argument made is that these discretions are enhanced by s 4 of the Act, which provides that the censor is the expert authorised by the Act to decide whether or not a publication is objectionable, and that evidence going to that question is not essential.⁵ Further, under the Act, the appointments of the Chief and Deputy Censors, and the members of the Board of Review, have been made on the recommendation of the Minister of Internal Affairs with the concurrence of the Minister of Women's Affairs and the Minister of Justice. Previously the appointment process was at departmental level. Two conflicting concerns were expressed about this change. One commentator suggested that the new requirements could make the appointment process receptive to departmental directives.⁶ Another suggested that the process is susceptible to the personal beliefs of the Minister of Internal Affairs and the feminist leanings of the then current Minister of Women's Affairs.⁷ These arguments may have been overstated. Some Ministers value their officials' advice and others do not.

3 See Caldwell, 'Pornography - An Argument for Censorship' [1992] 5 Canterbury LR 171, 201; Wrightson, 'Censorship in New Zealand', February 1994, an address to One Hundred and Fifty Ways of Loving (A multi-media groupshow addressing the Films, Videos and Publications Classification Act 1993); and Dugdale, 'Films Videos and Publications Classification Bill' (1993) NZLJ 16.

4 See (1992) 532 NZPD 12761.

5 Caldwell, *op cit*, above note 3, at 193.

6 Williams, 'Feminist Considerations of Harm and the Censorship of Pornography' (1993) 7 AULR 517, 525.

7 Dugdale, *op cit*, above note 3 at 17. For some reason, this commentator was not concerned that the personal views of the Minister of Justice could have some negative influence, but appeared to assume that they would, in fact, always balance those of the other Ministers. The criticism, if it has any validity, must apply across the board.

Some Ministers put aside their personal beliefs some of the time.⁸ It would be fair to say that the MMP environment may balance the process somewhat if necessary. However, the initial appointment process has been carried out and the results can be examined to a limited extent.

The first appointment process resulted in the appointment of Kathryn Paterson as Chief Censor, an Australian with considerable experience at federal level censoring Australian television, literature and films. The Deputy Censor, Lois Hutchinson, was previously New Zealand's Video Recordings Authority. Approximately ten Classification Officers were originally appointed to assist the Office (some positions were casual or part-time). The age range of officers was from the late twenties to mid-fifties. Individual biographical details are not available as the Office regards this as a privacy issue. However, it has advised that there was an ethnic and skills mix among the officers. Appointees came from both the public and private sector, some had legal training, some came from the previous censoring authorities, and others had backgrounds in nursing, and counselling. The Office advertised at the end of 1995 to fill further Classification Officer positions to deal with a backlog of work.⁹ The advertisement sought applicants described as team players, possessing well balanced judgment, highly developed critical analysis and decision-making ability, and socially well informed. It emphasised that experience with legal interpretation and/or a tertiary qualification in a relevant social science field would be desirable, and that appointment is legally limited to three years with one possible extension. By October 1996, the Office had a total of twenty-four Classification Officers. Fifteen were women and nine were men. All are full-time positions except for two, both positions held by female officers, one part-time and one on a casual basis.

The Film and Literature Board of Review was appointed in May 1995 and met for the first time late in 1995. More details are forthcoming about its membership than for the Classification Office. The President of the Board is Sandra Moran, a principal of a Wellington law firm with considerable litigation and legal committee experience. Her Deputy is Bill Hastings, a senior academic at Victoria University and former member of both the Video Recordings Authority and the Indecent Publications Tribunal. The remaining members of the Board, described as at time of appointment, are Denese Henare, a Barrister and Solicitor with tribal affiliations to Ngati Hine, Ngapuhi, and previous experience with the Film Censorship Board of Review, Professor Margaret Bedgood, Dean and Professor of Law at the University of Waikato, Bernadine Pool, a JP with a BA in Sociology, Miles Rogers, Programme Director of Concert FM with a B. Music in Composition and thirty years experience in the radio and television industry, Stephen Danby, a drama producer, with experience in the arts, Pamela Meekings-Stewart, an independent film and video-producer and director, and Stephanie Miller, a registered nurse, documentary film maker and previous part-time censor with the Video Recordings Authority.

It is impossible to discern departmental influence in the appointments, or to determine whether any of the major appointments in fact reflect the personal ideologies of any of the Ministers involved. Applicants are unlikely to include reference to 'fundamentalist Christian' or 'feminist zealot' in their

8 For example, Justice Minister Doug Graham, in relation to defacto property rights law reform in 1996.

9 See Annual Report of the Office of Film and Literature Classification 1995, 12, and Annual Report for 1996, 13-15.

Curriculum Vitae. What *can* be discerned from the biographical detail overall is that there is significant legal expertise, and a range of apparently relevant skills, as is required to be taken into account by ss 80(4) and 93(5) of the Act. There is some ethnic mix, though possibly less for the Review Board than for the Office, as Maori, but not Pacific Island interests appear to be represented. It is unclear whether our growing Asian population is represented. Women currently outnumber men on both bodies, significantly so in the Office.¹⁰ The Board of Review unfortunately appears to have no South Island representative.

A significant cause of concern is an apparent conflict of interest arising from the appointment of Sandra Moran as President of the Board of Review. Ms Moran also sits on the board of Independent Newspapers Limited, which dominates newspaper and magazine distribution throughout most of New Zealand. The Board considered this difficulty at its first meeting in 1995. Ms Moran advised that content of magazines is not a matter which ever comes before the Board of INL. The Board concluded that there was no potential for actual prejudice in a review. On the matter of conflict of interest generally, the Board has agreed that where a conflict of interest arises, the member in question is to excuse her or himself from a particular review. By October 1996, this procedure had only been exercised once, again in the case of Ms Moran. Ms Moran had acted as a legal representative for Truth for a number of years. She therefore excused herself from a review decision involving New Truth and TV Extra in 1996.¹¹ While the situation is of some concern, the approach of the Board seems practicable. New Zealand has a small population base and its professional and business communities reflect this base. It is highly likely that those in experienced positions in the legal profession will also be involved to some degree in the business sector or may have clients whose business is publication of some sort. There is a limited pool of talent from which to draw appropriate Board members, and if a practical form of Chinese wall can be erected to avoid conflict of interest arising, it should be. Finally, the position of the President would indicate that any bias would result in less censorship, which does not appear to have occurred.

However, the refusal of the Classification Office to provide details of the backgrounds of those appointed as censorship officers might be seen as more problematic. In fact the Office's argument that biographical details can be refused because they raise a privacy issue seems weak especially given that more CV information was made available for those appointed to the Board of Review. For the Office it could be argued that the latter positions were public appointments and those in the Office are ordinary civil servant positions. There are probably hundreds of civil servant appointments which affect our daily lives more than those of censorship officers. Yet there is no right to demand personal details of all of those individuals in order to determine whether personal biases might inform how civil servants go about their public duties. This must be correct since civil servants are expected to give independent neutral advice to the government of the day. However, the difficulty undoubtedly remains that the legislation grants to our censorship officers, whoever they are, significant discretion as to what forms of expression should be regulated. This is borne out by the growing body of

¹⁰ 6 : 3 on the Board of Review and 15 : 9 as to Classification Officers, translating to 17 : 9 if the Chief Censor and her Deputy are included.

¹¹ Decision 3/96, 26 June 1996.

editorial decisions, which do exhibit over-enthusiasm in some cases and arbitrariness in others.

IV. DECISIONS IN THE FIRST TWO YEARS

1. General matters

Decisions of the Office and Board of Review to the end of September 1996 were examined to attempt to identify significant trends in the way our new censors approach the censoring task. Because s 3 of the Act contains a more rigorous breakdown of criteria to be used in determining whether a publication is objectionable, it is to be expected that the government's declared aim of toughening up the approach to pornography is reflected in decisions of the Office. The legislation should have resulted in regulation of material which was not regulated before. A comparison of initial magazine classification decisions appears to bear this out. Caldwell has noted that in its latter years, the Indecent Publications Tribunal rarely banned homosexual publications outright. It considered that the sexually aroused male was always presented positively in pornography, in more equal roles, which was not the case with females.¹² In other words, the approach taken was that it was less possible to dehumanise and demean men. However, an examination of the Classification Register for December 1995 reveals the Office, in dealing with a large batch of 104 magazines aimed at the homosexual market, classified over half (59) as objectionable. Among the reasons given for the banning of this batch is reference to sexual and physical conduct of a degrading and demeaning nature, as set out in s 3(3) of the Act. Even allowing for the possibility that the nature of gay pornography being submitted for censorship has become considerably more 'hard-core' within a short time, it appears the approach to homosexual pornography has definitely changed.

Further, depictions of forced urolagnia and a homosexual relationship between an uncle and nephew were borderline decisions of the Indecent Publications Tribunal given conditional age restrictions rather than banned outright.¹³ Contrastingly, under the Act, all depictions of the use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct are objectionable if they promote or tend to promote the activity. Decisions made in June 1995 classified editions of the Australian magazine 'Ribald' as objectionable on the grounds that the publication tended to promote and support the use of urine in association with both sexual and degrading conduct.¹⁴ Further, one of the grounds on which the gay magazines referred to above were banned outright under the new regime was because they promoted familial sexual relationships and sexual relationships that involved an implicit breach of trust.¹⁵ Therefore it seems likely that the borderline Tribunal decisions described above would be different today and the material would be unavailable in any form.

However, it appears the Office has not gone as far as some suggested prior to the Act. Caldwell argued that the new criteria which define what material is objectionable can include depictions not only of the sexually

¹² Caldwell, *op cit*, above note 3, at 199-200.

¹³ Decision 116/92, 15 December 1992. See Caldwell, *op cit*, above note 3, at 200.

¹⁴ Eg Classification Register, December 1995, OFLC Ref 9400147.

¹⁵ Section 3(2)(d) of the Act. Eg Classification Register, June 1995, OFLC Refs 245 and 318.

violent, but also of the merely sexually explicit.¹⁶ The Office is not taking this strict approach. Material containing explicit displays of genitalia, including male genitalia, has tended to receive R18 restrictions.¹⁷ As to nudity per se, as depicted in naturist magazines, in the context of persuasion about the advantages of nudity and discussions of sexual issues, it was originally restricted by the Office to those of 16 years and over or who are accompanied by a parent or guardian.¹⁸ However, this publication was passed unrestricted by the Board on review, on the grounds that it was a genuine publication presenting the naked human form in a natural and non-sexual, non-exploitative manner.¹⁹

In summary, although the body of decisions in the first two years of the new regime does not generally support the view that merely sexually explicit material would be more regulated, the overall impression is that the Office is censoring material which would not have been regulated under the old regime. This is enhanced by a closer look at interpretations given to the other criteria which make up the objectionable test.

2. Likelihood of injury to the public good

This phrase is used in s 3(1) of the Act to give a general description of objectionable publications: ‘... a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good’. The Register reveals little about how the Office views the nature of this test or its place in classification. In general, the phrase is referred to as simply following from a finding that the publication in question is objectionable because it falls within the categories of 3(3) having taken the matters in 3(4) into account.²⁰

However, the Board of Review made very clear in its first decision that the phrase comprises a separate element which has to be satisfied.²¹ The Board adopted a definition from a previous Indecent Publications Tribunal decision²² that injury to the public good is “anything which interferes with the social contract in a way that upsets harmony, or equality and mutual respect for others, or the sanctity of life, or physical or mental freedom or both”. Clearly this goes to harm rather than offensiveness. Further, the requirement of *likelihood* was interpreted to mean more than a mere perhaps, and the likelihood must be one of discernible or actual injury (though this goes to quantum, and is not a hard proof requirement). The Board has held that publications meet this criteria if they upset mutual respect for others by reinforcing negative attitudes towards women amongst the men for whom the publication is intended.²³ The potential to reinforce negative male attitudes towards women amongst more impressionable male teenagers has also been found injurious to the public good, justifying R18 restrictions.²⁴ Further, the dissemination of misleading sexual health information in a video has been held to have great potential to upset the sanctity of life and health,

16 Caldwell, op cit, above note 3, at 201.

17 Eg the magazines ‘Erotic Film X Guide’, ‘Pacific Links No 7’ (both June 1995, OFLC Refs 229 and 235), and ‘Playgirl August 1994’, (August 1995, OFLC Ref 9400841).

18 Classification Register, December 1995, OFLC Ref 9400900-1.

19 Decision 2/96, 9 April 1996.

20 Eg Classification Register, December 1995, OFLC Refs 9400973 and 9400190.

21 Decision 1/95, ‘D.P. Women’, 20 December 1995.

22 Decision 80/92, ‘Re Shiny and others’.

23 Decision 1/95; Decision 7/96.

24 Decisions 2 and 3/95.

thereby satisfying the test.²⁵ Scenes in the film 'Seven' also justified an R18 restriction on the basis of injury to the public good. They were held to be likely to inure more impressionable young minds to the effects of violence.²⁶ But the test was not met by the mere possibility of misinterpretation of naturist magazines,²⁷ and where women were depicted as autonomous sexual human beings consenting to being filmed having sex, no negative social message was seen to be promoted.²⁸

Importantly, the Board has held that the 'likely to be injurious to the public good' test does not apply when a publication falls within s 3(2). The Board considered the links between the subsections in s 3 in Decision 3/96, the New Truth decision.²⁹ It held that full effect must be given to the deeming provision in subsection (2) without any consideration of the content and context criteria contained in subsections (3) and (4), or the injury to the public good test in subsection (1):

This interpretation carves out of the umbrella definition in subsection (1) publications deemed to be objectionable because they promote, support or tend to promote or support the activities listed in subsection (2). Consistent with the opening words of subsections (2), (3) and (4), the censor is not to have regard to the criteria in subsections (1), (3) and (4) when considering a publication to which subsection (2) applies. Only when the censor decides that a publication does not promote, support or tend to promote or support the activities listed in subsection (2) can the censor go on to consider subsections (3) and (4).

Therefore the Board concluded a publication which falls within s 3(2) is deemed to be objectionable and its availability is deemed to injure the public good. The Board thought that to read the subsection (3) and (4) criteria into subsection (2) would destroy the deeming provision in the latter and render it the same as subsections (3) and (4). It would destroy the two-tier classification system within the section, which the Board considered parliament has intended should operate to ban some publications on the basis of specific content, while the rest are dealt with by way of an exercise of judgment by our censors guided by the criteria in subsections (3) and (4). In reaching this decision, the Board rejected two other interpretations of how the parts of s 3 might work: that in dealing with subsection (2) the censor is also required to apply the subsection (1) test that the availability of the publication must be injurious to the public good; and that the content and context criteria in subsections (3) and (4) must also be applied to subsection (2).

The matter is not free from doubt, but there is some support for the Board's view in significant statements made during the passage of the Bill which eventually became the Act. The introductory speech of the Minister of Social Welfare noted the test in subsection (1) but went on to note that ... 'one category of material is marked for prohibition on its own terms'.³⁰ Further, though the report of the Department of Justice on the Bill prepared for the Select Committee states that: 'The ultimate standard for prohibition is that a publication is "likely to be injurious to the public good" (subclause (1))', it goes on to describe subclause 2's listed matters as 'material

25 Decision 1/95.

26 Decision 1/96.

27 Decision 2/96.

28 Decision 8/96.

29 Affirmed in Decisions 4 - 6/96.

30 (1992) 532 NZPD 12759.

automatically prohibited'.³¹ Both these statements imply that s 3(2) stands and operates on its own, without reference to any test in s 3(1). As to the effects of subsections 3(3) and (4), the explanatory note of the Bill as introduced describes these clauses as setting out 'criteria that are to be taken into account in determining whether or not any publication (other than a publication that is deemed by clause 3(2) to be objectionable) is objectionable or should be given any other classification'. This implies that s 3(2) is to operate independently also of any requirements in the later subsections. Finally, the Board's view does make logical sense of the wording in s 3. Section 3(1) states a general test of what is objectionable. Section 3(2) *deems* certain things to be objectionable for the purposes of the Act, implying that the requirements of s 3(1) and indeed, any other subsection, must be assumed to be met. Sections 3(3) and 3(4) are prefaced by the words 'In determining, for the purposes of this Act, whether or not any publication (*other than a publication to which subsection (2) of this section applies*) is objectionable ...'. The words in italics can only mean that the matters in subsections (3) and (4) can have no bearing on subsection (2), because it has already performed its function of assigning deemed objectionability.

Therefore the New Truth review decision appears to give coherence to the various parts of s 3 of the Act. However, it does also leave a clear impression that the censor does not have to exercise any judgment in relation to s 3(2). This is inaccurate. Indeed, in the New Truth decision itself, the Board proceeded to exercise a great deal of discretion using the subsection. The outcome is questionable and illustrates one of the main weaknesses in the legislation. It also has Bill of Rights implications. Both aspects are discussed in more detail below.³²

3. Promotes or supports, or tends to promote or support

The view given some currency prior to the passing of the Act that a new category of automatically banned material was created in s 3(2) was incorrect. Total prohibition of material containing the specific activities described in the subsection could only follow if the publication *promoted or supported, or tended to promote or support* the activities shown. Pure description or depiction was not enough. Therefore the inflexibility created by the list of behaviours in s 3(2) is offset by the flexibility of the 'promotes or supports' test. At the same time, the latter takes the full weight of the censorship decision. This has resulted in strained meanings and arbitrariness in some cases.

How has the promotion requirement been interpreted? The threshold is a low one. For example, the Office has produced a consistent series of very strict decisions about the exploitation of children or young persons for sexual purposes, as set out in s 3(2)(a) of the Act. A common theme of pornography involves depictions of women who are clearly of age or who are known to be of age, dressed up as schoolgirls for sexual titillation - school-girl fantasies. For example, the video 'Tickled and Spanked'³³ contained sexualised presentations of adult females dressed and acting like school girls. This was found to be the sexualised presentation of young persons, intended to

31 Report of the Department of Justice on the Films, Videos, and Publications Classification Bill, prepared for the Internal Affairs and Local Government Select Committee, 24 May 1993, 3.

32 See section 3 and Part V below.

33 Classification Register, December 1995, OFLC Ref 9501856.

sexually arouse the viewer, and as such, to support and tend to promote the exploitation of young persons for sexual purposes. Section 3(2)(a) applies even where the material presents a very obvious fantasy situation involving activities which would clearly be illegal if real children were involved. The video 'The Baby Clinic', where an adult female actor was presented as a small child, engaging in sexual activity with a care-giver,³⁴ is an example. Similarly, sexually explicit depictions of children's film characters shown for adult sexual arousal were held to be objectionable because they connected adult sexual activity with children's play.³⁵ Therefore, the fact that no real minors are actually involved in creating these depictions, or are very obviously not involved, does not prevent the material being held to promote and support sexual activity with young persons or minors.

This interpretation of the criteria in s 3(2)(a) is misunderstood. In November 1995 the Office classified eleven of twelve computer disks containing material downloaded from internet computer newsgroups and bulletin boards as objectionable.³⁶ Some of the material comprised pictures of bestiality and descriptions of sex among teenagers and sub-teenagers. The Office rejected some other material on the grounds that 'the women all appear to be in their late teens. The female models are presented as young due to their youthful facial features, shaved pubic area and by having their hair tied with ribbons or ponytails as in the style worn by young female children'.³⁷ A factor noted in the decisions was that some of the models depicted had the word 'Seventeen' on their clothing. The submitter argued that this referred to a title of a European magazine which carried a disclaimer that all its models were over eighteen in fact, and that a person is not a child or young person in legal terms in New Zealand if they are over seventeen. Such arguments overlook the fact that the Act deliberately omits to tie the description 'young person' to any legal definition based on age. In fact, there is no definition at all, in order to allow the Office to avoid technical arguments about the actual age of persons depicted. The focus of the provision is on the character of a portrayal of a child or younger person, rather than the question of the real age of the actor or model, which in many cases could never be ascertained. The effect of such decisions is clearly contentious, as it covers what some argue are merely harmless fantasies.

The same criteria have also been used by the Office to censor a T-shirt.³⁸ The item of apparel depicted babies in cartoon form. A female baby was shown with a dummy in her vagina and a look of enjoyment on her face. A male baby nearby had a thought bubble over his head with the word 'Bitch!' in it. This depiction was considered to tend to promote and support the exploitation of children for sexual purposes, particularly because the T-shirt was a form of accessible communication to the public. The T-shirt was classified objectionable under s 3(2) of the Act. Arguably the decision is wrong. While in extreme bad taste, highly offensive and sexist, it is questionable that such a depiction can be said to actually promote, or tend to promote or support the exploitation of children for sexual purposes. The decision is footnoted with a reference to 1993 statistics of victims of sexual abuse under the age of 16 and a note that numbers increased 1% in 1994.

34 Classification Register, December 1995, OFLC Ref 9501846.

35 Classification Register, June 1995, OFLC Ref 458.

36 Classification Register, November 1995, OFLC Refs 9400906, 9400909, 9400912, 9400915, 9400916, 9400919, 9400926-29, 9400943, 9400945.

37 Posting on Newsgroup: cantva nz.org.isocnz:258 by the submitter, Stephen Bell (ahaz@atlantis.atrrix.gen.nz), 24 November 1995.

38 Classification Register, March 1996, OFLC Ref 9500688 (full decision).

There is no reference to how many of these were attributable to vulgar T-shirts. The function of the T-shirt as a statement-making form of apparel was also treated as crucial. The full decision states:

The cartoon is large, filling most of the front of the T-shirt, and is boldly drawn with simple strokes effecting the stylised images. The print is large and is in bold capitals. The T-shirt is otherwise blank, having nothing to distract from the image. This style of cartoon is simplified for maximum impact on the viewer, enabling a striking, immediate interpretation, which is easily communicated at a glimpse T-shirts which feature images on the front and/or back are customarily interpreted as communicative statements ...³⁹

The task of censorship in this case appeared to involve an element of pop-psychology as well as a degree of evangelicalism. But more importantly, this feature of the decision demonstrates how context can be read in to the 'promotes and supports' test, though there is no provision for it in the Act. Examination of style, impact and ease of communication is analogous to examining the dominant effect of the publication as a whole, one of the context criteria specified in s 3(4)(a) as a matter to be considered in classifying publications falling outside s 3(2). This interpretation of s 3(2) does not comply with the earlier approach of the Office nor with the Board's New Truth decision made three months after the T-shirt decision. The banning of the piece of clothing was presented as something of a novelty by the media in New Zealand. No doubt the public was surprised that apparel which can be found openly in joke shops and gift shops which sell adult gifts could in fact be illegal.

The inflexibility of s 3(2), and the flexibility of the 'promotes and supports' test, has been illustrated most clearly in the Board's review of the Office's R18 classification of the weekly newspaper, New Truth and TV Extra.⁴⁰ The Board found the publication to be objectionable and banned it outright because it contained 18 small advertisements within 11 pages of advertisements for sexual services. The objectionable advertisements covered escorts, videos and personals, and contained words such as 'schoolboy', 'student', and 'schoolgirl' which the Board considered referred to the exploitation of young persons for sexual purposes; and words such as 'golden shower', 'brown shower' and 'water sports', which the Board considered indicated the use of urine or excrement in association with sexual conduct. The Board held that if the publication promoted, supported or tended to promote or support these activities as listed in s 3(2), it had no choice but to find it objectionable. The Board avoided arguments about the different meanings which could be attributed to the words. It concluded the test was not what the words 'promote' or 'support' meant in a theoretical dictionary sense, but simply 'when does a publication promote or support an activity?' The newspaper was found to so promote or tend to promote or support the activities advertised because the Board decided editors and publishers have a choice about what advertisements to accept. In this case, by publishing, at the very least they tended to support the activities. This was in spite of the fact that the advertisements were contained within a section of the newspaper which only took up a quarter of its pages, and did not in fact fill those pages. The Board considered it could not look for the dominant effect of the publication as a whole, as it could if s 3(3) applied, but only to whether the entire publication promoted or supported the activities. Clearly a

³⁹ OFLC Ref 9500688, March 1996, at 3.

⁴⁰ Decision 3/96, 26 June 1996. See Section 2 above.

few advertisements would hardly produce a dominant effect. However, because of the view the Board took of the function of newspaper editors, it held it was possible for a few small advertisements to indicate that the entire publication promoted or supported the activities.

The Board acknowledged the heavy-handedness of this decision. Its practical effect in terms of exposure of the public to objectionable material is nil, as the edition in question was published in November 1994. However as a result of the decision, editors and publishers within New Zealand will have to take responsibility for the advertising content of their publications, although the Board did admit the possibility of some sort of oversight argument where one advertisement slipped through. The Board was at pains to emphasise that the mandatory nature of s 3(2) left it no choice but to make this classification. It also pointed out that all of the activities described in s 3(2) are unlawful in New Zealand except the use of urine or excrement in association with sexual activity.

The decision is problematic. It is unclear how far the Board's reasoning will extend. The Board notes that publications do not just appear, they have publishers and editors. It states:

The content and form of a publication is the direct result and a clear reflection of that publication's editorial policy. If a newspaper publishes an advertisement, it must be taken to promote or support, or tend to promote or support, the content of that advertisement because the editor and publisher had the power to make a decision not to publish it. Because an editor could reject an advertisement, by accepting it, her publication must be taken as at least tending to promote or support the content of the advertisement.⁴¹

Similarly, books and films do not just appear. They have writers, editors and publishers. Therefore arguably Nabokov's 'Lolita'⁴² could fall foul of s 3(2) simply because an editor and a publisher had the power to decide that the book should contain material which takes a positive view of the exploitation of children or young persons for sexual purposes.

Further, it appears the decision turned on an unrealistic view of editorial control. In fact, the editors of books and films have far more control over content than busy editors running commercial weekly newspapers and magazines who largely leave their advertisement sections to run themselves. The law of defamation recognises limited defences for newspaper editors and publishers for innocent dissemination of libels, and in relation to articles containing comment not that of the publication,⁴³ based on a realistic view of the process of publication of commercial periodicals. But even if editors and publishers can be expected to closely monitor their advertising sections, they face the difficulty that until material is classified by the Office, it is not objectionable. Publication deadlines mean that newspapers will prefer to refuse to accept advertisements rather than obtain legal opinions about their status or a classification decision from the Office itself. The decision must therefore have a significant chill factor, and may result in loss of advertising revenue, threatening the commercial base of newspapers. This has Bill of Rights implications.

41 Decision 3/96, at 14.

42 Banned under the Indecent Publications Act 1910 in 1960. The outcry caused by this decision led to major reform of New Zealand censorship in the form of the Indecent Publications Act 1963. See P Christoffel, *Censored: A short history of censorship in New Zealand* (1989), at 24.

43 See ss 10 and 21 of the Defamation Act 1992.

Finally, it can well be argued of editorial pages that the content and comments there contained are the views of a newspaper's editor or publisher, but this seems less convincing of an advertisement section. The Board seems to be suggesting that a newspaper supports abortion if it advertises abortion clinics, gambling if it publishes advertisements for racemeets and lotto, and alcoholism and drunk driving if it advertises the sale of beer, wine and spirits. Extrapolating from the Board's finding would suggest that the publisher of an 'Exchange and Mart' type of publication devoted completely to all sorts of advertising is to be taken to promote or support all of the activities there presented for sale simply through the act of placing the ad. In fact, some of the activities advertised may actually negate each other - for example, an advertisement for a SPUC meeting would appear to be diametrically opposed to one advertising abortion or family planning clinics. Such important context could not be taken into account for the purposes of classification. However, if it *was* decided such a publication did not in its entirety promote or support the activities advertised, the resulting decision would be a nonsense. A publication containing contradictory advertisements would escape the censor's net. Such a result would encourage publishers to develop a form of 'bane and antidote' approach similar to that which avoids published words being found defamatory, by printing advertisements or notices disclaiming support for any apparently objectionable advertisements accepted from sources outside the publication. The reality ignored by the Board is that the producer or manufacturer or provider of services promotes their product, and the newspaper or other publication merely provides the medium in which to promote. Advertising pages can be seen as neutral spaces, providing no more than an opportunity to communicate, like a bulletin board or a shop window.

The New Truth decision is being appealed to the High Court. Because the Board applied its reasoning in three further decisions to twelve magazines,⁴⁴ those decisions are also being appealed. In those cases the Board read in the reasoning in the New Truth decision as integral to its findings that the magazines should be deemed objectionable under s 3(2), rather than subject to R18 classification and restricted display as imposed by the Office. Though some photographs are mentioned, these review decisions centred largely on the carrying of advertisements in the magazines. The focus therefore is on the words used in the advertisements, in particular on what the Board described as coded words. In the decision dealing with three editions of the magazine 'Knave', the Board cites advertisements for videos and phone sex using words such as 'amber', 'yellow', 'porcelain' and 'watersports' as code words for the use of urination with sexual content. It cites references to 'head girl', 'College sex' and 'Innocent and Tender' as advertising the exploitation of young persons for sexual purposes. The two other decisions on the magazines 'Two Blue' and 'Ravers' are similarly focussed. In each case, the Board held that the inclusion of the advertisements, no matter how small, meant the publications promoted, supported or tended to promote or support the activities advertised, which came within s 3(2), and were therefore deemed objectionable. There was therefore no need to consider display conditions.

The question of context and s 3(2) continues to give difficulty. Although in the New Truth decision the Board suggested a form of inadvertence defence based on the inclusion of one advertisement which has 'slipped past'

44 Decisions 4, 5 and 6/96: 'Knave' Vol 26 Nos 2, 3, and 4; 'Two Blue' Vol 1, Nos 1, 2, 3 and 4; 'Ravers' Vol 1, Nos 1, 2, 3 and 4; 'Ravers Clean Shaven Special Issue 1'.

a vigilant editor, the extent and workability of this defence is unclear. In the later Decision 6/96 the Board did not have to address the issue because more than one advertisement was involved. However, it was clearly conscious of the difficulties inherent in defending the position it has taken. Noting the existence of concerns about banning an entire issue on the basis of one advertisement, it stated:

We note however, that if the inclusion of such an advertisement is not demonstrably an oversight, and judging by the context in which it appears, is consistent with the general editorial policy of the magazines, then it is indeed possible that one advertisement could indicate that the publication promotes supports or tends to promote or support one of the matters listed in s 3(2).

This must be wrong. Having clearly rejected the use of any contextual test in relation to s 3(2) in the New Truth decision, the Board appears to be arguing that nevertheless, context can be used to determine whether one advertisement can cause a publication to meet the promote or supports test. Furthermore, it appears unlikely that the 'defence' will be of any practical use, but in any event, its basis is arbitrary. If there has been genuine inadvertence, then the number of advertisements which are mistakenly published is irrelevant.

The New Truth decision about advertisements, and its companion decisions, are therefore internally inconsistent. Their effect is that words are now regarded as more lethal than pictures. Pictures of female models spreading their labia for the viewer and in contorted positions emphasising their genitals,⁴⁵ and moving images on video showing ejaculation on women's faces⁴⁶ are available (though restricted), while newspapers and magazines containing a few small text advertisements which use words such as 'porcelain', 'golden sprinkle', and 'schoolgirl', are not. This seems out of all proportion to apparent harm. It therefore has Bill of Rights implications which are discussed below.⁴⁷ The decisions have also had undesirable effects on overseas publications. The views of the Board can have no effect on overseas editors and publishers and the advertisements they choose to accept. 'Knave' magazine, for example, is published in the United Kingdom. As noted,⁴⁸ following discussion with the Office, the distributors of the magazines 'Knave', 'Ravers' and 'Two Blue' now employ individuals whose soul task is to examine such magazines after they enter the country, in order to carefully obscure identified harmful words with black felt pen. This does not seem to comply with the total ban imposed in the New Truth decision, which held that advertisements could taint an entire publication. Such measures may avoid the imposition of state censorship, but more probably have the greatest effect of calling attention to the advertisements in question and emphasising the unfortunate contrast of what we are now allowed to see and what we are not.

4. Art and the promotes and supports test

It is unlikely that 'Lolita', a literary work mentioned above,⁴⁹ would in fact be found by our censors to offend against the Act. A great deal of effort is taken to ensure that art and literature do not fall foul of s 3(2). In contrast

45 Decision 2/95, magazine 'Lipstick 10'.

46 Decision 8/96, video 'The Voyeur #2'.

47 See Part V below.

48 See Introduction above.

49 See Section 3 above.

to the New Truth decision, a less strict application of the 'promotes and supports' requirement is illustrated by three decisions about the photographic works of Robert Mapplethorpe,⁵⁰ where the question whether works of art would be inappropriately caught in New Zealand's new censorship net arose. The photographs in question showed the use of urine associated with sexual conduct, and acts of torture and the infliction of extreme cruelty, as aspects of gay and sado-masochistic sexual subculture, in a manner which the Office stated it found both confronting and difficult. The conduct was clearly within the 'deemed objectionable' category of s 3(2) unless the publications did not promote and support or tend to promote or support the activities shown. In determining this, the Office gave weight to expert opinion in the submissions which argued that the photographs were significant works of art, notwithstanding the content. Again, this in itself would be insufficient under s 3(2) if these significant works of art still promoted or supported the activities themselves. However, the Office found that it was the *art of Mapplethorpe* being supported in the photographs, not the activities. Therefore the works were classified as objectionable except if availability was restricted to persons of eighteen years and over.

The Mapplethorpe decisions create a strained delineation between what promotes and what merely depicts. Much has been written about the work of Mapplethorpe and whether he created real art, a question which cannot be answered in the context of this article. However, it is reasonable to assume that if the photographs had not been found to be art, the question of whether or not they promoted or supported the activities depicted would not have assumed such national importance, nor would it have been necessary for the Office to confront arguments about what the function of fine art is. The question which followed from a liberal desire not to censor art, of what Mapplethorpe intended by his art, remains unanswered. The Office reasoned that the works did not promote or support the activities shown, but merely held up for display aspects of a minority subculture. Although 'tends to support' was acknowledged as a low test, the censor concluded that the publications did not have the purpose of promoting the use of urine in association with degrading or dehumanising conduct or sexual conduct. Nor was it seen as likely that they would have the *effect* of acting as an encouragement to the use of urine in association with this conduct, when viewed as art by reasonable members of the public. This reasoning is consistent with that used by the Office earlier in 1995 to classify the book by German Celant on Mapplethorpe which was published as a catalogue for the photographic exhibition, and contained copies of the photographs themselves together with text providing historical and biographical interpretation of the artist's work.⁵¹ After discussing the text accompanying the photograph involving urination, the censor noted that the book quotes Mapplethorpe discussing his experience of urination as a sexual expression as being 'pleasurable', and his opinion of the complexity of sexuality. The discussion was described as candid, and, whilst not condemning the practice, neither was the discussion considered to promote or support it in any way.

Such interpretations are subtle and borderline. There is a strong school of thought which maintains that Mapplethorpe used his abilities to force mainstream audiences to confront and accept gay subculture, or to at least see it presented in a positive light. Richard Marshall argues that:

50 Classification Register, December 1995, OFLC Refs 9501765, 9501766 and 9501767 (full decisions).

51 Classification Register, August 1995, OFLC Ref 9501017.

... The group identified as sadomasochistic represented both a type of sexual behaviour and an adopted style or attitude - often associated with leather and bondage. Mapplethorpe was a sympathetic participant in this group. He felt it was worthy, legitimate, previously unexplored, and an almost obligatory subject for him to treat. He approached it not as a voyeur but as an advocate, wanting to instil through his photographs dignity and beauty to a subject that was outside the accepted norms of behaviour.⁵²

On this view it can clearly be argued that Mapplethorpe's work promotes and supports the gay activities he depicted - he could hardly be described as neutral. In any event, to suggest that it is only the art of Mapplethorpe which is being supported by his photographs seems trite and empty of meaning - arguably all examples of an artist's work support that artist's body of work generally. Further, the seemingly contrived view that Mapplethorpe's work promotes something other than what he depicted was in fact unnecessary to the classification decision because an aesthetic argument, standard within artistic criticism, that the works merely held up for display aspects of a minority subculture, was accepted by the Office. Therefore it did not matter what else, if anything, was promoted or supported.

But at the very least, it can be strongly argued that Mapplethorpe's work both promoted itself (and in terms of shock value, the sado-masochistic works certainly did this), *and* the activities depicted. In contrast to the Mapplethorpe decisions, the Office classified the book 'Diva Obsession' as objectionable as tending to support a theme of sadistic force against women.⁵³ The book discussed sadism directed towards women in an historical and geographical context. However, the 'tends to support' test was met because the book was seen as endorsing the images contained in it as being legitimate modes of social entertainment. Yet Mapplethorpe's work at the least presents practices of gay subculture as legitimate modes of sexual expression, but did not satisfy the 'tends to support' test.

In the New Truth and Mapplethorpe decisions, the Board and the Office had to wrestle with the inflexibility created by the list of sexual behaviours contained in s 3(2). While the provision is a step short of automatic prohibition on the grounds of subject-matter alone, the only method of avoiding a complete ban lies in arguing that the material does not promote or support what it shows or describes. Where work which is accepted to have artistic or literary merit is being examined, there will always be a strong desire to avoid automatic prohibition. It can always be said of such works that they promote the work of the author or creator. In contrast to this, where advertisements for sexual services which appear in publications seen to have no artistic or cultural merit are examined, there will be a strong desire to exercise control. And it can always be said of such material that it literally promotes the activities by advertising them. The result is a self-serving process where it seems the 'promotes and supports' test is being defined by what our censors consider desirable and moral already instead of being applied in any coherent, predictable way. In other words, the 'promotes and supports test', which, because it imports discretion, can be seen as both a strength and a weakness in the legislation, allows our censors to pick and choose the material they wish to regulate. We therefore have a censorship regime which allows arbitrary results. It *has* produced arbitrary results. In part this reflects the fact that it is never possible to have clear and consistent

52 Richard Marshall, "Mapplethorpe's Vision", in R Marshall, Robert Mapplethorpe (1988), 14.

53 Classification Register, November 1995, OFLC Ref 9400568.

ensorship law to begin with if we also want to preserve liberal art and culture. When a legal system attempts to reflect pluralism, it must give up any claim to certainty. The question then becomes what level of uncertainty is acceptable. A Bill of Rights assists in answering this question.

5. Degrading, dehumanising or demeaning depictions

For material outside the 'deemed objectionable' categories in s 3(2) of the Act, s 3(3) requires decision-makers to give particular weight to the way in which certain subject matter is treated or persons are portrayed. Section 3(3) (a)(iii) refers to the extent and degree to which, and the manner in which, the publication describes, depicts or otherwise deals with sexual or physical conduct of a degrading or dehumanising or demeaning nature, and s 3(3)(c) to the publication degrading or dehumanising or demeaning any person. It was argued that this clause could be used by extremist appointees holding either arch-conservative or radical feminist values to cast the net of censorship ever-wider to ban even mere depictions of human nudity and sexual intercourse.⁵⁴ The Justice Department also opposed the use of the word 'demeaning' when reporting on the Bill because it was seen to have a general and weak meaning of belittling or lowering the dignity of a person. This was regarded as too imprecise to be of use.⁵⁵ However, the word was added to s 3(3) at the Committee stage of the Bill, bolstering arguments that the subsection could be misused to ban explicit sexual depictions outright, and perhaps to ban gay erotica which some people see as repulsive in itself.

What have our censors been doing with these subsections? The Classification Register shows they have been applied by the Office to three clear categories of material: depictions involving lack of consent, enjoyment or involvement, depictions of the verbal punishment of a participant, or publications which reduce the participants to a collection of mere body parts.⁵⁶ Unsurprisingly, consent and enjoyment features strongly in the

54 Dugdale, *op cit*, above note 3, at 17. Contrastingly, Caldwell does not see this possibility as a bad thing.

55 Report of the Department of Justice on the Films, Videos and Publications Classification Bill, May 1993, 10.

56 For example, explicit sexual depictions of women on playing cards (vacant and passive expressions and controlled positioning) Classification Register, January 1995, De Luxe Playing Cards with Sucking (no reference number); a scene in a video showing double penetration (a degrading focus on the woman's discomfort and lack of active participation in the sexual activity) Classification Register, April 1995, Video 'Stiff Competition II', (no reference number); part of the sound track of the same video of crowd noise (a sex competition in which a group of women compete to bring their male partners to ejaculation watched by a large exclusively male audience shouting comments such as 'bitch' and 'fuck that ass' directed at the women); a video dominated by strongly sexualised, though unrealistic depictions of women being tortured, (the association of particular activities with punishment and humiliation and the sexualisation of women's discomfort and struggling) Classification Register, June 1995, OFLC 882, Video 'White Slavery'; a scene in a video showing a woman telling a man during a telephone conversation to humiliate another woman and then to have sex with her (promotes the degrading treatment of women as a legitimate part of sexual activity) Classification Register, July 1995, OFLC 9500357, Video 'Domination'; a depiction of males masturbating and ejaculating over a prone woman's face while talking over her in a degrading and dehumanising manner and extended close focus shots of multiple penetration of a female (reducing her to a collection of orifices) Classification Register, March 1995, Video 'Harry Horndog Double Penetration Special' (no reference number); a scene of a man giving a woman an enema (prolonged, detailed depiction, close focus of the woman's buttocks and the water expelled intensifies the degrading and demeaning nature of the depiction) Classification Register, November 1995, OFLC 9500441, Video 'Bittes Latex No 2'; a scene where a man pulls and holds a woman's hair in order to manipulate her to perform the actions he dictates and positions her to ejaculate on her face, Classification Register, August 1996, OFLC 9600298, Video 'Lust Runner'. The words in brackets are those used by the censorship officer to describe why the publication is degrading, dehumanising or demeaning.

determination of whether or not a person has been degraded, dehumanised or demeaned. Thus, group sex where the sexual activity presents as consensual and mutually enjoyed by all participants was objectionable only in the hands of those under eighteen years of age.⁵⁷ But the video 'Various Japanese Hidden Cameras' containing scenes of women filmed unawares in public places undressing, washing and using toilets, was classified as objectionable, the emphasis in the decision being on the lack of consent which thus rendered the film voyeuristic, and degrading to the women concerned because it violated their personal privacy.⁵⁸

All of the examples footnoted above involve activities which were seen to be degrading to females, and made up the majority of such decisions. The question arises as to whether the decisions have applied the clause to find that women in general are degraded, dehumanised or demeaned, or whether this only applied to the actual women taking part in the depiction of the activity. The former interpretation is said to be a feminist mainstream view. A similar approach was criticised judicially in 1987 in relation to the Indecent Publications Tribunal as being impossible to apply because it could not be said that a representational view of women could denigrate all women.⁵⁹ However, the Tribunal later adopted a similar approach to that criticised in using as a guideline to identify indecent material reference to depictions of sexual activity which demeaned or treated as inherently inferior any person or group of persons.⁶⁰ The application of this test to women as a group has been identified as creating practical difficulties for the Tribunal and is said to have resulted in inconsistent decision making.⁶¹

The Act leaves open either approach, as s 3(3)(a)(iii) refers simply to sexual or physical conduct of a degrading or dehumanising or demeaning nature, while s 3(3)(c) refers to the degradation of 'any person'. The interpretational approach of the Office appears to be a mixture - of the seven decision summaries footnoted above⁶², five refer specifically to the actual woman or women involved in the depiction,⁶³ while two refer to effects on women in general.⁶⁴ The Board of Review in its first decision gave a clear indication of how the words 'degrades, dehumanises and demeans' are to be interpreted.⁶⁵ Referring to the *Concise Oxford Dictionary* (7th ed.) (an approach it rejected in the later *New Truth* decision) the Board defined 'degrade' as 'bring into dishonour or contempt', 'dehumanise' as 'divest of human characteristics; make impersonal or machine-like' and 'demean' as 'lower the dignity of'. It also stated that the meaning of the words is much broader than previous judicial criticism would allow, that New Zealand society has come to accept that women can be degraded, dehumanised and demeaned by representations showing behaviour of individual women, that the Act allows such arguments on representational viewpoints, and that proof is not required for this.

57 Classification Register, August 1995, OFLC Ref 1161, Video 'The Golden Triangle'; September 1995, OFLC Ref 9500480, Video 'The Ultimate Gang Bang'.

58 Classification Register, December 1995, OFLC Ref 9501833.

59 Jeffries and Quilliam JJ in *The Comptroller of Customs v Gordon and Gotch* (1987) 6 NZAR 469, 471 and 483.

60 *Re "Penthouse (US)" Vol 19, No 5 and others* [1991] NZAR 289, 325.

61 Caldwell op cit above, note 3, at 197.

62 Note 56.

63 Deluxe Playing Cards with Sucking, Videos: 'Stiff Competition II', 'Harry Horndog Double Penetration Special', 'Bittes Latex No 2', and 'Lust Runner'.

64 Videos: 'White Slavery', and 'Domination'.

65 See above at note 21.

In this decision, the Board classified the video 'D.P. Women' as objectionable whereas the Office had classified it R18. In the video there were frequent shots of women's genital and anal areas, though infrequent shots showing their whole bodies or faces except in the act of servicing men, and there was a complete absence of shots showing people doing anything other than having sex. However, the Board was careful to note that it was not the depiction of sexual acts per se, such as double penetration, which degraded, dehumanised or demeaned. Such effect would depend on there being signs of withdrawal of consent, and signs of physical discomfort, pain or injury. There were such signs in this video and therefore s 3(3)(a)(iii) applied. As to s 3(3)(c), the video not only degraded, dehumanised and demeaned the women taking part in it, because the video represented the women in it as machine-like collections of body parts that existed for no other purpose than to gratify male sexual impulses, but because the women in the video shared the characteristics used to demean them with all women, women in general were degraded, dehumanised and demeaned. This was so even though it could be argued that the wording of the provision, in referring to 'any person', refers only to individuals. Therefore, the Board clearly articulated the approach seemingly followed by the Office that representational arguments can be used to interpret the words 'degrade, dehumanise and demean' in the Act, and confirmed the general requirements in relation to explicit sexual activity that there be consent, enjoyment and involvement.⁶⁶

It is important to note that these subsections have also been applied by the Office to men⁶⁷ and transsexuals.⁶⁸ However, a different approach appears to be taken to degradation of men than to degradation of women. A video focussing on S & M related activities depicting demeaning conduct which involved a man being ordered to lick the boots and latex underwear of a mistress, wearing a dog collar and leash, the use of whips, riding crops, and metal clamps, and the use of language that degraded the man involved, was classified R18 as the activity as presented was not seen as harmful to an adult audience.⁶⁹ This seems almost to embrace the argument that it is not possible to sexually degrade or demean men. The Board seems to have endorsed this approach in its first decision, where it considered the video 'D.P. Women' merely did men a disservice by portraying them in constant need of sexual gratification and as generally treating women with contempt.

To summarise, despite the vagueness of the wording in these provisions, overall the Register offers no evidence that they have been used to ban explicit sexual depictions per se - as already noted, such depictions have generally been classified as R18 whether featuring heterosexual or gay sexual acts.⁷⁰ The words 'degradation, dehumanising or demeaning' have

66 In reviewing the video 'The Voyeur #2' in 1996 the Board stated that the provision would be satisfied if 'the female models were consistently filmed in a manner that reduced them to body parts, or if the men in the video recording were seen to treat, by way of words or actions, the female models as mere objects upon which to sexually gratify themselves, or if there was evidence of involuntariness or discomfort on the part of, or coercion against the female models'. Decision 8/96.

67 Classification Register, June 1995, OFLC Ref 001092, Video Slick 'Cum Bath Bonanza' (a video slick depicting both men and women as body parts); July 1996, OFLC Ref 9500230, Magazine 'Assmasters #17' (close-ups of splayed labia and penile penetration dehumanised the men and women presented).

68 Classification Register, November 1995, OFLC Ref 9400569 (a magazine containing a fetishised image of transsexuality in the context of dominance and submission).

69 Classification Register, October 1995, OFLC Ref 9500453.

70 It appears that very little lesbian material has been submitted, and even material using the word 'Lesbian' in a title may often turn out to be produced for male audiences. The video

consistently been used to ban or excise depictions involving lack of consent, enjoyment or involvement, the verbal punishment of a participant, or the reduction of the participants to a collection of mere body parts. It is hard to argue that depictions in the first two categories do not come within the legislative provisions. The third category has been contentious, but the Board of Review has settled the question of whether a representation can objectify an individual or member of a class. Such arguments are no longer confined to 'mainstream feminism', but are regarded by our censors as having entered mainstream consciousness.

There are indications, however, that the words in s 3(3) may not be able to be applied consistently in all circumstances intended to be covered by the Act. In August 1996 the Office classified four street signs erected in Karangahape Road in Auckland.⁷¹ The painted signs, which had existed for some years, advertised the services of a strip club, and the products and services offered in three sex-shops. They depicted nude or semi-nude women in sexual poses and were displayed prominently on a busy road which was known to be a 'red-light' area, but also contained ordinary businesses. In each case the Office considered that s 3(3)(c) applied to the extent that women as a class were degraded and dehumanised. The signs were therefore objectionable. These decisions were reached after extensive consultation not only with the member of the public who made the application, and the owners of the signs, but also with a local bus company, seventh form students at Auckland Girl's Grammar School, a school close to the sign, staff and trustee representatives of the latter school and other local schools, members of the local business association and members of relevant councils. The Office took particular care to apply all the relevant criteria in ss 3(3) and 3(4). It considered that the signs dealt with matters of sex, had a dominant effect of being prominent features in the surrounding street, had a significant and largely unavoidable impact in the area, had no artistic merit though might have a recognised kitsch value, and had no commercial, social and cultural merit which outweighed their negative effects. The Office performed a balancing exercise of the interests of the groups affected by the signs and concluded the availability of the publications was injurious to the public good. In each case it gave particular weight to what it accepted as widespread public concern about the effects on schoolchildren associated with the signs, in particular the students of Auckland Girls' Grammar School. The latter had submitted that the signs expressed negative messages about women and girls, and impacted on the self-esteem of women and girls looking at the signs. The Office noted that these decisions were the first relating to publicly displayed signs and banning of them had raised new issues. It stated that if the publications were to be moved, their use could change, and they could be referred or submitted for reconsideration under the Act.

In this case the Office was essentially performing a town-planning consent function using the inappropriate provisions of the Act as tools. Indeed the Auckland City Council acknowledged that it was looking for guidance on how the signs should be treated under its by-laws relating to signage. In weighing the interests of local groups which had complained against the commercial interests of the shop-owners who claimed a sort of

⁷¹ 'Lesbian Sleaze' consisting of four scenes of women engaged in sexual and SM activity as willing participants was classified as R18. Classification Register, September 1995, OFLC Ref 9500449.

⁷¹ Classification Register, August 1996, OFLC Refs 9600068-70 (full decisions).

prescriptive right to advertise their businesses in an area acknowledged as a red-light area for years, the Office appeared to consider it important that the nature of Karangahape Road is changing. It accepted from the evidence that the businesses offering sexual services and products are now in the minority in the area and may be moving elsewhere. Therefore, ultimately the Office appeared to be saying that if the signs were displayed in a predominantly red-light area they might in fact not be objectionable on the grounds that they degraded, dehumanised or demeaned women as a class. Yet it is difficult to see why physical location should make any difference. Using the dictionary definition accepted by the Board of Review in its first decision,⁷² the Office appears to be saying that women as a class may not be brought into dishonour and contempt, divested of human characteristics and made machine-like, and have their dignity lowered by a sign, as long as this occurs in surroundings where similar activities or depictions are taking place and are pursued for commercial gain. This can be called the 'only-to-be-expected' approach. Such depictions are only to be expected in a red-light area and therefore cannot degrade, dehumanise and demean. This suggests that clause 3(3)(c) can never have effect in a sex industry area. More nonsensically, if extrapolated to more typical publications, it suggests that as long as sexual depictions of women reducing them to no more than body parts or showing them being subject to punishment, or lacking consent or enjoyment are found within magazines, books, and films sold in sex shops, the restricted areas of video parlours, and even on the top shelves of the corner dairy, again such depictions are only to be expected because those places are set aside for such publications, and therefore cannot degrade, dehumanise or demean. But if this is so, it follows that if such depictions themselves simply appear within publications devoted predominantly to such depictions, the subsection must be completely ineffective. Such depictions are only to be expected in such magazines by those who choose to open the cover. In effect, s 3(3)(c) is left without any content at all. This unsustainable position arises because the Office, in dealing with the sex-shop signs, was really attempting to import some sort of offensiveness element into s 3(3) by suggesting that such signs in a real red-light area would be out-of-sight and out-of-mind, altering the weight to be given to commercial interests in such a case. Section 3(3) does not admit such an interpretation - offensiveness is only relevant to s 27, which provides for restrictions on display.

There are further problems with the manner in which s 3(3)(c) is being applied. The focus on consent, enjoyment or involvement has produced a strange and contradictory ideology which arguably has resulted in a state-endorsed view of acceptable sexuality. The magazine 'Climactic Scenes #103' was classified R18 by the Office in 1996.⁷³ The publication was described as containing a portrayal of a woman as sexually insatiable and servile to the gratification of males. However, this was seen to be mitigated by the active stance she asserted, pouting and posing throughout. This view seems highly contrived and rather simplistic.⁷⁴ It is unclear how the pouting and posing of a model can be seen to mitigate a visual inference that women are insatiable, servile and sexually available to men. Rather, it might simply be argued that the message sent is that women are actively and happily

⁷² Decision 1/95, Video 'D P Women'.

⁷³ OFLC Ref 9400867.

⁷⁴ As a test, it is akin to the stupid 'limp-dick' approach used by the American courts in the 1950s and 1960s. Any depiction of a flaccid penis was held not to be obscene. Any organ in a state of partial or full excitement failed the test.

insatiable, servile and sexually available to men. This might still be degrading, dehumanising or demeaning, perhaps more so. When the issue of consent is reduced to the suggestion that if the participants look happy and assertive, they cannot be degraded, dehumanised or demeaned, the issue has not been dealt with fully. The result is that the state endorses a view of sex where one party can do anything to the other so long as the latter is smiling and apparently happy. Part of the difficulty arises because the question whether an individual has been degraded, dehumanised or demeaned is a different question from that whether a group, class or gender has been degraded, dehumanised or demeaned. The issue of consent may be relevant to the first question but not to the second. Because it has been accepted that depictions of an individual woman can degrade, dehumanise or demean women in general, it follows from this that a consent of the individual woman depicted should also be imputed to women in general, thus implying that all women consent to activity which would otherwise be degrading. Such a result is again, laughable.

It is apparent then, that although the Office and the Board appear to have identified three clear categories of material which may be subject to the 'degrades, dehumanises and demeans' test in s 3(3)(c), difficulties with applying the test remain. Depictions which involve lack of consent, enjoyment or involvement, the verbal punishment of a participant, or the reduction of a participant to a collection of mere body parts are likely to attract the interest of our censors. However, the Office has incorrectly used an approach apparently based on avoiding offensiveness in applying the subsection to street signs. The legislation seems ill-suited to such subject matter. Further, the effect of consent on the subsection has not yet been clearly articulated and has produced questionable results. Finally, the extent of representational arguments which will be accepted is unclear.

V. THE BILL OF RIGHTS

It became apparent very quickly that the Office and the Board would have to deal regularly with Bill of Rights arguments put forward to avoid publications being classified as objectionable or made subject to restrictions. The relevant sections of the New Zealand Bill of Rights Act 1990 (the Bill) are:

4. Other enactments not affected-

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),-

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

(b) Decline to apply any provision of the enactment-

by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5. Justified limitations-

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.

6. Interpretation consistent with Bill of Rights to be preferred-

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.

7. Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights-

Where any Bill is introduced into the House of Representatives, the Attorney-General shall,-

(a) In the case of a Government Bill, on the introduction of that Bill; or

(b) In any other case, as soon as practicable after the introduction of the Bill,-

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights ...

14. Freedom of expression-

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.

Our growing body of Bill of Rights jurisprudence developed at High Court and Court of Appeal level, at times inconsistent and tentative, does not yet include a decision on the new regime established by the Act. The New Truth appeal will test the issues for the first time. Some general indications can be distilled from the cases however. First, freedom of expression has been defined to some degree. In *Solicitor General v Radio New Zealand* the Full Court of the High Court held that the freedom guaranteed is the right to everyone to express their thoughts, opinions and beliefs however unpopular, distasteful or contrary to the general opinion or to the particular opinion of others in the community.⁷⁵ However, this freedom was noted to be intrinsically limited and not to include some forms of expression. Three examples given were murder, threats or acts of violence, and defamation. It follows from this that threshold arguments could be made that pornography is not a form of expression because it is devoid of content, a mere depiction of desires and behaviours containing no opinion or information, and therefore cannot attract any protection under the Bill. The United States distinguishes between low-value and high-value speech when according it First Amendment protection. Obscene materials have been held not to count as speech.⁷⁶ Canada toyed with such an approach until the leading 1992 case of *R v Butler*,⁷⁷ where Sopinka J for the majority in the Supreme Court decided that magazines and videos containing hard core material depicted sexual activity which was part of the human experience, and such depiction had the potential of titillating some and informing others. The materials were therefore seen to convey ideas, opinions or feelings, which was expressive content. A similar view had been reached a year earlier by the New Zealand Indecent Publications Tribunal in *Re "Penthouse (US)" Vol 19, No 5 and others*,⁷⁸ where sexually explicit magazines were held to convey, or attempt

75 [1994] INZLR 48, 59. The majority of decisions involving consideration of s 14 do not attempt such definitions, the Court being content to move straight to the issue whether the particular act or thing in question is protected by freedom of expression as declared in the Bill.

76 See *Roth v United States*, 354 US 476, 481 (1957).

77 (1992) 89 DLR (4th) 449, 472.

78 [1991] NZAR 289, based in part on the Manitoba Queen's Bench decision in *Butler* (50 CCC (3d) 97), reversed in the Court of Appeal (60 CCC (3d) 219) and reversed again in the Supreme Court.

to convey, meaning, and not to be violent forms of expression.⁷⁹ That decision did not concern the effects of the Bill on the new regime. Therefore this general threshold question has yet to be tested to establish whether the materials subject to the Act *prima facie* fall within the scope of the guarantee in s 14 of the Bill. Proper consideration of the issue would involve examining the purpose of the protections in the Bill, and the nature of pornography itself. If pornography in general was found not to be speech, it would appear the operation of the Act could not be questioned on Bill of Rights grounds. But it seems likely that the Canadian approach would be compelling, for reasons which follow.

A generous and purposive approach to the Bill has been accepted. In the leading Court of Appeal decision *MOT v Noort*⁸⁰ Cooke P and Richardson J both referred to the need for a generous interpretation,⁸¹ and Hardie Boys J noted that the long title of the Bill demands for all its provisions a generous and purposive interpretation and that:

While not a constitutional document, it is nonetheless an affirmation and a means of promoting principles which are fundamental to every constitutional instrument.⁸²

Gault J concluded the rights affirmed in the Bill are to be given full effect and are not to be narrowly construed.⁸³ These dicta suggest that pornography would be found to be *prima facie* entitled to protection under s 14 of the Bill as a form of expression.

Canadian authority is seen as highly persuasive in interpreting the Bill. Similarly, American authority and European Court of Human Rights decisions are seen as relevant.⁸⁴ Reference is also made to the International Covenant on Civil and Political Rights which is affirmed by New Zealand in the preamble to the Bill. Richardson J articulated the approach in *Noort*:⁸⁵

Its [the Bill's] terms, in large measure, have been drawn from the Canadian Charter of Rights and Freedoms so that Canadian decisions can be expected to assist in interpretation so long as there is borne in mind the different status enjoyed by the Charter.⁸⁶

In *Solicitor-General v Radio New Zealand* the Full Court of the High Court said:

The Bill of Rights is a recent enactment and the jurisprudence is developing gradually and case by case. As is customary in proceedings such as this, where the Bill of Rights is raised, reference has been made to decisions in other jurisdictions and particularly in Canada where they have had a relatively lengthy period of discussion and consideration ...⁸⁷

Overseas authority is not adopted simplistically, however. In the latter case, the Court noted a number of matters which prevented immediate application of Canadian principles, and concluded that the approaches and principles

79 *Ibid.*, at 318-319.

80 [1992] 3 NZLR 260.

81 *Ibid.*, 269 and 277.

82 *Ibid.*, 286.

83 *Ibid.*, 292. See also J Burrows, 'Freedom of the Press' in P A Joseph (ed), *Essays on the Constitution* (1995), 289; Adams on Criminal Law (1992), the Hon J Bruce Robertson (ed), Ch 10.

84 See the judgments of Cooke P and Richardson J in *Noort* [1992] 3 NZLR 260, at 269, 283.

85 *Op cit* above, note 80.

86 This reference is to the fact that the Canadian Charter is supreme law while the Bill is subject to the primacy of the New Zealand Parliament.

87 [1994] 1 NZLR 48, 60.

adopted there could helpfully be borne in mind modified appropriately for New Zealand conditions.⁸⁸ The relevance of the European Convention of Human Rights and its associated jurisprudence has also been questioned where different words to those in the Bill are under consideration.⁸⁹ In general, Canadian authority has considerable influence, and material from other jurisdictions is regarded as of assistance. Because of the combination of the generous approach taken to the rights set out in the Bill, and the persuasiveness of Canadian authority, it is likely that the *Butler* approach to the question whether pornography is a form of expression would be accepted were such issues to be raised. It would be instructive to have the matter dealt with fully, however.

An important issue in relation to the Bill is how the operative sections 4, 5 and 6 are to work together. The difficulty which arises is to give content to s 5 where legislation is being challenged as inconsistent with the Bill. If s 4 is to operate first, then legislation which imposes a limit on a right in the Bill can apparently simply be applied without reference to s 5. There is no need to apply established tests using s 5 to see if the limit is reasonable. This approach emphasises the initial words in s 5 making it subject to s 4, and was the approach taken by Cooke P and Gault J in *Noort*. It leaves s 5 the function of providing the Attorney-General with guidance in reporting on a new bill which appears inconsistent with the Bill of Rights under s 7, and of providing guidance for courts considering whether a common law doctrine or a particular decision of a person or body subject to the Bill breaches its provisions. The majority in *Noort*, Richardson, McKay and Hardie Boys JJ, took a different approach however. Richardson J (with whom McKay J agreed) appeared to accept that turning to s 5 first is logical, while Hardie Boys J read both ss 5 and 6 together to determine the limits of the relevant right and then considered whether the legislation could be interpreted consistently with the right as limited.⁹⁰

Some confusion about the order in which the sections are to be applied remains but it would appear desirable to take an approach which is not highly semantic and which takes account of the history of the legislation. Section 5 was originally intended to have considerable content and the circumstances of the late introduction of s 4 into the Bill establish that it was intended to have only the limited effect of ensuring that statutes passed prior to the Bill were not impliedly repealed and those passed after it were not to simply be made invalid.⁹¹ In any event, it seems that since *Noort* the Courts are taking the approach of the majority, which *does* give content to s 5, although some give closer attention to the various components which need to be satisfied to comply with the section than others. A recent example is

⁸⁸ *Ibid*, at 61- 62.

⁸⁹ See Eichelbaum CJ and Greig J in *Solicitor General v Radio New Zealand*, *ibid*, at 62-63, and McGechan J in *Television New Zealand Ltd v Quinn* [1996] 3NZLR 24, at 58. However, Lord Cooke, in the latter case, was not inclined to take such a rigid approach (at 37).

⁹⁰ See also Adams on Criminal Law (1992), the Hon J Bruce Robertson (ed), Ch 10; W K Hastings, 'The Right to Protest Against Monarchism: Has O'Brien Come to New Zealand' (1996) Bill of Rights Bulletin 90. There is a very full judgment of Fisher J in the High Court in *Herewini v MOT* [1993] 747, in which the judge traverses the textual difficulties in some detail and concludes that the relevant order in which the sections should be applied is 4, 6, 5 but the appeal to the Court of Appeal was decided on other grounds with no consideration of this aspect of the lower court decision (*Police v Smith and Herewini* [1994] 2 NZLR 306).

⁹¹ A similar view is put forward in Adams, *ibid*, Ch 10.

*Zdrahal v Wellington City Council*⁹² where Greig J agreed with Hardie Boys J in *Noort* and read the three sections of the Bill as a whole.

How is all of this relevant to decisions made by the Office and Board of Review under the new censorship legislation? It seems that if a decision is to be challenged by reference to ss 5 and 14 of the Bill of Rights, it would, if dealt with most rigorously, be subject to the following series of tests:

1. Is the relevant section prescribed by law? This depends on whether or not it is so vague it cannot be applied. It may be so vague so as not to prescribe a limit at all, or it may be so imprecise it is not a reasonable limit.
2. A reasonable limit may be demonstrably justified if the objectives of the legislation in question justify overriding the right in the Bill.
3. There must be proportionality. This requires:
 - the existence of a rational connection between the impugned measures and the objective;
 - minimal impairment of the right or freedom;
 - a proper balance between the effects of the limiting measures and the legislative objective.

These steps were used in *Butler*, and few New Zealand decisions have articulated all of them. In *Noort* Cooke P accepted the vagueness component of the 'prescribed by law' test, but also thought the law must be adequately accessible so that a citizen could know the legal rules applicable in a given case.⁹³ Both he and Gault J took the tests no further because of their view that s 5 had no application where s 4 applied. Hardie Boys J concentrated on making s 5 a workable mechanism. But it was Richardson J who most clearly gave New Zealand context to the Canadian approach. The judge endorsed the Canadian stance which accepts limits being prescribed by law if they are expressly provided for by statute or regulation, or result from necessary implication from the terms of a statute or regulation or its operating requirements. However, in relation to the latter, Richardson J noted as a minor qualification that New Zealand courts interpret statutes with a view to making them workable in any event.⁹⁴ The judge then noted that the party seeking to rely on a provision which limits a right must show it is reasonable and demonstrably justified in a free and democratic society. He openly acknowledged that this necessarily involved public policy analysis and value judgments on the part of the Courts which would probably involve consideration of all economic, administrative and social implications. Finally he proposed weighing four issues:

1. the significance in the particular case of the values underlying the Bill of Rights Act;
2. the importance in the public interest of the intrusion on the particular right protected by the Bill of Rights Act;

92 [1995] 1 NZLR 700, at 710-711. As is common in the lower court decisions, the appellant did not appear to distinguish between challenging the legislation itself and challenging the decision made under it. In the latter case, there should be no difficulty applying s 5 as s 4 will have no application. See also W K Hastings, 'The Right to Protest Against Monarchism: Has O'Brien Come to New Zealand', (1996) BORB 90, commenting on *Braconov v Moss* [1996] 1 NZLR 445, where Penlington J acknowledges the different approaches to the working sections but appears to apply s 4 last (453-456), again without making the distinction referred to above clear. Hastings calls the challenging of a decision where a statute does not itself offend: '[the activation of the Bill of Rights] at a sub-textual level' - the judge has to exercise discretion to decide whether words with a clear but subjective meaning are satisfied by the facts before him or her (at 92).

93 Op cit, above note 80, at 272.

94 Op cit, above note 80, at 283.

3. the limits sought to be placed on the application of the Act provision in the particular case;
4. the effectiveness of the intrusion in protecting the interests put forward to justify those limits.⁹⁵

The extent and degree to which the courts enter into this exercise varies.⁹⁶ This *Butler/Noort* test applies both where legislation itself is being challenged, and where it is an administrative decision (made under legislation) which is being challenged but the legislation itself does not offend.⁹⁷ The difference is not very well articulated in the cases.⁹⁸ The reason for this may be that it appears different parts of the test will be determinative depending on what is being challenged. It appears that if legislation itself is being challenged then the 'prescribed by law' test is most relevant. However, where a decision is being challenged, it appears the proportionality test is most relevant. But such general conclusions are incorrect. The tests should be applied to both. In *RJR MacDonald Inc v Attorney General of Canada*⁹⁹ the Supreme Court of Canada applied the proportionality test to the federal Tobacco Products Control Act,¹⁰⁰ and held by majority that provisions banning advertising, restricting trademark usage, and requiring mandatory package warnings were inconsistent with the Charter and therefore invalid.¹⁰¹ *Butler* of course applied all parts of the test to legislation. But the test can be applied to individual administrative decisions as was done by the Indecent Publications Tribunal in *Re "Penthouse US" Vol 19, No 5 and others*,¹⁰² discussed in more detail below. In summary, in any given case, a party could choose to attack a decision made by an official to whom the Bill of Rights applies which affects her or him, in two ways - either by directly challenging the statute as being in breach of the Bill, or by challenging the decision made by the official as in breach, or both. Challenging the statute does not prevent it having effect, because of s 4 of the Bill. However, such challenge is in fact required if s 5 is to be given content, as set out by the majority in *Noort*.¹⁰³ Therefore, a censorship decision made either by the Office or the Board of Review, faces challenge on either ground - that the Act breaches the Bill, or that a particular censorship decision breaches the Bill.

⁹⁵ Op cit, above note 80, at 284.

⁹⁶ Cf Solicitor General v Radio New Zealand [1994] 1 NZLR 48, at 63-64; Zdrahal v Wellington City Council [1995] 1 NZLR 700, at 710-711, and Braconov v Moss [1996] 1 NZLR 445, at 454-455.

⁹⁷ A sub-textual decision. See note 92 above.

⁹⁸ For example, in *Noort*, Cooke P finds no inconsistency between the Bill of Rights and the relevant sections of the Transport Act 1962 (applying s 4 of the Bill first). At this point he appears to be treating the matter as one of challenge to the transport legislation (at 273-274). However, the President then finds that the evidential tests in question had been obtained in breach of the Bill. The violations of Bill rights appear to be the decisions of officers to take the tests without informing the subjects of their right to legal advice. Therefore, at this point, it appears that the judge is treating the matter as one of challenge to an administrative decision (at 274). But if this is so, then Cooke P should have applied s 5 of the Bill using its relevant components to test the limits imposed by the application of the transport legislation, as s 4 has no relevance in such a case. This he does not do. In contrast to this, Richardson J is quite clear that the claim is not one of rights being infringed by a statutory provision, but of a challenge to acts done by a person in performance of a power or duty conferred or imposed by law (at 281).

⁹⁹ (1995) 127 DLR (4th) 1.

¹⁰⁰ SC 1988, c. 20.

¹⁰¹ See Selene Mize, 'The Word "Dog" Never Bit Anyone - the Tobacco Advertising Ban and Freedom of Expression' (1995) 8 OLR 425, where similar arguments are made for New Zealand.

¹⁰² Op cit, above note 78, at 317-329.

¹⁰³ The majority in *Noort* avoided the appearance of wasting time in applying s 5 because the transport legislation, as limited by s 5, was found to be consistent with the Bill. Therefore there was no reason to apply s 4.

The Office has taken a consistent approach to freedom of expression arguments. Where s 3(2) is found to apply, the view is taken that that section cannot be given an interpretation which is consistent with the Bill. Therefore the material is deemed objectionable and cannot be made available in any form. The submitter of the computer disks referred to above¹⁰⁴ argued that the disks were for his personal use and for use with respect to his professional interests in censorship of computer networks and bulletin board systems. However, because the disks were found to contain material which fell under s 3(2) of the Act, these freedom of expression arguments were ineffective. Further, although freedom of expression was recognised in a case where an interested party stated he simply intended to sell and distribute a video in the normal manner through video retail outlets, it was trumped by the fact that the publication fell under s 3(2) criteria.¹⁰⁵ Where s 3(2) does not apply, availability is approached with care, so as not to overstep the reasonable limits requirement of the Bill. For example, in dealing with the Mapplethorpe photographs, the Office felt that the wider public interest was better served by the publications being made available than not, and, noting the merit of the works and the controlled circumstances in which they could be made available in an art gallery, gave an R18 classification which it felt still recognised the explicitness of the depictions. Again, in June 1995, the Office classified 57 of 265 issues of the magazine 'Ribald' as objectionable unless availability was restricted to the particular individual concerned, who had stated that the magazines were part of his personal collection.

The Board of Review has confirmed that the Bill applies to its decisions,¹⁰⁶ and endorsed the approach previously taken by the Indecent Publications Tribunal in *Re "Penthouse (US)" Vol 19, No 5 and others*.¹⁰⁷ In that case, the Tribunal was dealing with a decision to classify three magazines R18. In assessing those classifications in relation to s 14 of the Bill, the Tribunal asked whether the objective of the indecent publications legislation related to concerns which were pressing and substantial in a free and democratic society, and also applied a proportionality test.¹⁰⁸ It found that the regulation of sexually explicit depictions was a pressing and substantial concern in New Zealand, that the classification was rationally connected to the statutory objective of regulating such depictions, and was proportional because it was within the scope of the legislation, was squarely based on evidence given at the hearing, and limited freedom of expression only to the extent necessary to protect society from the injurious effects.¹⁰⁹ The Tribunal also considered the question whether the classification was prescribed by law. The classification was based on criteria laid down in the legislation but also on guidelines which made up a 'tripartite test' distilled from previous decisions.¹¹⁰ These guidelines were argued by counsel for Penthouse International as inaccessible and vague as they were not in the statute itself. The Tribunal was inclined to accept such an argument if a decision had been made based on the guidelines alone. But because its classification was based on specific statutory criteria and on new guidelines which had been recently clarified and were therefore accessible and precise,

104 Note 36.

105 Classification Register, December 1995, OFLC Ref 9500441.

106 Decision 1/95.

107 [1991] NZAR 289.

108 Using criteria summarised in the Manitoba Court of Queen's Bench in *Butler* (1990) 50 CCC (3d) 97.

109 Op cit, above note 107, at 320.

110 Op cit, above note 107, at 325.

the classification was ultimately held to be 'prescribed by law'. The Board of Review has affirmed this approach for the new regime. In classifying the video 'D.P. Women' it noted it had used criteria prescribed according to law, had reasoned the result of applying the criteria under the Act, and achieved Parliament's intention given the number of criteria violated by the publication.¹¹¹ The limitations imposed by the decision on freedom of expression were considered to be demonstrably justified in a free and democratic society by reference to a similar finding in relation to the Indecent Publications Act by Tipping J in the Full High Court decision *SPCS v Waverley*.¹¹² In fact, under the Act, it appears easier to make such arguments, as the specific criteria are set out in the Act, not in defacto guidelines which have to be argued as sufficiently precise and accessible. It seems our censors simply have to point to the fact that the criteria were used and argue the question of their reasonableness cannot arise because Parliament has determined this by enacting the criteria. This view is challenged below.

The question of demonstrably justified limitations is complicated and the Board took a more detailed approach in Decision 2/95 where it had imposed display conditions on three magazines.¹¹³ In testing the conditions, the Board applied the proportionality test, which it said requires that a condition limiting freedom of expression balances the prevention of injury that would be caused without the condition, against the limitation of freedom of expression with the condition. In applying this test the Board noted that the conditions were imposed to achieve Parliament's intention of preventing injury to the public good and minimising involuntary exposure to offensive covers (s 27 allows offensiveness to be taken into account for display conditions), that the conditions had been rationalised in the light of the classification given, that the limitation was the minimum required, and did not impinge more than was necessary on the distributor's profit-making ability.

In other decisions reference to Bill of Rights issues varies from a one or two line reference,¹¹⁴ to brief mantra¹¹⁵ to agonised analysis as in the New Truth decision,¹¹⁶ where the issues stand out most prominently. The Board acknowledged in that decision that 75% of the content of the publication ultimately banned would not have warranted a passing glance of the censor, and of the remaining 25%, only 18 advertisements were objectionable. The Board of Review took a broad approach to the Bill of Rights in this decision and acknowledged that its interpretation of s 3(2) had given it an absolute character which, if given full effect to would be said to be inconsistent with freedom of expression. However, it noted that this was the nature of censorship legislation, and that any attempt to water down the section would

111 Decision 1/95, at 14.

112 [1993] 2 NZLR 709, affirming Re "Penthouse US" Vol 19, No 5 and others [1991] NZAR 289, 297, 316ff.

113 Decision 2/95, 'Australian Penthouse Hot Shots No 1', 'Lipstick No 10' and 'New Rave Vol 1 to 3 (October 1994)', 30 January 1996.

114 Decisions 4, 5 and 6/96, based on the view following the New Truth decision, that it is not possible to give s 3(2) an interpretation consistent with the freedom of expression contained in the Bill.

115 Decision 3/95 at p 7: 'The criteria we have used to limit the availability of this video recording are prescribed by law. Our classification, display restriction and excision notice represent the minimum interference with the freedom of expression consistent with preventing likely injury to the public good. For this reason, the Board is of the view that the decisions it has made with respect to this video recording are demonstrably justified in a free and democratic society' (7).

116 See above, note 40.

mean that Parliament's intention could not then be carried out. The Board could not see how the New Zealand parliament could be said to have passed a law that cannot be justified in a free and democratic society while making that law a key provision in government policy. In any event, the Board considered that s 4 of the Bill directed the Board to enforce s 3 of the Act. Although the Board briefly considered Parliament's intention in passing the Act, and dealt with the question of 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society' with a single reference to the *Re Penthouse* decision, it did not rigorously apply the *Butler/Noort* tests. In particular, issues of proportionality were not dealt with at all. Further, the Board did not clearly differentiate between whether the legislation itself offends the Bill, or the classification decision. It is to these questions that I now turn.

The first question to be answered is whether the provisions of the Act itself breach the Bill of Rights. It could be argued that parts of s 3 are so vague it cannot be applied consistently. Therefore, as noted by Cooke P in *Noort*¹¹⁷ a citizen does not know the legal rules applicable in a given case because the law is not accessible. Consistently with Richardson J in the same case, any limits on rights in the Bill are not expressly provided for in statute or regulation because it is impossible to know what *is* provided for. Arguably the 'promotes and supports, or tends to promote or support' test in s 3(2) offends in this manner. It is not possible to know what this means in any given case. The argument may be made that understanding *is* made possible when the phrase is teamed up with one of the activities described in ss 2(a) - (f), but the cases show this to be incorrect. In the Mapplethorpe decisions, the meaning of the words 'promote and support' in relation to art was determined by the acceptance by the Office of an argument favoured by some experts in the art world. Therefore, where art is being classified, the most a citizen can do to avoid restriction where a s 3(2) activity is depicted is hope to produce a convincing expert who will sway the censor. The T-shirt decision of the Office and the New Truth decision show that when looking at the question of promotion and support, both the Office and the Board have imported some context elements in some circumstances into the s 3(2) tests where context is not meant to feature. Also, in its first decision, the Board used a dictionary definition to define the words 'degrading, dehumanising and demeaning' in s 3(3)(a)(iii) and s 3(3)(c), which is a common approach used by the Office for the promotes and supports test. Thus, a citizen could well be entitled to assume that such an approach would be used to interpret s 3(2). However, the Board specifically rejected the dictionary approach in the New Truth decision and used an arbitrary test of its own in relation to the promotes and supports test, and advertisements.¹¹⁸ Similarly, the Karangahape Road street signs decision demonstrates difficulty with the degrading, dehumanising and demeaning provision in s 3(3)(c) in that some sort of offensiveness element was imported into the section though not provided for.¹¹⁹ These serious inconsistencies cast doubt upon the notion that either of these phrases is easily interpreted and applied. They have not been interpreted consistently and are therefore inaccessible. It must of course be recognised that it is inevitable that phrases and words incapable of absolute, technical definition are used in legislation and fall to be interpreted by judges

117 Op cit, above note 80.

118 See the analysis in Part IV, Section 3 above.

119 See Part IV, Section 5 above.

on a daily basis.¹²⁰ Censorship as a form of regulation is a paradigm example where this will occur and should accordingly be tolerated to some degree. However, it is arguable that these decisions reveal that ss 3(2) and 3(3)(a)(iii) and 3(3)(c) of the Act do not yield an intelligible standard whereby a citizen can judge whether her or his behaviour is in accordance with the law. This breaches the Bill of Rights.

The Board considered the notion of vagueness in the New Truth decision and noted that the Human Rights Committee in its consideration of the Report submitted by New Zealand under Article 40 of the International Covenant on Civil and Political Rights expressed concern over the vagueness of the term "objectionable publication", recommending a more specific definition.¹²¹ However, the Board was able to ignore this argument by noting that the Attorney General's report to Parliament under s 7 of the Bill made no mention of inconsistency between s 3(2) of the Act and s 14 of the Bill, and by noting that s 3(2) was one of the cornerstones of the legislation, a key provision implementing government policy. Therefore the Board concluded Parliament cannot have intended to pass a key provision which was not justified in a free and democratic society. This incredulous argument is very weak. The report to Parliament was prepared by the Crown Law Office and was one of the first to be prepared under the section. The Department of Justice was recognised as having the best experience to prepare such reports as its existing functions included advising the Cabinet Legislation Committee about the content of draft bills. However a conflict of interest arose where the Department was promoting its own legislation, and in such a case, it was agreed the Crown Law Office would prepare the report. The report prepared in this case was prepared by Crown Law without much, if any, previous experience and during a period when the procedure was arguably temporary and tentative. It is therefore entirely possible that the report was not as comprehensive and rigorous as it might have been. Further, in answer to the point raised about Parliament's intention, in fact, the Attorney General, Paul East, when reporting to Parliament on the censorship legislation, pointed out that he considered clause 121 (now s 123) of the Act imposed retrospective criminal liability without the provision of a defence relating to lack of knowledge or reasonable belief for a simple possession charge, and therefore breached s 26 of the Bill of Rights which forbade conviction for an offence which was not an offence at the time it occurred.¹²² In spite of this report, Parliament passed the Act. In other words, Parliament passed legislation it knew full well or at least believed offended against the provisions of the Bill of Rights Act. This makes nonsense of the reasoning used by the Board in the New Truth decision to reject suggestions that the Act breaches the Bill of Rights.

The next question which must be asked about the provisions in the Act is whether the reasonable limits it contains are demonstrably justified by the objectives of the Act thereby justifying overriding freedom of expression. In *Re "Penthouse US" Vol 19, No 5 and others*¹²³ the Indecent Publications Tribunal thought that the regulation of sexually explicit depictions was a pressing and substantial concern in New Zealand. Clearly, the New Truth

¹²⁰ See Sopinka J in *Butler* 89 DLR (4th) 449, 475 (1992).

¹²¹ Decision 3/96, at 17.

¹²² (1992) 532 NZPD 12764-12765. In fact it is arguable that the clause did not breach the Bill. The Act provides in s 29 that the Courts are to refer publications to the Office for classification and trial is adjourned until the matter is determined. Courts often have to determine the quality of conduct after the fact, and this is not interpreted as retrospectivity.

¹²³ Op cit, above note 107, at 321.

decision of the Board would support arguments that at the time the Act was passed, Parliament considered that the harms of making, supply and possession of objectionable publications justified limiting freedom of expression. That aside, the question has to be whether there is a discernible object, and whether that object still justifies reasonable limits on freedom of expression. Given the arguments made above about vagueness, it could be said for those provisions that the object is unclear. But assuming it is clear, it seems likely a court would find *reasonable* limits are justified. The proportionality test should determine what limits are reasonable. Accordingly, the questions which make up the proportionality test should now be considered.

Does a rational connection exist between s 3 and the objectives of the Act? An answer in the affirmative requires assuming that the objective of s 3 is clear - that the vagueness arguments set out above are rejected. Assuming that, a question which could be asked is whether the complete ban provided for in s 3(2) is justified by the objective. That would require revisiting the issues which motivated Parliament in specifying the activities it wanted banned completely in s 3(2). An issue which should be addressed under this heading is whether it was rational for Parliament to ban absolutely the depiction of an activity which is not criminal. Lianne Dalziel, Labour MP for Christchurch Central, pointed out during the third reading of the bill which became the Act that all of the categories in what is now s 3(2) of the Act mention illegal acts except one, which refers to the use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct.¹²⁴ Arguably a complete ban of depictions of an otherwise lawful activity cannot be rationally connected to the dominant objective of s 3(2) which can only be that of banning depictions of criminal activities.

Is there minimal impairment of freedom of expression? The strict liability offence in s 123 can be said to more than minimally impair the freedom. It is no defence that the defendant had no knowledge or no reasonable cause to believe that the publication to which the charge relates was objectionable. This allows a defence of no knowledge of possession, but arguably still goes too far. Even our drug possession offences are not strict liability in this sense. Is pornography more evil than drugs? It would be rare that a defence of no knowledge or reasonable cause would be made out and the object of the legislation would not be defeated by the introduction of such a defence.

Finally, is there a proper balance between the effects of the limiting measures and the legislative objective? Again, assuming that objective is clear, all of the arguments made above can be marshalled to suggest that there is an imbalance. Therefore, applying the *Butler/Noort* tests, it is possible to argue that parts of the Act do breach the Bill of Rights.

Assuming all or any of these arguments are correct, there is no doubt that the practical effect of successfully establishing legislative breach of the Bill of Rights in such a way is negligible because s 4 of the Bill requires that the offending provisions be applied in any event. But the symbolic effect could be profound. The effect of a judge of the High Court or the Court of Appeal specifying the ways in which the Act offends against the Bill of Rights would bring home to the public mind the weaknesses in the legislation and focus the issues for further public debate. The result might be law reform based on informed discussion of the constitutional issues in a country previously not fully aware of the nature of constitutional rights.

¹²⁴ S 3(2)(d). See (1993) 537 NZPD 17491, at 17497.

A similar process should be applied to individual censorship decisions. On this basis it could be argued the New Truth decision offends because it is so vague its limits cannot be determined. It is unclear how far it extends, or what form the suggested defence of mistake may take. The complete ban it imposes is unreasonable in relation to the supposed objectives of the Act. It is not rationally connected to the objectives of the Act because it is arbitrary, based on an unrealistic view of editorial control and because it is based on an interpretation of s 3(2) which appears to consider context, if only to a limited extent. It does not minimally impair freedom of expression because it resulted in the complete banning of an edition of a newspaper which was two years old at the time of the decision, and because the offending advertisements took up a very tiny proportion of the publication. Because the result has been that coded words appear to be more dangerous than explicit pictures, and because the decision will have a chilling effect on what advertisements magazines accept for publication, there is an imbalance between the effects of this decision and the objectives of the Act. Similarly, the T-shirt decision appears to offend the proportionality test because it is not rationalised from the criteria in the Act, importing as it does context. This would also apply to the street sign decision which appears to be based on offensiveness. Both these decisions could also be argued as not minimally impairing freedom of expression and having a disproportionate chilling effect. In all of these decisions, s 4 of the Bill has no effect, and breach could result in invalidity of the original decision. The New Truth decision in particular appears indefensible. It is clearly wrong and should be overruled completely. The newspaper might fall to be reclassified under s 3(3), however any value deriving from this seems rather specious with the passing of time.

VI. CONCLUSION

New Zealand's new comprehensive censorship regime is well established and is generating an increasing number of decisions. The empowering legislation gives considerable discretion to our new censors. However, fears that the appointment process would result in non-representative censorship bodies with bias towards fundamentalism or radicalism appear misguided at this juncture. Both the Office of Film and Literature Classification and the Board of Review are administered by individuals who have varied but relevant professional and ethnic backgrounds, not unlike the backgrounds of those who were employed to censor publications under the previous regimes. In particular, there appears to be an abundance of legal expertise. There is a gender imbalance in that women outnumber men significantly, however.

There is no doubt that on a day-to-day basis, the Office deals with the standard, explicit, heterosexual pornography created for the male consumer which makes up the majority of its work, in an efficient and rational manner which is probably soundly based in law. It essentially labels this material and provides for its manner of display and sale. But looking at decisions made in the first two years of our new censorship regime, one cannot help but be left with an uneasy feeling about decisions which allow the state to regulate what items of clothing may look like, what publishers and editors may do and what street signs may depict. More material is being censored than under the old tripartite system. This follows from the more inclusive wording of the new legislation, but also from the manner in which both bodies are interpreting the discretionary powers which they have been given. It is clearly arguable that parts of ss 3 and 123 of the Films, Videos and

Publications Classification Act 1993 breach the Bill of Rights even though s 4 of the Bill does not allow legislative provisions to be invalidated. There have also been a number of significant decisions both from the Office and the Board which are inconsistent and arbitrary. As such they too breach the Bill of Rights and are invalid. What follows from this?

It is to be hoped that the courts will continue to take an approach to s 5 of the Bill which will fully test our censorship legislation. The symbolic effect of confronting the inconsistencies in the Act is considerable and it is therefore essential that our courts do not allow the existence of s 4 to pre-empt proper interpretation of the Bill. As a society, New Zealand is becoming increasingly aware of constitutional rights, and it is a mark of a more sophisticated society that our courts continue to breathe life into the Bill of Rights. Whatever position is held as regards the desirability of censorship, it is essential that New Zealanders be reminded what sort of censorship system they have, how it works and whether it threatens fundamental constitutional rights.

However, to note that parts of our censorship legislation breach our Bill of Rights is not to argue that dealing with the inconsistencies by eliminating legislative discretions altogether would solve all of these problems. It is accepted that censorship legislation, to work at all, must retain some discretionary elements. This survey has shown that combining discretionary elements with non-discretionary elements creates tension and in some cases, has meant that censorship cannot be applied in meaningful ways. The Chief Censor has made a recent statement which has implications for this state of affairs. Concerned with the increasing workload of the Office, she has suggested a law change which would automatically classify depictions of sex with children or bestiality as objectionable, in order to avoid the time-consuming task of applying the promotes and supports test.¹²⁵ Such a response should be strongly resisted as unworkable and undesirable. Quite apart from transferring the weight of definitional arguments to the question of what is child pornography or bestiality, it would surely result in censorship decisions which cannot be tested and which have disproportionate effects in terms of freedom of expression. If the legislation is to be retained, reform efforts should focus on correcting the anomalies in ss 3 and 123, and on training our censors to interpret the provisions correctly. If a consistent dictionary definition of the promotes and supports test cannot be established and maintained (either by definition in the legislation or by clearly articulated guidelines) then consideration should be given to the question whether s 3(2) of the Act should place all of the weight of the censorship decision on that particular test. It may be that the section would be made more workable if context is allowed to be taken into account to a limited extent, provided for in the legislation. Further, although one of the virtues of New Zealand's new censorship regime was said to be its comprehensiveness, perhaps it is too comprehensive. If the words 'degrading, dehumanising and demeaning' cannot be applied to street signs without importing tests more relevant to town planning, the question to be asked is whether censorship legislation is the appropriate vehicle for regulation of every type of publication. The focus of reform should be to make the legislation workable, not laughable. This survey has shown that at present, some of the results are laughable.

¹²⁵ Kathryn Paterson, making a submission to the Commerce and Commercial Law Reform Select Committee on the Technology and Crimes Reform Bill on 31 July 1996.

There are those who maintain that censorship can never be applied in meaningful ways. However, if it *is* to be applied, then at the very least, it should be applied consistently, and, since New Zealand now has a Bill of Rights, then it should be applied consistently with our constitutional rights. But technology is beginning to render questions of ideology and legality largely redundant. The Chief Censor has commented for the second year in a row that the most significant challenge for the Office will be keeping abreast of new technologies which both change the sorts of publications that are subject to the Act and the complexity of the work.¹²⁶ An increasing proportion of our censors' time is spent dealing with publications on or for use in the Internet. Similarly, the new censorship unit of the Department of Internal Affairs and the Inspectors of Publications working for it nationally spend the majority of their time detecting and prosecuting for possession of computer porn.¹²⁷ The issue is rapidly changing from what is to be censored and how, to whether censorship is possible at all. In such a world, education may be the key to combating perceived harms.

Note: During the publication process, in January 1997, the Board issued its decision on an appeal of the Karangahape Road sign decisions. By a majority of 4:2 it held that both signs should be unrestricted, and that issues of offensiveness should be dealt with by the local planning authority.¹²⁸

¹²⁶ See Annual Report of the Office, 1996, 11-12.

¹²⁷ The unit was established in July 1996. There are two Inspectors in Auckland, two with the National Manager in Wellington and one in Christchurch covering the whole of the South Island. Most of the objectionable material comprises child pornography. The Inspectors work closely with the police and the Customs Department.

¹²⁸ Decision 1/97, 24 January 1997.