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WHIMP, M.P. "I know it when I see it"...

MATTHEW PETER WHIMP

"I know it when I see it."*
CENSORSHIP: A SEARCH FOR CERTAINTY
A Note on *Society for the Promotion of Community Standards* v *Waverley International (1988) Ltd.*

Matthew Whimp
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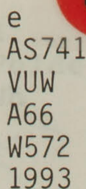

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* Stewart J in *Jacobellis* v *Ohio* (1964) 378 US 184, 197.

I INTRODUCTION

Censorship, throughout history has been an area of law which provokes a large amount of controversy in societies which value democracy. A fundamental tenet of a democracy is the freedom of citizens to express their views, thus creating a society capable of reaping the benefits of the ideas of all. From this basic premise, the need to limit to some extent the absolute right to freedom of speech has arisen, based on the theory that not all expression is beneficial to society, and that which is detrimental must be suppressed to benefit society as a whole. To this end, the legislature and courts have created criminal sanctions of serious consequence to proscribe what it sees as detrimental expression. Because of the importance of free speech, the law-makers have been at pains to ensure that what is suppressed is that, and only that, which it sees as detrimental to society. This has been achieved with a varying amount of success[1]. One fundamental part of the suppression of that which the legislature sees as detrimental, is creating a definition which includes only that which it wishes to proscribe and no more. This paper will analyse *Society for the Promotion of Community Standards* v *Waverly International (1988) Ltd*[2], a case in which issues of definitional certainty expose some weaknesses in the present censorship legislation under the Indecent Publications Act 1963, especially in light of the current attack on pornography by feminist thinkers. This paper will examine the issues that this case raises, in terms of the interpretation of guidelines issued by the Indecent Publications Tribunal, in light of the wider needs for definitional certainty in censorship law. It will then attempt an analysis of the new Films, Videos, and Publications Classification Bill 1993, as to its success in addressing the problems under the existing law.

[1] The success of the government is a purely subjective assessment, depending upon one's philosophical approach to censorship law. As was pointed out in *The Report of the Ministerial Committee of Inquiry into Pornography* (Justice Dept, Wellington, 1989), pp 13-26, the wide scope of views in New Zealand on pornography and censorship mean that the legislature will be unable to satisfy the wishes of all.

[2] Unreported, 27 Nov 1992, High Court Wellington Registry AP 213/91.

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II THE FACTS OF *Society for the Protection of Community Standards v Waverly International (1988) Ltd.*

Waverly came before the High Court on appeal from a decision of the Indecent Publications Tribunal, pursuant to s 19 of the Indecent Publications Act 1963. The case concerned a number of magazines which had been seized by the Collector of Customs, who had referred the magazines to the Tribunal for classification[3]. The magazines were grouped into nine categories by the customs department based on the similar nature of their content. The appeal was primarily focused on the magazines in category C[4], 6 of which were classified as unconditionally indecent, the remaining 109 magazines being classified as indecent in the hands of persons under the age of 18. The Tribunal stated that their reason for this classification was that six of the magazines came under the second of the guidelines issued by it in *Re "Penthouse (US)" Vol 19, No 5 and others*[5]. It stated that the dominant effect should not be established simply by a count of depictions, there should be a qualitative analysis also[6]. The effect must "prevail" over the other material. The injury to the public good cited by the Tribunal, to which guideline 2 is aimed, is the reinforcement of negative male attitudes towards women[7]. One should examine the depictions, their manner and extent and ask if the dominant effect of the magazines is to demean or treat as inherently inferior any person or group of persons[8]. It was then stated that the dominant effect of six of the magazines in category C was to demean women and thus they were to be classified as unconditionally indecent and that the remainder came under guideline 3[9] and should be

[3] *Re "Candy Floss No 1"* Decision No. 28/91.

[4] There were 115 magazines in this category and were described by the Tribunal as containing "photographs of single female models with very little accompanying text. Generally these publications place more emphasis, to a greater or lesser degree depending on each publication, on female genitalia, than those in category B", Above n 3, 5.

[5] [1991] NZAR 289; See below Part III A for the full text and history of guideline 2.

[6] Above n 3, 7.

[7] Above n 3, 7; See also below Part VI C.

[8] Above n 3, 7.

[9] Guideline 3 states: Depictions of individuals or sexual activity which do not fall into the above categories are conditionally indecent or not indecent depending on our application of the factors in s 11 [of the Indecent Publications Act 1963] (in this regard we emphasise matters of availability or distribution) and the definition of indecency in s 2.

classified R 18. The Society was joined as a party in the Tribunal hearing below, thus giving it standing to appeal that decision to the high court[10]. The Society based their appeal on three grounds. First, that the Tribunal applied an incorrect test of indecency, secondly that the Tribunal erred by relying upon the guidelines prescribed by the Tribunal in *Re Penthouse* (1990), thirdly that the Tribunal erred, by reserving itself the right to review the classification of a number of magazines, if an undertaking restricting distribution was broken. This paper will not deal with the third of these three grounds.

III THE DECISION OF THE HIGH COURT

A The Majority Approach

The majority decision of Tipping and Jaine JJ was delivered by Tipping J The first issue addressed by the Court was as to the nature of the appeal. It was stressed by Tipping J, that the Court was not able to exercise the jurisdiction of the tribunal de novo, and was restricted to an examination as to whether the Tribunal came to their decision by an error of law. The first ground of appeal, that the Tribunal applied an erroneous test for indecency, was given little attention by the judge, as counsel for the appellant could not point to any specific error and relied on the "general flavour of the tribunal's decision"[11]. Tipping J stated that the Tribunal was clearly referring to the definition of indecent in s 2 and the criteria of s 11 of the Indecent Publications Act 1963 when they made their classification[12].

The second ground of appeal, that the Tribunal erred by relying on guideline 2, was the main focus of the judgment. The use of guidelines was originally introduced into the decision making "vocabulary" of the Tribunal in the *Waverly* decisions of 1968[13]. Guidelines were developed by the tribunal to assist those persons and

[10] Section 19(1) of the Indecent Publications Act 1963.
[11] Above n 2,15.
[12] Above n 2, 16.
[13] *New Zealand Gazette,* 25 July 1968, p 1251.

organisations that deal with material that may potentially be the subject of censorship, to determine in advance the likely nature of that censorship. New guidelines were formulated in *Re Penthouse* (1990), which included guideline 2[14]:

> Depictions of sexual activity which demean or treat as inherently inferior or unequal any person or group of persons, which are not serious treatments and which are intended as sexual stimuli, are indecent (by way of example, this would include magazines the dominant content of which is the depiction of single models spreading their labia, magazines the dominant content of which is the close-up depiction of genitalia or other body parts, and other depictions which reduce a person to her or his sexual parts) .

Tipping J saw no problem with the Tribunal from time to time issuing and updating guidelines. The Society's first head of argument under this ground was that the Tribunal had elevated the guideline above the statutory criteria. It is clear law that guidelines issued to assist in the application of statutory criteria should not be elevated above those statutory criteria so that the guidelines become the test in place of the statutory criteria. In the case *Comptroller of Customs* v *Gordon & Gotch*[15], Quilliam J stated[16] :

> For myself I see no objection to the establishment by the Tribunal of criteria which are designed to assist it to a conclusion as to whether a document is injurious to the public good. I do not accept that there can properly be any slavish adherence to a formula in such matters. The danger of using a formula is that it tends to become in itself the test without reference to the principle which alone can be the proper basis of the decision.

Tipping J regarded that the Society's first argument to be unfounded and stated that the "Tribunal was careful to record in several places in the decision under appeal that it was treating the guidelines as guidelines only and was ultimately addressing itself to the statutory criteria"[17].

The alternative argument for the Society, was that the tribunal had applied the guideline incorrectly. In order to address this argument, Tipping J examined the

[14] Above n 5, 325.
[15] [1987] 2 NZLR 80.
[16] Above n 15, 83.
[17] Above n 2, 25.

meaning and application of guideline 2. Tipping J was of the view that guideline 2 could be better expressed, but the principle of the guideline was clear[18]. The guideline was to be applied with a two step approach. The first step is to ascertain whether the dominant content of the magazine is the type of depiction which is given by way of example, in parentheses, in the guideline[19]. The second step is to find that the dominant effect of the publication as a whole is to demean or treat as inherently inferior any person or group of persons. Tipping J recognised that:[20]

> The guideline is clearly not intended to produce the result that the magazines, the dominant content of which is for example, the depiction of single models spreading their labia, are to be regarded as per se indecent.

The publication must, in addition to the dominant content, have the dominant effect of demeaning or treating as inherently inferior any person or group of persons[21]. This conclusion is reflected in the suggested redraft of the guideline proposed by Tipping J[22]:

> A Publication whose dominant content is the depiction of multiple or single models spreading their labia, the close-up depiction of genitalia or other body parts or other depictions which reduce a person to his or her body parts, which are intended as sexual stimuli and which are not serious treatments are indecent if the dominant effect of such publication as a whole, is to demean or treat as inherently inferior any person or group of persons.

This formulation was preferred by Tipping J as it made the focus of the guideline clearer[23]:

> There will obviously be cases, of which the present guideline 2 is an example, where it is necessary, to avoid giving the wrong impression, to include within the guideline a qualifying or limiting element based on the effect of the material in question.

Tipping J then examined whether the tribunal had applied the guideline correctly. He

[18] Above n 2, 24.

[19] Above n 2, 21.

[20] Above n 2, 22.

[21] Above n 2, 22.

[22] Above n 2, 24; It should be noted that in subsequent decisions of the Tribunal, that the formulation proposed by Tipping J has not been adopted; See Indecent Publications Tribunal Decision No 45/93, 2.

[23] Above n 2, 21.

stated that they had found that the material in category C publications fell within the examples given in brackets by guideline 2[24] . But in the case of a majority of the magazines, their dominant effect was not to demean any person or group of persons[25]. Thus by addressing both limbs, the Tribunal had not erred in applying the guideline. Tipping J recognised that the Society was really trying to argue that the Tribunal had been plainly wrong on the facts. The test to be applied is that the assessment of the Tribunal "was plainly wrong as one no reasonable tribunal could have made"[26]. Tipping J recognised the experience and expertise of the Tribunal and that the difference between those magazines classified as unconditionally indecent and those classified R18 was one of degree[27] and as such, the court was not able to say that the facts inescapably lead to a conclusion that the tribunal was plainly wrong.[28] Thus the appeal was dismissed.

B The Minority Approach

The minority judgement was delivered by Eichelbaum CJ. He was in agreement with the majority on all but one of the issues, this being the actual final classification the tribunal gave the magazines. It is difficult to see from the judgment of Eichelbaum CJ, which of the grounds of appeal he disagreed with the majority on, in order to come to his conclusion that the magazines were incorrectly classified by the Tribunal. Eichelbaum CJ does not clearly state the actual ground upon which he relies, but it is implicit that he is relying on the ground that the decision of the Tribunal was plainly wrong, as one that no reasonable tribunal could make[29]. It is submitted that Eichelbaum CJ differed in his analysis from that of the majority in two respects in coming to his

[24] Above n 2, 26.

[25] Above n 2, 29.

[26] Above n 2, 31.

[27] In coming to this conclusion, Tipping J emphasised that this was not an appeal by way of rehearing, and as such, the Court had not had the benefit of hearing evidence on the nature of the magazines; Above n 2, 29.

[28] Above n 2, 30.

[29] *Society for the Promotion of Community Standards* v *Waverly International (1988) Ltd and Another* Unreported, 27 Nov 1992, High Court Wellington Registry AP 213/91; Dissenting Judgment of Eichelbaum CJ; 7.

conclusion that the 109 magazines classified by the Tribunal as R 18, should have been classified as unconditionally indecent. The first is that the Chief Justice substituted his own view of the facts for that of the Tribunal. Appeals to the High Court from decisions of the Tribunal are governed by s 19(2) of the Indecent Publications Act:

> The High Court shall hear and determine the appeal as if the decision of the Tribunal had been made in the exercise of a discretion.

Such an appeal is not one by way of rehearing, thus the threshold for holding that the Tribunal was plainly wrong when addressing itself to the correct legal test should be higher than if this were an appeal de novo[30]. It is submitted that Eichelbaum CJ was lead to the conclusion that the Tribunal was plainly wrong on the facts because of the manner in which Eichelbaum applied the second guideline to his view of the facts. The emphasis in Eichelbaum CJ's analysis was on the depictions of the models, rather than whether the dominant effect of each magazine was to demean women or to treat women as inherently inferior. Eichelbaum CJ in his analysis of what constituted the dominant effect of the magazine emphasised the approach of the Tribunal, that this was not to be assessed on a purely quantitative analysis of each magazine. A qualitative analysis was also necessary[31]. He then went on to argue, that if a publisher included in a magazine a significant number of "Pornographic"[32] photographs in a magazine, it must be inferred that the intention of the publisher was that these photos were intended to have the most impact. Thus, this would be deemed to be the dominant effect, notwithstanding that the publisher in fact failed in his/her intention[33]. This argument must be incorrect. The test of indecency from *Collector of Customs* v *Lawrence Publishing Co Ltd*[34] is whether a publication actually injures the public good. To say that in fact a publication does not injure the public good, but will be declared indecent because it was intended that the publication injure the public good is inconsistent with the test of actual injury and is inconsistent with Eichelbaum CJ's next statement that "the decision must be made on a

[30] This paper will not examine the threshold which will allow a judge on appeal from a lower court which is not by way of rehearing, to overrule the lower tribunal's conclusion on the facts.

[31] Above n 29, 6.

[32] Above n 29, 6.

[33] Above n 29, 6.

[34] [1986] 1 NZLR 404, 408.

consideration of each magazine"[35]. This analysis involves a jump from the dominant content of a magazine to the dominant effect of the magazine, by way of the intention of the publisher. Thus effect is deemed from, and equated with the image on the page. This approach flavours the next passage in which again Eichelbaum CJ examined the content of the magazines, rather than whether the dominant effect of the publication was that women in general were demeaned by those depictions[36] :

> The photographs of those R 18 magazines I looked at are an unrelenting concentration on the female models' genital and posterior areas, with numerous close up shots of genitalia often spread by the model's fingers. Many show as well other portions of the model's body including her face but this to my mind does not detract from the dominant effect. A number of poses are contrived or contorted; the women are depicted as available for male sexual gratification.

It is submitted that the emphasis in this passage is on the nature of the depictions and that the conclusion reached that[37]:

> ...the dominant effect of such a publication taken as a whole is to demean women and treat them as inherently inferior.

is a direct result of the inclusion in the depiction of material which is referred to in the brackets of guideline 2 by way of example. There is no analysis of how the depictions actually treat any person or group of persons as inherently inferior. There is no analysis of the actual effect on the reader . The words "the women are depicted as available for male sexual gratification" are an analysis of the image on the page and seems to be a conclusion derived from the inclusion of the various elements included in the brackets of guideline 2 alluded to in the words previous to that passage. There is no reasoning for this statement apart from the reference to the depictions of elements referred to in the brackets of guideline 2. Thus in Eichelbaum CJ's analysis, the inclusion of such material will, if found to be the dominant content of the magazine, inevitably lead to the conclusion that the dominant effect of the magazine is to demean or treat as inherently inferior. No analysis of the actual effect of the magazine is needed

[35] Above n 29, 7.
[36] Above n 29, 7.
[37] Above n 29, 7.

if those elements are indeed found to be the dominant content. Thus a conclusion of "demeaning" will be reached if the elements included in brackets exist as the dominant content, regardless of the effect on the reader.

IV WHICH APPROACH TO GUIDELINE 2 IS TO BE PREFERRED

The question of which approach is to be preferred may be answered by an analysis of the jurisprudential basis for limiting the freedom of speech under the Indecent Publications Act. The definition for indecency is given under s 2 of the Act as:

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

In *Lawrence*, the court of appeal decided that the meaning of indecent was coloured by the qualifying phrase "injurious to the public good". Thus the ordinary meaning of indecent could not be relied on by the Tribunal to hold that something is objectionable and thus subject to censorship, it needed to be "injurious to the public good"[38]. The phrase "injurious to the public good" is open to different interpretations[39].

A A Theoretical Approach to the Phrase "Injurious to the Public Good"

There are two possible jurisprudential bases for censorship which could be put forward as being intended by the legislature under the phrase "injurious to the public good. The first is the morality principal[40] which is:

> the notion that law is properly concerned with the preservation of a particular structure of moral beliefs, coupled with the related axiom that reference to moral precepts can by itself justify censorship of heretical expression.

If the interpretation of indecency is based on this principle, then once the structure of

[38] Above n 34, 408.
[39] See below Part IV B.
[40] S Gey "The Apologetics of Suppression: The Regulation of Pornography as Act and Idea" (1988) 86 Michigan L Rev 1564, 1568.

moral beliefs is established[41], any material inconsistent with those moral beliefs can be justifiably censored. The second is the harm principle[42]:

> It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) *and* there is probably no other means that is equally effective at no greater cost to other values.

Under this principal, in order for a publication to be injurious to the public good, the material must have an effect which is harmful[43] to some person, group or society as a whole. Under the harm principle, the effect of pornography on the reader which causes the harm is an essential element to be established before any limitation of freedom of expression can be justified. Thus any guideline which is designed to give effect to such a test should necessarily include that effect as part of that test. If a guideline does not include such an effect as an element of the test, and only refers to objectively identifiable criteria, then a publication which includes those criteria, but does not have the effect which the guideline is aimed at, will be interpreted by the lay person differently to that of the Tribunal, who will have reference to the effect that the guideline intends to prevent. The morality principle would admit guidelines of both types. Because any publication which causes a harm proscribed under the harm principle will always be inconsistent with the moral structure of a society, such publications will be caught under the morality principle. The morality principle will

[41] There has been criticism of this principle by both feminist and liberal writers alike; See S Gey, above n 40; See also C MacKinnon "Not a Moral Issue" (1984) 2 Yale Law & Policy Rev 292; The main criticism stems from the need in such a principle to establish what the structure of moral beliefs in a society is before an assessment of whether a given publication varies from it. Because any censorship decision is made by a tribunal (whether judge, jury or other), the moral structure used is necessarily subjective based on the tribunals assessment of community standards. Thus the moral structure being protected may only be the one perceived by the tribunal as the actual moral structure, when in fact it may not be. In New Zealand this problem exists to some extent also. The appointment of a specialist Tribunal mitigates this problem though, as it is able to hear evidence as to community standards under s 6(1) of the Indecent Publications Act; See extensive survey in *Re Penthouse* (1990).

[42] J Feinberg *The moral Limits of the Criminal Law: Harm to Others* (Oxford University Press, New York, 1984) 26.

[43] There has been criticism of this principle; See K Lahey "Pornography and Harm - Learning to listen to women" (1991) Vol 14 Nos 1/2 International Journal of Law and Psychology 117; This criticism is directed at the limited definition of harm often put forward by liberals as being harm proscribed by the criminal law and that there must be a direct causal link between the use of pornography and the harm proscribed. Thus harm of the kind objected to by feminist writers, being based on largely anecdotal evidence, is regarded as no harm at all under the liberal view.

also catch publications which are simply inconsistent with the moral structure of our society. Thus the publication need not have a harmful effect on the reader, it may simply be inconsistent with the community standards of tolerance[44]. A guideline under this principle need not have reference to an effect if it attempts to proscribe publications inconsistent with the moral standards of the community.

B The Judicial Approach to "Injurious to the Public Good"

The case law on this point is confused as to which principle the Indecent Publications Act works under. In *Lawrence*, Woodhouse P emphasised the need for the material to have some capacity for actual harm[45]. He also emphasises that an affront to the commonly held community standards is not enough for the indecency standard contemplated by the Act[46]. In *Society for the Protection of Community Standards* v *Everard*[47], these statements were interpreted to mean[48]:

> ...that which is an affront to commonly accepted standards is not, as a consequence, *necessarily* injurious to the public good. It may be. It may not be. That is not to suggest that no regard should be paid to "commonly accepted community standards", so far as such can be identified in today's turbulent society. Such may well provide at least a worthwhile starting point for determining whether material "is likely to be injurious to the public good.

In *Re Penthouse* (1990), it is implicit in the Tribunal's decision that its interpretation of what will constitute material "injurious the public good" through the guidelines, that their interpretation continues to "reflect society's standards"[49].

This change in approach from the decision in *Lawrence* may be justified on the

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[44] A moral generally held by the public may be that sex should be confined to marriage. Any depiction which shows sex outside marriage will be inconsistent with this moral precept and therefore be injurious to the public good. The depiction may need to have no effect on the reader to be banned.

[45] Above n 34, 409.

[46] Above n 34, 406.

[47] (1987) 7 NZAR 33.

[48] Above n 47, 56.

[49] Above n 5, 322.

introduction of the New Zealand Bill Of Rights Act 1990. Article 19(3) of the International Covenant on Civil and Political Rights (which can be used to interpret the Act through its affirmation in the long title of the Act), states the freedom of expression conferred by s 14 of the Bill of Rights Act[50] can be justifiably limited under s 5 by the Tribunal acting in performance of a duty prescribed by law under s 3 on two grounds[51] :

> (a) For the respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order ... or of public health or morals.

Thus the Tribunal must when interpreting what "injurious to the public good" means, under s 6 of the Bill of Rights Act, interpret that phrase consistent with both the freedom of expression conferred by s 14 and also the justifiable limits under s 5, as interpreted with regard to the Covenant. This means that the Tribunal has a duty to look to the commonly held community standards in the interpretation of indecency as one of the justifiable limits on the freedom of expression is the protection of public morals.

C Resolution of these Two Approaches

Thus New Zealand censorship law under the Indecent Publications Act is firmly based in the morality principle. This allows the Tribunal to censor material merely because it is inconsistent with community standards. This necessarily includes censorship because of a perceived harm that such material may cause, as such harm will always be inconsistent with community standards. In terms of guidelines, this means it is permissible to issue guidelines which refer solely to depictions alone without reference to any effect that they are to have on the reader before they will be censored, because such effect is not necessary, if such depictions are inconsistent with community standards. An example of such a guideline is in guideline 1[52]:

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[50] Section 14 provides: 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.

[51] These two elements are included in Article 19(3) of the International Covenant on Civil and Political Rights as limitations on an absolute right to freedom of expression in Article 19(2).

[52] Above n 5, 325.

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

If material contains depictions under this guideline, then regardless of the effect such material may or may not have on a person who reads it, that material will be held indecent.

Guideline 2 is directed at a perceived harm[53] (ie. to demean or treat as inherently inferior any person is harmful to a person, group or society as a whole and this is a justification for limiting freedom of expression). A guideline based upon this harm, must necessarily include reference to the effect that material must have upon the reader before the material can be declared indecent. The material must have the effect of demeaning women in the perception of the reader, necessarily meaning that the material must demean women before it will be held indecent. Thus a simple reference to objectively certain elements of a depiction ideally must be qualified in some way by a reference to the effect upon the reader that the publication has which causes the harm. On this approach, it becomes clear that under the Indecent Publications Act, the approach of, Tipping J is more consistent with the jurisprudential basis for censorship, when that basis is a perceived harm. The simple reference to depictions which, if present, deem the effect are not enough, the effect must be shown as well.

V POLICY IMPLICATIONS OF THIS APPROACH

Guidelines issued by the Indecent Publications Tribunal serve a dual purpose, the first is:[54]

> ...The Tribunal is endeavouring to assist those who have to administer the Act and whose

[53] The Tribunal perceives that reinforcing negative male attitudes towards women and their attitudes to coercive sexual behavior in material which demeans women is harmful; Above n 5, 328; See also C MacKinnon "Not a moral issue" (1984) 2 Yale Law & Policy Rev 321; K Lahey "Pornography and harm - Learning to Listen to Women" (1991) Vol 14 Nos 1/2 International Journal of Law and Psychology 117; See below Part VI for a fuller analysis.

[54] Above n 2, 17.

> activities are governed by the Act so that they may know in advance in general terms what classification certain material is likely to receive.

In serving this purpose, the Tribunal also emphasises that "[the guidelines'] primary and overriding requirement [is] to reflect the prevailing society standards and to prevent injury to the public good"[55] . Thus a guideline should maximise the objective certainty required of lay people and organisations who deal with material potentially subject to censorship under the Indecent Publications Act, while staying within the limits of the test for indecency laid down in s 2 and s 11 of that Act and the jurisprudential basis for such legislation[56]. A number of persons and organisations deal with material which may be subject to censorship on a day to day basis. Customs, importers of such material, distributors, retailers, travellers bringing material into New Zealand privately, authors and producers of sound recordings and the customers of retail outlets for such material. Such people need to know in advance of any seizure or dealing whether a publication[57] is likely to be declared indecent by the Tribunal. Under s 21(1) of the Indecent Publications Act a number of offenses[58] of strict liability are laid down. Under s 21(2) of the Act, it is stated that:

> It shall be no defence to a charge under [subsection (1)] that the defendant had no knowledge or no reasonable cause to believe that the document, sound recording, matter, or thing to which the charge relates was of an indecent nature.

In s 21(3) it is stated that:

> It is a defence to a charge under subsection (1) that the act of the defendant had no immoral or mischievous tendency.

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[55] Above n 5, 324.

[56] Above n 5, 324.

[57] Under s 2 of the Indecent Publications Act 1963 "document" is defined as: "... any book, newspaper, periodical, picture, film, photograph, photographic negative, photographic plate, or photographic slide, and any print or writing, and any paper or other thing which has printed or impressed upon it or otherwise shown thereon any word, statement, sign, picture, or representation."

[58] Such offenses include: (a) Sells or hires, or is in possession for the purpose of sale and hire, indecent material; (b) Printing an indecent document; (ba) Publishes for the purpose of sale any indecent material; (c) Makes an indecent sound recording; (d) Causes to be inserted in any newspaper, indecent material; (e) Exhibits for payment, indecent material; (f) Exhibits to any person indecent material, which is indecent in the hands of someone who is the age of the person to whom the material is exhibited; (g) Deals with indecent material contrary to any qualification of indecency put on it; (i) Exhibits indecent material in or within view of a public place; (j) Sends unsolicited indecent material to any person by way of advertising.

Under s 12(2), it is stated that:

> ... where in any civil or criminal proceedings before a Court ... a question arises as to whether any book or sound recording is indecent within the meaning of this Act or is indecent in the hands of persons under a specified age or is indecent unless its circulation is restricted to specified persons or a class of persons or unless used for a particular purpose, as the case may be, the court shall refer the question to the Tribunal for decision and report, and the Tribunal shall have exclusive jurisdiction to determine the question.

Read together, these provisions mean a conviction for dealing with indecent material can be obtained without the material in question having been subject to a decision of the Tribunal prior to the offence, notwithstanding that the defendant has no knowledge or even suspicion that the publication is indecent. A defence may exist under s 21(3), but the lack of immoral or mischievous tendency could not be due solely to the lack of knowledge of the nature of the material, as this would allow a defence which is expressly prohibited under section 21(2). Thus the onus falls on the person who deals with material which may be subject to censorship under the Indecent Publications Act to make an assessment as to whether material is indecent and thus whether so to deal with it or not. This makes public access to an objectively certain standard of extremely high importance. A test which is framed in objectively certain terms, which requires of the lay person no subjective value judgments would be the ideal for such a guideline.

The problem with the interpretation of guideline 2 proposed by Tipping J is that there is a necessary requirement that anyone attempting to use the guideline to adjudge whether a publication may be subject to some classification under the Indecent Publications Act, must make an assessment as to whether it demeans women. Under the guidelines as presently framed this poses problems.

VI THE INTERPRETATION OF "DEMEANING TO WOMEN"

A Judicial Approach To The Interpretation Of Demeaning To Women

The first judicial examination of the concept of "demeaning women" and its place under the Indecent Publications Act was in the case *Comptroller of Customs* v *Gordon & Gotch*. This was an appeal from a decision of the Tribunal[59] in which two of the Tribunal members held a publication unconditionally indecent on the basis that it denigrated[60] women. One of the issues on appeal was whether the Tribunal could under the statutory test of indecency hold that a publication which denigrated women was injurious to the public good. Quilliam J in response to this question was of the view that[61]:

> The expressions "representational view of women" and "denigration of all women" are imprecise and not, in my view, capable of definition so as to form a logical and coherent basis for a decision as to the classification of a document.

This view was expanded upon by Jeffries J. He thought that to say that the intention of the publishers of such magazines by the representations used in such magazines was to denigrate all women was illogical and that such an interpretation moved away from "the actual and real towards symbolism and questionable labelling"[62]. The judge drew an analogy between prostitution and the representations of women in the magazines, saying that it could not be said that prostitution denigrated all women as a class, as no one would associate all women with prostitutes. Thus no one would identify women as a class with the models in a magazine and thus be denigrated[63]. Thus under this view, the Tribunal could not use the argument that a publication depicting conduct which had the effect of demeaning the models, these models represented all women and as such this had a wider effect of demeaning all women. A model in a "pornographic"

[59] *Re "Fiesta" and "Knave"* (1986) 6 NZAR 213.

[60] It should be noted that the word "denigrated" is included as part of the matters to be taken into account for the classification of videos under s 21(2)(e) of the Video Recordings Act 1987.

[61] Above n 15, 83.

[62] Above n 15, 93.

[63] Above n 15, 94.

magazine could not be a symbol for all women[64].

The Tribunal up until 1990 was not prepared to use the argument that a publication could be held indecent if its dominant effect was to demean women[65]. In *Re Penthouse* (1990), by issuing Guideline 2, the Tribunal stated that this was an attempt to include a feminist viewpoint. Jeffries J in *Gordon & Gotch* expressed some concern about the use of a feminist argument in Tribunal proceedings[66], but this objection was interpreted to be procedural, in that the feminist argument could not be regarded as a fact and not sufficiently proved to allow the Tribunal to take official notice of it. In order to satisfy procedural fairness, the Tribunal must hear argument on the point before using it to declare a publication indecent[67]. Thus Jeffries J did not reject in substance the feminist viewpoint as long as there was ample evidence to support its use in Tribunal proceedings to satisfy the requirements of procedural fairness[68]. In *Re Penthouse* (1990), the Tribunal was of the view that such evidence did exist, from both written and oral evidence presented to the Tribunal and from the Morris Report[69], and moreover it was their duty under the Bill of Rights Act to do so[70]. The Tribunal in formulating guideline 2, emphasised the fact that it was not using the representational argument that was criticised by Jeffries J in *Gordon & Gotch*[71]. However the inclusion of the words "or group of persons" in the guideline would seem to come very close to

[64] For a more in depth analysis and criticism of Jeffries J's argument see below Part VI C.

[65] See *Re "Private Lives" Vol 1 Issues 2, 5 & 6* [1990] NZAR 526; The Tribunal held that in fact the magazines could demean the individual portrayed, and perhaps a class or group, but that such an argument was not available to the Tribunal.

[66] Above n 15, 95.

[67] Above n 15, 95.

[68] See generally J Smillie "The Problems of 'Official Notice': Reliance by Administrative Tribunals on the Personal Knowledge of their Members" [1975] Public Law 64.

[69] Morris *The Report of the Ministerial Committee of Inquiry into Pornography* (Justice Dept, Wellington, 1989).

[70] Under s 5 of the Bill of Rights Act 1990, freedom of expression may be limited to the extent that is justifiable in a free and democratic society. In *R* v *Butler* (1991) DLR (4d) 449, a decision of the Supreme Court of Canada which summarises the Canadian case law on the Canadian Charter (substantially the same as the Bill of Rights Act 1990), held that under the Canadian equivalent of s5 of The Bill of Rights Act, limitation of freedom of expression was justifiable to "[criminalise] the proliferation of materials which undermine another basic Charter right." per Sopinka J, 476.

[71] Above n 5, 329.

the representational argument rejected by Jeffries J. Prima facie it would seem that any image which demeaned a group (ie women), must do so because it represents all women. Thus to include these words would be to include the representation argument.[72]

B The Feminist Approach To Pornography[73]

The fundamental tenet of the feminist argument is that[74]:

> Pornography causes attitudes and behaviours of violence and discrimination which define the treatment and status of half the population.

To demean women in pornography is a form of sex discrimination and is neither harmless fantasy nor a corrupt and confused misrepresentation of an otherwise natural and healthy sexuality[75]. This view sees male and female sexuality as a social construct and that sexuality which includes male dominance as a fundamental aspect is harmful to women. Pornography is seen as institutionalising the sexuality of male supremacy[76] by fusing the eroticisation of dominance and submission with the social construction of male and female. The causal element is satisfied by the argument that men treat women as who they see women as being, and in pornography, women are seen as being submissive and acted upon, that women desire dispossession and cruelty and are there to be violated and possessed[77]. The feminist perception of how pornography harms society is best summarised by the passage[78]:

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[72] For an analysis and resolution of this problem, see below Part IV C.

[73] This paper will not examine the validity of the feminist argument in terms of whether it is sufficient to warrant the censorship of material which it aims to proscribe. It is clear from decisions of the Indecent Publications Tribunal and *Waverly*, that this argument has been accepted as being valid. A number of liberal writers in the United States have challenged the validity of the feminist argument. One major objection is the lack of empirical evidence that pornography in fact *causes* the harm on which the feminist argument is based. Another objection is that the logical consequence of the feminist argument is that a large amount of material which has no explicit sexual content, but demeans women would also be proscribed. This objection may not be persuasive. If material which is not explicit causes harm sufficient to warrant censorship, then this should be proscribed regardless of the nature of the material. See generally: I Jarvie "Pornography and/as Degradation" (1991) 14 International Journal of Law and Psychology 13; also see S Gey, Above n 40.

[74] C A MacKinnon "Not a Moral Issue" (1984) 2 Yale Law & Policy Rev 321, 323.

[75] Above n 74, 325.

[76] Above n 74, 326.

[77] Above n 74, 326.

[78] Above n 74, 328.

> Pornography participates in its audience's eroticism because it creates an accessible sexual object, the possession and consumption of which *is* male sexuality, to be consumed and possessed as which *is* female sexuality.

Thus to demean women is to construct for them a sexuality of powerlessness. This construction is seen to permeate all social interaction between men and women and is seen as harmful to women.

The question of how pornography in itself causes this harm is explored in a manner which is a form of literary or artistic criticism, from the feminist perspective[79]. In order to do this, a picture is taken and then analysed not merely in terms of the literal images, but also in terms of the techniques of literary criticism (ie the literal images are interpreted), such as imagery, allusion, symbolism, metaphor and juxtaposition. In a passage in *Pornography: Men Possessing Women*, an analysis is made of a depiction in a magazine for the homosexual market in which a man is depicted masturbating to a *Playboy* centerfold, this serves as a graphic example of the process envisaged by feminist writers[80]:

> Without the presence of the female, masculinity cannot be realised, even among men who exclusively want each other; so the female is conjured up, not just to haunt or threaten, but to confirm the real superiority of the male in the mind of the reader ... The feminine or references to the woman in male homosexual pornography clarify for the male that the significance of the penis cannot be compromised, no matter what words are used to describe his (temporary) position or state of mind ... [S]uperiority means power and in male terms power is sexually exciting. In pornography, the homosexual male, like the heterosexual male, is encouraged to experience and enjoy his sexual superiority over women.

The context of the image is explored in terms of how a given image portrays sexual power, how an image may or may not perpetuate female powerlessness and celebrate

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[79] See generally A Dworkin *Pornography: Men Possessing Women* (Perigree Books, New York, 1981); In this book, the author examines a number of "pornographic" texts and photographs, in terms of a feminist literary or artistic criticism, thus extracting the elements of the material which demeaned women.

[80] Above n 79, 44-45.

male power.

C The Resolution Of These Two Approaches In Guideline 2

By adopting the feminist approach, the Tribunal avoids the representational argument criticised by Jeffries J in *Gordon & Gotch*. In the representational argument, the models depicted symbolise all women, and therefore all women in the mind of the reader are equated with the demeaned position of the model, thus this is an argument based on harm to the reputation of all women, represented by the model. In the feminist view, the depiction causes or reinforces a construction of sexuality which discriminates against and is harmful as a cause of rape and abuse of women[81] . Thus the harm perceived is not that to demean women is to harm their reputation, but that to demean women is to reinforce a sexuality which is discriminatory and harmful. Thus the model(s) do not represent all women, they are a harmful image of sexuality itself.

However by affirming the feminist argument in guideline 2, the Tribunal has created great problems for organisations and individuals when dealing with material which is potentially subject to censorship under the Indecent Publications Act in terms of definitional certainty[82]:

> The wide range of argument from the importer, Customs and the Society indicates the extreme difficulty the Tribunal has had in attempting to translate the second guideline into a practical, applicable test which will generate certainty and predictability as well as ensuring that the public good is not injured.

The ordinary meaning of the verb "to demean" is to "lower the dignity of"[83], this definition contains no element of the comparative relationship between male and female that is demanded by the feminist argument, the definition is close to the idea of damaged reputation which was expressly rejected by Jeffries J in *Gordon & Gotch*. This may be an element of the feminist argument, but does not encapsulate the whole

[81] Above n 43, 129-130.
[82] Above n 3, 6.
[83] *The Concise Oxford Dictionary* (8 ed, Clarendon Press, Oxford, 1990), 308.

argument. It is far removed from the concepts envisaged by feminist writers of a construction of a sexuality which discriminates against and is harmful to women, by reinforcing female powerlessness and celebrating male power over, and possession of, women. The Tribunal in its decisions has stated in simple terms the harm that the guideline is aimed at as being to prevent "the potential reinforcement of negative male attitudes to women"[84], but this does not help in the definition of what the feminist view of demeaning means as opposed to the ordinary dictionary meaning, as it does not point out what those negative male attitudes are. It is clear from their decisions that the Tribunal is using a feminist gloss of the word "demean", but this is not clear at all in the guideline.

The phrase "treats as inherently inferior or unequal" also fails to convey adequately the feminist perspective that the guideline is primarily addressing for similar reasons. There is no mention of a comparison to any person with whom the person in the depiction must be inferior. Even if being inferior to someone is implicit in guideline 2, the person must necessarily be a symbol for the person or group who is/are treated as inherently inferior. This phrase comes close to the word "denigrate" which was criticised by Jeffries J in *Gordon & Gotch*, as symbolising a reduced reputation in all women. Thus the feminist perspective again is not reflected in the guideline.

The second and more serious problem with the guideline, which the judgement of Eichelbaum CJ graphically exhibited in his judgment in *Society for the Promotion of Community Standards* v *Waverly*, is the difficulty that a lay person will have in interpreting a picture or text in order to determine whether any given publication in fact does demean women. The guideline as it stands under the majority approach in *Waverly* means that ultimately before a publication is held indecent, it must demean women regardless of whether the publication contains elements listed in the brackets. The Tribunal is made up of five members two of whom must have special qualifications in the field of literature or education[85], and thus the expertise exists on the Tribunal to

[84] Above n 3, 7; Above n l.

[85] As required by s 3 of the Indecent Publications Act 1963.

assess publications in terms of the literary analysis envisaged by feminist writers. The lay person may not have such skills. It is arguable that a piece of literature conveys the meaning intended by the author to the reader, regardless of their ability to engage in literary criticism, and the skill of literary criticism is merely the ability to articulate how the author achieved his or her intended effect. Thus the lay person will intuitively know whether a publication has the dominant effect of demeaning women. Is this sufficiently certain to include in a legal test which has as its aim to promote both predictability and certainty, and to prevent injury to the public good? Such an argument is reminiscent of the words of Justice Stewart when talking of obscenity law in The U.S.A.: "I know it when I see it"[86]. An analysis based on intuition is not consistent with the goals of freedom of expression and its strict limitation by the legislature. Alternatively, to go to the other extreme that was manifested by the judgment of Eichelbaum CJ in *Waverly*, whereby an effect is deemed by reference to easily ascertained listings of conduct, regardless of the effect and context that they in fact have, is to go too far in the other direction. To disregard the effect is to disregard the harm to which the guideline is aimed at preventing. When these two weaknesses are combined, the guideline comes up wholly wanting in terms of definitional certainty. There is no actual reference to what is actually meant by the words "to demean" and the assistance given to determine whether something is demeaning to women is wholly inadequate, if the existence of such elements is necessarily qualified by the need for a publication to have the dominant effect of demeaning women.

VII AN ALTERNATIVE?

An alternative to Guideline 2 should address the fundamental problems of that guideline. The first of these problems is that the guideline through the use of the words "demean" and "treat as inherently inferior" alone in the guideline do not give any guide as to the effect to which the guideline is in fact addressed. The second problem is that the guideline does not adequately show how the connection between depiction and

[86] *Jacobellis* v *Ohio* (1964) 378 US 184, 197.

effect is to be assessed. First an alternative guideline should include reference to the feminist gloss of what is meant by "demeaning" in the preamble to the guideline in order to make clear the effect that the guideline is attempting to prevent. A suggested form may be:

> Material which constructs in the eyes of readers a sexuality for women which eroticises dominance by men and the submission of women, in which women are acted upon by men, is harmful, as it defines the treatment and status of women. Material having such an effect, which is not a serious treatment is injurious to the public good.

Secondly, the guideline should emphasise that in determining whether a publication demeans women, context is a vital element in such a determination to reflect the approach of feminist writers to actual pornographic material and that determination requires a connection to be made between the abstract concept of demean and the concrete image on the printed page. This poses serious problems for any tribunal issuing guidelines. The link required by the feminist approach to pornography is in the nature of a literary or artistic criticism type analysis[87]. This type of analysis is a skill often learnt at a university level of education, which not every person who may have to deal with such material and therefore come under the purview of the Act, will necessarily have.

This problem may be mitigated by the inclusion in the guideline of a more comprehensive list of elements which will help in determining whether a publication demeans women. This third element might be served by the use of such a list of elements which were used in a city ordinance on civil rights in Minneapolis in order to give a more comprehensive list of examples for a lay person to focus on[88]:

> Pornography is the graphic sexually explicit subordination of women, whether in pictures or words, that also includes one or more of the following:
>
> (i) Women are presented dehumanised as sexual objects, things or commodities; or

[87] Above part VI C.

[88] This ordinance was passed by the Minneapolis city council in 1983, but was ultimately vetoed by the mayor in 1984. See generally P Brest "Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis" (1987) 36 Stanford Law Review 607.

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(ii) Women are presented as sexual objects who enjoy pain or humiliation; or

(iii) Women are presented as sexual objects who experience sexual pleasure in being raped; or

(iv) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or

(v) Women are presented in postures of sexual submission, servility or display; or

(vi) Women's body parts - including but not limited to vaginas, breasts and buttocks - are exhibited, such that women are reduced to those parts; or

(vii) Women are presented as whores by nature; or

(viii) Women are presented being penetrated by objects or animals; or

(ix) Women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding or bruised or hurt in a context that makes these conditions sexual.

This formulation unfortunately involves a number of elements which require subjective assessment[89]. However these elements may be severable in order to give a list of objective elements by which an assessment could be made by an expanded category of elements from that of Guideline 2. In combination with a clearer indication of what the harmful effect intended to be proscribed, this will greatly improve the ability of those involved with material that may be subject to the Act to predict whether it may be censored.

VIII THE FILMS, VIDEOS, AND PUBLICATIONS CLASSIFICATION BILL 1993; DOES IT IMPROVE THE SITUATION?

In 1989, the government came under increasing pressure to reform New Zealand censorship law and as a result appointed a ministerial committee of inquiry to examine both public opinion on issues of pornography, and the ability of the current system to meet the needs of the public. The result was *The Morris Report* which

[89] These include elements such as "postures of sexual submission", "presented as whores by nature" and "shown as filthy" which will require elements of a deconstructionist analysis to make the link between the conceptual and the concrete.

recommended a comprehensive overhaul[90] of the current legislation on censorship in New Zealand. This resulted in the introduction of the Films, Videos, and Publications Classification Bill. This paper will focus solely upon the definition of "objectionable" in cl 3 of the Bill[91]. Because the Bill was introduced in order to improve the current law on censorship, this paper will examine the Bills approach to matter which demeans women, and whether the Bill has improved the definitional certainty of guideline 2 under the Indecent Publications Act.

A The Greater Need For Certainty.

Clause 121 of the new Bill creates even greater need for the legislature and the new classification authority to have regard to definitional certainty. This provision makes it an offence to simply be in possession of "objectionable" material as defined in cl 3 of the Bill, regardless of whether the material has been classified as such[92]. Thus under such a provision, the ability of the ordinary person to identify "objectionable" material is of even greater importance.

B The Definition Under Cl 3.

Under cl 3 of the Bill, the ultimate standard as to whether something will be banned is whether it is objectionable under the definition given to that word in the Bill. Under cl 3(1), a publication is objectionable if it "describes,depicts, expresses or otherwise deals with matters of 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". This formulation is manifestly similar to the test of indecency in the Indecent

[90] The major changes are: (1) One censorship standard for all publications, films and videos; (2) Establishment of new bodies: A classification office, aboard of review and an expanded industry labelling body; (3) Standard of "objectionability" which will prohibit material, the availability of which "is likely to be injurious to the public good"; (4) Certain extreme publications will be deemed to be "likely to be injurious to the public good"; (5) Existing criminal offenses to be rationalised and a new offense of possession to be added.

[91] This section is reproduced in full in Appendix A.

[92] Clause 26 of the Bill enables the court to refer any material for classification to the Authority in a criminal trial.

Publications Act[93], apart from the use of the idea of likelihood, and the element of availability[94]. The inclusion of these words may only be there to loosen up the requirements for proof of causation between the publication and injury to the public good[95] . Under cl 3(2), publications are *deemed* to be objectionable if they include depictions which promote or support exploitation of children, combining sex and violence, necrophilia, urolagnia, coprophilia, bestiality and acts of torture and extreme violence. Under cl 3(3), a number of elements are listed for the classification body to take into account when determining whether a publication is likely to be injurious to the public good under cl 3(1):

(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;

...

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

...

(c) Degrades or dehumanises or demeans any person;

---

[93] Section 2 of the Indecent Publications Act.

[94] The inclusion of the concept of availability may lead to problems. It may have been included to cover situations where a "one off" publication is submitted as a result of a charge under part VIII of the Bill. In this situation the publication is no longer available to anyone and therefore cannot injure the public good (Under cl 3(4)(d), the classification authority must take into account to whom the publication is intended or likely to be made available. If a publication is seized, it is not intended nor is it likely to be made available to anyone). In this situation, the classification authority would have to assume for the purpose of the charge that the publication were available to some person in order to determine whether it was injurious to the public good in the circumstances in which it was seized. Otherwise it would seem to be redundant, as availability is taken into account in cl 3(4)(d).

[95] This point was discussed in *Everard*, Above n 47, 56; It was held that the interpretation of s 2 of the Indecent Publications Act was useful in interpreting s 13 of the Films Act 1983 which used the phrase "likely to be injurious to the public good". Also in *Wheeler* v *Everard* Unreported, 22 Nov 1986, High Court Wellington Registry, CP 284/86, Heron J held that the same principles were applicable between the two statutes despite the difference in wording.

> ...
>
> (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 the ... sex ... of the members of that class.

The first question to be answered is whether the new statutory definition actually would allow the new classification body to declare a publication indecent on the basis that it demeaned women in terms of the feminist argument. The test in cl 3(1) that something must be "likely to be injurious to the public good" is manifestly similar to the test under the Indecent Publications Act. Thus it would seem prima facie, that what was injurious to the public good before the introduction of the Bill will still be injurious to the public good notwithstanding the introduction of this Bill. The ultimate criteria in each piece of legislation is/was that a publication be injurious and now the availability be likely to be injurious to the public good. The substance of what injures the public good should not change simply because the legislation has changed, thus the feminist argument remains valid under cl 3(1) of the Bill[96] . However does the inclusion of the word "demean" in cl 3(3), imply that only weight should be given to the fact that a publication may demean (in the dictionary sense of the word) women, and that a publication which does demean women (in the feminist sense) will not necessarily be injurious to the public good under cl 3(1)? It is arguable that the inclusion of the word demean is not a direct reference to the feminist argument, but is descriptive of the elements of that argument and should be read in its ordinary sense. Thus the feminist argument is still part of the "injurious to the public good" test, and that the word "demean" is used not in the sense used in Guideline 2 (ie as an encapsulation of that argument), but in its ordinary sense, as a concept useful in identifying elements of that approach in the relevant material[97] . Thus the feminist argument survives the old legislation. Does the inclusion of the extended criteria under cl 3(3) improve upon the definitional certainty in guideline ?

[96] This provision must also be interpreted in light of s 6 of the Bill of Rights Act 1990. For a full exposition of this argument see above Part IV B.

[97] Above part VI C.

The extended list of criteria in cl 3(3) are a marked improvement on the Indecent Publications Act, but in terms of the feminist critique of pornographic material which has become one of the big focuses of the censorship debate in recent years[98], the new statute is little improvement on Guideline 2. It contains a number of elements which may be useful in determining whether a publication will have the effect objected to in the feminist argument. Clauses 3(3)(a)(i), 3(3)(a)(ii) and 3(3)(a)(v) are helpful in directing what should be looked for in a publication, but they fail to include the element of objectification which is one of the main focuses of the feminist argument. The focus of these clauses on the more violent aspects of pornography may direct attention away from material which is not violent, but which the feminist writers see as equally harmful. Clauses 3(3)(a)(iii), 3(3)(c) and 3(3)(e) may be directed at this aspect of the feminist critique, but the use of words such as “degrades”, “dehumanises” and “demeans” means that this provision suffers from the same problems as Guideline 2[99] .

The new statute goes some way to improving the definitional certainty of what “demeaning to women” in terms of the feminist approach, means under the test of “likely to be injurious to the public good”, but it does not cover the whole picture. It does not outline the harm to which the feminist argument is aimed and does not explain the critical analysis to be undertaken in order to make the link between the conceptual and the concrete[100]. It is submitted that under the new legislation, the new classification authority should issue guidelines similar to that proposed in Part VII of this paper. This could be achieved through the Information Unit established under cl 81(1) of the Bill. Under cl 81(2)(b)(ii), the Unit must disseminate to the public information about the procedures for the classification of publications. This may include guidelines issued by the Classification Office. The use of the feminist argument in light of the progress made by women in recent decades is a growing phenomenon in censorship tribunals and litigation. If this argument is to continue and grow under the new test, then the difficulties in making the necessary connections with that which is depicted upon the

[98] See generally *The Report of the Ministerial Committee of Enquiry into Pornography*, Above n 69.

[99] Above part VI C.

[100] Economy of words may be cited as a reason for these omissions, as it would be a very clumsy statute that included the harm that the test of “injurious to the public good” is aimed at.

page and the harm caused by such depictions may be eased. The new authority should make it clear how it will approach such an issue, given the greater need for such action under cl 121 of the new statute.

IX CONCLUSION

Waverly is a case in which a number of issues facing the law of censorship have highlighted the need in New Zealand to address some of the more basic problems in this area. The need for the legislature to make clear what is tolerated in terms of free speech and what will be proscribed are paramount. In a democratic society, the need for its citizens to have a clear idea of what is, or will be, proscribed should be a driving force in such legislation. The introduction of the Films, Videos and Publications Classifications Bill will mean a major change in the way censorship law in New Zealand is administered. Under this new administration, the new classification authority should attempt to address some of the problems of definition, which were so acutely raised in *Waverly*. The Bill falls short of the mark in its attempts to resolve such issues. In a Bill which has the potential of impinging on peoples' civil liberties to the extent of the possession offence in cl 121, there must be sufficient certainty for people to avoid these draconian consequences. The increase in the use of the feminist approach to pornography as a justification for censorship has made this problem even more acute. The use of this argument is likely to increase with the great strides made in feminist scholarship, such as feminist legal theory and feminist philosophy. This paper has suggested a way in which these problems may be mitigated by the use of more effective guidelines and effective public dissemination of those guidelines. The only other alternative is that the public submit every piece of material which they suspect may be "Objectionable" to the classification authority. However the level of the fee for such submissions (Under cl 15(2) of the Bill) and lack of resources may make this impractical. The new Bill has meant an improvement in the administration of censorship in New Zealand, but the fundamental issues raised in this paper must be addressed before it is to become a credible piece of censorship legislation.

APPENDIX A

8. 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 to be 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 the colour, race, ethnic or national origins, sex, physical or intellectual capacity, or religious beliefs of the members of that class.

(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 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.

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