THE INDECENT PUBLICATIONS TRIBUNAL: A SYMPOSIUM

THE INDECENT PUBLICATIONS TRIBUNAL — A VIEW FROM THE INSIDE*

Stuart Perry**

New Zealanders do not like regimentation and aim at an economy as free as possible of restrictions on personal activity. There are nevertheless hangovers from older traditions and from our own history which point the division between liberty and licence. The amount of restriction desirable on any activity is often a matter on which opinion is sharply divided. Fortunately, with democratic forms of government, it is possible to find reasonably satisfactory solutions for most problems. Ministerial control, control by the executive, requires strict limitation: legislative control cannot in advance decide detailed questions. As in most British communities the liberty of the subject thus becomes largely a matter delegated to the courts, and on matters not strictly legal the expedient of using administrative tribunals has often proved valuable.

The Indecent Publications Act 1963 was an imaginative attempt to find a resultant for two forces which had gathered momentum in the community, but which seemed to be almost exactly opposed. On the one hand was a liberal desire to cut, or at least loosen, the trammels with which paternalistic governments were accused of having constrained the writted word; on the other was the desire to reform and improve literature, and particularly to protect the immature from whatever shock or harm might come from their exposure to such publications as horror comics. A purely academic approach might have led to the view that literary censorship was unnecessary. If we had never had censorship, had never made forbidden fruit of reading matter, that view might have prevailed — but we were not starting from scratch. We were conditioned by our own history and present context. Partly because of mass dissemination the sort of dirt which used to be swept under the Victorian carpet (to lie there, certainly, an inch thick) now travels by shiploads to the market places of the world. Prohibition, perhaps more than anything else, has caused proliferation: whatever the cause, modern blue literature is abundant and often sophisticated.

There was in 1963 no real movement towards immediate repeal of all censorship law. Although, for many, ultimate repeal seems the logical goal, public opinion at that point would obviously not have sustained such a movement. The legislature

* This article was prepared for the Otago Law Review. An early draft of some paragraphs appears also in the author's compilation, *Indexes to the Decisions of the Indecent Publications Tribunal, with the Acts and Regulations* (2nd ed., cum. 1964-73), 1974, McCrae Publishers, Box 3509, Wellington.

** LL.B., F.L.A., F.N.Z L.A. Mr Perry was city librarian, Wellington, 1946-73, and a member of the Indecent Publications Tribunal 1963-72.

decided to take the responsibility for laying down guidelines far more detailed than those provided by the existing legislation, and to remove the administration of this part of the law from the jurisdiction of the courts, which are normally concerned with the operation of strict law rather than with what must ultimately be conceded to be matters of opinion. Under the Indecent Publications Act 1910 a Magistrate, with really very little to guide him, had to decide questions of indecency in the light of his personal background and instincts rather than on any satisfactory definition of indecency. He might be Jew or Gentile, Catholic, Protestant or Freethinker. He would certainly do his best according to his conscience — but to a defendant it should not matter as much as it did which of a panel of judicial officers tried his case.

No one, it is probably fair to say, has produced a satisfactory comprehensive legal definition of obscenity or indecency: the New Zealand Act does not purport to do so (see s. 2; *Decisions 77-103,* (Delivered 15.7.68, Gazetted 25.7.68) pp. 208-210 post, and the judgments in *Robson* v. *Hicks Smith and Sons Ltd.,* [1965] N.Z.L.R. 113). The Act cannot entirely tune out the subjective element. What it does attempt is to ensure consistency by seeing that the same five people (ss. 3 and 4) subject to slow rotation, look at every issue. It provides exhaustive guidelines, subject always to the public interest. For an action against a person it substitutes an application for a document to be classified; and it provides that where action is in fact taken against a person in any court that action must be stopped until the five persons who constitute the Tribunal have reported their decision on it. The classification need not be simply "indecent" or "not indecent": the document may be categorised according to circumstances, for example according to the age of any person who may perform an act regarding it (s. 10). The Indecent Publications Tribunal is vested with very wide powers: the powers of a Commission of Inquiry (s. 7); the power to receive evidence which might not be admissible in the Supreme Court (s. 6); the power to prohibit publication, in certain circumstances, of its proceedings — which all courts have (s. 15); the power to operate without appeal except where it has misconceived its jurisdiction or acted under a mistaken view of the law (s. 19 (2)). It must reserve every one of its decisions, for they must be given in writing and must state the reasons which brought the Tribunal to its conclusions (s. 16). Since community standards change, there is provision for a new application to be made, after an appropriate time, in respect of a document which has already been classified. Once a document is certified as coming within a particular category the Tribunal's responsibility ceases. Imposition of penalties for breaches of the Act is for the courts.

When any matter has been entrusted by Parliament to a judical or quasi-judicial body, Ministerial control is, of course, minimised. During the early stages of the operation of this Act its interpretation was for a time under fire because a section of the public considered it too liberal. There was a suggestion of

possible Ministerial intervention. The chairman was the distinguished lawyer who had been the first President of New Zealand's Court of Appeal, the Rt Hon Sir Kenneth Gresson. In an uncompromising statement from the bench he indicated the impropriety that any such intervention would involve. The Tribunal — and the Act — survived. There have been other assaults, but the only changes incorporated into the Act have been those in the Indecent Publications Amendment Act 1972. Although some were controversial and were hotly contested at the time they were not designed to affect the main structure of the Act nor to alter materially its original conception. After ten years' trial this legislation may now fairly be regarded as an established and successful part of our law. No doubt there are flaws in the Act. Some people, for example, find the provisions for strict and vicarious liability carried forward from the 1910 Act quite repugnant: others, to be fair, would contest their omission. The statute has, on the whole, proved to be a workable and, indeed, highly successful measure. In spite of occasional calls for modification, usually of a minor nature, there is no apparent desire on the part of anyone to repeal or replace the Act.

The volume of work members of the Tribunal have to get through can at times be burdensome. The sheer volume of reading reaches such dimensions that much other and more enjoyable reading has to be excluded. Every member associated with any classification has himself scrutinised the work closely; he may also have had to hear oral submissions or to read written ones. He has discussed what the decision is to be, and on a later occasion he has considered and approved the terms of a written draft — or produced a dissent from it for the chairman to incorporate in the final text.

Various suggestions have been made for an amendment which might be produced if the burden should ever become intolerable. One of these, for a full-time Tribunal, would surely tend to produce a team of specialists, unversed in almost anything beyond dubious literature, girlie magazines and sound recordings: after a few years of neglect of the outside world unable to relate even these to their cultural context. Another suggestion, (borrowed from Australian practice) is for a larger team with a set number told off for each hearing to sit with the chairman while others stood down. Perhaps the consistency achieved already has had an effect in keeping the number of applications within manageable bounds. Even allowing for the possibility of an adjustment having to be made some day to cope with future growth, it does appear as though New Zealand has solved, as well as may be, a problem which has bedevilled governments all over the world.

Over eight hundred separate issues have now been determined: one hundred and sixty-nine classifications were made in 1973 alone. All the classifications have been printed, as required by s. 17, in the *New Zealand Gazette*. Examination of these will suggest that consistent standards were established in the early years, and that there has not been enough modification since

to embarrass those handling literature. A great many of the books and magazines pronounced on today are classified as indecent: it would be superficial to suggest because of this that the Tribunal is less liberal than it was. Though it is dealing with a substantial number of titles the fact that few works of literary merit and importance are now submitted for adjudication confirms the impression that the Tribunal's assessment of standards has gained community acceptance: as for the other documents submitted, the Tribunal is performing exactly the regulatory function that the Legislature intended.

Process of Decision Making

The Tribunal, consisting as it does of five members, has the great advantage, denied to an individual, of consultation and discussion. Frequently, in discussion, views are modified: ultimately in the very great majority of cases a concensus is arrived at and all members participate in making the classification. Occasionally there is disagreement, and a dissent is expressed. It is a matter of some difficulty to analyse one's own or anyone else's thought processes: the Solicitor-General, Mr H. R. C. Wild, Q.C., (now the Rt Hon Sir Richard Wild, C.J.), in introducing the Act to the Tribunal, expressed the view that ultimately decision might be found to boil down to subjective judgment in each case. Gresson P., in a famous dissent in the Court of Appeal (*In re Lolita* [1961] N.Z.L.R. 542) thought that the assessment of community standards would be an impossible task. Ultimately, it is suggested, how one casts one's vote as to whether exhibition or sale of a document is for the public good must be a matter of what one believes, a conclusion one has arrived at after often almost anguished thought and discussion. But a member of the Tribunal is also a member of the community, presumably with his eyes open to what society he belongs to, participating in the life of the community. It would be impossible to answer most of the questions posed by s. 11 as an isolated individual searching his own conscience for a yes or a no: they must necessarily be answered in the context of the community, what it is and what it currently accepts. Not only is the individual member of the Tribunal a member of the community, he must also be an assessor of its standards. No score-card procedure, taking the guidelines of the Act *seriatim* and adding up the pros and cons can bring him to an acceptable conclusion. He must finally make up his own mind, *but he must make it up in the light of community standards as far as he understands them.* He is in fact, directed to do so, and the Tribunal discussed the interpretations received from the Full Court in *Robson* v. *Hicks Smith and Sons Ltd.* [1965] N.Z.L.R. 1113, in the long and important *Waverley* classification, *Decisions 77-103* (Delivered 15.7.68, Gazetted 25.7.68). This discussion arose from submissions made by Mr R. C. Savage,* now Q.C., Solicitor-General, on the interpretation to be given to the word indecency,

* Mr Savage's views are elaborated in his article "Censorship," which appears in Keith (ed.) *Essays on Human Rights* (1968) 89-105.

and is of such importance that an extensive quotation is necessary:—

> Because Counsel for the Crown has at this hearing spoken at some length on the process by which, in his view, we should arrive at our decision, it is proper that we should address ourselves to this point; what we have to say is of general application and may be taken to govern all the conclusions at which we arrive. Mr Savage contended that the question of indecency is first to be determined in the light of the ordinary dictionary definition of the word; but then in terms of the enlarged definition of section 2, which extends the meaning to include "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"; but with the proviso that the determinaton was to be made by an objective assessment of the standard of the community.
>
> As to the ordinary dictionary meaning of the word "indecent", counsel claimed that the word means unacceptable by the current standards of the community.
>
> We have consulted dictionaries. The definitions given in the *Oxford English Dictionary* are of considerable authority and, in the case of this word, are similar to the definitions in other dictionaries.
>
> Of the three meanings given we think the third is the most apposite:
>
> 1. Unbecoming, highly unsuitable or inappropriate; contrary to the fitness of things; in extremely bad taste, unseemly.
> 2. Uncomely, inelegant in form (obs.).
> 3. Offending against the recognised standards of propriety and delicacy; highly indelicate, immodest; suggesting or tending to obscenity.
>
> We read these definitions in the light of the derivation of the word decent, which means what is fitting — indecent means by derivation what is not fitting.
>
> Counsel has suggested that our function is to assess and apply the standards of the community, as far as we can objectively do so, and has added that this may be an impossible task.
>
> Despite the misgivings expressed by Gresson P. in the *Lolita* case [1961] N.Z.L.R. (C.A.) 542 as to the difficulty of assessing contemporary community standards, we feel that we are bound by the decision of the Full Court in *Robson* v. *Hicks Smith and Sons Ltd.* [1965] N.Z.L.R. 1113 to do our best in this regard. We have regard to the words of Woodhouse J., at p. 1124, in which he says, after discussing section 11:
>
> > "For these reasons, in order to ascertain the standard against which any true assessment can be made of some given material, I think it must be relevant to look to see what is currently acceptable in the community and what other material in the form of literature or otherwise is already freely circulating or available."
>
> and, again, on the same page:
>
> > "All these statutory considerations presuppose, in my opinion, that the Tribunal will have available to it a suitable mirror of contemporary standards and affairs, and will evaluate these matters themselves and also the overall issues before it with a balanced and proper understanding of those contemporary standards."
>
> As members of the community, we are conditioned by its standards and would not find it possible, if we wished, to disregard them; yet we should state clearly our conclusion that the statute itself modifies the view that if a document is simply "highly indelicate" or "immodest" by current standards, it is therefore indecent within the meaning of the Act.
>
> This is indicated by the fact that subsection (2) of section 11 provides that notwithstanding the considerations the Tribunal is required to take into account under subsection (1) of the section, where the publication or any book or the distribution of any sound recording would be in the interests of art, literature, science, or learning, and would be for the public good, it shall not be classified as indecent. In addition to the task of classifying books and sound recordings imposed upon the Tribunal by section 10 (b), the duty is also cast upon it, in the case of books and sound recordings coming under subsection (1), of also deciding, first, if they would be in the interests of art, literature, science, or learning, and, secondly, if they would be for the public good. These are considerations overriding those set out in subsection (1) and go far beyond requiring the Tribunal to consider such material merely in terms of whether it is

"highly indelicate" or "immodest". The definition of "indecent" in section 2 also requires the Tribunal, in carrying out its classifying functions under section 10 (b), to go beyond the ordinary dictionary meaning of the word. If it is suggested that, judged by the yardstick of community standards, a document is highly indelicate or immodest and should therefore be held to be indecent in terms of the Act, we are unable to accept this narrow interpretation. To do so would be to ignore the provisions of subsection (2) of section 11 and the extended meaning of the word "indecent" in section 2, which, in our view, show that it was not the intention of the Act that anything which is no more than highly indelicate or immodest should be held to be indecent.

This Act proceeds upon a basis different from that of earlier Acts governing indecency in literature and, by section 3, it sets up a Tribunal of five members.

By section 10 it entrusts to this Tribunal the function of determining the character of any book or sound recording submitted to it for classification. This task is to be undertaken in the light of subsection (1) of section 11, which sets out six criteria to be held in mind, and of subsection (2) of section 11, the effect of which has been mentioned above.

In our view the committing of this determination to a Tribunal, together with the requirement in subsection (2) (b) of section 3 that at least two members shall have special qualifications in the field of literature or education, makes it clear that the Tribunal is required to arrive at its judgment partly by subjective processes, or at the least is not precluded, in arriving at its judgment, from having recourse to its own views on the matter. The words of Woodhouse J., quoted above, reinforce this view. In simple words, we assert that the Tribunal may say: As members of the community chosen to make the decision, we think it is not fitting that this book should circulate through the community; we do not have to substitute such a formula as: Whatever our views, we think on balance that more people would think this book indecent in terms of the Act than would not. That the statute so specifically directs our attention to overriding considerations of public interest and aesthetic value enormously strengthens this view.

The standards which at present appear to be acceptable to the community are, of course, constantly changing. We are aware also that these vary from group to group within the community.

We do not think the public interest requires suppression merely on the grounds of unorthodoxy, either in argument or in presentation, and we do not think that the community desires it.

We are aware of the present tendency towards the acceptance of more liberal standards and we are also aware of the dangers of too rapid change. It is our view that the Act as well as the community requires us to keep a balance between necessary protection and individual liberty.

Effect on Literature

When the Bill which became the Indecent Publications Act 1963 was introduced it was at first proposed that the *New Zealand Gazette* should be used for what appeared to be necessary in the way of publication, so that persons on enquiry could at least find out (though, it may be added, after possibly quite laborious searching) what they required to know. Newspaper publicity was to have been restricted to issues in which an important or difficult question was involved. One of many voices raised against the clause (cl. 15) was that of the New Zealand Centre of P.E.N., which said, inter alia:

> The fear of secrecy in censorship has an inhibiting effect upon writers; and even if no secrecy is wished or intended, the truth is that the law's provisions make it possible.
>
> The ultimate aim is surely to have no censorship. Our progress to that goal will depend upon the work of the Tribunal, and its work will not move creatively towards freedom — as it should do — unless from the beginning it is done in the open.

The section as finally enacted is s. 15: the powers given to the Tribunal to restrain publication match fairly those with which courts and tribunals are normally endowed.

P.E.N. was, of course, concerned primarily for the work of New Zealand writers. Standards under the Bill were to be the same for local and overseas publications: there were no differences under the Act. Beyond trying to draw a reasonable line between liberty and licence — and our Act is surely one, as much as the United Kingdom Obscene Publications Act 1959 which so described itself, "for the protection of literature" as much as for the protection of the immature — the legislature has made no attempt to specify separate local standards, or to insulate us from the outside world. Neither literary performance nor literary appreciation can have suffered from today's systematic approach, with the guidelines and criteria the present Act provides, with its efforts to ensure consistency and its care to ensure that potential worth is considered as much as potential harm.

Successive governments, although admittedly rather slowly, have dealt also with the positive aspect of this problem. As well as replacing censorship laws which had become almost disreputable they have attended to building up facilities for reading good books. Taking the policy "as a whole", if it is fair to put it in that way, there is a good deal to be said for this Gresham's Law type of approach. In a community with a reasonable standard of education good books do tend to drive out bad.

"Case Law"

"Case law" is perhaps a rather pretentious term to apply to the decisions of an administrative tribunal, but individual pronouncements need to be noticed. The decisions or classifications of the Tribunal tend to enunciate standards and methods of assessment which are used for consistency, but may of course require revision as circumstances change. Certain interpretations have been expressed of various of the Tribunal's functions, and it should be noticed that under s. 13 the Tribunal has access to the Supreme Court if it is in any doubt as to whether it has jurisdiction to determine any question under the Act. Some of the most significant decisions, together with the text of the sections of the Act to which they relate, are noted below.

Indecency

The Act provides some guide to indecency in the following sections:

> 2. *Interpretation* — In this Act, unless the context otherwise requires . . . "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.
>
> 11. *Matters to be taken into consideration by Tribunal or Court* —
> (1) In classifying or determining the character of any book or sound recording the Tribunal shall take into consideration —
> (a) The dominant effect of the book or sound recording as a whole:
> (b) The literary or artistic merit, or the medical, legal, political, social, or scientific character or importance of the book or sound recording:

(c) The persons, classes of persons, or age groups to or amongst whom the book or sound recording is or is intended or is likely to be published, heard, distributed, sold, exhibited, played, given, sent, or delivered:
(d) The price at which the book or sound recording sells or is intended to be sold:
(e) Whether any person is likely to be corrupted by reading the book or hearing the sound recording and whether other persons are likely to benefit therefrom:
(f) Whether the book or the sound recording displays an honest purpose and an honest thread of thought or whether its content is merely camouflage designed to render acceptable any indecent parts of the book or sound recording.

(2) Notwithstanding the provisions of subsection (1) of this section, where the publication of any book or the distribution of any sound recording would be in the interests of art, literature, science, or learning and would be for the public good, the Tribunal shall not classify it as indecent.

(3) When the Tribunal decides that any picture-story book likely to be read by children is indecent in the hands of children under a specified age that picture-story book shall be deemed to be indecent in the hands of all persons.

In saying what "indecent" includes, the section uses the words ". . . dealing with matters of sex, horror, crime, cruelty or violence in a manner injurious to the public good." Even before the 1954 Amendment to the 1910 Act licences under Customs Tariff Ex 301 (the general books import item) carried the tag: "No periodicals or magazines except approved publications and no subversive publications or publications which give prominence to sex, horror, terror, cruelty or crime will be admitted under this licence. . . ." A perusal of a fair number of the classifications is necessary to appreciate how the current formula has been interpreted. The "public good" provision supplies a helpful, indeed, an over-riding criterion which was not there before.

Decision No. 1, Another Country, by James Baldwin, [hardback edition] (Delivered 16.3.64, Gazetted 14.1.65). It was contended for the Secretary for Justice that the book offended against propriety or delicacy to such an extent as to render it indecent; that it dealt with crime (i.e., homosexuality) in a manner injurious to the public good and that it dealt with sex in a manner injurious to the public good. It was conceded that it might not be injurious to an adult of intelligence and mature mind.

Inter alia, the Tribunal said that its decision must be subjective, and must necessarily be coloured to some extent by the predispositions of the members: "In so far as it was contended that the Tribunal should attempt to assess the standard of the community, in our view this would be an impossible task." (But note that in later classifications the Tribunal has made it plain that it realises it is acting within a social context to which it must have regard: it is not engaged in an academic exercise.)

Decision No. 4, Lolita, by Vladimir Nabokov, (Delivered 11.8.64, Gazetted 14.1.65). This book had been considered under the 1910 Act and the chairman, who as President of the Court of Appeal had delivered a dissenting judgment, stood down. A Deputy Chairman was appointed. The majority, considering primarily s. 11 (1) and s. 11 (2), found that the book was not

indecent. It was found to have literary, sociological and psychological significance. The choice of theme alone (the seduction of a middle-aged man by a little girl) could not rule it out. The treatment was restrained: the man, in the grip of his obsession, is represented as "a pitiable, remorseful creature". The book was calculated to increase the reader's understanding of life and his sympathy for unfortunate deviators from the normal. The majority felt that to classify it as forbidden fruit, unless the restriction could be made fully effective, would intensify the risk of harm to anyone who might be harmed. The majority felt also that in many cases the imposition of an age restriction would result in the creation of a desire to read from unhealthy motives books, which, taken up and examined by chance, would have no depraving or corrupting influence. Quoting Gresson P. in *In re Lolita* the Deputy Chairman, A. P. Blair J., drew attention to the "real difficulty in any case under the Act . . . that so much had to be matter of opinion." Concurring in the conclusion of the majority as far as circulation to adults was concerned, he would have imposed an age 18 restriction, giving particular weight to s. 11 (e) (likelihood of corruption, etc.) This was the first instance of a dissenting judgment.

Decision No. 21, Playboy, August to December 1964 and January 1965 issues, (Delivered 23.8.65, Gazetted 26.8.65). Discussing the attitude of the magazine as expressed in the editorials of Mr Hefner, the Tribunal said:

> [The editor] appeals for what he regards as a saner and healthier view of sex than is revealed in American State laws or in institutional dogma. He pleads vigorously for new and more realistic standards based on personal conviction rather than on precepts laid down by persons who too often fail to practice them. While he advocates a freer code than our community has hither accepted, he nevertheless emphasises the sanctity of marriage and the need for responsible behaviour. In this claim that there is some place for sex outside marriage he examines attitudes widely held although infrequently expressed in general periodicals; they are, however, attitudes which ought to be expressed openly if a reasoned conclusion is to be reached. However disturbing this may be to many, we do not regard it as our function to criticise or to ban unorthodoxy in this realm any more than in any other.

Decisions 93-103. These form the latter part of a long series of classifications, Nos. 77-103, and are generally referred to as the *Waverley* decisions, from the name of the defendant company. (Delivered 15.7.68, Gazetted 25.7.68). Books had been seized under a search warrant issued under s. 25 (1) of the Act and the company was summoned before the Magistrate's Court to show cause why they should not be destroyed. Under s. 12 (1) the question of indecency was duly referred to the Tribunal.

Among the documents referred were naturist or nudist journals composed of or primarily featuring photographs of the nude form, entirely or predominantly of the nude female form. Police evidence was given to the effect that "girlie" magazines were part of the stock-in-trade of the pervert bent on seducing boys or younger men. The Tribunal took notice of and expressed itself as sharing widespread community scepticism as to how far printed matter conduces to the commission of offences against

the law. Section 11 (1) (e) required likelihood of corruption to be considered, but —

> In the case of a document which is not otherwise exceptionable this falls short of a direction that we should assume it to be inherently indecent because it may be used in a particular way. Nude photographs may no doubt be used in an attempt to corrupt young people, but so may old masters or pictures of famous statuary or even holy writ. . . . If pleasant and unretouched nude pictures were as common in the community as it appears they are in nudist clubs then it is likely that their production would be greeted with no more unseemly excitement than it is there. We are inclined to deprecate the practice of painting out pubic areas in health or naturist magazines, and we do not believe the Act requires that young people should be kept in ignorance of the appearance of the adult form.

Rejecting suggestions that practising naturists or nudists or members of their clubs should form a special class of persons privileged to see periodicals in their field, the Tribunal went on to say:

> We are of opinion that natural and straightforward nude photographs or collections of them in reproduction constitute a *first category* of publications and we regard them as unexceptionable.
> We consider that other pictures or collections may fall into a *second category*, in which nature combines with art to produce pictures which are not unacceptable; perhaps a little more posed and with greater emphasis on the beauty of the nude human body, but in no way unpleasant or exaggerated, and without undue emphasis on genitalia or reproduction of detail. We consider that in absolute terms publications in this class could do little harm; but, taking into account, as we must, the situation in the community, we can only take what steps we may to restrict the flood of borderline publications which we believe would follow too great relaxation. To allow unrestricted entry to any great number of journals in this class would, from sheer over emphasis, be contrary to the public interest. A classification which will operate as a restriction on display will best give effect to the intention of the Act as far as publications of this kind are concerned.
> There is a *third category* of photographs, often very skifully produced by celebrated photographers, which appear to be deliberately unnatural or artificial, and occasionally ugly, grotesque, or contrived. These we believe to be indecent.

Decision No. 114, Querelle of Brest, by Jean Genet, (Delivered 11.11.68, Gazetted 21.11.68). A pronouncement of some importance appears in this decision:

> An artist of Genet's intelligence and insight has a right to be read in his entirety, for each new work must modify our understanding of his total achievement. Nor do we consider it necessary to establish that a book by such a writer should possess exceptional literary merit: an artist also has the right to fail from time to time and yet be heard. There is in our view no comparison to be drawn between the serious literary work of a man like Genet, whose affinities are with such writers as Lawrence, Joyce, Nabokov and Baldwin, and the mass of cheap, cynically commercialised periodical and paperback pornography which the Tribunal is properly concerned to keep under strict restraint.

Decisions 157, 158, Penthouse v. 4 no. 3, and *Exclusive* v. 1 no. 11 (Delivered 12.9.69, Gazetted 18.9.69). These provide an explanation of the light in which the Tribunal sees some of its functions. The text, which is lengthy, points out that the overriding consideration must be the public interest:

> The public interest does not require that the Tribunal should attempt to make the community's reading tastes a model of propriety, or in any

way to improve them; nor, on the other hand, does it require that we should work to create more liberal standards. Decisions of that sort are for Parliament: our function is to interpret and apply the Act as it has been given to us, although in doing so some regard must in all [instances] be given to changing community standards. We do not consider ourselves empowered to declare a document indecent without keen regard to the fact that such a declaration means that if that document is handled in any of the ways enumerated in the Act the handling will constitute a criminal offence. An inconsiderable infringement of propriety or assault on accepted standards of good taste would not alone justify a classification of indecent. . . . These must be some active contravention of the public interest.

Reference was made to ss. 10 (b), 11 (1) (c), 11 (1) (e), and in particular to the words "likely to be corrupted," and the Tribunal observed, "Corruption is a strong and dramatic word. . . . Particularly in the case of young persons, corruption as we see it is usually a continuing process. . . . It is not a case of absolute and immediate corruption by exposure to a single document." The Tribunal had to consider whether exposure is likely to contribute to corruption, "giving that word its full and proper meaning, and weighing against our conclusion our assessment of whether other persons are likely to benefit from publication."

Periodicals presented difficulties:—"To consider a periodical as a whole where features of different kinds are included, some more repugnant to the Act than others, requires the introduction of a quantitative factor."

Of "girlie magazines" the Tribunal said it believed that society recognises that it is healthy for the young male to be made familiar with the details of the female anatomy and the attraction of the female form. There are two important paragraphs:

Some magazines go further and advocate philosophies and practices which are not socially acceptable in New Zealand, but on which there can be honest difference of opinion. Companionate marriage is an example. We do not believe it to be in the public interest that there should be a ban on the advocacy of the unorthodox, that those who consider that different mores would benefit society should not be allowed to plead their case temperately and logically, nor even that they should not be allowed considerable latitude in doing so. We are commissioned as arbiters not of morality but of decency, decency as it is understood in New Zealand while bearing in mind that in the modern world New Zealand is by no means entirely isolated.

It is at the point where the illustrations . . . are no longer intended to inform and attract but to distort and to pervert, where the text is not intended to develop an honestly entertained thesis but to make money regardless of any social consequences, that we believe the public interest requires us sometimes to prohibit circulation altogether, sometimes to restrict it to those who may with reasonable safety be relied upon to handle the material with discrimination and without undue risk of personal harm. A trivial and cynical treatment as opposed to a genuinely satirical treatment, or cheap plagiarism of better works, will sometimes be evidence that a document falls within a class which offends against the statute: a free interspersion of lubricious jests or use of captions of an offending nature may point in the same direction.

Decision No. 203; Cock, July 1969 issue, published by C. R. Wheeler. (Delivered 28.4.70, Gazetted 21.5.70.) The Tribunal said:

There may be grounds for regarding this journal as arrogant, offensive, "sick", or even libellous or subversive. We have no jurisdiction to consider

> any of these elements, unless, taken as a whole, the journal deals with sex, horror, crime, cruelty or violence in a manner injurious to the public good. Where it does deal with these matters the items are gross and offensive rather than harmful, and the paper is not primarily a vehicle for them. It is unlikely that anyone would buy it primarily to see them; and the general purpose of the paper is to put forward a point of view towards the acceptance of which their coarseness makes little contribution. Accordingly we decide that the magazine is not indecent.

There is a popular impression that if a matter comes to the Tribunal from a Court some amnesty is conferred. In fact, if the Tribunal's classification so warrants the action may be proceeded with, and there is nothing to prevent other prosecutions on different facts.

Decision No. 616, Step by Step Instruction in Sexual Technique, by Miss Tuppy Owens, (Delivered 18.12.72, Gazetted 11.1.73). This was the first sound recording submitted for decision, and the Tribunal had to consider whether the connotation of "indecent" in s. 2 should be taken as in any way different from that adopted for a book. The question of the possible application of s. 12 (4) — whether the definition of "document" in s. 2 includes sound recordings which have words impressed upon them in the tracks, is not recorded as having been considered. The Tribunal said inter alia:

> The written word is more personal and individual. A book or an article is read or studied or enjoyed generally in the privacy of the reader's thoughts. A recording, however, almost inevitably becomes a centre of group activity and enjoyment. Just as conduct acceptable in the privacy of one's home can be indecent in public, so a sound recording may not be acceptable where an article or book using the same material would be.

In the particular case the Tribunal found that the recording did not have either literary merit or social or scientific importance; the dominant effect was to incite rather than inform, "and taken in conjunction with the fact that it will inevitably be used for group listening this calls in question the honesty of purpose of the maker of the record."

As in all other instances the cover or jacket was regarded as properly part of the work. Although the jacket submitted was "exhibitionist and obscene" a plain cover proposed for use in New Zealand was also produced, and the question of the cover was not a contributing factor to the classification as indecent.

Decisions 661-697, Various comics, (Delivered 15.6.73, Gazetted 28.6.73). It was pleaded that the comics in issue were a satirical exposure of "straight" society. The Tribunal said that the legislature apparently recognised the practical difficulties involved in placing an age restriction on an art form which made a particular appeal to children; but decided that in any case, because of their content, the public good would not be served by permitting their free circulation. The 37 comic books were declared indecent.

Decisions No. 721, Hello Sex, by Anders and Gunilla Jorgens, (Delivered 13.8.73, Gazetted 23.8.73). The Tribunal found the text of this book unobjectionable. The Tribunal however accepted a contention that some of the photographs reproduced had been "chosen for their sensational and salacious appeal, and hence

there was no honesty of purpose in their inclusion." Some of the illustrations were also not relevant to the text. The photographs on the book cover were also "deliberately designed to appeal to the prurient." The Tribunal relied on s. 11 (1) (f) in declaring the book indecent.

The Classifications abound with instances of consideration of whether documents submitted can be said to have "an honest purpose", or whether the content is merely "camouflage", in the rather colourful word adopted from Mr Justice Stable's charge to the jury in *The Philanderer* (*R* v. *Martin Secker & Warburg* [1954] 1 W.L.R. 1138, [1954] 2 All E.R. 683) reprinted in Blom-Cooper *The Language of the Law,* (1961) 350.

Decision No. 764, Over-exposure, by Denis William Shirley, (Delivered 6.12.73, Gazetted 19.12.73). This document was a lengthy manuscript which included some photographs. *Over-exposure* was a tract against censorship, but in the view of the Tribunal its honesty of purpose was "at least suspect" because it was no less an appeal to prurience. The Tribunal could not accept that the depicting of sexual activities in the way in which they are described and depicted in this book would not be injurious to the public good. It is to be noted that in the course of the proceedings a suggestion was made, which was not pursued, that the Tribunal might find it both proper and useful to indicate with reasonable precision passages considered indecent, or indecent in certain hands.

Decision No. 766, Itch No. 2, (Delivered 14.12.73, Gazetted 10.1.74). In its decision on this journal the Tribunal referred to two statements in the judgment of Haslam J. in *Robson* v. *Hicks Smith and Sons Ltd.* [1965] N.Z.L.R. 1113 at 1120:

> . . . he states that the words of s. 11 (2) lead him to the conclusion "that the effect of the publication of a book upon 'the public good' is to be the primary element in its classification, and that this expression of variable content, designed to direct attention to the impact of a published work upon the community, is expressly left undefined so that the Tribunal may exercise its statutory powers with due regard to changing conditions". Again, at page 1121, he says: "It is therefore clear that protection of young persons from contamination by mischievous literature still survives as the salient purpose of the present Act."

Decisions 767-786, Various comics, (Delivered 14.12.73, Gazetted 10.1.74). The Tribunal said that two of three groups into which it divided the comics "could, if it were possible, be allowed restricted circulation". However, s. 11 (3) prevents that course being taken, so that all the books were declared indecent.

Decisions 791-3, Rally Girl Nos. 1, 2, 3, (Delivered 20.3.72, Gazetted 4.4.74). The Tribunal considered and quoted from the *Waverley* decisions and then proceeded:

> That was said six years ago and since then the classification into three categories depending on the degree of naturalness on the one hand or continued artificiality or provocativeness on the other has been adopted in a number of decisions. Reference is made to examples in decisions No. 157, 158, 265-280, 373, 387-389, 397-405, 446, 448, 568, 592, 639-641 and 728. A study of the publications covered by these decisions shows, it is submitted, that there is now fairly general agreement in our society that nakedness per se is not necessarily obscene. And there is evidence of a healthier and more wholesome attitude developing as the portrayal of the naked form becomes less subject to social taboos, and more acceptable.

> In 1968 the three magazines, the subject of the present reference to the Tribunal, would probably have been classified in the second category of the Waverley decisions. Many of the photographs are posed, unnatural and contrived. And in that category an age restriction would have been imposed. . . .

The Tribunal, in 1974, classified the three magazines as not indecent.

These decisions provided an admirable demonstration of the fact that though selection or formulation of an appropriate category must in the nature of things involve the exercise of subjective judgment, that judgment must be exercised in terms of the Act. The Act requires that the character of the document is to be determined in the light of certain considerations. A necessary and obvious part of the process is that the determination must be made within the context of society and social mores: the judgments in *Robson* v. *Hicks Smith and Sons Ltd.*, supra, make this very clear. When the individual member of the Tribunal approaches his assessment it is a question whether he tries to look at the community from outside, in order to arrive at an objective conclusion, or whether he first attempts to assume as far as possible the role and character and attitudes of the average reasonable member of the community. "It is common knowledge that the thought of man shall not be tried, for the Devil himself knoweth not the thought of man." In other words, the application of judgment to an issue becomes an instinctive and automatic process, and the lines of approach are not as distinct in fact as they may be in theory. Either process or a mixture of the two will, it is believed, lead the member of the Tribunal to the same conclusion. There remains one purely subjective element, inherent in this as in everything else. Because the member of the Tribunal is the person he is he will be unable to avoid his personal background, training, and predispositions affecting his approach. This may or may not be a good thing, but it is one of the facts of life. It draws attention to the wisdom of the provisions of section 3 of the Act requiring retirement by rotation, so that this subjective residue may be kept stirred.

Reconsideration of Indecency

The Act, as has been mentioned, provides specifically for changes in standards with the passage of time as to what constitutes indecency by providing:

> 20. *Reconsideration of books and sound recordings* —
>
> (1) Any person, with the leave of the Minister or, if such leave is refused, with the leave of the Chairman of the Tribunal, may submit any book or sound recording to the Tribunal for reconsideration of any decision, classification, or determination made in respect of it if not less than three years have elapsed since that book or recording was last considered by the Tribunal or the Supreme Court, and the Tribunal may alter or confirm the previous decision, classification, or determination.
>
> (2) Where the decision to be reconsidered is that of the Supreme Court the Tribunal shall refer the submission to that Court with or without a written report as the Chairman thinks fit and the provisions of subsections (3) to (6) of section 18 of this Act shall apply for the purposes of the reconsideration of any decision under this subsection.

The intention of this section was applied in:

Decision 281, Last Exit to Brooklyn, by Hubert Selby Jr. (Delivered 24.3.71, Gazetted 15.4.71). The decision on the first occasion was *No. 52,* (Delivered 1.11.67, Gazetted 9.11.67). A hardback edition was held to be indecent except in the hands of adults engaged in work or research in psychological or related fields. *Decision 281* was on a paperback edition. Applying an 18-year-old restriction only the Tribunal said: ". . . at the present time the book, even in paperback form should not be classified as restrictively as we classified it in 1967. . . . The importance this work has assumed in contemporary literature is such that adults should now be able to read it."

Decisions 791-3, see ante pp. 81-82.

Books and Sounds Recordings

Decision 828, Oh! Calcutta, by Kenneth Tynan, (Delivered 23.8.74, Gazetted 29.8.74). Provides a recent example of revision under s. 20.

The functions of the Tribunal are described by section 10 of the Act as determining the indecency or otherwise of books and sound recordings. "Sound recording" is not defined, but "book" is defined as follows:

> 2. *Interpretation* — In this Act, unless the context otherwise requires — "Book" means any book, magazine, or periodical (other than a newspaper published at intervals of less than a month) whether in manuscript or final form; and includes any picture-story book, whether likely to be read by children or not.

There have been several decisions of interest in relation to this provision:

Decision No. 113, Pad, by Catherine Leonard, (Delivered 9.9.68, Gazetted 19.9.68). The "manuscript" was a collection of nude photographs. The book was placed in the second of the "Waverley" categories (*Decisions Nos. 77-103,* see ante pp. 213-214) "where nature combines with art to produce pictures which are not unacceptable".

Decision No. 616, Step by Step Instruction in Sexual Technique, by Miss Tuppy Owens, see ante p. 216.

Decisions 661-697, Various comics, see ante p. 216.

Decision No. 764, Over-exposure, by Denis William Shirley, (Delivered 6.12.73, Gazetted 19.12.73). This document was a lengthy manuscript, including some photographs, which was submitted before publication. See ante p. 217.

Exhibition of Indecent Documents

The original provisions of the Act with regard to exhibition of indecent documents were as follows:

> 21. (1) Every person commits an offence against this Act who —
>
> . . .
>
> (e) Exhibits an indecent document to any person in consideration or expectation of any payment, or otherwise for gain; or
>
> (f) Sells, delivers, gives, exhibits, or offers to any person under the age of eighteen years any document or sound recording which is indecent

in the hands of a person of the age of the person to whom it is sold, delivered, given, exhibited, or offered; . . .

22. (1) Every person commits an offence against this Act who —

(a) Does any act mentioned in subsection (1) of section 21 of this Act knowing or having reasonable cause to believe that the document, sound recording, matter, or thing is indecent; or

(b) Exhibits an indecent document in or within view of a public place knowing or having reasonable cause to believe that the document is indecent; . . .

These sections were discussed in:

Decision No. 194, The Desire to Dominate, by Victor Rogano, (Delivered 16.12.69, Gazetted 15.1.70). This decision indicates the Tribunal's view that an age classification should effectively prevent display, a view which has often been contested.

Decision No. 220, Oh! Calcutta, by Kenneth Tynan, (Delivered 3.11.70, Gazetted 3.12.70). The Tribunal was divided over the script, which by a majority was held indecent. All members, however, agreed in this statement: "We are, however, neither required nor employed to make any classification of the performance as a whole, nor do we believe that our judgment in the matter of the particular script before us is, in fact, a prejudgment of any production of the review."

Police v. *Brien* [1971] N.Z.L.R. 119. This case contains an echo of *Sumpter* v. *Stevenson* [1939] N.Z.L.R. 446. In that case, on an appeal from a conviction under section 3 (a) of the 1910 Act, Sir Alexander Blair held that proof that there are certain portions of a classical work which offend against modern ideas of decency was not enough to support a conviction. The purpose for which an act was done had also to be considered:

"The circumstances of the publication must be such as to bring the indecent element somewhat into the forefront; or, to put it in another way, no offence is committed unless the purpose behind the publication is shown to be such as to give prominence to the indecent portions of the book. . . ." In *Police* v. *Brien* a bookseller had been successfully prosecuted for exhibiting for gain books declared unexceptionable by the Indecent Publications Tribunal: a picture was in question. Speight J. held that in considering the question of indecency full regard must be had for the context in which the picture appears. Just because a book meets with the approval of the Indecent Publications Tribunal cannot mean that, regardless of circumstances, a picture from that book can be displayed in an indecent manner.

These decisions have now been confirmed by sections 7 and 10 of the Indecent Publications Amendment Act 1972. The former of these provides the following additional clause to section 21 of the original Act:

(i) Exhibits an indecent document in or within view of a public place.

Section 10 of the 1972 Amendment inserts an additional section, 22A, which reads as follows:

22A. A person may be convicted of exhibiting an indecent document if what is exhibited is in all the circumstances indecent, notwithstanding that it is a part only of a document that is not indecent or is a restricted publication.

Conclusion

The above are some of the important decisions of the Tribunal with regard to the most significant statutory provisions relating to its jurisdiction, but in considering them and in looking to the future of the Tribunal it is appropriate to recall the words of the first Chairman, Sir Kenneth Gresson, who suggested at the beginning of the Tribunal's work, that the phrase *solvitur ambulando* should be the watchword of the Tribunal. The Tribunal has settled down. Mistakes have no doubt been made and attitudes have certainly been modified. The members have without question tried to be objective. The statute has stood the test of practical use. A real attempt has been made to see that justice is done in a notoriously difficult field, and that it is seen to be done as well. The following passage from Chapter 35 of *The French Lieutenant's Woman*, by John Fowles (1969, Panther reprint) is quoted with the author's permission to point up the nature of this whole field, in which standards change from year to year, and in which assessment of them can be no more than opinion, though its exercise may effectively be guided and directed as it is by our own statute:

> What are we faced with in the nineteenth century? An age where woman was sacred; and you could buy a thirteen-year-old girl for a few pounds — a few shillings, if you wanted her for only an hour or two. Where more churches were built than in the whole previous history of the country; and where one in sixty houses in London was a brothel (the modern ratio would be nearer one in six thousand). Where the sanctity of marriage (and chastity before marriage) was proclaimed from every pulpit, in every newspaper editorial and public utterance; and where never — or hardly ever — have so many great public figures, from the future king down, led scandalous private lives. Where the penal system was progressively humanised, and flagellation so rife that a Frenchman set out quite seriously to prove that the Marquis de Sade must have had English ancestry. Where the female body had never been so hidden from view; and where every sculptor was judged by his ability to carve naked women. Where there is not a single novel, play or poem of literary distinction that even goes beyond the sensuality of a kiss, where Dr Bowdler (the date of whose death, 1825, reminds us that the Victorian ethos was in being long before the strict threshold of the age) was widely considered a public benefactor; and where the output of pornography has never been exceeded. Where the excretory functions were never referred to; and where sanitation remained — the flushing lavatory came late in the age and remained a luxury well up to 1900 — so primitive that there can have been few houses, and few streets, where one was not constantly reminded of them. Where it was universally maintained that women do not have orgasms; and yet every prostitute was taught to simulate them. Where there was an enormous progress and liberation in every other field of human activity; and nothing but tyranny in the most personal and fundamental.

NOTE:

The decision of the Court of Appeal in *News Media Ownership Ltd.* v. *Police* (No. 44/74, delivered November 11, 1974) was delivered when this article was in page proof stage. The Court (Richmond and Moller J. J., McCarthy P. dissenting) discussed the definitions of indecency, in particular the differing considerations applicable when newspapers are considered by the Court rather than books considered by the Tribunal, the extent of the effect of the "tendency to corrupt" provision, and the circumstances in which a special defence may be invoked.