THE INDECENT PUBLICATIONS TRIBUNAL — A LEGAL PRACTITIONER'S VIEWPOINT

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An appraisal of the Indecent Publications Tribunal from a practitioner's point of view requires in the first place some description of the mechanics of the Tribunal and the way in which matters come before it. The Tribunal comprises five persons appointed by Government and is required to have a lawyer of not less than seven years' practice as Chairman. Two of its members shall have special qualifications in the field of literature or education. The Tribunal sits in Wellington and conducts its business as a Commission of Inquiry. Whilst it has an informality consistent with it having four lay members, it nevertheless is judicial in form and procedure.

Matters for consideration come before the Tribunal in a variety of ways. The general public, including all persons with greater interests than the public at large such as publishers, distributors, booksellers, societies for the protection of community standards and so on can apply to the Tribunal only after the Minister of Justice has granted leave so to do. There is no direct access to the Tribunal for the public generally and this privilege is confined to the Comptroller of Customs and the Secretary of Justice (s. 14 (1)). To save the time required to obtain ministerial leave, publishers and others often encourage the Customs to submit publications to avoid the more cumbersome proceedings of obtaining the leave of the Minister. This is of course perfectly proper because it is in the interests of all parties to have a prompt consideration of these matters.

In addition to the applications which come before the Tribunal in the two ways mentioned above, the courts in their criminal or civil jurisdiction are directed, where any question of indecency in a book or sound recording is contested, to refer the matter for ruling by the Tribunal (s. 12). The Magistrate or Judge must in those circumstances act in accordance with the Tribunal's decision. So far as is possible consistent decisions on the subject of indecency are consequently attained not only before the Tribunal but before the courts in their civil and criminal jurisdiction.

At the present time by far the greatest number of applications heard by the Tribunal are as a result of applications by the Comptroller of Customs whose department is the first exposed to the massive number of questionable publications from outside New Zealand which has followed an increased tolerance by western societies of discussion and depiction of sexual behaviour, violence and crime.

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The Tribunal once it is in receipt of an application and the advertising having been concluded fixes a date of hearing. Section 14 (5) (6) then requires as follows:

> (5) After public notice of the application has been given in accordance with subsection (4) of this section the Chairman shall fix a date and place for the hearing and shall cause the applicant, the Secretary, the publishers of the book or sound recording or their representative in New Zealand, and such other persons as have satisfied the Tribunal that they are likely to be affected to be given notice of that date and place.
> (6) The persons who are notified under subsection (5) of this section and such other persons as satisfy the Tribunal that they are likely to be affected and where the hearing is to determine the character of a book, the author of that book, may appear as parties to the proceedings and may call evidence before and make representations to the Tribunal.

These subsections have been the subject of decision. In Decision No. 396 the Tribunal dealt with an application to be heard by a society for the "protection of community standards". It was clear that if the Tribunal were satisfied that such an application be granted the Indecent Publications Tribunal would have vastly changed its character and would have been available as an open forum for pressure groups to air their views. Indecent publications are a sensitive subject politically. The right to be heard by all would have its attractions for that reason. The Tribunal had no difficulty in excluding from its hearings persons who had no greater interest in the legal sense than members of the public. This was not to say that an individual member of the public could not refer a book to the Tribunal. That right remained. What was avoided was the right to be heard on someone else's application as a person "likely to be affected" in terms of the section. The Tribunal said:

> The application was refused by the Tribunal but Mr Moody who appeared for the Justice Department agreed to put Miss Bartlett's written submissions in evidence. The grounds for the refusal were two. First the simple concern of any member of the public (even if substantiated by membership of a particular society) is a general one and far less than that implied by the expression "likely to be affected" which in the context means likely to be affected by the hearing of and decision on an application about a particular book. Miss Bartlett was not, for example, the author or distributor of the book in question, nor was her counsel able to establish that she was likely to be affected by this particular hearing in a way in which the public in general would not be affected. Second, Miss Bartlett, having engendered the application by the Secretary for Justice, must be deemed to have come to a decision to allow him to proceed rather than to seek leave to proceed herself in accordance with section (14) (2) of the Act. The existence of section 14 (6) is to make sure that no-one with a genuine and particular interest in the hearing or its outcome will lose his right to be heard. It is not to permit multiplication of parallel submissions; if it were, the number of persons who could be joined as parties would be without limit.

All applications with the exception of references by the court must be advertised as the Chairman directs, usually in the Gazette and by newspaper in the four main centres. The purpose of advertising these applications is to give information to the public as to the publications considered at any particular hearing. In light of Decision No. 396 the practical effect of advertising is no doubt restricted. In some cases however it has

been responsible for activating a group or groups whose interest and beliefs were relevant to a consideration of a particular book. This is probably justification in itself and preserves a constitutional safeguard. There is a strong case for publishing decisions other than in the *Gazette* for general public information and the publication of decisions as opposed to applications is at the moment treated somewhat haphazardly. Applications by their nature tend to be unilateral or at best contests between the Secretary of Justice or Comptroller of Customs and the publisher or distributor. In any event after completion of advertising formalities and having submitted sufficient copies of the book, magazine or sound recording with the application, the Tribunal is in a position to hear submissions from the parties on a day duly appointed.

In most hearings matters are dealt with by way of submissions and in many cases it is clear that the expertise of the Tribunal is all that is required to determine indecency. In a number of cases, however, a very real diversity of opinion will exist and evidence is called giving expression to the various points of view. Often the Tribunal has to determine whether what is admittedly of no literary value and has nothing else to recommend it is indecent or not. The Act is positive in its directions as to matters to be taken into account in the determination of indecency and there is no authority for excluding material because it may in all respects be worthless. The best illustration of this is the way in which the Tribunal classifies magazines which contain a large element of female nudity. The Tribunal has held that nudity in magazines is not objectionable but exception is taken to poses which are unnatural, artificial or contrived. In Decisions 77-103 commonly known as the Waverly Decisions the Tribunal categorised its attitude to nudity in magazines and the judgment is interesting in the way it approaches decision making. The Tribunal said in that decision:

> We take notice that there is in the community widespread scepticism, which we share, as to how far printed matter conduces to the commission of offences against the law. Subsection (1) (a) of s. 11 requires us in determining decency to take into account the likelihood of corruption, 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. We question whether certain of the photographs which have come under our notice would provide the would-be seducer with very much assistance. It is the spotlighting of the unfamiliar nude form that give reproduction of the photograph any special attraction they may have for the curious. If pleasant and unretouched nude pictures were as common in the community as it appears they are the nudist clubs, then it is likely that their production would be greeted with no more unseemly excitement that it is there.

The decisions of the Tribunal now total some 7-800. To the writer's knowledge there has only been one appeal to the Supreme Court but there is an unfettered right of appeal: *Robson* v. *Hicks Smith and Sons Ltd.* [1965] N.Z.L.R. 1113. If that is a measure of success of the Tribunal then one need say no more. The Waverly decision is clearly one of the Tribunal's most important decisions. A number of decisions relating to

"Playboy" are also important in the guide lines they give for these types of magazines. "'Playboy" has had and continues to have many immitators but many other magazines which publish similar provocative material and attempt the "Playboy" format have not found acceptability before the Tribunal. The publishers would seek to persuade that the distinctions between such magazines are made up of a number of smaller not easily discernible characteristics which give some magazines sufficient redeeming value to warrant a classification of not indecent or at least not indecent in the hands of persons over a certain age. One often wonders whether the Tribunal has regard to acceptability in other countries including volume of distribution as a criterion and less known and newer publications are excluded simply to reduce the volume of this material which is available for consumption. The Tribunal has in fact suggested as much in the Waverly Decision where it said:

> 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 border-line 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.

The Tribunal has a duty not to censor in the strict sense of the word but to classify publications. This gives the Tribunal freedom to classify work as indecent generally but to allow certain categories of persons to have access to them. The writings of De Sade have been dealt with on this basis reserving access to genuine students of abnormal psychology, as have a number of sexual manuals where the Tribunal has reserved access to young people for sex-educational purposes. In addition the Tribunal is required not only to classify but to report in cases referred to it by the courts. This would suggest a more detailed analysis of the particular publication and the Waverly decision presented the opportunity of giving detailed consideration to a number of publications referred to it by the court.

The ability to set guide lines for the trade to follow was one of the avowed intentions of the promoters of the Act. There can be no doubt that the advantage to all concerned in having a Tribunal outweighs the disadvantage of having to run the gauntlet of a likely variety of magistrates' decision. It must be a relief to magistrates as well to have this function performed for them in an area where opinions genuinely held vary so much. In the writer's view, guidelines now exist and there are now sufficient decisions from which a reasonably clear picture of what is acceptable or not acceptable can be obtained. Cutting across that is the changing standards of the world in which we live. New Zealand imports virtually all its cheap reading matter

and tends to be influenced by overseas developments in setting its own standards.

Very little hardcore pornography gets to the Tribunal and indeed very little probably comes into the country at all. The Tribunal has in its many decisions emphasised its literary approach which carries with it an undoubted liberal attitude to censorship. The Tribunal makes short work of rubbish but is careful to extract from the many publications it considers, works which have historical or literary significance. A difficult area comes in the consideration of writings by persons engaged in the scientific and social analysis of the most intimate of human relationships. This requires careful consideration and an assessment of genuine research as opposed to the more sensational and less objective writings in this field. This sorting by the Tribunal seems to have been achieved in a number of decisions.

The Tribunal has been aware of changes in public attitudes and thought and the "Last Exit to Brooklyn" decisions have illustrated this flexibility. A tribunal reconsideration permitted a paperback edition of this book to be declared not indecent in the hands of persons 18 years or over, three and a half years after the hardback decision had been considered indecent except in the hands of adults engaged in sociological research or work. (Decisions No. 52 and 281.)

Recently the first major objective inquiry into pornography was published and its views must be accorded great respect. The Report of the U.S. Commission on Obscenity and Pornography followed a Congressionally established advisory commission set up in January 1968 which deliberated for approximately two years. The manner and quality of its enquiry is undoubted. One of its many conclusions strikes a whimsical note into a topic a lot of us take so seriously. It reported:

> Extensive empirical investigations both by the Commission itself and by others provides no evidence that exposure to or use of explicit sexual materials play a significant role in the causation of social or individual harms such as crime, delinquency, sexual or non-sexual deviancy or severe emotional disturbances. (Legislation Recommendation 11 A1.)

The report is a useful handbook for anybody appearing before the Tribunal. It is published predictably in paperback form and its 700 pages give its findings and recommendations for legislative change in the United States.

In 1972 the Indecent Publications Amendment Act was passed and it is perhaps significant that it was some nine years before it was thought that amendments were necessary. In the writer's view this reflects the general acceptability of the Act and the way in which the Tribunal was operating. However there were two areas where practical problems had arisen. Immediately on publication of a pending application, human nature being what it is, demand for the book or magazine was stimulated and the purpose of the application often defeated. In many cases however responsible publishers were in the habit of ceasing distribution when either the Comptroller of Customs or the Secretary for Justice indicated his intention of applying. In the cases of monthly magazines already distributed, problems

arose. Consequently the legislation provided the right of the Comptroller of Customs and the Secretary of Justice to apply for an interim restriction. This had the effect, if granted, of determining the book as indecent until the hearing proper. The effect was mitigated in that no offence of selling or the like was involved unless there was knowledge of the interim order. Such order may be extended or revoked on application and ceases to have effect on the determination of the original application by the Tribunal. To the writer's knowledge no such application has been made since the Act was passed in October 1972.

Another more practical problem arose in dealing with serial publications. Every issue of a magazine is regarded separately for the purpose of classification under the Act. Indeed different issues of the same monthly magazines have been classified as indecent, others as indecent in the hands of persons under 18 years and some not indecent. That is, however, not as remarkable as it reads. Often a particular article will be of such character as to render an otherwise acceptable magazine unacceptable. One will see that advisers to publishers of controversial material walk something of a tightrope. In any event the legislation considered that if three issues of a magazine had been published within 12 months and had received classifications of indecent or a restricted classification (indecent in the hands of certain categories of person), then for a period of two years all such issues would be deemed to have that classification. Power is given to revoke such a classification within the two year period on application being made. The power to make such a restriction order has to the writer's knowledge not yet been exercised.

One must pause at this point to comment on the vast number of magazines which are circulated widely in New Zealand. In many cases society is dependent on the integrity of publishers and distributors before making a decision to distribute. The fact that the provisions of the amendment have rarely been used gives weight to the writer's view that they were probably unnecessary in the first place.

The question of exhibiting an indecent document is one which concerns the penal provisions of the Act and is not really within the scope of this article. Sufficient to say that it now seems that an exhibiting will require more than the display on a shelf of a book which is a restricted publication if nothing further is done. The matter is not yet resolved finally and turns on whether exhibiting a restricted publication requires an exhibiting *to* in the sense of an overt act or whether the mere passive display of a closed book is sufficient. Section 22A as inserted by the Amendment now gives weight in the writer's view to the argument that something more positive than display is required to constitute an exhibiting of a restricted publication.