

the public good. Mr Robertson suggested that actual sexual connection was never photographed in *Penthouse*. We drew his attention to the July issue and in particular to the pictorial sections on pages 119–123. If the intimacy shown in those photographs was not actual intercourse it gives every appearance of being just that.

From time to time—we can almost say regularly—we have for consideration publications which consist sometimes entirely of photographs and sometimes a minimal amount of text. On those occasions quite plainly the pictorial content is the only matter for consideration. A review of decisions will indicate that we have prepared to classify them with an age restriction as long as there are no features such as we mention in Decisions 1053 and 1054.

Perhaps the most important submission Mr Robertson made to us was in relation to the dominant effect of the publication. He argued both orally and in his written submissions that the dominant effect was to provoke and stimulate thought in the reader over a wide number of areas. Sex was one of those areas, Mr Robertson conceded, but although vital was not the predominant part of the magazine.

We do not accept this submission. We think the approach suggested is too academic. The Tribunal, over a 10-year period, during which time its composition has changed, has consistently found that the predominant effect of the magazine is to deal with sexual matters in a manner which hovers on the borderline of indecency. For example in 1974 in Decision No. 830 the Tribunal stated:

“The amount of material not concerned with sex varies among the 6 but at nowhere threatens to contest the dominance, in text and illustration, of the varied sexual fare. In its nature and in the tone of its treatment, some of the sexual material is more objectionable than the features of the earlier issues on which the Tribunal commented.”

In December 1976 the Tribunal in Decision No. 881 stated:

“Clearly in both text and photographs there is a predominant emphasis, in each magazine, on sexual matters.”

In Decision Nos 1033 (8 October 1982) and 1053 (16 March 1983) similar sentiments are expressed in the sections of the decisions that deal with the dominant effect of the magazine.

Mr Robertson's argument invites use to consider too narrow a spectrum. While we accept his argument that certain aspects of *Penthouse* would be thought provoking and stimulating to the reader, we feel it is a conceptual argument that could be applied to all but the most simple type of publication. Consequently we have no doubt that books and magazines dealing with matters of sex, horror, crime, cruelty or violence could be covered by the same argument as is advanced by Mr Robertson, on this point.

Accordingly, we feel that this argument carried little interest.

We reject the submission that the publication has great political and social character or is of great importance in the political and social field.

It makes some contribution to learning but its dominant effect remains sexual. We also suggest that there is room for doubt as to honesty of purpose. We pose the question—if the publication has received universal and international acceptance because of its investigative journalism and thought provoking articles why go to the extreme of including the sections to which we have objected? We refer to the pictorial sections in particular and to a lesser extent features such as *Forum* and *Call Me Madam*.

Mr Robertson produced to us a photocopy of an affidavit from Professor Haward who is the Professor of Clinical Psychiatry at the University of Surrey, a photocopy of what appears to be an unsworn affidavit from John Mortimer, QC and a statement from Mr Blom-Cooper, QC of London. Professor Haward suggests that the content of the issues of July to December 1983 inclusive are not indecent. He said that *Penthouse* magazine has been used for the diagnosis of psychosexual problems and for their subsequent treatment by behaviour therapy. He then went on to relate that a Medical Conference in 1972 had recommended the use of sex magazines for psychiatric purposes.

We are aware of a number of what we have called sex manuals which are available in New Zealand with or without an age restriction. We have classified a number of these in recent years and feel that they are more appropriate for the purpose mentioned by Professor Haward. So far as the affidavit of Mr Mortimer and the statement from Mr Blom-Cooper are concerned we note that they refer to the Obscene Publications Act 1959. We are not concerned with that Act but rather with the New Zealand Indecent Publications Act 1963. As we understand the position in the UK matters of obscenity come before a jury whereas under the New Zealand Act this Tribunal is charged with the duty of classifying books and sound recordings in accordance with the provisions of the Act. It may well be that should such issues call to be decided by a jury no conviction would result for one of 2 reasons.

Firstly, the jury might be satisfied that the publication is not indecent. Alternately there may be disagreement amongst members of a jury in which case, of course, no conviction would follow. We

are aware that there is a body of opinion in New Zealand and doubtless elsewhere, which is opposed to any form of censorship. We are also aware that there is also a body of opinion which would impose a stricter form of censorship than currently exists. The existence of these two lobbies could well be a reason for a jury failing to agree.

The fact remains that this Tribunal remains the judge of indecency in respect of books and sound recordings. Mr Robertson conceded as much, although he did say that as a Tribunal, we had a wider discretion to accept such evidence than perhaps a Court might have. In general Courts have been reluctant to accept expert evidence on the issue of whether a publication has a tendency to deprave and corrupt. Leading cases dealing with such issues are *DPP v Jordan* [1977] AC 699, *Buckley v Wathen* [1973] VR 51 (Victorian Supreme Court, full court).

Mr Timberlake's submissions do not sit easily with those made on behalf of the publishers who would accept an age restriction. Mr Timberlake's objection is to censorship. That issue is not one for us to decide. It is our function to carry out as best we can censorship of books and sound recordings in accordance with the terms of the Statute.

As we have mentioned earlier only 3 issues are before us namely those for June to August inclusive. We have had the opportunity of perusing those 1983 issues not already submitted for classification. Because the 3 issues before us contain multiple scenes they are classified as indecent.

Other issues for 1983 were handed to us as a basis for comparison. However, we have not been asked to classify them so that the distributors may have to decide for themselves what to do.

We have been asked again by Mr Robertson to make a restriction order pursuant to section 15A. Because all issues vary from 1 month to the next and for reasons which we have already given in earlier decisions, we are still not prepared to make a restriction order. Were we so minded and because of the variable nature, such a restriction order might be one declaring the publication as indecent. We have been informed, however, that the 1984 issues are markedly different from those of 1983. We have not yet seen them but if there is an improvement which is sustained over a period, it might be possible to make a restriction order once the publications have been submitted for classification.

Dated at Wellington this 26th day of April 1984.

Judge W. M. WILLIS, Chairman.

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Decision No. 12/84
BRO 76/83

Before the Broadcasting Tribunal

IN the matter of the Broadcasting Act 1976, and in the matter of an application by the OTAGO RADIO ASSOCIATION INCORPORATED to amend Warrant AM-1/4XD:

Chairman: B. H. Slane.

Members: Lionel R. Sceats, Ann E. Wilson.

Hearing: Wellington, 3 April 1984.

DECISION

THE applicant applied for 2 amendments to the warrant.

One was to permit the rebroadcasting of Radio New Zealand News bulletins which may at times contain sports results.

The other was to extend hours of broadcast on Sundays from 0900 hours to 1200 hours and from 0600 hours to 1100 hours to broadcast continuously from 0900 to 1100 hours.

In support of the application evidence was given by J. A. A. Tonkin the honorary secretary of the association. In evidence given by affidavit Mr Tonkin said it was the intention of the association to use the additional broadcast hours to provide a programme at present unavailable on Sunday afternoons in Dunedin. He described it as “light and bright musical” including music and songs, popular and the past, together with recent and new releases in the ‘ballads’ and ‘country’ styles collectively described generally as ‘easy listening’.

The association believed the programme would fill a gap on Sunday afternoons between the predominantly rock music from commercial stations and the national programme's lighter music and spoken programmes.

Information supplied with the application indicated that the station had sufficient number of people capable of presenting the programmes.

The association said that it may, after assessing the success of the extended broadcasts, apply for daytime broadcasting on public holidays and possibly Saturday afternoons.

The association approached Radio New Zealand with a view to rebroadcasting Radio New Zealand news bulletins to which Radio New Zealand agreed. The news bulletins are recorded and then