

weight to be given to the evidence is a matter for the Tribunal to decide. The function and approach of the Tribunal was commented on by the High Court in *Gordon and Gotch* especially in the judgment of Jefferies J at page 92, line 22 and following:

“The Tribunal, it could be said, is driven to search the whole range of its collective experience as well as any evidence which might be placed before it, but most certainly it is not limited to the evidence and the absence is not itself to be determinative. In reaching a decision on possible injury to the public good the Tribunal could hardly be said to be deciding, or resolving, a fact. Injury to the public good is in the same category as public interest which is nearly entirely judgmental. I do not exclude the value of evidence on injury if it is tendered, but if there is no evidence that condition does not, in my view, immobilise the Tribunal, or force it as a matter of law to act in any particular way.”

Internationally recognised experts on the effects of pornography have provided evidence for this sitting of the Tribunal. Their views on the subject warrant respect. All their evidence has been considered in full. Many of the witnesses conceded that *Penthouse* “undoubtedly and understandably offends many people” but, in general terms, their unanimous conclusion was that the manner in which sex is dealt with in *Penthouse (U.S.)* is not injurious to the public good because there is no discernible harm or injury to the public as a result.

#### *A Summary of Counsels' Submissions*

Detailed written and oral submissions were received from counsel on behalf of the parties. Without exception all submissions were helpful, relevant and carefully constructed. No disrespect is intended by the brief summaries which follow.

#### *Submissions of Counsel for Penthouse International*

1. The tripartite test was developed as a cumulative test, and its shift to a 3-stage alternative test was not as a result of any conscious decision by the Tribunal.

2. On the authority of the *Everard* decision alone the tripartite test, developed in 1982, with each limb applied in isolation, no longer reflects the limits of acceptability of the New Zealand community as a whole. At page 57 and 58 McGechan J stated:

“... any immutable rule that explicit displays of sexual intercourse are injurious to the public good does not usually fit in with the combined elements of all arms of the section 2 definition and the section 11 criteria in the Indecent Publications Act 1963.”

3. Changes in society on homosexuality (Homosexual Law Reform Act 1986) should be reflected by the Tribunal. It is unfair and discriminatory to single out lesbian acts from others.

4. Useful indications as to what is “injurious to the public good” are given by:

- (a) The report of the Ministerial Committee of Inquiry into Pornography (the “Morris report”, which includes views expressed by the Maori Women’s Welfare League), together with the Justice Department paper entitled “Censorship and Pornography: Proposals for Legislation” (October 1990).
- (b) Reports and findings of overseas committees of inquiry into pornography:
  - Report of the Committee on Obscenity and Film Censorship (the “Williams report”) 1979.
  - Pornography and Prostitution in Canada
  - Report of the Special Committee on Pornography and Prostitution (the “Fraser report”) 1985.
- (c) Judgments of Courts in New Zealand and decisions of specialist Tribunals, in particular:
  - *Society for the Promotion of Community Standards Inc v Everard* (1987) NZAR 32 (High Court).

– *Comptroller of Customs v Gordon & Gotch (NZ) Limited* (1987) 2 NZLR 80 (Full Court of High Court).

– *Howley v Lawrence Publishing Co Ltd.* (1986) 6 NZAR 193 (Court of Appeal).

(d) Expert opinion as to the injuriousness or otherwise to the public good of the material.

(e) Other evidence from within the community as to what is acceptable.

On the basis of the above materials (some of which are referred to in more detail later in this decision) Mr Akel submitted that there is no evidence that the availability of the type of erotic material in *Penthouse* magazine causes any type of harm to the extent that a general prohibition is warranted.

5. The issue of whether something is demeaning is not one of these criteria that the Tribunal can take into account (refer decision 28/90 *Private Lives*, Vol. 1, Issues 2, 5 and 6). Although the magazine is targeted at men, there is nothing in it that suggests male superiority. Each multiple pictorial essay illustrates the importance of mutual affection and joint satisfaction in a caring fantasy relationship. It is impossible to apply the question of the demeaning effect or degradation universally to women as a group and as such to perceive it as injurious to the public good (reference *Gordon & Gotch* and *Everard*). There is a fundamental difference between men and women’s sexuality. A characteristic of men’s sexuality is that it is much more immediate and direct. Male arousal is caused chiefly through vision, whereas women are aroused primarily by sense of touch.

6. Section 11 criteria:

(a) The dominant effect of the magazine is more appropriately described as “lifestyle” rather than sex.

(b) The photos in the magazine are of the highest artistic quality. Some of the world’s most prestigious writers have published works in *Penthouse*. On previous occasions the Tribunal has recognised the very high literary standard of the magazine. Both politically and socially the magazine is in the forefront of the news.

(c) The magazine is targeted at middle and upper income men between the ages of 23 and 35. It is not targeted at perverts or people who would not, for any reason, be considered to have normal and healthy sexual behaviour. The magazine is not designed to have any special appeal for children, persons of low intelligence or particularly vulnerable groups in society. The Tribunal has previously recognised that the magazine is directed at adult readers.

(d) It is envisaged that the price will be at least and probably more than that of Australian *Penthouse*, which is on the market at present for \$8.95. This price is sufficiently high to ensure that the magazine is bought only by those adults who really wish to read it.

(e) The expert evidence has established that the pictorial representations such as in *Penthouse*, (which lack any element of violence), result in no negative effects, and certainly no corruption.

(f) The publishers have an honest purpose. They aim to cater for all reasonable expectations and interests of men, recognising their sexual requirements as well as their intellectual, political, social and other lifestyle interests. The intellectual and lifestyle articles are not mere camouflage in the sense envisaged by the Act. The publication of the magazine and its contents is conducive rather than injurious to the public good.

#### *Submissions of Counsel for Gordon & Gotch*

1. Community standards of acceptability, or otherwise, have changed significantly in the last 4–5 years. Such rapid changes in community standards have been witnessed by reference to the tolerance of individual freedoms in matters of sexuality, e.g. the Homosexual Law Reform Act 1986; the screening in