meaning, and that magazines are obviously not a violent form of expression like picketing or rioting might be. They were consequently protected by the freedom of expression, even though their meaning was "offensive and disgusting to many people (page 117)". The Crown also referred us to the European Court of Human Rights decision to the same effect in *Handyside* v. *United Kingdom* 58 ILR 150, 1 EHRR 737. We conclude that the freedom of expression in New Zealand does indeed cover sexually explicit material of the kind before us in the present applications. These magazines convey, or attempt to convey, meaning, and they are not a violent form of expression. That, however, does not end the matter. As will become apparent we have decided to classify these publications as indecent in the hands of persons under the age of 18 years. Therefore we must also decide whether our restriction of these publications in this manner meets the 3 conditions of section 5 of the Bill of Rights.

Is our proposed classification demonstrably justifiable in terms of section 5 quoted above? Section 1 of the Canadian charter is identical to the operative part of section 5 of the Bill of Rights. Article 19 (3) of the International Covenant on Civil and Political Rights states that:

> "The exercise of the right provided for in paragraph 2 of this article [the freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (order public), or of public health or morals."

The European Convention for the Protection of Human Rights and Fundamental Freedoms contains no less than 10 limitations on the freedom of expression. Indeed, a limitation based on "morals" is common to the European and American conventions and the international covenant. The freedom of expression is generally limited to protect information which is contrary to public morals, or in the words of section 2 of the Indecent Publications Act, "injurious to the public good".

When deciding whether our classification is "reasonable", *Butler* again provides guidance. In interpreting the almost identically worded provision in the Canadian charter, the Supreme Court of Canada has interpreted 2 of the 3 section 5 factors together. In *R* v. *Oakes* (1986) 26 DLR (4th) 200 the Supreme Court set out what was necessary "[t]o establish that a limit is reasonable and demonstrably justified in a free and democratic society (at page 227)". The *Butler* court conveniently summarised these criteria (at page 119) as follows:

> "(a) The onus of proof to justify the application of section 1 [our section 5] is on the Crown."
>
> "(2) The civil standard of proof by a preponderance of probabilities applies."
>
> "(3) These requirements should be applied vigorously and will generally but not always require supportive evidence that should be cogent and persuasive."
>
> "(4) The objective sought to be achieved by the impugned legislation must relate to concerns which are pressing and substantial in a free and democratic society."
>
> [In the present case, in view of section 4 of the New Zealand Bill of Rights, the words "proposed classification" must be substituted for "impugned legislation"].
>
> "(5) The means utilised must be proportional or appropriate to the objective. In this connection there are 3 aspects:
>
> (i) The limiting measures must be carefully designed or rationally connected to the objective;
>
> (ii) they must impair freedom of expression as little as possible;
>
> (iii) their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the restriction of freedom of expression."

In New Zealand the point may have been left open by McGechan J in *Gordon & Gotch* where his Honour stated at 57 "requirements for discernible injury and capacity for some actual harm do not impose a procedural or evidential necessity for actual evidence to that effect."

The *Butler* Court went on (at page 121) to give examples of more precise bases upon which the freedom of expression can be limited. These examples are very useful and support our creation of new guidelines below:

> (1) The protection of people from involuntary exposure to pornographic material;
>
> (2) the protection of the vulnerable, for example children, from either exposure or participation;
>
> (3) the prevention of the circulation of pornographic material that effectively reduces the human or equality or other charter rights of individuals. This may arise, and often will arise, in material that mixes sex with violence or cruelty, or otherwise dehumanises women or men.

The application of these criteria is somewhat limited in New Zealand by the inability of a court or tribunal to refuse to apply a statutory provision "by reason only that the provision is inconsistent with any provision of this Bill of Rights" (section 4). Nevertheless, it is possible for a court or tribunal to make a finding that such a provision is inconsistent, but then go on to apply it. The *Oakes* test, therefore is of relevance to the Tribunal's interpretation of section 5. The criteria numbered (1) to (3) are procedural and evidential, and were easily met in these proceedings (see below under the heading "Guidelines" and above under the headings "Viva Voce Evidence", "Affidavit/Written statement Evidence" and "A Summary of the Submissions"). The criteria numbered (4) and (5) and the *Butler* examples, are substantive, and are also met by our proposed classification applying the statutory criteria and Tribunal-made interpretations of those criteria. There is little doubt that the regulation of sexually explicit depictions are "pressing and substantial" concerns in New Zealand; We are, of course, somewhat limited by section 10 as to the types of classifications we can give, but our classification is carefully designed in the sense that it is within the scope of section 10 (b) and is squarely based on the evidence of the effects of sexually explicit depictions at the hearing. The classification is therefore rationally connected to the statutory objective of regulating material that is in some way "indecent". By not stretch of the imagination can it be said that the classification "trenches" on any individual's or group's rights to the extent that it unjustifiably violates the freedom of expression, and in this regard, we have limited the freedom of expression only to the extent necessary to protect society from the injurious effects of allowing this material to be in the hands of those under the age of 18. Our classification is consequently reasonable and demonstrably justified in a free and democratic society.

Does our classification meet the third condition of section 5, that of "prescribed by law"? The classification is a decision made under a statutory power, and is one which applies statutory criteria. In this sense, it is clearly one that is "prescribed by law". There was some disagreement between Mr Akel and Ms Goddard as to whether the tripartite, or any other Tribunal-made test, was "prescribed by law". In Ontario where legislation can be struck down by the courts if it violates the Canadian charter, the provision in the Ontario Theatres Acts which gave the Ontario Censor Board the power simply to "censor" was held to violate the freedom of expression because it was not a reasonable limit "prescribed by law". The information guidelines issued by the censor Board and used to ban the film *Amerika* were held in *Re Ontario Film* to:

> "have no legislative or legal force of any kind. Hence, since