

because the questions themselves appear both leading and ambiguous.

Is the tripartite test consistent with the psychological evidence adduced at the hearing, and with current community standards summarised above? The first element of the tripartite test was stated in decision 1053 to be “scenarios involving more than 2 models, and in which sex and violence and intimacy and/or deviant aspects of sex are depicted among the models”. There was no psychological evidence adduced which indicated that sexual depictions involving more than 2 models were harmful. Nor is there any evidence that the community would not tolerate such depictions being restricted to adults. There is of course a danger that coercion or violence is implicit in any depiction of multiple model sexual activity. Under questioning from the Tribunal, Professor Donnerstein acknowledged that “there will be differences of opinion” over whether some multiple model scenes depict coercion. Whether or not this is so in any given depiction is of course difficult to ascertain, difficult to test for, and requires a certain degree of subjective judgment. It is however a valid concern. There was a great deal of evidence to the effect that the combination of sex and violence in one depiction is harmful, and this evidence is also consistent with the submissions on community standards. The sexual violence aspect of this branch of the tripartite test is therefore supported by the psychological evidence and by evidence of community standards. The meaning of “intimacy and/or deviant aspects of sex” has been the object of some comment in past submissions to the Tribunal. Again, there is no evidence that depictions of “intimacy” *per se* are harmful or inconsistent with community standards. If by “deviant aspects” is meant bestiality, paedophilia, necrophilia, coprophilia, urolagnia and sexual violence, then there is evidence in the Morris Report (and in the Crimes Act) that depictions of these activities are not tolerated by the community.

The second element of the tripartite test was stated in decision 1053 to be “multiple model scenes which depict lesbian acts”. Our comments with respect to depictions of multiple model activity in the first branch of the test are relevant here. While the “lesbian acts” referred to are probably more accurately called “woman-to-woman sexual activity” because most of these depictions are intended for a male heterosexual market rather than a lesbian market, there is no evidence to support a differentiation between homosexual and heterosexual depictions.

The third element of the tripartite test was stated in decision 1053 to be “heterosexual scenarios in which there is a high degree of intimacy (e.g. fellatio or cunnilingus or intercourse) depicted in the couple’s actions”. There is no psychological evidence to support the proposition that harm can be caused by depictions of these activities alone, i.e. in the absence of sexual violence. There are some groups in the community however which would want some attention paid to the manner in which these activities are depicted.

Finally, it was submitted by Mr Ellis that the tripartite test is cumulative, in that it was only meant to be used as a guide relevant to depictions which contained every aspect of the test. It is the Tribunal’s experience that such depictions, if they exist at all; must be extremely rare, and would be made suspect by the inclusion of violence alone.

Some of the tripartite test is therefore consistent with the psychological evidence and with evidence of community standards. Some however is not. The Crown was careful to emphasise that if the Tribunal was to develop a new test, it should be aware of the needs of Customs for clarity and ease of application. In particular, Customs “do not wish to become involved in subjective value judgments themselves on a day to day basis” (Closing Submissions of the Crown page 62). The Tribunal is aware of Customs’ needs. The Tribunal is also mindful of its primary, overriding requirement to reflect prevailing society standards and to prevent injury to the public

good. The Tribunal proposes the following guidelines, which are best seen as an evolution of, rather than a complete departure from, the previous tripartite test. They are guidelines based on a careful consideration of psychological evidence and evidence of community standards. They combine both content and context. Customs may not be comfortable with the latter aspect of the guidelines, but our main concern, as stated above, is to reflect as accurately as possible, community standards and psychological evidence concerning harmful depictions. We emphasise also that they are guidelines only, and are meant simply to “assist [the Tribunal] to a conclusion as to whether a document is injurious to the public good” (*Comptroller of Customs v. Gordon & Gotch* [1987] 2 NZLR 80, 83 per Quilliam J). The guidelines are as follows:

1. Depictions of violence, sexual violence, paedophilia, necrophilia, coprophilia, urolagnia and bestiality, which are not treated seriously and are intended as sexual stimuli are indecent:

By “seriously” we mean a scholarly, literary, artistic or scientific work.

2. Depictions of sexual activity which demean or treat as inherently inferior or unequal any person or group of persons, which are not serious treatments and which are intended as sexual stimuli, are indecent (by way of example, this would include magazines the dominant content of which is the depiction of single models spreading their labia, magazines the dominant content of which is the close-up depiction of genitalia or other body parts, and other depictions which reduce a person to her or his sexual parts);

3. Depictions of individuals or sexual activity which do not fall into the above categories are conditionally indecent or not indecent, depending on our application of the factors in section 11 (in this regard we emphasise matters of availability or distribution) and the definition of indecency in section 2.

Members of the Tribunal are deeply concerned that a possible consequence of the application of these guidelines, the section 11 criteria and the definition of indecency in section 2, is that sexually explicit, non-violent material which has been restricted to persons 18 years of age and over could end up displayed in retail outlets such as dairies across New Zealand. Whilst section 11 (1) (c) of the Act directs the Tribunal to consider, *inter alia*, the age groups amongst whom the publication is likely to be distributed, the Act does not give the Tribunal the power to order that a publication’s distribution be limited to places to which persons under the age of 18 years are denied access. We are aware however of a powerful argument to the effect that persons have a right to be free from exposure to sexually explicit material. Indeed, many of the examples given in the *Butler* case of bases upon which the freedom of expression could be limited are phrased in terms of protection from involuntary exposure to sexually explicit material. Mr Ford argued that *Penthouse (U.S.)* violated the right to freedom from discrimination in section 19 (1) of the Bill of Rights, although both Mr Akel and Mr Shaw disagreed, primarily on the basis that a depiction *per se* cannot discriminate; it is only to an act of discrimination that section 19 (1) directs itself. There is nevertheless merit in the “freedom from exposure” argument, independent of section 19 (1) of the Bill of Rights. This is especially true in New Zealand society, which is arguably more sensitive to exposure to sexually explicit material than say American society where many of the expert witnesses have conducted their studies. In order to address this concern, the Tribunal reminds distributors, retailers and enforcement bodies that every person commits an offence under section 21 (1) (f) of the Act who “exhibits ... to any person under the age of 18 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 ... exhibited”. In other words, retailers break the law if they display, in a