

publication to all women, but if one could prove such a link, the publication would still not be injurious because it does not injure the whole public? Or if one could prove such a link, that the publication would be injurious to the public good because it denigrates half of the public? We are inclined to the view that the opening sentence of the quotation qualifies the final sentence. His Honour emphasised that it was possible for the Tribunal to find that the manner in which some nude female models were depicted could warrant a finding that the depictions were injurious to the public good. It was just that such a finding could not be based on “representational grounds”. His Honour could not have meant that a depiction which did present an injurious view of a group of persons could never be injurious to the public good. Surely such a depiction could be injurious if it could be demonstrated that its effect was to injure the public good. For example, it may well be true that a publication which depicts women in a degrading manner does not *per se* degrade all women in society; on this we give no opinion. But if it could be shown that the same publication has an injurious effect on society, whether it is because it could reinforce negative stereotypical attitudes towards women amongst its readers (potentially endangering women and negatively colouring male attitudes), or any other demonstrable reason which indicates a negative impact on society as a whole, then Jeffries J’s comment would not prevent a finding of injury to the public good. Useful examples of grounds upon which the freedom of expression may legitimately be limited were set out in the *Butler* case. They were the protection of people from involuntary exposure to pornographic material, the protection of vulnerable segments of society, such as children, and the prevention of material which dehumanises or treats as unequal men or women, especially material which mixes sex with violence. The thrust of Jeffries J’s criticism was directed towards the absence of evidence or grounds for the minority’s finding of injury to the public good; it was not directed towards the finding of injury to the public good itself which His Honour stated at page 94 to be a legitimate finding if it were supported. We leave it upon as to whether a depiction which has a negative effect on one segment of society *per se* injures the public good in the absence of expert evidence to that effect. Some members feel that philosophically this must be right. But this reasoning does stray very close to the representational argument criticised by His Honour as an illogicality and we consequently do not rely on it.

Further, Jeffries J did not preclude consideration of a “feminist” viewpoint, or any other viewpoint for that matter, as long as certain procedural and evidential conditions were met. His Honour stated that it was “right in jurisdiction for the Tribunal” to find that a magazine dealt in matters of sex in a manner injurious to the public good “because of the manner in which the female nude form is depicted” (page 94). It was the basis of the minority decision, not the decision itself, which His Honour queried:

“... the feminist viewpoint had not been argued and apparently there had been no disclosure to the parties that it would be a controlling influence in their decision. ...By no stretch of the imagination could the feminist viewpoint be described as a fact, as that word is known in law. Also the feminist viewpoint is hardly in the category of facts for which official notice could be taken. Neither would the viewpoint come within the definitions of legislative or judgmental facts as previously mentioned in this judgment. There is no attempt to support the adoption of the feminist viewpoint by reference to any body of scientific or expert research. There is no citing of any authority for the propositions.” (page 95)

We have no doubt that whether or not the second limb of the new guidelines is seen as an expression of a feminist viewpoint, it is amply supported by evidence adduced at the hearing and made available to all parties, by the authoritative publications to which counsel referred, and by the members’ own expertise

in gauging what is injurious to the public good. It, along with the other 2 limbs, meets Jeffries J’s concern that the Tribunal “be most meticulous in the maintenance of procedural fairness and adherence to the governing statute (page 94)”. Indeed, we would go further and agree with the Crown’s submission that it is our duty to take into account feminist viewpoints, along with other viewpoints, in the light of the Bill of Rights’ requirement to justify in terms of a “free and democratic society” any limitations we create on the freedom of expression. This we have done.

Decision

We have reached the conclusion that these issues of *Penthouse (U.S.)* are not indecent in the hands of persons over the age of 18 years. We have reached this conclusion by considering all the evidence summarised above, and by applying the new guidelines. These new guidelines are based on this evidence and are meant to be of assistance in ascertaining whether these particular publications are injurious to the public good in view of the requirements imposed by the Bill of Rights. We have considered the meaning of “injurious to the public good” in the light of the requirement set out by the Court of Appeal in *Customs v. Lawrence Publishing Co Ltd.* [1986] 1 NZLR 404 that there be “discernible injury” or a “demonstration that any relevant material has a capacity for some actual harm (page 409)”. We have also reached this conclusion by considering the factors set out in section 11. The magazines contain none of the images referred to in the first limb of the guidelines, nor can they be said to demean or treat as inherently unequal any particular person or group of persons in a manner injurious to the public good. The magazines do contain writings and relatively tasteful photographs of apparently consensual adult sexual activity. The depictions include single models who are generally portrayed as whole persons rather than simply the sum of one or more of their parts. There are also depictions of woman-to-woman sexual activity, and multiple model sexual activity containing male participants. Again though, the depictions are of apparently consensual adult sexual activity and are not demeaning. The Tribunal notes that the dominant effect of the magazines is sexual, but this is balanced to some degree by writings concerning non-sexual matters and writings which put sex in a broader context. The magazine has received recognition for its editorial, literary and photographic content (Affidavit of John Evans, president of the international division of General Media, the publishers of *Penthouse*). The magazine is intended for an adult male heterosexual market. There was a great deal of evidence to the effect that a person’s views are established by the time they are 18-years-old, and that a magazine such as *Penthouse* is no more likely to affect those views than any other sector of the print or electronic media. Adults are therefore unlikely to be corrupted by reading these editions of *Penthouse (U.S.)*. Finally, some of the writing in these magazines does attempt to deal with matters of serious concern. Since the photographs themselves are only conditionally indecent, the writing cannot be said to be “merely camouflage designed to render acceptable any indecent parts”.

Initially the Tribunal was reluctant to grant a serial restriction order at this time. This reluctance arose from what might be considered by some to be the “landmark” nature of this decision and the caution we believe should be exercised in the establishment and application of new guidelines concerning indecency. Mr Akel’s offer to have the publisher provide a solicitors undertaking to seal all copies of *Penthouse (U.S.)* imported into New Zealand was linked to the granting of a serial restriction order. The Act does not give the Tribunal power to order that publications be sealed, although it directs us to consider matters of distribution in section 11 (1) (c) which have been re-emphasised in the third of the new guidelines. Consequently, because the sexual content of *Penthouse (U.S.)* goes beyond what has previously fallen into the R18 classification, Mr Akel’s offer is of considerable