

between *Penthouse (U.S.)* and *Penthouse Australia* is that the U.S. edition regularly includes pictorial representations of non-violent, consensual, sexual intimacy between adult models. We agree with Mr Ellis that the central issue requiring determination by the Tribunal in these proceedings is whether such representations in the context of these magazines are indecent in New Zealand in 1990. This being the case it will not be necessary in this decision to traverse the overall content of *Penthouse (U.S.)* magazine other than for the purpose of measuring them against the criteria contained in section 11 (1) of the Act.

The Legislation

Section 2 defines indecent as follows:

“ ‘Indecent’ includes describing, depicting, expressing, or otherwise dealing with matters of sex, horror, crime, cruelty, or violence in a manner that is injurious to the public good.”

The functions of the Tribunal are set out in section 10 of the Act:

“**10. Functions of Tribunal**—The functions of the Tribunal shall be—

- (a) To determine the character of any book or sound recording submitted to it for classification:
- (b) To classify books and sound recordings submitted to it as indecent or not or as indecent in the hands of persons under a specified age or as indecent unless their circulation is restricted to specified persons or classes of persons or unless used for a particular purpose, as the case may be:
- (c) To hear and determine any question relating to the character of a book or sound recording referred to it by a Court in any civil or criminal proceedings (including proceedings under section 25 of this Act), and to forward a report of its findings to that Court.”

The matter to be taken into consideration by the Tribunal in classifying or determining the character of any book are set out in section 11 (1) and (2) of the Act:

“**11. Matters to be taken into consideration by Tribunal or Court**—(1) In classifying or determining the character of any book or sound recording the Tribunal shall take into consideration—

- (a) The dominant effect of the book or sound recording as a whole:
- (b) The literary or artistic merit, or the medical, legal, political, social, or scientific character or importance of the book or sound recording:
- (c) The persons, classes of persons, or age groups to or amongst whom the book or sound recording is or is intended or is likely to be published, heard, distributed, sold, exhibited, played, given, sent, or delivered:
- (d) The price at which the book or sound recording sells or is intended to be sold:
- (e) Whether any person is likely to be corrupted by reading the book or hearing the sound recording and whether other persons are likely to benefit therefrom:
- (f) Whether book or the sound recording displays an honest purpose and an honest thread of thought or whether its content is merely camouflage designed to render acceptable any indecent parts of the book or sound recording.

(2) Notwithstanding the provisions of subsection (1) of this section, where the publication of any book or the distribution of any sound recording would be in the interests of art, literature, science, or learning, and would be for the public good, the Tribunal shall not classify it as indecent.”

Section 21 (1) of the Act lists a number of activities which

constitute offences under the Act. It is provided in subsection (2) of section 21 that it shall be no defence to a charge under subsection (1) that the defendant had no knowledge or no reasonable cause to believe that the document to which the charge relates was of an indecent nature. The particular activity which we wish to emphasise in the classification of these magazines is that which is contained in section 21 (1) (f):

“**21. Offences of strict liability**—Every person commits an offence against this Act who—

...
...

- (f) Sells, delivers, gives, exhibits, or offers 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 sold, delivered, given, exhibited, or offered;”

The Bill of Rights Act also has application to these proceedings. The parameters and tenets of section 2 of the Act, as judicially defined, are not inconsistent with the rights and freedoms contained in the Bill of Rights Act 1990. Given the relevance of the latter statute to the Act reference to the relevant provisions in the Bill of Rights Act will be made later in this decision.

What follows are brief summaries from the viva voce and affidavit evidence and the submissions of counsel for the parties. These summaries do not purport to be a complete coverage of all the evidence and submissions presented at the hearing. A total of 28 affidavits and statements were submitted on behalf of Penthouse International. With the exception of Inspector Kerr, Professors Mullen, Donnerstein and Linz and Dr Court there was no cross-examination. The society's case is based largely on the evidence of 1 witness only, Dr J. H. Court, a psychologist. To ensure that the society's case receives treatment in balance with the volume of evidence presented on behalf of Penthouse International our summary of Dr Court's evidence, and the conclusions we have drawn from it, will be fuller than the individual summaries of the evidence of the other witnesses.

Viva Voce Evidence

David Benjamin Kerr, a Chief Inspector of Police at Legal Section in Police National Headquarters. Inspector Kerr explained that one of his responsibilities was to monitor police inquiries and prosecutions under the Indecent Publications Act 1963 and the Video Recordings Act 1987 because both Acts require the leave of the Attorney-General to commence prosecutions. Inspector Kerr described a police computer programme, the “Sex Offender Report”, which between April 1988 and June 1990 built up information received from records relating to 53 alleged offenders in respect of 71 victims of sexual crimes where the alleged offender had been accused of or had admitted using sexually explicit material before or during the crime. From the information gathered Inspector Kerr explained that only 2 propositions could be supported. The first proposition was that there are a number of sexual crimes committed each year in which either prior to or during the offence the offender has used pictorial material some of which is sexually explicit. Inspector Kerr's second proposition was that a significant factor in the figures are the number of adult offenders (34) in the 30–80 year range using such material before committing sexual offences with young persons in the age range from 4–15 (56). Inspector Kerr emphasised repeatedly, in his evidence and under cross-examination by Mr Akel, that the figures were “link” only and “I am making no claim to causation in my figures” (page 2 of transcript). In many of the cases reported there was some previous relationship between the offender and the victim. Inspector Kerr also testified that there is no guarantee that the use of such material would be discovered by the investigating officer or, if it was, that it would be entered into the data base.