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IN THE COURT OF APPEAL OF NEW ZEALAND CA 58/00

BETWEEN LIVING WORD DISTRIBUTORS LIMITED

Appellant

AND HUMAN RIGHTS ACTION GROUP (WELLINGTON)

Respondent

Hearing: 10 and 11 July 2000

Coram: Richardson P
Gault J
Thomas J
Keith J
Tipping J

Appearances: P D McKenzie QC and P T Rishworth for Appellant
L J Taylor and A L Russell for Respondent

Intervenors:
E D France and J J Warburton for Attorney-General
T Ellis and A Shaw for New Zealand Council for Civil Liberties
F M Joychild for New Zealand Aids Foundation
C C Lawrence for Human Rights Commission and Race Relations Conciliator

Judgment: 31 August 2000

JUDGMENTS OF THE COURT

Judgments

Judgments	Para No
Richardson P, Gault, Keith and Tipping JJ	[1] - [52]
Thomas J	[53] - [88]

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RICHARDSON P, GAULT, KEITH AND TIPPING JJ (DELIVERED BY RICHARDSON P)

[1] This is an appeal on law against the decision of the Full Court (Heron J and Durie J) of 1 March 2000 dismissing the appeal on law to the High Court against the decision of the Film and Literature Board of Review classifying two videos imported from USA (*Gay Rights/Special Rights: Inside the Homosexual Agenda* and *AIDS: What You Haven't Been Told*) by the present appellant, Living Word Distributors Limited ("Living Word"), as "objectionable" for the purposes of the Films, Videos and Publications Classification Act 1993 ("the 1993 Act").

Background summary

[2] The videos were described by the Full Court in this way:

> The two video recordings with running times of approximately 43 and 83 minutes respectively, discuss aspects of homosexuality in the United States context, and discuss political and social ramifications of claims made by gay, lesbian, bisexual and trans-gendered people for equal rights and the right not to be discriminated against. The videos present a point of view that opposes the granting of such claims which it regards as special rights. The "Aids" video discusses political and social ramifications of the spread of HIV and Aids and presents an opinion that homosexuality is one of the causes of the spread of HIV and Aids. It can be said that both videos are provocative and tendentious, advocating a point of view which is opposed to any perceived entitlement of gay and lesbian people to further rights or to an enhancement of their rights by virtue of a claim to minority status. Such a claim, the videos argue, should be confined to what it regards as legitimate minority groups, not to be confused with persons with gay and lesbian sexual orientation. The videos express directly or indirectly probably undetermined factual assumptions and conclusions which the overall right of freedom of expression would and should protect.

[3] We were advised by Mr McKenzie QC, counsel for Living Word, that the videos, made in 1989, have not been subjected to censorship challenges in other jurisdictions.

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[4] In terms of the statutory sequence the videos were considered first by the Film and Video Labelling Body Inc on the application of Living Word. On 30 September 1994 they were rated "suitable for mature audiences 16 years of age and over" (ss9-11 of the 1993 Act). Next, on 17 February 1995 the present respondent, the Human Rights Action Group Inc, with the leave of the Chief Censor, submitted the two videos to the Classification Office, established under s76, for classification under s13(1)(c). On 18 November 1996 the Office classified each video as "objectionable except if the availability of the publication is restricted to persons who have attained the age of 18 years" (s38(1)).

[5] The Human Rights Action Group then applied under s47(2)(a) for review by the Board of the decisions of the Classification Office. Such a review is by way of re-examination of the publications by the Board without regard to the decisions of the Classification Office (s52(2)).

[6] The Human Rights Action Group sought a complete ban on the videos. Following a hearing on 22 May 1997 the Board in its decision of 18 December 1997, now reported at 4 HRNZ 422, and acting pursuant to s55, classified both videos as "objectionable". In terms of s123 it is an offence of strict liability to sell or hire videos classified as "objectionable". Similarly, s131(1) makes it an offence to possess any "objectionable publication" and subs (3) provides that "it shall be no defence ... that the defendant had no knowledge or no reasonable cause to believe that the publication to which the charge relates was objectionable".

[7] The Attorney-General's report to Parliament under s7 of the New Zealand Bill of Rights Act 1990 on the Bill which became the 1993 Act expressed the opinion that imposing criminal liability without the provision of a defence relating to a lack of knowledge or reasonable belief about the nature of the publication for a simple possession charge could not be justified under s5 of the Bill of Rights.

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[8] Not surprisingly given the respective roles and functions of the censoring bodies under the 1993 Act (see s4), appeals from the Board to the High Court (under s58) and from the High Court to this Court (under s70) are restricted to questions of law. And, of crucial importance in this case, the further appeal to this court is directed to "any final determination of the [High] court in respect of the appeal [to that court] as being erroneous in point of law". The question is whether the High Court has erred in law and, if so, the consequences which should follow from that determination. It follows that the first step in any appeal to this court is to identify the particular passages in the judgment of the High Court which are said to be erroneous in point of law.

The material legislation

[9] The object of the 1993 Act as stated in the long title is to "to consolidate and amend the law relating to the censoring of films, videos, books, and other publications". Section 3, dealing as the section heading states with the meaning of "objectionable", is central to the whole Act and to the argument on the appeal. It reads:

> **3. Meaning of "objectionable"**
>
> (1) For the purposes of this Act, a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good.
>
> (2) A publication shall be deemed to be objectionable for the purposes of this Act if the publication promotes or supports, or tends to promote or support,--
>
> (a) The exploitation of children, or young persons, or both, for sexual purposes; or
>
> (b) The use of violence or coercion to compel any person to participate in, or submit to, sexual conduct; or
>
> (c) Sexual conduct with or upon the body of a dead person; or
>
> (d) The use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct; or

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(e) Bestiality; or

(f) Acts of torture or the infliction of extreme violence or extreme cruelty.

(3) In determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) of this section applies) is objectionable or should be given a classification other than objectionable, particular weight shall be given to the extent and degree to which, and the manner in which, the publication--

(a) Describes, depicts, or otherwise deals with--

(i) Acts of torture, the infliction of serious physical harm, or acts of significant cruelty:

(ii) Sexual violence or sexual coercion, or violence or coercion in association with sexual conduct:

(iii) Other sexual or physical conduct of a degrading or dehumanising or demeaning nature:

(iv) Sexual conduct with or by children, or young persons, or both:

(v) Physical conduct in which sexual satisfaction is derived from inflicting or suffering cruelty or pain:

(b) Exploits the nudity of children, or young persons, or both:

(c) Degrades or dehumanises or demeans any person:

(d) Promotes or encourages criminal acts or acts of terrorism:

(e) Represents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of members of that class, being a characteristic that is a prohibited ground of discrimination specified in section 21(1) of the Human Rights Act 1993.

(4) In determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) of this section applies) is objectionable or should be given a classification other than objectionable, the following matters shall also be considered:

(a) The dominant effect of the publication as a whole:

(b) The impact of the medium in which the publication is presented:

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(c) The character of the publication, including any merit, value, or importance that the publication has in relation to literary, artistic, social, cultural, educational, scientific, or other matters:

(d) The persons, classes of persons, or age groups of the persons to whom the publication is intended or is likely to be made available:

(e) The purpose for which the publication is intended to be used:

(f) Any other relevant circumstances relating to the intended or likely use of the publication.

[10] Section 21(1) of the Human Rights Act 1993 ("the Human Rights Act"), referred to in s3(3)(e) reads:

(1) For the purposes of this Act, the prohibited grounds of discrimination are--

(a) Sex, which includes pregnancy and childbirth:

(b) Marital status, which means the status of being--

(i) Single; or

(ii) Married; or

(iii) Married but separated; or

(iv) A party to a marriage now dissolved; or

(v) Widowed; or

(vi) Living in a relationship in the nature of a marriage:

(c) Religious belief:

(d) Ethical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions:

(e) Colour:

(f) Race:

(g) Ethnic or national origins, which includes nationality or citizenship:

(h) Disability, which means--

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(i) Physical disability or impairment:

(ii) Physical illness:

(iii) Psychiatric illness:

(iv) Intellectual or psychological disability or impairment:

(v) Any other loss or abnormality of psychological, physiological, or anatomical structure or function:

(vi) Reliance on a guide dog, wheelchair, or other remedial means:

(vii) The presence in the body of organisms capable of causing illness:

(i) Age, which means,--

(i) For the purposes of sections 22 to 41 and section 70 of this Act and in relation to any different treatment based on age that occurs in the period beginning with the 1st day of February 1994 and ending with the close of the 31st day of January 1999, any age commencing with the age of 16 years and ending with the date on which persons of the age of the person whose age is in issue qualify for national superannuation under section 3 of the Social Welfare (Transitional Provisions) Act 1990 (irrespective of whether or not the particular person qualifies for national superannuation at that age or any other age):

(ii) For the purposes of sections 22 to 41 and section 70 of this Act and in relation to any different treatment based on age that occurs on or after the 1st day of February 1999, any age commencing with the age of 16 years:

(iii) For the purposes of any other provision of Part II of this Act, any age commencing with the age of 16 years:

(j) Political opinion, which includes the lack of a particular political opinion or any political opinion:

(k) Employment status, which means--

(i) Being unemployed; or

(ii) Being a recipient of a benefit under the Social Security Act 1964 or an entitlement under the Accident Insurance Act 1998:

(l) Family status, which means--

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(i) Having the responsibility for part-time care or full-time care of children or other dependants; or

(ii) Having no responsibility for the care of children or other dependants; or

(iii) Being married to, or being in a relationship in the nature of a marriage with, a particular person; or

(iv) Being a relative of a particular person:

(m) Sexual orientation, which means a heterosexual, homosexual, lesbian, or bisexual orientation.

[11] Sections 22 to 73 relate, with more detail and with exceptions, to various of those s21(1) categories in different ways and including in ss61 to 69 provisions concerning, as other forms of discrimination, such matters as racial disharmony, sexual harassment, victimisation, and advertisements. Reading those provisions brings home the numerous categories of discrimination dealt with in the Human Rights Act and the differing provisions applicable. And the numerous exceptions demonstrate that the law still accepts distinctions made on the basis of religion more readily than it does distinctions on the basis of race - and even more so in the case of other categories in s21(1) such as employment, political opinion, and age.

[12] The third statute for consideration in interpreting and applying s3 of the 1993 Act is the New Zealand Bill of Rights Act 1990. Sections 14 and 19, which were the subject of considerable discussion in the decisions of the High Court and the Board, provide:

14 FREEDOM OF EXPRESSION--

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

19 FREEDOM FROM DISCRIMINATION--

(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

[13] As well, ss 4, 5 and 6 are important to the argument of the appeal. They read:

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4 OTHER ENACTMENTS NOT AFFECTED--

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),--

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

(b) Decline to apply any provision of the enactment--

by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5 JUSTIFIED LIMITATIONS--

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

6 INTERPRETATION CONSISTENT WITH BILL OF RIGHTS TO BE PREFERRED--

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

The challenged determinations of the High Court

[14] As refined in argument, there were three major respects in which counsel for Living Word submitted that the High Court determination was erroneous in point of law: (1) in determining the subject matter requirement for a publication to come within s3(1), which is a question of construction of the section in its statutory context; (2) in determining the application of the Bill of Rights and, in particular, in bringing s19 into consideration along with s14; and (3) in determining that the Board did not err in law in its factual description and interpretation of the videos.

[15] The passages from the Full Court judgment particularly relied on for the first submission were paras [8] and [9]:

[8] Dealing with the second ground of appeal first, there are two questions, whether the videos deal with sex as such and whether the videos deal with some other topic within the ambit of s3. As to the first, sex is defined in the Shorter Oxford Dictionary as including

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"*Physical contact between individuals involving sexual stimulation of the genitals, sexual intercourse, spec. copulation, coitus*". The appellant argued that the videos dealt only peripherally with sexual matters, being more to do with the politics of persons of certain sexual orientation, and accordingly that the definition contained in s3(1) did not apply to them. While there is certainly a focus on a perceived homosexual agenda nonetheless homosexual sex is dealt with. The question is not whether this is central or marginal to the overall discourse but whether it forms part. It does, and that appears to us to satisfy the jurisdictional point, though whether it is dealt with in an objectionable way is another matter.

[9] However as the Board's primary finding relates to the impact of the videos on a class of persons defined by sexual orientation the more pertinent question is whether the impact of publication on such a class is within the section's purview. The use of the words "such as" suggests the generality of the approach and the possibility of a publication which referred to none of the specified items still being the subject of classification as objectionable. Indeed the inclusion of references to s21(1) of the Human Rights Act 1993, presupposes that some publications could avoid references to any of the matters which are used by way of illustration in s3(1) and still be determined as objectionable and within the jurisdiction of the Board. The list may thus be added to but the reference to s21(1) more explicitly justifies the inclusion of the topic of sexual orientation, as it does for race and gender. Again the manner in which sexual orientation is dealt with, and whether it is in fact objectionable on that ground, is a separate issue.

[16] The passages particularly relied on for the second submission were from paras [13], [14], [17] and [19]:

[13] [*Referring to s5 of the Bill of Rights*] The appellant says that censorship imposed in this case was more than a reasonable limit, that opinions on matters of morality and social policy ought not to be suppressed in a free and democratic society and the two videos were in essence attempting to express such opinions. The Court agrees that the ultimate question for the Board was quite a narrow one and was whether a decision to declare the videos objectionable resulted in a restriction of freedom of expression that is not justifiable as a reasonable limit in a free and democratic society. The appellant pointed out certain indicators that were not present at the time of the passing of the Films Act. The Board likewise referred also to the circumstances surrounding the amendment to s19 of the New Zealand Bill of Rights which provides that everyone has the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993, a more express reference than that previously contained in s19. Accordingly the very same right said to clash with the right contained in s14 might be seen to be a specific pointer towards the modification

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of the undoubtedly fundamental right to freedom of expression including the freedom to seek, receive and impart information and opinions of any kind in any form. ...

[14] ... We think it is not helpful to refer to s6 which provides that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning shall be preferred to any other meaning when s19 as recently amended incorporates the very same protection about which the decision of the Board is concerned.

...

[17] We accept Mr Rishworth's submission that fundamental rights are not to be regarded as taken away merely by general words. His argument that the rights of freedom of expression are so important that all enactments should be construed as to permit their continued exercise, runs straight into the no doubt equally important right, (and they are not ranked) contained in s19 as amended.

...

[19] ... The sting in the videos according to the Board as they saw it was the denigration of homosexuals, lesbians, bisexuals and others, in the context of this overall debate, running counter to a provision of the Human Rights Act, which is to be rejected by the Board in terms of its own Act, underpinned by reference to the Human Rights Act and s19 of the New Zealand Bill of Rights.

[17] The High Court discussion of the matters to which the third submission is particularly directed extends over paras [22] to [25] and para [31]. Paragraph [22] states the test of what constitutes an error of law in relation to factual determinations in conventional *Edwards v Bairstow* terms, including citing the following passages from the judgment of Lord Radcliffe ([1956] AC 14 at 36):

If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But without any such conception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. ...

I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with and contradictory of the determination made, or as one in which the true

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and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test.

[18] The Full Court went on to discuss complaints by Living Word about the factual and interpretative conclusions of the Board - which necessarily included the submissions emphasised in the argument of this appeal that those misdescriptions of the videos wrongly influenced the Board's classification as objectionable - and rejected the argument that the Board's discussion had proceeded on some fallacious foundation of fact.

> [24] ... We have considered the criticism of the Board's approach as outlined in the appellant's submissions but consider they are views reached as a matter of interpretation of the videos. For example, there is a question as to whether the video argues that condoms are ineffective or partially ineffective in limiting the spread of aids. Such matters of interpretation of the raw material under consideration are left by the legislature in the hands of the tribunal. This is not a case where in the examples advanced, of which only some have been referred to, the true and only reasonable conclusion contradicts the determination made by the Board. The Board saw the two videos as in totality representing directly or indirectly that members of the class under consideration were inherently inferior to other members by reason of a characteristic which is a prohibited ground from which the videos may be rendered objectionable.
>
> [25] To deal with those findings otherwise is to convert this court into a court of general appeal on censorship issues which has long since ceased to be the case.

[19] Finally, after concluding that it was difficult to question the Board's assessment that classification as objectionable was a reasonable limit on the freedom of expression consistent with s5 of the Bill of Rights, the Full Court added:

> The Court we must say has been troubled by the inroad into the free expression of opinions which this decision represents, particularly in this area of uncertain factual assumptions and premises, and a still evolving understanding of the phenomenon of homosexuality.

The subject matter requirement under s3(1)

[20] The submission for Living Word was that the Full Court erred in law in holding that the words "such as" in s3(1) indicate a generality of approach and

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that a publication which dealt with none of the specified items in the subsection could still be classified as being objectionable; and, in particular, in holding that the topic of sexual orientation (simpliciter) is included in the matters coming under the jurisdiction of the censoring authorities under s3(1). Mr McKenzie submitted that there were alternative ways in which s3(1) could be read. One was that the words "matters such as", not having any antecedent of a descriptive character, must be read as setting out an exhaustive set of categories, each of which is self-defining. The other would read the words "matters such as" as indicating that the five matters which are then identified are of the same kind or bear a close resemblance with the result that the reference to the item "sex" in s3(1) must carry with it features which also render horror, crime, cruelty, or violence objectionable and thus is confined to abusive or debasing sex.

[21] Mr Taylor for the Human Rights Action Group supported the approach taken in para [9] of the High Court judgment, namely, that s3(1) is not a jurisdictional gateway barring censoring as objectionable a publication which does not deal with any of the matters specified in the subsection. They are, he said, illustrative not delimiting and matters of sexual orientation are covered. Alternatively, he submitted that the videos in this case describe and deal with sexual behaviour in various forms and come within the description "matters such as sex" in s3(1).

[22] We should add, because it has a bearing on the outcome of the case, that in its analysis of s3 the Board said (at p428):

> These publications do not, strictly speaking, depict sex, horror, crime, cruelty or violence. The definition is, however, inclusive. It does not exclude consideration of other matters. Those other matters are, however, qualified by the final phrase "injurious to the public good". In *Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404, also reported as *Howley v Lawrence Publishing Co Ltd* (1986) NZAR 193 Woodhouse P stated at p410; p199 that the definition of indecency in the Indecent Publications Act 1963 included things other than matters of sex, horror, crime, cruelty and violence, but that those other things had to be injurious to the public good in order to be banned:

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> it would be extraordinary I think if such a further category could be banned by the Act as indecent without meeting the test of being injurious to the public good.

In other words, regardless of whether or not these videos deal with matters of sex, horror, crime, cruelty or violence, they can be brought into the definition of "objectionable" and made subject to the Board's jurisdiction by the words "such as".

[23] It went on to hold that s3(3)(e) applied to the videos and that the prohibited grounds of discrimination specified in s21(1) of the Human Rights Act were sexual orientation (s21(1)(m)) and the presence in the body of organisms capable of causing illness (s21(1)(h)(vii)).

Section 3: Discussion

[24] Whether and if so what subject matter limitations apply to publications before they can be considered for classification as objectionable is a straightforward question of construction of s3(1) in its statutory context. The structure of s3 was discussed by this court in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at paras [4] and [5]:

> [4] The structure of s 3 should be noted. Subsection (1) provides the general test for when a publication is objectionable. Various subject-matters are described and the publication is regarded as objectionable if the subject-matter is dealt with in such a manner that the availability of the publication is likely to be injurious to the public good. Central concepts are the manner in which the subject-matter is expressed or dealt with, the availability of the publication, and likelihood of injury to the public good. Subsection (2) deems a publication to be objectionable if it promotes or supports, or tends to promote or support, one or more of the six things listed in paras (a) to (f). The exploitation of children or young persons or both for sexual purposes is what is at issue in this present case.
>
> [5] For deemed objectionability the key concept is that the publication must promote or support, or tend to promote or support, the prohibited subject-matter. Parliament has said that if the criteria in subs (2) are fulfilled, the publication is to be regarded as objectionable; there is no alternative. Publications which fall foul of subs (2) are by legislative direction treated as dealing with a qualifying subject-matter in such a manner that the availability of the publication is likely to be injurious to the public good in terms of subs (1). A publication which is not deemed to be objectionable under subs (2) may nevertheless be

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classified as objectionable, or given a restricted classification under subs (3), after consideration of the matters referred to in that subsection, and in subs (4).

[25] Clearly, and as brought out in that para [4], s3(1) serves two purposes. The first is to define the reach of censorship in terms of the subject matter of the publication. The second is to set the test of "injurious to the public good" as the yardstick for determining whether a publication which has qualified in terms of subject matter can be classified as objectionable.

[26] "Such" is a flexible relative word whose meaning is to be gathered from the context in which it is used. *The Oxford English Dictionary* (2nd ed) notes that syntactically it may have backward or forward reference. In combination, the words following the expression "such as" may be demonstrative of the words which precede it without restricting the breadth of the preceding words; or they may introduce examples of a class and in context limit the meaning to the kinds or types specified. Clearly, the description of the subject matter in s3(1) is used in that latter sense. If it were intended that "matters" should extend to "all matters", there would be no need for the expression "such as" and no sense in it.

[27] The words "matters such as" in context are both expanding and limiting. They expand the qualifying content beyond a bare focus on one of the five categories specified. But the expression "such as" is narrower than "includes", which was the term used in defining "indecent" in the repealed Indecent Publications Act 1963. Given the similarity of the content description in the successive statutes, "such as" was a deliberate departure from the unrestricting "includes".

[28] The words used in s3 limit the qualifying publications to those that can fairly be described as dealing with matters of the kinds listed. In that regard, too, the collocation of words "sex, horror, crime, cruelty or violence", as the matters dealt with, tends to point to activity rather than to the expression of opinion or attitude.

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[29] That, in our view, is the scope of the subject matter gateway. Thus, in answer to Mr McKenzie's alternative submission, there is no justification for reading down "matters such as sex" by limiting the expression to abusive or degrading sex. However, features of that kind will be relevant at the next step in determining whether the publication deals with the subject matter in such a manner that the availability of the publication is likely to be injurious to the public good; and in applying subss (3) and (4).

[30] Equally, the presence of the subject matter requirement of s3(1) cannot be ignored or by-passed or added to by invoking s3(3)(e). The subject matter provision is obviously designed as imposing an immediate limitation on the reach of the censorship laws. Parliament could never have intended that a simple test of "injurious to the public good" could be used to ban discussion of any subject.

[31] We are also satisfied that the High Court erred in concluding in its para [9] (para [15] above) that the reference to s21(1) of the Human Rights Act in s3(3)(e) of the 1993 Act justifies including sexual orientation, race and gender within the s3(1) net. In terms of the statutory scheme, and consistently with s3(1), the opening words of subs (2) "A publication shall be deemed objectionable" and of subs (3) "In determining ... whether or not any publication ... is objectionable" must refer to a publication qualifying as to subject matter under the preceding subs (1). That conclusion is reinforced by the consideration that subs (3) is concerned only with the weight to be given in determining whether the publication is objectionable. Further, all six categories in s3(2) and categories (a) to (d) of s3(3) can readily be related back to the subject matter referred to in s3(1). And, the written submissions for the Attorney-General note that, whereas international anti-discrimination principles have gradually extended their reach to protect wider classes of vulnerable persons, the international prohibitions of hate propaganda have remained confined to the categories of race and religion; and that prohibition of hate propaganda is not seen as synonymous with more general anti-discrimination protections.

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[32] In that context there could be no warrant for reading s3(3)(e) as importing all of the grounds of discrimination specified in s21(1) of the Human Rights Act as stand alone topics for potential censorship. Those grounds include age, religion, political opinion, employment status, and receipt of a social benefit as well as race, ethnic origin, disability, family status and sexual orientation. If a publication dealing with a matter coming within s3(1) represents that members of a particular class of the public are inherently inferior by reason of a characteristic of members of that class within s3(3)(e), then s3(3) of course requires that particular weight be given to that feature of the publication. That is the purpose and effect of s3(3)(e) in the statutory scheme.

[33] In short, the 1993 Act recognises an obvious distinction between censorship legislation with its proper purpose and subject matter and anti-discrimination legislation with its own (different) purpose and subject matter. As well, each has its own remedies and sanctions. Section 3(1) sets boundaries of content-based regulation of speech. The applicability of s21 Human Rights Act grounds is included under s3(3)(e) as a factor to be weighed in relation to subject matter coming within s3(1), not as a separate reason for censorship.

[34] For these reasons we are satisfied that the High Court (particularly in its para [9]) and the Board erred in law in the interpretation of s3(1). However, it seems, in terms of the High Court's description of the videos (para [2]) and its initial conclusion in its para [8] (para 15 above), that the videos to some extent describe, depict or deal with sexual practices and accordingly may come within the expression "matters such as sex". It is unnecessary to examine this point any further because, for reasons we shall give when dealing with the second question, we are satisfied that the error of law involved there requires reconsideration of the videos by the Board and on any such reconsideration the Board will be required to determine in terms of our interpretation of s3(1) whether, as to subject matter, the videos can be considered for classification under the 1993 Act.

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Bill of Rights

[35] As noted in para [14], the submission for Living Word was that the High Court erred in law in its application of the Bill of Rights and in particular in bringing s19 into consideration along with s14.

[36] In *Moonen* the court discussed the impact of the Bill of Rights on the correct interpretation and application of the 1993 Act, and in particular s3. It is helpful to repeat paras [15] and [16] of that judgment:

> [15] Under s14 of the Bill of Rights, everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. This right is as wide as human thought and imagination. Censorship of publications to any extent acts as a pro tanto abrogation of the right to freedom of expression. The rationale for such abrogation is that other values are seen as predominating over freedom of expression. Nevertheless the extent of the pro tanto abrogation brought about by censorship legislation must, in terms of s5 of the Bill of Rights, constitute only such reasonable limitation on freedom of expression as can be demonstrably justified in a free and democratic society. If the Court considers that the right to freedom of expression has by censorship legislation been made subject to an unreasonable limitation, which cannot be demonstrably justified in a free and democratic society, there arises a breach of s5 of the Bill of Rights. Yet because s5 is subject to s4, that breach does not invalidate the legislation. The inconsistency is recognised but the legislation stands. Section 4 says as much, having relevance and effect, as it does, only if there is an inconsistency.
>
> [16] The present point is that relevant provisions of the Bill of Rights must be given full weight in the construction of the Act, and in any classification made thereunder. Indeed s6 of the Bill of Rights requires that where an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning shall be preferred to any other. Thus if there are two tenable meanings, the one which is most in harmony with the Bill of Rights must be adopted. Section 5 when read with s6 fulfils a similar role. An enactment which limits the rights and freedoms contained in the Bill of Rights should be given such tenable meaning and application as constitutes the least possible limitation. Where an unjustified and unreasonable limitation nevertheless results, because no other meaning or application is tenable, such limitation, while constituting a breach of s5, nevertheless prevails by dint of s4.

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[37] For reasons which we can express quite shortly we are satisfied that there are material errors of law in the analysis of the High Court (para [16] above). In this regard the starting point is that the censorship bodies under the 1993 Act, and notably here, the Board of Review, are performing public functions attracting the application of s3 of the Bill of Rights. It is their conduct in exercising their censorship role, and so in abridging free speech, which engages the Bill of Rights.

[38] In its para [13] the High Court saw the right to free expression (s14) as clashing with the right to freedom from discrimination (s19) and thought that clash might be seen to be a specific pointer towards the modification of the s14 right to freedom of expression. It was because they saw s19 as incorporating "the very same protection about which the decision of the Board is concerned" that they considered it not helpful to refer to s6 (the High Court's para [14]). While accepting that fundamental rights in the Bill of Rights were not to be seen as taken away by general words in the 1993 Act, they considered that the argument ran straight into the s19 right (the High Court's para [17]). And they agreed that the sting in the videos, which according to the Board was the degradation of homosexuals, lesbians, bisexuals and others, ran counter to s21(1) of the Human Rights Act and was to be rejected by the Board in terms of the 1993 Act underpinned by s19.

[39] As a matter of interpretation we have already suggested that the expression of the subject matter in s3(1) tends to point to activity rather than to the expression of opinion or attitude (para [25]). To construe likely injury to the public good in s3(1) in that light would accord with s6 of the Bill of Rights and provide a reasonable limit as can be demonstrably justified in a free and democratic society (s5).

[40] Further, the balancing required by s3 must be infused by due consideration of the application of the Bill of Rights. The inquiry is whether the depiction in the videos of a qualifying subject matter (such as sex) is in such a manner that the availability of the publication is likely to be injurious to the public good. At that point s14 must be given full weight in the application of s3(1), but s19

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does not apply directly. Section 3(3)(e) incorporates by reference the characteristics specified in s21(1) of the Human Rights Act as prohibited grounds of discrimination to which s19 applies. To the extent that s3(3)(e) has application of the particular subject matter of s3(1) the values underlying s19 are imported and become particular considerations in the assessment of objectionability under s3(1).

[41] But in terms of the statutory scheme there is no direct clash of rights. Rather, it is a matter of approaching the ultimate inquiry under s3 as indicated in *Moonen*. The Bill of Rights is a limitation on governmental, not private conduct. The ultimate inquiry under s3 involves balancing the rights of a speaker and of the members of the public to receive information under s14 of the Bill of Rights as against the State interest under the 1993 Act in protecting individuals from harm caused by the speech. And the fundamental error on the part of the High Court was in treating s19 as prevailing over s14.

[42] That same error permeates the Board of Review's approach in invoking s19 of the Bill of Rights. Indeed, while the Board noted that s6 of the Bill of Rights requires ambiguities in the 1993 Act to be given a meaning consistent with the rights and freedoms contained in the Bill of Rights, it concluded that the legislative scheme of the 1993 Act, the Human Rights Act, and the apparently competing rights in ss14 and 19 of the Bill of Rights provided some indication that, in a contest between the freedom of expression and the right to be free from discrimination, at least with respect to publications falling within s3(3)(e) of the 1993 Act, that right to be free from discrimination should prevail (p434). They went on to hold (p435) that when the rights in s14 and s19 came into conflict with each other, "the legislation gives precedence to the right to be free from discrimination"; and that if there is any doubt about that interpretation of the censorship legislation s6 of the Bill of Rights would suggest that such doubt should be resolved in favour of s19. Put bluntly, it is an assertion that s19 trumps s14 and, extraordinarily, that s6 produces that result.

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[43] It may be that the Board in its decision intended to convey that on its assessment the test of likely injury to the public good in s3(1) was made out even after giving due weight to the freedom of expression, and that in its preceding review of the relevant statutory provisions it was merely recognising that censorship in that situation necessarily limits freedom of expression which is just what the legislature contemplated. However, as explained, the terms employed in that review go further than that and indicate error of law.

[44] It follows that both the High Court and the Board misdirected themselves in law as to the impact of the Bill of Rights in this case. The only reasonable course is to remit the matter to the Board of Review for it to begin afresh. In doing so it will obviously need to assess whether the focus of the videos was, as the High Court saw it (para [2] above), on the expression of political and social opinion.

[45] In that regard the Board will no doubt have in mind the recent decision of the House of Lords in *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400 at 408:

> The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country ... .

As the European Court of Human Rights said in *Handyside v UK* (1976) 1 EHRR 737, 754 para 49:

> Freedom of expression constitutes one of the essential foundations of a [democratic] society ... Subject to Article 10(2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.

And the leading Canadian text (Hogg, *Constitutional Law of Canada* (4ed) para 40.6) notes that prior restraint on publication is usually regarded as the most severe way of curtailing freedom of expression because expression that is never published cannot

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contribute in any way to the democratic process, to the market-place of ideas or to personal fulfilment.

Description of the videos

[46] In view of these conclusions as to the first and second grounds of challenge to the Full Court's decision on law, and the consequential remitting of the matter to the Board for a wholly fresh consideration of the videos, it is not necessary to determine the third ground on which Living Word relied.

[47] Mr McKenzie for Living Word submitted that the High Court erred in law in holding that the Board's description of the videos was one that was reasonably open to the Board on the basis of the evidence and invited this court to view the videos when considering that submission.

[48] Mr Taylor for the Human Rights Action Group submitted that the inquiry was necessarily limited to whether the Full Court had erred in law and there was nothing in its judgment to justify an argument that it had done so. The Full Court had correctly directed itself in conventional *Edwards v Bairstow* terms and had rejected the argument that the Board's decision had proceeded on some fallacious foundation of fact applying Lord Radcliffe's language and holding that "This is not a case where ... the true and only reasonable conclusion contradicts the determination made by the Board".

[49] There may be room for argument as to whether on a second appeal on a point of law, where the court appealed from has considered and rejected an *Edwards v Bairstow* challenge in law to the original decision, the court determining the second appeal can go beyond the analysis in the first appeal judgment and review the original decision in the light of the evidence before the initial decision maker. As we have said, in the result it is unnecessary to explore that argument.

[50] But we should perhaps note that in the final sentence of its para [24] (para [18] above) the Full Court stated that the Board saw the two videos as in totality

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representing directly or indirectly that members of the class under consideration were inherently inferior to other members by reason of a characteristic which is a prohibited ground from which the videos may be rendered objectionable. It is at least arguable that that reflects the Full Court's incorrect assessment of the subject matter requirement under s3(1) and that the Full Court must be taken to have misapplied the *Edwards v Bairstow* test in adopting that description. In short, it seems that the Full Court erroneously accepted that the Board was not obliged ultimately to relate the necessary injuriousness to the public good to the qualifying definitional requirement of "sex" or "matters such as sex ...".

Result

[51] The court has unanimously concluded that the Full Court erred in law, as did the Board of Review. The appeal is allowed, the decisions of the Full Court and the Board are quashed and the matter is remitted to the Board. On any reconsideration of the videos the Board will no doubt review their content having regard to the observations made in this judgment and the judgment of Thomas J. We should add that we cannot see any possible basis in law for importing into s3 of the 1993 Act the anti discrimination provisions on public health grounds of s21(1)(h)(vii) of the Human Rights Act, as the Board did in its decision (para [23] above).

[52] We record counsel's advice that there are no issues as to costs.

THOMAS J

Introduction

[53] In writing separately I do not wish to derogate from the worth of the judgment to be delivered by Richardson P. For myself, however, I would not remit the matter back to the Film and Literature Board of Review. In my opinion, the Board exceeded its jurisdiction and the Full Court of the High Court was in

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error in not reaching that conclusion. I would therefore allow the appeal and quash the Board's decision.

The videos

[54] In order to lay the foundation for my opinion it is necessary to briefly describe the content of the two videos which were imported by the appellant.

[55] The video entitled "Aids: What You Haven't Been Told" discusses the connection between that disease and homosexuality. It is very much a product of its time – 1989. It suggests that homosexuality and intravenous drug use are closely connected with the spread of the disease and that homosexual practices, or the "homosexual lifestyle", mean that the United States of America is on the verge of an epidemic. The political power of homosexual voters, coupled with the key public health positions which homosexuals have "infiltrated", has resulted in the real issues about AIDS not being squarely confronted. The video contends that "safe sex" practices are not sufficient to prevent infection, and that abstinence is the only solution.

[56] The first segment of the video relates to the HIV virus. The theme of widespread promiscuity is then broached and the argument is advanced that the only answer is to curb the "promiscuous lifestyles" which have developed since the 1960s. Haemophiliac infections in the 1980s are discussed. It is argued that the danger of AIDS has not been promptly addressed for three reasons. One reason which is pressed for this failure is alleged to be pressure from the homosexual community. The other reasons relate to the cost of solving the problem and the desire on the part of public officials not to raise alarm among the public.

[57] It is next contended that AIDS awareness is being tackled hand in hand with the positive promotion of homosexuality – often by homosexual groups. AIDS education is all too often seen as a vehicle by which homosexuality is made respectable. The notion of "safe sex" is then challenged, it being

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claimed that safe sex a “myth”. Safe sex is not and cannot be completely safe.

[58] The cost of treating AIDS patients is addressed. What is described as the wider agenda of the homosexual political movement is also pursued. A number of gay persons and protesters insist that homosexuality is inherent. Other persons interviewed, however, argue that homosexuality is a “choice” which is open to the individuals concerned.

[59] The power, wealth and influence of the homosexual political movement is examined in the context of the question why so little has been done to combat the problem and the need to generate resistance to the “political” protection of the disease. The video then shortly discusses “deviant” behaviour, seemingly conflating homosexual orientation with sado-masochistic sex and prostitution. By implication, it is a “slippery slope” argument.

[60] The video concludes by emphasising that an epidemic could follow if the homosexual agenda is not thwarted. It encourages Christians to love homosexuals as people, but to exercise their political power.

[61] The second video is called “Gay Rights/Special Rights: Inside the Homosexual Agenda”. It expresses strong opposition to homosexuals being granted the benefit of the affirmative protections contained in the Civil Rights Act 1964. The Fourteenth Amendment to the United States Constitution prohibits states from, among other things, making or enforcing laws which deny to any person the equal protection of the law. Section 5 of the Amendment gave Congress the power to pass any laws needed for its enforcement. The Civil Rights Act of 1964 is one of these laws. It prohibits states from discriminating on certain grounds, such as race, colour, national origin, religion and sex, in certain contexts. The grounds did not include sexual orientation (and still do not). Hence, the agitation among the homosexual community to have the protections in this legislation extended to cover discrimination on the ground of sexual orientation.

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[62] The video does not clearly distinguish between possible amendments to the Act and the quite distinct jurisprudence of the Supreme Court recognising specially protected classes under the Fourteenth Amendment. Certain principles have been created by the Court for the purpose of determining whether a state law infringes the equal protection clause of that Amendment. A number of characteristics call for "heightened constitutional scrutiny". (See *Romer v Evans* 116 S Ct 1620 (1996) and *Korematsu v United States* 323 US 214 (1944)). Recognised characteristics include race, sex, illegitimacy and ancestry. Sexual orientation is not a recognised characteristic. The plight and historical treatment of African-Americans provides a comparative basis for deciding whether to extend the constitutional protection to new groups. (See *JEB v Alamaba ex rel TB (*1994) (Slip opinion, 9-10). This approach probably explains a lengthy segment in the video comparing African-Americans and homosexuals.

[63] Excerpts of several black people and one Hispanic person arguing against the extension of "special rights" to homosexuals are shown being interviewed in the video. These persons argue that extending this protection to homosexuals would water down the protection given to other minority groups. The video then presses the point that homosexuality is different from race. It seeks to show that black people face greater discrimination and are much more economically disadvantaged.

[64] Again, the video contends that homosexuality is behavioural, as opposed to genetic. It then devotes some time to the political demands of the gay community. It asserts that the "real agenda" of homosexuals is to make homosexuality as acceptable as heterosexuality. The attempt by gay advocates to redefine "family" is emphasised. Homosexuality is referred to as "compulsive" and "promiscuous". Passing reference is also made to deviant practices such as defecation and "golden showers".

[65] Returning to its theme it is said that homosexuals should not be discriminated against, but should not receive "special rights". The video ends with a plea to concerned viewers to contact their local Congressman or Senator, complain

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about the homosexual agenda, and to openly vow not to support pro-gay politicians.

Fundamentalism

[66] The videotapes portray the beliefs and prejudices of religious fundamentalism. Marty and Appleby have written that such fundamentalism manifests itself as a strategy or set of strategies by which its believers attempt to preserve a distinctive identity as a people or group. Feeling that this identity is at risk in the contemporary era they fortify it by a selective retrieval of doctrines, beliefs and practices from a more sacred past. Promoting a rigorous sociomoral code for its followers, the boundaries are set, the "enemy" is identified, converts are sought and institutions are created and sustained in pursuit of a comprehensive reconstruction of society. (Martin E Marty and R Scott Appleby (eds) *Fundamentalisms and Society* (1984) at 3).

[67] The videos fit this perception. While directed at the danger of an AIDS epidemic in the one case and the threat of an enlarged protection of civil rights embracing homosexuals in the other, both videos reveal an abhorrence of what is called the "homosexual lifestyle". This phrase is used persistently throughout the videos without being defined. It is, however, identified with promiscuous and irresponsible sexual behaviour by male homosexuals. Lack of balance is evident in the dogmatic way in which these characteristics are attributed to all homosexuals, and there is no recognition of the diversity of homosexual associations which do not accord with this stereotyped description. Nor is any appreciation shown as to the nature and depth of gay and homosexual orientation, such as the appreciation which has resulted in sexual orientation becoming a prohibited ground of discrimination in this and other countries. The propensity for such presentations to cause harm is apparent: they may mislead the uninformed; they simplify the issues in a manner which is unrealistic; they give credence to false facts and figures; they demean and trivialise homosexual associations which do not fit the popular negative stereotype; they are hurtful and oppressive to the homosexual community; they pose a wounding challenge to the personal belief that sexual

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orientation is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs; they may psychologically scar homosexual individuals who would not otherwise repress their sexual orientation; and they tend to victimise and alienate a sizeable proportion of the population.

[68] I do not wish it thought, therefore, that in holding that the Board exceeded its jurisdiction I condone the contents of the videos or endorse the view that the publication of the videos is in the public good. Nor, on the other hand, do I wish it thought that I accept the submissions of those who perceive the videos to be blatant bigotry or hate propaganda. In truth, my views are beside the point. What is in point is the question whether videos of this kind fall within the scope and intent of legislation directed at the censorship of unacceptable portrayals of pornographic sex and violence. I am not prepared to accept that this is the case.

The Films Video and Publications Classification Act 1993

[69] The fact that the Films Video and Publications Classification Act is directed at suppressing publication of objectionable material relating to graphic sex and violence is apparent from its legislative history. In 1987 the Government appointed a Committee of Inquiry into Pornography. The Committee's Report was published in 1989. It recommended that a new statute be enacted to provide a unified classification regime for the censorship of films, videos and publications. This recommendation was accepted, and the Films Act 1983, the Video Recording Act 1987 and the Indecent Publications Act 1963 were replaced by the present Act. A perusal of the Parliamentary Debates confirms that the Bill was perceived as censorship legislation dealing with "pornography and violence". Parliament sought to send a clear message to the censors that the publication of "pornographic and violent material" was unacceptable. A definition of "pornography" was not included in the legislation because of the difficulty of providing a satisfactory definition of that concept, but it was clearly contemplated that the "sex" which would be subject to the Act was sexual conduct or activity in the nature of pornography.

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[70] Consequently, the Long Title describes the legislation as an "Act to consolidate and amend the law relating to the **censoring** of films, videos, books, and other publications …" (Emphasis added). The scheme of the Act then reinforces the fact that the legislation is directed at the censorship of pornographic sex and violence. An Office of Film and Literary Classification and a Films and Literature Board of Review are established with the function of determining the classification of films, videos, books and other publications. The publications may be classified as unrestricted, or "objectionable", or objectionable other than in specified circumstances. Offences are created for anyone who supplies, distributes, displays or deals with publications otherwise than in accordance with their classification. As appropriate in censorship legislation, comprehensive procedures are contained in the Act to ensure that publications which are not objectionable as contemplated in the Act are not banned or restricted. It may also be noted that the Act does not contain provisions providing for investigation and conciliation as in the Human Rights Act 1993 (ss 76 to 81).

[71] The pivotal section in the Act is s 3. It defines the meaning of "objectionable". Under subs (1), a publication is objectionable if it describes or otherwise deals with "matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good". While the phrase "such as" indicates that the subsection is not limited to the specified matters, those matters nevertheless serve to limit the scope of the section. To pass through this "gateway" and be susceptible to censorship, the publications must either deal with sex, horror, crime, cruelty, or violence, or matters which are akin to those matters. The subject matter must then "be dealt with in such a manner that the availability of the publication is likely to be injurious to the public good" before censorship is permissible. The word "objectionable" is used throughout the Act as a convenient method of referring to publications which come within subs (1). It has no other or independent meaning for the purposes of the Act.

[72] Publications which Parliament then considers to be objectionable beyond all argument are set out in subs (2). These are publications which promote or

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support, or tend to promote or support, the exploitation of the young for sexual purposes or various extreme and deviant forms of sexual conduct. Acts of torture and extreme violence or cruelty are also included.

[73] Subsection (3) lists factors to which "particular weight" must be given in carrying out the test under subs (1). Particular weight is to be given to the "extent and degree to which, and the manner in which", the publication deals with acts of torture or the infliction of serious physical harm or acts of significant cruelty, or various forms of unacceptable sexual conduct; or which exploits the nudity of the young; or which degrades, dehumanises or demeans any person; or which promotes or encourages criminal acts or terrorism. The subsection then, in para (e), includes any publication which represents, whether directly or by implication, that members of any particular class are inherently inferior to other members of the public by reason of a characteristic which is a characteristic that is a prohibited ground of discrimination in s 21(1) of the Human Rights Act.

[74] Subsection (3) does not expand the scope of what may be classified as objectionable under subs (1). It requires only that "particular weight" be given to matters specified in the subsection in determining whether a publication dealing with matters that pass through the "gateway" in that subsection is objectionable. This format embraces para (e). The paragraph does not confer any original jurisdiction, and to the extent that the Board and then the Full Court of the High Court may have thought otherwise they are, with respect, in error.

[75] Subsection (4) then specifies a number of factors which must be considered, although not necessarily be given "particular weight", in deciding whether or not a publication is injurious to the public good. They are, as is to be expected, also matters germane to the censorship of sex and violence.

[76] It is therefore wrong to approach the Act as if it is directed at preventing discrimination. The prohibited grounds of discrimination in s 21 of the Human Rights Act are relevant only if and to the extent that the publication

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falls within the scope of subs (1). Self-evidently, many of the grounds in s 21 would not apply. Any grounds that could be applicable are then only relevant and to be given particular weight to the extent and manner in which the publication in issue represents that members of a particular class of the public are inherently inferior to other members of the public because of a characteristic of that class. Section 21 is introduced into the censorship regime in a limited and appurtenant manner.

[77] It follows that ss 14 and 19 of the Bill of Rights are not in direct opposition to each other. In this respect, the Board and the High Court were led into error. Neither s 14 nor s 19 "trump" the other. By virtue of s 6 of the Bill of Rights, freedom of expression, as affirmed in s 14, is a necessary consideration where a provision in the Act is capable of more than one meaning. See *Moonan v The Film and Literature Board of Review* [2000] 2 NZLR 9. But this is so of any rights contained in the Bill of Rights which might be applicable to the publication in issue.

[78] The Board was clearly concerned to work out the relationship of its governing Act and the Bill of Rights apart from a question of interpretation. For my part, I would hold that, unless precluded by the governing statute, the pertinent rights affirmed in the Bill of Rights should always be a relevant consideration. When making a determination whether a publication deals with a matter such as sex or violence in a manner which, if available, is likely to be injurious to the public good, the Board is not restricted to a consideration of the matters specified in subs (2) to (4) of the Act. The substantive decision is to be made under subs (1). Rights to be considered would include s 19 if and when appropriate. Where s 3 applies, s 19 could be directly relevant, but otherwise the values underlying that section may still be pertinent to the determination whether the publication of pornographic sex or violence in issue is injurious to the public good. By virtue of the fact the Act deals with censorship, however, it will invariably tend to be the right to freedom of expression affirmed in s 14 which will be particularly germane to the Board's consideration.

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[79] But s 14 falls to be taken into account in the context of the Act. It does not override the objectives of the Act. Nor does it override the statutory direction that the Office of Film and Literary Classification and the Film and Literary Classification Board discharge their respective functions as spelt out in the Act. Section 14 is not to be applied in such a way that it erodes the protection Parliament intends the public to have from the publication of pornographic sex or violent material which it perceives to be damaging to the public good. Thus, if in the Board's opinion the publication promotes or supports, or tends to promote or support, the matters contained in subs (2) it must be deemed to be objectionable and s 14 can have no bearing on that issue. Further, if the Board is satisfied that one or other of the matters in subs (3) is present, that matter is to be given particular weight in the Board's determination. Again, s 14 cannot detract from that statutory requirement. Nor can the Board be excused from giving full consideration to the more general matters contained in subs (4). Freedom of expression does not override or outweigh the express matters contained in subs (2) to (4), but by virtue of its place in the Bill of Rights, it remains a relevant consideration under subs (1) in determining whether the publication is objectionable

The nexus between the subject matter and injuriousness

[80] In my view, the videos do not fall within the scope of subs (1) of s 3. For present purposes they would need to describe, depict, express, or otherwise deal with "sex" or a "matter[s] such as sex" in such a manner that the availability of the videos would be injurious to the public good. Consequently, the injuriousness must be linked to the sex or matter such as sex to bring the publication within the scope of subs (1). This link is lacking in the present case. For that reason, the Board assumed a jurisdiction it did not have.

[81] I appreciate that an alternative way of forming this viewpoint would be to hold that the Board reached a decision which no reasonable Board, properly instructing itself, could have reached. But in so far as the question in issue relates to the sensitive topic of censorship, I prefer to find that the Board

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exceeded its jurisdiction. Nor do I see any point in holding that the Board effectively exceeded its jurisdiction and then remitting the matter back to the Board for it to confirm that it lacks jurisdiction.

[82] Neither video contains any explicit sexual images (other than gay men kissing). Female breasts which would be visible in certain crowd scenes are scrambled. Certainly, there is a discussion of deviant sexual practices which the videos link with homosexuality, but these references comprise a minute fraction of the total footage. If considered objectionable these segments could readily be dealt with under ss 32 and 33 of the Act. Indeed, it would be incongruous to the point of being askew to assume jurisdiction to classify as objectionable the whole of the videos without invoking the procedure in those sections when only a minute fraction of the videos can be said to touch on sex and, then, to do so in a manner which could not conceivably attract censorship. What is emphasised in the videos is the perceived promiscuity and irresponsible sexual behaviour of male homosexuals and the fact that they have chosen to pursue the "homosexual lifestyle". Otherwise, the videos are essentially political tracts.

[83] I should clarify that I do not consider that sexual orientation can be brought within the meaning of "sex" or "such matters as sex" for the purposes of the Act. Such an exclusion accords with North American jurisprudence: see for instance *Holloway v Arthur Andersen & Co* 566 F 2d 659 (1977), at 662-3 (9th Cir); *Blum v Gulf Oil Corp* 597 F 2d 936 (1979), at 938 (5th Cir); and *Williamson v A G Edwards & Sons Inc* 876 F 2d 69 (1989), at 70 (8th Cir). But irrespective of any such authority, sexual orientation cannot plausibly be included within the word "sex" or the phrase "matters such as sex" in the context of the Act. In general terms, this exclusion follows from the fact that the Act is in part directed at the censorship of pornographic sex and not at preventing discrimination based on sex. In an enactment directed at discrimination, the word "sex" may be tenably defined to include "gender", but that extension would not ordinarily be appropriate in a statute dealing with the censorship of pornographic sex. The word must necessarily take its meaning from its statutory context. A meaning excluding sexual orientation

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is also intimated by the other words with which the word "sex" is associated, that is, "horror, crime, cruelty, or violence". Pornographic sex is compatible with these concepts; sexual orientation is not. Subsections (2) and (3) further contribute to this meaning referring to socially unacceptable acts for sexual purposes or various forms of deviant sexual conduct. Consequently, in using the word "sex", subs (1) is essentially concerned with the depiction of unacceptable sexual conduct or activity. The concept of sexual orientation does not fit this description. Nor can comment on sexual orientation as a "lifestyle" tenably fall within the rubric of sex or a matter such as sex.

[84] I can turn now to the point on which I rest my opinion that the Board exceeded its jurisdiction. In my view it is decisive. The Board failed to link the subject matter at the "gateway", that is, sex or a matter akin to sex, with the test which is provided for determining whether that subject matter is objectionable, that is, whether it is portrayed in such a manner that the availability of the publication is likely to be injurious to the public good. In forging this link the crucial words are "in such a manner". Thus, it is not acceptable that a publication might deal with sex in an unobjectionable way but the publication then be held to be injurious to the public good for unrelated reasons. Where the alleged harm of the publication is unrelated to matters such as sex, horror, crime, cruelty, or violence, the Board does not have the jurisdiction to go further. Of course, where applicable, but only where applicable, the extent and the manner in which the publication as a whole may dehumanise or degrade the participants or represent that some groups are inherently inferior to others must be given particular weight. But the acid test cannot be escaped. It is the treatment of sex, or a matter such as sex, which must be injurious.

[85] In this case the alleged injuriousness to the public good was the manner in which the videos depicts homosexuals. This injuriousness is unrelated to the sex or a matter such as sex which is the subject matter of the videos for the purpose of subs (1). There is, in other words, no link between the subject matter of the publication and the respects in which the availability of the publication is said to be injurious to the public good.

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[86] It should probably be added that, because of the approach which it adopted, the Board did not itself seek to relate the injuriousness of the videos to sex or a matter such as sex. Self-evidently, it could not have done so. Nothing in the videos could plausibly be said to deal with sex in a manner which could be injurious to the public good. On the contrary, sex, to the extent that sex is dealt with at all, is depicted in a way which is commonplace and unexceptional.

[87] It is, I believe, important to insist upon this direct connection between the subject matter of the publication as defined in subs (1) and the manner in which its availability is likely to be injurious to the public good. If this is not done, the focus of the legislation is blunted and the jurisdiction of the Board is expanded beyond what was contemplated by Parliament in enacting a censorship law. It would be open to the Board to consider the question of injuriousness on a basis outside the scope of censorship legislation. Political, religious or other opinions which should have unrestricted dissemination in a free and open society would be at risk of being banned if they were expressed in a publication which also dealt, perhaps peripherally, with sex or violence. In effect, that was the position here. There was an extra-jurisdictional mismatch between the subject matter of the videos for the purpose of subs (1) and the respects in which it was alleged the videos were injurious to the public good.

[88] For the above reasons I consider that the Board lacked jurisdiction. It follows that the decision of the Full Court of the High Court was in error. I would therefore allow the appeal and quash the Board's decision.

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