

NEW ZEALAND MEDIA & ARTS LAW UPDATE
RECENT DEVELOPMENTS: DEFAMATION AND CENSORSHIP

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[227] The period under review has been one in which the power of the media to affect legal proceedings has been prominent, in particular in relation to the principle of open justice. Defamation cases raised issues relating to the defence of truth and how it relates to mitigation and lesser meanings, whether later different publications can support aggravated damages, and whether the same facts can support claims in negligence and defamation.

In the area of censorship, a familiar case wound to a surprising close, the High Court dealt with the application of the classification legislation to developing technology, film festival organisers and a community standards group battled over the matter of appeal rights in relation to controversial films, the High Court required the giving of better reasons in relation to Bill of Rights issues, and a government committee issued a conservative report urging a broadening of censorship laws, to which the government responded in a very cautious fashion. Developments in the areas of broadcasting standards, the Press Council, suppression and privacy will be covered in a forthcoming issue of the *Media and Arts Law Review*.

Defamation

Mitigation and truth

The High Court dealt with another aspect of proceedings on foot for some time in *Manning v TV3 Network Services*,² involving a TV3 broadcast of a programme alleging Manning had stolen rimu trees in a manner that amounted to ‘tree rustling’. In this interlocutory application, the Court confirmed two methods of proving a generally bad reputation. It was required to decide whether, if truth failed, a defendant can rely on evidence adduced to support truth in mitigation. Hansen J held that this is possible, outside of any provision in New Zealand’s *Defamation Act 1992*.³ Further,

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² [2002] High Court, Christchurch, CP 143/99 (Unreported, 25 July 2002). See (2002) 7(3) *Media & Arts Law Review* 224.

³ Referring to *Television New Zealand v Quinn* [1996] 3 NZLR 24, and Todd, *The Law of Torts in New Zealand* (3rd ed, 2001) 836, n 240.

the [228] judge considered the ambit of s 30 of the *Defamation Act*,⁴ finding that it allowed the proving of specific instances of misconduct, which, if shown to be generally known, will provide the foundation for an available inference that the plaintiff has a generally bad reputation in the relevant aspect.⁵ The judge thought the aspect to which the proceedings related in this case was an allegation of dishonesty, as the sting was an allegation of theft, a subset of dishonesty. This did not encompass any unethical or dishonourable behaviour which the plaintiff wished to have considered. However, the fact that s 30 was not engaged did not mean the evidence the plaintiff had showing unethical or dishonourable behaviour could not be used in the former way established by the common law, to show generally bad reputation.

Aggravated damages

*Hall v Fourth Estate Holdings Ltd*⁶ involved a claim by a prominent lawyer that she was defamed in an article published by the defendant which concluded with a reference to a story about a high profile lawyer's mental health. In fact, the reference was to another person, although the body of the article was about the plaintiff. The plaintiff filed defamation proceedings, clearly facing significant identification issues. Some two years later, the defendant published a further story containing other statements about the plaintiff. The plaintiff sought to argue that the later story also reflected on her professional competence and integrity, thus aggravating the original defamation. The issue therefore, was whether a fresh defamation, not directly related to the first, may be taken into account as an aggravating factor, rather than be sued upon as an independent defamation. The judge accepted this proposition. However, he held this could only enlarge the scope for damages for hurt feelings, not for reputational damage; it could not permit a subsequent award, but only increase the award originally pursued; and the defendant must be able to respond adequately, otherwise discretion could be exercised to require separate proceedings. In this case, the Court held there was sufficient nexus between the articles, which both contained statements going to the professionalism of the plaintiff. By a later ten to two majority,

⁴ Which provides that in any proceedings for defamation, the defendant may prove, in mitigation of damages, specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose reputation is generally bad in the aspect to which the proceedings relate.

⁵ *TVNZ v Ah Koy* [2001] Court of Appeal, CA 64/01 (Unreported, 26 November 2001) [44]. See (2002) 7(3) *Media & Arts Law Review* 228.

⁶ [2002] High Court, Auckland, CP 476/00 (Unreported, 9 August 2002).

a High Court jury rejected the plaintiff's claim. The plaintiff filed for a retrial but eventually abandoned the proceedings, and agreed to pay costs to the defendant.⁷

Negligence and defamation — again

*King v TV3 Network Services*⁸ was a partly successful application by the plaintiff for extension and review of a decision striking-out three of his four causes of action. Mr King ran a motor repair business which was given a poor evaluation on the defendant's consumer television show 'Target'. After complaining, Mr King was allowed to service and tune another car but no concession was made or any apology published. The plaintiff claimed interference with business by unlawful means, a breach of the *Fair Trading Act 1986*, defamation, and a cause of action in negligence. All claims except the defamation claim were originally struck out. On the issue whether the negligence claim should have been struck out, the Court considered the effect of the Court of Appeal decision in *Midland Metals Overseas Pty Ltd v The Christchurch Press Company*⁹ where the Court of Appeal held it would not superimpose a tort of negligent untrue statements causing damage to reputation over existing torts, including defamation, for major policy reasons, one being that to do so would bring about a new and significant fetter on freedom of [229] speech affecting not only the news media, but citizens generally.¹⁰ In the *King* case, however, Wild J did not think *Midland Metals* assisted the defendants. He distinguished the latter because there defamation was open to the plaintiff, whereas in *King* it was argued by the defendants that the plaintiff had no cause of action in defamation because he was not personally defamed. Secondly, the judge thought that in *Midlands* no necessary proximity or relationship between the parties sufficient to establish negligence existed, whereas in this case it was arguable. Wild J reinstated the claim to stand together with that in defamation. The judge essentially avoided the policy arguments raised in the Court of Appeal by suggesting there would be no overlap of different areas of law. However, this view depended on an assumption that the plaintiff's claim in defamation would fail, in which case the claim in negligence could provide a remedy. The effect of the decision is to allow claims for negligence and defamation to be made concurrently. That does not sit well with *Midlands*.

⁷ *National Business Review*, 4 October 2002.

⁸ [2002] High Court, Wellington, CP86/01 (Unreported, 1 October 2002).

⁹ [2002] 2 NZLR 289. See (2001) 6(3) *Media & Arts Law Review* 250.

Truth and Lesser Meanings

In *Julian v Television New Zealand Ltd*¹¹ the plaintiff applied for preliminary determination of certain issues. The facts were that Julian owned the company *Julian's Electrical & Energy Conservation Ltd* which began importing a device called 'Powermax'. This device was said to reduce bacteria by up to 96 per cent and to protect against bacterial and parasitic infection. However, the Commerce Commission undertook its own tests which revealed that the devices were totally ineffective in reducing bacterial and parasitic content in water. A story about the device was broadcast on TV One in which it was described as a 'rip-off' and the distributor was said to have 'duped' thousands of New Zealanders. The plaintiff and his company issued proceedings alleging that the news item was false and defamatory, claiming serious economic and financial loss.

The decision is significant because the judge, Salmon J, traversed the problem of whether a defendant can plead and rely on different imputations than those pleaded by the plaintiff, and then attempt to prove those imputations (usually lesser) are true. In this case, the defendant suggested a meaning that the plaintiff misled a large number of New Zealanders. The plaintiff claimed the broadcast suggested he was a con man who duped thousands, and his company was engaged in a scam. New Zealand precedent establishes that it is not open for a defendant to seek to justify a lesser meaning than that contended for by the plaintiff,¹² while English authority takes a more relaxed approach.¹³ Salmon J noted the *Defamation Act 1992* had been enacted since this position was established, and thought *Manning v TV3 Network Services Ltd*¹⁴ was the only case since its enactment to consider the issue.¹⁵ The Full Court of the High Court in *Manning* was of the view [230] that *Crush* could now be decided differently, but did not have to decide the matter. Salmon J did not share that view,

¹⁰ Ibid 304 [65] (Tipping J).

¹¹ [2003] High Court, Auckland, CP 367-SD/01 (Unreported, 25 February 2003).

¹² *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234.

¹³ *Polly Peck (Holdings) Plc v Trelford* [1986] 1 QB 1000.

¹⁴ [2001] High Court, Christchurch, CP 143/99 (Unreported, 31 August 2001). See (2002) 7(3) *Media & Arts Law Review* 224–5.

¹⁵ Salmon J also ignored a discussion of the issue in the Court of Appeal in *Television New Zealand v Ah Koy* [2002] 2 NZLR 616. TVNZ argued it had a right to assert lesser meanings and prove the truth of them. However, the Court found it did not have to decide that the law had changed because the lesser meanings asserted by TVNZ were not materially different from the meanings asserted by Mr Ah Koy. On the assumption that a lesser defamatory meaning can be pleaded and proved, but not

and furthermore, rejected an argument based on the *Bill of Rights* freedom of expression in support, by stating that the *Defamation Act* is clearly intended to provide limits to such a freedom.

The judge also considered aspects of the defence of statutory qualified privilege, although he decided that the question of the application of the defence was not one to be determined by way of preliminary application. He thought the defence could apply to a fair and accurate extract from or summary of a statement or document made by the Commission in the exercise of its functions or powers.¹⁶ In this case, the Chair of the Commerce Commission made statements for the purpose of the news report and the judge considered this came within the statutory protection. He also found that the occasion was a privileged one because the public generally had an interest in receiving the information about a product sold nationally. The media had a reciprocal interest or duty to disseminate the information. The judge left the matter of whether the defence as made out actually applied, for full hearing.

Miscellaneous

Buchanan v Jennings,¹⁷ discussed previously, is to be appealed to the Privy Council. It is hoped that august body, which the Government has announced will be abandoned as a court of last resort for New Zealand, can cast light on the difficulties accumulating around the defence of absolute privilege.

Overseas cases which will have, as yet, unknown effect in New Zealand, are *Dow Jones v Gutnick*¹⁸ in relation to the finding that in the case of material on the World Wide Web, it is where a person downloads the material that the damage to reputation may be done; and the series of decisions in *Loutchansky v Times Newspapers*, in which the question of the responsible behaviour of the media in relation to qualified privilege is being hammered out by the courts in the United Kingdom. The latter has

expressing a view either way, the Court held this should only be permitted if the alternative meaning is asserted by the defendant. See (2002) 7(3) *Media & Arts Law Review* 224–5.

¹⁶ By virtue of s 106(10) of the *Commerce Act 1986* and cl 3 of Pt 2 of Sch 1 to the *Defamation Act*.

¹⁷ [2002] 3 NZLR 145. See (2001) 6(3) *Media & Arts Law Review* 248.

¹⁸ (2002) 194 ALR 433.

impact on New Zealand's own developing qualified privilege defence established in *Lange v Atkinson*.¹⁹

Censorship

Child pornography

The case of Mr Gerardus Adrrianus Maria Moonen, his book *The Seventh Acolyte Reader*, and certain photographs of nude children, has been well documented in this publication.²⁰ The question of the classification of Mr Moonen's publications under the *Films, Videos and Publications Classification Act 1993* (the Act) has now been to the Board of Film and Literature Review (the Board) three times,²¹ the High Court and the Court of Appeal on two separate occasions each. The process resulted in New Zealand's leading decision on censorship and the *New Zealand Bill of Rights Act 1990: Moonen No 1*,²² in which a series of guidelines were outlined by Tipping J. Mr Moonen's second approach to the Court of Appeal, *Moonen No 2*,²³ revealed a Court of Appeal which did not wish to revisit the guidelines established by it in *Moonen No 1*, and which did not see a need to give any further certainty to the current law.

[231] The saga appears to have come to an end with *Collector of Customs v Moonen*,²⁴ in which Mr Moonen faced two charges under the *Customs Act 1966*²⁵ of importing into New Zealand negative strips and one proof sheet which were prohibited goods because they were classified as objectionable (by the Board, as outlined above). A quarantine officer had opened three parcels from Holland addressed to Mr Moonen in 1995 and discovered the material, thus engaging in a search and seizure of the items. While the process of classification had taken until 2002, this case involved the final issue whether the quarantine officer's original

¹⁹ [2000] 3 NZLR 385. See (2000) 5(3) *Media & Arts Law Review* 196 and (2001) 6(3) *Media & Arts Law Review* 247.

²⁰ (2000) 5 HRNZ 224. See (1999) 4 *Media & Arts Law Review* 19; (2000) 5(3) *Media & Arts Law Review* 196; (2001) 6(3) *Media & Arts Law Review* 252; (2002) 7(4) *Media & Arts Law Review* 316.

²¹ Some of the photographs were referred to the Board a third time in 2002 by the District Court as more than one year had elapsed since the last decision was recorded (Decision of District Court, 31 July 2002). The Board in this case found the photos objectionable using an exhaustive Bill of Rights analysis, and also refused to release the photographs to Mr Moonen's sole use for artistic purposes: *Decision of Film and Literature Board of Review on a Direction from the District Court re Moonen* (25 November 2002).

²² *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9

²³ *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754

²⁴ [2002] District Court, Wellington, CRN 70032003398/3400 (Unreported, 4 December 2002).

²⁵ Section 48(7)(a).

search and seizure was unlawful and unreasonable under s 21 of the *New Zealand Bill of Rights Act 1990*. The judge found the officer had no statutory power or authority to open parcels, and therefore this unlawful act tainted any subsequent dealing with the parcels. The search was also unreasonable. The evidence was therefore excluded.

Classification of jpg computer files

In *Goodin v The Department of Internal Affairs*²⁶ the High Court addressed the question whether a jpg computer file could be a publication under the Act. Mr Goodin owned a computer with two hard drives. He was charged and convicted in relation to 44 charges of possession of an objectionable publication.²⁷ The charges were expressed as relating to electronic pictures stored in jpg files located in two separate storage areas on the hard drives. One issue was whether a jpg file could be a publication under the Act, which in part of s 2 defines 'publication' to mean:

... any film, book, sound recording, picture, newspaper, photograph, photographic negative, photographic plate, or photographic slide ... or ... any paper or other thing on which is recorded or stored any information that, by the use of any computer or other electronic device, is capable of being reproduced or shown as any word, statement, sign, or representation.

The matter had not been directly addressed by the courts before, although there is some support for such a finding.²⁸

O'Regan J thought it clear that a computer hard drive can come within the definition. This has been assumed for some time, both by the Classification Office and the Department of Internal Affairs Censorship units which seize computer hard drives when executing warrants under the Act. Further, the judge held that data stored in a computer file or folder or on a computer disk which, by the use of a computer or other machine can be displayed in the form of an image, came within the ambit of the term 'picture' in the definition. He did this by accepting that the purpose of the Act was to provide a uniform regime for the control of objectionable material in a broad range of

²⁶ High Court, Gisborne, AP11/01 (Unreported, O'Regan J, 24 July 2002).

²⁷ Section 131 of the Act.

media. O'Regan J also found individual jpg files came within the definition of 'other thing' on which is stored information that by use of a computer is capable of being reproduced or shown as a representation. But the judge went further and stated that even if he had confined [232] operation of the Act to hard drives, he would have been prepared to amend the charges to cover the hard drives to ensure that the Act had effect.

The modern purposive approach used here is appropriate. O'Regan J could be described as bridging a hiatus in the legislation²⁹ without going beyond ascertainment of meaning. O'Regan J also applied s 6 of the *Interpretation Act* which legislates a dynamic approach to interpretation, to find the law is always speaking.

Following *Goodin*, Information Service Providers (such as Xtra, which serviced Mr Goodin) expressed concern that they might attract liability under the Act. However, the possession offence in the *Goodin* case requires some element of knowledge. The provision under which Goodin was charged makes it an offence to have in your possession an objectionable publication without lawful authority or excuse. It is no defence to such a charge that the defendant had no knowledge or no reasonable cause to believe that the publication to which the charge relates was objectionable. O'Regan J was of the view that this provision did not remove a requirement for some other sort of knowledge element altogether. Therefore, he implied a requirement for knowledge of the existence of a publication — that it is there. Mere proof of presence of an objectionable publication is insufficient for the purposes of this offence.

The unresolved issue is whether implied knowledge will be sufficient. Some ISPs monitor services, and it could be suggested that these providers are aware of the nature of the material they allow to travel on their networks. In overseas jurisdictions such as the USA, provision has been made to immunize information service providers from liability for information that originates with third parties.³⁰ In New Zealand, the Government Administration Committee has recently inquired into the capacity of the

²⁸ *S v Auckland District Court and New Zealand Police* [1999] High Court, Auckland, M310/SW99 (Unreported, 11 March 1999); *Department of Internal Affairs v Merry* [2000] DCR 733; *R v Millward* [2000] DCR 633.

²⁹ J Burrows, *Statute Law in New Zealand* (2nd ed, 1999) 127.

³⁰ *Communications Decency Act 1996* (NZ) s 230.

Act to deal with the impact of new technology on the classification process. It has recommended that obligations be placed on ISPs operating in New Zealand, regulated by a code of practice, to help police material emanating from outside the country,³¹ and that the Government examine the need for licensing or registration of ISPs.³² The Government has responded cautiously, stating that it will examine practical measures to enhance the application of the censorship laws to electronic material.³³

Baise-Moi, Festival Films and Interim Restriction Orders

The controversial French film *Baise-Moi* in which two female characters embark on a violent crime spree, leading to the death of one and the arrest of the other, has been noted previously.³⁴ The Office classified the film as objectionable except if its availability was limited for the purpose of study in a tertiary media or film studies course or as part of a film festival, and limited to those over 18 in both cases. On application for review by the Society for the Promotion of Community Standards (SPCS), the Board of Review passed the film as R18 after taking freedom of expression into account — it saw the film as a provocative work on the human condition.³⁵ That decision was appealed to the High Court in *re Baise-Moi v Society for the Protection of Community Standards*³⁶ Hammond J found the Act required consideration of the particular way the video (film) might be shown, and s 3(4)(f) required the intended [233] or likely use of the publication to be considered, including on television, and remitted the case to the Board to allow it to reconsider its classification. The Board of Review on its second look found the film version of *Baise-Moi* objectionable if made available to persons under the age of 18 years. Videos or DVD's of the film (with exactly the same content) were to be objectionable unless restricted to theatrical exhibition or exhibited as part of a tertiary media studies or film studies course, and in all cases to persons who have attained the age of 18 years.³⁷ The Board spelt out its reasoning quite fully and attempted to show that it had

³¹ Government Administration Committee, Parliament of New Zealand, *Inquiry into the Operation of the Films, Videos and Publications Classification Act 1993 and related issues: Report of the Government Administration Committee* (March 2003) Recommendation 27.

³² *Ibid* Recommendation 28.

³³ *Government Response to Government Administration Committee Report on Its Inquiry into the Operation of the Films, Videos and Publications Classification Act 1993 and Related Issues* [24].

³⁴ See (2002) 7(4) *Media & Arts Law Review*, 316.

³⁵ *Re Baise-Moi*, Decision of the Board of Review (13 March 2002).

³⁶ [2002] High Court, Wellington, AP 76/02 (Unreported, Hammond J, 23 July 2002).

³⁷ *Re Baise-Moi*, Decision of the Board of Review (1 November 2002).

applied the five steps in *Moonen No 1*, although it did state it would prefer a simpler approach to the latter and acknowledged that *Moonen No 2* would allow it to take a different approach. The Board also noted Hammond J's concern at the possibility of publications being screened on television, but found it had no jurisdiction to deal with television.

The SPCS appealed 23 days after receiving the Board's second decision and applied to the High Court for an interim restriction order until the appeal was determined. The application was dismissed.³⁸ France J in an oral judgment found that the Board appeared to have misunderstood Hammond J's earlier judgment as to the impact of its decision on possible television broadcast of the film in terms of the *Broadcasting Act 1989*. She considered the High Court to mean that if the choice for the Board is between Festival or general release, one relevant factor in that choice is that general release may mean television use. However, France J considered that the consequences regarding television use had largely been met in this case by later undertakings given about non-theatrical release, therefore it did not matter that the Board did not deal with the issue. The most compelling factor which weighed against a restriction order was the delay by the SPCS in pursuing the appeal. France J noted the link between appeal rights and interim orders, and that it is expected such avenues will be exercised in a timely manner. In this case, the advertising of the film had already begun, there was a strong public interest in freedom of expression, and the Court was not satisfied the public interest required an interim restriction order. The decision appeared to favour the arguments made in the media by film festival organizers wishing to screen controversial material, that the SPCS was using its appeal rights in a tactical manner to prevent film festival screenings.

The same fact pattern was repeated with other festival films, but involved slightly different powers to grant restriction orders vested in the President of the Film and Literature Board of Review, Claudia Elliott.³⁹ This sort of interim restriction order

³⁸ *Re Baise-Moi* [2003] NZAR 200.

³⁹ Interim restriction orders can be made by the President under s 49 of the Act. In these cases the SPCS applied for interim restriction orders in relation to four films due to be shown at film festivals (the films and decision dates and outcomes were: *Bully* (10 May 2002, order granted) *Visitor Q* (11 April 2002, order granted), *The Piano Teacher* (12 and 16 July 2002, no order), *Y Tu Mama Tambien* (12 July 2002, no order)).

effectively bans a film until the process of review of an original classification can be determined by the Board. An order can be applied for at any time before the review is completed, to the President of the Board. The President alone makes the decision, if satisfied that it is in the public interest to do so. Every application must be dealt with as soon as practicable.

The films *Bully* and *Visitor Q*, were to be shown at Becks Incredible Film Festival. The President interpreted the phrase ‘in the public interest’ broadly in the absence of any guidance in the statute and granted a restriction order. However, the President reached a different view when dealing with the films *The Piano Teacher* [234] and *Tu Mama Tambien*, which were to be shown at the more mainstream Auckland Film Festival. This difference, (and indeed, contrast to the approach of Hammond J in *Baise-Moi*), is explicable because express reference was made in the later decisions to *Fahey v TV3*⁴⁰ which required any prior restraint of free expression to pass a much higher threshold than the arguable standard case. Thus, giving more prominence to freedom of expression than in her previous decisions, the President concluded that though the SPCS had a legal right to apply for an order, it also had an obligation to present evidence to a sufficient standard to meet the *Fahey* requirements, which it had not been able to do. The decisions of the President of the Board of Review are not consistent, because there is little to set them apart from each other, but the results conflict. However, the later decisions demonstrate the required legal approach of giving prominence to freedom of expression (*Moonen 1* and *2*) and are therefore preferable. The decisions attracted much media criticism, some of it driven by film festival supporters.

On final review by the Board, *Visitor Q* was found to be objectionable except if the availability of the publication was limited for the purposes of study in a tertiary media or film studies course, or as part of a film festival organised by an incorporated film society, the New Zealand Film Festival Trust, or the Incredible Film Festival, and in all cases to persons who have attained the age of 18 years.⁴¹ Release on video or DVD has the same classification. *Bully* was found to be objectionable unless shown only to persons aged 18 years or over, and to be available for release in cinemas and also on

⁴⁰ [1999] 2 NZLR 129, 132.

video and DVD.⁴² In both cases, the Board found it had no jurisdiction to deal with possible broadcast on television, which does not accord with France J's views in *Baise-Moi*, above. However, in the decisions, the Board again spelt out its reasoning quite fully and attempted to show that it applied the five steps in *Moonen*, even though it indicated once again it would prefer a simpler approach to the latter and acknowledged that *Moonen No 2* would allow it to take a different approach.

Giving of Reasons

In an appeal by *Vixen Digital Ltd re Triple X NR31*,⁴³ Durie J considered the need for the Board to give reasons for its decisions, as required by s 55 of the Act. In this case the judge noted there is no general obligation on judges to give reasons, but that such an approach is regarded as desirable.⁴⁴ In relation to censorship, Durie J found it is not enough to merely assert that the matters required by statute to be considered and weighed have been so dealt with, and that the *Bill of Rights* requires more than a minimal response. A public law approach (*Moonen* yet again) required that reasons given should inform those with a power of review, of the process of thought involved in the original decision. However, reasons need not be extensive or cover every point, but should be sufficient to survive the review process. More substantive reasons were required in this case, and the judge directed the Board to reconsider its original decision. Although judges have no obligation to give reasons, failure to do so in the light of *Moonen No 1* must render censorship decisions extremely vulnerable to appeal. And it is axiomatic that once given, reasons must be adequate in the public law sense outlined by Durie J, since they share the same vulnerability. Durie J did not examine *Moonen No 2*, which was delivered three days before his judgment, and which allowed economical reasons, but required sufficiency to support conclusions reached. *Vixen* in the High Court appears compatible with the view of the Court of Appeal in *Moonen No 2*.

On review, the Board found *Vixen* to be objectionable except if the availability of the publication is restricted to persons who have attained the age of 18 years and with conditions that any label contains a warning as to explicit sexual content and unsafe

⁴¹ *Re Visitor Q*, Decision of the Board (1 November 2002).

⁴² *Re Bully*, Decision of the Board (11 April 2003).

⁴³ [2002] High Court Wellington, AP 101/00 (Unreported, 11 April 2002).

sex practices, as well as a requirement for a safe sex [235] message at the commencement of the publication.⁴⁵ Identical release on video or DVD attracts the same classification. Once more, the Board spelt out its reasoning quite fully and applied the five steps in *Moonen*, also stating it would prefer a simpler approach to the latter. However, the Board also noted its composition had changed from that which made the earlier decision, and considered that it is not possible for the current Board to give reasons for the prior Board's decision as required by Durie J in the High Court.

Government Inquiry into Censorship Issues and Response

The Government Administration Committee has issued a conservative report on its inquiry into censorship matters.⁴⁶ The main recommendations include a widening of the definition of objectionable publications, to allow matters such as nudity, offensive language, invasion of privacy, mental illness, suicide, sexual orientation and the sexual transmission of HIV, to come under the Act;⁴⁷ that the Act maintain consistency with the *Human Rights Act* (thus overriding the effect of the Court of Appeal in *Living Word Distributors v Human Rights Action Group*⁴⁸ which allowed freedom of expression to prevail in relation to videos which were homophobic);⁴⁹ that the government complete its review of offence provisions;⁵⁰ and in relation to the impact of the Internet on the censorship regime, that search and seizure powers be increased,⁵¹ that ISPs become more regulated,⁵² and that the *Broadcasting Act 1989* be reviewed to examine the adequacy of the current definition of broadcasting.⁵³ The government's response has essentially been a holding one.⁵⁴ An announcement had already been made that the government will significantly increase penalties for child pornography offences and will raise penalties for other objectionable publications.⁵⁵ In relation to expanding the definition of objectionable material, the government will

⁴⁴ *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546

⁴⁵ *Re Triple X NR31*, Decision of the Board (1 November 2002).

⁴⁶ Government Administration Committee, above n 31. See (2001) 6(3) *Media & Arts Law Review* 254.

⁴⁷ *Ibid* 5.

⁴⁸ [2000] 3 NZLR 570.

⁴⁹ See (2002) 6(3) *Media & Arts Law Review* 253.

⁵⁰ Government Administration Committee, above n 31, 8.

⁵¹ *Ibid* 7.

⁵² *Ibid*.

⁵³ *Ibid*.

⁵⁴ Government Response to Government Administration Committee Report, above n 33.

only consider the relevant laws,⁵⁶ and as regards the impact of the internet, it will examine practical measures.⁵⁷

⁵⁵ Ibid 2, 8. The intention is to bring penalties for supply and trading in child pornography offences broadly into line with those of the United Kingdom and Canada.

⁵⁶ Government Response to Government Administration Committee Report, above n 33, 3.

⁵⁷ Ibid 7–8.