

## DISSENTING OPINION OF DR DON MATHIESON, PRESIDENT

1. The majority decision, lucidly expressed by the Deputy President, records that I disagree with the result reached by the majority. I continue to believe that the appropriate restriction is R18. At the very least there should be an R14 restriction so that the book may not lawfully be distributed to persons aged 12 and 13 or even younger.
  
2. Despite all the submissions received by the Board, I adopt the reasons set out in my dissenting opinion of 17 December 2013. INTO THE RIVER is exactly the same in content as it was in 2013. I find the reasons of the majority for departing from the view expressed by the majority members of the Board in 2013 unconvincing. I shall elaborate that point and it will be necessary to expand on my 2013 reasons although they still essentially represent my thinking nearly 2 years later.
  
3. I agree with much of the majority decision. To avoid misunderstanding I think it is wise to rehearse the principal propositions in the majority decision with which I agree and on which I need to say no more. I agree that:
  - The personal views of Board members about whether the book is objectionable are irrelevant. As is the case for the majority, the Films, Videos, and Publications Classification Act 1993 is the only starting point for me. Thus my Christian faith is irrelevant. As the Act majors on the possibility of harm and injury to the public good, the morality of Te Arepa's luridly described sexual acts and his drug taking is irrelevant.
  - The NZ Bill of Rights Act 1990 must be taken into account. I have done so. What must drive any decision on a review under the 1993 Act is the wording of that Act. Section 5 of the 1990 Act authorises certain restrictions on the general right of freedom of expression.
  - The publication does not fall within s.3(2) of the 1993 Act (hereafter "the Act").
  - The dominant effect of the publication as a whole is what must be assessed.

- This book does describe, depict or otherwise deal with matters such as sex, crime, cruelty and violence, and therefore clearly passes through the gateway expressed in s.3(1) of the Act.
- There are aspects of this book that many will find offensive and many will regard as entirely inappropriate for children.
- It may well be that some “intermediate aged children” will read the book. (I would go further, however: it is highly likely that an appreciable number of 12, 13, 14 and 15 year olds will read the book, especially given all the media publicity).
- Any comparison with LOST GIRLS (assuming the legitimacy of reaching a conclusion from such a comparison, and treating the comparison as decisive- which as a matter of law I do not accept) does not assist the Board.

4. It is true, as the majority decision states in para 29, that “the Board has no power to review the decision by the Classification Office to accept the application for reconsideration inside the normal three year period” if that means act in the same way as the High Court in an application for review under the Judicature Amendment Act 1972. In the present case the Office accepted an application under s.42(3) inside the three year period. The Chief Censor professed himself satisfied that “special circumstances” existed within the meaning of s.42(3)(b). The Office then proceeded to issue a decision nullifying the carefully considered decision of the Board in 2013. A subsidiary reason for my interim restriction order, clearly signalled in the order itself, was that it was arguable that the Chief Censor’s decision was unlawful, from which it would follow that the Office would lack jurisdiction to entertain the reconsideration, and that it was independently in the public interest to issue the order-which would enable this arguable result to be argued. In its submissions to the Board the Office has, however, elected to be silent on this jurisdictional point.

5. That silence was strange especially when the Office had received Family First’s written submissions which contained detailed reasons for asserting the Chief Censor had acted unlawfully. The factors set out in the Chief Censor’s Notice of Decision dated 14 August 2015 were:

- the capacity of public libraries to mitigate the injury to the public good which might but for the restriction flow from unrestricted access to the book;
- the shared views of librarians across NZ, in particular the 63 public libraries run by local government authorities;
- the impact that the restriction had on the value of the book as a teaching resource;
- the significance of the book as an aid to countering issues in NZ about bullying.

6. In regard to the last circumstance, Family First submitted, and I agree, that a book may “address the issue of bullying effectively without being infested with gratuitous and offensive descriptions of sexual encounters involving children and adults, sexual grooming, rape, the normalisation of drug use etc”.

7. Section 42(3)(a) is authority for a reconsideration if, in the case of a film, the film “has been substantially altered since” the earlier decision of the Chief Censor or the Board. That powerfully assists in the interpretation of paragraph (b). In my opinion what paragraph (b) requires is some supervening event which has altered the situation relevantly, eg the amendment of a relevant Act of Parliament, or the excisions made in a new edition of the book. “Special circumstances” cannot, as a matter of law, include the mere existence of dissatisfaction with the earlier decision, however strongly supported, or the existence of the probable practical consequences of an earlier imposed AGE RESTRICTION. A desire to have another look at an earlier decision cannot legally qualify as a “special circumstance”. Nor does the existence of pressure on the Office to reconsider per se amount to such a circumstance.

8. In my opinion none of the factors cited by the Chief Censor amounts to an eligible “special circumstance” and his discretion was exercised unlawfully. The formula in paragraph (b) is not “if in his opinion special circumstances exist”. The “policy of the Act” (the primacy of which was recognised by the House of Lords in *Padfield’s case* (*Padfield v MAFF* [1968] AC 997)) is that a publication should not, in the public interest, be frequently reclassified, and the 14 August decision runs counter to that policy. A discretion wielder “must be guided by relevant considerations and not by irrelevant” ones: Lord Denning MR in *Breen v AEU* [1971] 2 QB 175,190. An age restriction

inevitably involves inconvenience for librarians and shopkeepers. When inconvenience is actually experienced this cannot count as a special circumstance justifying a reconsideration. To hold otherwise would be to confuse the jurisdiction to reconsider with an arguable ground for changing the earlier decision should jurisdiction exist.

9. I return to the contents of the book. It is notable that the proponents of an unrestricted classification, and indeed the majority members of this Board, feel able to refer simply to “two sex scenes”: see eg paras 43b and 59c of the majority decision. They do not quote the relevant passages which are gratuitously explicit in my view. If they were planned to be read aloud as part of a radio play there would immediately be an understandable howl of protest, and they would be removed. The impact of the written word is of course different but I cannot see that that somehow renders them more acceptable; indeed the printed word often has more influence, because it is not evanescent, than the spoken word. Take the scene between 13-year old Te Arepa (or Devon) and the young Maori mother, Tania, where sexual intercourse leads to “draping the wall of the bathroom with a ribbon of sperm” (page 159). How could that contribute to a valuable discussion about the dangers faced by young teenagers in modern society?

10. I repeat my previous dissenting opinion:

*“I do not think that the majority grapple with the fact that the principal character in the book who comes to be called Devon, is at all times aged either 13 or 14. The two extremely graphic sex scenes do not concern a teenager of 16 or 17. It is injurious to the public good to normalise, as the book does, sexual intercourse by young teenagers. Even if it is prevalent in our society it is injurious to depict it as a normal activity for 13 - or 14-year olds to engage in because this tends to encourage wholly undesirable experimentation. If sex at such a young age is regarded by a 13-year old as normal there are all too likely to be mistakes - young teenage pregnancies, coercion, drug administration to overcome reluctance and an absence of consent (ie rape) among them.*

*INTO THE RIVER portrays girls as all too ready for sexual activity. Sex is portrayed as very pleasurable at the time even if Devon ultimately regrets his actions. It is treated as an animalistic fun activity. That is to say, there is no relationship other than that of the evanescent moment, no foreplay, no emotion, no romance, certainly no affection*

*or love and no conversation about the possible consequences, no moralising and no contraception. Drug-taking is also presented as the kind of thing that a modern young teenager does; if you don't do it, it is likely you will be disapproved by your schoolmates."*

Irresponsible sexual activity simply for pleasure should not be engaged in by any teenagers, particularly those as young as 13. It does not equip them for adult sexual life; it may often be physically dangerous. It may contribute to youth suicide when a "relationship" breaks up, and it is not conducive to concentration on academic studies. The Board is required to give "particular weight" (s.3(3)) to the extent and degree to which, and the manner in which, the publication describes, depicts or otherwise deals with (iv)"sexual conduct with or by children, or young persons, or both." I do so. The book degrades and demeans Devon's sexual partners, and suggests that instant gratification is what you are entitled to expect in today's society. Even if many young teenage New Zealanders could be shown to think like that (which I very much doubt and no hard survey evidence was presented) any increase in such attitudes is injurious to all the other young teenagers as a section of our society and to society generally.

11. The majority consider that the book "does not sensationalise, glamorise or otherwise favourably portray the sex, violence, cruelty, demeaning behaviour and other undesirable conduct which it describes". I completely disagree. Most responsible parents would, I believe, regard the book as sensationalising the behaviour described as well as presenting it as normal behaviour these days, i.e normalising it. It is said that the characters in the book "all experience negative outcomes from their involvement in these behaviours": para 62. I disagree: for example, Devon's negative feelings after Tania, the teenage mother, abruptly leaves him is not a consequence of his reflection on his repeated nocturnal trysts but of the fact that she has left him. The majority read the book as "a morality tale warning against the dangers of the various choices which Te Arepa makes....". It certainly warns against the danger of being caught engaging in illicit sex or taking drugs. There are admittedly references to the importance of not making wrong choices but I cannot see how that could properly be treated as decisive: it is merely one factor to be weighed in the balance against the negative effects in terms of normalisation, and it is clearly outweighed. To take a parallel, if an author were to describe torture very explicitly occurring in a Nazi concentration camp,

suggesting that brutal torture was normal in the camp, and if it were evaluated as an objectionable book, it would not matter that the book also ends with the conviction and punishment of the torturers or that the book could be charitably regarded as a morality tale that tells us that torture does not ultimately “pay”.

12. The majority are undoubtedly right to give major attention to paragraph (a) of s.3(4) — “the dominant effect of the publication as a whole”. Their characterisation of that dominant effect is different from mine. When they turn to (d) - the intended or likely audience - they quote the author’s 2013 submission where he says that he sees the book as one “for the older end of the young adult readership” though he thinks that teenagers under the age of 15 should be allowed to read it. The majority of the Board, for their part, accept that “the publication is intended for teenagers.” That amounts to a slide. Teenagers aged 18 are properly described as “young adults”; 13 year olds equally clearly are not “young adults”. There is an ambivalence about the various descriptions of the intended audience. The fact remains that there is a big gap between the intellect and capacity for critical judgment of the normal 13 year old and the same capacities in the normal 18 year old. The latter will usually be able to reject messages which are critically evaluated as wrong or misleading or both. That is the main reason why there should at least be an R14 restriction. If there were such a restriction - as there has been since 2013 - I should not have written this dissent, even though I have considerable doubt about the ability of many (not of course all) 15, 16 and 17-year-olds to read the book without being unduly influenced and harmed by it.
  
13. It is true that there is “no direct evidence of any harm.” That is of no importance. In the nature of the case it would be extraordinarily difficult to research the effect of the book on particular categories of readers when it was available on an unrestricted basis. Even identifying who had read the book would have been almost impossible. As in several reviews that have come before the Board, the Board is left to apply its own knowledge of how people in various age groups act and react. I believe there are many innocent 13-year-olds and still younger people who need sheltering from very explicit descriptions of casual sex and drug taking. Parents have the primary responsibility but society has to help. Freedom of expression is very important but Parliament has subjected that freedom within important limits in the 1993 Act

14. The majority (see para 68) refers to “the range of other books, and also other TV, gaming and internet entertainment options, available to readers and consumers on an unrestricted basis.” In this environment, they go on to say, it is not clear that the availability of INTO THE RIVER on an unrestricted basis would be likely to have any material or appreciable negative impact on the public good. Quite apart from the impressionistic approach this involves, I believe this type of reasoning is incompatible with the 1993 Act. The Act requires the Board to consider the publication in question, not to embark on a comprehensive tour of (inter alia) modern literature and internet material. Section 3A, for instance, concentrates on the effect of “the availability of the publication” as does s.3(1). The ultimate question is: is the availability of this present publication “likely to be injurious to the public good”? The public good includes the “good” of any appreciable section of the public. The fact that “other sources out there” but not formally before the Board may be injurious to the public good in a similar manner must be disregarded as a matter of law in my opinion. Further, “injurious to the public good” must be interpreted in its plain ordinary meaning: it does not mean grossly injurious, nor does it mean injurious as an exclusive causal factor. In paras 85 and 86 of the majority decision, read together, the question of likelihood of injury from a “single book” or “arising from this book specifically” is correctly identified as the ultimate question that must be asked. But the range of other books, and their influence on their answer to that question, is viewed as very persuasive when in my view it should, as a matter of law, be ignored. It is an inherent dilemma of modern censorship that people can access a vast range of salacious material in different forms but the censoring authorities can deal only with items that are plucked out of the mass and formally placed before them. I conclude that the availability of the present book is “likely to be injurious” to teenagers aged under 18, and, much more emphatically, for the reasons given in para 13, young and immature people aged under 14.
15. In my view the reasons advanced by the majority for departing from their adoption of an R14 restriction in 2013 are unconvincing. They refer to “better information available at this review particularly regarding the consequences of a restriction even for those over the restricted age”. But those consequences were, or at least should have been, foreseen by the Board. The inconvenience to librarians and the mechanics of enforcing

a restriction are real but I for my part foresaw that there would be some such practical inconveniences which are necessarily involved in the imposition of a restriction. I know of no other item of "better information". The fact that associations of librarians and booksellers are now known to be opposed to any censorship of anything, and in favour of an unrestricted classification of this book in particular, cannot rank as a new fact that was unknown in 2013. The book is identical, then and now. The intellectual and emotional maturity of 12- and 13 year-old children is probably the exactly the same as it was less than 2 years ago.

16. In my view s.3A of the Act applies and authorises an age restriction. The majority accept that the book contains "highly offensive language". They downplay the next inquiry, which is into its "extent or degree". The volume of highly offensive language is huge. I illustrate that with just one of the words which are "highly offensive to the public in general", namely "cock". Wiremu's cock is pointed to and then shrinks at page 12. At page 17 of the book "an eel might bite their cocks off." There is reference to covering and hiding cocks - at page 90 Te Arepa "looked down at his cock which was still standing at attention" at page 160. And at page 197 he has "an enormous erection" in "bulging trousers". Family First have counted 10 references to "cock" and 9 uses of "cunt". "Fuck" AND "shit" are used 17 and 16 times respectively throughout the book. No responsible parent of a 17-year old, let alone of a 12-year old, would want this repetitive coarse language normalised. The Act demands offensiveness to "the public in general".
17. The fact that highly offensive language is normal parlance in some areas or among certain groups is beside the point if that test is met. The issue is the "likelihood of serious harm" to persons under the age of 14. That does not mean inevitable harm to every single person within the category, and there may well be some 12-year-olds who have become familiar with "cock" and the other offensive words and who will not be harmed. But the great majority of those aged 13 or less are in my view likely to be harmed. The offensive language will be a significant contributory factor to that harm, and that is, in my opinion, enough to attract s.3A. The harm is the normalisation of the highly offensive language in the young person's vocabulary together with the development of an unhealthy preoccupation with private parts of the body and their potential use in sexual activity: the reverse of the old proverb urging mens sana in



corpore sano. As Jock Anderson has said (quoted by Family First): “liberally sprinkling a book aimed at youngsters with foul language - of a kind that would not so long ago have led to arrest - is no way to increase anyone’s literacy.” I reject any notion that INTO THE RIVER must be unrestricted because of its alleged effect in getting boys to read. That seems absurd when there are so many thrilling but wholesome adventure stories for boys. It is simply irrelevant that the language “occurs in the context of character portrayals that are realistic” (see para 74 of the majority decision). A fictional character never shown as uttering anything other than the most offensive filth might still be realistically portrayed but so what?

18. In my view s.3B also applies to INTO THE RIVER. If s.3B is held not to apply I am unable to envisage any material short of hard core pornography to which the majority would feel able to hold that s.3B does apply.
19. The majority (see paras 78-81) accept that s.3B(3) applies. This is because of the references to bullying, dangerous driving, drug use and racist behaviours and attitudes. Will the material be likely to cause persons aged 13 or less (or in my preference 17 or less) to be “greatly disturbed or shocked” (s.3B(4)(a))? I believe it is so likely - in the case of a probable majority but not everyone within that category. Their “general levels of emotional and intellectual development and maturity” are such that they will be greatly shocked or disturbed. They are not seeking sexual titillation and are likely to know nothing about the effect of taking drugs or about the existence of paedophiliac teachers such as the one mistily described in the book. But knowledge of unfamiliar practices is pressed upon them. Since they are dangerous practices an unrestricted availability is likely to be “injurious to the public good” within s.3B(2). Some in the category will be encouraged to experiment or to seek personal experience of pleasurable behaviour which they have so far missed out on. If 18-year olds can find useful discussion material in this book, which may then be said to serve an educational purpose, which I very much doubt (because the harmfulness of drug-taking, for instance, is never expressly discussed by the book’s characters) they will, at least typically, have sufficient development and maturity to deal with the highly explicit sex scenes, the drug-taking, the criminal activity and the utter disregard of the interests of other people shown by Te Arepa, without being greatly shocked or disturbed. That

cannot be said about the development and maturity of younger persons, and the inability to say it increases markedly as we come right down, as the majority decision would permit, to those aged 13 or younger.

20. I myself regard an R18 restriction as controversial but am in no doubt that a proper application of our current censorship law, which may or may not be out of date, requires the attachment of an R14 restriction to this publication at the very least.



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President