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| **DEcision of film and literature review board** | |
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| **Under** | the Films, Videos and Publications Classifications Act 1993 | |
| **In the Matter** | of an application under section 47 by [Applicant M]for a review of the publication(s) entitled:  *Z/reprised (or Z upside down), 1997* (photograph)  *Z/grid, 1997* (photograph)  *Mother goes upside down, 1984 (*photograph)  *Zillah, 1977* (photograph)  *Z. Wood Street, 1980* (photograph)  *Six Woman Photographers* (book) | |

**Introduction**

1. The following members of the Board met in Wellington on 13 April 2018 to consider this application for review:

R Schmidt-McCleave (President)

J Peters

Dr T Brown

M Waitoki

G Ferguson

S Gill

1. This is an appeal to the Board under section 47(2)(e) of the Films, Videos, and Publications Classification Act 1993 (the **Act**), by [Applicant M] for a review of the decision of the Office of Film and Literature Classification (the **Classification Office**) dated 19 January 2018.
2. The publications consist of a book containing photographs, as well as individual photographs, which depict [Applicant M]nude in various scenes as a child or young person in the 1970s and 1980s, and taken during and after a period of time in which she was being sexually abused by a friend of [redacted] (resulting in a conviction of the perpetrator in 2011). Each of the publications is described fully in the Board’s consideration of each later in this decision.
3. Only five of the eight photographs considered in the Classification Office decision, as well as the book *Six Woman Photographers,* are under consideration by the Board in this review. The five photographs considered are *Zillah, 1977; Z. Wood Street, 1980; Z/reprised (or Z upside down), 1997; Z/grid, 1997;* and *Mother goes upside down, 1984* (collectively, the **five photographs**).
4. The book, *Six Women Photographers*, was submitted to the Classification Office on behalf of the Secretary for Internal Affairs under section 13(1)(b) of the Act following a request by [Applicant M] to have the book restricted from public access by the National Library of New Zealand (the **National Library**).
5. The five photographs are from the collection of the Museum of New Zealand Te Papa Tongarewa (**Te Papa**) and were called in for classification (with three other photographs not the subject of this review) by the Chief Censor under section 13(3) of the Act.
6. In its decision, the Classification Office classified the book *Six Women Photographers* and eight photographs as unrestricted under the Act.
7. [Applicant M] seeks a review of that decision. She provided submissions in support of her appeal. Submissions were also received from the Classification Office, and from Ms Rhondda Bosworth, the photographer who took all the photographs under review except *Zillah, 1977* (which was taken by another photographer, Ann Noble). Ms Bosworth’s photographs also feature in a chapter of the book *Six Woman Photographers.* [Redacted].

**The principles of review and the legal principles applicable**

*The Films, Videos and Publications Classification Act 1993*

1. As required by section 52(2) of the Act, the Board conducts its review by way of re-examination of the publications at issue without regard to the decision of the Classification Office. The Board has examined every publication referred to it, in order to determine the classification of each (as required by section 52(3) of the Act)).
2. In determining the classification of any publication referred to it, the Board is required by section 52(4) to take into account the matters referred to in sections 3 to 3D of the Act.
3. The relevant parts of sections 3 to 3D of the Act are set out below.
4. Section 3 of the Act sets out the meaning of “*objectionable*” for the purposes of the Act. Section 3(1) provides that 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.
5. In turn, and for the avoidance of doubt,[[1]](#footnote-1) section 3(1A) provides that, without limiting section 3(1), a publication deals with a matter such as sex for the purposes of section 3(1) if:
   1. the publication is or contains 1 or more visual images of 1 or more children or young persons who are nude or partially nude; and
   2. those 1 or more visual images are, alone, or together with any other contents of the publication, reasonably regarded as sexual in nature.
6. In other words, a publication is taken to be dealing with sex if it contains nude or partially nude images of children or young persons *and* those images, alone or together with the rest of the publication, are *reasonably regarded as sexual in nature.* It is after that determination has been made that the second part of section 3(1) is considered, namely whether sex is dealt with in such a manner that the availability of the publication is likely to be injurious to the public good. The Board returns to this two-part test later in this decision.
7. Further, section 3(2) deems a publication to be objectionable for the purposes of the Act if it promotes or supports, or tends to promote or support, certain behaviours, including (at section 3(2)(a)), “*the exploitation of children, or young persons, or both, for sexual purposes*”. The Court of Appeal has held there to be a high threshold to be overcome before the deeming provision renders a publication objectionable.[[2]](#footnote-2)
8. Section 3(3) is also relevant. That provision states that in determining whether or not a publication (other than a publication which has been *deemed* objectionable under section 3(2)) is objectionable, particular weight must be given to the extent and degree to which, and the manner in which, the publication does certain things, including:
   1. Describes, depicts, or otherwise deals with, *inter alia*, sexual conduct with or by children, or young persons, or both (section 3(3)(a)(iv)).
   2. Exploits the nudity of children, or young persons, or both (section 3(3)(c)).
9. Finally, section 3(4) requires that, in determining whether or not a publication (other than a publication which has been deemed objectionable under section 3(2)) is objectionable, the Board must consider the following matters:
   1. The dominant effect of the publication as a whole.
   2. The impact of the medium in which the publication is presented.
   3. 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.
   4. The persons, classes of persons, or age groups of the persons to whom the publication is intended or is likely to be made available.
   5. The purpose for which the publication is intended to be used.
   6. Any other relevant circumstances relating to the intended or likely use of the publication.
10. Section 4(1) provides that the question whether a publication is objectionable is a matter for the expert judgment of the person or body authorised or required to determine it, and evidence as to, or proof of, any of the matters or particulars that the person or body is required to consider in determining that question is not essential to its determination. Without limiting subsection (1), where evidence as to, or proof of, any such matter or particulars is available, it is required to be taken into consideration (section 4(2)).

*Case law*

1. The Board is also mindful of certain higher case law pertaining to its review, particularly the two decisions of the Court of Appeal in *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 and *Living Word Distributors v Human Rights Action Group (Wellington)* [2000] 3 NZLR 570.
2. In *Moonen,* the Court of Appeal espoused the importance of the New Zealand Bill of Rights Act 1990 (**BORA**). The Board is mindful that, in applying the Act, it must act consistently with BORA. Section 14 of BORA states that 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.”* Under section 5 of BORA, this freedom is subject “*only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”*  Further, section 6 of BORA provides that “*[wherever] an enactment can be given a meaning that is consistent with the rights and freedoms contained [in BORA], that meaning shall be preferred to any other meaning.”*
3. In *Living Word Distributors*, the Court of Appeal described section 3(1) of the Act as a “*subject matter gateway*” to being found to be objectionable, in that if a publication does not describe, depict, express, or otherwise deal with matters such as sex, horror, crime, cruelty, or violence, it cannot be classified as objectionable. Once a publication makes it through the subject matter gateway, the Board must then consider whether 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. The remaining subsections of section 3 of the Act may assist the Board in that analysis.

**Submissions received**

1. As stated, the Board received submissions from [Applicant M], one of the two photographers (Ms Bosworth) and the Classification Office. These are summarised below.

*[Applicant M] submissions*

1. [Applicant M] provided full and moving written submissions setting out her reasons for why the publications should be found to be objectionable. She also included with her submissions various other documents, including the response from the Privacy Commissioner into her complaint under privacy legislation, letters from family members, police transcripts related to the conviction in 2011 referred to in paragraph 3 above and other information. The Board has considered all information provided to it by [Applicant M] very carefully.
2. In summary, [Applicant M] submits that:

* The photographs of her as a naked child represent her in a way that is not her and is harmful both to her personally and to society.
* As a naked child model, she was subject to a power imbalance and, combined with the sexual abuse she suffered as a child and young person, she is rendered incapable of obtaining justice and exercising consent.
* If the images remain unrestricted, they will outlive her and will continue to remind her of that time in her life, oppressing and humiliating her. They will also inspire other artists, leading to further children potentially being exploited and harmed.
* The photographs must be viewed in the context of [Applicant M] being a vulnerable, confused child being subjected to grooming by men present in her life and being preyed upon sexually. Those same men, she says, would have been aroused by the photographs of her.

1. [Applicant M’s] specific submissions on each particular photograph are discussed below when the Board turns to consider each publication.

*Rhondda Bosworth*

1. Ms Bosworth gave a short submission, in which she categorised [Applicant M’s] appeal to the Board as part of an “*ongoing vendetta*” on the latter’s part, and that the appeal forms part of a very personal situation. She submitted that the photographs do not offend anyone except [Applicant M] herself and that, therefore, the Board should not reverse the classification made by the Classification Office.
2. Ms Bosworth explained that her work is autobiographical, and that the photographs in question were taken in the 1970s and 1980s in the time of a “*different zeitgeist”*, when she was blinded to “*the male gaze and the detrimental effect on [redacted].”* Ms Bosworth says that she would not now take naked photographs of someone so young.
3. [Paragraph redacted]

*Classification Office*

1. The Classification Office submits that the only relevant consideration under section 3(1) is whether each publication deals with a matter such as sex. To determine that, the Office refers to section 3(1A)(a), noting that *Zillah, 1977; Z. Wood Street, 1980; Mother Goes Upside Down 1984;* and the book *Six Women Photographers,* satisfy the first limb of the section 3(1A) test because they contain one or more visual images of a child or young person who is nude or partially nude. However, *Z/reprised (or Z upside down), 1997* and *Z/grid, 1997* do not satisfy the first limb of the section 3(1A) test, the Classification Office says, because neither image contains a visual image of a child or young person who is nude or partially nude. That being so, *Z/reprised (or Z upside down), 1997* and *Z/grid, 1997* do not deal with a matter such as sex.
2. The Classification Office then considered the section 3(1A)(b) requirement that the visual images be “*reasonably capable of being regarded as sexual in nature*”. The Classification Office submitted that there is more than one tenable meaning of the phrase, and to be consistent with BORA the Board is required to use a meaning that “*impinges as little as possible on the freedom of expression.”*[[3]](#footnote-3)
3. In this regard, the Classification Office submitted that, in summary, nudity is not inherently sexual in nature and the fact that a person with a sexual interest in children or young persons would find an image to be sexual in nature cannot be the test of what is reasonably capable of being regarded as sexual in nature. Equally, it would be inconsistent with the Act’s purpose to require that images be overtly sexual in nature to meet the “*reasonably capable”* aspect of the test. In summary, the Classification Office submitted:

“*It is submitted that a meaning that impinges as little as possible on the right to freedom of expression, while still giving effect to the intent of the words and the purpose of the Act, is that for the nudity of the child or young person to be reasonably capable of being regarded as sexual in nature, there needs to be something about the nudity, the subject (such as their pose, what they are wearing, their facial expressions, etc.), the setting of the image, the composition of the image, or surrounding elements within the publication that lend it a (reasonably) possible sexual reading.”*

1. The Classification Office’s specific submissions on each particular photograph are discussed below when the Board turns to consider each publication.

**The photographs**

1. The Board has reviewed five photographs depicting [Applicant M] at various ages in the 1970s and 1980s and considers each in detail below. Four of the photographs were taken by Ms Bosworth, and one by Anne Noble (who did not make a submission to the Board).

*Z/reprised (or Z upside down), 1997*

1. *Z/reprised* is a black and white photograph by Ms Bosworth of a young woman (advised by [Applicant M] to be herself). The age of the person depicted is not able to be easily ascertained; while she is undoubtedly young, she is also wearing noticeable eye and lip make-up. The image depicts the young woman’s face and is divided by the use of contrast into different grids of darkness and light. There is a great sadness emanating from the image; the young woman is clearly nursing a terrible burden of some description and is in emotional pain.
2. [Applicant M] says of this image, and of *Z/grid* discussed next, that both contain references to mutilation and interrogation and are similar to known paintings of Jesus Christ. She says the image depicts her post-abuse humiliation at the hands of [redacted], and she has no escape from the viewer witnessing her pain. The rearranging of the photograph, by the use of the dark and light “*grids*”, [Applicant M] submits is subject of the image, and the figure within it, to mutilation. [Applicant M] views the image as “*an emblem of abuse, neglect and humiliation of a young woman who has been deliberately exposed to child sexual abuse by her [redacted]”* (because, [Applicant M] says, [redacted] knew by the time the photograph was taken, that [redacted] had been sexually abused from the age of 12 years by her [redacted] acquaintance and, indeed, blamed her for that abuse in interviews with the police).
3. The Classifications Office points out that there is no nudity in the photograph and it does not therefore deal with a matter such as sex (i.e. failing at the first limb of the section 3(1) gateway test).
4. With reference to the last point, the Board notes that section 3(1) contains the words “*such as*” so that just because a publication does not deal with one of the listed items in subsection (1) does not necessarily mean it cannot be considered objectionable.
5. Having said that, however, the Board does consider that there is no aspect of this image which can be considered objectionable. There is no nudity of a child or young person in the photograph which means that section 3(1A) does not apply.
6. Further, while there is undoubtedly immense emotional pain emanating from the image, and the Board’s knowledge of the context surrounding the image as informed by [Applicant M] submissions help explain that emotional pain, on its face the photograph can be viewed as the artist playing with light and darkness using a sad face as the medium. While there may, indeed, be questions of consent in terms of the ability of children and young persons to object to their images being utilised later without their knowledge or agreement, this is a gap in the law which the Board is unable to fill by use of the Act.
7. The Board therefore finds *Z/reprised* to be unrestricted under section 23(2)(a) of the Act.

*Z/grid, 1997*

1. The same analysis as for *Z/reprised* applies to *Z/grid* in the Board’s view. In essence, *Z/grid* is a close-up version of *Z/reprised* which is more focussed upon the young woman’s face. For the same reasons as set out above, the Board finds *Z/grid* to be unrestricted under section 23(2)(a) of the Act.

*Mother goes upside down, 1984*

1. *Mother goes upside down, 1984* depicts two black and white photographs placed on some kind of black spotted cloth. The left photograph shows an unidentifiable naked person curled into a foetal position and huddling on some form of dark ground or background. The face of the person is not visible, nor are any parts of the anatomy as such, save for the naked left arm, back and part of a curved left buttock and thigh. The right photograph shows a smiling woman in possibly her thirties, taken at some earlier point in time as depicted by the 60s or 70s hairstyle.
2. [Applicant M] submits that the image is harmful and offensive as it is intended to disempower and shame a naked child. She advises the picture was taken at a time when she was being groomed for sexual abuse at age 12 by a male acquaintance of [redacted]. [Applicant M] remembers the photograph being taken and says she was led by [redacted] to the top of Mount Eden and asked to strip in public and lie in the foetal position in the bushes close to a public walkway with men walking past. [Applicant M] says the image depicts seduction, sexual maturity and shame and perpetuates her humiliation, particularly being framed in this way some years after it was taken and once [redacted] was aware that the sexual abuse had taken place.
3. The Classifications Office submits that the aesthetic of the image is “*quite stark*” and the nudity is not romanticised or eroticised, with no sense of intending to show sexual availability.
4. While the Board found the left-hand image of the naked cowering person somewhat disturbing, especially knowing the context in which the photograph was taken, it is of the view that it is not sufficient to meet the first limb of the section 3(1) gateway. While there is nudity in the photograph, it is impossible to tell the age of the person in the foetal position. There is nothing overtly sexual or violent in the image in the Board’s view and it does not therefore describe, depict, express or otherwise deal with sex, cruelty or violence to bring it within the first limb of the subject matter gateway. Certainly, again, the Board has sympathy that there appears to be issues of lack of consent with respect to the ability of a young person to object to such an image being taken or utilised, and recourse for such a young person to take action in relation to such images, but the Act under which the Board must decide this review does not enable those issues to be dealt with here.
5. The Board therefore finds *Mother goes upside down, 1984* to be unrestricted under section 23(2)(a) of the Act.

*Z. Wood Street, 1980*

1. *Z. Wood Street, 1980,* depicts a young woman standing naked against a dark background. Her head is tilted to the left, and her face is made up but unsmiling. Her eyes are dark rimmed and appear to be inviting the viewer in a rather challenging or provocative manner. The light in the photograph is focussed on the young woman’s naked body, with her large breasts and pubic hair being extremely visible. The photograph is cropped at the woman’s thighs, directly below her pubic hair, and above her head.
2. [Applicant M] in her submissions advises that the photograph was taken of her by [redacted], while she stood in a corner, aged 15 years. She says the image is evocative of Picasso’s *Les Demoiselles d’Avignon* and imitates the artistic concept of the ‘*male gaze’* and the ‘*reversed gaze*’ of a naked female, intended to indicate sexual awareness. She says the photograph was taken by [redacted] at a time [redacted] had been sexually abused by male acquaintance of [redacted] and that this photograph exposed her to further abuse, by artificially and deliberately representing her as sexualised.
3. The Classifications Office submits that the image is a stark one and “*there is no sense that what is intended to be shown is sexual availability.”* The Office notes that while the nude subject is the sole focus of the image, there is nothing sexual in the pose, the composition of the photograph or anything else and one of the most eye-catching parts of the photograph is the subject’s face and her gaze at the camera. The Classifications Office therefore submits that the image is not reasonably capable of being regarded as sexual in nature, and does not deal with a matter such as sex, so that the section 3(1) subject gateway is not satisfied.
4. For the avoidance of doubt, the Board does not consider that any of the circumstances set out in section 3(2) of the Act are present here and *Z. Wood Street* cannot be deemed to be objectionable under that subsection.
5. The Board does not, however, agree with the Classification Office’s view as to the section 3(1) gateway. The Board does consider that the visual image of the naked young person in *Z. Wood Street* can reasonably be regarded as sexual in nature.
6. The Board was particularly motivated in this conclusion by the fact that it considered this image to clearly be of a young person, albeit a young person made up to look older than her years. She is obviously nude and, in the Board’s opinion, her image can reasonably regarded as sexual in nature. There is a certain (albeit defiant) “*come hither*” element to her gaze as shown by the tilted head. Further, while the young woman’s face is an important element of the image, so too are her breasts and pubic area, the latter drawn attention to by the careful cropping of the picture below her pubic hair. The picture suggests sexual availability and experience, rather than merely being a picture of a naked teenager.
7. The Board must therefore consider the second part of the test, namely whether sex is described, depicted, expressed, or otherwise dealt with in the image in such a manner that the availability of the publication is likely to be injurious to the public good (and therefore “*objectionable*”). In undertaking this consideration, the Board has had regard to section 3(3) and section 3(4) in the manner set out below.
8. The Board is of the view that depicting young persons as being older than they are and being sexually available normalises the sexualisation of young women and forms part of a continuous desensitising of the public to the sexualisation of children and young persons and is therefore harmful to those children and young persons and injurious to the public good.
9. The Board is aided in this viewpoint by section 3(3) which requires the Board in determining whether a publication is objectionable, to give particular weight to the extent and degree to which, and the manner in which, the publication *“describes, depicts, or otherwise deals with [inter alia] sexual conduct with or by children or young persons, or both* (section 3(3)(a)(iv) and/or“*exploits the nudity of children, or young persons, or both”* (section 3(3)(c)). Here, the young woman is clearly a young person who has been made to look older and who has had an image composed in a particular way for a particular effect, namely the conveying of a sexual availability that in reality did not exist, by the use of a picture which conveys a sense of some form of awkward and uncomfortable sexual slave (shown by the tilted head and defiantly provocative gaze).
10. In terms of the section 3(4) factors, the Board considers that:
    1. The dominant effect of the publication as a whole is to convey an available sexuality on the part of a young woman, which in reality does not exist.
    2. The impact of the black and white photograph in which the image is presented is to focus light and attention on certain aspects of the young girl’s anatomy, most particularly her large breasts and pubic area.
    3. The image was one held in the original by Te Papa,[[4]](#footnote-4) which shows that it has artistic merit as representative of a style of New Zealand photography at a point in time and by a recognised New Zealand feminist photographer.
    4. The image forms part of a national collection, and therefore was originally intended to be viewed by anyone if exhibited.[[5]](#footnote-5) Prints of the image may conceivably also form part of collections in other galleries around the country (and, possibly, online collections).
    5. The purpose for which the image was made has to be assumed to be as for d. above.
11. The Board therefore finds that the section 3(1) test is met. The Board classifies *Z. Wood Street* under section 23(2)(c) of the Act as objectionable except if its availability is restricted to [Applicant M] only.

*Zillah, 1977*

1. *Zillah* is the one photograph of the set submitted for review taken by Anne Noble. The black and white photograph depicts a naked young girl of pubescent age (demonstrated by developing breasts with nipples in shadow) cropped from below the breasts up and from the hairline down, sitting in some kind of wicker chair. Although her face is in shadow, she is not smiling and her eyes are dark and hooded staring back at the camera. The light in the photograph is focussed on her chest area so that, in the opinion of the Board, the viewer’s eyes are drawn to the young girl’s breasts before her face. There is, again in the Board’s opinion, some form of suggested sexual power in the image’s framing, which stands in contrast to the girl’s age and her lack of sexual power.
2. [Applicant M] says of *Zillah* that she is ten years old in the photograph and that it is a sexualised image evoking the *femme fatale*, and imitating the artistic concept of the ‘*male gaze’* and the ‘*reversed gaze*’ of a naked female, intended to indicate sexual awareness (and shown by such paintings as Picasso’s *Les Demoiselles d’Avignon)*. [Applicant M] also points to the similarities in the naked female posed in a wicker chair with what she says was an iconic poster for a soft porn film of the 1970s “*Emmanuelle*”. [Applicant M] seeks a complete restriction of the photograph or, alternatively, a restriction to use by anyone but herself as model only.
3. The Classifications Office accepts that *Zillah* features a naked image of a child. It describes the photograph as “*striking*”, with the child as the sole focus of the image. In the Classification Office’s view, however, while the child’s chest is bare, “*the viewer’s eye is very much drawn to her face.”* The Classifications Office does not see *Zillah* as being reasonably capable of being regarded as sexual in nature and, therefore, it does not deal with a matter such as sex and fails at the section 3(1) gateway.
4. For the avoidance of doubt, the Board does not consider that any of the circumstances set out in section 3(2) of the Act are present here and *Zillah* cannot be deemed to be objectionable under that subsection.
5. The Board does not, however, agree with the Classification Office’s view as to the section 3(1) gateway. The Board does consider that the visual image of the naked girl in *Zillah* can reasonably be regarded as sexual in nature. The Board regards the focus of the picture as being the breasts, with the viewer’s eye being drawn there first, before the child’s face. In that analysis, the Board has considered the use of lighting in the photograph, with the main light being on the chest area, as well as factors such as cropping, with the bottom crop taking place directly below the burgeoning breasts. The Board therefore finds that the image can reasonably be regarded as sexual in nature.
6. The Board must therefore consider the second part of the test, namely whether sex is described, depicted, expressed, or otherwise dealt with in the image in such a manner that the availability of the publication is likely to be injurious to the public good (and therefore “*objectionable*”). In undertaking this consideration, the Board has had regard to section 3(3) and section 3(4) in the manner set out below.
7. In the Board’s view, the image seeks to make a statement about sexual availability and power that ought not to be made in the case of a child or young person. There is no doubt that depiction of a child or young person in this way, with the suggestions of sexual power that arise, is injurious to that child or young person. The question the Board has wrestled with is whether it is also injurious to the public good. In the Board’s view, it is. The Board agrees with the Classifications Office that nudity of itself is not necessarily problematic. However, society has become increasingly desensitised to notions of children and young people as sexualised beings, when they are not. Allowing a child or young person to be depicted in this manner reinforces the notion that children and young persons have some sort of sexual power, and increases the vulnerability of sexually abused young people. Also of relevance, in the Board’s opinion, is the impact on such children once they reach adulthood, knowing that sexualised images, taken when they were not in a position to consent, exist of them for eternity and potentially in the public domain. Research has shown that ongoing reminders of childhood sexual abuse can be extremely damaging for adult victims of such.
8. The Board is aided in this viewpoint by section 3(3) which requires the Board in determining whether a publication is objectionable, to give particular weight to the extent and degree to which, and the manner in which, the publication, *inter alia* “*exploits the nudity of children, or young persons, or both”* (section 3(3)(c)). The word “*exploits”* connotes the use of something for a purpose other than what is indeed. In this case, the photograph is of a 10 year old girl who likely does not want to know that her body is changing and developing, and certainly does not want to have those changes photographed in a way which draws a viewer’s attention to them.
9. In terms of the section 3(4) factors, the Board considers that:
   1. The dominant effect of the publication as a whole is to draw the viewer’s attention to the developing sexuality of a young girl.
   2. The impact of the black and white photograph in which the image is presented is to focus light and attention on certain aspects of the young girl’s anatomy, most particularly her developing breasts and, to a lesser extent but crucial to the overall message, the message implied by her direct and unsmiling gaze.
   3. The image was one held in the original by Te Papa,[[6]](#footnote-6) which shows that it has artistic merit as representative of a style of New Zealand photography at a point in time and by a recognised New Zealand feminist photographer.
   4. The image forms part of a national collection, and therefore was originally intended to be viewed by anyone if exhibited.[[7]](#footnote-7) Prints of the image may conceivably also form part of collections in other galleries around the country (and, possibly, online collections).
   5. The purpose for which the image was made has to be assumed to be as for d. above (in the absence of a submission from the photographer herself).
10. The Board therefore finds that the section 3(1) test is met. The Board classifies *Zillah* under section 23(2)(c) of the Act as objectionable except if its availability is restricted to [Applicant M] only.

**The book *Six Women Photographers***

1. The book *Six Woman Photographers* is a periodical folio publication from 1997, published by PhotoForum Inc (who did not make a submission). It contains the work of six female New Zealand photographers, with a chapter devoted to each. The chapter depicting the work of Rhondda Bosworth contains seven black and white photographs, five of which are of [Applicant M].
2. The photographs in question are:
   1. Page 28: *Absence of Z(1) 1985* which is a photograph within a photograph of a teenage [Applicant M’s] head and shoulders against some dotted fabric with a handwritten envelope in the background.
   2. Page 29: *Absence of Z(2) 1985* which contains two photographs set against a dotted fabric background, one being the head and shoulders image also in the photograph on page 28 and the other being of naked breasts, with the head in darkness.
   3. Page 30: *Family Memorabilia (1), 1985* which is a collection of items, including a snapshot type photograph of [Applicant M] standing in the corner of a room wearing only a white singlet and with her pubic hair visible. Although her age is not obvious in the photograph, she does appear to be pre-teen and [Applicant M] advises in her submissions that she was 12 in the photograph.
   4. Page 31: *Family Memorabilia (2), 1985* which is a similar collection of items as above and, again, features the snapshot image of [Applicant M], aged pre-teen, clad only in a white singlet.
   5. Page 32: *Mother goes upside down 1985* which is a reproduction of the photograph by the same name already discussed above.
3. [Applicant M’s] particular focus is, understandably, on the images in the book of herself clad only in a singlet and exhibiting pubic hair in the *Family Memorabilia* photographs. She submits that the image is harmful to the public and puts 12 year old girls at risk of sexual abuse “*by fuelling the fantasies of sick individuals*” and reinforcing the paedophile narrative that children are sexually available. She references once more the historical artwork mentioned already as well as [redacted] knowledge at this time of the sexual abuse perpetrated upon [redacted].
4. The Classifications Office submitted that, in summary:
   1. There is nothing remotely sexual in the rest of the book, either in the Rhondda Bosworth section or the book as a whole.
   2. None of the nude images have an immediate sexual tone as the poses are not sexual or suggestion but very matter-of-fact depictions of nudity.
   3. The nudity is not the sole focus of any of the images, and the nude or partially nude photographs are small and just one part of a large photograph.
5. Therefore, while the book contains visual images of a child or young person who is nude or partially nude, these images alone, or together with any other contents of the book, are not reasonably capable of being regarded as sexual in nature, the book does not therefore deal with a matter such as sex and does not pass through the section 3(1) subject matter gateway.
6. Ms Bosworth advises she regrets the image used in “Family Memorabilia”, describing it as “*a horrible error of judgement.”* However, she contends the book cannot be classified, noting that it was published thirty years ago, in 1987, with a small circulation (about 800 copies) and is no longer for sale. Any copies of the book are “*all tucked away in photography afficionados’ and feminists’ libraries*” and the photographs are not out there “*causing havoc and horror.”*
7. It is fair to say that the Board struggled greatly with this aspect of the review. Because of the views it had reached as to the image *Mother goes upside down,* and because the two *Absence of Z* photographs do not contain child nudity or partial nudity (albeit clearly conveying great sadness and emotional pain), the *Family Memorabilia* images occupied the bulk of the Board’s consideration in this part of the review.
8. Undoubtedly, the Board’s struggle with these two images arose from its knowledge of the context of the photographs, which imparted a feeling that these items constituted the collected items of a family where paedophilia had torn relationships apart. However, ultimately, the Board reached the view that it is not clear that the image is of a child or young person; rather, on its face, the picture is of a partially naked person wearing only a singlet and the images cannot therefore be said to be reasonably regarded as sexual in nature. The images are just one of a number of items in the photographs, which are ultimately familial and not overtly sexual in nature (as is the book as a whole). The book had a limited publication and the Board understands that the National Library has removed it from being available for public access.
9. The Board was again acutely aware here of a gap in the legislative regime that means [Applicant M] appears unable to redress the fact that partially nude photographs of her as a young child have been used in this way, but the Board remains bound by the Act and reached the view that the book does not pass through the section 3(1) subject matter gateway.
10. The book *Six Woman Photographers* is classified as unrestricted under section 23(2)(a) of the Act.

**Conclusion**

1. In conclusion, the Board’s decisions on each of the publications are as follows:
   1. The photographs *Z/reprised (or Z upside down), 1997*; *Z/grid, 1997* and *Mother goes upside down, 1984* are classified as unrestricted under section 23(2)(a) of the Act.
   2. The photographs *Z. Wood Street 1980* and *Zillah, 1977* are classified under section 23(2)(c) of the Act as objectionable except if their availability is restricted to [Applicant M] only.
   3. The book *Six Woman Photographers* is classified as unrestricted under section 23(2)(a) of the Act.
2. The Board hereby directs the Classification Office pursuant to section 55(1)(e) of the Act to enter the Board’s decision in the Register.

**Dated** at Wellington this 1st day of May 2018

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Rachael Schmidt-McCleave

President

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| **decision of film and literature review board** | |
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| **Under** | the Films, Videos and Publications Classifications Act 1993 | |
| **In the Matter** | of an application under section 47 by [Applicant M] for a review of the publication(s) entitled:  *Z/reprised (or Z upside down), 1997* (photograph)  *Z/grid, 1997* (photograph)  *Mother goes upside down, 1984 (*photograph)  *Zillah, 1977* (photograph)  *Z. Wood Street, 1980* (photograph)  *Six Woman Photographers* (book) | |

**CORRIGENDUM TO DECISION**

**Corrigendum to decision**

In the decision dated 1 May 2018, paragraph 75 mistakenly stated that “*the Board understands that the National Library has now removed [the book] from the national collection.”*

The correct situation is that “*the Board understands that the National Library has removed [the book] from being available for public access.”*

**Dated** at Wellington this 16th day of May 2018

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Rachael Schmidt-McCleave

President

1. Section 3(1B). [↑](#footnote-ref-1)
2. *Moonen v the Film and Literature Board of Review* [2000] 2 NZLR 9. [↑](#footnote-ref-2)
3. Citing the Court of Appeal in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 [*Moonen No 1*] at [27]. [↑](#footnote-ref-3)
4. The Board does understand that Te Papa has withdrawn the photograph from the collection and has agreed to give the original image to [Applicant M]. [↑](#footnote-ref-4)
5. See note 4 above. [↑](#footnote-ref-5)
6. The Board does understand that Te Papa has withdrawn the photograph from the collection and has agreed to give the original image to [Applicant M]. [↑](#footnote-ref-6)
7. See note 4 above. [↑](#footnote-ref-7)