

SUBMISSION IN RELATION TO DISCUSSION PAPER ON 'MATERIAL THAT ADVOCATES TERRORIST ACTS'

Books won't stay banned. They won't burn. Ideas won't go to jail. In the long run of history, the censor and the inquisitor have always lost. The only weapon against bad ideas is better ideas.

~Alfred Whitney Griswold, *New York Times*, 24 February 1959

1. The fundamental question that arises at the outset is why are the proposed amendments necessary? The answer provided in the Discussion Paper seems to be twofold. Firstly, *"doubt exists as to the extent to which the present law ensures that all material that advocates terrorist acts is refused classification"* (Discussion Paper page 2). Secondly, to protect *"the impressionable and vulnerable in the community"* (Discussion Paper page 3).
2. Neither of these reasons justify the proposed amendments.

Doubt As to the Coverage of the Current Law

3. The lack of clarity in the present legislation is said to be demonstrated by the following:
 - (i) public concern about various material that is available in the form of books, DVDs or on the internet;
 - (ii) the differences in interpretation in Board and Review decisions which overturn Board decisions applying the same criteria to the same material;

- (iii) litigation in the Federal Court (for which judgment has yet to be handed down) over the interpretation of the phrase;
 - (iv) further litigation may result in a clearer understanding of the current law but it is doubtful that it will supply real clarity anytime soon.
4. In relation to the various matters relied on as demonstrating a lack of certainty:
- (i) the fact that there may be public concern about books, DVDs or material available on the internet does not, of itself, indicate that there is a need for a change in the existing law. There is no evidence that the so called 'public concern' represents the opinion of the majority of Australians, or even a sizeable minority. The Discussion Paper is notably lacking in precision and detail in relation to this important question. If a fair and informed debate were held, the majority of Australians would reject the proposed amendments as unduly and arbitrarily limiting the right of free speech.
 - (ii) To the extent that uncertainty exists because of the unresolved litigation in *New South Wales Council for Civil Liberties v Classification Review Board & Attorney-General (Cth)*, the uncertainty is in relation to a very narrow issue of statutory construction. It is quite misleading to put forward the uncertainty arising from the litigation in the Federal Court as justifying the wide ranging amendment now proposed.
 - (iii) The fact that there are different interpretations between the Board and the Review Board in relation to publications dealt with under the existing law is simply a reflection of the fact that minds can differ on whether any individual publication meets a statutory description. This is why there is an appeals process. The proposed amendments, involving as they do judgments being made about such things as the indirect effect of a publication, will not change the fact that minds may differ on whether the relevant statutory test has been met. As the Discussion Paper itself states (at page 6), under the proposed amendments the Board and the Review Board will need to decide that the act fell within the definition of a 'terrorist act' and that the material

clearly 'advocates' doing an act within the meaning of 'advocate' as explained in the Code or the Guidelines. These are matters on which differences between the Board and the Review Board can clearly arise.

Protection of the Impressionable and Vulnerable in the Community

5. Once again the Discussion Paper is long on generalisation and very short on detail and evidence. We are not told precisely who are the weak and the vulnerable in the Australian community likely to engage in terrorism as a result of reading material praising terrorist acts.
6. Even if one accepts for the purposes of the argument that such an impressionable and vulnerable group exists in the community, the Discussion Paper overlooks the point that banning publications demonstrates a fear on the part of the State and invests the authors of the banned publications with a power and status that they do not, and should not, have. In banning publications the message sent by the State to the impressionable and vulnerable is a simple one: 'we fear what the author is saying, you are not allowed to hear it'. Banning a publication makes a martyr of the author and, to the vulnerable and the impressionable, is likely to make the author's message more attractive rather than less attractive.
7. A liberal democratic society such as we have in Australia is strong enough to combat the expression of unpalatable views by argument and the exposure of such views to analysis, criticism and ridicule. The notion that we must ban books in order to protect the impressionable and the vulnerable is quite simply ludicrous.

Conclusion

8. The reality is that the present law is more than adequate to deal with material that advocates terrorist acts. The proposition that uncertainty in the present law justifies or requires the type of amendments proposed in the Discussion Paper is without foundation. The reason for this is that material which may have an effect can be readily banned under the present regime. The proposal in the Discussion Paper is really designed only to ban the expression of opinions that will have no effect.

9. It is interesting to note that other liberal democracies have not found it necessary to resort to the type of censorship contained in the proposed amendments. The United States, for example, has historically required that speech create a “clear and present danger” for exemption from protection under the First Amendment of the Constitution. In *Brandenburg v. Ohio* 395 U.S. 444 (1969) it was held that the First Amendment protected violence-advocating anti-Semitic and racist speech of Ku Klux Klan members. This case distinguished the constitutionally protected “mere advocacy” of violence or unlawful behaviour from unprotected speech which must intentionally create a high likelihood of real imminent harm.
10. The United States position vividly demonstrates that a functioning Western liberal democracy does not need to resort to the sort of restrictions upon freedom of expression and thought contained in the proposed amendments.
11. In the Discussion Paper there are statements about the nature of Australian society. Thus for example we are told at page 6 that “*Freedom of speech is a valued part of Australian society*”, and again at page 7 that “*free speech is an important tenet of our Western liberal democracy*”. These statements are, of course, true. The Discussion Paper pays lip service to these values while ignoring the fact that the proposed amendments to the Code have the capacity to affect the expression of opinions about current matters of great controversy. The fact that some of these opinions may be unpalatable to the overwhelming majority of Australians is no reason to give way to the Pavlovian desire to ban the expression of such opinions. The proper response is to defeat bad ideas with better ideas.

Stephen Blanks
Secretary, NSW Council for Civil Liberties

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