CENSORSHIP OF RELIGIOUS TEXTS: THE LIMITS OF PLURALISM

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In responding to the threat of terrorism after 11 September 2001, the Australian Government made radical changes to the Australian legal landscape, enacting more than 30 anti-terrorism statutes and entering into a variety of cooperative law enforcement schemes with state and territory governments. Common to many of these measures is a special emphasis on preventive legal measures against terrorism, involving differing degrees of predictive, precautionary, anticipatory or even speculative law enforcement strategies. The initial legislative response included the adoption of wide-ranging preparatory criminal offences, such as financing, preparing or training for terrorism, to enable intervention by law enforcement authorities before terrorist acts actually occur.[1] These offences were coupled with new executive powers to proscribe terrorist organisations, which may trigger related new offences such as membership or direction of, or even mere association with, a banned terrorist organisation. The power to proscribe is no longer limited to banning organisations listed as terrorist by the United Nations Security Council, but provides the Attorney-General with a unilateral power to proscribe, without effective judicial oversight. Even the more limited power over terrorist organisations listed by the Security Council has been criticised for serious procedural and evidentiary deficiencies, potentially leading to erroneous proscriptions and denial of elementary procedural fairness.

In addition to these preventive powers, the Australian Security Intelligence Organisation (ASIO) was empowered to question and detain people, for up to seven days, who are not even suspected of terrorism but who may know something about it, taking Australia's preventive approach beyond the bounds of comparable common law jurisdictions. The *Anti-Terrorism Act (No 2) 2005* (Cth) continues and accelerates the preventive trend, allowing preventive detention orders or control orders to be imposed on people who have not been charged with any criminal offence, and who, for lack of evidence that would likely satisfy the criminal standard of proof, may not be indictable. The Act also allows the Australian Federal Police to issue notices to produce information in relation to terrorist investigations

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1 For an overview of key Australian anti-terrorism law since 11 September 2001, see A Lynch and G Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (2006) and (2004) 27 *UNSW Law Journal* (Special Issue: Counter-Terrorism Laws).

without the approval of a magistrate, thus by-passing the protections of regular search warrant procedures. The Act triples the length of some ASIO warrants, inviting the authorities to conduct fishing expeditions over extended periods in the absence of sufficient evidence of specific criminal conduct. A new offence of financing terrorism in the absence of an intention to finance extends criminal liability too far and makes it impossible for individuals to know the scope of their legal liabilities with any certainty.

An increasingly important aspect of the preventive response to terrorism worldwide is efforts to restrict oral or written expression which variously incites, encourages, condones, justifies or glorifies terrorism, in some cases even where expression relates solely to past terrorist acts, or where expression bears no close relationship to the likelihood of specific or determinate acts of terrorism actually occurring. The Council of Europe, the Security Council, and the United Kingdom have all focused attention on legal means of restricting terror related speech, beyond the ordinary circumstances covered by regular offences of incitement to crime.[2] The impulse underlying these efforts is the belief that certain speech or publications, while not directly inciting specific terrorist acts, create a climate conducive to the radicalisation or indoctrination of segments of the population, which may in turn inspire terrorist violence at an unknown and unspecified point down the track. Not only is every idea an incitement, many more ideas are transformed into crimes.

In Australia, while the idea of criminalising the glorification of terrorism was floated by the government, so far speech has been limited in less extensive ways. The 2005 legislation extended the grounds for banning an organisation as terrorist where it advocates terrorism. Praise is included as a form of advocacy. After much criticism of the original Bill, the Act as adopted qualifies this provision by requiring that the praise must intend to create a substantial risk of a terrorist attack occurring or be likely to have that effect. Most controversially, disused federal sedition offences were resurrected and modernised, with the effect of drawing public attention to the inappropriateness of the very concept of sedition in a modern pluralist democracy.[3] Following widespread public unease about the freedom of speech implications of enlivening crimes of sedition, significant amendments were made to the law before its adoption.

More extensive changes were proposed by the Australian Law Reform Commission (ALRC) in September 2006, including abandonment the discredited terminology of "sedition" in labelling what are really offences

2 See B Saul, "Speaking of Terror: Criminalizing Incitement to Violence" (2005) 28 *UNSW Law Journal* 868; and generally L Alexander, "Incitement and Freedom of Speech" in D Kretzmer and F Kershman Hazan (eds), *Freedom of Speech and Incitement against democracy* (2000), 101; K Greenawalt, *Speech, Crime and the Uses of Language* (1989), chapter 6.

3 Saul, ibid; G Griffith, "Sedition, Incitement and Vilification: Issues in the Current Debate", New South Wales Parliamentary Library Research Service, Briefing Paper No 1/06, February 2006; Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005).

against political order or liberty in a constitutional democracy. While the ALRC's recommendations effectively balance many of the competing interests at stake, the ALRC still allows speech to be restricted even where it is unlikely to actually result in terrorist acts occurring, such as where a person urges conduct which is unrealistic, impossible to perform, or universally repudiated. Australia is set to continue to allow speech to be restricted in circumstances in which restriction would not be tolerated in jurisdictions more protective of unpalatable speech, such as the United States.[4]

The restriction of expression which is, or is imagined to be, related to the commission of terrorism, forms part of a broader cultural and political contest about the articulation and representation of acceptable social behaviour, values and morality. Many Western democracies have become increasingly concerned to tighten immigration controls and thereby to dictate the composition of the population; to create more stringent, values based citizenship or immigration tests, in order to exclude those who are not sufficiently assimilated into the belief systems of the mainstream cultural identity; and in some cases, even to restrict when and where religion specific clothing (such as Islamic headscarves) may be worn.[5] Despite smacking of antiquated bolshevism, there is also a creeping official strategy of "re-education", re-socialisation or re-indoctrination of terrorists in some countries, designed to set minds back on the straight and narrow. Australia's own Muslim Reference Group under the auspices of the Department of Immigration and Multicultural Affairs has even announced a university to educate unruly imams.

The Australian Prime Minister has further called on immigrants to integrate into the community and to accept "Australian" values, such as democracy, the rule of law, the equality of women, and the English language.[6] The scope of officially sanctioned values remains unclear, and other values could equally be posited as "Australian", whether drawn from the dominant discourse (such as cricket, mateship and crocodile wrestling) or from darker self images (race rioting or refugee bashing, excessive consumption and pollution, or a dreary parochialism). Underlying these developments is a political impulse to build solidarity in a time of real or imagined crisis (the war on terror, and the rhetorically related Iraq War), achieved by drawing closer the boundaries of permissible community values and membership. They are also a reaction to spectacular examples of religious sensitivity and inflammation, such as the depiction of the prophet Mohammed in Danish cartoons in 2005, or even the portrayal of Mohammed's decapitated head in Mozart's opera *Idomeneo*.[7]

4 See e.g., *Brandenburg v Ohio* 395 US 444 (1969) (limiting speech only where it is likely to produce imminent lawless action).

5 See D McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (2006); I Ward, "Headscarf Stories" (2006) 29 *Hastings International and Comparative Law Review* 315.

6 R Kerbaj, "Howard tells Muslims to Learn English", *The Australian*, 1 September 2006.

7 R Boyes, "Mozart Sacrificed to Muslims", *The Australian*, 28 September 2006

The new anti-terrorism laws have attracted much critical attention. This article focuses instead on an established area of Australian law which has been recently redeployed to restrict freedom of expression for anti-terrorism purposes. Long a field of controversy, particularly in the arts, literature and student media,[8] censorship law is a politically malleable tool which has now been applied ostensibly to avert the incitement of terrorism. The Attorney-General has raised the further possibility of reviewing censorship laws to accommodate the terrorist challenge.[9] This article analyses two decisions of Australia's Classification Review Board in mid-2006 to refuse classification to two radical Islamic publications concerning "jihad": *Join the Caravan* and *Defence of the Muslim Lands*. It first outlines the reasons for the decisions, before questioning whether the decisions were correctly made. It then examines whether the criteria for refusing classification are appropriate for dealing with religious texts, particularly in a climate of pervasive anti-terrorism sentiment which increasingly devalues freedom of expression as something that jeopardises the higher public good of security.

The Classification Framework

Under a uniform national scheme, the Classification Board (within the Office of Film and Literature Classification) classifies publications for sale on behalf of all Australian States and Territories.[10] A publication which is "Refused Classification" may not be imported, sold or delivered in Australia, although possession is not unlawful. Section 9 of the *Classification (Publications, Film and Computer Games) Act 1995* (Cth) provides for the classification of publications according to a National Classification Code, while there are also Guidelines for the Classification of Publications, issued in 2005. The Code states that a publication which promotes, incites or instructs in matters of crime or violence must be refused classification.[11] The Code also refuses classification in some circumstances where a publication is likely to cause offence, or because it describes, depicts, expresses or deals with "sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults".[12]

In the making of decisions on the classification of a publication (or a

(reporting a decision by the German opera in Berlin to cancel the opera for fear of Muslim anger).

8 For some recent controversies, see e.g., E Beal, "Artistic Merit Not Sufficient: 'Baise Moi' Refused Classification" (2002) 2 *Art and Law* 1; G Griffith, "Censorship Controversies: Asking Questions about the OFLC" (2000) 4 *Telemedia* 1; M Clayton, "Free Speech and Censorship after the Rabelais Case" (1998) 3 *Media and Arts Law Review* 194; K Winton, "*Salo*: Why The Classification Review Board Banned It" (1998) 144 *Communications Update* 19.

9 S Kearney, "Crackdown on Extremist Books", *The Australian*, 12 July 2006.

10 See generally, N O'Neill, S Rice and R Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2nd ed, 2004), chapter 15.

11 National Classification Code, Publications Table, 1(c).

12 National Classification Code, Publications Table, 1(b) and (a) respectively.

film or a computer game), s 11 of the Act sets out the matters to be taken into account:

> (a) the standards of morality, decency and propriety generally accepted by reasonable adults; and
> (b) the literary, artistic or educational merit (if any) of the publication, film or computer game; and
> (c) the general character of the publication, film or computer game, including whether it is of a medical, legal or scientific character; and
> (d) the persons or class of persons to or amongst whom it is published or is intended or likely to be published.

These matters are augmented by "principles" in the Code which decision makers should consider:

> (a) adults should be able to read, hear and see what they want;
> (b) minors should be protected from material likely to harm or disturb them;
> (c) everyone should be protected from exposure to unsolicited material that they find offensive;
> (d) the need to take account of community concerns about:
> (i) depictions that condone or incite violence, particularly sexual violence; and
> (ii) the portrayal of persons in a demeaning manner.

The Guidelines then provide decision makers with further guidance on the meaning and application of the criteria in the Code, with emphasis on the context in which classifiable elements occur, the impact of individual elements and their cumulative effect, and factors such as the emphasis, tone, frequency, context and detail in textual descriptions and visual depictions.

The Classification Decisions

In December 2005, the Australian Federal Police applied for the classification of a number of publications which were thought to encourage terrorism, including the books *Join the Caravan* and *Defence of the Muslim Lands*. The Classification Board classified both publications "Unrestricted" later that month. Almost six months later, the Commonwealth Attorney-General applied for a review of decisions not to classify eight books and a film, following advice from the Commonwealth Director of Public Prosecutions that some of the so called "books of hate" were not seditious.[13] State governments had also felt unable to control the publications under incitement or vilification offences.[14] In the UK, authorities had gone so far as to close bookshops selling extremist literature after the 7 July 2005 terrorist bombings in London.

Soon after the review request, in early July 2006 the Classification Review Board unanimously found that both *Join the Caravan* and *Defence of the Muslim Lands* promoted, incited or instructed in matters of crime

13 S Kearney, "Crackdown on Extremist Books", *The Australian*, 12 July 2006.
14 AAP, "Bin Laden Book Ban 'Not an Option'", *The Sydney Morning Herald*, 18 July 2006.

or violence—specifically terrorism as defined in Australian law—and classified both publications as "Refused Classification".[15] Refusal was thought warranted despite an acknowledgement that the Code should be conservatively interpreted.[16] The Board considered submissions from the New South Wales Council for Civil Liberties, but the Attorney-General was unrepresented. The remaining six books were left unrestricted,[17] while the film, *Jihad or Terrorism*, was classified "Parental Guidance" (PG) due to its "mild themes". In late 2006, the New South Wales Council for Civil Liberties appealed the decisions to the Federal Court, on the grounds of error of law and improper exercise of power.

Both publications refused classification were written by the late Palestinian Islamic scholar, Sheikh Abdullah Azzam, and invoked classical Islamic religious texts and scholarship. *Join the Caravan* was first published in 1987 and a 2001 edition was the subject of classification. *Defence of the Muslim Lands* was first published in 1984 (four years after the Soviet invasion of Afghanistan) and the edition classified was published in 2002. In both cases, as discussed below, the date of the editions assumed some importance because of material later added by others to the author's original text. In both cases, once the Review Board established that the publications promoted, incited or instructed in crime, it found it unnecessary to consider other classifiable elements of violence, adult themes, nudity, coarse language, sex or drug use.[18] The latter criteria reflect more subjective notions of moral offensiveness, rather than objectively identifiable criminal conduct, which is generally predicated on a democratic judgment about harmfulness. The reference point for both decisions was the definition of a "terrorist act" (and related terrorist offences attracting extraterritorial jurisdiction) under s 101.1 of the Commonwealth Criminal Code.[19]

Join the Caravan addresses the religious obligation on Muslims to undertake Jihad, particularly to expel disbelievers from occupied Muslim territories, and in the specific context of the Soviet invasion and occupation of Afghanistan. The Review Board found that the structure and nature of the book rendered it a direct, explicit, genuine, emotive and passionate appeal to Muslims to fight non-believers, particularly in Afghanistan but also elsewhere.[20] It was thought to provide specific instruction about

15 National Classification Code, Publications Table, 1(c).

16 Classification Review Board (CRB), Decision: *Join the Caravan* (19, 20, 23 June and 3 July 2006), 7; CRB, Decision: *Defence of the Muslim Lands* (19, 20, 23 June and 3 and 5 July 2006), 7.

17 *The Ideological Attack*; *The Criminal West*; *Jihad in the Qur'an and Sunnah*; *The Absent Obligation*; *Islam and Modern Man: The Call to Islam to Modern Man Volume II*; *The Qur'anic Concept of War*.

18 CRB, Decision: *Join the Caravan*, 6; CRB, Decision: *Defence of the Muslim Lands*, 3.

19 A "terrorist act" is defined as an action or threat done or made with the intention of advancing a political, religious or ideological cause; and with the intention of either (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or (ii) intimidating the public or a section of the public.

20 *Join the Caravan*, above n 16, 3, 4, 6.

preparing for Jihad in Afghanistan, including "practical details" such as saving money to support one's family, and permitting relief from Jihad where a person cannot obtain a visa or is denied permission to travel.[21] Its objective purpose was to promote and incite terrorism (both as violence, and as a crime defined in Australian law) against disbelievers, particularly in Afghanistan, and included suicide bombing and martyrdom operations.[22] The Review Board was mindful of the general principle that adults should be able to read what they want, but noted community concern about material that promotes terrorism. It believed that the book presented a one sided and extreme interpretation of Islam, which did not have any discernible educational or literary merit and which may appeal to disenfranchised segments of the community.[23]

The reasons for refusing classification to *Defence of the Muslim Lands* were similar. The book asserts that Jihad is the paramount religious obligation of all Muslims before calling for Jihad in Afghanistan and Palestine. The Review Board found that the publication was an emotive, impassioned, genuine, explicit and specific plea for Muslims to fight Jihad for Allah. Its objective purpose was to promote and incite terrorism (such as suicide bombing or martyrdom operations) against disbelievers in occupied Muslim lands or elsewhere,[24] and to justify and glorify martyrdom operations. It advances concepts of both defensive (to expel disbelievers from Muslim lands) and offensive (to attack the enemy in their own territory) Jihad.[25] The book also states that Muslims should advance on the Philippines, Kashmir, Lebanon, Chad and Eritrea, and notes the success of martyrdom operations in Palestine, Chechnya and Afghanistan.[26] The Review Board decided that the book provides a degree of instruction on how to plan and execute martyrdom operations, which, while not detailed in the Board's view, had an increased impact "in the context of the document as a whole, and due to the tone of glorification and justification".[27] This included details (particularly in an appendix) about suicide bombing techniques, their political and psychological benefits, and the distress caused to the enemy.

The context surrounding both books and their author was also relevant to the decisions to refuse classification. The Review Board noted that the author was a prominent and extreme Jihadi who had engaged in terrorism, was linked to the Taliban, and had mentored Osama Bin Laden and associates. No evidence was, however, cited for these assertions, and in particular to show that the author had actually engaged in terrorism—as opposed to advocating resistance against the Soviet occupation of

21 Ibid, 5, 6.
22 Ibid, 6, 7.
23 *Join the Caravan*, above n 16, 6; *Defence of the Muslim Lands*, above n 16, 6–7.
24 *Defence of the Muslim Lands*, ibid, 4.
25 Ibid, 5.
26 Ibid.
27 Ibid, 4.

Afghanistan, at a time when terrorism remained undefined and unknown in Australian law. The sheikh's reputed nickname, "Godfather of Jihad", and motto (which did not appear in either book) were cited as further proof of the author's links to terrorism: "Jihad and the rifle alone. No negotiations, no conferences and no dialogue."[28] Yet, by itself, a generalised statement of support for the concept of Jihad implies nothing about the manner in which Jihad should be conducted; indeed, some interpretations of Jihad are compatible with international humanitarian law, which regulates the means and methods of permissible warfare.

Other contextual factors were also thought relevant by the Review Board. Both books carried a written statement of endorsement by Osama Bin Laden, although the statements were written at a time when Bin Laden was primarily opposed to the Soviet occupation of Afghanistan and had not yet escalated his activities beyond that conflict. *Defence of the Muslim Lands* was also accompanied by "letters of agreement" from Islamic scholars supporting martyrdom operations.

More importantly, the Review Board observed that while both books were originally written to justify Jihad in Soviet occupied Afghanistan, the publisher's prefaces to both books sought to apply their religious principles to "Jihad in general"[29] or "to all similar situations facing the Muslims today".[30] The Review Board noted that an earlier 1996 edition of *Defence of the Muslim Lands* was the first English translation, done by the mujahadeen in Bosnia to encourage foreign Muslims to assist their cause (which, the Review Board omits, included self defence against Serbian ethnic cleansing). In determining its objective purpose, the Review Board agreed with the prefatory statement to the 2001 edition of *Join the Caravan*, that the book was "one of the principal inspirations for thousands of Muslims from all over the world to go and fight in Afghanistan to defend Muslim blood, property and honour",[31] despite the reference relating to the earlier Soviet occupation. More concretely, the preface disapproved of Ahmad Shah Masood's alliance with foreign states to fight against a sharia (Taliban) regime in Afghanistan, and the Review Board noted Masood's assassination on 9 September 2001,[32] implicitly linking it to Jihadi motivations.

Analysis of the Classification Decisions

Any decision to effectively ban religious texts—even obscure and marginal ones—is bound to be controversial in a pluralist, democratic society. Recourse to the law on classification was necessary in these cases because the author was dead and hence could not be charged with ordinary criminal

28 Ibid.
29 *Join the Caravan*, above n 16, 3, 6.
30 *Defence of the Muslim Lands*, above n 16, 4.
31 *Join the Caravan*, above n 16, 5.
32 Ibid.

offences such as incitement to crime or even the amended sedition offences. Even if the author were still alive, refusing classification may still be a valid means of restricting dissemination of his message.

The immediate legal question is whether the books were correctly classified, in that the law was properly applied and discretionary powers were exercised within the range of permissible choices. The Review Board deliberately avoided becoming embroiled in arguments about the more controversial criteria for refusing classification, emphasising that the books incited objectively identifiable crimes rather than focusing on the subjective question of whether they offended against generally accepted adult standards of morality, decency and propriety. Even on this narrower, more legalistic ground, the decisions still raise questions as to whether the law was properly applied.

In the first place, both books predominantly concern the obligation of Muslims to fight Jihad in the specific context of the Soviet occupation of Afghanistan, with only peripheral relevance to other conflicts or contemporary situations. Violent resistance to Soviet rule was actively advocated and financed by some western States at the time, including the United States. Inciting violence against Soviet forces amounted to little more than insisting on the exercise of the internationally recognised legal right of self defence against the unlawful use of force and external aggression—one of the fundamental rights under the United Nations Charter and customary international law. Following the Soviet withdrawal from Afghanistan, the primary object of the violence incited has disappeared, and with it much of the motivational force underlying the publications has necessarily dissipated. The publications are heavily historical,[33] and indeed substantially anachronistic. Further, extraterritorial terrorist offences were only enacted into Australian law in 2002 and at the time the books were written in the 1980s, the conduct advocated was not criminal under Australian law, which lacked both the substantive offences mentioned (terrorism) and the necessary extended geographical jurisdiction.

Secondly, the Review Board conflates the well known distinction in situations of armed conflict between the *jus ad bellum* (law on the resort to force) and the *jus in bello* (law on the conduct of hostilities). The bulk of both publications is devoted to establishing when the duty to wage Jihad arises, rather than discussing the manner, means or methods by which Jihad, once established as necessary, should be fought. The main text of *Join the Caravan* only really deals with the conduct of hostilities by referring to *constraints* on violence, by mentioning in passing the "juristic details of Jihad, such as distribution of booty and treatment of prisoners of war". The means of fighting Jihad are only dealt with at length in Appendix C to *Defence of the Muslim Lands*, whereas there is little express advocacy of, for

33 N Abjorsensen, "Strike Up the Ban: Censor Joins the War on Terrorism", Discussion Paper 26/06 (August 2006), *Democratic Audit of Australia* (ANU) 5.

example, indiscriminately attacking civilians in *Join the Caravan*. Appendix C is entitled "The Islamic Ruling on Martyrdom Operations" and does expressly support suicide bombing, describing the contemporary form of martyrdom operations as:

> to wire up one's body, or a vehicle or suitcase with explosives, and enter into amongst a conglomeration of the enemy, or in their vital facilities, and to detonate in an appropriate place there in order to cause the maximum losses in the enemy ranks, taking advantage of the element of surprise and penetration...

A further means specified is "to break into the enemy barracks or area of conglomeration and fire at them at close range, without having prepared any plan of escape, not having considered escape a possibility". It is claimed that no other technique "strikes as much terror" into enemies, nor inflicts heavier losses at the lowest cost, particularly when war booty captured from the Russians is turned back on them. It is significant that these methods outlined in the Appendix were not part of the text first published by the author, and were added later to distort the original Islamic text. Were the original text to be republished, without the contextual glosses of the publisher or the appendices, many of the Review Board's objections would disappear.

Even if the books are still relevant to post-Soviet Afghanistan and the contemporary war on terror, merely fighting with the Taliban against western and pro-western forces does not automatically equate with committing terrorist acts. Two distinct situations must be considered. Prior to the US led invasion of Afghanistan in late 2001, the Taliban constituted the de facto government of most of the state of Afghanistan, since it effectively controlled most of its territory and population. Once the international armed conflict commenced in late 2001, the Taliban's armed forces were entitled, under international humanitarian law, to recognition as combatants as the regular armed forces of Afghanistan. So much was acknowledged by widespread international legal opinion that captured Taliban fighters were entitled to prisoner of war status (in contrast to some irregular forces, such as Al-Qaeda). Taliban combatants (and foreign Islamic fighters under Taliban command) who complied with humanitarian law (and avoided war crimes) enjoyed combatant immunity under international law and could not be prosecuted for common crimes under national law, including for extraterritorial Australian offences. To the extent that Australian terrorist offences purport to criminalise otherwise lawful combat in an international armed conflict, they directly conflict with Australia's obligations under humanitarian law, and moreover jeopardise the safety of captured Australian soldiers, who may expect reciprocal treatment. Australia's terrorist offences were surely not intended to interfere with the carefully crafted parameters of humanitarian law, developed over centuries of progressive legal codification.

Ironically, before the overthrow of the Taliban, non-state forces

(such as the Northern Alliance) which were arrayed against the Taliban government—and allied with western forces—would themselves have been regarded as committing terrorist acts if the new Australian offences had been enacted earlier than 2002. Since the Australian terrorist offences are not qualified by any provision excluding their application to situations of armed conflict, even otherwise lawful killing of Taliban soldiers by forces allied to Australia could constitute terrorist crimes.

More extraordinary is the possibility that Australian soldiers themselves could find themselves liable to prosecution for terrorism, as a result of their using politically motivated violence (i.e. by implementing Australian Government policy by force) to coerce or intimidate a foreign government (the Taliban). Since Australia pursues a dualist conception of the relationship between international law and domestic law, the lawfulness of Australia's conduct under the international law of self defence and/or humanitarian law does not remedy or excuse violations of domestic criminal law. While Australian military personnel are subject to a regime of military discipline, such law is not exclusive and even Australian forces overseas enjoy no explicit immunity from Commonwealth criminal law, including the extraterritorial application of war crimes and terrorism offences.[34]

After the US overthrew the Taliban and occupied Afghanistan, remnant Taliban forces and foreign Islamic Jihadis continued sporadically resisting the multinational force authorised by the Security Council, as well as the newly formed Afghan government allied with the multinational forces. At a minimum, once Afghan authorities resumed control from the temporary occupation forces, the continuing conflict was transformed into a non-international armed conflict, in which the new Afghan government sought to suppress non-State resistance forces, with the ongoing assistance of the multinational forces requested to remain. The concepts of combatancy and combatant immunity do not apply to non-international armed conflicts as they do in international conflicts,[35] such that rebel forces fighting the Afghan government may commit terrorist acts under Australian law even if they comply in a de facto sense with the basic principles of humanitarian law (for example, by solely targeting military rather than civilian objectives).

The treatment of captured rebels was historically within the reserved domain of domestic jurisdiction of the affected State, which was entitled (but not required) to criminalise and prosecute rebel military actions (although it was also common to confer amnesties on rebels upon the close of hostilities[36]). By encouraging all States to criminalise and assert

34 *The Defence Force Discipline Act 1982* (Cth), s 61, applies the ACT Criminal Code to defence force members, even when overseas: see *Re Colonel Aird; Ex parte Alpert* (2004) 209 ALR 311.

35 B Saul, *Defining Terrorism in International Law* (2006), chapter 2.

36 Article 6(5) of the 1977 Protocol II to the 1949 Geneva Conventions states that: "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict".

jurisdiction over international terrorism—without defining it[37]—resolutions of the United Nations Security Council since 11 September 2001 have transformed a matter within domestic jurisdiction into one of international concern, since non-international armed conflicts are not expressly excluded from the ambit of the obligation to criminalise "terrorist" violence. States need not, therefore, distinguish situations of violent domestic rebellion (which may informally respect the laws and customs of war) from terrorist violence proper (involving the deliberate targetting of civilians, or governments outside a conflict situation), signifying a blurring of different species of political violence. Even some suicide bombings may not violate the tenets of humanitarian law, where they are directed exclusively or proportionately against military targets, in an armed conflict, and where the attacker is not perfidious (that is, the bomber does not conceal him or herself as a civilian).

Broader Implications of the Decisions

The Review Board's decisions rested in part on its view that publications of this kind may appeal to disenfranchised segments of the community. Under the Act, the decision maker is entitled to take into account "the persons or class of persons to or amongst whom it is published or is intended or likely to be published". However, it is a quantum leap of judgment by the Review Board to assert baldly that disenfranchised members of the community will somehow be spurred to action by obscure, turgid, and anachronistic texts by a long dead author, particularly when extremely graphic and explicit DVDs and CDs are in circulation for the specific purpose of recruiting jihadis. Society liberally permits the viewing of explicit visual representations of fictional (and some real) violence against people in films and on television, yet becomes squeamish when "terror" books depict violence with far less immediacy and intensity.

In particular, the empirical basis for the Review Board's assertion is unclear. It offers no evidence to sustain any degree of causation between reading publications of this nature and resort to terrorist acts in Australia or elsewhere. While in censorship debates there has been considerable scholarly attention given to understanding the connections between pornography and the commission of violence against women,[38] or between violent films or music and violence, less consideration has been given to whether and how religious publications lead to violence. No doubt small incitements can sometimes trigger violent conflagrations; the lessons of hate speech in Rwanda (and before it in the racist pamphleteering of Nazi Germany) are hard to ignore. But often, particularly in relation to terrorism, causation is more murky and difficult to prove. While the University of

37 B Saul, above n 35, chapter 4.

38 See e.g., B Harris, "Censorship: A Comparative Approach Offering a New Theoretical Basis for Classification in Australia" (2005) 8 *Canberra Law Review* 25 (reviewing the relevant research).

Western Australia is now researching why young Muslims turn to militant Islam through extreme literature, the process of radicalisation is poorly understood and under theorised.

Unless there are definite grounds for believing that a publication is likely to incite imminent, unlawful violence, it is arguable that censors should not step in. The idea that publications may contribute in some ethereal way to an intellectual climate conducive to terrorism is hardly a rationally probative basis on which to limit free expression, although such expression may cross over into racial or religious hate speech (or hatred against Western civilisation loosely defined). Banning religious texts is itself likely to radicalise adherents to a religion who would not otherwise be influenced, since it may be perceived as an attack by the state on religious freedom. In the age of the internet, there is often ready online access to banned publications, piquing the interest of the aggrieved in publications which would not otherwise have come to their attention. *Join the Caravan* and *Defence of the Muslim Lands* are easily locatable in full text on the internet after a perfunctory search.[39]

A further question concerns whether the religious character of a publication should have any bearing on the process of decision making about classification. The Act explicitly states that the "literary, artistic or educational merit", or "medical, legal or scientific character" of a publication is a relevant matter to be taken into account. There is, however, no mention of the religious or spiritual nature of a publication, despite the self evident claim of religion to special consideration. On one view, there should be a higher threshold for intervening in religious speech than in less sacred expression, to recognise the profound spiritual importance of freedom of religious belief and expression to adherents. While extreme religious views may have little instrumental value in producing a better social or political order, safeguarding such views is nonetheless critical in constituting a society of equal and responsible moral agents, entitled to formulate and express their own opinions without paternalistic interference.[40] On this view, the Review Board failed to give weight adequately to the relative importance of preserving freedom of religious speech as far as possible. Moreover, since religious texts are often densely imbricated with metaphor, allusion, and fable, censors might be expected to read them figuratively rather than literally, allowing a wide and benevolent margin of deference. Non-interference by the state in religious freedom also serves the broader social objective of preserving a separation between church (or mosque) and state, which is undermined as soon as the state is seen to meddle disproportionately more in some religions (particularly Islam) than others.

39 See <http://www.religioscope.com>; <http://www.islamistwatch.org>; or <http://www.worldofislam.info>.

40 For a discussion of these two justifications for free speech, see R Dworkin, "The Coming Battles over Free Speech", *The New York Review of Books*, 11 June 1992, 190.

The alternative view is that in a secular democracy, religious speech is no more important than any other type of speech, and may even be less important than that political speech which is necessary to sustain the political life (and thereby every other kind of life) of the community. Moreover, precisely because religion is a matter of faith rather than rational proof, its followers are arguably more susceptible to emotional manipulation in service of eschatological or millennarian ends. For these reasons, religious texts might be expected to exhibit a special degree of restraint in what they ask or command of their followers, and the state should vigorously emasculate any violent literary impulses before they take root and flourish amongst believers. Further, political or secular ambitions often masquerade as religious injunctions and the state is entitled to disrobe them when they do so, so that religion does not become a smokescreen for all manner of violent or criminal impulses.

The difficulty is that it is sometimes extremely hard to divorce politics from religion and vice versa; there is often no bright line. *Join the Caravan* and *Defence of the Muslim Lands* are cases in point, where religious convictions seemingly demand political action, although believers are likely to perceive their conduct as religious rather than political. From the perspective of legal regulation, it is preferable to treat religious texts which incite crime or violence, on a plane of political action, as religious speech which is excessive and liable to curtailment—rather than seeking to deny their religious character and regarding them merely as inciting political crime. Whereas the former approach allows religions to define their own parameters, the latter approach problematically intrudes with exterior judgments about what does and does not count as religious.

In Australia, approaches raise similar constitutional questions. Briefly, the express constitutional protection of freedom of religion in section 116 of the Commonwealth Constitution prevents the Commonwealth from making any law "for prohibiting the free exercise of religion", which may be interpreted to include freely communicating religious ideas—even publications urging violence. To the extent that religious texts are seen to invoke political ideas, the implied constitutional freedom of political communication may also be relevant. *Join the Caravan* and *Defence of Muslim Lands*, for instance, criticise the participation of Western powers in Afghanistan, which implicitly includes Australia. Whether such criticism relates to the Australian political system of representative and responsible government depends on how widely or narrowly the boundaries of that system are construed, but it is certainly arguable on the wider view that criticism of a democracy's decision to wage war is squarely within the ambit of political communication.

Whether the publications in question are regarded as political or religious, neither constitutional freedom is absolute and restrictions on both have been recognised by the High Court, as long as limitations are reasonably appropriate and adapted to securing a legitimate aim, including

the prevention of crime.[41] While insulting words have been subject to a more stringent test for restriction—requiring a likelihood of inciting imminent lawless action[42]—speech which incites crime or violence may be restricted as long as the restriction is proportionate to a legitimate aim, and even if no imminent crime or violence is likely. As noted earlier, the ALRC maintained this position after reviewing Commonwealth sedition offences in 2006. The ALRC rejected arguments that the law ought to require a likelihood of imminent action, in the erroneous belief that requiring an intention to urge violence is sufficient to address "concerns about the need for a closer connection between the urging and an increased likelihood of violence occurring".[43] As for religious freedom, the constitutional protection limits only Commonwealth laws and does not prevent the States from curtailing religious speech, which is significant given that it is primarily state criminal laws that enforce classification decisions.[44]

A broader policy issue arising from the classification decisions is selectivity in enforcement. It is questionable why these publications were refused classification, yet the collected speeches of Osama Bin Laden are freely available from a major transnational Western publisher.[45] Likewise, Australia has refused immigration clearance to recently convicted Holocaust denier David Irving, yet Hitler's seething masterwork, *Mein Kampf*, is available without restriction in Australian book stores. It might even be questioned why Australian Government statements which argued for invading Iraq in March 2003—an action widely considered to constitute unlawful aggression under international law—were not banned for inciting crime and violence.[46] A classification system which is driven by complaints rather than the objective identification of harmful publications is more likely than not to reflect subjective, irrational or majoritarian beliefs about what is socially acceptable.

If violent, crime inciting publications are worthy of eradication, there

41 See e.g., *Brown v Classification Review Board of the Office of Film and Literature Classification* (1998) 50 ALD 765.

42 *Coleman v Power* (2004) 209 ALR 182, 210 (McHugh J), 229–30 (Gummow and Hayne JJ), 246–47 (Kirby J); see D Meagher, "The 'Fighting Words' Doctrine: Off the First Amendment Canvas and into the Implied Freedom Ring?" (2005) 11 *UNSW Law Journal Forum* 14.

43 ALRC, *Fighting Words: A Review of Sedition Laws in Australia, Report 104*, July 2006, 185.

44 Although the laws cannot be enforced without the initial Commonwealth classification decision.

45 Osama Bin Laden, *Messages to the World: The Statements of Osama Bin Laden* (ed B Lawrence, trans J Howarth, Verso, 2005); see also R Hamud (ed), *Osama Bin Laden: America's Enemy in His Own Words* (2005).

46 While crimes refer to domestic law, it is possible that the customary international crime of aggression, recognised in *R v Jones* [2006] UKHL 16, is part of Australian law, though this is unlikely on the reasoning of the Full Federal Court in *Nulyarimma v Thompson* [1999] FCA 1192 (refusing to recognise the customary crime of genocide in domestic law, partly on policy grounds (preventing unfairness to an accused due to lack of specificity) and partly because s 1.1 of the *Criminal Code* (Cth) specifies that it contains the "only" offences against Commonwealth law (to ensure parliamentary control of new crimes). The status of customary law in domestic law has not been definitely decided.

is a real question whether double standards are at work. Arguably, books such as *Join the Caravan* or *Defence of the Muslim Lands* are not objectively worse than, for instance, the mainstream Christian Bible. The blood curdling Old Testament is full of stories detailing the fanatical slaughter of whole cities, including innocents; the wrath of a punitive, vengeful, war-mongering God; and the crude favouring of a "chosen" people to the detriment (and occasional extermination) of others. Despite the redemption and forgiveness celebrated in the New Testament, it too is not beyond reproach: it rails against homosexual perverts;[47] demands death for sexual immorality;[48] makes husbands supreme over their wives[49] (including their bodies[50]); insists women cover their heads and remain silent in church;[51] objects to heathen judges judging disputes between Christians[52] (a rudimentary sharia law?); and visits the terrible plagues of Revelation upon all humanity. The Christian tradition can easily be painted in a manner as extreme and fanatical as radical Islam if the right gloss is put on it. Indeed the glorification of the cult of death is hardly foreign to western culture: Wilfred Owen's poem long ago exposed:

> The old Lie; Dulce et decorum est / Pro patria mori ("it is sweet and right to die for your country").[53]

Just because a violent Bible has become widely accepted by the mainstream culture should not render it immune from the same degree of scrutiny imposed on the texts of minority religions—although it is hard to argue in favour of equal treatment by bad laws. One might argue that context, culture and history are everything, rendering the Bible comparatively harmless in spite of its literal meanings and invocations. But such considerations—and latitude—must surely be applied to other religious texts in a pluralist society, even those which deviate from accepted or mainstream community standards. This is particularly the case when classification decisions are based not on whether a publication incites crime, but on whether it gives offence or depicts cruelty, violence or revolting or abhorrent phenomena which offend against the standards of morality, decency and propriety generally accepted by reasonable adults. There is a real question whether classification on these grounds can ever be rationally supported in a pluralist community, which does not presuppose a homogenous social order. It might be argued that such standards are fictions necessary to maintain a sense of community solidarity, and to prevent the fracturing of social relations into hundreds of autonomous, tribal universes. Yet, it is arguably sufficient to refuse classification to publications inciting

47 The Bible, 1 Corinthians 6.9.
48 Ibid, 10.8.
49 Ibid, 11.3.
50 Ibid, 7.4.
51 Ibid, 11.7 ("A man has not need to cover his head, because he reflects the image and glory of God. But woman reflects the glory of man"); 14.35.
52 Ibid, 6.1.
53 W Owen, "Dulce et decorum est" (1917–18).

imminent, serious crime, while eliminating altogether the paternalistic and infantilising criteria of moral offensiveness, decency and propriety. This is not to advocate a social world founded on postmodern relativism; rather, it resurrects a fairly conservative vision of old fashioned liberalism, based on equal treatment and respect for difference.

Conclusion

Classification law attempts to balance the competing public interests in freedom of expression and the prevention of crime (and far more controversially, offensive material). In a secular democracy, it is plain that religious impulses to violence cannot be justified or excused in the same way that religious conviction can provide an accepted ground for failing to vote or to work on spiritual holidays. In most cases, extreme religious views should be exposed to public scrutiny rather than hidden away by overzealous censors making judgments on behalf of everyone else. Except at the margins, law should play no role in policing religion or cultural expression. The law should only intervene in those truly exceptional cases where a religion seeks to impose its will on non-consenting, non-believers, through inciting imminent violence which is reasonably likely to occur. Whether or not religious expression is entitled to more or less protection than regular political (or other speech), neither *Join the Caravan* nor *Defence of the Muslim Lands* falls into the exceptional category and sensibly, neither publication ought to have been refused classification.