Last updated: 28 March 1999

Rabelais Defence Campaign

Support the Former Student Editors of Rabelais in the Fight for Free Speech in Australia

NEW On 24 March 1999, the charges against the former editors of Rabelais were dropped by the Director of Public Prosecutions, without explanation.

A Short History of a Bad Case of Political Censorship in Victoria

The 1995 editors of La Trobe University student newspaper, Rabelais, face a total of $72,000 in fines and six years jail each for running an article entitled 'The Art of Shoplifting' in the July edition. The following is a brief summary of events.

1994: Victorian Liberal Government introduces legislation ("VSU") that prohibits the use of student money by student organisations to fund, amongst other things, a student newspaper.

July 1995: 'The Art of Shoplifting' article published in Rabelais.

August 1995: The mass media widely report the publication of the article. Police and Neighbourhood Watch express outrage. John Laws and the Retail Traders Association call for state action to be taken.

16-17 August 1995: Rabelais editors arrested, interrogated, photographed and fingerprinted by the Preston CIB - the latter presumably so that prints could be matched with those discovered on the editorial pages of magazines and other dangerous items (pens, paper) found at well-known crime scenes such as editorial offices, printers, libraries and other haunts for the criminal underworld.

September 1995: The Retail Traders Association submits Rabelais for classification to the Office of Films and Literature Classifications (OFLC). The publication is refused classification, banning it in its entirety. The Retail Traders Association is informed of the decision. No-one else is informed - including neither the editors or publishers of Rabelais, who had only thirty days to appeal the decision.

January-February 1996: The Rabelais editors are charged by Victorian Police under the provisions of the Classification of Films and Publications Act, with publishing, distributing and depositing an "objectionable

publication". At the very end of February the (now ex-) editors receive the prosecution brief, and discover the federal decision to ban the July edition.

28 April 1996: The case against the editors is adjourned until the 31 July, pending a hearing to appeal the decision of the OFLC.

May 1996: The editors successfully argue to the national Classification Review Board of the OFLC that they are "aggrieved" by the decision to ban Rabelais and that a special case should be made to allow them to appeal, even though the thirty day time period elapsed long ago

July 1996: The editors appealed against the Chief Censor's decision, asking the Classification Review Board to replace it with a decision to classify the publication 'Unrestricted'. The practical consequences of this would be to give the defendants an absolute statutory defence to the police charges against them. Submissions were made to the review board on the former editors' behalf by Stuart Littlemore QC, who argued that they were protected by constitutional guarantees of freedom of political expression. Ultimately, the Classification Review Board declined even to consider these arguments, and upheld the Chief Censor's decision.

15 August 1996: The former editors lodged an application with the Federal Court of Australia to review the Review Board's decision.

21 May 1997: The former editors, represented again by Stuart Littlemore, appear before Justice Merkel of the Federal Court of Australia, and argue that the Review Board's refusal to classify the Rabelais publication was an act of censorship and impugned the freedom of speech and expression guaranteed under Australian law. A rally outside the court hears Jackie Lynch (National Union of Students), Joseph O'Reilly ([BROKEN LINK] Liberty - the Victorian Council of Civil Liberties), Leigh Hubbard (Victorian Trades Hall Council) and Terry Lane (Free Speech Committee) speak in defence of the editors.

6 June 1997: The Federal Court hands down its decision dismissing the former editors' appeal. Justice Merkel finds that the Review Board was open to come to the decision that it did, and rejects the arguments that 'communication' such as the Rabelais article enjoys any constitutional protection. The judgment is a new tool for those who might have reason to limit rights to political expression in Australia where that expression includes advocating a breach of the law. Leaflets calling for demonstrations, union publications advocating industrial action, guides giving instructions on safer drug usage and much other material now fall into this category.

27 June 1997: The former editors file an appeal against Justice Merkel's decision to the Full Court of the Federal Court of Australia. (See media release)

30 September 1997: Senator Natasha Stott Despoya speaks in the Senate about the case and the need to re-evaluate and re-examine the relevant laws.

2 October 1997: Senator Bob Brown places a motion before the Senate urging the Government to review the National Classification Code.

2 October 1997: Liberty, the Victorian Council of Civil Liberties, announces it is seeking leave of the court to appear at the hearing because of the important issues it raises about freedom of speech and censorship. Liberty has briefed Hartog Berkeley QC, former Victorian Solicitor General, to appear on its behalf. (See media release)

7 October 1997: A rally was held outside the Federal Court prior to the appeal being heard by the Full Federal Court. The Council for Civil Liberties' application to appear in the case was refused. The Court reserved its decision, which was expected before the end of December.

24 March 1998: The full Federal Court handed down judgment upholding the ban on the Rabelais article. The full text of the banned article is included in the Court judgment. The Court rejected argument that the article fell within the implied Constitutional freedom for discussion on political and government matters because it was not published "in the course of the political or democratic process" and said it did not have to decide whether the Rabelais article instructed

in crime, but whether it was reasonably open to the censorship Board to make that finding.

Also on 24 March, Senator Bob Brown gave notice of a Senate motion expressing concern that the current classification laws are limiting legitimate freedom of expression and political dissent and calling on the Government to urgently review classification laws.

The former editors have received legal advice from a Queen's Counsel that it is appropriate to seek leave to appeal to the High Court and an application is being prepared. Mr Ben Ross, one of the former editors, said "It is important that we contest this interpretation of the law, which is going to restrict anyone involved in political dissent whether industrial, environmental or anything else."

See also links to media reports regarding the March 1998 decision.

28 March 1998: The Melbourne Age, in an article titled "Legal twist on banned article" by Peter Gregory, Chief Court Reporter, reported that:

> 'Australia's censorship authority has told a Federal Court judge he might have breached the law by publishing a banned article on shoplifting in a judgment that upheld its banning.
> In a letter to Justice Peter Heerey, a lawyer from the Australian Government Solicitor's office said the Office of Film and Literature Classification thought the Federal Court might not have been aware of laws about objectionable publications.
> [...]
> "Whether or not the legislation applies to publication or distribution of the article by the court as part of the court's judgment, there would appear to be an issue whether the legislation applies to consequential publication, and distribution by other persons/bodies," the solicitor said. "Leaving aside the question of whether any illegality would be involved, it does seem inappropriate...that the article be published as a result of a court judgment upholding a decision that the article be refused classification."
> Justice Heerey's associate, Ms Christine Petrov, wrote in reply "Their honors see no reason why the judgments should not be published in the usual way. [...] '

Nevertheless, the judgment became available for purchase from Federal Court registries late on 3 April. Court representatives advised that no decision had been made as to whether it would be made available on the Internet. However, it was finally published on-line on 9 April.

On 23 April 1998, Electronic Frontiers Australia (EFA) sent an application to the OFLC for classification of a Full Federal Court's publication under Section 13 of the Classification (Publications, Films and Computer Games) Act 1995 ("the Act"). In July 1998, the Acting Chief Censor informed EFA that the Classification Board of the Office of Film and Literature Classification (OFLC) does not know what its powers are and does not intend to find out. This attitude threatens the rights and freedom of Australians to access case law, either by application of censorship law, or by uncertainty and intimidation. For the latest details on this matter, see EFA's page.

11 December 1998: The High Court refused to grant the former editors special leave to appeal the decision of the Federal Court.

[Back to Index]

Background Briefing Paper

Australian court confirms ban on student newspaper: former editors face 6 years jail

Melita Berndt, Michael Brown, Ben Ross and Valentina Srpcanska were in 1995 the editors of Rabelais, the newspaper published regularly by the Students Representative Council of La Trobe University in Melbourne, Australia. All of the editors were students and had been elected at the most recent annual student elections.

In July 1995 an edition of Rabelais was published which included an article about shoplifting. Following publication,

there was a substantial and quite unexpected level of media interest. Representatives of major retail chains and of the local police condemned the publication. The editors have defended and explained the article in terms of raising issues about the pattern of wealth distribution in Australian society, questioning the sanctity of private property, and highlighting the inadequacy of financial support for students.

Following unprecedented intervention from State and Federal Government ministers, media personalities and the Retail Traders Association, the article was subsequently banned and the former editors have all been charged in relation to the article with each facing 6 years in jail or $72,000 in fines. The defendants unsuccessfully appealed to the Classification Review Board against the Chief Censor's decision to ban the article. If the Review Board had changed the article's classification from 'RC' (Refused Classification) to 'Unrestricted' the defendants would have had a complete defence to the criminal charges. On June 6 1997, the Federal Court of Australia dismissed the defendants' application to have the court review the Review Board's decision. The editors filed an appeal against the Federal Court's decision which was heard by the Full Federal Court on 7 October 1997. On 24 March 1998, a decision upholding the ban on the article, was handed down. An application to seek leave to appeal to the High Court is being prepared.

This following section discusses the history of the case and the June 1997 Federal Court decision in more detail.

Background to the Prosecution

In Australia's federal system of government, criminal law matters are generally the responsibility of various state governments. The federal government has a very limited role. It is quite unusual for federal government ministers or officials to become involved in initiating prosecutions under state laws. In the case of the Rabelais editors, however, there was a surprising and disturbing intervention from the federal government.

On 8 August 1995, the then federal government minister for education, Mr Simon Crean, was 'grilled' on a nationally syndicated radio program by a well known confrontationist talkback personality who extracted from the minister an undertaking to pursue the student editors, to determine if federal government funding to their paper could be cut and to determine if the individuals could be prosecuted in the criminal courts. The exchange took place against a background of widespread speculation that an early federal election may have been imminent.

According to documents obtained by the defendants, the 24 hours following the talkback radio program witnessed a burst of frenetic activity among the most senior officials in the minister's department and legal advisers to the government. This activity culminated in the minister arranging for the paper's funding to be cut, and writing to the state government minister responsible for criminal prosecutions, advising her of provisions of little known state law under which the editors could apparently be prosecuted. The federal minister also wrote to the radio personality, advising him of the action.

In little over a week, the editors were arrested, interviewed, photographed and fingerprinted by police. Some months later, they were formally charged with criminal offences relating to the publication of an 'objectionable publication' under the Victorian Classification of Films and Publications Act 1990 (the censorship code). Each editor faces three charges, each charge carrying a penalty of up to two years imprisonment and a $24000 fine.

Publications that 'promote, incite or instruct in matters of crime or violence' are considered objectionable under the censorship code.

Secret Censorship

Australia has a complicated set of federal and state legislative arrangements supporting the censorship and classification system for films, computer games, books and other publications. The Rabelais case highlights some of the dangers and defects of this system.

Before the defendants had been charged, the Retail Traders Association of Victoria applied to the censorship authorities (the Office of Film and Literature Classification) for the edition of Rabelais to be classified. They did not inform the editors or publishers that they were doing so. The censorship authorities received and considered the application, again without informing the editors or publishers. The Chief Censor decided to 'refuse to classify' (in effect, to ban) the

edition on the basis that it instructed in matters of crime. The defendants were not made aware that they had been subject to the classification procedure until well after they were charged. At no stage were the editors given an opportunity to put their case. All of this was legal under the censorship legislation.

The consequence of a refusal of classification is that any person who distributes such a publication is exposed to the possibility of prosecution.

The editors appealed against the Chief Censor's decision, asking the Classification Review Board to replace it with a decision to classify the publication 'unrestricted'. The practical consequences of this would have been to give the defendants an absolute statutory defence to the police charges against them. On 12 July 1996, submissions were made to the review board on the former editors' behalf by Stuart Littlemore QC, who argued that they were protected by constitutional guarantees of freedom of political expression. It was also argued that the censorship legislation should be restrictively interpreted to give effect to Australia's international human rights obligations, including Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which affords broad protection for freedom of speech generally. Australia has ratified and acceded to the ICCPR.

The Classification Review Board declined even to consider these arguments, and upheld the Chief Censor's decision.

The former editors lodged an application with the Federal Court of Australia to review the Review Board's decision. They argued essentially that the imposition of an RC classification on the Rabelais publication impugned the freedom of speech and expression guaranteed under Australian law. Specifically, the Review Board should have construed the classification code with reference to Australian and international law protecting freedom of speech, and also characterised the article as a political publication which ought to be constitutionally and legally protected.

On June 6 1997, the Federal Court ruled that (inter alia):

- subject only to any constitutional protection of the freedom of political communication and discussion, the legislature can restrict or inhibit freedom of speech;
- this article was not 'political communication' and was not subject to any such protection;
- the Review Board did not err in law in deciding that the article instructed in a matter of crime;
- the Review Board did not err in law in deciding that the censorship code 'overrode' any rights to free speech granted by Australian and international law.

(See http://www.austlii.edu.au/au/cases/cth/federal_ct/1997/474.html for full judgment.)

The former editors application for review was thus dismissed.

A Dangerous Precedent

The judgment states that such restrictions of the right to free speech would be acceptable worldwide. In particular the judge noted that the applicants could not find any authorities 'in the free speech jurisprudence of the United States or other jurisdictions where constitutional protection is given for speech which might be likely to cause or induce the commission of a crime'. Consideration of the ICCPR, the US Constitution and law of other jurisdictions was used to support the final decision.

It seems that the law in Australia is now that any publication which promotes, incites or instructs in matters of crime (which in essence, according to the judgment, covers most activity which attracts state sanctions except for regulatory offences) or violence can and should be banned, and anyone who distributes or publishes such an item is open to prosecution. Further, 'instructs' is given its 'ordinary and usual meaning' viz. 'to furnish with knowledge, esp. by a systematic method; teach; train; educate'.

Much protest, dissent and industrial disputation that occurs in Australia involves activity that is technically illegal. Many rallies, demonstrations, strikes and pickets are subject either to statutory or common law restrictions, or to directions from police officers, municipal and other authorities. The State of Western Australia still has laws prohibiting unauthorised gatherings of more than three people in public.

The judgment provides a new tool for those who might have reason to limit rights to political expression in Australia where that expression might include advocating activity that involves a technical breach of the law. Leaflets calling for demonstrations, union publications advocating industrial action, guides giving instructions on safer drug usage and much other material now falls into this category.

For information on developments subsequent to June 1997, see the chronology.

For additional information, including links to newspaper articles and other pages about the case, see The State of Censorship - The Rabelais Case.

[Back to Index]

What Can You Do?

The former editors' challenge to the censorship ban is supported by prominent individuals and organisations including: Richard Walsh (CEO, Australian Consolidated Press), Leigh Hubbard (Secretary, Trades Hall Council), Fr Edmund Campion (Chair, Literature Fund, Australia Council), National Union of Students, Tom Shapcott AO (Professor of Creative Writing, Adelaide University), Terry Lane (Free Speech Committee), Media, Entertainment & Arts Alliance, Robert Richter QC (Civil Liberties Council), Dr Don Anderson (Literary Columnist, Sydney Morning Herald).

If you, too, support the editors' challenge to the censorship ban, you can:

- **Write a letter of support** for the former editors stating that you want the charges against them dropped. (Please also advise whether or not your name may be used in publicity in support of this demand.) Send letters by email to: rabelais4 -at- binary net au, or snailmail to the address below. *Please do it very soon.*

[Back to Index]

Contact Details

Rabelais Editors Defence Campaign
PO Box 146
La Trobe University
Bundoora VIC 3083
Australia

Ph: (03) 9660 4769
Fax: (03) 9660 4896
Email: rabelais4 -at- binary net au

[Back to Index]

Last updated: 28 March 1999