

15<sup>th</sup> April 2019

To the Secretary for Internal Affairs  
Department of Internal Affairs  
Private Bag  
Wellington

- 1 Pursuant to section 47 of the Films, Videos, and Publications Classification Act 1993, I hereby apply for a review, by the Film and Literature Board of Review, of the publication specified in paragraph 2 of this application.  
I am making this application pursuant to paragraph (e) of section 47(2) of the Films, Videos, and Publications Classification Act 1993.  
The decision of the Classification Office in respect of the publication was entered in the register of classification decisions on 29 March 2019.
- 2 The particulars of the publication are: a political manifesto titled "The Great Replacement". It is understood to have been authored by Mr. Brenton Tarrant.
- 3 My name and address are as follows:  
Name: The Kiwi Party Incorporated (Gary Burch)  
Address: P.O. Box 218, Waimauku 0842
- 4 The application fee of \$1100.00 is enclosed.  
Signature of applicant:  
Date: 18<sup>th</sup> April 2019

#### Introduction

1. The Kiwi Party seeks leave to review the decision of the Chief Censor, hereafter the 'Censor', to prohibit Mr. Brenton Tarrant's manifesto titled, 'The Great Replacement' hereafter 'the Manifesto'.

The reasons why the applicant considers that the publication to which the application relates should be reviewed by the Board of Review

2. The Kiwi Party seeks leave on the basis that it is a NZ political party which advocates for a written constitution, protecting free speech as high law, and which takes the position that the decision of the Censor to prohibit a political manifesto was unlawful, as set out below.

First cause of action    Illegality            common law Constitutional right to free speech

3. The English common law Constitution is not a codified and written constitution but it is high law and as such cannot be displaced by statute law. This Constitution, called by Blackstone, the "Ancient Constitution", hereafter termed the "Constitution" became the Constitution of New Zealand by the

Treaty of Waitangi. The right to free speech is a core Constitutional right, which is distinct from and superior to the affirmation of this right in legislation, such as the New Zealand Bill of Rights Act 'NZBORA'.

4. The NZBORA states that its purpose is:

“to affirm, protect, and promote human rights and fundamental freedoms in New Zealand”

5. It follows then that the NZBORA did not have as its purpose the abrogation of Constitutional rights and that it merely provides a subordinate legislative regime, which was primarily intended to import an international treaty, the “International Covenant on Civil and Political Rights” into domestic law. It is this international treaty which is properly subject to s4 NZBORA. Section 4 provides that “other enactments not effected” as it is a principle of the Constitution that the executive cannot make domestic law, by the incorporation into statute law of treaties made with foreign powers.

6. Political free speech is an absolute right under the Constitution. The imposition of Draconian penalties, of up to 10 years' imprisonment, for having in one's possession a political manifesto, is a sanction akin to those imposed by totalitarian regimes to suppress democratic processes. The Censor's decision to penalise political free speech, with such severity, flies in the face of the norms which operate in a free and democratic society.

7. Accordingly, the Censor acted illegally in prohibiting the Manifesto.

Second cause of action    Illegality                      Breach of Separation of powers

8. As a political appointee the Censor is a creature of the executive.

9. Under the NZ Constitution the separation of powers precludes the executive from exercising legislative or judicial powers.

10. In relying on the ideological construct of “dangerous speech”, a foreign doctrine inimical to freedom of speech, rather than the plain meaning of s14 NZBORA as interpreted by the Courts of NZ, the Censor has purported to act legislatively or judicially.

11. The determination of the Censor incorporated a breach of the separation of powers, was unconstitutional and hence unlawful.

Third cause of action    illegality                      error of law

12. In his determination the Censor stated:

No submissions were required or sought in relation to the classification of the text. Submissions are not required in cases where the Chief Censor has exercised his authority to call in a publication for examination under section 13(3) of the FVPC Act.

13. Section 13(3) of the FVPC Act provides:

The Chief Censor may, on his or her own motion, determine that any publication should be received for examination by the Classification Office. In any such case the Chief Censor shall, by notice in writing, direct the chief executive of the New Zealand Customs Service or the Secretary to take all reasonable steps to obtain a copy of the publication and submit it to the Classification Office under paragraph (a) or, as the case requires, paragraph (b) of subsection (1).

14. As can be seen s13(3) refers only to the power of a Censor to submit a publication to the Classification Office on their "own motion" and is silent as to the making of submissions.

15. The FVPC Act makes provision for submissions at s20, as follows:

Right to make submissions

(1) The following persons may make written submissions to the Classification Office in respect of the classification of any publication submitted to the Classification Office under section 13:

(a) the Secretary:

(b) the person who submitted the publication:

(c) any person who is notified under section 19(4) or (5):

(d) such other persons who satisfy the Chief Censor that they are likely to be affected by the classification of the publication.

16. Clearly s20(1)(d) must import an ability to so satisfy the Censor and equally clearly there are those in New Zealand who believe in the right to free speech and so would likely avail themselves of their statutory right to seek to make submissions. Any prohibition of political speech engages the substance of a free and democratic society and so affects to who uphold these values. Accordingly, the Censor would have no grounds to refuse such an application.

17. The NZ Bill of Rights Act, at s6, provides:

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

18. Any conflict between the power of Censor to submit an application on his own motion and the ability to make submissions was required by law to be resolved in favour of a rights affirmative outcome.

19. The Censor has prevented the operation of s20(1)(d) and has so acted unlawfully.

20. The Censor must be taken to know the Act he operates under and accordingly his avoidance of his duty under s20(1)(d) was done knowingly. Further the Censor must be taken to have known that in acting unlawfully he was potentially exposing persons to harsh penal sanctions, in the circumstances of a rapid change of the law and in an area of law in which a reasonable person might well expect they still held the right to freedom of speech.

21. The Censor has acted illegally in not applying the Act, as he did not allow any time for any persons to make an application pursuant to s20(1)(d).

Fourth cause of action predetermination

22. In regard to his determination to submit the Manifesto for Classification pursuant to s13(3) the Censor stated that:

In this particular case there is clear public interest in this publication being classified as soon as possible.

23. It is evident in his own words that the Censor predetermined his decision to submit the Manifesto for classification.

24. As set out above the Censor claimed that there was “clear public interest” in haste but without waiting to see if any public applications were made pursuant to s20(1)(d) the Censor has no basis for the claim that the public sought haste.

25. The Censor has no lawful power to be able to arbitrarily determine what is and what is not in the public interest.

26. The Censor predetermined the process of classification and prohibition and hence his actions were unlawful.

Fifth cause of action fettering of the Censor’s discretion

27. As set out above at paragraphs 6 & 7 the Censor says that he exercised his powers under s13 FVPC to submit the Manifesto for classification “on his own motion”.

28. The Kiwi Party has made an OIA request seeking all communications between the Censor and any other person in the period from the Christchurch incident, to his making of the determination to submit the Manifesto for classification. Evidence obtained in response to this request may show that in fact the Censor did not decide to submit the Manifesto for classification “on his own motion”. The Kiwi Party reserves the right to present any evidence in respect of this claim when and if such evidence is provided.

Sixth cause of action Irrelevant consideration

29. In coming to his decision the Censor sets out at length criteria which stem from the doctrine of “dangerous speech” as espoused by Susan Benech, an ideologue hostile to freedom of speech.

30. In relation to Susan Benech’s criteria for cutting down the scope of free speech the Censor states:

The content and context of this document fits all of these criteria and can fairly be characterized as posing a genuine and identifiable danger to society.

31. The Censor must base his decision upon NZ law, as interpreted by the Courts of NZ.

32. By relying upon the ideological construct of “dangerous speech”, which is a foreign doctrine promoted as a means to attack freedom of speech, the Censor has taken account of an irrelevant consideration, as this construct is not part of NZ law.

Seventh cause of action

Mandatory relevant considerations

33. In coming to his decision the Censor failed to take account of the fact that the government’s response to Mr. Brenton Tarrant’s alleged actions closely accord with the strategy outlined in Mr. Tarrant’s Manifesto.

34. The coincidence of a terrorist strategy and government policy is an issue of the highest importance to a free and democratic society.

35. Accordingly, the Censor has failed to take account of a mandatory relevant consideration and his determination is invalid.

36. The Censor states that he had consideration of the s14 of New Zealand Bill of Rights Act, which sets out the right to free speech, as affirmed in that Act.

37. In coming to his decision the censor referred to the following passage:

The author presents any group of people who are not white and European (presumably referring to people of Caucasian descent) but who are resident in a territory or country where there are a large number of white European (Caucasian) residents as an “invader”. The “invaders” are portrayed as a direct threat to white Europeans. All non-white citizens, residents and immigrants are simply referred to as “invaders” throughout the document.

38. The above passage is a paradigm instance of political speech, the foundational societal interest which the right to free speech protects. However, in regard to the above passage the Censor did not enter into any discussion in regard to the preeminence of political speech within the broader free speech spectrum.

40. The Censor’s reliance on Susan Benech’s indicia for “dangerous speech” demonstrates his hostility to freedom of speech, as affirmed by s14 NZBORA and as interpreted by the Courts of NZ.

41. The Censor’s claim that he considered s14 NZBORA, as interpreted by the Courts of NZ, was a sham. Accordingly, the Censor failed to actually consider the right to free speech, which was a mandatory relevant consideration.

42. The Manifesto states:

For too long those who have profited most from the importation of cheap labour have gone unpunished. The economic elites who line their pockets with the profit received from our own ethnic replacement.

43. The Censor was obliged to consider the extent to which the above statement was a political critique of Labour Party policy when it is also Labour Policy to increase the power of the Censor, by enacting anti free speech legislation.

44. The Censor was obliged to consider the extent to which the political stance of the Manifesto conflicted with his own political stance.

45. In failing to consider political differences between the Manifesto and the governing political party, which has as one of its aims policy which would increase the power of the Censor and by failing to address conflict of interest the Censor has not considered mandatory relevant considerations.

Eight cause of action                      Irrationality

46. In his Decision the Censor stated:

While likely not persuasive or harmful to most adult readers, there is a high risk of the publication persuading some young people and adults who are vulnerable to the way it promotes terrorist violence.

47. However, the Censor placed a blanket prohibition of the publication whereby normally excepted persons, for who the Manifesto is highly unlikely to be “persuasive or harmful” are not able to read the Manifesto. At the time of writing the exemption sought to even make this review application has not been granted and the Kiwi Party seek to be able to add to its submissions when this exemption is granted.

48. The disjoint between the Censor’s statement that the Manifesto is “likely not persuasive or harmful to most adult readers” and a blanket prohibition demonstrates a lack of coherence between the Censor’s findings and his decision not to allow standard exceptions. As such the prohibition is bad for irrationality.

Conclusion

49. In his determination the Censor sets out a checklist of the reasons why the Manifesto was prohibited, as follows:

- (a) Including unambiguous calls for acts of terrorist violence;
- (b) Including information about possible terrorist targets in New Zealand;
- (c) Providing some information on the means and method for terrorist attacks;
- (d) Creating a false sense of urgency by characterising the presence of non-white New Zealand residents as an invasion;

- (e) Dehumanising and demonising non-white New Zealanders as “invaders” – justifying violent action to remove them;
- (f) Exhorting readers to violence and murder by misrepresenting these actions as part of a grand historical struggle;
- (g) Attempting to show that the disaffected and vulnerable can find meaning through violence;
- (h) Using specific cues and references to create a sense of community and connection with those who are already susceptible to the writer’s violent, extremist views.

50. In response:

- (a) Correct but true for any revolutionary tract;
- (b) The Manifesto adds nothing to what any person would know;
- (c) Minimal and nothing novel.
- (d) The Censor is making a political statement not a legal one;
- (e) As above and also incorrect, the Manifesto makes no adverse comments about Maori;
- (f) Correct but again true for any revolutionary tract;
- (g) As above;
- (h) No basis for the Censor to conjecture that internet users savvy with a few terms the Manifesto employs are so susceptible.

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GR Burch (Secretary)  
The Kiwi Party Incorporated