



QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

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The Chair
Health and Community Services Committee

By Email: hcsc@parliament.qld.gov.au

Dear Sir

Inquiry into Sexually Explicit Outdoor Advertising

The premise of this inquiry seems to be that the Queensland community is somehow under threat from a range of allegedly sexually explicit outdoor advertising which needs to be regulated in some fashion.

This proposal plainly brings into play the right to freedom of speech.

The QCCL recently recommitted itself to the principles of John Stuart Mill. Mill argued that free speech is a particular type of good to which the harm principle does not apply. The special status of speech derives from its being essential to equal participation in our democratic process and to the dignity, autonomy and rationality of human beings.

Speech is fundamental to human activity, especially that organised democratically. For this reason it cannot be limited except in narrow ways and circumstances.

Speech that is protected as being essential to equal participation in the political process is the core of protected speech. Speech is also protected as central to human autonomy, dignity and rationality.

Commercial speech partakes in these same ends and values. It is also entitled to protection even though some have argued, such as the US Supreme Court, that the level of protection is less than that to be afforded to political speech.

The protection of freedom of speech means that in every circumstance where the issue is raised the law should err on the side of freedom of speech because of the important values that it promotes.

The most important rule that is derived from this approach is that a distinction needs to be made between whether the harm the state is seeking to avert is one that grows out of the fact that a person is communicating, and more particularly by the way people can be expected to react to the person's message, or rather would arise even if the person's conduct had no communicative significance to it whatsoever.

On this basis the US Supreme Court has long since recognised that a law which regulates the placing of billboards on aesthetic grounds can be justified.

A law then which proposes to regulate billboards on the basis that they contain sexually explicit material is however a law which clearly raises free speech questions.¹

In every claim to freedom of speech two rights are involved. The rights of the people who are conveying the information and those who want to receive the information. So that when restricting the rights of billboard owners or advertisers, parliament is not only restricting the rights of those people but restricting the rights of those who may be interested in receiving the information that they have to provide.

Furthermore, it is trite to say that when you go into public you are often subject to unwelcome views, ideas and sights. Whilst some may find the sounds of the latest boy band in the mall entertaining and exciting, others may find it nauseating.

It is in our view clear that the rights of the viewer or listener do not and cannot triumph over the rights of the speaker when the viewer can relatively easily escape from the speaker's grasp.

Just as the person walking down the mall who is nauseated by the sounds of the latest boy band can avoid that sound by plugging their earphones in or leaving the mall, the person who is offended by a billboard can simply avert their eyes or drive by.

In the terms of reference the interests of children are invoked. Certainly the QCCL accepts that the State is entitled to greater freedom to protect children. In this context it was certainly the QCCL's policy in the era when pornography was conveyed mainly by magazines that it was appropriate that those magazines should not be displayed where they could be accessed by children or they should be sold only whilst covered in some opaque material such as a brown paper bag.

However we object to the notion that all nudity can be deemed obscene even to minors. Quite clearly certain nudity or sexually explicit material can have an educational value.

It must also be observed that the sexually explicit material that may be contained on billboards is of course a minor part of the sexually explicit material to be found all over our contemporary media.

In the final analysis, whilst the State has a legitimate interest in protecting children it is not entitled to reduce all adults to the level of children. To avoid this state of affairs, the ultimate responsibility for protecting children from allegedly obscene material lies with parents.

In fact, it would be our submission that the purpose of this type of legislation is not actually to protect children but to protect parents from the embarrassment of having to explain things to their children.

This was a point well made by the highly regarded American jurist, Richard Posner:

¹ It has been argued that pornography, that is sexually explicit material which has simply as its purpose to arouse the viewer, is not legitimately to be considered speech. This is a view which has some attraction to it. However, two caveats need to be made. First of all we are speaking billboards it does not seem to us that they fall within that definition of pornography, that is, they exist *simply* for the purpose of arousing a person. Moreover, even the context of pornography in this sense, there remains a clear requirement to show that the pornography actually has the capacity to do the harm which is asserted. This is because when regulating speech governments are always in a position of a conflict of interest.

"The right of parents to enlist the aid of the State to shield their children from ideas of which the parents disapprove cannot be plenary...People are unlikely to become well functioning, independent minded adults and responsible citizens if they are raised in an intellectual bubble." – *American Amusement Machine Association v Kendrick* 244 F. 3d 572 at 577

Looking around our streets the QCCL Executive can find no example of a billboard which it would consider needs to be banned. Consequently its view is that the current regulatory arrangements are entirely satisfactory. The QCCL sees no reason to change them.

We trust this of assistance to you in your deliberations.

Yours faithfully

[Redacted Signature]
Michael Cope
Executive Member
For and on behalf the
Queensland Council for Civil Liberties
21 June 2013
[Redacted]