



## Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007

Mary Anne Neilsen  
Law and Bills Digest Section

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## Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007

**Date introduced:** 21 June 2007

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** The day after Royal Assent.

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

The purpose of the Bill is to amend the *Classification (Publications, Films, and Computer Games) Act 1995* to require that publications, films or computer games that advocate terrorist acts be refused classification, making it essentially illegal to sell or deliver that material within Australia.

### Background

#### National Classification Scheme

The National Classification Scheme is a cooperative arrangement between the Commonwealth, states and territories established by *the Classification (Publications, Films and Computer Games) Act 1995* (the Classification Act). The Classification Act provides that the Classification Board classifies films (including videos and DVDs), computer games and certain publications. As part of the National Classification Scheme, each state and territory has enacted classification enforcement legislation that complements the Commonwealth Classification Act. State and territory classification legislation prescribes penalties for classification offences and provides for enforcement of classification decisions in the particular jurisdictions.<sup>1</sup> The [National Classification Code](#) contains descriptions about the products which would fall within the classification types. For example, the Code sets out the level of depiction of sex and violence and other issues which would cause a film to be classified as G, PG, M etc. The criteria for classification

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1. Office of Film and Literature Classification, Annual Report for the Classification Board and the Classification Review Board, 2005–2006, pp. 9–10.

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are also contained in the [Guidelines for the Classification of Films and Computer Games](#) and the [Guidelines for the Classification of Publications](#).

Classification decisions are made by the Classification Board and, on appeal, reviewed by the Classification Review Board (the Boards). The Classification Board makes about 10,000 decisions a year and the Review Board generally makes about 20.<sup>2</sup> Section 11 of the Classification Act sets out some broad principles the Boards are to consider in classification. These include:

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

#### ‘Refused classification’

Under section 9 of the Classification Act, publications, films and computer games must be classified in accordance with the National Classification Code and Guidelines. The National Classification Code provides that certain types of publications, films and computer games must be refused classification. Materials which are classed as ‘Refused Classification’ are effectively banned since under state and territory laws it is prohibited to sell, distribute or publicly exhibit materials which have been refused classification.

The existing provisions of the Classification Code provide that material must be refused classification if, amongst other things, it promotes, incites or instructs in matters of crime or violence.

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2. Senate Standing Committee on Legal and Constitutional Affairs, Ms Shelley, Discussion, 17 July 2007 p. 19.

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## Basis of policy commitment

Discussion paper: Material that advocates terrorist acts

On 1 May 2007, the Attorney-General's Department released a discussion paper<sup>3</sup> which outlined proposed amendments to the Classification Code and the Classification Guidelines. The amendments proposed in the discussion paper were premised on the assertion that the existing grounds for refusing classification are not sufficiently clear to ensure that material which 'advocates the doing of a terrorist act' is denied classification. As already noted, the Code currently requires that material be refused classification if it promotes, incites, or instructs in matters of crime or violence.

The existing grounds for refusing classification were claimed to be inadequate—the paper pointing to a combination of public concern about various material available as books, DVDs or on the internet; the differences of interpretation in Board and Review Board review decisions which overturn Board decisions applying the same criteria to the same material; and litigation in the Federal Court over the interpretation of the phrase.<sup>4</sup> The paper states:

Arguably, terrorist acts are of sufficient concern and pose such potential danger to the community that material that advocates people commit them should be specifically identified for refusal of classification. The classification scheme should be clear enough that the impressionable and vulnerable in the community are protected from material which encourages people to carry out acts of terrorism through techniques such as praising terrorist acts or issuing calls for action based on ideological or religious duty.<sup>5</sup>

The specific changes suggested in the discussion paper were an amendment to the Classification Code to add a new and distinct ground for refusing classification for material that *advocates* the doing of a terrorist act; and amendments to the relevant Classification Guidelines to define the terms 'advocates' and 'terrorist act' in terms which mirror the Commonwealth Criminal Code.

The Department received 25 submissions from members of the public and various organisation. The submissions can be found at the Department's website: [www.ag.gov.au](http://www.ag.gov.au).

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3. Attorney-General's Department, Material that advocates terrorist acts: Discussion paper, 1 May 2007.  
<http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP10AE457C710B1085CA2572CE0028849E>, accessed on 9 August 2007.

4. *ibid.*, p. 2.

5. *ibid.*, p. 3.

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As noted above, the Classification Scheme is a cooperative national scheme. Amending the Classification Code and Guidelines requires the cooperation and agreement of the states and territories (sections 6 and 12 of the Classification Act). If the state and territory governments and the Commonwealth Attorney-General agree on amendments, then the code and guidelines would be taken to be amended and the Bill would not be required. Anticipating that such cooperation is unlikely to be secured, the Commonwealth Attorney-General introduced the current Bill. It is designed to achieve the same reforms as those proposed in the discussion paper, but by way of direct amendment to the Act. In this way the Government is not dependent on approval by the states and territories.

At the Coalition of Australian Governments (COAG) meeting in July 2007, the states and territories did not agree to amendment of the Code,<sup>6</sup> and the Commonwealth Attorney-General subsequently indicated that the government would go ahead with the Bill.<sup>7</sup>

## Main provisions

**Item 2** of Schedule 1 amends section 9 the Classification Act to read: 'Subject to section 9A, publications, films and computer games are to be classified in accordance with the Code and the classification guidelines.' The effect is that even before material is assessed according to the requirements of the Classification Code and Guidelines, it must be refused classification under section 9A of the Act if it 'advocates the doing of a terrorist act'.

**Proposed subsection 9A(1)** of the Bill requires that a publication, film or computer game that advocates the doing of a terrorist act must be classified as 'Refused Classification'.

**Proposed subsection 9A(2)** defines 'advocates' using an adapted version of the definition in Schedule 1, subsection 102.1(1A) of the *Criminal Code Act 1995* (Criminal Code). A publication, film or computer game advocates the doing of a terrorist act if:

- a) it directly or indirectly counsels or urges the doing of a terrorist act
- b) it directly or indirectly provides instruction on the doing of a terrorist act, or

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6. Only New South Wales and South Australia agreed.

7. The Hon. P Ruddock, 'Labor States fail to agree on material advocating terrorism', *Media release*, 27 July 2007:  
<http://parlinfoweb.parl.net/parlinfo/Repository1/Media/pressrel/8TUN60.pdf>  
Accessed on 10 August 2007.

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- c) it directly praises doing a terrorist act where there is a risk that such praise might lead a person (regardless of his or her age or any mental impairment) to engage in a terrorist act.

It is paragraph c) that has been considered the most problematic by those with concerns about the Bill. Further discussion of this provision is provided below under *Position of significant interest groups*. For a full discussion of the criminal code provisions see the [Review of Security and Counter Terrorism Legislation](#) Parliamentary Paper no.: 423/06.

**Proposed subsection 9A(3)** provides for exceptions. It is an addition made in response to concerns raised with the discussion paper discussed above. It limits this definition of terrorist act by providing that material will not be regarded as advocating the doing of a terrorist attack if it depicts or directly describes a terrorist act but the depiction or description could reasonably be considered to have been done merely as part of public discussion or debate or as entertainment or satire. The Explanatory Memorandum provides examples.

**Proposed subsection 9A(4)** adopts the definition of 'terrorist act' directly from subsection 100.1 (1) of the Criminal Code Act. In essence, the Criminal Code defines 'terrorist act' as an action or threat of action that is done with the intention of advancing a political, religious or ideological cause and is also done with the intention of coercing or influencing by intimidation any government, the public or a section of the public. Subsection 100.1(2) of the Criminal Code outlines additional criteria which must be met for a threat or action to meet the definition of 'terrorist act'. Specifically the threat or action must have the intention or effect of:

- causing serious physical harm or death
- causing serious damage to property
- creating a serious risk to the health or safety of the public or a section of the public, or
- interfering with an electronic system.

Subsection 100.1 (3) of the Criminal Code outlines criteria identifying what does not constitute a 'terrorist act' including: advocacy, protest, dissent, and industrial action.

The effect of the amendments in Schedule 1 is that decisions made by the Classification Board and Review Board, under proposed section 9A to classify a particular publication or film as RC, would then be enforced as any other RC decision is enforced under state and territory legislation. For example it is an offence under state and territory law to sell an RC publication or to publicly exhibit an RC film. Those restrictions and offences would automatically apply to these decisions.

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## Senate Standing Committee on Legal and Constitutional Affairs

On 21 June 2007, the Senate referred the Bill to the Standing Committee on Legal and Constitutional Affairs (Senate Committee) for inquiry and report<sup>8</sup> by 30 July 2007. The Committee received 22 submissions, 16 critical of the Bill and six supporting its passage with two of the six arguing for a strengthening of the provisions.

In its report, the Committee noted that a common concern in submissions was the definition of 'advocate'. It is problematic in requiring the Classification Boards to refuse classification to material praising terrorist acts where there is a risk that the praise may lead to a person, regardless of age or mental impairment, engaging in a terrorist act.<sup>9</sup>

The Senate Committee recommended that the Bill be passed subject to an amendment deleting the requirement that the threshold test for determining whether material advocates terrorist act be based on its influence on the young and the mentally impaired.

The Committee recommended that the Bill be amended to delete from paragraph 9(A)(2)(c) the following words:

(regardless of his or her age or any mental impairment (within the meaning of section 7.3 of the Criminal Code) that the person may suffer)<sup>10</sup>

## Position of significant interest groups/press commentary

The summaries contained in this section reflect the fact that the majority of submissions to the Senate Committee (16 of the 22) raised concerns with the Bill.

### Law Council of Australia

The Law Council believes the Bill should not proceed because:

- the need for the proposed amendments has not been demonstrated

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8. Senate Standing Committee on Legal and Constitutional Affairs, *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007: Report*, July 2007. [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/classification/report/index.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/classification/report/index.htm)

9. Senate Standing Committee on Legal and Constitutional Affairs, *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007: Report*, July 2007, paragraph 3.33.

10. *ibid.*, Recommendation 1.

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- the intended implications of the amendments are unclear and have not been plainly and consistently stated, and
- the amendments seek to rely on definitions used in the Criminal Code, which have already been the subject of substantial criticism because they are overly broad and vague.<sup>11</sup>

In their submission, the Law Council notes that the Security Legislation Review Committee, the Parliamentary Joint Committee on Intelligence and Security, and the Senate Legal and Constitutional Affairs Committee have all recommended the amendment of section 102.1(1A) of the Criminal Code which defines ‘advocates’ and is the equivalent of proposed subsection 9A(2).

All three Committees recommended that, at the very least paragraph (c) of the definition should be amended to require a *substantial risk* (rather than just a risk) that the praise might lead someone to engage in terrorism.

The Law Council makes a further point that by proceeding with the Bill, the Federal Government is subverting the cooperative National Classification Scheme by circumventing the Classification Code. This Scheme has worked well since its introduction in 1996 and the Law Council believes Parliament should be loathe to jeopardise it in order to give effect to reforms which have not been shown to be necessary.<sup>12</sup>

### Gilbert & Tobin Centre of Public Law

The Gilbert & Tobin Centre of Public Law from the University of New South Wales states that while understanding and sharing the policy grounds underpinning efforts to refuse classification to material advocating terrorism it believes that can be accomplished under the Classification Code as it presently stands. Their concern is that the proposed amendment will not provide the certainty which is claimed and in fact, the converse is true. They argue:

It is much simpler to identify speech which encourages the doing of ‘crime or violence’ than specifically a ‘terrorist act’, given the lengthy and complex definition, including motivational elements, which supports the latter. The use of ‘advocacy’ is rendered problematic because of its inclusion of ‘praise’ – a far vaguer standard than ‘promotes’ or ‘incites’. The debates which accompanied the introduction of those definitions into the Criminal Code and their subsequent review show that there are

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11. Submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into the Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007, No. 15, p. 4.

12. *ibid.*, p. 12.

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very real difficulties in their potential application. Those experiences should be drawn upon before moving to add those terms into the Classification Code.<sup>13</sup>

The Centre concludes:

Lastly, these amendments have the potential to uncomfortably politicise the work of the Classification Board and Classification Review Board. This is due to the particular characteristics of terrorism as an element in broader political and societal conflict. The advantage of restricting classification to material purely on the basis of its connection to criminality or violence (the existing ground) is that the Boards will still be able to effectively control access to material which may have the effect of promoting crimes of that nature. They will be spared the contentious and difficult task of identifying sides in a particular conflict as being associated with terrorism, which these amendments would potentially require. In particular cases that may produce an unacceptable intrusion upon free political speech.<sup>14</sup>

### Australia/Israel and Jewish Affairs Council

The Australia/Israel and Jewish Affairs Council supports the Bill but would like the Government to go further and address the issue of hate material.<sup>15</sup> It argues:

While it is true that other legislation governs such material, this legislation relies generally on civil action, and often takes years to resolve...While these cases await resolution, the materials in question are freely available. Some hate material may preach, for example, that certain sections of the community are the enemy of certain other sections or of all other people, or that they deserve death or damnation while not advocating a terrorist act even under the proposed definition. Such material may, especially cumulatively, generate incitement to terrorist acts. We have seen, for example, how second generation immigrants in the UK have become radicalised over time and formed home grown terrorist cells. We believe that such extreme hate material should also be refused classification, even though it would probably not be said to advocate a terrorist act, as the effect may ultimately be the same.<sup>16</sup>

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13. Submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into the Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007, Submission, No. 11. p. 5.

14. *ibid.*

15. Submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into the Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007, Submission No. 8.

16. *ibid.*, p. 2.

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In response to this suggestion, the spokesperson from the Attorney-General's Department at Senate Committee hearings stated that the decision was taken that this Bill is the appropriate point to set the balance between freedom of expression and removing material that should not be there. Some material, while it may be extremely unpleasant and/or offensive, is nevertheless not material that should be censored.<sup>17</sup>

### **Festival of Light**

The Festival of Light supports the Bill and sees it as a reasonable measure in contributing to the prevention of terrorist acts being committed. However the Festival of Light notes that the provisions in themselves will not adequately protect the Australian community from material that advocates terrorist acts as any such material available electronically outside Australia will still be available from within Australia. It therefore argues that the Government should implement a mandatory filtering system at either national or ISP level which would allow the blocking of access to all offshore websites which host content which is material advocating terrorist acts.<sup>18</sup>

### **Classification Review Board**

The Classification Review Board, in giving evidence to the Senate Committee, noted that its role is not to comment on policy. However the Board does have some concerns regarding how it might apply proposed section 9A because of the complexity of the definitions and the intricacy of the proposed criteria. Ms Maureen Shelley, Convenor of the Classification Review Board, stated:

To ensure consistency and that an objective test is applied, it seems probable to me that the review board [...] would refuse classification to any material that praised a terrorist act. Otherwise the review board would need to make an assessment of risks, including that at the lowest level. It would have to formally decide that there was a risk, no matter how slight, and whether a minor or a person with a mental impairment might be affected by that material.<sup>19</sup>

Ms Shelley stated the test is a very different test to the reasonable persons test or a reasonable person test because it requires the Board to consider not what a 'reasonable

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17. Senate Standing Committee on Legal and Constitutional Affairs, Ms Shelley, Discussion, *Hansard*, 17 Jul 2007 p. 19.

18. *ibid.*, Submission No. 22.

19. Senate Standing Committee on Legal and Constitutional Affairs, Ms Shelley, Discussion, *Hansard*, 17 Jul 2007 p. 13.

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adult' would do but what a person who is presumably unreasonable and not an adult would do:

I do not know how on earth you could objectively assess what an unreasonable person who is not an adult might do.

Ms Shelley suggested that if Parliament would prefer that the Boards assess the risk of someone engaging in a terrorist act, perhaps the risk should be qualified with the words 'substantial' or 'significant'. In that case, only material that praises terrorist acts and carries a substantial or significant risk would advocate terrorist acts.<sup>20</sup>

The Review Board also envisages difficulties with the definition of a 'terrorist act'. As it comes from the Criminal Code, it has multiple elements and requires a detailed consideration of the nature of the action. The Boards, of which members are drawn from the community and are not required to be trained lawyers, might not have evidence of some of these elements and might have limited means of investigating them.<sup>21</sup>

Attorney-General's Department response

In response, Ms Davies, Assistant Secretary, Classification Policy Branch, noted there are ongoing interpretive difficulties with the existing provision and that Federal Court cases have not managed to shed any significant light on the scope of that provision.

Ms Davies commented that what the new provisions are aimed at addressing is material that will act upon the impressionable and upon people who are not adults. Ms Davies also argued that the Attorney-General's Department does not agree that all material that praises terrorism will be refused classification. In particular, there will be praise that falls within the descriptors in proposed subsection (3) and where, on any reasonable consideration of the material, there is simply no risk that someone will be led to commit a terrorist act by viewing it.<sup>22</sup>

In relation to adding the words 'substantial or significant' risk rather than just a risk, the Attorney-General's Department argued that to do this would be to have a different meaning for advocates in this context than it has in the context of the Criminal Code, and

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20. *ibid.*

21. *ibid.*

22. Senate Standing Committee on Legal and Constitutional Affairs, Ms Davies, Discussion, *Hansard*, 17 Jul 2007, p. 26.

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the government's view is that it would not be helpful in a whole range of ways to start to use this language with different meanings in different contexts.<sup>23</sup>

The Department also noted that the existing criteria for using Refused Classification (ie material that promotes, incites or instructs in matters of crime or violence) is not limited to material that will act on an adult. The new criteria falls into that same category. It is too serious to be simply restricted; it should not be available to anyone.<sup>24</sup>

### Human Rights and Equal Opportunity Commission

HREOC in their submission on the discussion paper states that it is not convinced of the necessity for the legislation and argued that the proposal be reconsidered. At a minimum HREOC submitted that the definition of 'advocate' a terrorist act be amended to:

- require that there is a substantial' risk (not merely a risk) that the praise might lead a person to engage in a terrorist act, and
- delete the reference to 'regardless of age or any mental impairment.'<sup>25</sup>

### New South Wales Council for Civil Liberties

The New South Wales Council for Civil Liberties (CCL) believes the Bill is unnecessary and is an ineffective restriction on freedom of speech. CCL notes the problems of adopting from the Criminal Code the definitions of 'advocates' and 'terrorist act' arguing that these definitions will produce absurd and unwanted results.<sup>26</sup>

### University of Melbourne

In its submission regarding the discussion paper, the University indicated that it shares the Attorneys-Generals' concerns about terrorism. However it argues that national security

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23. *ibid.*, p. 25.

24. *ibid.*

25. Submission on the Discussion paper: General's Department, Material that advocates terrorist acts. At:  
[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(22D92C3251275720C801B3314F7A9BA2\)~Human+Rights+and+Equal+Opportunity+Commission.pdf/\\$file/Human+Rights+and+Equal+Opportunity+Commission.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(22D92C3251275720C801B3314F7A9BA2)~Human+Rights+and+Equal+Opportunity+Commission.pdf/$file/Human+Rights+and+Equal+Opportunity+Commission.pdf)

26. Submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into the Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007, No. 10.

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requires a sophisticated understanding of terrorist movements as well as measures to obstruct their recruitment. Any measures to restrict access to publications advocating terrorism should therefore ensure that such publications remain available for teaching and research purposes.<sup>27</sup>

## ALP/Australian Democrat/Greens/Family First policy position/commitments

### Australian Labor Party

Shadow Attorney-General, Senator Joe Ludwig, has indicated that Labor broadly supports moves to better deal with material that advocates terrorism stating that publications, DVDs and the like where extremists are inciting hate and pushing extremist views to encourage violence are unacceptable. In the Senate Committee inquiry, the Labor Party Senators supported the recommendation to pass the Bill.

### Australian Democrats

The Australian Democrats, in their dissenting report on the Senate Committee inquiry into the Bill stated that the Australian Democrats oppose the Bill. Their objections are that it undermines Australians' right to freedom of speech and further, the Australian Government should not be legislating in this area on constitutional grounds. Should the Bill be passed, the Democrats would then move amendments so as to narrow the scope of the materials which can be censored and introduce more objective tests, and would provide an exemption so that individuals may apply to the Review Board to access potentially banned material for educational purposes.

The dissenting report concludes:

The Democrats do not believe that sufficient justification has been provided for the extended and unprecedented powers the government is seeking under this legislation.

In the absence of evidence supporting this Bill as a proportionate response to terrorism, the Democrats consider that the current Classification laws are adequate.

This Bill should not be passed without a balance being struck between the security imperative and the need to preserve civil liberties and safeguard human rights. This Bill should be rejected.<sup>28</sup>

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27. University of Melbourne, 'Discussion paper of the Standing Committee of Attorneys-General: Material that advocates terrorist acts, 1 May 2007', Submission.

28. Paragraphs 1.46–148.

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## Financial implications

The Explanatory Memorandum states it is not expected that there will be any significant financial impact.

## Conclusion

The Bill is notable in breaking with the cooperative classification scheme that has operated between the states, territories and the Commonwealth since 1996. The Attorney-General, the Hon. P. Ruddock, argues that the failure of the states and territories to recognise the need to do everything possible to stop the recruitment of the impressionable and vulnerable into terrorist activity, left him with no choice but to act independently.<sup>29</sup>

There is, however, a powerful and persuasive lobby of concern about the Bill coming from prominent legal, human rights, educational, cultural and media groups. While understanding the intrinsic policy grounds underpinning efforts to refuse classification of material advocating terrorism, the group in general argues that this can be accomplished under the Classification Code as it presently stands. The group shares concern about the drafting of the provisions in the Bill and its reliance on definitions from the Criminal Code which have already been the subject of substantial criticism for being overly broad and vague. The Classification Review Board, one of the bodies responsible for interpreting the proposed provisions, believes the Board will have difficulty interpreting them as currently drafted. Those from the academic community argue that at the very least a special exemption should be made for academic research and human rights groups, such as HREOC, believe the provisions have freedom of speech implications.

It would seem that the Bill presents Parliament with a difficult task of getting the right balance between doing its utmost in ensuring a protection of freedom of speech, while at the same time being able to stem the flow of material advocating and inciting terrorist actions against the Australian community.

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29. The Hon. P Ruddock, 'Labor States fail to agree on material advocating terrorism', *Media release*, 27 July 2007:  
<http://parlinfoweb.parl.net/parlinfo/Repository1/Media/pressrel/8TUN60.pdf>  
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