

The Senate

Standing Committee on
Legal and Constitutional Affairs

Classification (Publications, Films and
Computer Games) Amendment (Terrorist
Material) Bill 2007 [Provisions]

July 2007

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TABLE OF CONTENTS

MEMBERS OF THE COMMITTEE	iii
ABBREVIATIONS	vii
CHAPTER 1	1
INTRODUCTION	
Background	1
Acknowledgement	3
Note on references	3
CHAPTER 2	5
OVERVIEW OF THE BILL	
CHAPTER 3	7
KEY ISSUES	
Definition of the term 'terrorist act'	7
Definition of 'advocates'	9
Exemptions	13
Committee view	15
ADDITIONAL COMMENTS BY SENATOR NATASHA STOTT DESPOJA ON BEHALF OF THE AUSTRALIAN DEMOCRATS	19
APPENDIX 1 SUBMISSIONS AND ADDITIONAL INFORMATION RECEIVED	27
APPENDIX 2 WITNESSES WHO APPEARED BEFORE THE COMMITTEE	29

ABBREVIATIONS

AIJAC	Australia/Israel and Jewish Affairs Council
AMCRAN	Australian Muslim Civil Rights Advocacy Network
APC	Australian Press Council
Arts Law Centre	Arts Law Centre of Australia
ASA	Australian Society of Authors
Bill	Classification (Publications, Films, and Computer Games) Amendment (Terrorist Material) Bill 2007
Classification Act	<i>Classification (Publications, Films and Computer Games) Act 1995</i>
Department	Attorney-General's Department
Gilbert + Tobin Centre	Gilbert + Tobin Centre of Public Law
JCIS	Parliamentary Joint Committee on Intelligence and Security
Law Council	Law Council of Australia
NAVA	National Association for the Visual Arts
Review Board	Classification Review Board
UK	United Kingdom
UN	United Nations

CHAPTER 1

INTRODUCTION

Background

1.1 On 21 June 2007, the Senate referred the provisions of the Classification (Publications, Films, and Computer Games) Amendment (Terrorist Material) Bill (the Bill) to the Standing Committee on Legal and Constitutional Affairs, for inquiry and report by 30 July 2007.

1.2 The Bill amends the *Classification (Publications, Films and Computer Games) Act 1995* (the Classification Act) to require that publications, films or computer games that advocate the doing of a terrorist act be classified as 'Refused Classification'.

1.3 In his Second Reading Speech, the Attorney-General stated that the Bill:

...improves the ability of our laws to prevent the circulation of material which advocates the doing of terrorist acts...Currently there is too much uncertainty around whether the existing classification laws adequately capture such material.¹

Classification Regime in Australia

1.4 Classification decisions are made by the Classification Board and, on appeal, reviewed by the Classification Review Board (the Boards).

1.5 When making decisions the Boards follow:

- the Classification Act which establishes the Boards and sets out the procedures the Boards must follow when making classification decisions;
- the National Classification Code (the Code), which provides a broad description of the classification categories and can only be amended by agreement between the Commonwealth and the states and territories; and
- the Guidelines for the Classification of Film and Computer Games and the Guidelines for the Classification of Publications which describe the elements of the categories in more detail. The guidelines, like the Code, can only be amended following agreement between the Commonwealth and, the states and territories.

1.6 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.

1 The Hon Mr Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 21 June 2007, p. 3.

Decision to Amend the Classification Act

1.7 In his Second Reading Speech, the Attorney-General stated that 'the classification scheme is a cooperative national scheme' and that he would 'prefer to see these provisions in the National Code and guidelines'.² However, the Attorney-General noted that:

I first sought state and territory agreement to changes to the classification laws in July 2006. To date, they have been reluctant to respond positively to my proposals. I am not prepared to wait indefinitely to address this problem.³

1.8 The Attorney-General went on to say that he was hopeful agreement could be reached when the Standing Committee of Attorneys General met in July 2007, in which case amendments to the Classification Act would not be required. On 27 July 2007, the Attorney-General's Department informed the committee that the Standing Committee of Attorneys General had not reached agreement.⁴

Consultation

1.9 In May 2007 the Attorney-General's Department released a discussion paper on the proposed changes to the classification regime and called for submissions from interested parties. The Code currently requires that material be refused classification if it promotes, incites, or instructs in matters of crime or violence. The discussion paper states that:

The elements of the term 'promotes, incites, or instructs in matters of crime or violence' are not fully explained in either the guidelines or by judicial consideration. There remains uncertainty around the classification of material which may more insidiously encourage people – whether or not they are naïve and impressionable – to commit terrorist acts. Material may be expressed in a way that does not clearly attract the operation of the provisions that would require it to be refused classification.⁵

1.10 The Department received 25 submissions from members of the public and various organisations. The submissions can be found on the Department's website: www.ag.gov.au.

2 The Hon Mr Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 21 June 2007, p. 3.

3 The Hon Mr Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 21 June 2007, p. 3.

4 Advice from the Attorney-General's Department to the committee secretariat on 27 July 2007.

5 Attorney-General's Department, *Material that Advocates Terrorist Acts Discussion Paper*, 1 May 2007 at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(878CAEAF8D7CA41B4CD31727CCC28450\)~Material+that+Advocates+Terrorist+Acts+-+Discussion+Paper+for+public+consultation+-+1+May+2007.PDF/\\$file/Material+that+Advocates+Terrorist+Acts+-+Discussion+Paper+for+public+consultation+-+1+May+2007.PDF](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(878CAEAF8D7CA41B4CD31727CCC28450)~Material+that+Advocates+Terrorist+Acts+-+Discussion+Paper+for+public+consultation+-+1+May+2007.PDF/$file/Material+that+Advocates+Terrorist+Acts+-+Discussion+Paper+for+public+consultation+-+1+May+2007.PDF) (accessed 27 June 2007).

1.11 In response to concerns raised in the consultation process, proposed subsection 9A(3) was added to the Bill to provide an exemption for material that could reasonably be considered to be part of 'public discussion, debate, entertainment or satire'.

Conduct of the inquiry

1.12 The committee advertised the inquiry in *The Australian* newspaper on 27 June 2007 and 11 July 2007, and invited submissions by 11 July 2007. Details of the inquiry, the Bill, and associated documents were placed on the committee's website. The committee also wrote to over 40 organisations and individuals.

1.13 The committee received 22 submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

1.14 The committee held a public hearing on 17 July 2007. A list of witnesses who appeared at the hearing is at Appendix 2 and copies of the Hansard transcript are available through the Internet at <http://aph.gov.au/hansard>.

Acknowledgement

1.15 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.16 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter briefly outlines the main provisions of the Bill.

Schedule 1 –

2.2 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.'

2.3 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 'Refused Classification'.

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

- (a) it directly or indirectly counsels or urges the doing of a terrorist act; or
- (b) it directly or indirectly provides instruction on the doing of a terrorist act; or
- (c) it directly praises the doing of a terrorist act in the circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3 of the Criminal Code) that the person might suffer) to engage in a terrorist act.

2.5 Proposed subsection 9A(3) provides an exemption for some material that might otherwise be considered to advocate the doing of a terrorist act as follows:

A publication, film, or computer game does not advocate the doing of a terrorist act if it depicts or describes a terrorist act, but the depiction or description could reasonably be considered to be done merely as part of public discussion or debate or as entertainment or satire.

2.6 Proposed subsection 9A(4) adopts the definition of 'terrorist act' directly from subsection 100.1 (1) of the *Criminal Code Act 1995*.

2.7 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.'

2.8 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.

2.9 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.

2.10 To fall outside the definition of 'terrorist act', the advocacy, protest, dissent or industrial action must not be intended:

- to cause serious harm that is physical harm to a person;
- to cause a person's death;
- to endanger the life of a person, other than the person taking the action; or
- to create a serious risk to the health or safety of the public or a section of the public.

CHAPTER 3

KEY ISSUES

3.1 Evidence to the committee raised concerns regarding:

- the definition of the term 'terrorist act';
- the words 'directly and indirectly' in proposed paragraphs 9A(2)(a) and (b);
- the phrase in proposed paragraph 9A(2)(c) 'regardless of his or her age or any mental impairment that the person might suffer'; and
- the exemptions in proposed subsection 9A(3).

Definition of the term 'terrorist act'

3.2 Some submissions expressed concern that the bill adopts the definition of 'terrorist act' directly from subsection 100.1 (1) of the Criminal Code.¹ The Law Council of Australia argued that the definition of 'terrorist act' taken from the Criminal Code:

...should not be emulated in other legislation without further refinement consistent with the recommendations of the Security Legislation Review Committee, the Parliamentary Joint Committee on Intelligence and Security and the UN Special Rapporteur.²

3.3 In its report on the Review of Security and Counter Terrorism Legislation the Parliamentary Joint Committee on Intelligence and Security (JCIS) argued that there should be a clearer distinction between a threat and an act of terrorist violence and recommended that the 'threat' of a terrorist act be removed from the definition of terrorism and be dealt with as a separate offence. JCIS was of the view that this would improve clarity and still achieve the policy objective.³

3.4 The Gilbert + Tobin Centre argued that the definition of terrorist act in section 100.1 of the Criminal Code 'has attracted substantial criticism'. It also submitted that:

While, in our view, the Australian definition...is more carefully drafted than those of other nations like the United Kingdom and the United States....it is not free from complications and omissions.⁴

¹ *Submission 13*, pp 7-9; *Submission 14*, p. 6; *Submission 16*, pp 2-3; *Submission 10*, pp 5-6.

² *Submission 15*, p. 12.

³ Joint Standing Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, p. 62.

⁴ *Submission 11*, p. 2.

3.5 Conversely, the Executive Council of Australian Jewry argued in its submission that the definition of 'terrorist act' adopted in the Bill should go even further to include all terrorism offences under the Criminal Code. Arguing that 'terrorist acts form part of a pattern of conduct, not all of which is violent, which when considered in context are intended and serve to undermine our society and nation', the Executive Council concluded that:

It seems to us incongruous that the amendments proposed to the Classification Code would be narrower than the Criminal Code provisions. Taking such a narrow approach would open the door to classification and distribution of material which is criminal or seditious or both.⁵

3.6 Similarly, the Australia/Israel and Jewish Affairs Council (AIJAC) submitted that the Bill does not go far enough because hate material is not captured as material that advocates terrorist acts. The Council noted the government's position that such material is captured by other legislation (such as racial vilification laws) but argued:

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.⁶

Departmental response

3.7 The Attorney-General's Department (the Department) submitted that 'terrorist act is defined very tightly in the Criminal Code'⁷ and noted that the Attorney-General has decided that the definitions of the phrases 'terrorist act' and 'advocates' should be consistent in the Classification Act and the Criminal Code provisions.⁸

⁵ *Submission 7*, Attachment, p. 2.

⁶ *Submission 8*, p. 2.

⁷ *Committee Hansard*, 17 July 2007, p. 24.

⁸ *Committee Hansard*, 17 July 2007, p. 25; see also Attorney-General, *Letter to the Classification Review Board*, 26 July 2007, p. 2.

Definition of 'advocates'

Material that praises terrorist acts

3.8 An area of concern to submitters and witnesses was proposed paragraph 9(A)(2)(c).⁹ This clause requires that the Boards refuse classification to materials praising terrorist acts where there is a risk that the praise may lead a person, regardless of the age or mental impairment of that person, to engage in a terrorist act. The Law Council of Australia (Law Council) argued that in a departure from usual practice, this proposed subsection:

...appears to require decision makers to consider the lowest societal common denominator in considering how material will be processed, comprehended and acted upon - an almost impossible test to apply.¹⁰

3.9 In its submission, the Classification Review Board foreshadowed possible problems for decision makers in applying proposed paragraph 9(A)(2)(c):

It is difficult to envisage circumstances where the Review Board might objectively assess how a teenager, for example, or a person with some mental impairment might react to praise of a terrorist act.¹¹

3.10 In evidence to the committee, the Convener of the Classification Review Board expanded on the concerns raised in its submission, namely that there may be some difficulty with the way the Review Board would deal with issues of mental impairment:

...the Classification Review Board...[has] discussed the proposals and, as far as we can see, if we made a determination that there was praise of a terrorist act then we would have to refuse the work classification. We cannot work out any other way that we could, on a consistent basis, without some anomaly arising with different panels, apply any criteria which would lead to a consistent application of the Act, apart from simply saying that, if there is praise, it must be refused.¹²

3.11 The Convener addressed the issue of risk in more detail, stating that:

To ensure consistency and that an objective test is applied, it seems probable to me that the Review Board—without wanting to try to forecast what the Review Board might do in some future application—would refuse classification to any material that praised a terrorist act. Otherwise, the review board would need to make an assessment of risk, including that at the lowest level. It would have to formally decide that there was a risk, no

⁹ *Submission 3*, p. 3; *Submission 11*, p. 5; *Submission 12*, p. 4; *Submission 15*, p. 7; *Submission 18*, p. 8.

¹⁰ *Submission 15*, p. 7.

¹¹ *Submission 12*, p. 1; see also Classification Review Board, *Letter to the Attorney-General*, 20 June 2007, p. 1.

¹² *Committee Hansard*, 17 July 2007, p. 14.

matter how slight, and whether a minor or a person with a mental impairment might be affected by that material. It is difficult to envisage an objective test that the review board could use to assess such a risk in regard to a young or mentally impaired person and in regard to their reaction to the praise of a terrorist act.¹³

3.12 The Convenor suggested that:

If parliament would prefer that we 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 which praises terrorist acts and carries a substantial or significant risk would advocate terrorist acts. This would give the review board, and of course the Classification Board, discretion and perhaps avoid the provision catching material unintentionally.¹⁴

3.13 The Convener also told the committee that that proposed paragraph 9A(c) did not employ the 'reasonable adults' test as used by the Review Board when making decisions, and as such the Bill would be a significant departure from current practice.¹⁵

3.14 Addressing the proposed paragraph 9A(2)(c) from an industry perspective, the Australian Publishers Association argued that 'in deciding how to ensure a manuscript is not classified as RC', publishers would be required to have 'unfathomable anticipation' in deciding how a person with a mental impairment, or a child might react to a publication.¹⁶

3.15 Moving beyond practical concerns, the Gilbert + Tobin Centre argued that:

Basing our censorship laws, and thus what the general community can read and view, on the reaction of someone with a mental illness is unjustifiable. It would permit all sorts of material to be banned that no reasonable person would see as offensive and dangerous.¹⁷

Departmental response

3.16 In response to the concern that the reasonable adult test would not apply to material that advocates terrorist acts, a representative from the Department told the committee that:

...the convenor spoke about applying 'reasonable adult' and 'reasonable adults' tests. The committee should be aware that neither of those tests...applies to the provision of promoting, inciting or instructing in

¹³ *Committee Hansard*, 17 July 2007, p. 13.

¹⁴ *Committee Hansard*, 17 July 2007, p. 13.

¹⁵ *Committee Hansard*, 17 July 2007, p. 13.

¹⁶ *Submission 18*, p. 8.

¹⁷ *Submission 11*, p. 4.

matters of crime or violence. That criterion, which is in the Classification Code as it currently exists, is not qualified by any test relating to reasonable or otherwise adults or minors.¹⁸

3.17 The Department also responded to more general concerns about applying the provisions in the Bill to classification decisions:

Concerns have also been expressed about the ease of applying the provisions, but they do provide a clear set of elements for the Classification Board and the Classification Review Board to consider when making decisions. To be refused classification, material must advocate the doing of a terrorist act and each of those two terms is defined in the bill. They are precisely defined terms that take their meaning from or directly adopt the Criminal Code provisions, which were agreed by the Council of Australian Governments following widespread consultation when introducing anti-terrorism laws in 2005.¹⁹

3.18 The Department noted the evidence of the Classification Review Board that there may be difficulties in applying the tests proposed by the Bill and submitted:

We would all agree it is a complex area and one where there are going to be a variety of views. However, officers and statutory bodies who are charged with administrative decision making always have to exercise judgement. There are many complex decisions required of decision makers across the country and the Attorney and the department have confidence in both the board and the review board to be able to apply the provisions and to apply good judgement in doing so. They will be required to take into account matters in section 11 of the Classification Act, which include, for example, the general character of the publication, film or computer game, the person or class of persons amongst whom the material is intended or likely to be published and its literary or educational merit. The new provisions are intended to strike an appropriate balance between setting out clear standards and elements and allowing room for exercise of decision-making discretion.²⁰

The words 'indirectly' and 'directly' in proposed paragraphs 9(A)(2)(a) and (b)

3.19 Submissions expressed concern regarding the terms 'indirectly' and 'directly' in proposed paragraphs 9(A)(2)(a) and (b).²¹ The Australian Muslim Civil Rights Advocacy Network (AMCRAN) argued that:

¹⁸ *Committee Hansard*, 17 July 2007, p. 25; see also Attorney-General, *Letter to the Classification Review Board*, 26 July 2007, p. 2.

¹⁹ *Committee Hansard*, 17 July 2007, p. 23; see also Attorney-General, *Letter to the Classification Review Board*, 26 July 2007, p. 2.

²⁰ *Committee Hansard*, 17 July 2007, p. 24; see also Attorney-General, *Letter to the Classification Review Board*, 26 July 2007, p. 2; and Attorney-General's Department, *Response to question on notice*, 26 July 2007, p. 1.

²¹ *Submission 18*, p. 8; *Submission 11*, p. 4.

...there is considerable uncertainty in the definitions, and the reach of the provisions is likely to be too broad. For example, "providing instruction in the doing of a terrorist act" and the term "urging the doing of a terrorist act" are unreasonably vague and could potentially cover a wide range of activities. The problem is further exacerbated by the inclusion of "indirectly" as a qualifier.²²

3.20 Other submissions also expressed concern at the inclusion of the word 'indirectly' as a qualifier, arguing that this term was too broad. In its submission to the committee the New South Wales Council of Civil Liberties argued the definition of 'advocates' fails to limit what may 'indirectly' urge or provide instruction on the doing of a terrorist act.²³

3.21 On this issue, the Australian Press Council (APC) expressed the view that the definition of 'advocates' seems excessively broad and could prevent the 'free expression of views on political issues'. APC argued further that:

Most unsettling is the inclusion of the word "indirectly", which has the potential to be interpreted so as to prohibit publication of material which is not intended to support terrorism, but is merely commenting upon an aspect of terrorist activity or is approving of political ideas which may be identified with terrorist activity.²⁴

3.22 More broadly, Dr John Bryne of the Australian Library and Information Association argued that:

We are most concerned about the chilling effect that this could have on freedom of expression but we are particularly concerned about the situation that it would place libraries in of not being able to fulfil their responsibility to make information available. I am a university librarian and, in my working life, I have a duty to provide access to the information resources that scholars and students need. We have already seen through the exercise of the current provisions two books removed from the shelves of the University of Melbourne library. That affects the capacity of scholars at that institution and nationally to undertake research. We are most concerned that these provisions not be broadened.²⁵

3.23 In contrast, AIJAC supported the definition of 'advocates' used in the Bill. AIJAC argued it is important 'to Refuse Classification to materials not only advocating a specific terrorist act, but to materials that advocate terrorist acts, or the support of terrorist groups, in general.' AIJAC told the committee that:

[It is] therefore in agreement with the decision to apply the 'refused classification' (RC) category to materials that advocate terrorists acts, and

²² *Submission 20*, p. 2.

²³ *Submission 10*, p. 6.

²⁴ *Submission 6*, p. 5.

²⁵ *Committee Hansard*, 17 July 2007, p. 7.

with the proposed definition of "advocate" to include directly or indirectly counselling, urging or instructing on doing a terrorist act, or directly praising a terrorist act.²⁶

Departmental response

3.24 In relation to concerns that the Bill may limit access to material in the context of academic research, the Department advised that:

[T]he Attorney-General has made comments publicly that it may be appropriate for such materials to be used for academic research and education under appropriate supervision or in appropriate circumstances. It is the state and territory classification enforcement legislation that generally prevents people from giving to anyone—that is, delivering to them or showing them—or displaying or exhibiting material that is classified as 'refused classification'. At the [Standing Committee of Attorneys General] meeting in April this year, censorship ministers agreed that access to RC material for legitimate academic research and for educational purposes may be appropriate in some specific and limited circumstances. They requested that officers develop proposals for a mechanism to provide access to RC material.²⁷

Exemptions

3.25 Several submissions commented on the exemptions in proposed subsection 9A(3).²⁸ Despite some acknowledgement that the government's intention in proposed subsection 9A(3) is to provide balance to the high level of potential censorship in the Bill,²⁹ these submissions argued that the exemption clause does not go far enough in providing adequate protection for freedom of speech.

3.26 For example, the Australian Society of Authors (ASA) articulated its concerns in this regard as follows:

The grave effect that we perceive with the proposed changes is that, despite allowances for public discussion, debate, entertainment and satire in...proposed Section 9A(3), legitimately held opinions would be suppressed. The proposed legislation is so broad in its wording that the ASA believes it will act as an unnecessary damper on freedom of expression.³⁰

²⁶ *Submission 8*, p. 1.

²⁷ *Committee Hansard*, 17 July 2007, p. 24.

²⁸ Australian Society of Authors, *Submission 5*; Australian Press Council, *Submission 6*; Arts Law Centre of Australia, *Submission 9*; Gilbert & Tobin Centre of Public Law, *Submission 11*; Australian Publishers Association, *Submission 18*; National Association for the Visual Arts, *Submission 19*.

²⁹ See for example, Australian Press Council, *Submission 6*, p. 3; Arts Law Centre of Australia, *Submission 9*, p. 3; Australian Publishers Association, *Submission 18*, p. 8.

³⁰ *Submission 5*, pp 1-2.

3.27 APC pointed to the potentially problematic nature of the drafting in proposed subsection 9A(3):

The exemption clause that is included in the Bill as introduced into Parliament makes an exemption for material which "depicts or describes" terrorism, if the depiction or description could reasonably be considered to be done merely as part of public discussion or debate or as entertainment or satire. However, if applied in its literal sense, this would not exempt all material from censorship, even where such material is intended to contribute to public discussion or debate. In particular, material that is in the nature of opinion or commentary may not be regarded as depicting or describing. The insertion of the phrase "depicts or describes" thus has the effect of narrowing the scope of the exemption.³¹

3.28 The Gilbert + Tobin Centre argued that the proposed exemption is 'apparently narrow', and 'certainly unclear' in its use of the word 'but' and in referring to material 'done merely as part of public discussion or debate or as entertainment or satire'.³² The Gilbert + Tobin Centre also submitted that the exemption is not broad enough to cover a range of other important speech, including academic research and access to banned material for academic research.³³

3.29 The Arts Law Centre of Australia (Arts Law Centre) and the National Association for the Visual Arts (NAVA) commented on proposed subsection 9A(3) in the context of its potential to undermine artistic expression. The Arts Law Centre argued that the exemption clause, as drafted, is insufficient to adequately protect the breadth of artistic activity in Australia:

Artists engage in artistic expression and create artistic works for a wide range of reasons. These reasons may include encouraging public discussion or debate or providing entertainment or satire, however the purposes and forms of expression can be broader than any of these terms. An environment in which artists cannot be confident in the legal status of their work and the legal rights and obligations relevant to such work has a chilling effect on creativity, leading to works not being created or, if created, not being publicly released.³⁴

3.30 The Arts Law Centre and NAVA suggested that proposed subsection 9A(3) should be amended to specifically include 'artistic expression' in order to clarify that artistic expressions do not constitute the advocating of a terrorist act.³⁵

³¹ *Submission 6*, p. 3.

³² *Submission 11*, p. 4.

³³ *Submission 11*, pp 4-5.

³⁴ *Submission 9*, p. 2.

³⁵ *Submission 9*, p. 2; *Submission 19*, p. 2.

Departmental response

3.31 During evidence to the committee, the Attorney-General's Department noted that:

The original proposal outlined in the discussion paper has been modified to address concerns expressed about its scope, and in particular a new provision, 9A(3), was introduced to make it clear that material that does no more than contribute to public discussion or debate or is no more than entertainment or satire is not material to which this provision is intended to apply. The explanatory memorandum clearly states that the provision is only intended to capture material which goes further than that and actually advocates the doing of a terrorist act.³⁶

Committee view

3.32 The amendments contained in the Bill aim to ensure that material advocating terrorist acts and instructing in the conduct of terrorist acts will be refused classification. The committee supports the Bill's aim and agrees that such material should be refused classification.

Definition of 'terrorist act'

3.33 The committee is mindful of the concerns of submitters and witnesses regarding the definition of 'terrorist act' in the Bill, as directly adopted from section 100.1 in the Criminal Code. The committee notes, however, that this definition was subject to considerable public debate and examination in the Parliament and by the Senate Legal and Constitutional Legislation Committee in its report on the Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and related bills.³⁷

3.34 Furthermore, the Classification Code currently requires that material that promotes, incites or instructs in matters of crime or violence be refused classification. As a result, the existing definition of 'terrorist act' in the Criminal Code is already relevant to classification decisions. Indeed, the committee notes that the Classification Review Board has cited the definition of 'terrorist act' from the Criminal Code in two previous decisions where it refused classification of the publications *Join the Caravan* and *Defence of the Muslim Lands*.

3.35 Given these factors, the committee is not persuaded that the definition of terrorist act needs to be narrowed for the purposes of this Bill. For the same reasons, the committee is not persuaded that the definition of terrorist act should be expanded, as suggested by the Executive Council of Australian Jewry and AIJAC.

³⁶ *Committee Hansard*, 17 July 2007, p. 23; see also Attorney-General, *Letter to the Classification Review Board*, 26 July 2007, pp 2-3; and Attorney-General's Department, *Response to question on notice*, 26 July 2007, p. 1.

³⁷ Tabled 8 May 2002.

Definition of 'advocates'

3.36 The committee accepts that the definition of 'advocates' is appropriate in the context of the Criminal Code where it relates to a determination that an organisation is a terrorist organisation. In that context, considering whether direct praise creates a risk of leading a person to engage in a terrorist act *regardless of his or her age or any mental impairment* is appropriate because such organisations are very likely to specifically target the young and vulnerable. However, in the context of the classification regime the inclusion of this phrase has much broader implications. This is because it is not the fact of praising a terrorist act which is at issue but what impact the material might have *if* it was put before young people or people suffering a mental illness.

3.37 At a practical level, the committee believes that proposed paragraph 9A(2)(c) would therefore be problematic for classification decision makers to implement. The committee finds it difficult to envisage how a classification decision maker could decide how a person with a mental illness may react after viewing certain material. The committee believes that given the difficulty of applying the test, there would be considerable scope for confusion. As a result, the Bill may have an effect well beyond its stated aim.

3.38 The committee is also mindful of the difficulties that writers, artists and publishers would face in determining whether work they create or distribute will be captured by this provision.

3.39 More broadly, the committee is concerned about explicitly basing classification decisions on the possible reaction of persons with a mental illness. The committee believes that basing classification decisions on such considerations creates a substantial risk that such a test could prevent access to material which should be available to adults, particularly those engaged in academic research of terrorism or public debate about this important matter.

3.40 However, the committee is concerned about the effect that materials may have on young people, in particular teenagers. The committee strongly believes classification decision makers should take into account how young people may react to such material. As a result, the committee believes that the inclusion of a reasonable adult test in proposed paragraph 9A(2)(c) would be too restrictive. As a compromise, the committee recommends that the phrase 'regardless of his or her age or any mental impairment' should be removed from paragraph 9(A)(2)(c). This will leave decision makers more flexibility to consider the level of risk that material may lead to terrorist acts.

Recommendation 1

3.41 The committee recommends that the bill be amended to delete '(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)' from proposed paragraph 9(A)(2)(c).

3.42 The committee notes concerns that the use of the word 'indirectly' in proposed paragraphs 9A(2)(a) and (b) is too broad for the purposes of classification and would have the effect of refusing classification to a broader range of material than is required to achieve the government's purpose. However, the committee believes that deleting the term 'indirectly' would undermine the objective of the Bill by excessively narrowing the definition of 'advocates' since it would limit the definition to material which 'directly' counsels, urges or provides instruction in the doing of a terrorist act.

3.43 The committee also welcomes advice from the Department that the Australian Government is working with state and territory governments to establish a mechanism to allow materials which have been refused classification to be used for legitimate academic research and for educational purposes.

3.44 The committee notes the evidence suggesting that the exemptions clause does not go far enough to protect a range of other speech. However, the committee is satisfied that the clause, as presently drafted, is broad enough to provide adequate protection for freedom of speech whilst meeting the government's objectives in relation to the classification of material that advocates terrorism.

Recommendation 2

3.45 Subject to the preceding recommendation, the committee recommends that the Bill be passed.

Senator Guy Barnett
Chair

ADDITIONAL COMMENTS AND POINTS OF DISSENT BY SENATOR NATASHA STOTT DESPOJA ON BEHALF OF THE AUSTRALIAN DEMOCRATS

1.1 The Democrats oppose this Bill.

1.2 A number of submitters to this inquiry indicated that the classification scheme as presently configured is capable of being applied so as to ban material which advocates terrorism.¹

1.3 We believe that this Bill as introduced will erode key legal and civil rights and undermine fundamental civil liberties such as freedom of speech, freedom of association and freedom of religion.

1.4 This Bill represents a confrontational approach by the Government to law making. Comments by the Federal Attorney-General to the effect that this legislative change is necessary because of a lack of cooperation from State Governments are commensurate with a power grab and must be resisted.

1.5 The content of the Bill has been appropriately described as unjustified and unrepresentative of community views. Several agencies have requested empirical evidence to show a causative link between accessing 'radical materials' and the risk of terrorism occurring. The Democrats agree that in such an important issue as this, it is imperative that law be made through empirical evidence.

1.6 During this inquiry there has not been a convincing argument made as to why existing classification laws should be extended in this manner or how the vulnerable in the community are to be protected.

1.7 We believe Recommendation 1 contained in the Chair's report will improve the Bill and lessen the potential for abuses of human rights but provide the following additions:

Democratic Principles & International Law obligations

1.8 This Bill undermines Australians' right to freedom of speech. It is tantamount to the censorship of ideas.

¹ Law Council of Australia, *Submission 15*; Uniting Justice Australia, *Submission 3*; Australian Press Council, *Submission 6*; Federation of Community Legal Centres, *Submission 13*; Gilbert + Tobin Centre of Public Law, *Submission 11*; New South Wales Council for Civil Liberties (NSWCCL), *Submission 10*.

1.9 We note reference to two fundamental international Treaties. First, to Article 29(b) of the *Universal Declaration of Human Rights* which states:

...in the exercise of a person's rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of human dignity and the general welfare of a democratic society.²

1.10 Second, to the International Covenant on Civil and Political Rights which states that:

...everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, whether orally, in writing or in print, in the form of art, or through any other media of his choice.³

This Article is subject to the qualification that it may be restricted where such restrictions are provided for by law and are necessary:

- (a) For the respect of the rights or reputations of others; or
- (b) For the protection of national security or of public order (ordre public) or of public health or morals⁴.

1.11 The Human Rights and Equal Opportunity Commission which is responsible for advising the Commonwealth Government and Parliament on its human rights obligations, recommended that the proposal be reconsidered on the basis that it was not convinced “of the necessity for tighter censorship laws in order to combat incitement and/or glorification of terrorism.”⁵ We entirely agree with this sentiment.

Recommendation 1

It is not appropriate to modify classification law in this far-reaching manner.

Absence of a Bill of Rights

1.13 This Bill's dramatic implications for human rights and civil liberties are even more concerning, given Australia does not have a Bill of Rights or Human Rights Act.

1.14 As the only common law country without such protection, the basic human rights of Australians are subject to greater risk than the rights of citizens of these other nations.

² Referred to by Uniting Justice Australia in *Submission 3*, p. 2.

³ NSWCCCL, *Submission 10*, p. 2.

⁴ Referred to in the submission of the Federation of Community Legal Centres (VIC) INC, *Submission 13*, p. 13.

⁵ Law Council of Australia, *Submission 15*, p. 7.

1.15 While a number of the provisions contained in this Bill emulate the United Kingdom's laws, it does not contain the UK's accompanying protections for human rights and civil liberties. In this context the Democrats refer to the point made by the NSWCCCL in their submission. The NSWCCCL have quoted Professor Clive Walker, Leeds University, as saying 'the Human Rights Act 1988 limits the UK anti-terrorism legislation's impact on freedom of expression'.⁶

1.16 The *Human Rights Act* and the *European Convention on Human Rights* provide citizens of the United Kingdom with an avenue of appeal and an opportunity for judicial review when their Government infringes on these rights.

1.17 The absence of a Bill of Rights or Human Rights Act exposes needlessly Australians to unjust infringements on their rights and freedoms.

1.18 Currently, provided that the Parliament makes its intention clear, it can pass legislation violating almost any human right, with the exception of the few express rights which are protected by the Constitution including the right to trial by jury and freedom of religion. However, even these express rights are limited, for instance, trial by jury applies only where the Commonwealth has determined that a trial is to be 'on indictment'. In other words, it operates at the discretion of the Commonwealth.

1.19 A Bill of Rights is about protecting people and ensuring that our Government remains accountable for its actions.

1.20 Bills of Rights generally cover rights such as freedom of religion; freedom of peaceful assembly; freedom of association; the right to vote; the right to a fair trial; the right to life, liberty and security of the person; the right not to be arbitrarily detained; the right not to be subjected to cruel and unusual treatment; equality before the law; and, the right not to be discriminated against.

1.21 For example, the New Zealand *Bill of Rights Act* covers a range of civil and political rights. The United Kingdom's *Human Rights Act 1998* incorporates rights set out in the European Convention on Human Rights including the rights to property, education and free elections, and the abolition of the death penalty. Canada's *Charter of Human Rights and Freedoms* includes the right to affirmative action and cultural rights. The *South African Bill of Rights* is striking for its broad coverage of rights. It includes economic and social rights such as access to housing, health care, food, water and security, and rights such as that to a healthy environment and also property rights.

1.22 We also note that the absence of a Bill of Rights in Australia places an obligation on the Government to incorporate consideration of protections for fundamental rights and freedoms. We refer to the submission from the Sydney Centre for International and Global Law which states:

⁶ NSWCCCL, *Submission 10*, p. 4. See *The impact of UK Anti-Terror Laws on Freedom of Expression*, April 2006, available at <http://www.article19.org/pdfs/analysis/terrorism-submission-to-icj-panel.pdf>

...in the absence of any entrenched statutory or constitutional protection of human rights in Australia, it would not be appropriate to modify classification law in this far-reaching manner. The proposed amendments have the potential to unjustifiably and arbitrarily infringe freedom of expression, without showing any proximate connection to a substantial likelihood of imminent unlawful terrorist violence actually occurring.⁷

1.23 The Democrats' *Parliamentary Charter of Rights and Freedoms Bill* is on the Senate Notice Paper and the Democrats will continue to advocate for an Australian Charter of Rights and Freedoms.

Recommendation 2

That Parliament should enact a *Parliamentary Charter of Rights and Freedoms Bill* to provide Australians with basic protections against which legislation that potential infringes on human rights and civil liberties may be moderated.

Constitutional validity of the Bill

1.25 The Sydney Centre for International and Global Law and the Federation of Community Legal Centres both focused upon possible Constitutional invalidity of the Bill.

1.26 The committee received evidence that specifically mentioned the implied Constitutional Freedom of political communication in *Lange v Australian Broadcasting Corporation*⁸ and referred to section 116 of the Australian Constitution which protects freedom of religion. It has been suggested that the proposed classification laws will too narrowly restrict these freedoms.

1.27 The Democrats are persuaded by these arguments and recommend that the Commonwealth should not be legislating in this area on constitutional grounds.

1.28 We also note the point made by the Sydney Centre for International and Global Law that the Constitutional protection limits only Commonwealth laws and does not prevent the States from curtailing freedom of religious expression, which is significant given that State criminal laws primarily enforce classification decisions.⁹

1.29 We also note comments made by the Law Council in its submission that there is a need for classification laws throughout Australia to be uniform in order to be effective.¹⁰

1.30 The Law Council further warns that Parliament should not jeopardise the cooperative national scheme, by using the Classification Act to circumvent the

⁷ Sydney Centre for International and Global Law, *Submission 3*.

⁸ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520

⁹ Sydney Centre for International and Global Law, *Submission 14*, pp 3 -5.

¹⁰ Law Council of Australia, *Submission 15*, p. 12.

nationally agreed standards in the Classification Code. In short they state 'the success in Australia's federal system is contingent on jurisdictions not withdrawing their support or simply "going it alone" whenever their preferred view does not prevail'¹¹.

1.31 We refer to comments made by the Victorian Attorney-General in a media release dated 24 July 2007. Mr Hulls has stated:

'It is disgraceful that Mr Ruddock has already introduced legislation into Federal Parliament before the matter has even been properly discussed with the states and territories,' Mr Hulls said.

'He is trying to bully the states and territories into accepting laws he hasn't even demonstrated we need. And if they don't, he will break apart the cooperative agreement with the state and territories on film and literature classifications.'¹²

Recommendation 3

That the laws not be passed on constitutional grounds

Definition of a terrorist act

1.32 The Bill uses a problematic definition of terrorism. In the words of the NSWCCCL 'the Code has too broad a definition of what may constitute terrorist activities. While this broad definition may be suitable for dealing with actual terrorist actions, it is not suitable as a guideline for censorship.'¹³

1.33 The definition of a terrorist act is taken from the Commonwealth Criminal Code.

1.33 Many submitters referred to the problems of adopting the definition of 'advocates' because advocates restricts an organisation from 'directly or indirectly' urging or providing instruction on a terrorist act. Criticism has also been directed at the use of the word 'praising' a terrorist act and 'indirectly counselling' a terrorist act. Uniting Justice Australia has gone so far as saying that the Code's provisions of criminal sanctions for organisations 'advocating a terrorist act have been overzealous'.

1.34 We consider all of these phrases unnecessarily limit freedom of speech and undermine a liberal democracy. Moreover, we agree with the point made by The Sydney Centre for International and Global Law that:

...the new concepts of 'directly' counselling or urging, and directly instructing, are already well covered by the existing test of promoting, inciting or instructing in crime

¹¹ Law Council of Australia, *Submission 15*, p. 12.

¹² Victorian Attorney-General, *Media Release*, 'Ruddock Hell-Bent on Going it alone on Censorship' 24 July 2007, www.dpc.vic.gov.au

¹³ NSWCCCL, *Submission 10*, p. 5.

or violence. To this extent, the proposed amendment simply introduces unnecessary duplication and complexity – and uncertainty- into classification decisions.¹⁴

1.35 If this Bill is to become law we will be moving amendments to delete reference to the phrases identified above and replace them with terms which narrow the scope of materials which can be censored and introduce more objective tests.

1.36 We also consider there should be more leeway afforded to the Classification Review Board to label some material in the context of a struggle for liberation or independence rather than a 'terrorist act'. Gilbert and Tobin Centre of Public Law in their submission refer to this Bill as failing to adequately address whether the legitimate actions of a nation on the world stage in accordance with what they perceive as their national interests may amount to terrorism.¹⁵ The Classification Review Board also state that 'usually the Classification Board and the Review Board are given some discretion in the application of tests where a refused Classification is the likely outcome'¹⁶.

Recommendation 4

That the definition of 'advocates' be amended by deleting the words 'or indirectly' from paragraphs 9A(2)(a) and (b) and deleting paragraph 9A(2)(c) which deals with praise of terrorist acts and the Explanatory Memorandum of the Bill should be amended to give the Classification Review Board more leeway to balance genuine freedom of political speech with what might be defined as terrorism. Further, the Explanatory Memorandum should refer to an example of what international conflicts may constitute terrorist acts.

Exemption for genuine educational purposes and policy makers

1.37 This Bill does not address whether academics or policy makers may access banned material for academic or policy research.

1.38 The Democrats know of three incidents which highlight the need to grant academics access to banned materials for study.

1.39 The first incident relates to media reports in October 2006 that Melbourne University intends to challenge the new terrorism laws, which prevent access to some academic books. The challenge has arisen in the context of a university historian and lecturer bringing two books to help his students understand Jihad only to have these books removed from the library shelves.

1.40 The second incident relates to the Australian Federal Police questioning a Melbourne University student named Abraham because he borrowed library books

¹⁴ The Sydney Centre for International and Global Law *Submission 14*, p. 6.

¹⁵ Gilbert and Tobin Centre of Public Law *Submission 11*, pp 3-4.

¹⁶ Classification Review Board, *Submission 12*, p. 2.

about terrorism and suicide. Quite ironically his studies involved preventing terrorism from occurring.

1.41 The third incident relates to a student studying at the University of Wollongong who was investigated as a result of false allegations that she attended a meeting supporting Hezbollah.

1.42 Educational research into terrorism is under attack from the proposed Classification laws. Academics, Teachers and students, are entitled to read about terrorism without fear of a knock at the door from the Australian Federal Police or ASIO.

1.43 In relation to policy makers, as the NSWCCCL suggests the proposed censorship laws will also limit materials to policy makers. This will severely limit the ability for the leaders of Australia to effectively address any future foreign policy issues arising from this ongoing threat.¹⁷

1.44 In the same tenor Gilbert and Tobin in their submission state:

Limiting academics' access to books on terrorism will hinder their ability to understand and criticise the ideas expressed in them. This is a problem not only for the academics themselves but also for the community at large, which depends upon quality academic work to better understand the social and security challenges facing the nation.¹⁸

1.45 The ideology of terrorism versus terrorist operations are distinct and the Bill needs to acknowledge the genuine study of the causes of terrorism. The Democrats oppose the restriction of materials for genuine academic or policy research.

Recommendation 5

That an exemption be included so that individuals may apply to the Classification Review Board to access potentially banned material for educational purposes. The exemption process should be proscribed and the decision whether or not to grant the request should be reviewable.

Conclusion

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

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

¹⁷ NSWCCCL, *Submission 10*, pp 6-7.

¹⁸ Gilbert + Tobin Law Centre *Submission 11*, pp 4-5.

1.48 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.

Senator Natasha Stott Despoja

Australian Democrats

APPENDIX 1

SUBMISSIONS AND ADDITIONAL INFORMATION RECEIVED

Submission Number	Submittor
1	Australian Catholic University
2	Australian Catholic Office for Film and Broadcasting
3	Uniting Justice Australia
4	Lesbian & Gay Solidarity Group (Melbourne)
5	Australian Society of Authors
6	Australian Press Council
7	Executive Council of Australian Jewry Inc
8	Australia/Israel & Jewish Affairs Council
9	Arts Law Centre of Australia
10	New South Wales Council for Civil Liberties (CCL)
11	Gilbert +Tobin Centre of Public Law
12	Classification Review Board
13	Federation of Community Legal Centres (Vic) Inc
14	Sydney Centre for International and Global Law
15	Law Council of Australia
16	Australian Library and Information Association
17	Quaker Peace and Legislation Committee
18	Australian Publishers Association (APA)
19	National Association for the Visual Arts (NAVA)
20	The Australian Muslim Civil Rights Advocacy Network (AMCRAN)
21	Northern Territory Police
22	Festival of Light

ADDITIONAL INFORMATION RECEIVED

1. Attorney-General's Department response to matters raised during 17 July 2007 public hearing.
2. Classification Review Board answers to questions on notice from 17 July 2007 public hearing.
3. Classification Review Board letter to the Attorney-General regarding material that advocates terrorists acts
4. Attorney-General's letter in response to the Classification Review Board regarding material that advocates terrorists acts

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Sydney, 17 July 2007

BYRNE, Dr John Alexander, Fellow,
Australian Library and Information Association

DAVIES, Ms Amanda, Assistant Secretary, Classification Policy Branch
Attorney-General's Department

FISHER, Dr Jeremy, Executive Director
Australian Society of Authors

JONES, Mr Jeremy Sean, Director of International and Community Affairs
Australia/Israel and Jewish Affairs Council

SHELLEY, Ms Maureen, Convenor
Classification Review Board

SMITH, Ms Kerri-Ann, Principal Legal Officer, Classification Policy Branch
Attorney-General's Department

