

**Australian Press Council submission to the
Australian Senate Legal and Constitutional Affairs
Committee Inquiry into the *Classification
(Publications, Films and Computer Games)
Amendment (Terrorist Material) Bill 2007***

Executive Summary

The Australian Press Council encourages the Senate Legal and Constitutional Affairs Committee to reject the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007*.

If the committee regards to proposed legislation as appropriate and necessary the Council urges the committee to adopt the following amendments to the Bill:

- The phrase “indirectly” should be removed from clause and 9A(2)(a) and 9A(2)(b) of Schedule 1 of the Bill.
- The phrase “or any mental impairment” should be removed from clause 9A(2)(c) of Schedule 1 of the Bill.
- The inclusion of the phrase “depicts or describes” in clause 9A(3) of Schedule 1 of the Bill has the effect of narrowing the exemption for material which is part of public debate. The clause should be reworded to remove this phrase.

Australian Press Council submission to the Australian Senate Legal and Constitutional Affairs Committee Inquiry into the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007*

The Australian Press Council objects to the proposed changes to the classification scheme intended to prevent the publication of material that advocates terrorism. The Council is of the view that the proposed amendments are unnecessary and have the potential to impede freedom of speech and of expression.

While the Press Council accepts that publishers have a responsibility to exercise some caution in selecting material and in preparing it for publication, the Council does not accept the assertion that a review of the classification scheme is necessary in order to restrict the publication of material that urges political or ideologically motivated violence. There are other legislative mechanisms in place that restrict such material, including laws against sedition, racial vilification and various provisions within the Criminal Code and anti-terrorism legislation. The classification scheme itself has already been applied to ban material that has been regarded by some as advocating terrorism, when two books (*Defence of the Muslim Lands* and *Join the Caravan*) were refused classification.

In its submission in response to the Attorney-General's discussion paper, the Council expressed concerns with regard to the proposed amendments and their potential to act as an impediment to free speech¹. The Council acknowledges that the Bill in the form in which it was introduced into Parliament has advanced some way towards addressing the concerns raised in its previous submission. However, the Council does not believe that the amendments already adopted go far enough to adequately protect freedom of speech.

The Press Council is of the view that the definition of "advocate" that is used in the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill* is too broad. Two particular phrases should be removed from schedule 1 of the Bill. Firstly, the phrase "or indirectly" should be removed from clauses 9A(2)(a) and 9A(2)(b). Secondly the phrase "or any mental impairment" should be removed from clause 9A(2)(c). The inclusion of these phrases has the potential to prevent the publication of material that provides information or commentary and that is appropriate subject matter for public discourse.

We note that, in his Second Reading speech, the Attorney-General explained the definition of "advocate" as having been adopted from the *Criminal Code Act 1995*. However, as the Press Council stated in our earlier submission, the standard of proof required to be met in criminal matters is much higher than in other areas of law and therefore the definitions used in criminal cases are not an appropriate test to be applied to classification.

¹ See appendix attached.

The Press Council recognizes that clause 9A(3) of schedule 1 is a sincere attempt on the part of the Attorney-General to address concerns raised with respect to freedom of speech. However, as presently worded, this clause is problematic. In its earlier submission the Press Council sought the inclusion of exemptions for public interest, satire, artistic expression, information and education. 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.

Appendix

Australian Press Council submission to the Commonwealth Attorney-General: Proposed amendments to the Classification Code to prohibit publication of material advocating terrorism

The Australian Press Council expresses its abhorrence at the government's proposed changes to the classification scheme. While the stated objective of restricting the publication of material advocating terrorism may seem benign, the amended classification scheme has the potential to impede freedom of speech and of expression.

Democracy is a living organism which demands exposure to air and light in order to thrive. Sometimes, the stimulus necessary to promote democracy is provocative and potentially volatile in its character. In a well meaning but ultimately misguided attempt to protect democracy, censorship of material which is perceived as advocating terrorism risks smothering democracy within a hermetic barrier which strangles it to death.

It is by no means clear that a review of the classification scheme is necessary in order to restrict the publication of material which urges political or ideologically motivated violence. There are other legislative mechanisms in place which restrict such material, including laws against sedition, racial vilification and various provisions within the Criminal Code and anti-terrorism legislation. Further, the issuing of an "RC" classification by the Classification Review Board against *Defence of the Muslim Lands* and *Join the Caravan* in 2006 demonstrates that the classification scheme as presently configured is already capable of being applied so as to ban material which advocates terrorism.

In addition to being unnecessary, the proposal to ban material which is classed as advocating terrorism has significant potential to prevent the publication of material of a far broader character than that which it is intended to obstruct. People of different political and ideological viewpoints will disagree as to what defines terrorist activity and where to draw the line between that material which should and that which should not be made public. There will never be universal agreement as to what material should be censored where political and ideological objectives are concerned. There may be universal condemnation of violence, but in order to ban material which promotes violence there is no need to make specific reference to terrorism. The use of the word "terrorism" implies political or ideological objectives or motivations, and it is impossible to assess such motivations without reference to one's own ideological prejudices. "Terrorism" is a subjective notion – hence the oft quoted truism, one man's terrorist is another man's freedom fighter. The inherent subjectivity of the word "terrorist" is demonstrated by the fact that foreign governments have in the past declared both Gandhi and the Dalai Llama to be terrorists.

To illustrate this point, it is not difficult to identify subjects or themes which could potentially be censored on the premise that it advocates terrorism, yet which are considered by many to be appropriate subjects for publication:

- Narratives which depict in a romantic or heroic manner the activities of the movements engaged in resistance to Nazi occupation in WWII.

- Narratives pertaining to volunteers involved in the Spanish Civil War
- Material which informs or illustrates in a supportive way the activities of independence movements in Timor, Papua or Aceh.
- Material which depicts in a positive manner the activities of the African National Congress under apartheid.
- Commentary on the Palestine-Israel conflict, including material referring to the the two intafadas, the massacres at Sabra and Shatila and the erection of the security wall and opposition to it.
- Exhibitions by artists such as Gerhard Richter, among whose most prominent works is a series of paintings of members of the Baader-Meinhof terrorist group.
- Commentary or dramatisation dealing with the political situation in Ireland, particularly where such material expresses support for Irish nationalism or its opponents.

It should be noted that even the promotion of violence or attacks against infrastructure may be the appropriate subject for public discourse in certain very limited circumstances – such as when a foreign government is engaged in continuous and egregious breaches of human rights and defiance of international law.

The public is informed that certain material is “not intended to be captured by the provisions”, including investigative journalism, satire, patriotic material which glorifies war, and material which deals with contentious matter in an entertaining, informative, educational, ironic or controversial manner. The discussion paper states that “the Board and Review Board are used to dealing with such material and giving appropriate classifications”. This implies that the public are being asked to trust the classification review board to apply the classification in a manner which does not intrude into freedom of speech. Whether the individuals on the board are capable of applying the classification appropriately is not to the point – the Council’s concern is that the members of the board may find themselves subject to government or political pressure or influence. Such pressure might be brought with a view to censoring material which is critical of the government or its allies, which inspires activism or civil disobedience or which is politically inconvenient. There is significant potential for the application of the “RC” classification to be manipulated to achieve political objectives in the name of protecting security. In order to minimize the pressure which might potentially be brought to bear upon the Classification Board and the Classification Review Board it is fundamental that any exemptions are placed in the legislation itself and are drafted in such a way as to ensure that they provide the broadest possible protection for the free and open expression of political and ideological ideas.

One particular aspect of the proposed revision of the classification scheme which is of concern is the definition of “advocating terrorism”. The definition of “advocate” as adopted from the Criminal Code seems excessively broad. 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. The reference to “praising” also has the tendency to prevent the free expression of views on political issues.

This raises the question of whether it is appropriate to rely upon the definition which is derived from the Criminal Code. Prosecutors in criminal proceedings are required to satisfy the court to a higher level of proof than that which is required to be satisfied in civil proceedings. Material which escapes criminal prosecution may nonetheless be refused classification.

It is the view of the Press Council that there should be no introduction of a ban on the publication of material on the grounds that it advocates terrorism.

However, if the government does proceed to introduce such a revision of the classification scheme, the Press Council urges the government to formulate the classification in such a manner as to minimize its potential to act as an impediment to free speech. This can be achieved by implementing the Council's recommendations, as follows.

Firstly, **the definition of "advocate"** for the purposes of assessing whether material advocates terrorism **should be narrowed** so as to minimize its potential to act as an obstruction to free expression. At the minimum, **the word "indirectly" should be omitted** from the definition which is used as the basis for the classification.

Secondly, **the classification scheme should include a thorough and exhaustive list of broadly defined exemptions to any "RC" classification based on advocating terrorism.** Such exemptions should include, but not be limited to, the following:

- **Public interest**
- **Artistic expression**
- **Satire**
- **Information and education**

In order to ensure that such exemptions are authoritative, **it is imperative that such exemptions be placed in the legislation itself** rather than in the explanatory memorandum.

In addition to these safeguards, it is also suggested that the government might consider using a classification which, while restricting access to adults and warning of the inflammatory nature of content, does not prevent its publication, as an alternative to the RC classification.