



**Australian Government**  
**Classification Review Board**

Our ref: 07/9099

Ms Jackie Morris  
Committee Secretary  
Senate Standing Committee on Legal and Constitutional Affairs  
Department of the Senate  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600  
By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Ms Morris

Thank you for inviting the Classification Review Board (the Review Board) to make a submission on the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007*.

This Bill is of particular interest to the Review Board because the Review Board will directly apply the proposed provisions. The Review Board classifies films, computer games and certain publications upon application for review of a Classification Board decision. Both boards apply criteria in the *Classification (Publications, Films and Computer Games) Act 1995*, the National Classification Code and the classification guidelines.

This submission does not address broader questions concerning terrorism and freedom of speech, but is confined to how the Review Board might apply the proposed section 9A of the Classification Act.

*Definition of 'advocates'*

The Review Board's concern is with the third element of the definition of 'advocates'. Material will advocate the doing of a terrorist act if:

'it directly praises the doing of a terrorist act in 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...) to engage in a terrorist act.'

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. It would appear that the effect of this test is that if material praises a terrorist act, then that material would be required to be refused classification.

This also seems a low threshold. The Review Board finds it hard to envisage praise of a terrorist act that might not lead *someone* to engage in a terrorist act. In the absence of a 'reasonable adult' or some other common law test explained in judicial decisions, the section

seems to proscribe all<sup>1</sup> direct praise of terrorist acts. If this is Parliament's intention, then perhaps the section should be drafted to reflect this. Material 'advocates the doing of a terrorist act if... it directly praises the doing of a terrorist act.'

Material that 'directly or *indirectly* counsels or urges' or 'directly or *indirectly* provides instruction on' the doing of a terrorist act will also be proscribed (my emphasis). These seem potentially broad categories and possibly difficult to apply. They also do not seem to require any assessment of the likelihood that someone might be led to engage in the terrorist act.

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. Such discretion could be given by the use of the term 'substantial or significant risk' instead of 'circumstances where there is a risk'. This would allow for some flexibility in borderline cases, while ensuring Parliament's intention of refusing classification to all material that is most likely to advocate a terrorist act is met.

#### *Definition of 'terrorist act'*

The proposed definition of 'terrorist act' refers to a definition in section 100.1 of the *Criminal Code*. This definition has multiple elements and requires a detailed consideration of the nature of the action and the intentions of the person performing the action. It seems problematic to assess from a publication, film or computer game the intentions of persons acting in response to the publication, film or computer game. Will the Review Board have to try to assess whether the material seems to advocate the doing of an act by a person with the requisite intention, as opposed to doing the act with some other intention? The Review Board would not have any evidence of intentions, so would have to consider likely intentions.

The Explanatory Memorandum suggests that the material itself need not evince any intention to inspire a specific terrorist act.<sup>2</sup> Generalised exhortations to commit terrorist acts would seem to be enough. This might be hard to reconcile with the definition of 'terrorist act' which seems to contemplate specific, concrete acts.

Properly applying these definitions seems involved and complex. Members of the Classification Board and the Classification Review Board are selected to reflect the Australian community. The boards are administrative decision making bodies. Although I have every confidence in the Review Board, and the Review Board has some members with extensive legal experience, I remain concerned that the Review Board may have to apply what seem to be unnecessarily intricate, legal tests drafted to be applied by the Courts.

Thank you for considering our submission.

Yours Sincerely

Maureen Shelley  
Convenor  
10 July 2007

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<sup>1</sup> Subject to subsection (3)

<sup>2</sup> 'The advocacy would need to be about doing a terrorist act, not merely expressing generalised support of a cause. The definition recognises that some communications about doing a terrorist act are inherently dangerous because they could inspire a person to cause harm to the community. This could be the case where it may not be possible to show a person had any intention that a specific terrorism offence be committed or to communicate the material to any particular person' (EM par 5).