



AUSTRALIAN PUBLISHERS ASSOCIATION

**Submission
on
Draft of proposed Bill**

**Inquiry into the Classification (Publications, Films and
Computer Games)
Amendment (Terrorist Material) Bill 2007
July 2007**

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Background to Submission

1. On 21 June 2007, the Senate referred the provisions of the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007* ("the Bill") to the Legal and Constitutional Affairs Committee for inquiry and report by 30 July 2007.
2. The Standing Committee has established an Inquiry into the Bill.
3. The APA makes this submission on the Bill on the invitation of the Standing Committee on Legal and Constitutional Affairs.

The Bill

4. The Bill amends the *Classification (Publications, Films and Computer Games) Act 1995* (the Act) to require that publications, films or computer games that advocate the doing of a terrorist act must be classified as Refused Classification ("RC"). The Bill adopts the meanings of 'advocate' and 'terrorist acts' from the *Criminal Code Act 1995* (Cwlth) by adaptation of language or direct reference.

Detailed Comments.

5. The regime of the Bill is simple enough when it deals with literary works. It seeks to include in the 'submittable publication' provisions in the *Classification (Publications, Films and Computer Games) Act 1995* ("the Act") publications that advocate the doing of a terrorist act. These provisions will allow a publication that is an unclassified work to be called in, if certain statutory provisions are met.
6. The Act already provides a procedure for calling in of items for classification if they are unclassified and it appears they fall within the national classification guidelines and code.
7. The understanding of two definitions from the Act is important to see how this form of classification operates. These are 'publication' and 'submittable publication'.
8. 'Publication' means any written or pictorial matter, but does not include:
 - (a) a film; or
 - (b) a computer game; or
 - (c) an advertisement for a publication, a film or a computer game; section 5 of the Act.
9. A 'submittable publication' means an unclassified publication that, having regard to the Code and the classification guidelines to the extent that they relate to publications, contains depictions or descriptions that:

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- (a) are likely to cause the publication to be classified RC; or
 - (b) are likely to cause offence to a reasonable adult to the extent that the publication should not be sold or displayed as an unrestricted publication; or
 - (c) are unsuitable for a minor to see or read; section 5 of the Act.
10. The Bill seeks to add to the definition of 'submittable publication' clause 9A. This will expand what constitutes a 'submittable publication'.
11. The procedure surrounding a 'submittable publication' is found in Division 3 of the Act - 'Submittable publications'. Section 23 of the Act, which sits in this Division, permits the calling in of submittable publications for classification if the Director has reasonable grounds to believe that a publication is a submittable publication; and the publication is being published in the Australian Capital Territory, or the Director has reasonable grounds to believe that it will be published in the Australian Capital Territory: section 23 (1) of the Act.
12. There is a constitutional reason as to why the Act only has jurisdiction over the Australian Capital Territory. In fact, the Second Reading Speech of the Bill made by the Attorney-General states:
- The Bill introduces new provisions to the Classification Act, which will expressly require that publications, films or computer games that advocate the doing of a terrorist act must be classified as refused Classification.
- I would prefer to see these provisions in the National Classification Code and guidelines, not in the Classification Act, but that requires the States' and Territories' Agreement.
- As the classification scheme is a co-operative national scheme the State and Territory Censorship Ministers and I must agree to the provisions of the Code and guidelines.
13. Without a national scheme giving effect to the measures of the Bill what is proposed will have no real and effective impact.
14. A person has three business days to comply with the Notice: section 23(3) of the Act.
15. The terms of section 23(3) of the Act is a strict liability measure as defined in section 6.1 of the *Criminal Code Act 1995* (Cwth) (*Criminal Code*"); section 23(4) of the Act.
16. The Criminal Code defines strict liability as:
- 6.1 Strict liability

- (1) If a law that creates an offence provides that the offence is an offence of strict liability:
 - (a) there are no fault elements for any of the physical elements of the offence; and
 - (b) the defence of mistake of fact under section 9.2 is available.
- (2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:
 - (a) there are no fault elements for that physical element; and
 - (b) the defence of mistake of fact under section 9.2 is available in relation to that physical element.
- (3) The existence of strict liability does not make any other defence unavailable.

Division 5—Fault elements 5.1 Fault elements

- (1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.
 - (2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.
17. The Parliament has provided that an offence is to occur in the event of the failure of acting on a section 23(3) notice. An offence has two parts under section 3.1 of the Criminal Code.

3.1 Elements

- (1) An offence consists of physical elements and fault elements.
- (2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.
- (3) The law that creates the offence may provide different fault elements for different physical elements.

By making the offence a strict liability offence the Parliament has removed the fault elements requirement.

18. All of this is quite straightforward.

Addressing the clauses of the Bill.

Clause 9A(1)

19. Clause 9A(1) provides that a publication, film or computer game that advocates the doing of a terrorist act must be classified RC
20. Clause 9A(4) states that 'terrorist act' has the meaning given by section 100.1 of the *Criminal Code*. This section is set out in full below.

terrorist act means an action or threat of action where:

- (a) the action falls within subsection (2) and does not fall within

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- subsection (3); and
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
 - (c) the action is done or the threat is made with the intention of:
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (ii) intimidating the public or a section of the public.
- (2) Action falls within this subsection if it:
- (a) causes serious harm that is physical harm to a person; or
 - (b) causes serious damage to property; or
 - (c) causes a person's death; or
 - (d) endangers a person's life, other than the life of the person taking the action; or
 - (e) creates a serious risk to the health or safety of the public or a section of the public; or
 - (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - (i) an information system; or
 - (ii) a telecommunications system; or
 - (iii) a financial system; or
 - (iv) a system used for the delivery of essential government services; or
 - (v) a system used for, or by, an essential public utility; or
 - (g) a system used for, or by, a transport system.
- (3) Action falls within this subsection if it:
- (a) is advocacy, protest, dissent or industrial action; and
 - (b) is not intended:
 - (i) to cause serious harm that is physical harm to a person; or
 - (ii) to cause a person's death; or
 - (iii) to endanger the life of a person, other than the person taking the action; or
 - (iv) to create a serious risk to the health or safety of the public or a section of the public.

Clause 9A(2)

19. Clause 9A(2) is as the Explanatory Memorandum ("EM") to the Bill states a direct adaptation from Criminal Code section 100.1(1A) 'Definition of Advocate'. The Clause has three parts which set out three differing tests as to whether a publication advocates the doing of a terrorist act:

- the written form or pictorial form direct or indirectly counsels or urges the doing of a terrorist act;
- the written form or pictorial form direct or indirectly provides instruction on the doing of a terrorist act;
- the written form or pictorial form directly praises the doing of a

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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 mental impairment (within the meaning of section 7.3 of the *Criminal Code*) that the person might suffer) to engage in a terrorist act.

20. The provisions are complex.

Definition of advocacy is very wide without carve out provision

21. The advocacy can be direct or indirect and can take the form of urging the doing of an act or providing instruction to do an act. In seeking an understanding of this definition it has to be remembered it is a definition and not an offence. The offence lies in section 23 of the Act in failing to act on a notice issued under Division 3 - Submittable Publication. As there is no offence there are no elements as such to the definition. In forming an opinion on reasonable grounds that a publication is a submittable publication, the director need only look at the material and its context and not at the intention of the author or publisher of the publication. Publications, films or computer games are things and mere expressions.

22. To analysis this further we provide an example.

If a publication outlines in detail how a character might murder a fictional person by the construction of an explosive device using household and garden products, does this amount to indirect advocacy by providing instructions to do an act of terrorism?

The prima facie answer on the basis of clause 9A(2)(b) is yes. The publication clearly provides instruction if the detail is clear and concise and conclusive. Clause 9A(3), the defence clause, will be discussed later but without this Subclause the Bill would be a weapon of broad censorship in such circumstances.

Meaning of word 'indirectly'

23. The use of the word 'indirectly' is an issue in Subclauses 9A2(a) and (b). A point that bears noting is that in the EM in paragraphs 4 & 5, where commentary on this clause is made, it is silent on possible examples of application of the word 'indirect'. What is stated is:

4. The definition of 'advocates' is adapted directly from the definition of 'advocates' in section 102.1(1A) of the Criminal Code where it applies to the activities of an organisation. It is intended that 'advocate' should have the same meaning in the Classification Act when applied to a publication, film or computer game as in the Criminal Code when applied to an organisation. 'Advocate' covers direct or indirect advocacy, in the form of counselling, urging or providing instruction on the doing of a terrorist act. It also covers direct praise of a terrorist act where there is a risk that such praise might lead a person (regardless of his

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or her age or any mental impairment) to engage in a terrorist act; thus is intended to capture material that has the capacity to lead the impressionable to engage in a terrorist act.

5. 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.

24. It is somewhat difficult to see what the word 'indirect' would mean when urging the doing of a terrorist act. The point is that the clause addresses the form and contents of a publication not the intent of the author or publisher of the publication. The only person who has to form an opinion of the publication is the Director. Yet if the indirect consequence can create a terrorist act how does the creator of the work anticipate such a thing. Clearly under this Bill, the creator or publisher are not subject of a potential event if, indirectly, their work advocates a terrorist act. The penalty is a possible pecuniary one as the document is classified RC.
25. All of this gives rise to a complexity in creating a publication. The overall issue will be considered further in the 'carve out' clause.

Clause 9A(2)(c)

26. In clause 9A(2)(c) the word 'praise' is used. 'Praise' is the express approbation and/or admiration for doing the act or the commendation of doing the act or glorifying the act: Pocket Oxford Dictionary.
27. Each of these acts that constitute 'praise' requires a positive action on behalf of the author of the publication. There is no indirect act that is picked up here. Yet the definitions used, raise the indirect and the unknown for the author, editor or publisher and the fate of his or her publication.
28. Clause 9A(2)(c) refers to the *Criminal Code Act 1995*, section 7.3 for the definition of 'mental impairment'.

7.3 Mental impairment

- (1) A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that:
- (a) the person did not know the nature and quality of the conduct; or
 - (b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or

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- (c) the person was unable to control the conduct.
 - (2) The question whether the person was suffering from a mental impairment is one of fact.
 - (3) A person is presumed not to have been suffering from such a mental impairment. The presumption is only displaced if it is proved on the balance of probabilities (by the prosecution or the defence) that the person was suffering from such a mental impairment.
 - (8) In this section:
mental impairment includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.
 - (9) The reference in subsection (8) to **mental illness** is a reference to an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli. However, such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur.
29. In contemplating what a publisher preparing a manuscript for publication needs to do to ensure that the manuscript is not classified RC, it is obvious it will not be easy. How does any one know without detailed insight of a particular person's troubled mind, what might be praise to a reasonable person is to another, a catalyst for acts of harm to persons and property. The clause is quite specific and does not use the word 'reasonable'. The word 'risk' is used as the nexus between the future act of a troubled mind and the praising material. This is an extremely subjective test that the Director will be applying and requires unfathomable anticipation on the part of the creator of the publication. Again here the carve-out provision becomes important.

Clause 9A(3)

30. Clause 9A(3) is the defence or carve out clause which states under what circumstances 'advocacy' will not depict or describe a terrorist act even if it does this. Provided the 'depiction or description' could reasonably be considered to be done merely as part of public discussion, debate, entertainment or satire, then a publication will not contravene the provisions of Clause 9A.
31. Clearly this clause is one which seeks to offer a balance to the high level of potential censorship in this Bill, but does it achieve what it seeks to do through the language chosen? The word 'entertainment' means amusement or public performance. 'Satire' is the use of ridicule or sarcasm to discourage the use of vice & folly or to expose false pretensions. Debate has a meaning of a discussion of a question in a deliberative society and public discussion is more an exchange or comparison of opinions held amongst those in the discussion.

32. The EM comments on this clause are as follows:

Proposed new subsection 9A(3) clarifies that the provision is not intended to capture material whose depiction or description of a terrorist act could reasonably be considered to be done *merely* as part of public discussion or debate or as entertainment or satire. The subsection clarifies that material, which does *no more than* contribute to public discussion or debate or provide entertainment or satirical comment, is *not* material which should be classified as RC under this provision. Examples could include investigative journalists' work, historical analyses, material that might appear to glorify war or battle (including 'factional' or fictional accounts of war, insurgency or resistance), satirical pieces, and popular culture movies. On the other hand, material containing content which goes further and advocates the doing of terrorist acts, for example by directly praising terrorist acts in circumstances where there was a risk of leading a person to do similar, runs the risk of inspiring someone to commit a terrorist act. Such material would be required to be classified RC.

33. The tiebreaker between the carve out in clause 9A(3) and the balance of the clause are the words 'merely' and 'reasonably'. Literally the word 'merely' means 'just only' and is derived from the Latin 'merus' which means unmixed. This becomes a question of fact. The use of the word 'reasonably' makes the Director's decision one that has to balance out all the circumstances when being exercised pursuant to Division 3 of the Act. Provided a wide meaning is given to the categories of classes of carve-out material then the defence will be effective.
34. Illustration of the carve-out might be useful. The example of the explosive use of agriculture and domestic products in a murder mystery might provide some assistance. If this example is merely part of a murder mystery plot it is hoped that clause 9A(3) would spare the publisher from receiving a notice issued by the Director pursuant to section 23 of the Act. The publication, whilst explicit in its detail, would be merely for entertainment and it would be reasonable for that view to be taken.
35. There is however one other exception buried within the Bill. The definition of a terrorist act has not been considered. It is as stated above, a borrowed definition from the Criminal Code and it has many parts. It is defined as an act that is an action, or threat of action, that has an aim of achieving a political, religious or ideological cause; and there is an intention of:
- (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (ii) intimidating the public or a section of the public.

There has also to be an outcome that any action will cause serious physical harm to a person, serious damage to property; a person's death; or endangers a person's life, other than the life of the person taking the action; or a serious risk to the health or safety of the public or a section of the public;

or seriously interferes with, seriously disrupts, or destroys, an electronic system.

36. However, an action will not be a terrorist act if it is:
- (a) advocacy, protest, dissent or industrial action; and
 - (b) is not intended:
 - (i) to cause serious harm that is physical harm to a person; or
 - (ii) to cause a person's death; or
 - (iii) to endanger the life of a person, other than the person taking the action; or
 - (iv) to create a serious risk.

This exception to the definition of a terrorist act is also an exception to the Clause 9A of the Bill. One cannot advocate a terrorist act if the act thought to be such an act, is excluded from the statutory definition. The underlying issue here is, that whereas Clause 9A has not issues of 'fault elements' such as intent, this exception is squarely based on a 'lack of intent' to do certain acts. So how does one ascertain if a publication has intent, how does one imbue a piece of paper with motivation without looking through it, to the entity behind it? This is quite removed from the scope of the Act which is about classification of the physical product.

37. If the publisher of our murder mystery was known to be a strong supporter of a religious sect or a political anarchist group who had been known to make threats to disrupt society, how might clause 9A(3) apply. The murder mystery is merely for entertainment. Can it reasonably be considered that the clear description of making a home made bomb in the text was providing instruction or is it still just the story line?
38. One line of argument is that it does provide advocacy as defined in clause 9A. However a 'terrorist act' is not a terrorist act pursuant to section 100.1(3) if it is advocacy, protest, dissent or industrial action without an intention to harm anyone or anything. So whilst an act might advocate within the meaning of clause 9A, it might not be a terrorist act as it was advocacy without an intention to do harm. This lack of intent one assumes is ascertained within the Bill and the Act which by the Director reaching his statutory decision on reasonable grounds. It becomes an exercise of balancing circumstantial evidence before issuing the notice under section 23(3) of the Act.
39. Underlying this Bill are two defence or carve out provisions. The APA welcomes both.

Reclassification

40. The Bill does not contemplate the possibility of reclassification of the material outlined in Clause 9A and has placed the entire amendment within the unclassified call in provisions. This does seem odd given the point of the Bill

is to assist with the 'fight against terrorism'. There is currently no clear and apparent power to reclassify material already classified should it be found to fall within the provisions of Clause 9A. It is not inconceivable that the type of publication which is to be classified RC, because it advocates a terrorist act, might be in the market place already with another classification when, due to changed circumstances, events overseas or new information, it is quite apparent that this material should be reclassified RC. Yet the Act in Part 4, Reclassification, section 38(1) states a publication cannot be reclassified within 2 years of classification. Section 97A of the Act does allow reclassification but only in very prescribed circumstances. This seems to be a gap in the application of the policy behind this Bill.

Conclusion

41. The APA understands the policy objective of the Bill.
42. The APA considers that the measure needs to be applied in a national context if it is to be applied.
43. The APA welcomes the two defences that are contained within the Bill; clause 9A(3) and section 100.1(3) of the Criminal Code.
44. The APA considers the drafting far too complex for anyone creating a publication to understand without the assistance of legal advice. It is what might be referred to as 'five finger' legalisation because it takes that many fingers in the various pieces of legislation to follow the legislative pathway. Why is it not possible to place all the intended legislation in one place rather than have references to other legislation within the proposed legislation?

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