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STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

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

TUESDAY, 17 JULY 2007

SYDNEY

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SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Tuesday, 17 July 2007

Members: Senator Barnett *(Chair)*, Senator Crossin *(Deputy Chair)*, Senators Bartlett, Kirk, Ludwig, Parry, Payne and Trood

Participating members: Senators Allison, Bernardi, Bob Brown, George Campbell, Carr, Chapman, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Fielding, Fierravanti-Wells, Fifield, Heffernan, Hogg, Humphries, Hurley, Joyce, Kemp, Lightfoot, Lundy, Ian Macdonald, Sandy Macdonald, McGauran, McLucas, Milne, Murray, Nettle, Patterson, Robert Ray, Sherry, Siewert, Stephens, Stott Despoja, Watson and Webber

Senators in attendance: Senators Barnett, Kirk, Ludwig and Parry

Terms of reference for the inquiry:

To inquire into and report on: Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007

WITNESSES

Committee met at 1.12 pm

CHAIR (Senator Barnett)—This is the hearing for the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007. The inquiry was referred to the committee by the Senate on 21 June 2007 for report by 30 July 2007. The committee has received 20 submissions for this inquiry. All submissions have been authorised for publication and are available on the committee's website.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. The committee prefers all evidence to be given in public, but under the Senate's resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

If a witness objects to answering a question, the witness should state the ground upon which the objection is taken, and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may of course also be made at any other time.

[1.14 pm]

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

CHAIR—I welcome Mr Jeremy Jones from the Australia/Israel and Jewish Affairs Council. The Australia/Israel and Jewish Affairs Council has submitted submission No. 8. Do you have any alterations or additions to the submission?

Mr Jones—I do not have any alterations, but I would be grateful to speak a little bit further to it.

CHAIR—I ask you to make a short opening statement, after which I will ask senators from the committee to ask questions.

Mr Jones—The Jewish community is very conscious of the reality of terrorism. On a personal note, back in 1982 I regularly had coffee with the then Consul General of Israel where we would discuss the week's events as they related to his country and to the Australian Jewish community. One week we cancelled because I had other commitments. The time and place where I had normally been on a weekly basis was within minutes of where a bomb was planted at the consulate in Sydney in December 1982. The same evening a bomb went off in the Hakoah Club in Sydney, which was very close to where I was then living. Those are not necessarily the only examples of terrorism in Australia, but they are ones of which I am very personally aware.

We as an organisation and from the Jewish community are also very aware of the availability of material which justifies and rationalises terrorism. I had the misfortune of sitting through the many hours of the *Death Series* DVDs, which were at the heart of the investigation into what existed in Australia which would allow one to effectively classify or restrict material which rationalised, advocated or incited terrorism. I am also very aware of the way in which the racial hatred legislation operates in Australia. There were some references in the discussion paper to that. I was the complainant in both the Toben and Scully cases and know very much about how the processes work and their limitations, particularly the difficulty in having legislation which assumes that it is possible to take actions under that legislation, which I would say, as someone who has a great deal of familiarity with it, simply is not possible.

I would also like to mention briefly some of the issues that we as a community and the Australia/Israel Jewish Affairs Council as an organisation have with distribution of hate material. I have made a number of visits physically to bookstores, fetes and other places in Australia where material has been made available specifically to the Islamic community in Australia, such as the Islamic Bookshop in Lakemba but also at annual events such as the Eid Fair and Festival, and been able to obtain quite openly material which, for instance, describes Jews as the enemy of humanity. It has the simple aim, it would seem, of saying that if you take any action whatsoever against a Jewish person it is not the same as doing it against somebody who has an entitlement to have any level of freedom—even freedom to live. Some of this is material aimed at children; some of it is material which is for a more general audience. There was an article in today's *Herald Sun* in Melbourne about taxi drivers handing

out material including the Sheikh Feiz Mohammed DVDs. There was an article in today's *Daily Telegraph* about the way in which children's television icons are used in certain circumstances to dehumanise enemies and to create the seeds which could grow, potentially, into terrorism.

If there is a lesson that we are learning more and more often as we examine and try to work out responses to terrorism, it is that, although there can be factors which rationalise and justify terrorism, the actual cause of terrorism—if there is one—seems to be that people learn to hate and to target certain groups as no longer having the entitlements that you would think belong to all humanity. It is a difficult but necessary job that the Parliament of Australia has taken upon itself: to try to work out how we can do our utmost to protect the freedom of speech, the freedom of association and all the other freedoms that we so value in his country, while at the same time being able to stem the flow of hate material and material justifying, advocating and inciting terrorist actions against members of the Australian community.

Senator LUDWIG—Thank you for appearing here today. You are aware that there are a range of submissions that disagree with your view, particularly about constricting or chilling free speech and the ability of people to read, hear and see what they want to hear, read and see as involving a 'reasonable adult' test—that is the usual phrase that is used. Do you argue against that or do you argue specifically against the material you have seen? What I am trying to ascertain is: do you think the Classification Board got it wrong in this instance and that the Sheikh Feiz video should have been refused classification? Or, more broadly, do you think that there is a requirement for the law to be changed to ensure that the decisions of the Classification Board are appropriately adapted?

Mr Jones—I think both are true and this would not be the only time where I would have a strong disagreement with the classifications made by people. I do not doubt their goodwill, their skill or whatever, but any group of human beings are capable of being mistaken in their judgements. To my mind this is not dissimilar to the case when the English writer—I am not sure how you would describe him—David Irving put out a video of a speech he was going to give in Australia. Anybody looking at that video under New South Wales or federal antiracism laws—there may have been other states, but I was only looking at New South Wales and federal laws—would have said that if this was given as a speech it would have been in breach of the appropriate laws. The Classification Board gave it a G, for general distribution. This was material that basically denied the Holocaust and said there was an international Jewish conspiracy at play. Similarly with these DVDs, taking into account the full impact of what they were trying to do, which was to create the circumstances which would allow, justify and excuse terrorism in the name of the particular religious view of the main speaker—in this case Sheikh Feiz Mohammed—I could see that there was, to my mind anyway, a lack of real understanding about what the possible if not probable effects of the DVDs were.

When it comes to more general issues, yes, I am aware there are other views. I was quite active personally in the discussions which resulted in the instigation of state and federal laws to deal with racist material and I am quite involved in discussions relating to religious vilification, which is not exactly the same, but these are issues relating to where the appropriate boundary is placed on freedom of speech and what is the responsibility of society

to set standards. Also, when we are able to show that harm does come from this sort of speech, there are going to be fundamental philosophical differences.

To my mind, I would face problems with the law if I claimed that my soap powder made your clothes whiter than any other and it did not. Everybody seems to accept that it is an abuse of free speech to make a claim like that when it is commercial. If someone makes a claim which could lead to people thinking of another group of human beings as not entitled to basic human rights, I would hope it becomes a similar sort of question, and the way it has been dealt with by the states and federally has been with a range of racial discrimination and racial hatred legislation. I would think, given the understood need now, that material which takes us a step further and relates to terrorism would also need to be considered as one of those things which go beyond the very broad allowance and the maximisation in principle of freedom of speech as long as it is not harming another human being.

Senator LUDWIG—The existing phrase in the code goes to 'promote, incite and instruct in matters of crime or violence'. I am sure you are familiar with those words. Can you comment on whether or not the amendment is necessary to pick up something that is not in those words as they stand? A range of submissions argue that the matters of terrorism acts could fall within 'promote, incite or instruct in matters of crime or violence'. Do you have a view or do you want to comment on that?

Mr Jones—I do not speak as a lawyer but lawyers who have looked at this, who I have discussed the matter with, have convinced me that it would be more appropriate, considering what we are talking about—which is the commission of terrorist acts or support for terrorist acts—to be looking at words along the lines of 'prohibiting the publication of material which incites, counsels, condones, encourages, praises or urges acts of violence'. These are more applicable to the sort of material which seems to have led to people not only carrying out acts of terrorism but being sympathetic to the aims and actions of terrorists.

Senator LUDWIG—You also mentioned the issue of what is called hate material. Do you want to take the opportunity to elaborate on that for the committee? You say in your submission that it should contain not only this measure but additional measures, and that is one of them. I was just interested to hear your views on that.

Mr Jones—When you look at some of the material which I have seen—and specifically I am looking at material that deals with Jewish people because that has been my area of expertise and professional interest for some time—there is material which could be taken under the federal racial hatred law, but any material taken under the racial hatred law can lead to a very long, protracted and difficult legal process. It is civil law. The onus of proof is entirely on the complainant. There are many defences available, and that is why there are going to be many cases which are not pursued even though you could argue the material would be overtly racist, inciting or justifying hatred.

The sort of difference I am talking about is between someone who is putting out a leaflet, making a public statement or has a website which consists of a certain tone, as against someone who is selling books, making books and DVDs available and promoting these in the way hate material I have picked up at bookshops has been promoted. My receipts have stated 'educational material' because that is the belief of those making the material available. The

question is: how would you deal with that sort of material, given that it can in certain circumstances be material which condones, praises or even urges—'urges' is probably too strong in the sort of material I am thinking of—and certainly justifies terrorism while not necessarily saying, 'Go out and commit an act'? It is material which on any reasonable view would be allowing somebody to believe that, by committing a terrorist act, they are doing something which is not only justifiable but in some senses praiseworthy.

Senator KIRK—Thank you very much for your submission. I understand from what you are saying that you are more or less satisfied with the terms of the bill, and if anything you would like to see it go further. What is your view on proposed section 9A(3), which indicates that a publication, film or computer game will not advocate the doing of a terrorist act in circumstances where it could reasonably be considered to be done merely as part of public discussion or debate or as entertainment or satire? I notice that in your written submission you make no reference to that provision, which I suppose is perhaps seen as a defence to the provision. I just wondered what your view was about that proposed subsection.

Mr Jones—The subsection is not unreasonable. As I hope we make clear in the written submission and my verbal submission, you want the maximum amount of free speech possible while also allowing society to protect itself from those who would encourage acts of terrorism. Satire would certainly be one area. You would have scholarly debate and interest. You would not want a situation where people were not able to accurately and fairly report, for example, or study the words of others without feeling that they could be subject to criminal law.

If we are talking about the free speech aspects, the racial and religious hate laws at a state level are all designed to interfere with free speech as minimally as possible while protecting community standards. With terrorism, we are not just talking about community standards; we are also talking about the physical safety of the community. I think the same broad principle should apply.

Senator KIRK—From what you are saying, you think that this provision does allow for public debate and discussion. My particular concern relates to research and academic freedom and whether or not it will permit this kind of debate, discussion and writing to occur.

Mr Jones—I think the provision does allow for that. We as an organisation certainly share your concern. We would not want research to be hindered.

Senator KIRK—So it achieves the right balance, in your view?

Mr Jones—It has the potential to achieve the right balance, but the reality is that you are going to be dealing with human beings interpreting this one way or the other. But I think that it is as good a guarantee as we can get.

Senator PARRY—In relation to your suggestion that the bill should go further to include, in particular, issues that relate to your culture, can you give a practical example that does not fit within the classification but that you would like to see added to the classification?

Mr Jones—If possible I would like to have time to respond to that with material. I do not have anything with me and I certainly do not want to give an answer which could in any way be misleading. I physically see material but I do not want to misrepresent that material to you.

Senator PARRY—Could you provide that on notice. You are the only witness who has asked for increased provisions, so it would be good to have some form of example to understand why.

Mr Jones—Yes, I will.

Senator TROOD—In relation to the advocacy of terrorist organisations, are you referring to proscribed terrorist organisations, or are you talking about organisations that might be considered in some views to be terrorist organisations?

Mr Jones—We see this as being part of the whole platform of the government in dealing with terrorism. The government identifies proscribed terrorist organisations. I think the next step should be that if I, an organisation or anybody else had a differing view, we should have to go through the process of convincing the government that these were organisations which should be proscribed. That is moving beyond actions. A terrorist action does not have to be committed by a terrorist organisation. As we have seen this recently in England, people do not have to belong to an organisation or we may not necessarily know what organisations people belong to. In the meantime, we have to be satisfied that, if an organisation is a proscribed terrorist organisation, it is very clear what we are talking about. If there is a particular act that is terrorist, that is something that would also be in the same category. But, when there are organisations that are understood by some to be terrorist but are not proscribed under Australian law, I do not think you could extend that for the reasons that I think were implicit in your question—namely, that there could be many people claiming that many things are terrorist. Many of them may be right but, until the argument is settled as to whether or not they are proscribed terrorist organisations, it would be very difficult for anybody to argue that any group that is not on that list be should be considered to be the same as groups that are on that list because support for them is proscribed.

Senator TROOD—If we accept your submission on this point, you would be happy with the definition of a terrorist organisation being limited to proscribed organisations. You would presumably allow yourself the opportunity to make a case if there were others that you thought should be included but were not for the time being.

Mr Jones—I would not be happy, but I would understand that that would be necessary.

Senator TROOD—This other matter of indirectly advocating a terrorist act—which, as you point out, is not included in the bill—is a real challenge for a democratic society. You have made the point that the bill does not cover indirectly praising a terrorist act; it talks about directly praising a terrorist act. Would a political pamphlet which alluded to various means of political action—for example, saying that you can write letters to your local MP and you can protest and that terrorism is also part of political action—be an act which was indirectly praising terrorism or not?

Mr Jones—It is difficult when we are talking in hypotheticals, and I appreciate that we are talking hypothetically in our submission; it is not in any way a comment on your question. Somebody saying your political action could be to write letters to your local member of parliament and then blow up his office would be quite unlikely. More likely would be something which said you must give every aspect of your life in martyrdom to a particular cause, you must dedicate every soul and your life is not worth living unless this end is

achieved. But it is very difficult talking hypothetically. As with any bill dealing with content of publications, there are going to be human beings making interpretations somewhere down the line. I would think the reason to include any reference to indirectly advocating terrorism would be for cases where, prima facie, something was advocating terrorism but there were subtleties designed to avoid prosecution and the government had the intention of trying to restrict that. It is just allowing the net to be cast a little wider given the complications of this entire issue. As I think I said in my opening comments, we do not underestimate the difficulties in any part of this area. It is extremely complicated in a local environment but even more so in an international environment where material is an international concern—it is not just a matter of someone handing out a leaflet in the street—with satellite communication, the internet et cetera.

Senator TROOD—The problem is testing questions of fact and getting a consistency of application, I think, which is what we ought to be striving for so that organisations or activities which are perhaps described in your view as advocating terrorism are consistently described as indirectly advocating terrorism. The difficulty with expanding it is in trying to get some sort of consistency in relation to that interpretation. This definition comes directly from the Crimes Act. The Attorney has just taken it from that and put it in this particular piece of legislation, so it is consistent with the existing legislation in relation to this area, as I understand it.

Mr Jones—One of the problems, though, that any country faces when trying to deal with issues of terrorism is where it is only thought of as a criminal act and a mindset applies to it that says, 'This is just another criminal act,' without understanding the world view of the perpetrator of that criminal act and what they are trying to achieve through that individual criminal act. I am talking here about a mentality, often but not necessarily always, of warfare against society as a whole and an attempt to change society. If you look at it only through the prism of a crime compared to other crimes, you will see there are going to be real difficulties in trying to effectively combat it as a phenomenon.

CHAIR—Thank you for your submission today. I note that you have made a submission to the Attorney-General's discussion paper that was released in May; thanks for that. You have obviously put some thought into these matters. I am wondering whether you have considered the Attorney-General's perspective in his second reading speech, where he made it clear that he was disappointed that the states and territories had not agreed to his suggestions that they amend their own legislation with regard to classifications and publications. His preference was that they do that and his backstop was to bring in this bill. He made that clear in his second reading speech where he said:

I am not prepared to wait indefinitely to address this problem.

Could you advise the committee as to whether you have a similar view, whether you would prefer this matter to be dealt with by the states and territories or whether you are happy for us to proceed down this track in light of the need to get this sort of legislation clearly on the books at any cost?

Mr Jones—In a political system such as Australia's, there are going to be competing reasons why one process may be preferable to another, why state governments and federal governments do what they do in areas where the reasons would not necessarily be clear to

members of the public who are not so involved in the process. Our concern is not so much about who does it but that the right thing is done. We recognise the importance of doing this as speedily as possible, but it is also important that the final product is right. If I was sitting around a table being asked by members of a state parliament if I thought they were doing the right thing and the federal government were doing the wrong thing, I would have to answer the same way. For members of the Australian community, which government does it is less important than that it is done; how quickly it is done is important but less important than that it be done in a way which best protects the rights of all Australians.

CHAIR—Let us clarify one thing: you support the bill in its current form subject to the reservations that you would like it to go further.

Mr Jones—Subject to the recommendation, yes, we do.

CHAIR—I suppose there are two options for the Attorney and the government. One is to do nothing and wait for the states and territories to consider. The Attorney does not wish to wait, and that is why he has brought the bill forward. I understand they have a meeting on 26 and 27 July or thereabouts with the state and territories. He wants to proceed as quickly as possible. I am wondering if you support his objective of moving on this matter as soon as possible rather than delaying the legislation.

Senator LUDWIG—Or, to put it another way, perhaps the Attorney-General should not be playing politics with it and the real issue is that there is an end result as early as possible to ensure that this material is not available in the way your submission outlines.

Mr Jones—As I hope I said in my previous comment—although I may have been guilty of indirectly making a comment rather than doing it directly—as a member of the public, it is more important that the right outcome is achieved. One party or one individual can accuse another—I do not mean 'political party' when I say 'party'—of playing political games, doing things with its urgent schedule which suits it and not others or responding with schedules which suit it and not others. The way we see it is that the outcome is most important. I am aware that the peak elected body of the Australian Jewish community, the Executive Council of Australian Jewry, encouraged its constituent bodies, which are state and territory bodies, to write to state and territory attorneys-general urging support for what the federal government was doing, given that there seemed to be a process which was moving most speedily and was allowing for processes such as this for community response and feedback.

CHAIR—When did that occur? Was the objective of the letter for the states and territories to proceed with their legislation? Is that the thrust of what you are saying?

Dr Jones—The letter more pointed out the principles at stake and encouraged the matter to be dealt with as speedily and effectively as possible. The letter went in late May.

CHAIR—Have you had any feedback?

Dr Jones—I am aware of the letter but I am not aware of the feedback because my involvement with that body is only at the federal level and not at the level of any of the individual constituents. I am a national office-bearer.

CHAIR—If you were happy to take it on notice, subject to their consent of course, it would be most interesting to hear any response.

Dr Jones—I certainly will take it on notice and report whatever I can back to this committee.

CHAIR—Thank you for your evidence today.

[1.46 pm]

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

FISHER, Dr Jeremy, Executive Director, Australian Society of Authors

CHAIR—Welcome. The Australian Society of Authors has lodged submission No. 5 with the committee and the Australian Library and Information Association has lodged submission No. 16. Do you wish to make any amendments or alterations?

Dr Fisher—No.

CHAIR—Do you have any comments to make on the capacity in which you appear?

Dr Byrne—I appear for the Australian Library and Information Association, the Council of Australian University Librarians, National and State Libraries Australasia and the Australian Law Librarians Association.

CHAIR—We invite you to make a short opening statement, which we will follow with questions.

Dr Fisher—The Australian Society of Authors is the peak body representing Australia's literary creators. It has over 3,000 members and represents biographers, historians, illustrators, academics, cartoonists, scientists, food and wine writers, children's writers, ghostwriters, librettists, travel writers, romance writers, translators, computer programmers, journalists, poets and novelists—a wide range of literary creators. Our members have not at this point expressed any concern with regard to the issue of terrorism except that they believe that many of the implications of the bill would limit freedom of expression in their work. We believe that the proposed bill is unnecessary. Terrorist acts are criminal acts, and the current classification for publications that promote, incite or instruct in matters of crime or violence covers such acts. Any further extension is unnecessary and, in fact, would impinge upon freedom of speech.

Dr Byrne—The bodies I represent are the peak bodies for libraries nationally, for university libraries, for the national and state libraries and also for the law librarians. A librarian's job is to provide access to information and to preserve and carry forward our heritage in all forms. We share the view of the authors and creators that in a free society people must be able to express their opinions, their ideas and their works of the imagination and that these may well be challenging. We believe that the current legislation for film and literature classification with regard to racial vilification and both incitement to and carrying out of violence is more than adequate to deal with the issues addressed by this bill.

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. Thank you.

Senator PARRY—This is a very perplexing issue. Where would you draw the line for what should not be available for the public to view? Is there any material under any category whatsoever that you would draw the line at and that you think should not be available?

Dr Byrne—We believe that the current operation of the film and literature classification, with the two-step process of classification and review board, works well and has worked well since its inception to draw a line at materials that incite violence and that exceed the community standards by applying the test of the reasonable adult. We also believe that the criminal provisions provide other protections on incitement to violence, conspiracy to conduct violence et cetera which prevent public utterances of that nature. In addition, we believe that the racial vilification provisions deal with the issues of denigration of people on the basis of race and in New South Wales also on the basis of religion.

Senator PARRY—If you are suggesting that the current provisions under legislation prevent material that will promote terrorist acts, what is the problem with absolutely making sure by having a specific provision for antiterrorism?

Dr Byrne—The problem is of course the erosion of access to information. That is what we are concerned about.

Senator PARRY—But we are talking about the erosion of access to information that we would consider to be information we do not want to be available.

Dr Fisher—One of the issues that comes up is the emotion that surrounds terrorism as we define it. Let us take the word terrorism away and look at something else that brings about great impassioned debate, such as abortion. On one side you have people who argue strenuously for the right to life of the foetus and, on the other side, people argue very strongly for the right of a mother to be able to decide the fate of her unborn child. There is much impassioned debate around this issue. There has been violence caused in many situations, not only in Australia but overseas, as a result of that impassioned debate. Would we argue that, because of that debate, violence occurs and therefore anything which advocates either position should be banned? Indeed, no. I would argue very strongly that both points of view should be allowed to be put and debated and argued, and likewise with regard to anything which purportedly advocates terrorism. The terrorist act itself is the crime and that is already covered under the classification guidelines.

Senator PARRY—My understanding is that we are dealing with something that is unique, in the sense that material that advocates becoming a terrorist, giving up your life for a terrorist cause, has a more profound effect than, with all respect—and I think that was a very good example that you gave—abortion. I do not know but I presume that we do not have a prolific number of books out there advocating abortion with tips about how to abort a foetus and pushing and promoting that and creating the same amount of emotion as terrorism does. Whilst the sanctity of life is extremely important—and I will declare that I am an anti-abortionist, if you like—we are not talking about the mass killing of hundreds or potentially thousands of people. I think the magnitude is different. As much as I hate to create magnitudes of the value of life, I think you understand what I am talking about when it comes to the gravity of the situation. Do you consider that, on that basis, we have a need to be more stringent with our classifications?

Dr Fisher—No.

Senator PARRY—Okay; that is a very clear position.

Dr Byrne—In regard to the abortion issue, I think the point that Dr Fisher was making was about advocacy in regard to abortion rather than abortion itself. There is quite a literature about how to protest against abortion. Some of that advocates quite violent acts against those who carry out abortions, abortion premises and so on. There is the potential to censor literature advocating abortion rather than abortion itself.

The other issue here is that, when thinking about where we draw the line, I think we have to focus on the act. Incitement to kill people, plans to kill people and threats to kill people are all addressed under the Criminal Code. Inciting people to take up a cause becomes a matter of degree and interpretation. There is an enormous amount of religious and political literature about that. It would be very difficult to draw a distinction between 'join the holy martyrs' in the sense of subscribing to a religion and 'join the holy martyrs' in the sense of becoming a suicide bomber. That difficulty has been alluded to in the submission made by the Classification Review Board.

Senator PARRY—What if there was a large amount of writing concerning the destruction of libraries by self-detonation with a list of every library in Australia that should be targeted, probably in a priority order, and this material went round and round in circles? I know I am talking about a self-interest issue here, but it is to do with, as I say, the magnitude. Would you feel as though we should do everything we could to stop that by removing the list, the instructions and the material saying why we should be doing this? Do you feel as though it would be justified to remove that sort of literature from the marketplace?

Dr Byrne—Not because they are libraries; they could be libraries or parliament houses.

Senator PARRY—I just wanted to get it closer to home.

Dr Byrne—Indeed. There I would argue that that is making threats and should be dealt with under the Criminal Code as making threats. We would certainly be ramping up our security.

Dr Fisher—Obviously if someone did blow up a library they would be committing a criminal act, in which case the law would take action against them.

Senator PARRY—Yes, but it is the incitement of it, the stimulation by having literature available that gives clear indications as to what one should do or hints at what one should do and promotes the cause 'Why I hate libraries'. Grade 6 would give you enough to start with!

Dr Fisher—I could take it back to the point of an author, say, having a fatwa declared against them. Is that something which could be an issue of incitement? We are aware of a major author who has just been knighted in the United Kingdom and had such a fatwa declared against him. There is an argument that the fatwa was declared against the particular points of view that that author expressed. Do we say that that author should not express those points of view? Do we declare that the people who declared the fatwa are doing something wrong? History can change in any way in terms of points of view so that what may be wrong in one sense may become right in another. Let us not forget that Nelson Mandela was imprisoned as a terrorist.

Senator TROOD—I share your concerns about this. I think we have to be very careful about trying to find the balance between protecting the wider community interests and preserving the liberties which we hold so dear and think are so fundamental to our way of life. In a way we have gone further already. We have incorporated this definition into the Criminal Code.

In a sense, there is a kind of comparison between rape and assault. Clearly, rape is an assault but it goes further: it more particularly defines the nature of the criminal act that we are seeking to outlaw. This seems to be a bit like that: you say some of these things are covered as crimes—and indeed some of them are—but this is a very specific identification of crime with regard to political activity, so it more specifically defines that in the context of the particular circumstances in which we now find ourselves.

There is a defence here, or at least a caveat, which is included in the bill, which is designed to protect much of the writing that does not fall into the category of advocacy and which would otherwise be in danger of being proscribed. Does that not go far enough from your perspective? If you take the view that it does not go far enough, could you envisage a form of words which might adequately meet the concerns that you have?

Dr Fisher—I think the whole suggestion, the reclassification, is unnecessary in its entirety, so let me say that in the first instance. The issue that we would have if it were in place is the moral opprobrium it would put on people to act in accordance with it. Even without such a classification change, last year we had instances of poets in Wollongong who were forbidden to read their poetry in National Poetry Week in the centre of Wollongong, in Wollongong Mall, because of fears by the council that they might have said something in their poems that was seditious or against policy that would be regarded as some sort of criminal thing in which case the council would be liable.

CHAIR—Are you talking about the local council?

Dr Fisher—Wollongong City Council, yes. They were actually forbidden a licence to read their poetry in National Poetry Week for that cause. We would see that these sorts of classification changes would enhance that perception and lead to less freedom of expression by creators for fear that something might be done, even if it were not done.

Senator TROOD—I do not know the particular circumstances of the council, but that strikes me as a very bizarre intervention on behalf of so-called protection of the public interest or at least protection of the council's interest, however it might have been defined. But this is a responsibility that is given to a very specific organisation in relation to classification, so it is not in danger of being misinterpreted widely within the community. It would become, I imagine, a practice which would be consistently applied by a classification organisation.

Dr Byrne—Unlike the situation where matters are decided by the judiciary, the classification decisions, while published, are not broadly disseminated. We do not build a body of law and understanding in the way that we do with judicial interpretations. It becomes, as we have seen in film classification over many years, a matter for contention, and creators have to decide whether they are going to push the envelope or play safe. In many cases, creators and publishers will play safe to get out the work. That is what we mean when we talk

about a chilling effect. It becomes, in effect, self-censorship because of the fear of the potential consequences.

Senator TROOD—I expect we all do that in some sense, don't we? We all check our behaviour for fear it might offend, whether it be a traffic offence or something of that kind. So there is nothing you can tell us about the exception that you think can be redrawn to meet the concerns you have?

Dr Byrne—I believe that it is not strong enough. It puts the onus effectively on the creator to demonstrate that their work qualifies under those general provisions, that their work is not work that should be refused classification because it is satire or political comment. It effectively shifts the onus of responsibility. The other area is the potential for libraries to make already produced information available. In a statement the minister already indicated that he recognises that there are not adequate provisions for that and has suggested the possibility of some sort of licence for libraries, particularly university libraries. That goes back to where we were before the censorship reforms that Senator Chipp brought in.

Dr Fisher—There are many academic and legal arguments as to what satire actually is. I would not want to make a definition for it myself.

Senator TROOD—These are all indeed challenging parts of this area of the law. The two books that you referred to, Dr Byrne, were from the University of Melbourne, I think you said.

Dr Byrne—That is right.

Senator TROOD—Might they be protected by this caveat, do you think?

Dr Byrne—I do not think so. They are turgid works which I readily obtained on the internet after they had been refused classification. They were in fact produced at the time that the West and the United States in particular was supporting the Taliban against the Soviet incursion into Afghanistan. I guess that illustrates the fraught nature of venturing into this area of political censorship.

Senator LUDWIG—The current cooperative scheme is a compact between the states and the federal government. Libraries fall under the states, but they have a national perspective. If the scheme in this instance was put out of kilter by the actions of the Attorney-General in bringing forward legislation which the states have a different view on and they do not try to achieve a consensus, what would be your view about that? Is it better from a library's perspective to have a consensus so that you have one rule on how you address each library, or does it not matter?

Dr Byrne—It matters a lot. Libraries are lean operations that operate best in a situation of consistency and known rules. Libraries of course operate locally for their local community, organisation or university, but they all participate in inter-library loans where they send material interstate and overseas. If they have to check whether something that is legally available in New South Wales could be sent to Victoria where it is not legally available, it will severely complicate that very valuable work that provides efficient use of resources.

Senator LUDWIG—In terms of the 'chilling effect' this might have on authors more broadly, your contention, as I understand it, is that they would then play safe and self-censor.

Is there any evidence of that? The reason I am seeking this information from you is because, if you look at filmmakers and authors, you will see that it seems to be that when they do not self-censor and do not play safe there is usually a media hubbub that surrounds them and, with that, interest, attention and more sales. I will not pick on books and authors particularly; it could be films. Therefore, my idea is that some films might seek a particular type of classification and, if they do not achieve it, the notoriety of that would create a certain amount of media attention—which they tell me is not all that bad because it causes people to want to go see the film—or they might change the content slightly to accord with the Classification Code to get a lower classification and achieve the end result. I am sorry that this is such a long question, but what I am trying to explore with you is the idea that it will have a chilling effect in that authors and filmmakers will then play safe. Is there any research that demonstrates that, in fact, that does happen?

Dr Fisher—There is no research that I am aware of. Anecdotally though, I am aware of many members having said to me that there are certain themes and other sorts of things that they feel they cannot write about or go into because of fears that they would fall foul of a provision such as this one. It is a very hard thing to research because you are working with people who are generally working on their own, often in the relative secrecy of the process of creation.

Senator LUDWIG—I wonder if that is slightly different from the chilling effect—that is, they decide that they do not particularly want to write in that area because they are not sure whether or not it will meet the requirements, or they deliberately do write in that area. In other words, it is counterbalanced by those who specifically take the view that they want to be provocative. I am aware of a range of authors who seem to fit that bill. Then there are a range of film producers—Michael Moore is perhaps one of them—who take a dissenting view, although we now know that there is dissent about him as well. What I am trying to balance out is that that argument gets raised and I am concerned about it—that it would have a chilling effect. I am concerned that it would stop people from writing in this area. But I was trying to pin that on something a bit more concrete.

Dr Byrne—I am not aware of any research in Australia on that specifically, although there has been much comment over the years about the chilling effect of our defamation laws. However, I am aware of considerable work overseas in countries as diverse as Chile—under the Pinochet dictatorship—and in the countries of the former Soviet bloc. Colleagues from those countries speak about the continuation of self-censorship long after the explicit restrictions were lifted. It became a way of life for you to not say or write things because they were unacceptable. So there is general evidence about that but I am not aware of any specifically in Australia.

Senator LUDWIG—That makes sense if you put it in the Pinochet context, or if you put it in with a range of dictatorships that we can readily recollect. But more broadly, what I am trying to ascertain is whether it applies in a Western democracy where we are talking about a classification board making a decision that is reviewable and where free speech—although not constitutionally entrenched—is said to still exist.

Dr Fisher—There are some examples in the study of works that have been censored because of their falling foul of, say, obscenity guidelines or other sorts of things—the classification guidelines cover that. I particularly draw to your notice the case of a book called *Maurice* that was written by the well-known English author EM Forster. Forster allowed that book to be published after his death because he did not want it published during his lifetime—in fact he could not publish it because the Home Office would not allow a book with two male protagonists to have a happy ending. This is part and parcel of the chilling effect. He could have written a book with them dying tragically but he chose not to.

Senator LUDWIG—In response to that, I guess it did not stop Lenny Bruce either.

Dr Fisher—Yes.

Senator LUDWIG—In your submission, particularly if we put the definition of advocacy of terrorism within the frame of how this legislation is intended to operate, there are two points. One is whether it is being used as a way of corralling the states to agree. We will put that aside; it seems to be the elephant in the corner. The legislation may be odious if the states agree and the compact remains. If they do not agree, then it seems to be the will of the Attorney-General to proceed with the legislation. We will assume the latter of the two and ignore the elephant in the corner for the moment. The bill will work by a change to the code. The words 'terrorism' or 'terrorist acts' are not defined. It seems that we will then go to the Criminal Code, the Classification Board and the Classification Review Board to determine the ordinary sense of those words. The code contains the general safeguards that I think you were taken to earlier by one of the senators. The terrorist act also creates safeguards because it talks about that which advocates general dissent and the like—words to that effect. I am sure you are familiar with it. Is it your contention that the way the scheme is to operate will have a detrimental effect on the ability of authors to write, of libraries to keep books and of our scholars to be able to access material? The additional question, which I think you touched on earlier, was the ability for scholars doing scholarly work to access material that is refused classification. Is there a scheme currently that allows them to do that?

Dr Byrne—They can apply to the Attorney-General for licence to access materials refused classification. Because of the tight nature of the current classification guidelines, this rarely causes a major issue. I work at UTS where many people work in the field of cultural studies. It is quite possible that material deemed to exceed community standards of obscenity would be of interest to them in their research, and we might have to take steps to obtain it, but it is fairly narrow. The provisions that are contemplated in this bill broaden the ambit so much that we believe they will have a much greater effect if the bill is passed. As so often happens in life, it would be better to have a rear-vision mirror where we could say that a terrorist act has occurred and a particular was incitement for the Madrid bombing or the Bali bombings and we can see a causal relationship. This legislation tries to project the argument that because some material expressing certain views has been made available a terrorist act may occur in the future. Therefore, it casts the net very widely, which is our concern.

Senator KIRK—I am interested in the likely impact of this legislation on the ability of academics to access information. You gave the example of the two books that had been banned that were produced by the University of Melbourne. You were quite able to readily

access them on the internet, and I think that would be the case with a great deal of information that we are talking about. What comment do you have about that?

Dr Byrne—It demonstrates that the legislation is likely to be ineffectual except possibly for material produced in Australia—but even then, of course, it can be lodged on a server overseas—so we are compromising our commitment to freedom of speech for something which will not effect the outcomes that are desired. In fact, it may well tend to drive the material underground into the circles of those who favour terrorism and conspiracies by making it more obscurely available than if it is generally available for comment, refutation or argument in our society.

Senator KIRK—So is accessing this banned material—not that I am looking to go ahead and do this—simply a matter of typing in the name of the book into Google?

Dr Byrne—Yes, you can just google it.

Senator KIRK—So even if it is hosted overseas it is still accessible here in Australia—it is just not hosted by an Australian.

Dr Byrne—In probably about 50 seconds.

Senator KIRK—As you say, it makes the whole scheme, in a sense, somewhat superfluous.

Dr Byrne—But dangerous in principle.

CHAIR—I would like to ask if you have put your minds to the classification review of *The Peaceful Pill Handbook* by Dr Nitschke, which was refused classification. I was wondering if you had a view in regard to that decision.

Dr Fisher—My own view is that it should not have been refused the classification, in that the book itself is putting out ideas that can be debated and refuted. The Australian Society of Authors has no position on the book. That is a personal position.

Dr Byrne—The same would be true for the associations I represent and my own views. I think that—and coupled with my answer to the previous question—demonstrates that in a free society we are better fighting ideas with ideas. If we disagree with Dr Nitschke's arguments we should be refuting those arguments rather than attempting to suppress them.

Senator PARRY—It has provoked—I think that is the best word—a response. What would happen if a lot of people followed Dr Nitschke's advice—forgetting which side of the euthanasia debate you are on—and this happened before.

Senator LUDWIG—I think that assumes they follow that you are on one side of the debate.

Senator PARRY—No, I meant our views. If that happened, the damage would already be done. It would be too late, if you are anti-euthanasia.

Dr Byrne—I think that illustrates the dilemma when you are dealing with what is essentially an argument about beliefs and ideology.

Senator PARRY—I assume we are all antiterrorist.

Dr Fisher—We are talking about euthanasia and terrorism as if they are something new, but they are both concepts that have been with us for a long time.

Senator PARRY—This is a very difficult debate and discussion.

CHAIR—Thanks for your evidence today.

[2.23 pm]

SHELLEY, Ms Maureen, Convenor, Classification Review Board

CHAIR—Welcome. Thank you for being here. The Classification Review Board has lodged submission No. 12 with the committee. Do you wish to make any amendments or alterations?

Ms Shelley—Not to the submission, but with your permission I would like to make an opening statement.

CHAIR—You have that permission, and at the conclusion of that opening statement I will invite members of the committee to ask questions.

Ms Shelley—Thank you for inviting me to speak on behalf of the Classification Review Board. The review board, upon application, reviews decisions of the Classification Board. These two boards will apply the proposed section of the classification act prescribing material that advocates terrorist acts. As an independent statutory body, the review board does not make any comment on the policy behind the proposed provision and it has every intention of carefully applying any criteria parliament decides to create.

However, the review board has some concerns about how it might apply proposed section 9A. The review board is concerned about the definitions, particularly the definition of 'advocates', and the intricacy of the proposed criteria. If we turn to the definition of 'advocates', section 9A(2)(a) and (b) states that something that 'directly or indirectly counsels or urges the doing of a terrorist act' or 'directly or indirectly provides instruction on the doing of a terrorist act' will be proscribed. The difficulties with that are that these are potentially very broad categories, they may be difficult to apply objectively and, therefore, the proposed provision has the potential to lead to anomalous decision making.

Section 9A(2)(c) says that the review board must consider whether the material before 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.' I am not sure if you are familiar with the current test that we use, but 'reasonable adults' are usually the class of persons whom we consider in the classification act as it stands. So this is a significant departure from our current practice.

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 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.

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. If you consider what material might be captured by such which carries any risk, I can think of some sermons on the topic of an eye for an eye and a tooth for a tooth that would be included, If you include any risk at all to a person of a young age or with a mental impairment who is not bringing risk to their decision making, it may well be that some of our more inflammatory Sunday speakers could well be advocating material which would be a terrorist act.

The proposed definition of a terrorist act comes from the Criminal Code. It has multiple elements and requires a detailed consideration of the nature of the action. The review board might not have evidence of some of these elements and might have limited means of investigating them. Currently, we are required to assess evidence put before us but we are not required to investigate to the extent that may be necessary under this proposal.

The definition also requires the review board to consider the intention of persons performing a terrorist act. This would be a hypothetical reader, viewer or computer gamer. It seems problematic to assess the intentions of persons acting in response to a publication, film or computer game. The review board would not have any evidence before it of such intentions and would have to consider likely intentions. I find it difficult to envisage how we could objectively make such an assessment. The explanatory memorandum suggests that the material itself need not evince any intention to inspire a specific terrorist act, and this might be hard to reconcile with the definition of a terrorist act, which seems to contemplate concrete acts of terrorism.

The intricacy of these new criteria are such that properly applying these definitions seems unnecessarily involved and complex. They are more complicated than other criteria within the act and the code currently. Furthermore, the proposed section will not be considered in isolation but somehow needs to be balanced with the considerations required under section 11 of the act, which allow adult Australians to read, see, hear and play what they wish. We already have limitations on that right to read, see, hear and play what we wish, but the complexity of this is adding another layer to the work of the review board.

Our members are chosen to reflect the ordinary Australian community and to make administrative decisions. We are not required to be lawyers, although members of the review board are, and we have some quite senior legal expertise on the review board currently. Given that we are not there as lawyers or legal experts but as ordinary Australians, the review board has concerns that the test within the proposed legislation is unnecessarily intricate and legalistic. Having stated that, I have every confidence that the review board, and the members of the review board, would carefully apply any criteria that the parliament sets and would endeavour to do its very best to satisfy parliament's intention in all its classification decisions.

Senator LUDWIG—You raise an argument about the broad nature and you then offer a solution to that. Do you agree with the HREOC submission? They made the same point in a recommendation. They submitted that paragraph (c) of the definition should be amended from 'risk that such praise might lead a person to engage in a terrorist act' to 'a substantial risk'. Are you familiar with that submission?

Ms Shelley—I have read it, but our submission to the committee was that 'substantial risk' should be included, so that is also our submission. If HREOC says the same thing—

Senator LUDWIG—There are two voices now.

Ms Shelley—They would say the same.

Senator LUDWIG—They also made an additional recommendation—they made three in total. The third recommendation was:

HREOC therefore recommends that the reference to 'regardless of age or any mental impairment' be deleted from paragraph 9(c) of the definition of 'advocates'. HREOC recommends that paragraph 9(c) be reworded as follows …

(c) directly praises doing a terrorist act where there is a substantial risk that such praise might lead a person to engage in a terrorist act.

Have you had an opportunity to consider whether or not you have the same view? You indicated some difficulty with the way the Classification Board and the Classification Review Board would deal with the issues of mental impairment.

Ms Shelley—I cannot speak for the Classification Board—I would leave that to the director. But, with regard to the Classification Review Board, we have 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.

Senator LUDWIG—Have you made an assessment of how many publications might come under that hammer?

Ms Shelley—That is not within our ambit. We simply review decisions of the Classification Board when someone has lodged an application for review. You may be aware that last year we had nine matters referred to us by the Attorney-General which would possibly have been captured by these proposals. Two of those were refused classification under the existing legislation and it is possible, though I have not read them again with these amendments in mind, that more of that material would be captured by these proposals. But I have not gone to it directly.

Senator LUDWIG—If you have anything further to say on it, feel free to provide a submission to the committee in the available time. It only relates to the review board decision. This will affect the decision the Classification Board makes—but, of course, you cannot speak about that, and I am not asking you to.

Ms Shelley—Okay.

Senator LUDWIG—The submission from the Gilbert + Tobin Centre of Public Law argued that, given the nature of terrorism, the bill would overly politicise the Classification Review Board. Do you have a view about that?

Ms Shelley—I think it would be a policy matter. I do not know that I could comment, Senator.

Senator LUDWIG—In your opening address you commented on how the 'reasonable adult' test would apply and expressed some concerns about it. Do you want to elaborate on that in any more detail?

Ms Shelley—At the moment there are two tests within the act. There are two audiences that we must consider depending on which section of the act applies. Normally we consider 'reasonable adults', which is a higher test to reach. Where it concerns material regarding the portrayal of persons under the age of 18, it is 'a reasonable adult'. If you could consider a hypothetical 'reasonable adult', it would seem that that would be an easier test to meet. If you considered the material regarding, say, a child to be offensive, then a 'reasonable adult' is an easier test to meet than the one of 'reasonable adults', which envisages a whole class of persons. We apply those two tests, and there is currently quite a lot of case law around them in Australia, New Zealand, Canada and the United Kingdom which we can refer to and rely on. 'A person regardless of his or her age and regardless of any mental impairment' is a very different test because it requires you to consider not what a 'reasonable adult' would do but what a person who is presumably unreasonable and not an adult would do. I do not know how on earth you could objectively assess what an unreasonable person who is not an adult might do.

Senator LUDWIG—Did you provide a submission to the original discussion paper?

Ms Shelley—Yes, we did.

Senator LUDWIG—Were these matters raised in it?

Ms Shelley—Yes, they were.

Senator LUDWIG—Have you received a reply from the Attorney-General's Department about any of these matters?

Ms Shelley—We have received acknowledgement regarding our submissions.

Senator LUDWIG—Have you taken the opportunity of writing to the Attorney-General separately from this expressing any views about how the scheme might work?

Ms Shelley—I took the opportunity to write to the Attorney-General—yes.

Senator LUDWIG—That is separate from both the discussion paper and from this process.

Ms Shelley—Yes.

Senator LUDWIG—Is that available for the public?

Ms Shelley—I assume it would be FOI-able. I do not know what other availability it might have.

Senator LUDWIG—Could you take it on notice and, if you can, make it available for the committee. I understand that you would have to, obviously, check.

Ms Shelley—I will do that.

Senator LUDWIG—Did the Attorney-General provide a reply?

Ms Shelley—I cannot recall directly, Senator. I would have to take it on notice and come back to you.

Senator LUDWIG—Yes, if you would not mind. It obviously encompasses two issues. If there is a reply, could it also be made available to the committee.

Ms Shelley—Certainly.

Senator KIRK—Thank you for your submission, Ms Shelley. I was interested in what you were saying just a moment ago and what you say in your submission about the very low threshold that this establishes. You talked about how with the 'reasonable adult' test there is a considerable amount of precedent to which the Classification Review Board can look when trying to interpret what it means. The way that you describe the lower threshold test as being the 'unreasonable adult of virtually any age' made me wonder whether any judicial precedent has considered this kind of lower threshold, which then made me wonder whether any precedent exists in any other jurisdiction—in other words, whether any other country has adopted the kind of low-threshold test that is being proposed by this bill.

Ms Shelley—My understanding is that this is a test that is in the Criminal Code. I am not sure if there have been any decisions under the Criminal Code. I would assume that, if there have been, they would be published and be available, but that is not something which I have searched for personally.

Senator KIRK—So it would seem that the Classification Review Board would perhaps need to look to those criminal precedents when trying to interpret—

Dr Byrne—If such existed, yes, we would.

Senator LUDWIG—Perhaps we can broadly step back and look at the consultative process that has occurred. When was it first raised with the Classification Review Board that there was likely to be a change or that, even more broadly, people were unhappy with the way Classification Review Board decisions were being dealt with in the instances of this type of terrorist material?

Ms Shelley—From personal recollection, it was when the Attorney announced that he would be looking at these changes. We were advised by the Attorney-General's Department at that time.

Senator LUDWIG—Do you recall when that was? I will not pin you on a date but, more broadly, was it January 2006 or mid-July 2006?

Ms Shelley—No; it was this year.

Senator LUDWIG—And it had not been raised with the review board before then? I am happy for you to take it on notice and check the records.

Ms Shelley—I would be more satisfied if I could do that; thank you.

Senator LUDWIG—All right. What I wanted to establish after that was: in the consultative process or at any time were you consulted or did you simply see the discussion paper and then respond to it? I am happy for you to take that on notice also to check the record. I am trying to establish how effective the consultative process was and whether it was a two-way street—whether there were issues taken on board and shared, as a result of which we now have a bill.

Ms Shelley—As far as I am aware, it was the standard consultative process, where a discussion paper is put up, submissions are invited, those submissions are made public, some amendments are made as a result of the submissions or the process and then there is this further process. As far as I am aware, it is just the standard, open process that is used.

Senator LUDWIG—Were you consulted in respect of this bill?

Ms Shelley—Yes.

Senator LUDWIG—What form did that take? How were you consulted about this bill?

Ms Shelley—The Attorney-General's Department advised us of the proposals and supplied copies of the amendments and of course we were invited to make the public submission, and we took the opportunity to do so.

Senator LUDWIG—Was that prior to it being tabled in parliament?

Ms Shelley—Yes, as far as I am aware. I would like to check that but I believe it was prior to it being tabled.

Senator LUDWIG—So you would have seen early drafts?

Ms Shelley—Yes.

Senator LUDWIG—The question then goes to whether or not any amendments that you offered were proposed or taken up at that point. I assume—and you can correct me if I am wrong—that your concerns have been consistent from the discussion paper right through to seeing the bill and that those would have been echoed to the Attorney-General's Department on both accounts, in your submission to the discussion paper and in response to the bill.

Ms Shelley—Our submissions have been consistent throughout. There have been amendments made which envisage some exceptions, which you would have in the proposed legislation before you, but the changes have not gone to the key issues that we have raised.

Senator PARRY—I am not aware—and maybe I should be—of whether or not 'reasonable adult' is defined in the current act that governs your organisation.

Ms Shelley—It is defined via case law.

Senator PARRY—Currently, if a computer game came before the Classification Board for classification, how many people would view that?

Ms Shelley—I cannot comment on the processes of the Classification Board. The Classification Review Board has a separate process. If it came before us it would be a minimum of three people and a maximum—

Senator PARRY—I am sorry; excuse my ignorance. You are the Convenor of the Classification Review Board and the material does not come to you?

Ms Shelley—It comes to us on appeal, not in the first instance. We are the secondary decision maker.

Senator PARRY—Thank you. I did not realise that.

CHAIR—It is a reasonably recent change—is that correct?

Ms Shelley—As far as I am aware there has been a classification board or a similar body and a review body or review board for about 35 years.

Senator PARRY—So there is a classification board which does all of the classification—

Ms Shelley—Yes, that is correct.

Senator PARRY—and the Classification Review Board, which you represent, which reviews decisions that the classification board gets wrong or right or whatever that are appealed against.

Ms Shelley—And which are appealed.

Senator PARRY—Okay.

Senator LUDWIG—So Mr Cornall is the new Des Clark perhaps. They have rolled the policy-making body.

Senator PARRY—Okay.

Ms Shelley—Just to clarify: there have been no changes in the statutory boards. The statutory boards have been there for quite a long time. There has been no change to those.

Senator PARRY—Tell me whether you can or cannot answer this. What I am trying to get to is what the process is for computer games now. Can you answer that or not?

Ms Shelley—With computer games, as you are probably aware, there is a bit of a self assessment process whereby qualified assessors who are usually employed by the computer game companies make a full report. They assess the computer game and make a full report. This is then considered by the classification board—that is the primary decision maker—and then, if they agree with that, that is the classification it gets; if they do not, then they look at it themselves and make a decision. If anyone is unhappy with that decision and wants it reviewed then they make an application to the review board for a review of the decision. That is the body that I chair.

Senator PARRY—I have no questions for you in that case. They are all framed around the classification.

Senator TROOD—Is it right to say that, from the review board's perspective, you would prefer to have legislation which you have to implement in terms which are familiar to you? In other words: applying definitions which you have applied over a long period of time and for which there is an understanding, either in legislation or by the common law, and have a use which is readily understandable to the members of the review board?

Ms Shelley—It is not a matter of familiarity. The classification act and the code and the guidelines which we have applied have changed almost every year since I have been convener. So for the past 5½ years there have been changes of one kind or another. It is not a matter of familiarity; it is a matter of clarity and an objective test which can be applied.

Senator TROOD—I thought I was helping you.

Ms Shelley—I am sorry.

Senator TROOD—Let me try again. You wish to apply tests which you understand—can I put it that way?

Ms Shelley—We wish to apply tests which are clear. If it is parliament's intent that all material which praises terrorism is to be refused classification, that is what we will do.

Senator TROOD—I understand that, and we would all expect that of you because you are statutory agency.

Senator PARRY—But you would not do that; it is a different board that does that.

Ms Shelley—If the matter came to us for review, we would do that. We make classification decisions; we just make them at a tertiary level rather than at a primary level.

Senator TROOD—I understand your willingness to abide by whatever parliament dictates that you should. Of course there could be no question that you would do that. But in fulfilling your obligation, your preference obviously is for applying tests that have a meaning which are in relation to a common standard or something that you understand which is consistent with the act's existing arrangements. For example, 'reasonable adult' is a phrase or a term with which you have familiarity, which you are used to applying and which has a meaning that you understand.

Ms Shelley—And has a substantial body of case law.

Senator TROOD—That is what I am saying: there is a body of knowledge around that phrase with which you are familiar.

Ms Shelley—That is correct.

Senator TROOD—That is what I was trying to get at originally. Therefore, in applying the parliament's will, you could understand how to apply a 'reasonable adult' test because you are familiar with it—because you would know the body of law and the body of knowledge around it. If we can find some way of incorporating that phrase into the application of these provisions, you would have an objective test to apply.

Ms Shelley—If the phrase 'a person, regardless of his or her age or mental impairment' were removed, it would have the same impact.

Senator TROOD—Yes—

Ms Shelley—The difficulty is that, by the inclusion of that phrase—

Senator TROOD—Not necessarily. I can see how that would help you in some respect, but it would not necessarily help you in relation to provisions A and B, would it?

Ms Shelley—Certainly as a reasonable adult you would be assessing the risk. At the moment there is no opportunity to assess the risk.

Senator TROOD—I understand the point you are making. You are basically saying that there will always be a risk from our perspective and therefore we would be obliged to—

Ms Shelley—You would think that that would be logical, wouldn't you?

Senator TROOD—I can see how a risk averse organisation might take that position. I do not have any difficulty understanding that at all. Can you explain to me what you—not the Classification Board but the review board—do in relation to an item that comes before you that has the possibility of, for example, corrupting a younger person, although I am not sure that that is the right word? It might pass a 'reasonable adult' test but, if it is out there, there is

the danger that a precocious 16-year-old or even a 13-year-old could read this. What view does the review board take in relation to that kind of material?

Ms Shelley—We already apply that test under section 11 of the act, which is that we must have regard to the general standard of propriety and decency of the Australian community. We also have to consider any harm to minors. So we already have to take those considerations into account. The way that is usually dealt with when classifying something that is of harm to minors is by either putting an advisory classification on it such as M for 'mature', meaning that it is not recommended for persons under 15, or MA, which is legally restrictive and therefore means that you must be accompanied by an adult, or R for 'restricted', which means that it is only available to adults. So you can deal with the degree of harm to minors through advisory classifications. This gives you no opportunity to do that because you would either have to refuse it, or possibly you could restrict it. But if it praises a terrorist act, you would have to refuse it classification.

Senator TROOD—I appreciate the concerns that you are expressing. I am trying to seek a way around the problem.

Senator LUDWIG—I do not think it is concerns she is expressing. I think she is telling you what the view would be.

Senator TROOD—I understand that, but there must be a solution to this. Maybe that solution relates to 'substantial or significant'. Perhaps the working in of—

Senator LUDWIG—Perhaps a cooperative scheme by the states.

Senator PARRY—How would that help?

CHAIR—We are still waiting.

Senator TROOD—I want to clarify the consequences of your rejecting an appeal. Presumably it allows for a judicial examination of your decision. Is that correct?

Ms Shelley—That is correct. It would go to the Federal Court.

Senator TROOD—Does that happen often?

Ms Shelley—Prior to my being convenor, it happened five times in 35 years. Since I have been convenor—and I do not take this as a reflection on my own performance—we have had, I think, four appeals in five years. I think it is because of the more contentious nature of the material which has been coming before the review board, including the two Islamic literature books last year and a number of other adult publications.

Senator TROOD—Were they appealed?

Ms Shelley—One appeal was dismissed by the Federal Court in regard to the Islamic books, but they have gone on to appeal that further. They have appealed the Federal Court's decision.

Senator TROOD—I suppose my concern is that, if this legislation were to become overly complicated—and you have made the point that we now would seem to have to apply a multiplicity of tests with which we are unfamiliar—there is a danger that more of the decisions could end up being appealed. You may not be able to answer that question.

Ms Shelley—That is possible, but it is hard to envisage because we do not have the act in its final form at this stage.

Senator TROOD—This might be compromised foresight but, nevertheless, if you have to apply more complicated legislation and people are aggrieved by the result then it might end up being more often appealed that it would otherwise be.

Ms Shelley—That may be.

Senator TROOD—Are you aware of any legislation overseas—you have alluded to other jurisdictions in relation to the application of the reasonable adult test, for example—where there has been an attempt to try to work in the terrorism concerns?

Ms Shelley—I have not examined such legislation or case law in that regard, no.

Senator PARRY—I have now got my head around the fact that you are not the board that I thought you were. How many referrals to the Classification Board end up coming to you for review, as a percentage?

Ms Shelley—A very minor number. The Classification Board makes about 10,000 decisions a year and we generally make about 20.

Senator PARRY—I think we have the wrong board before us, but thank you.

CHAIR—I was a little confused about the changes made recently. Is it the secretariat of your board and the Classification Board that is being subsumed into the Attorney-General's Department? Can you give us clarity on that?

Ms Shelley—It is only the policy and administrative staff that have been subsumed. The two classification boards are still independent boards and remain separate.

CHAIR—Yes, I am aware that they are independent boards, but the policy staff and the—

Ms Shelley—Secretariat administrative staff.

CHAIR—Okay, good.

Ms Shelley—So there have been no changes to either board.

CHAIR—Good. We are getting a lot of clarity on some of these matters this afternoon. I want to ask you about the federal legislation that is before us and whether it would fit underneath the national Classification Code and your guidelines, which are part of a cooperative that has been agreed to at a state and territory level. Do you see that as being able to fit underneath? I have the code and the guidelines in front of me, but this is legislation that sort of sits at the federal level. Do you have a response to that comment?

Ms Shelley—There have been regular amendments to the act over my term as convener and, obviously, once those amendments are made, they are simply applied. The code is a lesser instrument than an act, as you would know, but, because the act says that we must make decisions in accordance with the code, it still applies. If something is in the act, you look to the act and then the code and then the guidelines. It is a balancing act between all of them, but if one section of the act says, 'This must be refused classification', or that is how the review board reads it, we would apply that first. Currently, for example, if we find that a terrorist act is being incited or promoted within a publication, regardless of the fact that adults are allowed

to read, see, and hear what they want, we then refuse it classification. We are well-used to balancing different sections of the act, the code and the guidelines. That is what we are trained to do.

CHAIR—I will be asking the Attorney-General's Department what head of power we are acting on with respect to this legislation. I do not know if you have addressed your mind to that. We have a cooperative arrangement here and the different states and territories have obviously legislated to set up this system, which is a cooperative system, and yet we are acting at a federal level. Do you have a response to that? You may not have turned your mind to that question.

Ms Shelley—I am not a lawyer; I do not think that that is something I would be qualified to comment on.

CHAIR—Let us go to something that you might be able to comment on, and that is the decisions you made regarding *The Signs of the Hour* and *The Grave*.

Ms Shelley—I think they must have been decisions of the Classification Board.

CHAIR—So they did not come to your board?

Ms Shelley—No.

CHAIR—What about *Join the Caravan*?

Ms Shelley—*Join the Caravan* and *Defence of the Muslim Lands* came to the review board.

CHAIR—And *The Peaceful Pill*?

Ms Shelley—That came to the review board.

CHAIR—Can you recall the reason for the decision to refuse classification?

Ms Shelley—Yes; It was because it promoted crimes.

CHAIR—What type of crimes?

Ms Shelley—Specifically the manufacture of barbiturates and then a whole lot of other crimes in relation to the coroners legislation. I think the book breached about 42 separate pieces of legislation.

CHAIR—Can you rule out that it related to incitement and encouragement of suicide?

Ms Shelley—Suicide, as you would know, is not an illegal act. It is not something which is proscribed by law. So if the book merely advocated lawful means of suicide then it would not have been refused classification. It was refused classification because it instructed in and promoted unlawful means of suicide.

CHAIR—I understand it related to the importation of barbiturates, as you have indicated, rather than the incitement or encouragement of suicide.

Ms Shelley—That is correct.

CHAIR—That is what I wanted to clarify with you. There would be a view, I would suggest, that others might have that the promotion of, incitement of or instruction in matters

of crime or violence would include suicide. But the review board, it would appear, has a different view.

Ms Shelley—Suicide is not a crime, so you would have to look at it as if it were violence. We did not turn our minds to whether it was prohibited on that ground because there were so many other laws that it breached. I think it was a 22-page decision. I cannot remember all of it.

CHAIR—So you did not turn your minds to whether suicide came under an act of violence?

Ms Shelley—Only in a peripheral way. We did consider that an action which was so injurious to your health as to cause death, even though it might be peacefully carried out, could be defined as violence. But we did not refuse the book classification on that ground; we refused it classification on the ground that it promoted and instructed in matters of crime, specifically the manufacture and importation of barbiturates and a whole range of crimes in relation to the coroners act—deceptive conduct in relation to death.

CHAIR—I have actually read the decision and reasons for it. I am just wondering whether you have turned your mind to whether an act of suicide is actually an act of violence.

Ms Shelley—I think in the decision we did include a sentence saying that an action which was so injurious as to be fatal, even if it was quite a calm and peaceful action—as would be brought about by the plastic bag and helium gas death—could be considered to be violence. But, as I said, there were so many other grounds that we did not need to consider that one in detail.

Senator TROOD—In relation to proposed section 9A(2) of the bill—leaving aside the complications of proposed subsection (c), which I appreciate is a difficulty—subsections (a) and (b) state that you are required to refuse classification of something that advocates terrorism by directly or indirectly counselling terrorism. Would it present a problem for the review board to reach a conclusion as to whether or not something advocated terrorism through either of those things?

Ms Shelley—That was my submission. It is a very broad category and it is difficult to apply 'indirectly counselling' objectively.

Senator TROOD—So 'advocates' is not the issue for you, is it, because you are used to 'incitement', which is a similar idea?

Ms Shelley—We have 'promote, incite and instruct' currently.

Senator TROOD—'Promote, incite and instruct' is not dissimilar to 'advocate'. I allow the possibility that it has a different meaning in some law, but that is not the problem you have here. The problem is in relation to 'directly or indirectly'—is that what you said?

Ms Shelley—The problem is 'directly or indirectly counsels or urges'.

Senator TROOD—So it is the content of the proposed subsections rather than the advocacy part of it that causes you concern?

Ms Shelley—I would refer you to our submission. The fourth paragraph of our submission to you is that our concern is with the third element of the definition of 'advocate', where something:

... 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—

Senator TROOD—I understand your concern about (c) and I appreciate that, but these are alternatives; they are not cumulative.

Ms Shelley—If you turn to the second page of our submission, you will see that the second paragraph at the top is what I said to you earlier, which is that these are potentially broad categories that will possibly be difficult to apply and they do not seem to require any assessment of the likelihood that someone might be led to engage in a terrorist act.

Senator TROOD—You do not have any means of judging those things? You do not have any existing test which you could apply which would give you guidance as to how to determine that?

Ms Shelley—We do not have to assess the likelihood because we are not required to assess it. It is only if we believe there is a risk when something directly or indirectly provides instruction on the doing of a terrorist act. At the moment you have to consider in some instances the effect of it and in other instances you have to consider what a reasonable adult would do. This definition requires you to consider all persons, regardless of their age or mental impairment, and it says 'direct' and 'indirect' and 'counsels' and 'urges'.

Senator TROOD—Let me put this proposition to you: if the subsection of 9A(2) said something like 'advocates the doing of an act by the standards generally accepted by an adult' and was then followed by (a) and (b), would that help you?

Ms Shelley—Yes. That would be closer to the standard test that is currently applied, but it would then go away from the Criminal Code.

Senator TROOD—I understand that, but, as I said, I am here to help.

Ms Shelley—Thank you, Senator.

CHAIR—Senator Trood, that is an excellent sentiment. I have a quick final question on your classifications—MA, M and so on. Let us say that you are at the movie theatre and the film is rated M and is not recommended for viewing by persons under 15—who is responsible for a kid under 15? Is it the parent or the—

Ms Shelley—The parents are because that is an advisory classification. The government has advised through the statutory bodies that the government is not recommending that material to children under 15.

CHAIR—Let us say it is an R film and the kid is obviously under-age—do they have any responsibility?

Ms Shelley—Of course, the parents still have the responsibility but, in addition to that, the person screening the film is required to allow only adults in. As I understand it, they do regularly ask for confirmation of age for adult films.

CHAIR—Is that in separate legislation? Where is that provided for?

Ms Shelley—It is in the state legislation. The states are responsible for enforcement.

CHAIR—Thanks for your evidence.

Ms Shelley—My pleasure.

Proceedings suspended from 3.10 pm to 3.21 pm

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

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

CHAIR—We welcome officers of the Attorney-General's Department. You have not lodged a submission with the committee?

Ms Davies—No.

CHAIR—Thank you for being here. I remind senators that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Officers of the department are also reminded that any claim that it could be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim. I now invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to ask questions.

Ms Davies—As the committee is aware, the Attorney-General introduced this bill into parliament on 21 June. The bill would require that material that advocates terrorist acts is refused classification, making it essentially illegal to sell or deliver that material within Australia. The Attorney-General has publicly expressed concern about the lack of clarity in the current classification laws to specifically address the sort of material that advocates people commit terrorist acts and the time taken to reach agreement with states and territories to amend classification laws. This bill is a response to both those issues.

As the committee is aware, the Attorney-General is seeking the agreement of his state and territory counterparts at the next meeting of the Standing Committee of Attorneys-General, to be held on the 26th and 27th of this month, for a similar amendment of the National Classification Code and guidelines. If agreement is reached at that meeting on amendments to the National Classification Code and the guidelines then this bill will not be required. Whether amendments are made by way of amendments to the code and guidelines or whether they are made by way of amendments to the act itself will in effect make no difference in the enforcement of decisions to classify material as RC, assuming that those amendments have the same coverage.

This bill takes into account submissions that the department received on consultation we conducted on an earlier draft of the proposal, which was put out in a discussion paper, as the committee is aware. There are submissions to this inquiry—and there were to the discussion paper—that are critical of some elements of the proposal. 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.

The bill is not about restricting freedom of speech; it is about ensuring that material advocating terrorist acts is no longer legally available. There are current provisions in the Classification Code—which some submissions have indicated to the committee are adequate—requiring that material that promotes, incites or instructs on matters of crime or violence be refused classification. However, there are ongoing interpretive difficulties with this provision. Federal court cases, of which there are a very small number as the committee has been made aware, have not managed to shed any significant light on the scope of that provision.

Concerns have been expressed to the committee about the scope of the amendments proposed in the bill, but the provisions do set a very high hurdle for material to be refused classification. 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 antiterrorism laws in 2005.

The elements in the bill and careful definitions provide more step-by-step detailed information for decision makers to assess whether or not material advocates the doing of a terrorist act. As the committee is aware, 'advocate' has three prongs. The board and the review board would consider whether material directly or indirectly counsels or urges the doing of a terrorist act, or directly or indirectly provides instructions on the doing a terrorist act, or directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might lead someone to engage in a terrorist act regardless of their age or mental impairment.

The element is not satisfied if the advocating is only about expressing support for a cause generally. It must be advocacy specifically of the doing of a terrorist act. Likewise, terrorist act is defined very tightly in the Criminal Code. It must be an action or a threat of action intended to advance a cause which might be political, ideological or religious; intended to coerce or intimidate the government or the public; that causes serious physical harm or death to a person or endangers a person's life or involves serious risk to public health or safety or serious damage to property or serious interference with essential electronic systems, including, for example, transport. It does not include advocacy, protest, dissent or industrial action which is not intended to cause serious harm, death, endangerment of life or serious risk to the health or safety of the public.

The Classification Review Board has suggested that the test leaves no room for discretion and there may be difficulties in applying the various tests in the elements of the new proposal. 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 judgment. 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 judgment 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.

Earlier today some concerns were expressed about access to material in the context of academic research. I thought I should clarify for the committee that the 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's 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. The department has established a working group of Commonwealth, state and territory officers to examine possible options and to report back to ministers on proposals that could be put in place.

Senator TROOD—On that last matter, do you expect that those recommendations will come to the next meeting—the one at the end of this month?

Ms Davies—They will not come to the July meeting. The next scheduled meeting is in November and we would expect proposals to have been developed sufficiently to report back to ministers at that time. One of the issues that we have to grapple with is that, under the current state and territory legislation, some of the acts have provisions for the state or territory attorney to, in effect, grant an exemption that allows somebody access to particular material. Some of them have provisions that would allow a prescription in regulations of material that access could be granted to and there is some overlap of those things. One of the things that we are trying to do at the moment is analyse how the existing mechanisms work and relate to each other. In addition, we are commencing the work on circumstances that might be appropriate to be listed as to whether it was the act or in regulations or—

Senator TROOD—So whatever is decided may require a legislative change or a regulatory change?

Ms Davies—Not to the Commonwealth legislation. It would potentially be to the state and territory legislation. Although, as I said, at least some of the jurisdictions would have the ability by one or other mechanism at the moment.

Senator TROOD—You were here when the Classification Review Board gave its evidence and you no doubt heard the concerns that were expressed about the difficulties here. Ms Shelley argued that the concerns were consistent with the concerns they have expressed in relation to the draft of the legislation. Have their concerns been accommodated in any way in the bill that we now have before us?

Ms Davies—In part, yes. The review board has expressed essentially the same concerns about using the definitions and the language that are drawn from the Criminal Code. We have not changed the provision of 'directly praises' where there is a risk. However, the proposed subsection (3) also does address some of their issues. Certainly the Attorney-General was made aware of the issues that the review board raised. But the decision that the definitions of the terminology should not be different between the classification act and the crimes act provisions was one that he made while knowing the views of the review board.

In that context I probably should clarify something. The convenor spoke about applying 'reasonable adult' and 'reasonable adults' tests. The committee should be aware that neither of those tests of reasonable adult or reasonable adults applies to the provision of promoting, inciting or instructing in 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. It is simply material that promotes, incites or instructs in matters of crime or violence that must be refused classification.

Senator TROOD—So your argument is that the application of these terrorism provisions would be applied in much the same way?

Ms Davies—Certainly the first two limbs. The third one does have a test that expressly is not limited to reasonable adults, but it is not necessarily clear that the existing test is also limited to reasonable adults.

Senator TROOD—So your proposition to us is that both the board and the review board would be working with an instrument with which they are entirely familiar, so it would not challenge them to try to create new criteria for judgements, as was put to us by Ms Shelley?

Ms Davies—It would be new language and a new set of steps to be considered by both boards but, yes, I think it would be fair to say that it is not a significant difference in terms of that test of reasonable adults or not in the context of the provision that is most closely aligned at the moment.

Senator TROOD—So it is not an entirely different structure?

Ms Davies—No.

Senator TROOD—I see. Subclause (2)(c) is different. It adds a complication—from the point of view of the review board, in any event. Why might their suggestion about 'substantial or significant' not be substituted for 'a risk'?

Ms Davies—To do so would be to have a different meaning for advocates in this context than it has in the context of the Criminal Code, and I believe that the government's view is that it would not be helpful in a whole range of ways to start to use this language with different meanings in different contexts.

Senator PARRY—The act gives the code its teeth. Who amends the code?

Ms Davies—The code is taken to be amended when all participating ministers, which is all the Commonwealth, state and territory ministers with responsibility for classification matters, agree to amendments.

Senator PARRY—By simple majority or unanimous decision?

Ms Davies—All.

Senator PARRY—Why has the department gone down the path of trying to negotiate the legislation with the states first and now—that having been too slow, having failed or whatever terminology we like to use—proposing a federal act? Why not just go into an act federally in the first place? Was it just to get harmony with the legislation?

Ms Davies—The classification scheme is essentially a cooperative scheme in which the Commonwealth act establishes the two boards, the actual classifications and the process for applying classifications, if you like, to material. Then there is state and territory legislation which outlines how material that is classified or not classified can be dealt with. So it is the state and territory legislation that in effect sets up the enforcement regime for those classifications and the restrictions on use of material that is classified. The usual approach is for changes to that scheme to be discussed, consulted on and decided through the Standing Committee of Attorneys-General process, and so that is what the Attorney first attempted to do in the middle of last year.

Senator LUDWIG—The Classification Review Board has raised the issue that in their view of how the bill would work 'praising' in itself would be sufficient. You obviously had that submission from them before. What is your response to that? They say material that came before them that praised terrorism would be subject to an RC classification. Is that the way the legislation is intended to work?

Ms Davies—No, it is not. My view would be that, if and when the amendments come into effect, the review board would obtain advice on the operation of that provision, and there are definitely circumstances where praise does not include a risk that someone will commit a terrorist act.

Senator LUDWIG—So you think they are wrong? They are going to be the independent body that looks at this matter, aren't they?

Ms Davies—For decisions on review.

Senator LUDWIG—Yes. So they have provided a carefully qualified position that accords with HREOC's view. I think the Law Council mentions it as well. All of that put together means that without the change to the bill to include the words 'substantial risk' it is likely that praising of terrorist acts will be refused classification by the Classification Review Board. What do you say about that?

Ms Davies—We do not agree. In particular, there will be praise that falls within the descriptors in proposed subsection (3) and where, on any reasonable consideration of the material, there is simply no risk that someone will be led to commit a terrorist act by viewing it.

Senator LUDWIG—We might be going around in circles but it seems to me the Classification Review Board have made a very plain statement about how they think the bill will be interpreted. Without change they will interpret it that way, I assume, irrespective of your view. Your view cannot prevail in the sense that an independent body will make the decision. Their independent view says that any material that praises terrorism will fall within

the category of matters that they will refuse classification for. Having said that, what do you intend to do about it?

Ms Davies—The convenor indicated that the review board members have discussed this provision and at this point do not see how they would assess risk. Therefore they came to the conclusion that they would effectively determine that any praise required a refusal of classification. The review board frequently, quite regularly, obtains legal advice on the application and interpretation of the provisions it is applying. When called upon to actually apply the requirements, I would be confident that on further reflection and on obtaining advice the review board would determine that it was capable of assessing whether or not the circumstances were such that there was a risk.

Senator LUDWIG—Have you obtained legal advice to that effect?

Ms Davies—The department certainly obtained advice in the context of drafting the provisions.

Senator LUDWIG—That does not answer the question I asked. The question relates to whether or not you have obtained a legal opinion.

Ms Davies—We do not have a legal opinion that says what the Classification Review Board would do.

Senator LUDWIG—Or their view of how praising will in fact work. But you say your view is better than their view.

Ms Davies—Particularly in drafting the new provision, the department certainly did obtain advice and was satisfied that paragraph (c) does not lead to 'all praise must be refused classification'.

Senator LUDWIG—Is that advice available to the committee?

Ms Davies—We would not usually provide it.

Senator LUDWIG—Why I ask specifically in this case is that the Classification Review Board have put a strident position. You say it is wrong, but you are not prepared to say why it is wrong or how it is wrong. You just simply say that it is wrong and that, upon reflection, the Classification Review Board will come to the right decision. What if they do not? Do we then see another amendment to the legislation? Do you come back? How does the committee address that issue?

Ms Davies—There are two elements to that. The review board cannot ignore a significant part of that paragraph. It has to look at whether—

Senator LUDWIG—I guess they can; otherwise, it will be appellable.

CHAIR—Senator Ludwig, could you let Ms Davies finish.

Ms Davies—If the review board simply ignores the language in the paragraph then it would be reviewable in the Federal Court. But I do not believe that the review board would seek to simply ignore language that it is required to apply. I am not denying that it will be a complex assessment for the review board to make. But I am very confident that the review board, if called upon to apply the provision, will make an assessment of whether the circumstances are such that there is a risk that a person may engage in a terrorist act. I would

expect the board would seek advice on the interpretation and application of that provision. It may well be that it is some time before any material would come before the review board. There may well be greater guidance available on the interpretation of that provision as it is in the Criminal Code at that point. It is not possible to say.

Senator LUDWIG—I have a bill before the committee and I have a submission from the Classification Review Board, which says, 'This is the way we will interpret it and this is what the effect will be.' Left with that view, it is a reasonably strident submission that points the way they will interpret the legislation. We agree that it will not be you—as in the Attorney-General's Department—who will interpret the legislation; it will be the review board, focusing on their requirements. What can you provide to the committee that will indicate that your view will prevail in that they will take a wider view and that it will not simply be elements of praising terrorist acts that will be refused classification? You do not share that view. I am asking you to demonstrate why you say your view will prevail. Why should I accept your submission that their view will not prevail?

Ms Davies—I cannot guarantee what the review board will or will not do at the end of the day. I can tell you that I am very confident that, if called upon to apply the provision, the review board would seek advice on its interpretation and on the method by which they would apply it.

Senator LUDWIG—Logically, we then go to the next step: if they do make a decision, based on what they have indicated today, which is contrary to your view, what do you do then?

Ms Davies—I would advise the Attorney-General, who would make a decision about whether he would like to proceed and, if so, how.

Senator LUDWIG—It seems rather unsatisfactory from the community's perspective when we look at a bill in that frame. Be that as it may, the bill would be otiose if the states and the federal government agree on a form of words. Is that correct?

Ms Davies—If the state and territory ministers and the Commonwealth Attorney agree on amendments to the code and guidelines then the code and guidelines would be taken to be amended and the bill would not be required.

Senator LUDWIG—A number of submitters have mentioned a range of Federal Court decisions. Which ones are we referring to specifically? Is there a range of cases that are currently what are called controversial Federal Court decisions or are there a couple currently in train?

Ms Davies—There are two matters currently before the Federal Court in relation to review of classification decisions. One is the New South Wales Council for Civil Liberties against the Classification Review Board and the Attorney. Just in the last few days we have been notified of an appeal of a decision in the Federal Court so that will go to the full Federal Court in due course.

CHAIR—Which decision is that?

Ms Davies—The New South Wales Council for Civil Liberties against the Classification Review Board and the Attorney. That one relates to the two publications that were refused

classification. The other one currently before the Federal Court is adultshop.com against the review board. It is due for hearing in September, but it does not relate to the provisions.

Senator LUDWIG—It does not sound like it! HREOC in their submission make three recommendations but two are more germane. They are concerned about the same thing that the Classification Review Board mentioned but also about how matters will affect minors and persons, regardless of their age or any mental impairment. They go on to say:

HREOC therefore recommends that the reference to 'regardless of age or any mental impairment' be deleted from paragraph 9(c) of the definition of 'advocates'. HREOC recommends that paragraph 9(c) be reworded as follows:

… … …

(c) directly praises doing a terrorist act where there is a substantial risk that such praise might lead a person to engage in a terrorist act.

What do you say in response to both HREOC's submission and the Classification Review Board that, when you include 'regardless of age or any mental impairment'—we are not talking about reasonable adults in that instance; I know that test does not apply—without the words 'substantial risk' they would then err on the side of caution and refuse classification of material because it would be difficult to assess where you do not know the level of mental impairment or, in particular, the age of the child or the person? You could look at a person who is aged 18, as distinct from a person who is 17, but you could then look at a child who is aged five or a person who has mental impairment at a certain level, who might be very close to functioning as an adult, although the mental impairment may be more substantial. How does the Classification Review Board assess those matters in deciding whether there is no risk that such praise may lead a person to engage in a terrorist act?

Ms Davies—There are a couple of elements to that. For example, if you are talking about a child aged five then you would also have to take into account whether that child would be capable of engaging in a terrorist act. A child aged five, who, in response to material, may run around the backyard with a wooden stick is not actually engaging in a terrorist act. It is not just about a risk that someone will be imbued with a desire to do something; it is about a risk of engaging in a terrorist act.

Senator LUDWIG—We are all familiar with child soldiers and we are also familiar with Vietnam experiences.

Ms Davies—Certainly.

Senator LUDWIG—Their age can be five, six, eight, 10 or 11.

Ms Davies—One matter that has to be borne in mind when we are looking at this matter is that if the material were only capable of acting upon a reasonable adult then we would not have the problem we have. But the material that these provisions are aimed at addressing is material that will act upon the impressionable and upon people who are not adults. With respect to the other aspect of assessing risk, though, section 11 of the act sets out a number of matters to which—

Senator LUDWIG—In those instances, though, it is not usually a case where we refuse classification; we would, in the broad scheme of things, grade it according to G, PG, M, MA15 or R18+, wouldn't we?

Ms Davies—In some instances, but—

Senator LUDWIG—In the broad scheme of things that is how the system works; but we do not grade them all because of the likely effect on a 10-year-old.

Ms Davies—In the same way that material which promotes, incites or instructs in matters of crime or violence is not limited to material that will act on an adult. I think this criteria falls into that same category. It is too serious to be simply restricted; it should not be available to anyone. When I say that this material is often aimed at the impressionable, it may be the impressionable in their 20s or it may be the impressionable in their teens.

Senator LUDWIG—That has helped me to understand.

Ms Davies—The other criteria that both boards have before them is the requirement in section 11 to take into account a range of matters when making any classification decisions. That includes the general character of the publication, film or game and the person or class of persons amongst whom it is published or intended to be published. It is not a completely abstract assessment; it is an assessment in the context in which the particular material is being released, exhibited or whatever.

Senator KIRK—With respect to the overall effectiveness of this legislation, given the factors the New South Wales Council for Civil Liberties points out, all this terrorist material is readily accessible on the internet. What is the aim and objective of the legislation? If it is to prevent people from accessing this information then the whole regime will be quite ineffective. The very fact that something is refused classification will probably only encourage people to find out more about it and, therefore, search for it on the internet.

Ms Davies—The classification scheme itself applies to films, publications and computer games. As you would be aware, the material that is on the internet, whether stored, live or streamed kind of content, is regulated under the Broadcasting Services Act, which is not a matter for this portfolio. Nevertheless, the Broadcasting Services Act provides that the material that is classified as RC is prohibited content. Where material is hosted in Australia then the Australian Communications and Media Authority can investigate complaints and, if material is prohibited content, require it to be taken down. Obviously, it is much more difficult when material is hosted overseas. They can take action by notifying enforcement authorities overseas. They also notify internet service providers, who, in some instances, certainly can block access to particular sites or material. But it is not a perfect solution. By the same token, I guess as a start point, if we said, 'Irrespective of how we classify material in Australia, one way or another people will be able to access it on the internet,' then we would, in essence, be taking the view that there is very little value in doing what we can. The reality is that, while many people do access material on the internet, the material that has caused concern to date has been in hard copy form, in printed publications and on DVDs. I think dealing with that material in that form is still considered to have value.

Senator KIRK—I suppose it goes back to the question: what does this legislation change? It has been argued by many that the existing regime is already adequate, that these provisions

are unnecessary and that, once this legislation comes into effect and starts to operate, there will be increased scrutiny and spotlight on the material that is refused classification. Earlier—you may have been here—the gentleman from the Australian Library and Information Association was talking about the book *Join the Caravan*, which was refused classification. His response was to immediately access it on the internet. Do you understand what I am saying? In some sense, it has a counterproductive effect insofar as, once the spotlight is put on these materials that are being refused classification, it just encourages people to take it that step further and access it on the internet. And, as you say, there is very little by way of enforcement mechanisms to prevent that material from being accessed. I guess it goes to a question of policy which you cannot comment on.

Ms Davies—It is not a matter for this portfolio, as I said.

CHAIR—Firstly, I think you indicated earlier that the Attorney had indicated that section 9A(2)(c) was to be consistent with criminal law. Is that correct?

Ms Davies—That is correct.

CHAIR—Nevertheless, I still see an issue here with the term 'a risk.' Senator Trood asked whether consideration had been given to the use of the word 'significant' or 'substantial' or other similar words in asking questions of the review board. We have had submissions from Gilbert and Tobin, the Law Council, the Classification Review Board and the New South Wales Council for Civil Liberties. Could you review the *Hansard* and, once you have reviewed it, if you think there is further response to the questions put and to the concerns that have been expressed, could you let us know, if you believe that to be appropriate.

Ms Davies—Certainly.

CHAIR—Can you alert me to the head of power under the Constitution for the legislation? I have read the explanatory memorandum and other sources. I am aware of the trade and commerce power and the postal power under section 51. Can you alert me to that, bearing in mind that this is a cooperative arrangement?

Ms Davies—The classification act itself, including these amendments, primarily relies on the territory's power. The classification act applies in the ACT and then, as I said, it is the state and territory legislation that then gives effect to classification decisions by creating a regime for dealing with how material which has been classified can be dealt with.

CHAIR—Let me get this right. This would apply directly in the ACT and then it would automatically apply in each state and territory as a result of their legislation, or would they need to legislate?

Ms Davies—No, they would not need to legislate. The classification act automatically applies in the ACT. All the states and territories, including the ACT, then have what we generally refer to as enforcement legislation. Decisions that are made under the new provision—a decision of the board or the review board—to classify a particular publication, for example, as RC, would then simply be enforced as any other RC decision is enforced under state and territory legislation. For example, it is an offence under state and territory law to sell an RC publication or to publicly exhibit an RC film. Those restrictions and offences will automatically apply to these decisions.

CHAIR—But would there be a legal possibility for a state or territory to remove that provision from their legislation?

Ms Davies—Technically, it would be possible. I assume that for a state or territory to legislate that material which was classified RC because it advocated terrorist acts should not be considered to be RC and should be considered to be some other classification they would have to deal with what you then did with it.

CHAIR—That is obviously unlikely, but I am just getting my head around how the system works. With regard to the meeting on 26 July, 27 July or thereabouts—

Ms Davies—Those are the dates.

CHAIR—have you, at this stage, been advised of the position of any of the states or territories? I alert you to the media release of Rob Hulls in Victoria a month or so ago. Have you had any other feedback as to their position?

Ms Davies—At this point, we do not know what position the state and territory attorneys will be taking at the meeting.

Senator LUDWIG—Have you inquired?

Ms Davies—We have regular interchange with the group of officers who are censorship officials. I am not sure whether we have recently expressly inquired, but we have meetings with the officers approximately six weeks before the ministers' meetings. At that point, a number of officers were not aware of what position their ministers were likely to take.

Senator LUDWIG—I will make a plea on behalf of the secretariat: if matters change significantly in that this bill is no longer necessary, can you advise the committee secretariat of that, because they could at least cease doing much of the work that they are currently doing. If you are able to, I am sure they would find that helpful.

Ms Davies—I will be at that meeting and I would expect that we will be able to call the secretary on that day.

CHAIR—Finally, we had a submission this morning from the Australia/Israel and Jewish Affairs Council, which supported the bill, but they want to go further and address the issue of hate material. Have you considered that and, if so, what is your response?

Ms Davies—That was considered particularly in the context of the discussion paper and submissions on that. Essentially, we briefed the Attorney on the range of views that were put forward. The decision that was taken was that this bill is the appropriate point to set the balance between freedom of expression and removing material that should not be there. Some material, while it may be extremely unpleasant and/or offensive, is nevertheless not material that should be censored.

CHAIR—Thank you for your evidence today.

Committee adjourned at 4.08 pm