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Committee Secretary
Senate Legal and Constitutional Affairs References Committee
Parliament House
Canberra ACT 2600

21 February 2011

Dear Secretary

Inquiry into the 'Australian Film and Literature Classification Scheme'

Thank you for the opportunity to make a submission to this inquiry. I am an academic with extensive expertise in the area of freedom of speech.

I will limit my comments in this submission to one section of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth), namely s 9A. This section was added to the Act in 2007, with the passage of the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007* (Cth).

Section 9A allows for refusal of classification to a publication, film or computer game that advocates the doing of a terrorist act. The definition of advocacy includes an act that 'directly or indirectly counsels or urges the doing of a terrorist act'; 'directly or indirectly provides instruction on the doing of a terrorist act'; or (in s 9A(2)(c)):

> 'directly praises the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3 of the Criminal Code) that the person might suffer) to engage in a terrorist act'.

I note that with the passage of the *National Security Legislation Amendment Act* 2010, this section was amended to include the word 'substantial' before the word 'risk' in this provision.

In spite of this amendment, difficulties remain with this provision. I will elaborate on them here.

1. The provision does not rely upon the usual 'reasonable adult test utilised by the Classification Review Board in its decision making. Instead, it relies upon the idea of a person of any age or with any mental impairment. The addition of a separate category of person in this sole provision is inconsistent, confusing and unnecessary. In its submission in May 2007 to the then Attorney-General's Discussion Paper on this amendment, the Classification Review Board expressed particular concern at this departure from the reasonable adult test (see http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_MaterialthatAdvocatesTerroristActs-PublicConsultation).

2. Other provisions can be used to refuse classification to material that promotes, incites or instructs in matters of crime or violence. Section 9A thus is not substantively useful. It adds nothing that is beneficial to the classification regime in dealing with material that could realistically lead people to commit terrorist acts.

3. The classification regime in Australia is premised on the general assumption, as stated in the *National Classification Code* (s 1(a)) that adults should be able to read, hear and see what they want.

Section 9A appears to override this general directive, and moreover does so unnecessarily (see point 2 above).

In the area of classification, there is a particularly strong freedom of speech argument that people ought to be able to make up their own minds as to the value of material they read, hear or see. Governments should be cautious about preventing people's access to materials they deem dangerous. Indeed, trying to prevent people from doing so may increase the desirability of such material. This kind of caution is not evident in section 9A.

4. The prohibition of the kinds of materials likely to be captured by s 9A is unworkable. An internet search for materials that were refused classification on the ground that they promoted, incited or instructed in matters of crime and that instigated the introduction of s 9A, namely *Defence of the Muslim Lands* and *Join the Caravan*, reveals that they are able to be accessed in full within seconds.

In summary, given the breadth of the provision in s9A, the difficulties of making determinations under s9A, the coverage of relevant materials under other aspects of the classification system, and the unworkability in practice of s9A, it ought to be repealed.

Recommendation 1: Repeal s 9A of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

It is to be noted that during discussions surrounding the introduction in 2007 of s9A, it was reported that the then Attorney-General conceded that an exception should be included in the provision to permit access to such materials for the purpose of genuine scholarly research. Despite this agreement, no such exception was introduced. If the section is to remain, this exception should be introduced to allow scholarly research, and to preserve intellectual freedom which is a cornerstone of the search for new knowledge.

Recommendation 2: If s 9A of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) remains, it should be amended to allow for an exception to permit scholarly research.

Yours sincerely

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