

CHAPTER 3

KEY ISSUES

3.1 Evidence to the committee raised concerns regarding:

- the definition of the term 'terrorist act';
- the words 'directly and indirectly' in proposed paragraphs 9A(2)(a) and (b);
- the phrase in proposed paragraph 9A(2)(c) 'regardless of his or her age or any mental impairment that the person might suffer'; and
- the exemptions in proposed subsection 9A(3).

Definition of the term 'terrorist act'

3.2 Some submissions expressed concern that the bill adopts the definition of 'terrorist act' directly from subsection 100.1 (1) of the Criminal Code.¹ The Law Council of Australia argued that the definition of 'terrorist act' taken from the Criminal Code:

...should not be emulated in other legislation without further refinement consistent with the recommendations of the Security Legislation Review Committee, the Parliamentary Joint Committee on Intelligence and Security and the UN Special Rapporteur.²

3.3 In its report on the Review of Security and Counter Terrorism Legislation the Parliamentary Joint Committee on Intelligence and Security (JCIS) argued that there should be a clearer distinction between a threat and an act of terrorist violence and recommended that the 'threat' of a terrorist act be removed from the definition of terrorism and be dealt with as a separate offence. JCIS was of the view that this would improve clarity and still achieve the policy objective.³

3.4 The Gilbert + Tobin Centre argued that the definition of terrorist act in section 100.1 of the Criminal Code 'has attracted substantial criticism'. It also submitted that:

While, in our view, the Australian definition...is more carefully drafted than those of other nations like the United Kingdom and the United States....it is not free from complications and omissions.⁴

¹ *Submission 13*, pp 7-9; *Submission 14*, p. 6; *Submission 16*, pp 2-3; *Submission 10*, pp 5-6.

² *Submission 15*, p. 12.

³ Joint Standing Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, p. 62.

⁴ *Submission 11*, p. 2.

3.5 Conversely, the Executive Council of Australian Jewry argued in its submission that the definition of 'terrorist act' adopted in the Bill should go even further to include all terrorism offences under the Criminal Code. Arguing that 'terrorist acts form part of a pattern of conduct, not all of which is violent, which when considered in context are intended and serve to undermine our society and nation', the Executive Council concluded that:

It seems to us incongruous that the amendments proposed to the Classification Code would be narrower than the Criminal Code provisions. Taking such a narrow approach would open the door to classification and distribution of material which is criminal or seditious or both.⁵

3.6 Similarly, the Australia/Israel and Jewish Affairs Council (AIJAC) submitted that the Bill does not go far enough because hate material is not captured as material that advocates terrorist acts. The Council noted the government's position that such material is captured by other legislation (such as racial vilification laws) but argued:

While it is true that other legislation governs such material, this legislation relies generally on civil action, and often takes years to resolve...While these cases await resolution, the materials in question are freely available. Some hate material may preach, for example, that certain sections of the community are the enemy of certain other sections or of all other people, or that they deserve death or damnation while not advocating a terrorist act even under the proposed definition. Such material may, especially cumulatively, generate incitement to terrorist acts. We have seen, for example, how second generation immigrants in the UK have become radicalised over time and formed home grown terrorist cells. We believe that such extreme hate material should also be refused classification, even though it would probably not be said to advocate a terrorist act, as the effect may ultimately be the same.⁶

Departmental response

3.7 The Attorney-General's Department (the Department) submitted that 'terrorist act is defined very tightly in the Criminal Code'⁷ and noted that the Attorney-General has decided that the definitions of the phrases 'terrorist act' and 'advocates' should be consistent in the Classification Act and the Criminal Code provisions.⁸

⁵ *Submission 7*, Attachment, p. 2.

⁶ *Submission 8*, p. 2.

⁷ *Committee Hansard*, 17 July 2007, p. 24.

⁸ *Committee Hansard*, 17 July 2007, p. 25; see also Attorney-General, *Letter to the Classification Review Board*, 26 July 2007, p. 2.

Definition of 'advocates'

Material that praises terrorist acts

3.8 An area of concern to submitters and witnesses was proposed paragraph 9(A)(2)(c).⁹ This clause requires that the Boards refuse classification to materials praising terrorist acts where there is a risk that the praise may lead a person, regardless of the age or mental impairment of that person, to engage in a terrorist act. The Law Council of Australia (Law Council) argued that in a departure from usual practice, this proposed subsection:

...appears to require decision makers to consider the lowest societal common denominator in considering how material will be processed, comprehended and acted upon - an almost impossible test to apply.¹⁰

3.9 In its submission, the Classification Review Board foreshadowed possible problems for decision makers in applying proposed paragraph 9(A)(2)(c):

It is difficult to envisage circumstances where the Review Board might objectively assess how a teenager, for example, or a person with some mental impairment might react to praise of a terrorist act.¹¹

3.10 In evidence to the committee, the Convener of the Classification Review Board expanded on the concerns raised in its submission, namely that there may be some difficulty with the way the Review Board would deal with issues of mental impairment:

...the Classification Review Board...[has] 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.¹²

3.11 The Convener addressed the issue of risk in more detail, stating that:

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

⁹ *Submission 3*, p. 3; *Submission 11*, p. 5; *Submission 12*, p. 4; *Submission 15*, p. 7; *Submission 18*, p. 8.

¹⁰ *Submission 15*, p. 7.

¹¹ *Submission 12*, p. 1; see also Classification Review Board, *Letter to the Attorney-General*, 20 June 2007, p. 1.

¹² *Committee Hansard*, 17 July 2007, p. 14.

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.¹³

3.12 The Convenor suggested that:

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.¹⁴

3.13 The Convenor also told the committee that that proposed paragraph 9A(c) did not employ the 'reasonable adults' test as used by the Review Board when making decisions, and as such the Bill would be a significant departure from current practice.¹⁵

3.14 Addressing the proposed paragraph 9A(2)(c) from an industry perspective, the Australian Publishers Association argued that 'in deciding how to ensure a manuscript is not classified as RC', publishers would be required to have 'unfathomable anticipation' in deciding how a person with a mental impairment, or a child might react to a publication.¹⁶

3.15 Moving beyond practical concerns, the Gilbert + Tobin Centre argued that:

Basing our censorship laws, and thus what the general community can read and view, on the reaction of someone with a mental illness is unjustifiable. It would permit all sorts of material to be banned that no reasonable person would see as offensive and dangerous.¹⁷

Departmental response

3.16 In response to the concern that the reasonable adult test would not apply to material that advocates terrorist acts, a representative from the Department told the committee that:

...the convenor spoke about applying 'reasonable adult' and 'reasonable adults' tests. The committee should be aware that neither of those tests...applies to the provision of promoting, inciting or instructing in

¹³ *Committee Hansard*, 17 July 2007, p. 13.

¹⁴ *Committee Hansard*, 17 July 2007, p. 13.

¹⁵ *Committee Hansard*, 17 July 2007, p. 13.

¹⁶ *Submission 18*, p. 8.

¹⁷ *Submission 11*, p. 4.

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.¹⁸

3.17 The Department also responded to more general concerns about applying the provisions in the Bill to classification decisions:

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 anti-terrorism laws in 2005.¹⁹

3.18 The Department noted the evidence of the Classification Review Board that there may be difficulties in applying the tests proposed by the Bill and submitted:

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 judgement. 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 judgement 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.²⁰

The words 'indirectly' and 'directly' in proposed paragraphs 9(A)(2)(a) and (b)

3.19 Submissions expressed concern regarding the terms 'indirectly' and 'directly' in proposed paragraphs 9(A)(2)(a) and (b).²¹ The Australian Muslim Civil Rights Advocacy Network (AMCRAN) argued that:

¹⁸ *Committee Hansard*, 17 July 2007, p. 25; see also Attorney-General, *Letter to the Classification Review Board*, 26 July 2007, p. 2.

¹⁹ *Committee Hansard*, 17 July 2007, p. 23; see also Attorney-General, *Letter to the Classification Review Board*, 26 July 2007, p. 2.

²⁰ *Committee Hansard*, 17 July 2007, p. 24; see also Attorney-General, *Letter to the Classification Review Board*, 26 July 2007, p. 2; and Attorney-General's Department, *Response to question on notice*, 26 July 2007, p. 1.

²¹ *Submission 18*, p. 8; *Submission 11*, p. 4.

...there is considerable uncertainty in the definitions, and the reach of the provisions is likely to be too broad. For example, "providing instruction in the doing of a terrorist act" and the term "urging the doing of a terrorist act" are unreasonably vague and could potentially cover a wide range of activities. The problem is further exacerbated by the inclusion of "indirectly" as a qualifier.²²

3.20 Other submissions also expressed concern at the inclusion of the word 'indirectly' as a qualifier, arguing that this term was too broad. In its submission to the committee the New South Wales Council of Civil Liberties argued the definition of 'advocates' fails to limit what may 'indirectly' urge or provide instruction on the doing of a terrorist act.²³

3.21 On this issue, the Australian Press Council (APC) expressed the view that the definition of 'advocates' seems excessively broad and could prevent the 'free expression of views on political issues'. APC argued further that:

Most unsettling is the inclusion of the word "indirectly", which has the potential to be interpreted so as to prohibit publication of material which is not intended to support terrorism, but is merely commenting upon an aspect of terrorist activity or is approving of political ideas which may be identified with terrorist activity.²⁴

3.22 More broadly, Dr John Bryne of the Australian Library and Information Association argued that:

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.²⁵

3.23 In contrast, AIJAC supported the definition of 'advocates' used in the Bill. AIJAC argued it is important 'to Refuse Classification to materials not only advocating a specific terrorist act, but to materials that advocate terrorist acts, or the support of terrorist groups, in general.' AIJAC told the committee that:

[It is] therefore in agreement with the decision to apply the 'refused classification' (RC) category to materials that advocate terrorists acts, and

²² *Submission 20*, p. 2.

²³ *Submission 10*, p. 6.

²⁴ *Submission 6*, p. 5.

²⁵ *Committee Hansard*, 17 July 2007, p. 7.

with the proposed definition of "advocate" to include directly or indirectly counselling, urging or instructing on doing a terrorist act, or directly praising a terrorist act.²⁶

Departmental response

3.24 In relation to concerns that the Bill may limit access to material in the context of academic research, the Department advised that:

[T]he 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 of Attorneys General] 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.²⁷

Exemptions

3.25 Several submissions commented on the exemptions in proposed subsection 9A(3).²⁸ Despite some acknowledgement that the government's intention in proposed subsection 9A(3) is to provide balance to the high level of potential censorship in the Bill,²⁹ these submissions argued that the exemption clause does not go far enough in providing adequate protection for freedom of speech.

3.26 For example, the Australian Society of Authors (ASA) articulated its concerns in this regard as follows:

The grave effect that we perceive with the proposed changes is that, despite allowances for public discussion, debate, entertainment and satire in...proposed Section 9A(3), legitimately held opinions would be suppressed. The proposed legislation is so broad in its wording that the ASA believes it will act as an unnecessary damper on freedom of expression.³⁰

²⁶ *Submission 8*, p. 1.

²⁷ *Committee Hansard*, 17 July 2007, p. 24.

²⁸ Australian Society of Authors, *Submission 5*; Australian Press Council, *Submission 6*; Arts Law Centre of Australia, *Submission 9*; Gilbert & Tobin Centre of Public Law, *Submission 11*; Australian Publishers Association, *Submission 18*; National Association for the Visual Arts, *Submission 19*.

²⁹ See for example, Australian Press Council, *Submission 6*, p. 3; Arts Law Centre of Australia, *Submission 9*, p. 3; Australian Publishers Association, *Submission 18*, p. 8.

³⁰ *Submission 5*, pp 1-2.

3.27 APC pointed to the potentially problematic nature of the drafting in proposed subsection 9A(3):

The exemption clause that is included in the Bill as introduced into Parliament makes an exemption for material which "depicts or describes" terrorism, if the depiction or description could reasonably be considered to be done merely as part of public discussion or debate or as entertainment or satire. However, if applied in its literal sense, this would not exempt all material from censorship, even where such material is intended to contribute to public discussion or debate. In particular, material that is in the nature of opinion or commentary may not be regarded as depicting or describing. The insertion of the phrase "depicts or describes" thus has the effect of narrowing the scope of the exemption.³¹

3.28 The Gilbert + Tobin Centre argued that the proposed exemption is 'apparently narrow', and 'certainly unclear' in its use of the word 'but' and in referring to material 'done merely as part of public discussion or debate or as entertainment or satire'.³² The Gilbert + Tobin Centre also submitted that the exemption is not broad enough to cover a range of other important speech, including academic research and access to banned material for academic research.³³

3.29 The Arts Law Centre of Australia (Arts Law Centre) and the National Association for the Visual Arts (NAVA) commented on proposed subsection 9A(3) in the context of its potential to undermine artistic expression. The Arts Law Centre argued that the exemption clause, as drafted, is insufficient to adequately protect the breadth of artistic activity in Australia:

Artists engage in artistic expression and create artistic works for a wide range of reasons. These reasons may include encouraging public discussion or debate or providing entertainment or satire, however the purposes and forms of expression can be broader than any of these terms. An environment in which artists cannot be confident in the legal status of their work and the legal rights and obligations relevant to such work has a chilling effect on creativity, leading to works not being created or, if created, not being publicly released.³⁴

3.30 The Arts Law Centre and NAVA suggested that proposed subsection 9A(3) should be amended to specifically include 'artistic expression' in order to clarify that artistic expressions do not constitute the advocating of a terrorist act.³⁵

³¹ *Submission 6*, p. 3.

³² *Submission 11*, p. 4.

³³ *Submission 11*, pp 4-5.

³⁴ *Submission 9*, p. 2.

³⁵ *Submission 9*, p. 2; *Submission 19*, p. 2.

Departmental response

3.31 During evidence to the committee, the Attorney-General's Department noted that:

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.³⁶

Committee view

3.32 The amendments contained in the Bill aim to ensure that material advocating terrorist acts and instructing in the conduct of terrorist acts will be refused classification. The committee supports the Bill's aim and agrees that such material should be refused classification.

Definition of 'terrorist act'

3.33 The committee is mindful of the concerns of submitters and witnesses regarding the definition of 'terrorist act' in the Bill, as directly adopted from section 100.1 in the Criminal Code. The committee notes, however, that this definition was subject to considerable public debate and examination in the Parliament and by the Senate Legal and Constitutional Legislation Committee in its report on the Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and related bills.³⁷

3.34 Furthermore, the Classification Code currently requires that material that promotes, incites or instructs in matters of crime or violence be refused classification. As a result, the existing definition of 'terrorist act' in the Criminal Code is already relevant to classification decisions. Indeed, the committee notes that the Classification Review Board has cited the definition of 'terrorist act' from the Criminal Code in two previous decisions where it refused classification of the publications *Join the Caravan* and *Defence of the Muslim Lands*.

3.35 Given these factors, the committee is not persuaded that the definition of terrorist act needs to be narrowed for the purposes of this Bill. For the same reasons, the committee is not persuaded that the definition of terrorist act should be expanded, as suggested by the Executive Council of Australian Jewry and AIJAC.

³⁶ *Committee Hansard*, 17 July 2007, p. 23; see also Attorney-General, *Letter to the Classification Review Board*, 26 July 2007, pp 2-3; and Attorney-General's Department, *Response to question on notice*, 26 July 2007, p. 1.

³⁷ Tabled 8 May 2002.

Definition of 'advocates'

3.36 The committee accepts that the definition of 'advocates' is appropriate in the context of the Criminal Code where it relates to a determination that an organisation is a terrorist organisation. In that context, considering whether direct praise creates a risk of leading a person to engage in a terrorist act *regardless of his or her age or any mental impairment* is appropriate because such organisations are very likely to specifically target the young and vulnerable. However, in the context of the classification regime the inclusion of this phrase has much broader implications. This is because it is not the fact of praising a terrorist act which is at issue but what impact the material might have *if* it was put before young people or people suffering a mental illness.

3.37 At a practical level, the committee believes that proposed paragraph 9A(2)(c) would therefore be problematic for classification decision makers to implement. The committee finds it difficult to envisage how a classification decision maker could decide how a person with a mental illness may react after viewing certain material. The committee believes that given the difficulty of applying the test, there would be considerable scope for confusion. As a result, the Bill may have an effect well beyond its stated aim.

3.38 The committee is also mindful of the difficulties that writers, artists and publishers would face in determining whether work they create or distribute will be captured by this provision.

3.39 More broadly, the committee is concerned about explicitly basing classification decisions on the possible reaction of persons with a mental illness. The committee believes that basing classification decisions on such considerations creates a substantial risk that such a test could prevent access to material which should be available to adults, particularly those engaged in academic research of terrorism or public debate about this important matter.

3.40 However, the committee is concerned about the effect that materials may have on young people, in particular teenagers. The committee strongly believes classification decision makers should take into account how young people may react to such material. As a result, the committee believes that the inclusion of a reasonable adult test in proposed paragraph 9A(2)(c) would be too restrictive. As a compromise, the committee recommends that the phrase 'regardless of his or her age or any mental impairment' should be removed from paragraph 9(A)(2)(c). This will leave decision makers more flexibility to consider the level of risk that material may lead to terrorist acts.

Recommendation 1

3.41 The committee recommends that the bill be amended to delete '(regardless of his or her age or any mental impairment (within the meaning of section 7.3 of the *Criminal Code*) that the person may suffer)' from proposed paragraph 9(A)(2)(c).

3.42 The committee notes concerns that the use of the word 'indirectly' in proposed paragraphs 9A(2)(a) and (b) is too broad for the purposes of classification and would have the effect of refusing classification to a broader range of material than is required to achieve the government's purpose. However, the committee believes that deleting the term 'indirectly' would undermine the objective of the Bill by excessively narrowing the definition of 'advocates' since it would limit the definition to material which 'directly' counsels, urges or provides instruction in the doing of a terrorist act.

3.43 The committee also welcomes advice from the Department that the Australian Government is working with state and territory governments to establish a mechanism to allow materials which have been refused classification to be used for legitimate academic research and for educational purposes.

3.44 The committee notes the evidence suggesting that the exemptions clause does not go far enough to protect a range of other speech. However, the committee is satisfied that the clause, as presently drafted, is broad enough to provide adequate protection for freedom of speech whilst meeting the government's objectives in relation to the classification of material that advocates terrorism.

Recommendation 2

3.45 Subject to the preceding recommendation, the committee recommends that the Bill be passed.

Senator Guy Barnett
Chair

