

10 July 2007

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

Dear Sir/Madam

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

The NSW Council for Civil Liberties (NSWCCL) thanks the Committee for this opportunity to make a submission to the Inquiry.

1. Executive Summary

The New South Wales Council for Civil Liberties (CCL) believes that the proposed bill is an unnecessary and ineffective restriction on freedom of speech.

The proposed legislation does nothing to protect Australia from a future terrorist attack -- it only serves to prevent the flow of information that is essential for the proper functioning of a democratic state. Preventing this flow of information limits the ability of Australians to adequately address future terrorism concerns.

The government, in its 2004 White Paper on Terrorism, states that we are engaged in a battle of ideas.¹ The publications which have so far been banned on the grounds of promoting, inciting or instructing in matters of crime or violence set out the ideas we are battling against. It is not possible to effectively battle these ideas on the basis of the government's official summary. The battle cannot be won without access to the ideas in full.

¹ The White Paper is available at http://www.dfat.gov.au/publications/terrorism/transnational_terrorism.pdf – Reference to the author of the now banned books is at page 23. A discussion of the “battle of ideas” is at page 104.

Banning materials which advocate terrorism in the broad definition proposed by this Bill sends a message that the terrorists have succeeded and can continue to succeed in undermining our free and democratic system of government.

2. The proposed Amendment presents a disproportionate restriction on freedom of speech

- CCL submitted on 29 May 2007 in response to the Attorney General’s discussion paper that the Bill is unnecessary, ineffectual and ultimately ludicrous. This submission adopts and elaborates on the views expressed therein.²

2.1 Freedom of Speech Principles

- The censorship of publications, films, and video games that advocate “terrorist acts” is an unnecessary infringement on adult people’s right to freedom of speech.
- A free and democratic society-upholding people’s freedom of speech ensures that adult people have the right to express their views as well as the right to read, hear, and see all materials that they wish without government interference, subject only to necessary limitations as explained below.
- Freedom of speech is an essential right under the *International Covenant on Civil and Political Rights (ICCPR)*:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.³

- While freedom of speech is an essential right, the *ICCPR* recognises that the right is not absolute, subject to certain restrictions for reasons such as respect for the rights and reputations of others, national security, public order, or public health or morals.⁴ However, “these shall only be such as are provided by law and **are necessary**.”
- The European Court of Human Rights has expounded on the meaning of necessity:

It is implicit in this standard the notion that the restriction, even if justified to achieve one of the stated purposes, must be framed so as not to limit the right protected more than is necessary. The

² See NSWCCCL, “Submission in Relation to Discussion Paper on ‘Material that Advocates Terrorist Acts,’” 29 May 2007, available at: <http://www.nswccl.org.au/docs/pdf/Material%20Advocating%20terrorism%20070529.pdf>.

³ *International Covenant on Civil and Political Rights*, Art. 19(1).

⁴ *ICCPR*, Art. 19(3), emphasis added.

restriction must be proportionate and closely tailored to the aim sought to be achieved.⁵

- This means that any law abridging the fundamental, democratic right of freedom of speech must be only come about when:
 1. **There is no alternative** to a restriction of free speech to protect this value.
 2. That when it's necessary to have a restriction, it is done by the **least intrusive** means possible.⁶

2.2 The Bill is an overly intrusive, ineffective, curb on free speech

- The proposed Bill is based upon the need to protect “the impressionable and vulnerable in the community” from being persuaded by materials that advocate terrorist activities. A secondary value is to protect terrorist individuals from obtaining information to commit these acts.
- The Bill does not proceed on the premise that the “impressionable and vulnerable in the community” are an identifiable group who can be protected under a censorship regime. The censorship regime otherwise proceeds on the basis that those requiring protection are minors, and provides for age appropriate classifications. Thus, the Bill is inherently overly intrusive.
- The idea that adult persons interested in accessing material advocating terrorism, within the definition proposed in the Bill, are all within the category of “impressionable and vulnerable” has been demonstrated to be false over the last 12 months since the 2 Islamic books were refused classification.⁷ The book *Join the Caravan* has been used by the Lowy Institute for International Affairs as a reference point in a major paper on Australian foreign policy: *Joining the caravan? The Middle East, Islamism and Indonesia*⁸ Both banned books are used as teaching materials at Melbourne University.
- The premise of the Bill is that there are adults of sound mind in the community who are none-the-less impressionable and vulnerable to the extent that it is legitimate for the government to restrict their access to publications, films and computer games. This premise is antithetical to a free society. There are many alternative and legitimate avenues available for government to seek to address sections of the community whom the government believes are subject to undue influence. These include education, social services and programs aimed at integration.

⁵ See Alan Leung, *Preserving free speech in Hong Kong*, Hong Kong Democratic Foundation, 18 December, 2000, Available at:

<http://www.hkdf.org/newsarticles.asp?show=newsarticles&newsarticle=115>

See also, *Faurisson v. France* (1996) UN Doc CCPR/C/D/550/1993 (Mrs. Evatt, Messrs Kretmer & Klein), 8; *Gauthier v. Canada* (2003), UN Doc. CCPR/C/78/D/D/941/2000, [13.6]: the operation and application of laws that restrict freedom of speech must be ‘necessary and proportionate to the goal in question and not arbitrary’.

⁶ See *id.*

⁷ *Defence of the Muslim Lands* and *Join the Caravan*, refused classification by the Classification Review Board July 2006

⁸ available at <http://www.lowyinstitute.org/Publication.asp?pid=229>

- Furthermore, there is an inherent problem with labelling adults of sound mind as impressionable and vulnerable. Legislation that labels all adults of sound mind as impressionable is overprotective as adults of sound mind are capable of recognising that terrorism is wrong. Overprotective legislation limits discourse within society. Limiting this discourse prevents citizens' ability to discuss, debate, and reflect about these issues therefore preventing the democratic processes.
- The UK terrorist legislation is similar to the Australian one in the sense that it restricts speech that "glorifies terrorism."⁹ Though the CCL is opposed to restrictions on free speech, the differences between the Australian and UK version exemplify how expansive this legislation is. The UK definition limits restrictions to a "reasonable person" standard. Unlike Australia, the UK does not restrict access to materials based upon the "most impressionable" part of the adult community.
- Furthermore, the UK's bill of rights protects their citizens from unnecessary infringements that may potentially arise from these laws. Clive Walker, a professor at Leeds University, recently stated that the *Human Rights Act 1988* limits the UK's legislation.¹⁰ This provides courts a means to check and limit expansive legislation. Any legislation passed in Australia lacks this essential safeguard.
- However, critics of the UK's law point out that this less expansive legislation is still an unnecessary restriction of free speech.¹¹ The European High Court of Human Rights commented on similar provisions stating that these restrictions on speech are only justified if the censored material is inciting "imminent violence."¹² The criticism on the less restrictive UK legislation further exemplifies that the proposed legislation is an unwarranted and unnecessary restriction on freedom of speech.
- Further, the Bill will be ineffective. Numerous websites already contain these materials and information and anyone desiring this information can easily access it. Any attempt at censorship which does not affect access to the internet will not be an effective means of preventing the flow of materials or information to those to whom it is legitimate to protect as "impressionable and vulnerable".
- The stated objectives of the Bill could be legitimately achieved by accommodating material advocating terrorism within the R1 or R2 categories in the case of publications, the R category in relation to films and a category restricted to adults in relation to computer games.

⁹ See Terrorism Act 2006, Chapter 11

¹⁰ Connie Levett, *Law lacks checks: experts*, Sydney Morning Herald, 5 July 2007, Available at: <http://www.smh.com.au/news/national/laws-lack-checks-experts/2007/07/04/1183351293904.html>

¹¹ See Gareth Crossman, *Reconciling freedom with security*, 155 NLJ 1193 (Aug. 2005): it would be impossible to draft an offence criminalising "condoning or **glorifying**" terrorism without significant intrusions into **free speech** rights

¹² See The Impact of UK Anti-Terror Laws on Freedom of Expression, April 2006, Available at <http://www.article19.org/pdfs/analysis/terrorism-submission-to-icj-panel.pdf>: Discussing *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, adopted October 1995; see also *Karatas v. Turkey* 8 July 1999, Application No. 23168/94

2.3 The proposed restriction is not the least intrusive means of preventing harm.

- While the CCL believes that this bill is unnecessary, if the government believes that they would protect harm by censoring some material, using the least intrusive method of achieving their goals is necessary. Most forms of speech subject to this bill would not incite imminent violence, and therefore it is overly intrusive to restrict adults' access.
- The **least intrusive** means to prevent access of the impressionable community is to limit the access of these materials to adults. This means that impressionable youths would not have access to the materials, while upholding adults' freedom of speech.
- Furthermore, under the current censorship laws, adults cannot have access to video games that is inappropriate for youths. Any censorship legislation cannot be the least intrusive means of restricting access when adults are restricted access. Therefore, the CCL believes that any amendment should include a revised "adult" classification for video games.

3. Problems with adopting the definitions from the Criminal Code Act definitions for "advocates" and "terrorist act"

- While the CCL is adamant against an adoption of any bill that unnecessarily abridges free speech, the adoption of the Criminal Code definitions is especially worrisome. The ramifications of adopting criminal definitions for censorship will likely produce absurd and unwanted results.
- The Code has too broad a definition of what may constitute terrorist activities. While this broad definition may be suitable for dealing with actual terrorist actions, it is not suitable as a guideline for censorship.
- Part of the problem of defining terrorism is that what constitutes terrorism is not that action that takes place, but the resulting fear from the action. Rosalyn Higgins, the President of the International Court of Justice, explained this difficulty by stating¹³:

“ ‘Terrorism is a term without legal significance. It is merely a convenient way of alluding activities, whether of States or individuals, widely disapproved of and in which either the methods used unlawful, or the targets protected, or both....The term is at once a shorthand to allude to a variety of problems with some common elements, and a method of indicating community condemnation for the act concerned.’ ”

- Trying to define a word meant to describe such a broad range of conduct will capture activities that society considers legitimate. For example, advocating activities such as Nelson Mandela's recruitment of a gorilla army, or depictions of the American and French revolutions, would fall under the proposed definition.

¹³ Gerald L. Neuman, *Humanitarian Law and Counter-Terrorist Force*, EJIL 2003.14(283): citing Higgins, *The General International Law of Terrorism*, in R. Higgins and M. Flory (eds), *Terrorism and international law* (1997) 13, at 28.

- Adopting the definition of “advocates” exacerbates this problem. This is because “advocates” proscribes an organisation from “directly or indirectly” “urging” or “providing instruction” on a terrorist act. Under this definition, anything that displays an organisation committing some sort of terrorist act might be censored. This is because the current definition fails to limit what may “indirectly” urge or provide instruction to a terrorist act. This expansive definition allows the censorship board to censor a wide range of materials.
- For example, the film *V for Vendetta* is within the parameters for censorship. The movie has a fictional character, V, which commits “terrorist activities,” including blowing up the House of Parliament and controlling a network analogous to the BBC, to bring down a fictional, totalitarian government. The movie is “advocating” terrorism in the sense that it is calling for a revolution against a repressive state.
- Under the proposed law, this movie may not be permissible for adults in Australia. This result is absurd as the movie has enjoyed large-scale success in every western democracy and also such traditionally repressive states as Lebanon, Russia, and Egypt.¹⁴
- This movie would not be the only popular piece that may fall under the provisions of this bill. Other examples include *Braveheart* (promoting violent actions against a ruling government), *Death of Klinghoffer* (American Opera detailing the story of a 1985 hijacking), and *Robin Hood* (theft and menace to cause fear in the ruling state).

4. Censoring materials related to terrorist activities will have other adverse effects.

4.1 Broadly censoring publications, films, and video games will create a chilling effect on artists.

- Interpretations of publications and films are analogous to the interpretations of artwork. Each viewing or understanding of the piece is different based upon the “eye of the beholder.”¹⁵ With the censors broad discretion described above, censorship will likely increase. This is because an overly protective censorship board will censor any material that could indirectly induce the most impressionable of minds.
- Notice of censorships will have an adverse effect on future artist, writers, and filmmakers. This is because a chilling effect occurs when governments overly curtail fundamental rights such as freedom of speech.¹⁶ A chilling effect subconsciously causes members of the public to change their behaviour to avoid government detection (or in this case censorship). While censorship generally

¹⁴ See *V for Vendetta* Foreign Box Office Totals, 5 November 2005, available At <http://boxofficemojo.com/movies/?page=intl&id=vforvendetta.htm>

¹⁵ See Oliver Watts, *The image and the terrorist*, 10 LTC 221 at 221-23

¹⁶ See John W. Whitehead, *Forfeiting “Enduring Freedom” for “Homeland Security”*: A Constitutional Analysis of the USA Patriot Act and the Justice Department’s Anti-Terrorism Initiatives, 51 Am. U.L. Rev. 1081, at 1091-92 (Aug. 2002): Discussing the United State’s Patriot Act’s effect on free speech.

increases the public's curiosity into a subject, it will severely limit any potential profit achieved from the piece.

- This severe disincentive to the producer will subconsciously affect (in the form of the chilling effect) any potential inquest that an artist, writer, or filmmakers do in relation to terrorism or government criticism.
- Therefore, this bill will indirectly prevent legitimate pieces of work from production. Not having materials that comment on terrorism or governmental criticism will reduce political discourse stemming from these pieces. As political discourse is essential to any democracy, any restriction that reduces discourse is unadvisable.

4.2 Limiting access of materials that advocate terrorist materials will prevent substantial inquiries to comprehensive solutions to terrorism.

- Materials such as artwork, movies, and books commonly take the viewer into a situation that is unusual or foreign to them. These sorts of pieces are able to bring the viewer into another world, providing the viewer a better understanding of the subject.
- While the vast majority of Australians do not agree with any terrorist action, most are unfamiliar with the roots and rationale behind global terrorism.
- Though the rationale behind terrorism is illogical, understanding the basis for this rationale is vital to understanding terrorism. One of the best ways of obtaining this knowledge is from first hand renditions depicting the terrorist's rationale.
- As the most critical part of a liberal democracy is the voting public, it is important that the public have the ability to gain multiple viewpoints on a critical policy issue such as terrorism. Censoring one of the most important viewpoints, (the first person rationale) will only prevent the public from making informed decisions on the direction of policy for Australia.
- Furthermore, this censorship will also limit these materials to policy makers. This will severely limit the ability for the leaders of Australia to effectively address any future foreign policy issues arising from this ongoing threat. As the Australian Library and Information Association writes, "We cannot refute what we cannot read."¹⁷

¹⁷ Australian Library and Information Association et al., "Submission to Material That Advocates Terrorist Acts Discussion Paper," 29 May 2007, available at: <http://alia.org.au/advocacy/submissions/terrorist.html>.