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THE UNIVERSITY OF NEW SOUTH WALES
FACULTY OF LAW

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Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Secretary

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

Thank you for the opportunity to make a submission on this Bill. Please find attached a submission from our Centre. It has been adapted from a submission made to the Attorney-General's Department discussion paper that led to this Bill.

Yours sincerely

Dr Andrew Lynch
Director
Terrorism and Law Project

Ms Edwina MacDonald
Senior Research Director

Professor George Williams
Anthony Mason Professor
and Centre Director

SYDNEY 2052 AUSTRALIA
Email:
gtcentre@unsw.edu.au
Telephone: +61 (2) 9385 2257
Facsimile: +61 (2) 9385 1175
Web:
www.gtcentre.unsw.edu.au

1. The Bill is premised on the idea that it is necessary to amend the National Classification Code by including a requirement that publications, films and computer games that 'advocate terrorist acts' be refused classification. This is due to the belief that the existing ground of refusing classification to material if it 'promotes, incites or instructs in matters of crime or violence' is inadequate since it may not catch 'material which may more insidiously encourage people…to commit terrorist acts'.

Need for the amendment

2. The need for adding this additional ground for refusing classification is not clear. It appears to hinge upon the opinion that 'promotion' and 'incitement' (and to a lesser degree, 'instruction') are nebulous terms. While that might be so, the problems of clarity are compounded, rather than simplified, by adding a criterion of 'advocates terrorist acts', particularly insofar as 'advocates' is defined to include 'praise'. To the extent that 'advocate' encompasses direct or indirect counselling or urging the doing of a terrorist act, or direct or indirect instruction on doing such an act (proposed sub-sections 9A(2) (a) and (b)), material of that description would already be liable to classification as that which 'promotes, incites or instructs in matters of crime or violence'. In July 2006, for example, the Classification Review Board banned two books, *Defence of the Muslim Lands* and *Join the Caravan*, because they promote and incite crime, namely terrorism. In its submission to the Attorney-General's Department, the Classification Review Board indicated that it also found the difference between the existing criteria and the proposed additional criteria to be unclear.

3. The main point of distinction then between the existing criterion and the proposed additional one is the width potentially available through the element of 'advocates' in section 9A(2)(c) which refers to '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 (within the meaning of section 7.3 of the *Criminal Code*) that the person might suffer) to engage in a terrorist act.'.

The definitions of 'terrorist act' and 'advocates'

4. This Bill draws on the definitions of 'advocate' and 'terrorist act' employed by Part 5.3 of the Commonwealth Criminal Code. Both those definitions have attracted substantial criticism. While, in our view, the Australian definition of 'terrorist act' in section 100.1 is more carefully drafted than those of other nations like the United Kingdom and the United States (which do not exclude advocacy, protest and industrial action), it is not free from complications and omissions. For example, it does not address whether the actions of a nation as part of an armed conflict can amount to terrorism.

5. Additionally, it must be recognised that 'terrorism' is a concept the application of which is inevitably open to contest. This was recently demonstrated by the way in which the term was employed by both sides in the conflict between Israel and Lebanon in 2006. Although the National Classification Code necessarily operates by reference to standards about which persons may disagree, the determination as to what is or is not a 'terrorist act' is not simply another judgment in this vein. Rather, the context in which such discussions must inevitably take place, mean that the judgment of reviewers has the potential to directly impact upon the scope of permissible political speech. Terrorism is a criminal activity under Australian and international law, but the consequence of adding the proposed amendment to the Code is to enable the restriction of speech which is further removed from the clear criminality of

terrorism and closer to the political dimensions which underlie the phenomenon. Put plainly, what some see as terrorism, others see as defence or a struggle for liberation. After all, Nobel Peace Prize winner Nelson Mandela was called a terrorist by many during his fight against apartheid in South Africa, including by British Prime Minister Margaret Thatcher. His past actions would also satisfy the definition of 'terrorist act' under Australian law, which provides no leeway for someone who causes harm as part of a struggle for liberation.

6. We agree even more strongly with the criticism made by many of the definition of 'advocates' in section 102.1(1A) of the Code. Admittedly that criticism has been in the context where a finding of 'advocacy' would support the proscription of an organisation, with the consequence that its members and associates may face criminal prosecution for offences attracting severe penalties. We acknowledge that the purpose to be served by use of the definition in the Classification Code is distinct and has far less direct impact upon individual liberty.

7. Further entrenchment of the vague standard of 'praise' in federal legislation should to be avoided. The Attorney-General's Department's Security Legislation Review Committee in its report of June 2006 recommended removal of sub-section 102.1(1A)(c) – that part of the definition of 'advocates' which includes 'praise' (see 8.11 of the Committee's Report). In December 2006, the Parliamentary Joint Committee on Intelligence and Security desisted from supporting repeal of that sub-section but resolved to 'consider the question further in its consideration of the listing process in 2007' (see 5.67 of the Committee's Report). It did, however, agree with the SLRC by recommending amendment of the provision so as to require a 'substantial risk' that the person be led by the statement to engage in a terrorist act (see Recommendation 14 of the Committee's Report). The PJCIS has concluded the hearings in its Inquiry into the Terrorist Organisation Listing Provisions of the *Criminal Code Act 1995* and is due to deliver its final report shortly. At the very least, the proposed amendments to the Classification Code should be delayed until the views of the PJCIS on the definition of 'advocates' in section 102.1(1A) are known.

8. The uncertainties which inhere in the term 'terrorism' are unhelpfully magnified when coupled with 'praise'. Because terrorism is merely a tactic employed by protagonists there is a risk that those discussing a particular conflict might be seen to condone such activities when addressing the underlying causes of that conflict or expressing sympathy for the position of one side. An example is provided by the controversy which greeted the statement by Cherie Blair, wife of the British Prime Minister, when she said of the Israeli-Palestinian conflict: 'As long as young people feel they have got no hope but to blow themselves up you are never going to make progress'.[1] That comment provoked uproar on the basis that it might be seen as excusing, if not justifying, suicide bombing. An apology was later issued by the Prime Minister's office. It is difficult to draw clear lines around what constitutes 'praise' and what does not. In attempting to explain the causes of terrorism, organisations such as Red Cross or Amnesty International must take care not to be seen as supporting such activities.

9. The Attorney-General's Department discussion paper foresaw these concerns and sought to provide reassurance by saying that the change would not be intended to 'restrict film-makers or authors or publishers dealing with contentious subject matter in an entertaining, informative, educational, ironical or controversial way'. But it needs to be acknowledged

[1] 'PM's wife 'sorry' in suicide bomb row', *BBC News*, 18 June 2002, <http://news.bbc.co.uk/2/hi/uk_news/politics/2051372.stm>.

that the distinction will not always be clear-cut. So it is not at all simple to see why a biography of Nelson Mandela which is largely favorable to its subject, or a film seeking to explain to audiences why the September 11 attacks on the United States were greeted with celebration in some Arab countries, will not risk being denied classification.

10. This is particularly so given that a book, film of computer game could be banned for praising a terrorist act where there is merely a risk that this might lead someone with a metal impairment to take up terrorism. Right and wrong under Australian law are usually determined by the actions of a reasonable person, not someone with a mental impairment (which section 7.3 of the *Criminal Code* states includes 'senility, intellectual disability, mental illness, brain damage and severe personality disorder'). 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 or dangerous. It would also put authors, publishers and the Classification Board in an impossible position. Each will be faced with having to assess the legality of books, films or computer games in light of the possible actions of very young persons or those with one or more mental impairments. That the hypothetical person's response is wrong-headed or irrational would be irrelevant.

Inadequate exceptions

11. The Bill is not balanced or checked by effective protection of freedom of speech in the Australian Constitution or a national Charter of Rights.

12. Instead, proposed section 9A(3) provides that 'A publication, film or computer game does not advocate the doing of a terrorist act if it depicts or describes a terrorist act, but the depiction or description could reasonably be considered to be done merely as part of public discussion or debate or as entertainment or satire.'

13. The exception 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'.

14. It is also not broad enough in covering a range of other important speech. For example, academic research and access to banned material for academic research is not addressed by the Bill yet this has already been an issue in the recent past. The banning of the two Islamic books has already impacted on academic research. The University of Melbourne library has withdrawn access to these books, which were bought in 2005 for a university course on jihad, so as not to fall foul of the censorship laws. Attorney-General Philip Ruddock had indicated that he would consider whether academics may access banned material for research on a 'limited' and 'structured' basis.[2] Yet this issue has not been addressed in the current reform proposals.

15. In order to understand a complex and intractable problem like terrorism, academics need to be able to access books about terrorism and in support of terrorism. Limiting academics' access to books on terrorism will hinder their ability to understand and criticise the ideas expressed in them. This is a problem not only for the academics themselves but also for the community at large, which depends upon quality academic work to better understand the social and security challenges facing the nation. It is important that researchers are able to

[2] ABC Television, 'Melbourne Uni to challenge terrorism law', *Lateline*, 2 October 2006, <http://www.abc.net.au/lateline/content/2006/s1753912.htm>.

access such information and that the process for obtaining access does not deter them from undertaking research in this area at all.

Conclusion

16. In making this submission we are not suggesting that material which a reasonable person would regard as counseling, urging, promoting, inciting or instructing in respect of violent crime, including terrorist acts, should be freely available in the community. We understand and share the policy grounds underpinning efforts to refuse classification to such material. We believe that can be accomplished under the Classification Code as it presently stands.

17. Our concern is that the proposed amendment will not provide the certainty which is claimed. Indeed, the converse is true. It is much simpler to identify speech which encourages the doing of 'crime or violence' than specifically a 'terrorist act', given the lengthy and complex definition, including motivational elements, which supports the latter. The use of 'advocacy' is rendered problematic because of its inclusion of 'praise' – a far vaguer standard than 'promotes' or 'incites'. The debates which accompanied the introduction of those definitions into the Criminal Code and their subsequent review show that there are very real difficulties in their potential application. Those experiences should be drawn upon before moving to add those terms into the Classification Code.

18. Lastly, these amendments have the potential to uncomfortably politicise the work of the Classification Board and Classification Review Board. This is due to the particular characteristics of terrorism as an element in broader political and societal conflict. The advantage of restricting classification to material purely on the basis of its connection to criminality or violence (the existing ground) is that the Boards will still be able to effectively control access to material which may have the effect of promoting crimes of that nature. They will be spared the contentious and difficult task of identifying sides in a particular conflict as being associated with terrorism, which these amendments would potentially require. In particular cases that may produce an unacceptable intrusion upon free political speech.