

**SUBMISSION OF THE FEDERATION OF COMMUNITY
LEGAL CENTRES (VIC.) INC**

**TO THE SENATE STANDING COMMITTEE ON LEGAL
AND CONSTITUTIONAL AFFAIRS**

**REGARDING THE CLASSIFICATION (PUBLICATIONS,
FILMS AND COMPUTER GAMES) AMENDMENT
(TERRORIST MATERIAL) BILL 2007**



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The Federation of Community Legal Centres

The Federation of Community Legal Centres Vic. Inc ('the Federation') is the peak body for fifty-two Community Legal Centres across Victoria, including both generalist and specialist centres. Community Legal Centres provide free legal advice, information, assistance and representation to more than 100,000 Victorians each year. We exercise an integrated approach combining assistance of individual clients with preventative community legal education and work to identify and reform laws, legal and social systems.

Community Legal Centres have expertise in working with excluded and disadvantaged communities and people from culturally and linguistically diverse backgrounds. We operate within a community development framework. We provide a bridge between disadvantaged and marginalised communities and the justice system. We work with the communities of which we are a part. We listen, we learn, and we provide the infrastructure necessary for our communities' knowledge and experiences to be heard.

The Federation, as a peak body, facilitates collaboration across a diverse membership. Workers and volunteers throughout Victoria come together through working groups and other formal and informal networks to exchange ideas and strategise for change.

The day-to-day work of Community Legal Centres reflects a 30-year commitment to social justice, human rights, equity, democracy and community participation.

The Anti-Terrorism Laws Working Group is one of a number of issue-specific working groups within the Federation comprising workers from member centres. This Working Group supports CLC's to provide targeted community legal education programs for communities affected by the State and Commonwealth anti-terrorism laws and supports CLC lawyers to provide up-to-date legal advice to clients affected by the State and Commonwealth anti-terrorism laws. The Working Group also works to monitor the impact of State and Commonwealth anti-terrorism laws on affected communities and individuals. The Working Group has worked closely with a number of communities that have been affected by recent changes to Australia's anti-terrorism laws, in particular Muslim, Kurdish, Tamil and Somali community groups.

Introduction

The Federation does not support Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007 ('the Bill'), which proposes to amend the Classification (Publications, Films and Computer Games) Act 1995 ('the Act') to refuse classification of material advocating the doing of terrorist acts.

In our view the proposed amendments are not necessary. In our assessment the current Classification Scheme has sufficient scope to be able to deal with material inciting or promoting terrorist acts.

In our view, the Bill represents an undue incursion into freedom of political expression and is not appropriate in a modern, liberal democracy. The Bill is particularly disproportionate due to the proposed definitions of 'terrorist act' and 'advocates', which are overly broad. As a result there will be the potential for excessive censorship of political, religious and ideological material. In this regard we are concerned that the Bill contravenes internationally accepted human rights principles, may be unconstitutional and even goes beyond the principles espoused in the Classification Scheme itself.¹

We are also concerned that these broad definitions will result in discriminatory application of the Classification Scheme and as a result, material produced by certain community groups will be censored more than others.

Necessity

In our view the current Classification Scheme is already sufficient to deal with material that advocates terrorism. The National Classification Code ('the Classification Code') currently provides that material that 'promotes, incites or instructs in matters of crime or violence' must be refused classification.² Under the Commonwealth *Criminal Code Act 1995* ('the Criminal Code'), engaging in a 'terrorist act' is a serious criminal offence, punishable by life imprisonment.³ Any material that promotes, incites or instructs in a terrorist act is therefore already liable to being refused classification under the current Classification Scheme. In his second reading speech in relation to the Bill, the Attorney General stated that 'currently there is too much uncertainty around whether the existing classification laws adequately capture [material which advocates the doing of terrorist acts]'.⁴ Given that a 'terrorist act' is clearly a crime, however, undoubtedly material that 'promotes, incites or instructs in' a terrorist act will fall within the scope of the existing Classification Code. The Federation is therefore of the view that the Classification Scheme has sufficient scope and does offer sufficient clarity to allow classification of material dealing with terrorist acts.

¹ Any reference to the 'Classification Scheme' is intended to encompass the *Classification (Publications, Films and Computer Games) Act 1995 (Cth)*, the *National Classification Code* and the *Classification Guidelines*.

² Clauses 2 and 3, *National Classification Code (the Classification Code)*

³ Section 101.1, Part 5.3, Schedule 1, *Criminal Code Act 1995 (Cth)*

⁴ Second Reading, Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007, 21 June 2007, available at <http://www.parlinfoweb.aph.gov.au> at 28 June 2007 ('Second Reading Speech').

We acknowledge that 'promotes, incites or instructs in' may not be the same as 'advocates' the Bill proposes to define it. In our view, however, the term 'advocates' as proposed is too broad and creates too broad a category of material that may be refused classification. This will be discussed further below. For this reason, we take the view that, inasmuch as the Classification Scheme currently covers material that 'promotes, incites or instructs in' terrorist acts, it is sufficient to deal with material advocating terrorism.

The Discussion Paper released by the Attorney-General's Department as part of its initial consultation process on this issue ('the Discussion Paper') noted that the Code also provides that material may be refused classification on the basis that 'material deals with matters of violence in such a way that it "offends against the standards of morality, decency and propriety of a reasonable adult to the extent that [it] should not be classified"'.⁵ The Discussion Paper then stated, however, that 'this provision has not been actively used in classifying material that might be considered to encourage terrorist acts'.⁶ In our view this provision would be sufficient to classify material that truly raises community concerns because it advocates terrorism. Simply because it has not been used for this purpose to date, does not mean that it is not fit for this purpose. This provision might easily be used to deal with material that incites widespread killing via bombing, for example, as this would clearly offend against a reasonable adult's sense of morality, decency and propriety. Similarly it could easily be used to classify material that incites or advocates suicide bombing, hijacking, hostage taking or other acts of violence that are commonly associated with the notion of terrorism.

The Discussion Paper refers to current Federal Court litigation which may clarify the exact scope of the Code and Guidelines in relation to material advocating terrorist acts. We presume that the litigation referred to is the case relating to the decision to refuse classification to the books 'Join the Caravan' and 'Defence of the Muslim Lands'. In this case, the Classification Board at first instances classified both publications as 'unrestricted'. These decisions were later set aside by the Classification Review Board, with classified both classifications as 'RC (Refused Classification)'. The New South Wales Council for Civil Liberties has made application to the Federal Court for an order of review in relation to the Classification Review Board's decisions.

While we submit that the current Code and Guidelines are adequate, as discussed above, the current Federal Court litigation will inevitably shed some light on exactly how material advocating terrorism may be dealt with under these instruments. The Federation, therefore, takes the view that it would be imprudent to amend the Code and Guidelines in the absence of a clear indication that they are currently inadequate. In our view, it is imperative that a reasoned and evidence-based approach to this issue be taken, particularly given the serious incursion into civil liberties and political freedoms that is being proposed. This requires waiting for the outcome of any pending court proceedings that deal with the issue. Clearly it would be unwise to amend the Code and Guidelines, only to find out that they were adequate all along when the results of the current proceedings emerge.

⁵ Classification Policy Branch, Attorney-General's Department, *Material That Advocates Terrorist Acts Discussion Paper* 1 May 2007, available at <http://www.ag.gov.au>, 2 ('The Discussion Paper')

⁶ Ibid

Justification

In its News Releases of 27 July 2006 and 3 May 2007 the Attorney-General's Department has suggested that the proposed amendments stem from a need to protect the community from terrorism and that they have emerged in response to community anger about the availability of material advocating terrorism.⁷

With respect to the first-mentioned ground, it is our view that the current Classification Scheme is sufficient to deal with material of concern (as argued above). We also submit that refusing classification to material advocating terrorist acts will not actually have the effect of making our society any safer. It is more likely that such material will continue to be circulated except via more covert channels. In this sense it will then become more difficult to monitor the kinds of material that are being consumed by the community. In our view, it would be naïve to suggest that increasing censorship of such materials and ideas will actually eliminate that material and those ideas altogether. Instead, increasing censorship will simply push such things underground. Any threat posed to the wider community (and the Federation does not necessarily accept that such materials pose a widespread threat in and of themselves) will not be reduced, and there is even a risk that it may be increased.

Another possible outcome of the banning of material is that it impedes worthwhile and productive debate and discussion about that material. If there is a genuine concern about material that advocates terrorist acts, surely the community requires access to that material in order to be able to debate its merits and expose the lack thereof. We note the comments of Amir Butler, co-convenor of the Australian Muslim Civil Rights Advocacy Network (AMCRAN) in relation to the Classification Review Board decisions discussed above:

*If we are to properly defeat what is essentially a perverted understanding of Islam, it is not enough to simply argue that these ideas are bad because the Government says so. These ideas must be comprehensively debunked and refuted. And Muslim leaders, scholars and intellectuals have been doing just this for more than 1000 years. This is the only means by which people will be dissuaded from adopting these ideas. Yet by banning these books the Government is now denying the community the opportunity to do so. Without access to this material, it is impossible for us to understand the ideas, articles and justifications being used by the terrorists. If we, as a community, cannot understand the religious arguments being offered for suicide bombings, it is impossible for us to refute them.*⁸

This comment raises a genuine concern that material advocating terrorism will covertly proliferate and become more persuasive if it is refused classification because it cannot be effectively refuted by communities.

⁷ News Releases available at <http://www.ag.gov.au>

⁸ Amir Butler (2006) Banning Books Won't Protect Us, *Herald Sun*, 11 August 2006

Furthermore, if increased censorship will not achieve the objective of reducing danger to the community, the proposed legislative change and the greater restrictions it imposes are unjustified.

With respect to the latter ground for change, we note that the Attorney-General's 'News Release' of 27 July 2006 regarding this proposal states that 'a significant proportion of the community is outraged that this material is available'.⁹ 'Community concern' was again referred to in the News Release of 3 May 2007.¹⁰ Firstly, the Federation takes that view that the Attorney-General's department should make public the results of any recent and comprehensive survey or study that has informed these comments and that this information should have been included in their Discussion Paper. Where such significant legislative changes are proposed it is imperative that the impetus for these changes be a matter of public record. In the absence of such records, it is our view that the highly expansive definition of 'terrorist act' proposed does not accurately reflect community views. The broad range of conduct that may be encompassed by the proposed definition of 'terrorist act' greatly exceeds the common-place notion of 'terrorism' which is generally limited to bombings, hijackings, hostage taking etc. (The breadth of this definition and its implications are discussed further below.) As stated in the Classification Code, classifications decisions are to give effect to the principles, inter alia, that 'adults should be able to read, hear and see what they want' and 'the need to take account community concerns about depictions that condone or incite violence...'¹¹ Any proposal to increase censorship should therefore be based on an accurate and detailed assessment of actual community concerns. In this case, we submit that the proposed amendment goes beyond the scope of community concerns because the broad definitions relied upon have the effect of exposing an inordinately wide array of political material to censorship. The proposed amendments do not just cover material advocating the types of acts that the community are concerned about but expand the scope of the Classification Scheme even further. Insofar as they drastically exceed the scope of community concerns, the amendments proposed in the Bill are not justified.

Breadth of Definitions

The Bill proposes that the definitions of 'terrorist act' and 'advocate' contained in the proposed Section 9A will be the same as the definitions contained in the Criminal Code.¹²

Definition of 'Terrorist Act'

In the Criminal Code, a 'terrorist act' is defined as an action or threat of action done or made with

- the intention of advancing a political, religious or ideological cause; and
- the intention of coercing or influencing by intimidation a government of the Commonwealth, State, Territory, foreign country or a section of the public.

Further, to be a 'terrorist act', the action must either cause or threaten serious physical harm to a person, serious property damage, a person's death,

⁹ Ibid

¹⁰ Ibid

¹¹ Clause 1, *Classification Code*

¹² Item 3, Schedule 1 Amendments, Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill ('the Bill')

endangerment to a person's life, a serious risk to public health or safety, or serious interference with an electronic system.¹³

An exception has been created for advocacy, protest, dissent or industrial action that is not intended to cause death, physical harm, endangerment to a person or a serious risk to public health or safety.¹⁴

As the Federation has argued on previous occasions, we are of the view that this definition is overly broad and consequently may be applied to an inordinately wide array of acts and threats of acts. The corollary of this, when it is transposed into the Classification Scheme, is that an inordinately wide array of materials will be exposed to censorship.

The breadth of the term 'terrorist act' was confirmed by Justice McClellan in an article on 'Terrorism and the Law'. Justice McClellan commented that 'It is apparent that the definition of "terrorist act" is capable of catching conduct that does not fall within popular notions of a terrorist act'.¹⁵ In our view, this is a serious concern. It is even more concerning given that it is proposed that the same definition be incorporated into the Classification Scheme, which necessarily relies on notions of community standards, public opinion and the 'reasonable adult'. While the Attorney-General's 'News Release' of 3 May 2007 states that '[t]errorist acts are a specific and highly dangerous threat', the definition of 'terrorist act' proposed is not at all specific and actually may encompass a range of activities that goes well beyond accepted conceptions of terrorism.¹⁶

It is important to note that breadth of this definition is substantially exacerbated by the inclusion of the mere 'threat' of the designated activities in the definition of terrorist act. Thus, a terrorist act may either be an action that falls within the above definition or a threat of such an action. In the Classification Scheme context, this means that material that advocates making a threat of doing a terrorist act may be refused classification. This creates quite a distance between actual conduct that is concerning (ie actual violence and property damage) and the material that is being banned. In this regard, the broad definition of 'terrorist act' means that the legislation will exceed the scope of its stated aim, ie to protect the community.

At this juncture, we note also that the Parliamentary Joint Committee on Intelligence and Security (PJCIS), in its 'Review of Security and Counter Terrorism Legislation', has recommended that the definition of terrorist act be amended to remove the threat of terrorist acts.¹⁷ This was also recommended by the Scheller Committee in its inquiry into the Australian security legislation.¹⁸ We urge the Senate Legal and Constitutional Committee to consider the findings of those

¹³ Paragraph 100.1, Schedule 1, *Criminal Code Act 1995 (Cth)*

¹⁴ *ibid*

¹⁵ Justice McClellan, *Terrorism and the Law 2006* as cited in, Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* December 2006, 99 ('Security Legislation Review')

¹⁶ *News Release, ibid*

¹⁷ *Security Legislation Review* 62 *ibid*

¹⁸ As cited in *Security Legislation Review, ibid*

Committees with respect to the definition of 'terrorist act' before the term is imported wholesale into other legislation.

Definition of Advocates

The definition of 'advocates' is also unduly expansive. As noted above, the Bill proposes that the definition of advocates that is contained in the Criminal Code will be utilised in the Classification Act. This defines advocates to mean:

Action that

- directly or indirectly counsels or urges doing a terrorist act; or
- directly or indirectly provides instruction on doing a terrorist act; or
- directly praises doing a terrorist act where there is a risk that such praise might lead a person (regardless of his or her age or any mental impairment) to engage in a terrorist act.¹⁹

Firstly we note the criticisms of both the Sheller Committee and the Parliamentary Joint Committee on Intelligence and Security in relation to this definition. Both Committees expressed concern that the term 'risk' was too broad and suggests a 'mere chance'. While the Sheller Committee recommended repeal of that subsection altogether in the context of the Criminal Code, the PJCIS recommended that 'risk' be amended to 'substantial risk'.²⁰

The Federation is of the view that censoring material that merely advocates a terrorist act is entirely inappropriate, particularly where 'advocating' may involve simply praising the act or indirectly urging/counselling it. The definition of 'advocates', which would apply to terrorist acts, goes further than the definitions that apply to any other material relating to criminal activity by allowing for the censorship of material that praises terrorist acts. Furthermore, the proposed definition of 'terrorist act' is itself so broad that material praising a wide array of political acts (including the liberation and self-defence of people subject to foreign occupation or an oppressive government, for example) may be censored and not just material that the broader public finds abhorrent.

In a liberal democracy it is not desirable that to ban certain materials simply because they express praise for certain acts (however abhorrent those acts may seem to the broader public). It is the fundamental basis of any open, democratic society that its members be able to freely express their opinions, regardless of the content of those opinions. The above definition of 'advocates' and the consequent breadth of the proposed amendments would seriously jeopardise this fundamental precept.

Problems Created by these Broad Definitions

When used in combination, the terms 'advocates' and 'terrorist act' as defined in the Bill will create an exceedingly broad category of material that may be refused classification.

The Discussion Papers stated that '[i]t is intended that only material that advocates terrorist acts as strictly described would be refused classification'.²¹ Unfortunately however, as discussed above, the terms 'terrorist acts' and 'advocates' are not

¹⁹ Section 102.1(1A) *Criminal Code*, *ibid*

²⁰ *Security Legislation Review* 71 *ibid*

²¹ *The Discussion Paper* 2 *ibid*

'strictly described' at all. Implicitly acknowledging the breadth of those definitions, the Explanatory Memorandum has sought to clarify the types of material that would be unlikely to be refused classification under the proposed law.²² The Bill proposes that a publication, film or computer game would not be deemed to be advocating a terrorist act if it simply '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'.²³ Elaborating on that, the Explanatory Memorandum provides some examples of material that would not be refused classification, referring to 'investigative journalists' work, historical analyses, material that might appear to glorify war or battle (including 'factional' or fictional accounts of war, insurgency or resistance), satirical pieces and popular culture movies'.²⁴ In our view, however, the definition of 'terrorist act' is so broad that the Explanatory Memorandum and the Bill are necessarily at odds. This may be illustrated by examining the example of material glorifying war or battle. Clearly such material may have the effect of encouraging individuals to enlist in an army in order to become involved in war-time activities, activities which could fall within the current definition of 'terrorist act'. Such material therefore goes beyond merely 'depicting and describing', however, it will still attract the proposed Section 9A(3) exception on the basis that the depiction or description was mere as entertainment. Similarly patriotic battle movies, for example, might easily fall within the definition of material that 'advocates' a 'terrorist act' because of the breadth of the definitions relied upon. The question then arises, 'why should some materials be banned and others not, when both of them fall within the definitions in the Classification Scheme?'

In our view, the Explanatory Memorandum does not provide the answer to this question. Whereas the definitions proposed in the Bill are broad and may include many things, the Explanatory Memorandum refers to the terms as if they were limited, so that a list of what does not fall within them can be clearly articulated. In our view, this is an inconsistency between the Explanatory Memorandum and the proposed head legislation that is unacceptable. The proposed legislation should clearly reflect the scope of the powers being conferred. It is unacceptable and imprudent to make the legislation inordinately broad and then seek to clarify it via an Explanatory Memorandum that simply contains a short list of subjectively-determined examples. If approached in this way, the proposed amendments will only create more uncertainty and will give rise to the possibility of legislative over-reach. Furthermore, the question 'why should some materials be banned and others not, when both of them fall within the definitions in the Act?' will remain unanswered.

We provide the following example, by way of illustration. It is clear to us and to those who prepared the Discussion Paper that a necessary result of the proposed amendments is that some Australian Defence Force (ADF) materials and government materials relating to national defence would fall within the scope of the definition of material advocating a terrorist act. For example, any material that

²² Paragraph 12, Explanatory Memorandum, Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007, ('Explanatory Memorandum') available at <http://www.parlinfoweb.aph.gov.au> at 28 June 2007

²³ Item 3 (Section 9A(3)), Schedule 1 – Amendments, *The Bill*, *ibid*

²⁴ Paragraph 12, *Explanatory Memorandum*, *ibid*

advocates for Australia's involvement in the war in Iraq will fall within the definition of material advocating a terrorist act. Any material which urges citizens to join Australia's armed forces is effectively advocating a terrorist act given that Australia is currently participating in the war in Iraq. In recognition of these logical conclusions, the Discussion Paper has suggested that terrorist act 'would not include action legitimately taken by the armed forces of a country on the international stage in accordance with what they perceive to be their national interests and international law'.²⁵ Even though many ADF and government materials could fall within the definition of 'advocates the doing of a terrorist act', clearly they will not be 'refused classification' because they are state-sanctioned and would be deemed to be part of 'public discussion'. This kind of inconsistency is fundamentally counter-democratic. Due to the definitions of 'terrorist act' and 'advocates', two sets of material may equally fall within the scope of the Classification Scheme and one will be censored simply because it is not state-sanctioned. By this reasoning, for example, the materials of the African National Congress in South Africa in fighting apartheid would be subject to censorship under the Bill whereas materials produced by the apartheid South African government would not.

The Federation is fundamentally opposed to legislation that opens the door to political censorship in this way. We are opposed to unnecessary incursions into free speech and civil liberties, particularly where they impinge upon political expression. As a result of the broad definitions proposed for 'advocates' and 'terrorist act', if the Bill is passed it may give rise to situations where political censorship occurs in relation to material that is politically and/or socially controversial. In our submission, this kind of politicised censorship has no place in a modern, democratic context.

At this juncture we note also that the exception relating to descriptions and depictions that are part of 'public discussion' seems to be an exception that could encompass most material that is involved in the classification process.²⁶ Surely most material that is not produced for entertainment is produced for public consideration and discussion. In this regard, there is a distinct possibility that this exception renders the Bill itself incapable of operation.

Exception Relating to Entertainment and 'Popular Culture'

As indicated in the Explanatory Memorandum, under the proposed Bill 'popular culture movies' that would otherwise fall within the definition of 'advocating the doing of a terrorist act' will not be refused classification. Presumably this is because they fall within the Bill's exception for material that is done as entertainment. It is unclear, however, why 'popular culture movies' that advocate terrorist acts should be allowed classification whilst other material which similarly advocates terrorist acts should be banned. It is also unclear why material for entertainment that also advocates the doing of a terrorist act should be the subject of a special exception. Surely if the concern being addressed by this Bill is the fact that certain material advocates terrorist acts, logically all material that has this effect should be refused classification, regardless of whether it is intended to

²⁵ Ibid 6

²⁶ Item 3, Section 9A(3), *The Bill*, *ibid*.

entertain or not. The Bill and Explanatory Memorandum do not provide any criteria or further detail to explain the distinction that is being drawn here. We can only assume, therefore, that the only basis for this is that some materials are state-sanctioned and others are not. As noted above, the Federation is fundamentally opposed to legislation that involves political censorship in this way.

Furthermore, given the broad definitions relied upon, we do not accept that Attorney-General's remark that the Bill 'will not impinge of freedom of speech'.²⁷ While the Attorney-General suggests that the Bill 'is not intended to restrict the genuine and legitimate exercise of freedom of speech', clearly the effect of the Bill will be just that.²⁸ While the Bill has sought to protect 'mainstream popular culture', it offers no such protection for material that is not 'mainstream' or 'popular'. The broad definitions relied upon mean that an exceedingly wide range of material would fall within the scope of the Bill. The factor which will determine which material is refused classification appears to hinge on some consideration of what is 'popular' or not. Allowing circulation of material that has broad popularity, while banning other material simply because it is less popular is not, in our view, a sound basis for classification scheme. The tenet of 'freedom of speech' referred to by the Attorney-General historically and politically relates to protecting the freedom of people to say 'unpopular' things. The banning of non-popular material (as opposed to popular material) clearly impinges on freedom of speech. In this regard the Bill is disturbingly undemocratic.

Proportionality

Its reliance on such broad definitions means that the proposed legislative amendment is disproportionate to its aims.

As discussed above, the proposed definitions of 'advocates' and 'terrorist act' are so broad that they may encompass a wide range of political, ideological and religious material. While the legislation appears to be aimed at restricting circulation of a particular kind of material (as indicated in the Explanatory Memorandum and Second Reading Speech), it may in fact open the door to more far-reaching restrictions. In this regard, the proposed legislation is not proportionate.

Proposed legislation must also be proportionate to the problem posed by such material in our domestic context. In that regard, while the issue of politically and religiously motivated violence may be a highly pressing concern in the global context, any domestic legislative response must be proportionate to the risk of such activity occurring in Australia. In light of the level of the threat of terrorist activity currently occurring in Australia, we believe that the proposal represents an inordinate curtailment of civil liberties – that is, a disproportionate response. As discussed elsewhere in this submission, the proposal does represent a departure from fundamental legal and democratic principles. In our view, it is a disproportionate departure.

²⁷ *Second Reading Speech*, *ibid*

²⁸ *Ibid*

Constitutionality

The Federation is also concerned that the proposed amendments may be unconstitutional. While the work we do does not make us experts in constitutional law, we do regard the Bill as raising questions around the issue of freedom of political communications.²⁹ As found by the majority in *Lange v ABC*, laws enacted to satisfy some legitimate end are not invalidated by the principle of freedom of political communication implicit in the Australian Constitution (as previously established by the High Court).³⁰ The majority stated, however, that these laws must satisfy two conditions so as not to be invalidated:

*One, that the law is compatible with the maintenance of the constitutionally prescribed system of representative government and two, that the law is reasonable appropriate and adapted to achieving that legitimate object or end.*³¹

In our view, the Bill represents an excessive incursion into the freedom of political communication. While proposing to restrict a certain type of material, it in fact addresses itself to a much broader category of materials because of the broad definitions relied upon. It is, therefore, not reasonably appropriate and adapted to achieving its stated aims and may be invalidated due to the implied freedom of political communication.

International Human Rights

One of our key concerns regarding the Bill is its capacity to suppress freedom of political and religious expression. The definition of 'terrorist act', insofar as it requires political, religious or ideological aims, means that this amendment has the capacity to unduly limit people's freedom of religious and political expression.

We are therefore also concerned that these provisions are inconsistent with Australia's international obligations under the *International Covenant on Civil and Political Rights* ('ICCPR').³² The ICCPR was ratified by Australia in 1972 and comprises Schedule 2 of the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*. Most notably the Bill is inconsistent with those obligations relating to freedom of expression as contained in Article 19(2). Article 19(2) provides that:

Everyone shall have the right to freedom of expression; this right shall include the 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 [sic] choice.³³

This Article is subject to the qualification that it may be subject to certain restrictions where those restrictions are provided by law and are necessary:

- (a) For the respect of the rights or reputations of others;

²⁹ See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanus v Herald and Weekly Times Ltd* (1994) 182 CLR 104

³⁰ *Lange v ABC* (1997) 189 CLR 520

³¹ *Ibid*

³² *International Covenant on Civil and Political Rights* (ICCPR). Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, in accordance with Article 49 (ICCPR).

³³ *Ibid*

- (b) For the protection of national security or of public order (ordre public) or of public health or morals.³⁴

We submit that the proposed amendments are not consistent with the right to freedom of expression, even taking into account the qualification relating to national security. In our view, the proposed amendments will place a greater restriction on the right to freedom of association than is necessary in a democratic society to maintain national security. The restriction is greater than necessary particularly in light of the expansive definitions of ‘terrorist act’ and ‘advocates’ which create a very large category of material that may be refused classification. In our view, therefore, the censorship being proposed goes well beyond that which would be acceptable under the ICCPR.

Consistency with Principles of Classification Scheme

As referred to above, the Classification Code states at Clause 1 that the following principles must underpin classification decisions:

- (a) that adults should be able to read, hear and see what they want;
- (b) minors should be protected from material likely to harm or disturb them;
- (c) everyone should be protected from exposure to unsolicited material that they find offensive
- (d) the need to take account of community concerns about:
 - (i) depictions that condone or incite violence, particularly sexual violence; and
 - (ii) the portrayal of person in a demeaning manner.³⁵

Clause 1 suggests that while it is a general principle that adults should be able to read, hear and see what they want, where principles (b), (c) and (d) come into play, that general principle may be restricted. As the Bill relies on very broad definitions of ‘advocates’ and ‘terrorist act’ it allows for censorship of material that does not fall within the scope of principles (b), (c) and (d). By proposing to refuse classification to material that does not necessarily fall within the scope of principles (b), (c) and (d), the proposed amendments are not consistent with the principles espoused in the Code.

Discriminatory Application

A further concern is that the definition of ‘terrorist act’ necessarily relates to politically, religiously and ideologically motivated acts only. In the context of the Classification Scheme, this means that the definition is particularly prone to being applied in a way that suppresses material related to particular kinds of political dissent, certain religious views and some ideological causes.

The Discussion Paper is itself an indication of this issue. In the discussion paper, the two examples of material that would fall within the definition of material that advocates terrorist acts, related to material published by a ‘fundamentalist religious organisation’ and material distributed at ‘a cultural festival’.³⁶ This is re-emphasised in the Explanatory Memorandum which refers only to ‘mainstream popular culture’ as being the subject of an exception in the Bill - the corollary of this being, that

³⁴ Ibid

³⁵ Clause 1, *Classification Code*

³⁶ *The Discussion Paper* ibid 3

anything that is not religiously or ethnically 'mainstream' will be more open to being refused classification.³⁷ Although the definition of 'terrorist act' is extremely broad, the focus is clearly on non-mainstream religion and non-Anglo ethnicity when looking at the source of 'terrorist acts'. In our experience conducting community legal education and casework with culturally and linguistically diverse communities, these communities are inordinately targeted by counter-terrorism legislation and policing. In particular, Islamic communities have disproportionately borne the brunt of security measures. For example, all but one of the 19 organisations that have been listed as terrorist organisations in Australia are Islamic organisations. Up until recently, all of those people charged with terrorism offences have been Islamic.

Given the political and media environment which readily links terrorism with Islam, there is a real concern that material produced by Islamic groups is more likely to be viewed as submittable material than material produced by non-Islamic groups. Once submitted for classification, there is also a great risk that material relating to Islam will be more like to be assessed as advocating the doing of terrorist acts. The current political and media climate is such that an Islamic publication discussing terrorist acts is more like to be viewed as advocating those acts than a similar non-Islamic publication.

The Classification process exacerbates this concern. While all films, videos and DVD's for public screening, hire or sale must be classified, publications only need to be classified where they are 'submittable' publications. Currently, a submittable publication is one that is likely to be restricted to adults because it

- contains depictions or descriptions likely to cause offence to a reasonable adult;
- is unsuitable for a minor to see or read; or
- it is likely to be refused classification.

The Bill proposes to add consideration of the proposed section 9A to the definition of 'submittable publication'. This means that material which potentially 'advocates the doing of a terrorist act' will fall within the definition of 'submittable publication'.

As suggested in the Discussion Paper, the standard requirements and procedures for classification will apply and therefore publishers and distributors of material that falls within the definition of a 'submittable publication' will need to apply to the Classification Board for classification of their material. We are concerned, that materials relating to Islam and terrorism will be more likely to be viewed as 'submittable publications' from the outset because of their Islamic links and because of the links currently drawn between Islam and terrorism in many circles. In this way, Islamic publications will be more likely to attract the classification process than non-Islamic publications.

While at present we raise these concerns in relation to Muslim communities, we are also concerned that these issues may extend to other non-Anglo ethnic and religious groups as time goes on. For example, the Tamil and Somali communities have recently become the focus of counter-terrorism policing and the Kurdish community affected by the listing of the Kurdistan Workers' Party as a terrorist organisation.

³⁷ *Explanatory Memorandum*, *ibid.*

In our view, it is entirely unacceptable that materials produced by one community group would be censored more than those produced by another, particularly where this censorship takes place along religious or ethnic lines.

Conclusion

The Federation's views regarding the Bill may be summarised as follows:

- We submit that the existing Classification Scheme is sufficient to deal with material relating to terrorism.
- We argue that the Bill will not address the issue of community safety from terrorism or even material advocating terrorism.
- We submit that the definitions of 'terrorist act' and 'advocates' are too broad and therefore are inappropriate in the context of the Classification Scheme. We argue that the scope of the Bill is not commensurate with community concerns because the proposed definition of 'terrorist act' goes beyond commonly accepted notions of terrorism.
- We submit that the definitions of 'terrorist act' and 'advocates' are too broad and therefore inappropriate in the context of the Classification Scheme.
- We argue that as a result of these broad definitions, the Bill represents an unjustified incursion into civil liberties and fundamental democratic principles.
- We submit that the Bill's inclusion of an exception relating to entertainment and popular culture is without logical basis and is also indicative of the fundamentally undemocratic nature of the Bill.
- We raise the concern that the proposed legislative amendments will in fact be unconstitutional.
- We raise the concern that the proposed legislative amendments are inconsistent with Australia's international human rights obligations.
- We raise the question of whether the proposed amendments are even consistent with the principles espoused in the Classification Code itself.
- And finally, we are concerned that the Classification Scheme will be applied in a discriminatory manner or to suppress political dissent. The very broad definition of terrorist act relied upon contributes to the scope of discriminatory application.

Given these very serious concerns, the Federation does not support the Bill and we strongly urge the Senate Standing Committee on Legal and Constitutional Affairs to recommend that the Bill not be passed as law.