



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

Senate Standing Committee on Legal and Constitutional
Affairs

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GPO Box 1989, Canberra,
ACT 2601, DX 5719 Canberra

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

19 Torrens St Braddon ACT 2612
www.lawcouncil.asn.au

Table of Contents

Introduction.....	3
Failure to Demonstrate a Need for the Amendments.....	4
Confusion over the Implications of the Amendments.....	7
Use of Ambiguous and Broad Definitions.....	10
Subverting the Cooperative National Classification Scheme by Circumventing the Classification Code.....	12

Introduction

Under section 9 of the Classification (Publications, Films and Computer Games) Act 1995 ("the Classification Act") publications, films and computer games must be classified in accordance with the National Classification Code and Guidelines. The National Classification Code in turn provides that certain types of publications, films and computer games must be refused classification. Materials which fall into this "refused classification" category are effectively banned in that under State and Territory laws it is prohibited to sell, distribute or publicly exhibit materials which have been refused classification.

The current provisions of the Classification Code provide that material must be refused classification if, amongst other things, it promotes, incites or instructs in matters of crime or violence.

On 1 May 2007, the Attorney General's Department released a Discussion Paper which outlined proposed amendments to the Classification Code and the Classification Guidelines. The amendments proposed in the Discussion Paper were premised on the assertion that the existing grounds for refusing classification are not sufficiently clear to ensure that material which "advocates the doing of a terrorist act" is denied classification.

The existing grounds for refusing classification were claimed to be inadequate notwithstanding an acknowledgement that a terrorist act is both a matter of crime and of violence and as such material which promotes or incites the commission of such an act or provides instruction on its commission must already be refused classification.

The specific changes suggested in the Discussion Paper were an amendment to the Classification Code to add a new and distinct ground for refusing classification for material that advocates the doing of a terrorist act and amendments to the relevant Classification Guidelines to define the terms "advocates" and "terrorist act" in terms which mirror the Commonwealth Criminal Code.

The classification scheme is a cooperative national scheme. Amending the Classification Code and Guidelines requires the cooperation and agreement of the states and territories.¹ Anticipating that such cooperation is unlikely to be secured, the Commonwealth Attorney-General has introduced the current Bill. It is designed to achieve the same reforms as those proposed in the Discussion Paper, but by way of direct amendment to the Classification (Publications, Films and Computer Games) Act 1995 ("the Act").

Under the provisions proposed in the Bill, even before material is assessed according to the requirements of the Classification Code and Guidelines, it must be refused classification under section 9A(1) of the Act if it "advocates the doing of a terrorist act".

As suggested in the initial Discussion Paper, the Bill's key terms are defined consistently with provisions of the Criminal Code.

Under section 9A(2) material will be regarded as "advocating" the doing of a terrorist act if :

¹ See ss6 and 12 of the Classification Act

- (a) *It directly or indirectly counsels or urges doing a terrorist act; or*
- (b) *It directly or indirectly provides instruction on doing a terrorist act; or*
- (c) *It 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."*

Section 9A(3) purports to limit this definition by providing that material will not be regarded as advocating the doing of a terrorist attack if it depicts or directly describes a terrorist act but the depiction or description could reasonably be considered to have been done merely as part of public discussion or debate or as entertainment or satire.

Section 9A(4) provides that "terrorist act" has the meaning given by section 100.1 of the *Criminal Code*.

The Law Council has the same concerns with the current Bill as it did with the proposal contained in the initial Discussion Paper. In particular the Law Council believes that:

- no need for the proposed amendments has been demonstrated;
- the intended implications of the amendments are unclear and have not been plainly and consistently stated; and
- the amendments seek to rely on definitions used in the Criminal Code which have already been the subject of substantial criticism because they are overly broad and vague.

For those reasons, the Law Council believes that the Bill should not proceed.

Failure to Demonstrate a Need for the Amendments

Neither the Second Reading Speech nor the Explanatory Memorandum (EM) makes any positive case for why the expansion of Australia's classification regime is necessary. The closest the Second Reading Speech comes to addressing the question of necessity is as follows:

"The Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007 improves the ability of our laws to prevent the circulation of material which advocates the doing of terrorist acts.

This is a serious issue. Currently there is too much uncertainty around whether the existing classification laws adequately capture such material. This material should not be legally available in Australia.

...

This bill will improve the ability of our laws to prevent the circulation of material which advocates the doing of terrorist acts. Classification laws need to be better able to ensure that such material is not available in Australia."

Neither the Second Reading Speech nor the EM even make mention of the existing grounds for refusing classification to material if it "promotes, incites or instructs in matters of crime or violence", let alone attempt to explain why those existing grounds

are inadequate or insufficiently clear. No information is provided to explain the assertion that the Bill represents an improvement to the current classification regime.

The Second Reading Speech proceeds on the basis that the legislative amendments to the Classification Act are necessary because the States have not yet volunteered their agreement to achieve the intended reforms by other means, namely through amendments to the Classification Code and Guidelines. Almost half the Second Reading Speech is dedicated to this topic.

The Law Council believes that the Attorney-General ought to have first explained to the Parliament why it was necessary for the amendments to proceed, before addressing in detail why, politically, it was necessary to proceed by a certain course.

Demonstrating that the amendments are necessary is not just about good practice and the maintenance of legislative standards. To the extent that the amendments involve expanding restrictions on freedom of expression, establishing their necessity is also required to ensure compliance with Australia's obligations under international law.

Article 19(3) of the International Covenant on Civil and Political Rights requires that any restrictions governments impose on freedom of expression must be *necessary* :

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order or of public health or morals.

With the current level of information provided in the Second Reading Speech and EM about the operation of the existing classification regime and the intended effect of the proposed amendments, the Law Council believes that members of parliament could not possibly satisfy themselves that the proposed amendments are *necessary* in the manner required by international law.

For example, the Law Council believes that members of parliament have been given insufficient information to answer the following critical questions:

- are the current provisions directed at materials that promote, incite or instruct on matters of crime or violence insufficient to prohibit the distribution of materials which are likely to increase the risk of a terrorist act?
- If so, in what way are the current provisions insufficient? What type of material do they allow to be published which the Government claims it is necessary to ban?
- Is it in fact necessary to ban this additional material for the protection of national security and/or the respect of other rights? Would the banning of such material actually serve to decrease the risk of a terrorist act and how?
- Are the proposed amendments appropriately targeted at banning this type of material – that is, are the parameters of the type of material targeted clearly defined and are those parameters as narrowly drawn as possible? Or are the proposed amendments so broad or so discretionary that they unduly burden public debate in a manner which is fundamentally incompatible with freedom of expression?

Like the Second Reading Speech and EM, the initial Discussion Paper also failed to yield any satisfactory answers to these critical questions.

The Discussion Paper did not provide details of any particular cases where problematic materials regarded as "advocating terrorist acts" have received classification either at first instance or on review under the current classification regime.

Likewise the Discussion Paper was unable to offer a single clear example of material which would not be considered to promote, incite or instruct in matters of crime or violence but which should be banned on the basis that it advocates the doing of a terrorist act.

Instead the Discussion Paper offered vague references to the types of material which may not be presently covered by the Classification Code but which would be covered if the proposed changes are made.

For example, the Discussion Paper asserted that material which directly praises an act of terrorism *might* not be regarded as promoting or inciting violence, even though it carries a risk that a person who reads or views such material might be influenced to commit a similar act.

It was not explained in the Discussion Paper why such material would not qualify as "promoting crime or violence". It was simply stated that it was not clear that it would be covered.

The Law Council submitted that under *both* the current provisions and the proposed provisions, praise for an act of crime or violence might lead to a refusal to provide classification. The difference being that under the current provision the critical question will be whether the "praise" is such that it promotes or incites crime or violence while under the proposed provisions the critical question will be whether the "praise" creates the mere risk that a person (regardless of his or her age or any mental impairment) might be influenced to commit a terrorist attack.

The Discussion Paper did not explore the practical implications of the differences between these two threshold tests in terms of what material currently not covered would be covered if the amendments were passed.

The Law Council believes that the test currently in place is already both appropriate and sufficient for ensuring that materials with a real potential to increase the risk of a terrorist act are denied classification.

As a further example, the Discussion Paper also asserted that material which through its words and/or tone, *indirectly* counsels, urges or provides instruction on the commission of a terrorist act, may not be regarded as promoting, inciting or instructing in matters of crime or violence even though it somehow encourages terrorism.

According to the Discussion Paper material may operate in this *indirect* manner through its "inspirational tone or exhortations" even when it does not expressly praise or urge anyone to undertake a terrorist action.

Without proper explanation, and the benefit of some actual cases, it is difficult to comprehend what is envisaged by material that, through its words or tone, *indirectly* counsels or urges the commission of an act of terrorism but falls short of promoting or inciting violence.

The Law Council questions how it is anticipated that decision makers will identify such material with any precision or consistency.

The Law Council submitted in its response to the Discussion Paper that in order to apply these vague terms, decision makers would inevitably have to have reference to contextual factors. Lest the terms be applied too broadly or in a discriminatory manner, the Law Council expressed the hope that decision makers would still ultimately find themselves engaged in considering whether the material, *in all the relevant circumstances*, promotes or incites violence.

The Law Council's full response to the Discussion Paper is attached at Appendix 1.

Responses to the Discussion Paper received from many other organisations indicate that the Law Council was far from alone in failing to comprehend the necessity for the proposed changes.

For example, the Human Rights and Equal Opportunity Commission (HREOC), which is tasked with advising the Commonwealth Government and Parliament on its human rights obligations, recommended that the proposal be reconsidered on the basis that:

"HREOC is not convinced of the necessity for tighter censorship laws in order to combat incitement and/or glorification of terrorism."

Recommendation 1: Until it is demonstrated, with reference to concrete examples, why the amendments are necessary, the Bill should not proceed.

Confusion over the Implications of the Amendments

As a consequence of failing to explain why the amendments to the current classification regime are a necessary and proportionate measure, the Second Reading Speech and EM also fail to explain precisely how the amendments will operate.

At least two key questions are raised but left unanswered by the Bill, leaving decision-makers in a difficult position.

- 1. Does the Bill require decision-makers to take into account the young and mentally impaired in the community more so than at present?**

According to Paragraph (c) of the definition of "advocates" adopted by the Bill, material advocates the doing of a terrorist act if:

It 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.

This definition suggests that material must be assessed according to how it might be understood and acted upon by *any* person, not necessarily an ordinary or reasonable member of its intended or likely audience. In fact, the EM states that paragraph (c) of the definition of terrorism is specifically "intended to capture material that has the capacity to lead the impressionable to engage in a terrorist act."

In a departure from usual practice, this 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.

On the contrary, however, the EM states that "the amendment is not intended to exclude from the Boards' consideration the matters in section 11 of the Act". One of these matters is "the persons or class of persons to or amongst whom [the material] is published or is intended or likely to be published."

The Law Council suggests that the amendments send contradictory messages to decision makers which are likely to increase, rather than reduce, uncertainty about the criteria to be applied in assessing material submitted for classification.

The Law Council believes that assessing material on the basis of how it might be received and understood by the most suggestible or disturbed members of the community, even where it is not specifically designed to target or play upon their vulnerabilities, is unnecessarily restrictive. The ability of people to participate in public debate, both by receiving and imparting information, should not be unduly circumscribed by prohibitions based on speculation about how irrational actors *may* respond to certain material.

Recommendation 2: If the Bill proceeds, subsection 9A(2)(c) should be amended to remove the phrase "regardless of his or her age or mental impairment". Instead the section should clarify that decision makers should assess the likely impact of the material based on the persons or class of persons to or amongst whom it is published or is intended or likely to be published.

2. Should decision-makers focus only on the possible effect of the material, inadvertent or otherwise, or on the intent of its creator?

The Bill sends mixed messages to decision makers about whether material should be assessed based on the intentions of its creator or whether it should be assessed according to how it *might* be interpreted by any member of the public.

As noted above, subsection 9A(2)(c) of the definition of advocacy appears to indicate that the decision maker must focus upon how people (including children and the mentally impaired) might receive and act upon information, irrespective of its intended impact, of which no mention is made.

Subsection 9A(2)(a) of the definition of advocacy which deals with the *indirect* counseling or urging of a terrorist act, by its nature, suggests that decision makers ought not to focus on the creator's intended (or direct) purpose of the publication but on the possible subsidiary effect that the material might have on a person exposed to it.

This emphasis on the inadvertent potential consequences of published materials is echoed in the EM which explains that "*the definition [of advocates] recognizes that some communications about doing a terrorist act are inherently dangerous because they could inspire a person to cause harm to the community. This could be the case where it may not be possible to show a person had any intention that a specific terrorism offence be committed or to communicate the material to any particular person*".

On the other hand subsection 9A(3) suggests that the creator's intention, rather than speculation about what the material might inspire, is of overriding importance. That subsection provides that material will not be regarded as advocating the doing of a terrorist attack if it depicts or directly describes a terrorist act but the depiction or description could reasonably be considered to **have been done** merely as part of public discussion or debate or as entertainment or satire.

It is very difficult to see how these concepts can be reconciled. On the one hand, decision makers are instructed to consider how material might be received and interpreted by the most impressionable and to decide whether the material is potentially 'dangerous' on that basis. On the other hand, decision makers are instructed that, if the material was produced with the intention of participating in public discussion or debate or as entertainment or satire, then any inadvertent impact is immaterial.

The EM offers no real guidance to decision makers. It assumes that there is a clear and obvious distinction to be drawn between a legitimate contribution to the public debate and material which might be construed, for example, as praise for the doing of a terrorist act. The EM provides that:

"[Subsection 9A(3)] clarifies that material, which does no more than contribute to public discussion or debate or provide entertainment or satirical comment, is not material which should be classified as RC under this provision. Examples could include 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. On the other hand, material containing content which goes further and advocates the doing of terrorist acts, for example by directly praising terrorist acts in circumstances where there was a risk of leading a person to do similar, runs the risk of inspiring someone to commit a terrorist act. Such material would be required to be classified RC."

This explanation is nonsensical. In effect the EM states that material, which does no more than contribute to public discussion or debate or provide entertainment or satirical comment, is not material that advocates the doing of a terrorist act unless it goes further and advocates the doing of a terrorist act.

In its response to the initial Discussion Paper HREOC noted that "a way of ensuring that legislation in this area is carefully targeted and proportionate, is to expressly require both the specific intent to incite the commission of a terrorist act and a concrete danger of this act being committed as a result of the incitement"

Of course material which fulfilled those criteria would already be covered by the current provisions of the Classification Code.

Nonetheless, the Law Council recommends as follows:

Recommendation 3: If the Bill proceeds, the Law Council recommends that the definition of "advocates" provided in subsection 9A(2) should be amended to require that the consequences described in paragraphs (a) to (c) are intended or might reasonably be regarded as intended by the creator of the material.

Use of Ambiguous and Broad Definitions

The proposed amendments seek to rely on definitions used in the Criminal Code which have already been the subject of substantial criticism.

For example, the Government appointed Security Legislation Review Committee (SLRC), the Parliamentary Joint Committee on Intelligence and Security (PJCIS) and the Senate Legal and Constitutional Affairs Committee have all recommended the amendment of section 102.1(1A) of the Criminal Code which, like the proposed amendments, currently defines "advocates" as follows:

*"102.1(1A) in this Division, an organization **advocates** the doing of a terrorist act if:*

- (a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or*
- (b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or*
- (c) the organisation 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 that the person might suffer) to engage in a terrorist act."*

All three Committees recommended that, at the very least, paragraph (c) of the definition should be amended to require a **substantial** risk that the praise might lead someone to engage in terrorism.

The SLRC in fact recommended that the better course would be to delete paragraph (c) all together.

When the PJCIS considered the definition in December 2006, it concluded that it did not support the complete repeal of paragraph (c) of the definition, but indicated that it would review the issue again in 2007.

The definition was also reviewed by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. He noted that *"there is a legitimate need to suppress the incitement of international terrorism."* However, he also expressed concern that *"(i)n defining "advocacy", section 102.1 (1A) (c) of the Criminal Code Act 1995 includes what might be described as the glorification of terrorism. The Special Rapporteur considers that this definition lacks sufficient precision and has the potential to cover statements which, in a very generalized or abstract way, somehow support, justify or condone terrorism."*

While all these comments and recommendations were made in the context of reviewing the grounds for proscribing an organisation as a terrorist organisation, they remain relevant to the current proposal. A definition which has been described as "lack(ing) sufficient precision" and which has been subject to calls for amendment, including from parliamentary committees, should not be copied into further legislation.

The Second Reading Speech asserts that the amendments are designed to address "uncertainty" in the current regime and yet they adopt concepts from the Criminal Code which have been criticised precisely because they are inherently and unfairly ambiguous. In that way, the proposed amendments appear more likely to increase the level of uncertainty surrounding the classification process rather than introduce consistency and clarity.

The Criminal Code definition of a "terrorist act" has also been subject to significant debate and review

The UN Special Rapporteur made the following comments about the current definition:

"The Special Rapporteur takes the view that Australia's definition of a "terrorist act" goes beyond the Security Council's characterization:

(a) By including acts the commission of which go beyond an intention of causing death or serious bodily injury, or the taking of hostages (see sections 100.1 (3) (b) (iii) and 100.1 (3) (b) (iv)); and

(b) By including acts not defined in the international conventions and protocols relating to terrorism (see sections 100.1 (2) (b), (d), (e) and (f)).

The latter aspects of Australia's definition of "terrorist acts" clearly include criminal activity, such as the interference with an information system with the intent to create a serious risk to the safety of the public (through the combination of sections 100.1 (2) (f) (1) and 100.1 (3) (b) (iv)).

The Special Rapporteur takes the view, however, that although it is permissible to criminalize such conduct it should not be brought within a framework of legislation intended to counter international terrorism unless that conduct is accompanied by an intention to cause death or serious bodily injury.

The Government of Australia reports that Australia has been identified by jihadist groups as a terrorist target and that authorities consider that a terrorist attack within Australia could well occur, possibly without notice, thus assessing the level of alert as "medium" (a terrorist act could occur).

To go beyond the cumulative restrictions of resolution 1566 (2004), however, there must be a rational link between threats faced by Australia and the types of conduct proscribed in its legislation that go beyond proscriptions within the universal terrorism-related conventions. Australia must clearly distinguish terrorist conduct from ordinary criminal conduct.

It is also relevant to note that the definition of a terrorist act includes not just action on the part of a person, but also a "threat of action" (sect. 101.1 (1)). The Special Rapporteur calls for caution in this respect, in order to ensure compliance with the requirements of legality."

The SLRC recommended that:

- the definition of a "terrorist act" should be amended to expand the concept of harm to include psychological harm; and
- the reference to "threat of action" and other references to "threat" should be removed from the definition of "terrorist act". (The SLRC recommended that a separate criminal offence should be created to cover threats to commit an act of terrorism.)

The PJCIS did not agree with the SLRC that the definition of a terrorist act should be amended to include psychological harm. However, the PJCIS did recommend that the threat of a terrorist act be removed from the definition and made the subject of a separate offence.

The PJCIS also recommended that the definition "be amended to include a provision or a note that expressly excludes conduct regulated by the law of armed conflict."

In its response to the Discussion Paper the Law Council recommended that, in view of perceived problems with the definitions of "advocates" and "terrorist act" as currently formulated in the Criminal Code, those definitions 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.

Ultimately the Law Council believes that the clearer and more appropriate threshold question for whether material should be refused classification is, as at present, whether it promotes, incites or instructs in matters of crime or violence.

Subverting the Cooperative National Classification Scheme by Circumventing the Classification Code

The need for classification laws throughout Australia to be uniform in order to be effective and efficient was identified as early as 1928 by the *Royal Commission on the Moving Picture Industry in Australia*. Nonetheless, a cooperative national scheme took decades to negotiate and was not finally agreed upon and put in place until 1996. According to information on the Commonwealth Government's classification website the scheme has been highly successful. In a document titled "*History of the cooperative national scheme for the classification of films in Australia*" it is claimed:

*Once the national classification scheme commenced on 1 January 1996, evidence indicated the national scheme was superior to all previous schemes, with uniformity in legislation, classification standards and fees that provide the community and industry with reliable and timely classification services and information. The regulatory burden on industry is at a minimum and classification information is consistent for consumers across the country.*²

The Law Council believes that the Parliament should be loathe to abandon, or at the very least, jeopardise this cooperative national scheme, by using the Classification Act to circumvent the nationally agreed standards in the Classification Code. The success of negotiated national schemes in Australia's federal system is contingent on jurisdictions not withdrawing their support or simply "going it alone" whenever their preferred view does not prevail.

The Law Council believes that the Parliament should be particularly reticent to subvert the intended operation of the scheme in order to give effect to reforms which have not been shown to be necessary.

² See: <http://www.classification.gov.au/resource.html?resource=859&filename=859.pdf>

The Law Council also draws the Committee's attention to the fact that classification decisions made pursuant to the Classification Code, must give effect, as far as possible, to the following principles:

- (a) 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 persons in a demeaning manner.

The Law Council believes that these principles provide an appropriate framework within which to evaluate materials submitted for classification. The Law Council believes that the first principle, in particular, is the appropriate starting point for decision-makers.

The Law Council is concerned that decisions made under the provisions introduced under the Bill will be made in isolation. They will not be made under the Classification Code and therefore will not be guided and constrained by the above principles, nor will they be guided by the Classification Guidelines.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.

GPO Box 1989, Canberra,
ACT 2601, DX 5719 Canberra

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

19 Torrens St Braddon ACT 2612
www.lawcouncil.asn.au



Kerri-Ann Smith
Classification Review
Classification Policy Branch
Australian Attorney-General's Department
Robert Garran Offices
2-4 National Circuit
BARTON ACT 2600

classificationreview@ag.gov.au

Dear Ms Smith,

Law Council Response to Discussion Paper on Material That Advocates Terrorist Acts

On 1 May 2007, the Attorney General's Department released a discussion paper which outlined proposed amendments to the National Classification Code and the Classification Guidelines.

The amendments are designed to ensure that under the National Classification Code materials that "advocate terrorist acts" must be refused classification. The amendments are also designed to ensure that the words "advocates" and "terrorist act" are explained in the relevant Classification Guidelines in terms which mirror the Commonwealth Criminal Code.

Specifically it is proposed to define "advocates" as:

"action that:

- (a) directly or indirectly counsels or urges doing a terrorist act; or
- (b) directly or indirectly provides instruction on doing a terrorist act; or
- (c) 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."

It is proposed to define a "terrorist act" as:

"an action or threat of action that causes serious physical harm or death to a person, or endangers a person's life or involves serious risk to public health or safety, serious damage to property or serious interference with essential electronic systems. Such an action or threat of action must also be intended to advance a political, ideological or religious cause and to coerce or influence by intimidation an Australian or foreign government or intimidate the public or a section of the public. However, it does not include advocacy, protest, dissent or industrial action which is not intended to cause

serious harm, death, endangerment of life, or serious risk to the health or safety of the public.

Failure to explain the shortcomings of the current Code/Guidelines

Under State and Territory Laws it is prohibited to sell, distribute or publicly exhibit materials which have been refused classification.

Therefore, a decision to refuse classification has serious ramifications for freedom of expression. Material should only be denied classification if prohibiting its distribution is necessary and proportionate to the achievement of a clearly defined, legitimate objective. In this way, the classification process involves a weighing and balancing of different rights and interests.

At present under the National Classification Code the balance is struck as follows - material must be refused classification if, amongst other things:

- "it promotes, incites or instructs in matters of crime or violence"; or
- "it offends against the standards of morality, decency and propriety of a reasonable adult to the extent that [it] should not be classified."

The proposed amendments to the Classification Code and Guidelines are premised on the assertion that these existing provisions are not sufficiently clear to ensure that the Classification Board and the Classification Review Board will strike the correct balance with respect to material that advocates terrorist acts.

This lack of clarity is apparently manifest in:

- public concern about various material available as books, DVDs or on the internet;
- the differences of interpretation in Board decisions and Review Board decisions which overturn Board decisions applying the same criteria to the same material; and
- litigation in the Federal Court (for which judgment has yet to be handed down) over the interpretation of the phrase.

The discussion paper does not expand on any of these points or provide details of any particular cases where problematic materials regarded as "advocating terrorist acts" have received classification either at first instance or on review. This is both surprising and disappointing given that the alleged inadequacy of the existing provisions has apparently given rise to an *urgent* need for reform.

The failure to include and carefully discuss this type of crucial information significantly diminishes the value of public consultation on the proposed amendments. With any proposed change to the classification regime which might lead to greater censorship, the most important questions for consultation are:

- whether the change is necessary; and if so
- whether the proposed change would in fact properly address the shortcomings of the existing regime.

These questions can not be properly considered without detailed information about the operation of the existing regime.

The release of the discussion paper and reform proposals followed shortly after media reports that a DVD, in which Sheik Feiz Mohammed reportedly calls for the murder of infidels and describes Jews as "pigs", was given a PG rating by the Classification Board. There is no mention of the DVD and related decision or, if there is one, the appeal decision, in the discussion paper. If this case provided the impetus for the amendment proposals or even just for their accelerated consideration, then at the very least the details of this one case and the Board's decision should have been included.

Instead the discussion paper deals only in hypothetical scenarios.

The first example provided is of a hypothetical article, about an individual who has detonated a suicide bomb amidst a market place of civilian shoppers, in which the author directly praises the bomb's deadly effect on 'the enemy' and the bomber's consequent martyrdom and claims that the bomber will be assured a place in heaven.

It is asserted that material of this nature which directly praises an act of terrorism might not be regarded as promoting or inciting violence, even though it carries a risk that a person who reads or views such material might be influenced to commit a similar act.

It is not explained in the discussion paper why such material would not qualify as "promoting crime or violence" or as offending "against the standards of morality, decency and propriety of a reasonable adult". It is simply stated that it is not clear that it would be covered.

Under *both* the current provisions and the proposed provisions, praise for an act of crime or violence might lead to a refusal to provide classification. The difference is that under the current provision the critical question is whether the "praise" serves to promote or incite crime or violence while under the proposed provisions the critical question will be whether the "praise" creates the risk that a person (regardless of his or her age or any mental impairment) might be influenced to commit a terrorist attack.

The discussion paper should have properly explored the practical implications, if any, of the difference between these two questions.

Is the primary difference in the assessment of the audience, that is, will the young and mentally impaired in the community be taken into account more so than at present?

Is the primary difference that a greater emphasis will be placed on the possible effect of the material, inadvertent or otherwise, than on its intent?

Is the primary difference simply that the line is to be drawn at a different point on the spectrum? For example, will material be refused classification if it contains a description of a suicide bomber as a "brave martyr" or would it need to go further and describe the bomber as "brave martyr who is an example and inspiration to us all" or further still to describe him or her as a "brave martyr whose action has shown the way to all those who are really committed to {insert cause}". Which if any of these would have been captured under the current provisions and which would be captured under the proposed provisions?

The discussion paper does not address these issues.

The second hypothetical scenario included in the discussion paper refers to material distributed at a cultural festival which, through its words and/or tone, *indirectly* counsels, urges or provides instruction on the commission of a terrorist act.

According to the discussion paper material may operate in this *indirect* manner through its "inspirational tone or exhortations" even when it does not expressly praise or urge anyone to undertake a terrorist action. The discussion paper suggests that such material, under the current provisions, may not be regarded as promoting, inciting or instructing in matters of crime or violence even though it somehow encourages terrorism.

Without proper explanation, and the benefit of some actual cases, it is difficult to comprehend what is envisaged by material that, through its words or tone, *indirectly* counsels or urges the commission of an act of terrorism but falls short of promoting or inciting violence. It is particularly difficult to understand what material might fall within this category when the discussion paper emphasises that to be refused classification:

- "material would have to be specifically about advocating committing a terrorist act, not merely expressing generalised support for a cause" and
- not simply "patriotic material that might appear to glorify war."

Without understanding the type of additional material which might be captured by the amended provisions, it is not possible to assess whether the proposed changes are necessary and proportionate.

For example, the Law Council questions whether a recording of the classic hymn "We Stand for God" might be captured given that it includes lyrics such as:

"We stand for God and for His glory/The Lord Supreme and God of all/Against His foes we raise the standard/ Around the Cross we hear His call/To Thee we pledge our lives and service/For God we live, for God we'll die/...His law divine and truth unchanging/In this land our place must hold."?

Would the recording of the hymn only be regarded as indirectly counselling or urging an act of terrorism if sung in the wrong tone or if intended for an aggrieved audience with a propensity for violent martyrdom?

If it does depend on these contextual factors, the Law Council questions how the proposed changes deliver greater certainty. Will the Classification Board or Classification Review Board still essentially be engaged in considering whether the material, in all the circumstances, promotes or incites violence? If so, what would be wrong with that? Why is that not the appropriate question?

All of these unanswered questions serve to emphasise that, due to the cursory nature of the discussion paper, the Law Council is unable to form a view on the need for and appropriateness of the proposed changes. From the information provided in the discussion paper it is not possible to discern whether or how the current Classification Code has allowed materials to be classified and distributed which increase the likelihood of a terrorist act. At face value, the existing Classification Code appears to offer ample scope for refusing to classify problematic materials.

Reliance on Criminal Code Definitions

The proposed amendments seek to rely on definitions used in the Criminal Code which have already been the subject of substantial criticism.

For example, the Government appointed Security Legislation Review Committee (SLRC), the Parliamentary Joint Committee on Intelligence and Security (PJCIS) and the Senate Legal and Constitutional Affairs Committee have all recommended the amendment of section 102.1(1A) of the Criminal Code which currently defines "advocates" as follows:

"102.1(1A) In this Division, an organisation advocates the doing of a terrorist act if:

- (a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or*
- (b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or*
- (c) the organisation 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 that the person might suffer) to engage in a terrorist act."*

All three Committees recommended that, at the very least, paragraph (c) of the definition should be amended to require a **substantial** risk that the praise might lead someone to engage in terrorism.

The SLRC in fact recommended that the better course would be to delete paragraph (c) all together.

When the PJCIS considered the definition in December 2006, it concluded that it did not support the complete repeal of paragraph (c) of the definition, but indicated that it would review the issue again in 2007.

The definition was also reviewed by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. He noted that *"there is a legitimate need to suppress the incitement of international terrorism."* However, he also expressed concern that *"(i)n defining 'advocacy', section 102.1 (1A) (c) of the Criminal Code Act 1995 includes what might be described as the glorification of terrorism. The Special Rapporteur considers that this definition lacks sufficient precision and has the potential to cover statements which, in a very generalized or abstract way, somehow support, justify or condone terrorism."*

While all these comments and recommendations were made in the context of reviewing the grounds for proscribing an organisation as a terrorist organisation, they remain relevant to the current reform proposal. A definition which has been described as "lack(ing) sufficient precision" and which has been subject to calls for amendment, including from parliamentary committees, should not simply be copied into further legislation.

The same is true in relation to the Criminal Code definition of a "terrorist act".

The UN Special Rapporteur made the following comments about the current definition:

"The Special Rapporteur takes the view that Australia's definition of a 'terrorist act' goes beyond the Security Council's characterization:

- (a) By including acts the commission of which go beyond an intention of causing death or serious bodily injury, or the taking of hostages (see sections 100.1 (3) (b) (iii) and 100.1 (3) (b) (iv)); and*
- (b) By including acts not defined in the international conventions and protocols relating to terrorism (see sections 100.1 (2) (b), (d), (e) and (f)).*

The latter aspects of Australia's definition of "terrorist acts" clearly include criminal activity, such as the interference with an information system with the intent to create a serious risk to the safety of the public (through the combination of sections 100.1 (2) (f) (1) and 100.1 (3) (b) (iv)).

The Special Rapporteur takes the view, however, that although it is permissible to criminalize such conduct it should not be brought within a framework of legislation intended to counter international terrorism unless that conduct is accompanied by an intention to cause death or serious bodily injury.

The Government of Australia reports that Australia has been identified by jihadist groups as a terrorist target and that authorities consider that a terrorist attack within

Australia could well occur, possibly without notice, thus assessing the level of alert as "medium" (a terrorist act could occur).

To go beyond the cumulative restrictions of resolution 1566 (2004), however, there must be a rational link between threats faced by Australia and the types of conduct proscribed in its legislation that go beyond proscriptions within the universal terrorism-related conventions. Australia must clearly distinguish terrorist conduct from ordinary criminal conduct.

It is also relevant to note that the definition of a terrorist act includes not just action on the part of a person, but also a "threat of action" (sect. 101.1 (1)). The Special Rapporteur calls for caution in this respect, in order to ensure compliance with the requirements of legality."

The SLRC recommended that:

- the definition of a "terrorist act" should be amended to expand the concept of harm to include psychological harm; and
- the reference to "threat of action" and other references to "threat" should be removed from the definition of "terrorist act". (The SLRC recommended that a separate criminal offence should be created to cover threats to commit an act of terrorism.)

The PJCIS did not agree with the SLRC that the definition of a terrorist act should be amended to include psychological harm. However, the PJCIS did recommend that the threat of a terrorist act be removed from the definition and made the subject of a separate offence.

While the discussion paper on the Classification Code proposes drawing on definitions found in the Criminal Code, there is no indication within the paper that any consideration has been given to views previously expressed on the appropriateness and quality of those definitions.

The recommendations and comments noted above have been made, not by public interests groups, but by parliamentary committees, by an independent expert appointed by the United Nations, and by a representative panel of domestic experts commissioned by the Australian government, in accordance with legislative requirements, to review Australia's security legislation.

It reflects poorly on legislative standards and the health of our democracy that it was not regarded as necessary for the discussion paper to address the recommendations of those committees and experts nor to explain why it was proposed, despite their recommendations, to use the definitions without alteration.

The Law Council believes that in view of perceived problems with the definitions of "advocates" and "terrorist act" as currently formulated in the Criminal Code, they

should not be emulated in other legislation without further refinement consistent with the recommendations of the SLRC, PJCIS and UN Special Rapporteur.

I hope that these comments are of some assistance to you even though, for the most part, they are necessarily focussed on deficiencies in the discussion paper's case for reform rather than the substance of the proposed reforms.

Please do not hesitate to contact me if you wish to discuss the matters raised in this letter further.

Yours sincerely

Peter Webb
Secretary-General

28 May 2007