



freedom to write...
freedom to read

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Submission to the National Human Rights Consultation: *Protecting Freedom of Expression of Writers and Readers*

Sydney PEN, an affiliate of International PEN, is an association of writers devoted to freedom of expression in Australia and in the world at large. This submission addresses four key areas where the freedom of expression of writers can be better protected in Australia:

1. Classification / Censorship Legislation
2. Sedition Offences
3. Proceeds of Crime Legislation
4. Protecting Academic Freedom

At a structural level, Sydney PEN urges the strongest possible protection of human rights, ideally through a justiciable bill of rights which provides: (a) a new cause of action where human rights are infringed; (b) binding remedies, including compensation; (c) judicial power to declare inoperative legislation which unjustifiably infringes a human right.

1. Classification / Censorship Legislation

Sydney PEN urges the repeal of the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007*. The Act introduces a number of ambiguities into classification law and exposes an unjustified range of texts to censorship.

Whilst under international law freedom of expression may be limited to protect national security, this may only be justified if there is a definite causal link between the banned materials and a likelihood of terrorist acts. By banning materials which generally 'indirectly' incite or directly 'praise' terrorism in a general sense, the Act impinges disproportionately on freedom of expression.

Such vague provisions also introduce a wide degree of subjectivity into decision making which could lead to unpredictable conclusions about individual texts, increasing artistic and academic uncertainty about their rights. The notion that scholars must apply for special exemption to access banned texts also limits our academic ability to understand terrorism.

Classification law is an ill-suited medium for combating the incitement of terrorism. Bans on such materials risk increasing their influence among disaffected groups. The amendments should be repealed in favour of socio-political anti-terrorism strategies.

A full analysis of the legislation is appended to this submission on page 6.

2. Sedition Offences

Sydney PEN strongly encourages the reform of Australia's new sedition laws, which have generated much anxiety within the community and among writers. The laws unreasonably and unjustifiably limit the international human right to freedom of expression by failing to clearly distinguish between legitimate free speech and conduct specifically calculated to (and likely to result in) incite violence or crime. Such laws have no place in a modern, self-respecting democracy which values freedom of expression. Historically, sedition laws have been manipulatively used against legitimate political opponents and to prosecute trivial statements which do not reasonably incite violence.

Sydney PEN encourages reform of the sedition laws in line with the ALRC's recommendations. However, reform should go further than the ALRC's recommendations by also requiring that prohibited incitements must also be reasonably likely to result in violence (consistent with the more protective jurisprudence on free speech in the United States). At the moment, the sedition laws prohibit incitements even if they are not likely to encourage violence, and this amounts to an arbitrary and unjustifiable interference in freedom of expression.

The laws are too broad and ambiguous in scope, and risk criminalising and chilling literary expression. Given the metaphorical, generalised content of many textual forms, unclear rules may encourage self-censorship among artists for fear of harsh interpretations of their work. This is already occurring, as evidenced by the SBS inclusion of a sedition clause in its standard TV licensing agreement. **The laws are also perceived by some religious communities to be targeted at them in a discriminatory fashion, and thus risk chilling freedom of legitimate religious expression.**

The narrow construction of the 'good faith' defence, the placing of the burden of proof on the artist and the failure to expressly protect academic or scientific discussion does not provide sufficient protection for writers. At the very least the laws require redefinition to clarify their meaning and minimise artist self-censorship. For the most part, existing criminal offences better target and control the harms covered by the sedition laws, without carrying the same degree of historical baggage and popular resistance to the law. The role of Australia's creative arts community in facilitating the exchange of ideas is indicative of a healthy democracy and should not be unjustifiably constrained.

3. Proceeds of Crime Legislation

The *Proceeds of Crime Act 2002* (Cth) permits a literary proceeds order to be made which prevents a person from obtaining profits or benefits as a result of the publication in any form, of details or experiences related to that person's crime or life of criminal activity. Confiscating the proceeds of crime ordinarily aims to deter crime by removing the incentive to engage in criminal activity. Literary proceeds orders are different because writing or telling a story about one's crime is not itself unlawful. Instead, such orders are said to be justified on policy grounds to prevent a person becoming unjustly enriched by their crime. Offenders are still free to express themselves without restriction, but cannot enjoy the financial benefits of such expression.

Properly crafted laws may be necessary and proportionate restrictions on freedom of expression. Literary proceeds confiscation orders are not issued automatically but require a range of matters to be considered by a judge in his/her discretion, ensuring that some considerations relating to individual circumstances can be taken into account.

However, Sydney PEN is concerned about the wide scope of literary proceeds orders under Australian law. Firstly, in contrast to comparable laws in the United States, in Australia there is no requirement that a person has been convicted of an offence. A person acquitted of an offence may still be subject to literary proceeds order for amounts derived in relation to the charged offence and the court only need be satisfied on the balance of probabilities that the person committed an offence.

Secondly, amendments to the Act made by anti-terrorism laws amended the definition of literary proceeds (s 153 of the Act) to include any benefit that a person derives from the commercial exploitation of his or her notoriety resulting directly or indirectly from him or her committing an offence. The Explanatory Memorandum indicates that this is intended to vitiate a claim that a person's notoriety stems from circumstances related to their commission of an offence, such as their place of incarceration, and not from the actual commission of the offence.

However, the amendment may also vitiate a claim that a person's notoriety stemmed not from the actual commission of the offence, but from injustice with which they were treated by the police or legal system as a result of being charged with or convicted of the offence (including inhuman treatment, torture, miscarriage of justice or some other injustice), or where a person wishes to profit from writing about criticisms of the prison system, rehabilitation and so forth.

Thirdly, s 337A of the Act explicitly recognises convictions in a US Military Commission as foreign offences in relation to which literary proceeds flowing from such offences may be confiscated. Australia's recognition of the validity of all offences triable before a US Military Commission, including retrospective offences such as providing 'material support to

terrorism', is not appropriate given the widespread legal opinion that the Military Commission trial process was unfair, in contravention of international human rights standards, and possibly amounted to the war crime of denial of a fair trial. Such a provision was also clearly intended to apply specifically to the case of David Hicks.

4. Protecting Academic Freedom

Academics are writers whose freedom of expression is of concern to Sydney PEN. Academics are among our membership, and PEN also advocates on behalf of academic writers unjustly imprisoned worldwide. **Academic freedom in Australia has come under pressure in recent years by factors such as larger class sizes and higher administrative loads; commercialisation; changes to research funding; and anti-terrorism laws** (including sedition, censorship, ASIO powers and new crimes): see E MacDonald and G Williams, 'Banned Books and Seditious Speech: Anti-Terrorism Laws and Other Threats to Academic Freedom' (2007) 12 *Australia & New Zealand Journal of Law & Education* 29-46.

Sydney PEN believes that the creation and publication of academic scholarship should be as free as possible from political interference, while acting within the law in a democratic society. Only by establishing the conditions of academic freedom can the full potential for intellectual progress within our universities be realised. The independence of academics is essential to ensure that they can freely develop critical thought and expression and thus contribute new insights to society.

PEN's experience in working to free writers in prison around the world illustrates the vital role which academic freedom can play in opposing political repression. In many countries, the slide towards authoritarianism has involved increased restrictions on academic freedom, ultimately to its vanishing point. Relative autonomy from political interference makes an important contribution to maintaining a robust civil society and a functioning democracy.

In our view, there is little substance to any suggestion that prejudice is in any way common or systemic in Australian universities. As in any sector of the community – whether from the Parliament to a football club – individual cases of prejudice can never be ruled out, but academia is no more prejudiced – and may be less so – than other professions.

Australian universities are amongst the most intellectually diverse and vibrant places for the production of scholarly research and writing of any university sector in the world. Scholarly merit is a core criterion in the appointment and career progression of academic writers, and there are no barriers to entry for academics who do not share a particular intellectual viewpoint. Universities are founded on the ideal of academic freedom of thought, opinion and expression; and ideological, political or cultural prejudice is antithetical to the professional duties of academics.

Where cases of prejudice do exist, the scholarly community itself is best placed to ensure academic diversity and freedom, and the intervention of the Parliament is not appropriate. Peer review of research maintains rigorous academic standards and ensures that any academic who is genuinely ‘prejudiced’ – *in the sense of making claims or assertions which are not supportable or verifiable by evidence or argumentation* – will not prosper.

Further, the academic community is also best placed to deal with allegations of misconduct by academics, such as in the rare case where an academic subjects a student’s views to ridicule or vilification. Indeed, universities already have mechanisms in place for dealing with allegations of professional misconduct by academics, and for applying appropriate penalties. The suggestion that universities may be prejudiced and lacking in diversity has the potential to undermine academic freedom and diversity, since it sends a message to academics that they are under suspicion and that their views require policing by politicians.

Ensuring academic freedom requires that the government (1) refrain from interfering in academic expression and (2) establish the structural conditions which enable academics to freely write. The following steps are recommended to enhance academic freedom:

1. Overall funding to universities, and research funding specifically, should be increased in order to relieve teaching and administrative pressures on academic workloads, and therefore to better enable research and writing productivity and quality;
2. Parliament should legislatively protect academic freedom in universities, for example based on the protection in s 161 of the *Education Act 1989* (New Zealand);
3. Workplace agreements in all Australian universities should include a minimum standard clause on the protection of academic freedom;
4. Individual academic employment contracts should expressly provide for the protection of academic freedom in employment.

Conclusion

Sydney PEN is pleased to have this opportunity to participate in the national human rights consultation. We strongly urge better protection of freedom of expression in Australia, both through removing the impediments to its exercise identified in the four areas above, as well as through the provision of prospective protection through an enforceable bill of rights. Please be in touch if you require any further information.

Dr Ben Saul

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Appendix

Analysis of the Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007

Executive Summary

1. The Act has possible implications for internationally protected human rights; in particular, the Act may not be a justifiable and proportionate restriction on freedom of expression;
2. The Act will give rise to more legal uncertainties than it would resolve, by introducing ambiguous new terms, duplicating existing law, increasing selectivity in the law, and relying, without further qualification, on the definition of “terrorist act” in the Criminal Code;
3. The rationale for the Act is not convincing given the lack of empirical evidence as to the causation between such materials, radicalisation and the risk of terrorism occurring;
4. The exclusionary provision in the Act is welcome but its very wide scope creates uncertainty;
5. Scholarly access to materials refused classification must be provided for in secure libraries;
6. Politics and society, not the law, are the most effective and appropriate means of combating inflammatory speech which falls short of directly inciting violence; banning materials of this kind risks making them more attractive and influential, and is thus counterproductive.

A Introduction

This analysis acknowledges the seriousness of contemporary terrorist threats to Australia, including the possible role played by some publications and other materials in contributing to the development of terrorist threats. In this context, the United Nations Security Council has urged States to prevent incitement to terrorism and has condemned its justification or glorification (Resolution 1624 (2005)), although the resolution is non-binding. The 2005 Council of Europe *Convention on the Prevention of Terrorism* requires State parties to criminalise “public provocation to commit a terrorist offence”, although it is defined in a way similar to traditional crimes of incitement. Likewise, a recent British offence of “encouragement of terrorism” is only slightly wider than the classical concept of incitement, while Britain rejected a new offence of glorifying or condoning terrorism. In 2007, a Canadian Parliamentary Committee proposed criminalising the glorification of terrorism,¹ although no legislation has yet been adopted.

On one hand, it might be argued that refusal of classification to publications, films or games carries less serious consequences than, for instance, these recent foreign examples of criminal liability for indirectly encouraging terrorism, and accordingly classification law could be seen as less invasive of rights and freedoms than new criminal liabilities.

However, classification law has a wider impact on rights in a different sense, since it affects not one individual who may be criminally responsible for advocating or praising terrorism, but instead deprives the community as a whole of access to banned material.

Measures to confront terrorist threats must be considered in the context of equally important social values. In particular, classification law must balance the competing public interests in freedom of expression and the prevention of terrorist crime or violence. The British and Council of Europe criminal law measures against expressions encouraging terrorism were only adopted in the knowledge that sophisticated system of human rights law and institutions existed in the UK and across Europe, which provided human rights remedies to protect free expression from undue interference.² A similar level of protection does not exist in Australia, and the human rights implications of the proposed changes are examined below.

B Implications for Freedom of Expression (including Religious Expression)

1 *International Human Rights Law*

In international law, it is recognised that freedom of expression ‘carries with it special duties and responsibilities’ and may be limited by law if necessary to secure ‘respect of the rights or reputations of others’ or to protect ‘national security ... public order... public health or morals’.³ Suppressing speech which proximately encourages violence is a justifiable restriction in a democratic society, since the protection of life is a higher normative and social value which momentarily trumps free expression – but only to the extent strictly necessary to prevent the greater harm.

Refusing classification to materials which incite, promote or instruct in crime or violence will usually amount to a permissible and justifiable restriction on freedom of expression under international human rights law, assuming that restrictions are necessary and proportionate in the particular case. Such restriction aims to protect the public interest in ensuring public order through the prevention of crime.

On the other hand, an Act to ban materials which merely tend to encourage terrorism in a general sense (rather than a more direct, specific and intentional way) is less likely to constitute a lawful restriction on freedom of expression, particularly when there is no proximate connection to the likelihood of imminent terrorist violence or crime actually occurring. While the right of free speech is not absolute and may be limited to prevent serious social harms, it cannot be restricted because of mere speculation that it leads to terrorism. Only expressions which have a direct and close connection to the commission of a specific crime arguably amount to justifiable restrictions on freedom of expression. There must be a definite causation between the materials and the possible commission of terrorism.

Further, alternative, less invasive means must be first exhausted before recourse is made to the more restrictive measure of prohibiting access to such materials. Arguably, a better way of combating problems of radicalisation is through community education, outreach, empowerment, and the inclusion of such people in our society, community and institutions – and not through the quick fix of refusing classification. *Alternative means* should be fully pursued before freedom of expression is so restricted.

2 Protections in Australian Law

The absence of a human rights framework in Australia has hampered the evolution of a sophisticated jurisprudence on the circumstances in which classification law can be regarded as imposing legitimate restrictions on freedom of expression and freedom of religious expression. Such analysis is nonetheless important from the point of view of the values of the Australian community and Australia's international obligations.

In the absence of any entrenched statutory or constitutional protection of human rights in Australia, it would not be appropriate to modify classification law in this far-reaching manner. The proposed amendments have the potential to unjustifiably and arbitrarily infringe freedom of expression, without showing any proximate connection to a substantial likelihood of imminent unlawful terrorist violence actually occurring.

(a) Constitutional Freedom of Political Communication

In the absence of a bill of rights, the Australian Constitution impliedly protects only *political* communication (*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520), and not speech more generally. This means that Australian courts are less able to supervise classification laws for excessively restricting free expression. In *Jones v Scully*,⁴ Hely J found that freedom of communication is not absolute, but 'is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*'. Justice Hely applied the test for the validity of restrictions on free communication laid down in *Lange v Australian Broadcasting Corporation*⁵ ('*Lange*'), and found that (1) the legislative object of eliminating racial discrimination is compatible with maintaining responsible and representative government, and (2) the law is reasonably appropriate and adapted to eliminating racial discrimination.

Further, in *Brown v Classification Review Board of the Office of Film and Literature Classification*⁶ ('*Brown*'), the Full Federal Court found that a law prohibiting the classification of a publication that 'instructs in matters of crime' was a permissible restriction on the implied freedom. Applying *Lange*, the law was compatible with representative and responsible government and appropriate and adapted to that end.⁷

While insulting words have been subject to a more stringent test for restriction – requiring a likelihood of inciting imminent lawless action (see *Coleman v Power*)⁸ – speech which incites crime or violence may be restricted as long as the restriction is proportionate to a legitimate aim, and even if no imminent crime or violence is likely.

The problem in these cases is that the question of whether a law is compatible with representative and responsible government is too narrowly drawn to supply general guidance as to when classification laws may legitimately restrict freedom of expression. The Australian test protects speech only as an incident of protecting the constitutional system, whereas American constitutional law values and protects speech as an end in itself, even where it is unrelated to politics.

In the leading case of *Brandenburg v Ohio*⁹ ('*Brandenburg*'), the US Supreme Court found that the First Amendment to the US Constitution did not 'permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action'.¹⁰ The twin requirements of the imminence and likelihood (or probability) of crime ensure that speech is not prematurely restricted; there must be a proximate connection or causal link between the advocacy and the occurrence of crime.

Such a test would likely invalidate attempts to ban materials which advocate terrorism through indirect means or praise. Whereas Australia's existing classification law aims to protect against imminent criminal harm, there is no comparable proximity between indirect advocacy or direct praise and actual terrorist harm.

In contrast, not only does Australian law fail to protect non-political speech, under Australia's more subjective and deferential test even political communication could be restricted by the proposed classification laws on advocacy/praise, since it may be open to the courts to find that such a law is both compatible with responsible and representative government and appropriate and adapted to preventing terrorism.

The US test is not ideal, however, since it permits speech to be restricted to prevent *any* lawless action. Arguably, the *Brandenburg* test should be supplemented by a requirement that only very serious criminal harms should permit the restriction of free speech; a proportionality element might allow that free speech could be restricted more readily where the consequences of advocacy/praise are greater. Not all acts of terrorism are equally serious, particularly acts of preparation or support; for example, it is difficult to see why, under Australian law, a publication advocating that a person collect a document to be used in a threat to commit terrorism should be banned.

(b) Constitutional Freedom of Religious Expression

On the other hand, the express constitutional protection for freedom of religion in Australia (*Australian Constitution* s 116) raises a different challenge to any proposed refusal of classification to materials advocating/praising *religious* violence. The Commonwealth cannot make any law 'for prohibiting the free exercise of religion', which may be interpreted to include freely communicating religious ideas – even those urging violence.

While such a challenge is in uncharted waters due to the scarcity of case law, even express constitutional rights are not absolute and proportional restrictions on violent religious speech may be upheld by the High Court. Refusal of classification of materials on the existing grounds of inciting, promoting or instructing in crime or violence would likely be seen as a legitimate and proportionate restriction on freedom of religious expression. In a secular democracy, it is plain that religious impulses to violence cannot be justified or excused in the same way that religious convictions can provide an acceptable ground for failing to vote or to work on spiritual holidays.

In contrast, a proposed power to refuse classification for “praising” terrorism may excessively restrict freedom of religious expression, since it disproportionately affects all believers to control the expressions of a few. However, it must be noted that the constitutional protection limits only Commonwealth laws and does not prevent the States from curtailing religious speech, which is significant given that State criminal laws primarily enforce classification decisions.¹¹

To the extent that religious texts are seen to invoke political ideas, the implied constitutional freedom of political communication may also be relevant. *Join the Caravan* and *Defence of Muslim Lands*, for instance, criticize the participation of western powers in Afghanistan, which implicitly includes Australia. Whether such criticism relates to the Australian political system of representative and responsible government depends on how widely or narrowly the boundaries of that system are construed, but it is certainly arguable on the wider view that criticism of a democracy’s decision to wage war is squarely within the ambit of political communication.

C Lack of Certainty and the Need for the Amendment

The main purpose of the amendments is to address uncertainties in whether existing law ensures that material advocating terrorism is refused classification (Attorney-General Ruddock, Second Reading Speech, 21 June 2007). Lack of clarity may be seen to arise from interpretive differences in Classification Board and Review Board decisions, litigation in the Federal Court, and public concern about the availability of certain materials.

There are a number of difficulties with this rationale underlying the Act. **First**, differences of interpretation between decision-makers are inevitable, particularly in a field of relatively (and necessarily) subjective decision-making about whether particular texts, films or games encourage terrorism in some way. In a hierarchical system of appeals from the Classification Board to the Review Board to the Federal Court, there will always be differences of opinion, which are a healthy part of the rule of law process. Some of the controversy and uncertainty in the area is driven by political dissatisfaction with classification decisions, rather than errors in decision-making.

Further, people read and interpret publications, view and interpret films, and play and interpret video games in a variety of different ways, including in ways which contradict the intentions (where discernible) of the author/producer/programmer. Human expression is infinitely nuanced and there will always be difficulties in interpreting the meaning, intention and effects of materials. This is particularly so in relation to *indirect* expressions, the meaning of which is not immediately or obviously apparent. This is particularly relevant in the case of religious texts, which are often densely imbricated with metaphor, myth, allusion, allegory, parable and fable, and which are often open to conflicting or contradictory interpretations.

Secondly, these interpretive differences would be amplified – *and thus, paradoxically, uncertainty would be increased rather than reduced* – by the proposed amendments. When compared with the proposed amendments, the existing terms used in making classification decisions are relatively precise: “promotes, incites or instructs in matters of crime or violence”. Although these terms have not been exhaustively defined, and will always require consideration on a case by case basis, their ordinary meaning is well understood, publicly comprehensible, and has been elucidated in the guidelines and in decision-making to date.

While there remain uncertainties in the existing test, the proposed amendments would introduce further numerous ambiguities and uncertainties into classification decisions. The term “advocate” has no straightforward meaning, but is defined by reference to vague notions such as “directly or indirectly counsels or urges”, “directly or indirectly provides instruction”, or “directly praises” (where there is “a risk” that it “might” lead to terrorism).

On one hand, some of these new terms are much broader than the existing test, and are thus likely to increase rather than reduce uncertainty. In particular, “indirectly” counselling, urging or instructing in crime has no easily comprehended, prospectively knowable scope, such that a wide degree of subjectivity is introduced into decision-making, and likely leading to arbitrary and unpredictable decisions. *Examples of publications, films or games which may fall within the proposed amendments are given at the end of this analysis.*

This problem is best illustrated by the example of “indirectly counselling” provided in the Attorney-General’s Discussion Paper during its review. The example cannot point to any objectively identifiable details in the hypothetical pamphlet or DVD which indirectly counsel terrorism, but instead makes vague reference to the “text, tone and context” and the “inspirational tone and exhortations” of the material having such effect.

Such matters are plainly open to very different interpretations, given the absence of any specific textual or other evidence of any intention to encourage terrorism. The fact that the hypothetical material is not a “dispassionate expose of serious issues” is hardly a compelling basis on which to refuse it classification. It is puzzling that such an ambiguous and unconvincing example is used to support both the need for the amendment and its purpose in reducing uncertainty about the classification decisions.

As for “directly praising” terrorism, the concept is overly-inclusive. Allowing publications to be refused classification where there is a mere “risk” that praise “might” lead to terrorism sets the bar too low and interferes prematurely and unjustifiably in freedom of expression. In contrast, a stronger case for refusing classification would exist if praise gave rise to a “substantial” risk that terrorism is “likely” to occur, whereas the proposed test is much too restrictive of expression.

Further, there is currently no requirement that the author or producer of a publication or film “intend” that terrorism should occur as a result of direct praise, and there may be cases where the author approves of particular past “terrorist acts” (such as violence committed by the French resistance or Yugoslav partisans against Nazi rule in Europe, or by East Timorese guerrillas during Indonesian rule) without intending that others emulate such conduct in different contemporary contexts.

On the other hand, some of the new terms merely duplicate parts of the existing test, and are thus unnecessary. For example, in various jurisdictions, the courts have interpreted “incitement” (part of the existing test) by its ordinary textual (or dictionary) meaning, such as to urge, spur on, stir up, prompt to action, instigate or stimulate,¹² or simply to request or encourage.¹³ It would thus appear that the new concepts of “directly” counselling or urging, and directly instructing, are already well covered by the existing test of promoting, inciting or instructing in crime or violence. To this extent, the proposed amendment simply introduces unnecessary duplication and complexity – and uncertainty – into classification decisions.

As a result, the only new elements in the proposed test are the concepts of “indirectly” counselling, urging or instructing, or directly praising terrorism. If the amendments do proceed, as a matter of economy and simplicity in drafting, it would make more sense to insert the words “directly or indirectly” before the existing test of “promotes, incites or instructs in matters of crime or violence”; and further to define the existing term “promotes” as including “directly praising” where there is a risk of terrorism.

Thirdly, part of any uncertainty surrounding classification decisions relating to terrorism arises because of the definition of “terrorist acts” in the Commonwealth Criminal Code. The concept is inherently controversial; there is no accepted international law definition; reasonable minds differ on whether some kinds of legitimate political violence should be excluded from it; and the broad scope of the Australian definition brings a very wide range of conduct within its ambit, and thus exposes a very wide range of publications to potential refusal of classification. The proposed “advocacy” limb will simply expand any current uncertainty about the range of materials to be refused classification.

In this context, it must be noted that the existing law allows the refusal of classification of materials which incite any of the many broad terrorism offences in s 100.1 of the Criminal Code, including where publication or film incites, promotes or instructs a person to: train for

terrorism; possess ‘a thing’ connected with terrorism; collect or make a document connected with terrorism; or do acts preparatory to terrorism.¹⁴ Since a ‘terrorist act’ includes *threats* to commit terrorism, the above offences are considerably widened; thus a publication can be banned if it incites a person to train to threaten to commit terrorism, or to collect a document for use in such a threat.

Fourthly, to the extent that public concerns reflect uncertainty about the current law, some public concerns may reflect that some classification decisions have been wrongly made according to the existing law – that is, that the existing law is sufficient to deal with terrorist materials, but it has been wrongly applied. One solution to this problem is to improve decision making by enhancing understanding of the applicable law and the quality of decision-makers.

Equally, some public or media concerns may not be well founded, either misunderstanding the scope of the existing law, or pushing for radical restrictions on freedom of expression or religion which are alien to Australian democratic traditions. In a climate of considerable public and political anxiety about terrorism, measures popularly thought necessary to combat it are not necessarily objectively founded, and indeed may be excessive in relation to the scale of the threat.

D Uncertainty Due to Selectivity in Classification

The expansion of the grounds for refusing classification to terrorist-related materials would likely increase the already problematic degree of selectivity in classification decisions. It is questionable why, for instance, some recent publications were refused classification (such as *Join the Caravan* and *Defence of the Muslim Lands*), yet the collected speeches of Osama Bin Laden are freely available from a major transnational western publisher,¹⁵ and Hitler’s seething masterwork, *Mein Kampf*, can be freely bought in Australian bookstores. In a subjective complaints-driven classification system, some decisions appear affected by political considerations rather than an objective appreciation of the genuine risk posed by materials.

There is a real question whether double standards are at work. To some, books such as *Join the Caravan* or *Defence of the Muslim Lands* do not seem objectively worse than, for instance, the mainstream Christian Bible. On one view, the blood-curdling Old Testament is full of stories detailing the fanatical slaughter of whole cities, including innocents; the wrath of a punitive, vengeful, war-mongering God; and the crude favouring of a ‘chosen’ people to the detriment (and occasional extermination) of others.

Despite the redemption and forgiveness celebrated in the New Testament, it too is not beyond reproach: it rails against homosexual perverts;¹⁶ demands death for sexual immorality;¹⁷ makes husbands supreme over their wives¹⁸ (including their bodies¹⁹); insists women cover their heads and remain silent in church;²⁰ objects to heathen judges judging

disputes between Christians²¹ (a sharia law?); and visits the plagues of Revelation upon all humanity. The Christian tradition can be painted in a manner as extreme and fanatical as radical Islam if the right gloss is put on it.

Just because a violent Bible has become widely accepted by the mainstream culture should not render it immune from the same degree of scrutiny imposed on the texts of minority religions – although it is hard to argue in favour of equal treatment by bad laws. One might argue that context, culture and history are everything, rendering the Bible comparatively harmless in spite of its literal meanings and invocations. But such considerations – and latitude – must surely be applied to other religious texts in a pluralist society, even those which deviate from accepted or mainstream community standards. The separation between church (or mosque) and State is undermined as soon as the State is seen to meddle disproportionately more in some religions (particularly Islam) than others.

Rather than expanding the potential for selectivity by adding new vague criteria, policy efforts directed towards reducing uncertainty would be better focused on dealing with the existing systemic uncertainty resulting from the application of the criteria already in place. Doing so would enhance confidence in the legitimacy and fairness of classification decision-making.

E Impressionable Audiences Vulnerable to Radicalisation

It is certainly possible that some indirect terrorist materials may appeal to some disenfranchised segments of the community. The Attorney-General's Discussion Paper, for instance, suggests that some people are easily influenced – the young, the impressionable, the vulnerable, those subject to manipulative recruitment and so on. However, these risks do not support the modification of existing classification law.

First, under the existing law, a decision-maker is entitled to take into account “the persons or class of persons to or amongst whom it is published or is intended or likely to be published”. Thus it is already within the discretion of classification decision-makers to consider the impact of materials on the impressionable and the vulnerable in deciding whether to refuse classification to terrorist-related materials.

Secondly, it is unclear whether empirical evidence can sustain any proven causation between reading/viewing/playing materials which “advocate” terrorism and the likelihood of the actual commission of terrorist acts in Australia or elsewhere. While in censorship debates there has been considerable scholarly attention to the connections between pornography and violence against women,²² or between violent films or music and violence, less consideration has been given to whether and how materials lead to terrorism. Causation is often murky and difficult to prove, and the process of radicalisation is poorly understood and under-researched.

In such circumstances, unless there are reasonable grounds for believing that a publication is likely to incite imminent, unlawful terrorist violence, it is arguable that classification law has no role in restricting such materials. The idea that publications or films may contribute in some ethereal, unproven way to an intellectual climate conducive to terrorism is hardly a rationally probative basis on which to limit free expression.

Banning religious texts is especially likely to radicalise adherents to a religion who would not otherwise be influenced, since it may be perceived as an attack by the State on religious freedom. There is often ready online access to banned publications, piquing the interest of the aggrieved in publications which would not otherwise have come to their attention.

Thirdly, if some people are so impressionable and vulnerable, it is questionable whether they are indeed likely to be influenced by material which does not *directly* incite terrorism, but instead resorts to more subtle, sophisticated, devious or indirect methods, many of which may not be obvious to or comprehended by audiences whose capacity to appreciate those materials is considered limited.

Fourthly, even if the vulnerability or susceptibility of certain people is established on the evidence, it may nonetheless constitute a disproportionate and unreasonable restriction on freedom of expression to restrict the access of the population as whole to materials which may encourage terrorism by a few in rare cases.

Ultimately, a better way of combating problems of alienation, radicalisation and vulnerability is through community education, outreach, empowerment, and the inclusion of such people in our society, community and institutions – and not through the quick fix of refusing classification. Such *alternative means* should be seriously considered before freedom of expression is so restricted.

F Exclusions and the Definition of Terrorism

It is commendable that the Act excludes depictions or descriptions which could reasonably be considered to be done as part of public discussion or debate or as entertainment or satire (clause 9A(3)). The exclusion may indeed be very broad. While the precise scope of the provision is not clear, on an expansive interpretation the term “entertainment” could cover any work of fiction (in which case, it might be preferable simply to exclude fictional works from the Act). Equally, “public discussion” or “debate” arguably covers most non-fiction materials, in which case the same point might be made about the clarity of the exclusion.

The main qualifying factor here is the notion of “reasonably be considered”, which imports considerable subjectivity in the evaluation of what material may be excluded (which thus may well increase uncertainty in decision making even further).

In this sense, the provision is not as specific as, for instance, defences in some State and Commonwealth anti-vilification legislation, which typically protect statements made in good faith for academic, artistic, scientific, religious, journalistic or other public interest purposes.

Nonetheless, the provision in the Act is desirable on public interest and freedom of expression grounds. To take one example, it is important to ensure that media publications which are genuinely reporting on terrorist matters of public interest are not refused classification. The 1995 *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* assert that: 'Expression may not be prevented or punished merely because it transmits information issued by or about an organisation that a government has declared threatens national security'.

Further, Johannesburg Principle 6 provides that punishing expression as a threat to national security is only permitted where the government can demonstrate the expression is intended to incite violence and that there is a direct and immediate connection between the expression and the likelihood of occurrence of such violence. While that principle relates to criminal sanctions, it indicates that freedom of expression should only be restricted where it is directly connected with violence.

There is a question here whether journalists (or academics or other groups) are entitled to a special defence for those particular occupations. This would raise a serious question as to whether other groups or professions should be similarly specially protected – for example, artists, politicians, religious leaders and so forth. These groups have equally valid (if differently justified) claims to protected speech. Granting all such groups the benefit of special protection raises a further challenge to equal treatment before the law, in that ordinary citizens are not entitled to similarly privileged treatment and thus become over-criminalized as a result. There is also the danger of exempting so many occupation-specific categories of speech that the offence itself becomes shot through with exceptions and rendered ineffective.

Nonetheless, these categories are generally accepted as providing good reasons for certain kinds of otherwise impermissible speech (as long as the categories are not abused or manipulated for ulterior criminal purposes). Otherwise, banning general statements of support for "terrorism" (which, as noted above, is defined very broadly) risks unjustifiably restricting a range of legitimate expression in a democratic society, including attempts by academics, journalists and religious leaders to fathom (and hence to reduce) the causes of, and motivations for, terrorism.

On the other hand, the general, non-selective protection of debate and public discussion in the Act is likely to cover most of these groups anyway, and on balance there is no pressing need for more specific protection.

G Advocacy and the Definition of Terrorism

The definition of terrorist acts in the Commonwealth Criminal Code is not limited to violence by non-State actors, but potentially covers conduct committed by governments, public officials, and members of the Australian armed forces, where such conduct meets the specified definition. Patriotic publications (historical or contemporary) which, for instance, approve of the criminal mistreatment of enemy soldiers, prisoners or civilians, where connected with the political purposes of the conflict, could, for instance, prima facie amount to material advocating terrorism.

A well-known example might be the story of *Breaker Morant*, fictionalised in Kit Denton's 1973 novel *The Breaker* and in Bruce Beresford's film of 1980. On one view, those materials could be interpreted to glorify Morant's execution of Boer prisoners in cold blood, with the effect of advocating (that is, indirectly counselling, urging, instructing, or even directly praising) similar acts of terrorism – politically motivated violence committed in part to intimidate the Boers. It may depend on whether the film is seen as "entertainment".

Further, the activities of State armed forces in armed conflict is not expressly excluded from the definition of terrorist acts in the Commonwealth Criminal Code and so could still amount to terrorism. Even if armed forces comply with humanitarian law, the internationally lawful targeting of a military adversary can be seen as politically motivated violence to coerce or intimidate a foreign government.

The Act may prima facie allow the banning of books or films (including historical, non-fiction ones, as well as fictional materials) advocating or praising Australian military actions against foreign governments – including Australia's participation in Iraq and Afghanistan in the "war on terror", or materials dealing with the First and Second World Wars, or conflicts in East Timor, Korea or Vietnam. Further, even publications containing statements by government leaders that the Iraqi people should "rise up" against Saddam Hussein – as the United States suggested during the 1990 Gulf War – may amount to advocating terrorism.

Similarly, the military activities of non-State forces participating in non-international armed conflicts are not equally considered outside the definition of terrorist acts. Domestic rebels or revolutionaries in other countries, who informally comply with humanitarian law, by targeting only military objectives and sparing civilians, arguably should not be classified as terrorists under Australian criminal law, and thus materials dealing with their struggles should equally not be refused classification. Moreover, material concerning de facto State armed forces under international law would also need to be excluded.

The Commonwealth Criminal Code extends universal jurisdiction over terrorist acts which are entirely unconnected to Australia. Under the proposed test, this means that a publication or film which is sympathetic to any violent anti-authoritarian struggle anywhere in the world could be refused classification. On policy grounds, it is undesirable to protect

authoritarian regimes by banning publications or films which praise or otherwise advocate resistance to them. This would include, for instance, advocating violent resistance against the genocidal government of Sudan, or self-defence by Afghan resistance fighters against the internationally unlawful Soviet occupation of Afghanistan in the 1980s.

H Scholarly Access to Materials Refused Classification

If material advocating terrorism is refused classification, it is important to ensure that academic researchers, teachers and students maintained access to publications dealing with terrorism. A number of Australian scholars and students are currently conducting research or teaching which involves, for example, the use (and critical analysis) of radical Islamic texts. Scholarly examination of such texts is essential in order for our society to understand, examine and, if necessary, to respond to such religious claims, as well as how such texts contribute to the radicalisation of parts of the population.

A formal procedure or mechanism should be established to permit libraries to securely hold such materials, and to allow access to them by genuine researchers and students.

I Broader Policy Implications and Conclusion

There is a real danger that refusing classification to materials which generally express support for terrorism will drive such beliefs underground. Rather than exposing them to public debate – which allows erroneous or misconceived ideas to be corrected and ventilates their poison – banning them risks aggravating the grievances often underlying terrorism, and thus increasing, not reducing, its likelihood.

It is true that some speech (the illogical, the absurd, or the fundamentalist) cannot be rationally countered by other speech, and it is plain that this is not an ideal world of deliberative and respectful public reason. Yet, the place for combating stupid or ignorant ideas, or even blood fantasies, lies in the cut and thrust of public debate, and more broadly in the political, social, cultural, religious and private realms. Classification law is ill-suited to reforming expressions of poor judgment, bad taste, or odious beliefs. Suppressing the public availability of such materials may succeed only in intensifying clandestine efforts to produce and distribute such publications, precisely because of their flavour as forbidden fruit.

Speech is the foundation of all human communities and without it, politics becomes impossible. Unless we are able to hear and understand the views of our political adversaries, we cannot hope to turn their minds and convince them that they are wrong, or even to change our own behaviour to accommodate opposing views that turn out to be right. At the same time, as Hannah Arendt argued, ‘speech is helpless when confronted with violence’²³ and freedom of speech reaches its natural limit when it urges unlawful violence against a democracy. Quite rightly, classification law has always allowed the banning of materials which directly incite, promote or instruct in specific crimes or violence.

While every society has the highest public interest in protecting itself and its institutions from violence, no society should ban materials that it finds distasteful when such expressions are relatively remote from the actual practice of terrorist violence by others. While '[e]very idea is an incitement',²⁴ some incitements are more dangerous than others and only these deserve restriction. A robust and mature democracy should be expected to absorb unpalatable ideas without prohibiting them.

In most cases, extreme views should be exposed to public scrutiny rather than hidden away by classification authorities – however well intentioned – making judgments on behalf of the rest of society. Except at the margins, law should play little role in policing political, religious or cultural expression. The law should only intervene in those truly exceptional cases where materials have a direct and proximate connection to the terrorist crimes or violence. As a Conservative member of the British Parliament stated in recent parliamentary debates about British anti-terrorism measures: "The common law has always been extremely careful to ensure that the proscription of speech is precise, carefully targeted and narrowly defined."²⁵

Examples of Material Potentially Captured by the Proposed Amendments

The following are examples of materials which could prima facie fall within the definition of materials advocating terrorism (the question is then whether such material falls within the exceptions in the Act, the scope of which is unclear. That analysis is not done here).

- Publications or films which praise or indirectly counsel, urge or instruct in terrorism by supporting contemporary rebel or resistance movements against dictatorial or authoritarian regimes, such as the Burmese military, Mugabe's Zimbabwe, or Sudanese authorities in Darfur;
- Publications or films which praise or indirectly counsel, urge or instruct in terrorism by supporting historical rebel or resistance movements against authoritarian regimes in the past, such as Pol Pot's Khmer Rouge in Cambodia, Nazi occupied Europe, Stalinist Russia, Saddam Hussein's Iraq, or the Indonesian occupation of East Timor; these may include, for instance, the writings of Nelson Mandela or Malcolm X; or even "factional" films such as Mel Gibson's *Braveheart* (1995) (dealing with Scottish resistance to English rule) or *Spartacus* (1960) (a slave revolt against Roman domination);
- Publications or films which praise or indirectly counsel, urge or instruct in terrorism by supporting non-State resistance movements in situations of armed conflict, whether in the context of resistance to occupation forces, the exercise of self-determination, or proxy wars such as that described in *Lawrence of Arabia*;
- Fictional publications or films which praise or indirectly counsel, urge or instruct in terrorism by supporting fictional rebel or resistance movements against authoritarian regimes; examples might include *Star Wars* (as an allegory for perceived struggles between good and evil in the Cold War, Vietnam War, or the present global "war on

terror”); *Robin Hood*; the film *V for Vendetta* (2005) (involving resistance to a future fascist regime in Britain); the Academy Award winning *Pan’s Labyrinth* (2006) (a fairy tale involving resistance to Franco’s fascist regime in Spain); or even *Fight Club* (1999) (concerning violent anarchic rejection of society).

- Fictional publications of films which, while ultimately rejecting terrorist violence, nonetheless provide details on its commission; examples might include *The Manchurian Candidate* (1962) (providing indirect instruction on how to assassinate a US President); *Apocalypse Now* (1979) (again dealing with violent assassination); the *Die Hard* films (depicting a variety of terrorist methods); *Munich* (2005) (involving the State-sponsored assassination of terrorist adversaries); the American TV series *24* (detailed depictions of terrorist methods and strategies); or the film *Day Night Day Night* (2006) (depicting the final 48 hours of a suicide bomber);
- Expressing the view that a purported ‘terrorist organisation’ (such as Hezbollah or the Tamil Tigers) should not be listed or regarded as a terrorist organisation;
- First person “shooter” computer games such as *Quake*, *Doom* or *Wolfenstein*, which may indirectly encourage killing, or strategy games such as *Counterstrike*, where participants can play as a terrorist group attacking their enemies, with detailed use of explosives and other terrorist methods.

NOTES

This analysis draws on previously published material: Ben Saul, “Censorship of Religious Texts: The Limits of Pluralism” (2006) 8 *UTS Law Review* 49 and Ben Saul, ‘Speaking of Terror: Criminalizing Incitement to Violence’ (2005) 28 *UNSW Law Journal* 868.

¹ Canadian Parliament, House of Commons, Standing Committee on Public Safety and National Security, April 2007.

² Explanatory Report to the *Council of Europe Convention on the Prevention of Terrorism*, paras 27, 30, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/196.htm>.

³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 19(3) (entered into force 23 March 1976).

⁴ (2002) FCA 1080 (Unreported, Hely J, 2 September 2002).

⁵ (1997) 189 CLR 520, 561–2.

⁶ (1998) 50 ALD 765.

⁷ *Ibid* [238E], [246G], [258C]–[258D].

⁸ *Coleman v Power* (2004) 209 ALR 182 at 210 (McHugh J), 229–230 (Gummow and Hayne JJ), 246–247 (Kirby J); see D Meagher, ‘The “Fighting Words” Doctrine: Off the First Amendment Canvas and into the Implied Freedom Ring?’ (2005) 11 *UNSW Law Journal Forum* 14.

⁹ 395 US 444 (1969).

¹⁰ *Brandenburg*, [6]. See generally Steven Heyman (ed), *Hate Speech and the Constitution, Volume 2* (1996); Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* (1995); R Dworkin, ‘The Coming Battles of Free Speech’, *New York Review of Books*, 11 June 1992, 190.

¹¹ Although the laws cannot be enforced without the initial Commonwealth classification decision.

¹² *R v Crichton* [1915] SALR 1 (Way CJ); *Catch the Fire Ministries* [2004] VCAT 2510 (Unreported, Higgins VP, 22 December 2004) [18]; *Brown v Classification Review Board of the Office of Film and Literature Classification* (1998) 50 ALD 765, 778.

¹³ *R v Massie* [1999] 1 VR 542, 547.

¹⁴ In addition, it is already possible to ban publications which incite offences concerning terrorist organisations: directing them, being a member, recruiting for them, funding them, providing support or resources to them, or associating with them: *Criminal Code Act 1995* (Cth) ss 102.2–102.8.

¹⁵ Osama Bin Laden, *Messages to the World: The Statements of Osama bin Laden* (ed B Lawrence, trans J Howarth, Verso, London, 2005); see also R Hamud (ed), *Osama Bin Laden: America's Enemy in His Own Words* (Nadeem Publishing, San Diego, 2005).

¹⁶ The Bible, 1 Corinthians 6.9.

¹⁷ The Bible, 1 Corinthians 10.8.

¹⁸ The Bible, 1 Corinthians 11.3.

¹⁹ The Bible, 1 Corinthians 7.4.

²⁰ The Bible, 1 Corinthians 11.7 (“A man has not need to cover his head, because he reflects the image and glory of God. But woman reflects the glory of man”); 14.35.

²¹ The Bible, 1 Corinthians 6.1.

²² See, eg, B Harris, ‘Censorship: A Comparative Approach Offering A New Theoretical Basis for Classification in Australia’ (2005) 8 *Canberra Law Review* 25 (reviewing the relevant research).

²³ Hannah Arendt, *On Revolution* (Penguin, London, 1990), 19.

²⁴ *Gitlow v New York*, 268 US 652, 673 (1925) (Holmes J, dissenting).

²⁵ Mr Geoffrey Cox (Torridge and West Devon) (Con), House of Commons Hansard, 9 Nov 2005: Column 424.