June 2007

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

Dear Ms Smith

SUBMISSION IN REGARD TO THE DISCUSSION PAPER DATED 1 MAY 2007:

MATERIAL THAT ADVOCATES TERRORIST ACTS

This is a personal submission but is informed by my current position as the President of the International Federation of Library Associations and Institutions (IFLA), my chairmanship of the Federation's Committee on Free Access to Information and Freedom of Expression during its formative years, 1997-2003, my experience as a practising chief librarian at an Australian university, and extensive research into the nature and impact of censorship.

The submission is presented under the headings used in the Discussion Paper with some concluding comments at the end.

1 BACKGROUND

The Discussion Paper asserts, without providing evidence that "There are community concerns about the public availability of material that advocates people commit terrorist acts." There may well be some members of the community who are concerned as there are some who are concerned about many public utterances and much material that is generally available but that in itself is not a reason for prohibiting publication or distribution.

The principle underlying Australia's approach to censorship over the last four decades has been "community standards" not "some community concern". The national classification scheme administered by the Office of Film and Literature Classification has provided guidance through published classification ratings to most materials within the ambit of the legislation, thereby enabling members of the community to judge for themselves whether they or their dependent minors should view such materials. In providing that guidance, prohibiting the viewing some materials by minors, and prohibiting some materials entirely through "Refused Classification", the OFLC has endeavoured to apply "community standards" and to ensure the protection of the most vulnerable in our community. However, except for the small proportion of materials which are "Refused Classification", adults have been considered able to judge for themselves what films they might view, books they might read or games they might play.

The proposal outlined in the discussion paper goes much further by seeking to totally ban some materials without attempting to provide guidance in the way that the scheme does at present. Further, it significantly

expands the ambit of the scheme to encompass political issues, a contentious and dangerous extension beyond the current focus on adult themes, sex and violence.

2 PROPOSAL SUMMARY

The Discussion Paper notes that "The proposal is to amend the National Classification Code to include the requirement that publications, films and computer games that 'advocate terrorist acts' be refused classification." In other words, the intent is to ban outright publications, films and computer games that 'advocate terrorist acts'. As mentioned above, this represents a very significant departure from the current application of the national classification scheme.

If the proposal is to be adopted, it is therefore most important to understand the meaning of the terms 'advocate' and 'terrorist act' because both are used in common speech and may be widely applied with the potential to bring political materials within the ambit of the Code. As the OED definition notes, 'terrorist' is a political term and can include those who have resisted unjust oppression such as the French Resistance during World War II. The Macquarie Dictionary defines terrorism as "a method of resisting a government or of governing by deliberate acts of armed violence". To note the wide applicability of this term is not to condone terrorist heinous crimes such as the September 11 attacks or the Bali, Madrid and London bombings but is to emphasise that the proposal has potentially much wider applicability, especially in the hands of a repressive government.

According to the Discussion Paper: "The meaning of the terms 'advocate' and 'terrorist act' would be explained in the amendments – by using terms similar to the provisions in the Criminal Code definitions ...". The suggested explanations are:

> "**Advocate** 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."
>
> "**Terrorist act** An action or threat of action that is 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. Such an action or threat of action must also cause serious physical harm or death to a person, or endanger a person's life or involve serious risk to public health or safety, serious damage to property or serious interference with essential electronic systems. 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"

The explanation of "advocate" is consistent with the Criminal Code definition but the explanation of "terrorist act" attempts to modify the Criminal Code definition, which is reproduced below, through the qualifications and exclusions in the last two sentences.

> "**terrorist act** means an action or threat of action where:
> (a) the action falls within subsection (2) and does not fall within subsection (3); and
> (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
> (c) the action is done or the threat is made with the intention of:
> (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
> (ii) intimidating the public or a section of the public."

The intent of that qualification is expanded by the comment:

> "In addition, the Explanatory Statement would provide further explanation and discussion of the terms and the types of material that would be unlikely to be considered to advocate terrorist acts such as bona fide articles by investigative journalists, satirical pieces or patriotic battle movies. It is intended that only material that advocates terrorist acts as strictly described would be refused classification."

This reassurance is profoundly troubling since it nowhere recognises the vital importance of freedom of expression and information in a free society. The terms "bona fide articles", "investigative journalists", "satirical pieces" and "patriotic battle movies" narrow the protection until it is meaningless. In the absence in Australia of a First Amendment or Bill of Rights style protection of the right of free speech, the reassurance that such materials, let alone general comment by concerned citizens, would be "unlikely" or not "intended" to be banned offers little comfort.

Thus, the proposal as described in this section presents an abrogation of the rights to which all Australians are entitled under Article 19 of the Universal Declaration of Human Rights:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

It also likely to limit the rights in Articles 1 and 2 (equality in dignity and rights and non-discrimination), 6-11 (legal rights), 18 (freedom of thought, conscience and religion), 21 (political participation), 26 (education) and 27 (cultural and scientific participation) and their further codification in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

3 LACK OF CERTAINTY

The Discussion Paper asserts that:

> "Doubts exist as to the extent to which the present law ensures all material that advocates terrorist acts is refused classification … differences of interpretation in Board and Review Board review 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. Further litigation may result in a clearer understanding of the current law but it is doubtful that it will supply real clarity anytime soon."

In other words, the proposal seeks to circumvent due legal process and to dilute the checks and balances offered by the Australian legal system. Our protections have long relied on the common law and the interplay between executive and judiciary in its development. We place our freedoms in jeopardy when we seek to weaken those established processes.

The rest of this section concerns the elements of the term "promotes, incites or instructs in matters of crime or violence" and suggests that banning materials is the only way to protect Australian society against actions by "the impressionable and vulnerable in the community" who might be encouraged or influenced "to carry out acts of terrorism through techniques such as praising terrorist acts or issuing calls for action based on ideological or religious duty … [or] through its text, tone and context … indirectly urge or instruct the reader to commit a terrorist act by for example causing death or serious harm to sections of the community to advance a political, ideological or religious cause".

The causing of harm to sections of the community to advance a political, ideological or religious cause is repugnant to Australians and the citizens of any civil society. But the abrogation of the freedoms which lie at the core of free and civil societies is no less serious. The attempt to provide "certainty" by limiting fundamental freedoms undermines the very freedoms it seeks to protect. "Certainty" is better provided by ensuring proper policing, detection and retribution for those who threaten or carry out violent acts whether of a terrorist nature or otherwise.

4 WHAT WILL BE THE EFFECT OF THE CHANGES?

The effect will be to bring in a regime of political censorship which Australia has not had for decades. It will have a chilling effect on freedom of expression and will inhibit freedom of access to information. In the hands of an ideologically driven government, it could become a tool for political repression.

This is dangerous and unnecessary. Law enforcement authorities already have the necessary tools to fight the scourge of terrorism, as the Discussion Paper notes:

> "Criminal laws allow the prosecution of a person who commits a range of offences and crimes (including those preparatory to and/or in collusion with others) which could be part of terrorist activity. Sedition laws allow the prosecution of a person for advocating that force or violence be used against a Government. Terrorism laws allow the prosecution of a person for committing a terrorist act or training for or otherwise preparing or financing such activities."

Those capabilities have been significantly enhanced through the 2007 Federal Budget as was noted in the summary "Attorney-General's Portfolio Security Environment Update 2007-08".

The argument advanced that this proposal is necessary because "the evidential burden is high and the relevant or appropriate person to be prosecuted may not be identifiable or within jurisdiction" demonstrates a lack of respect for due legal process. It intimates that because of the difficulty of prosecuting the guilty, the innocent will have their fundamental freedom of information and expression circumscribed. And, furthermore, materials will be banned not because they have contributed to any terrorist act but because they are perceived to pose a risk of influencing or encouraging some people, "the impressionable and vulnerable in the community" to carry out acts of terrorism. No evidence is required of a causative nature.

Measures to 'target the material and get it out of circulation ... [and] prevent import or export', in the words of the Paper, have very serious consequences for a liberal democracy because they prevent adults from viewing, reading or hearing information which may inform their judgements on issues of public concern. The suggestion that all Australians need to be prevented from accessing such material because they might be "impressionable and vulnerable" or suffer from "any mental impairment" is insulting and undermines our freedoms.

Further, the proposed measures hamper libraries in their primary mission of making available information and will make it impossible to comply with charters such as that of the National Library of Australia "to maintain and develop a national collection of library material, including a comprehensive collection of library material relating to Australia and the Australian people … [and] to make library material in the national collection available … in the national interest" (National Library Act 1960). For universities, the effect of the proposal, should it proceed, would be to prevent their libraries making available information needed for research and study into the mentality and strategies of terrorists and would hamper unbiased research in many areas including the National Research Priority Number 4, "Safeguarding Australia from terrorism, crime, invasive diseases and pests …". The suggestion that material might be made available for research purposes under some form of ministerial discretion or restrictive licence is inadequate because it places the minister in the position of making a determination on the research.

5 AMENDING THE CODE AND GUIDELINES

This section of the Discussion Paper notes that:

> "The Code sets out some broad principles to which classification decisions should give effect (as far as possible), including that adults should be able to read, hear and see what they like, that everyone should be protected from exposure to unsolicited material they find offensive, and the need to take account of community concerns about depictions that condone or incite violence".

However, the proposal does not recognise the principles that "adults should be able to read, hear and see what they like" nor does it seek to provide the guidance which the classification scheme does in its current application. This proposal provides for censorship to prevent adults from reading, hearing and seeing what they like if it is considered to fall within the ambit of the loose definitions of "advocate" and "terrorism".

6 ELEMENTS 'TERRORIST ACT' AND 'ADVOCATE'

The problematic nature of the explanations or definitions has been outlined above. The discussion in this section of the Discussion Paper heightens those concerns in its reference to the "concept of the expansive definition of 'advocates'".

Further, the Discussion Paper acknowledges that:

> "Some concern has been expressed about the implications of using terminology from the Criminal Code in a civil context and whether this could mean that a wider range of material is captured and a greater restriction on freedom of expression than is desirable is a likely result."

This is the likely result and will not be minimised by the application of "a civil standard of what represents community values" by the Board and Review Board since the lower burden of proof required in civil cases would offer less protection to freedom of expression and information.

7 SCOPE OF PROPOSAL

It is not correct to say that the proposed amendments to the Code and guidelines would operate in the same fashion as the current provisions because the proposed amendments are intended to 'target the material and get it out of circulation ... [and] prevent import or export' not to institute a classification scheme under which a small proportion of materials may be "Refused Classification". Nor is it accurate to assert that "The proposal imposes no additional requirements for law enforcement or policing". The extension of the Code to cover essentially political issues will significantly extend the boundaries of law enforcement activity in Australia.

8 DISTINGUISHING SO-CALLED 'HATE' MATERIAL FROM MATERIAL THAT ADVOCATES TERRORIST ACTS

As the Discussion Paper notes, provisions already exist to control racial vilification and judicial decisions consider the interaction between those protections and freedom of speech. No changes are required for that purpose.

9 CONSEQUENTIAL AMENDMENTS TO CUSTOMS REGULATIONS

These proposed amendments pose the same dangers as the proposed changes to the Code. They inhibit access to information including the views of those who may be fanatically opposed to the freedoms which Australians enjoy.

Conclusion

As I have argued throughout this submission, the proposal is unnecessary because existing legislation covers violence, incitement to violence, hate speech and intimidation. Furthermore, the proposal is dangerous in that it seeks to abrogate the fundamental freedoms on which a free and civil society is based, including the freedom to access "material that could be considered by some to be offensive, insulting, controversial, or just unpleasant" which is and should continue to be readily available to adults. As the proposal notes, "Free speech is an important tenet of our Western liberal democracy and is enshrined in the Code": it must be protected.

And, finally, the proposal jeopardises the integrity of our universities because, as has already been demonstrated in the case of the banning of *Join the Caravan* and *Defence of the Muslim Lands*, it will prevent materials being made available by libraries for research and study. It is not satisfactory to suggest, as the Minister has, that special provisions might be made for permission to be given for such access. If universities libraries cannot acquire the materials needed for research and study of terrorism, we not only limit our freedoms but we compromise our safety.

Yours sincerely

Alex Byrne