

**Submission in relation to the classification of material that advocates terrorist acts – Patrick Emerton, Lecturer in Law, Monash University**

This submission contends that the Classification Code and guidelines not be amended in the way foreshadowed in the discussion paper. The reasons for this contention are threefold:

- The proposal to refuse classification to material that *advocates terrorist acts*, as that phrase is defined by the *Criminal Code*, is overly broad in the range of material covered;
- As a consequence, in practice, the proposal is likely to have discriminatory consequences;
- The existing provision that material which ‘promotes, incites or instructs in matters of crime or violence’ be refused classification offers ample scope to deal with material that is objectionable in its promotion of politically motivated violence.

*Excessive breadth*

As set forth in the *Criminal Code* (section 100.1), the phrase ‘terrorist act’ includes any action or threat of action where the following four criteria are met:

- the action is done, or the threat made, with the intention of advancing a political, religious or ideological cause;
- the action is done, or the threat made, with the intention of coercing, or influencing by intimidation, any government, Australian or foreign, or any section of the public of any country anywhere in the world;
- the action does, or the threatened action would:
  - cause serious physical harm, or death, to a person; or,

- endanger the life of a person other than the one taking the action; or,
  - create a serious risk to the health and safety of the public, or of a section of the public; or,
  - cause serious damage to property; or,
  - destroy, or seriously interfere with or disrupt, an electronic system;
- the action is, or the threatened action would be:
    - action that is not advocacy, protest, dissent or industrial action; or,
    - intended to cause either serious physical harm, or death, to a person; or,
    - intended to endanger the life of a person other than the one taking the action; or,
    - intended to create a serious risk to the health and safety of the public, or of a section of the public.

This definition would be reproduced in the guidelines (as set forth on pp 13 and 17 of the Discussion Paper).

As defined in the *Criminal Code* (section 102.1(1A) ), ‘to advocate the doing of a terrorist act’ is:

- to directly or indirectly counsel or urge the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or,
- to directly or indirectly provide instruction on the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or,

- to directly praise 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 (whether or not a terrorist act has occurred or will occur).

This definition would be reproduced in the guidelines (as set forth on pp 12–13 and 15 of the Discussion Paper).

It is obvious that, read together, these two definitions mean that a very wide range of material would be apt to be refused classification on the grounds that it advocates the doing of terrorist acts. The definition of ‘terrorist act’ includes virtually all actual, attempted or threatened political violence, anywhere in the world, whether undertaken by a government or by private individuals, whether undertaken in support of or in opposition to democracy, whether undertaken aggressively or defensively, and whether undertaken with or without justification. And any material which directly praises such acts or threats, or which counsels, urges or instructs in them, would be liable to be refused classification.

Obvious examples of such material would include:

- A very wide range of military training manuals;
- All propaganda for war, by whichever government it was produced;
- Any press release or other statement praising the military activities of any soldier or other fighter.

A further example, which arises in the course of my own teaching, would be *The Communist Manifesto*, which famously concludes with the following words:

The communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a communistic revolution. The proletarians have nothing to lose but their chains. They have a world to win. WORKINGMEN OF ALL COUNTRIES, UNITE!<sup>1</sup>

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<sup>1</sup> Lewis S Feuer (ed), *Marx & Engels: Basic writings on politics and philosophy*, Fontana/Collins, 1984, p 82.

These words manifestly counsel terrorist acts. The work in which they occur is a staple of any serious course on modern political or social theory. It would be absurd for such a work to be refused classification. (At the other end of the political spectrum, and equally absurd as an object of censorship given its significance for historical and political inquiry, would be *Mein Kampf*.)

### *Discriminatory consequences*

Given the extreme breadth of material that would fall under the definition of 'advocating terrorism', a serious concern arises that the definition would be applied in a partial, and potentially discriminatory manner.

This concern is not purely abstract: it arises out of the very examples given in the Discussion Paper itself. The discussion paper gives the following examples:

- An article published by a fundamentalist religious organisation describes the action of an individual who has detonated a suicide bomb amidst a market place of civilian shoppers, causing death and mayhem. The article directly praises the particular act, its deadly effect on 'the enemy' and the bomber's consequent martyrdom. It claims that the person would be assured a place in heaven. (p 3)
- A pamphlet distributed at a cultural festival, or a DVD of a speech adopts words and / or tone which indirectly advocate committing a terrorist act. It does not provide detailed step-by-step instruction on how to carry out any specific action. It does not expressly urge anyone to take action. It does not expressly praise an action. (p 3)
- [P]atriotic material that might appear to glorify war or battle. (p 6)
- [A]ction legitimately taken by the armed forces of a country on the international stage in accordance with what they perceive to be their national interests and international law. (p 6)

The first of these is offered as an example of direct praise of a terrorist act, the second as an example of indirect counselling, urging and/or instruction. It is said, of the third

example, that it is ‘not intended’ to be caught by the proposal. However, it is completely obscure in what way the third example differs from the first or second, each of which could well be described as *patriotic material glorifying war or battle*.

It might be thought that it is relevant that the first example involves attacks upon civilians, but there are two reasons why this is irrelevant under the definitions of ‘advocacy’ and ‘terrorist act’:

- The definition of terrorist act makes no reference to the targets of the actual or threatened violence;
- Many acts of war or battle involve the deliberate killing of civilians (for example, the bombing of German and Japanese cities by the Allies during the Second World War).

The suggestion is therefore raised that certain sorts of patriotism will not be censored (eg that involving Australia, the United States, etc) but others will be (eg that involving Lebanon, the occupied Palestinian territories, etc). This sort of discriminatory application of censorship laws is inimical to liberal democracy, in which the government does not take sides in its citizens political opinions and disagreements.

The fourth example identified above is said, in the Discussion Paper, to not be included in the definition of ‘terrorist act’. No reason for this assertion is given; and in fact the assertion is false, for no distinction is drawn in the definition of ‘terrorist act’ between violence carried out by state and non-state actors, and nor is any distinction drawn between legitimate violence and illegitimate violence.

Furthermore, there is express statutory warrant for the proposition that ‘terrorist act’ encompasses the activities of armed forces. The *Crimes (Foreign Incursions and Recruitment) Act 1978* establishes as defence to the crime of incursion, that the accused was serving in the armed forces of a foreign state (s 6(4)(a) ). An exception to that defence arises, however, if the organisation with which the accused was serving has been listed under Division 102 of the *Criminal Code* as a ‘terrorist organisation’ (ss 6(5),(6),(7)(b) ). At the time this provision was introduced into the *Crimes (Foreign Incursions and Recruitment) Act 1978* (by the *Anti-Terrorism Act 2004*), the

principal criteria for listing an organisation under Division 102 of the *Criminal Code* was that the organisation be ‘directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act’ (*Criminal Code*, s 102.1(1)). This demonstrates that statute expressly contemplates the activities of armed forces as falling within the definition of ‘terrorist act’.

Again, then, the only basis on which such activity can be excluded from the scope of the proposed censorship is if the proposed Code and guidelines are applied in a discriminatory fashion, legitimating the violence of states but censoring expressions of support for non-state violence. This, again, would be inimical to liberal democracy. In practical terms, for example, it would have the capacity to limit the distribution of material by organisations of the sort who, in times past, offered political support to the ANC’s struggle in South Africa, and the struggle of Fretilin in East Timor.\

#### *Ample existing powers of censorship*

As the Discussion Paper notes, the existing Classification Code requires material to be refused classification if it ‘promotes, incites or instructs in matters of crime or violence’. Given that it is a serious criminal offence, punishable by up to life imprisonment, to engage in a terrorist act (*Criminal Code*, s 101.2), there is ample existing power to censor material that promotes, incites or instructs in the doing of terrorist acts.

The discussion paper notes that ‘this provision has not been actively used in classifying material that might be considered to encourage terrorist acts’ (p 2). There are two possible explanations for such a state of affairs. First, it may be that little such material is being produced and distributed. If this is so, then there is no need for further powers to deal with it. Second, it may be that existing powers are not being used to their full extent. If this is so, then there is no need for additional powers while existing powers go unused. Either way, there is no need for adopting the proposal put forward in the Discussion Paper.

The Discussion Paper expresses concern that

There remains uncertainty around the classification of material which may more insidiously encourage people – whether or not they are naïve and impressionable – to

commit terrorist acts. Material may be expressed in a way that does not clearly attract the operation of the provisions that would require it to be refused classification. (p 3)

As the existing Code include *instruction*, the proposed new powers would add little on that score. Furthermore, if material is not explicit enough to constitute *incitement* or *promotion*, then it is not at all clear how it can constitute *counselling* or *urging*, especially as (pursuant to the *Criminal Code*, s 11.4(1) ) ‘incitement’ is defined by reference to ‘urging’.

Likewise, it is unclear how *insidious encouragement* (the words used in the Discussion Paper) would not be a form of *promotion* (the existing terminology of the Code). It seems, therefore, that the real target of the proposal is material that *praises* the doing of terrorist acts without either counselling, urging, promoting or instructing such activity; or material which is deemed to *insidiously encourages* such activity, although there is insufficient basis for judging it to *promote* such activity. In a liberal democracy, in which political freedom is paramount, there is no basis for censoring material of the first sort. The Discussion Paper, with its expressed desire to exempt patriotic material, in effect concedes this point, at least in respect of those political views that enjoy the favour of censorship authorities. But in a liberal democracy even unfavoured political views must be permitted expression.

Nor is there any basis for censoring material of the second sort, which is deemed to *insidiously encourage* terrorist acts although there is insufficient basis to judge that it *promotes* them. To institute such a subjective basis for classification is in effect to invite the censor to refuse classification to politically unfavoured material, while permitting other (suitably ‘patriotic’) material to be distributed.

In a liberal democracy, freedom of political expression is a pre-eminent value. This value is one of those reflected in the statement of principles with which the Classification Code begins. Where material cannot be shown to promote, incite or instruct in the doing of terrorist acts, then the mere fact that it expresses praise for an act of politically-motivated violence should not be a sufficient basis for censoring it. Given that the Discussion Paper itself is at pains to acknowledge the legitimacy of some such material, the almost certain practical result of the proposed amendment would be the discriminatory application of the new rules in a way that is quite contrary to the political values of a liberal democracy.