THE UNIVERSITY OF
NEW SOUTH WALES

FACULTY OF LAW

25 May 2007

Ms 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

Discussion Paper on Material that Advocates Terrorist Acts

Thank you for the opportunity to make a submission in response to the Discussion Paper on Material that Advocates Terrorist Acts released on 1 May 2007.

Please find attached a submission from our Centre on elements of the proposed amendments which we believe require some further consideration.

Yours sincerely,

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1. The Discussion Paper argues that it is necessary to amend the National Classification Code by including a requirement that publications, films and computer games that 'advocate terrorist acts' be refused classification. This is due to the belief that the existing ground of refusing classification to material if it 'promotes, incites or instructs in matters of crime or violence' is inadequate since it may not catch 'material which may more insidiously encourage people…to commit terrorist acts'. As examples of such material the Discussion Paper suggests publications which praise terrorist acts or call for action in accordance with ideological or religious duty.

Need for the amendment

2. Despite the positions adopted in the Discussion Paper, the need for adding this additional ground for refusing classification is not particularly clear. It appears to hinge upon the opinion that 'promotion' and 'incitement' (and to a lesser degree, 'instruction') are somewhat nebulous terms, 'not fully explained in either the guidelines or by judicial consideration'. While that might be so, it is submitted that problems of clarity are compounded, rather than simplified, by adding a criterion of 'advocates terrorist acts', particularly insofar as 'advocates' is defined to include 'praise'. To the extent that 'advocate' encompasses direct or indirect counselling or urging the doing of a terrorist act, or direct or indirect instruction on doing such an act, we submit that material of that description would already be liable to classification as that which 'promotes, incites or instructs in matters of crime or violence'.

3. The main point of distinction then between the existing criterion and the proposed additional one is the width potentially available through the element of 'advocates' which refers to 'directly praises doing of 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'.

The definitions of 'terrorist act' and 'advocates'

4. As the Discussion Paper acknowledges, this proposal draws directly on the definitions of 'advocate' and 'terrorist act' employed by Part 5.3 of the Commonwealth Criminal Code. Both those definitions have attracted substantial criticism. While, in our view, the Australian definition of 'terrorist act' in section 100.1 is more carefully drafted than those of other nations like the United Kingdom and the United States (which do not exclude advocacy, protest and industrial action), it is not free from complications and omissions. For example, it does not address whether the actions of a nation as part of an armed conflict can amount to terrorism. The definition would seem to include them, but the Discussion Paper asserts that for the purposes of classification, "Terrorist act' would not include action legitimately taken by the armed forces of a country on the international stage in accordance with what they perceive to be their national interests and international law'. That exemption would need to be expressed in any definition inserted into the Classification Code – a verbatim replication of section 100.1 will not necessarily ensure the concept is so confined.

5. Additionally, it must be recognised that 'terrorism' is a concept the application of which is inevitably open to contest. This was recently demonstrated by the way in which the term was employed by both sides in the conflict between Israel and Lebanon in 2006. Although the National Classification Code necessarily operates by reference to standards about which persons may disagree – centrally, whether materials 'cause

offence' – the determination as to what is or is not a 'terrorist act' is not simply another judgment in this vein. Rather, the context in which such discussions must inevitably take place, mean that the judgment of reviewers has the potential to directly impact upon the scope of permissible political speech. Terrorism is a criminal activity under Australian and international law, but the consequence of adding the proposed amendment to the Code is to enable the restriction of speech which is further removed from the clear criminality of terrorism and closer to the political dimensions which underlie the phenomenon. Put plainly, what some see as terrorism, others see as defence or a struggle for liberation. After all, Nobel Peace Prize winner Nelson Mandela was called a terrorist by many during his fight against apartheid in South Africa, including by British Prime Minister Margaret Thatcher. His past actions would also satisfy the definition of 'terrorist act' under Australian law, which provides no leeway for someone who causes harm as part of a struggle for liberation.

6. We agree even more strongly with the criticism made by many of the definition of 'advocates' in section 102.1(1A) of the Code. Admittedly that criticism has hitherto been in the context where a finding of 'advocacy' would support the proscription of an organisation, with the consequence that its members and associates may face criminal prosecution for offences attracting severe penalties. We acknowledge that the purpose to be served by use of the definition in the Classification Code is distinct and has far less direct impact upon individual liberty.

7. Nevertheless, we submit that further entrenchment of the vague standard of 'praise' in federal legislation is to be avoided. The Attorney-General's Department's Security Legislation Review Committee in its report of June 2006 recommended removal of sub-section 102.1(1A)(c) – that part of the definition of 'advocates' which includes 'praise' (see 8.11 of the Committee's Report). In December 2006, the Parliamentary Joint Committee on Intelligence and Security desisted from supporting repeal of that sub-section but resolved to 'consider the question further in its consideration of the listing process in 2007' (see 5.67 of the Committee's Report). It did, however, agree with the SLRC by recommending amendment of the provision so as to require a 'substantial risk' that the person be led by the statement to engage in a terrorist act (see Recommendation 14 of the Committee's Report). The PJCIS has concluded the hearings in its Inquiry into the Terrorist Organisation Listing Provisions of the *Criminal Code Act 1995* and is due to deliver its final report shortly. At the very least, the proposed amendments to the Classification Code should be delayed until the views of the PJCIS on the definition of 'advocates' in section 102.1(1A) are known.

8. The uncertainties which inhere in the term 'terrorism' are unhelpfully magnified when coupled with 'praise'. Because terrorism is merely a tactic employed by protagonists there is a risk that those discussing a particular conflict might be seen to condone such activities when addressing the underlying causes of that conflict or expressing sympathy for the position of one side. An example is provided by the controversy which greeted the statement by Cherie Blair, wife of the British Prime Minister, when she said of the Israeli-Palestinian conflict: 'As long as young people feel they have got no hope but to blow themselves up you are never going to make progress'.[1] That comment provoked uproar on the basis that it might be seen as excusing, if not justifying, suicide bombing. An apology was later issued by the Prime Minister's office. It is difficult to draw clear lines around what constitutes 'praise' and what does not. In attempting to explain the

[1] 'PM's wife 'sorry' in suicide bomb row', *BBC News*, 18 June 2002, <http://news.bbc.co.uk/2/hi/uk_news/politics/2051372.stm>.

causes of terrorism, organisations such as Red Cross or Amnesty International must take care not to be seen as supporting such activities.

9. The Discussion Paper has foreseen these concerns and seeks to provide reassurance by saying that it is not intended that the amendments would 'restrict film-makers or authors or publishers dealing with contentious subject matter in an entertaining, informative, educational, ironical or controversial way'. But it needs to be acknowledged that the distinction will not always be clear-cut. So it is not at all simple to see why a biography of Nelson Mandela which is largely favorable to its subject, or a film seeking to explain to audiences why the September 11 attacks on the United States were greeted with celebration in some Arab countries, will not risk being denied classification. This is particularly so given the express statement in the definition of 'advocate' that the immaturity or mental impairment of a person potentially exposed to the material and encouraged to engage in a terrorist act is irrelevant. At the very least, the Code should be amended so as to apply a 'reasonable person' standard when assessing the impact of such material.

Access for academic purposes

10. Access to banned material for academic research is not addressed in the Discussion Paper. However, Attorney-General Philip Ruddock has indicated that he will consider whether academics may access banned material for research on a 'limited' and 'structured' basis.[2] Access to banned material for research purposes should be considered in relation to the existing censorship provisions, as well as for any extensions to the provisions.

11. In order to understand a complex and intractable problem like terrorism, academics need to be able to access books about terrorism and in support of terrorism. Limiting academics' access to books on terrorism will hinder their ability to understand and criticise the ideas expressed in them. This is a problem not only for the academics themselves but also for the community at large, which depends upon quality academic work to better understand the social and security challenges facing the nation. It is important that researchers are able to access such information and that the process for obtaining access does not deter them from undertaking research in this area at all.

Conclusion

12. We wish to state very clearly that in making this submission we are not suggesting that material which a reasonable person would regard as counseling, urging, promoting, inciting or instructing in respect of violent crime, including terrorist acts, should be freely available in the community. We understand and share the policy grounds underpinning efforts to refuse classification to such material. We believe that can be accomplished under the Classification Code as it presently stands – despite any sense of uncertainty over the existing terminology and disquiet over any particular classification decisions which have been made.

13. Our concern is that amendment of the Code in the manner proposed will not provide the certainty which is claimed. Indeed, the converse is true. It is much simpler to identify speech which encourages the doing of 'crime or violence' than specifically a 'terrorist

[2] ABC Television, 'Melbourne Uni to challenge terrorism law', *Lateline*, 2 October 2006, <http://www.abc.net.au/lateline/content/2006/s1753912.htm> at 23 May 2007.

act', given the lengthy and complex definition, including motivational elements, which supports the latter. The use of 'advocacy' is rendered problematic because of its inclusion of 'praise' – a far vaguer standard than 'promotes' or 'incites'. The debates which accompanied the introduction of those definitions into the Criminal Code and their subsequent review show that there are very real difficulties in their potential application. Those experiences should be drawn upon before moving to transplant those terms into the Classification Code.

14. Lastly, these amendments have the potential to uncomfortably politicise the work of the Classification Board and Classification Review Board. This is due to the particular characteristics of terrorism as an element in broader political and societal conflict. The advantage of restricting classification to material purely on the basis of its connection to criminality or violence (the existing ground) is that the Boards will still be able to effectively control access to material which may have the effect of promoting crimes of that nature. They will be spared though the contentious and difficult task of identifying sides in a particular conflict as being associated with terrorism, which these amendments would potentially require. In particular cases that may produce an unacceptable intrusion upon free political speech, which is not, we submit, at risk under the existing arrangements.