



**Human Rights and Equal
Opportunity Commission**

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Submission of the

**HUMAN RIGHTS AND EQUAL OPPORTUNITY
COMMISSION (HREOC)**

to the

ATTORNEY-GENERAL'S DEPARTMENT

on the

**MATERIAL THAT ADVOCATES TERROROIST
ACTS DISCUSSION PAPER**

29 May 2007

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A. Introduction

1. The Human Rights and Equal Opportunity Commission (HREOC) makes this submission to the Classification Policy Branch of the Attorney - General's Department in response to the *Material That Advocates Terrorist Acts Discussion Paper*.

B. Summary

2. HREOC is not convinced of the necessity for tighter censorship laws in order to combat incitement and/or glorification of terrorism. As stated by the Organisation for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR):

The prevention of terrorism... may be seen in the broader perspective of creating an environment which is not conducive to terrorist recruitment or the acceptance of justifications put forward by terrorists for their actions. In this regard, it is of the utmost importance that laws designed to prevent incitement to terrorism and related speech do not go further than is absolutely necessary for the prevention of terrorism. The suppression of expression that falls short of incitement to violence may not only be problematic legally but may also be counter-productive in that it can seem to lend the views expressed a legitimacy that they would not attract if they were expressed openly. It can also lead to a sense of alienation through depriving parts of the community of a legitimate means of expressing their views which may tend to push them further towards more radical forms of discourse or create an environment which is more susceptible to terrorists' discourse.¹

Recommendations

3. HREOC recommends that the proposal be reconsidered.

¹ *Background Paper on Human Rights Considerations in Combating Incitement to Terrorism and Related Offences*, OSCE/CoE Expert workshop, *Preventing Terrorism: Fighting Incitement and Related Terrorist Activities*, Vienna, 19-20 October 2006, p 3.

4. At a minimum HREOC submits that the proposed definition of ‘advocate’ a terrorist act in paragraph (c) should be amended to:

- require that there is a ‘substantial’ risk (not merely a risk) that the praise might lead a person to engage in a terrorist act; and
- delete the reference to ‘regardless of age or any mental impairment’,

so that paragraph (c) of the definition of ‘advocates’ reads as follows:

Action that:

...

(c) directly praises doing a terrorist act where there is a substantial risk that such praise might lead a person to engage in a terrorist act.

C. What is the proposal?

5. The National Classification Code already requires publications to be refused classification if they ‘promote, incite or instruct in matters of crime or violence’, or if they ‘offend against the standards of morality, decency and propriety generally accepted by reasonable adults’.

6. The discussion paper proposes to add a new category of publications that must be refused classification - publications, films and computer games that ‘advocate terrorist acts’.

7. The discussion paper proposes that ‘advocate’ and ‘terrorist act’ will be defined in terms similar to definitions in the *Criminal Code 1995* (Cth) (although somewhat simplified), as follows:

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.

D. The human right to freedom of expression

- 8. In international human rights law, the main guarantee for freedom of expression is Article 19 of the International Covenant on Civil and Political Rights (ICCPR).
- 9. Article 19 ICCPR reads:
 - 1. Everyone shall have the right to hold opinions without interference.
 - 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
 - 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - a. For respect of the rights or reputations of others;
 - b. For the protection of national security or of public order (ordre public), or of public health or morals.
- 10. Freedom of expression is one of the essential foundations of a democratic society. It provides protection for ideas, opinions and information that may offend, shock or disturb either the Government or part of the population.

11. As a qualified right, the right to freedom of expression does allow for a degree of limitation on the exercise of the right. In order to interfere with the right to freedom of expression, however, the tests of legality, necessity and proportionality must be satisfied.
12. The balancing exercise to determine the extent to which freedom of expression may be limited in the context of prevention of terrorism is highly complex.

Restrictions on freedom of expression require legal certainty

13. Any restriction on freedom of expression must be clearly established by law so that a person can judge whether or not their publication would be refused classification (Article 19(3) ICCPR).

Restrictions on freedom of expression must be proportionate and necessary

14. The interference with freedom of expression must also be ‘necessary’ in a democratic society (Article 19(3) ICCPR). ‘Necessary’ does not mean indispensable, but neither does it mean ‘reasonable’ or ‘desirable’. It implies a pressing social need, which must accord with the requirements of a democratic society, that is, tolerance and broad-mindedness.²
15. The principle of proportionality also requires a reasonable relationship between the means employed and the aims sought to be achieved.³ Factors to consider when assessing whether or not an action is proportionate are:
 - Have relevant and sufficient reasons been advanced in support of it?

² The government must demonstrate that “(a) the expression or information at issue poses a serious threat to a legitimate national security interest; (b) the restriction imposed is the least restrictive means possible for protecting that interest; and (c) the restriction is compatible with democratic principles”, *Johannesburg Principles*, Principle 1.3.

³ “The Court must look at the impugned interference in the light of the case as a whole. In particular, it must determine whether the interference in issue was ‘proportionate to the legitimate aims pursued’ and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’”, see ECtHR, *Lingens v. Austria*, 8 July 1986, para. 40, and ECtHR, *Barfod v. Denmark*, 22 February 1989, para. 28.

- Was there a less restrictive measure?
 - Has there been some measure of procedural fairness in the decision making process?
 - Do safeguards against abuse exist?
 - Does the restriction in question destroy the ‘very essence’ of the right in question?⁴
16. As stated by the United Nations Special Rapporteur on Freedom of Opinion and Expression and others:

The right to freedom of expression is universally recognised as a cherished human right and to respond to terrorism by restricting this right could facilitate certain terrorist objectives, in particular the dismantling of human rights. While it may be legitimate to ban incitement to terrorism or acts of terrorism, States should not employ vague terms such as ‘glorifying’ or ‘promoting’ terrorism when restricting expression. Incitement should be understood as a direct call to engage in terrorism, with the intention that this should promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring.⁵

17. Therefore a way of ensuring that legislation in this area is carefully targeted and proportionate, is to expressly require both a **specific intent** to incite the commission of a terrorist act and a **concrete danger** of this act being committed **as a result of** incitement.⁶

⁴ *Background Paper on Human Rights Considerations in Combating Incitement to Terrorism and Related Offences*, *op cit*, p 3.

⁵ Joint declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 21 December 2005.

⁶ The importance of such elements for human rights compliant laws on incitement is also stressed in House of Lords, House of Commons-Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters, Third Report of Session 2005–06, HL Paper 75-I-HC 561, 28 November 2005, spec. pp. 15-22.

E. HREOC's concern with the proposed changes

18. HREOC is not convinced of the necessity for tighter censorship laws in order to combat incitement and/or glorification of terrorism.
19. The current censorship laws already require materials to be refused classification if they 'promote, incite or instruct in matters of crime or violence'. The breadth of the proposed new category and definition of material that 'advocates' terrorist acts may unjustifiably and disproportionately restrict the right to freedom of expression in some circumstances.

Recommendation 1

20. HREOC recommends that the proposal be reconsidered.

Paragraph (c) of proposed definition of 'advocate' is too broad and lacks legal certainty

21. Paragraph (c) of the proposed definition of 'advocate' provides:

Action that:

...

(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.

22. This definition is based on s 102.1(3) of the Criminal Code. HREOC is concerned that this definition is extremely broad, and raised this concern previously in its submission to the Security Legislation Review (January 2006) in respect of the Criminal Code amendments.⁷

⁷ See http://www.humanrights.gov.au/legal/submissions/security_legislation_review.html, p 9.

Recommendation 2

23. As HREOC submitted to the Security Legislation Review, paragraph (c) of the definition should be amended from ‘risk’ such praise might have the effect of leading a person to engage in a terrorist act, to ‘substantial risk’.⁸ This was the recommendation of the Senate Legal and Constitutional Committee in its report into the *Anti-Terrorism Act (No.2) 2005* (Cth) (which enacted that provision).⁹
24. HREOC also notes that the definition of ‘advocate’ requires the assessment of risk to be made against a person of any age and regardless of ‘any mental impairment’. It is not clear how a person attempting to assess material against such a definition will determine what persons of unspecified mental impairments ‘might’ be lead to do by an act. When combined with the breadth of the term ‘risk’ and the use of the word ‘might’, the section has a breadth that cannot, in HREOC’s view, be justified.
25. Because it lacks legal certainty and goes beyond what is necessary and proportionate, the proposed definition is too broad in scope and fails the human rights tests identified above.

Recommendation 3

26. HREOC therefore recommends that the reference to ‘regardless of age or any mental impairment’ be deleted from paragraph 9(c) of the definition of ‘advocates’. HREOC recommends that paragraph 9(c) be reworded as follows:

Action that:

...

(c) directly praises doing a terrorist act where there is a substantial risk that such praise might lead a person to engage in a terrorist act.

⁸ *Ibid.*

⁹ The Committee’s report is available at:

http://www.aph.gov.au/senate/committee/legcon_ctte/terrorism/report/index.htm

See the comments of the Committee at paragraphs 5.234 and 5.325, and Recommendation 31.