



University of Sydney



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Classification Review, Classification Policy Branch
Australian Attorney-General's Department

By email:
classificationreview@ag.gov.au

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Dear Ms Smith

Please consider this submission to your *Classification Review concerning Material that Advocates Terrorist Acts*. This is a joint submission of the following organisations:

- **Sydney Centre for International and Global Law** at Sydney University, a research centre with expertise in anti-terrorism law and freedom of expression and religion;
- **Australian Lawyers for Human Rights**, a network of over 1200 Australian lawyers active in practising and promoting international human rights standards in Australia;
- **Sydney PEN**, part of a worldwide, non-political association of writers which exists to promote literature and freedom of expression.

The contents of this submission are as follows:

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Please be in touch if you require further information or clarification.

Yours sincerely

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A Introduction

This submission 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 and freedoms 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 the prohibited 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 further below.

B Lack of Certainty and the Need for the Amendment

The Discussion Paper indicates that the main purpose of the amendments is to address uncertainties in whether existing law ensures that material advocating terrorism is refused classification. The lack of clarity is said 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 these assertions. **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 **part (H)** at the end of this submission.*

This problem is best illustrated by the example of “indirectly counselling” provided in the Discussion Paper itself. 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,³ or simply to request or encourage.⁴ 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.⁵ 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.

C 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,⁶ 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. Arguably, books such as *Join the Caravan* or *Defence of the Muslim Lands* are not objectively worse than, for instance, the mainstream Christian Bible. 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;⁷ demands death for sexual immorality;⁸ makes husbands supreme over their wives⁹ (including their bodies¹⁰); insists women cover their heads and remain silent in church;¹¹ objects to heathen judges judging disputes between Christians¹² (a rudimentary sharia law?); and visits the terrible plagues of Revelation upon all humanity.

The Christian tradition can easily be painted in a manner as extreme and fanatical as radical Islam if the right gloss is put on it. Indeed the glorification of the cult of death is hardly foreign to western culture: Wilfred Owen's poem long ago exposed 'The old Lie; Dulce et decorum est / Pro patria mori' ('it is sweet and right to die for your country').¹³

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.

D Impressionable Audiences Vulnerable to Radicalisation

The Discussion Paper suggests that some people are easily influenced – the young, the impressionable, the vulnerable, those subject to manipulative recruitment and so on. It is certainly possible that some indirect terrorist materials may appeal to some disenfranchised

segments of the community. 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, the Discussion Paper offers no empirical evidence to 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,¹⁴ 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, the 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 to such materials. Such alternative means should be seriously considered before freedom of expression is so restricted.

E Exclusions and the Definition of Terrorism

The Discussion Paper indicates that the amendments are not intended to capture material such as journalism, satire, patriotic material glorifying war or battle, nor is it intended to restrict film-makers, authors or publishers from dealing with contentious subjects in an entertaining, informative, educational, ironical or controversial way.

It is, however, entirely unclear how the proposed amendments support this assertion. There is no explicit exclusion of such matters from the scope of the amendments. In the light of the Discussion Paper's own lack of confidence about classification decision-making concerning terrorism, the public surely cannot be expected to believe that decision-makers will routinely exempt such material from RC classification, based on their own voluntary sense of restraint.

While most of these exclusions are desirable on the public interest and freedom of expression grounds, given the potential breadth of the proposals, it would be essential to expressly safeguard them in the legislation. For instance, good faith exceptions commonly found in State and Commonwealth anti-vilification legislation typically protect statements made in good faith for academic, artistic, scientific, religious, journalistic or other public interest purposes, and a similar exclusion could be crafted for materials which exhibit such purposes in the classification law context.

To take one example, it would be important to ensure that academic researchers, teachers and students maintained access to publications dealing with terrorism which are refused classification. A number of Australian scholars 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.

Similarly, it would be 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.

If journalists and academics are thought entitled to a special defence, it raises 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. There is also a real danger that banning the expression of 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 – refusing classification 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.

The scope of any potential exclusions does, however, require further consideration in other respects. For example, it is questionable whether patriotic material glorifying war or battle, as identified by the Discussion Paper, ought to be available where such material advocates terrorist acts (whether by counselling, urging, instructing or praising them).

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, should be equally subject to the proposed classification regime. There would be no justification for exempting material endorsing State terrorism from the proposal.

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.

The Discussion Paper's purported exclusion of State armed forces acting on the international plane from the definition of terrorism also raises different issues. **First**, currently such conduct 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.

It would thus be necessary to expressly exclude materials dealing with such conduct in the classification legislation, given the absent protection in the Criminal Code. In its current form, the amendments would 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.

Second, assuming such exclusion is desirable on policy grounds (by preventing the interference of domestic criminal law in combatant immunity under international humanitarian law), it should not be limited to conduct within “the framework of the internationally recognised concept of war” as suggested by the Discussion Paper. “War” is an obsolete concept in international law; the modern law refers to “armed conflict”, which encompasses hostilities beneath the traditional threshold of a (declared) war prior to 1945.

Thirdly, if such exclusion is accepted, it becomes questionable why 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.

F 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’.¹⁵ 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 is designed to protect the public interest in maintaining public order through the prevention of crime.

On the other hand, this proposal 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.

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*,¹⁶ 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*¹⁷ ('*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*¹⁸ ('*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.¹⁹

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*)²⁰ – 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*²¹ (*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’.²² The twin requirements of the imminence and likelihood (or probability) of crime ensure that speech is not prematurely restricted; there must be a sufficiently proximate connection or causal link between the advocacy and the eventuality 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.²³

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.

G 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'²⁴ 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',²⁵ 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."²⁶

H Examples of Material Potentially Captured by the Proposed Amendments

- 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, Robert Mugabe's Zimbabwe, or the 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"); George Orwell's *Animal Farm*; the story of *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 or 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 (involving depiction of a variety of terrorist methods); *Munich* (2005) (involving the State-sponsored assassination of terrorist adversaries); the American TV series *24* (involving 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 submission 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.

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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 *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.

⁴ *R v Massie* [1999] 1 VR 542, 547.

⁵ 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.

⁶ 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).

⁷ The Bible, 1 Corinthians 6.9.

⁸ The Bible, 1 Corinthians 10.8.

⁹ The Bible, 1 Corinthians 11.3.

¹⁰ The Bible, 1 Corinthians 7.4.

¹¹ 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.

¹² The Bible, 1 Corinthians 6.1.

¹³ W Owen, ‘Dulce et decorum est’ (1917-18).

¹⁴ 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).

¹⁵ *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).

¹⁶ (2002) FCA 1080 (Unreported, Hely J, 2 September 2002).

¹⁷ (1997) 189 CLR 520, 561–2.

¹⁸ (1998) 50 ALD 765.

¹⁹ *Ibid* [238E], [246G], [258C]–[258D].

²⁰ *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.

²¹ 395 US 444 (1969).

²² 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.

²³ Although the laws cannot be enforced without the initial Commonwealth classification decision.

²⁴ Hannah Arendt, *On Revolution* (Penguin, London, 1990), 19.

²⁵ *Gitlow v New York*, 268 US 652, 673 (1925) (Holmes J, dissenting).

²⁶ Mr Geoffrey Cox (Torrige and West Devon) (Con), House of Commons Hansard, 9 Nov 2005: Column 424.