Australian Censorship Policy and the Advocacy of Terrorism

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Abstract

The *Classification (Publications, Films and Computer Games) Act 1995* (Cth) provides for the regulation and censorship of a wide variety of material in Australia. This article examines the implications for Australian censorship policy in light of amendments to that Act by the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007* (Cth). The amendments create a new regime for regulating material that advocates terrorism. The amendments are assessed against two key principles of Australian censorship policy: first, that censorship decisions are to be made by independent bodies (namely, the Classification Board and Classification Review Board); and second, that there should be a co-operative, uniform scheme for the making of censorship decisions.

1. Introduction

The position of 'Censor' was one of Ancient Rome's most esteemed public offices. The Censors had two primary functions: to keep public morals and to maintain the register of citizens. From these come our modern concepts of the 'censor' and 'census'. The two roles were complementary. A Censor who found a citizen in violation of public morals could exclude that citizen from the official register. For millennia, censorship and ostracism have hunted together.

This article was prompted by amendments to Australian censorship law as set out in the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ('*Classification Act*') by the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007* (Cth) ('*Terrorist Material Act*'). The amendments create a special regime for regulating material that advocates terrorism. In effect, they censor any material that has a risk of causing a person, regardless of their age or mental impairment, to commit a terrorist act.

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A central challenge of censorship law and policy concerns how to ban dangerous speech without limiting valuable political, educational, artistic and other expression. This problem is particularly acute when, as is the case with the *Terrorist Material Act*, the speech in issue is likely to be that of a minority group. Much of the critique of laws like the *Terrorist Material Act* has come from within the tradition of theoretical thinking on freedom of speech. Arguments of this kind are familiar: vague laws which restrain speech have the potential to be applied in an overbroad manner, directly restraining valuable, harmless speech; censorship laws have a chilling effect on free speech beyond their direct operation; banning books gives them 'a potent subterranean existence beyond the reach of intellectual refutation by open discussion and social contest';[1] surveillance of censored material is more difficult because censoring drives the enemy underground; and censorship apparently targeted at a minority further alienates that group.

In this article, we take a less well-trodden approach. We examine the *Terrorist Material Act* from the perspective of Commonwealth censorship policy. We find that the amendments represent a fundamental regression in approach. They do so by making censorship decisions depend on a direction from the political branch of government and by forswearing national uniformity for opportunistic federalism.

We first outline relevant aspects of the development of Commonwealth censorship policy. We then explain the nature of the recent amendments and their likely impact. Finally, we turn to the two ways in which the amendments reverse the direction of Australian censorship policy, and outline the risks in that reversal. Our analysis suggests that this new direction in Commonwealth censorship policy was a wrong turn, which brings substantial hazards for the future of censorship law in Australia.

2. *Australian Censorship Policy*

A. Australia's Current Censorship Scheme

The centrepiece of the Commonwealth censorship scheme is the co-operative classification and enforcement system established by the *Classification Act* and State and Territory Enforcement Acts.[2] Under that system, Commonwealth law determines the classification given to material; State and Territory laws constitute a regime to enforce those classifications. The *Classification Act* applies to written publications, films and computer games. The *Broadcasting Services Act 1992*

1 Frank Moorhouse, 'The Writer in a Time of Terror' (2007) 68 *Intellectual Property Forum* 10, 24.

2 See *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW); *Classification of Publications, Films and Computer Games Act 1985* (NT); *Classification of Computer Games and Images Act 1995* (Qld); *Classification of Films Act 1991* (Qld); *Classification of Publications Act 1991* (Qld); *Classification (Publications, Films and Computer Games) Act 1995* (SA); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas); *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic); *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA).

(Cth) has the effect that the same criteria as determine classification under the *Classification Act* regulate internet content. Further, it is a condition of television and radio licences that the licensee does not broadcast content that has been refused classification.[3]

Most Australians are familiar with the public face of the classification scheme: the ratings from 'G' (General Viewing) upwards given to movies and computer games. Classification decisions are made by the Classification Board.[4] The Classification Board's decisions are subject to review by the Classification Review Board[5] (where we refer to these Boards jointly, we will call them 'the Boards').

The Boards are formally separate from the political arms of government. The Commonwealth Attorney-General is responsible for appointing members, through the Governor-General,[6] but the Attorney-General's statutory role ends there. The Attorney-General has no express power to direct the Board to reach a particular decision. Indeed, the Boards and the Attorney-General do not always agree. In 2006, the Classification Review Board declined to refuse classification to six books and one film that the Attorney-General believed incited terrorism and had been inappropriately classified by the Classification Board.[7] If the Attorney-General were to give such a direction and the Board were to follow it, the decision would probably be vitiated for either bias or a failure to exercise the power as a discretion.

The Attorney-General's power to appoint Board members is not at large. In making appointments, 'regard is to be had to the desirability of ensuring that the membership of the Board is broadly representative of the Australian community'.[8] The former Director of the Office of Film and Literature Classification ('OFLC') has described the Classification Board as a 'semi-permanent jury; a randomly selected group … called upon to make decisions on standards on behalf of the community'.[9] Before making an appointment, the Attorney-General must consult with the censorship Ministers of the States and Territories.[10] When making decisions, Board members must disclose any interests, and may be barred from participating.[11] Further, the Boards check that their decisions align with general community attitudes by running regular 'community assessment panels'. These

3 See *Broadcasting Services Act 1992* (Cth) Sch 6 cl 24(e).

4 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ('*Classification Act*') s 10.

5 *Classification Act* s 42.

6 *Classification Act* ss 48(1), 74(1).

7 See the Classification Review Board's decisions regarding *Jihad or Terrorism*; *Jihad in the Qu'ran and Sunnah*; *Islam and Modern Man*; *The Qu'ranic Concept of War*; *The Absent Obligation*; *The Criminal West* and *The Ideological Attack,* 10 July 2006 <http://www.classification.gov.au/www/cob/classification.nsf/AllDocs/1C93A1C55C47FED7CA2575980000960A?OpenDocument> at 30 July 2009.

8 *Classification Act* ss 48(2), 74(2).

9 John Dickie, 'Classification and Community Attitudes' in Centre for Media, Communications and Information Technology Law, *Proceedings of a Seminar held on Classification and Community Attitudes* (Research Paper, University of Melbourne, 1998) 4.

10 *Classification Act* ss 48(3), 74(3).

11 *Classification Act* ss 64, 82.

panels involve a group of community members watching several pre-release films for which they do not know the rating. The community members rate the film, and that rating is compared with the Board's rating.[12]

The *Classification Act* provides, subject to an exception introduced by the *Terrorist Material Act*, which we will discuss below, that publications are to be classified in accordance with 'the Code' and 'the Guidelines'.[13] Thus, three documents regulate the Board's classification power: the *Classification Act*, the *National Classification Code 2005* (Cth) ('the Code') and the *Guidelines for the Classification of Publications 2005* (Cth) ('the Guidelines').[14]

Section 11 of the *Classification Act* is titled 'Matters to be considered in classification'. It provides:

> The matters to be taken into account [in making a classification] include:
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> (a) the standards of morality, decency and propriety generally accepted by reasonable adults; and
>
> (b) the literary, artistic or educational merit (if any) of the [publication]; and
>
> (c) the general character of the [publication], including whether it is of medical, legal or scientific character; and
>
> (e) the persons or class of persons to or amongst whom it is published or is intended or likely to be published.

The Code and the Guidelines are Commonwealth legislative instruments. Significantly, however, their content is determined by agreement between the Commonwealth, States and Territories. The Code and Guidelines seem to be of similar effect, though the Code expresses more generic principles than the Guidelines.

Clause 1 of the Code gives the broadest statement of the principles guiding classification decisions. It provides:

> Classification decisions are to give effect, as far as possible, to the following principles:
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> (a) adults should be able to read, hear and see what they want;
>
> (b) minors should be protected from material likely to harm or disturb them;
>
> (c) everyone should be protected from exposure to unsolicited material that they find offensive;
>
> (d) the need to take account of community concerns about:
>
> (i) depictions that condone or incite violence, particularly sexual violence; and
>
> (ii) the portrayal of persons in a demeaning manner.

The Code then provides a table indicating appropriate classifications for publications.[15] The highest rating is 'Refused Classification' ('RC'). The Code directs the Board to refuse classification to all publications that 'promote, incite or instruct in matters of crime or violence'.[16] If a publication is classified RC, it is

12 See the discussion in Sarah McKenzie, 'Classification and Censorship' (2004) 37 *Screen Education* 52, 53.

13 *Classification Act* s 9.

14 See also the *Guidelines for the Classification of Films and Computer Games 2005* (Cth).

15 *National Classification Code 2005* (Cth) cl 2.

effectively banned. Under State and Territory laws, publications classified RC cannot be sold or publicly exhibited.[17] They also cannot be possessed with the intention of selling them,[18] nor privately exhibited before a minor.[19]

The Guidelines amplify the Code. They give detailed descriptions of the core concepts. Relevantly, they state that '[p]ublications will be classified "RC" … if they contain … detailed instruction in: (i) matters of crime or violence, (ii) the use of proscribed drugs'.[20]

The Code and the Guidelines appear to direct the Boards to classify publications 'RC' if they promote, incite or instruct in crime. It has been held, however, that those instruments can legally only create a presumption that the Boards should adopt a certain classification in certain circumstances. Classifications, in all circumstances, remain 'a matter of judgment'.[21] This means that, if the Code or Guidelines purport to direct the Boards to make a particular decision in particular circumstances, thereby negating any discretion the Boards have, they would be *ultra vires* the enabling Act.

The many factors relevant to classification set out in the *Classification Act*, the Code and the Guidelines indicate the complexity of the decisions made by the Boards. No publication is defined merely by subject matter. The Boards must also consider academic merit, likely audience, the nature of the publication, community concerns and a range of additional factors set out in the Code and Guidelines. This is not a simple process. Nor is it a process involving a merely superficial analysis. It requires an analysis of the publication in its full context.

For example, in 2003, the Classification Review Board considered the classification appropriate for a film prepared by a child sexual assault academic titled *The Sexualisation of Girl Children and Adolescents on the Internet*.[22] The film contained depictions of child pornography. The Board noted that, on its face, the film contributed to academic debate suggesting it should be permitted distribution, albeit restricted distribution. The Board, however, ultimately refused the film classification. It took into account that the film lacked academic rigour: it had no abstract, literature review nor references to other academic studies. The Board noted that there was no evidence of safeguards to ensure the film only reached its intended audience. The Board concluded that '[t]he harm caused by the extensive and detailed depictions of child pornography involving children and young people would not be outweighed by the expected benefits to knowledge.'[23]

16 *National Classification Code 2005* (Cth) cl 2 Item 1(c).

17 See, eg, *Classification (Publications, Films and Computer Games) Enforcement Act* 1995 (NSW) s 6.

18 See, eg, *Classification (Publications, Films and Computer Games) Enforcement Act* 1995 (NSW) s 26.

19 See, eg, *Classification (Publications, Films and Computer Games) Enforcement Act* 1995 (NSW) s 12.

20 *Guidelines for the Classification of Publications 2005* (Cth) 14.

21 *Adultshop.com Ltd v Members of the Classification Review Board* (2007) 243 ALR 752, [104] (Jacobson J).

22 Classification Review Board, Decision on *The Sexualisation of Girl Children and Adolescents on the Internet,* 18 December 2003 <http://www.classification.gov.au/www/cob/rwpattach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)~288.pdf/$file/288.pdf> at 30 July 2009.

23 Ibid 4.

It is apparent from this brief overview that the classification scheme has two very important features. First, it creates a system in which classification decisions are formally independent of politics, are discretionary and involve balancing complex, context-dependent factors. Second, it creates an integrated, co-operative federal system in which each jurisdiction plays an ongoing role. The scheme has not always been this way.

We turn now to a brief history of Commonwealth censorship policy, to explain how these two features have come to form a central part of the system. We do not seek to recount an exhaustive history of censorship in Australia. Instead, we recount a history based around these two themes. We focus on censorship in relation to print media and films. The regulation of television and the internet are relatively recent phenomena, and reflect the developments in print and film censorship.[24]

B. Towards Guided, Independent Discretion

For the majority of Australia's history, censorship decisions were made according to broad, relatively unconfined discretionary powers, either by ministers or officers of government departments. Since 1901, Commonwealth censors have been most active in banning books. For periods, *The Catcher in the Rye*, *Lolita*, *Portnoy's Complaint*, *Lady Chatterley's Lover* and *Ulysses* were banned. It is no surprise, then, that the regulation of books best evidences the trend towards accountability and independence in censorship.

In 1901, the Commonwealth took over the customs functions formerly exercised by the colonial governments. In doing so, the Commonwealth adopted as 'prohibited imports' a category formerly prohibited by the colonial Customs Acts: books that were 'blasphemous, obscene or indecent'. At various times, this prohibition appeared in the schedules and body of the Commonwealth Customs Regulations.[25] State and Territory obscenity laws continued to regulate publications produced within Australia. Like the Commonwealth customs laws, the State laws banned publications that were blasphemous, obscene or indecent.[26]

At the Commonwealth level, the decision as to whether books were blasphemous, obscene or indecent depended on the opinion of the relevant customs official, who was under no statutory or departmental obligation to consult the community, nor to have regard to any particular criteria.[27] During the First World War, the Department of Trade and Customs began referring books to the War Office censors, but did not consult outside government.[28]

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24 See generally Gareth Griffith, *Censorship in Australia: Regulating the Internet and other Recent Developments* (Briefing Paper, NSW Parliamentary Library Research Service, 2002).

25 Anthony Blackshield, 'Censorship and the Law' in Geoffrey Dutton and Max Harris (eds), *Australia's Censorship Crisis* (1970) 9, 13.

26 See, eg, Peter Coleman, *Obscenity, Blasphemy, Sedition: Censorship in Australia* (1962) 166–168.

27 See ibid 3–36. For a detailed discussion of the inter-departmental process for prohibiting imports, see Roger Douglas, 'Saving Australia from Sedition: Customs, the Attorney-General's Department and the Administration of Peacetime Political Censorship' (2002) 30 *Federal Law Review* 135, 143–147.

28 See Coleman, above n 26, 109.

In 1929, the Scullin Government decided that existing literature censorship procedures were too opaque. It adopted a new administrative standard for decisions about prohibiting the importation of publications. Under that policy, decisions would be based on permitting 'what is usually considered unobjectionable in the household of the ordinary, self-respecting citizen'.[29] This policy, which expressly depended on community standards, resulted in the Customs Department adopting a new practice of referring to literary advisers for guidance.[30] This practice was optional, but it clearly indicated a view that some censorship decisions were more complex than in-house expertise could handle.[31] This group of advisers became the Book Censorship Advisory Committee, which, in 1937, was replaced by the Literature Censorship Board and an appeal censor. The Board comprised two academics, while Sir Robert Garran KC became the appeal censor.[32] The Board's role was advisory, but the government indicated that it would systematically seek and follow the Board's advice.[33] In 1968, the Literature Censorship Board was replaced by the National Literature Board of Review, which in time became the Classification Board and Classification Review Board.

During the 1930s, community concern grew about the influx of American comics. By July 1934, New South Wales alone was receiving 100,000 new comics each month.[34] There was concern that these comics were corrupting Australian morality, particularly that of the young.[35] In 1938, the Acting Minister for Customs responded to this concern by announcing new regulations prohibiting:[36]

> literature which, in the opinion of the Minister … :
>
> (a) unduly emphasises matters of sex or of crime; or
>
> (b) is likely to encourage depravity.

This power co-existed with the general import prohibition on items that were blasphemous, obscene or indecent. The new regulations further provided that prohibitions based on the opinion of the Minister could not be challenged in the courts.

During the 1930s, there is evidence that Commonwealth officials brought some principles to bear on their general discretion.[37] There was a general preference towards permitting works that were intellectual, expensive and difficult to access, and against permitting works with the opposite features. This preference was, however, at best, an extra-statutory, unpublicised, internal departmental policy.

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29 Ibid 20.

30 Ibid 24.

31 In 1936, following criticism of the politicisation of import restrictions on seditious literature, the Minister for Trade and Customs petitioned Cabinet to permit the external advisers to be consulted on seditious literature, as well as on obscene literature. Cabinet rejected this proposal. See Douglas, above n 27, 149.

32 Coleman, above n 26, 26.

33 See ibid 26–27.

34 Ibid 146.

35 Ibid 146–151.

36 Ibid 152.

37 See Douglas, above n 27, 153–155.

This lack of statutory guidance seems to have resulted in what might now appear to be discriminatory censorship decisions. Roger Douglas points, for example, to the fact that Lenin's *Complete Works* was permitted even though individual pamphlets from that collection were prohibited.[38] This distinction appears to have been justified on the basis that the *Complete Works* was costlier, rarer and more likely to be of only academic interest.

During this period, further discretionary censorship powers were reposed in the Postal Department and Minister. Under the *Post and Telegraph Act 1901* (Cth), the Postal Department had the power to impound or destroy indecent or obscene materials sent by mail, and the Minister had a discretion to direct that no mail be delivered to any person whom the Minister has reasonable ground to suppose was conducting an obscene, indecent or immoral undertaking.[39] 'Indecent or obscene materials' was defined broadly and inclusively by the Act to cover, for example, advertisements relating to sexual impotence or intercourse, pregnancy and female sexual problems.[40]

In 1963, the general prohibition on blasphemous, indecent or obscene literature was transferred from the First Schedule of the *Customs (Prohibited Imports) Regulations 1956* (Cth) to the body of the Regulations. It became a new regulation 4A. The effect was that those items were now presumed to be prohibited, but the Minister had a discretion to permit importation in special cases.[41] Because of policies adopted by the Minister and the Customs Department, all publications with literary merit were dealt with under regulation 4A.[42] The regulation did not specify criteria to guide the Minister's discretion. However, the Minister gave an assurance that he would always refer publications covered by regulation 4A to the Literature Censorship Board.[43]

At the time of the 1963 amendments, the prohibition on literature unduly emphasising sex or crime, or likely to encourage depravity, remained. It formed item 22 of the Second Schedule. In practice, item 22 covered all material deemed by the Customs Department not to have literary merit.[44] Censorship decisions in relation to that material were made by the Customs Department without reference to the Board. In 1968, however, item 22 was transposed into regulation 4A.[45] The effect was to make the prohibition, like that on blasphemous, indecent or obscene items, subject to a ministerial discretion to permit importation in special cases. It also meant that the Minister's policy of referring matters to the Literature Censorship Board now applied to all material, regardless of whether it had literary pretensions.

38 See, eg, ibid.
39 Blackshield, above n 25, 10.
40 Ibid.
41 See generally ibid 14–15.
42 Ibid 15.
43 Ibid.
44 Ibid 14–15.
45 Ibid 16.

In 1973, reforms championed by Senator Don Chipp saw major amendments to censorship law. Chipp's amendments introduced statutory principles for the making of censorship decisions.[46] The primary principle was that adults are entitled to read, hear and see what they wish. This principle was tempered by the propositions that people should not be exposed to unsolicited material offensive to them and that children must be adequately protected from material likely to harm or disturb them.

In 1984, there was further reform. This centred on the *Classification of Publications Ordinance 1983* (ACT) ('1983 ACT Ordinance'). That Ordinance applied to publications within the Commonwealth system, as well as to participating States and Territories. It introduced the key balancing factors presently applied by the Classification Boards: the publication's literary, artistic or educational merit and the publication's intended or likely audience. This was based on the old State obscenity statutes which, in the 1950s, had been amended to guide administrators by requiring them to have regard to the character of the publication, its likely audience and any literary merit.[47]

In 1996, with the introduction of the *Classification Act*, literature censorship became the sole responsibility of the Classification Board and Classification Review Board.[48]

In contrast to written literature, from 1917, censorship decisions about imported films were made, not by the Customs Department, but by the Commonwealth Film Censorship Board. The Board examined imported films and classified them for public exhibition in accordance with State legislation.[49] However, like written publications, Commonwealth film censorship has evolved towards conferring a guided discretion independent of government interference.

The statutes applied by the Film Censorship Board were regularly amended by the States, but they consistently conferred a broad, relatively unconfined discretionary power. In 1966, for instance, the Board imposed an outright ban on all horror films because they were 'undesirable in the public interest'.[50] The Board was under no obligation to publish its decisions, nor to keep a public record of banned films. Senator Chipp's 1973 amendments revolutionised the Film Censorship Board's processes. All of its nine members were to be appointed by the government, but seven of those were formally independent of the Commonwealth censorship bureaucracy.[51] Further, its censorship decisions were to be published in the Commonwealth Gazette.[52]

46 See Commonwealth Attorney-General's Department, 'Joint Ministerial Meeting on Censorship', (Media Release, 31 August 1973).
47 Coleman, above n 26, 166–167.
48 See, eg, Griffith, above n 24, 13–14.
49 See ibid 6.
50 Ibid.
51 Ibid.
52 Ibid.

The 1983 ACT Ordinance applied to films, thereby introducing statutory criteria to guide the Board's discretion. As with books, the 1996 *Classification Act* reposed censorship decisions in the Classification Board and Classification Review Board.

C. Towards Co-operation and Uniformity

The structure of Australian censorship law has been determined largely by the allocation of legislative power by the Australian Constitution. This has led to a two-tier system. As is apparent from our discussion above, the Commonwealth has regulated publications primarily through its customs powers, while the States have regulated publications produced in Australia. For most of the 20th century, this split resulted in very different censorship regimes at the State and Commonwealth levels. In the early years of federation, there were ongoing disagreements between the States and the Commonwealth. State censorship boards were regularly convened to censor deliberately or to permit books that had been categorised differently at the Commonwealth level.[53] This situation prompted a Royal Commission into the Film Industry to report in 1928:[54]

> The existence of two or more censorship authorities with perhaps widely divergent views and unequal standards creates confusion in the minds of importers, producers and exhibitors as to what requirements must be complied with in order to satisfy the plural censorship … [Uniform regulation] is deemed to be of such importance as to require special and early attention.

From that time, calls for a uniform national censorship scheme were a constant refrain.[55] However, it was only after nearly four decades had passed that, in 1967, the Commonwealth and States reached an in-principle agreement providing for a degree of consistency in decision-making. The agreement, implemented by amendments in 1968, saw the formation of the National Literature Board. This Board was meant to have responsibility for all print publications having 'pretensions to merit' (a term used to differentiate 'literature' from 'popular fiction'). Imported material was submitted to the Board by the Customs Department, while local material was submitted to it by the State governments. The intention was that the Board's opinion should, in practice, bind State governments. This was only one step towards consistency: neither the State governments nor the Minister for Customs were legally bound by the Board's opinions.[56]

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53 Office of Film and Literature Classification, 'History of Cooperative National Scheme for the Classification of Films in Australia' <http://www.classification.gov.au/resource.html?resource=859&filename=859.pdf> 6.

54 Commonwealth, Royal Commission on the Moving Picture Industry in Australia, *Report* (1928) [41], [204].

55 See Office of Film and Literature Classification, 'History of Cooperative National Scheme for the Classification of Films in Australia' <http://www.classification.gov.au/resource.html?resource=859&filename=859.pdf> 7.

56 See Blackshield, above n 25, 16.

Calls for uniformity further increased from 1970. Between September 1970 and 1995, the need for uniformity was discussed at the meetings of Commonwealth, State and Territory Censorship Ministers 37 times.[57] The 1983 ACT Ordinance brought further consistency.[58] Under that Ordinance, following agreement between the Commonwealth, New South Wales, Victoria, South Australia and the Northern Territory, classification of print publications was undertaken by the Office of Film and Literature Classification ('OFLC'). Queensland joined the scheme in 1991. Videos for sale and hire were also classified by the OFLC, but the OFLC applied State legislation in doing so.

The scheme established by the 1983 ACT Ordinance was complicated and incomplete. Any amendment to the scheme required executive agreement between the participating jurisdictions and new legislation from each Parliament. Daryl Williams, the former Commonwealth Attorney-General, said of the scheme established by the 1983 ACT Ordinance:[59]

> Clearly the so called 'national scheme' that existed prior to 1996 was complex and lacked real uniformity … In the case of films, each decision of the Classification Board was, in fact, made under up to 12 separate pieces of legislation … For publications, it was not unusual for a classification officer to be required to make different decisions for different jurisdictions in light of the criteria to be applied.

The primary recommendation of the 1991 Australian Law Reform Commission ('ALRC') Report, *Censorship Procedure,* was the introduction of a more uniform scheme.[60] The ALRC said, '[a] legislative framework is needed which will enable the Federal, State and Territory laws about the classification of films and publications to operate, to the greatest extent possible, as national laws.'[61] The ALRC recommended a co-operative scheme that:[62]

> would involve the creation, by a federal Act, of the classifying bodies. That Act would also set out the procedures those bodies would follow. The classification categories and criteria would not be legislated by any State or Territory, nor by the Commonwealth. Instead, they would be … agreed to by the States, the Northern Territory and the Commonwealth. They would form a 'code'. An agreement between governments would include provision for amendment of the code from time to time. The classifying body would be instructed by the federal Act to make decisions in accordance with the terms of the agreed code.

57 Office of Film and Literature Classification, 'History of Cooperative National Scheme for the Classification of Films in Australia' <http://www.classification.gov.au/resource.html?resource=859&filename=859.pdf> 9.

58 See the discussion in Griffith, above n 24, 9–11.

59 Daryl Williams, 'From Censorship to Classification' (1997) 4 *Murdoch University Electronic Journal of Law* 29, [16]–[17].

60 See Australian Law Reform Commission, *Censorship Procedure*, Report No 55 (1991) [2.9].

61 Ibid.

62 Ibid [2.12].

This recommendation formed the basis of the scheme established by the 1996 *Classification Act*.[63] Co-operation between the units of the federation lay at the core of the scheme. When the Bill for the Act was being debated in the Federal Parliament, Minsters of Parliament noted that, under the new scheme, 'the Commonwealth and the states and territories [sic] are equal partners and … policy on these matters is derived from agreement between those jurisdictions'[64] and that the 'bill [would] be fruitless without the co-operation of the states and territories [sic]'.[65]

We have already outlined the framework of the 1996 scheme: the Boards make classification decisions for publications, films and computer games that are generally applicable to all Australian jurisdictions in accordance with the mutually-agreed Code and Guidelines. Under the 1996 scheme, three jurisdictions (South Australia, Tasmania and the Northern Territory) reserved some censorship powers that permitted them to override Commonwealth classification decisions. Queensland retained no reserve censorship powers, but permitted State officers to classify publications that the Boards had not yet classified. Western Australia, initially only partly involved in the scheme, joined fully in 2003.[66]

The path towards the present degree of uniformity has been slow, but consistent. In 1995, John Dickie, Chief Censor of the Commonwealth, noted that the new Act would 'mean for the first time since Federation [that] all of the jurisdictions will have modern legislation in place, overwhelmingly uniform in application and with one set of classification principles'.[67] At each step, increasing uniformity has depended upon co-operation between the Commonwealth, the States and the Territories.

3. The Terrorist Material Act

We argued in the previous section that the trend in Australian censorship policy since 1901 has been towards a uniform national scheme in which censorship decisions are based upon the guided discretion of a body formally independent of government. We argue here that, in this context, the most recent amendments to Australian censorship law are a fundamental regression. They remove discretion, they effectively repose censorship decisions in a political branch of government, they repudiate co-operation and they consequently invite non-uniformity.

63 The *Classification Act 1995* (Cth) commenced operation on 1 January 1996.

64 Commonwealth, *Parliamentary Debates,* House of Representatives, 22 September 1994, 1389 (Janice Crosio).

65 Commonwealth, *Parliamentary Debates,* House of Representatives, 22 September 1994, 1393 (Silvia Smith).

66 See generally Office of Film and Literature Classification, 'History of Cooperative National Scheme for the Classification of Films in Australia' <http://www.classification.gov.au/resource.html?resource=859&filename=859.pdf> 3–5.

67 Office of Film and Literature Classification, 'History of Cooperative National Scheme for the Classification of Films in Australia' <http://www.classification.gov.au/resource.html?resource=859&filename=859.pdf> 2.

The *Terrorist Material Act* came about in a climate of community concern over eight books and one film that were thought to incite terrorism. These books and film had been classified unrestricted or 'PG' by the Classification Board.[68] Federal Attorney-General Phillip Ruddock then referred the items to the Classification Review Board, which classified two of the books 'RC' and maintained the original classification for the other seven items. The two books that were banned were titled *Join the Caravan* and *In the Defence of the Muslim Lands*.[69] Both were passionate calls to arms to Muslims against the Soviet occupation of Afghanistan. Both discussed and explained the concept of jihad. In banning the books, the Board relied on the provisions of the Code and the Guidelines directing it to classify as 'RC' material that incites or promotes crime. These were the first two books banned in Australia since 1973.[70]

The Board's decision to ban the two books was challenged by the New South Wales Council for Civil Liberties in *New South Wales Council for Civil Liberties Inc v Classification Review Board (No 2)*.[71] In 2007, while judgment in the case was reserved, the Commonwealth sought to ensure similar material would always be refused classification. The rationale was that 'terrorist acts are of sufficient concern … that material that advocates people commit them should be specifically identified for refusal of classification'.[72]

Initially, the Commonwealth sought to implement this policy through amendments to the Code and the Guidelines. Amending those instruments required the agreement of the States and Territories. At the July 2007 Council of Australian Governments meeting, the States and Territories failed to agree to the changes.[73] As a result, the Commonwealth enacted the *Terrorist Material Act*, which amended the *Classification Act*. Unlike changes to the Code and the Guidelines, this did not require the agreement of the States and Territories.

The *Terrorist Material Act* inserted a new section 9A into the *Classification Act*, which relevantly provides:

> **Section 9A Refused Classification for [publications] that advocate terrorist acts**
>
> (1) A publication, film or computer game that advocates the doing of a terrorist act must be classified RC.

Subsection (2) of section 9A defines 'advocates' using the same terms as are in section 102.1(1A) of the *Criminal Code Act 1995* (Cth) (*'Criminal Code'*):

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68 See generally Commonwealth, *Parliamentary Debates,* House of Representatives, 15 August 2007, 19 (Phillip Ruddock).

69 See Edwina MacDonald and George Williams, 'Banned Books and Seditious Speech: Anti-Terrorism Laws and Other Threats to Academic Freedom' (2007) 12 *Australia & New Zealand Journal of Law & Education* 29, 38–39.

70 Moorhouse, above n 1, 20.

71 (2007) 159 FCR 108.

72 Commonwealth Attorney-General's Department, *Material that Advocates Terrorist Acts: Discussion Paper* (1 May 2007) 3.

73 See Phillip Ruddock, 'Labor States Fail to Act on Material Advocating Terrorism' (Media Release, 27 July 2007).

> (2) Subject to subsection (3), for the purposes of this section, a publication, film or computer game advocates the doing of a terrorist act if:
>
> (a) it directly or indirectly counsels or urges the doing of a terrorist act; or
>
> (b) it directly or indirectly provides instructions on the doing of a terrorist act; or
>
> (c) it directly praises the doing of a terrorist act in circumstances where there is a risk that such a praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3 of the *Criminal Code*) that the person might suffer) to engage in a terrorist act.

On its face, this is a broad definition, with 'terrorist act' given the same meaning as in section 100.1 of the Commonwealth *Criminal Code*.[74] Subsection (3) carves out certain materials from the scope of subsection (2):

> (3) A publication, film or computer game does not advocate the doing of a terrorist act if it depicts or describes a terrorist act, but the depiction or description could reasonably be considered to be done merely as part of public discussion or debate or as entertainment or satire.

There are no other exceptions.

Section 9A creates a two-step decision-making process. First, the Boards determine whether material advocates terrorism, then, if they find that it does, they must classify it 'RC'. This is inconsistent with the principle that the Boards' classification decisions should be discretionary, as part of the guided balancing of complex, unquantifiable values. Section 9A eliminates the Boards' discretion as to what classification to give in certain circumstances. If they find that material advocates a terrorist act, they *must* classify it 'RC'. If the Boards fail to classify such a publication 'RC', their decision would ordinarily be *ultra vires* and a court could quash it, or even order that the item be refused classification. In effect, the decision as to what classification to give material that falls within section 9A has been made pre-emptively by Parliament.

The section also seems to leave no room for the complex balancing process in which the Boards have traditionally engaged. Some of this complex array of factors is contained in section 11 of the *Classification Act*, which requires the Boards to take into account factors such as literary, artistic or academic merit and the nature of the publication in issue. The relationship between sections 9A and 11 has not yet been tested. In relation to non-section 9A decisions, the section 11 factors are relevant in the sense that they are mandatory considerations.[75] It may

74 *Classification Act* s 9A(4).

75 *Adultshop.com Ltd v Members of the Classification Review Board* (2007) 243 ALR 752, [87], [97] (Jacobson J).

be that the effect of section 9A is to make the section 11 factors no longer mandatory if it is independently determined that the material advocates terrorism.

Whether the section 11 factors are mandatory considerations or not, they are almost certainly redundant when it comes to Board determinations of whether material advocates terrorism. If a book urges terrorism, what difference could it make that the book is of literary merit? Or that it is of a historical or religious nature? Determining whether material advocates terrorism does not involve the balancing in which the Boards are expert. The determination depends not upon subtle considerations of a publication's merit, but upon the legal construction of the terms in section 9A and specific findings of fact about the material before the Board in light of that construction. Balancing does not enter into the process. To be sure, when the Boards apply section 9A, they will necessarily construe the terms of the section, and, during that process of construction, may be influenced by subjective factors. Such influence is likely — both as a matter of fact and until there is authoritative judicial construction of the terms of the section. Further, as noted, subsection 9A(3) carves out some material that is part of public debate or entertainment. Even in this case, however, it is clear that the Boards' interpretative exercise is far more constrained than it formerly was. What is also clear is that once it is determined that the material advocates terrorism (as broadly defined by the legislation), the Boards have no more room to act. They cannot determine, for example, that the material would only incite terrorism in a very specific, highly unlikely context and that any risk is outweighed by the publication's artistic merit.

The amendments also sideline the Code and the Guidelines. Formerly, section 9 of the *Classification Act* required all classification decisions to be made in accordance with the Code and the Guidelines. Following the amendments, section 9 now provides that this is 'subject to section 9A'. The effect is that, when section 9A applies, the Code and the Guidelines have no bearing whatsoever on the classification process. Three points are significant here.

First, this reinforces that the amendments undermine the balancing typically involved in censorship decisions. The Code and the Guidelines contain a sophisticated system of considerations for the Boards to apply when reaching classification decisions. They also give the Boards a vocabulary to debate and explain that balancing, defining terms such as 'discreet', 'gratuitous' and 'tone'.

Second, the amendments have the perverse effect of *reducing* the statutory guidance given to the Boards in the decision-making process. When the Boards make decisions under section 9, they apply the *Classification Act*, the Code and the Guidelines. Together, those instruments create a systematic, regulated decision-making process. None of this extensive guidance applies to the Boards' decisions under section 9A. There are no statutorily-enumerated factors to consider — even though the terms used in section 9A, such as 'urge', 'counsel', 'instruct in' and 'praise', have a potentially broad scope.

Third, the sidelining of the Code and Guidelines means the sidelining of State and Territory input into the classification process. Section 9A was enacted, not only without the support of all the States and Territories, but in the face of express

opposition from some of them. The Attorney-General for Victoria, Rob Hulls, described the legislation as 'bully[ing]' the States and a 'disgraceful' attempt to 'break apart the co-operative agreement with the states and territories [sic]'.[76] This State opposition has directed attention to the special exemption powers that exist under State and Territory enforcement laws. The Commonwealth Attorney-General's Department has indicated that these exemption powers provide a way of limiting the overbreadth of section 9A and, perhaps, of accommodating disagreement by the States and Territories.[77]

The terms in which the exemption power is conferred differ between jurisdictions, but the basic idea is the same. The relevant Acts all confer a power on the Director of the Classification Board (and sometimes the relevant censorship Minister) to exempt an individual or organisation, individually or unrestrictedly, from the effect of the enforcement Act.[78] The Director could thus permit the distribution of publications that have been refused classification. Each decision of the Director is, however, made under individual State and Territory legislation. The terms of the sections conferring the power diverge and most of the laws permit the State or Territory censorship Minister to issue guidelines for the making of exemption decisions. Those guidelines would be specific to exemption decisions made under the laws of that jurisdiction.

There is already a divergence between jurisdictions in censorship law. It can be expected that section 9A will bring about further divergence as jurisdictions apply different views on how best to deal with the overbreadth of section 9A. The insertion of section 9A has already, for example, led New South Wales to amend substantially and to broaden its exemption powers.[79] The result is a repeat of the situation that existed before the introduction of the *Classification Act*, in which Commonwealth authorities were required to make censorship decisions in light of nine or more sets of laws. More significantly, individuals are expected to regulate their lives, speech and access to information according to a multiplicity of legal regimes.

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76 Victoria Attorney-General's Office, 'Ruddock Hell-Bent on Going it Alone on Censorship' (Media Release, 24 July 2007) <http://www.dpc.vic.gov.au/domino/Web_Notes/newmedia.nsf/798c8b072d117a01ca256c8c0019bb01/e382266876e88da8ca2573220082fc65!OpenDocument> at 30 July 2009.

77 Commonwealth, *Official Committee Hansard,* Senate Standing Committee on Legal and Constitutional Affairs, 17 July 2007, 35 (Amanda Davies).

78 *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT) Pt 7; *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) Pt 6, Div 3; *Classification of Publications, Films and Computer Games Act 1985* (NT) Pt 10; *Classification of Computer Games and Images Act 1995* (Qld) Pt 7; *Classification of Films Act 1991* (Qld) Pt 7; *Classification of Publications Act 1991* (Qld) s 37; *Classification (Publications, Films and Computer Games) Act 1995* (SA) Pt 8; *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) Pt 7; *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) Pt 8; *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA) Pt 8.

79 *Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2007* (NSW) Sch 2, amending *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 51.

These aspects of the *Terrorist Material Act* clearly run counter to the themes of Commonwealth censorship policy that we examined above. This is not necessarily a bad thing. The fact that policy develops in a way contrary to its historical direction is not, in itself, a persuasive argument against the policy. It is only persuasive if there are good reasons why, over time, the policy had been evolving in that particular direction. It is to these reasons that we turn in the next two sections.

4. The 'Citizens' Jury'

A. Drawbacks of a Statutory Direction

In 1998, John Dickie, Chief Censor of Australia, described the Classification Board as a 'jury … called upon to make decisions on standards on behalf of the community'.[80] The *Terrorist Material Act* operates as a parliamentary direction to this citizens' jury to reach a particular decision in particular circumstances without regard to the complex factors ordinarily applied in censorship decisions. The rationale for this shift may be that unlike, for example, causing offence to others, incitement to crime is a criminal act in itself and should not be subject to the discretion of a citizens' jury. We argued above that, before the *Terrorist Material Act*, the Commonwealth system had evolved to a state in which it was characterised by censorship decisions being made by a body formally independent of politics acting according to a guided discretion applied through balancing context-dependent facts and policy values. Why had it evolved this way? This question has not been fully explored in the literature. Here, we venture some thoughts.

Directing the Boards to reach a particular decision in particular circumstances is a manifestation of what public policy theorists call 'comprehensive rationality'.[81] Under this paradigm, the policy-maker purports *ex ante* to determine the outcome of a particular interaction with government. It is associated with lists of command-style legal rules that purport to deal with all situations that could possibly arise. Comprehensive rationality is also associated with minimising administrative discretion. Possibilities have been *ex ante* conceived and all have solutions *ex ante* imposed. The recent history of Australian migration policy, in which migration laws have proliferated and purported to cover almost the full range of contingencies, is one example of a kind of comprehensive rationality. One of the primary benefits of systems developed in this way is that a legislator's fear that administrators might incorrectly make a decision is allayed. A further benefit is that systems of rules developed by elected politicians and applied mechanically by unelected administrators may have greater democratic legitimacy than those that leave substantial discretion to the administrators. But what are the costs of such systems?

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80 Dickie, above n 9, 4.

81 See, eg, Charles E Lindblom, 'The Science of "Muddling Through"' (1959) 19 *Public Administration Review* 79.

(i) Denial of Context-Dependence

Systems based on comprehensive rationality assume that the policy-maker has, *ex ante*, perfect information. They assume the policy-maker can comprehensively ascertain the problem, its causes and its solutions. In the case of section 9A, the problem identified is terrorism, while the relevant cause is said to be publications that urge, instruct in or praise terrorism. This cause is further narrowed down not to be 'urging etc' generally, but 'urging etc' in the technical sense used in the *Criminal Code*. The solution imposed by section 9A is the refusal of classification to those publications.

The primary problem with this kind of approach is that, typically, policy-makers do not have perfect information, and cannot foresee all eventualities. In general, this is a trite point, but it is one with particular resonance in the context of censorship. This is because the likely effect of each publication is uniquely context-dependent. It is not amenable to *ex ante* taxonomy. This context-dependence manifests in several ways. As any student of high school English is aware, determining the character of a publication is neither simple nor robotic. What may appear worthy of censorship on a literal interpretation, for instance, may in fact be a satire or parody. It has been said of censorship:[82]

> [T]here is nothing mechanical about this process … [It] requires sensitive judgements to be made of an aesthetic and moral kind … The classifiers play a dual role, as experts who are also representative of the community at large, who are charged with the task of interpreting and applying this normative schema on the community's behalf.

Few, for example, would advocate censoring sections of the Bible which, on their face, invoke ethnic hatred and violence. That is primarily because, understood in their context, those invocations may be figurative or anachronistic.

The significance of context extends beyond features inherent to the publication to the nature of the likely audience. Australian author Frank Moorhouse has pointed out that censorship of this kind assumes an understanding of: [83]

> the message that is being sent, the message that is being received and what the effect of the message will be upon the recipient. In truth, they are all unknowable … To put it bluntly, the receiver of a media message modifies and interprets it … [T]here cannot be a 'solitary' or 'virginal' recipient of a media message … In a relatively open society, every message is in collision.

It is this context-dependence that has resulted in the sophisticated system delineated in the *Classification Act*, Code and Guidelines. The Code and Guidelines indicate the cornucopia of factors that might be pertinent: distinctions between 'depiction' and 'description', or between 'realistic depiction' and 'stylised depiction'; and concepts such as 'prominence', 'frequency', 'emphasis', 'gratuity' and 'exploitativeness'. These are aesthetic, subtle and fundamentally

82 Griffith, above n 24, 3.

83 Moorhouse, above n 1, 24.

context-dependent notions. Similarly, this context-dependence has resulted in the enumeration of relevant factors in section 11, including the publication's nature and its likely and intended audience. Context may be particularly significant when the question is whether a depiction of violence incites further violence. Some evidence suggests that the mere depiction of violence is not sufficient. What may create a risk of incitement, however, are depictions of violence where the aggressor's violence is not depicted pejoratively.[84]

The context in which a publication must be judged includes a temporal component. What is inappropriate for publication today may be appropriate tomorrow, and vice versa. In 1971, Justice Bray of the South Australian Supreme Court, speaking extra-judicially noted that:[85]

> the whole history of the censorship of literature in Australia follows an almost undeviating pattern … The book comes into the country, and someone makes a fuss about it, the book is banned; ten years after … the ban is removed, the book is allowed to come in, and in fifteen years time it is required reading … in the University.

The point is that community standards change over time. This is borne out by the very instance that resulted in the *Terrorist Material Act*. The two Islamic books ultimately banned by the Classification Review Board were written during, and pertained to, the Muslim jihad against the Soviet occupation of Afghanistan in the 1980s. When the books were first written, dissemination of them in Australia may have been entirely appropriate. Since 9/11 and the subsequent war in Afghanistan, that, arguably, may have changed. *Ex ante* designations of the appropriateness of certain categories of books posit an inflexible, non-evolving rule. Under section 9A, whether material advocates terrorism is to be determined on the face of the publication itself, without regard to the contemporary audience and other, seemingly necessary, contextual factors.

Section 9A undermines the Boards' capacity to assess publications in their context in several ways. When section 9A applies, the Code and Guidelines, which give the Boards a guide and vocabulary to understand complexity, do not apply.[86] No doubt, the Boards will still need to make sensitive judgments when determining whether material advocates terrorist acts. The question for the Boards is, however, highly legalised: does this material advocate terrorist acts within the meaning of the terms used in the *Criminal Code*? The scope of the matters the Boards may bring to bear on making decisions under section 9A are confined by the legal meaning given to the specific terms used in that section. One example of this is that expert judgments of the likely audience of a publication are not required, instead, under paragraph 9A(2)(c), the Boards must assess in relation to all conceivable persons. The Classification Review Board has already indicated that, in consequence, any publication that praises terrorism in any way will be banned.[87]

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84 See Edward Donnerstein, Daniel Linz and Steven Penrod, *The Question of Pornography: Research Findings and Implications* (1987) 93–100, 102.

85 A E Woodward, 'Censorship' (1971) 45 *Australian Law Journal* 570, 585.

86 *Classification Act* s 9.

87 Commonwealth, *Official Committee Hansard,* Senate Standing Committee on Legal and Constitutional Affairs, 17 July 2007, 21 (Maureen Shelley).

Section 9A confines, if not removes, the Boards' role in balancing factors. It assumes that publications can be classified and regulated *ex ante*. This assumption is unsound.

(ii) Prioritising One Principle over Others

We have argued that there is value in permitting subtle balancing of facts. Here, we suggest that there is also value in permitting the balancing of different policy objectives. By contrast, the nature of comprehensively rational systems is that they select one ultimate objective. Where there is a system comprised purely of rules, some of those rules will often contradict each other on their face. Comprehensively rational systems seek to resolve these contradictions *ex ante*. The effect of this is to proscribe case-by-case balancing of different policy values. This is what section 9A does. It posits an ultimate policy objective: banning terrorist speech. Subsection 9A(3) carves out some material from the overall ban, but the carve out is confined. The effect of subsection 9A(3) is to underscore that values not protected by the carve out are not protected by the law.

As we noted above, Don Chipp's reforms of Commonwealth censorship law were based upon several propositions: adults should be free to read, see and hear what they want; people should not be exposed to unsolicited offensive material; and the need to take account of community concerns about violent and demeaning material. These principles are reflected in clause 1 of the Code, which provides that classification decisions must give effect to them as far as possible. They reflect the competing values at stake in censorship. The adoption of the first principle — the freedom to access information — means Australia's system is now generally described as a system of classification, not censorship. The principle evokes a presumption that material should be accessible, unless there is sufficient contrary reason. One of the practical effects of the first principle is that the Boards have taken a narrow approach to construing the restrictive provisions of the Code and Guidelines. For instance, in the Classification Review Board's decision on *Join the Caravan*, one of the two books banned in 2006, the Board noted 'the need to undertake a conservative interpretation of the Code'.[88] This approach is informed by broader legal values, such as the constitutional freedom of political communication. What is important is that, in the general system of classification, the principles play off against each other, with no one predominating.

The effect of section 9A is that many of the values normally associated with censorship decisions are abandoned. One of these is the presumption in favour of access. Another is the importance of academics and policy-makers having access to information. It goes without saying that access to information for researchers is particularly important in areas of study such as the causes of terrorism. A number of Australian scholars were, before the amendments, researching on radical

88 See Classification Review Board, Decision on *Join the Caravan,* 10 July 2006 <http://www.classification.gov.au/www/cob/rwpattach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)~873.pdf/$file/873.pdf> 7 at 30 July 2009.

Islamic texts.[89] Indeed, soon before the Classification Review Board banned *Join the Caravan*, the book had been used by the Lowy Institute for International Policy as the basis for a major paper on Australian foreign policy.[90]

Section 9A contains no exception for special access to terrorist material. After the Classification Review Board decisions, the University of Melbourne Library withdrew access to *Join the Caravan* and *Defence of the Muslim Lands*, which had been bought for a university course on jihad, so as not to fall foul of the law.[91] The University has also pre-emptively removed several other books from its library[92] and has expressed concern that the library may inadvertently find itself in criminal breach of the law.[93] The University pointed out that there are alternative ways of achieving the government's policy objective: the materials could be kept under restricted access in the library, for example.[94] Section 9A gives no weight to these pragmatic options. On the other hand, these are the kinds of safeguards that the Boards are ordinarily able to take into account.[95]

The Federal Attorney-General's Department indicated that there might be *ad hoc* exceptions under State and Territory laws, with each jurisdiction providing for special access regimes. Under that kind of system, the censorship Minister of each jurisdiction would need to determine access on a case-by-case basis.[96] We discuss this concept in more detail below when we discuss uniformity. For now, we note only that this policy would be a return to the long abandoned approach of making censorship decisions depend on the effectively unreviewable, *ad hoc* discretion of politicians. In addition, making access depend on ministerial fiat exponentially increases the unwieldiness of the process that academics and policy-makers must carry out to undertake research. This can only have a chilling effect on such endeavours.

A further value normally implicated in censorship law is artistic and creative expression. Donald McDonald, Director of the Classification Board, has acknowledged the centrality of this principle to the classification scheme.[97] Section 9A contains a carve out for some artistic expression, with material created for public debate, entertainment or satire being protected. That carve out is,

89 Joint Submission to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 10 July 2007, 10 (Australian Lawyers for Human Rights, Sydney PEN and Ben Saul).

90 See Anthony Bubalo and Greg Fealy, *Joining the Caravan? The Middle East, Islamism and Indonesia* (2005).

91 See Submission to the Attorney-General's Department on the Discussion Paper on Material that Advocates Terrorist Acts, Parliament of Australia, 25 May 2007, 2 (University of Melbourne) 2; MacDonald and Williams, above n 70, 39.

92 See University of Melbourne, above n 91, 2.

93 Ibid 3.

94 Ibid.

95 See, eg, Classification Review Board, Decision on *The Sexualisation of Girl Children and Adolescents on the Internet,* above n 22, 4.

96 See Commonwealth, *Official Committee Hansard,* Senate Standing Committee on Legal and Constitutional Affairs, 17 July 2007, 25 (Amanda Davies).

97 See Donald McDonald, 'Sense and Censorbility' (Speech delivered at Currency House, Redfern, 26 September 2007) 13.

however, confined and vague. In one sense, the vagueness of the carve out might be thought to increase the Boards' capacity to apply section 9A flexibly. The real effect, however, seems to be to chill artistic expression because of uncertainty. Artists have already indicated that the uncertain nature of the exception will deter artistic expression.[98] In any event, vague or not, the exception is clearly highly-confined and has no exception for, for example, extraordinary circumstances.

These adverse effects are all the consequence of stipulating absolute rules and policy solutions *ex ante*. The result is that competing, important policy values are discarded, or, at best, re-introduced in a confined, vague way.

(iii) Problems with Lists

In addition to requiring perfect information about a problem, systems based on comprehensive rationality require express enumeration of the problem. Thus, the policy underlying the *Terrorist Material Act* posits terrorist speech as a problem. It further impliedly suggests that terrorist speech is a problem worthy of special treatment. This has two significant consequences.

First, it encourages groups who believe that they have identified a problem just as important as terrorist speech to push for special treatment for their problem. This was apparent during the Senate Committee inquiry into the Bill that became the *Terrorist Material Act*. The Australia/Israel and Jewish Affairs Council pushed for section 9A, or an equivalent, to extend to hate speech.[99] Similarly, the Australian Christian Lobby argued that the new section highlighted the need for different laws in relation to the depiction of real sex.[100]

The problem with enumerating one particular problem is that it is the thin end of the wedge. It emboldens the enumeration of further problems and the development of specific rules for those new problems. This can be bad in itself when those new problems are not of the same order as the first one, but end up being accorded the same treatment. It also creates particular risks when the community is subject to a moral panic and censorship can be seen as an easy political solution. In 1950, Prime Minister Menzies sought censorship of communist propaganda, asking, '[a]re we to treat deliberate frustration of national recovery, of economic stability and of proper defence preparations as a mere exercise of civil rights?'[101] Recently, there was uproar over an exhibition of photographs depicting naked child models by Bill Henson.[102] The Prime Minister, Kevin Rudd, called the photographs 'revolting' and some community groups demanded prosecutions. It is easy to foresee, during similar future episodes,

98 See Submission to the Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 10 July 2007, 2 (Arts Law Centre of Australia); Submission to the Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 13 July 2007, 2 (National Association for the Visual Arts).

99 See Evidence to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Sydney, 17 July 2007, 4 (Jeremy Jones).

100 See Submission to the Attorney-General's Department on the Discussion Paper on Material that Advocates Terrorist Acts, Parliament of Australia, 23 May 2007, 1–2 (Australian Christian Lobby).

101 Moorhouse, above n 1, 10.

strong, perhaps irresistible, pressure to extend section 9A to new types of material. The ongoing risk is of an incremental proliferation of censorship that will generally long outlive any original need or perceived need and that often will not be adapted to the original problem it was designed to solve. Proliferation of censorship laws has a chilling effect on speech and enlivens a risk of discrimination in enforcement.

The second consequence is that enumerating one problem, and seemingly prioritising it over others, necessarily discriminates. Section 9A directly identifies and targets particular conduct (terrorist speech) and particular media (the media regulated by the *Classification Act*). This communicates that terrorism is worthy of special treatment by the law; that it is different in kind to other crime. There has been much debate about whether this proposition can be sustained[103] and we do not propose to retread this ground. What is undeniable is that special terrorist laws may be perceived as State targeting of religious minorities.[104] One can easily imagine the question being asked: 'why does the government have special laws censoring Muslim religious texts because they incite violence, but not censoring the many mainstream publications showing how to commit the perfect crime?'[105] The risk is that existing alienation is magnified.

As well as targeting particular conduct, section 9A targets particular media. The *Classification Act* applies directly to publications, films and computer games. By virtue of the *Broadcasting Services Act 1992* (Cth), it also applies to most internet content.[106] It only applies to internet content, however, in a very roundabout way. Its applications depend either on someone notifying the Australian Communications and Media Authority ('ACMA') of the suspect content and ACMA then being able to force the removal of that content, or on the effectiveness of blocking measures implemented by internet service providers.[107] Both approaches are slow and will never be entirely effective. There have been no examples of the effective banning in Australia of online terrorist material. Indeed, Frank Moorhouse has accessed both jihad books banned in 2006 through the

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102 See, eg, Josephine Tovey, Les Kennedy and Dylan Welch, 'Art Obscenity Charges', *Sydney Morning Herald* (Sydney), 24 May 2008 <http://www.smh.com.au/articles/2008/05/23/1211183097197.html> at 30 July 2009. The Australia Council for the Arts has developed guidelines for artists working with children. See Australia Council for the Arts, *Protocols for Working with Children in Art* (December 2008) <http://www.australiacouncil.gov.au/__data/assets/pdf_file/0006/46086/Children_in_art_protocols.pdf> at 30 July 2009.

103 Compare Philip Ruddock, 'Law as a Preventative Weapon Against Terrorism' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 4, and Patrick Emerton, 'Australia's Terrorism Offences – A Case Against' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 75.

104 Waleed Aly, 'Muslim Communities: Their Voice in Australia's Terrorism Laws and Policies' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 198, 201; Andrew Lynch and Nicola McGarrity, 'Counter-Terrorism Laws: How Neutral Laws Create Fear and Anxiety in Australia's Muslim Communities' (2008) 33 *Alternative Law Journal* 225.

105 This idea is from Moorhouse, above n 1, 23.

106 See *Broadcasting Services Act 1992* (Cth) Sch 5 cl 3.

107 See *Broadcasting Services Act 1992* (Cth) Sch 5.

internet.[108] Further, the *Classification Act* does not apply directly to other media. For instance, television content is primarily self-regulated.[109] Section 9A does not apply to television because the system of self-regulation proceeds according to guidelines not based on the *Classification Act* but on the Code and the Guidelines.[110]

The consequence is that section 9A results in different rules for different kinds of media. This may drive terrorist speech to particular public media in which it is harder to monitor (for example, the internet), or simply to media in which it may not be prohibited. Lists of rules, an incident of systems based on comprehensive rationality, create opportunities for 'gaming' the system. This may undermine the policy objective.

(iv) Decisions Made at a Political Level

An overarching theme of our first three points is that section 9A removes decision-making from the Classification Board and the Classification Review Board. The real decisions have, instead, already been made by Parliament. This is the nature of systems based on comprehensive rationality: they can evince paranoia about lower-level, non-political, administrative discretion. Section 9A involves a political branch of government imposing a policy solution.

Former Attorney-General, Daryl Williams, strongly advocated separating politics and censorship. In his view, 'if we are to have an independent and transparent decision-making process, the task of balancing the competing interests must be left to the classifiers to decide'.[111] The Western, and particularly the Anglo-American, tradition has always approached the mixing of censorship and politics with substantial scepticism. Political censorship offends both democratic and liberal strands of political thinking. The reasons are familiar. When censorship decisions are made at political levels, there is a risk they will be applied to stifle unpopular, but valuable, political speech, or applied for personal, partisan ends. Australia has not been immune from political censorship. During the 1894 economic downturn, the Minister for Justice for Victoria waged a personal battle to censor the periodical *Justice*, which had published articles critical of him.[112]

It is in this context that the former Chief Censor, John Dickie's, likening of the Classification Board to a 'jury'[113] is resonant. The Boards are called upon to make decisions according to law, in the light of community standards. No politician, no matter how urgent the perceived need, can unilaterally censor material. Cynics will point out that appointments to the Boards are made by politicians. Each decision, however, is not, and the history of Board decisions demonstrates their willingness to make decisions contrary to the prevailing governmental view. For example,

108 Moorhouse, above n 1, 20.

109 See *Broadcasting Services Act 1992* (Cth) Sch 2 cl 9(1)(c).

110 See *Commercial Television Industry Code of Practice 2004* (Cth) Appendix 5. See also *Broadcasting Services Act 1992* (Cth) s 123(3C).

111 Williams, above n 60, [83].

112 Coleman, above n 26, 105.

113 Dickie, above n 9, 4.

whilst banning two Islamic books at the application of the government in 2006, the Classification Review Board dismissed the government's application in relation to seven other items. Reposing censorship power in the Boards to be exercised according to a guided discretion operates as an important check on government power. Section 9A revokes that discretion, and while the Boards implement the provision, they do so as automatons. The further risk is that, when applying section 9A, the Boards will not be perceived to be acting independently. The additional, and more concerning, risk is that section 9A will be followed by new sections 9B and 9C censoring further materials for reasons of partisanship, political opportunism or self-interest.

B. The Special Case of Incitement to Crime?

We have argued that section 9A goes against the grain of Commonwealth censorship policy. It imposes a policy solution from Parliament, rather than letting solutions depend on the balancing of facts and policies at the administrative level. We have argued that there are many reasons to think that policies of this kind are undesirable in the context of censorship. Here, we respond to what we see as the primary objection to our argument.

The objection runs as follows. Balancing values is important in censorship. So too is it important for community representatives, not politicians, to be responsible for determining and applying community standards. There are, however, no competing values and community standards to be applied when it comes to crime. Publications inciting crime are not like publications depicting sex. Publications depicting sex may be offensive to some, but not to others. The community has a rightful role in drawing the line at where publications become sufficiently offensive to justify censorship. Crime is not a matter of taste. The fact that the conduct is criminalised irrefutably shows that the community finds the criminalised conduct taboo. Community representatives have no further role to play in determining its appropriateness, indeed, it would probably be 'wrong' for community representatives to determine it *is* appropriate.

The inherent embargo against material depicting or inciting certain kinds of conduct has been a constant refrain during the evolution of censorship policy. During the passage of the *Classification Act*, Peter Reith advocated the automatic banning of 'child pornography, bestiality, sexual violence, incitement to drug taking, terrorist activity and exhibitions of extreme violence'.[114] Similar sentiments have been expressed by Attorneys-General[115] and Chief Censors.[116]

It is generally possible to assume a near-universal community abhorrence of crime. One can assume that the same follows in the case of terrorism. Hence, it is arguable that to ask the Board to take into account community standards or competing values when it comes to advocacy of terrorism is wrong-headed,

114 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 1994, 1385 (Peter Reith).

115 See, eg, Williams, above n 60, [81].

116 See, eg, McDonald, above n 98, 6.

because community standards are clear and inhibiting crime trumps other values. In these circumstances, it may be appropriate for Parliament to direct the Boards how to respond.

While this argument has never been put in these terms, its basic ideas underlie much of the support for section 9A. We agree with its fundamental premises: that crime is abhorrent and that materials that incite crime should generally be censored. We disagree with the inference from these premises that the appropriate policy response is to direct the Boards to reach a particular decision in particular circumstances. Where the *only* consideration in deciding whether to ban a publication is whether it incites crime, we believe that decision is best made according to the criminal law and by those expert in applying and enforcing that law. Where, however, there are other considerations at play, such as balancing policy values other than inhibiting crime (such as artistic merit), or a need to determine and apply community attitudes about violent speech, then that process is best undertaken by the Classification Board and Classification Review Board. This is especially true where the publication is, on its face, very remote from the commission of an actual crime.

Commonwealth and State laws variously criminalise incitement to,[117] or counselling of,[118] crime. These criminal laws deter publications that incite crime. The production and distribution of such publications can also be restrained by injunction pursuant to ordinary principles for vindicating public rights.[119] Decisions to apply and enforce these laws are made by administrators expert in interpreting and applying criminal law: police officers, public prosecutors and judges. This was the historical method of censoring dangerous materials. Not until 1938 was 'undue emphasis on matters of crime' introduced as a new category of materials that could not be imported.[120] It was introduced then to respond to the temporary influx of comics.[121]

This formula was retained at the Commonwealth level until the introduction of the 1983 ACT Ordinance. Clause 19(4) of the Ordinance applied to inhibit material that 'promotes, incites or instructs in terrorism'. The meaning of 'terrorism' was linked to the definition of 'terrorism' in section 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*'). In 1986, the *ASIO Act* was amended and the definition of 'terrorism' omitted.[122] In 1989, the Australian Capital Territory Government apparently realised the 1983 ACT Ordinance was linked to a definition that no longer existed. The Ordinance was amended so that it used the terms 'promotes, incites or instructs in matters of crime or violence'.[123] The phrase is now used in the Code.

117 See, eg, *Criminal Code Act 1995* (Cth) s 11.4(1); *Crimes Act 1958* (Vic) s 321G; *Crimes Prevention Act 1916* (NSW) ss 2–5.

118 See, eg, *Crimes Act 1958* (Vic) ss 323, 324.

119 See, eg, *Cooney v Ku-ring-gai Corporation* (1963) 114 CLR 582.

120 See Coleman, above n 26, 167.

121 Ibid 146–147.

122 *Australian Security Intelligence Organisation Amendment Act 1986* (Cth) s 3.

123 *Classification of Publications (Amendment) Ordinance 1989* (ACT) (No 2 of 1989).

This brief review of history indicates that the Boards' responsibility for restraining unlawful conduct has not been the result of a process of rational policy development. In part, it is historical accident. In part, it may also be bad policy. The Boards' expertise does not lie in determining and applying criminal law. It lies in determining and applying community standards and balancing competing values. The Convenor of the Classification Review Board, Maureen Shelley, has acknowledged this. She has expressed concern that the Board is not comprised only of lawyers, and may have difficulty in applying criminal law rules.[124] Previous classification decisions demonstrate this complexity. In the decision to ban Philip Nitschke and Fiona Stewart's book *The Peaceful Pill Handbook* because it instructed in crime, the Classification Review Board was called on to interpret and apply 35 pieces of legislation.[125]

When applying section 9A, the Boards' role is solely to interpret and apply a test adopted from criminal law. It is only to determine whether the material advocates terrorism within the meaning of the often vague terms used in section 9A. This falls outside of the recognised expertise of the Boards. They are expert at interpreting and applying criminal laws *as one part* of a more complicated process; at balancing criminal law against other objectives in the individual circumstances of a publication. This is what the Board did in the decision on *The Sexualisation of Girl Children and Adolescents on the Internet*. That decision was about a film, produced for academic reasons, containing depictions of child pornography. The Board refused classification, but it recognised that the need to do everything possible to restrain incitement to child sexual assault may, in some circumstances, be outweighed by the need for proper academic research in the area.[126] Further, the Boards are expert at considering the holistic question of whether a publication promotes crime or violence. This is a question that depends on a fine examination of the publication's narrative style, audience and broader context. These are the kinds of determinations in which the Boards are expert. They are not the kinds of determinations involved in section 9A.

5. Co-operative Federalism and Censorship

The second cleavage between section 9A and the evolution of Commonwealth censorship policy is the fact that it was enacted without the co-operation of the States and Territories. We outlined above how this has focused attention on State and Territory *ad hoc* exemption laws. This results in a situation in which censorship decisions depend not on one uniform set of laws, but on the

124 Submission to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 10 July 2007, 2 (Classification Review Board).

125 Classification Review Board, Decision on *The Peaceful Pill Handbook,* 24 February 2007 <http://www.classification.gov.au/www/cob/rwpattach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)~989+-+Decision+7+February+2007+-+The+Peaceful+Pill+Handbook.pdf/$file/989+-+Decision+7+February+2007+-+The+Peaceful+Pill+Handbook.pdf> 6-8 at 30 July 2009.

126 Classification Review Board, Decision on *The Sexualisation of Girl Children and Adolescents on the Internet,* above n 22, 4.

idiosyncratic operation of up to nine sets of laws. The obvious risk is that censorship decisions will vary depending upon the jurisdiction, with what is permitted in one jurisdiction being prohibited in another. It also results in censorship decisions depending on the largely unguided discretion of the Director of the Censorship Board. Further, the Commonwealth's decision to proceed unilaterally to amend a scheme that had been engendered and sustained by co-operation undermines the inter-jurisdictional trust needed for future schemes, whether in the field of censorship or otherwise.

Few would disagree that co-operation to achieve uniformity within the federation is often a good thing[127] and actions that undermine co-operation and encourage disunity are bad. Indeed, there has been bipartisan, inter-jurisdictional support for uniformity in censorship policy for many years. During the parliamentary debates preceding the enactment of the *Classification Act*, Attorney-General Michael Lavarch lauded the co-operative approach that had brought about the legislation[128] and Peter Reith, then a Liberal Shadow Minister, pointed out that co-operation with the States over censorship legislation was particularly important, since '[n]ot all wisdom resides in Canberra'.[129] Further, for obvious reasons, there has always been strong support from the publishing industry for uniform rules, uniform application of those rules and minimal duplication.[130]

Co-operation and uniformity have been seen as particularly significant in the area of censorship policy, and there has been a virtually unbroken trend towards these goals since 1901. We accept that uniformity is not always desirable in a federal system. There may be substantial benefits to civil liberties and other values from having diverse criminal laws (particularly with respect to purely private conduct, such as sexuality). There may also be substantial economic advantages from having different, experimental laws amongst the States. Our claim is that there are particular reasons, in the context of censorship law, for uniformity — and particularly uniformity achieved through co-operation.

Australian history shows that a censorship system that is not uniform is not effective. Formerly, when the Commonwealth had responsibility for imported books and the States for those published in Australia, publishers would often have two shots at classification in Australia. If they were refused permission to import from the Commonwealth, they would seek permission to produce and distribute from a State. During the 1950s, for example, Australian Protestants wanted to distribute the extremist anti-Catholic book, *The Priest, the Woman and the*

127 In *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, 589, for example, Deane J described Commonwealth-State co-operation as 'a positive objective of the Constitution'. See John Wanna, John Phillimore, Alan Fenna and Jeffrey Harwood, *Common Cause: Strengthening Australia's Cooperative Federalism* (Final Report to the Council for the Australian Federation, May 2009).

128 See Commonwealth, *Parliamentary Debates,* House of Representatives, 22 September 1994, 1381 (Michael Lavarch).

129 See Commonwealth, *Parliamentary Debates,* House of Representatives, 22 September 1994, 1386 (Peter Reith).

130 See, eg, ALRC, above n 61, [3.5].

Confessional. The Minister for Customs repeatedly refused permission to import. Protestant Publications, Sydney, simply sidestepped this by printing the book in Australia.[131] The same facts repeated themselves with attempts to distribute the Canadian book, *The Awful Disclosures of Maria Monk*.[132] A lack of uniformity weakens the force of the classification scheme as a whole, as well as the stigma that should be attached to banned material.

On the other hand, lack of uniformity can sometimes mean that one jurisdiction determines censorship policy for the remainder of Australia. Where only one jurisdiction chooses to ban material, it can still defeat the commercial incentive to import material into or print material in Australia. This happened regularly in the 1950s. During that period, Queensland's censorship board was particularly vigorous, banning 47 publications in one year alone. Queensland's censorship has been described as akin to 'a sort of national censorship, since the risk of losing the Queensland market led many publishers to change the character of their publications'.[133] Alternatively, banning material in one jurisdiction may chill its publication and distribution in another for fear that a similar decision will be made, or that the publication will be illicitly distributed in the State in which it is banned with potentially criminal consequences for the publisher.

The history of censorship also shows that proliferation of censorship laws gives a government intent on censoring material more bites at the cherry. If it fails to censor under one legal avenue, it may try another. During the 1930s, several Commonwealth attempts to ban American comics failed, before it settled on amending the customs regulations to prohibit materials unduly emphasising crime.[134] Similarly, in 2006, the Attorney-General only referred the Islamic books to the Classification Review Board after the Australian Federal Police and Commonwealth Director of Public Prosecutions had investigated the material and declined to commence investigations.[135]

The converse occurred in relation to Philip Nitschke and Fiona Stewart's book, *The Peaceful Pill Handbook*.[136] Customs officials prohibited importation of the book. This did not determine the legality of domestic printing and distribution. Late in 2002, the Classification Board permitted domestic publication, so long as the book was sold only to adults. After discovering this, the Attorney-General petitioned the Review Board to reconsider the matter and refuse classification. In doing so, he argued that it was anomalous that the book should have been refused import permission, while being permitted domestic publication. On review, the book was banned. Proliferation of legal remedies in relation to the same underlying facts is not necessarily a problem. It creates a risk, however, that individuals will either be persecuted or perpetually uncertain of their legal status.

131 See Coleman, above n 26, 16.
132 See ibid 17.
133 Ibid 170.
134 Ibid 146–151.
135 Moorhouse, above n 1, 17.
136 See the description in David Marr, 'His Master's Voice: The Corruption of Public Debate under Howard' (2007) 26 *Quarterly Essay* 1, 20–22.

As well as being significant for publishers, uniformity is particularly important for one of the other major stakeholders in the publications industry: libraries. The Australian Library and Information Association has indicated that inconsistency between jurisdictions compromises the system of inter-library loans that is critical to researchers and other readers.[137]

Censorship policy has been heading towards uniformity, through co-operation, for over a century. This culminated in the uniform system established by the *Classification Act*. The OFLC says that this 'national scheme was superior to all previous schemes'.[138] The circumstances that have resulted in section 9A reverse this century-long trend.

6. Conclusion

The amendments introduced by the *Terrorist Material Act* run counter to sound policy in the field of Commonwealth censorship law. They remove discretion in censorship decisions from the independent Classification Board and Classification Review Board by pre-empting their decisions at a political level. They also fracture the co-operative, uniform scheme introduced by the *Classification Act* towards which Commonwealth censorship policy has evolved for a century.

In some ways, our focus on section 9A is narrow. Our analysis, however, has broader significance. As we have argued, section 9A is the thin end of the wedge. Censorship laws have a habit of widening in response to pressing issues of the day. Long after the issue has dissipated in the public's consciousness, the restrictive law remains, redundant but chilling, or ready for selective enforcement, or even just no longer appropriate and adapted to any contemporary policy objective. The changes introduced by the *Terrorist Material Act*, though reasonably minor in themselves, herald a fundamental reversion in censorship policy. They are unfortunate in returning to discredited policies from the past.

137 See Evidence to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Sydney, 17 July 2007, 14 (John Alexander Byrne, Fellow of the Australian Library and Information Association).

138 See Office of Film and Literature Classification, 'History of Cooperative National Scheme for the Classification of Films in Australia' <http://www.classification.gov.au/resource.html?resource=859&filename=859.pdf> 7.