

CHAPTER 3

KEY ISSUES

3.1 Submissions to the inquiry were clearly divided between those expressing support for the Bill and its policy objectives, and those expressing strong opposition to it. However, the great majority of submissions and witnesses objected to the Bill in its entirety. This chapter discusses the key issues raised in the course of the committee's inquiry, including:

- the proposition that the Bill is required in order to protect the 'vulnerable';
- arguments that the measures contained in the Bill are uncalled-for, misguided and counterproductive;
- arguments in favour of the Bill and its policy objectives;
- the extent to which the Bill will impact unduly on free speech and on personal and private communications between individuals, and access to information;
- concerns over terms and definitions used in the Bill; and
- the Bill's inconsistency with the Customs Regulations.

Policy justification of the Bill – to protect the 'vulnerable'

3.2 The policy aim or objective behind the Bill is to protect vulnerable people who may be suicidal or have suicidal tendencies. As the Attorney-General argued in his Second Reading Speech:

There is a real need to protect vulnerable individuals from people who use the internet with destructive intent to counsel or incite others to take their own lives. The internet contains readily accessible sites and chat rooms that positively advocate suicide and discourage individuals from seeking psychiatric or other help. Many of these sites also provide explicit instructions on methods of committing suicide. There have been instances where internet chat rooms have been used by a person, or even a group of persons, to urge another to commit suicide. Recent studies have shown that in some cases such internet chat room discussions have led to a person attempting suicide, and sometimes successfully. This research points to evidence that vulnerable individuals were compelled so strongly by others to take their own lives that they felt to back out or seek help would involve losing face.¹

3.3 The Attorney-General's Department (the Department) advised the committee that the Bill's purpose was:

1 The Hon Philip Ruddock MP, Attorney-General, Second Reading Speech, *House of Representatives Hansard*, 10 March 2005, pp 4-5.

1) to complement Customs Regulations [that prohibit]...the import and export of suicide kits and associated instructions.

After the introduction of the Customs Regulations, the Internet was used to post information on how to make and use suicide kits in an effort to circumvent the intention of these Customs offences. This Bill is intended to criminalise this process.

2) to proactively respond to media reports and research studies which suggest that certain information about suicide on the Internet may encourage suicidal behaviour.

Web sites that provide chat rooms or bulletin boards devoted to discussion about suicide, in particular, have the potential to influence suicidal behaviour.²

3.4 At the hearing, representatives from the Department conceded that 'it is very clear that there was not a detailed scientific study or an extensive research project' which had prompted the Bill.³ Rather, the Bill appears more a reaction in part to perceived community concern over the risks posed by the Internet. This was borne out by other witnesses and submissions which provided the committee with examples of websites and Internet chat rooms containing detailed descriptions of methods of committing suicide that reportedly have resulted in suicides or attempted suicides overseas.⁴

Arguments that the Bill is uncalled-for and misguided

3.5 The committee also received considerable evidence to the effect that the Bill was misguided and/or that, in practice, it would not achieve its stated aim of protecting the vulnerable.

3.6 It was argued that the Bill was misdirected in that the Federal Government had merely sought to prohibit access to information about suicide rather than address the underlying causes of suicide. For example, the Law Society of New South Wales argued that the Bill 'will not operate to protect vulnerable people who are at risk of committing suicide' because:

(t)he major factor leading to suicide is despair, which can be triggered by tragedy such as personal despondency, loneliness, depression, mental illness, family breakdown or death of a loved one, poverty, unemployment, financial ruin, substance abuse or the chronic pain of a terminal illness. People at risk, in particular young people, require far more pro-active

2 *Submission 31*, p. 5.

3 *Committee Hansard*, 14 April 2005, p. 29.

4 For example, see Mr Graham Preston, Right to Life Australia, *Committee Hansard*, 14 April 2005, pp 1-2.

measures to address the causes of suicide and to help them rebuild their lives.⁵

3.7 It was also argued that the Bill was misdirected in that the risk that the Internet, or material on the Internet, posed to so-called vulnerable people has been overstated. For example, the Atheist Foundation of Australia (the Atheist Foundation) argued that anecdotal evidence – such as that put forward in support of the Bill – is not enough to justify the enactment of criminal laws. Further, the Atheist Foundation stated that its own 'investigations into the rationale behind the proposed Bill have failed to find the necessary evidence for its implementation'.⁶

3.8 Other submitters stressed that the premise of the Bill in specifically targeting the Internet was incorrect as the rate of suicide in Australia has decreased since the Internet became publicly accessible in Australia in 1994.⁷ Electronic Frontiers Australia (EFA) submitted that the Bill would not achieve any reduction of suicide rates in practice:

EFA considers it extremely unlikely that criminalising use of the Internet to access, and/or make available, the subject material will make the slightest difference to the incidence of suicide in Australia and certainly not by the most common methods of hanging and motor vehicle exhaust.⁸

3.9 Dr Philip Nitschke from Exit International made a similar argument:

The point that I would keep coming back to is the fact that suicide rates have dropped in the very same period that the internet has become more increasingly used. So in a sense we seem to be complaining about or blaming the internet for something which has got no relationship, or at least a very questionable relationship, with what is a very positive prognostic trend which we have noticed in suicide rates amongst the various age groups.⁹

3.10 Mr Kep Enderby QC from the Voluntary Euthanasia Society of New South Wales also advised the committee that:

I disagree...that suicide is a major problem in Australia, and that young people are especially prone to suicide. That is just not correct. It is wrong. The opposite is true: it is the elderly who are most attracted to the idea of suicide as an escape from the inevitable problems and discomforts, and sometimes pain, of old age. I think I can speak with some feeling, because I am about to enter my 80th year. I do not regard myself as particularly vulnerable, as has often been expressed here by earlier speakers about the

5 *Submission 18*, pp. 1-2.

6 *Submission 23*, p. 1.

7 See, for example, Electronic Frontiers Australia, *Submission 28*, p. 4.

8 *Submission 28*, p. 5.

9 *Committee Hansard*, 14 April 2005, pp 13-14.

elderly. The rate of suicide in Australia is only two per cent of all Australian deaths, with by far the greatest majority of those suicides being voluntary euthanasia type deaths.¹⁰

3.11 Similarly, the West Australian Voluntary Euthanasia Society submitted that 'the largest number of suicides in the country is among persons of over 75 and the largest proportion of those die by hanging'.¹¹ The Voluntary Euthanasia Society of Queensland made a similar point:

According to the Australian Bureau of Statistics each week 3 persons over the age of 73 commit suicide in the most horrendous ways possible, and all because they were unable to source or were deprived of meaningful information and help.¹²

3.12 Others also argued that the proposed prohibition on access to information would be counterproductive and only compound the problem of suicide. Dr Nitschke from Exit International argued that:

One of the ways one protects vulnerable individuals is to treat them with respect and to engage in legitimate discussion with them. You do not respect a society or individuals within that society by restricting them from information which you deem to be adversely helpful to them. Our suggestion is the one that I referred to earlier: when people are able to talk openly about this issue, their health indices improve. They feel less anxious, less worried and they go on to live longer lives. Happier people have access to good information and to sit around and try to restrict access to information, acting as some form of judge about what is deemed to be in their best interests, I feel is the wrong way for our society to be heading.¹³

3.13 Mr Neil Cook also argued that measures such as those contained in the Bill will actually exacerbate the suicide problem in Australia:

There are those who will promote this legislation on the grounds of increased teenage suicide statistics; however that is a weak and false premise upon which to base a case, especially when such statistics should rightly be addressed by greater collective societal involvement as opposed to legislative stop gaps such as this Bill...There are other ways and means to address these issues. Legislation outlawing the right of persons to seek their own exit from this life, with grace and dignity, will simply drive the proponents underground. The practice will not cease. It will simply become more difficult, for those who so desire, to achieve creating more pain and misery for those people, and ultimately placing a wholly unnecessary burden on the rest of society.¹⁴

10 *Committee Hansard*, 14 April 2005, p. 16.

11 *Submission 4*, p. 1.

12 *Submission 15*, p. 1.

13 *Committee Hansard*, 14 April 2005, p. 14.

14 *Submission 22*, p. 1.

3.14 The New South Wales Council of Civil Liberties suggested that, if the purpose of the Bill is to protect the 'vulnerable', then that objective would be better achieved through appropriate regulation, not criminalisation:

By regulating who has access to this information, it might be possible to identify vulnerable individuals and ensure they receive appropriate counselling.¹⁵

3.15 And further:

Regulation will also be a useful mechanism for ensuring that people who are medically certified as terminally-ill can lawfully access the information. Regulation will also help ensure that only people over a certain age can access the information, to inform themselves appropriately.¹⁶

3.16 Ms Irene Graham from EFA told the committee that she was unsure who the 'vulnerable' individuals to be protected by the Bill actually are:

I certainly hope that the word 'vulnerable' is referring to, for example, depressed teenagers, as distinct from adults wishing to make a rational decision about their end of life options... [O]ur view, as a general civil liberties position, would be that adults should have rights to access the kind of information and counselling that this bill seeks to prohibit. So if the vulnerable individuals that the bill is referring to are terminally ill people and older people that are wanting to know information, we do not consider that they should necessarily be considered to be vulnerable and so be prevented from being able to obtain information. As far as whether it will actually achieve the objective of protecting whomever the vulnerable people are, we do not believe it is going to do that either because we do not see how this Australian legislation can do anything about the information on web sites all over the world.¹⁷

3.17 Critics of the Bill made much of the fact that it would not, and could not, prevent Australians from accessing suicide related material or chat rooms on websites hosted outside Australia.¹⁸ This, it is argued, will render the Bill meaningless. Ms Irene Graham from EFA told the committee that:

[The Bill] will not have any effect on international communication except to the extent of criminalising Australians that are participating in any such international communication. This bill will not stop the amount of information that is on the internet on overseas sites. To the best of my knowledge, there is no way that any ISP can block access to material on international sites short of the development of the great Australian firewall, which was discussed back in 1999 and 2000 with regard to the issue of

15 *Submission 27*, p. 3.

16 *Submission 27*, p. 3.

17 *Committee Hansard*, 14 April 2005, p. 23.

18 See further the discussion at para 3.22.

blocking access to pornography. Nothing has changed since 1999-2000. It is still simply impractical to do that.¹⁹

3.18 The Atheist Foundation of Australia agreed:

The Internet is a World-Wide-Web with its benefits of instantaneous and voluminous information sharing capacity not controllable by any one country. To attempt this action is not only futile in the long term, but will negatively affect non-targeted persons.²⁰

Arguments in favour of the Bill and its policy objectives

3.19 The Bill and its objectives also received strong support from several groups. For example, Mr Richard Egan from the Coalition for the Defence of Human Life told the committee that the Bill 'addresses in a useful way the threat to innocent and vulnerable people posed by material that counsels or incites suicide or promotes or instructs in methods of suicide.'²¹ Mr Egan explained that, in his view, 'innocent and vulnerable' means:

...anyone...who has access to a carrier service and who has a suicidal predisposition through depression or facing the particular stresses in life that lead people to commit suicide. They may be people of any age or condition in society.²²

3.20 Mr Graham Preston from Right to Life Australia agreed:

We think that that should be taken very broadly. Simply by definition, it is those who are open to the possibility of committing suicide...20 per cent of Australians have indicated that they have thought at times that life is not worth living and 10 per cent have seriously considered suicide. That would obviously take in a large number of people, presumably right across the spectrum. The very fact that a person may consider life not worth living or seriously consider suicide, we would see that as making them vulnerable.²³

3.21 Salt Shakers agreed that the Bill was a positive move:

The strategy of making the dissemination of suicide-related material via the internet an offence is a positive move. The internet is often used by the younger generation, particularly to access chat rooms and an 'online community'. The promotion of suicide via websites/chat rooms allows young people to have an easy access to unhelpful and potentially dangerous information.²⁴

19 *Committee Hansard*, 14 April 2005, p. 22.

20 *Submission 23*, p. 1.

21 *Committee Hansard*, 14 April 2005, p. 2.

22 *Committee Hansard*, 14 April 2005, p. 4.

23 *Committee Hansard*, 14 April 2005, p. 8.

24 *Submission 26*, p. 3.

3.22 While acknowledging that there has been a reduction in suicide rates since the availability of the Internet,²⁵ and that 'no-one should walk away from this bill thinking that suicide prevention has been tackled in some major way',²⁶ Mr Egan from the Coalition for the Defence of Human Life argued that the Bill is a worthy measure that could prove useful in preventing at least some suicides in Australia:

All we are saying is that there is evidence in some psychiatric case histories and in general media reports that some individuals have committed suicide after following detailed instructions from either web sites or chat rooms on the internet. We are not making a statistical argument for this at all.²⁷

3.23 Mr Preston from Right to Life Australia drew an interesting analogy between suicide and policies relating to cigarette advertisement:

Our organisation does not take lightly supporting a bill which is intended to prohibit access to information. However, we would see the situation as being similar to that of advertising cigarette smoking. Smoking is not illegal but it is generally accepted that because of the harm it causes it is appropriate not to allow it to be advertised. In the same way suicide is not illegal but, due to the harm that promotion of it can cause, we believe is appropriate for this bill to prohibit promotion of it through carriage services, particularly the internet.²⁸

3.24 Some supporters of the Bill also argued that the Bill could be strengthened further in order to better achieve its aim. For example, the Festival of Light Australia argued that, as currently drafted, the Bill contains a loophole in relation to suicide promotion websites hosted overseas which should be rectified.²⁹ Mr Egan from the Coalition for the Defence of Human Life contended that 'once the URLs of such sites are drawn to the attention of [Australia-based] internet service providers there [should be] a penalty on them if they do not block access to those sites'.³⁰ Without such a provision, Mr Egan suggested that the Bill's effectiveness 'may be more symbolic than real'.³¹

3.25 Mr Egan also suggested that the Bill could be bolstered further by including specific provisions regarding advertising for sale of supply devices designed or customised to be used by a person to commit suicide, or the advertising of meetings at

25 *Committee Hansard*, 14 April 2005, p. 5.

26 *Committee Hansard*, 14 April 2005, p. 3.

27 *Committee Hansard*, 14 April 2005, p. 5.

28 *Committee Hansard*, 14 April 2005, p. 7.

29 *Submission 29*, p. 2.

30 *Committee Hansard*, 14 April 2005, p. 3.

31 *Committee Hansard*, 14 April 2005, p. 3.

which instructions and methods of suicide are given.³² In its submission, the Australian Christian Lobby suggested a similar amendment to the Bill.³³

The extent to which the Bill unduly impacts on free speech

3.26 The committee received considerable evidence in relation to the impact of the Bill on free speech; on personal and private communications between individuals; and on access to and possession of information.

Public discussion or debate about euthanasia

3.27 A number of submissions expressed concern that the Bill impacts adversely on free speech and the implied constitutional right to freedom of political communication. It was submitted that the Bill's offence provision could encompass debate about law reform and that, to the extent that such communication is protected by the implied freedom of political communication, the Bill could be struck down as being unconstitutional.³⁴

3.28 However, a representative from the Department told the committee that the Department did not agree with that assessment:

What has to be borne in mind in addition to anything else is that these are criminal offences. If there are ambiguities in the provisions they would be read by the court, in the normal order of construction, in favour of the defendant. When you see a provision like this, which is a clear indication of the intention of parliament, then the courts are not going to look for fine distinctions and work their way through it. So I do not share those views.³⁵

3.29 Nonetheless, the committee received considerable evidence indicating widespread concern in this regard. For example, the Voluntary Euthanasia Societies in each state argued that the Bill would seriously impinge on their activities in trying to legitimately change the law in relation to voluntary euthanasia.³⁶

3.30 The Voluntary Euthanasia Society of Tasmania (VEST) argued that, since suicide is not a crime, it is reasonable for any adult to seek information in relation to it. That is, '(i)t should not be illegal to supply information to rational responsible adults regarding a legal act regardless of how it will be used.'³⁷ VEST also submitted

32 *Committee Hansard*, 14 April 2005, p. 2.

33 *Submission 13*, p. 1.

34 For example, see Electronic Frontiers Australia, *Submission 28*, pp. 7-8 and New South Wales Council for Civil Liberties, *Submission 27*, pp. 4-5.

35 *Committee Hansard*, 14 April 2005, p. 29.

36 For example, see Voluntary Euthanasia Society of Tasmania, *Submission 6*.

37 *Submission 6*, p. 2.

that the greatest impact of the Bill will be upon poorer elderly, frail and/or incurably suffering people who are not familiar with the legal system.³⁸

3.31 The Voluntary Euthanasia Society of Victoria (VESV) argued that in order for it to inform and influence opinion, both in general and within the political arena, it is necessary to encourage debate about voluntary euthanasia. Such debate could include arguments about the merits of allowing the self-administration of lethal substances by a rational, terminally ill person in order to relieve their suffering. VESV was also of the view that proving that one did not have the requisite intention not to encourage suicide while at the same time discussing the possibility of medically assisted dying would be difficult.³⁹

3.32 In evidence, Dr Nitschke from Exit International contended that the Bill has the ability to seriously threaten any ability to openly debate suicide and related issues.⁴⁰ He explained that the addition of subsections 474.29A(3) and (4) to the Bill did little to allay his concerns in relation to the practical reality of dealing with these issues:

...the fundamental concerns we have [is] that the border between a discussion of a so-called method and the necessary discussion about a political change in a way to achieve that political change is exceedingly grey. So I do not find much reassurance in that particular statement [in those subsections] which seems to, if you like, protect the legitimate political process—and the process of discussing it in the broader community—that might be involved in this social issue, but at the same time try to delineate between that and what I see as the inevitable next question that I will get.⁴¹

3.33 Dr Nitschke also posed some interesting questions:

Again, where does one draw the line here? It is almost impossible to disentangle legitimate discussions about legal changes to the voluntary euthanasia situation in this nation and the very specific question that people almost invariably go on to ask: ‘If the law won’t change, how do I get an option for myself personally?’ So a person who one minute is talking about how they might go and lobby their politicians, the next minute is asking you: ‘I’ve got 50 morphine tablets here. If I take them, will I die?’ At which point do I hang up the phone? I am suggesting that at least this sort of legislation has the ability to seriously threaten any ability to openly politically debate this important social issue.⁴²

38 *Submission 6*, p. 4.

39 *Submission 11*, p. 1.

40 *Committee Hansard*, 14 April 2005, p. 12.

41 *Committee Hansard*, 14 April 2005, p. 13.

42 *Committee Hansard*, 14 April 2005, p. 12.

3.34 Ms Sandra Milne, who informed the committee that she had been diagnosed with inoperable cancer, emphasised the importance of informed debate in relation to suicide:

I believe that an informed debate about suicide results in a reduction in the number of suicides in this country. Persons aware of all their options will often extend their life by not acting prematurely. Unsuccessful suicide attempts often lead to unintended physical or mental harm. Many elderly people commit suicide in the most horrendous ways, and all because they were unable to source or were deprived of meaningful information and help. It is likely that, had these people been able to discuss their intention, some lives would not have been lost. For some, an attempt at suicide is a cry for help. This law would ensure that that cry would not be heard. Indeed with the risk of prosecution this law brings, it is more likely to ensure that attempts to suicide are successful.⁴³

3.35 However, the committee also received evidence from those who disagreed with this view. For example, Dr David M Gawler argued that the Bill is very precise in its offences and, since it 'quite plainly places no limitation on political communication regarding laws relating to euthanasia or suicide',⁴⁴ it is wrong 'to provide special privileges for the advocates of euthanasia or suicide'.⁴⁵

3.36 The Department's response to concerns raised in relation to the 2004 Bill regarding the criminalisation of information protected by the implied right to freedom of political communication was to insert the two clarifying provisions. Proposed subsections 474.29A(3)-(4) provide that a person does not commit an offence merely because they use a carriage service to engage in public discussion or debate about euthanasia or suicide or advocate reform of the law in relation to euthanasia or suicide. The Department explained:

There had been concern raised in the submissions to this Committee in its consideration of the 2004 version of the Bill that the Bill could be applied to organisations that have as their objective the reform of the law on voluntary euthanasia but as a corollary, discussed different methods of suicide and suicide statistics in order to make their case. It is considered that a person who engages in genuine debate over euthanasia related law reform or suicide would not have the requisite intent.⁴⁶

3.37 However, for some this provided little reassurance. For example, Ms Irene Graham from EFA told the committee that in her view the additional clauses are 'completely worthless'⁴⁷ since they merely restate the offence provisions:

43 *Submission 14*, p. 1.

44 *Submission 12*, p. 1.

45 *Submission 12*, p. 1.

46 *Submission 32*, p. 7.

47 *Committee Hansard*, 14 April 2005, p. 24.

[T]hey [do not] say anything different to what the offences themselves say. We think the offences themselves say 'will interfere with political communication'. I am not sure whether that was clear. To us, the exception that has been put in there simply will not work because it is still predicated on the intent of the person. When you look at the offences, the intent of the person depends on whether there was a substantial risk that something may happen or that something may happen in the ordinary course of events, because of the default fault elements in the Criminal Code.⁴⁸

3.38 She contended further:

To us, the bill is saying on the one hand that political communication will not be interfered with but then on the other it is saying, 'Provided that you did not intend to cause counselling or inciting or promoting to happen.' We believe it will simply chill freedom of political expression and discussion. Whether it will actually ban it is open to question, because it depends on the extent to which law enforcement agencies are going to run around trying to enforce this and, of course, on what a court decides about the specific wording of the legislation. But, to us, it will at the very least chill political communication.⁴⁹

3.39 The committee is aware of the suggestions from Professor George Williams in relation to how the original Bill might be amended to protect the Bill from possible unconstitutionality, including the insertion of a savings clause that might indicate that the Bill does not apply to the extent that it limits political communication.⁵⁰ The committee notes that, in order to address concerns about its impact on the implied right to political communication, the Government has altered the Bill in line with Professor Williams' suggestions.

Personal and private communications between individuals

3.40 Several submissions and witnesses expressed concern that the Bill would impact negatively on the ability of individuals to engage in private communications via electronic media since the offences in the Bill would apply to personal and private communications by means of telephone calls and email, including communications between friends or relatives, or discussions in the context of a doctor-patient relationship.

3.41 Ms Irene Graham from EFA articulated this point as follows:

...under the definition of 'communication' in the Criminal Code Act currently, the proposed offences will definitely apply to personal and private communications by means of telephone and email between two friends or relatives. We are absolutely opposed to parliament legislating to

48 *Committee Hansard*, 14 April 2005, p. 24.

49 *Committee Hansard*, 14 April 2005, pp 24-25.

50 *Submission 21*, p. 2.

prohibit individuals from communicating one-to-one by telephone or email.⁵¹

3.42 Dr Philip Nitschke from Exit International held a similar view:

We should be very clear: we are not talking just about information freely available for anyone who can work a keyboard; we are talking about the very personal communications that go on here, sometimes in the privileged context of doctor-patient relationships, with some protections because of that, but a large number which are just consultations between private individuals in society. We should not, I suggest, be introducing legislation which strikes right at the heart of that ability for people to access information.⁵²

3.43 Further, Dr Nitschke argued that the Bill:

...has the ability to very seriously restrict essential communication between Australians—and I am not just talking about doctor-patient communications; I am talking about communications between sons and parents, between parents and parents and between individuals in Australia who have a very reasonable right to be able to openly communicate with each other about what we would describe as end of life options. This legislation has that ability.⁵³

3.44 In the submission from Gilbert and Tobin Centre of Public Law, Professor George Williams also argued that, since the Bill criminalises not only public or mass communication regarding suicide, but also private communications between individuals, it would 'have a significant impact on the capacity of individuals who are seriously or terminally ill to access information about suicide'.⁵⁴ Specifically:

This raises an issue which merits consideration: the degree to which we wish to protect both freedom of speech which falls outside the definition of 'political communication', and the right of citizens to access information and make informed choices. We are concerned that legislation such as this, in limiting communication about an activity that is not illegal and in regulating the subject matter beyond existing State law, may go too far in restricting free communication.⁵⁵

3.45 The New South Wales Council for Civil Liberties was strongly opposed to the Bill's failure to recognise the distinction between public and private information exchange:

51 *Committee Hansard*, 14 April 2005, p. 21.

52 *Committee Hansard*, 14 April 2005, p. 11.

53 *Committee Hansard*, 14 April 2005, p. 12.

54 *Submission 21*, p. 2.

55 *Submission 21*, p. 2.

...Parliament has no place intervening in a private conversation between two consenting adult citizens discussing euthanasia options over the telephone.⁵⁶

3.46 Dr Nitschke also explained his views in relation to the specific impact on doctor-patient relationships:

There are certain protections that can be implied and accessed in the doctor-patient confidentiality relationship. The problem we have with this legislation is that, because it relates to electronic communications or carriage services, it specifically impacts on the ability to talk on the phone to one's patients. As far as I know, there is no other proposed legislation or existing legislation that prohibits such discussions. This legislation would seemingly specifically target the ability of doctors to communicate on the phone with patients if the question of suicide should arise.⁵⁷

3.47 Dr Nitschke expressed the fear that the Bill could have a serious impact on the work of Exit International because of the capacity to intrude into private and personal communications:

...it does seem perfectly plausible that, if such a law were to pass and if someone were to, for example, suspect that Exit's work would require specific surveillance because we talk a lot to people who wish to think about end of life options, this legislation might then be used to seek and obtain the necessary abilities to tap phones. So the legislation has the ability to provide that next step.⁵⁸

3.48 While a representative from the Department told the committee at the public hearing that the proscription of private communications between individuals was not part of the publicly-stated or direct intention of the Bill,⁵⁹ in its response to questions on notice the Department maintained that personal and private conversations over the telephone or email should come within the ambit of the Bill.

3.49 The Department's justification for this approach was expressed as follows:

The Bill has the same application as the related telecommunications offences in the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act 2004*. Mobile phone text messaging and email has the potential to transmit the same sort of information as contained on the Internet. It was also intended that these offences address all material transmitted by way of a carriage service, including personal telephone and email conversations.⁶⁰

56 *Submission 27*, p. 5.

57 *Committee Hansard*, 14 April 2005, p. 11.

58 *Committee Hansard*, 14 April 2005, p. 12.

59 *Committee Hansard*, 14 April 2005, p. 26.

60 *Submission 32*, p. 8.

3.50 Further:

The aim of the Bill is to protect the vulnerable in society from this sort of influence in a moment of crisis and it is irrelevant if the incitement or instruction comes through the Internet or by way of a personal phone call. If the intent was to counsel or incite suicide or to promote or provide instruction on a particular method of committing suicide, the Government intends this conduct to be captured by these offences.⁶¹

3.51 The Department pointed out that state and territory laws currently capture instances where a person counsels or incites another person during a private telephone conversation or email exchange to commit suicide. These laws have even broader application in this regard since they would also capture private face-to-face conversations held in a private residence and which counsel or incite the suicide or attempted suicide of another.⁶²

3.52 In response to questioning by the committee in relation to the criminalisation of counselling over the telephone, particularly in the context of doctor-patient communications, the departmental representative stated that:

[The Bill] would capture it if the counselling involved an incitement to commit suicide. If a doctor, in the course of that telephone communication, were to provide information about a method of suicide which encouraged the use of that method it would be caught.⁶³

Impact on access to and possession of information

3.53 Several submissions and witnesses opposed the Bill's criminalisation of access to and possession of information about suicide, particularly where that information is never passed on or where there is no attempt at suicide.⁶⁴

3.54 Mr Anthony and Mrs Beryl Saclier argued that:

61 *Submission 32*, p. 8.

62 *Submission 32*, p. 8.

63 *Committee Hansard*, 14 April 2005, p. 27.

64 For example, see New South Wales Council for Civil Liberties, *Submission 27*, p. 3; Electronic Frontiers Australia, *Submission 28*, p. 11. The committee also notes that there are inconsistencies with state and territory legislation in relation to accessing and possessing suicide-related information. For example, under section 31C of the NSW Crimes Act, a person must actually 'aid or abet' or 'incite or counsel' another person to commit or attempt suicide. Therefore, obtaining information in hard copy form from a library (perhaps with the intention of passing it to a terminally ill relative) would not be an offence under NSW law until actual assistance or incitement occurs (and suicide or an attempt results). Obtaining exactly the same material from the Internet (with the intention of passing it to a terminally ill relative for their use) would be an offence under the Bill. See further Angus Martyn, Parliamentary Library, *Criminal Code Amendment (Suicide Related Material Offences) Bill 2005*, Bills Digest No. 133 2004-05, p. 7.

An exchange of knowledge may have no 'intent' other than to share facts among those who want them. This bill attacks the innocent research of rational people intent on conducting their lives according to their own rights, with no intention of harming others.⁶⁵

3.55 The Department's response to such concerns was that the Bill does not criminalise simple access to or possession of material and that for a criminal offence to be proven there must also be an intention to use the material for a particular purpose, namely to commit an offence against proposed section 474.29A.⁶⁶

Definitional issues

3.56 Some submitters, in particular EFA, raised a number of issues in relation to certain elements of the offences and some of the definitions used in the Bill. These included the following:

- the application of the fault element of recklessness to the question of whether material 'incites suicide'; and
- the use of the words 'counsels or incites' in the proposed offence provisions.

Recklessness

3.57 In relation to the fault element of recklessness, Ms Irene Graham from EFA explained her concerns at the hearing:

It appears to us that part of the reason those fault elements and so forth are being used in that way is that the Commonwealth does not have the constitutional power to prohibit the conduct of inciting or counselling suicide. So once again it is prohibiting the conduct of using a carriage service, and we think this is part of the reason that the way in which the fault elements apply is so objectionable. The actual intent to commit to counsel or incite is not the actual criminal offence. A lower fault element of recklessness applies to intent to counsel or incite, because the actual legislation is not making it illegal to do that; it is making it illegal to use a carriage service when there is a circumstance that something else may happen.⁶⁷

3.58 Since the offences in the Bill are framed in this way, and because of the application of the fault elements in the Criminal Code, EFA argued that a person may be found guilty of the offences when they did not intend to engage in conduct to incite or counsel a person to commit suicide.⁶⁸

65 *Submission 8*, p. 3.

66 *Submission 32*, p. 9.

67 *Committee Hansard*, 14 April 2005, p. 25.

68 *Submission 28*, p. 9.

3.59 The Department rejected this analysis of the offences in the Bill. It argued that the concerns of the Model Criminal Code Committee⁶⁹ are satisfied by the current drafting of the Bill. In particular, the Department reiterated that the fault element of recklessness applies to the requirement that the material must directly or indirectly counsel or incite suicide, or directly or indirectly promote or provide instruction on a particular method of committing suicide. However, even if a person is reckless as to these matters, it does not automatically follow that they have committed an offence under the Bill.⁷⁰

3.60 This is because:

For an offence to be committed the person must also have intended that the relevant material be used, by the person who engages in the offending conduct or another person, to counsel or incite suicide, or to promote or provide instruction on a method of committing suicide. Alternatively, where the material promotes or provides instruction on a method of committing suicide, a person could also be guilty of an offence if they intended that another person use the material to actually commit suicide.

Without that intention, no offence would be committed.⁷¹

Counsels or incites

3.61 In relation to use of the word 'incites' (particularly in combination with the word 'indirectly'), Ms Graham of EFA stated that:

...we note that the model criminal code committee has previously rejected use of that word in criminal offences because some courts have interpreted 'incites' as only requiring causing. Given research findings of a link between media coverage of suicides and additional suicides, the proposed offences have the potential to criminalise journalists and ordinary individuals reporting on and discussing suicide. We also think that at least some internet material such as suicide related research, prevention and support material will be caught by the offences.⁷²

3.62 EFA also noted that the term 'counsels' is not defined in the Bill and that the phrase 'counsels suicide' is 'dangerously broad'.⁷³ There appeared to be a widely held

69 The Model Criminal Code Committee, in considering the offence of inciting the commission of an offence, rejected the use of the word 'incites' because 'some courts have interpreted incites as only requiring causing rather than advocating the offence'. That committee decided that 'the word 'urges' would avoid this ambiguity while capturing the essence of the offence'. The committee was also concerned that the fault element of 'recklessness in incitement was too great a threat to free speech' and, as a result, the word 'urges' was used and intention, not recklessness, applies: see further EFA, *Submission 28*, pp 8-9.

70 *Submission 32*, p. 9.

71 *Submission 32*, p. 9.

72 *Committee Hansard*, 14 April 2005, p. 21.

73 *Submission 28*, p. 12.

concern that the term 'counsel' was intended to capture doctor-patient communications and other forms of counselling, such as those provided by Lifeline. EFA expressed the view that:

(i)t would include information that advises someone not to commit suicide, as well as information that advises someone to do so. We are highly concerned that the use of the word "counsels" would enable prosecution (or at least harassment) of people who counsel other people who are considering committing suicide but intend to discourage, not encourage, those other people from taking that course of action.⁷⁴

3.63 At the hearing, departmental representatives explained that the term is a legal one and would be given a narrow legal meaning by the courts. That is:

...it is a legally used concept which appears widely throughout Commonwealth law or Australian law. In the Commonwealth context, if you go to a person who aids, abets, counsels or procures the commission of an offence, you have to read the word 'counsels' in the context of aiding, abetting and procuring. It is not counselling in the medical sense of providing assistance and information; it is actually encouraging the person with an intent to bring about a result.⁷⁵

3.64 In answers to questions on notice, the Department elaborated:

In the context of these offences, the term 'counsels' is intended to have a narrow meaning. It would cover the encouragement or urging of a person to commit suicide and the giving of advice or assistance directed at the actual commission of suicide. The Bill will not capture the counselling of a person who is considering committing suicide by friends and family or organisations such as Lifeline.⁷⁶

3.65 Similarly, the Department explained that the term 'indirectly or directly' is a commonly used drafting device in criminal offences and does not widen the intended operation of these offences due to the intention element of the offences.⁷⁷

3.66 The South Australian Voluntary Euthanasia Society suggested that the phrase 'counsels or incites suicide' should be changed to read 'promotes or incites suicide'.⁷⁸ At the hearing, the committee asked the Department to give some consideration to this suggestion. It later informed the committee that:

The term 'counsels or incites' suicide was introduced after public consultation on the exposure draft of the Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004, which

74 *Submission 28*, p. 12.

75 *Committee Hansard*, 14 April 2005, pp 28-29.

76 *Submission 32*, p. 10.

77 *Submission 32*, p. 10.

78 *Submission 10*, p. 1.

originally contained these offences. Prior to this change, it was proposed that a person would be guilty of an offence if they used a carriage service to access, transmit or make available material that was suicide promotion material and the person intended that that material be used to promote, counsel or incite suicide. It was considered that a broad interpretation of these draft offences could have resulted in material that advocates, debates or promotes euthanasia-related law reform being caught. To ensure that the Bill did not inadvertently criminalise such debate, the current formulation of words were adopted.⁷⁹

3.67 The Department also noted that:

The term ‘promotes’ has a broader reach than the widely used ‘counsels’ and may pick up a discussion of the merits of committing suicide that falls short of advising or recommending it and accordingly this change should not be made.⁸⁰

3.68 And:

The offences do not refer to counselling about suicide, such as the services provided by Lifeline. Rather, they cover the situation where someone intends to use material to counsel suicide. In this context, the term counsels is intended to have the narrow meaning of encouraging or urging the commission of a suicide or the giving of advice or assistance directed at the actual commission of suicide.⁸¹

3.69 The Department also made a suggestion as to how the Bill might be amended to make the provision clearer than it currently stands:

It may make this provision clearer if the word ‘committing’ was inserted in between the phrase ‘counsels or incites suicide’ in section 474.29A(1) (b) and (c). The phrase would then read ‘counsels or incites committing suicide’. It would put beyond doubt that counselling about suicide would not be captured unless the person encouraged or gave advice on the actual commission of a suicide.⁸²

Inconsistency with Customs Regulations

3.70 As mentioned above, a stated aim of the Bill is to prevent the Internet being used to circumvent the Customs Regulations (which prohibit the physical importation of suicide related material).

3.71 EFA submitted that the offences proposed in the Bill cover a vastly broader range of material than that prohibited by amendments to the Customs Regulations,

79 *Submission 32*, p. 3.

80 *Submission 32*, p. 4.

81 *Submission 32*, p. 4.

82 *Submission 32*, p. 4.

which these offences are intended to complement. That is, the Bill would prohibit accessing and making available material by means of the Internet and other carriage services that remain lawful to import, export, access and distribute by other methods.⁸³

3.72 Further, EFA argued that:

...the Bill should not prohibit information that is not illegal to import and export, nor information that is not illegal to access or distribute within Australia by means other than a telecommunications carriage service.⁸⁴

3.73 The Department agreed that the Bill does cover a broader range of material than that prohibited by the amendments to the Customs Regulations.⁸⁵ Specifically:

The Bill deals with information on the Internet that instructs on the construction and use of a suicide device as well as step by step guides on how to commit suicide using available medicines, poisons and other non-devices. Both types of material result in the same sort of harm. The Bill is intended to capture material and conduct in chat rooms and bulletin boards which actively encourage and provides information on specific methods of suicide.

These offences reflect the increased dependence of the community on telecommunications technology and the harm that can be done by its misuse.⁸⁶

The committee's view

3.74 The committee recognises that the topic of suicide (including euthanasia) raises extremely complex and sensitive issues which require a cautious and well-informed policy approach. The committee is also conscious that the issue of suicide and how best to respond to it remains a difficult one for the Australian community. This is reflected in the sharp divide between those submissions and witnesses who supported the Bill and its purpose, and those who strongly objected to it.

3.75 The committee is also mindful of the balance of the evidence presented to it in the course of the inquiry. The committee notes stated concern within sections of the community that the Bill represents a misguided and unrealistic approach to a complicated policy matter that would not be effective in preventing suicide. In the committee's view, these arguments carry some weight. However, on balance, the committee does not consider that they are such as to prevent passage of the Bill. The committee notes again that assisting or encouraging another person to commit suicide is an offence in all states and territories. Moreover, to assist or encourage another

83 *Submission 28*, p. 6.

84 *Submission 28*, p. 6.

85 *Submission 32*, p. 6.

86 *Submission 32*, p. 7.

person to attempt to commit suicide remains an offence in most Australian jurisdictions.

3.76 The committee's view is that the issues raised by the Bill are best addressed as part of a broader, multifaceted policy or strategy by Australian governments that is required to address the problem of suicide and related issues in Australia. Yet the committee also acknowledges that, without a broader range of research, initiatives and proactive measures to address suicide and related issues, it is clear that the Bill is unlikely to be effective in meeting its aims. The Bill, for example, will only apply to Australian hosted websites. The committee notes that the Senate Select Committee on Mental Health has recently been established and that its broad terms of reference would encompass consideration of the issues surrounding suicide in Australia and the national, state and territory policies or strategies required to address those issues.

3.77 The committee acknowledges concerns that the measures in the Bill will extend to personal and private communications between individuals including – potentially – discussions in the context of doctor-patient relationships and counselling services offered by organisations such as Lifeline. The committee is also concerned by these aspects of the Bill. However, the committee also notes that adequate safeguards and limits are in place, such as the requirement to satisfy a court beyond any reasonable doubt that a defendant had the requisite intent. Precedents for such offences do exist.⁸⁷ The committee also notes and supports the Department's suggested addition of the word 'committing' to the phrase 'counsels or incites suicide' in paragraphs 474.29A(1)(b) and (c) of the Bill, so that the phrase reads 'counsels or incites committing suicide', to help create greater certainty in relation to the kind of behaviour captured by the Bill's offences.

3.78 The committee acknowledges that concerns exist with respect to safeguards provided by proposed subsections 474.29A(3) and (4). As explained above, these provide that a person does not commit an offence merely because they use a carriage service to engage in public discussion or debate about euthanasia or suicide, or advocate reform of the law in relation to euthanasia or suicide. The committee's view is that the operation of these statutory safeguards should be subject to review. To this end, a report on the first 12 month's operation of these provisions should be prepared and presented to Parliament for its consideration.

87 Existing federal legislation already intrudes into the area of private electronic communications between individuals. Section 474.14 of the Criminal Code, for example, prohibits the use of a telecommunications network (including a carriage service) with intention to commit a serious offence. A 'serious' offence includes any offence against a law of the Commonwealth, a state or a territory that is punishable by imprisonment for a period of 5 or more years or for life. This includes state and territory criminal offences in relation to suicide. The type of conduct captured by the offence in section 474.14 would include using a telephone to facilitate commission of state and territory offences concerning suicide.

Recommendation 1

3.1 The committee recommends that proposed paragraphs 474.29A(1)(b) and (c) be amended so that the phrase 'counsels or incites suicide' reads 'counsels or incites another person to commit or attempt to commit suicide'.

Recommendation 2

3.1 The committee recommends that the Bill be amended to insert a requirement that, as soon as practicable after the end of 12 months from the date of the Bill's commencement, the Attorney-General must cause to be laid before each House of Parliament a comprehensive report on the operation of proposed subsections 474.29A(3) and (4).

Recommendation 3

3.2 Subject to the preceding recommendations, the committee recommends that the Senate pass the Bill.

Recommendation 4

3.3 The committee supports and calls for the implementation of additional broader research, strategies, resourcing and policy initiatives by the Federal Government and state/territory governments in order to address jointly and consistently issues relating to suicide in Australia.

Senator Marise Payne
Chair

