

**SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL
COMMITTEE**

**Criminal Code Amendment (Suicide Related Material Offences) Bill
2004
proposed sections 474.29A and 474.29B**

PREPARED BY

VOLUNTARY EUTHANASIA SOCIETY OF TASMANIA INC. (VEST)

AUTHOR

**Jocelyn Head
President
PO Box 1022
Sandy Bay
Tasmania
7006**

Phone Number 03 62486681

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SUBMISSION

A It is submitted that these proposed sections:-

- 1. are rejected in full because they have a far reaching effect much broader than suggested by the explanatory memorandum, or**
- 2. are altered to make them restricted in application to precisely the circumstances suggested in the explanatory memorandum.**

INTRODUCTION

I am writing this submission in opposition to the inclusion of the proposed sections 474.29A and 474.29B in the Federal Criminal Code on behalf of the members of the Voluntary Euthanasia Society of Tasmania Inc (VEST).

The proposed sections will have application much wider than held out in the explanatory memorandum. The memorandum becomes so incorrect that it gives a false impression of the effect of the proposals and is positively deceitful.

We consider that these 'Suicide Related Material' amendments should be rejected outright because their greatest impact will be upon the poor elderly, frail and/or incurably suffering people who are not familiar with the legal system.

Alternatively the proposed sections should be amended to reflect the explanation given in the accompanying explanatory memorandum and only that explanation.

In this submission I first point out how the explanatory memorandum is deceptive. Then I discuss the possible extent and effect should the relevant sections become Law. This is followed by suggested amendments to the proposed legislation so that it truly reflects the intent described. An attachment suggests possible wording which will make the legislation consistent with the explanatory memorandum.

EXPLANATORY MEMORANDUM IS INCORRECT AND DECEPTIVE

The explanatory memorandum makes two comments regarding the intent of the amendments. They are firstly, that the amendments are complementary to the customs regulations prohibiting the import and export of suicide kits and associated instructions and secondly, that these offences are not intended to catch Internet material that advocates or debates law reform on euthanasia and associates suicide related issues.

Extends further than the customs regulations

The proposed legislation would proscribe any material which indirectly counsels suicide or any method of committing suicide if it is intended that the material be used by any person to commit suicide. This is much wider than the custom regulations which refer to physical devices designed or customised to be used by a person to commit suicide and related instructional material.

Creates new crimes

Currently legal activities of adults would be criminalised under the proposed legislation.

It could be possible that any communication between friends over the net or by phone, discussing their end of life decisions and views on suicide methods would be caught if each was indifferent to whether the other did in fact intend to commit suicide in this way. Suicide is not a crime and it is reasonable for any adult to seek information regarding any legal act. **It should not be illegal to supply information to rational responsible adults regarding a legal act regardless of how it will be used.**

Recklessness is the culpability element which could be defined in lay terms as the circumstance where an individual is aware of the possibility of a risk, or should reasonably be aware, and it is unjustifiable to take that risk. In this case the risk is that any third person will actually use the material to commit suicide.

It has certainly been argued by the prosecution in court recently that publication of details of the method used by a suicide should be suppressed in case this information may be used by others to commit suicide (Tasmania v John Stuart Godfrey). It could be argued by future prosecutors under the proposed legislation that publication of suicide methods in court cases by newspapers could be considered reckless.

A carriage service is more than the Internet. It includes phones, mail, radio, TV , interactive TV and satellite transmission. It would also apply to books and newspapers which all involve carriage services at some part of their production or distribution. None of the proponents of this particular legislation point out that it would criminalise material transmitted legally today in our newspapers, over the phones and by post, their only references are to the internet.

Easily applied to Law Reform activities and associations

As written this legislation could easily be applied to organisations which have as their objective the reform of the law on voluntary euthanasia but which as a corollary discuss different methods of suicide and suicide statistics in order to make their case. It could be decided by a court that there was a risk that the information would be used to commit suicide and the publication of these issues was therefore reckless.

Could apply to future and present acceptable medical practice

An even more ridiculous situation could result from this legislation. It may be that an Australian State, in future, could pass a law allowing the supply by prescription, by medical practitioners, of medication to end life in strictly controlled circumstances. (Similar to the Oregon legislation.) In this case the medical practitioner might be caught by this legislation for legally discussing this option with their patients and/ or prescribing medication under such legislation.

The legislation could even be found to apply to the discussion of medication between doctor and patient today, regarding any medical regime which had a double effect (eg a level of sedation which in order to eliminate symptoms will result in death).

This latter point seems a very long bow to draw given the decisions by juries and sentences by judges in recent court cases regarding assisted suicide (sparsity of guilty decisions and sentences are very light) . However any possibility that this could happen should be clearly eliminated.

The Pope has expressed the view that removal of feeding tubes is killing (according to press reports). Presumably if the tubes are removed at the wish of the patient this could be considered suicide. If this were the criterion applied to "a particular method of committing suicide" under the proposed legislation it could easily apply to current medical practice.

Evidence of deceptive nature of explanatory memorandum

The words used to describe the intentions are exactly those that were used in the exposure draft. This original proposed legislation would have resulted in suicides and failed suicides being liable for crippling fines if they had obtained information over the net. Whoever drafted the original legislation could not have been unaware of this effect and one must assume it was deliberate. This is clear proof that the proposed legislation was intended to go far beyond the intent described.

Thankfully the political process has successfully removed this worst aspect of the original proposal.

Further evidence of the deceptive intent of the proposers is that this legislation was buried within legislation which extends current criminal activities to the closing of loopholes applying if those crimes were conducted over the net. Such as child pornography and fraud.

Summary of deceptive intent of explanatory memorandum

The proposed sections go much further than complementing the customs regulations regarding suicide kits. They may restrict the socially responsible activities of organisations debating changes to the law on euthanasia. They may apply to doctor patient communication in accordance with current medical practice. In addition they may have an application to any future actions taken legally in accordance with any successful future legal changes allowing euthanasia in any state in Australia.

The courts decide cases on the letter of the legislation not on paragraphs in explanatory memoranda. If proposers of the legislation contend that our concerns are unjustified we can reasonably ask them to explain precisely to whom and what activity would the legislation apply? and why it cannot apply to the mentioned circumstances?

POSSIBLE EXTENT AND EFFECT OF THE LEGISLATION

The poor elderly and frail, or incurably suffering people are most likely to be fined under the proposed legislation.

Older members of society are more concerned with the circumstances of their death than younger people and it is also natural for them to be curious about the possibility of an uncomfortable end of life situation including their actual death. Very often obtaining knowledge of possible options for palliative care and in-home support is enough to relieve anxiety and make life easier.

Some people suffering pain or great distress which cannot be alleviated will attempt to commit suicide. Knowledge of the likelihood of success or failure of different forms of suicide can reassure and comfort people. There is some evidence to suggest that the availability of release from the fear of suffering results in individuals having a better end to life.

At the very least, knowledge of different possible methods can help the individual avoid methods which are likely to fail and leave them even more incapacitated. This happens frequently as suicide statistics demonstrate.

These disadvantaged, older, sick or frail members of our society are most likely to exchange information on self relief and often are unfamiliar with the law and therefore most likely to fall within the ambit of this legislation..

The wealthy are always able to find the legal means to a swift end of life. The doctor of George V admitted in 1937 or 1938 that he had hastened the King's death. Other examples abound where the wealthy can obtain drugs or the assistance of a medical practitioner to legally obtain a dignified death.

The wealthy can easily obtain illegal recreational drugs which can be lethal, GBH and barbiturates and other illegal substances in sufficient quantities to kill are, I understand, still readily available. (I have the crazy mental picture of the local oldies, hovering on their zimmer frames arriving, by the busload at raves and night clubs to buy such drugs.)

One of the nasty effects of this legislation would be the financial impact on those found guilty. because they provide a friend with information on their own preferred method of suicide with a 'reckless disregard' to whether it is used to commit suicide.

The fines and legal bills will drive them further into poverty and force them to be reliant on social security. Presumably if they are unable to pay their fines they can ultimately be jailed for non-payment.

Where is the public good in punishing poor people in end of life situations just because they exchange information with like minded people regarding acts which are not illegal?

Adverse affect on free speech

This legislation is obviously designed to include punishment of people who obtain and exchange information about a legal act with indifference regarding whether it is used by others to commit suicide as well as catching those who deliberately propose, initiate or incite suicide. This is a limitation of the common law right of free speech on philosophical or deeply held social convictions. It would not be suggested in Australia in restricting religious advocacy of any particular sect's beliefs and practices in relation to otherwise legal activity.

It is easy to find information on dangerous activities which may cause death in any library in Australia. Information on suicide can be exchanged by word of mouth or by passing books or handwritten notes between people.

In *Tasmania v John Stuart Godfrey* the prosecutor applied to have details of the suicide method suppressed. Justice Underwood refused the application on the ground that information was freely available in cases of murder so why not in cases of assisted suicide. This is a chilling example of the possible avenues to suppress information on legal activities.

It follows that information on methods used in similar criminal cases of assisted suicide may be obtained from court records and discussed with friends with reckless disregard to the fact that they may use these methods to seek a dignified end to life. But if the information is obtained over the net, by phone or any other carriage service and used in exactly the same way, a crime has occurred and one is liable to a fine of up to \$110,000.

All of this is in regard to an act which is not illegal!

Perhaps we will return to passing information in brown paper bags as occurred in my youth. Today this would not cover *Playboy* and *Hustler* (now seen as mild adult entertainment) but the created forbidden information on methods of suicide (ropes, guns, high buildings etc.). The modern pornography!

Seems a bit silly.

Proponents of the legislation make much of the risk to the vulnerable temporarily depressed young people. Suicide in these cases is tragic. This in itself does not justify the censorship that the proposed legislation would impose. The plight of the greater number of people denied relief from suffering in painful, distressing and 'for the rest of their life' situations is equally tragic.

More people die every year from the affects of smoking than commit suicide, yet we do not make criminals of people who urge others to smoke, nor proprietors of shops with point of sale advertising. The same is true of alcohol and alcohol related deaths and family violence. Why should we censor suicide related material.

While it is true that young people currently access the net more frequently than our elderly population much of their activity is related to leisure pursuits. Older people search for useable information or to contact friends and family. These are the responsible adults who's legitimate freedom of access to information will be censored.

Adults in our society are entitled to make up their own minds in relation to many dangerous activities (mountaineering, bungee jumping etc.) and should not be not unduly restricted in life preferences by making promotion of these dangerous activities a crime.

History has shown that societies cannot suppress information or the free expression of opinion regarding legal acts for any length of time. Nor is suppression of information successful in respect of actions which the majority of the population support. (Remember about 80% of the general population and 70% of Catholics support some form of voluntary euthanasia.)

This legislation is a serious infringement on free speech in Australia. It has the potential to restrict all forms of communication because today virtually every item of information passes through a carriage service at some time including books and newspapers. If passed this legislation will impose tighter censorship in relation to suicide related material than in any other democratic English speaking country in the world, as well as many other democracies.

Young potential suicides least likely to be affected

The greatest number of young suicides come from those who are impoverished, mentally ill or homeless or a combination of all three. These are exactly the category of people who are least likely to have access to the internet or access to information using any other carriage service.

The deaths of young suicides are overwhelmingly the result of temporary desperation and impulsive actions and by their nature involve the minimum of planning regarding the method used. They are very unlikely to search the net for methods using artificial devices to produce an easy death. Their methods are most often guns, jumping from great heights, motor vehicle accidents or hanging.

Proposed sections would make bad law

Laws and associated sanctions and penalties are designed to punish socially unacceptable behaviour, to allow for reflection and rehabilitation of the guilty, to make reparation to the injured parties (where possible) and to provide a deterrent to others. Overall the law should be seen to apply consistently and equitably.

Where laws do not do these things they are bad laws. If the relevant behaviour is not seen as socially culpable by the majority of the population the law will be ignored. If the relevant behaviour is seen as inconsistent with the basic principles and freedoms of our common law it will be disobeyed and our system of law, in itself, will be brought into disrepute.

If the full effect of the law falls harshly on the weak, ill and disadvantaged then eventually it will be repealed, hopefully without a great deal of social unrest but with intervening unjustifiable individual suffering.

The proposed sections in the bill as they stand make bad law because the legislation;

- a) will punish most heavily the poorer, elderly, weak and suffering people,
- b) will not provide a significant deterrent to youth suicide,
- c) can easily be avoided by the wealthy, knowledgeable and privileged,
- d) will be inconsistent with an adult's right to free speech and to obtain and share information matter which is legal and which may affect them,
- e) could apply to discussion between medical practitioners and their patients,
- f) can be used to prevent canvassing of changes to the law relating to voluntary euthanasia and a dignified death, which is supported by the large majority of the population (almost 80%) and the large majority of religious believers (over 70%),
- g) is ambiguous in wording and could have a very wide application,
- h) will be virtually impossible to police equitably.

As we move further into the 21st Century, more and more people will keep in touch through carriage services, Internet, wireless Internet through TV and radio, visual phone services etc and therefore more and more likely to run foul of this legislation.

We would need to double our police force to effectively and equitably administer this law. It is unrealistic to expect that the police will conduct a costly, comprehensive and concerted effort against discussion over a carriage service of a legal activity however recklessly undertaken. This is especially so with juries reluctant to convict and judges inclined to minimum sentences (as is the current case with assisted suicide prosecutions).

However individual prosecutions of high profile people are more likely .

Aggressively pro euthanasia individuals or groups such as Philip Nitschke and his organisation EXIT Australia are likely to be caught by this legislation.

It has been suggested in the press that this legislation is designed to limit the activities of Philip Nitschke. Conviction and fines, if obtained, will no doubt curtail Philip's activities.

Philip raises awareness of the issue of voluntary euthanasia all over Australia and in various forums. However his success is a reflection of social interest in his views, the desire for information on matters of voluntary euthanasia by a large number of people and that the majority of the population consider that they should have access to information which he apparently provides.

More publicity from unsuccessful prosecution would support his activities.

If the legislation is designed to halt the operations of one man it is using a pile driver to crack a nut. This is very bad law.

Ambiguity of wording makes effect wide and uncertain

In Tasmania the crime of assisting suicide uses the words 'aids or instigates'. This is fairly clear and unambiguous. The word 'counsel' in the proposed legislation is open to a range of interpretations.

The word counsel has changed enormously in meaning in the 50 years since suicide was decriminalised and the crime of assisting suicide was enacted. Today counselling may mean simply listening and gently exploring ideas proposed by the counselled individual as in post traumatic stress counselling. It could be argued that even a statement of an individual's own preferences regarding methods of suicide could be seen as 'indirectly counselling'.

VEST does not endorse the activities of any individual who initiates the suggestion of suicide and imposes the idea on another person. Our members are prepared to listen and discuss the issue of peaceful release from suffering and ending life with interested people in a reasoned and rational manner. We always refer deeply distressed and distraught people to Lifeline. We are concerned that parts of our activities could be considered reckless indirect counselling.

The explanatory memorandum states that the legislation is not intended to apply to societies such as ours which are seeking to change the law and do not **generally** counsel or incite suicide. The inclusion of the word generally also illustrates the ambiguity of the proposed legislation.

However the very arguments of voluntary euthanasia organisations is that individuals should have the ability to make choices regarding the end of their life. They argue that suicide may very well be a rational choice after careful deliberation. That eminent decisions makers such as judges and politicians having been trusted to make decisions affecting many people should be able to decide the end of their own life. They argue that they should be able to legally obtain the means to gently end suffering and distress even if this means dying.

As in all other aspects of social policy voluntary euthanasia groups should not have to be overly concerned about what the mentally ill will make of their expressed views for fear that they are recklessly indirectly or directly counselling suicide.

The words 'indirectly counsels' are so broad that the application of the legislation is unsure. The level of proof for this offence is recklessness. It is not necessary for the prosecution to prove intention beyond a shadow of doubt but just that the person concerned should have realised that the material could have been used by someone to commit suicide or that an ordinary person would have been so aware. When the words 'indirectly counsels and recklessly' are considered together the actual meaning is very obscure and could cover a wide range of communication.

This ambiguity would make for much costly legal debate.

**SUGGESTED AMENDMENTS TO PROPOSED LEGISLATION
SO THAT IT ACCURATELY REFLECTS THE INTENT DESCRIBED IN THE
EXPLANATORY MEMORANDUM**

- 1. Insert into the legislation at 274.29B(4) a clear statement that the legislation does not apply to the use of any carriage service for material that advocates or debates law reform on voluntary euthanasia and/or suicide related issues.**

The words of the explanatory memorandum are of little relevance in a court of law which will usually only rely on the letter of the law. This insertion will reflect more closely the words of the explanatory memorandum at page 4 third paragraph:

"These offences are not intended to capture Internet material that advocates law reform on euthanasia and/or suicide related issues, as this type of material will generally not counsel or incite suicide, nor promote or provide instruction on particular methods of committing suicide. For similar reasons, Internet material dealing with suicide-related research and suicide prevention or support material will generally not be caught by the offences."

- 2. Include a provision at 274.29B(5) that the law does not apply to discussion between medical practitioners and their patients in respect to legal and acceptable medical practices.**

This would protect medical practitioners in advising their patients of any option regarding end of life treatments through the foreseeable future and/or where there is a double effect as is often the

case in automatic administration of morphine through drivers or drips or other future medical devices.

3. Insert the words `using a device designed or customised to be used by a person to commit suicide' after the words committing suicide wherever they occur.

This would make the legislation consistent with the intent described in the explanatory memorandum at page 3 first paragraph.

"The proposed offences are intended to compliment amendments to the *Customs (Prohibited Imports) Regulations 1956(subregulation 3AA(2))* and the *Customs (Prohibited Exports) Regulations 1958(subregulation 13GA(2))* prohibiting the importation and exportation of documents that promote the use of a device designed or customised to be used by a person to commit suicide (suicide kit), counsel or incite a person to commit suicide using a suicide kit, or instruct a person how to commit suicide using a suicide kit."

4. Delete section 474.29A(1) relating to suicide promotion material . This would require a consequential alteration to the preparatory offences in section 474.29B to reflect this change. This consequential amendment would delete 474.29B(1)(b)(i)

474.29A(1) as it stands could seriously affect the right to free speech

This amendment would limit the legislation to the use of material promoting a particular method of committing suicide and not just general material. Suicide is not a crime and adults should be able to have a reasonable discussion of this matter regardless of the communication method used. This would require the following administrative adjustments.

- a). Renumber section 474.29A(2) to section 474.29A(1)
- b). Renumber section 474.29B(1)(b)(ii) to 474(B)(1)(b)(i) and
- c). Renumber section 474.29B(1)(b)(iii) to 474(B)(1)(b)(ii)

5. Delete the word indirectly whenever it occurs.

This will remove ambiguity and align the legislation with the customs regulations.

6. Replace the words `counsels or incites' with the words `suggests, proposes or incites' wherever they occurs

This will remove the ambiguity surrounding the modern every day use of the word counsels which includes just listening and asking non leading questions.

CONCLUSION

The legislation is likely to impact hardest on the most vulnerable people in our society and will drastically alter the right to free speech in respect to voluntary euthanasia, suicide and other related issues.

The legislation will be impossible to police and cannot be equitably applied without substantial additional resources. These resources would be more effectively in reducing youth suicide if they were spent on health and social support issues for the young.

As it currently stands this legislation will seriously impinge on the activities of associations trying legitimately to change the law in relation to voluntary euthanasia.

As written it is ambiguous and has a much wider effect than suggested in the explanatory memorandum which was patently deceptive in respect to the initial proposals and is still deceptive. The overemphasis by proponents on the internet and not other carriage services is also deceptive.

The issues involved relating to suicide and consequentially to voluntary euthanasia have wide public interest and should have a wider forum for public debate than is allowed in the eight months since the bill was first proposed. The large majority of the population would not be aware of how easily and swiftly their right to free speech on a legal issue could be eroded. More time should be allowed for public debate.

We consider that the legislation should be rejected entirely.

Alternatively the amendments we propose will result in the legislation being consistent with the explanatory memorandum. The attachment shows how sections 474.29A and 474.29B could be worded if our amendments are endorsed.

I hope that our arguments can influence the decisions of the Committee.

Jocelyn Head,
President
Voluntary Euthanasia Society of Tasmania

ATTACHMENT

POSSIBLE WORDING IF AMENDMENTS PROPOSED BY VEST ARE ACCEPTED

474.29A Using a carriage service for devices and documents relating to suicide

- (1) A person is guilty of an offence if:
- (a) the person:
 - (i) uses a carriage service to access material; or
 - (ii) uses a carriage service to cause material to be transmitted to the person;
or
 - (iii) uses a carriage service to transmit material; or
 - (iv) uses a carriage service to make material available; or
 - (v) uses a carriage service to publish or otherwise distribute material; and
 - (b) the material directly:
 - (i) promotes a particular method of committing suicide using a device designed or customised to be used by a person to commit suicide; or
 - (ii) provides instruction on a particular method of committing suicide using a device designed or customised to be used by a person to commit suicide;
and
 - (c) the person:
 - (i) intends to use the material to promote that method of committing suicide or provide instruction on that method of committing suicide; or
 - (ii) intends that material be used by another person to promote that method of committing suicide or provide instruction on that method of committing suicide; or
 - (iii) intends the material be used by another person to commit suicide.

Penalty: 1,000 penalty units.

474.29B Possessing, controlling, producing, supplying or obtaining suicide related material for use through a carriage service

- (1) A person is guilty of an offence if:
- (a) the person:
 - (i) has possession or control of material; or
 - (ii) produces, supplies or obtains material: and
 - (b) the material directly :
 - (i) counsels or incites suicide using a device designed or customised to be used by a person to commit suicide; or

- (ii) promotes a particular method of committing suicide using a device designed or customised to be used by a person to commit suicide; or
- (ii) provides instruction on a particular method of committing suicide using a device designed or customised to be used by a person to commit suicide;
- and
- (c) the person has that possession or control, or engages in that production, supply or obtaining, with the intention that the material be used:
 - (i) by that person; or
 - (ii) by another person;in committing an offence against section 474.29A (using a carriage service for suicide related material).

Penalty 1,000 penalty units.

- (2) A person may be found guilty of an offence against subsection (1) even if committing the offence against section 474.29A (using a carriage service for suicide promotion material) is impossible.
- (3) It is not an offence to attempt to commit an offence against subsection (1).
- (4) sections 474.29A and 474.29B have no application in respect of communication between medical practitioner and patient in accordance with current medical practice.
- (5) sections 474.29A and 474.29B have no application in respect to material that advocates or debates law reform on euthanasia and/or suicide related material.