

Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Australia

30 March 2005

Dear Secretary,

Submission to Senate Committee re Criminal Code Amendment (Suicide Related Material Offences) Bill 2005

I am writing to support the Bill on the basis that promoters of suicide, such as Dr Philip Nitschke have had carte blanche in teaching citizens how to commit suicide, by methods such as using plastic bags to suffocate, COGen machines to asphyxiate and is now proposing to teach elderly citizens how to prepare poisons to use to commit suicide. I understand that despite various complaints to Police and Medical Boards, no State agency has shown the courage or willingness to enforce criminal and disciplinary laws in an attempt to stop him and his supporters. The enactment of the Bill, together with the amendments to the Customs (Prohibited Imports) Regulations and Customs (Prohibited Exports) Regulations constitutes a concerted effort by the national Parliament to protect vulnerable depressed citizens from his deadly example and that of others of like mind. Examples of his activities which warrant the enactment of the Bill are:

1. His promotion of the COGen carbon monoxide machine and description of how to use it and so called "Exit Bags" to commit suicide at a conference held at the YWCA in Sydney from 30 May to 1 June 2003, entitled "Killing Me Softly", organised by Exit Australia, which he established and runs and the Voluntary Euthanasia Society of NSW.
2. His attempt to take a COGen Suicide machine out of Australia in January 2003, in breach of the Customs (Prohibited Exports) Regulations and
3. His ongoing promotion of methods of committing suicide, including by arranging and speaking at suicide workshops.
4. His recent release of a book, Killing me Softly, explaining how to suicide.

The medical profession in Australia has consistently taken the view that participating in voluntary euthanasia and assisting suicide is unethical. On 25 May 2002 at the annual national conference of the Australian Medical Association, the AMA re-affirmed its opposition to voluntary euthanasia by "a resounding majority." AMA ethics committee chairman Dr Trevor Mudge said doctors need support not to contravene the law or their ethical responsibility to patients.

"We also reaffirm that the first duty of doctors is to do no harm. and that a situation where doctors should be taking the lives of their patients would undermine the very fabric of medical practice." Dr Mudge said.

1. Launch of COGen suicide machine at the Killing Me Softly Conference

Dr Nitschke's campaign to promote new methods of assisting suicide clearly conflicts with this important ethical position. In the course of his well organised "publicity stunts" he also appears to be acting in breach of the criminal law. News segments were broadcast on TV on the evening of Saturday 31 May 2003, which show him clearly demonstrating how his COGen machine works and demonstrating how "Exit bags" work to a group of over 100 mainly elderly supporters, some of whom were televised saying how useful the COGen machine would be for them. On 1 June 2003, the Sun Herald covered this conference extensively, in an article entitled, **"Elderly rush to inspect new DIY death kits."** A photograph was captioned, **"Generation Exit: Conference –goers suss out Dr Philip Nitschke's new suicide machine at Sydney's YWCA yesterday."**

The article also described how "A group of elderly people at a voluntary euthanasia conference swarmed around a table containing the components of mercy killing activist Dr Philip Nitschke's new suicide machine. About 150 euthanasia supporters grabbed eagerly at the bottles of chemicals, rubber tubing and plastic piping as Dr Nitschke prepared to unveil the device" at the conference.

In the various news segments, Dr Nitschke showed and described to his audience how "Exit bags" worked to suffocate people who use them. He also showed how his COGen machine could be used to commit suicide, by putting nasal prongs into a person's nostrils. While demonstrating this he said, "If you were breathing that through nasal prongs you would die within a few minutes."

He said a person would switch the machine on, take one or two deep breaths, "then simply lean back in the chair, arch back and then a deep, exhale, then death."

"It's effectively a death from low oxygen to the brain because the blood is rendered useless in terms of oxygen-carrying capacity because of the presence of carbon monoxide."

Dr Nitschke said a person using this device could not be resuscitated. "Once you start this machine there's no turning back."

Later Dr Nitschke confirmed that his purpose was to teach interested people how to kill themselves when he said, "You don't actually need a doctor to die...People should have access to a type of death of their choosing."

Dr Nitschke's promotion of methods of suicide prima facie appear to breach a number of provisions of the Crimes Act 1900 (NSW).

The Criminal Law concerning suicide

Section 31C of the Crimes Act 1900 (NSW), like its equivalents in other States and Territories, is based on Section 2 of the Suicide Act 1961 (UK). *S. 31C* proscribes aiding and abetting the suicide or attempted suicide of another person, imposing a maximum penalty of 10 years imprisonment. Also proscribed is inciting or counselling another person to commit suicide, where the other person commits or attempts to commit suicide, as a consequence, attracting a maximum penalty of 5 years imprisonment.

Although persons have been prosecuted under S. 31C and its equivalents, to date there have been no reported judicial interpretations of the provisions by Australian courts. However, several English courts have interpreted the UK equivalent provisions and their decisions are persuasive and likely to be followed in Australian Courts.

One English case relevant to the promotion and supply of COGEN machines and “Exit bags” is *R v Yolande Tregenna McShane*¹, a decision of 3 judges of the English Court of Appeal. In that case the court ruled that Mrs McShane had been rightly convicted of the offences of (1) attempting to counsel or procure her mother’s suicide and (2) attempting to cause to be taken by her mother a destructive or noxious thing so as to thereby endanger her mother’s life.

Section 39 of the Crimes Act 1900 creates an offence in similar terms to charge (2) above. Undoubtedly carbon monoxide, the gas produced by the COGEN machine, is a “*noxious thing*”.

The police suspected that Mrs McShane was trying to help her mother to kill herself. Her mother suffered from fantasies and had threatened to suicide for years. Her mother, convalescing from a fall, had been found in a coma and it was suspected that Mrs McShane had supplied her with drugs so that she could receive her inheritance from her grandmother’s estate, who had left the bulk of her estate to Mrs McShane, with her mother having a life interest in the income from it. Accordingly, the police covertly arranged to videotape and sound record the conversation when Mrs McShane next visited her mother. On the next visit, Mrs McShane was seen to pin a packet containing nembatal tablets inside her mother’s clothing. Suicide was discussed, Mrs McShane telling her mother the number of tablets it was necessary to take, but that she, Mrs McShane must not be connected with the taking or she would not inherit under her grandmother’s will. She was heard to say, “Don’t let’s make a mess of it this time. We thought we had done so well before.”

The court held that (1) any attempt to commit an offence was an offence at common law and it followed that Mrs McShane had been properly charged on that count even though the crime defined in s.2 of the Suicide Act 1961 was itself in the nature of an attempt - the suicide itself need not be an actual or attempted suicide - and in the instant case the appellant had been rightly convicted on count 1 as the case was not one of a suicide pact, nor was it in the nature of an attempt to commit an impossible crime, for the mother might have taken the nembatal tablets;

¹ (1978) 66 Cr App R 97

(2) As to count 2, there was abundant authority for saying that no consent could render innocent what was in fact a dangerous act; the conviction on that count could also stand.

Mrs McShane had been sentenced to concurrent terms of two years' imprisonment. Her appeal against sentence was also dismissed.

What is an attempt in law and how does this case apply to Dr Nitschke?

Section 344A of the Crimes Act provides that "(1) Subject to this Act, any person who attempts to commit any offence for which a penalty is provided under this Act shall be liable to that penalty."

It has been ruled by the NSW Court of Criminal Appeal² that an attempt to commit a crime has been proved if the Crown establishes:

- (i) that the accused intended to do the acts with the relevant state of mind which together would comprise the intended crime; and
- (ii) that, with that intention, he did some act towards the commission of that crime which went beyond mere preparation and which cannot be reasonably be regarded as having any purpose other than the commission of that crime.

In another English case in 1983³, Woolf J following the *McShane* decision, stated that the distribution of a booklet which contained information on how to commit suicide, with intent to assist or encourage suicide, may constitute an attempt to aid and abet suicide.⁴

In addition to the attempt offence, if two or more persons agree to assist potential suicides and one of them puts another party to the agreement in touch with potential suicides knowing and intending that person should help suicide if circumstances permitted, then each may be liable to conviction for conspiracy to aid and abet suicide.⁵

These cases apply to Dr Nitschke's situation. The offence of attempt to aid and abet suicide or attempted suicide doesn't require anyone to go ahead with suicide or

² *R v Mai and Tran (1992) 26 NSWLR 371; 60 A Crim R 49 at 59*

³ *Attorney-General v Able (1983) 3 WLR 845*

⁴ "I therefore conclude that to distribute the booklet can be an offence. But, before an offence can be established to have been committed, it must at least be proved: (a) that the alleged offender had the necessary intent, that is, he intended the booklet to be used by someone contemplating suicide and intended that person would be assisted by the booklet's contents, or otherwise encouraged to attempt to take or to take his own life; (b) that while he still had that intention he distributed the booklet to such a person who read it; and, (c) in addition, if an offence under section 2 is to be proved, that such a person was assisted or encouraged by so reading the booklet to attempt to take or to take his own life, otherwise the alleged offender cannot be guilty of more than an attempt.

If these facts can be proved, then it does not make any difference that the person would have tried to commit suicide anyway. Nor does it make any difference, as the respondents contend, that the information contained in the booklet is already in the public domain. The distinguishing feature between an innocent and guilty distribution is that in the former case the distributor will not have the necessary intent, while in the latter case he will.

⁵ *R v Nicholas Reed [1982] Crim LR 819*, a decision of the English Court of Appeal which is also likely to be followed by Australian Courts.

attempted suicide. Although Dr Nitschke claims that he is being careful not to break the criminal law, his actions suggest otherwise. He has a considerable capacity for attracting media attention. He deliberately sought and attracted saturation media coverage for the “launch” of his COGen machine. Brochures advertising the “Killing Me Softly” Conference were forwarded to supporters of assisted suicide and euthanasia including members of the NSW Voluntary Euthanasia Society and supporters of Dr Nitschke’s own organisation, Exit Australia. The fact of the launch was mentioned in a number of newspaper articles, including The Australian on 20 May 2003. Dr Nitschke was also interviewed on Triple J FM Radio on Thursday 29 May 2003 about the Conference and the COGen machine and by Kerri-Anne Kennerly on Channel 9’s Mornings with Kerri-Anne on Monday 2 June 2003. It was apparent from the TV News clips and the Sun Herald photo that his mainly elderly audience were people interested in learning how the COGen machine worked and a number at least were potential suicides. Dr Nitschke, knowing and indeed telling his audience of the ability of the COGEN machine, and “Exit bags” to kill, knowing that the audience was made up of potential suicidists eager to learn about a new fast and so it was claimed, painless method of suicide, demonstrated and explained to that audience how to use such devices.

2. Attempt to export COGen Machine in breach of Customs regulations

Recently, the Commonwealth Government has sought to ban the import and export of such machines and the equally notorious “Exit bags”, by amending the *Customs (Prohibited Imports)* and *Customs (Prohibited Exports) Regulations* to include provisions prohibiting the import and export of “a device designed or customised to be used by a person to commit suicide, or to be used by a person to assist another person to commit suicide” or documents promoting the use of such devices; or that counsels or incites a person to commit suicide using such a device; or that instructs a person how to commit suicide using such devices.⁶

It was widely reported that Customs officers seized a COGEN machine from Dr Nitschke prior to his departure for the US Hemlock Society Conference in Denver USA in January 2003. Articles were published in the Sydney Morning Herald of 14 January 2003 and the Sun Herald of 19 January 2003 concerning this seizure. It is not known whether Dr Nitschke was prosecuted over this matter.

3. Suicide Workshops

Dr Nitschke has been conducting workshops in capital cities in Australia and New Zealand apparently providing information on how to commit suicide. Dr Nitschke has openly admitted that some persons who have attended these workshops have subsequently suicided. For example the Sydney Morning Herald of 27 November 2002 stated that, “Three elderly people have committed suicide after attending euthanasia workshops run by Dr Philip Nitschke. A 79 year-old French-born retired academic, Lisette Nigot, took a fatal overdose in Perth after discussing her situation with him several weeks ago. And in Bundaberg, Queensland, Sydney and Marjorie Croft, both 89, overdosed in their retirement village last October. All sent farewell

⁶ Reg 3AA *Customs (Prohibited Imports) Regulations*; Reg 13GA *Customs (Prohibited Exports) Regulations*.

notes to Dr Nitschke.” The article also contained criticism of Dr Nitschke by the Prime Minister and Professor Ian Hickie, head of the National Depression Initiative, Beyond Blue, who told the Herald, *“We can have no confidence in Dr Nitschke’s assessment of their mental state. If I was contacted by a person, as a doctor my first obligation was to conduct formal psychiatric assessment, not provide advice about how one kills oneself.”*

Dr Nitschke told his audience at the Killing Me Softly Conference that he would be further demonstrating the COGen machine at forthcoming suicide workshops. Anyone showing persons attending a suicide workshop or conference how to make or use such devices or distributing documents containing such information would also appear to be prima facie liable to conviction for at least attempting to aid and abet suicide.

4. Killing me Softly book

In this book he states:

Rather than focusing upon the possibility of legislative change, in Killing Me Softly I take a different and more controversial approach by exploring the role of DIY (do-it-yourself) technologies. I investigate how new and readily obtainable methods can provide people with real end-of-life choices. At a public level, these technologies will be a watershed for those seeking control over when and how they die.

Conclusion

Inciting and or/aiding and abetting suicide are offences in every State and Territory in Australia. Dr Nitschke, who carries on his activities on a national and sometimes, international basis, appears to breach the criminal law and medical ethics with impunity. It is an insult to law abiding and ethical medical practitioners to allow him to continue his activities promoting methods and apparently providing the means for committing suicide. While State and Territorial law enforcement and disciplinary authorities decline to act, depressed people, including youth are sure to attempt suicide using his methods. Some otherwise healthy people who fail in such attempts, may harm themselves and then expect our community to cover their treatment and rehabilitation. It is submitted that the actions of Dr Nitschke, his involvement in the deaths of Norma Hall at South Coogee in January 2001, Nancy Crick in Queensland in May 2002, Lisette Nigot in Perth in 2002, Sydney and Marjorie Croft in Bundaberg in 2001 and various others, warrant the enactment of national legislation.

I commend the terms of the Bill as an appropriate public policy response to crusaders who appear otherwise above the law.

Yours sincerely,

Julianne Smith