

3 April 2005

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

Via Email: legcon.sen@aph.gov.au

Dear Mr Walsh

Inquiry into the provisions of the Criminal Code Amendment (Suicide Related Material Offences) Bill 2005

Please find attached submission from Electronic Frontiers Australia Inc. to the Committee's inquiry.

EFA appreciates the opportunity to make a submission and would be pleased to provide further information, including by way of oral testimony, in response to any questions Committee members may have.

EFA's Executive Director is based in Brisbane and can be contacted directly at the telephone and fax numbers shown above and by email to ed@efa.org.au.

Yours sincerely

Irene Graham
Executive Director
Electronic Frontiers Australia Inc.

**Electronic Frontiers Australia Inc. (EFA)
Submission**

**To: Senate Legal & Constitutional Legislation Committee
Re: *Criminal Code Amendment (Suicide Related Material Offences)*
*Bill 2005***

3 April 2005

Contents:

1. [Executive Summary](#)
2. [Introduction](#)
3. [Suicide Rate and Public Access to the Internet](#)
4. [Existing Similar C'th Criminal Offence](#)
5. [Comparison with Customs Regulations](#)
6. [Freedom of political communication](#)
7. [Freedom of personal private communication](#)
8. [Fault Elements: Intention and Recklessness](#)
9. [Criminalising access to and possession of information](#)
10. [Material that directly or indirectly counsels or incites](#)
11. [Material that directly or indirectly promotes or provides instruction](#)
12. [Conclusion](#)
13. [References](#)
14. [About EFA](#)

1. Executive Summary

- a. Statistics published in December 2004 by the Australian Bureau of Statistics show that since general availability of access to the Internet in Australia in 1994, suicide rates have decreased.
- b. The present Bill is unnecessary as existing offences created by the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No. 2) 2004* adequately deal with the matter.
- c. Although the Explanatory Memorandum states the proposed offences are intended to complement the Customs Regulations, the Bill covers a vastly broader range of material.
- d. The proposed offences would chill freedom of political communication and there are no exceptions in the latest version of Bill that would ensure that Internet material advocating or debating law reform on suicide related issues would not be criminalised.
- e. Under the current *Criminal Code Act 1995* definition of "communication", the proposed offences will apply to personal and private communications by means of private telephone calls or email between two friends or relatives, including where a rational adult has asked for

the information/material. No Parliament should enact legislation prohibiting such communications.

- f. The provisions criminalising access to and possession of information should be deleted. There are extremely few types of information that it is illegal to access and/or possess under Commonwealth, State and Territory laws (e.g. child pornography), and the material the subject of the Bill is of an entirely different nature which should not be made illegal to access or possess.
- g. EFA objects to the application of the fault element of recklessness to the question of whether material "incites suicide". Due to the way the offences are drafted, together with application of the fault elements of the *Criminal Code Act 1995*, a person can be found guilty of the offence when they did not intend to engage in conduct to incite (or counsel) a person to commit suicide. This would create fear of criminal prosecution and therefore, at the least, chill freedom of communication.
- h. Use of the word "incites" in the offences is undesirable because among other things, as pointed out by the Model Criminal Code Committee when previously rejecting use of that word, some courts have interpreted incites as only requiring causing. Given research findings of a link between media coverage of suicides and further suicides, the proposed offences have the potential to criminalise journalists and ordinary individuals reporting on and discussing suicide.
- i. The proposed provisions are drafted in a way that it is likely that at least some Internet material dealing with suicide-related research and suicide prevention or support material will be caught by the offences.
- j. Federal Court interpretation of existing censorship laws prohibiting publication of material that "promotes, incites or instructs in matters of crime or violence" enable the banning of even a satirical article published in a university student journal. Similarly broad interpretations of the proposed offences have too much potential to capture speech that should not be prohibited.
- k. The Bill should be abandoned. The proposals are not technology-independent and will prohibit information that is not illegal to import and export, and information that is not illegal to access or distribute within Australia by means other telecommunications. EFA is opposed to laws that prohibit communications over the Internet and other telecommunications services that are not prohibited by other means.

[▲ Go to Contents List](#)

2. Introduction

1. Electronic Frontiers Australia Inc. ("EFA") sent a submission to the Attorney-General's Department regarding the April 2004 Exposure Draft of the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004* which included offences concerning suicide related material.
2. In that submission, we said the proposed offences concerning "suicide promotion material" should be deleted entirely.
3. The originally proposed suicide related offences were changed before introduction into Parliament in mid 2004, and the 2004 version of the Bill has since been amended resulting in the current *Criminal Code Amendment (Suicide Related Material Offences) Bill 2005*^[1].
4. However, despite two rounds of changes apparently intended to address public opposition to the proposed new criminal offences, the changes do not resolve the problems. We find the Bill totally objectionable as poorly constructed law and a gross infringement of fundamental human rights of communication.

[▲ Go to Contents List](#)

3. Suicide Rate and Public Access to the Internet

5. EFA notes the considerable commentary in some second reading speeches (2004) which appears to blame the existence of information on the Internet for suicide, although the rate of suicide in Australia has decreased since the Internet became publicly accessible in Australia.
6. Access to the Internet did not become generally available to the public in Australia until commercial ISPs (e.g. OzEmail) commenced operations in 1994 and at that time the cost of access was not affordable to the vast majority of people.
7. According to information published by the Australian Bureau of Statistics in December 2004 (*3309.0.55.001 Suicides: Recent Trends, Australia*^[2]):

"The age-standardised suicide rate (for persons) in 2003 was 6% lower than the corresponding rate for the previous year and 24% lower than the peak for the period 1993–2003, which occurred in 1997.

For males, in many age groups, there was a decline in age-specific suicide rates following peaks in the years 1997 and 1998. The age-standardised suicide rate for total males (17.7 per 100,000) in 2003 was lower than in any year in the previous decade (1993–2002).

Similarly for females, there were declines in rates for some age groups over this period and the age-standardised suicide rate for total females (4.7 per 100,000) in 2003 was the lowest since 1994."
8. Given the availability of public access to the Internet in Australia since 1994 correlates with a decreased rate of suicide in Australia, the Internet certainly cannot be blamed for the suicide rate.

9. It should also be noted that while a search using terms such as 'suicide "how to"' returns millions of results, this provides no indication whatsoever of how many pages actually provide information about how to commit suicide. Web site providers intending to *discourage* people from committing suicide often use terms such as "how to" in meta tags etc to attract at-risk people to their sites. Similarly sites providing information about how to help save a friend from committing suicide will result from such searches.

10. The ABS also reports, in relation to methods of suicide^[3], that:

"In 2003 the most common method of suicide was hanging, which was used in almost half (45%) of all suicide deaths. The next most used methods were poisoning by 'other' (including motor vehicle exhaust) (19%), Other (15%), poisoning by drugs (13%), and methods using firearms (9%). This distribution was consistent with that of the previous few years. However, over the decade strong trends were apparent such as the increase in the use of hanging, and a decrease in methods using firearms."

11. 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.

▲ [Go to Contents List](#)

4. Existing Similar C'th Criminal Offence

12. EFA submits that the Bill is unnecessary. New Commonwealth criminal offences (enacted last year) adequately deal with the matter.

13. That legislation (operative from 1 March 2005) makes it a criminal offence to, in effect, use a carriage service to commit, or facilitate the commission of (including by another person), the existing State/Territory criminal offences of aiding or abetting the suicide or attempted suicide of another person, and/or inciting or counselling another person to commit suicide.

14. This new Commonwealth offence was contained in the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No. 2) 2004* which inserted new [Section 474.14 – Using a telecommunications network with intention to commit a serious offence^{\[4\]}](#) into the [Criminal Code Act 1995 \(C'th\)^{\[5\]}](#). A 'serious' offence^[6] in this context means an 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 the above mentioned State/Territory criminal offences relating to suicide.

15. As stated in the Explanatory Memorandum to the above mentioned Bill, the type of conduct covered by the existing Section 474.14 offence includes "*the simple making of a telephone call to facilitate the commission of a bank robbery*".

16. Obviously it would also include using a telephone or Internet service to facilitate commission of State/Territory offences concerning aiding, abetting, inciting, counselling, etc, suicide.

17. Furthermore as the penalty for breach of Section 474.14 is equal to the maximum penalty for the serious offence the person commits or is intending to commit, the penalty is imprisonment not solely a monetary fine as contained in the current Bill.

18. It is therefore questionable which offence would be most likely to be used by the prosecution and, moreover, whether an accused person could be charged with two C'th offences and/or also a State/Territory offence.

[▲ Go to Contents List](#)

5. Comparison with Customs Regulations

19. Although the [Explanatory Memorandum^{\[7\]}](#) states:

"The proposed offences are intended to complement amendments to the [Customs \(Prohibited Imports\) Regulations 1956 \(subregulation 3AA\(2\)^{\[8\]}](#) and the [Customs \(Prohibited Exports\) Regulations 1958 \(subregulation 13GA\(2\)^{\[9\]}](#)"

20. the offences proposed in the Bill cover a vastly broader range of material than that prohibited by the amendments to the Customs Regulations which is limited to:

- (a) a document that promotes the use 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;
- (b) a document that counsels or incites a person to commit suicide using one of those devices;
- (c) a document that instructs a person how to commit suicide using one of those devices.

21. Unlike the Customs Regulations, the Bill seeks to prohibit material that does not mention such a device and that does not counsel or incite "a person to commit suicide". Hence the Bill would prohibit accessing and making available material by means of the Internet and other carriage services that would nevertheless remain lawful to import, export, access and distribute by other methods.

22. EFA submits 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.

[▲ Go to Contents List](#)

6. Freedom of political communication

23. The issue of probable criminalisation of some information protected by the implied right to freedom of political communication has previously been raised, for example, in 2004 second reading speeches, the 2004 [submission by Professor George Williams^{\[10\]}](#) and the 2005 [Bills Digest No. 133^{\[11\]}](#).

24. We note that two new clauses (474.29A (3) and (4)) have been added to the latest version of the Bill which according to the Explanatory Memorandum^[12] purport to ensure that the offences do not "capture Internet material that advocates or debates law reform on euthanasia and/or suicide related issues".

25. However, the new clauses do not fix the problem. In our view these exceptions are worthless because they, just like the offences, are qualified by the *intent* of the person. Hence these "public discussion or debate" and "advocating reform of the law" exceptions do not apply if the trier of fact (judge) believes/decides the person had an ulterior motive. (We assume the trier of fact will be a judge, not be a jury, because the offence is not proposed to be a C'th indictable offence).

26. As a result, the same problem exists as with the previous version of the Bill, as stated in Professor Williams' 2004 submission:

"If the content is such that it could be considered as 'directly or indirectly' counselling or inciting suicide – despite a primary focus on law reform – an offence may be committed even if there is, in fact, no suicide or attempt at suicide. The possibility thus exists that the amendment could encompass debate about law reform."

27. We note that there have been suggestions of amending the Bill to include a provision, as found in other Acts^[13], such as:

"This section does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication."

28. However, EFA does not consider such a provision adequate because it does not provide sufficient, if any, surety as to what may or may not be communicated without risking criminal prosecution. While such a provision may ensure the legislation is constitutionally valid, as [Simon Evans has remarked](#)^[14] concerning the same provision in another Bill:

"it is constitutionally problematic, in the sense that it conflicts with a basic principle of the Australian constitutional order, the rule of law. That principle requires that the law be clear and capable of functioning as a guide for those subject to the law on how they should act. The provision that the section defining the offence 'does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication' does not comply with this principle. The content of the constitutional doctrine is unclear and contested. It would be a brave lawyer indeed who confidently advised a client that what he or she proposed to do fell within the protected scope of the freedom."

29. Further, given that there are [differing opinions both within and between the courts](#)^[15] about the boundaries of the implied freedom, members of the general public cannot be expected to know its limits with any certainty.

30. EFA considers it highly unlikely that adding exceptions or defences can resolve the problem. The wording of the actual offences would need to be amended to significantly narrow their breadth. They are not reasonably appropriate and adapted to achieving a legitimate end. The proposed offences not only threaten freedom of political communication but also unjustifiably infringe individuals' fundamental right to "*seek, receive and impart information and ideas of all kinds,*

regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice" (*International Covenant on Civil and Political Rights, Schedule 2 Human Rights And Equal Opportunity Commission Act 1986 (C'th)*^[16]) as discussed below.

[▲ Go to Contents List](#)

7. Freedom of personal private communication

31. We note the commentary in the Bills Digest^[17] stating that:

"It is arguable that there is some uncertainty over what constitutes 'material' in the above offences. The term is defined in section 473.1 of the Criminal Code as including 'material in any form, or combination of forms, capable of constituting a communication.' Does this include a verbal conversation? If so, a private telephone conversation between two friends or relatives, in which one 'counsels or incites suicide' or provides 'instruction' on a particular method of suicide could come within the scope of the new subsection 474.29A offences."

32. Amendments to the *Criminal Code Act 1995* (enacted last year and effective from 1 March 2005) inserted a new definition into the Criminal Code *Dictionary*^[18] which states:

"communication includes any communication:
(a) whether between persons and persons, things and things or persons and things;
and
(b) whether the communication is:
(i) in the form of text; or
(ii) in the form of speech, music or other sounds; or
(iii) in the form of visual images (still or moving); or
(iv) in the form of signals; or
(v) in the form of data; or
(vi) in any other form; or
(vii) in any combination of forms."

33. Accordingly it seems clear that the offences apply to personal and private communications by means of private telephone calls and email between two friends or relatives, including where a rational adult has asked for the information/material.

34. EFA considers it is completely inappropriate for any Parliament to enact legislation prohibiting such communications.

[▲ Go to Contents List](#)

8. Fault Elements: Intention and Recklessness

35. EFA considers the proposed offences have high potential to capture an unjustifiably vast range of material resulting, in part, from the way in which the offences are framed.

36. Among other things, we object to the application of the fault element of recklessness to the question of whether material "incites suicide". We note that the *Model Criminal Code*^[19]

Committee, in considering the offence of inciting the commission of an offence, "*was concerned that some courts have interpreted incites as only requiring causing rather than advocating the offence*" and 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*"^[20]. As a result the word "urges" was used and intention, not recklessness, applies (for example, see [s11.4 Incitement, Criminal Code Act 1995 \(C'th\)](#)^[21]).

37. In our view, the elements of the proposed offences, together with the wide range of information that is believed to incite/cause at-risk individuals to commit suicide (see [Section 10](#) later herein) also result in too great a threat to free speech.

38. In relation to the proposed offences, the Explanatory Memorandum^[22] states:

"The conduct listed in paragraphs 474.29A(1)(a) ... must be accompanied by an intention that ... the relevant material be used, by the person who engages in the offending conduct or another person, to counsel or incite suicide ...

As the offences in proposed subsections 474.29A(1) ... require the intention that the relevant material be used in a particular way for the offence to be proven, no special defences for the proposed offences are necessary. (Of course, the general defences in Chapter 2 of the Criminal Code will apply.) This is because no-one should have a defence available to them if they intend, in engaging in particular conduct, to, for example, incite a person to commit suicide."

39. EFA considers the above commentary concerning a requirement of intention to be misleading and irrelevant because it refers to conduct that is entirely different from the conduct to be criminalised by the Bill.

40. The Bill does not propose to criminalise **conduct** that incites (or counsels) a person to commit suicide with intent to do so, nor criminalise the **conduct** of using material to incite (or counsel) suicide with intent to do so. (The Bill would be less problematic if that was the type of offence proposed, although then it would not be within the Commonwealth's constitutional powers).

41. The only **conduct** it proposes to criminalise is the use of a carriage service.

42. Whether or not the conduct of using a carriage service is criminal depends on:

- a. whether the **circumstance** exists that "the material directly or indirectly counsels or incites suicide" or that "the material directly or indirectly promotes, or provides instruction on, a particular method of committing suicide"; and
- b. whether the person intends their conduct (use of a carriage service) to bring about a **result** that the material be used to counsel or incite suicide by that person *or* some other person.

43. Therefore, as a result of the way in which the offence is framed, together with application of the fault elements in Division 5 of the *Criminal Code Act 1995*, a person can be found guilty of the offence when they did not intend to engage in conduct to incite (or counsel) a person to commit suicide.

44. This is because in relation to the result in (b) above, [Section 5.2\(3\)^{\[23\]}](#) of the *Criminal Code Act 1995* states that:

"A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events." (emphasis added)

45. and in relation to the circumstance in (a) above, [Section 5.4\(1\)^{\[24\]}](#) (the default fault element specified in [Section 5.6\(2\)^{\[25\]}](#)) states that:

"(1) A person is reckless with respect to a circumstance if:
(a) he or she is aware of a substantial risk that the circumstance exists or will exist;
and
(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk." (emphasis added)

46. Accordingly, the offence can be made out, for example, when a person:

- a. was "aware of a substantial risk" that the material does, or will, directly or **indirectly** counsel or incite suicide and "it was unjustifiable to take that risk"; and was aware that "in the ordinary course of events" the material would be used to counsel or incite suicide;
- or
- b. was "aware of a substantial risk" that the material does, or will, directly or **indirectly** promote or provide instruction on a particular method of committing suicide and "it was unjustifiable to take that risk"; and was aware that "in the ordinary course of events" the material would be used by another person to commit suicide.

47. In view of the above, the offences would apparently capture a vast range of material because it is arguably within the awareness of a person making material available on the Internet that a person at risk of committing suicide may read it.

48. Moreover, [research studies](#) show that there is, at least, a substantial risk that reports about suicide in newspapers and on television/radio, and general public discussion about suicide, cause suicide. (For examples, see [Section 10](#) later herein).

49. The question therefore arises, in any particular instance, of whether it is "unjustifiable to take the risk" that the material incites/causes suicide. The answer to that question is to be determined by the judge (the trier of fact) in a particular case. (We assume the trier of fact will not be a jury because the offence is not proposed to be a C'th indictable offence).

50. In our view if this Bill is enacted, it will create fear of criminal prosecution and therefore, at the least, chill freedom of communication, not only in relation to political communication but also in relation to public discussion about the problem of suicide and media reports about suicide.

51. In summary, the proposed offences present too great a threat to free speech and the public's right to have access to information.

[▲ Go to Contents List](#)

9. Criminalising access to and possession of information

52. EFA is generally opposed to laws that criminalise access to and possession of information. To our knowledge the only material that it is currently illegal to access on the Internet or possess, under the laws of almost all Australian jurisdictions, is child pornography/child abuse material.

53. Notably, it not a criminal offence under Commonwealth law (nor the laws of almost all States/Territories) to use a carriage service to access/obtain possession of material that provides instruction on committing murder, or promotes a particular method of committing murder (or any other violent crime) with the intention of committing murder.

54. However, the Bill would place material that "directly or indirectly counsels or incites suicide" and material that "promotes a particular method of committing suicide; or provides instruction on a particular method of committing suicide" into a new special category of prohibited information notwithstanding that it is not a crime to commit or attempt to commit suicide.

55. Although the proposed offence requires intention to use the material for particular purposes, charges may be laid merely when it is perceived that a person may have intended that *someone else* use the information for a prohibited purpose, even when they have not made the material available to anyone else. We are of the view that such laws are too prone to selective use to victimise and harass people notwithstanding that the probability of a court finding intent and convicting may be low, that is, there may be no intention to actually prosecute.

56. EFA submits that the components of the proposed offences concerning access and possession should be deleted.

[▲ Go to Contents List](#)

10. Material that directly or indirectly counsels or incites

57. As discussed in [Section 8 above](#), use of the word "incites" is problematic and undesirable for the same reasons stated by the Model Criminal Code Committee in rejecting use of that word. Among other things, their reasons included that "some courts have interpreted incites as only requiring causing". The inclusion of the word "indirectly" exacerbates the problem.

58. The Mindframe Media and Mental Health project web site (part of the Mindframe National Media Initiative funded by the Australian Government Department of Health and Ageing) provides an [extensive list of summaries of research studies](#)^[26] showing that there is, at least, a substantial risk that general discussion and media reports about suicide causes suicide. The list includes the following:

- "A major 1995 study of coverage in Australian newspapers found that rates of male suicide increased following reports of suicide, with actual male suicides peaking on the third day after the story appeared."
- "Higher rates of suicide by a particular method such as burning or anti-freeze poisoning, have been found to follow the appearance of newspaper stories on a suicide by these methods."
- A Queensland study found a peak in suicide rates following extensive negative publicity about suicides in the psychiatric wards of a local general hospital."

- "Warwick Blood and Jane Pirkis (2001) conducted a review of studies on a variety of media, and both fictional and non-fictional portrayals of suicide. They found that recent, reliable Australian research does demonstrate a link between reporting and suicide." (*Suicide and the Media: A Critical Review*^[27], research report funded and published by the Commonwealth Department of Health and Aged Care, 2001).
- (See also *Aspects of youth suicide*^[28], House of Representatives Standing Committee on Family and Community Affairs, Hansard transcript, 1997.)

59. EFA considers the offences have high potential to criminalise journalists and ordinary individuals reporting on and discussing suicide. The Explanatory Memorandum provides no information indicating whether or not it is intended to criminalise such information and one wonders whether the drafters of the offences were aware of the above facts in deciding to create an offence involving "indirectly inciting".

60. The word "counsels" is also not defined in the Bill. Definitions in general use include^[29]:

- something that provides direction or advice as to a decision or course of action;
- to give advice, especially on social or personal problems;
- to listen to and give support or professional advice to somebody who needs help; to advise somebody to do something.

61. The proposed prohibition of material that "counsels suicide" is dangerously broad. It 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.

62. We also object to the inclusion of the word "indirectly". In our view the offences could catch a wide range of legitimate information because it could be contended that the material "indirectly" "counsels" suicide.

63. On its face, the provision would make it a criminal offence to make available material that counsels people not to attempt to commit suicide including when the person intends the material be used to counsel against committing suicide.

64. If that is not the Parliament's intent, the Bill should make clear that it is not. It should not be left to a court to guess what the Parliament intended. The Federal Court was faced with this problem in 1998 in considering the meaning of the phrase "instructs in matters of crime" as contained in the Classification Act 1995. The Court opined^[30]:

"The mere furnishing of information about how to commit crime is not sufficient. If it were, a newspaper report about how a bank was broken into and robbed might instruct in matters of crime. That could not have been Parliament's intention."

65. In our view the use of the word "counsels" is very likely to at least chill, if not ban, speech that should not be banned and thereby unduly impair rational adults' ability to access and receive information to assist them in making informed choices.

66. As Federal Court Justice Ron Merkel remarked in *Michael Brown & Ors v the members of the Classification Review Board of the OFLC* [1997] 474 FCA^[31]:

"...it is important to observe the difficulties inherent in the administration of any anti-speech code. As was said by Harry Kalven Jnr.:

'It is technically impossible to write an anti-speech code that cannot be twisted against speech nobody means to bar. It has been tried and tried and tried'."

67. We observe that the drafters of the [Explanatory Memorandum to the 2004 Bill](#)^[32] apparently recognised the Bill could ban speech that nobody means to bar. For example, it stated:

*"Internet material dealing with suicide-related research and suicide prevention or support material will **generally** not be caught by the offences."* [emphasis added]

68. While that sentence is not contained in the Explanatory Memorandum to the current Bill^[33], the same situation applies. No amendments have been made that would even reduce the possibility of such material being caught.

[▲ Go to Contents List](#)

11. Material that directly or indirectly promotes or provides instruction

69. Similarly, the proposed prohibition of material that "directly or indirectly" "promotes a particular method of committing suicide" or "provides instruction on a particular method of committing suicide" is of major concern.

70. The Federal Court decision in *Michael Brown & Ors v Members of the Classification Review Board of the OFLC* [1998] 319 FCA^[34] dealt with an appeal against a 'refused classification' decision. As the full bench of the Court stated:

"The appeal raise[d] questions about the proper construction of the words 'instruct in matters of crime' in the National Classification Code made under the Classification (Publications, Films and Computer Games) Act 1995 (Cth). It also raise[d] questions about the extent and limits of freedom of expression and the ways in which that value is applied in a democratic society."

71. As demonstrated by the Court decision dismissing the appeal, existing censorship laws prohibiting publication of material that "promotes, incites or instructs in matters of crime or violence" enable the banning of even a satirical article published in a university student journal.

72. Among other things, the decision contains extensive discussion about the various meanings of the word "instructs" and the very limited implied right to freedom of political communication.

73. EFA considers that decision, to the extent that it may represent Australian law, is a matter for law reform by the Commonwealth and States. Accordingly, we are opposed to new laws, such as the current Bill, that have similar potential to be interpreted as having exceedingly broad application.

74. Offences concerning material that directly or **indirectly** "promotes a particular method" or "provides instruction on a particular method" have considerable potential to capture media reports and even research studies, given that "*Higher rates of suicide by a particular method such as burning or anti-freeze poisoning, have been found to follow the appearance of newspaper stories on a suicide by these methods*"^[35]. When material is not found to provide "instruction" it may nevertheless be found to "promote" the particular method. As the Federal Court remarked in the above mentioned case "*According to the Shorter Oxford English Dictionary, to promote is to further the growth, development, progress or establishment of (anything); to further advance, encourage.*"

75. Also, in our opinion, the breadth of some provisions of this Bill have high potential to result in events similar to those which occurred in relation to the above case. The Federal Court apparently considered it necessary to include an unabridged copy of the banned article in their decision which, like other Federal Court decisions, is publicly available on the Internet. Subsequently in 1999, four years after the accused students had been arrested, and widespread public criticism of the breadth of the censorship law, the Victorian Director of Public Prosecutions dropped all charges without explanation.

76. In our view this Bill has too much potential to capture speech that should not be prohibited and, as in the above case, could readily be used in a highly selectively manner to victimise and harass persons whose speech some politicians do not like whether or not there is actually intention to proceed to trial.

[▲ Go to Contents List](#)

12. Conclusion

77. The proposed legislation is not technology-independent. It will prohibit information that is not illegal to import and export, and information that is not illegal to access or distribute within Australia by means other than a telecommunications carriage service. EFA is opposed to laws that prohibit communications by means of the Internet and other telecommunications services that are not prohibited by other means.

78. The proposed offences not only threaten freedom of political communication but also unjustifiably infringe individuals' fundamental right to "*seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice*" (*International Covenant on Civil and Political Rights, Schedule 2 Human Rights And Equal Opportunity Commission Act 1986 (C'th)*^[36]).

79. The Bill is unnecessary because new Commonwealth criminal offences (enacted last year and operative from 1 March 2005) make it a criminal offence to, in effect, use a carriage service to commit, or facilitate the commission of (including by another person), the existing State/Territory criminal offences of aiding or abetting the suicide or attempted suicide of another person, and/or inciting or counselling another person to commit suicide.

80. In conclusion, EFA submits that the Bill should be abandoned.

[▲ Go to Contents List](#)

13. References

1. *Criminal Code Amendment (Suicide Related Material Offences) Bill 2005*

<[http://parlinfoweb.aph.gov.au/piweb/browse.aspx?path=legislation%20%3E%20current%20bills%20by%20title%20%3E%20criminal%20code%20amendment%20\(suicide%20related%20material%20offences\)%20bill%202005](http://parlinfoweb.aph.gov.au/piweb/browse.aspx?path=legislation%20%3E%20current%20bills%20by%20title%20%3E%20criminal%20code%20amendment%20(suicide%20related%20material%20offences)%20bill%202005)>

2. Australian Bureau of Statistics, *3309.0.55.001 Suicides: Recent Trends, Australia*, 15 December 2004

<<http://www.abs.gov.au/Ausstats/abs@.nsf/0/a61b65ae88ebf976ca256def00724cde?OpenDocument>>

3. See note 2.

4. *Criminal Code Act 1995 (C'th)*, Section 474.14 – Using a telecommunications network with intention to commit a serious offence

<<http://scaleplus.law.gov.au/html/pasteact/1/686/1/PA005480.htm>>

5. *Criminal Code Act 1995 (C'th)*

<<http://scaleplus.law.gov.au/html/pasteact/1/686/top.htm>>

6. *Criminal Code Act 1995 (C'th)*, Section 473.1 Definitions: 'serious' offence

<<http://scaleplus.law.gov.au/html/pasteact/1/686/1/PA005270.htm>>

7. Explanatory Memorandum to the *Criminal Code Amendment (Suicide Related Material Offences) Bill 2005*

<http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=1976&TABLE=EMS>

8. Customs (Prohibited Imports) Regulations 1956 (subregulation 3AA(2))

<http://www.austlii.edu.au/au/legis/cth/consol_reg/cir1956432/s3aa.html>

9. Customs (Prohibited Exports) Regulations 1958 (subregulation 13GA(2))

<http://www.austlii.edu.au/au/legis/cth/consol_reg/cer1958439/s13ga.html>

10. Professor George Williams, Director, Gilbert + Tobin Centre of Public Law at the University of New South Wales, *Submission to Senate Committee Inquiry*, August 2004

<http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/suicide/submissions/sub21.pdf>

11. Bills Digest No. 133, *Criminal Code Amendment (Suicide Related Material Offences) Bill 2005*, 15 March 2005

<http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=4948&TABLE=BILLSDGS>

12. See note 7.

13. *Australian Security Intelligence Organisation Act 1979 (C'th)*, Section 34VAA(12) – Secrecy relating to warrants and questioning.

<http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/cth/consol_act/asioa1979472/s34vaa.html>

[Olympic Insignia Protection Act 1987 \(Cth\), Section 73.](#)

<http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/cth/consol_act/oipa1987306/s73.html>

[Spam Act 2003 \(Cth\), Section 44.](#)

<http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/cth/consol_act/sa200366/s44.html>

14. [Constitutional concerns about the proposed offence of associating with terrorist organisations,](#)

Simon Evans (Director of the Centre for Comparative Constitutional Studies), 18 June 2004

<http://www.simonevans.org/weblog/2004/06/constitutional_.html>

15. [Constitutional Guarantees: Implied freedom of political communication examined by lower courts,](#) Constitutional News, Centre for Comparative Constitutional Studies, University of Melbourne

<[http://www.law.unimelb.edu.au/cccs/news/Constitutional%20News_current.html#](http://www.law.unimelb.edu.au/cccs/news/Constitutional%20News_current.html#ConstitutionalGuarantees)

ConstitutionalGuarantees>

16. [International Covenant on Civil and Political Rights,](#) Schedule 2 Human Rights And Equal Opportunity Commission Act 1986 (C'th)

<http://www.austlii.edu.au/au/legis/cth/consol_act/hraeoca1986512/sch2.html>

17. See note 11.

18. [Dictionary,](#) Criminal Code Act 1995 (C'th)

<<http://scaleplus.law.gov.au/html/pasteact/1/686/1/PA005910.htm>>

19. [Model Criminal Code Report,](#) Chapters 1 and 2 General Principles of Criminal Responsibility, Criminal Law Officers Committee (now Model Criminal Code Officers Committee) of the Standing Committee of Attorneys-General, December 1992

<<http://www.ag.gov.au/agd/www/Agdhome.nsf/Page/RWPA93DBE7859B79635CA256BB20083B557?OpenDocument>>

20. See note 19.

21. [Section 11.4 Incitement,](#) Criminal Code Act 1995 (C'th)

<<http://scaleplus.law.gov.au/html/pasteact/1/686/0/PA000660.htm>>

22. See note 7.

23. [Section 5.2\(3\),](#) Criminal Code Act 1995 (C'th)

<<http://scaleplus.law.gov.au/html/pasteact/1/686/0/PA000300.htm>>

24. [Section 5.4\(1\),](#) Criminal Code Act 1995 (C'th)

<<http://scaleplus.law.gov.au/html/pasteact/1/686/0/PA000320.htm>>

25. [Section 5.6\(2\),](#) Criminal Code Act 1995 (C'th)

<<http://scaleplus.law.gov.au/html/pasteact/1/686/0/PA000340.htm>>

26. [Media & Suicide,](#) Mindframe Media and Mental Health Project (part of the Mindframe National Media Initiative funded by the Australian Government Department of Health and Ageing).

<<http://www.mindframe-media.info/suicide/media.php>>

27. *Suicide and the Media: A Critical Review*, Jane Pirkis, Centre for Health Program Evaluation, University of Melbourne & R Warwick Blood, School of Professional Communication, University of Canberra, published by the Commonwealth Department of Health and Aged Care, 2001
<http://www.auseinet.com/resources/other/med_suicide.pdf>

28. *Aspects of youth suicide*, House of Representatives Standing Committee on Family and Community Affairs, Hansard transcript, 28 February 1997.
<<http://www.aph.gov.au/hansard/reps/commttee/r3503500.pdf>>

29. <http://www.wordwebonline.com/search.pl?w=counsels>
<http://dictionary.cambridge.org/define.asp?key=17530&dict=CALD>
<http://www1.oup.co.uk/elt/oald/bin/oald2.pl>

30. *Michael Brown & Ors v Members of the Classification Review Board of the OFLC* [1998] 319 FCA
<http://www.austlii.edu.au/au/cases/cth/federal_ct/1998/319.html>

31. *Michael Brown & Ors v the Members of the Classification Review Board of the OFLC* [1997] 474 FCA
<http://www.austlii.edu.au/au/cases/cth/federal_ct/1997/474.html>

32. Explanatory Memorandum to the *Criminal Code Amendment (Suicide Related Material Offences) Bill 2004*
<http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=1877&TABLE=OLDEMS>

33. See note 7.

34. See note 30.

35. See note 26.

36. See note 16.

▲ [Go to Contents List](#)

14. About EFA

Electronic Frontiers Australia Inc. ("EFA") is a non-profit national organisation representing Internet users concerned with on-line rights and freedoms. EFA was established in January 1994 and incorporated under the *Associations Incorporation Act* (S.A.) in May 1994.

EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting online civil liberties. EFA members and supporters come from all parts of Australia and from diverse backgrounds.

Our major objectives are to protect and promote the civil liberties of users of computer based communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of computer based communications systems.

EFA policy formulation, decision making and oversight of organisational activities are the responsibility of the EFA Board of Management. The elected Board Members act in a voluntary capacity; they are not remunerated for time spent on EFA activities. The role of Executive Director was established in 1999 and reports to the Board.

[▲ Go to Contents List](#)
