

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT

Criminal Code Amendment (Suicide Related Material Offences) Bill 2005

Public Hearing 14 April 2005

Questions Taken on Notice

Question No. 1

Senator Ludwig asked the following question at the hearing on 14 April 2005

Senator LUDWIG—The ABA also say, 'We note that schedule 5 currently provides no formal mechanism by which the ABA may report to a law enforcement agency internet content that is found not to be prohibited.' They have certain rules about classifications: what might or might not be prohibited or whether it needs classification.

Mr Gray—One may be minded to ask why they or anybody else needs an express power to report a serious criminal offence to the law enforcement authorities. Maybe there is a secrecy provision in the legislation which causes the problems. But the relevant information principle provides an exemption under the Privacy Act for communications necessary and relevant to the enforcement of the criminal law.

Senator LUDWIG—Your answer to the ABA is that they should refer all material which may offend the Criminal Code Amendment (Suicide Related Material Offences) Bill in this instance, should it pass, to the relevant law enforcement agency?

Mr Gray—Which would be the Australian Federal Police. Now if there is a legal, technical problem with that happening because of the scope of the secrecy provision then I am quite happy to take that on notice. But we have not had representations to the department, although I notice we have had the representations to 23 August 2004 to the ABA for some time. I make that point, out of fairness to them. It may be an issue that we should take up with the Australian Broadcasting Authority. If there is an issue, it should be relatively easy to resolve.

The answer to the honourable senator's question is as follows:

The Department has been in contact with the ABA to discuss these matters and to ascertain what, if any, obstacles exist for the ABA referring material that may contravene this Bill to the appropriate authorities.

The ABA has formal powers to investigate certain types of Internet content under Schedule 5 to the *Broadcasting Services Act 1992*. This includes material that provides 'detailed instruction or promotion in matters of crime or violence.' The ABA can take action in relation to content that is prohibited or potentially prohibited, applying the criteria set out in the *Classification Publications, Films and Computer Games) Act 1995* (the Classification Act) and the Guidelines for the Classification of Films and Computer Games 2003 (the Guidelines).

If the ABA identifies material which contravenes its requirements, the ABA can implement its take down procedures. These procedures are unrelated to any action under the proposed criminal offences in this Bill.

These criminal offences and the classification scheme are two separate and distinct schemes. The role of assessing whether the relevant material contravenes the proposed offences under this Bill will be for law enforcement and prosecution agencies.

Where a complaint is made to the ABA about suicide material and it meets the criterion applied by the ABA in assessing Internet content, this content is referred via service agreements made under Schedule 5 to State, Territory and Commonwealth law enforcement agencies for follow up action. Where the content does not meet the criteria, Schedule 5 does not envisage referral.

However, there is nothing to prevent the ABA from referring this material to the relevant law enforcement agency if they are concerned that it may breach the offences proposed under this Bill.

Question No. 2

Senator Payne asked the following question at the hearing on 14 April 2005

CHAIR—My suggestion is ‘promote’. In fact, it is not mine; it is in one of our submissions, and I am interested in canvassing it.

Mr Gray—I think ‘promote’ is a wider term, quite frankly.

CHAIR—I do not think this is a breadth question. I think this is a language question. It might have been better described as a semantic question, and I do not mean that in a disparaging way. I will leave that thought with you, and the committee may pursue it further in the report process.

Mr Gray—I do understand the question and I do see the point. It is not something I really want to express a concluded view on here and now. In other contexts, we have looked at changing words because they have a connotation in a specific environment.

CHAIR—Thank you very much. I appreciate your openness on that.

Mr Gray—It has just been pointed out to me that the phrase actually appears in the Customs regulations.

CHAIR—That does not necessarily make it helpful.

Mr Gray—No, I understand. It occurs in various other places. It is a commonly used phrase. It is used in the New South Wales—

CHAIR—There is absolutely no dispute that it is commonly used. That is not my argument.

Mr Gray—You just do not like it in this context.

CHAIR—My argument is about the context in which we are currently operating.

Mr Gray—We can give some thought to that. I just do not know where we will get to with that process, but I am certainly happy to take it on notice.

The answer to the honourable senator’s question is as follows:

Consideration has been given to replacing the word ‘counsels’ with the word ‘promotes’ in section 474.29A(1).

The offences in this Bill have been drafted to cover a specific and narrow set of circumstances to ensure that the offences do not infringe against the implied freedom of political communication.

The term ‘counsels or incites’ suicide was introduced after public consultation on the exposure draft of the Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004, which originally contained these offences. Prior to this change, it was proposed that a person would be guilty of an offence if they used a carriage service to access, transmit or make available material that was suicide promotion material and the person intended that that material be used to

promote, counsel or incite suicide. It was considered that a broad interpretation of these draft offences could have resulted in material that advocates, debates or promotes euthanasia-related law reform being caught. To ensure that the Bill did not inadvertently criminalise such debate, the current formulation of words were adopted.

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

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

This is consistent with the meaning of this term when used in the Commonwealth Customs (Prohibited Imports) and (Prohibited Exports) Regulations dealing with the import and export of suicide kits and in State and Territory law relating to aiding suicide. For example, s31C of the NSW Crimes Act and s17 of the ACT Crimes Act.

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

Question No. 3

Senator Payne asked the following question at the hearing on 14 April 2005

CHAIR—I think we have covered most areas that we wanted to pursue this morning, and we thank you for your assistance. I would not mind if you would take on notice an examination of some of the details of the Electronic Frontiers Australia submission, which is very detailed, particularly with regard to the fault elements and a number of other issues. Please take on notice the department's responses to that submission and come back to us. You would of course be aware that the committee is currently examining three separate pieces of legislation. This is the third hearing we have had in a relatively short space of time, so we are as pressed for time as usual—as I know the department is; I am not drawing a line between us. We would appreciate your assistance with that.

The answer to the honourable senator's question is as follows:

Electronic Frontiers Australia Inc (EFA) raised a number of issues of concern in their comprehensive submission lodged for the Committee's consideration of the Criminal Code Amendment (Suicide Related Material Offences) Bill 2005. Below, the Department has summarised and responded to the key points raised by EFA.

Issue 1: Suicide Rate and Public Access to the Internet:

EFA notes that since the Internet has become publicly available, suicide rates in Australia have decreased. 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.

Departmental Response:

The rates of suicide are decreasing.

The impetus behind the development of this legislation was two-fold:

- 1) to complement Customs Regulations on the import and export of suicide kits and associated instructions.
After the introduction of the Customs Regulations, the Internet was used to post information on how to make and use suicide kits in an effort to circumvent the intention of these Customs offences. This Bill is intended to criminalise this process.
- 2) to proactively respond to media reports and research studies which suggest that certain information about suicide on the Internet may encourage suicidal behaviour.
Web sites that provide chat rooms or bulletin boards devoted to discussion about suicide, in particular, have the potential to influence suicidal behaviour.

Evidence presented to the Committee showed that Internet sites providing detailed descriptions on methods of committing suicide are easily and quickly accessible.

This legislation will encourage the removal of material from carriage services that includes information that is intended to promote a particular method of suicide or counsel or incite suicide. It will be more difficult to find step by step guides to suicide online.

Issue 2: Existing Similar Commonwealth Criminal Offence

EFA submits that this Bill is unnecessary as section 474.14 of the Criminal Code, which came into operation on 1 March 2005, adequately deals with this matter.

Departmental Response

Under section 474.14 of the Criminal Code, a person is guilty of an offence if they use a telecommunications network with the intention to commit, or facilitate the commission of, a serious offence against Commonwealth, State or Territory law. A serious offence is an offence punishable by imprisonment for at least five years.

This offence would capture State and Territory offences of aiding and abetting or counselling or inciting the suicide or attempted suicide of another person, if this aid or counsel was provided using a carriage service.

The proposed offences (474.29A and 474.29B) in this Bill go beyond the ambit of State and Territory offences in this area by covering material that promotes or provides instruction on a particular method of committing suicide. Section 474.29B also provides an offence for conduct preparatory to an offence under section 474.29A

The proposed offences also do not need a specific person to be targeted or evidence that a person has committed or attempted to commit suicide. These offences enable law enforcement agencies to act before a person actually dies or harms themselves as a result of that conduct.

In any event, the proposed offences would address the relevant conduct expressly and leave no doubts about precisely what conduct was covered.

Issue 3: Comparison with Customs Regulations

EFA notes that the offences in this Bill cover a vastly broader range of material than that prohibited by the amendments to the Customs Regulations, which these offences are intended to complement. 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.

Departmental Response

This Bill does cover a broader range of material than that prohibited by the amendments to the Customs Regulations.

The ambit of Customs jurisdiction is limited to physical material that can be seized entering or exiting Australia. The Customs Regulations deal only with suicide devices and documents that promote, counsels or incites, or instructs in the use of one of these devices.

This legislation complements the Customs Regulations to prevent the Internet being used to circumvent the Customs Regulations.

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

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

Issue 4: Freedom of Political Communication

EFA is concerned that this Bill could result in the criminalisation of some information protected by the implied right to freedom of political communication.

Departmental Response

The terms of these offences have been drafted to apply to a specific and narrow set of circumstances. These offences only apply where

- the material directly or indirectly ‘counsels or incites’ suicide and the person intends to use the material for that purpose (clause 474.29A(1)), or
- where the material directly or indirectly promotes a particular method of suicide or provides instruction on a particular method (clause 474.29A(2)) and the person intends to use the material for that purpose or intends the material to be used by another person to commit suicide.

To avoid any doubt on this issue, two clarifying provisions have been inserted into the Bill which provide that a person does not commit an offence merely because they use a carriage service to engage in public discussion or debate about euthanasia or suicide or advocate reform of the law relating to euthanasia or suicide

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

It was important to ensure that a person or organisation could not, under the guise of a discussion on euthanasia, circumvent the law by providing detailed instructions on a method of committing suicide or promoting a particular method of suicide. The intent requirement satisfies this concern.

Issue 5: Freedom of personal private communication

EFA notes that these 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. EFA considers it completely inappropriate for any Parliament to enact legislation prohibiting such communications.

Departmental Response

The predominant focus of the Criminal Code Amendment (Suicide Related Material Offences) Bill 2005 has been to address the circumvention of the Customs Regulations by use of the Internet and to respond to the media reports and research papers on the effect of suicide material on the Internet.

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

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

State and Territory laws would also capture instances where a person counsels or incites another person during a private phone conversation to commit suicide. The State and Territory laws have broader application in this regard as they will also capture private face to face conversations held in a private residence that counsel or incites the suicide or attempted suicide of another.

It is an offence in each Australian jurisdiction to counsel, aid or procure a person to commit suicide. This Bill is targeted at the same type of activity when undertaken using a carriage service.

Issue 6: Fault Elements: Intention and Recklessness

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. They object to the application of the fault element of recklessness to the question of whether material 'incites' suicide. EFA is concerned that a person could be found guilty of an offence when they did not intend to engage in conduct to incite (or counsel) a person to commit suicide.

Departmental Response

EFA has noted that the Model Criminal Code 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*".

Section 11.4 of the *Criminal Code* picks up the recommendations of the Model Criminal Code Committee. It states as follows:

- 11.4(1) A person who urges the commission of an offence is guilty of the offence of incitement.**
- 11.4(2) For the person to be guilty, the person must intend that the offence incited be committed.**

The proposed offences do not rely on the general extension of criminal responsibility, as provided by section 11.4 of the *Criminal Code*. Rather, the term ‘incites’ is an element of the specific proposed offences. Nonetheless, the concept of ‘urging the commission’ of the suicide would be instructive in determining the intended meaning of ‘incites’ under these proposed offences.

The fault element of recklessness applies to the requirement that the material must directly or indirectly counsel or incite suicide, or directly or indirectly promote or provide instruction on a particular method of committing suicide. However, even if a person is reckless as to these matters, it does not automatically follow that they have committed an offence under this Bill.

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

Without that intention, no offence would be committed. This requirement would satisfy the concerns of the Model Criminal Code Committee.

Issue 7: Criminalising access to and possession of information

EFA is generally opposed to laws that criminalise access to and possession of information.

EFA notes that although the proposed offence requires intention to use the material for particular purposes, charges may be laid merely where 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. EFA 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.

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

Departmental Response

These laws do not criminalise simple access to or possession of material. For a criminal offence to be proven there must also be an intention to use the material for a particular purpose.

Proposed subsection 474.29B will make it an offence for a person to possess or control suicide related material, or produce, supply or obtain suicide related material with the intention that it be used, by that person or by another person, in committing an offence against the proposed primary offence in section 474.29A. This proposed offence covers a broad range of preparatory conduct undertaken with the intention to commit the primary offence. For example, it would cover the production of a document which provides step by step instructions on a particular method of suicide and encouragement to use that method with the intent to place it on the Internet for the purpose that it be used by another person to commit suicide. Should the production of this document and the intent behind it, come to the attention of authorities, a person could be charged notwithstanding that that material has not been made available to anyone else.

Issue 8: Material that directly or indirectly counsels or incites

EFA also objects to the inclusion of the word ‘indirectly’. In their view the offences would catch a wide range of legitimate information because it could be contended that the material ‘indirectly’ ‘counsels’ suicide.

EFA is concerned that the proposed prohibition of material that ‘counsels suicide’ is too broad. It would include information that advises someone not to commit suicide, as well as information that advises someone to do so.

Departmental Response

The term ‘indirectly or directly’ is a commonly used drafting device in criminal offences that covers a situation where a person does not actually carry out the prescribed conduct in exact words but does so by necessary implication.

The use of the term ‘indirectly or directly’ does not widen the intended operation of these offences. For an offence to apply, there must still be an intention that the relevant material be used to counsel or incite suicide, to promote a particular method of suicide, or be used by a person as instructions on how to commit suicide.

The phrase ‘counsels or incites’ is widely used in criminal law across Australia. For example, the same language of ‘counsels and incites’ is used in the Commonwealth Customs (Prohibited Imports) and (Prohibited Exports) Regulations dealing with the import and export of suicide kits. The term ‘counsels or incites’ is also widely used in State and Territory law relating to aiding suicide. For example, section 31 C of the New South Wales Crimes Act and s17 of the ACT Crimes Act both use the phrase ‘incites or counsels’.

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

Issue 9: Material that directly or indirectly promotes or provides instructions

The EFA is also concerned about 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. They refer to the case of *Michael Brown & Ors v Members of the Classification Review Board of the OFLC* under which censorship laws enabled the banning of a satirical article published in a university student journal. They are concerned that these offences will have exceedingly broad application.

Departmental Response

The use of the term ‘indirectly or directly’ has been canvassed above.

Whether an offence is committed will always depend on the content and nature of the material made available. However, the requirement of intention is critical to the operation of this legislation and the determination of whether an offence has been committed. For an offence to apply under this Bill, there must still be an intention that the relevant material be used to promote a particular

method of suicide, or be used by a person as instructions on how to commit suicide. It is this crucial requirement of intention that limits the application of these offences to a specific and narrow set of circumstances.