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## SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

**Reference: Criminal Code Amendment (Suicide Related Material Offences) Bill  
2005**

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**SENATE**  
**LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE**  
**Thursday, 14 April 2005**

**Members:** Senator Payne (*Chair*), Senator Bolkus (*Deputy Chair*), Senators Greig, Ludwig, Mason and Scullion

**Participating members:** Senators Abetz, Barnett, Bartlett, Mark Bishop, Brandis, Brown, Buckland, George Campbell, Carr, Chapman, Colbeck, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Hogg, Humphries, Kirk, Knowles, Lightfoot, Lundy, Mackay, McGauran, McLucas, Nettle, Robert Ray, Ridgeway, Sherry, Stephens, Stott Despoja, Tchen, Tierney and Watson

**Senators in attendance:** Senators Greig, Ludwig and Payne

**Terms of reference for the inquiry:**

Criminal Code Amendment (Suicide Related Material Offences) Bill 2005

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**Committee met at 8.53 a.m.**

**CHAIR**—Good morning ladies and gentlemen. This is the hearing for the Senate Legal and Constitutional Legislation Committee inquiry into the provisions of the Criminal Code Amendment (Suicide Related Material Offences) Bill 2005. The inquiry was referred to the committee by the Senate on 16 March 2005, for report by 10 May 2005. The bill proposes to amend the Criminal Code Act 1995 to insert new offences dealing with the use of a carriage service, including the internet, to access, transmit or otherwise make available suicide related material and the possession, production, supplying or obtaining of suicide related material for use through a carriage service.

The committee has received 31 submissions for this inquiry, and the submissions authorised for publication are available on the committee's web site. Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses do have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

[8.54 a.m.]

**EGAN, Mr Richard John, Board Member, Treasurer and Spokesman, Coalition for the Defence of Human Life**

**CHAIR**—Welcome. You have lodged a submission with the committee which we have numbered 9. Do you need to make any amendments or alterations to that submission?

**Mr Egan**—There are no amendments or alterations, although I do have some additional material that I will come to in a moment.

**CHAIR**—Certainly. I invite you to make a short opening statement, at the conclusion of which we will go to questions from members of the committee.

**Mr Egan**—The Coalition for the Defence of Human Life strongly supports the bill because we believe it addresses in a useful way the threat to innocent and vulnerable people posed by material that counsels or incites suicide or promotes or instructs in methods of suicide. As outlined in the submission we do have some suggestions for strengthening the bill and making a little clearer some things that could be included as suicide related material. Those suggestions include advertising for sale or supply devices designed or customised to be used by a person to commit suicide. It seemed unclear to us whether an advertisement for a particular suicide device would be caught by the legislation if the advertisement itself did not give instructions as to how to use the device when clearly the purpose of advertising it is that people purchase the device and use it to commit suicide. That seems to be the kind of thing that the bill seeks to target, but we are uncertain whether in fact the bill successfully targets that. Similarly, it is unclear whether the advertising of meetings at which instructions and methods of suicide will be given would be covered. If a meeting is clearly for the purpose of instructing those who attend the meeting in particular methods of suicide, it is our submission that that ought to be caught by the bill, and we propose an amendment to address that.

We make a suggestion with regard to penalties. Where the use of the carriage service to induce a person to commit suicide or to attempt to commit suicide actually results in someone either attempting or actually committing suicide we think the penalties should be similar to those in state legislation for the same offence, which is imprisonment for 10 years. We are also concerned that the bill has a loophole in that internet sites hosted offshore are not easily caught, because, rightly, there is an exception for internet service providers who do not know that suicide related material is being accessed through their service. We believe that the bill certainly needs a provision to ensure that once the URLs of such sites are drawn to the attention of the internet service providers there is a penalty on them if they do not block access to those sites. I believe that is a similar provision to what was originally part of the same bill in relation to child pornography, where internet service providers have a defence but not once it is drawn to their attention that a site is a child pornography site under those provisions.

Finally, in relation to the submission, we do not support any of the provisions that seek to preserve the constitutional right to political free speech. We believe the Constitution does that adequately without needing to specifically put it into legislation and that nothing in the bill, either explicitly or implicitly, seeks to suppress political free speech. Further to our

submission, I have a couple of comments on two other submissions. The submission from the Australian Broadcasting Authority drew attention to the fact that publications that instruct in methods of suicide are not refused classification in Australia under the current classification guidelines, and it pointed to some difficulty with that in relation to the ABA's role in notifying internet content hosts of sites which would offend under this legislation.

Our proposal is that either in this bill or at a later stage the Senate look at amending the classification act. It seems to me that publications such as *Final Exit*, which instruct in detail in methods of suicide, are just as harmful as the same material on the internet. That publication was at least temporarily banned in at least one state in Australia when it first came out, but unfortunately since then it has been classified R and the book has been implicated in some successful suicides in Australia.

Also, Electronic Frontiers Australia suggest in their submission that section 474.14 of the Criminal Code already covers the field, making this bill unnecessary. It seems to me that it does not, because while that deals with the use of a carriage service to commit a serious offence—and that may well cover actually inducing someone to commit or attempt to commit suicide—it certainly does not cover the lesser offences that are contained in this bill in relation to generally putting out information that promotes or instructs in particular methods of suicide. Finally, because some of the submissions do express scepticism as to whether there are in fact 'how to commit suicide' sites on the web and whether anyone ever follows the suggestions on those sites, I do have a collection of articles drawn from the general media—mainly from internet sources and psychiatric literature—which does have some case history reports. I would like to table that for the committee's consideration.

**CHAIR**—We will take that as a tabled document. Do you have anything further to add?

**Mr Egan**—No.

**Senator LUDWIG**—In your submission you say that the provision in respect of freedom of political communication is unnecessary. Can you elaborate on that? The provision and the explanatory memorandum seems to me to say that it puts beyond doubt what political freedom of speech is or is not.

**Mr Egan**—I guess I just have an instinctive concern that, if something already seems to me to be beyond doubt, a further clause that says it is putting it beyond doubt may raise a new doubt that certain kinds of things are being protected that perhaps should not be, so therefore the provision goes too far. I am not strongly objecting to the version that is in the bill itself. I would only go so far as to say that I think it is unnecessary. I think some of the alternative amendments that have been proposed at different stages do create a doubt and, in a way, give the appearance of singling it out for protection that could lead to some unforeseen consequences.

**Senator LUDWIG**—But you do not object to the belt and braces approach that the legislation might adopt in that instance?

**Mr Egan**—I do not have a strong objection to that.

**Senator LUDWIG**—The other issue is the direction of the bill itself more generally regarding the protection of the young and vulnerable in our society. Do you think that, whilst this bill does one thing, there is more that can be done in this area?

**Mr Egan**—There is an enormous amount that can be done in this area. As a parent and a member of the community, I believe suicide is an enormous tragedy. I have no particular expertise in suicide prevention, so I am not going to speculate on what would be the best things for the government or parliament to do in that area, but certainly no-one should walk away from this bill thinking that suicide prevention has been tackled in some major way. I think this is tackling an area which is likely to be increasingly a threat to young people in an Internet saturated society. This is certainly an area that needs tackling, and we are very pleased to see the parliament tackling it, but it does not cover the field by any means.

**Senator LUDWIG**—I take it that you support the bill.

**Mr Egan**—Yes.

**Senator LUDWIG**—What difference do you think it will make?

**Mr Egan**—I think it will make a lot more difference if the suggestion that ISPs be required to block access to identified suicide promotion sites hosted offshore is adopted. Without that provision, it is going to be of some usefulness, but its usefulness may be more symbolic and token than real. The technology and capacity are there to require internet service providers to block access to sites. That has to happen for child pornography under the legislation just passed by the Senate a few months ago. If the Senate believes sites which promote suicide or instruct in methods of suicide should be taken down if they are in Australia, I cannot see any reason why there should not be a requirement in the legislation for ISPs to block access to offshore sites as they become identified.

**Senator LUDWIG**—Was your organisation consulted about the development of this bill?

**Mr Egan**—We were not consulted about the development. Sometime before the bill surfaced, I wrote lobbying letters on this question to several members of parliament. I cannot now remember which list I used or if I wrote to everybody or the ones I thought might give me a sympathetic hearing. That followed a series of reports of individuals, mainly teenagers I think, following detailed instructions from internet sites, including sites which involved chat rooms, where they were actively egged on to commit suicide. For example, one that struck me particularly was where the person who had committed suicide had made an attempt and had failed and then was harassed by members of the group, which said: ‘You weren’t serious; you didn’t take enough pills. If you’re going to be serious, you have to take this number of pills of this kind.’ That disturbed me very greatly, so I wrote some letters calling for this sort of regulation of the internet, and certainly I was delighted when the bill was introduced.

**Senator LUDWIG**—Are teenagers the class of people that you refer to as the innocent or the vulnerable?

**Mr Egan**—No. I think anyone is who has access to a carrier service and who has a suicidal predisposition through depression or facing the particular stresses in life that lead people to commit suicide. They may be people of any age or condition in society. Teenagers are a particular class because they are probably more involved in internet use and more likely to get

engaged in the kinds of suicide promoting chat rooms and so on that, as has already been evidenced, lead some of them to commit suicide. I single out teenagers but I do not limit the innocent and vulnerable to teenagers, by any means.

**CHAIR**—From the amendments and your submission, I am trying to understand how you see the bill as really producing the result it is apparently intended to produce; that is—and I am not quite sure how to term it—to remove the counselling or promotion of, or the incitement to, suicide. Do you think the bill covers the field?

**Mr Egan**—It does not in the areas that I have identified in the submission. Firstly, there is the issue of where the internet content is located. If it is located in Australia, there are provisions in the bill to get that content off the internet. If it is located offshore, the only penalty seems to be on perhaps the individual who is accessing it, which is not the most helpful place to have the penalty. That is why I cannot stress strongly enough the necessity for having a system, with a penalty, where ISPs are required to block access to identified suicide-promoting sites.

**CHAIR**—I am not technically very good at these things. Can you explain to me how an ISP will do that?

**Mr Egan**—My understanding is that this has been proposed for other areas. For example, the Australian Securities and Investments Commission is proposing it for a limited number of fraud sites located offshore.

**CHAIR**—Happily for me I do not have to deal with their legislation. Perhaps you could explain it to me.

**Mr Egan**—My understanding—and again it is from a non-boffin—is simply that, once a URL or an IP address of a site is located and identified as containing suicide-related material, that information would be communicated to ISPs. They would simply need to build into their system something that blocks that URL so that a user of an ISP—

**CHAIR**—What do you mean by ‘build something into their system’?

**Mr Egan**—They have to do that at the moment with child pornography sites. There are black-listed sites. They would simply add these things to that.

**CHAIR**—Who black-lists the sites which hold pornography?

**Mr Egan**—The Australian Broadcasting Authority is the relevant authority.

**CHAIR**—So you would be asking the ABA to black-list this other set of sites?

**Mr Egan**—That is probably the appropriate agency to do it. They issue the take-down orders for porn-related sites.

**CHAIR**—I think you also referred to books. In terms of covering the field, you would be looking at banning certain books as well?

**Mr Egan**—Yes. That is obviously a question for the classification act, because the Commonwealth does not have the head of power, as far as I am aware, to deal with publications.

**CHAIR**—Do you think all the states and territories would agree to that?

**Mr Egan**—I think it is something that the Commonwealth should take a lead on and invite the states and territories to support. The classification guidelines are—

**CHAIR**—We might just get through the little tax hurdle first and then we will look at guidelines.

**Mr Egan**—There is a process of regular review of the classification guidelines. In another capacity, I am engaged in some lobbying on the question of film classification for other reasons than this. I doubt that there is a state that is interested in seeing more suicides in that state. I do not think it is a hard job to get people to see that having something which is essentially a handbook on how to commit suicide is not exactly helping to prevent suicide. I do not see that as an insurmountable obstacle, but I appreciate that the Commonwealth cannot do that on its own.

**CHAIR**—My recollection is that the internet became reasonably publicly accessible in around the mid-nineties. What is the statistical correlation, if any, between that and the number of suicides in the last 10 years in Australia? Has it increased since the availability of the internet?

**Mr Egan**—No. I understand there has been some reduction, thankfully, in the suicide rate. I do not think anything can be drawn from that in relation to the internet.

**CHAIR**—Had there been an increase, would you be drawing something from that?

**Mr Egan**—I am not sure that I would in the absence of any detailed studies that showed that particular suicides were internet related. That is certainly not our claim. We have not advanced that claim. All we are saying is that there is evidence in some psychiatric case histories and in general media reports that some individuals have committed suicide after following detailed instructions from either web sites or chat rooms on the internet. We are not making a statistical argument for this at all.

**CHAIR**—Let me come to the media in terms of covering the field again. How does your organisation suggest that the media deal with the reporting of suicides? It is a very sensitive issue.

**Mr Egan**—It is. I am not across the detail of this, but I understand that in fairly recent times the media have adopted an approach—I do not know if it is a formal stated code or an informal practice—of less detailed reporting, particularly of youth suicides, and there has even been a lack of reporting of some youth suicides. My understanding is that this followed a spate of copycat suicides when the media were less restrained in their commentary. To their credit, it is an area where they have shown some restraint and I think there has been a resultant decrease in copycat suicides. But I am not in a position to give the committee any direct evidence on that.

**CHAIR**—Do you think that was an appropriate course for the media to have taken?

**Mr Egan**—Absolutely, yes. The public interest is in suicide as a problem and as a social and psychiatric issue and so on. Certainly, the things that lead to suicide, such as depression and mental illness, are things we need information on, but we do not need detailed reporting on how a particular young person has committed suicide. That is completely unhelpful. The media is right to be restrained in its reports on this.

**CHAIR**—Indeed—I appreciate the difference. Can you tell me a little about the Coalition for the Defence of Human Life?

**Mr Egan**—Yes. It has about 24 member organisations in Western Australia.

**CHAIR**—You are WA based?

**Mr Egan**—Yes. The brief of the Coalition for the Defence of Human Life is to defend human life from fertilisation to natural death, so we have an interest in everything from embryo research, abortion, infanticide and euthanasia to genetic screening and that sort of thing.

**CHAIR**—What work do you do on the mental health issues that you just raised in relation to suicide?

**Mr Egan**—Some of our groups probably would have some involvement in the counselling side of that, but the organisation as such does not do any direct work with mental health.

**CHAIR**—I think you said in your remarks that you did not support the amendments in relation to the right to freedom of political communication. I was not sure whether, flowing from that, you did not support subsections (3) and (4) of proposed section 29A.

**Mr Egan**—In answer to Senator Ludwig's questions, my position is that I see the new subsections as unnecessary, but I do not have any strong opposition to them. I think they are crafted better than some of the other proposed ways of dealing with this particular concern. It is certainly not our intention that the bill ban political free speech in relation to calls for legalised euthanasia and so on. Of course, the bill cannot, because, as I understand it, the High Court in its latest judgments still upholds an implied right, albeit a limited one, to political free speech in the Constitution. I did have a concern that some of the ways of dealing with this could create a privileged area of free speech in relation to promoting legalised euthanasia that may go beyond what is in the implied constitutional right.

**CHAIR**—Do you still think that is the case?

**Mr Egan**—I do not think that is the case in the present drafting of the bill, but I thought it may have been in a couple of the proposed amendments to earlier versions of the bill.

**CHAIR**—Thank you very much.

[9.18 a.m.]

**PRESTON, Mr John Graham, Queensland Coordinator, Right to Life Australia**

**CHAIR**—Welcome. You have lodged a submission with the committee, which we have numbered 2. Do you need to make any amendments or alterations to that submission?

**Mr Preston**—There are no amendments, but I would like to make some additions.

**CHAIR**—Do you mean documents?

**Mr Preston**—I will be referring to documents that I will be happy to offer to you.

**CHAIR**—I invite you to make an opening statement and we will go to questions after that.

**Mr Preston**—Our organisation, Right to Life Australia, support the bill but we would like to see one additional section added to that. Firstly, though, I would point out that in less than one hour of searching on the internet I was able to find the following web sites. Satanservice.org provides a 106-page ‘practical guide to suicide’, as they call it, which, as its length indicates, is a very detailed description of just about every imaginable way to kill yourself. I have copied some sample pages from these, not the entire document. ‘The Suicide Files: Thanatogast’s Suicide Methods’ are not as lengthy as the previous site but again provide very detailed information about how to kill yourself. The author says in the introduction:

There are lots of ways to kill yourself, if you want to. Pills and potions, plants and violent ends: all are available to you.

Whether you’re a jumper or a poisoner, a blood and gore or clean and tidy suicide-devotee, there is information here for you.

Then there is deviantcase.com, which lists their top rated suicide methods under the headings of ‘most reliable’, ‘fastest’, ‘least painful’ and ‘best all-round drugs’. It then goes on to provide very comprehensive information about each method so that the user can be sure that they will work. Then there is a much shorter site headed ‘How to Kill Yourself Using the Inhalation of Carbon Monoxide Gas’ which, as its title states, tells you precisely how to kill yourself by these means. It is told by a man, Jerry Hunt, who did precisely that: he killed himself with carbon monoxide gas. Then at the site ‘Suicide isn’t so bad, give it a chance’, the author starts off:

Thinking about suicide but you’re not sure if it’s the right thing to do? Here are some tips to help you decide whether or not killing yourself is a good choice ...

He goes on to list 10 tips. Tip No. 3, for example, says:

Depressed? Don’t have any friends? I guess nobody told you, but being depressed and feeling lonely isn’t normal. Everyone else is happy, and has lots of friends so there must be something wrong with you. Put the prozac away, what you need is rat poison.

The last line of the site reads:

morons have killed themselves after reading this page.

The last site I will mention starts off: ‘If you have come to this page looking for methods information, I am sorry but it has been removed in anticipation of the passage of the Criminal Code Amendment (Suicide Related Material Offences) Bill 2005. This makes it illegal for me

to retain the methods page.’ I would not suggest that I came across dozens of sites promoting and explaining how to commit suicide—I did not—but those that are there are easy enough to find and they are certainly very explicit.

A major study in 2002 conducted by Griffith University’s Australian Institute for Suicide Research and Prevention found that as many as 20 per cent of Australians have thought life was not worth living, that 10 per cent have seriously considered suicide and that 3.1 per cent of people have attempted suicide. Suicide is the 13th leading cause of death worldwide, and in Australia suicide has surpassed motor vehicle accidents as the No. 1 killer of males aged 25 to 44.

Headlines in newspapers such as ‘Our silent epidemic’—referring to suicide—are not uncommon. A report in 2003 recorded in the *Bath Chronicle* stated that, after a 17-year-old youth hanged himself, police found on his computer graphic information from web sites on means of suicide. Inspector Paul Ginger of the Wiltshire Police Computer Crime Unit said:

This is a very sad case ... These websites are a concern nationwide ...’

On 8 June 2004 the *San Francisco Chronicle* reported on an online service which encourages successful suicide. At that time it had been linked to at least 28 deaths. The author of the article, Julia Scheeres, wrote:

... the discussion group defines its philosophy as being “pro-choice” suicide. Participants view suicide as a civil right that anyone should be able to exercise, for whatever reason.

Last year, an article was published in the *Nordic Journal of Psychiatry*, entitled ‘Parasuicide online: can suicide websites trigger suicidal behaviour in predisposed adolescents?’ The authors present a case study of a 17-year-old girl who attempted suicide and almost died after viewing internet web sites. The authors of the study, referring to Germany, concluded that 30 per cent of all adolescents have suicidal thoughts and approximately half of adolescents, and that number is increasing, use the web; that youths with dependent, insecure, frightened and evasive traits as well as those who cannot express their worries, fears and sadness to a parent and thus look for guidance on the internet may especially be at risk; and that in a psychiatric exploration, issues of recreational activities and TV viewing times should be supplemented by questions concerning use of computer and internet, frequency and duration of internet access and preferred web sites and chat platforms. The authors suggest that a general prohibition of suicides is neither practical nor reasonable, but that the owners of suicide sites should be aware of their responsibilities to adolescents; that they should know and follow the fundamental rules of suicide prophylaxis as they should be applied to other media; and that no information should be given on suicide methods, their efficiency or their availability.

In Australia we have those who advocate that being given assistance to commit suicide should be regarded as a human right. Several years ago during an interview Philip Nitschke was asked whether he saw any restrictions that should be placed on euthanasia and assisted suicide generally. He replied in part that we must accept that people have a right to dispose of their life whenever they want, so all people qualify, and that someone needs to provide the knowledge, training or recourse necessary to anyone who wants it, including the depressed, the elderly, the bereaved and the troubled teen. This would mean that the so-called peaceful

pill, or suicide pill, should be available in the supermarket so that those old enough to understand death could obtain death peacefully at the time of their choosing.

As probably is well known to the panel, Nitschke and his organisation continue to promote workshops for the production of suicide pills or potions. Mr Nitschke believes children from as young as 12, as indicated in this article, should be given the right to choose to end their lives. I mention these things to show that there are zealots who are determined to promote the means to commit suicide, including, explicitly, to the very young and the highly vulnerable. I note that Philip Nitschke is to follow me so I am happy to leave the full text of the interview I refer to so it cannot be said that he was misquoted.

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

We would recommend that the bill add a section which would require internet service providers to restrict access to web sites which provide promotion and instruction material referring to suicide. The necessity for this is made evident in Philip Nitschke's own new book, *Killing me Softly*. On page 255 it says that national governments having no jurisdiction over offshore hosted web sites, despite their best efforts at censorship and filtering, ensures that these lines of communication remain clear and open and details about the design and construction of devices such as the CoGenie and the peaceful pill can still be circulated. I would emphasise that last section. With that addition, we believe that the bill should be supported.

**Senator LUDWIG**—I note that you mention promotion in your submission. The bill does not, as I understand it, make promotion an offence—it is ‘counsel or incite’. By ‘promotion’ do you mean ‘counsel or incite’ or do you want to go one step further? What do you understand ‘counsel or incite’ to mean? Have you turned your mind to that particular phrase?

**Mr Preston**—Yes, I have. I see that ‘counsel’ refers to giving advice about and ‘incite’ means in the sense of urging to.

**Senator LUDWIG**—The bill also goes on to say there is an offence if—and I quote:

(b) the material directly or indirectly:

- (i) promotes a particular method of committing suicide; or
- (ii) provides instruction on a particular method of committing suicide ...

There are two main elements as to how the bill will operate. I wonder whether you have turned your mind to examining how those phrases would operate in practice. You also raised the issue that it seems only to apply to sites in Australia —and we will certainly ask this of Attorney-General's—in the sense that it is an offence in Australia; it does not seem to have any extraterritorial effect. Given the size and scale of the internet, it appears that offshore sites are not captured in the bill. Do you have a view about that?

**Mr Preston**—Yes. As the previous speakers said, we see this as an essential element that has been missed by the bill and needs to be added. As indicated earlier, there is one site that has voluntarily been withdrawn by the person. In view of this—and presumably that is an Australian site, whereas the others are still there—we believe it would be better for them not to be available at all and, therefore, that should be added to the bill.

**Senator LUDWIG**—In terms of the provision in the bill which deals with implied freedom of political communication, do you have a view about whether that achieves its purpose?

**Mr Preston**—Sections 3 and 4. It would seem to us to be an acceptable addition to the bill from the original. Yes, we see that that is a valid addition and, as far as we can tell, it would achieve its intention.

**Senator LUDWIG**—In his second reading speech, Mr Ruddock, the Attorney-General—I am not sure whether you have had a chance to read it; I expect you have—

**Mr Preston**—Yes, we have.

**Senator LUDWIG**—said:

Recent studies have shown that in some cases such internet chat room discussions have led to a person attempting suicide, and sometimes successfully.

This research points to evidence that vulnerable individuals were compelled so strongly by others to take their own lives ...

Are you aware of any research?

**Mr Preston**—I referred to the one from the *Nordic Journal of Psychiatry*. That was the only study that I came across that made direct reference. There was another article which I did not mention—

**Senator LUDWIG**—If you are aware of any, I am happy for you to take those on notice and provide the references to the committee so that we could have a look at them as well.

**Mr Preston**—Yes, it was headed, ‘Suicide pacts and the internet’. That was all. That is available.

**Senator LUDWIG**—Mr Ruddock also said:

The bill seeks to protect vulnerable individuals ...

There does not seem to be a view, at least in his second reading speech, about who ‘vulnerable individuals’ are. Does your organisation have a view about who would be encompassed by the definition of ‘vulnerable individuals’?

**Mr Preston**—No. We think that that should be taken very broadly. Simply by definition, it is those who are open to the possibility of committing suicide. As that earlier study that I referred to said, 20 per cent of Australians have indicated that they have thought at times that life is not worth living and 10 per cent have seriously considered suicide. That would obviously take in a large number of people, presumably right across the spectrum. The very fact that a person may consider life not worth living or seriously consider suicide, we would see that as making them vulnerable.

**Senator LUDWIG**—In terms of measures in the scheme of things, this is one measure by the Attorney-General to achieve a particular stated purpose. Is the federal government doing enough in your view, across other avenues as well, to ensure that those people who are vulnerable in our society are sufficiently protected?

**Mr Preston**—I would have to say that I do not know. As far as this step goes, we would see it as an appropriate step to take with regard to the internet. We see that as a particular concern with its very wide usage, particularly among young people. So as far as this goes, we would see it as valid. I could not comment beyond that.

**Senator LUDWIG**—Do you think that it will in fact be successful? Mr Ruddock seems to be saying that the bill seeks to protect vulnerable individuals by preventing the use of the internet in this way but does not seek to stifle legitimate debate on euthanasia or suicide related issues. Do you think it will achieve that? That seems to be the central purpose of the bill.

**Mr Preston**—Yes, it is hard to know how successful it will be. Presumably if somebody were to be successfully prosecuted then that would have a very strong deterrent effect on others. I do not see this stifling political debate about the lawfulness of euthanasia and so on. I do not think people need to fear that it will prevent legitimate debate. Certainly as far as discouraging the transmission and access to this dangerous material goes, we see it as important to try to do so.

**CHAIR**—Mr Preston, does Right to Life have a specific view about the clauses of the bill that pertain to public discussion or debate—clauses 474.29A(3) and 474.29A(4)?

**Mr Preston**—As I indicated, we are quite happy that those additions have been made. We do not have any objection to those and we think it is quite appropriate that they are there.

**CHAIR**—If you were in a position of being able to advocate other changes to the legislation—I understand your view about sites hosted offshore—what other initiatives would you suggest ought to be pursued?

**Mr Preston**—That was essentially our only recommendation in terms of additional material.

**CHAIR**—Some of the submissions raised concerns with the committee that the bill may have the effect of precluding individuals from discussing with even one other person their concerns in relation to suicide—their own position or something like that. Do you think the bill will have an impact on those sorts of communications either by telephone or email?

**Mr Preston**—I believe it is possible that it would, yes.

**CHAIR**—Do you think that is appropriate?

**Mr Preston**—Yes, if that one person communicating with another is inciting or counselling others with the intention that the other person may use a means to commit suicide.

**CHAIR**—It is a hard line to draw though, isn't it?

**Mr Preston**—It is.

**CHAIR**—What is the intent and what is direct or indirect? I am hoping greater minds than mine will be making those assessments.

**Mr Preston**—Yes, we would agree that this is a challenging area—but we see this as a necessary part of the bill. If it is going to be able to stop the gross abuses, such as I mentioned earlier, that is an unavoidable difficulty that must be faced. We believe it is important that we make these changes so that, as best we can, we prevent people gaining access to this dangerous information and perhaps losing their lives through it.

**CHAIR**—That is a big step, though: potentially criminalising the discussions between two people that may not even result in a suicide or an attempted suicide. Don't you think that is a large step in the criminal process?

**Mr Preston**—It is; I would not deny that, but in terms of the potential to save human lives I would see this as perhaps a necessary step to take.

**CHAIR**—If you take that step, where does it stop?

**Mr Preston**—As far as this bill goes, it stops with not using carriage services.

**CHAIR**—Supporters of old-fashioned letters might find that a positive step. Thank you very much for assisting the committee, Mr Preston, and for your submission.

[9.41 a.m.]

**NITSCHKE, Dr Philip, Director, Exit International**

**CHAIR**—Welcome. You have lodged two submissions with the committee, numbered 16 and 16A by the committee. Do you need to make any amendments or alterations to those submissions?

**Dr Nitschke**—I do not wish to make any alterations but I wish to add material to the first submission in a short statement, if I may.

**CHAIR**—Certainly. In fact, I invite you to make an opening statement and at the end of that we will go to questions from committee members.

**Dr Nitschke**—I think we should be quite clear about the bill that is under consideration here today and the effect that it will have. It has already been alluded to in a couple of the previous discussions here this morning. This is a bill that will strike right at the heart of the ability of doctors like me to communicate openly and honestly with our patients. I should also be clear, I suppose, about just what it is that Exit International does, because there is considerable misinformation about that, and some of that misinformation has been included in submissions provided to your committee. In fact, a number of those submissions have been forwarded to me for comment, because they quite adversely reflect on the work that Exit International does. I will take the opportunity now, if I may, to clarify just what it is that we do and explain why this bill, if it were to be passed, would seriously affect what in many cases can be seen as a very therapeutic and beneficial medical involvement we have with the elderly people in Australia.

Exit International runs a clinic service and a workshop service, where people come to seek advice. In the clinic service I talk to sick people, and I do that in the capacity of an Australian registered doctor. We invariably talk about suicide; this is the reason they contact us. It was not that many years ago that I did my medical training at Sydney University, and it was made quite clear that if you are going to consult, discuss or counsel people on an issue such as suicide you must be open and frank with them. You must be able to speak about methods, and you must be able to ask very direct questions such as: if you are thinking of suicide, how do you plan to do it? To do other than that is to effectively render that particular consultation less than likely to have any impact.

That is part of my own training and it has certainly been borne out by my own experiences. I have to be able to speak frankly about this. Of course, if this legislation is passed, we are not talking just about information publicly available on the internet; much more worrying is the fact that almost all the communications that are carried out between my organisation and my patients take place on the telephone, by fax and by email. Even in a situation where we have an initial consultation I almost invariably have to follow up through phone consultations. With the way this legislation is structured, any discussion of that nature would seem, in my understanding of the legislation, to be totally prohibited and could likely attract severe penalty.

I might also point out that it is not just me that is caught up by this sort of legislation, despite the large number of submissions that seem to relate to the work of our organisation. Yesterday I received a fax from The Samaritans in Perth, who made the point that they were concerned:

Is this new legislation going to affect our service?

The Samaritans in Perth work on a suicide crisis line. They asked:

Will our service be in contravention of the legislation, since we ask if people intend to commit suicide and if so how they intend to bring about their death?

Of course they do that—that is what they are trained to do. That is what I do, that is the work that we do, and it is necessary if one is to be involved in any useful way with the patients we deal with. To my understanding of the law as it currently is worded, those conversations will be prohibited or, if they are carried out, they will be done so at considerable risk to our organisation. We get faxes and we get emails every day, such as this one:

As we grow older, we feel we should have more information on what is available if we feel we should need to end our own lives. We are 82 and 78 and hope we have years left, but we need to have something worked out so we can retain our independence.

People want information. The question that goes to the very heart of this piece of legislation is: where are you going to stop people getting access to valid information? I will quote a section out of our book, which has recently been published and mentioned. I hope that I can table the book, because it relates specifically to this legislation in many ways, especially the last chapter. The book says:

... the ethics manual of the Royal Australian College of Physicians, which states that the trust which is essential to effective consultation should not be based on the traditional, paternalistic model but on a requirement for honest and effective communication between doctor and patient ...

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

I conclude this statement by pointing out that we have considerable anecdotal evidence, to be published, I might add, that access to good information by elderly Australians—these are the people who come to our workshops—provides a sense of wellbeing when they feel they are in control. Perhaps paradoxically, people live longer and have better, happier lives when they can understand all there is to know about issues such as suicide. To deny people access to this information is simply to worsen their health indices and, I would suggest, increase the numbers of suicides. We are all concerned about the suicides that are going on out there—and decreasing, and that has been mentioned today. The rate of suicide is decreasing in the context of the increased access to the internet. So where is the problem? These suicides which are now going on will take place, and more so if people cannot get access to good information. Desperate people do desperate things. Providing information alleviates desperation. That is

my general statement. I would like to table the book, especially the last part of it—‘The empire strikes back’—in the hope that it will provide reference for the discussion that is taking place.

**CHAIR**—Thank you very much, Dr Nitschke. I suspect you cannot table the last chapter. You either table the whole book or not.

**Dr Nitschke**—I will table the whole book.

**CHAIR**—Thank you. We will take that as a tabled document. On the points that you make in relation to your communications personally, if I may distinguish those from the broad of Exit International—communications from you as Dr Nitschke—are you saying that the effect of the bill on you as a practitioner will be to render a fundamental change to your doctor-patient relationship?

**Dr Nitschke**—It is not just me; I think every doctor will find this.

**CHAIR**—I understand that, I am speaking in the broad.

**Dr Nitschke**—Yes, definitely.

**CHAIR**—In what other areas is doctor-patient confidentiality impacted by external events? Where else can it be breached? I do not understand enough about the doctor-patient relationship and the confidentiality of that to appreciate the details.

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

Of course, by extension there—and again I relate to this letter from the Samaritans in Perth—it is very hard for us to see how counselling services can function at all if this legislation were passed, because to be effective counselling services must talk openly and must be able to discuss questions about the methods proposed. That is brought up by ‘to advise, counsel or assist’. We are talking about counselling here with this legislation. Counselling means discussion. Are we proposing it? It says ‘directly or indirectly’. Some are arguing, and some have argued here today, that the provision of information effectively does counsel and therefore promote. It becomes very hard to see where the line is going to be drawn here, and I suspect that this legislation in its current wording is so woolly that, if one would like to take it to its limits, it could effectively eliminate a large amount of therapeutic communication that goes on across this nation today.

**CHAIR**—You mentioned in your opening remarks, and your submission refers to, elderly Australians in particular. Do they represent the bulk of your work through Exit International? Are there are other people who approach your organisation?

**Dr Nitschke**—The average age of our members is 75. We have almost no young members. The young members we do have are people whose parents have generally had some very difficult circumstances in their deaths, and their children have come along and joined the

organisation. When I have clinics I deal with people who are seriously ill. When we run workshops we assist those elderly folk who want to know what their end of life options are.

**Senator GREIG**—I apologise for not being here for the beginning of your contribution, but I saw some of it on internal television. I do not have a question so much as the hope to tease out a bit more of the issue. You are arguing—rightly, I think—that conversations between doctors and patients over the phone might be in breach of the legislation if it were to pass. I am wondering, though, how somebody will know that conversations had taken place unless they were spoken of. The only other alternative, as I see it, would be phone tapping, and I just cannot see phone tapping being applied in this instance. I am not saying it cannot happen; I am saying I cannot see it as a likely outcome. I am not suggesting that is in defence of the legislation.

The other thing is that just out of curiosity the other day I typed in ‘how to kill yourself’ on the Google search engine on my laptop. It came up with eight million references. Not all of them related to euthanasia but many of them did. I was able to pull up one American site—and I would argue that this legislation would be in breach of the first amendment in America and could not be possible there—which showed very graphically with pictures how to gas yourself with carbon monoxide, including how to buy it, how to get the gas mask, photos, text and everything. I thought that, under this legislation, it would be all but impossible to ban that site, because the legislation does not have international reach in terms of the internet. My rhetorical question is: what then would the real effect of this legislation be? It is not something that you could necessarily answer, but I would be interested in your comments.

**Dr Nitschke**—I think we have some insight into what it will do. I think you are correct in saying that it will have almost no effect on internet sites, but it has the ability to very seriously restrict essential communication between Australians—and I am not just talking about doctor-patient communications; I am talking about communications between sons and parents, between parents and parents and between individuals in Australia who have a very reasonable right to be able to openly communicate with each other about what we would describe as end of life options. This legislation has that ability.

Your question of how that would ever be known about is interesting, I guess, but I do not think that is a reason we should willingly allow such a piece of legislation to pass. For example, it does seem perfectly plausible that, if such a law were to pass and if someone were to, for example, suspect that Exit’s work would require specific surveillance because we talk a lot to people who wish to think about end of life options, this legislation might then be used to seek and obtain the necessary abilities to tap phones. So the legislation has the ability to provide that next step. Of course, we are very concerned about the fact that it will stifle very legitimate communication and that that will extend into what has supposedly been protected by the inclusion of these last two proposed subsections: the ability to discuss openly the political debate that surrounds voluntary euthanasia.

Again, where does one draw the line here? It is almost impossible to disentangle legitimate discussions about legal changes to the voluntary euthanasia situation in this nation and the very specific question that people almost invariably go on to ask: ‘If the law won’t change, how do I get an option for myself personally?’ So a person who one minute is talking about how they might go and lobby their politicians, the next minute is asking you: ‘I’ve got 50

morphine tablets here. If I take them, will I die?' At which point do I hang up the phone? I am suggesting that at least this sort of legislation has the ability to seriously threaten any ability to openly politically debate this important social issue.

**Senator GREIG**—I forget the name of the author—he is an American fellow—who wrote *Final Exit*, which I understand has been banned in Australia, or banned from sale within Australia. I am uncertain on that point. I remember discussion in my home state of Western Australia about prohibiting entry of it into the state. I wonder whether purchasing that book through amazon.com would be a breach of this law?

**Dr Nitschke**—It is very interesting that the law does not relate to the printed word. Of course, people like Derek Humphry—

**Senator GREIG**—But what about the digital transaction?

**Dr Nitschke**—Exactly. Derek Humphry—he is the author of *Final Exit*—has been in touch with me, asking me the specific question: what will this legislation, if passed, do to the sales of *Final Exit*? The book is quite specific about methods of ending your life. It is available in all libraries in Australia and can be obtained through bookshops in Australia. Are we seriously now going to take that next step—as urged by two previous contributors to this Senate hearing—that this book be now removed from the bookshops? If people buy the book, ring me and say, 'I've read in *Final Exit* that if you take these tablets you die,' at which point do I hang up the phone? It would seem to me to be a ludicrous passage of a piece of information, which ultimately makes it impossible to talk about a book that can be purchased in the bookshops.

Other people have taken the next step and are saying that this book should be banned. One of the submissions to your committee suggest that this book contains that material. Penguin were very careful about that and said, 'We really have to know what this law is saying on this issue, because it is a very difficult area.' But we are not talking about the published word; we're talking about talking about the published word on the electronic media.

**Senator LUDWIG**—Where are Exit International based?

**Dr Nitschke**—We are based in Darwin.

**Senator LUDWIG**—Do you host a web site?

**Dr Nitschke**—Yes, we do. We would welcome people to have a look at it.

**Senator LUDWIG**—Where is that hosted from?

**Dr Nitschke**—It is hosted in Australia.

**Senator LUDWIG**—Do you have an overseas hosted web site?

**Dr Nitschke**—No, we do not. None of the material on that web site would be seen to be urging or encouraging people to suicide. Of course, we use that web site to let people know that we exist. We are concerned about the legislation's ability to impact on private communications. All of the material that we are talking about—which perhaps would be considered to be in the area of discussing methods and the like—takes place on a one-to-one basis or through email and the like. But all of that is covered by this law.

**Senator LUDWIG**—I am not sure whether I asked that question but that is helpful, in any event. There have been a number of submitters to the committee who have indicated both support for and opposition to the bill. Also, they have raised the issue of the implied freedom of political communication, as you have. The provision in the bill seems to me at least to be a belt and braces approach in that respect. Do you have a particular view about that? If the bill were to pass, should that particular provision be contained in the bill?

**Dr Nitschke**—Which provision is that?

**Senator LUDWIG**—The part which is effectively a belt and braces approach. It says that it does not affect the implied political communication.

**Dr Nitschke**—These are the additional subsections (3) and (4)?

**Senator LUDWIG**—Yes.

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

**Senator LUDWIG**—Is Exit International familiar with recent studies in relation to internet chat room discussions which have led to persons attempting suicide and sometimes being successful? This was referred to in Mr Ruddock's second reading speech.

**Dr Nitschke**—Yes, we are familiar with that. We have looked into some of the reference material. It is an area of concern and I think there is considerable academic debate about the relevance. We have been singularly reluctant as an organisation to host a chat room and have never hosted a chat room and never intend to host a chat room, because I suspect that there are difficulties with chat rooms. Again, we are talking about open access communication here between groups of people talking about methods of suicide. We do not do that. On the question of whether that then leads to suicide or not, I am uncertain about the research. The point that I would keep coming back to is the fact that suicide rates have dropped in the very same period that the internet has become more increasingly used. So in a sense we seem to be complaining about or blaming the internet for something which has got no relationship, or at least a very questionable relationship, with what is a very positive prognostic trend which we have noticed in suicide rates amongst the various age groups.

**Senator LUDWIG**—I will come back to the question: is Exit International aware of any research?

**Dr Nitschke**—Aware of the research, yes—only the research that was mentioned in Ruddock's talk.

**Senator LUDWIG**—I guess that is the moot point. He does not actually mention the research; he talks about research, but it does not seem to be specified in any particular way.

**Dr Nitschke**—No, I have not been able to find—

**Senator LUDWIG**—I will follow that up with the Attorney-General's Department. I was just curious whether or not Exit International was familiar with any recent studies in this area.

**Dr Nitschke**—No.

**Senator LUDWIG**—In his second reading speech, Mr Ruddock stated:

The bill seeks to protect vulnerable individuals by preventing the use of the internet in this way but does not seek to stifle legitimate debate on euthanasia or suicide related issues.

Do you have a view about the object of the bill in protecting vulnerable individuals?

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

**Senator LUDWIG**—In answer to a couple of questions from Senator Payne and I think in your earlier submission, it seems to me that you say that this bill will restrict the ability for discourse between doctor and patient—I am similarly not familiar with the rules that surround that—and also between community organisations or community support groups or support groups per se who then might engage in telephonic communication with people about this. The bill in its plain reading states that it is about 'counsel or incite' and the second limb seems to be 'intends to use material to counsel or incite', so there is an intention as well. The second offence of which a person can be found guilty is if a person uses a carriage service to access material to directly or indirectly promote a particular method of committing suicide or provides instruction on a particular method of committing suicide. Do you say that is blurred? I am just trying to grasp what you mean by discussing information. Later on in the bill it seems to say, in relation to academic research, that engaging in public discussion or debate about euthanasia or suicide is not an offence. What I am trying to ascertain is: do you say that that first part—the two offences—fall over the line? These are my words, so it is preferable if you would try to explain to me, as best you can, your view about how this legislation will impact upon the telephonic communication about information.

**Dr Nitschke**—It is hard to know. I try, of course, to impose it on our own everyday scenarios to see how they would be affected by the legislation. You have mentioned the terms 'counsel' and 'incite' and I ask myself: 'Do I "incite" when I talk to a person about an issue that commonly is raised?'

**Senator LUDWIG**—I was not asking about you in that sense but more broadly.

**Dr Nitschke**—With respect to all of the communications that are going on out there as we try to talk to people about their end-of-life options, most of those communications would seem to fall over that line that you have described. They would effectively have some

component of that conversation which could be deemed to be directly or indirectly—as is the wording in this legislation—counselling or inciting. If one simply described the quantities of drugs which are lethal, in whatever context, that would seem to be an act which would attract the attention of this legislation. This is something which counsellors are doing, I am doing and members of our organisation are doing all the time. That seems, in our experience at least, to provide the person receiving that information with a degree of, first of all, respect by treating them as an adult worthy of recipience of this information and, ultimately, we see it as being protective of them.

**CHAIR**—In a submission from Dr Fiona Stewart she indicates that Australia, as a signatory to the World Health Organisation Declaration of Alma-Ata, by implementing this bill would be in contravention of our international obligations under that declaration. Can you provide the committee with any more information on that?

**Dr Nitschke**—I can only say that I read that submission and I agree that that would seem to be the case. I guess the best person to answer that would be Fiona Stewart, who is here, but I could not take it further.

**CHAIR**—Unfortunately, we cannot have as many witnesses as we would like, but we can explore that further, thank you.

**Dr Nitschke**—I will add one thing if I may: that question about the international consideration is one of the points raised in my earlier submission. A lot of our communications come in from overseas, again, by email and of course the question there is: is a law such as this allowed to be affecting or effectively controlling what would seem to be the legitimate discourse between people from other countries outside this jurisdiction?

**CHAIR**—There are no further questions for you at this stage. If the committee has other issues it needs to raise with you we will pursue those through the secretariat with your office.

**Dr Nitschke**—Please do.

**CHAIR**—Thank you.

[10.08 a.m.]

**ENDERBY, Mr Keppel Earl QC, President, Voluntary Euthanasia Society of New South Wales**

**CHAIR**—Welcome, Mr Enderby. The Voluntary Euthanasia Society of New South Wales has lodged two submissions with the committee, which we have numbered 5 and 5A. Do you need to make any amendments or alterations to those submissions?

**Mr Enderby**—No.

**CHAIR**—You may make an opening statement and at the conclusion of that we will go to questions.

**Mr Enderby**—I would like to add a few words to what I have tried to say in the written submission. Basically, it comes down to this: notwithstanding the proposed subsection 474.29A of the bill, as stated in my written submission to the committee, the enactment of the bill will seriously hamper the work of all voluntary euthanasia societies and their various branches as they exist throughout Australia.

The putting of subsection 474.29A into the bill is itself a confession that something had to be done to minimise the amount of criticism that the bill would attract because of the restrictions it was placing on civil liberties here in Australia. The enactment of section 474.29A will not prevent many supporters of voluntary euthanasia being deterred, out of fear, from being active in that support or, because of fear, justified or otherwise, of committing a serious crime. Criminal law—and this is a basic tenet, as I remember back to my law school days—should only be enacted where there is a demonstrable social problem or social mischief that should be attended to. We should not just go on multiplying the making of criminal laws for often imagined offences. Applying that test to this particular situation, there is no such social problem or mischief in Australia relating to suicide that justifies this legislation.

With the greatest of respect to my good friend Senator Ludwig, I disagree with the opinion expressed in his message to me of 4 April—and he said it again this morning to one of the earlier speakers—that suicide is a major problem in Australia, and that young people are especially prone to suicide. That is just not correct. It is wrong. The opposite is true: it is the elderly who are most attracted to the idea of suicide as an escape from the inevitable problems and discomforts, and sometimes pain, of old age. I think I can speak with some feeling, because I am about to enter my 80th year. I do not regard myself as particularly vulnerable, as has often been expressed here by earlier speakers about the elderly. The rate of suicide in Australia is only two per cent of all Australian deaths, with by far the greatest majority of those suicides being voluntary euthanasia type deaths. These have been carried out, unfortunately, illegally because of the social need and the demand for them. That is proof that the non-voluntary euthanasia type suicides are very minor—almost infinitesimal in their number. In the United States of America, the rate of suicide in old age is approximately five times that of young adult people. There is no reason to suppose that it will be any different in Australia. As we have been reminded recently, we are all living longer and growing older.

Death is always sad but, as has been said by one or two of the previous speakers and conceded even by the supporters of this bill, suicide rates are falling everywhere, and they are falling notwithstanding the popularity of the email revolution. The number of old people over 65 will double in the next 40 years. One in four of us will be over 65 then. The demand for voluntary euthanasia, already great, will become even greater. The only social mischief—and I emphasise this, Madam Chair—in Australia relating to suicide is not the type of suicide that this bill is aimed at; it is the present illegality of the type of suicide that we call voluntary euthanasia. It is the hardship and suffering caused by that illegality that should be addressed and abolished by the repeal of sections like—and this is only one that I cite—31C of the New South Wales Crimes Act, and its equivalent in the other states and territories, that make aiding or abetting suicide or attempted suicide crimes. Legislation, such as the Northern Territory legislation—until it was nullified by the Andrews act—should be enacted. Such legislation now exists in the Netherlands, in Belgium, in Switzerland and in Oregon in the United States. There is no evidence of any slippery-slope condition having developed in any of those countries. Australia should join in, not try and stay out.

The Voluntary Euthanasia Society of New South Wales is a supporter of the work being done by Dr Nitschke and the organisation Exit International, and it is obvious that if this bill becomes law it will seriously interfere with that work. Most voluntary euthanasiasts are also members of Exit International. I know that perhaps nine out of 10 members of the New South Wales branch also belong to Exit International. I myself am a member of both. People who support voluntary euthanasia believe in the right of any rational person, usually an old person, to be able to end their life if they so wish and decide to do so and, if necessary, to be able to get from someone help or advice on how best to do it without that other person breaking the law and committing a crime. They want the law changed so that they can exercise their right to die if they want to. I do not put it beyond the realm of possibility that I will be doing it. I have had a remarkably lucky and fortunate life, and I am very conscious of the fact that it is coming to an end. I am very conscious of the fact of the decline in my physical and mental powers over the last year or so after I had some heart surgery. The causes for it are the subject of debate. I have had tests and all sorts of things done in respect of it. I do not have any Nembutal—I wish I did; I wish I could get it—not that I would use it automatically, because I am still sufficiently alive not to call it quits just yet but I do not rule out the circumstances that it could come about. I hope I will not need the advice of people like Dr Nitschke, but you never know.

Dr Nitschke has many admirers. This bill is obviously aimed to a large extent at him. I am one of those admirers. For what it is worth—and I will say this in conclusion—apart from being the President of the Voluntary Euthanasia Society of New South Wales, I am on the committee of the New South Wales Council for Civil Liberties and am also a member of the Humanist Society of New South Wales. The Council for Civil Liberties is a supporter of voluntary euthanasia and also a supporter of and sympathiser with Dr Nitschke and Exit International. I have little doubt that the Humanist Society, although it has not put its mind to it yet, would also be a supporter and sympathiser if it were asked to be so.

**CHAIR**—Thank you very much, Mr Enderby, for your comments. I am interested in the observations that you made about the constraints you see the bill bringing to the work of Exit

International. I assume—perhaps incorrectly, so I stand to be corrected—the Voluntary Euthanasia Society is represented around Australia.

**Mr Enderby**—Yes. It is in each of the states. New South Wales, for example, has its headquarters in Sydney. It has branches on the North Coast, the Central Coast and the South Coast, and it has a branch here in Canberra, although the Canberra branch is a little bit subdued at the moment for the reason that they cannot see any merit in it as long as the Andrews act remains in force. They just cannot do what the Northern Territory tried to do.

**CHAIR**—Are you of the view that proposed sections 474.29A(3) and (4), relating to debate and discussion—that is, the engagement in public discussion or debate about euthanasia or suicide, and the advocacy of reform of the law relating to euthanasia or suicide—will not protect the work of the Voluntary Euthanasia Society and Exit International?

**Mr Enderby**—I do not believe they will. The reason is that the two concepts are so vague and overlapping. The objects of the Voluntary Euthanasia Society are pretty much the same as the objects of what Dr Nitschke's Exit International is on about. They cannot be separated. The law is a nightmare when you try to do it. The resulting fear because of that uncertainty in the minds of people will mean that, while they believe that voluntary euthanasia is a good thing, they will be deterred, if this legislation goes through, from joining an association and partaking in any of its work.

**CHAIR**—You mentioned in your submission the annual general meeting of the Voluntary Euthanasia Society of New South Wales and, I understand from your submission, a discussion it had on this bill. Is there anything further you wish to advise the committee of in relation to that?

**Mr Enderby**—No, I do not think so, Madam Chair. There were about 100 people in attendance. I moved the motion. It was carried unanimously. If the committee will bear with me, I will tell a short story on a similar matter. There is a man in New South Wales called Fred Thompson. I do not know whether any members of the committee know the name. He had a lot of publicity on the ABC, in the *Sydney Morning Herald* and in other papers around Australia a little while ago. He killed his wife.

Fred Thompson is a man in his early 70s, 72 or 73. He is a retired plumber. He married a lady from Cyprus and she soon came down with multiple sclerosis, a very painful and debilitating incurable condition. He retired as a plumber in order to look after her, and for the last 16 years or so of her life they were known by everyone as a devoted couple. He had to do everything for her—wipe her bottom, feed her, give her her pills; the lot. Like the case in New Zealand of Lesley Martin, where Lesley Martin's mother was asking, 'Please bring it to an end, please do something and find a way to let me die,' Fred Thompson's wife was saying the same thing to him over the years, and eventually he did. He gave her her tablets one night, which put her to sleep, kissed her and then put a pillow over her face until she stopped breathing.

She was cremated and he went back to Cyprus and told her relatives there what he had done. I am not sure they welcomed the news—I do not know—but when he came back he immediately went to the police and told them what he had done. For 2½ years they could not make up their minds whether to charge him with murder; attempted murder, as had been done

in the case of Lesley Martin in New Zealand; or the lesser offence of aiding and abetting a suicide—although she had not done it; he had done it.

This is all background and perhaps more than you need, but I made submissions to Nick Cowdery, the Director of Public Prosecutions in Sydney, that in the exercise of his discretionary powers he not prosecute. I spoke a number of times with the detectives. They were obviously sympathetic and did not want to prosecute. Fred Thompson, probably unwisely, kept annoying the police and saying, ‘Are you going to prosecute me or not?’ Eventually, of course, they had to do it.

Before they got around to doing it, 2½ years later, there was a big public meeting called up in Toukley, where Fred Thompson lived. I went up there and advised him strongly not to make a speech because, putting on my ex-lawyer’s hat, I did not know what he had told the police. I knew he had spoken to the police, but I did not know how much he had told them and there might have been someone in the audience such that he would be filling in gaps in what was otherwise their case. But he made a very emotional speech, and 200-odd people there stood up and applauded him.

When he eventually came before the court, he was given a suspended sentence of 18 months. He should have been given a medal. The terrible thing about it was that, having walked away from the court, some of his neighbours called him a murderer and he then tried to kill himself. He failed. Some neighbour found him and called an ambulance, and they saved him. But that is the sort of social mischief that is a consequence of the law we have at the moment and of us not having a law like the Northern Territory tried to have and such as Oregon, Holland, Switzerland and Belgium have. That is the social mischief, and we are seeing more and more of it.

**Senator GREIG**—I want to draw on your legal expertise.

**Mr Enderby**—It is a bit rusty these days.

**Senator GREIG**—But perhaps better than mine. On the question of advocacy, when does that become promotion? For me that is the core of this issue.

**Mr Enderby**—Counselling, you mean.

**Senator GREIG**—Yes. When does discussion of a topic become the promotion of a topic?

**Mr Enderby**—That is very difficult, even with sympathy. There was a case in New South Wales involving a person called Nancy Crick. Nancy Crick somehow had access to the necessary drugs to do what she wanted to do. She was old and ill and she decided to say goodbye to her friends. It is the last thing I would want to do. If I were going to do it, I would hide myself in some back room—maybe with my wife; I do not know. But she had about 20 or 30 people around her as she took her pills and said goodbye. Was that aiding or abetting? Would that have been counselling? They were certainly not trying to talk her out of it; they were accepting her decision to do it. It is only very recently—and I am not even sure in my own mind that it is yet—that a decision has been made not to prosecute. For 2½ years, similar to the Fred Thompson case, they just could not make up their minds. The concept is so vague.

**Senator GREIG**—Is there a fear amongst voluntary euthanasia groups that that vagueness might result in self-censorship—that there will be a reluctance to discuss, display or meet?

**Mr Enderby**—That is exactly my point, which is from the point of view of the Voluntary Euthanasia Society of New South Wales. It will deter them from being active. It will be a fear. I had a glance at the submission from Electronic Frontiers Australia this morning. Philip Nitschke let me look at it this morning. I do not know whether the committee has had a chance to see it, but it touches on that aspect as well.

**Senator GREIG**—We will be hearing from them next, I think.

**Senator LUDWIG**—Do you think that the most problematic aspect of this bill is the undefined terms ‘counsel or incite’ and to promote ‘directly or indirectly’?

**Mr Enderby**—No. I think it goes deeper than that. As I have tried to say in my written submission and what I added to it this morning, it is my view and the view of the society that I represent that a rational, sane adult—more often than not the elderly and those who are ill—have the right to be able to bring their life to an end if they want to, if they rationally decide that that is what they want. The law at the moment prevents them doing it. Suicide used to be a crime—I suppose this is probably forgotten these days. When I tell people that they say, ‘How could suicide be a crime? The person is dead.’ It was a crime punishable in different ways. It was only abolished as a crime in New South Wales as late as 1983—that is only 20-odd years ago.

**Senator LUDWIG**—I am aware of that. It nearly is always the attempted offences.

**Mr Enderby**—What used to happen with the suicide itself was that the person who did it was denied the rights of Christian burial. They could not be buried in a Christian cemetery. They had to be put out on a highway somewhere with a stake through their heart. Their property was confiscated and forfeited to the Crown, to the state. That was the form of punishment that was administered to them. Attempted suicide was a common law crime. I do not know whether it was ever given statutory effect in Australia—it might have been; I have just forgotten now. In 1983 New South Wales—I think the other states did it at about the same time—enacted 31C. This section makes anyone who aids or abets—that is ‘aids or abets’, not ‘aids and abets’, which is terribly vague, as I tried to say in the Nancy Crick case—guilty of an offence, and the same with attempting suicide, and it carries a penalty of 10 years. In certain circumstances, it can go before a magistrate and the penalty is five years.

**Senator LUDWIG**—On the issue of the implied right to freedom of political communication, do you think this bill stifles that debate or allows that debate to still continue?

**Mr Enderby**—The debate is taking place now, this morning, in one sense. But if it becomes law, it will stifle debate.

**Senator LUDWIG**—In what way will it stifle debate?

**Mr Enderby**—As Philip Nitschke tried to explain, people will be fearful of overstepping the line. Where is the line to be drawn?

**Senator LUDWIG**—Would you be fearful of overstepping the line?

**Mr Enderby**—I would be conscious that I might be committing a crime. Whether that would stop me or not, I do not know. It depends on how strongly I felt about it, I suppose. I have embraced a lot of unpopular causes in my time, as well as some popular ones.

**Senator LUDWIG**—On the issue of the extraterritoriality of the offence in that it applies to ISPs and the like in Australia and, obviously, does not apply overseas—have you had a look at that issue yourself?

**Mr Enderby**—Only in that I heard what was said here this morning and I thoroughly agree with it. If things come into Australia as email and by virtue of web sites, they cannot be stopped. It will operate in other areas but it will not have much utility.

**Senator LUDWIG**—I have asked a number of submitters about the object of the bill. It seems that the bill seeks to protect vulnerable individuals. That seems to be the stated purpose.

**Mr Enderby**—Who do not exist—except for only an extraordinarily small percentage.

**Senator LUDWIG**—That is what I was interested to hear your response to. Who do you say could be included in the definition ‘vulnerable individuals’ and do they need protection, in your view? Would this bill in fact protect them?

**Mr Enderby**—I referred in my opening remarks to whether there was a social mischief. Suicide has been a feature of every society since primitive times. Primitive people practised it and had their different reasons. With the emergence of the great religions, it was banned because it was thought that it was God’s decision when you died and went to heaven, not the individual’s. You were usurping the function of God if you killed yourself. Constantine, the Roman emperor, was the first to make that declaration when he authorised or approved Christianity. The Mohammedans have the same rule in the Koran for the same reason. The modern world in which we live is largely a secular world—not that everybody wants it to be a secular world; I appreciate that. It should be a rational application of these principles: is there a social mischief that has to be attended to or are we going to create a greater social mischief in the law we are going to enact to try and overcome the earlier social mischief which we have exaggerated enormously? It does not really exist.

**Senator LUDWIG**—You are not saying that there is no such thing as vulnerable people who cannot make rational decisions.

**Mr Enderby**—No.

**Senator LUDWIG**—I think you indicated that there were instances where, in your view, people could make a rational decision to do X. But for those who may not be able to make a rational decision, will this bill assist?

**Mr Enderby**—I cannot say that there are no such people, but there is not such a degree of social mischief that this bill says exists. Let me diverge again. In my own life I had a brother who killed himself. He was 70. He was rational. He had had a very good life. He had had a wonderful life. He loved his golf but suddenly at 70 he had some problems—health problems, matrimonial problems and a few other things. He was being threatened with losing the first love of his life—I am not going into all the details—which was playing golf. He was a member of the Australian Golf Club.

He bought *Final Exit*—Humphry’s book. He came and discussed it with me. I bought a copy, too, and I read it. It became a bestseller over in the United States. It is still available in Australia. I have got two copies of it. You can still buy it. This legislation is talking about

doing all sorts of things, but you can go and buy *Final Exit*. It tells you how to do it. My brother, Don, chose what he thought was the best method and he did it. In advance, he went to the humanists. He was a humanist. He arranged for some advocate or whatever they call them in the humanist society to make the speech at the funeral, the cremation. Don wrote his own obituary. It was the most humorous sort of thing. He ended up saying—most people there were his golfing mates from the Australian—‘If you don’t fix that bunker at the 18th I’ll come back and haunt you.’ He was not depressed and he was not vulnerable. He was just making a rational decision. He came around and unloaded his library on me leading up to it, even though I did not know he was doing it.

I have a daughter who has twice tried to kill herself, not irrationally but in the most rational way. She has had a good life, too. She is 51 now. She was a highly qualified nurse. She lived in Perth; she married a Perth chap. She had three children, all of whom were grown up. She was very maternalistic. She had an IVF child, a little boy called James, who is now eight. She had hardly had him, by arrangement with the fertility clinic, when she came down with a very nasty form of malignant brain tumour, which led to her having surgery. This had to be followed by radiation therapy, and she changed. Her whole personality changed.

She is not vulnerable in any sense. She has lost her right to drive a motor car because she has epileptic turns. She is on heavy doses of morphine for the headaches and so forth. That led to her elder daughter bringing an action in the Family Court of Western Australia to take the boy away from her, and she fought that in a litigation, with Muggins here paying the bill, of course. She lost the child. She has access to him and can ring him up. She moved over to the eastern states. I bought her a house. She rings the little boy up every Saturday and she has him three weeks a year over here. She has him at the moment.

With all these things going on, she took an overdose of morphine one night. It was not enough, and she survived. She later took another dose, but she was saved because her neighbour came in and called an ambulance. She now lives up in Wyong, but she has a most miserable life. She lives on a disability pension. I am not trying to big-note myself, but I had to send her \$1,000 the other day so that she could give the little boy a fair time and could at least pay for taxi fares and whatever might be needed. But I am just waiting for the next time. When she rings me up every Sunday morning, she is obviously still a very unhappy human being. She might die any time, but she might live for another 20 years. She might also do what she has unsuccessfully tried to do twice, and I would not blame her.

**CHAIR**—Thank you very much for coming before the committee this morning and for your submission. We appreciate the information and we will consider it in our committee deliberations.

[10.36 a.m.]

**GRAHAM, Ms Irene Joy, Executive Director, Electronic Frontiers Australia Inc.**

**CHAIR**—Welcome. EFA has lodged a submission with the committee, which we have numbered 28. Do you need to make any amendments or alterations to that submission?

**Ms Graham**—No.

**CHAIR**—I invite you to make an opening statement and we will go to questions after that.

**Ms Graham**—In EFA's view, this bill is poorly constructed law and a gross infringement of the fundamental human rights of communication. The proposals are not technology independent and will prohibit information that is not illegal to import or export and information that is not illegal to access or distribute within Australia by means other than telecommunications. EFA is and has long been opposed to laws that prohibit communications over the internet and telecommunications services that are not prohibited by other means. As we have indicated in our submission, the statistics published in December 2004 by the Australian Bureau of Statistics show that, since access to the internet became generally available in Australia in 1994, suicide rates have decreased. It seems very difficult to blame the internet for the suicide rate.

We also feel 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. That legislation makes it a criminal offence to, in effect, use a carriage service to commit or encourage anybody else to commit offences that are already criminal offences under state and territory law. This means that if you use a carriage service to commit a state or territory offence of aiding or abetting a person to commit suicide, that is already a Commonwealth offence. Aiding or abetting a person to commit suicide is clearly quite a different offence to the kinds of offences that are proposed in this legislation, which all deal with simple information.

The explanatory memorandum states that the proposed offences are intended to complement the customs regulations. However, the bill covers a vastly broader range of material. In our view, these will chill freedom of political communication, and there are no exceptions in the latest version of the bill that would ensure that internet material advocating or debating law reform on suicide related issues would not be criminalised.

We also note that, under the definition of 'communication' in the Criminal Code Act currently, the proposed offences will definitely apply to personal and private communications by means of telephone and email between two friends or relatives. We are absolutely opposed to parliament legislating to prohibit individuals from communicating one-to-one by telephone or email. We are also particularly concerned about the offences that criminalise access to and possession of information. There are very few types of information in Australia that are illegal for individuals to access and possess. To our knowledge, this in effect is really only child pornography type material. The material that is the subject of this bill is of a completely different nature and we believe it should not be made illegal to access or possess.

Another of our major concerns about the bill is the application of the fault element of recklessness to the question of whether material incites suicide. Due to the way the offences are drafted and the fault elements of the Criminal Code, 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. In our view, this would at the very least create a fear of criminal prosecution and therefore at the very least chill freedom of communication. We are also concerned by the use of the word ‘incites’ and we note that the model criminal code committee has previously rejected use of that word in criminal offences because some courts have interpreted ‘incites’ as only requiring causing. Given research findings of a link between media coverage of suicides and additional suicides, the proposed offences have the potential to criminalise journalists and ordinary individuals reporting on and discussing suicide. We also think that at least some internet material such as suicide related research, prevention and support material will be caught by the offences.

We are also concerned that, in our view, the actual wording of most of the offences is insufficiently defined for people to generally be able to understand where the line is drawn. As we have noted in our submission, there have been previous decisions of the Federal Court in relation to existing censorship laws where material that promotes, incites or instructs in matters of crime enable the banning of even a satirical article published in a university student magazine. We are of the view that this particular bill has similar potential to be exceedingly broadly interpreted and therefore capture far more speech than even, perhaps, the advocates of the legislation consider that it would. For all of those reasons, EFA believes this bill should be abandoned.

**CHAIR**—I thank you very much for the comprehensive submission you have provided for us today.

**Senator GREIG**—Could you confirm or clarify my understanding in terms of the electronic technicalities of what we are dealing with here? If the bill is to become law, what does it mean for international communication?

**Ms Graham**—As far as we can see, it will not have any effect on international communication except to the extent of criminalising Australians that are participating in any such international communication. This bill will not stop the amount of information that is on the internet on overseas sites. To the best of my knowledge, there is no way that any ISP can block access to material on international sites short of the development of the great Australian firewall, which was discussed back in 1999 and 2000 with regard to the issue of blocking access to pornography. Nothing has changed since 1999-2000. It is still simply impractical to do that.

I note that just last year the Minister for Communications, Information Technology and the Arts indicated that the government does consider that it is still impractical to try to block access to sites and that additional funds are being put into community education and parental education to deal with the problem of child access. The same principle applies to this kind of material. It would be even more difficult to try to filter or block, because it is not even as well defined as other types of material that have been considered problematic before.

**Senator GREIG**—So, in that sense, would you see it as being similar to previous government attempts to ban online gambling or pornography on the internet, which do not seem to have worked in any real way?

**Ms Graham**—We see it as being exactly the same in terms of the practicalities, but I think we are possibly even more concerned about this particular legislation because it goes beyond previous proposals into email and telephone calls between individual people—one-to-one conversations. That was not previously the case with the censorship legislation passed in 1999—that specifically excluded ordinary email. This bill does not exclude ordinary email and ordinary email in that sense is basically one-to-one communications. So we are more concerned about this bill because it goes beyond just saying that you cannot put certain kinds of material on the internet.

With the kind of information that is being discussed here, we believe that it would be preferable for Australians to be able to obtain that information from other Australians rather than by going to people that they do not know in overseas countries to get that information, where those peoples may not have to comply with other relevant laws in Australia, such as those to do with approved drugs and whatever the case may be. We think it would be much more preferable if Australians were able to continue to get the information they wish to have from other Australians rather than being forced to go to overseas sites or organisations—and goodness only knows who might be running them. That is why we think this is of even more concern than previous censorship proposals.

**Senator GREIG**—Have you had representations from internet service providers? Are you able to speak, in part, on their behalf about their concerns with the legislation, if they have them?

**Ms Graham**—EFA certainly could not speak on behalf of internet service providers but I do not think I would be exaggerating to say that, in general, ISPs would be of the view that it is impossible for them to prevent access to this kind of material any more than they already do with regard to pornography. The current Commonwealth law requires them to make filtering software available to their customers, and that is what they do. The same situation applies to this—they could not do any more than that. Once again, I am quite sure that they would not want to be legally liable for this kind of material any more than for any other kind of material.

**Senator GREIG**—Does EFA hold the concern that this legislation, if passed and complemented by the telecommunications interception legislation, provides for, perhaps, a dangerous mix, and that the opportunity for authorities to walk into ISPs without the appropriate warrants and grab a swag of information could capture people who might have been innocently communicating on this topic?

**Ms Graham**—That is definitely a concern. What is even more of a concern is that, under current laws, it is not entirely clear to what extent law enforcement authorities would be able to get access. For example, if individuals were having an email conversation—two individuals, with one advising or counselling the other—to the extent that those emails would be stored on the ISP's equipment prior to being downloaded, the laws passed in December mean that there is no longer an interception warrant required to access such emails. Certainly, the law enforcement authorities could go to an internet service provider and find out what was

sitting in your mailbox. Arguably, the police and law enforcement authorities would need an ordinary search warrant to do that. The question is, I suppose, whether magistrates would provide a search warrant for this kind of thing.

One thing I find somewhat interesting is that it is a monetary penalty, not imprisonment, unlike other provisions in the Crimes Act. I have been a little intrigued as to why that may be, and I do not know the answer. It is difficult to say the extent to which this would result in, for example, voluntary euthanasia advocates and so forth finding that their email was being monitored very closely by certain law enforcement agencies. It is certainly very possible and we find it very concerning.

**Senator LUDWIG**—Ms Graham, I think you have appeared before the committee on a number of occasions, particularly in relation to telecommunications interception legislation, and that seems to be another review in train on which I suspect you may end up back before us again. The bill as it stands attempts, as seems to be the object that can be discerned from Mr Ruddock's second reading speech, to protect vulnerable individuals by preventing the use of the internet in this way. Do you have a view on that?

**Ms Graham**—In terms of the word 'vulnerable'?

**Senator LUDWIG**—There are really two issues. There is the protection of vulnerable individuals and then the legislation preventing the use of those vulnerable individuals as to the internet. Of course the bill has, as you have indicated, a wider reach than that. I think that is recognised in the bill, in that it also encompasses emails, faxes and phones, both fixed line and mobile ones, and probably satellite ones as well, so it does not stop there.

**Ms Graham**—It is not clear to us, from the explanatory memorandum, who the vulnerable individuals are. I would suspect that it is principally referring to teenagers, because there was a media report mid last year about a Japanese suicide pact involving teenagers. I certainly hope that the word 'vulnerable' is referring to, for example, depressed teenagers, as distinct from adults wishing to make a rational decision about their end of life options. EFA are principally concerned about freedom of speech and we do not normally get into other specific areas, but certainly our view, as a general civil liberties position, would be that adults should have rights to access the kind of information and counselling that this bill seeks to prohibit. So if the vulnerable individuals that the bill is referring to are terminally ill people and older people that are wanting to know information, we do not consider that they should necessarily be considered to be vulnerable and so be prevented from being able to obtain information. As far as whether it will actually achieve the objective of protecting whomever the vulnerable people are, we do not believe it is going to do that either because we do not see how this Australian legislation can do anything about the information on web sites all over the world.

**Senator LUDWIG**—There was a suggestion earlier from a submitter about a take-down notice. Are you familiar with that legislation?

**Ms Graham**—If I recall correctly, that witness referred to the Australian Broadcasting Authority. Certainly the legislation I am aware of that involves the Australian Broadcasting Authority is the internet censorship legislation that came into effect on 1 January 2000 as a broadcasting services amendment act.

**Senator LUDWIG**—That is what I thought it was.

**Ms Graham**—Yes, that is what it is. The Australian Broadcasting Authority certainly has the power to order an Australian ISP to take material down from the ISP's web site where the ABA has found that it is in breach of classification laws. In the case of an Australian hosted site, the Australian Broadcasting Authority is required to refer the material to the Office of Film and Literature Classification to find out what the classification of the material is, so it is not actually the ABA that makes the classification decision; it is the OFLC. If I recall correctly, the Australian Broadcasting Authority did send a submission to this committee's inquiry into this bill pointing out that there is a considerable amount of information that the ABA seem to think could be caught by this bill. However, when they have sent it to the censorship office to be classified, the office has found that it not be banned. It seemed to me that the ABA's submission was suggesting that this bill would cover more material than they would actually have the power to order taken down under the existing classification legislation. I believe that to be the case as well. I believe this bill bans information that would not be banned under the classification act.

**Senator LUDWIG**—Do you have the reference where the Model Criminal Code Officers Committee looked at the word 'incite'? I know that might be a large stretch.

**Ms Graham**—Where the model criminal code committee looked at it?

**Senator LUDWIG**—Yes.

**Ms Graham**—Yes. I thought we put a reference at the back to where that came from.

**Senator LUDWIG**—I might have missed that reference.

**Ms Graham**—It is in the report of the model criminal code committee on the proposed uniform national criminal code.

**Senator LUDWIG**—I can find that.

**Ms Graham**—It is in that section that they discuss an offence of facilitating the commission of an offence and incitement in that regard. That is where they discussed why they did not use 'incite' in the design of the offence in the Criminal Code.

**CHAIR**—I think that is in part 10 of your submission, isn't it? We will work that out.

**Ms Graham**—It is in section 8, paragraph 36. It refers to reference 20—it does appear that there could be a problem here with the reference numbers at the bottom. Either I am not following it, looking at it quickly, or they do not end up where they should be.

**CHAIR**—I go back to reference No. 11.

**Ms Graham**—It is reference No. 19. I think there is a problem with the reference numbering in that area. Number 19 is where they actually refer to having decided not to use the word 'incite'.

**Senator LUDWIG**—Yes. I was going to go back and look through the Model Criminal Code, but then I thought it might be easier just to ask you where it was.

**Ms Graham**—That is fine.

**Senator LUDWIG**—'Counsel' is there too. I do not know whether the Model Criminal Code has anything to say about that but, if you take the ordinary definition of 'counsel',

today's connotation would be broader than what you might think it means—that is, to encourage, but it might also include general discussion. As that usage would apply in relation to the internet it might create ambiguity. Is your argument basically that the legislation is ambiguous and will not have the intended effect? Or on another level is it that, even it were clear, you would still object to the legislation?

**Ms Graham**—We probably would not object to legislation that was the same as the state and territory offences. I have forgotten the exact wording but it is where state legislation specifically prohibits incitement of a nature that actually aids a person to commit suicide. Because that is already a criminal offence under state and territory law, we would probably not object to legislation that was simply saying that you cannot do that through the internet either. The point is that already enacted within the Commonwealth Criminal Code last year is an offence that covers precisely that.

In our view the Commonwealth government has probably designed these offences in this way rather than more like the state and territory offences because the Commonwealth does not have the constitutional power to enact a more narrowly defined offence concerning inciting or urging a person to commit suicide because, of course, it is for the states and territories to decide where to draw the line. What the Commonwealth government appears to have done is to make it an offence to use a carriage service. This is another aspect that we are concerned with. We are making it illegal here to simply use a carriage service, and then around that are all these other issues with the fault elements about recklessness and how you define a particular word.

**Senator LUDWIG**—A provision in the bill seems to be a belt and braces approach in that it states that the bill does not interfere with the implied constitutional right for freedom of political communication. Do you say that the provision is ineffective or the bill does that in any event by the ambiguity of its terms?

**Ms Graham**—We believe that the additional clauses (3) and (4) are completely worthless. We do not think they say anything different to what the offences themselves say. We think the offences themselves say 'will interfere with political communication'. I am not sure whether that was clear. To us, the exception that has been put in there simply will not work because it is still predicated on the intent of the person. When you look at the offences, the intent of the person depends on whether there was a substantial risk that something may happen or that something may happen in the ordinary course of events, because of the default fault elements in the Criminal Code.

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

**CHAIR**—In part 8 of your submission, you go into quite some detail about the fault elements in relation to intention and recklessness and the separation in the drafting. Do you have any further comments to make in that regard?

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

We are not saying that the way the offence is drafted is not correct in terms of the Criminal Code. Far be it for us to say how the Criminal Code should be worded, but it seems to us to be consistent with what the Attorney-General's Department has said in the past about the way offences are drafted. We feel that the core problem originates from the fact that it is not actual conduct that is being made a criminal offence.

**CHAIR**—It is the use of a carriage service.

**Ms Graham**—Yes, that is right.

**CHAIR**—And then whether that use is criminal depends on two other factors.

**Ms Graham**—Yes, which basically boil down to whether there is a substantial risk of the material being considered as able to incite or counsel and whether in the ordinary course of events it may be used in such a way. Of course, when you put material on the internet, on a web site, it may well be considered by a court that, in the ordinary course of events, the person should have known that someone might read it and decide to commit suicide.

**CHAIR**—Thanks very much, Ms Graham. As I said at the beginning, your submission is very comprehensive and we are very grateful for that.

[11.06 a.m.]

**GRAY, Mr Geoffrey, Acting Assistant Secretary, Criminal Law Branch, Criminal Justice Division, Attorney-General's Department**

**WILLIAMS, Miss Kimberley Anne, Senior Legal Officer, Criminal Law Branch, Criminal Justice Division, Attorney-General's Department**

**CHAIR**—I welcome representatives from the Attorney-General's Department, Mr Geoff Gray and Ms Kimberley Williams. Before we begin, I remind senators that, under the Senate's procedures for the protection of witnesses, departmental representatives should not be asked for opinions on matters of policy. If necessary, they must be given the opportunity to refer those matters to the appropriate minister. Mr Gray and Ms Williams, before we begin questions, would you like to make an opening statement or would you like to respond to the issues that have been raised during the course of the morning in submissions?

**Mr Gray**—Thank you for the opportunity. We do not wish to make an extensive opening comment. We are basically here to answer questions that the committee may have. I think that the bill, the second reading speech and the explanatory memorandum speak for themselves. I would say, though, that what we have attempted to do in this legislation—as we always do with legislation of this kind—is to draw a balance between freedom of speech, which is obviously very important, and the need to protect vulnerable members of the community, which I think is equally important. There is always some trade-off in that situation. I think this bill does draw a balance, and hopefully the committee will agree that it is an appropriate balance.

One thing that I would point out in relation to the previous submissions is that the concept of incitement still appears in the Criminal Code. Section 11.4 of the Criminal Code creates an offence of incitement at the Commonwealth level. As a result of comments, 11.4(1) now says: A person who urges the commission of an offence is guilty of the offence of incitement.

It took the point that 'incitement' was unclear as a legal concept and clarified what it is, but 'incitement' still appears in the code. That is a minor point. It is a technicality that I noticed was raised in previous submissions.

**CHAIR**—In the *Bills Digest* on this bill and in a number of the submissions there are concerns raised about communication between individuals either by email or by telephone—using a carriage service—around this issue where one person who may be described as suicidal communicates with another person who may or may not be in the same situation. Is that communication caught?

**Mr Gray**—I believe the answer to that would be yes. If as a result of the communication the person uses the carriage service—which they would do if they were using the phone service or the internet—and they made material available which counselled or incited suicide, yes, they would be caught by these provisions.

**CHAIR**—Is that part of the publicly stated intention of the bill—to proscribe private communications between individuals in this country?

**Mr Gray**—I suspect not. I have not gone back and looked at the material which has been released. Obviously, it does not come as a surprise to those who have read the bill. They have obviously drawn that conclusion from the provisions. I do not think that was part of the direct intention of the legislation. The bill talks about releasing material over the internet, but when you come down to defining what that means you come back to carriage service providers and you come back to communicating information. It tends to enter into the realms of policy as to whether that conduct should be caught—

**CHAIR**—I did not ask you that.

**Mr Gray**—I was just going to point out that inciting and counselling and assisting with suicide is already an offence at state level, so it is not as though those provisions create new offences unknown to the Australian law.

**CHAIR**—There are currently no offences which proscribe communication between two individuals in this area, are there?

**Mr Gray**—If a person incites another to commit suicide—

**CHAIR**—I did not ask you that. In terms of the use of the carriage service, which is what this bill seeks to criminalise, I do not recall there being other legislative initiatives which criminalise a discussion between two individuals in this country, or a private email between two individuals in this country, in this manner.

**Mr Gray**—I come back with that answer. If a person was to incite another person to commit suicide, whether they were to do it by direct speech, by telephone or by email, that would be caught by the existing offences under state law. So I do not think it is quite correct to say that this is a totally new concept. As to whether there are Commonwealth laws which regulate communications between individuals via the internet, I suspect there are, but off the top of my head I cannot think of any. But it has just been pointed out to me that a suite of offences have been brought in. There is the crime of using a telecommunications service to menace and harass another person. Certainly in that situation the person receiving the phone call is the victim of—

**CHAIR**—I think that is a slightly different circumstance in terms of the effects likely to arise.

**Mr Gray**—I accept that. Nonetheless, we do not recognise personal communications as sacrosanct.

**CHAIR**—So would it be caught as an unintended consequence?

**Mr Gray**—I do not know that it is an unintended consequence. I do not know if I could answer that question.

**CHAIR**—You said it was not intended, so I drew from that that perhaps it was an unintended consequence. In relation to doctor-patient communications over the telephone, in particular, which has been raised both in submissions and with us today, is it intended to criminalise counselling in that regard?

**Mr Gray**—I think the short answer is that it would capture it if the counselling involved an incitement to commit suicide. If a doctor, in the course of that telephone communication, were

to provide information about a method of suicide which encouraged the use of that method it would be caught.

**CHAIR**—The example put to us this morning was that, if the doctor asks the patient in this case what they are intending to do, that will go to enough degree to be caught by the bill.

**Mr Gray**—In relation to that, it is absolutely absurd to think that a doctor who is counselling a terminally ill patient and who is considering providing assistance to assist the patient to commit suicide is going to provide that information down the telephone or via the internet. If this bill stops that conduct, is that a problem?

**CHAIR**—I think you are asking me for a view on a policy matter, Mr Gray.

**Mr Gray**—No—it is a rhetorical question. I was stating a position.

**CHAIR**—If you do want to go down that road, I am more than happy to do that. As I understand the position which I just put to you and which has been put to us by a medical practitioner—which I am not, and I am not aware that you are, today—if a patient speaks to their doctor, and not necessarily the doctor providing us with the evidence, but any practitioner in the country, and indicates that they are intending a particular course of action, and that doctor asks them what they are intending to do, is that in breach of the bill as it is currently drafted, firstly? Secondly, is that doctor—any doctor in the country—now required to hang up on their patient?

**Mr Gray**—I do not think that they hang up on their patient. I do not think a doctor should ever do that in dealing with someone in that position.

**CHAIR**—Then how do they avoid criminal behaviour?

**Mr Gray**—They avoid it by not providing material that counts as inciting suicide.

**CHAIR**—You have not answered my first question. If the doctor asks what method the individual is intending to use is that in breach, as the bill is currently drafted?

**Mr Gray**—No.

**CHAIR**—Is that counselling?

**Mr Gray**—No.

**CHAIR**—I am not sure I understand the meaning of counselling as it is used in the bill. Perhaps you could help me with that?

**Mr Gray**—That is a very good question. There is a definition for counselling in 11.2(1) of the Criminal Code, so I will take the committee to that if I may. It just uses the term.

**CHAIR**—I have the term; I just do not have a definition.

**Mr Gray**—It is used in 11.2(1) of the Criminal Code. I know that this is an indirect answer, because I think I am right in saying that there is not a definition as such, but it is a legally used concept which appears widely throughout Commonwealth law or Australian law. In the Commonwealth context, if you go to a person who aids, abets, counsels or procures the commission of an offence, you have to read the word ‘counsels’ in the context of aiding, abetting and procuring. It is not counselling in the medical sense of providing assistance and information; it is actually encouraging the person with an intent to bring about a result.

**CHAIR**—This is quite a challenging concept that we are dealing with. Let me extend the discussion to counselling more broadly. I am not a Lifeline volunteer and I have never been a Lifeline volunteer, but I have visited plenty of Lifeline offices and spoken to plenty of their counsellors. In some instances they spend a lot of time talking to people in enormous difficulties about those difficulties and their problems. I do not think I am going beyond the bounds of the imagination by suggesting that this will include people talking to Lifeline counsellors over the telephone—that is their only method of communication—about what they want to do, how they want to do it and so on. In the course of that conversation, I can easily imagine a counsellor at Lifeline being caught by the provisions of this bill. Not because you would say they were inciting, but just because in the basis of the conversation they might find themselves in a position described as counselling in relation to suicide.

I do not know how much personal contact you have had with these things, but I have had more than I like to think about. It is very hard to speak to people who have challenging mental health issues in a logical and sensible manner. Sometimes the conversation will go down that road. I am really concerned about the way in which those sorts of communications between two individuals might be caught.

**Mr Gray**—Firstly, I have not had exposure to that situation and I have great sympathy for those who do. No-one is suggesting that the issues raised by this bill are simple or easy. The whole area of suicide and euthanasia is a major, sensitive and difficult one, especially for those who are involved in it. I would say that, if a Lifeline counsellor were to speak to a person, it only becomes an offence if they provide material that directly or indirectly promotes a particular method of committing suicide or provides instruction on a particular method of committing suicide or they incite suicide. I defer to the greater knowledge of those who have been involved in these things, but it seems to me that that is the diametric opposite of what a Lifeline counsellor should be doing when they are dealing with somebody who is in a difficult position and is considering suicide. Surely the Lifeline counsellor does not provide them with the information they need to go through with that?

**CHAIR**—I am not going to venture down the road of suggesting what they should or should not do. I regard that as outside my purview. I feel like I am second-guessing what happens in these private communications, whether between a doctor and a patient, a therapist and an individual or a Lifeline counsellor and the person on the end of the phone who they do not even know. One of the other issues raised with us has been the existing offences which came into being on 1 March this year. Why don't they cover this particular aspect of concern?

**Mr Gray**—There are two things I would say about the existing offences you mention. I cannot remember the exact sentence, but I know the offence you are speaking about. It is use of a carriage service to commit an offence against state law. That would pick up some of the conduct in this area if the incitement here—the use of the internet—actually affected an individual. They do not actually have to commit suicide; if you are inciting them to commit suicide, yes, they would be caught. What is not caught under those laws is putting material on the web which encourages suicide, because you cannot show that they have actually incited a particular individual. It is arguable that that is covered, but we would take the view that it is not. So this offence is directed to different activity.

The second thing I would say about this is that, although that provision in the Criminal Code is a very useful and very sensible provision, it is by no means an easy provision to understand. If we as a community want to make it an offence for people to use the internet to encourage suicide, then I think there is a very strong argument to say that we should have an offence which is addressed in those terms rather than having a provision buried away in the Criminal Code.

**CHAIR**—I appreciate the difference that you are drawing there. So it is in fact stepping away from the offences that already exist at state and territory level and the recently enacted legislation that applies to those, and just adding to those the internet component of it. Is that what you are saying?

**Mr Gray**—Yes, it is supplementing the state offences. I do not think it is standing back from them. I suppose what I am saying here today is that this supplements the type of conduct which is already an offence at state level by also making more general conduct or similar conduct a criminal offence. So I am not saying it does not create a new area of criminal law—it does—but it would be wrong to see this as something new and exceptional.

**CHAIR**—The Gilbert and Tobin Centre of Public Law made a submission to the inquiry and raised some concerns about the fact that, even with the amendment, the bill may have an impact on discussion of law reform. Do you have any comment to make on that?

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

**CHAIR**—How does that sit with the division between ‘directly and indirectly’, though? I think that is the nub of the problem.

**Mr Gray**—The ‘directly and indirectly’ is a drafting device, if I can use that word, which is used throughout criminal law—

**CHAIR**—I understand that.

**Mr Gray**—and has been for as long as anyone can remember. It is essential to have those provisions because they cover the situation where a person does not actually carry out the prescribed conduct in express words but does so by necessary implication. I do not want to go to the facts of this case because you will find those provisions used throughout Commonwealth law and it would be odd if they did not appear here. It is just to avoid the technical defence and the arguments that can be run in a criminal case, because of the rule that I just mentioned about reading ambiguities in favour of the defendant, that you have to be able to make it clear that you want to pick up conduct which achieves the result, whether it does it directly or indirectly. I can understand why people looking at these provisions address those sorts of concepts, but, again, I just do not share the concerns. It seems to me that the conduct that this bill is aimed at is quite clear. Of course, it picks up a whole range of activities, which you have identified, but it is clear what it is intended to do. Using ‘indirectly’

does not widen it, in my opinion, beyond the operation of those provisions. You cannot give a provision an extended operation by putting ‘directly’ in it.

**CHAIR**—Thank you, Mr Gray.

**Senator LUDWIG**—In respect of the second reading speech and the recent studies, do you have copies of those studies?

**Mr Gray**—We do have some copies. We noticed some references to these in the submissions so we went back through the files of the Attorney-General’s Department. These are some studies that we had on file. As far as we can tell, they have all either been provided to the Attorney or were referred to in briefing material, so I am quite happy to hand them up.

**Senator LUDWIG**—In his second read speech, the Attorney-General said:

This research points to evidence that vulnerable individuals were compelled so strongly by others to take their own lives that they felt to back out or seek help would involve losing face.

Do they cover those sorts of points?

**Mr Gray**—Looking at this material, I see that there are references to those by many newsgroups. The quotes are the sorts of things that have been quoted in the second reading speech. I have here an article that talks about suicide on web sites. It quotes Dr Thompson as saying that there are many newsgroups and bulletin boards on the net that positively advocate suicide and discourage individuals from seeking psychiatric help. I was not in the chair at the time this bill was being drafted but it is very clear that there was not a detailed scientific study or an extensive research project. There was a reaction to the articles that had appeared which referred to other research that suggests there is a problem and that there are these bulletin boards.

**Senator LUDWIG**—Would you summarise what the problem is, how large it is, what the bill seeks to address and whether it addresses all of the problem that you identify as the main mischief to the bill or whether there are still gaps?

**Mr Gray**—Yes, there are enormous gaps, as we all know, because of the inability to regulate conduct outside Australia. I think that point has also been made by the representations to the committee. What this bill will do and can only do at this stage is to regulate conduct in Australia. As to the number of bulletin boards that are out there and the number of people who have been encouraged to commit suicide, I cannot answer those questions. The Royal College of Psychiatrists seems to be a reputable body, and it has produced a report saying that it is a problem.

**Senator LUDWIG**—The bill seeks to protect vulnerable individuals. Who do you say are vulnerable individuals?

**Mr Gray**—Obviously youths and children come to mind readily, but I do not think it is limited to that. With regard to the statements about vulnerable individuals and supporting material, I think I am right in saying that the bill itself does not limit the offences to material released to vulnerable individuals. Quite frankly, I think that people can be vulnerable at any stage in their lives. We see examples of adults committing suicide. Last night, we got some statistics from the Australian Bureau of Statistics. The results were a little different from what I expected. I thought that the peak of suicide would be amongst youths. In fact, the highest

age group—and this is the 2003 statistics for males and females—is the 30 to 34 years age group. It is all very well to talk about adults making informed choices. I agree with that entirely, but are people who are vulnerable and considering suicide in a position to make an informed choice? That is the real problem. If this information is so readily available, it can be used by people before they have had the opportunity to make an informed choice. To answer your question in a roundabout way, I do not see it as limited to children.

**Senator LUDWIG**—The Australian Broadcasting Authority made a submission to the committee in respect of their responsibility under schedule 5. Have you had an opportunity to have a look at that?

**Mr Gray**—I had a quick look, but I did not go into any detail. I think we have the ABA submission. Do you want me to look at it now?

**Senator LUDWIG**—It would help if you would say whether there is a problem with the bill, insofar as they have indicated, or whether they have no concerns?

**Mr Gray**—I have the submission here. Could you direct me to the page?

**Senator LUDWIG**—It covers a couple of areas, but at page 2, it states:

However, at present, Internet content found not to be sufficiently serious (such as the example outlined above) would not be reported to law enforcement for investigation under Schedule 5, even though the material may—under the proposed Criminal Code amendments—indicate the commission of a criminal offence.

Further, under the heading ‘ABA indemnity from prosecution’, it states:

I note that the proposed Criminal Code amendments appear not to provide protection from criminal proceedings equivalent to that provided to the ABA under Schedule 5.

I guess that the ABA are broadly concerned that they may not be able to meet the requirements of the legislation and may expose themselves to litigation.

**Mr Gray**—So we are looking for a provision in the bill, with the solution?

**Senator LUDWIG**—I am not. I am asking you whether you can meet the ABA’s concerns?

**Mr Gray**—I assume from what you have said and from just looking at the submission briefly—

**Senator LUDWIG**—I am happy for you to take it on notice or you can read their letter.

**Mr Gray**—I am happy to take it on notice, if I need to. But if the concept is that people need civil protection or protection against civil action for reporting alleged offences against the criminal law, there are provisions like that in various places, under Commonwealth law, in the Financial Transaction Reports Act, where banks report suspicious transactions. They are very unusual provisions. Essentially, the law relies on the fact that the courts are not going to entertain an assumption. Civil courts are not going to entertain actions for damages against people who have reported criminal offences. It would be totally contrary to public policy for a court to punish a person because they report criminal conduct to an appropriate authority. There are, as I say, situations where that protection has been inserted into the legislation in

order to encourage people who might not otherwise be prepared to comply with their civic duty to do so. But I am not aware of any cases, although I stand to be corrected.

**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.

**Senator LUDWIG**—The ABA have an indemnity from prosecution. Clause 89 of schedule 5 provides specific protection to ABA members, staff and other persons involved in internet content investigations from potential criminal proceedings arising as a result of possessing potentially prohibited internet content. If they check their web sites and look at their content and find, I suspect, alleged material then they are in possession of it?

**Mr Gray**—That provision is necessary for the ABA—clause 89 of schedule 5—because of the child sex offences provisions in the Criminal Code. There are offences of possessing material without any specific intention and therefore you need that provision so that, when ABA come to do their job, if they end up possessing the material they would breach the legislation unless they had an exemption. This is different. This is possessing material and distributing it with an intent or with recklessness. It is distribution for a purpose. If the ABA were to come across this material on a webpage and say, ‘This looks like a breach of the suicide provisions,’ and pass it on to the Australian Federal Police, they would not be caught by these offences.

**Senator LUDWIG**—But a person is guilty of an offence if the person uses a carriage service to access material that directly or indirectly counsels or incites suicide. You say that it is if the person intends to use the material to counsel or incite suicide or intends that the material be used by another person.

**Mr Gray**—Yes.

**Senator LUDWIG**—So that, whilst there is no intention—

**Mr Gray**—There is no offence by the ABA.

**Senator LUDWIG**—A person is guilty of an offence if the person uses a carriage service to access material and that material directly or indirectly promotes a particular method of committing suicide or provides instruction on a particular method of committing suicide. Then you say that is constrained by ‘the person intends to use the material to promote that method of committing suicide or provide instruction on that method of committing suicide’.

**Mr Gray**—That is right; there is no offence if there is no intent. In that provision, the word ‘intent’ is used. That is the highest level of the mental element under the code.

**Senator LUDWIG**—In any event, there is no intention provision under the child pornography legislation, is there?

**Mr Gray**—No. It is an offence to download child pornography and it is an offence against state law to possess child pornography. There is provision in the Commonwealth act for the Attorney-General to approve educational or scientific use. But that approval has to be given expressly by the Attorney-General. The state laws also have exemptions. For the most part I think they are just written into it where it is possessed for one of those purposes or it is possessed for publicly acceptable purposes. There is a question whether the ABA’s concern in relation to child pornography could have been met by an exemption under those provisions given by the Attorney-General. But there would be other things they would be concerned about possessing. One wonders, but I can see why that provision is in there.

**Senator LUDWIG**—The content also includes disclaimers linked to help centres and information that would tend to discourage suicide related activity if, under the classification act and OFLC guidelines, the site was considered not to contain sufficient detail or impact to warrant an R, so classification was not prohibited. What if they had hosted web sites or hyperlinks to sites which counsel or incite suicide?

**Mr Gray**—I am not sure if this question is limited to the ABA. I suppose it is an appropriate place to point out that the bill does not catch the internet service provider that is the host of the material. I know there have been some suggestions made in some of the submissions that it should be widened out so it does but that is not part of this current exercise. If the ABA or any other body was hosting a web site, not knowing what was on there, they would not have the intentions. Even if you could construct an argument to say that they distributed it in some sort of technical sense, an ISP who has no knowledge of the material passing through would not be in breach of these provisions.

**Senator LUDWIG**—And once they had knowledge?

**Mr Gray**—I was trying to duck the technical question which you have taken me to. If an ISP was aware that it was hosting a webpage that contained this material, I suspect that they would be caught either by these provisions or by one of the incitement or aiding and abetting provisions in the Criminal Code. I would not like to take that as a concluded view as I have not had a chance to think it through but I think it might include an ISP who was, for example, given notification that they were hosting a webpage.

**Senator LUDWIG**—That is where I was going to go to next, because that is assuming the ISP has knowledge of it. If the ISP is advised or informed that they have potentially hosted—

or had hyperlinks to, or links on particular webpages to—internet webpages which might contain the material as described in this bill, are they then caught by the legislation if they do nothing about it? Once they move from a point of not knowing to at least knowledge of it, and that knowledge is being provided by some third party, does that apply to this legislation?

**Mr Gray**—They would not be caught by any of the offences in this bill because you come back to the question of intent. In the case you have postulated, the ISP would have no intent. They would presumably say, ‘We don’t police what happens on our system and, therefore, we’re not going to take it off.’ In a situation like that, they would not have intent. It would be very unsafe for an ISP to take that view given the extensions of criminal responsibility which appear in chapter 2 of the Criminal Code. I referred before to 11.2(1):

A person who aids, abets, counsels or procures the commission of an offence ... is taken to have committed that offence and is punishable accordingly.

It is an interesting question and I think an ISP may very well have a responsibility, if they know that their system is being used to commit crime, to take appropriate action. One might say: isn’t that the way it should be? Leaving aside for the moment these specific offences, if you are an ISP and you know that your system is being used to host web sites which are committing fraud on a massive scale or distributing terrorist material, encouraging and inciting terrorism, one would think that there is at least an argument to say that you, as the ISP, should take some action.

**Senator LUDWIG**—In relation to the customs legislation, the EFA, in paragraphs 19, 20, 21 and 22 in section 5 of their submission, seem to make the point—and I want your view about whether it is correct or not—that the offences proposed in this bill cover a vastly broader range of material than that prohibited by the amendments to the customs regulations, which is limited to (a), (b) and (c). So whilst import and export seems to be limited to (a), (b) and (c), the EFA’s contention is that this bill covers a vastly broader range of material.

**Mr Gray**—Yes. The customs regulations of course deal with the paper based, physical world, and these provisions deal with the electronic world. It is very difficult to draw a precise analogy between the two. What we have said in the material is that these offences would complement the customs regulations. By that, we did not mean to say that they would simply take the customs regime and apply it electronically, but we would say it certainly is consistent with the customs regime.

**Senator LUDWIG**—It seems that it was supposed to be at least complementary, but the bill would then prohibit accessing and making it available by means of the internet and other carriage services, but it would nevertheless remain lawful to import, export, access and distribute by other methods. Would that still be the case if you have a set of customs regulations which do (a), (b) and (c)? In relation to the range of material that is captured by this bill, there is a subset which, if it were paper based or object based, you could import or export as the case may be and so then it would not be caught by the customs legislation. Or are they overlapping without any gap?

**Mr Gray**—I will never pretend there are no gaps in Commonwealth law. The customs regulations provisions, which I have now got in front of me, deal with devices: documents that provoke the use of a device, documents that incite a person to use that device, documents

that instruct a person how to use that device. I might withdraw what I said before, which was that it deals in a physical world and not a paper based world.

So far these regulations are directed at devices. I guess where the gap comes in is in the case of a publication. If, instead of putting the material on the web page, you printed it off and posted it, the bill would not be caught by these regulations. To tell you the absolute truth, I do not know if it would be caught by something else. I have not looked at that question. If it were specific enough it would be caught by the state provisions about inciting someone to commit suicide. But as to the suggestion that there are other ways that this material could be distributed, I would accept that there probably are. I am not sure that that is a reason not to enact this bill.

**Senator GREIG**—As a starting point, what was the origin of the legislation? What was the initiative? I know that it is sometimes the case that people from the department get representations from the community or business or something and then they approach the government and say, ‘Look, this is an area you might want to consider.’ Was that the case here or was it more just a policy that came from government?

**Mr Gray**—I can only go on my understanding because, as I think I mentioned, I was not there at the time. This bill was initially part of the amendments to the telecommunications bill which introduced the offences. The two were split because they were seen to deal with different matters. My understanding of the genesis of it is research material. Perhaps I will hand over to Miss Williams.

**Miss Williams**—My understanding is that one of the driving factors behind this legislation was the fact that the customs laws that were brought into place were being circumvented by use of the internet. The customs laws, as you say, prevent the import and export of devices and information on how to use those devices into and out of Australia. When those laws came into place, the internet was used to place instructions on how to make and utilise those devices to try and circumvent those laws. That was one of the driving factors behind bringing this legislation into place. It was to complement, as we said, those customs regulations.

**Senator GREIG**—Mr Gray, you were arguing earlier in defence of the legislation that promoting and assisting suicide is unlawful at a state and territory level. Is it the case, therefore, that somehow Commonwealth law is quarantined from that and, in response to that, it needs a separate and discrete piece of law to address it or is directly inciting suicide already unlawful if it were to happen at a Commonwealth level through state jurisdiction?

**Mr Gray**—The Commonwealth obviously, as everybody knows, has limited jurisdiction. It is unlikely that the Commonwealth could enact an offence. There may be a convention somewhere. It is sometimes a bit hard to be definite on these things. I suspect that the Commonwealth would have problems enacting a crime which made it an offence to incite suicide. What the Commonwealth would have power to do would be to make it an offence to incite suicide by using the internet in the same way that this bill would make it an offence to use the internet to encourage suicide. That would have been an alternative option. It has not been taken. This provision is in fact wider and it presumably reflects a concern. What Miss Williams says is correct, but coinciding with those concerns was this research material, which suggests that there are these web pages out there. People went looking for web pages and

found them. That was seen by parliament as a matter of concern. This bill will do several things. It will prevent incitement to suicide by using the web, it will prevent giving details via the web about how to operate a suicide machine and it will also attack web based incitement.

**Senator GREIG**—How will it do that given that overwhelmingly this material is internationally based and the law has no reach?

**Mr Gray**—That is right. That is an eternal problem with the internet and it is one that governments around the world are grappling with all the time. How do you control misuse of the internet? If I can again move away from this bill, there is clear conduct that we would all recognise does involve an abuse of the internet and it should be policed. What can governments do other than to regulate their own patch of territory? I see this bill as doing that. Australia has said, ‘You cannot distribute this material within Australia.’ I suppose the hope is that in the long term other countries in the world will adopt similar legislation and eventually there will be global laws on this topic.

**Senator GREIG**—That assumes a united effort of international cooperation, which is not and will not be there, if for no other reason than that this legislation would not be possible in America because it would be in breach of the first amendment.

**Mr Gray**—That argument has not prevented Australia from passing laws on racial vilification via the internet. In fact, the push for those has come from the US, even though they cannot pass laws. It is a very real problem. I agree with that.

**Senator GREIG**—I am more familiar with the laws we passed three or four years ago on online gambling, which had the effect of shutting down Lasseter’s Casino online gambling service. There are still a plethora of online gambling services, which are spammed to me daily, and the law has had no reach in that regard.

Domestically, voluntary euthanasia groups have expressed the real concern that this legislation would impact on them just through their advocacy, their support for law reform, their soliciting of members and their servicing of their membership with information. Let me paint a scenario: a person emails a voluntary euthanasia group and says: ‘I am thinking of killing myself. What is the most efficient and painless way to do that?’ Let us say that that voluntary euthanasia group emails back and says, ‘We cannot and do not provide that information; however, here is a hyperlink to a site in the United States,’ or, ‘Here is the link to amazon.com; you can purchase a book called *Final Exit* which will detail this information for you.’ Are they breaking the law in providing that information?

**Mr Gray**—Let me just go through the provision and perhaps I can answer the question at the end. The relevant part reads:

A person is guilty of an offence if:

(a) the person:

... ..

(ii) uses a carriage service to cause material to be transmitted to the person; or

(iii) uses a carriage service to transmit material ...

I think that would capture the hotlink examples you have given. The provision continues:

(b) the material directly or indirectly counsels or incites suicide ...

**Senator GREIG**—I will take that as a yes.

**Mr Gray**—It is a partial ‘yes’. In relation to the hotlink the answer is yes, but I am not sure about ‘you can buy this book’. You are not using the carriage service to make the material available.

**Senator GREIG**—But they have used the carriage service to communicate to this person by email that this is how they can contact amazon.com, which is a website. Is that caught by the ambit of the law?

**Mr Gray**—On my reading of it here and now, I do not think it is.

**Senator GREIG**—You do not think it is or you know it is not?

**Mr Gray**—I never say the word ‘know’ in relation to legal interpretation.

**Senator GREIG**—But this is the understandable fear of the community—the ambiguity.

**CHAIR**—That is confidence inspiring, Mr Gray! We are regularly after people who will tell us what things mean.

**Mr Gray**—The High Court—

**CHAIR**—They are not keen on coming before the committee so we have to rely on the Attorney-General’s Department. We should ask the High Court.

**Mr Gray**—‘I think’ is a lawyer’s device for saying ‘my view, subject to the courts ruling to the contrary’—which is always the rider to any views expressed.

**Senator GREIG**—Surely. I can see the absurd situation where a voluntary euthanasia group providing information by email to someone about how to access the *Final Exit* book through Amazon would be unlawful but if that same person were to write to them and they wrote back telling them the same thing it would not be.

**Mr Gray**—We have had debate on this side of the table but my personal view is that if you give people an indication of where the information is available it is not caught by the law. The difference is that with hot linking they would get the material through the web. If you were to tell them where they could get a book or if you said, ‘I cannot tell you, but Mr X is an expert on all of this and can help you; contact him,’ I do not think that would be caught by these provisions. You come back to the principle that these are provisions of criminal law. Ambiguities are read against the prosecution. If the provisions are ambiguous then, in my view, a court would not read them as having that effect. Whether that conduct should be caught is a totally different question.

**CHAIR**—When we were speaking earlier, I was asking some questions in relation to the use of the word ‘counselling’. It seems to me that these are unique circumstances for the use of that word and that this is not quite the same as counselling someone to commit a violent crime, a fraud or something like that—the sorts of examples that we have talked about elsewhere. The use of the word ‘counselling’ is what I am referring to. There is a suggestion from one of the submitters that it would be clearer in the context in which we are currently operating to use the words ‘promote or incite suicide’ rather than the word ‘counsel’, because

we are dealing with issues which may have an impact on the common or daily understanding of the use of the word ‘counsel’. Is that something that the department might consider?

**Mr Gray**—It does not attract me, I have to say. I know it sounds like lawyer-speak, but at the end of the day these are criminal offences in legislation and you have to use lawyer-speak. ‘Counsel’ is a word which is in fact defined. The effect of the provision I read out from the Criminal Code, which escapes me for the moment, was to define—

**CHAIR**—11.2(1), I think.

**Mr Gray**—Sorry, I withdraw all of that; I am getting confused with incitement.

**CHAIR**—I am not going back to incitement.

**Mr Gray**—No; I withdraw all of that. As far as ‘counsel’ goes, again it is a word that is used in the Criminal Code. I think it causes some concern in this area because of the concept of counselling. The word is used for different concepts, but this is a provision of the criminal law and I think that the meaning of it is clear in a criminal context. The problem is coming up with an alternative formulation. The MCCOC—

**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.

**CHAIR**—That is fine. At least we have opened up the discussion.

**Mr Gray**—I must say, on that point, that it was not something that occurred to any of us. But different people looking at it through different eyes see different implications.

**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.

**Mr Gray**—Yes. We can certainly address that.

**CHAIR**—There may be other questions which have come out of today's deliberations. We will get to you very promptly if we have questions on notice. I am not sure about that, but if we do we would also appreciate assistance with those.

**Mr Gray**—Certainly.

**CHAIR**—There being no further questions, I thank you very much for your assistance today and for going through some of the detail of this with the committee. I also want to thank all of the witnesses who have given evidence to the committee today and those present in the room. These are not simple or easy issues—they often inflame passions—and I am very grateful for the manner in which everyone present has conducted themselves today and assisted the committee with our deliberations. I declare this meeting of the Senate Legal and Constitutional Legislation Committee adjourned.

**Committee adjourned at 12.00 p.m.**