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Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004

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Contents

Purpose.	1
Background.	2
Constitutional power over telecommunications	2
Causing 'offence'.	3
Current censorship laws.	3
Racial vilification	4
Child pornography and child abuse material	5
Assisting Suicide.	5
Exposure Draft and Discussion paper	6
Main Provisions	7
Schedule 1 – Telecommunications Offences	7
Division 474 Subdivision B – Interference with Telecommunications.	7
Division 474 Subdivision C – Offences related to use of telecommunications	8
Intention to commit a serious offence.	8
Making a threat.	8
Menacing, harassing or causing offence	9
Child pornography and child abuse material	11
Procuring or 'grooming' a person under 16 years of age	12
Suicide related material.	13
Consequential amendments	14

Schedule 2 – Contamination offence.	14
Schedule 3 – Financial Information Offences	15
Schedule 4 – Other amendments of the Criminal Code.	16
Alternative verdicts.	16
Knowledge of law.	16
Schedule 5 – Amendments of other Acts.	17
Crimes (Aviation) Act 1991.	17
Customs Act 1901.	17
Mutual Assistance in Criminal Matters Act 1987.	17
Concluding Comments.	18
Regulation of mobile communications	18
Interception devices	18
Menacing or harassing.	18
Causing 'offence'.	18
Child Pornography and Child Abuse material	21
Range of legislation to consult	21
Assisting suicide via a carriage service.	22
Range of offences in the Bill	22
Other	23
Endnotes.	23

Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004

Date Introduced: 24 June 2004

House: Senate

Portfolio: Justice and Customs

Commencement: Various (see Main Provisions section)

Purpose

The major part of the Bill introduces new offences under the *Criminal Code Act 1995* (the 'Criminal Code') involving use of a telecommunications network or 'carriage service' (the internet, emails, mobile and fixed telephones, faxes, radio and TV). Proposed new offences include the use of such a network or service:

- for a 'serious offence'
- to make a threat
- to menace, harass or 'cause offence'
- for child pornography or child abuse material
- to procure or 'groom' a person under 16 years of age for a sexual purpose, and
- for suicide related material.

The Bill also proposes new offences relating to contamination of goods, dishonest financial dealing and child prostitution on board Australian-registered aircraft.

The Bill also makes important changes to the Criminal Code in relation to the criminal trial process. It proposes that:

- where a jury is satisfied that an accused was responsible for a crime, but is unsure whether they carried out the crime themselves or were complicit in the offence, the jury should be able to find the accused guilty of the crime, and

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- a person should remain criminally responsible if they are ignorant of or mistaken about a law or regulation creating an offence, unless the law or regulation expressly provides otherwise.

In addition, the Bill amends the *Customs Act 1901* to ensure that in prosecuting a charge of illegally importing narcotics it will not be necessary to prove that the accused intentionally brought a prohibited item into Australia.

Finally, the Bill amends the *Mutual Assistance in Criminal Matters Act 1987* to make it easier for a foreign country to obtain evidence from Australia in criminal investigations.

Background

Constitutional power over telecommunications

A person can only be validly subject to the proposed offences if the new provisions are within Commonwealth constitutional power. By linking many of the proposed offences in **Schedule 1** of the Bill to use of telecommunications networks or 'carriage services', the Government will make the new provisions applicable in a wide variety – but not all – situations.

The Commonwealth appears to have full constitutional power to make laws in relation to electronic telecommunications, including the internet. Under section 51(5) of the Constitution it has power to legislate with respect to 'postal, telegraphic, telephonic and *other like services*'. Even though radio and television were not contemplated at the time the Constitution was drafted, both those mediums have been held by the High Court to be 'other like services' within the scope of section 51(5).¹ In 1935 the High Court stated that the common characteristic of postal, telegraphic and telephonic services was that:

They are...communication services...If a new form of communication should be discovered, it too might be made the subject of legislation as a 'like service'.²

The court also rejected the notion that section 51(5) was restricted to services for communication between individuals.³ So creating offences relating to use of telephones, the internet and other 'carriage services' is plainly within Commonwealth power.

However, if a telecommunications network or 'carriage service' is not used for a particular activity, and provided the person carrying out the activity is not otherwise within a head of power in the Constitution (e.g. a corporation, trading interstate, or within the scope of a relevant international agreement), the Commonwealth will have no constitutional power to regulate the activity, let alone specify it as a criminal offence. For example, a person using a library to obtain 'suicide related material' in physical form could not validly be

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subject to a Commonwealth law. Any offence in such circumstances would be a matter for State law.

According to the Minister for Justice and Customs, Senator Ellison, 'the taking of a photo using a camera phone would be covered by this legislation if it were used to transmit child pornography or images which were used to menace, harass or for other offensive purposes'.⁴ Someone taking an offensive picture of a person without permission would be caught by existing State legislation. The federal law proposed in this Bill would come in once the pictures were transmitted from phone to phone or over the internet.

Causing 'offence'

Apart from a specific offence of using carriage services for child pornography and child abuse material, the Bill also introduces a general crime of using a carriage service to 'cause offence'. This offence appears to cover both general 'offensive' material as regulated by the Commonwealth Office of Film and Literature Classification (OFLC) and more specific offensive conduct such as racial vilification already covered by various Commonwealth and State/Territory laws.

Current censorship laws⁵

A cooperative federal scheme provides a uniform censorship and classification system throughout all Australian jurisdictions. This scheme consists of central Commonwealth legislation and complementary State and Territory provisions.

Classification of films, computer games and publications is administered by the OFLC under the [*Classification \(Publications, Films and Computer Games\) Act 1995*](#). The Act covers the structure and functions of the OFLC as well as classification criteria and procedures. State and Territory legislation deals with the enforcement of classification decisions. The classification scheme for television, radio and internet is overseen by the Australian Broadcasting Authority (ABA) under the [*Broadcasting Services Act 1992*](#).⁶

All States and Territories have retained or enacted their own classification legislation. Generally the object of the State and Territory legislation is to give effect to the national classification scheme as set out in the Classification (Publications, Films and Computer Games) Act.

Publications, films and computer games are classified in accordance with the National Classification Code and the classification guidelines. The Commonwealth Minister determines the classification guidelines in agreement with each participating State/Territory Minister. The Code contains the general principle that 'adults should be able to read, hear and see what they want'. However this is qualified by the following concerns:

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- minors should be protected from material likely to harm or disturb them
- everyone should be protected from exposure to unsolicited material that they find offensive, and
- the need to take account of community concerns about:
 - depictions that condone or incite violence, particularly sexual violence, and
 - the portrayal of persons in a demeaning manner.

In relation to regulation of internet content, the explanatory memorandum to the Bill notes that:

Under the Online Content Co-Regulatory Scheme (the Scheme), created by Schedule 5 of the Broadcasting Services Act, the ABA handles and investigates complaints from the public about prohibited Internet content or potential prohibited Internet content and can order Australian Internet content hosts not to host such content. The Scheme also requires scheduled filter software manufacturers to update their filters in accordance with ABA notifications so that prohibited content or potential prohibited Internet cannot be accessed when using such software.⁷

For further background, see the parliamentary library e-brief by Kim Jackson, *Censorship and Classification in Australia* (October 2001).⁸

Racial vilification

One of the situations that the Government envisages will be covered by the offence of using a carriage service to 'cause offence' introduced by the Bill is 'use that vilifies persons on the basis of their race or religion'.⁹

The Commonwealth *Racial Discrimination Act 1975* prohibits actions that are:

reasonably likely...to offend, insult, humiliate or intimidate another person or a group of people...because of the race, colour or national or ethnic origin of the other person or some or all of the people in the group.¹⁰

However the Racial Discrimination Act does not make such actions a specific criminal offence.¹¹

Most other Australian jurisdictions have similar legislation which both prohibits such conduct and makes it a criminal offence. The prohibition generally applies to 'public acts', i.e. 'any form of communication to the public', which would include racial vilification via the internet but does not cover private communications such telephone conversations.¹²

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Child pornography and child abuse material

Under Schedule 5 of the *Broadcasting Services Act 1992* the Online Content Co-Regulatory Scheme administered by the ABA regulates internet service providers and internet content hosts. However it does not regulate either producers of content, or persons who upload or access content. These categories of online content creators and end users are regulated instead by a combination of State and Territory online enforcement laws and the criminal laws.

In general, State classification and criminal laws do not make it an offence for adults to view or possess pornography. Classification guidelines relate mainly to the ability of children to access such material.

Possession of child pornography and/or child abuse material, however, is an offence in all States and Territories. In Western Australia, for example, it is an offence punishable by imprisonment for up to 7 years to possess or copy with intent to sell or supply, or to display, exhibit, publish or actually sell or supply 'child pornography'. Possession of 10 or more copies of an item of child pornography is evidence of an intention to sell or supply.¹³ 'Child pornography' is defined as:

an article that describes or depicts, in a manner that is likely to cause offence to a reasonable adult, a person who is, or who looks like, a child under 16 years of age, whether the person is engaged in sexual activity or not.¹⁴

In Queensland, a person must not knowingly have possession of a 'child abuse' publication or 'child abuse' photography, or advertise, sell, distribute, exhibit or display a 'prohibited' publication or 'child abuse' photograph.¹⁵ The maximum penalty is imprisonment for 3 years. A 'child abuse publication' is defined as:

a Refused Classification publication that depicts or describes in pictorial or other form a person who is, or who looks like, a child under 16 years (whether the person is engaged in sexual activity or not) in a way that is likely to cause offence to a reasonable adult.¹⁶

These offences would appear to encompass use of any public 'carriage service' (internet, radio, tv, sending pictures by mobile phone etc).

Assisting Suicide

While suicide or attempted suicide is no longer an offence in Australia, assisting or encouraging another person to commit suicide is an offence in all States and Territories. In addition, to assist or encourage another person to *attempt* to commit suicide is an offence in the Australian Capital Territory, the Northern Territory, New South Wales, South Australia and Victoria. Further, except in Victoria, a person can be prosecuted for 'attempt' if they have unsuccessfully assisted or encouraged suicide. Murder or manslaughter may

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also be relevant, on the basis that the assistance or encouragement caused the death of a person who committed suicide. However the deliberate taking of one's own life would normally be an 'intervening cause' which relieves the other person of responsibility.¹⁷

The offence of 'assisting suicide' under the New South Wales *Crimes Act 1900* is expressed in the following terms:

31C Aiding etc suicide

(1) A person who aids or abets the suicide or attempted suicide of another person shall be liable to imprisonment for 10 years.

(2) Where:

(a) a person incites or counsels another person to commit suicide, and

(b) that other person commits, or attempts to commit, suicide as a consequence of that incitement or counsel,

the first mentioned person shall be liable to imprisonment for 5 years.

Exposure Draft and Discussion paper

The Attorney-General's Department published an [exposure draft](#) of the Bill in March 2004, providing one month for interested persons and organisations to comment.¹⁸ Some of the publicly available comments received on the exposure draft are included below.

On 15 July 2004 the Minister for Communications, Information Technology and the Arts invited public comment as part of a review into the regulation of illegal or offensive content on mobile telephones and other mobile devices. The Minister announced that:

Pending the results of this new review, I have already directed the Australian Communications Authority (ACA) to regulate access to content provided on new premium services delivered over mobiles.

This included putting in place access controls for adult content delivered on the new premium rate services and on proprietary networks operated by carriers. These controls will restrict access by children to content that is unsuitable for them.¹⁹

The Department of Communications, Information Technology and the Arts issued a [discussion paper](#)²⁰ as part of this review, calling for submissions by 3 September 2004.

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Main Provisions

Schedule 1 – Telecommunications Offences

Commencement: Six months and one day after Royal Assent.

Schedule 1 Part 1 amends the Criminal Code and other Commonwealth Acts to provide for a range of telecommunications offences, aimed particularly at misuse of 'carriage services'.

Item 18 of Schedule 1 provides that the phrase '**carriage service**' is to have the same meaning as in the *Telecommunications Act 1997*, i.e. 'a service for carrying communications by means of guided and/or *unguided* electromagnetic energy',²¹ Parliament might note that on this basis 'carriage service' not only covers the internet, emails, telephone (mobile and fixed), faxes etc, but would also include radio and TV.

Item 1 of Schedule 1 replaces Part 10.6 of the Criminal Code with a **new Part 10.6** covering various telecommunications offences. The new provisions will also replace the telecommunications offences in existing Part VIIB of the *Crimes Act 1914* (**item 5**).

Some parts of **Schedule 1** reproduce existing offences under the Criminal Code and/or the Crimes Act, or reproduce such offences with minor changes only. This digest does not provide detailed comments on these provisions.

Division 474 Subdivision B – Interference with Telecommunications

Proposed section 474.4 – Interception devices

This provision makes it an offence to manufacture, advertise, sell or possess an 'interception device'. The proposed section specifies exceptions where it is not an offence to sell or possess a device for intercepting telecommunications (for example, where interception is conducted lawfully by law enforcement or national security agencies under the *Telecommunications (Interception) Act 1979*).

As noted by Electronic Frontiers Australia (EFA),²² the proposed wording does not provide an exception for the use of modems, mobile phones, telephone handsets etc 'by persons accessing their own email and stored voice mail messages'.²³

Proposed section 474.5 – Wrongful delivery of communications

This provision is based on **existing section 85ZD** of the Crimes Act, making it an offence to cause a telecommunication to be received by someone other than the person or service it is directed to. An issue is whether this is properly worded for modern use of internet services. There would appear to be an offence under the proposed section where, for

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example, a business instructs an internet service provider to re-direct emails addressed to a former employee.

Proposed sections 474.7 to 474.12 – Modification and copying of telecommunications device identifier or account identifier

These provisions propose new offences for unauthorised modification or copying of telecommunications equipment or account 'identifiers'. The offences are aimed particularly at unauthorised use of lost or stolen mobile phones, and at attempts to hamper interception and tracking of mobile phone calls (for example, by copying several mobile phone numbers onto a single 'subscriber identity module' (SIM) card).

Division 474 Subdivision C – Offences related to use of telecommunications

Intention to commit a serious offence

This Bill proposes a **new section 474.14** of the Criminal Code to replace **existing section 85ZK** of the Crimes Act. The new provision will make it an offence to use a telecommunications network for a 'serious offence'. Instead of a maximum penalty of 5 years imprisonment in the current provision, the maximum penalty will be the same as that for the particular offence.

A 'serious offence' is an offence against a law of the Commonwealth, a State or a Territory punishable by imprisonment for life or 5 or more years. It also includes any offence against foreign law that would be a 'serious offence' under the Bill if committed in Australia.²⁴

Proposed subsection 474.14(5) provides that a person can be found guilty of intending to commit a serious offence through use of a telecommunications network 'even if committing the serious offence is impossible'. The explanatory memorandum notes that this:

reflects the emergent common law consensus that a person can be convicted of attempt – here, essentially a preparatory offence – even though completion of the offence was impossible in the circumstances. In other words, the law of attempt holds that it is irrelevant if a particular result does not occur.²⁵

Making a threat

Proposed section 474.15 makes it an offence to 'use a carriage service' to threaten to kill or cause serious harm with the intention of instilling fear in another person.

The explanatory memorandum does not explain why a specific offence is needed covering use of a telecommunications/carriage service to make a threat given the existence in all

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Australian jurisdictions of general statutory and/or common law crimes of 'assault' (which includes threatening assault) with no restriction on the medium used to communicate a threat.²⁶ Adding the proposed new offence for 'use of a carriage service' is, however, consistent with **existing section 471.11** which makes it a crime to 'use a postal or similar service to make a threat'.

Menacing, harassing or causing offence

Under **proposed section 474.17** there will be a maximum punishment of 3 years imprisonment for using a telecommunications/carriage service in a way 'that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive'. The proposed provision will replace **existing section 85ZE** of the Crimes Act.

Menacing or harassing

The explanatory memorandum notes that in relation to 'menacing or harassing' use of a carriage service the proposed offence is broader than existing subsection 85ZE(1) of the Crimes Act. This is because the proposed provision:

removes the requirement that the recipient be in fact menaced or harassed and replaces it with an objective standard. The proposed offence provides that reasonable persons must regard the use of the carriage service, given all the circumstances, as menacing, harassing or offensive. This allows community standards and common sense to be imported into a decision on whether the conduct is in fact menacing, harassing or offensive.²⁷ (emphasis added)

In addition, as the explanatory memorandum says, whether 'reasonable persons' would regard particular use of a carriage service as *menacing* or *harassing* is 'a circumstance in which the offending conduct must occur'.²⁸ Under section 5.6 of the Criminal Code, this means that to be guilty of the proposed offence, a person need not *intend* to cause 'reasonable persons' to feel menaced or harassed but need only be *reckless* as to whether that reaction occurs, i.e. 'aware of a substantial risk' – which it is not justifiable to take – that this might occur.²⁹ This is similar to **existing section 471.12** of the Criminal Code regarding use of a postal or similar service 'to menace, harass or cause offence'.

EFA 'is strongly opposed to the removal of the requirement that another person be in fact menaced or harassed.' It believes that the change is aimed at use of the internet to organise political protests: 'the aim of the proposed offence is to facilitate criminal prosecution of Internet users, and especially political activists'.³⁰ As the Government said in August 2003:

People using the Internet to advocate or facilitate violent protests, for example by spreading information on methods of violently disrupting international meetings and attacking police officers protecting such gatherings, including those using the Internet to harass or menace others are amongst those who could be prosecuted under the new offences.³¹

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EFA believes that the existing parts of section 85ZE of the Crimes Act relating to menacing or harassing use of telecommunications/carriage services do not need to be changed. If use of the internet actually menaces or harasses a person, such conduct can be prosecuted. In addition, EFA notes that material on the internet which 'promotes, instructs or incites in matters of violence or crime' can be classified 'Refused Classification' by the Classification Board, and that under Schedule 5 of the *Broadcasting Services Act 1992* such material has been prohibited internet content since 1 January 2000.³²

Causing offence

Under **existing section 85ZE** of the Crimes Act, the offence consisting of 'offensive' use of a telecommunications service does not apply to 'use of a carriage service to carry Internet content'.³³ In contrast, the offence in **proposed section 474.17** will apply to any use of a 'carriage service', including the internet.

Proposed section 473.4 states that in deciding whether reasonable persons would regard a particular use of a telecommunications/carriage service as 'offensive', a court is to consider:

- (a) the standards of morality, decency and propriety generally accepted by reasonable adults; and
- (b) the literary, artistic or educational merit (if any) of the material; and
- (c) the general character of the material (including whether it is of a medical, legal or scientific character)

The explanatory memorandum notes:

The factors listed are the same as the first three matters that are to be considered by the Classification Board in making decisions on the classification of publications, films and computer games under section 11 of the *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act).³⁴

While a court will need to consider such factors when deciding what amounts to an 'offensive' use of a *carriage service* for the purpose of **proposed section 474.17** and other parts of **new Part 10.6**, there is no such requirement for **existing section 471.12** concerning 'offensive' use of a *postal or similar service*.

According to EFA, the inclusion of internet content in the proposed offence is a direct reversal of the Federal Government's 1999 decision to exclude such content from coverage by the Crimes Act on commencement of the *Broadcasting Services Amendment (Online Services) Act 1999* which established a Commonwealth scheme of internet regulation. This scheme regulates internet service providers and internet content hosts. EFA notes that:

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It seems beyond doubt that the proposed offence is intended, among other things, to enable the ABA to refer Internet content that has been classified R18+ or X18+ or 'Refused Classification' to Federal police for prosecution of the content provider. To date, it has been considered a decision for State and Territory Governments as to whether or not their censorship laws enable criminal prosecution of Internet users.

Furthermore, the proposed offence is so broad it would cover not only distribution of 'offensive' material but also **access to** such material. As such the offence could in effect criminalise access to material that is not illegal to possess offline under the States' and Territories' censorship laws.³⁵

Child pornography and child abuse material

Proposed sections 474.19 and 474.20, and proposed sections 474.22 and 474.23 will make it an offence under Commonwealth law to use a telecommunications/carriage service to access, transmit, make available, publish or distribute 'child pornography' or 'child abuse material'. It will also be an offence for a person to receive such material through a carriage service as a result of their own actions, or to carry out related activities (possessing, controlling, producing, supplying, obtaining etc). The maximum penalty will be imprisonment for 10 years.

'Child abuse material'³⁶ and 'child pornography' are defined in **proposed section 473.1** to include 'material that *depicts* a person, or a representation of a person' who 'is, or *appears* to be' under 18 years of age, and who is or appears to be a victim of torture, cruelty or physical abuse, or who is engaged in, or appears to be engaged in, a sexual pose or sexual activity. The definition also includes 'material that *describes* a person who is, or 'is *implied* to be' under 18 years of age and who is or is implied to be a victim of torture, cruelty or physical abuse, or who is engaged in, or is implied to be engaged in, a sexual pose or sexual activity.

The definition of 'child pornography' material also includes the *depiction, representation* or *description* of a sexual organ or the anal region of a person, or the breasts of a female person who is, *appears* to be, or is *implied* to be under 18 years of age.

The definitions apply if the depiction or description is done in such a way that 'reasonable persons would, in all the circumstances, regard as being offensive'. As noted above in relation to 'using a carriage service to cause offence', in deciding what reasonable persons would regard as 'offensive', a court is to take into account the factors in **proposed section 473.4** (including eg. the standards of morality, decency and propriety generally accepted by reasonable adults etc).

Proposed sections 474.21 and 474.24 provide defences in relation to use of a carriage service for child pornography and child abuse. These include use of a carriage service for such purposes where this 'does not extend beyond what is of public benefit'. However conduct that is of 'public benefit' is limited to conduct which 'is necessary or of assistance

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in' specified situations, including 'scientific, medical or educational research *that has been approved by the Minister in writing*'. As the explanatory memorandum notes:

This defence will ensure that legitimate research dealing with child pornography [or child abuse material] on the Internet can be undertaken provided the authorisation of the Minister for Justice and Customs is received. Persons who are caught with Internet child pornography and who argue that they were involved in 'personal research' will not have a defence available to them unless they have received approval for their research from the Minister. Likewise, if a person who has received approval for particular research engages in conduct that falls outside what is 'necessary for or of assistance in' conducting that research, the defence will not be available to them.³⁷

In addition, **proposed section 474.13** provides a defence in relation to the proposed offences for 'carriers', 'carriage service providers', internet service providers and internet content providers when they are acting solely in those capacities. However, under **proposed section 474.25**, internet service providers and internet content providers can be fined up to \$11 000 (for an individual) or \$55 000 (for a body corporate) if they are aware that their services could be used to access child pornography or child abuse material and do not refer details of the material to the Australian Federal Police within a reasonable time.

Procuring or 'grooming' a person under 16 years of age

The explanatory memorandum notes that **proposed sections 474.26 to 474.29**:

contain an offence regime targeting adult offenders who exploit the anonymity of telecommunications services (for example, the Internet) to win the trust of a child as a first step towards the future sexual abuse of that child. The practice is known as 'online grooming'.³⁸

Under **proposed section 474.26**, for a 'procuring' offence to be committed, the sender must actually intend to procure sexual activity through use of a carriage service. In addition, the sender must be at least 18 years of age. The recipient must be under 16 years of age, or believed by the sender to be under 16. This will allow law enforcement officers to assume the identity of a fictitious child to interact with potential predatory adults over the internet.³⁹ The maximum penalty for such an offence will be 15 years imprisonment.

Under **proposed section 474.27**, a 'grooming' offence is committed where material that is 'indecent according to the standards of ordinary people' is sent to a person who is, or the sender believes to be, under 16. The sender must intend to make it 'easier to procure the recipient to engage in or submit to sexual activity'. The maximum penalty for the 'grooming' offences in **proposed subsections 474.27(1) and (2)** will be 12 years imprisonment. The maximum penalty for the offence in **proposed subsection 474.27(3)** – where the sender intends to groom the recipient to engage in sexual activity in the presence of an adult with another person aged under 18 – will be 15 years imprisonment.

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Under **proposed subsection 474.27(4)**, whether material is 'indecent' will be a matter for a court and/or jury.

Proposed section 474.28 contains a number of provisions designed to make prosecution of these offences easier. It specifically provides that for the purpose of these offences, it does not matter that the recipient is fictitious person, or that it was impossible for sexual activity to take place. In addition, 'absolute liability' applies to whether the recipient is under 16 and to whether a third person for whom the recipient is being procured or groomed is over 18. This means the prosecution does not have to prove intention, knowledge, recklessness or negligence on the part of the defendant in relation to these elements of an offence. However, under **proposed section 474.29** it will be a defence if the defendant believed the recipient was not under 16 or that a third person was not at least 18, although a jury can take into account whether the alleged belief was reasonable.

Suicide related material

Proposed sections 474.30 and 474.31 will make it an offence to use a telecommunications/carriage service to access, cause to be transmitted, make available, publish or distribute 'suicide related material' with the intention to 'counsel or incite suicide'. If the material *directly or indirectly* counsels or incites suicide an offence will be committed. It will also be an offence to use a telecommunications/carriage service to *directly or indirectly* 'promote or provide instruction on' a particular method of committing suicide, with the intention that the material is used to promote or provide instruction on that method of suicide.

An offence will also be committed if a person 'possesses, controls, produces or supplies' suicide related material with the intention that the material be used to promote, counsel or incite suicide through use of a carriage service.

The maximum penalty for such offences will be \$110 000 for individuals or \$550 000 for a body corporate. Specific defences are not included in the Bill, because, as the explanatory memorandum says, 'no-one should have a defence available to them if they intend, in engaging in particular conduct, to, for example, incite a person to commit suicide.'⁴⁰

Under the definition in **proposed section 473.1**, 'suicide related *material*' includes 'material in any form...capable of constituting a *communication*'. Under **Schedule 1 Part 2 Item 19** of the Bill, a 'communication' can be in any form, including 'speech, music or other sounds etc'. Under the terms of the Bill, therefore, a person who uses a telephone to 'indirectly' counsel suicide or provide advice on a method of suicide may be guilty of an offence.

In addition, as the explanatory memorandum points out:

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the offence would apply to the possession or production of paper leaflets providing instruction on a particular method of suicide, provided the person engaging in this conduct intended that the information on the leaflets also be made available on the Internet.⁴¹

According to Democrats Senator Brian Greig:

If this Bill passes, it will become very difficult or even illegal in Australia for voluntary euthanasia groups to share information over the phone, host websites, debate issues online or even to provide help and advice to people who request it by phone or the internet.⁴²

President of the South Australian Voluntary Euthanasia Society, Frances Coombe, said in response to the exposure draft that:

We do not advocate suicide or self-deliverance. Nevertheless the proposed amendments could be used to inhibit or put an end to our legitimate activities. Competent adults have a right to end their own lives. It is most important that those who see this as a possibility should have access to advice to ensure that they do not act irrationally or by inappropriate means.⁴³

In contrast, however, the explanatory memorandum states that:

These offences are not intended to capture Internet material that advocates or debates law reform on euthanasia and/or suicide related issues, as this type of material will generally not counsel or incite suicide, nor promote or provide instruction on particular methods of committing suicide. For similar reasons, Internet material dealing with suicide-related research and suicide prevention or support material will generally not be caught by the offences.⁴⁴

Consequential amendments

Schedule 1 items 25-29 amend the *Telecommunications (Interception) Act 1979* to ensure that law enforcement officers can intercept and record communications relevant to offences under the **proposed new Part 10.6** of the Criminal Code.

Schedule 2 – Contamination offence

Commencement: 28 days after Royal Assent.

Schedule 2 of the Bill proposes a **new Part 9.6** in Chapter 9 of the Criminal Code ('Dangers to the community').

New Part 9.6 will contain three new offences 'designed to overlap and complement the State and Territory contamination of goods offences'.⁴⁵ The new offences are:

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- contaminating goods (**proposed section 380.2**)
- threatening to contaminate goods (**proposed section 380.3**) and
- making false statements about goods being contaminated (**proposed section 380.4**).

Each offence will carry a maximum penalty of 10 years imprisonment.

These new offences under Commonwealth law will have extended geographic reach, allowing prosecution where eg. a threat to contaminate Australian goods is made from overseas. To enable maximum Commonwealth coverage, **new Part 9.6** is expressly based on the 'implied nationhood power'⁴⁶ in the Constitution, as well as the Commonwealth's constitutional powers over overseas and interstate trade,⁴⁷ and corporations.⁴⁸ The external affairs power⁴⁹ would also provide jurisdiction where an offence has an overseas element.

The new offences are derived from the [1998 Model Criminal Code Officers' Committee \(MCCOC\) Report on Contamination of Goods](#).⁵⁰

Schedule 3 – Financial Information Offences

Commencement: 28 days after Royal Assent.

Schedule 3 of the Bill proposes to insert **new Part 10.8** – 'Financial information offences' in Chapter 10 of the Criminal Code ('National Infrastructure').

These amendments will implement the model offence in the March 2004 MCCOC discussion paper on [Credit Card Skimming Offences](#).⁵¹ The model offence criminalises dishonestly obtaining or dealing in personal financial information without the consent of the person to whom the information relates.

The explanatory memorandum notes that:

While existing federal, State and Territory fraud and forgery laws cover many of the activities related to credit and debit card skimming, they do not comprehensively cover the act of skimming the data, possession of the skimmed data, or possession or importation of a skimming device.⁵²

Apart from credit card skimming, the proposed offences cover other dishonest dealings with personal financial information, such as internet banking fraud and obtaining credit card details or other financial information from discarded bank statements or receipts.

The maximum penalty for the proposed offences is imprisonment for 3 – 5 years.

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Schedule 4 – Other amendments of the Criminal Code

Commencement: 28 days after Royal Assent

Alternative verdicts

Schedule 4 Item 1 amends section 11.2 of the Criminal Code to assist a jury when it is unsure whether an accused has themselves committed an offence or has instead been complicit in the offence. As the explanatory memorandum notes, 'such cases are most likely to occur where two persons are each charged with the primary offence and with complicity and common purpose in the alternative'.⁵³ **Item 1** inserts **new subsection 11.2(7)** providing that in where a jury is satisfied in such a situation that the accused is responsible for the crime it can find the person guilty.

Knowledge of law

Schedule 4 Items 5 to 7 will amend sections 9.3 and 9.4 of the Criminal Code which provide that a person can be criminally responsible even if they are ignorant of or mistaken about the statute or subordinate legislation creating the offence. Under the current provisions, a person is however not criminally responsible if

- the statute or subordinate legislation *'is expressly or impliedly to the contrary effect'*, or
- if *'the ignorance or mistake negates a fault element that applies to a physical element of the offence.'*

Under the proposed amendments, the first exception would only apply where the statute or subordinate legislation *'is expressly to the contrary effect'*. The second exception is removed entirely.

The explanatory memorandum notes that it is proposed to remove the word *'impliedly'* from the first exception because of the frequent use of cross-referencing legislation. There is a concern that:

a simple cross-reference in an offence to another provision would *'impliedly'* require the person to have knowledge of that particular provision to be criminally liable for the offence.⁵⁴

The explanatory memorandum also explains that the second exception will be removed because this situation will be covered by the amended first exception:

'Expressly' will be evidenced where a fault element as provided in sections 5.1 of the *Criminal Code* is specifically included in the relevant physical element of the criminal offence.

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Accordingly, where a criminal offence provision does contain an express fault element which together with the relevant physical element requires the defendant to know or have an awareness of the law, the general principle [that 'ignorance of the law is no excuse'] will not apply.⁵⁵

Schedule 5 – Amendments of other Acts

Commencement: The main items of significance in **Schedule 5** commence 28 days after Royal Assent.

Crimes (Aviation) Act 1991

Schedule 5 Item 2 inserts a reference to the *Prostitution Act 1992* (ACT) in **subparagraph 15(1)(b)(ii)** of the *Crimes (Aviation) Act 1991*. The proposed provision will make it an offence to engage in child prostitution on board an Australian-registered aircraft outside Australia. The explanatory memorandum notes that this will ensure that the application of Australia's criminal laws on board aircraft complies with Australia's international obligations under the Optional Protocol to the Convention of the Rights of the Child on the sale of children, child prostitution and child pornography.⁵⁶

Customs Act 1901

Schedule 5 Items 3 to 8 amend **section 233B** of the *Customs Act 1901* – which makes it an offence to illegally import narcotics – in response to the decision of the NSW District Court in *R v Ismail* (26 May 2003). In that case the court held that the prosecution not only had to prove that the act of importing was intentional but that the accused intentionally brought a prohibited item into Australia. The explanatory memorandum notes that until *R v Ismail* the prosecution only had to show that the accused was 'reckless' as to whether the imported item was prohibited.⁵⁷

These amendments will ensure that the proof requirements in relation to prosecutions for such offences under the Customs Act are returned to the situation before the *R v Ismail* decision.

Mutual Assistance in Criminal Matters Act 1987

Schedule 5 Items 10 and 11 amend **section 15** of the *Mutual Assistance in Criminal Matters Act 1987* to remove the need for a foreign country, when seeking mutual assistance in a criminal matter, to specifically request that a search warrant be obtained if this is required under Australian law. The explanatory memorandum notes that under the proposed amendments a foreign country need only ask the Attorney-General to arrange for evidential material to be obtained. The Attorney-General can then exercise his or her own

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discretion to determine whether a search warrant is the appropriate means by which the material should be obtained.⁵⁸

Concluding Comments

Regulation of mobile communications

The Bill pre-empts the outcome of the review into the regulation of illegal or offensive content on mobile telephones and other mobile devices announced by the then Minister for Communications, Information Technology and the Arts in July 2004. The Bill introduces extensive additional regulation of 'carriage services' including mobile communication devices. Parliament may wish to defer final consideration of the Bill until the review is completed. Having access to the outcome of the review would enable Parliament to be better informed about the suitability of key aspects of the Bill.

Interception devices

Parliament should consider whether an exception for use of a person's own computer, telephone or mobile phone should be included in relation to **proposed section 474.4** prohibiting use of 'interception devices'. While 'interception' as commonly understood (and as defined in the *Telecommunications (Interception) Act 1979*)⁵⁹ would not seem to include access by the intended recipient, Parliament might note the view of EFA that:

the provisions appear to place people who sell, possess, etc. a modem or mobile phone etc. in breach of the Criminal Code Act. Even if that would not currently be the result, it appears it will if amendments to the TI [Telecommunications Interception] Act concerning delayed access messages, substantially similar to those in the TI Bill 2004, are enacted. Obviously such an outcome would be ludicrous and would not be enforced.⁶⁰

Menacing or harassing

Parliament should consider the concerns raised above in relation to the 'menacing or harassing' element of the new offence in **proposed section 474.17**, in particular whether it is appropriate to make use of a telecommunications/carriage service an offence even where there is no intention to menace or harass and no actual menacing or harassment occurs.

Causing 'offence'

There are a number of issues with the 'causing offence' element of **proposed section 474.17** – i.e. using a 'carriage service' in a way that reasonable person would regard as 'offensive' – that Parliament should consider:

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1. The proposed offence covers both content that may be 'morally' offensive to the public in general without a particular target, as well as comments, publications or other material that may offend – and may be intentionally targeted at – people from a particular race or religion or with some other special background. Parliament might consider whether vilification for racial/religious reasons should be covered in the same provision as a general 'morality' offence. In EFA's view, it is:

highly inappropriate to attempt to deal with such matters by way of laws criminalising 'offensive' use of a carriage service. Matters of vilification should be dealt with under laws of general application and we note that HREOC has previously ordered removal of Internet content found to be in breach of the C'th Racial Hatred Act.⁶¹

The proposed offence is not limited to 'any form of communication *to the public*', i.e. there is no distinction between private and public comment as in the Commonwealth Racial Discrimination Act and equivalent State/Territory legislation. While the Government states that the offence is aimed, amongst other things, at 'racial or religious vilification', there has been no explanation of why the new provision is needed on top of existing legislation which already covers racial/religious slurs made in public (including – under State and Territory laws – making such conduct a criminal offence).

2. Are the standards listed in **proposed section 473.4** for deciding whether reasonable people would regard material as 'offensive' appropriate for the new criminal offence in **proposed section 474.17**? As the explanatory memorandum said, these standards are copied from the standards used by the Classification Board – under the Classification (Publications, Films and Computer Games) Act – in deciding what rating to give publications, films and computer games.

On one hand, there is the argument that 'offensive' material should be defined consistently across all Commonwealth legislation.

On the other hand, are the 'moral' standards that the Classification Board must use in determining what is currently acceptable for showing to Australian society appropriate for use in a court of law in deciding whether to convict a person of the proposed new offence punishable by up to 3 years in prison? It is one thing to select individuals representing Australian society to be on the Classification Board, and for the Board then to judge a film against its members' standards of 'morality, decency and propriety' and their assessment of 'literary, artistic or educational merit'. It is quite another to require a judge or a non-expert selection of jurors to decide what is meant in a strict legal sense by eg 'standards of propriety generally accepted by reasonable adults', let alone to determine whether particular material has 'literary or artistic merit'.

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Allowing a court to convict and imprison people based on these types of legal 'standards' appears to be a throw-back to the type of situation in eg the 1971 Oz obscenity trial in the United Kingdom.⁶²

3. It may be that parts of **proposed section 473.4** are too vague to be regarded as a 'law' in accordance with section 51 of the Constitution. Section 51 gives Parliament the 'power to make laws for the peace, order and good government of the Commonwealth'. However, merely including something in legislation is not enough to make it a 'law'. It must provide or allow for the identification of a sufficiently certain standard against which to measure conduct. As one commentator has said in relation to Canadian constitutional law:

It is a principle of fundamental justice in Canada...that a statute is 'void for vagueness' if its prohibitions are not clearly defined. A vague law offends the values of constitutionalism. It does not provide sufficiently clear standards to avoid arbitrary and discriminatory applications by those charged with enforcement. It does not provide reasonable notice of what is prohibited so that citizens can govern themselves safely.⁶³

As the Australian High Court said in *Plaintiff S157* (2003) (in relation to a suggestion that the *Migration Act 1958* could authorise a 'totally open-ended discretion' by the Minister about which 'aliens' could enter Australia):

The provisions canvassed by the Commonwealth would appear to lack that hallmark of the exercise of legislative power identified by Latham CJ in *The Commonwealth v Grunseit*,⁶⁴ namely, the determination of 'the content of a law as a rule of conduct or a declaration as to power, right or duty'.⁶⁵

Parliament might consider whether the standards specified in **proposed section 473.4** have a sufficiently certain *legal* (as opposed to *social*) meaning to qualify as a 'law' in the sense used in section 51 of the Constitution.

4. Directing courts to consider 'social' criteria in deciding whether use of a carriage service is 'offensive' may breach the separation of powers doctrine in the Constitution, which prevents Australian courts when exercising federal jurisdiction from discharging 'non-judicial functions'. So while consideration of such factors by a non-judicial body such as the Classification Board would not raise a constitutional issue, the same does not apply when such factors are taken into account by a 'chapter III' court.
5. There is no requirement to take such factors into account in relation to the 'offensive' use of a 'postal or similar service' in existing section 471.12 of the Criminal Code.
6. The offence in **proposed section 474.17** appears to cover not only *distribution* of 'offensive' material but also *access* to such material on the internet. As such the

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offence could in effect criminalise access to material which it is not illegal to possess offline under State and Territory censorship laws.⁶⁶

In light of the above issues, Parliament might consider whether the 'causing offence' element of **proposed section 474.17** adds any useful regulation of the internet and other 'carriage services' beyond that which already exists under State and Territory law.

Child Pornography and Child Abuse material

Parliament should also consider carefully the wording of the proposed definitions, which include 'depictions' or 'representations' of those who '*appear to be*' engaged in a 'sexual pose', 'descriptions' of persons who are '*implied to be*' engaged in a sexual pose, as well as, 'descriptions' of, for example, 'the breasts of a female person' who '*is implied to be*' under 18. This appears to extend the range material that could be held to be 'child pornography' or 'child abuse' material if it is 'offensive' well beyond that caught by State and Territory legislation.

In addition, the Classification Board's standards as incorporated in **proposed section 473.4** are applied to determine what is 'offensive' for the purpose of a 'child pornography' or 'child abuse material' offence in **proposed sections 474.19-20 and 474.22-23**. See the discussion in the section immediately above on the suitability of these standards for use in criminal proceedings.

Parliament may wish to consider whether it is appropriate to have definitions of 'child pornography' and 'child abuse' material covering a potentially very wide range of material coupled with uncertain standards for determining whether such material is 'offensive' for offences that are punishable by up to ten years imprisonment.

In addition, the Bill will make legitimate educational and other research into these areas through use of the internet or other 'carriage service' subject to written approval from the Minister. As Young Media Australia has asked, what about 'community organisations with a bona fide, demonstrated interest in protection of children?'⁶⁷ Such organisations would have no defence under **proposed sections 474.21 or 474.24** if they conduct research into child pornography if they had not obtained written Ministerial approval. These provisions establish a cumbersome process for legitimate research. An alternative would be to specify a defence for using of a carriage service for 'child pornography' or 'child abuse material' if an organisation can demonstrate that educational/scientific research was for a legitimate purpose.

Range of legislation to consult

A more general issue raised by the introduction by the Bill of new offences applying to use of the internet is the added difficulty for publishers and producers who want to distribute through the internet of keeping track of the applicable laws. There is already a

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variety of State and Territory as well as Commonwealth legislation that must be consulted. Given that the classification scheme for the internet comes under the Broadcasting Services Act, it may have made the compliance task of internet publishers and producers easier if the Bill had amended that Act to include the new offences rather than inserting them in the Criminal Code.

Assisting suicide via a carriage service

Parliament may wish to consider whether it is appropriate under **proposed sections 474.30 to 474.32** of the Bill that:

- A person can commit an offence even if there is no suicide or even attempt at suicide, and that
- Material that 'directly or *indirectly*' counsels or incites suicide or promotes a particular method of suicide is sufficient for an offence to be committed. It might be questioned whether material that 'indirectly' or 'in passing' counsels, incites or promotes suicide should make a person liable for criminal prosecution. In addition, it might be questioned whether the use of 'indirectly' in this context provides a sufficiently certain legal standard for courts to measure conduct against.

The claim in the explanatory memorandum that 'Internet material that advocates or debates law reform on euthanasia' and 'Internet material dealing with suicide-related research'⁶⁸ will not 'generally' be caught by the proposed offences seems problematic. The Bill specifically does not provide any defence for such activities. If the intention behind publishing such research is to counsel suicide or promote a particular method of suicide, there will be an offence under the Bill.

Passage of the Bill in its current form will produce inconsistencies between State and Federal law on suicide-related material. For example, under section 31C of the NSW Crimes Act, a person must actually 'aid or abet' or 'incite or counsel' another person to commit or attempt suicide. So, for example, obtaining information in physical form from a library, perhaps with the intention of passing it to a terminally ill relative, would not be an offence under NSW law until actual assistance or incitement occurs (and suicide or an attempt results). Such an activity is also beyond the reach of Commonwealth law.

Under **proposed provision 474.30**, however, obtaining exactly the same material from the internet with the intention of passing it to the terminally ill relative for their use will be an offence punishable by a fine of up to \$110 000.

Range of offences in the Bill

It is unclear why the Government chose to introduce such a variety of new offences in the one Bill. As the South Australian Voluntary Euthanasia Society noted:

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It is particularly unfortunate that the proposed amendments link the controversial and ill-defined issue of the promotion of suicide to the distribution of child pornography, which is universally abhorrent. The presentation of these disparate issues as a package deal has the potential to distort debate and to bias the outcome.⁶⁹

Former Northern Territory Chief Minister Marshall Perron said the Federal Parliament should consider assisting suicide as a separate matter:

The argument is that lumping it in with other matters such as child pornography makes it almost unchallengeable and that is what the minister hopes...What parliamentarian is going to get up and speak against this in parliament. It is too hot to handle.⁷⁰

Other

See **Main Provisions** section for comments on **proposed sections 474.5** (wrongful delivery of communications), **474.15** (use of a carriage service to make a threat).

Endnotes

- 1 *R v Brislan; Ex parte Williams* (1935) 54 CLR 262 (radio); *Jones v Commonwealth* (1965) 112 CLR 206 (television).
- 2 54 CLR 262 at 280.
- 3 Ibid at 282–3.
- 4 *The Age*, 28 July 2004, p. 4.
- 5 Based on Arts Law Centre of Australia, 'Classification and Censorship' at <http://www.artslaw.com.au/reference/infoclassification/index.html>; and Halsbury's Laws of Australia, 80-1985, 'Censorship' 175–6.
- 6 Specific internet censorship regulation was introduced by the [Broadcasting Services Amendment \(Online Services\) Act 1999](#).
- 7 Explanatory memorandum p. 37. For further background on regulation of internet content, see Department of Communications, Information Technology and the Arts, 'Broadcasting and Online Regulation' at http://www.dcita.gov.au/Article/0,,0_1-2_10-3_481-4_13871,00.html
- 8 http://www.aph.gov.au/library/intguide/sp/censorship_ebrief.htm. Available on-line only.
- 9 Explanatory memorandum, p. 33.
- 10 Section 18C.
- 11 Section 26.
- 12 E.g. *Anti-Discrimination Act 1977* (NSW) sections 20C and 20D.

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- 13 *Censorship Act 1996* (WA) section 60.
- 14 *Ibid*, section 3.
- 15 *Classification of Publications Act 1991* (Qld), Part 3.
- 16 *Ibid*, section 3.
- 17 This paragraph based on Lawbook Company, *Laws of Australia*, Chapter 8, Related Offences Part B, Suicide, 'Assisting Suicide Attempt' [192].
- 18 See:
<http://www.ag.gov.au/www/agdHome.nsf/AllDocs/28614E7E165BD55DCA256E55000B56F6?OpenDocument>.
- 19 Hon. Daryl Williams, Minister for Communications, Information Technology and the Arts, *News Release* 109/04, 15 July 2004.
- 20 http://www.dcita.gov.au/download/0.2720.4_119499.00.pdf.
- 21 Telecommunications Act section 7, emphasis added.
- 22 EFA describes itself as 'a non-profit national organisation representing Internet users concerned with on-line freedoms and rights', see <http://www.efa.org.au/AboutEFA/#who>.
- 23 EFA submission in response to the Exposure Draft of the Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004 and associated Explanatory Notes, see <http://www.efa.org.au/Publish/efasubm-agd-teleco.html#47415>.
- 24 See definitions in **proposed section 473.1**.
- 25 Explanatory memorandum, p. 31.
- 26 For example, section 21 of the *Crimes Act 1958* (Victoria) provides that:
A person who, without lawful excuse, makes to another person a threat to inflict serious injury on that other person or any other person-
 - (a) intending that that other person would fear the threat would be carried out; or
 - (b) being reckless as to whether or not that other person would fear the threat would be carried out-is guilty of an indictable offence.
Penalty: Level 6 imprisonment (5 years maximum).
- 27 Explanatory memorandum, p. 33.
- 28 *Ibid*.
- 29 Criminal Code section 5.4.
- 30 EFA, *op. cit*.

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- 31 Senator Alston, Minister for Communications, Information Technology and the Arts, and Senator Ellison, Minister for Justice and Customs, *Joint Media Release*, 153/03, 20 August 2003.
- 32 EFA, op. cit.
- 33 Subsection 85ZE(2)
- 34 Explanatory memorandum, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004, p. 14.
- 35 EFA, op. cit.
- 36 Proposed section 473.1 states that 'material' includes material in any form, or combination of forms, capable of constituting a communication. 'Communication' in turn is defined in **Schedule 1 item 19** of the Bill.
- 37 Explanatory memorandum, pp. 38, 42
- 38 Ibid, p. 44.
- 39 Ibid, p. 45.
- 40 Ibid, p. 51.
- 41 Ibid, p. 52.
42. Democrats media release 04/302 19 April 2004.
- 43 Letter to Minister for Justice and Customs, Senator Ellison, 12 April 2004, published at <http://www.saves.asn.au/resources/newsletter/jul2004/item3.htm>.
- 44 Explanatory memorandum, p. 52.
- 45 Ibid, p. 63.
- 46 The High Court has held that there is a 'nationhood power' implied in the Constitution allowing the Commonwealth to legislate for matters which are 'inherently national'.⁴⁶ (*Davis v Commonwealth* (1988) 166 CLR 79).
- 47 Section 51(1) Constitution.
- 48 Section 51(20) Constitution.
- 49 Section 51(29) Constitution.
- 50
[http://www.law.gov.au/www/rwpattach.nsf/viewasattachmentPersonal/5DE0B9AA3D0C3CA5CA256BB300049FDA/\\$file/modelcode_ch8_publicorder_offences.pdf](http://www.law.gov.au/www/rwpattach.nsf/viewasattachmentPersonal/5DE0B9AA3D0C3CA5CA256BB300049FDA/$file/modelcode_ch8_publicorder_offences.pdf)
- 51
<http://www.ag.gov.au/www/agdHome.nsf/AllDocs/RWPF2336E9517064C20CA256E5B000E639D?OpenDocument>
- 52 Explanatory memorandum, p. 71.
- 53 Ibid, p. 75.

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- 54 Ibid, p. 76.
- 55 Ibid.
- 56 Ibid, p. 78.
- 57 Ibid.
- 58 Ibid, p. 80.
- 59 Section 6.
- 60 EFA, op. cit.
- 61 Ibid.
- 62 See e.g. 'Oz trial lifted lid on porn squad bribery', at <http://pers-www.wlv.ac.uk/~fa1871/oztrial.htm>, from Guardian Unlimited Website, 13 November 1999
- 63 Peter Hogg, *Constitutional Law of Canada* (1992), p. 864.
- 64 (1943) 67 CLR 58 at 82.
- 65 (2003) 211 CLR 476 at 513.
- 66 EFA, op. cit.
- 67 Young Media Australia, *Submission on the Exposure Draft of the Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004*, April 2004.
- 68 Explanatory memorandum, p. 52.
- 69 <http://www.saves.asn.au/resources/newsletter/jul2004/item3.htm>
- 70 *Sunday Territorian*, 2 May 2004, p. 4.

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