



Criminal Code Amendment (Suicide Related Material Offences) Bill 2005

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Criminal Code Amendment (Suicide Related Material Offences) Bill 2005

Date Introduced: 10 March 2005

House: House of Representatives

Portfolio: Justice and Customs

Commencement: Sections 1-3 commence on Royal Assent. The operative sections of the Bill, contained in Schedule 1, will commence six months after Royal Assent.

Purpose

The Bill introduces new offences of using a 'carriage service'¹ (the internet, emails, mobile and fixed telephones, faxes, radio and TV) for the purposes of counselling or inciting suicide, or promoting or providing instruction on a particular method of suicide. Possession or supply etc of material that is intended to be used for such offences is also itself an offence.

Background

The recent origins of the Bill

The suicide-related offences created by this Bill were originally contained in the Crimes Legislation Amendment (Telecommunications Offences and other Measures) Bill 2004.² That 'omnibus' Bill, introduced on June 24 2004, contained a whole range of offences, including offences related to child pornography and internet 'grooming' of minors for sexual purposes.

The suicide-related offences were subsequently excised from the omnibus Bill and reintroduced without change on 4 August in the Criminal Code Amendment (Suicide Related Material Offences) Bill 2004. That Bill was briefly debated in the House of Representatives on 11 August 2004. The ALP supported the Bill, although it expressed concerns about whether it might criminalise forms of debate on law reform regarding voluntary euthanasia. Accordingly, the ALP foreshadowed that they would move an amendment in the Senate 'which provides the offence does not apply to the extent that it would infringe the implied constitutional freedom of political communication'.³ The then Greens member for Cunningham, Michael Organ, opposed the Bill.⁴ The Bill did not reach the Senate before the proroguing of Parliament on 31 August 2004.

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Constitutional power over telecommunications

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).⁵ 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'.⁶

The court also rejected the notion that section 51(5) was restricted to services for communication between individuals.⁷ 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 borrowing a book from library to obtain suicide related material in physical form could not validly be subject to a Commonwealth law. Any offence in such circumstances would be a matter for State law.

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 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.⁸ 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.

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(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.

The Bill and the implied freedom of political communication

The Criminal Code Amendment (Suicide Related Material Offences) Bill 2004 was referred to the Senate Legal and Constitutional Legislation Committee. Whilst the Committee discontinued the inquiry due to the proroguing of Parliament on 31 August 2004, a number of submissions were received before this. One of the submissions was from the Gilbert and Tobin Centre of Public Law at the University of New South Wales. In part, the submission stated:⁹

It has been suggested that material such as communication about law reform on voluntary euthanasia would not be criminalised by the legislation. However, the drafting of the bill does not guarantee compatibility with the Constitution. The Bill requires that, in order for an offence to be made out, the accused must have an intent that the material incite suicide. Section 5.2 of the Commonwealth *Criminal Code* defines intention 'with respect to a result' as being satisfied where a person 'means to bring [that result] about or is aware that it will occur in the ordinary course of events'. Once information is posted on the internet, it is arguably within the awareness of the individual posting it that the information may be accessed by a person considering committing suicide. If the content is such that it could be considered as 'directly *or indirectly*' counselling or inciting suicide - despite a primary focus on law reform - an offence may be committed even if there is, in fact, no suicide or attempt at suicide. The possibility thus exists that the amendment could encompass debate about law reform.

Such communication might also be protected by the implied freedom of political communication derived by the High Court from the Constitution in cases such as *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. To the extent that this is the case, the legislation could be struck down as unconstitutional.

A way of countering this possibility would be to insert a savings clause into the legislation to indicate that it does not apply to the extent that it limits political communication. A model for this is provided by section 34VAA(12) of the *Australian Security Intelligence Organisation Act 1979 (Cth)*, which states:

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

A similar provision can be found in other Acts, including in section 73 of the *Olympic Insignia Protection Act 1987 (Cth)* and section 44 of the *Spam Act 2003 (Cth)*.

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Another option would be to limit the definition of what is proscribed to exclude political communication in the same way as does section 9 of the *Tobacco Advertising Prohibition Act 1992* (Cth). Section 9 in defining ‘tobacco advertisement’ states:

Exception-political discourse

(1A) To remove any doubt, it is declared that if:

- (a) something (*the advertisement*) does not promote, and is not intended to promote, any particular tobacco product or particular range of tobacco products; and
 - (b) the advertisement does not promote, and is not intended to promote, smoking; and
 - (c) the advertisement relates solely to government or political matters;
- the advertisement is not a tobacco advertisement for the purposes of this Act

One or other of the above options would seem a sensible measure to protect the Bill from potential unconstitutionality.

The Bill has been altered to take account of the type of concerns expressed above, although the form of the amendments are different from the suggestions contained in the submission to the Committee. The amendments are discussed in the main provisions section of this Digest.

Main Provisions

Schedule 1 proposes three offences be inserted in the *Criminal Code Act 1995* (the Criminal Code).

There are three elements to the **new subsection 474.29A(1)** offence, all of which must be met. They are:

- the use of a carriage service to access, cause to be transmitted, make available, publish or distribute material
- the material must directly or indirectly counsel or incite suicide, and
- the relevant person must intend either to use to the material themselves to counsel or incite suicide, or that it be used by another person to counsel or incite suicide.

The **new subsection 474.29A(2)** offence essentially has similar elements, except the material must promote, or provide instructions on, a particular method of committing suicide. The maximum penalty for both offences is 1,000 penalty units (\$110,000) for a person or five times that for a corporation.

Due to the application of section 5.6 of the Criminal Code, a person need only be ‘reckless’ regarding the second element above (ie whether material directly or indirectly counsels or incites suicide or promotes or provides instruction of a particular method of

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committing suicide).¹⁰ Neither the second reading speech nor the Explanatory Memorandum provides guidance on the situations in which material would be considered to ‘indirectly’ promote or provide instruction.

The issue of ‘intention’ in the third dot point has prompted considerable discussion over the possible scope of the offences. According to the Gilbert and Tobin submission reproduced above, the Criminal Code definition of ‘intention’ might cause problems because, should a person put material on the internet, it might be difficult for them to refute the proposition that they were ‘aware’ that it might be accessed by someone who would then use it to counsel suicide etc. To avoid this, a defence has been added that was not contained in the Criminal Code Amendment (Suicide Related Material Offences) Bill 2004. **New subsections 474.29A(3)-(4)** provide that if a carriage service is used to engage either in public discussion or advocacy of law reform with respect to euthanasia or suicide, no offence is committed if the person *does not intend* the material to be used to counsel suicide etc.

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

The Explanatory Memorandum notes that Customs Regulations are also being amended to prohibit the import or export of documents relating to construction or use of ‘suicide kits’.¹¹

The third proposed offence in the Bill is contained in new subsection 474.29B(1). Again, this has three elements that must be met:

- the possession, control, production, supply or obtaining of material
- the material directly or indirectly counsels or incites suicide, or promotes or provides instructions of a particular method of committing suicide.
- the person in possession, control etc intends that it be used by themselves or another in committing an offence against **new section 474.29A**

Note that under subsection 9.3(1) of the Criminal Code, a person can be criminally responsible for an offence even if they are ignorant of other legislation that affects the operation of the offence. Thus the fact a person did not know that certain actions would constitute an offence under **new section 474.29A** would not alter their potential criminal responsibility under **new subsection 474.29B(1)**. Note that under **new subsection 474.29B(2)**, a person may still commit an offence against **subsection 474.29B(1)**, even if for some reason it is impossible to commit a **new section 474.29A** offence.

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New subsection 474.29B(1) also carries a maximum penalty of 1,000 penalty units (\$110,000) for a person or five times that for a corporation.

In relation to **new subsection 474.29B(1)**, the Explanatory Memorandum comments:¹²

The proposed offence covers a broad range of preparatory conduct undertaken with the intention to commit a primary offence. As an example, 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 for the purpose that it be used by another person to commit suicide. Proposed sections 473.2 and 473.3 in the Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (no.2) 2004 are intended to outline situations that are considered 'possession or control of material in the form of data' or 'producing, supplying or obtaining material in the form of data' for the purposes of this proposed offence.

Under the Bill, there would be situations where no offence occurs even where a carriage service was used to obtain suicide-related material that was later used to counsel or assist suicide. For example, if a person downloaded material via the internet only for the purposes of academic research, but later provided it to a terminally ill friend for the purposes of assisting their suicide, the first person would not have the necessary intention to commit a **new section 474.29A** offence. However, depending on the circumstances, the later action may be an offence under State or Territory law.

Concluding Comments

In some instances, the offences created by the Bill go beyond equivalent offences under State law. 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). Under **new provision 474.29B(1)**, 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.

The Bill also does not require any attempt to commit suicide to occur in order for an offence to occur. Certainly in the case where a person places information or an opinion on the internet where it may have very wide distribution and unpredictable consequences this is appropriate. Whether this is always so where material is passed only between two individuals is a matter that Parliament may wish to consider.

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The main provision sections of this Digest also raised questions about whether the Bill would apply to private telephone conversations and the like. In addition, it also highlighted the lack of guidance on the situations in which material would be considered to 'indirectly' promote or provide instruction, an issue that may be crucial to determining whether an offence has occurred.

Endnotes

- 1 Formally, a 'carriage service' is defined in section 7 of the *Telecommunications Act 1997* as means a service for carrying communications by means of guided and/or unguided electromagnetic energy.
- 2 Parts of this Digest are drawn from the Digest for that Bill.
- 3 Mr Robert McClelland MP, *House of Representative Debates*, 11 August p 32473.
- 4 *House of Representative Debates*, 11 August p 32477.
- 5 *R v Brislan; Ex parte Williams* (1935) 54 CLR 262 (radio); *Jones v Commonwealth* (1965) 112 CLR 206 (television).
- 6 54 CLR 262 at 280.
- 7 *ibid.* at 282-3.
- 8 This paragraph based on Lawbook Company, *Laws of Australia*, Chapter 8, Related Offences Part B, Suicide, 'Assisting Suicide Attempt' [192].
- 9 See http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/suicide/submissions/sub21.pdf
- 10 That is, they need not affirmatively *know* that the material counsels suicide etc. Recklessness is defined in the Criminal Code as that 'he or she is aware of a substantial risk that the circumstance exists or will exist and having regard to the circumstances known to him or her, it is unjustifiable to take the risk'.
- 11 At p. 3.
- 12 At p. 4.

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