

CHAPTER THREE

ISSUES

3.1 This chapter outlines five main issues raised during the inquiry, which include:

- The Constitutional validity of certain provisions of the Bill;
- national consistency;
- access to materials for legitimate purposes;
- defining and interpreting societal standards; and
- double jeopardy.

3.2 The Committee notes that the inquiry process was conducted over a short period of time. However, the Committee also notes that the Attorney General's department sought public comments on the exposure draft of the Bill. They received approximately 60 submissions which raised a number of issues. A representative from the Attorney General's department gave evidence to the Committee that every effort was made to address concerns in the redrafting of the Bill¹.

3.3 In the four submissions that were received by the Committee, only a limited number of concerns were raised. Whilst also commenting on the short time-frame of the Committee's inquiry, Electronic Frontiers Australia (EFA) noted in their submission:

Many of the numerous issues and concerns raised in our April submission were addressed and resolved to EFA's satisfaction by the Attorney-General's Dept prior to introduction of the proposed legislation into Parliament on 24 June 2004.²

3.4 At the hearing, the Attorney-General's Department and Australian Federal Police were questioned on the issues raised by the EFA submission, and those raised in the Bill's Digest³ of the Bill.

Constitutional Matters

3.5 The Bills Digest questioned whether parts of proposed section 473.4 of the Bill might be too vague to be regarded as 'law' in accordance with section 51 of the Constitution. The Bills Digest states:

1 *Committee Hansard*, 9 August 2004, p.6

2 Electronic Frontiers Australia, *Submission 1*, p.1.

3 Prince P and Jordan R, 2 August 2004, '*Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004*', Information and Research Services Parliamentary Library, Bills Digest No. 13, 2004 – 05.

..... 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.

3.6 In relation to the above statement the Attorney General's department stated in a submission to the Committee:

The provisions of the Bill are constitutionally valid. The provisions contain an explicit link with a subject within constitutional power, i.e. a telecommunications service (see section 51(v) of the Constitution). Moreover, the relevant prohibition is not discretionary in the sense considered in the joint judgement in *Plaintiff S157 v The Commonwealth* (2003) 195 ALR 34 (at paragraph 102). It operates by reference to words whose meaning is capable of being ascertained by a court. The matters to be taken into account under section 473.4 are also described in objective terms and could be the subject of evidence or judicial notice by a court.⁴

National Consistency

3.7 The Explanatory Memorandum to the Bill states that "updating and moving existing Crimes Act offences into the Criminal Code is a part of the process of placing all the Commonwealth's serious offences in the Code".⁵ During the hearing the Committee asked a representative of the Attorney General's department whether the Bill had been referred to the Model Criminal Code Committee. The response was that:

Aspects of the bill do come from the Model Criminal Code Committee. The credit card skimming aspect and the contamination of goods aspect were both developed by the Model Criminal Code Committee. To get the states interested you have to have offences where we have a shared interest in terms of enactment. Telecommunication offences are an area of exclusive Commonwealth jurisdiction. At the edges there are some offences where there is shared jurisdiction. The one that comes to mind is the grooming offence. There is certainly a grooming offence in Queensland. But that is basically the exception. These offences are primarily offences concerned with federal jurisdiction. So that is the reason. Apart from the credit card skimming the focus has been on the double jeopardy issue and a few other issues.⁶

3.8 The Bills Digest questioned the relevance of proposed section 474.17, arguing Parliament may wish to consider whether it adds any useful regulation of the internet

4 Attorney-General's Department, *Submission 5*, p.2.

5 *Explanatory Memorandum*, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No.2) 2004, p.1.

6 *Committee Hansard*, 9 August 2004, p.3.

and other 'carriage services' beyond that which already exists under State and Territory law.⁷

3.9 A representative of the Attorney General's department responded to this point:

[t]here has always been an equivalent offence to this in the Crimes Act. We have updated it and moved it across to the Criminal Code as part of the menu of offences that are in this part of the code. Clearly, cross-border use of telecommunications is very common. There must be some value in having the same rules applying wherever you are in Australia⁸.

Access to Material for Legitimate Purposes

3.10 The Committee asked the Attorney-General's Department in the hearing whether there were any outstanding issues following the consultation process, a representative of the Attorney-General's Department stated:

No, I suppose one of the most difficult issues that we did face was the whole issue of research into paedophilia and making sure that we had an appropriate mechanism for dealing with that. We had a general test, which related to research, and some of the feedback we got was that this had actually been misused by people in the past. Consequently we tightened up the provisions in relation to research. We spoke to the Australian Institute of Criminology about just how prevalent this research was, and the information we received was that it was not very prevalent. To make sure that there was certainty with the provisions, we decided that where it was specific research into paedophilia we would have an approval process from the minister for justice. We were concerned that it was difficult to get a good general formula.

You will find that in 474.21 on page 27 of the bill. There we have got a provision which says that a person is not criminally responsible for these offences because of engaging in particular conduct if the conduct is of public benefit and does not extend beyond what is of public benefit. So you can get approved research but, if you get the approval, that is not a blank cheque; it still has to be to the public benefit. This is designed to provide an appropriate authorisation, but at the same time it is attempting not to allow someone to operate under the guise of it. That was an interesting issue that came out of public consultation.⁹

3.11 These defence provisions relating to child pornography and abuse are contained respectively in proposed sections 474.21 and 474.22. The Committee notes

7 Prince P and Jordan R, 2 August 2004, '*Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004*', Information and Research Services Parliamentary Library, Bills Digest No. 13, 2004 – 05, p.21

8 *Committee Hansard*, 9 August 2004, p.11.

9 *Committee Hansard*, 9 August 2004, p.3

that to be successful these defences require that the conduct is of public benefit, does not extend beyond what is of public benefit, and is necessary for or of assistance in:

- (a) enforcing a law of the Commonwealth, a State or Territory; or
- (b) monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or a Territory; or
- (c) the administration of justice; or
- (d) conducting scientific, medical or educational research that has been approved by the Minister in writing for the purposes of this section.¹⁰

3.12 This would mean that for researchers (who do not satisfy criteria (a), (b) or (c) above) to access child pornography or abuse material, they would be required to obtain approval from the Minister in writing.

3.13 The Committee asked the Attorney-General's Department whether there was a precedent for the Crown to issue permission for research in such a way. It was explained:

I suppose the area that comes to mind is drug legislation. The drug conventions provide exceptions in relation to medical and scientific research for any prohibited drug basically, so that is quite controlled and there is approval of such a drug. Certainly at state level that approval is by ministers and I think that at federal level it might be the secretary of the department of health. That is the closest parallel I can think of. That would probably be a lot more common than this. We were always very hesitant to have these approval processes, but in this case we were informed by the Institute of Criminology that this type of research was fairly rare. This meant that we had an opportunity to have a really clear outcome¹¹.

Defining and Interpreting Societal Standards

3.14 The Bill would provide that in determining whether material under proposed section 474.17 is 'offensive', factors to be taken into account include:

- (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)¹²

¹⁰ proposed subsections 474.21(2) and 474.24(2)

¹¹ *Committee Hansard*, 9 August 2004, p.3

¹² Proposed section 473.4

3.15 A representative from the Attorney-General's Department noted that "in relation to determining whether the material is offensive, those factors have been taken from the national classification scheme"¹³. They also stated that:

...the definition of 'indecent' used in the proposed grooming offence was drawn from the *Model Criminal Code*. Part 5.2 of the Code deals with sexual offences and it is in this context that 'indecent' is defined in section 5.2.2 to mean 'indecent according to the standards of ordinary people'. A copy of the explanation of this definition and its application is provided in pages 105 and 107 of the Model Criminal Code Officers Committee Report of 1999 on *Sexual Offences Against the Person* (see Attachment A).

The definition of 'indecent' used in the proposed grooming offence is consistent with the definition of 'act of indecency' used in the child sex tourism offences in Part IIIA of the *Crimes Act 1914*. Both definitions rely on an objective standard, linked to the views of ordinary people, about what is or is not indecent.¹⁴

3.16 During the hearing the Committee inquired as to how such definitions would be applied in practice and who would apply it. Representatives of the Attorney General's Department stated:

.... It is one of these things [definitions] where the courts have traditionally left it to the jury, and that is what is intended by it. ...

....there are factors to help the jury or the decider of fact determine what is offensive. I think it is appropriate to have some consistency with what other areas of government have to look at when determining whether other material is offensive. When they are looking at the particular degrees of offensiveness it is still useful to have a list of factors to take into consideration when determining that.

Of course, you have to bear in mind, as you do, that we are talking about the criminal standard of proof. The prosecution has to prove these offences. Consequently, if there were some uncertainty, it would not weigh against the accused; it would weigh more against the prosecution¹⁵.

Double Jeopardy

3.17 Electronic Frontiers Australia stated in their submission to the inquiry that they "oppose the proposed sections 474.20 and 474.23 if the rules of double jeopardy do not apply to a situation" regarding possessing, controlling, production, supplying or obtaining child pornography material for the use through a carriage service or "whether a person could be prosecuted for possession with intent of use in

13 *Committee Hansard*, 9 August 2004, p.4

14 Attorney-General's Department, *Submission 5*, p.2.

15 *Committee Hansard*, 9 August 2004, pp. 5, 8

commission of an offence under C'th law and also simple possession under State/Territory law"¹⁶.

3.18 The Committee raised this concern with the representatives of the Attorney General's Department who responded that:

We do not get rid of the rules of double jeopardy in this law. The rules of double jeopardy still apply. Those principles are contained in our Crimes Act. So if there is an issue of double jeopardy, those rules will apply. As I mentioned earlier regarding the Model Criminal Code Committee, a lot of work has been done on the rules of double jeopardy in order to clarify them and work out what are appropriate exceptions and, hopefully, to codify them. At the moment we rely on the Crimes Act. The rules of double jeopardy rely heavily on the common law. So if there is a question about double jeopardy when charging offences, the DPP will not touch it with a barge pole.

The Committee's view

3.19 The Committee notes that submissions to the inquiry did not raise any substantial concerns with the Bill, and the most substantial submission noted that the consultation process had allowed many concerns to be addressed.

3.20 In their submission to the inquiry the Attorney-General's Department provided a table detailing the concerns raised in the consultation process and the amendments that were made to the draft Bill as a result.

3.21 The Committee recommends that the Bill proceed.

Recommendation 1

3.22 The Committee recommends that the Bill proceed.

Senator Marise Payne

Chair