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The Secretary
Senate Legal and Constitutional Legislation Committee
Parliament House
Canberra ACT 2600

Dear Secretary

Inquiry into the Provisions of the Criminal Code Amendment (Suicide Related Material Offences) Bill 2004

Thank you for the opportunity to make a submission to this inquiry.

The Criminal Code Amendment (Suicide Related Material Offences) Bill 2004 touches upon a sensitive and controversial debate. We make submissions below about two issues in regard to freedom of speech.

The first is a constitutional issue. 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.

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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)*.

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 second issue is a question of public policy. The legislation in its current form relates to a very broad range of communications, ranging from television and the internet to mobile and fixed telephones. As such, it proscribes not only public or mass communication, but also private communications between individuals. This is likely to have a significant impact on the capacity of individuals who are seriously or terminally ill to access information about suicide. The act of suicide itself is not prohibited by the law of any state or territory, although each jurisdiction contains provisions criminalising acts such as aiding or abetting or procuring suicide. This raises an issue which merits consideration: the degree to which we wish to protect both freedom of speech which falls outside the definition of ‘political communication’, and the right of citizens to access information and make informed choices. We are concerned that legislation such as this, in limiting communication about an activity that is not illegal and in regulating the subject matter beyond existing State law, may go too far in restricting free communication.

Yours sincerely

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