

2004-2005

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CRIMINAL CODE AMENDMENT (SUICIDE RELATED MATERIAL
OFFENCES) BILL 2005

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Justice and Customs,
Senator the Honourable Chris Ellison)

Criminal Code Amendment (Suicide Related Material Offences) Bill 2005

General Outline

The Criminal Code Amendment (Suicide Related Material Offences) Bill 2005 will insert new offences into the *Criminal Code* dealing with use of a carriage service to access, transmit or otherwise make available suicide related material, and possession, production, supplying or obtaining suicide related material for use through a carriage service (suicide related material offences).

The measures in this Bill complement the measures in the Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (no. 2) 2004. That Bill will repeal the telecommunications offences in the *Crimes Act 1914* and replace them with new and updated telecommunications offences in the *Criminal Code*. 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.

Since the enactment of the existing telecommunications offences in 1989, the telecommunications environment has changed substantially, both in terms of the regulatory environment and the technology available. The offences account for this change and better reflect the community's increased dependence on telecommunications and the harm that can be done by misuse or disruption.

Financial Impact

There is no financial impact flowing directly from the offence provisions of this Bill.

NOTES ON CLAUSES

Clause 1 Short title

This is a formal clause which provides for the citation of the Bill.

Clause 2 Commencement

This clause set out when the various parts of the Bill commence.

Sections 1-3 of the Bill (the short title, the commencement and the schedules provision) will commence on the day that the Bill receives Royal Assent.

Schedule 1 of the Bill, which inserts new suicide related material offences into the *Criminal Code Act 1995*, will commence the day after a period of six months after the Bill receives Royal Assent.

Clause 3 Schedule(s)

This clause makes it clear that the Schedules to the Bill will amend the Acts set out in those Schedules in accordance with the provisions set out in each Schedule.

SCHEDULE 1 – SUICIDE RELATED MATERIAL OFFENCES

This schedule will insert two suicide related material offences into the *Criminal Code*: proposed sections 474.29A and 474.29B.

Proposed section 474.29A Using a carriage service for suicide related material

Proposed subsection 474.29A(1) will make it an offence for a person to use a carriage service to access, transmit to themselves, transmit generally, make available, or publish or otherwise distribute material that directly or indirectly counsels or incites suicide, with the intention that they, or another person, will use the material to counsel or incite suicide. 'Access' is intended to be defined in proposed section 473.1 of the Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (no.2) 2004 which is likely to be enacted earlier than this Bill. 'Access' is defined in that section to include the display of material by a computer or any other output of the material from a computer, the copying or moving of the material to any place in a computer or to a data storage device and the execution of a program (where the material is a program).

Proposed subsection 474.29A(2) will make it an offence for a person to use a carriage service to access, transmit to themselves, transmit generally, make available, or publish or otherwise distribute material that directly or indirectly promotes, or provides instruction on, a particular method of committing suicide, with the intention that they, or another person, will use the material to promote or provide instruction on that method of committing suicide. Proposed subsection 474.29A(2) will also make it an offence to engage in the conduct, listed above, with the intention that the material be used by another person to commit suicide.

The proposed offences are intended to complement amendments to the *Customs (Prohibited Imports) Regulations 1956* (subregulation 3AA(2)) and the *Customs (Prohibited Exports) Regulations 1958* (subregulation 13GA(2)) prohibiting the physical importation and exportation of documents that promote the use of a device designed or customised to be used by a person to commit suicide (suicide kit), counsel or incite a person to commit suicide using a suicide kit, or instruct a person how to commit suicide using a suicide kit.

The maximum penalties for the proposed offences are 1000 penalty units, which is \$110,000 under the existing \$110 value for a penalty unit in section 4AA of the Crimes Act. The maximum fine will be \$550,000 for a body corporate under the provisions for calculating maximum fines in section 4B of that Act. These penalties are the same as the maximum penalty that applies to the illegal importation or exportation of documents related to suicide kits (see sections 233 and 233AB of the *Customs Act 1901*).

The proposed offences are particularly aimed at use of the Internet, email and other online applications and are intended to cover the range of activities that a person can engage in when using these. The types of activities covered by the conduct listed in paragraphs 474.29A(1)(a) and (2)(a) include, amongst others, viewing; copying; downloading; making available for viewing, copying or downloading; sending and exchanging.

The conduct listed in paragraphs 474.29A(1)(a) and (2)(a) must be accompanied by an *intention* that, respectively:

- the relevant material be used, by the person who engages in the offending conduct or another person, to counsel or incite suicide (in the case of subsection 474.29A(1)), or
- the relevant material be used by the person engaging in the offending conduct or another person, to promote a method of committing suicide or provide instruction on a method of committing suicide, or that another person use the material to actually commit suicide (in the case of subsection 474.29A(2)).

As the offences in proposed subsections 474.29A(1) and (2) require the *intention* that the relevant material be used in a particular way for the offence to be proven, no special defences for the proposed offences are necessary. (Of course, the general defences in Chapter 2 of the *Criminal Code* will apply.) This is because 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.

Under paragraphs 474.29A(1)(b) and (2)(b), the relevant material must in fact be, respectively:

- material that directly or indirectly counsels or incites suicide (in the case of subsection 474.29A(1)), or

- material that directly or indirectly promotes, or provides instruction on, a particular method of committing suicide (in the case of subsection 474.29A(2)).

These constitute physical elements of the respective offences that are circumstances. By application of the default fault elements in section 5.6 of the *Criminal Code*, the fault element of *recklessness* will apply to them. ‘Recklessness’ as it applies to a circumstance is defined in section 5.4 of the *Criminal Code*.

These offences are not intended to capture Internet material that advocates or debates law reform on euthanasia and/or suicide related issues. Accordingly, proposed subsections 474.29A(3) and (4) have been inserted to make it clear that the offences in subsections 474.29A(1) and 474.29A(2) only apply where the person intends to use the material concerned to counsel or incite suicide, or to promote or provide instruction on a method of committing suicide. A person is not guilty of these offences merely because the person uses a carriage service to engage in public discussion or debate about, or advocates reform of the law relating to, euthanasia or suicide.

Proposed section 474.29B Possessing, producing, supplying or obtaining suicide related material for use through a carriage service

Proposed subsection 474.29B(1) will make it an offence for a person to possess or control suicide related material (as covered by proposed section 474.29A), or produce, supply or obtain suicide related material with the intention that it be used, by that person or another person, in committing an offence against proposed section 474.29A (a primary offence). A specific preparatory offence is necessary, because this conduct would not always be caught by the extension of criminal liability in Division 11 of Part 2.4 of the *Criminal Code*. The proposed offence will carry the same maximum penalty as the primary offences of 1000 penalty units, which is \$110,000 under the existing \$110 value for a penalty unit in section 4AA of the Crimes Act. The maximum fine will be \$550,000 for a body corporate under the provisions for calculating maximum fines in section 4B of that Act.

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.

Subsection 474.29B(2) provides that a person can be found guilty of an offence against subsection 474.29B(1), even if it is impossible to commit a primary offence. This provision 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.

Subsection 474.29B provides that it is not an offence to attempt to commit an offence against subsection 474.29B. Subsections 474.29B(2) and (3) of the proposed offence are drawn from the offence of *attempt* under section 11.1 of the *Criminal Code*. Given proposed section 474.29B's preparatory nature in relation to the primary offence, it is appropriate that it contain such provisions.