

20 June 2008

Assistant Secretary  
Criminal Law Branch  
Attorney-General's Department  
Robert Garran Offices  
National Circuit  
Barton, ACT 2600.

Dear Sir/Madam,

**Crimes Legislation Amendment (Telecommunications Offences and Other Measures)  
Bill 2004 – Exposure draft 11/03/2004**

I refer to the request for submissions on the above exposure draft Bill and set out below on behalf of Liberty Victoria a small number of concerns about the Bill.

***Clause 474.16***

This provision would make it an offence to use a carriage service in a way that is “menacing, harassing or offensive”. Liberty Victoria considers the provision goes too far in outlawing conduct that is merely offensive. It cannot be doubted that, in numerous private telephone conversations every day, things are said that a reasonable person would regard as offensive. That ought not to give rise to criminal liability.

Reported decisions on the present s 85ZE of the Crimes Act (on which cl 474.16 is based) show that prosecuting authorities do not rely on the “offensive” limb of the section, and charges in such cases have been confined to allegations of menacing or harassing behaviour. However, this is simply a matter of prosecutorial discretion and it is undesirable that the criminal law should rely on this discretion to avoid undesirable results.

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The Explanatory Memorandum in para 150 says that the offence will be caused by “use that vilifies a person on the basis of their race or religion”. This appears to be directed to the “offensive” limb of the clause and also appears to be a reference to s 18C of the Racial Discrimination Act 1975. However, that provision only applies to acts “otherwise than in private”. Furthermore, “offensive” obviously covers a range of conduct beyond racial vilification.

It is therefore submitted that “offensive” should be deleted from cl 474.16(1)(b).

***Clauses 474.19(1) and 474.22(1)***

These provisions would create defences to the offences of possessing or using child pornography and child abuse material. Liberty is concerned that they do not go far enough in exempting genuine academic or artistic research. It recommends that “, other academic or artistic” be added after “medical” in cls 474.19(1)(b) and 474.22(1)(b).

***Clauses 474.23(1)(c), (2)(c), (3)(c), (3)(d), 474.24(1)(d), (2)(d) and 474.25(12)***

These provisions concern the offences of procuring and “grooming” persons under the age of consent for sexual activity. The concern is that they apply when the offender merely believes the other person to be under the age of consent, even though he or she is not. Thus a person could be convicted merely for a guilty mind in circumstances where there was no danger of a person under the age of consent being procured or “groomed” for sexual activity.

In the Explanatory Memorandum the justification given for this is that it will permit police “sting” operations. While such operations might be accepted, a different legislative solution should be found to preserve their effectiveness. This could be done, for example, by a formulation such as the following:

“the recipient is someone who is under the age of consent in relation to that sexual activity or is a law enforcement officer assuming a fictitious identity of a person under that age for the purpose of a criminal investigation”.

Clause 474.25(12) would then be unnecessary.

***Clause 474.24(1)(b) and (2)(b)***

Clause 474.24 would make it an offence to send “indecent” material to an underage person with a view to facilitating sexual activity with that person. However, there is no definition of “indecent”. Liberty Victoria considers it would be preferable to have a definition such as that contained in s 50AB of the Crimes Act.

***Clause 474.25***

Liberty Victoria supports the proposal for a uniform age of consent of 16 years in place of the provisions in the exposure draft which apply different ages of consent depending on the jurisdiction in which certain acts occur.

Please keep Liberty Victoria informed of the progress of the Bill. You may reply to me at the following address:

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Yours faithfully,

**Michael Pearce**