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Senate Legal and Constitutional Affairs Committee
Parliament of Australia
By email: legcon.sen@aph.gov.au

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Dear Committee,

Criminal Code Amendment (Harming Australians) Bill 2013 ('the Bill')

Thank you for the opportunity to make a submission to this inquiry. The Bill seeks to give unlimited retrospective application to the offences in Division 115 of the *Criminal Code Act 1995* (Cth). Division 115 was inserted by the *Criminal Code Amendment (Offences Against Australians) Act 2002* (Cth) (**'the 2002 Act'**) to facilitate the prosecution in Australia of acts of terrorism committed against Australians by foreigners on foreign soil, in the wake of the 2002 Bali bombings.

Our submission focuses on the compliance of the Bill with Australia's international law obligations, particularly in the areas of criminal jurisdiction, international counter-terrorism law, and international human rights law. In summary, the Bill:

- violates the prohibition on retrospective criminal laws in Article 15 of the ICCPR;
- likely exceeds the permissible exercise of extraterritorial criminal jurisdiction on the basis of the passive personality principle under public international law; and
- unjustifiably extends offences which are largely redundant in light of the availability of extensive federal terrorism and terrorist organisation offences.

Retrospective Criminal Laws

The 2002 Act received Royal Assent on 15 November 2002 but was made retrospective to 1 October 2002. The Bill seeks to remove all temporal limitations on the application of Division 115 offences, such that an act would be an offence under Australian law irrespective of whether it occurred before or after the commencement of the 2002 Act.

As recognised in the *Statement of Compatibility with Human Rights*, retrospective criminal laws are prohibited by Article 15 of the International Covenant on Civil and Political Rights (ICCPR), which binds Australia. The Statement nonetheless concludes that the Bill is compatible with human rights, because the offences to which the Bill relates already exist in other jurisdictions. Legally that view is entirely wrong.

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The Statement fundamentally misinterprets and misapplies Article 15 of the ICCPR. Article 15(1) relevantly provides that '[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed'. Article 15(2) is an exception which provides that a person may still be held responsible for international crimes which were not already codified in domestic law at the time of the conduct, namely genocide, war crimes, crimes against humanity, slavery, and torture.[1]

The effect of Article 15 is to require criminal liabilities in every national legal system to be prospectively knowable, or notified in advance, to those subject those liabilities. The sole exception concerns international crimes. Article 15 does not, and was not intended to, permit one national jurisdiction to retrospectively punish conduct on the basis that it was already criminalised in a foreign national jurisdiction but not locally.

Otherwise one jurisdiction could pluck offences from any of the 200 or so foreign legal systems at any time to impose retrospective liabilities within its own jurisdiction. Criminal liability would become radically indeterminate and arbitrary, resulting in grave unfairness to an accused. People could no longer securely know their criminal liabilities in advance. As a leading commentator observes, drawing on cases, Article 15 requires states 'to define precisely by law all criminal offences in the interest of legal certainty and to preclude the application of criminal laws from being extended by analogy'.[2]

The reference in Article 15(1) to 'national' law means that each national legal system must prospectively prescribe the scope of criminal liabilities. It does not mean, and has never been understood to mean in the jurisprudence, that a national law is not retrospective as long as some *other* nation's law already criminalises that conduct. This is obvious from the text, drafting history, and subsequent interpretation of Article 15(1).

Further, the offences in Division 115, including 'murder', 'manslaughter' and 'recklessly causing serious harm', may be defined differently in foreign jurisdictions. They can turn on subtle questions about the requisite mental state of the accused, which may not be understood uniformly across jurisdictions. Further, different defences may apply in a foreign jurisdiction – for example, where one country has legalised assisted euthanasia where it remains criminal in Australia.

It is conceivable, therefore, that a person could be found guilty of a crime in Australia notwithstanding that at the time of the offence they would not have been liable under either Australian *or* foreign law. While the Bill's retrospectively is purportedly justified on the basis that the conduct is already criminal elsewhere, there is no requirement in the elements of the offences that the prosecution must demonstrate that the conduct was criminal elsewhere (as, for instance, in the 'double criminality' rule in extradition law).

It has been suggested to this inquiry that the requirement of the Attorney-General's consent to a prosecution somehow vitiates the problem of retrospectivity. Legally that view is nonsense. Neither Article 15 nor general international law confers a right on a national minister to endorse retrospective criminal punishment, just as ministers enjoy no right to elect to violate other basic human rights standards. The rule is strict.

[1] Manfred Nowak, *UN Covenant on Civil and Political Rights: CPPR Commentary* (2nd ed, NP Engel, Kehl, 2005), 368.
[2] Manfred Nowak, *UN Covenant on Civil and Political Rights: CPPR Commentary* (2nd ed, NP Engel, Kehl, 2005), 360.

Extra-territorial Criminal Jurisdiction

The Bill proposes to temporally extend offences which already have an insecure jurisdictional basis in international law. Under international law, prescriptive criminal jurisdiction over crimes is primarily territorial. That is, a state can prescribe an act as criminal under its local law if that act occurs within its own territory.

The Bill seeks to extend Australia's controversial assertion of *extra-territorial* jurisdiction over any person who commits an act in a foreign country that harms an Australian. This basis of jurisdiction is known as the 'passive personality principle'. It is generally accepted that passive personality jurisdiction may be exercised in relation to a small number of serious transnational crimes concerning terrorism, [1] such as hijacking, hostage taking, attacks on protected persons and the like. However, there is little support in state practice for the extraterritorial extension of ordinary violent offences such as those which are covered by the Act and the Bill.

The passive personality principle should be deployed with caution for good reason, as it creates the risk of subjecting individuals to concurrent and potentially conflicting jurisdictions, and infringes the territorial sovereignty of foreign states. A person will often not know the nationality of a person with whom he or she comes into contact in a foreign place, and thus will often not know which foreign criminal laws may apply. As Judge Moore wrote in his dissenting opinion in *S.S. Lotus (France v Turkey)*,[2] should the passive personality principle be widely applied, 'an inhabitant of a great commercial city, in which foreigners congregate, may in the course of an hour unconsciously fall under the operation of a number of foreign criminal codes.'[3] He continued:

> '[T]his claim is at variance not only with the principle of the exclusive jurisdiction of a State over its own territory, but also with the equally well-settled principle that a person visiting a foreign country, far from radiating for his protection the jurisdiction of his own country, falls under the dominion of the local law and, except so far as his government may diplomatically intervene in case of a denial of justice, must look to that law for his protection.'[4]

The Act and the Bill risk generating tension with foreign states. A foreign state which protested against the exercise of Australian jurisdiction over an act committed on the foreign state's soil would have a stronger international legal claim.

Redundancy and overreach of 'offences against Australians'

The offences against Australians provisions in the Criminal Code should arguably be repealed altogether, not maintained and certainly not retrospectively extended. The Criminal Code now contains a very extensive suite of terrorism and terrorist organisation offences (many of which have been criticised for their expansiveness).

If the purpose of the offences of harming Australians overseas is to protect Australians from terrorism, then the proper course of action is to apply the terrorism offences. Counter-terrorism law is internationally mandated by UN Security Council resolution 1373 and 1566 and the numerous UN and other specialised sectoral anti-terrorism treaties adopted since the 1960s. Those instruments contain carefully agreed rules concerning the exercise of extraterritorial jurisdiction over terrorism and the definition of terrorist offences. Australia should not unilaterally apply unique and controversial extraterritorial offences which fall outside the ambit of international agreement.

Australia should not unilaterally impose its criminal law on other states' territories in a manner which circumvents the processes of agreeing treaties over many years.

We also note that the Bill would unjustifiably stretch the retrospectivity of Division 115 offences beyond its original limited purpose to prosecute the perpetrators of the 2002 Bali Bombings, to impose unlimited retrospective liability for unrelated acts.

Please be in touch if we can be of any further assistance.

Yours sincerely,

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Notes

[1] James Crawford, *Brownlie's Principles of Public International Law* (8th ed, Oxford University Press, 2012).
[2] 1927 PCIJ (Ser A) No 10 (7 September 1927).
[3] Ibid 92.
[4] Ibid.