



Australian Government
Attorney-General's Department
Criminal Justice Division

Senate Standing Committee on Legal and Constitutional Affairs
Inquiry into the Criminal Code Amendment (Harming Australians) Bill 2013

Attorney-General's Department submission

January 2014

Introduction

1. The Attorney-General's Department welcomes the opportunity to provide the Senate Standing Committee on Legal and Constitutional Affairs with this submission as part of the Committee's inquiry into the Criminal Code Amendment (Harming Australians) Bill 2013 (the Bill).
2. The Bill was introduced as a private senator's bill into the Senate by Senator Nick Xenophon on 11 December 2013. Schedule 1 of the Bill seeks to amend the *Criminal Code Act 1995* (Cth) (the Criminal Code) to give retrospective effect to the offences in Part 5.4 of the Criminal Code relating to harming Australians.

Overview of existing offences

3. The offences in Part 5.4 were introduced into the Criminal Code through the *Criminal Code Amendment (Offences Against Australians) Act 2002* (the Offences Against Australians Act) in response to the Bali Bombings in which 88 Australians were killed.
4. In accordance with Part 5.4, any person may be prosecuted in Australia for:
 - murder of an Australian citizen or resident outside Australia
 - manslaughter of an Australian citizen or resident outside Australia, or
 - intentionally or recklessly causing serious harm to an Australian citizen or resident outside Australia.
5. The justification for the offences when they were introduced into the Criminal Code in 2002 was to 'provide coverage for overseas attacks on Australian citizens and residents' in order to 'complement the existing terrorism legislation' and to provide a prosecution option 'where perpetrators are unable to be prosecuted under the terrorism legislation.'¹
6. In the Second Reading Speech for the Offences Against Australians Bill, the then Attorney-General, the Hon Daryl Williams QC MP, stated that the legislation would 'ensure there are no loopholes in terms of prosecuting terrorist acts involving murder overseas' and would 'provide a prosecution option where perpetrators are unable to be prosecuted under the terrorism legislation.'
7. The offences were granted Royal Assent on 14 November 2002 but were given very limited retrospective operation to commence on 1 October 2002. The Explanatory Memorandum for the Offences Against Australians Act stated:

While retrospective offences are generally not appropriate, retrospective application is justifiable in these circumstances because the conduct which is being criminalised – causing death or serious injury – is conduct which is universally known to be conduct which is criminal in nature. These types of offences are distinct from regulatory offences which may target conduct not widely perceived as criminal, but the conduct is criminalised to achieve a particular outcome.

¹ Explanatory Memorandum, *Criminal Code Amendment (Offences Against Australians) Act 2002*

Overview of the Bill

8. The Bill seeks to amend each of the offences in Part 5.4 of the Criminal Code by inserting the words 'whether before, on or after the commencement of this section'. The Explanatory Memorandum for the Bill states that the 'impact of this amendment will be that previous situations where an Australian citizen or resident has been harmed overseas may now be included under the offence provisions in that Division.'

Commonwealth criminal law policy regarding retrospectivity

9. Federal Parliament and successive governments have endorsed retrospective criminal offences only in rare circumstances and with strong justification, for example where there has been a need to address a gap in existing offences and moral culpability of those involved means that there is no substantive injustice in retrospectivity.

10. The basis for this position is that people are entitled to regulate their affairs on the assumption that conduct which is not currently a crime will not be made a crime retrospectively through backdating criminal offences. This accords with Australia's obligations in relation to Article 15 of the International Covenant on Civil and Political Rights ('ICCPR'), which 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'.

Comments on the amendments proposed by the Bill

11. The Attorney-General's Department considers that the retrospective application of the offences has not been sufficiently justified in the Explanatory Memorandum for the Bill.

12. As discussed above, when the offences in Part 5.4 were introduced, a 45-day retrospective application was permitted to cover the circumstances of the Bali bombings. This was on the basis that 'the conduct which is being criminalised...is conduct which is universally known to be conduct which is criminal in nature.'² These offences were not intended to have any further retrospective effect to cover other significant terrorist events involving Australians, including, for example, the September 11 bombings.

13. The Explanatory Memorandum for the current Bill similarly identifies 'the crimes of murder, manslaughter and serious harm to another person... already exist in other jurisdictions' as a justification that these offences should apply retrospectively. The Department considers that this is not sufficiently persuasive to permit retrospective application beyond the original 45 days, to the unlimited timeframe of 'before' the commencement date of 1 October 2002.

14. While the Department acknowledges that offences such as murder, manslaughter and intentionally or recklessly causing serious harm have long been recognised as criminal offences, the Department is concerned with the potential application of penalties that may arise from the proposed amendments. Article 15 of the ICCPR provides that a heavier penalty shall not be imposed 'than the one that was applicable at the time when the criminal offence was committed'. The penalties for the offences in the Offences Against Australians Act (namely 15 years imprisonment for recklessly causing serious harm, 20 years

² Explanatory Memorandum, *Criminal Code Amendment (Offences Against Australians) Act 2002*

imprisonment for intentionally causing serious harm, 25 years for manslaughter and life imprisonment for murder) are greater than those applicable for similar crimes of murder and manslaughter in certain Australian State jurisdictions, reflecting the seriousness of terrorism offences. Given that the Bill is intended to operate retrospectively, it is possible that the extension of these penalties may raise issues in relation to Australia's compliance with Article 15 of the ICCPR.

15. The Department is also concerned that the proposed amendments would be uncertain. In particular, it is unclear how far back the offences would apply given that the amendments only specify the timeframe as 'before' 1 October 2002. This would presumably give the offences retrospective effect as far back as Federation. In addition, while the Offences Against Australians Act provides that the Division 'is not intended to exclude or limit the operation of any other law of the Commonwealth or of a State or Territory' (104.5), the intended scope of the amendments is less clear. The object of the current Bill is broadly 'justice for Australian citizens and residents who were the victims of certain violent crimes committed before 1 October 2002 outside Australia'. The Explanatory Memorandum clarifies that '[t]he aim of this bill is to allow prosecutions under this division to apply to any case that occurred before this date and that meets the other criteria in the division.' Whilst the scope of the amendment does not explicitly extend beyond that of the original Act, the Department considers that greater specificity is required to ensure the law is sufficiently clear and consistent with Australia's obligations in relation to Article 15 of the ICCPR.

16. The Explanatory Memorandum states that this Bill 'extends the capacity for involvement of Australia law enforcement'. The offences in Part 5.4 do not, however, empower the Australian Federal Police or any other Australian law enforcement agency to exercise powers outside Australia. Any investigation for an offence under Part 5.4 would need to respect the sovereignty of the jurisdiction in which the alleged conduct occurred. Evidence may be located outside Australia, which would mean that the cooperation of that country would be needed to obtain evidence for any Australian prosecution. Furthermore, where suspects are located outside Australia, prosecution of the offences in Australia will still depend on the country in which the suspects are located agreeing to their extradition to Australia. The proposed retrospectivity of this Bill would make it difficult to satisfy a common requirement in extradition treaties that dual criminality be assessed at the time the conduct occurred.