

Criminal Code Amendment (Harming Australians) Bill 2013

Sponsor: Senator Xenophon

Introduced: Senate, 11 December 2013

Summary of committee concerns

1.122 The committee seeks further information to determine whether the bill is compatible with the prohibition against retrospective criminal laws.

Overview

1.123 This bill proposes to extend the application of existing offences in the *Criminal Code Act 1995* relating to harming Australians overseas. These offences criminalise the murder or manslaughter of, or causing of serious harm to, Australian citizens or residents outside of Australia. The offences commenced on 1 October 2002 and therefore apply to acts committed after that date. The bill proposes to amend these offences so that they apply to acts which occur before, on or after the commencement of the offences.

Compatibility with human rights

Statement of compatibility

1.124 The bill is accompanied by a statement of compatibility that states that the bill engages the right to a fair trial,¹ including the presumption of innocence² and other minimum guarantees in criminal proceedings.³ The statement states that the bill 'does not limit or constrain these rights in any way, as the provisions it amends do not directly relate to enforcement or the justice system'.⁴ The statement also states that the bill engages the prohibition on retrospective criminal laws,⁵ but that:

[t]he provisions in the Bill relate to the crimes of murder, manslaughter and serious harm to another person, all of which already exist in other jurisdictions. As such, the Bill does not introduce retrospective crimes, but instead extends the capacity for involvement of Australian law enforcement that this Division already provides'.⁶

1.125 The statement concludes that the bill is compatible with human rights because it does not limit any existing rights or breach the prohibition on retrospective criminal laws.

1 Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

2 Article 14(2) of the ICCPR.

3 Articles 14(3), (5), (6) and (7) of the ICCPR.

4 Statement of compatibility, p 1.

5 Article 15 of the ICCPR.

6 Statement of compatibility, p 1.

Committee view on compatibility

Prohibition against retrospective criminal laws

1.126 The offences which are the subject of this bill were introduced in 2002, through the *Criminal Code Amendment (Offences Against Australians) Act 2002* (the 2002 Act). The measures were implemented in the aftermath of the Bali bombing attack, which occurred on 12 October 2002. The attack killed 202 people, including 88 Australians. According to the explanatory memorandum accompanying the 2002 bill:

[t]he offences will provide coverage for overseas attacks on Australian citizens and residents, and in appropriate circumstances enable the perpetrators of those attacks to be prosecuted in Australia. The new offences will complement the existing terrorism legislation, and will provide a prosecution option where perpetrators are unable to be prosecuted under the terrorism legislation.⁷

1.127 In introducing the offences, the then Attorney-General, Mr Daryl Williams MP, stated:

The government is strongly committed to ensuring that Australia has every tool it needs to prosecute those who engage in heinous crimes overseas against Australian citizens and residents, such as those we experienced in Bali. ... It will ensure there are no loopholes in terms of prosecuting terrorist acts involving murder overseas. And it further strengthens legislation in our new counter-terrorism package, which already has extraterritorial effect.⁸

1.128 While the 2002 Act received Royal Assent and commenced on 14 November 2002, Schedule 1 to the Act containing the new offences commenced retrospectively with effect from 1 October 2002, approximately six weeks prior to their enactment. Given the government's intention in introducing the offences, it appears that the offences were intended to be applicable to the Bali attack, which occurred approximately one month prior to the passage of the legislation.

1.129 According to the explanatory memorandum accompanying the 2002 bill:

Whilst 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.⁹

7 Criminal Code Amendment (Offences Against Australians) Bill 2002, Explanatory memorandum, p 1.

8 Criminal Code Amendment (Offences Against Australians) Bill 2002, Second reading speech, Mr Daryl Williams MP, *Senate Hansard*, Tuesday 12 November 2002, p 8797.

9 Criminal Code Amendment (Offences Against Australians) Bill 2002, Explanatory memorandum, p 2.

1.130 The current bill seeks to extend the retrospective nature of the offences so that they would apply at any time before the commencement of the provisions. The committee does not consider that, as stated in the statement of compatibility, the bill merely 'extends the capacity for involvement of Australian law enforcement that this Division already provides'.¹⁰ The bill expands the scope of the offences so that a person may be prosecuted under the offences for conduct which occurred at any time prior to the introduction of the offences, including before 1 October 2002.

1.131 Article 15 of the International Covenant on Civil and Political Rights (ICCPR) contains the prohibition against retrospective criminal laws and provides that no-one can be found guilty of an offence that was not a crime 'under national or international law' at the time it was committed. The prohibition supports long-recognised criminal law principles that there can be no crime or punishment without a prior provision by law. This is an absolute right which cannot be limited.

1.132 For an offence to be a crime under national law for the purposes of article 15(1), it must generally be based in statute or the common law. An offence under international treaty law may fulfil the requirement of a crime under 'international law' under article 15(1).¹¹

1.133 A criminal offence may be considered to be based in either national or international law for the purposes of the prohibition (and as such not contrary to the prohibition) where it satisfies the requirements of accessibility and foreseeability.¹² In other words, a person should be able to reasonably foresee the consequences of their actions. This may be the case even where conduct is not expressly prohibited at the time which the conduct occurs, but which a person may reasonably be able to foresee may attract criminal sanction.

1.134 Article 15(2) of the ICCPR sets out an exception to the prohibition so that the prohibition will not apply if the relevant act was criminal at the time it was committed 'according to the general principles of law recognised by the community of nations'. Accordingly, the retrospective criminalisation of an act which is recognised as criminal under customary international law may not infringe the prohibition.¹³

10 Statement of compatibility, p 1.

11 M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, 2005), p 360.

12 See, for example, the jurisprudence of the European Court of Human Rights in: *SW v UK* (Application No. 20166/92, 22 November 1995), paras 35 and 43; *Kokkinakis v Greece* (Application No. 14307/88, 25 May 1993), para 52; and *G v France* (Application No. 15312/89, 27 September 1995), para 25. The UN Human Rights Committee has also stated that laws which are vague and not clearly prescribed will not satisfy the requirement that offences be established in law for the purposes of article 15: see Concluding Observations of the Human Rights Committee, Belgium, UN Doc. CCPR/CO/81/BEL (2004), para 24.

13 M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, 2005), p 368.

1.135 As set out above, it appears to the committee that the purpose of these offences when they were originally introduced in 2002 was to strengthen Australia's counter-terrorism capabilities by enabling the prosecution in Australia of acts of international terrorism against Australians overseas. However, the committee notes that the offences themselves are not in fact limited to offences of terrorism, but apply to any murder, manslaughter or causing of serious harm to Australians overseas.

1.136 The committee intends to write to Senator Xenophon to seek further clarification on whether the offences which the bill seeks to apply prior to their commencement:

- **involve conduct which is based in international law for the purposes of article 15(1) of the ICCPR so as not to offend the prohibition;**
- **involve conduct which meets requirements of foreseeability for the purposes of article 15(1) of the ICCPR so as not to offend the prohibition;**
or
- **involve conduct which is criminal according to the general principles of law recognised by the community of nations so as to fall within the exception to the prohibition in article 15(2) of the ICCPR.**

1.137 Further, the reasons behind why it was considered appropriate to commence the offences as they were originally introduced prior to their enactment and how the original offences were considered to be consistent with article 15 of the ICCPR may assist the committee in assessing the impact of the current proposal. Accordingly, the committee considers that it will also be useful to seek the views of the Attorney-General, as the Minister responsible for the *Criminal Code Act 1995*, on the above questions.

1.138 The committee would welcome the views of the Attorney-General, as the Minister responsible for the *Criminal Code Act 1995*, on the rationale behind the retrospective application of the existing offences and on the compatibility of the existing offences with the prohibition in article 15 of the ICCPR, to inform the committee's examination of the current proposal.

Right to be presumed innocent

1.139 Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. Absolute liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault.

1.140 However, absolute liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the

defendant's right to a defence. In other words, such offences must be reasonable, necessary and proportionate to that aim.

1.141 The offences which this bill seeks to expand apply absolute liability to the circumstance that the person who is harmed is an Australian citizen or resident.¹⁴ Absolute liability is also applied to the circumstance of the offence of manslaughter that the conduct causes the death of another person.¹⁵

1.142 The committee considers that the application of absolute liability in the offences is likely to be compatible with the presumption of innocence. Notwithstanding the fact that the offences carry high maximum penalties (up to life imprisonment), absolute liability is only being applied to certain elements of the offence, elements which do not go to the core of the criminality being addressed.

1.143 The committee, however, emphasises its expectation, as set out in its Practice Note 1, that statements of compatibility should include sufficient detail of relevant provisions in a bill which impact on human rights to enable the committee to assess their compatibility. This includes identifying and providing a justification where absolute liability is applied, including where an existing application of absolute liability is expanded.

14 *Criminal Code Act 1995*, s 115.1(2), s 115.2(2), s 115.3(2) and s 115.4(2).

15 *Criminal Code Act*, s 115.2(2).

