

## Consideration of responses

### Criminal Code Amendment (Harming Australians) Bill 2013

*Sponsor: Senator Xenophon*

*Introduced: Senate, 11 December 2013*

*Status: Before Senate*

*PJCHR comments: Second Report of 44<sup>th</sup> Parliament, tabled 11 February 2014*

*Response dated: 5 March 2014*

#### Information sought by the committee

3.1 The *Criminal Code Amendment (Offences Against Australians) Act 2002* (the 2002 Act) inserted a new Division 104 (Harming Australians) into the *Criminal Code Act 1995*. This established new offences of murder, manslaughter, and the intentional or reckless infliction of serious harm on Australian citizens or residents abroad. The 2002 Act commenced operation on 14 November 2002 but operated retrospectively, with effect from 1 October 2002. The current bill seeks to extend the retrospective application of these offences so that they apply to acts which occur any time before, on or after the commencement of the offences.

3.2 In addition to seeking further clarification from Senator Xenophon in relation to the bill, the committee also indicated it would welcome information from the Attorney-General, as the Minister responsible for the Criminal Code, 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 International Covenant on Civil and Political Rights (ICCPR), to inform the committee's examination of the current bill.

3.3 The Attorney-General's Department's response is attached.

#### Committee's response

3.4 The committee thanks the Attorney-General and his Department for their response.

**3.5 The committee intends to write to Senator Xenophon to draw his attention to the Attorney-General's Department's response.**

3.6 The committee has concerns about the retrospective operation of the original bill, as well as the further retrospective application proposed by this bill.

3.7 Article 15(1) of the ICCPR prohibits retrospective criminal laws. However, as the Department's response notes, article 15(2) of the ICCPR permits the retrospective application of national criminal laws in relation to 'any act or omission

which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.’ This exception is generally understood as referring to acts which are recognised as constituting international crimes at the time they are committed and includes, for example, genocide and crimes against humanity.

3.8 The explanatory memorandum to the 2002 bill did not explicitly assess the compatibility of the proposed retrospective operation of the bill with article 15(2) of the ICCPR. In a passage quoted in the Departmental response to the committee’s comments on the present bill,<sup>1</sup> the explanatory memorandum justified the retrospective operation of the 2002 bill in the following terms:

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.<sup>2</sup>

3.9 The suggestion that criminal laws may operate retrospectively in relation to conduct ‘which is universally known to be conduct which is criminal in nature’ goes beyond what is permitted under article 15(2), if that category is intended to include acts which are not accepted as crimes under international law. This appears to be the case under both the 2002 provisions and this bill. Murder, manslaughter and the infliction of serious harm are not, without more, international crimes, even though they are crimes under the ordinary criminal law of most, if not all, countries.

3.10 To the extent the government may wish to argue that it was permissible to legislate retrospectively in relation to such offences where they were committed as part of a terrorist activity, the government would have to demonstrate that as of 2002, the relevant acts of terrorism amounted to international crimes, not just crimes under domestic law. Neither the 2002 explanatory memorandum nor the Departmental response explores this issue, and the legislation does not appear to be drafted on this basis. In any event, it is not clear that such acts of terrorism would in 2002 have amounted to international crimes.

**3.11 The committee intends to defer its final consideration of this bill pending receipt of a response from Senator Xenophon. The committee intends to write to the Attorney-General to draw his attention to its interim comments.**

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1 At paragraph 13.

2 Explanatory memorandum, p 2 (note on clause 2).



Australian Government  
Attorney-General's Department

MC14/04327



Senator Dean Smith  
Chair  
Parliamentary Joint Committee on Human Rights  
S1.111  
Parliament House  
CANBERRA ACT 2600

Dear Senator

I refer to the Parliamentary Joint Committee on Human Rights' *Second Report of the 44<sup>th</sup> Parliament* tabled on Tuesday 11 February 2014 which reviewed, amongst other bills, the Criminal Code Amendment (Harming Australians) Bill 2013. You have sought the Attorney-General's clarification on a number of matters set out in this report. Your correspondence has been forwarded to the Department for reply.

Please find attached the Department's submission addressing these matters.

The action officer for this matter is Elise Perry who can be contacted on (02) 6141 3032.

Yours sincerely

Iain Anderson  
First Assistant Secretary  
Criminal Justice Division

- 5 MAR 2014



**Australian Government**  

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**Attorney-General's Department**  
**Criminal Justice Division**

Parliamentary Joint Committee on Human Rights  
**Criminal Code Amendment (Harming Australians) Bill 2013**

**Attorney-General's Department submission**

**February 2014**

## **Introduction**

1. The Attorney-General's Department welcomes the opportunity to provide the Parliamentary Joint Committee on Human Rights with this submission as part of the Committee's examination of 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 Harming Australians provisions found in Division 115 in Schedule 1 of the *Criminal Code Act 1995* (Cth) (the Criminal Code) to allow the offences of murder, manslaughter and the causing of intentional or reckless serious harm committed against Australians overseas to have effect before, on or after the date of commencement.

3. The *Criminal Code Amendment (Offences Against Australians) Act 2002* (the Offences Against Australians Act), which enacted these Harming Australians provisions, was granted Royal Assent on 15 November 2002, however commenced retrospectively with effect from 1 October 2002, approximately six weeks prior to their enactment.

4. The Parliamentary Joint Committee on Human Rights has sought the views of the Attorney-General's Department on the rationale behind this retrospective application of the existing offences and on the compatibility of the existing offences with the prohibition in article 15 of the *International Covenant on Civil and Political Rights* (ICCPR).

### **Commonwealth criminal law policy regarding retrospectivity**

5. The Federal Parliament and successive Australian Governments have only endorsed retrospective criminal offences in very limited circumstances. Exceptions have been made on a case by case basis and only where there has been a strong need to address a gap in existing offences, and the moral culpability of those involved means there is no substantive injustice in retrospectivity.

6. The basis of 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 under article 15 of the ICCPR. Article 15(1) provides that:

No 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. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

7. Article 15(2) provides that the prohibition contained in article 15(1) does 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'.

### **The retrospective application of the existing offences**

8. Division 115 of the Criminal Code provides that any person may be prosecuted in Australia for:

- murder of an Australian citizen or resident outside Australia (section 115.1)

- manslaughter of an Australian citizen or resident outside Australia (section 115.2), or
- intentionally or recklessly causing serious harm to an Australian citizen or resident outside Australia A (section 115.3 and section 115.4).

9. These offences were granted Royal Assent on 14 November 2002, but were given very limited retrospective operation to commence on 1 October 2002.

10. The justification for these offences, as stated in the Explanatory Memorandum for the Offences Against Australians Act, was to 'provide coverage for overseas attacks on Australian citizens and residents'. These were designed to 'complement the existing terrorism legislation' by providing a 'prosecution option where perpetrators are unable to be prosecuted under the terrorism legislation.'

11. The then Attorney-General, the Hon Daryl Williams QC MP, explained in the Second Reading Speech that this was necessary given that some countries 'may not have specific counter-terrorism laws, but they will have murder laws.' This new offence would 'fulfil the pre-condition for extradition that there is dual criminality and enable extradition for murder,' thus filling a gap in existing counter-terrorism legislation. As a result, the legislation would 'ensure there are no loopholes in terms of prosecuting terrorist acts involving murder overseas'.

12. The impetus for the introduction of these offences was the Bali Bombings, which occurred on 12 October 2002 and killed 202 people, including 88 Australians. To allow for the prosecution of the perpetrators of the Bali Bombings, the offences were given very limited retrospective operation to commence on 1 October 2002, only 45 days prior to the enactment of the Act.

13. This is compatible with article 15 of the ICCPR, as reflected in the Explanatory Memorandum to the 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.<sup>1</sup>

14. The scope of the prohibition in article 15 of the ICCPR also includes that laws must not impose greater punishments than those which would have been available at the time the acts were done. The penalties set out in the Offences Against Australians Act (namely 15 years imprisonment for recklessly causing serious harm, 20 years imprisonment for intentionally causing serious harm, 25 years for manslaughter and life imprisonment for murder) are comparable to similar crimes of murder and manslaughter in certain Australian State jurisdictions. As explained in the Explanatory Memorandum, these are maximum penalties and a judge has discretion to reduce these penalties where appropriate. The limitation of the retrospective period to only 45 days ensures that this obligation is able to be upheld by Australia and that any penalties imposed would not be greater than those available at the time the acts were commissioned.

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<sup>1</sup> Explanatory Memorandum, *Criminal Code Amendment (Offences Against Australians) Act 2002*.

## **Conclusion**

15. The Government does not lightly pursue retrospective criminal laws and has only considered them where there are exceptional or special circumstances. The Offences Against Australians Act permitted a limited retrospective application of 45 days to address a potential gap with respect to dual criminality and offshore terrorist acts involving murder, and to capture the specific circumstances of the Bali Bombings.

