

CHAPTER 1

Introduction and background

Referral and conduct of the inquiry

1.1 On 12 December 2013, the Criminal Code Amendment (Harming Australians) Bill 2013 (the Bill) was referred, on the recommendation of the Selection of Bills Committee, to the Senate Legal and Constitutional Affairs Legislation Committee (the committee), for inquiry and report by 4 March 2014.¹ The reporting date was subsequently extended until 28 May 2014.² On 27 May 2014 the committee tabled an interim report for the inquiry, extending the reporting date to 4 December 2014.³ On 3 December 2014, the Senate granted a further extension of time for reporting until 12 February 2015.⁴ Additional extensions of time to report were subsequently granted, until 24 June 2015 and then 13 August 2015.⁵

1.2 The Bill is a private senator's bill, introduced into the Senate by Senator Nick Xenophon on 11 December 2013.⁶

1.3 Details of the inquiry, including links to the Bill and associated documents, were placed on the committee's website at www.aph.gov.au/senate/legalcon. The committee also wrote to organisations and individuals, inviting submissions by 21 January 2014.

1.4 The committee received 5 submissions, which are listed at Appendix 1. The committee thanks those organisations and individuals that made submissions to the inquiry.

Background

1.5 Following the Bali bombings on 12 October 2002, the then federal government introduced amendments to the *Criminal Code Act 1995* (Criminal Code) which made it an offence to harm Australians overseas.⁷ The Explanatory Memorandum to the 2002 bill stated:

The 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

1 *Journals of the Senate*, No. 11, 12 December 2013, p. 361.

2 *Journals of the Senate*, No. 16, 4 March 2014, p. 528; Senate Legal and Constitutional.

3 Senate Legal and Constitutional Affairs Legislation Committee, *Interim Report into the Criminal Code Amendment (Harming Australians) Bill 2013*, 27 May 2014.

4 *Journals of the Senate*, No. 73, 3 December 2014, p. 1965.

5 *Journals of the Senate*, No. 78, 12 February 2015, p. 2158; *Journals of the Senate*, No. 99, 22 June 2015, p. 2744.

6 *Journals of the Senate*, No. 10, 11 December 2013, p. 339.

7 *Criminal Code Amendment (Offences Against Australians) Act 2002*.

offences will complement the existing terrorism legislation, and will provide a prosecution option where perpetrators are unable to be prosecuted under the terrorism legislation.⁸

1.6 The relevant provisions are found in Part 5.4 (Division 115) of the Criminal Code, and cover murder, manslaughter, and intentionally or recklessly causing serious harm to an Australian citizen or resident in a place outside Australia.⁹ Under section 115.6, proceedings for an offence under Division 115 cannot be commenced without the written consent of the Attorney-General.

1.7 While the *Criminal Code Amendment (Offences Against Australians) Act 2002* was passed by the Senate and received Royal Assent on 14 November 2002, the schedule of the legislation containing the new offences and other amendments to the Criminal Code commenced retrospectively from 1 October 2002.¹⁰ The Explanatory Memorandum to the 2002 legislation stated:

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.¹¹

1.8 The Attorney-General's Department articulated the Commonwealth's broader criminal law policy in relation to retrospectivity:

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.

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...which provides that '[n]o one shall be held guilty of any criminal offence on account of any act

8 *Criminal Code Amendment (Offences Against Australians) Bill 2002*, Explanatory Memorandum, p. 1.

9 These offences are found in sections 115.1, 115.2, 115.3 and 115.4 of the Criminal Code respectively.

10 See: Bills Homepage, *Criminal Code Amendment (Offences Against Australians) Bill 2002*, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r1680 (accessed 16 December 2013); *Criminal Code Amendment (Offences Against Australians) Bill 2002*, Explanatory Memorandum, p. 2.

11 *Criminal Code Amendment (Offences Against Australians) Bill 2002*, Explanatory Memorandum, p. 2.

or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed'.¹²

Purpose of the Bill

1.9 The Bill seeks to amend the *Criminal Code Act 1995* (Criminal Code) in order to extend existing provisions that make it an offence to harm Australians overseas. The existing provisions apply only to offences committed after 1 October 2002. The proposed amendments in the Bill would allow the existing provisions to apply to any case that occurred before October 2002 and meets other criteria in the Criminal Code.¹³

1.10 In his second reading speech, Senator Xenophon stated that an individual case had highlighted the need for the proposed changes:

I have been approached by a family who have been directly impacted by the limited time period that applies to the provisions under Division 115 of the Act. Their family member was brutally murdered before the 1 October 2002 date, and the case has never been resolved...The aim of this bill is to ensure all Australians can receive justice under these provisions, not just those who were affected after a certain date.¹⁴

Overview of the Bill

1.11 The Bill consists of several preliminary provisions and one schedule. Clause 3 of the Bill states that the object of the Bill is 'justice for Australian citizens and residents who were the victims of certain violent crimes committed before 1 October 2002 outside Australia'.

1.12 Schedule 1 of the Bill contains the proposed amendments to the Criminal Code. Item 1 of Schedule 1 seeks to amend paragraphs 115.1(1)(b), 115.2(1)(b), 115.3(1)(b) and 115.4(1)(b) of the Criminal Code. In each instance, this proposed amendment would extend the application of each of the four offences contained in Division 115¹⁵ by inserting the phrase "whether before, on or after the commencement of this section" in relation to each offence. For example, subsection 115.1(1), which deals with the murder of an Australian citizen or resident, would read:

- (1) A person is guilty of an offence if:
- (a) the person engages in conduct outside Australia; and

12 *Submission 3*, p. 3.

13 Explanatory Memorandum (EM), p. 2.

14 Senator Nick Xenophon, *Senate Hansard*, 11 December 2013, p. 73.

15 These are: Murder of an Australian citizen or resident of Australia (section 115.1); Manslaughter of an Australian citizen or resident of Australia (section 115.2); Intentionally causing serious harm to an Australian citizen or resident of Australia (section 115.3); and Recklessly causing serious harm to an Australian citizen or resident of Australia.

(b) the conduct causes the death of another person, *whether before, on or after the commencement of this section*;¹⁶ and

(c) the other person is an Australian citizen or a resident of Australia; and

(d) the first-mentioned person intends to cause, or is reckless as to causing, the death of the Australian citizen or resident of Australia or any other person by the conduct.

1.13 Item 2 of Schedule 1 is an avoidance of doubt provision, which clarifies that the amendments made by Schedule 1 apply to "conduct that occurs at any time, whether before, on or after the commencement of Schedule 1 to the *Criminal Code Amendment (Offences Against Australians) Act 2002*".

Consideration of the Bill by other committees

1.14 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee) considered the Bill in its *Alert Digest No. 1 of 2014*, and stated that 'neither the explanatory memorandum nor the statement of compatibility detail the extent of the problem which the bill seeks to address'. Further, the Scrutiny Committee considered that 'the justification offered for the approach taken in this bill is insufficiently detailed and informative', and stated it would seek further advice from Senator Xenophon regarding the issues it had raised.¹⁷

1.15 The Parliamentary Joint Committee on Human Rights (PJCHR) also commented on the Bill in its *Second Report of the 44th Parliament*. The PJCHR stated that further clarification was required to explain how the Bill does not offend the prohibition on retrospective criminal laws in Article 15 of the ICCPR, and proposed to seek clarification from Senator Xenophon on this matter.¹⁸

16 Emphasis added to show the proposed amendments contained in the Bill.

17 Senate Committee for the Scrutiny of Bills, *Alert Digest No. 1 of 2014*, 12 February 2014, pp 1-2.

18 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, February 2014, p. 33.