

CHAPTER 2

Key issues

2.1 Submitters raised several issues in relation to the Bill. Of principal interest was whether the amendments introduced by the Bill are consistent with the stated purpose of the current offences in Part 5.4 (Division 115) of the Criminal Code, and the justification for the retrospective application of offences proposed by the Bill.

Altering the purpose of the offences in Part 5.4 of the Criminal Code

2.2 The Attorney-General's Department (the department) noted that the offences in Part 5.4 were introduced in response to the 2002 Bali bombings in which 88 Australians were killed, in order to ensure that 'there are no loopholes in terms of prosecuting terrorist acts involving murder overseas' and 'provide a prosecution option where perpetrators are unable to be prosecuted under the terrorism legislation'.¹

2.3 The Rule of Law Institute Australia (RoLIA) argued that the Bill 'departs significantly' from this original purpose, broadening it to operate as a 'catch-all for any relevant act committed at any point in time in the past which has harmed an Australian', rather than targeting terrorist acts more specifically.² RoLIA suggested that, in the context of the Attorney-General authorising proceedings to be brought under Division 115, the new broader purpose of the Division could be inconsistent with other factors which the Attorney-General would necessarily have to consider.³

Retrospectivity of the proposed amendments

2.4 Submitters discussed several points in relation to the proposed extension of the retrospective application of the offences in Division 115 of the Criminal Code, including: whether the original legislation that introduced these offences into the Criminal Code constitutes a precedent for extending retrospectivity through the Bill; whether this aspect of the Bill is consistent with Australia's obligations under international law; and the role of the Attorney-General in bringing proceedings under Division 115.

Precedent formed by the 2002 legislation

2.5 Senator Xenophon's second reading speech argued that the original Act that introduced Division 115 into the Criminal Code forms a precedent for the amendments proposed in the Bill:

[I]n response to concerns regarding the retrospectivity of criminal law, it is important to note that the original bill that established these provisions, the *Criminal Code Amendment (Offences Against Australians) Bill 2002*, was in itself retrospective. The Bill itself was assented to on 14 November 2002,

1 *Submission 3*, p. 2.

2 *Submission 2*, p. 4.

3 *Submission 2*, p. 6.

but the provisions came into effect from 1 October 2002. Presumably this was to ensure the Bali Bombings, which occurred on 12 October 2002, were covered by the provisions.

As such, in response to criticisms of retrospectivity and changing the law to suit a particular case, the bill that established Division 115 in 2002 forms the precedent for the measures in this bill.⁴

2.6 The department noted that the initial retrospectivity in the Bill was designed specifically to cover the Bali bombings:

[W]hen the offences in Part 5.4 were introduced, a 45-day retrospective application was permitted to cover the circumstances of the Bali bombings...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.⁵

Consistency with Australia's international law obligations

2.7 Submitters raised several issues in relation to the Bill's consistency with Australia's obligations under article 15 of the International Covenant on Civil and Political Rights (ICCPR).

2.8 The Bill's Statement of Compatibility with Human Rights states that the Bill does not or breach the prohibition on retrospective criminal laws, noting:

The 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

2.9 Professor Ben Saul and Ms Kathleen Heath of the Sydney Centre for International Law disagreed, arguing that the Bill does violate the prohibition on retrospective criminal laws:

The effect of Article 15 [of the ICCPR] is to require criminal liabilities in every national legal system to be prospectively knowable, or notified in advance, to those subject [to] 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.

...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

4 *Senate Hansard*, 11 December 2013, p. 73.

5 *Submission 3*, p. 3.

6 Explanatory Memorandum (EM), p. 4.

already criminalises that conduct. This is obvious from the text, drafting history, and subsequent interpretation of Article 15(1).⁷

2.10 Professor Saul and Ms Heath also explained that the offences modified by the Bill are not necessarily uniform across jurisdictions:

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).⁸

2.11 Dr Patrick Emerton of Monash University suggested that this problem could potentially be avoided by introducing a general defence provision into Division 115 of the Criminal Code, making it a defence to any offence against the Division that the conduct was not criminal in the jurisdiction in which it was committed at the time it was committed.⁹

Application of penalties

2.12 The department highlighted that the potential application of penalties under the Bill may be inconsistent with Australia's international obligations:

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...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.¹⁰

2.13 Dr Emerton suggested that a general sentencing provision could be introduced into Division 115 to help address this issue, stipulating that no sentence imposed

7 *Submission 5*, p. 2.

8 *Submission 5*, p. 2. See also: Dr Patrick Emerton, *Submission 1*, p. 2.

9 *Submission 1*, pp 2-3.

10 *Submission 3*, p. 4. See also: Dr Patrick Emerton, *Submission 1*, p. 2.

under the Division may exceed the maximum penalty to which the convicted person might have been liable had he or she been sentenced for the criminal conduct in the jurisdiction in which it took place, at the time that it took place.¹¹

Discretion of the Attorney-General in bringing proceedings

2.14 The Rule of Law Institute argued that the existing provisions in Division 115 that require the written consent of the Attorney-General before proceedings can be commenced, provide a strong safeguard even if the retrospectivity of the offences is extended by the Bill:

As the first law officer it is expected that the Attorney-General would weigh all the relevant considerations relating to the commencement of proceedings under these offences. The proposed unlimited retrospectivity would be another factor to consider for cases occurring before the 1 October 2002...¹²

The independence of the prosecution in approaching the Attorney-General to bring proceedings, as well as the ultimate decision as to whether proceedings will commence is not affected by the retrospective operation of the offences... We consider the Attorney-General would proceed cautiously and only in a rare case authorise a prosecution under the Bill.¹³

2.15 Professor Saul and Ms Heath disagreed with this view:

It has been suggested...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 [of the ICCPR] 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.¹⁴

Other considerations

2.16 RoLIA noted that the proposed retrospectivity of the provisions in the Bill 'does not remove the power of an Australian Court to dismiss proceedings where it finds them manifestly unfair for the accused', and that this provides an additional level of protection for the accused which prevents the likelihood of a case progressing where the proceedings would be unfair.¹⁵ The Rule of Law Institute concluded that, on balance, 'the subject matter of the Bill and safeguards warrant the provisions being made retrospective'.¹⁶

2.17 The department did not agree with this conclusion, stating that the argument mounted in the Explanatory Memorandum was not 'sufficiently persuasive to permit

11 *Submission 1*, p. 3.

12 *Submission 2*, p. 5.

13 *Submission 2*, p. 7.

14 *Submission 5*, p. 2.

15 *Submission 2*, p. 7.

16 *Submission 2*, p. 7.

retrospective application beyond the original 45 days, to the unlimited timeframe of 'before' the commencement date of 1 October 2002'.¹⁷

Difficulties associated with bringing proceedings under the Bill

2.18 The department noted the practical challenges associated with bringing proceedings under Division 115 of the Criminal Code, and countered the claim made in the Explanatory Memorandum that the Bill 'extends the capacity for involvement of Australian law enforcement that this Division already provides':

The offences in Part 5.4 do not...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.¹⁸

Committee view

2.19 The intended purpose of the Bill is to seek justice for Australians who have been harmed overseas and the committee believes that this is a laudable aim.

2.20 The committee acknowledges some of the concerns raised in respect of the Bill, for example its retrospective application and the broadness of the provisions covering any relevant acts which seriously harm or kill an Australian overseas. Furthermore, the committee is of the view there may be practical difficulties that would make it problematic to bring proceedings for offences under the Bill that occurred before the initial 2002 commencement date.

2.21 In light of these considerations, the committee is of the view that the further consultation on the Bill is warranted prior to its consideration by the Senate.

Recommendation 1

2.22 The committee recommends that further consultation is conducted on the Bill prior to its consideration by the Senate.

**Senator the Hon Ian Macdonald
Chair**

17 *Submission 3*, p. 3.

18 *Submission 3*, p. 4.

