

Additional comments by Senator Nick Xenophon

1.1 For over 20 years, the Bradshaw family have been fighting to obtain justice following the brutal murder of their 26 year old daughter Anthea Bradshaw-Hall in Brunei in 1994. Brunei authorities have failed lay charges in the case. However, forensic evidence obtained by Australian authorities led to the former director of Public Prosecutions in South Australia, Stephen Pallaris QC, indicating there was a strong case to lay charges against a suspect. Of course, this bill is not just about one particular tragic case and one family's search for justice. Its application will be to give the families of those murdered overseas, in the absence of action by local authorities, a real opportunity for justice and closure.

1.2 The Criminal Code Amendment (Harming Australians) Bill 2013 aims to extend existing provisions within the *Criminal Code Act 1995* ('the Criminal Code') that make it an offence to harm Australians overseas. These provisions were introduced following the 2002 Bali terrorist bombings in which 88 Australians were killed. However these provisions only extend to offences committed against Australians on or after 1 October 2002. As a result a gap exists in the Federal Government's ability to prosecute serious offences committed against Australians overseas prior to that date.

1.3 As the Explanatory Memorandum explains:

The 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. This is to ensure that all Australians harmed overseas have access to the same level of justice.¹

1.4 I acknowledge the concerns of some parties that this bill offends the prohibition on retrospective criminal laws contained in Article 15 of the International Covenant on Civil and Political Rights.

1.5 In its justification of the amendments to the Criminal Code following the Bali bombings the Attorney General's Department 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.²

1 Explanatory Memorandum, p. 2.

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

1.6 Just as the 2002 amendment related to prosecution following death or serious injury to an Australian overseas, so too does this bill. The Explanatory Memorandum explains:

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.³

1.7 Murder, manslaughter and causing serious harm are all currently considered to be crimes in every jurisdiction in the world. A person committing one of these crimes at any time could not have operated on the assumption that they were not committing a crime.

1.8 Ms Claire O'Connor SC, a noted human rights lawyer, provided a legal opinion on the operations of this bill. In relation to retrospectivity she stated:

In my view the Bill cannot be said to breach the human right in relation to the rule about retrospectivity because of the observed difference between an act being a crime at the time of the commission as distinct from an act which was not a crime at the time. In any event if there is a failure to afford a human right to an accused this is outweighed by the more compelling human right of the victim.⁴

1.9 Ms O'Connor SC continued:

It is my view that the proposed Bill does not fall foul of the intent of Article 15 of the ICCPR. There is a distinction between protecting persons from being charged with crimes that were not crimes at the time of the commission and charging persons with crimes that were crimes at the time but where the jurisdiction to try the crime in Australia only has been extended.⁵

1.10 The committee has also raised concerns about the open ended nature of this amendment, however I reject this assertion on the following grounds:

1.11 Section 115.6 of the Criminal Code specifically states that proceedings for an offence under this Division must not be commenced without the Attorney-General's written consent. Further, orders relating to extradition proceedings provide a further threshold that must be met before proceedings can be commenced.

1.12 As Ms O'Connor SC pointed out in her opinion:

Further, there are safeguards with the process of charge and proceedings with a trial which enables any accused to put to a Court particular matters

3 EM, p. 4.

4 Claire O'Connor SC, *Opinion – Criminal Code Amendment (Harming Australians) Bill 2014*, p. 7 (included at Attachment A).

5 Claire O'Connor SC, *Opinion – Criminal Code Amendment (Harming Australians) Bill 2014*, p. 7.

which he/she says impact on the ability of an accused to have a fair trial; prosecution is not automatic simply because a charge is laid...⁶

1.13 The Attorney-General's Department also raised concerns that the potential penalties that may apply to those convicted under the provisions in the bill may be heavier than those that are already in place. I believe this is an example of a permissible limitation in terms of human rights concerns for several reasons. Firstly, the offences that apply are serious criminal offences, including murder, which might reasonably be expected to carry far greater penalties in other jurisdictions, including the death penalty. It is therefore foreseeable that a person who had, for example, murdered an Australian in an overseas jurisdiction may face a lesser penalty if required to face this charge in Australia than they would have in the jurisdiction in which they committed the crime.

1.14 It is disappointing the committee is maintaining its position that this bill is an 'inappropriate vehicle' for pursuing the goal of seeking justice for Australians killed or seriously harmed overseas. I consider this bill is a very appropriate vehicle for pursuing the goal of seeking justice for Australians killed or seriously harmed overseas.

1.15 I acknowledge there are concerns about the operation of this bill and so I take this opportunity to indicate that I propose to amend the bill in line with the recommendations made by Ms O'Connor SC.

1.16 For example, Ms O'Connor SC has suggested the bill could be refined by specifying a requirement that criminal processes in the jurisdiction of the offence must be exhausted before the processes in this bill can be activated. Ms O'Connor's opinion is attached.

1.17 Finally, I am grateful to the committee and its chair, the Senator the Hon Ian Macdonald for their patience in this matter. I have been involved in lengthy negotiations with the Attorney-General and his office for a considerable period since prior to the introduction of this bill. I am grateful for the Attorney and his advisers' time and I hope the Government will be making a decision in the near future as to the progress of this bill, or a bill in similar terms, so that the family of Anthea Bradshaw-Hall, and many other Australian families, can obtain justice where an Australian has been killed or seriously injured overseas as a result of a criminal act.

Recommendation 1

1.18 That this bill be passed with appropriate amendments as outlined in the opinion of Ms O'Connor SC.

Senator Nick Xenophon

6 Claire O'Connor SC, *Opinion – Criminal Code Amendment (Harming Australians) Bill 2014*, pp 8-9.

