Additional Comments from Senator Nick Xenophon - Attachment A

OPINION

CRIMINAL CODE AMENDMENT (HARMING AUSTRALIANS) BILL 2013

Introduction

1. I have been asked to provide an opinion in relation to the human rights implications of the *Criminal Code Amendment (Harming Australians) Bill* 2013 (the Bill). I have not been asked to give my opinion on any likely outcome of legal challenges that may arise should a prosecution be instigated against a citizen or resident if the Bill is passed. I do comment however on the likely approach of the High Court might take consistent with previous decisions should a challenge be instigated by an accused person.
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 *Criminal Code 1995 (Cth)* to give retrospective effect to the offences in Part 5.4 of the said Code relating to harming Australians.
3. The offences in Part 5.4 were introduced into the *Criminal Code* through the *Criminal Code Amendment (Offences Against Australians) Act 2002* in response to the Bali Bombings. This amendment had 6 weeks retrospectivity. The Explanatory Memorandum addressed the retrospective nature of Part 5.4.
4. That legislation was introduced to ensure that persons who could not be charged under terrorism legislation for the Bali bombings did not escape prosecution.
5. In accordance with Part 5.4 any person may be prosecuted in Australia for a murder, manslaughter, or recklessly causing serious harm to an Australian citizen or resident where the offence occurred outside Australia.
6. The Bill seeks to add into Part 5.4 of the Act the words "*whether before, or after the commencement of this section*."

7. The Explanatory Memorandum for the Bill states that the "*impact of the amendment will be that previous situations where an Australian citizen or resident has been harmed overseas may now be included under the offence provisions in that Division.*"

8. I understand that the Commonwealth Attorney-General's Department has sought from Senator Xenophon an Opinion that addresses the human rights implication of the Bill.

The Background to the Proposed Bill.

9. In 1994 a woman, Anthea Bradshaw-Hall, was murdered. Bradshaw-Hall and her husband had been married for only three months and were renting an apartment in Brunei when her husband claimed he returned home one day to find her murdered. She has significant inflicted injuries. She had been strangled and stabbed. The couple were Australian citizens.

10. No one has been charged.

11. Ms. Bradshaw-Hall has very supportive family who have sought justice for her.

12. The former Director of Public Prosecutions in SA, Stephen Pallaras, QC, was asked by the deceased's family to review the case. He did so.

13. Mr. Pallaras said he would have supported the prosecution of an unnamed suspect on the evidence he then had. The Brunei police were provided with Mr Pallaras's view but would not lay a charge against the suspect. Mr. Pallaras instigated further inquiries.

14. The deceased's family also have the support of South Australian Police, such support including, in 2003, the then South Australian Police Commissioner meeting with the Brunei High Commissioner to try to press for charges to be laid. Still the Brunei authorities did not charge anyone.

15. South Australian Police detectives travelled to Brunei in November 2004; reviewed

the case file; copied statements and interviewed other witnesses who were not spoken at the time of the initial investigation. Exhibits were handed over to the South Australian police by the Brunei police who brought them to Australia to have them forensically examined by the South Australian Forensic Science Centre. Mr. Pallaras then said that those results further confirmed his view that the suspect was implicated and should be charged.

16. The South Australian Police had also interviewed the suspect.

17. The information gained from examining the exhibits and taking further statements etc. were passed on to the Brunei authorities along with Mr. Pallaras's view. Once again the authorities in Brunei refused to act.

18. Mr. Pallaras continued to state his view that if the murder had occurred in his State as DPP he would have recommended a prosecution of the suspect.

19. At present the suspect cannot be charged unless the Brunei police have a change of heart (and after 20 years this is highly unlikely) or the Bill is passed.

20. It is intended that the Bill will have retrospective effect to enable this to occur.

Materials Provided

21. I confirm that Senator Xenophon's office has provided me with the following

- Attorney-General Department's submission in relation to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the *Criminal Code Amendment (Harming Australians) Bill* 2013, dated January 2014 (The Senate Standing Committee).
- A copy of the proposed Bill (which is an amendment to the *Criminal Code Act* 1995).
- The Expl*anatory Memorandum* to the Senate of 2013
- Links to a newspaper report in relation to the information about the deceased's story.

- The submissions received by the Senate Standing Committee.

The Current Law

22. There are two legislative instruments in Australia which enable Australia to prosecute others for crimes committed entirely outside the jurisdiction and which have retrospective effect.

23. The *War Crimes Amendment Act* (1998) (Cth) amended the *War Crimes Act* 1945 and enabled the prosecution of persons resident in Australia for war crimes committed during the Second World War. The retrospective nature of the legislation has been the subject of academic and legal comment.

24. The *Criminal Code Amendment (Offences Against Australians) Act* 2002, was granted Royal Assent on 15 November 2002 and was made in respect to 1 October 2002. As referred to above this enabled prosecutions for the Bali bombing which occurred some 4 weeks earlier.

25. In criminal law the courts have been loath to approve retrospective legislation. The Attorney General's Submission states, correctly, that,

> *"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 the is no substantive injustice in retrospectivity." (*para 9)
>
> *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 the backdating of criminal offences…."* (Para 10 of the Submission).

26. The human rights principle that applies to such opposition is that a person should know when committing a particular act that the act is unlawful when it was committed.

27. This principle is expressed in the *International Covenant on Civil and Political Rights,* 1966 (*ICCPR*) which came into force generally in 1976 and, the relevant section, in Australia, in 1979. Article 15 of the *Covenant* says,

1. *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. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby*.
2. *Nothing in this article shall prejudice the trial and punishment of any person for 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*.

Human Rights

28. Any discussion on human rights needs to recognize that often in complex matters there can be two competing rights which are in conflict. In the case that Bill is attempting to resolve we have a clear example of the tension between such competing rights. One the one hand we have the right of a citizen or resident not to be charged for a crime which it might be said was not chargeable in Australia at the time of the commission of that crime. The other right is that of a victim having justice. There is a right for the victim, her family and society to have a wrongdoer brought to trial and to prevent criminal being able to hide behind an incompetent and/or corrupt external regime and thereby escape conviction for the most serious of all crimes; as in this case - murder.

29. Since World War II there has been a growing appreciation in international communities and some member States, including Australia, that women as victims of serious crime have been ignored or given less priority in rights discussions about criminal law. Many attempts to rectify this imbalance have occurred. While boys and men have been the victim of sexual crimes it is by far women and girls who are generally the victims of such offending.

30. The steps that Australian States and Territories and the corresponding Courts and investigative arms of Government have taken to protect women and girls as victims include;

- The extension in most States and Territories of the ability to charge historical sex crimes,
- The ability of a tribunal to hear a complainant's first complaint of a sexual crime as an exception to the hearsay rule,
- The recognition of the need to reconsider consent laws,
- The removal of the bar on rape in marriage,
- Consideration, even if not at a legislative stage, of the need to redefine 'provocation' in the context of female conduct,
- Increasing penalties for domestic crimes - for example in some jurisdictions instead of the courts finding that an assault or rape occurred as 'just a domestic matter,' as was the case 25 years ago, instead Parliaments enacting legislation whereby being in a domestic relationship and harming a partner or child becomes an aggravating feature,
- Training of police in the recognition of cycles of violence,
- Setting up specialists courts to encourage women and girls to proceed with court actions against perpetrators,
- Having suppression orders designed to protect the identity of victims of sex crimes,
- Allowing evidence to be taken in a protected way; for example by video streamed into the court room, behind screens, allowing a support person to sit with the victim and the use of other forms of evidence capture e.g. in Western Australia the complainant can give evidence soon after reporting a crime to save delay and the compounding of the stress of the charges with years waiting for a jury trial,
- Restricting the practice of oral committals for victims of sexual crimes so that victims only give their evidence once.

31. In the international arena the woman and girl as victim has also been given greater significance in recent decades. Some examples include;

- Concern and action on elimination of genital mutilation,
- The ratification by some member states of the 1979 *Convention to Eliminate All Forms of Discrimination Against Women* (which Australia ratified in 1983),
- The *London Summit to End Sexual Violence in Conflict*, in June 2014, which saw recommendations which included the creation of categories for War Crimes Tribunal to try offenders who have committed sexual crimes,
- The recognition of the need for apologies and compensation for the thousands of 'comfort women' used by the Japanese during World War II.

Does the Bill Breach Human Rights?

32. 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 acts 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. However it is my view that there are valid problems with the current form of the Bill as stated below.

33. 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.

34. Part (2) of Article 15 in my view recognizes this distinction.

35. Article 15 of the ICCPR did not intend to permit one national jurisdiction to punish

conduct because it was already criminalized in another jurisdiction, but not locally.[1]

36. Dr. Saul, in the material given to me, opines that the offences in Division 115 of the Bill includes offences for which there might be different standards across different jurisdictions with different defences applying across those jurisdictions. He criticizes the proposed Bill in that, for example, a person could be found guilty of a crime in Australia which they could not have been guilty of at the time of the offence in either Australian or foreign law. In my view this is incorrect and it is not what the Bill is seeking to do. If I am wrong about that then the suggestions at the end of the Opinion will deal with Dr. Saul's concerns.

37. In *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 the High Court found that the *War Crimes Amendment Act* 1988 was lawful because it in fact sought to prosecute for offences which would have been crimes at the time of the commission of the offence. Further, the as pointed out earlier the *ICCPR*, paragraph (2) of Article 15, says,

> *"Nothing in this article shall prejudice the trial and punishment of any person for any act or omission* ***which, at the time when it was committed****, was criminal according to the general principles of law recognised by the community of nations." (*My emphasis).

38. I note that the Submission by the Attorney General, in seeking to differentiate the Bill from the other legislative instruments that allow for retrospective prosecution points out that 88 Australians died in the Bali bombings and, although not numerated, many died in World War II. Prosecutions under the *War Crimes Act 1945* occurred after the enactment in Japan for example.

39. It should not matter whether a person or a number of persons are killed by a perpetrator and there is nothing compelling in any argument for limiting the application of retrospective legislation to mass deaths.

40. Further, there are safeguards with the process of charge and proceeding with a trial

1 See submission of Dr Ben Saul to the Senate Legal and Constitutional Affairs Committee 29 January 2014.

which enables any accused to put to a Court particular matters 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 unlike other serious crimes committed within Australia.

41. The definition of serious crimes encompasses only those offences where the community has a public interest to ensure the rights of victims are paramount over the rights of a perpetrator.

42. This approach is consistent with the majority of the High Court in *Polyukhovich* which considered the challenge to the lawfulness of retrospective charging of Australian residents and citizens for war crimes committed during World War II. (See below for the analysis of the Judgement.)

43. There are some concerns I have with the scope of the Bill that the Senator might need to consider. The Bill does differ fundamentally from the other Acts charging criminal offences that have had retrospective effect in Australia -

    - The Bill is not directed at any particular period of time or event. The *War Crimes Act* 1945 was backdated to 1939; The *Criminal Code Amendment (Offences Against Australians) Act* 2002 was only given less than two months retrospective effect. The Submission by the Attorney General says that there is potential for a person to be charged for a crime that goes back as far as Federation. Of course that person would now be over 100 year old. The period caught by the Bill is, likely to be from the post war period. If the Bill also says a person is not to be charged unless they were an adult at the time of the commission of the offence (which was formerly 20) then a person born turning 20 in 1945 would be 89 years old now.
    - The Bill is not targeting any particular event even though it was proposed as a change to enable prosecution of the suspect in the aforementioned

murder. While it is my view that this does should and does not have a human rights impact of itself it may make any challenges to the retrospective nature of the amendment more likely and/or more difficult to defend,

- The Bill is not dealing with a catastrophic event that concerns all Australians; unlike the Bali bombing in 2002 or the atrocities that dawned on the world in 1945. The Bill will be viewed as a fundamental change to a right that has been entrenched in criminal law for centuries and not just a response which might be seen as appropriate to great loss of lives in acts of war or terror. In my view some time frame for the charging and/or some statement about exhausting the criminal process in the jurisdiction where the crime was committed might need to be considered.
- The Bill does not provide for like penalties for persons charged in Australia under State law. The Bali bombing provisions were, according to the Attorney General's submission, designed to complement gaps in terrorism legislation. Of course the problem with that Submission is that, by definition, the offences were not terrorism offences anyway if a prosecution under the original Act was instigated – it was to pick up where terrorism charges could not occur. This means that penalties were always intended to be greater than corresponding State penalties for non-terrorism offences. However, it might be that the Bill could simply amend the penalty clause by providing, in addition to the extension of the application, an amendment that enables a court to apply the equivalent sentencing principles.
- The Bill and the Explanatory Memorandum are silent on the need to be satisfied that no prosecution is intending to/could occur in the place of the crime before a prosecution under the Bill could occur. This can be dealt with

by consideration of the amending the Bill with limiting application.

- The Bill does not deal with the admissibility of evidence obtained outside its jurisdiction and who has the power to obtain and retain such evidence. I note in the case discussed the police were given extraordinary latitude in Brunei and that SA resources were spent on the investigation. I doubt that in jurisdictions refusing or unable to pursue a prosecution for harm done to an Australian such cooperation would normally be forthcoming. One has to only contemplate the difficulty the Australian Police are having in Europe at the moment attempting to gather evidence from the Malaysian Airlines Crash.

44. While examples do not always assist in determining the need to limit or extend proposed changes it seems that the Bill could result in the following;

- A prosecution in Australia of a person who had committed a crime elsewhere where the victim was an Australian citizen or resident and where the foreign country was seeking deportation of the suspect. This could be done, for example, to avoid a harsher penalty in that foreign nation and once a conviction occurred in Australia a defence of *autrefois convict* would apply and deportation would be avoided.
- Persons could be convicted in Australia in relation to acts that have occurred 70 or more years ago and not in a war context. While philosophically I, as a human rights lawyer, would see no distinction between that occurring and charging war criminals in 1945, I can see that it still poses an argument for those seeking to be critical of the scope of the Bill. The difficulty in defending such a charge would be obvious. Witnesses have died or are not able to be located; evidence lost; the expense of travel to the foreign country by either the accused or investigators would be

prohibitive.

- The other factors such as the ability of a defendant to secure defence evidence, the amount of time that has passed, the seriousness of the crime are all factors that a Court should take into account in determining whether it would be just to allow the prosecution to proceed. I would prefer that the Bill provide statutory guidance to factors that a Court should take into account in allowing a prosecution to proceed. This would be consistent with other Articles of the *ICCPR* which prescribe for fair trials and the right to be heard.

Other Factors including likely challenges to the lawfulness of a prosecution.

45. I do not intend to provide an opinion as to the likely outcome of a legal challenge to a prosecution brought as a result of this change as this goes beyond the scope of what I was asked to consider. However, by examining the arguments that the State is likely to face it will assist in understanding the human rights principles which are likely to be considered by any court of review and may provide some assistance to the debate.

46. It is likely that anyone charged as a result of the change in the law would challenge the lawfulness of the charge. There are few cases involving such challenges to legislation; but all that have reached the High Court have erred on the side of the State[2].

47. As said earlier my opinion is consistent, in my view, with the rationale of the High Court in *Polyukhovich.* I accept that the Bill is broader than extending the power to charge war criminals from the World War II living in Australia as residents or citizens with offences that occurred during a distinct event over a six year period. It is my view, however, that the rationale for the justification of the High Court applies equally

2 There have been challenges to the lawfulness of Parliament implementing changes to a sentence through policies which effectively give a person a longer sentence than the sentencing court did.

to the scope of the Bill.

48. In the decision of *Polyukhovich* the High Court considered the constitutionality of the *War Crimes Amendment Act* (1998) (*Cth).* That Act sought to define a war crime as conduct which took place outside Australia generally. The State sought to prosecute Mr. Polyukhovich, who was an Australian citizen, with crimes he had committed in Europe. Each of the Judges in the Court gave different reasons for their support or rejection of the defendant's argument about validity. The decision of the High Court was not unanimous.

49. Mason CJ said at [28],

> *"It is contended that the powers of Parliament to an act of retrospective or retroactive law dealing with substantive rights or liabilities does not extend to a law which makes past conduct a criminal offence. Such a law, it is said, stands in a very different position. It is suggested that support be found in Blackstone's Commentary and in the decisions of the Supreme Court of the United States on Art.1, s.9, cl.3 and Art.1, s.10, cl.1 of the United States Constitution for the proposition that such retrospective criminal law is beyond the power of the legislature on the ground that it is an interference with judicial power."*

Mason CJ went onto quote from Blackstone's Commentary from page 46, explaining the principle behind rejecting Parliament's power to allow for charging for retrospective crimes [49],

> *"Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law: he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence in futuro, and be notified before the commencement; which is implied in the term 'prescribed'."*

Mason CJ went on to note that Blackstone did not say it was beyond the power of Parliament to enact such a law and reiterated Blackstone's view was that such power had to be reasonable. His Honour also pointed out that there was nothing in the Australian Constitution which prohibited retrospectivity.

50. Brennan J went on to say that for a war crime to be a serious crime and caught by the Act the offence had to be a serious crime within the law as it existed at that time

in Australia. He quoted from the preamble to the Act which says the intention of the Act is "*to bring to trial in the ordinary criminal courts in Australia of persons who committed serious war crimes in Europe during World War II."* His Honour then said, [8],

> *"It is immaterial that, when the relevant act was done, the person who did it was not then an Australian citizen or resident, that no Australian citizen or resident nor any other person under or entitled to protection of Australian law was a victim or likely victim, that the armed conflict in the course of which the act was committed did not involve Australia or that the act was lawful accordingly to the laws of the place where the act was done at the time when it was done.*
>
> *Whether or not any relevant Australian interests was involved when the relevant act was done, is sufficient for the purposes of the Act that the person who did the act became an Australian citizen or an Australian resident. The act is truly retrospective in its operation: that is to say it attaches penalties under Australian municipal law to the doing of an act to which the penalty was not attached when the act was done. Under this Act, the plaintiff is charged with offences allegedly committed in 1942 and 1943 in the Ukraine during Germany's occupation of that Territory. It is alleged that he wilfully killed a number of people in pursuit of German policies – either a policy of persecuting the Jewish people or those opposed to German policies or a policy of annihilating suspected partisans or communists.*
>
> *The plaintiff was not then an Australian citizen or resident. If the allegation is made and the charges be true, the plaintiff was guilty of heinous offences against the laws of the Ukraine against the laws and customs of war but he is not charged with offences against the law of the Ukraine nor, as we shall see, with offences against the laws and customs of war. He is charged with offences against the municipal law of Australia, created by section 9 of the Act. The validity of the Act depends upon the legislature power of the Parliament to create the offence defined by the Act and to vest jurisdiction in Australian courts to try persons charged with that offence. As the Act is retrospective in its operation, I assume that the defendants will seek constitutional support for the Act…"*

Brennan J also quoted from Halsbury's Laws of England, [36]

> *"International law recognises certain international crimes in respect of which any country may exercise criminal jurisdiction regardless of the citizenship or residents of the alleged offender or the place where the offence was committed…"*

His Honour also said [45] and [48]

> *"It is one thing to vest in a municipal court jurisdiction to administer the law of nations, albeit that that law is adopted by the municipal law. It is another thing to vest jurisdiction to administer municipal law that does not correspond with international law. The real objection to the validity of the*

Act is that the Act rejects international law as the governing law for the trial as the governing law for the trial of persons allegedly guilty of war crimes and adopts a municipal law definition which operates retrospectively. That retrospectivity denies to the Act the capacity to satisfy an international obligation or to meet an international concern or to confer a universal jurisdiction recognised by international law."

…."Thus international law not only refuses to countenance retrospective provisions in international criminal law; it condemns as offensive to human rights retrospective municipal criminal law imposing a punishment for crime unless the crime was a crime under international law at the time when the relevant act was done. It follows that there can be no international obligation to enact a municipal law to attach a penalty to past conduct unless that conduct, at the time when it was engaged in, was a crime under international law. International concerns must be qualified in like manner."

His Honour went onto conclude that section 9 of the *War Crimes Act* 1945 would be invalid.

51. Deane J went onto consider the retrospectivity of the prosecution. He said at [59]

"The critical question upon the answer to which this judgment turns is ultimately one of abstract constitutional law. It is whether the Commonwealth parliament possesses power to legislate that a 'person…is guilty' of a crime against Commonwealth law if, in the past, he has done some specified thing which was not, when done, such a crime. That question must, in my view, be answered in the negative for the reason that a law which declares that a person 'is guilty' of a crime against a law of the Commonwealth if he has done an act which did not, when done, in fact contravene any such law is inconsistent with Chapter III of the Constitution. Both in substance and in form, the central operation of the Act is as such a legislative declaration of criminal guilt. It prohibits nothing, prescribes no rule of conduct and is incapable of being contravened since, by its terms, it is inapplicable to acts committed after its enactment. As I have endeavoured to explain, it is not to the point that the Act identifies a 'person' whom it declares to be 'guilty' of past crimes against the law of the Commonwealth not by name but, in the case of the plaintiff, by reference to whether, within a long past period and in another country, he did an alleged act which was not such a crime when done and which is never, if done where it was allegedly done, been prohibited by any applicable law of the Commonwealth, including the Act. Nor is it to the point that the operation of the Act to declare that such a person 'is guilty' of such a past crime is obscured by the requirement of a trial to determine whether a particular accused is in fact such a person. What is to the point for the purposes of the present case is the combined effect of two propositions which are basic to the criminal jurisprudence of this country. The first of those propositions is almost a truism. It is that criminal guilt, under our system of law, means being guilty of a contravention of the requirements of a then existing and applicable penal law: a crime is, as Blackstone wrote (see above), 'an act committed, or omitted, in violation of a public law, either forbidding or commanding it'. That proposition lies at the heart of Lord Atkin's comments in the Proprietary Articles Case (see above) when he wrote that criminal law 'connotes only the quality of such acts or omissions as are prohibited

under appropriate penal provisions' and that the 'criminal quality of an act' cannot 'be discovered by reference to any standard but one: Is the act prohibited with penal consequences?" The second of those two propositions is that the function of determining whether a person is in fact guilty of a crime against a law of the Commonwealth is a function which appertains exclusively to, and which cannot be excluded from, the judicial power which our Constitution vests solely in the courts which it designates. That being so, it is beyond the competence of the Parliament to declare, as s.9 (1) of the Act purports to do, that a 'person...is guilty' of a crime against a law of the Commonwealth by reason of having committed a past act which did not, when done, contravene any applicable Commonwealth law and was therefore not in fact such a crime."

52. Dawson J, consistent with the view of the Chief Justice, found that the fact that the law operates on the past conduct of persons who, at the time of the commission of that offence had no connection with Australia, does not in any way detract from its character as a law with respect to the external affairs power under the Constitution. His Honour discussed the unusual nature of war crimes at [18],

> *"However, the ex post facto creation of war crimes may be seen to be justifiable in a way that is not possible with other ex post facto criminal laws, particularly where the conduct proscribed would have been criminal conduct had it occurred within Australia. The wrongful nature of the conduct ought to have been apparent to those who engaged in it even if, because of the circumstances in which the conduct took place, there was no offence against domestic law. And, of course, if the conduct amounted to genocide or a crime against humanity, that comment would be the stronger. This justification for a different approach with respect to war crimes is reflected in the International Covenant on Civil and Political Rights to which Australia became a signatory on 18 December 1972. Article 15(1) of that Covenant forbids the ex post facto creation of criminal offences, but Article 15(2) provides: 'Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.' Because of the view which I take of the external affairs power, I have no need to enter upon the question whether before 1945 genocide or crimes against humanity constituted offences under customary international law; it is sufficient to observe that, even if they did not, the wrongful nature of the conduct would nevertheless have been plainly evident. War crimes of the kind created by the Act simply could not, in any civilized community, have been described as innocent or blameless conduct merely because of the absence of proscription by law."*

53. Toohey J also supported the majority view that the Act was valid. He considered the Act consistent with the State's exercise of the Constitution's external powers. His Honour was concerned with the nature of the crime at the time it was committed and

whether it was a known international crime. He said [47],

> *"There was no international agreement creating a crime against humanity (*in 1945*). If the crime existed, it was a matter of customary law. A customary law comprises two elements: (i) general practice by states; and (ii) opinio juris, in other words, expressed opinion that such a crime exists. Material sources produced before 1945 are evidence of both of these elements; those produced after 1945 are evidence of opinio juris only, as they are statements of opinion as to the state of international law in the past. A survey of the material is useful."*

His Honour went onto consider pre-1939 works including the *Hague Convention* and Acts from other member States which had enacted similar legislation; Israel, Canada and the UK. He concluded that before 1939 there was a consciousness of acts which offended fundamental human rights which may be called crimes against humanity at [69].

He went onto say [70],

> "*It follows that, at the relevant time, conduct which amounted to persecution on the relevant grounds, or extermination of a civilian population, including a civilian population of the same nationality as the offender, constituted a crime in international law only if it was proved that the conduct was itself a war crime or was done in execution of or in connection with a war crime."*

He further said that the allegations against the accused in Mr. Polyukhovich's matter were sufficient to amount to a war crime as well as a crime against humanity. He said [103] [105], and [106]

> *"I do not accept the submission of the Commonwealth in the absolute terms in which it was proffered. In legislation, judicial decisions and statements of principles, both of municipal and international law, there has emerged a general abhorrence of retroactive criminal law. The notion that there should be no crime or punishment, except in accordance with law, was recognised as early as 1651, when Hobbes wrote:*
>
> > *'No law, made after a fact done, can make it a crime…For before the law, there is no transgression of the law:'…"*
>
> ….
>
> *"In international law the principle of non-retroactivity is enshrined in Article 15(1) of the International Covenant on Civil and Political Rights (1966), which reads, inter alia:*
>
> > *'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'."*

….

> *"All these general objections to retroactively applied criminal liability have their source in a fundamental notion of justice and fairness. They refer to the desire to ensure that individuals are reasonably free to maintain control of their lives by choosing to avoid conduct which will attract criminal sanction; a choice made impossible if conduct is assessed by rules made in the future…Laws should function to give reasonable warning of their operation and permit individuals to rely on that scope and meaning until expressly altered. Another nineteenth-century rationale for the principle was expressed in terms of specific deterrence:*
>
> *'The reason why these laws are so universally condemned is, that they overlook the great object of all criminal law, which is, to hold up the fear and certainty of punishment as a counteracting motive, to the minds of persons tempted to crime, to prevent them from committing it. But a punishment prescribed after an act is done, cannot, of course, present any such motive': Jacquins v The Commonwealth (1852) 63 Mass 279'."*

His Honour also found that Chapter III of the Constitution was not offended by any retrospective law. His Honour concluded [116],

> *"There is an element of risk in attempting to summarise the contents of any judgment. But, having regard to the length of this judgment and the range of issues it canvasses, there is some justification for making the attempt. What follows is a summary of the judgment; it need hardly be said that the summary cannot be divorced from the context in which it appears.*
>
> 1. *The power of the Parliament to make laws with respect to 'External affairs'…includes a power to make laws with respect to matters external to Australia which touch or concern Australia in some way.*
>
> 2. *The Act is a law with respect to a matter external to Australia, touching or concerning the national interest of Australia, insofar as it relates to conduct occurring outside Australia arising from 'war' as defined.*
>
> 3. *There is insufficient evidence of any international obligation to seek out war criminals and bring them to trial to support the Act as an exercise of the external affairs power.*
>
> 4. *Likewise, there is insufficient evidence of any international concern that war criminals be tried in countries other than those in which their crimes were committed to support the Act as an exercise of the external affairs power.*
>
> 5. *The power of the Parliament to make laws with respect to 'External affairs' includes a power to make laws with respect to international crimes which are subject to the universal jurisdiction.*
>
> 6. *The Act is a law with respect to external affairs insofar as it is an exercise of the universal jurisdiction to prosecute war crimes and crimes against humanity as formulated in international law at the relevant time.*

7. *The Act cannot be supported by reference to the defence power in…the Constitution.*

8. *The validity of the Act may be tested against the requirements of Chapter III of the Constitution, that is, the Act must not call for an exercise, by a court to which the Chapter applies, of what is not truly judicial power.*

9. *In its application to the information against the plaintiff, the Act does not offend Chapter III of the Constitution."*

54. Gaudron J held that the Act was invalid. She said [24]

> *"The first and most unusual feature of the offence created by s.9 of the Act is that it is confined to past conduct and, it is common ground, to conduct which, at the time of its commission, was not subject to any law of this country. In particular, it was not then governed by the criminal law of this country and, thus, could not then form the basis of a criminal prosecution in this country."*

She went onto say [36],

> *"Equally, it would be a travesty of the judicial process if, in proceedings to determine whether a person had committed an act proscribed by and punishable by law, the law proscribing and providing for punishment of that act were a law invented to fit the facts after they had become known. In that situation, the proceedings would not be directed to ascertaining guilt or innocence (which is the function of criminal proceedings and the exclusive function of the courts), but to ascertaining whether the Parliament had perfected its intention of declaring the act in question an act against the criminal law. That is what is involved if a criminal law is allowed to take effect from some time prior to its enactment. Of course, the position is different if the law re-enacts an earlier law which applied when the acts were committed. At least that is so to the extent that that earlier law has not been brought to bear on conduct falling or alleged to fall within it. In this regard, it is sufficient to state that, in my view, a law would not be a law re-enacting an earlier law if it purported to apply cumulatively upon it. And the position is different again in the case of a law which acts retrospectively upon civil rights, obligations or liabilities. The function of a court in civil proceedings is the determination of present rights, obligations or liabilities. In that context, a retrospective civil law is very much like a statutory fiction in that it is a convenient way of formulating laws which, by their application to the facts in issue, determine the nature and extent of those present rights, obligations or liabilities."*

Her Honour distinguished the case of *Kidman v The Queen*[3] (a 1915 case which concerned the prosecution of an offender for a past act of fraud, but where the fraud would have been a common law offence at the time that it was in fact committed). The definition from *Kidman's* case, which Gaudron J quoted from, says that a

3 (1915) 20 CLR 425.

retroactive law is a

> *"…law by which, after an act has been committed which was not punishable…at the time it was committed, the person is declared to have been guilty of a crime and to be held liable for punishment".*

Gaudron J went onto find that the *War Crimes Act* was not a re-enactment or reproduction of an earlier law, pointing to the fact that the defendants showed that the rules of international law with respect to war crimes and crimes against humanity at that time were, in any event, not reproduced in the Act.

55. Finally, McHugh J found that although the Act penalized conduct which occurred outside Australia it was validly enacted pursuant to the external affairs power of the Constitution. He said [11],

> *"Accordingly, the terms 'external affairs' should be interpreted to include any matter, thing, event or relationship existing or arising or which might exist or arise outside Australia…is not confined, therefore, to the making of laws authorising arrangements with other nations or implementing arrangements properly entered into other nations…Nor is it confined to affairs which concern Australia's relations with other countries or affect Australia's standing of the community of nations or which have some recognisable connection with Australia." A law which punishes an Australian resident or citizen in respect of conduct occurring outside Australia is a law for the peace, order and good government of the Commonwealth with respect to 'external affairs'. Thus, in so far as the Act operates in respect of 'war crimes' committed by Australian residents or citizens outside Australia, it would have been validly enacted under the external affairs power if it had been enacted on 1 September 1939. On that hypothesis, the Act would have operated prospectively to punish Australian citizens and residents in respect of conduct occurring outside Australia with respect to a war occurring in Europe. The critical question, however, is whether the retrospective operation of the Act means that it is not a law with respect to external affairs even though the Act punishes conduct which has occurred outside Australia.*

56. Those Judges supporting the legislation in *Polyukhovich* took into account that the *War Crimes Amendment Act* provided a number of protections for defendants in challenging the prosecution.

57. The grounds for the dissenting judges to support the defendant's argument turned on the existence of the offence at the time; not the issue of retrospectivity.

Summary

58. In conclusion, I support the injustice that the Bill is addressing; namely the inability to charge the suspect for the murder of Ms. Bradshaw-Hall. In my view the Bill is consistent with support for the rights of victims within the justice system. The Bill is extremely wide in its application however and provides for no guidance in relation to the court's discretion. In my view it would be preferable for the Bill to also include

(a) A specific time period that it applies to,

(b) Clarify that prosecutions can only occur if the authorities where the crime was committed fail to charge a suspect,

(c) Allowing only a prosecution to proceed if the defendant is able to have a fair trial taking into account but not limited to,

(i) The time since the offence occurred,

(ii) The ability of the accused person to obtain exculpatory evidence and/or challenge implicating evidence,

(iii) The ability of the accused to have access to, for forensic and other purposes, exhibits, witnesses etc., in circumstances where the integrity of the exhibits has not been compromised,

(iv) The defendant's ability to locate and/or call relevant witnesses to prove his/her innocence,

(d) If the crime was a crime in Australia **and** in the country where the offence occurred at the time of its commission,

(e) It shall be a complete bar to a prosecution if an accused has faced trial in any country for the same act regardless of the charge and regardless of the outcome. This does not apply as a complete bar if charges were withdrawn - but the withdrawal and the reason for it shall be taken into account by the Court to determine if a charge should be permitted to proceed.

(f) A charge cannot be laid under the Act to prevent the attempted deportation of a suspect to the county where the offence occurred.

Claire O'Connor

1 August 2014