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Criminal Code Amendment (Offences Against Australians) Bill 2002

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 67 2002–03

Criminal Code Amendment (Offences Against Australians)
Bill 2002

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25 November 2002

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Criminal Code Amendment (Offences Against Australians) Bill 2002

Date Introduced: 12 November 2002

House: House of Representatives

Portfolio: Justice and Customs

Commencement: The main part of the Bill, Schedule 1, will commence retrospectively on 1 October 2002.

Purpose

To create offences of murder, manslaughter or serious harm to Australian citizens or residents outside of Australia. The intent is to:

- facilitate the extradition of persons suspected of such actions to Australia; and
- make it potentially easier to prosecute a person than under existing terrorism legislation.

Background

The origin of the Bill

The Criminal Code Amendment (Offences Against Australians) Bill 2002 (the Bill) was introduced as a direct result of the Bali Bombings on 12 October 2002. In a joint news release, the Attorney-General and Minister for Justice and Customs said:¹

The legislation will ensure that Australia can effectively cooperate with the broadest possible range of countries to combat transnational crimes and prosecute the people responsible for such atrocities as the Bali attacks.

In particular, it will ensure there are no legal loopholes in terms of prosecuting terrorist acts involving murder overseas. It also strengthens legislation in our new counter-terrorism package, which already has extra-territorial effect.

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To extradite a suspected offender from a foreign country there must be 'dual criminality' - that is, the conduct must constitute an offence in both Australia and the other country.

The Bill was introduced on 12 November 2002 and passed on 14 November.

Unlike State and Territory laws, neither the *Crimes Act (Cmth) 1914* or the *Criminal Code (Cmth) 1995* (Criminal Code) contain offences of murder or infliction of harm against ordinary citizens, except in particular circumstances, for example in the context of war crimes or crimes against humanity. The murder of a person may constitute an act of terrorism under recent amendments to the Criminal Code², but the offence is terrorism, not murder.

As mentioned later in the main provisions section of this Digest, the conduct constituting the offences contained in this Bill must occur outside of Australia. From a constitutional perspective, the authority to legislate extraterritorially in this manner can be derived from the external affairs power because the offences relate to matters that are 'physically external' to Australia: see *Polyukhovich v. Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501, per Mason CJ at pp. 530-531.

Prosecuting for murder etc as compared to terrorism

One of the purposes of the Bill is to make it potentially easier to prosecute a person for a violent act committed overseas than under existing terrorism legislation. There are two broad 'streams' of terrorist offences in the Commonwealth Criminal Code: offences under Division 72 - *International terrorist activities using explosive or lethal devices* and offences under Part 5.3 - *Terrorism*.

There are significant prosecution hurdles to convict a person of a terrorist act under Part 5.3. For example, if a person plants a bomb in a foreign country that kills an Australian, a terrorist act would only occur, if amongst other things, if it was proven that the bombing was done:³

with the intention of advancing a political, religious or ideological cause; and

with the intention of:

- i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
- ii) intimidating the public or a section of the public.

Obviously proving the particular motivation of the accused beyond reasonable doubt may be quite difficult unless they, or an accomplice, give relevant evidence.

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It is potentially easier to convict a person under Division 72 since there are no 'motivational' requirements as outlined above for Part 5.3. However, Division 72 has its own limitations - for example it would not apply to a bombing which targets a private residence.

By comparison, the offence provisions of the Bill do not require proof of motivation, and are not limited to the bombing of 'public' places. Details of the offence provisions of the Bill are contained in the main provisions sections of this Digest.

Extradition under Australian law

Extradition to or from Australia is under the *Extradition Act 1988* (Cmth). In cases where a foreign country applies to Australia for extradition, paragraph 19(2)(c) of the Act requires the conduct underlying the extradition request to be an offence in Australia carrying a penalty of at least 12 months imprisonment. While there is no such equivalent requirement in the Act itself when Australia is requesting extradition from a foreign country to Australia, section 11 of the *Extradition Act 1988* allows extradition to be subject to particular conditions set out in regulations. For example, clause 5 of the Extradition (Republic of Indonesia) Regulations states that extradition matters with Indonesia are subject to the 1992 Treaty between the two countries. Article 2(1) of this treaty provides:

Persons shall be extradited according to the provisions of this Treaty for any act or omission constituting any of the following offences, **provided the offence is punishable by the laws of both contracting states** by a term of imprisonment of not less than one year or by a more severe penalty...[offences include]...murder, manslaughter, maliciously or wilfully wounding or inflicting grievous bodily harm...and aiding, abetting, counselling or procuring the commission of, being an accessory before or after the fact to, or attempting or conspiring to commit [such offences].⁴

There is no listing of a 'general' terrorism offence in Article 2(1).

The requirement that a person's conduct be an offence in both jurisdictions is what called *dual criminality*. The principle may be applied differently in different jurisdictions. One uncertainty surrounding its application is which part of the conduct may be taken into account in determining whether that conduct would be an offence in the jurisdiction from which extradition is requested. Article 2(3) of the Treaty seems to take a fairly broad view on the question, in that the respective offences do not need to correspond exactly, whether in category, title or constituent elements:

For the purpose of this Article in determining whether an offence is an offence against the law of both Contracting States:

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(a) it shall not matter whether the laws of the Contracting States place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;

(b) the totality of the acts or omissions alleged against the person whose extradition is requested shall be taken into account and it shall not matter whether, under the laws of the Contracting States, the constituent elements of the offence differ.

Nonetheless, it is possible that an Indonesian court considering an extradition application might decide that the elements of the various terrorism offences (eg a requirement for an ideological or similar motivation by the accused) under the Commonwealth Criminal Code are not likewise criminalised under Indonesian law. If so, Indonesia would not be obliged to extradite persons suspected of the Bali bombings. By introducing the crimes of murder etc of Australians overseas, the Bill overcomes this uncertainty in relation to the extradition Treaty with Indonesia.⁵

The Bill also assists to ensure that extradition requests will not be defeated by application of the 'political offence' exception. Australia's extradition treaties include an exception⁶ to the obligation to extradite where the requested State determines that the offence for which extradition was sought is a political offence or an offence of a political character. It is arguable that the requirement for some form of ideological motivation in the Criminal Code Part 5.3 offences⁷ referred to above might mean that a foreign court or government could consider those offences to be political offences.⁸ Since the offences created by the Bill do not include any ideological element, this potential obstacle to extradition should not arise.

However, it should also be noted that Article 1 of the Australian-Indonesian extradition Treaty further limits the respective countries obligations to grant an application for extradition. Indonesia is only obliged under Article 1 to extradite persons to Australia if they are Australian nationals. For all other nationals, Indonesia has the discretion whether to extradite or not.⁹ This discretion is in part reflected in Article 7 of Indonesia's Extradition Law¹⁰, of which the translation is:

(1) A request for the extradition of a national of the Republic of Indonesia shall be **refused**.

(2) A deviation from the provision of paragraph (1) mentioned above may be made if in the view of the circumstances it would be better if the person concerned be tried at **the place of the commission of the crime**.

It would therefore appear that under the above law, any Indonesian nationals involved in the Bali bombings cannot be extradited and tried in Australia, unless their crime was to engage in conspiracy etc in Australia. As it stands, this law could only be overridden by a decree of the Indonesia Peoples Consultative Assembly.¹¹ The Indonesian President cannot override the law.

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Retrospectivity

The main part of the Bill, Schedule 1, will be taken to have commenced on 1 October 2002 ie retrospectively. The explanatory memorandum to the Bill comments that:

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.

Main Provisions

Item 2 provides that Schedule 1 is taken to have commenced on 1 October 2002, ie retrospectively.

Schedule 1

Schedule 1 inserts a **new Part 5.4, Division 104** "Harming Australians" into the Criminal Code.

New section 104.1 creates the offence of murdering of an Australian citizen / resident. The conduct constituting the murder must occur outside of Australia, although the actual death of the victim may occur elsewhere¹², for example as occurred for severely injured Australians evacuated from Bali. The accused must have either intended, or been reckless¹³ about, causing death, to Australians or others. For example, a person setting off a bomb in a hall thinking only locals were present could be still guilty of **new section 104.1** if the bomb killed an Australian citizen or resident.

New section 104.1 carries a maximum penalty of life imprisonment.

New section 104.2 creates the offence of manslaughter of an Australian citizen / resident. The elements of the offence are similar to **new section 104.1**, except that the accused only needs to have either intended, or been reckless about, their conduct causing 'serious harm'. Serious harm is already defined in the Criminal Code as being 'harm'¹⁴ (including the cumulative effect of any harm) that endangers, or is likely to endanger, a person's life; or that is or is likely to be significant and longstanding'.

New section 104.2 carries a maximum penalty of 25 years imprisonment.

New section 104.3 creates the offence of intentionally causing serious harm to an Australian citizen / resident. The accused must have intended their conduct to cause serious harm to a person. Being reckless is not required (this is covered by **new section**

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104.4). As for all offences in the Bill, the conduct constituting the offence must occur outside of Australia.

New section 104.3 carries a maximum penalty of 20 years imprisonment.

New section 104.4 creates the offence of recklessly causing serious harm to an Australian citizen / resident.

The offence carries a maximum penalty of 15 years imprisonment.

New section 104.5 provides that the above offences do not exclude or limit the application of other Commonwealth, State or Territory laws. The explanatory memorandum to the Bill comments that:

in some circumstances...existing [Criminal Code] terrorism laws (which also have extraterritorial application) may apply to the same conduct to which these offences would apply. Proposed section 104.5 ensures that where there are two or more offences covering the same conduct the most appropriate offence is able to be prosecuted.

New section 104.6 provides that any prosecutions under the above offence provisions can only be undertaken with the written consent of the Attorney-General. However, investigation of a suspected offence and subsequent arrest and remanding of a suspect does not require such consent. **New section 104.6** is consistent with other Commonwealth law where prosecutions may involve sensitive security or foreign relations issues.

Existing sections 15.1-15.4 of the Criminal Code deal with extending the jurisdiction of Commonwealth criminal law to various situations where conduct and / or the consequences of that conduct occur outside of Australia. Section 15.4 ('Category D') provides the most extended jurisdiction, in that it provides that an offence applies where the relevant conduct and / or the consequences occur entirely outside of Australia. **New section 104.8** provides that a slightly modified form of Category D extended jurisdiction applies to the above **new section 104.1-104.4** offences.

Specifically, **new paragraph 104.8(a)** means that where the conduct of the accused occurs overseas, the Division 104 offences will apply regardless of whether the consequence of that conduct – death or serious harm – occurs overseas or in Australia. **New paragraph 104.8(b)** clarifies how Category D applies to 'ancillary offences'. The concept of ancillary offences are detailed in existing Division 11 of the Criminal Code. Essentially, Division 11 provides that attempting to commit an offence, aiding, abetting, the counselling, procurement or incitement of the commission of an offence, or engaging in a conspiracy to commit an offence *are all themselves (ancillary) offences*. **New paragraph 104.8(b)** effectively provides that as long as the 'primary' offence (eg murder of an Australian under **new section 104.1**) occurs outside of Australia, a related ancillary offence (eg conspiracy to commit murder) can be committed whether the relevant ancillary conduct takes place inside or outside of Australia.

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For the purpose of the above offences, **new section 104.9** provides that a person is taken to have caused the death or harm to another if their conduct 'substantially contributes to the death or harm'. As the explanatory memorandum notes, this is consistent with the common law¹⁵ and existing provisions in the Criminal Code.

Concluding Comments

For the reasons mentioned in the background section of this Digest, current Indonesian law - assuming there is no intervention by the Indonesian Peoples Consultative Assembly - seemingly prohibits any Indonesian nationals involved in the Bali bombings from being extradited (and thus tried) in Australia.

Endnotes

- 1 ['Stronger powers to prosecute terrorists'](#) Media Release 24 October 2002
- 2 See existing subsection 100.1(1) for the required elements of a terrorist act.
- 3 See subsection 100.1(1).
- 4 Article 2(1).
- 5 The dual criminality issue is not just restricted to Indonesia. It potentially exists in extradition arrangements with other countries as well.
- 6 But see also footnote 8.
- 7 This should not be an issue for Division 72 offences as Division 72 implements the 1997 International Convention for the Suppression of Terrorist Bombing. Article 11 of the Convention specifically states that 'a request for extradition or for mutual legal assistance based on [offences under the Convention] may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives'.
- 8 Note that extradition from Commonwealth countries is covered by the Extradition (Commonwealth Countries) Regulations 1998. These regulations state that 'an offence constituted by taking or endangering, attempting to take or endanger or participating in the taking or endangering of, the life of a person, being an offence committed in circumstances in which such conduct creates a *collective danger*, whether direct or indirect, to the lives of other persons, is...[taken]...not to be a political offence in relation to that Commonwealth country'. Also, Commonwealth Law Ministers have recently agreed to 'remov[e] the political offence exception from the [extradition] scheme provides a framework for extradition arrangements

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- for all Commonwealth countries'. See 'No Safe Haven for Terrorists', the Hon Daryl Williams, *News Release* 22 November 2002.
- 9 The range of extradition treaties Australia has with other countries seem to vary on issue of whether a country is bound to extradite its own nationals.
 - 10 Law of the Republic of Indonesia, Number 1, 1979.
 - 11 The Peoples Consultative Assembly (commonly referred to as to by the Indonesian acronym, the MPR) is the supreme policy making body of Indonesian government. The MPR consists of 700 members, 462 of whom are directly elected in general elections. The Indonesian Armed Forces, which includes the Police, exercise a power of appointment for a further 38 seats. However, these appointed seats are gradually being phased out and replaced by elected members. These elected and appointed members, totalling 500 in number, comprise the House of Representatives (commonly referred to by the Indonesian acronym, DPR). The DPR performs the main legislative function of passing legislation and also supervises the performance of the executive branch. The remaining 200 members of the MPR, who do not play an active role in legislative process, are made up of 135 regional representatives and 65 societal group representatives. Source: <http://www.lgslaw.co.id/legalsys.asp>
 - 12 See **new section 108.4**.
 - 13 The Criminal Code defines a person as being reckless if they 'are aware of a substantial risk that the result will occur; and having regard to the circumstances known to him or her, it is unjustifiable to take the risk'.
 - 14 Harm is itself defined as 'physical harm or harm to a person's mental health, whether temporary or permanent. However, it does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community'.
 - 15 See *Royall* (1991) 172 CLR 378, per Brennan J at 398.

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