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Crimes (Overseas) Amendment Bill 2003

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Crimes (Overseas) Amendment Bill 2003

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Law and Bills Digest Group
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Contents

Purpose	1
Background.	1
<i>Crimes (Overseas) Act 1964</i>	1
Joint Standing Committee on Foreign Affairs, Defence and Trade report— <i>Bougainville: The Peace Process and Beyond</i>	2
Joint Ministerial news release—26 June 2003	3
Australian civilian deployments overseas	4
Main Provisions	4
Definitions	4
Repeal of section 4 of the Crimes (Overseas) Act	5
Category 1—Australians who have diplomatic, consular or similar immunity	5
Category 2—Australians civilians working in foreign countries under relevant arrangements or agreements.	5
Category 3—Australian civilians working in foreign countries under declared agreements or arrangements.	6
Category 4—Australians civilians working in declared foreign countries and declared parts of foreign countries.	7
Conduct which is covered by the legislation and the period of coverage	7
Members of the Australian Defence Force, the Australian Security Intelligence Service (ASIS) and Defence Signals Directorate (DSD).	8
Which Australian criminal laws apply to conduct covered by the legislation?	8
Consent to prosecutions.	8
Evidence.	8
Concluding Comments.	9
Endnotes.	10

Crimes (Overseas) Amendment Bill 2003

Date Introduced: 11 September 2003

House: House of Representatives

Portfolio: Attorney-General

Commencement: Formal provisions commence on Royal Assent. The substantive provisions have a retrospective commencement date—1 July 2003.

Purpose

To amend the *Crimes (Overseas) Act 1964* to make certain Australians working in foreign countries subject to Australian criminal law rather than local law for offences committed in those foreign countries.

Background

To place the amendments proposed by this Bill in context, this section of the Digest will look at the background to the *Crimes (Overseas) Act 1964*, proposals for amendment made in 1999 by the Joint Standing Committee on Foreign Affairs, Defence and Trade, and a recent Ministerial news release foreshadowing changes to the Act.

Crimes (Overseas) Act 1964

The Crimes (Overseas) Act was enacted following Australia's commitment of police to serve in a United Nations Force on Cyprus. In his Second Reading Speech for the Crimes (Overseas) Bill 1964, Attorney-General Snedden remarked:

Honourable members will recall that earlier this year the Commonwealth Government was asked by the United Nations to furnish some forty policemen for service with the United Nations Force [in Cyprus]. ... The Commonwealth and the States have co-operated in meeting the request of the United Nations.

...

Under the agreement concluded with the United Nations, the Republic of Cyprus has made very substantial concessions in favour of countries that have contributed personnel to the United Nations Force. The concessions so made, indeed, take away

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entirely the right of the Cyprus courts to exercise jurisdiction in respect of offences committed by members of that Force. At the same time, all countries contributing personnel have an obligation, pursuant to their status of forces agreement, to see to it that their own laws apply, and that the jurisdiction of their courts is available, in relation to any offences that might be committed by their personnel. At the moment there is, so to speak, a legal vacuum insofar as members of the Australian Police Unit are concerned. They are not subject to the jurisdiction of the Cyprus courts, and yet, as matters stand, the laws in force in Australia with respect generally to the commission of offences do not apply to them. The Bill now before the House is designed to fill that gap.¹

The wording of the Crimes (Overseas) Act was designed to be broad enough to cover the deployment of Australian police to Cyprus and to cover future overseas deployments of Australian civilians (including police officers) as part of United Nations peacekeeping forces. It also contains arrest, trial and evidence provisions. For example, it provides that a ‘Commonwealth officer’ may arrest a person outside Australia without a warrant if he or she believes on reasonable grounds that the person has committed or is committing an offence against the Act² so that the person can be returned to Australia for trial.

The Crimes (Overseas) Act operates only when there is an immunity arrangement in place involving the United Nations and the government of a foreign country.³ The jurisdictional gaps that can arise were the subject of comment in a 1999 report by the Joint Standing Committee on Foreign Affairs, Defence and Trade.

Joint Standing Committee on Foreign Affairs, Defence and Trade report— *Bougainville: The Peace Process and Beyond*

In 1999, the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSC) presented its report on Bougainville. Under an agreement signed in 1998, Papua New Guinea invited a number of countries including Australia, Fiji, New Zealand and Vanuatu to participate in a Peace Monitoring Group (PMG) on Bougainville. The Australian contingent included civilians and Australian Defence Force (ADF) personnel.

Article 10 of the *Agreement between Papua New Guinea, Australia, Fiji, New Zealand and Vanuatu Concerning the Neutral Truce Monitoring Group for Bougainville* stated that members of the PMG were immune from PNG laws and subject to the laws of their Participating State for any criminal or disciplinary offences that they might commit on Bougainville.

In evidence to the JSC, the Attorney-General’s Department commented that while ADF personnel in Bougainville were subject to Australian jurisdiction because of the operation of the *Defence Force Discipline Act 1982*, Australian civilians fell outside the reach of both Australian and PNG law.⁴ The Crimes (Overseas) Act did not apply to them because its operation was limited to situations in which there was an agreement in place involving the United Nations.

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The Attorney-General's Department suggested that section 3 of the Crimes (Overseas) Act be amended so that it applied to 'Australian citizens and residents (other than Defence Force members) serving overseas under a "prescribed arrangement"'.⁵ It suggested that the expression, 'prescribed arrangement' be defined to include:

An arrangement made between the Commonwealth and the United Nations

An arrangement, as specified in Regulations, made between the Commonwealth and another country;

An arrangement under which the person is serving as an Australian diplomatic or consular official.⁶

Recommendation 9 of the JSC's report proposed that the Crimes (Overseas) Act be amended to 'extend its jurisdiction to Australian civilians serving overseas in situations not covered by the agreement of the United Nations'.⁷ Additionally, the JSC adopted the suggestion made by the Attorney-General's Department quoted above as recommendation 10 of its report.⁸

The Government's response to the JSC report was tabled in November 2000. In relation to recommendation 9 it responded:

Accepted. The Government recognises that there is an omission in Australian criminal jurisdiction regarding Australian persons serving overseas in circumstances where they are exempt from local jurisdiction, and will examine possible amendments to the Crimes (Overseas) Act.⁹

The Government's response also noted recommendation 10 and stated that it would examine proposed amendments.¹⁰

Joint Ministerial news release—26 June 2003

The subject of the Crimes (Overseas) Act re-surfaced on 26 June 2003, when the Attorney-General, the Minister for Foreign Affairs and the Minister for Justice and Customs issued a media release in which they said:

The Howard Government is always keenly concerned to ensure that all Australians deployed overseas to places like Iraq have the best protections the Government can offer.

In the current security environment, when Australia is doing so much on the world stage, we want to ensure that our people have the maximum protection available.

In some cases, this involves the negotiation of immunity from the jurisdiction of the local courts in the country of deployment.

Where the Government has negotiated such immunities, it is important that it has the ability to prosecute in Australian courts any crimes which may have been committed

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by personnel deployed overseas by the Australian Government. This ensures that there is no jurisdictional gap.

Were Australia unable to exercise its own jurisdiction in these cases, particularly in the case of serious crimes, Australia would face pressure to waive immunity, and allow the overseas local court to prosecute these crimes.

This is an important amendment which will ensure that Australians deployed overseas by the Australian Government can in future be covered by the extraterritorial application of Australia's domestic criminal jurisdiction.

...

In relation to Iraq, the Act will be stated to operate from 1 July 2003.¹¹

Australian civilian deployments overseas

Australian civilians are involved in a number of overseas deployments at present.¹² The joint Ministerial news release and the Second Reading Speech identified Iraq as one site of such deployments. The Solomon Islands, where Australian police are part of a multinational force to restore law and order, is another site. The first AFP contingent left for the Solomon Islands on 24 July 2003.¹³ Australian Protective Service Officers have also been deployed to the Solomon Islands. In respect of Iraq and the Solomon Islands, it is proposed that regulations will be made with retrospective operation—from 1 July 2003 to ensure that Australian civilians deployed there ‘will be protected by the extension of Australian criminal jurisdiction over offences committed [since that date]’.¹⁴

Main Provisions

Definitions

As amended, the Crimes (Overseas) Act will apply, in specified circumstances, to ‘Australians’ in ‘foreign countries’.

The term, ‘Australians’, is defined to mean Australian citizens and non-citizens who are able to remain in Australia indefinitely under the *Migration Act 1958* (**item 3**).¹⁵

The term, ‘foreign country’, is defined to exclude Australia and Australia’s external territories and to include a foreign country’s territory, maritime areas and air space (**item 9**).

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Repeal of section 4 of the Crimes (Overseas) Act

For technical and other reasons, existing section 4 of the Crimes (Overseas) Act provides that if a person's conduct in a foreign country would be an offence under Jervis Bay Territory law and the person is covered by an immunity arrangement between the United Nations and the foreign country, then the person can be dealt with under Jervis Bay Territory law.

Section 4 is repealed by **item 16** and new categories of exemption from the operation of foreign laws are provided in **new section 3A**. **New section 3A** also makes anyone covered by the exemptions liable to prosecution under Australian law.

Category 1—Australians who have diplomatic, consular or similar immunity

The first category of persons to whom the legislation applies are 'Australians' who are immune from criminal proceedings in a foreign country because of diplomatic or consular immunity or because they enjoy immunity as a result of their relationship with an international organisation [**new subsection 3A(1)**].

There are some exceptions to this general rule in order to provide protection against double jeopardy. Thus, a person will not be subject to prosecution in an Australian court under the amendments if:

- criminal proceedings against that person are already underway in the foreign country or the person will become subject to criminal proceedings in the future in the foreign country because their immunity is of limited duration, and
- the person could be prosecuted in the foreign country even if he or she had already been prosecuted under Australian criminal law [**new subsection 3A(2)**].

The legislation will apply to an act falling within Category 1 if the act occurs after the date of Royal Assent [**sub-item 25(1)**].

Category 2—Australians civilians working in foreign countries under relevant arrangements or agreements

The second category of 'Australians' to whom the legislation will apply are Australian civilians working in a foreign country under a 'relevant agreement or arrangement'¹⁶ and who have immunity from criminal proceedings in that foreign country as a result of agreements or arrangements between:

- Australia and the United Nations
- Australia and another country, or

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- the United Nations and the foreign country [**new subsection 3A(3) and item 14**].

The legislation will apply to acts committed by Australians who fall within Category 2 if the act occurs after the date of Royal Assent [**sub-item 25(2)**]. The legislation will not apply where a person commits an act outside the immunity that has been granted under the agreement or arrangement [**new subsection 3A(3)**].

Category 3—Australian civilians working in foreign countries under declared agreements or arrangements

The third category of ‘Australians’ to which the legislation will apply are Australians who are working in a foreign country under a ‘declared agreement or arrangement’ [**new subsection 3A(4)**]. An agreement or arrangement becomes a ‘declared agreement or arrangement’ if it:

- operates between Australia and the United Nations or between Australia and another country,¹⁷ and
- is prescribed by regulations made under **new section 3B**, and

Unlike ‘relevant agreements or arrangements’, ‘declared agreements or arrangements’ do not involve a grant of immunity by the foreign country or the United Nations. However, as a result of being ‘declared agreements or arrangements’, Australian criminal jurisdiction will apply extraterritorially to Australians working under those agreements or arrangements.

Before regulations are made under **new section 3B**, the Attorney-General must have consulted the Minister for Foreign Affairs and be satisfied that it would be appropriate to make the regulations having regard to a number of factors—such as the nature of activities that will be engaged in by Australians, the duration of those activities, the number of Australians likely to be affected and whether local criminal laws would otherwise apply to Australians [**new subsection 3B(3)**].

The following examples are provided by the Explanatory Memorandum of how subsection 3A(4) might apply:

This subsection may apply where the Commonwealth has deployed Australians overseas, but where no immunity has been granted by the receiving country. In such a situation, Australia may have arranged that if Australia can exercise jurisdiction over an Australian working under that agreement or arrangement, Australian jurisdiction will take priority over local jurisdiction. The subsection may also be used to extend jurisdiction over Air Security Officers, as Air Security Officer agreements generally require Australia to have the capacity to exercise jurisdiction over Air Security Officers while in foreign countries.¹⁸

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Category 4—Australians civilians working in declared foreign countries and declared parts of foreign countries

The fourth category of ‘Australians’ to whom the legislation applies are Australians working in a ‘declared foreign country’ or in a ‘declared part of a foreign country’ on behalf of the Commonwealth or as a result of Commonwealth commitments or directions [**new subsections 3A(5) and (6)**].

There is no requirement that:

- any arrangement or agreement is in place—for example, between Australia and the United Nations
- any immunity has been extended to Australians by the foreign country.

A country becomes a ‘declared foreign country’ and a part of a foreign country becomes ‘a declared part of a foreign country’ once it is prescribed by regulation [**new subsections 3C(1) & (2)**].

The Attorney-General must consult the Minister for Foreign Affairs before regulations are made and must be satisfied that it would be appropriate to make the regulations, having regard to the same criteria as are set out when regulations are made for ‘declared agreements or arrangements’ [**new subsection 3C(4)**]. Regulations identifying a country or part of a country as a ‘declared foreign country’ or ‘a declared part of a foreign country’ must have a start date and a finishing date [**new subsection 3C(3)**].

Regulations made under **new section 3C** can be backdated to 1 July 2003, so long as they are made within 3 months from the date that the legislation receives Royal Assent [**new subsection 3C(5)**].

Conduct which is covered by the legislation and the period of coverage

In relation to categories 2-4 described above, the legislation applies irrespective of whether the person’s acts are committed while they are ‘off duty’ or ‘on duty’—beginning when they arrive in the foreign country¹⁹ and ending when they leave the foreign country²⁰ [**new subsections 3A(7)-(9)**]. The Notes to **new subsection 3A(8)** give the following example:

If an Australian is sent to the foreign country to undertake a particular project during a period, this Act applies not only to acts done while the Australian is actively engaged in carrying out the project but also to acts done during that period while the Australian is “off duty”.

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Members of the Australian Defence Force, the Australian Security Intelligence Service (ASIS) and Defence Signals Directorate (DSD)

The legislation will not apply to members of the ADF. Nor will it apply to members of ASIS or DSD (if the act or omission occurs in the proper performance of their duty) [**new subsection 3A(10)**].

Members of the Australian Defence Force are subject to the *Defence Force Discipline Act 1982*, which has extraterritorial operation.

Members of ASIS and DSD are immune from criminal or civil liability under Australian law for acts done outside Australia in the ‘proper performance’ of their agency’s functions.²¹

Which Australian criminal laws apply to conduct covered by the legislation?

If a person’s acts or omissions would have contravened the criminal laws of the Jervis Bay Territory (had their conduct occurred there instead of in the foreign country), then the ‘criminal laws’ of Jervis Bay Territory will apply to them. This expression is defined to include offences, principles of criminal responsibility, defences and principles of statutory interpretation as set down in statutes or by the common law [**new section 3**].

As a general matter, laws in force in the Jervis Bay Territory include Commonwealth laws, ACT laws—such as the *Crimes Act 1900* (ACT)—and Ordinances made by the Governor-General.²²

Other Commonwealth Acts that adopt criminal laws of the Jervis Bay Territory include the *Defence Force Discipline Act 1982*²³ and the *Crimes at Sea Act 2000*.²⁴

Consent to prosecutions

Prosecutions can only be commenced with the consent of the Attorney-General following consultations with the Minister for Foreign Affairs (**new section 4**).

Evidence

At present, section 8 of the Crimes (Overseas) Act provides that the Attorney-General can issue a certificate that the Act applies to a specified person. Such a certificate is evidence of what it contains.

Section 8 is repealed and replaced (**item 24**). As a result, the Attorney-General will be empowered to authorise the Secretary of the Attorney-General’s Department or an SES officer or acting SES officer in that Department to issue certificates. A certificate can certify to any matter relevant to determining whether a person is a person to whom the Act

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applies. A certificate is prima facie evidence of what it states and, unless the contrary is proved, is taken to have been validly issued.

New section 8 will also contain procedural requirements. For instance, a certificate cannot be used in criminal proceedings unless the defendant or their legal representative has been given a copy. Further, if the certificate is admitted as evidence, the issuer of the certificate can be called by the defendant as a witness for the prosecution and cross-examined by the defendant.

Concluding Comments

The Bill does three quite distinct things. First, it plugs jurisdictional gaps that may be created when certain Australian civilians working overseas are given immunity—because of their diplomatic status or an arrangement with the United Nations or another country—which may place them beyond the reach of any criminal law if they commit offences overseas. It plugs those jurisdictional gaps by giving Australian criminal law an extraterritorial operation.

Second, it covers the situation where there is an agreement between the United Nations and Australia or between Australia and a foreign country that does not incorporate an immunity arrangement [see **new subsection 3A(4) and new section 3B**].²⁵ An example given by the Explanatory Memorandum is where there is an arrangement with a foreign country that gives priority to Australian criminal laws, necessitating Australian criminal law being given extraterritorial effect in order to avoid exposure of Australian civilian personnel to prosecution in local courts.

Third, it operates, in relation to a ‘declared foreign country’ where Australia applies Australian law to certain Australian civilians working in that country even though there may be no agreement or arrangement in place [see **new subsections 3A(5) and (6) and new section 3C**].²⁶ This category, in particular, appears designed to ensure that Australians are not ‘vulnerable to prosecution by criminal justice systems that fall short of Australian standards.’²⁷

The exercise of criminal jurisdiction has traditionally been based on the principle of territoriality—a notion reinforced by the (rebuttable) presumption against extraterritoriality and the idea of national sovereignty.²⁸ This is not to say that extended forms of criminal jurisdiction—for instance, based on the nationality of the offender—do not exist.

The Commonwealth Criminal Code allows for extended geographical jurisdiction. Issues surrounding the extension of Australian criminal jurisdiction led the Attorney-General to say, when introducing the relevant amendments to the Criminal Code, that:

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Naturally, it is intended that extended forms of jurisdiction will only be applied where there is justification for this, having regard to considerations of international law, comity and practice.²⁹

In considering the amendments relating to 'declared foreign countries', Members and Senators may be interested to note that where Commonwealth criminal law has previously extended extraterritorially it has generally done so in relation to crimes that are recognised as having 'universal jurisdiction' and crimes involving human rights violations.³⁰ The 'declared foreign country' amendments extend much more generally than this and involve an assertion of Australian jurisdiction without, necessarily, the consent of the foreign country or the agreement of the United Nations.

A number of questions might arise about the 'declared foreign country' amendments, including:

- how the amendments will work in practice if the foreign country has not consented to the assertion of Australian jurisdiction,
- whether the matters that need to be taken into account by the Minister before regulations are made under **new section 3C** should be different to those that are taken into account when regulations are made under **new section 3B**. In the latter case, there must be an arrangement of some sort in place with either the United Nations or the foreign country. In contrast, a regulation made under **new section 3C** may involve a unilateral decision by Australia to assert its criminal jurisdiction extraterritorially.
- the retrospective operation of regulations (to 1 July 2003) provided for in **new subsection 3C(5)**, and
- whether double jeopardy protections need to be included to protect Australians who may have been convicted or acquitted of offences in a declared foreign country or declared part of a foreign country so that they cannot be prosecuted under Australian criminal law for offences arising from the same conduct.³¹

Endnotes

- 1 House of Representatives, *Hansard*, 29 October 1964, pp. 2478–9.
- 2 Section 6, Crimes (Overseas) Act.
- 3 See, in particular, the definition of 'person to whom this Act applies' in section 3 and paragraph 4(b), Crimes (Overseas) Act.

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- 4 See Joint Standing Committee on Foreign Affairs, Defence and Trade, [*Bougainville: The Peace Process and Beyond*](#), 1999, p. 113.
- 5 Ibid, p. 114.
- 6 Ibid.
- 7 Ibid, recommendation 9.
- 8 Ibid, p. 115.
- 9 [Government Response](#) to the Joint Committee on Foreign Affairs, Defence and Trade Report, 'Bougainville: The Peace Process and Beyond', November 2000, p. 4.
- 10 Ibid, pp. 4–5.
- 11 *Joint News Release*, 'Protecting Australian personnel deployed overseas', 26 June 2003.
- 12 House of Representatives, *Hansard*, Second Reading Speech, 'Crimes (Overseas) Amendment Bill 2003', 11 September 2003, p. 19208.
- 13 Australian Federal Police, *Media Release*, 'AFP to lead a law enforcement operation to the Solomons', 22 July 2003.
- 14 Ibid.
- 15 In contrast, the Principal Act referred to Australian citizens and to non-citizens ordinarily resident in Australia. Its definitions of 'non-citizen' and 'person to whom this Act applies' are repealed by **items 12 and 13**.
- 16 This expression is defined by **item 14** as an agreement or arrangement between Australia and the United Nations or between Australia and another country.
- 17 See the definition of 'relevant agreement or arrangement' (**item 14**).
- 18 Explanatory Memorandum, p. 6.
- 19 Or part of the foreign country.
- 20 Or part of the foreign country.
- 21 Section 14, *Intelligence Services Act 2001*. The Inspector-General of Intelligence and Security can certify 'any fact relevant to the question of whether an act was done in the proper performance of a function of an agency' and that certificate is prima facie evidence of what it states [subsections 14(2B) & (2C)].
- 22 Such as the Administration Ordinance 1990 and the Leases Ordinance 1992.
- 23 Section 61 of the *Defence Force Discipline Act 1982* provides that a defence member or defence civilian is guilty of an offence if he or she commits what would be an offence in the Jervis Bay Territory, irrespective of whether that offence is committed inside or outside the Jervis Bay Territory.
- 24 Section 6 adopts the criminal laws of the Jervis Bay Territory.
- 25 See the discussion of 'Category 3' above.

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- 26 A wide range of Australian civilians might be covered by regulations ‘declaring’ foreign countries or parts of foreign countries—extending from Australians working on behalf of the Commonwealth to Australians working ‘pursuant to commitments or directions given by, or on terms determined by, the Commonwealth.’ See the discussion of ‘Category 4’.
- 27 House of Representatives, *Hansard*, Second Reading Speech, ‘Crimes (Overseas) Amendment Bill 2003’, 11 September 2003, p. 19208.
- 28 Simon Bronitt & Bernadette McSherry, *Principles of Criminal Law*, 2001.
- 29 House of Representatives, *Hansard*, Second Reading Speech, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999, 24 November 1999, p. 12465.
- 30 Bronitt & McSherry, *op. cit.*
- 31 Query whether double jeopardy protections are also needed in relation to Australians whose conduct is covered by ‘declared agreements or arrangements’. The Bill gives double jeopardy protections to Australian diplomats and consular officials [**new subsection 3A(2)**]. Other Commonwealth laws with extraterritorial reach that include double jeopardy protections include the *Crimes At Sea Act 2000* (section 6A), the *Crimes (Aviation) Act 1991* (section 50) and the *Crimes Act 1914* (section 50AD).

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