

**SUBMISSION TO THE SENATE COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS – INQUIRY INTO THE PROVISIONS OF THE
CRIMINAL CODE AMENDMENT (HARMING AUSTRALIANS) BILL 2013**

This submission deals with one aspect of the Criminal Code Amendment (Harming Australians) Bill 2013 ('the Bill'), namely, its potential to lead to the retrospective prosecution of criminal conduct.

The Explanatory Memorandum to the Bill deals with this issue as follows:

The provisions in the Bill relate to the crimes of murder, manslaughter and serious harm to another person, all of which already exist in other jurisdictions. As such, the Bill does not introduce retrospective crimes, but instead extends the capacity for involvement of Australian law enforcement that this Division already provides.¹

In his Second Reading speech in support of the Bill, Senator Xenophon similarly says that:

[T]his bill deals with crimes of murder, manslaughter and causing serious harm, which already exist in all other jurisdictions. As such, this bill does not establish a crime retrospectively, but instead extends the capacity for involvement of Australian law enforcement that this Division already provides.²

Speaking at the level of generality, these claims are true. However, the offences as defined in Division 115 of the *Criminal Code* (Cth) use notions of "intention" and "recklessness" that are defined in Division 5 of the *Criminal Code*. Not all legal systems use the same notions in defining criminal offences, and the definitions used in the *Criminal Code* are not uncontentious even with common law jurisdictions. Ian Leader-Elliott makes this point in his *Guide for Practitioners*. In relation to "intention", the *Guide* observes that

If one *means* to cause a consequence, one *intends* that consequence. If one merely takes a conscious and unjustified risk that the consequence might occur, one may be *reckless* with respect to that consequence but it is not intended. Chapter 2 maintains the distinction between intended results and results which are merely risked. It does, however, extend the concept of intention beyond those instances where the result was *meant* to occur. If the person realised that the result was certain to follow their conduct, it is treated as intentional. The extension is controversial, for it cuts across moral distinctions which are held to be of fundamental importance by many moral philosophers and concerned citizens. Many people would argue that there is an essential moral difference, for example, between the administration of a pain-killing drug which is meant to kill a terminally ill patient and administration of the same drug, in the same dosage, with the intention of alleviating pain, though death is known to be an inevitable side effect of the drug... The Code

¹ "Statement of Compatibility with Human Rights", Explanatory Memorandum, Criminal Code Amendment (Harming Australians) Bill 2013.

² Hansard, Senate, Wednesday 11 Dec 2013 p 1488.

formulation was intended to settle, by stipulation, a dispute over the legal meaning of intention that has continued without resolution for half a century.³

In relation to “recklessness”, the *Guide* notes that

To say that a risk was substantial, it is necessary to adopt the standpoint of a reasonable observer at the time of the allegedly reckless conduct, before the outcome was known... The first step ... is to establish that there was a risk and that the risk was “substantial”. The standard is obviously vague. It also involves significant conceptual problems... The *Code* requirement of “substantial risk” appears to have been chosen for its irreducible indeterminacy of meaning.⁴

It is therefore possible that a person might be guilty of an offence under provisions defined using the technical vocabulary of the *Criminal Code* although that person’s conduct did not amount to an offence in the jurisdiction in which it was committed, because the conduct fell within those margins where the technicalities in defining such notions as “intention” and “recklessness” make a practical difference. This possibility is enhanced

In such cases, the provisions of the Bill would permit a person to be retrospectively convicted of a criminal offence for conduct which was not criminal at the time it was undertaken.

There is another respect in which it is not true that the Bill, when it operates retrospectively, simply “extends the capacity for involvement of Australian law enforcement” in investigating and bringing to prosecution conduct which was in any event criminal, namely, in relation to sentencing. Even where conduct undertaken in another jurisdiction was criminal in that jurisdiction at the time of the conduct, the maximum possible sentence may have been less than the maximum sentences found in Division 115 of the *Criminal Code*.⁵

These risks of retrospectively criminalising what was, at the time, non-criminal conduct, or of retrospectively sentencing a person in a manner more severe than that to which their conduct exposed them at the time, could be eliminated by introducing two provisions into Division 115: a general defence provision making it a defence to any offence against the

³ *The Commonwealth Criminal Code: A Guide for Practitioners* (Commonwealth Attorney-General’s Department in association with the Australian Institute of Judicial Administration, 2002)

⁴ *Ibid* 73.

⁵ These maximum sentences are 15 years imprisonment for recklessly causing serious harm, 20 years imprisonment for intentionally causing serious harm, 25 years for manslaughter (which is defined as causing death by way of conduct that was intended to cause serious harm, or in respect of which the perpetrator was reckless as to the possibility that the conduct would cause serious harm) and life imprisonment for murder.

Division that the conduct was not criminal in the jurisdiction in which it was committed at the time it was committed; and a general sentencing provision stipulating that no sentence imposed for a defence against the Division may exceed the maximum penalty to which the convicted person might have been liable had he or she been sentenced for the criminal conduct in the jurisdiction in which it took place, at the time that it took place.

The inclusion of such provisions would make good on the intentions stated in the Explanatory Memorandum, and in Senator Xenophon's Second Reading Speech, that the Bill not give rise to retrospective criminal liability, and I therefore urge the Committee to recommend the inclusion of provisions along such lines in its report on the Bill.

Dr Patrick Emerton

Senior Lecturer, Monash University Faculty of Law and
Associate, Castan Centre for Human Rights Law

Faculty of Law
Building 12
Monash University
VIC 3800