

RULE OF LAW INSTITUTE OF AUSTRALIA

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary

The Rule of Law Institute of Australia (RoLIA) thanks the Committee for the opportunity to make a submission on the *Criminal Code Amendment (Harming Australians) Bill 2013*.

RoLIA is an independent and not-for-profit body. It does not receive any government funding.

The objectives of the Institute include:

- Fostering the rule of law in Australia, including the freedom of speech and the freedom of the media
- Reducing the complexity, arbitrariness and uncertainty of Australian laws
- Promoting good governance in Australia by the rule of law
- Encouraging truth and transparency in Australian Federal and State governments, and government departments and agencies
- Reducing the complexity, arbitrariness and uncertainty of the administrative application of Australian laws.

The Institute makes the following submission on the Bill.

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Submission to the Senate Legal and Constitutional Affairs Legislation Committee

Criminal Amendment (Harming Australians) Bill 2013 (Cth)

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Contents

Executive Summary.....	3
The Harming Australians Division in the Commonwealth Criminal Code.....	4
Purpose of the Original Law.....	4
Role of the Attorney-General in Authorising Proceedings.....	5

Executive Summary

1. The *Criminal Code Amendment (Harming Australians) Bill 2013* will amend the *Commonwealth Criminal Code* to extend the jurisdiction of Australian courts retrospectively to allow for the prosecution of murder, manslaughter and other offences committed against Australians while overseas.
2. The proposal offends a fundamental principle of the rule of law, which is that no law should operate retrospectively. However, there are safeguards in the offence's provisions which seriously restrict its operation and which we consider on balance justifies its enactment.

The Harming Australians Division in the Commonwealth Criminal Code

3. The *Criminal Amendment (Harming Australians) Bill 2013 (Cth)* will amend the harming Australians offences and provisions found in Division 115 in Schedule 1 of the *Criminal Code Act 1995 (Cth)*. It proposes to allow for the offences of murder, manslaughter, and the causing of intentional or reckless serious harm to have effect before, on and after their dates of commencement.
4. Currently, the harming Australians provisions have effect from 1 October 2002. The *Criminal Code Amendment (Offences Against Australians) Act 2002 (Cth)* which enacted the Harming Australians Division was granted Royal Assent on 15 November 2002, but was made retrospective to 1 October 2002.

Purpose of the Original Law

5. The Bill departs significantly from the stated purpose of the *Criminal Code Amendment (Offences Against Australians) Act 2002 (Cth)* which was to make it easier to charge those accused of terrorist acts with a criminal offence without the need to use terrorism legislation.¹ The retrospectivity in the original act was clearly intended to allow for the prosecution of perpetrators of the 2002 Bali Bombings and was made retrospective by only 45 days to reflect this. This is a stark contrast to the unlimited retrospectivity proposed in the Bill which makes these offences a catch-all for any relevant act committed at any point in time in the past which has harmed an Australian.²
6. The justification for the retrospectivity in the 2002 Act was that ‘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’ across

¹ Explanatory Memorandum, Criminal Code Amendment (Offences Against Australians) Bill 2002. <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r1680>; Attorney-General and Minister for Justice and Customs, ‘Stronger powers to prosecute terrorists’, (Media release, 24 October 2002). The media release is no longer available online on the Attorney-General’s Department website but is quoted and referenced in the Bills Digest on the Australian Parliament House website: <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0203/03bd067>

² An Australian Institute of Criminology paper states for the period 1995 – 2003 that 158 Australians were murdered overseas. This includes the 88 Australians murdered in the Bali Bombings, and the 10 Australians killed in the World Trade Centre Terrorist attacks see: John Venditto and Jenny Mouszos, ‘The murder of overseas visitors in Australia’, *Trends and Issues in Crime and Criminal Justice*, (June 2006, Australian Institute of Criminology), p. 5.

all jurisdictions.³

7. The proposed Bill relies on the same justification that comparable offences exist across all jurisdictions and that the retrospectivity does not create retrospective criminal offences, but only extends the jurisdiction of Australian Courts.⁴
8. There are countless examples where a prosecution would be reasonable but there are also countless examples where it would not. A typical example of a prosecution under the Bill where it might be reasonable is where a person accused of murdering an Australian overseas who is not charged in that country with an offence but on coming to Australia is charged with an offence.
9. However, what of a medical doctor, in a country where medically assisted euthanasia is legal, assists an Australian citizen to end their life. Would that doctor be subject to prosecution for the offence if they entered Australia or came within the reach of an authority that would deliver the person in to the custody of Australian authorities. If the doctor were charged with an act committed prior to October 1 2002, the Bill is not merely extending the jurisdiction of Australian courts, it is creating a substantive offence which does not exist in the jurisdiction in which it was committed.

Role of the Attorney-General in Authorising Proceedings under the Harming Australians Division

10. The Attorney-General under Part 115.6(1) of the Harming Australians Division in the *Criminal Code Act 1995 (Cth)* must provide written authorisation for proceedings to take place. As the first law officer it is expected that the Attorney-General would weigh all the relevant considerations relating to the commencement of proceedings under these offences. The proposed unlimited retrospectivity would be another factor to consider for cases occurring before the 1 October 2002, the commencement date of the Act.
11. The role of the Attorney-General in authorising prosecutions is recognised

³ Explanatory Memorandum, *Criminal Code Amendment (Offences Against Australians) Bill 2002*.

⁴ Explanatory Memorandum, *Criminal Amendment (Harming Australians) Bill 2013 (Cth)*.

http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fs942_ems_c63b7733-7117-4453-b843-6127a5904aa8%22

in the *Prosecution Policy of the Commonwealth* as being justified when offences ‘involve a use of the criminal law in sensitive or controversial areas, or must take account of important considerations of public policy’.⁵ The retrospectivity in the proposed Bill intends to bring these offences to bear on cases which occurred prior to 2002. The reasons for which the Attorney-General may choose to authorise or deny consent for proceedings raises some questions about the compatibility of this with the purpose of the offences. Since the amendment broadens the purpose of this offence from addressing harm done to Australians in terrorist attacks, to a catch-all for harm which may have befallen an Australian at any point in time, this changes the context in which the Attorney-General is making a decision about the commencement of proceedings.

12. The public policy considerations in the *Prosecution Policy of the Commonwealth* are not normally considered with respect to the offences of murder, manslaughter, and serious harm. External factors such as the effect proceedings may have on Australia’s international relations, or the potential cost to the tax payer of conducting proceedings may not be consistent with the purpose of the law which is to seek justice for Australians who are harmed or killed overseas.
13. We believe the Attorney-General is the appropriate person to make this determination, as they have the expertise of their department, as well as the ability to correspond with other relevant agencies about the particulars of a case.
14. If a certain case actionable under the Harming Australians offences, due to the proposed retrospectivity, was denied authorisation only on the basis of public policy grounds, this would bring the Australian law into contempt with its purpose, and highlights the reason why responsibility for prosecutorial decisions for criminal offences has largely become the responsibility of the Commonwealth, State and Territory Directors of Public Prosecutions.
15. A possible example is the murder of two Australian journalists⁶ Gregory Shackleton and Anthony Stewart in East Timor in 1975. It raises matters

⁵ Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (2009), [2.24]. <<http://www.cdpp.gov.au/publications/prosecution-policy-of-the-commonwealth/>>; Attorney-General’s Department, AGD Submission to ALRC Inquiry ‘Secrecy Laws and Open Government’, 2009 quoted in Australian Law Reform Commission, *Secrecy Laws and Open Government*, <<http://www.alrc.gov.au/publications/7-general-secrecy-offence-exceptions-and-penalties/other-issues>>

⁶ We are unsure whether the murder of the other three journalists would fall under the Harming Australians Offence since they were of British and New Zealand nationality, however, if they were Australian residents they could also fall under the purview of the proposed amendments to the Harming Australians offences.

which are sensitive to relations between Australia and Indonesia, and which are the subject of an ongoing investigation by the Australian Federal Police. Under the stated purpose and provisions of the Bill it is clear how the Harming Australians offences may relate to this case. Whether this offence would change the current legal standpoint with regard to the extradition of suspects in those killings is beyond the scope of this submission.

16. The retrospectivity proposed in this provision does not remove the power of an Australian Court to dismiss proceedings where it finds them manifestly unfair for the accused. This provides an additional level of protection for the accused which prevents the likelihood of a case progressing where the proceedings would be unfair.
17. The independence of the prosecution in approaching the Attorney-General to bring proceedings, as well as the ultimate decision as to whether proceedings will commence is not affected by the retrospective operation of the offences. There is no reason to assume the Commonwealth, State or Territory Departments of Public Prosecutions would have interest in pursuing a case that was without merit – it would be in the interest of the prosecution to address any issues pertaining to retrospectivity of the offence before the commencement of proceedings and substantive issues in the case.
18. We consider the Attorney-General would proceed cautiously and only in a rare case authorise a prosecution under the Bill.
19. The Institute has considered other protections to limit the discretion of the Attorney-General, however, these are either too complex so as to be unwieldy, or place restrictions on the application of the offence which would make its use impractical or impossible, especially where a case had occurred prior to 2002.
20. In balance we consider the subject matter of the Bill and safeguards warrant the provisions being made retrospectively.

END OF SUBMISSION