4

Other amendments to the Criminal Code

4.1 Further to the proposed amendments relating to control orders discussed in Chapters 2 and 3, the Bill proposes a number of other amendments to the Criminal Code:

- Schedule 1 adds an additional exception to the criminal offence of 'getting funds to, from or for a terrorist organisation', and amends the wording of an existing exception to the offence of 'associating with terrorist organisations'.
- Schedule 5 adopts a new defined term of 'imminent terrorist act' and clarifies the thresholds applicable to the application for or issuing of a preventative detention order (PDO).
- Schedule 6 removes the Family Court of Australia from the list of superior courts in which a person must have served as a judge before being eligible to be appointed as an issuing authority for continued PDOs.
- Schedule 11 creates a new offence for publicly advocating genocide.

Receiving funds for legal assistance (Schedule 1)

4.2 Schedule 1 to the Bill primarily relates to the offence under the Criminal Code of 'getting funds to, from or for a terrorist organisation', which carries a maximum penalty of 25 years' imprisonment (where the person knows it is a terrorist organisation) or 15 years' imprisonment (where the person is reckless as to whether it is a terrorist organisation).[1]

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1 *Criminal Code Act 1995* (Criminal Code), section 102.6.

4.3 The offence currently contains exceptions for a person who proves that he or she received funds from a terrorist organisation solely for the purpose of providing

- legal representation for a person in proceedings relating to [Division 102 of the Criminal Code]; or
- assistance to the organisation for it to comply with a law of the Commonwealth or a State or Territory.[2]

4.4 The Bill proposes to add an additional exception to the offence for

- legal advice or legal representation in connection with the question of whether the organisation is a terrorist organisation.

4.5 This provision is a partial implementation of Recommendation 20 of the COAG Review of Counter-Terrorism Legislation, which recommended that

> subsection 102.6(3)(a) be amended to exempt the receipt of funds from a terrorist organisation for the purpose of legal advice or legal representation in connection with criminal proceedings or proceedings relating to criminal proceedings (including possible criminal proceedings in the future) and in connection with civil proceedings of the following kind:
>
> (i) Proceedings relating to whether the organisation in question is a terrorist organisation, including the proscription of an organisation, a review of any proscription, or the de-listing of an organisation; or
>
> (ii) A decision made or proposed to be made under Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979 (Cth), or proceedings relating to such a decision or proposed decision; or
>
> (iii) A listing or proposed listing under section 15 of the Charter of the United Nations Act 1945 (Cth) or an application or proposed application to revoke such a listing, or proceedings relating to such a listing or application or proposed listing or application; or
>
> (iv) Proceedings conducted by a military commission of the United States of America or any proceedings relating to or arising from such a proceeding; or
>
> (v) Proceedings for a review of a decision relating to a passport or other travel document or to a failure to issue such a passport or other travel document (including a passport or other travel

2 Criminal Code, subsection 102.6(3).

> document that was, or would have been, issued by or on behalf of the government of a foreign country).[3]

4.6 The COAG response to the COAG Review considered that 'the range of circumstances in which the exception ought to apply should be more limited', and as such the Bill only proposes to implement the recommendation in part.[4]

4.7 The Explanatory Memorandum contains further information on the rationale behind this measure:

> It is appropriate that an organisation is provided with an opportunity to contest a determination that it is a terrorist organisation. The amendment will enable a lawyer to receive funds from a terrorist organisation in cases where it seeks to challenge its status as a terrorist organisation. However, the exception will not extend to receiving funds for legal services that could help the organisation flourish. For example, lawyers will not be able to receive funds for providing legal advice or legal representation in general commercial or civil transactional matters.[5]

4.8 The Attorney-General's Department submission provided examples of why the existing exemptions were not sufficient:

> [A] person could be facing prosecution for a financing terrorism offence under Division 103. Part of the prosecution case could be that the individual was providing or collecting funds for a terrorist organisation that is not 'listed' but falls within the meaning of the Criminal Code. A lawyer would be unable to receive funds from the organisation to provide legal advice or legal representation to the individual who has been charged under Division 103 of the Criminal Code for financing terrorism, even though there may be a legal question as to whether the organisation is a terrorist organisation.
>
> In addition, the current exception may not apply for the purpose of providing legal advice on the potential delisting of a terrorist organisation on the basis that it does not fall within the meaning of a 'proceeding' relating to Division 102.

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3 Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation*, 2013, p. 29.

4 Attorney-General's Department, *Submission 9*, p. 12.

5 Explanatory Memorandum, pp. 40–41.

4.9 The Bill also proposes to modify the language used in the equivalent existing exemption to the Criminal Code offence of 'associating with terrorist organisations'. This offence currently excludes the provision of legal advice or legal representation in connection with 'proceedings relating to whether the organisation in question is a terrorist organisation'.[6] The Bill proposes to change the wording of this exception to 'the question of whether the organisation is a terrorist organisation', hence removing the word 'proceedings'. The Explanatory Memorandum provides the following reason for this change:

> Currently, the reference to proceedings in subparagraph 102.8(4)(d)(ii) could create uncertainty as to whether formal proceedings must be instituted before the exemption applies. The amendment removes this ambiguity and provides certainty that legal advice or legal representation can be provided in relation to the question of whether the organisation in question is a terrorist organisation, before proceedings are formally instituted or have commenced.[7]

Matters raised in evidence

4.10 This schedule attracted only a small amount of comment from submitters. The Muslim Legal Network (NSW) indicated its support for the amendments, noting that it is 'essential that any person who is a defendant in criminal proceedings … has adequate legal representation', and that the inclusion of the exception would 'ensure their right to fair trial'.[8]

4.11 A joint submission from councils for civil liberties across Australia also indicated support for the proposal and agreement with the rationale in the Explanatory Memorandum. The councils noted, however, that the Bill did not propose to implement the COAG Review's related recommendation concerning the legal burden on the defendant being reduced to an evidential one.[9] The councils called for this recommendation to also be implemented.[10]

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6 Criminal Code, subparagraph 102.8(4)(d)(ii).

7 Explanatory Memorandum, p. 41.

8 Muslim Legal Network (NSW), *Submission 11*, p. 5.

9 See Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation*, 2013, p. 28.

10 Joint councils for civil liberties, *Submission 17*, p. 3.

4.12 At the public hearing, the Committee asked the Department for further information on the genesis of the changes proposed in Schedule 1.[11] In a supplementary submission, the Department advised that the COAG Review recommendation drew on a number of public submissions in favour of expanding the exception for lawyers to receive funds from a terrorist organisation, in addition to the 2006 Report of the Security Legislation Review Committee (the Sheller Report) and a subsequent report by the then Parliamentary Joint Committee on Intelligence and Security.[12]

4.13 No concerns were raised by inquiry participants in relation to the particular amendments proposed in the Bill. As such, the Committee makes no further comments and supports the schedule's inclusion in the Bill.

Preventative detention orders – 'imminent' test (Schedule 5)

4.14 The preventative detention order (PDO) regime allows persons over 16 years of age to be taken into custody and detained for a short period of time—up to 48 hours—in order to (a) prevent an imminent terrorist act occurring; or (b) preserve evidence of, or relating to, a recent terrorist act.[13]

4.15 Under subsection 105.4(4) of the Criminal Code, an AFP member may apply to an issuing authority for a person to be made subject to an initial PDO if the following criteria are met:[14]

> (a) in the case of an AFP member—the member suspects, on reasonable grounds, that the subject:
>
> (i) will engage in a terrorist act; or
>
> (ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or
>
> (iii) has done an act in preparation for, or planning, a terrorist act; and

11 *Committee Hansard*, 14 December 2015, Canberra, p. 45.

12 Attorney-General's Department, *Submission 9.1*, p. 5.

13 See Criminal Code, Division 105—Preventative detention orders.

14 For the purposes of initial PDOs, the issuing authority is a 'senior AFP member', which includes the Commissioner, a Deputy Commissioner, or 'an AFP member of, or above, the rank of Superintendent'. See Criminal Code, section 100.1.

(b) in the case of an issuing authority—the issuing authority is satisfied there are reasonable grounds to suspect that the subject:

(i) will engage in a terrorist act; or

(ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or

(iii) has done an act in preparation for, or planning, a terrorist act; and

(c) the person is satisfied that making the order would substantially assist in preventing a terrorist act occurring; and

(d) the person is satisfied that detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (c).[15]

4.16 Under subsection 105.4(5), for the purposes of the above criteria, a terrorist act

(a) must be one that is imminent; and

(b) must be one that is expected to occur, in any event, at some time in the next 14 days.[16]

4.17 Schedule 5 to the Bill proposes to repeal and replace subsection 105.4(5) with the following new definition of 'imminent terrorist act':

An ***imminent terrorist act*** is a terrorist act that:

(a) in the case of an AFP member—the member suspects, on reasonable grounds; or

(b) in the case of an issuing authority—the issuing authority is satisfied there are reasonable grounds to suspect;

is **capable of being carried out, and could occur, within the next 14 days**. [emphasis added]

4.18 Through consequential amendments to subsection (4),[17] this newly defined term of 'imminent terrorist act' would form the basis of the test that applications for PDOs must meet if they are to be issued.

4.19 The Explanatory Memorandum states that the amendments are intended to 'clarify how the "imminent" test in subsection 105.4(5) operates'. It

15 Criminal Code, subsection 105.4(4).

16 Criminal Code, subsection 105.4(5).

17 Item 1, Schedule 5 to the Bill.

notes that the current language in the subsection is 'confusing' and could be interpreted to impose 'impractical constraints on law enforcement agencies':

> [Subsection 105.4(5)] requires an expectation that an event will occur in the next 14 days. However, law enforcement agencies may be aware of individuals who intend to commit terrorist acts and who possess the necessary ability to carry out a terrorist act, but who have no clear timeframe in mind as to when they might perpetrate the act. The terrorist act could potentially occur within hours, weeks or months. In such circumstances, law enforcement agencies may not be able to obtain a PDO as the issuing authority may not be satisfied that there is an expectation the act will occur within precisely 14 days, despite the clear and ongoing threat posed by the individual. The current focus of 105.4(5) on the timing for when an act will occur within a certain period, rather than the capability for an act to occur within a certain period, is problematic.
>
> …
>
> With the terrorist threat continuing to evolve, radicalisation occurs with increasing speed and terrorists may seek to commit terrorist acts quickly to evade the attention of law enforcement. Law enforcement may be aware that a person has the intention, motivation and necessary tools to commit a terrorist act, but no evidence as to the specific date on which the attack is planned to occur. In other circumstances, a person may become aware that they are the subject of law enforcement surveillance and accordingly change the timing of the planned attack to evade attention. In such circumstances, explicit reference to 'capability' will ensure that law enforcement is able to take appropriate action to protect public safety and prevent the terrorist act from occurring.[18]

4.20 The Explanatory Memorandum further states that the existing structure of section 105.4 is open to two differing interpretations of the thresholds to apply to the 'imminent' test. The proposed amendments are intended to clarify that 'the test of "imminent terrorist act" must be read in conjunction with the thresholds applicable to the AFP member and issuing authority'—that is, the thresholds of 'suspects, on reasonable grounds'

18 Explanatory Memorandum, pp. 60–61.

and 'satisfied that there are reasonable grounds to suspect' are built into the definition of 'imminent terrorist act'.[19]

4.21 In reviewing the Bill, the Senate Standing Committee for the Scrutiny of Bills flagged that the proposed new definition of 'imminent terrorist act' would constitute a broadening of the power to issue a PDO, and sought more explanation from the Attorney-General as to why this should occur.[20] The Parliamentary Joint Committee on Human Rights similarly sought advice on the objective of the proposal, whether the proposal is 'rationally connected to that objective', and whether the limitation on the right to liberty is a 'reasonable and proportionate measure for the achievement of that objective'.[21]

Matters raised in evidence

4.22 Submissions from the Attorney-General's Department and the AFP expanded on the rationale for the proposed amendments in Schedule 5. The Attorney-General's Department noted that the amendment would seek to address the 'possible compromise to the operational utility of the PDO regime' that exists in the 14-day requirement, in which it is 'often difficult, if not impossible' to establish with certainty that a terrorist act is expected to occur within exactly 14 days.[22]

4.23 The Department noted that similar concerns had been raised in the 2012 report by the former Independent National Security Legislation Monitor (INSLM).[23] The former INSLM, while recommending that the PDO regime be repealed entirely, noted that the 'degree of precision required in the 14-day requirement 'limits the efficacy of the PDO regime'. He recommended that, if PDOs were to be retained, the imminence test should be replaced with a requirement that there is 'a sufficient possibility of the terrorist act occurring sufficiently soon so as to justify the restraints imposed by the PDO'.[24]

4.24 The AFP submitted that the intention of the Bill was

19 Explanatory Memorandum, p. 61.

20 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 13/15*, 25 November 2015, p. 12.

21 Parliamentary Joint Committee on Human Rights, *Thirty-second reports of the 44th Parliament*, 1 December 2015, p. 24.

22 Attorney-General's Department, *Submission 9*, p. 8.

23 Attorney-General's Department, *Submission 9*, p. 8.

24 Independent National Security Legislation Monitor, *Declassified Annual Report: 20 December 2012*, p. 52.

> not to expand the meaning of 'imminent', but rather to clarify its meaning. That is, it seeks to address the underlying factors which made a terrorist act 'likely to occur at any moment':
>
> - the intent of a person to commit a terrorist act in the near future (within the next 14 days); and
> - the actual capability of a person to commit a terrorist act in the near future (within the next 14 days).[25]

4.25 During the inquiry, several submitters took the opportunity to state their concerns about the PDO regime as a whole, primarily citing issues with the utility of the regime, a perceived lack of procedural fairness, and human rights concerns.[26] Notwithstanding these concerns, comments by submitters on the specific amendments proposed in the Bill were mixed.

4.26 The Australian Human Rights Commission, for example, was opposed to the amendments, arguing that they would 'substantially reduce' the threshold required to be met to obtain a PDO.[27] The Commission noted that the dictionary definition of 'imminent' involves 'a very high likelihood (or even certainty) of an event occurring and a short timeframe within which it is to occur'.[28] It argued that, under the existing legislation,

> [t]he requirement that an issuing authority be satisfied there are reasonable grounds to suspect an imminent terrorist attack may not be an easy one to meet. However, that is entirely consistent with the extraordinary nature of the preventative detention order regime … It is not appropriate that powers of this nature be exercised if there is not a high risk of a terrorist act.

4.27 The Commission suggested that the proposed lowering of the threshold had 'not been shown to be justified', and 'could allow an order to be made in cases where no more is shown than that there is a possibility a terrorist attack might occur'.[29]

4.28 The Muslim Legal Network (NSW) similarly opposed the amendments, arguing that the new definition of 'imminent terrorist act' would amount to lowering the threshold for impeding upon an individual's right to be at liberty on the basis of 'subjective' criteria.[30]

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25 Australian Federal Police, *Submission 3*, p. 14.

26 Gilbert + Tobin Centre of Public Law, *Submission 2*, pp. 7, 8–9; Australian Human Rights Commission, *Submission 5*, p. 6; Law Council of Australia, *Submission 6*, p. 15; Joint councils for civil liberties, *Submission 17*, pp. 11–12.

27 Australian Human Rights Commission, *Submission 5*, p. 16.

28 Australian Human Rights Commission, *Submission 5*, p. 15.

29 Australian Human Rights Commission, *Submission 5*, p. 15, 16.

30 Muslim Legal Network (NSW), *Submission 11*, p. 15.

4.29 The Gilbert + Tobin Centre of Public Law, on the other hand, while opposing PDOs generally, supported the amendments as proposed in Schedule 5. It noted that the existing legislation was 'awkwardly phrased' in that the requirement that a terrorist act be expected to occur within 14 days is 'restrictive and conceivably fails to capture terrorist acts that could occur on very short notice but for which no date has been set'. The Centre submitted that the amendment proposed in the Bill would 'improve the clarity of the provisions'.[31]

4.30 The Law Council of Australia supported the INSLM's recommendation that, if the PDO regime were to be retained, the imminence test should be amended. However, it argued that the inclusion of the words 'could occur' (within 14 days) was too broad, and 'may not ensure that only situations where there is a real risk of a terrorist attack occurring are captured'. The Law Council's submission recommended that 'could occur' be replaced with 'is likely to occur', such that an imminent terrorist act would be one that

> is capable of being carried out, and *is likely to* occur, within the next 14 days.[32]

4.31 A similar recommendation was made in the joint submission from the councils for civil liberties across Australia.[33]

4.32 Ms Gabrielle Bashir SC expanded on the Law Council's recommendation at the public hearing and suggested that the definition of 'imminent terrorist act' proposed in the Bill would introduce 'vagueness' into the existing legislation, increasing its susceptibility to challenge on constitutional grounds. Ms Bashir indicated that a definition that incorporated 'likelihood' would help bring it into line with previous High Court decisions.[34]

4.33 Responding to the language in the AFP's submission that the intention of the Bill is to clarify the meaning of 'imminent' to 'address the underlying factors which make a terrorist act "likely to occur at any moment"',[35] the President of the Law Council added that

> it seems from what you have just read out to the committee that there may have been an intention to direct the words 'could occur'

31 Gilbert + Tobin Centre of Public Law, *Submission 2*, pp. 7–8.

32 Law Council of Australia, *Submission 6*, p. 16.

33 Joint councils for civil liberties, *Submission 17*, p. 12.

34 Ms Gabrielle Bashir, SC, Member, National Criminal Law Committee, Law Council of Australia, *Committee Hansard*, Canberra, 14 December 2015, p. 5.

35 Australian Federal Police, *Submission 3*, p. 14.

> to the rather arbitrary and definite time frame of 14 days. It does not, on our reading, have that effect. In fact, the effect of using those words is to dilute and weaken the circumstances but do nothing about the arbitrariness of the 14 days. Certainly, the Law Council does not submit that the 14 days is some magical, important period. If the objective was to create some flexibility around that 14-day period within limits, then that is not something that would concern the Law Council. But we do not think that these proposed words achieve that.[36]

4.34 In a supplementary submission, the Attorney-General's Department highlighted problems with the proposal for the definition of 'imminent terrorist act' to be phrased around likelihood:

> The proposed phrase 'likely to occur' would not entirely overcome the problems with the existing phrase 'expected to occur' as it still places an emphasis on the probability of an act occurring within 14 days. As noted in the AFP submission, a terrorist act can be likely to occur at any moment in circumstances where a person has made plans or preparations to carry out an act, but has not yet selected a date for it to occur (for example, if a terrorist has concealed a bomb in a building with a remote detonator). In those circumstances, if the test for the issue of the PDO was that the terrorist act was 'likely to occur within 14 days', the AFP would still be required to provide evidence as to the likelihood of the act occurring within that set timeframe. This test may be impossible to meet if the terrorist had no particular timeframe for executing their plan, even if it could occur at any moment.[37]

4.35 At the public hearing, Ms Bashir also suggested 'unacceptable risk of harm' as an alternative form of words that, while not preferred by the Law Council compared to its recommendation of 'is likely to occur', would represent the 'very minimum' of what should be considered. Ms Bashir noted that 'unacceptable risk of a terrorist attack occurring' would be consistent with language approved by the High Court in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.[38]

4.36 In response, the Attorney-General's Department argued that an 'unacceptable risk' component was already part of the PDO regime:

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36 Mr Duncan McConnel, President, Law Council of Australia, *Committee Hansard*, Canberra, 14 December 2015, p. 6.

37 Attorney-General's Department, *Submission 9.1*, p. 16.

38 Ms Bashir, Law Council of Australia, *Committee Hansard*, Canberra, 14 December 2015, pp. 5, 7.

> The proposal that the test should refer to an 'unacceptable risk of harm' requires a balancing exercise to be undertaken between the relevant nature and degree of risk of harm to the community and the deprivation of a person's liberty for a limited period of time. However, this balancing exercise is already built into the preventative detention order regime under paragraphs 105.4(4)(c) and (d) which require that the issuing authority is satisfied that making the order would substantially assist in preventing an imminent terrorist act, and that detaining the person is reasonably necessary for the purpose of preventing a terrorist act. To the extent that the 'unacceptable risk' component is already a part of the preventative detention order regime, it would be undesirable and unnecessary to include it within the revised 'imminent' test.[39]

Committee comment

4.37 During this inquiry, the Committee considered the specified amendments contained in the Bill, rather than examining the merits of the PDO regime as a whole.[40]

4.38 There were mixed views on the proposed amendments. The majority of inquiry participants who commented on the provision accepted the need for less restrictive wording in the 'imminent terrorist act' test for PDOs, as is proposed in the Bill and was initially recommended by the INSLM. However, views on the precise wording selected varied.

4.39 While accepting the need to address the current limits on the efficacy of the PDO regime, the Committee acknowledges concerns that the wording in the Bill may be overly broad, and as a result could potentially increase the susceptibility of the legislation to legal challenge on constitutional grounds.

4.40 Alternative proposals put before the Committee included redrafting the definition of 'imminent terrorist act' to require consideration of whether an act is 'likely to occur' within 14 days, or to require consideration of whether there is an 'unacceptable risk' that an attack may occur. However, there are difficulties with both of these alternative propositions.

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39 Attorney-General's Department, *Submission 9.1*, p. 17.

40 The Committee is required to undertake a separate, broader review of the operation, effectiveness and implications of the PDO regime, along with a range of other counter-terrorism powers, by 7 March 2018 under paragraph 29(1)(bb) of the *Intelligence Services Act 2001*.

4.41 In regard to the proposal to replace the Bill's use of the words 'could occur' with 'is likely to occur' (within the next 14 days), it is unclear that this would overcome the existing overly-restrictive requirement that a terrorist act must be *expected* to occur, at any event, within 14 days. It would still prevent the use of a PDO in circumstances where the AFP does not have evidence as to when precisely the terrorist act is likely to occur, including in circumstances where a terrorist attack could occur at any moment.

4.42 The Committee also examined the Law Council of Australia's proposal to introduce a requirement for consideration of whether there is an 'unacceptable risk' of a terrorist act occurring. This subjective test would avoid the need to define 'imminent' or specify an arbitrary time period, and would require the decision-maker to balance the risk to the community of a terrorist act occurring against the deprivation of liberty under a PDO for the individual involved. However, the Committee accepts the Attorney-General's Department's view that a similar 'balancing exercise' is already built into the PDO regime. It is not clear how an additional balancing exercise would sit with the existing requirements, and it may in fact risk duplicating or making unworkable the current requirements.

4.43 It is important that any changes to the 'imminent' test in the PDO regime be considered in light of the other significant thresholds that must be met before a PDO can be issued. As noted earlier, for a PDO to be made under the existing legislation an AFP member must 'suspect on reasonable grounds' and an issuing authority must be 'satisfied that there are reasonable grounds to suspect' that the subject

- will engage in a terrorist act; or
- possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or
- has done an act in preparation for, or planning, a terrorist act.[41]

Additionally, both the AFP member and the issuing authority must be satisfied that

- making the order would substantially assist in preventing a terrorist act occurring; and

41 Criminal Code, paragraph 105.4(4)(a)–(b).

- detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose preventing a terrorist act occurring.[42]

4.44 Together, these requirements will ensure that PDOs are only used in the most extreme situations where rapid preventative detention is reasonably necessary for preventing a terrorist act, including where the timing of that terrorist act is uncertain.

4.45 The new definition of 'imminent terrorist act' in the Bill retains a 14 day outer limit in which a terrorist act must be 'capable of being carried out, and could occur' to meet the requirements of the PDO regime. As some submitters pointed out, however, this definition stretches beyond the common understanding of the term 'imminent', which implies that an act is 'likely to occur at any moment' or is 'about to happen'.[43] In fact, the focus of the new definition is more on the capacity of an act to occur (at any time), rather than on its imminence. The Committee therefore considers that the word 'imminent' in the definition should be removed altogether.

4.46 The Committee suggests that subsection 105.4(5) in the Bill be rephrased simply to state:

> A terrorist act referred to in subsection (4) is a terrorist act that
>
> (a) in the case of an AFP member—the member suspects, on reasonable grounds; or
>
> (b) in the case of an issuing authority—the issuing authority is satisfied there are reasonable grounds to suspect;
>
> is capable of being carried out, and could occur, within the next 14 days.

4.47 The Committee notes that, as part of its enabling legislation, it has oversight over the performance of the AFP's functions with respect to the Commonwealth PDO regime. The Committee is also required to review the operation, effectiveness and implications of the PDO regime by 7 March 2018. In carrying out both of these functions, the Committee will pay close attention to the practical operation of the regime, including with respect to the changes proposed in the Bill.

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42 Criminal Code, paragraph 105.4(4)(c)–(d).

43 See Australian Human Rights Commission, *Submission 5*, p. 15, citing the Macquarie Dictionary (3rd ed.).

Recommendation 15

The Committee recommends that clause 105.4(5) of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to replace the term 'imminent terrorist act' with 'terrorist act' in the threshold test for preventative detention orders (PDOs).

The Committee notes that the use of the word 'imminent' could be regarded as inconsistent with the Bill's amended definition of a terrorist act that is 'capable of occurring, and could occur, within the next 14 days'.

The Committee notes that existing thresholds under the PDO regime would continue to require the applicant and the issuing authority to be satisfied that making the PDO would substantially assist in preventing a terrorist act from occurring and that detaining the subject for the applicable period is reasonably necessary for the purpose preventing a terrorist act from occurring.

Preventative detention orders –issuing authorities (Schedule 6)

4.48 Schedule 6 to the Bill proposes to remove the 'Family Court of Australia or of a State' from the Criminal Code definition of 'superior court'.[44] This would have the effect of removing the Family Court from the list of courts in which a *retired* judge must have served as a judge for five years before being eligible to be appointed as an issuing authority for continued PDOs. 'Superior courts' would be limited to the High Court, the Federal Court of Australia, the Supreme Court of a state or territory, or the District Court (or equivalent) of a state or territory.[45]

4.49 Under existing provisions in the Criminal Code, *serving* judges of federal courts (which would include the Federal Circuit Court and the Family Court of Australia), serving judges of State and Territory supreme courts, and the President or Deputy President of the Administrative Appeals Tribunal may also be appointed as issuing authorities for continued

44 See Criminal Code, section 100.1.

45 Explanatory Memorandum, p. 63. See Criminal Code, section 100.1 (definition of 'superior court') and section 105.2 (Issuing authorities for continued preventative detention orders).

PDOs.[46] Initial PDOs are made internally by a senior member of the AFP.[47] The Bill does not propose to amend these provisions.

4.50 The Explanatory Memorandum provides the following rationale for the proposal in the Bill:

> Currently, a person who has served as a judge of the Family Court for at least five years may be appointed as an issuing authority under section 105.2, with various powers including the power to make and extend a continued PDO.
>
> However, while the other courts within the definition of a 'superior court' exercise functions relevant to the areas of criminal law and counter-terrorism, the Family Court does not have jurisdiction in relation to those matters. It is anomalous for a judge of the Family Court to play a role in the control order regime, and no Family Court judge has ever been appointed under section 105.2.
>
> This amendment removes the anomaly and means that only those judges who have served in a court which ordinarily exercises criminal jurisdiction will be eligible for appointment as an issuing authority for continued PDOs.[48]

Matters raised in evidence

4.51 The proposed amendment is somewhat similar to the proposed omission of the Family Court from the definition of 'issuing court' for Control Orders, provided for in Schedule 4 (see Chapter 2). As with Schedule 4, a number of participants in the inquiry expressed their support for the removal of the Family Court from the definition of 'superior court',[49] with one submission opposing the amendment on the grounds that Family Court members have more experience than others in considering the best interests of children.[50]

4.52 In its submission, the Gilbert + Tobin Centre of Public Law argued that the Federal Circuit Court should additionally be 'stripped of jurisdiction to

46 Criminal Code, Section 105.2.

47 Criminal Code, Section 100.1, definition of 'issuing authority'.

48 Explanatory Memorandum, p. 63.

49 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 8; Law Council of Australia, *Submission 6*, p. 15; Joint councils for civil liberties, *Submission 17*, p. 11; Professor Andrew Lynch, Gilbert + Tobin Centre of Public Law, *Committee Hansard*, Canberra, 14 December 2015, pp. 18, 19.

50 Australian Lawyers for Human Rights, *Submission 4*, p. 4.

issue PDOs'.[51] In response, the Attorney-General's Department argued that it was appropriate for judges of the Federal Circuit Court to retain the ability to be appointed as issuing authorities

> to ensure flexibility and to facilitate access to an issuing authority at a range of locations, including at short notice, noting the urgency necessarily associated with the making of a preventative detention order to prevent an imminent terrorist attack.[52]

4.53 Gilbert + Tobin also expressed a more general concern that the power of *serving* judges to be made issuing authorities for PDOs was of 'questionable' constitutional validity:

> Chapter III of the Constitution prohibits the conferral of any functions on a serving judge in his or her personal capacity, when those functions are incompatible with the independence or integrity of the judicial institution.
>
> … The involvement of serving state, territory or federal judges in a scheme that brings about the detention of citizens in proceedings lacking procedural fairness undermines the integrity of the judicial institution and could be struck down on this basis. In order to avoid this risk of constitutional invalidity, the role of issuing authority ought not be conferred on serving judges of any court.[53]

4.54 In a supplementary submission, the Attorney-General's Department contested the Centre's assertion that the PDO regime lacked procedural fairness and responded as follows:

> The Minister can only appoint a person who has provided written consent. This ensures persons appointed as an issuing authority have considered and understands the role. In exercising functions as an issuing authority, subsection 105.18(2) makes it clear that the functions conferred are conferred in a *personal capacity* and not as a court or a member of a court, regardless of whether the person is a current or former judge.[54]

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51 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 8.

52 Attorney-General's Department, *Submission 9.1*, p. 17.

53 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 8. See also Rebecca Ananian-Welsh, 'Preventative Detention Orders and the Separation of Judicial Power', *University of New South Wales Law Journal*, 38(2), 2015, p. 756.

54 Attorney-General's Department, *Submission 9.1*, p. 17. Emphasis in the original.

Committee comment

4.55 The Committee notes there was general support for the proposal to remove the Family Court of Australia or of a State from the definition of 'superior court'. The Federal Circuit Court is already excluded from this definition.

4.56 The definition of 'superior court', which would be amended by the Bill, is only relevant to the eligibility of *retired* judges to become PDO issuing authorities. A broader range of *serving* judges—including those of both the Family Court of Australia and Federal Circuit Court—will still be eligible to be appointed as issuing authorities if the Bill is passed.

4.57 The Committee supports the amendment as outlined in the Bill in relation to retired judges, but considers that an additional amendment is required to paragraph 105.2(1)(b) of the Criminal Code to provide that a serving judge of the Family Court of Australia is also ineligible to be appointed as an issuing authority. This would be in keeping with the stated intent of the Bill to remove an anomaly in which Family Court judges can be appointed as issuing authorities for PDOs, despite the Family Court not having jurisdiction in relation to matters of criminal law and counter-terrorism.[55]

4.58 At this point in time and based on the evidence received to this inquiry, the Committee is not convinced of the need to also remove the ability of Federal Circuit Court judges to be appointed.

4.59 Although some have questioned the constitutional validity of appointing any serving judges as issuing authorities, the Committee notes the clear intention that any judge appointed would only have the functions of an issuing officer conferred on them in a personal capacity. Such a judge would presumably give careful consideration to any perceived impact on the independence and integrity of the judiciary prior to giving their written consent to be an issuing officer. The Committee also notes that no PDOs have been issued under the Commonwealth regime to date.[56]

Recommendation 16

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to remove the ability for serving judges of the Family Court of Australia to be appointed as issuing authorities under paragraph 105.2(1)(b) of the Criminal Code.

55 See Explanatory Memorandum, p. 63.

56 Australian Federal Police, *Submission 3*, p. 14.

Advocating genocide offence (Schedule 11)

4.60 Schedule 11 to the Bill proposes to insert a new offence into the Criminal Code, carrying a maximum seven year prison sentence, targeting persons who 'publicly advocate genocide'.

4.61 Genocide is defined in the Bill as the commission of any of the genocide offences outlined in existing Division 268 of the Criminal Code. These offences cover acts committed with an intent to 'destroy, in whole or in part', a 'particular national, ethnical, racial or religious group, as such', including by killing; causing serious bodily or mental harm; deliberately inflicting conditions of life calculated to bring about physical destruction; imposing measures intended to prevent births; and forcibly transferring children.[57] The 'extended criminal liability' offences related to genocide—that is, attempt, incitement, conspiracy, complicity and common purpose, joint commission and commission by proxy—are specifically excluded from the new offence.[58]

4.62 The term 'advocate' is defined in the Bill to mean 'counsel, promote, encourage or urge'.[59] This is the same language used to define 'advocates' in relation to the 'advocating terrorism' offence that was enacted under section 80.2C of the Criminal Code in 2014. However, unlike the 'advocating terrorism' offence, the new 'advocating genocide' offence, as drafted, is limited to *public* advocacy.[60] The Explanatory Memorandum notes that, while the word 'publicly' is not defined, it would include:

- causing words, sounds, images of writing to be communicated to the public, a section of the public, or a member of members of the public,
- conduct undertaken in a public place, or
- conduct undertaken in the sight or hearing of people who are in a public place.[61]

4.63 According to the Explanatory Memorandum, the existing Criminal Code offences for incitement and urging violence would continue to be pursued 'where there is sufficient evidence', however, this would not always be possible:

57 Criminal Code, Division 268, Subdivision B—Genocide.

58 Proposed subsection 80.2D(3).

59 Proposed subsection 80.2D(3).

60 Proposed subsection 80.2D(1).

61 Explanatory Memorandum, p. 108.

> These offences require proof that the person intended the crime or violence to be committed, and there are circumstances where there is insufficient evidence to meet that threshold. Groups or individuals publicly advocating genocide can be very deliberate about the precise language they use, even though their overall message still has the impact of encouraging others to engage in genocide.[62]

4.64 The Explanatory Memorandum argues that, in addition to the existing 'advocating terrorism' offence, the new offence would become one of the tools available to law enforcement agencies to help them 'intervene earlier' in order to 'prevent and disrupt the radicalisation process and engagement in terrorist activity'. Such tools were said to be necessary because of the increased speed of the radicalisation process in recent times:

> [I]n the current threat environment, the use of social media by hate preachers means the speed at which persons can become radicalised and could prepare to carry out genocide may be accelerated. It is no longer the case that explicit statements (which would provide evidence to meet the threshold of intention and could be used in a prosecution for inciting genocide) are required to inspire others to take potentially devastating action against groups of individuals.[63]

4.65 The proposed new offence includes a 'double jeopardy' protection in relation to any prior convictions or acquittals by the International Criminal Court.[64] A note in the provision also refers to the existing defences in section 80.3 of the Criminal Code for acts done in 'good faith'.[65]

4.66 The Committee previously examined the 'advocating terrorism' offence in its review of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014. Submitters to that inquiry identified a number of concerns relating to the proposed advocating terrorism offence, including:

- the sufficiency of the existing incitement and urging violence offences in capturing those who directly encourage others to engage in criminal acts,

62 Explanatory Memorandum, pp. 108–109.

63 Explanatory Memorandum, p. 109.

64 Proposed subsection 80.2D(2).

65 Proposed subsection 80.2D(1).

- that a 'recklessness' threshold is a disproportionate impingement on the right to free speech,
- the potentially counter-productive nature of the offence,
- that the definition of 'advocacy' is overly vague and does not provide sufficient clarity to enable people to know what activity could be deemed illegal, and
- that the 'good faith' defence does not sufficiently capture the full range of activities that should be covered.[66]

4.67 In its report on the Foreign Fighters Bill, the Committee accepted that, despite these concerns, the Government has a responsibility for ensuring that advocacy of terrorism is discouraged and prevented, and that the existing offences did not cover this type of behaviour.[67] It also accepted that 'recklessness' was the appropriate test for assessing an individual's behaviour under the proposed offence,[68] and that the existing 'good faith' defence and other criminal law safeguards would ensure an appropriate balance was struck between free speech, healthy public discourse and the illegal and unwanted encouragement of terrorism.[69]

4.68 Acting on recommendations of the Committee, the Government revised the Foreign Fighters Bill's Explanatory Memorandum to clarify the meaning of the terms 'encourage', 'advocacy' and 'promotion' as they relate to the advocating terrorism offence.[70] The Explanatory Memorandum to the current Bill contains similar language to clarify the meaning of these expressions in respect to the proposed 'advocacy of genocide' offence:

> The terms 'promotes' and 'encourages' are not defined. The ordinary meaning of each of the relevant expressions varies, but it is important that they be interpreted broadly to ensure a person who advocates genocide does not escape punishment by relying on a narrow construction of the terms or one of the terms.

66 Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, p. 30.

67 Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, p. 42.

68 Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, p. 39.

69 Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, p. 43.

70 Senator the Hon George Brandis QC, Attorney-General, 'Government response to committee report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014', *Media release*, 22 October 2014.

> However, some examples of the ordinary meaning of each of the expressions follow: to 'counsel' the doing of an act (when used as a verb) is to urge the doing or adoption of the action or to recommend doing the action; to 'encourage' means to inspire or stimulate by assistance of approval; to 'promote' means to advance, further or launch; and 'urge' covers pressing by persuasion or recommendation, insisting on, pushing along and exerting a driving or impelling force.[71]

4.69 The Explanatory Memorandum contends that, while these expressions may be interpreted broadly, combined with the existing 'good faith' defences it would be clear that they do not cover 'merely commenting on or drawing attention to a factual scenario', such as pointing out errors in government policy or publishing material about a matter of public interest in good faith:

> This will not stifle true debate that occurs—and should occur—within a democratic and free society. The new offence is designed to capture those communications that create an unacceptable risk of the commission of genocide. Accordingly, a successful prosecution will require evidence that the person intentionally communicated something in circumstances where there is a substantial risk that somebody would take that speech as advocating the commission of a genocide offence.[72]

Matters raised in evidence

4.70 In its submission, the AFP expressed its concern about the impact of 'hate preachers' on the current crime environment and provided further detail on the rationale for the new offence:

> The new 'advocating genocide' offence is directed at those who supply the motivation and imprimatur for violence. This is particularly the case where the person advocating genocide holds significant influence over other people who sympathise with, and are prepared to fight for, the genocide cause. …
>
> The cumulative effect of more generalised statements, when made by a person in a position of influence and authority, can still have the impact of directly encouraging others to undertake a range of violent acts, including genocide, overseas or in Australia. The AFP therefore require tools, such as the new 'advocating genocide'

71 Explanatory Memorandum, p. 109.

72 Explanatory Memorandum, pp. 109–110.

> offence, to intervene earlier in the radicalisation process to prevent and disrupt further engagement in genocide.[73]

4.71 The Attorney-General's Department's submission noted that the proposed new offence would be consistent with the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) as well as 'offences enacted by some of Australia's closest allies, including the United States, Canada and Ireland', in its prohibition of 'direct and public incitement' to commit genocide.[74]

4.72 Other submitters to the inquiry raised concerns about the proposed new offence, in particular:

- the justification for the new offence and overlap with existing offences,
- the breadth of conduct potentially falling under the definition of 'advocating',
- the absence of a fault element of 'intention' or 'recklessness', and
- the lack of a definition of 'publicly'.

4.73 Several inquiry participants questioned the necessity for the new offence in light of existing offences that could target the same behaviour.[75] For example, the Australian Human Rights Commission noted existing offences for 'urging violence' and 'advocating terrorism' that it considered would 'capture much of the conduct at which the proposed measures are said to be targeted'. It recommended the Committee 'scrutinise closely the claimed justifications' for the new offence.[76] The Muslim Legal Network (NSW) further identified sedition offences and an offence targeting the use of carriage services (such as social media) to 'menace, harass or cause offence'.[77]

4.74 The Gilbert + Tobin Centre of Public Law contended that the new offence would go 'significantly beyond the law of incitement' and that

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73 AFP, *Submission 3*, p. 16.

74 Attorney-General's Department, *Submission 9*, p. 12.

75 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 12; Australian Human Rights Commission, *Submission 5*, p. 20–22; Law Council of Australia, *Submission 6*, pp. 23–24; Muslim Legal Network (NSW), *Submission 11*, p. 37; Joint councils for civil liberties, *Submission 17*, p. 17; Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 14 December 2015, p. 16; Mr Zaahir Edries, President, Muslim Legal Network (NSW), *Committee Hansard*, Canberra, 14 December 2015, p. 29.

76 Australian Human Rights Commission, *Submission 5*, p. 21.

77 Muslim Legal Network (NSW), *Submission 11*, p. 37.

> to the extent that the offence includes speech that amounts to incitement, its enactment is entirely superfluous since the incitement of genocide is already a criminal offence.[78]

4.75 At the public hearing, the Attorney-General's Department provided the Committee with an explanation of the difference between the proposed new offence and existing offences, and the gap in the legislation that the new offence is seeking to fill:

> [I]nciting genocide would be a criminal offence under the Criminal Code. The penalty provisions in the code would provide that that would be a 10-year penalty. However, the elements of that would be that you intentionally—because intention is read in—engage in conduct that is advocating, promoting or inciting genocide and you also intend that that conduct happen. What we are seeing in what has been broadly described as hate speech is commentary—and I cannot give you a specific example—where it is quite intentional in terms of the conduct that they are engaging in, whether that is something written or spoken, but there is no evidence that they actually intend that the genocide occur. It is very difficult to identify what proof or evidence you would adduce in order to prove not only that I said, 'You should kill all the people of race X,' but that I actually intended for you to do that.
>
> Our concern is that it is easy to mount an argument that you did not intend that conduct to be followed through on. With this particular proposed offence if you intentionally … and publicly advocate genocide that is sufficient for this offence, and that is why it has a lower penalty of seven years. It is capturing the difference between intentionally engaging in that conduct intending that something happen on the one hand and intentionally engaging in that conduct of advocating genocide without any particular intention as to what follows on the other hand.[79]

4.76 In a supplementary submission, the Department noted this difference was the reason for the lower maximum sentence for the proposed offence (seven years) compared to the existing incitement offence (10 years). It added:

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78 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 12.

79 Ms Karen Bishop, Acting Assistant Secretary, Counter-Terrorism Branch, Attorney-General's Department, *Committee Hansard*, Canberra, 14 December 2015, p. 42.

> Where there is evidence that a person engaged in inciting conduct and also intended genocide would occur, the person would be charged with the more serious offence.[80]

4.77 Similarly to submissions made to the Committee's previous review of the 'advocating terrorism' offence, several inquiry participants argued that the term 'advocating' was defined too broadly in the Bill.[81] For example, a joint submission to the inquiry received from a range of media organisations echoed a concern the group previously raised that the ambiguous nature of the term 'advocates' could potentially limit discussion, debate and the exploration of terrorism in news and current affairs reporting.[82]

4.78 The joint submission from councils for civil liberties across Australia noted that the existing 'advocating terrorism' offence has been identified as a law that may restrict speech or expression by the Australian Law Reform Commission in its review of Commonwealth laws that encroach upon traditional rights, freedoms and privileges.[83]

4.79 At the public hearing, representatives of the Muslim Legal Network (NSW) explained their concerns about the breadth of the offence and its potential impact on freedom of speech:

> What we are mindful of is throwing a very wide net which could impact on people's ability to speak freely about issues. There are valid concerns for many people in the general wider community with respect to issues around the world, be they speaking about ISIS or any other terrorist type of organisation. What we have to do is not to limit or stifle discussion about how we address those issues.[84] …
>
> What that also does is it pushes those discussions underground, which is dangerous. They should be open to criticism and open to be challenged. We are certainly not saying we are advocating that hate speech should be without any sort of restrictions but it does

80 Attorney-General's Department, *Submission 9.1*, p. 26.

81 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 11; Australian Human Rights Commission, *Submission 5*, p. 21; Law Council of Australia, *Submission 6*, pp. 24; Muslim Legal Network (NSW), *Submission 11*, p. 37.

82 Joint media organisations, *Submission 7*, p. 2.

83 Joint councils for civil liberties, *Submission 17*, p. 18. See Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws, Interim Report*, July 2015, pp. 65–68.

84 Mr Edries, Muslim Legal Network (NSW), *Committee Hansard*, Canberra, 14 December 2015, p. 29.

> need to be considered that pushing these sort of conversations underground is effectively what these provisions will do, which potentially will be more dangerous.[85]

4.80 The Australian Human Rights Commission submitted that the lack of precision in the definition of 'advocating' may

> infringe the right, protected by article 15 of the ICCPR, that criminal offences be defined with sufficient precision to allow people to regulate their conduct.[86]

4.81 The Gilbert + Tobin Centre of Public Law specifically highlighted concerns about the use of the term 'promotion' in the definition of 'advocating', which it submitted

> could encompass a general statement of support that is posed online or through some other means, with no particular audience in mind. It is thus a less determinate form of speech to which to attach criminal liability.[87]

4.82 While the proposed new offence requires that a person intentionally advocates genocide, a number of participants pointed out that, unlike the 'advocating terrorism' offence, there is no fault element requiring the offender to *intend* another person to act upon their words.[88] The majority of these participants recommended such an element should be included in the new offence.

4.83 At the public hearing, the Muslim Legal Network (NSW) told the committee that the lack of the intention element would open up the offence to a 'very broad scope' of conduct:

> Although we appreciate the intention of the type of conduct that is being targeted, with the way it is drafted at present, it could potentially open up to many unintended situations as well. We are talking about social media. For example, could liking or sharing a post or something as simple as that advocate genocide? We just do

85 Ms Rabea Khan, Vice-President, Muslim Legal Network (NSW), *Committee Hansard*, Canberra, 14 December 2015, p. 29.

86 Australian Human Rights Commission, *Submission 5*, p. 21.

87 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 11.

88 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 11; Law Council of Australia, *Submission 6*, p. 25; Joint media organisations, *Submission 7*, p. 2; Muslim Legal Network (NSW), *Submission 11*, p. 37; Joint councils for civil liberties, *Submission 17*, p. 17; Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 14 December 2015, p. 16; Ms Khan, Muslim Legal Network (NSW), *Committee Hansard*, Canberra, 14 December 2015, p. 28.

> not know and until those test cases come through, we will not know. That is our primary concern.[89]

4.84 The Law Council of Australia recommended that, if the 'advocating genocide' offence were to proceed, the offence should be amended to similar terms to those in the 'advocating terrorism' offence by requiring at least that the person be *reckless* that another person might engage in genocide on the basis of their advocacy.[90]

4.85 At the public hearing, the Attorney-General's Department explained that the reason no fault element of recklessness was included in the offence was that

> the government has decided that it is appropriate, given the consequences of actual genocide occurring or the risks of it occurring—given how heinous it is—that one element is the appropriate one in this particular instance.[91]

4.86 In a supplementary submission, the Department further responded to concerns that the offence does not require a person to be reckless as to whether another person would act on their advocacy of genocide. The Department emphasised the existing elements of the offence that any prosecution must prove beyond reasonable doubt:

> The prosecution must prove the person 'intentionally' made the relevant conduct or said the relevant statement. Inadvertent or reckless conduct would not be captured by the offence. In addition, the prosecution must also prove the person's conduct advocated 'genocide' within the meaning of the offences in Division 268 of the Criminal Code. Advocating conduct that falls short of one of those offences would not be captured. In addition, the prosecution must prove the person's conduct occurred in public. Statements made or conduct undertaken in private would not be captured.[92]

4.87 The Law Council also questioned the legitimacy of the offence being limited to advocacy of genocide that is 'public':

> It is also not clear why the offence should distinguish between publicly advocating genocide and private advocacy. Arguably,

89 Ms Khan, Muslim Legal Network (NSW), *Committee Hansard*, Canberra, 14 December 2015, p. 28.

90 Law Council of Australia, *Submission 6*, p. 26.

91 Ms Bishop, Attorney-General's Department, *Committee Hansard*, Canberra, 14 December 2015, p. 42

92 Attorney-General's Department, *Submission 9.1*, p. 29.

> private advocacy might be more dangerous depending on the context. Further, it is not clear under the definition of 'advocates' as to whether a person can ever advocate privately.[93]

4.88 The Law Council pointed out that the term 'publicly' is not defined in the Bill, a fact which it considered to be 'inconsistent with the rule of law because there is insufficient clarity to enable people to know what activity could be deemed illegal'. The Law Council argued that, if the term 'publicly' was to be retained, it should be further clarified by amendment to either the Bill or the Explanatory Memorandum, and that the definition 'should not be so broad as to capture a wide range of benign conduct'.[94]

4.89 Similar concerns about the vagueness of the definition of 'publicly' were raised in submissions from the Muslim Legal Network (NSW) and the councils for civil liberties across Australia,[95] and in the review of the Bill by the Senate Standing Committee for the Scrutiny of Bills.[96]

4.90 Responding to these concerns, the Attorney-General's Department noted that the offence, as drafted, 'more fully addresses' the requirement under the Genocide Convention for states to punish 'direct and *public* incitement to commit genocide'.[97] The Department argued it would be 'undesirable' to define the expression 'publicly' in the Bill as it 'may lead to a narrow interpretation that could exclude some types of conduct sought to be captured by the proposed offence':

> In the rapidly evolving modern technological world, the meaning of 'publicly' may have a different meaning than one which may have existed 30 years ago, before social media. To publicly advocate would include a statement made at a public rally attended by many people, or a statement on national television. However it will be a matter for the court to determine whether conduct constituting 'advocacy' was made 'publicly', taking into account the conduct and all the facts and circumstances.[98]

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93 Law Council of Australia, *Submission 6*, p. 26.

94 Law Council of Australia, *Submission 6*, pp. 25–26.

95 Muslim Legal Network (NSW), *Submission 11*, p. 35; Joint councils for civil liberties, *Submission 17*, p. 17.

96 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 13/15*, 25 November 2015, p. 20.

97 Attorney-General's Department, *Submission 9.1*, p. 28.

98 Attorney-General's Department, *Submission 9.1*, p. 28.

Committee comment

4.91 Genocide is a most horrendous crime, and the Committee supports measures aimed at closing any legislative gaps that allow persons to advocate the commission of genocide without consequence.

4.92 The Committee notes that the incitement of genocide is already an offence under the Criminal Code carrying a maximum sentence of 10 years' imprisonment.[99] Urging violence against racial, religious, national, ethnic or political groups is also a criminal offence carrying a maximum sentence of seven years' imprisonment.[100]

4.93 Some participants in the inquiry argued that such existing offences mean that the proposed 'advocating genocide' offence is unnecessary. However, the Committee recognises that the new offence is targeted at behaviour that does not meet the thresholds for prosecution under existing legislation. Evidence from the AFP was that such tools are needed to enable police to intervene earlier in the radicalisation process to prevent and disrupt further engagement in genocide offences.

4.94 A key difference between existing offences and the proposed new offence is that the existing offences would require both that the urging of genocide is intended to occur *and* that the offender intends that a genocide offence be undertaken. The proposed 'advocating genocide' offence, on the other hand, only requires that genocide be intentionally (and publicly) advocated. The Committee understands that the new offence will enable the prosecution of persons of influence who openly advocate genocide, but, because of the language deliberately used, are not able to be prosecuted due to the near impossibility of proving whether they intend others to act on their words. The Committee therefore considers it would be counter-productive to reintroduce a second intention-based element into the offence, as some submitters suggested.

4.95 However, noting the potential for the proposed offence to limit freedom of speech, the Committee sees merit in the suggestion that a 'recklessness' element should be added to the new offence—that is, to be guilty of the offence, a person would have to both *intentionally* advocate genocide and be *reckless* as to whether another person might engage in genocide on the basis of their advocacy. Such a fault element is included in the equivalent 'advocating terrorism' offence, which the Committee previously considered in its review of the Counter-Terrorism Legislation Amendment

99 See Division 269 and extended liability provisions for incitement under section 11.4.

100 Criminal Code, section 80.2A.

(Foreign Fighters) Bill 2014. In that review, the Committee accepted that the 'recklessness' threshold was an 'appropriate tool for assessing an individual's behaviour under the proposed offence'.[101] The Committee stands by this conclusion with respect to the 'advocating genocide' offence.

4.96 While a lower threshold than 'intention', a 'recklessness' threshold would still require the prosecution to prove that the accused was *aware of a substantial risk* that a genocide offence would occur as the result of the their conduct and, *having regard to the circumstances known to him or her, it was unjustifiable to take that risk*.[102] The offence would therefore take into account a person's unique circumstances, including any special positions of power or influence the individual may hold.

4.97 The Committee understands that the usual police investigation thresholds relating to the seriousness of the offence, as well as the discretion of the Commonwealth Director of Public Prosecutions, as outlined in the prosecution policy of the Commonwealth, will continue to apply to the new offence.

4.98 The Committee notes that the definition of 'advocates' in the Bill uses the same terminology as used in the 'advocating terrorism' offence's definition of 'advocates'—that is, a person who 'counsels, promotes, encourages or urges'. The Committee gave close consideration to the definition of 'advocates' in its previous review of the 'advocating terrorism' offence. While recognising the intentional use of broad language in the definition for policy reasons, the Committee recommended that further clarity be provided to explain the activities that would be covered by the terms 'encourages', 'promotes' and, 'advocacy'. As a result of this recommendation, the Explanatory Memorandum was amended to give further clarity to the definition of 'advocates'. The Committee notes that a similar clarification has been included in the Explanatory Memorandum for the current Bill in relation to 'advocating genocide'.

4.99 The Committee understands that the 'advocating genocide' offence has been limited to 'public' advocacy in order to more closely reflect the language used in the Genocide Convention, which requires 'direct *and public* incitement to commit genocide' to be punishable. However, the Committee questions whether it is necessary to include this limitation

101 Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, p. 39.

102 Criminal Code, section 5.4.

given that the new offence already goes beyond the requirements of the Genocide Convention by dealing with 'advocacy' rather than 'incitement'. Removing the term 'publicly' would be consistent with the existing 'advocating terrorism' offence, for which no such limitation applies. It would also address concerns raised by inquiry participants that it is not clear what conduct it is intended to be included—and excluded—by the use of the term.

Recommendation 17

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended so that, in order to meet the threshold to be convicted of the proposed 'advocating genocide' offence, a person must be reckless as to whether another person might engage in genocide on the basis of their advocacy.

Recommendation 18

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to remove the word 'publicly' from the proposed 'advocating genocide' offence.