

CHAPTER 1

INTRODUCTION

Background to the inquiry

1.1 On 14 October 1999, the Senate referred the *Anti-Genocide Bill 1999* ('the Bill') to the Legal and Constitutional Affairs References Committee ('the Committee'), for inquiry and report by 30 June 2000.

1.2 The Private Senator's Bill was introduced into the Senate by Senator Brian Greig of the Australian Democrats. In his Second Reading Speech, Senator Greig commented upon the need to complete unfinished business of the Commonwealth Parliament by incorporating into domestic legislation the United Nations *Convention for the Prevention and Punishment of the Crime of Genocide* ('the Genocide Convention', 'the Convention') which was ratified by Australia in 1949.¹

Terms of reference

1.3 The terms of reference are:

- (1) The adequacy of Australia's implementation of the Convention for the Prevention and Punishment of the Crime of Genocide and other relevant international obligations, with particular reference to:
 - a) the formulation of an appropriate definition of genocide;
 - b) the status of the convention under Australian law, particularly with reference to the decision of the High Court in *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*;
 - c) laws in other jurisdictions that have implemented the convention;
 - d) the appropriateness or otherwise of the retrospective application of the provisions of the bill;
 - e) the implications of the Federal Court decision on 1 September 1999 in *Nulyarimma v Thompson*;
 - f) the extraterritorial application of Australian law, particularly as it may relate to East Timor; and

1 Senator B Greig, Second Reading Speech, 13 October 1999, *Information Package for the Committee's Inquiry*

- g) the relationship between Australian and international criminal law enforcement mechanisms for bringing perpetrators of genocide to justice.
- (2) The Committee, in its report, is also required to include suggested draft amendments to the bill.

Conduct of the inquiry

1.4 The Committee advertised the terms of reference in national and state newspapers on Saturday 20 November 1999. The Committee also wrote to a number of individuals and organisations. Thirty-six submissions were received.²

1.5 The Committee conducted public hearings in Sydney on 12 May 2000, and in Melbourne on 16 May 2000.³

Background to the inquiry

1.6 The stated aim of the Bill is to achieve compliance with the Genocide Convention by formally incorporating the crime of genocide into Australian domestic law.

1.7 In his Second Reading Speech, Senator Greig referred to the multipartisan spirit with which the *Genocide Convention Bill* 1949, the Bill to ratify the Convention, was embraced at the time of its introduction. Parliamentary leaders of both the Government and the Opposition affirmed Australia's abomination of the crime of genocide and Australia's commitment to the prevention and punishment of genocide.

1.8 Recent inquiries have drawn the attention of the Parliament to the lack of legislation for implementation of the Genocide Convention.

1.9 In its 1992 review of Australia's efforts to promote and protect human rights, the Joint Standing Committee on Foreign Affairs, Defence and Trade recommended that the Australian Government introduce legislation to implement the Genocide Convention. The Committee concluded that it is difficult "to know ... whether the failure to legislate has been a matter of neglect or purposeful inaction".⁴

1.10 In a review in 1994, the Committee commented:

The Committee notes with regret that the Government has decided against enacting such legislation, apparently believing that existing state and federal legislation obviates the need for the creation of a specific offence of

2 A list of submissions is at Appendix 1

3 A list of witnesses at these hearings is at Appendix 2

4 Joint Committee on Foreign Affairs and Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights*, AGPS, 1992, pp. xxvii, 31-32. Similar comment was made in 1991 in the *Report of the Review of Criminal Law* (Cth) chaired by Sir Harry Gibbs

genocide. The Committee does not share the view that there is no need for legislation specific to the offence of genocide and repeats its recommendation from 1992 that such legislation should be enacted by the Government.⁵

1.11 In May 1997, the Human Rights and Equal Opportunity Commission report on the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families stated:

While Australia ratified the 1948 Genocide Convention, its provisions have not been incorporated into Australian law. The Genocide Act 1949 (Cth) merely approved ratification of the Convention and extended its provisions to external territories. Australian service personnel engaged in conflicts overseas are covered by its provisions but not those working within Australia. ... The effect of implementation would be to create a criminal offence of genocide, including attempting to commit genocide, complicity in the crime of genocide and inciting others to commit genocide. Effective penalties would have to be provided. Implementation would establish a right to compensation for victims of genocide.⁶

1.12 That inquiry, in Recommendation 10, recommended that the Commonwealth legislate to implement the Genocide Convention with full domestic effect.

1.13 The *Anti-Genocide Bill* has been introduced against the background of the judgment of the Full Federal Court of Australia on 1 September 1999 in the case of *Nulyarimma v Thompson* which found that the crime of genocide was not recognised in Australian courts.

1.14 Further, at the time of the introduction of the Bill, the events in East Timor had produced charges of atrocities, war crimes and genocide.⁷

Outline of the report

1.15 The report of the Committee addresses all matters in the terms of reference.

1.16 In doing so, the Committee has focussed on the key issue of the adequacy of Australia's implementation of the Genocide Convention. We consider the content of the draft legislation against the background of relevant laws in Australia, and assess

5 Joint Committee on Foreign Affairs, Defence and Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights*, AGPS, 1994, p. 26

6 Human Rights and Equal Opportunity Commission, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing them home*, 1997, p. 295

7 See, for example, transcript of interview of the Minister for Foreign Affairs and Trade, the Hon. Alexander Downer MP, with Geoffrey Barker, Paul Bongiorno, and Paul Kelly on *Meet the Press*, 5 September 1999; Karen Polglaze, 'Asia: Soldiers disobeyed orders in East Timor: Wiranto', Australian Associated Press, Jakarta, 16 May 2000; and Geoff Spencer, 'Asia: Wiranto denies he is war criminal over East Timor', Australian Associated Press, Jakarta, 11 June 2000

the Bill's appropriateness in view of Australia's international obligations and domestic concerns.

1.17 The Committee was asked to examine the following questions:

- Is there a need for anti-genocide legislation in Australia?
- If there is, does the Bill meet this need?
- If it does not, how can the current Bill be improved upon in order to satisfy Australia's international obligations?

1.18 Chapter 2 of the report reviews the history of formulation of the international Genocide Convention; key elements of the Convention; and anti-genocide laws in other jurisdictions.

1.19 Chapter 3 considers the need for anti-genocide legislation in Australia and examines the adequacy of current laws. Key issues in this regard are whether the Bill is premature ahead of possible High Court consideration of the judgment in *Nulyarimma v Thompson* and any international and domestic implications of amending the Convention definition.

1.20 Chapter 4 examines the draft Bill in detail, commenting on the key provisions, including its definition of genocide, and considering the proposed amendments to the Convention.

1.21 Chapter 5 contains the Committee's conclusions and recommendations.

References

1.22 All references to submission page numbers are to the page numbers as they appear in printed volumes of submissions with the exceptions of Submission Numbers 31-36.