CHAPTER 3

THE NEED FOR THE LEGISLATION

Distinguishing features of the Bill

3.1 The Bill, in particular, seeks to expand the original target groups based on nationality, ethnicity, race or religion to include four additional groups, based on gender, sexuality, political affiliation or disability.

3.2 The Bill departs significantly from the Convention definition by adding the word 'distinct' to qualify the group of people.

3.3 The Bill also emphasises that the group can include, but not be limited to, the eight categories of groups listed in the definition.

3.4 A further important departure from the Genocide Convention is that the Bill's definition removes the words 'as such' in respect of the group which is targeted for destruction through the acts listed in the legislation.

3.5 The Bill is not retrospective in its application, and only Australian citizens or persons present in Australia may be prosecuted under the legislation.

3.6 Further, the Bill does not import Article IV of the Convention, which states that persons committing genocide will be punished regardless of 'whether they are constitutionally responsible rulers, public officials or private individuals.'

The Australian context

3.7 The perceived need for this Bill arises, according to Senator Greig's Second Reading Speech, from the inadequacy of Australia's existing criminal laws to protect groups at risk from the crime of genocide.[1] The Bill was introduced as a means of responding to findings by the courts in a number of precedential cases that genocide is not a crime under domestic law.[2]

3.8. The Committee has noted that, **over almost half a century, the prevailing view** of the crime of genocide has been reflected by statements made in Parliament at the time of ratifying the Convention in 1949, to the effect that genocide was a crime perpetrated in other parts of the world which could never be countenanced in Australia.[3]

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1 Second Reading Speech in *Information Package for the Committee's Inquiry*

2 For example, *Kruger v Commonwealth* (1997) 190 CLR 1 ('The Stolen Generation Case')

3 Second Reading Speech in *Information Package for the Committee's Inquiry*

3.9 Such a view is held even to this day by some Australians. For example, the Christian Democratic Party commented in its oral evidence at hearing:

> I think Australia often signs these [United Nations Conventions] when it knows the Australian people would never carry out an act of genocide against another section of its community. I could never envisage this in Australia.[4]

3.10 The parliamentary debates during the passage of the *Genocide Convention Bill* 1949 indicate clearly that the primary Australian legislation was intended to have a very limited application. The then leader of the Opposition, Mr Menzies, agreed with the view put by the Government's Mr Beazley, to the effect that ratification of the Convention had "no effect or relevance inside our own country".[5]

3.11 Since that time Governments have argued that it has not been necessary to incorporate the Genocide Convention into Australian law as the actions referred to in Article II of the Convention constitute criminal offences throughout Australia.[6]

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4 *Transcript of evidence*, Christian Democratic Party, p. 66

5 See *Submission No. 29*, Law Council of Australia, p. 426

6 This formulation is used, for example, in a letter of 15 September 1999 from the Office of the Attorney-General to Amnesty International Australia. See *Submission No. 7*, Amnesty International Australia, p.90. It would appear that, at the time of ratifying the Convention in 1949, the Australian Government adopted a 'wait and see' approach regarding implementation of the treaty. Australia preferred to be guided by the actions of other states, particularly those with similar jurisdictions such as the United States and the United Kingdom (both of whom left domestic implementation for at least another twenty years). In the interim, Australia took the view that other states would be satisfied that its existing criminal laws were adequate to safeguard against commission of genocide. For instance, Stephen Tully (*Submission No. 17*, p. 211 comments: 'A 1991 Review of Commonwealth Criminal Law explained the failure of Australia to implement provisions of the Genocide Convention into municipal law in the following terms: ' … the Australian government decided in 1949 to limit Australian legislation to approve ratification. Whether there should be further Australian implementation or clarifying legislation was left in abeyance until the attitude of other contracting parties and action taken by other contracting parties as regards their domestic legislation was known.' The Review Committee was of the opinion that the 'unfinished business' of Australian law was 'clearly unsatisfactory'. The position of the Australian government in 1949 must be treated in a sympathetic light in view of the deeper philosophical reservations expressed by some states on the issue whether a Convention was even necessary or desirable. In this respect, the then Australian delegate commented that: 'while speed was essential, it was even more important to ensure that the Convention … be based on legal and moral principles which would command universal respect and would be enforced.''

Further, in briefing the United Nations on Australia's ratification of the Convention, the Minister for External Affairs, Dr Evatt, said 'Whilst the strict legal position therefore is that some alteration of Australian domestic law appears to be necessary, it may be considered that other parties to the Convention will be satisfied, without any such alteration, that Australia is substantially carrying out its obligations, or that the question of implementing legislation may be left until the attitude of other parties, and the action to be taken by other parties as regards their own domestic laws, is known.' Quoted in *Written Submissions of the Aboriginal Genocide Prosecutors and Intervenors*, in the case of *Nulyarimma v Thompson*, filed in the ACT Supreme Court on 20 November 1998, No.SC 457 of 1998, at p. 22 (materials accompanying *Submission No. 32*, Sovereign Union of First Nations Peoples of Australia). Ms Eleanor Gilbert, Research Coordinator of Sovereign Union of First Nations Peoples of Australia, referred at hearing to a Department of External Affairs document of 1954 which stated: 'Unfortunately we now know that Australia has ratified a Convention without the power to implement certain of its

Judicial consideration

3.12 Judicial consideration of the *Genocide Convention Act* 1949 has confirmed that genocide is not a crime within Australia. In *Kruger v Commonwealth* (1997), the High Court held that, even if there were a valid principle of law prohibiting genocide in Australia, the conduct covered by the ordinance in question in that case – the removal of Aboriginal children from their parents in their own 'best interests' – did not amount to genocide. This was on the basis that the necessary intention to harm the group was not established. The question of whether genocide was a domestic crime was left relatively open as the court found it unnecessary to go on to discuss whether genocide formed part of Australian law.[7]

3.13 The Federal Court case of *Nulyarimma v Thompson* (1 September 1999) provides a more recent judicial discussion of the status of genocide as a crime in Australia. Based on principles clarified in *Minister for Immigration and Ethnic Affairs v Teoh* (1995),[8] Wilcox and Whitlam JJ held that genocide was not an offence in Australian law, notwithstanding the arguable importation of the crime of genocide

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provisions. Our reasons for accepting the Convention were of course largely moral. However, it is sufficient to say here that, should these difficulties be known internationally, and to countries not our friends, Australia might be subject to most bitter attacks; and the prestige and ethical motive for our original sin would not only be lost but Australia would face charges of irresponsibility in regard to its international obligations.' *Transcript of evidence*, Sovereign Union of First Nations Peoples of Australia , p. 56

7 Alexander Reilly, in 'Control in the Leviathan: Limitations on the power of Parliament to pass genocidal laws in Australia', *Flinders Journal of Law Reform* (3: 2, December 1999) p.253 comments: 'In *Kruger*, the High Court was asked to consider whether the removal of children from their parents under the *Aboriginal Ordinance 1918* (NT) were acts of genocide contrary to the *Genocide Convention*. Only Dawson and Gummow JJ addressed the issue. Both held that the legislation itself could not be construed as implementing a policy of genocide. The court did not consider whether particular executive acts carried out pursuant to the legislation were unconstitutional acts of genocide.' Toohey J hinted strongly that if the applicants had argued their case differently, the court might have been called upon to consider making such a finding. … 'In *Kruger*, a major hurdle to a finding of genocide was the lack of evidence of an intention to commit acts of genocide. Brennan CJ looked simply at the face of the legislation for the requisite intention of Parliament. Since the legislation stated that removal was authorised when 'in the interests' of the child, this was sufficient to rebut a genocidal intention and meant that Brennan CJ did not have to consider further the allegation of genocide. [Brennan CJ said:] In retrospect, many would say that the risk of a child suffering mental harm by being kept away from its mother or family was too great to permit even a well-intentioned policy of separation to be implemented, but the existence of that risk did not deny the legislative power to make the laws which permitted the implementation of the policy'

See also *Submission No. 6*, Mr Martin Flynn, *Submissions*, pp. 64-83

8 In *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287, Mason CJ and Deane J said: 'It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of Parliament, not the Executive. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law.' See *Nulyarimma v Thompson*, pp. 8-9, in *Information Package for the Committee's Inquiry*

into domestic law.[9] Significantly, Wilcox J held in *Nulyarimma* that, even if genocide were a crime in Australia, the alleged acts committed against Aboriginal peoples were not actuated by the requisite criminal intent. One individual's intent to kill one member of the target group does not suggest an intention to destroy the group, as such.[10]

3.14 In a minority judgment, Merkel J argued against the view of the other two judges that customary international law can only be incorporated into municipal law in common law states like Australia, by legislation.[11] It remains for the High Court to consider and rule on the validity of Merkel J's argument, though no appeals have been lodged with the court at the time of completion of this report.[12]

3.15 Few other cases in Australian courts have discussed the international crime of genocide in relation to domestic law.[13]

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9 Wilcox J in *Nulyarimma* found: 'Although I agree with both my colleagues that genocide is a crime under international customary law, like Whitlam J but unlike Merkel J, I do not think that, in the absence of appropriate legislation, it is cognisable in an Australian court'. See *Nulyarimma*, in *Information Package for the Committee's Inquiry* at p. 7

10 Wilcox J in *Nulyarimma* found: '… it is apparent from his Honour's account [Crispin J in the judgment under appeal] that this course of conduct ['the wholesale destruction of Aboriginal peoples … related to an equally wholesale usurpation of their lands'] was not the product of any sustained or official intention to destroy the Aboriginal people, but rather of circumstances and the attitudes and actions of many individuals, often in defiance of official instructions. In the case of a dispossession of land and destruction of Peoples that occurred gradually over several generations and stemmed from many causes, it is impossible to fix any particular person or institution with an intention to destroy the Aboriginal people as a whole.' See *Nulyarimma* in *Information Package for the Committee's Inquiry* at p. 6

11 Merkel J in *Nulyarimma*: 'In my view there is no binding authority or persuasive jurisprudential support for the Commonwealth's submission that adoption of customary international civil law or criminal law in relation to universal crimes, as such, into Australian municipal law requires legislation to that effect. (*supra* at p. 34) 'In the present case I have no difficulty in determining that the "end" or "goal" which the law serves will be better served by treating universal crimes against humanity as part of the common law in Australia. Further a decision to incorporate crimes against humanity, including genocide, as part of Australia's municipal law at the end of the 20th century, satisfies the criteria of experience, common sense, legal principle and public policy. For the foregoing reasons I am of the view that the offence of genocide is an offence under the common law of Australia.' See *Nulyarimma* in *Information Package for the Committee's Inquiry* at p. 42

12 An application for special leave to appeal the Full Federal Court's decision in *Nulyarimma v Thompson* is expected to be lodged with the High Court of Australia on 4 August 2000. See Transcript of Proceedings of *The Arabunna People and Kevin Buzzacott v Hugh Morgan*, No.356/1999, in the Supreme Court of Adelaide (Kelly J presiding), 8 June 2000, p. 18

13 In addition to aforementioned cases, the jurisprudence on the crime of genocide includes *Kartinyeri v Commonwealth* (1998) 152 ALR 540; and *Thorpe v Kennett* [1999] VSC 442 (Unreported, Supreme Court of Victoria, 15 November 1999). Related aspects, though not genocide *per se*, have been discussed in *Buzzacott v Hill* [1999] FCA 639; *Cubillo v Commonwealth* (1999) 163 ALR 395; *Thorpe v Commonwealth (No 3)* (1997) 144 ALR 677; *Coe v Commonwealth* (1993) 118 ALR 193 ('The Wiradjuri Claim'); *Coe v Commonwealth* (1979) 24 ALR 118; *Hanna Bryk v Anna Kovacevic And: Louis Nowra and Melbourne Theatre Company* [1999] HREOCA 11 (21 June 1999)

Timeliness of the Bill

3.16 The Committee has considered whether, ahead of further judicial decisions on the matter, it may be premature for legislation to be introduced to establish genocide as a crime in Australia. This issue was discussed at some length at the public hearings. Some witnesses expressed the view that the draft Bill, if anything, was 50 years overdue. It was also argued that, absent such legislation, meritorious cases would have to endure a protracted process of clarifying the law by judicial interpretation.

3.17 For instance, the Human Rights and Equal Opportunity Commission (HREOC), when asked whether the Bill is premature and if the High Court of Australia, in a matter of law, could determine what genocide is, stated:

> For one thing, the case could go on forever and it could be a long time before we reach a definition or an action. It is not the custom of common law courts to give definitions of a sort outside the very limitations of a case. Whilst we do look forward to the views that would be expressed by the most senior of judges in our country, I do not think that it should pre-empt other actions being taken.
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> Finally, I do think a bill of this sort should come into existence as quickly as possible. We cannot afford to wait for judicial decisions. It may, in fact, be an entirely unhelpful decision from our point of view. A national statement should be made, especially if we see ourselves as participating in all sorts of international activities in connection with crimes against humanity in other countries. …
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> We have been bound since 1951 to implement the Genocide Convention, and for 50 years we have been in breach of our obligations. How can that be premature?[14]

3.18 This view was echoed by a number of other witnesses at the hearings who spoke in favour of implementing domestic legislation.[15] Professor Colin Tatz, of the Centre for Comparative Genocide Studies, stated the case with particular force:

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14 *Transcript of evidence*, Human Rights and Equal Opportunity Commission, p. 5

15 For example, Amnesty International Australia commented: '… Australia signed this 50 years ago, it came into force in 1951 and really for another day to go by without its full implementation into domestic law is a difficulty.' *Transcript of evidence*, Amnesty International Australia, p. 40

The National Council of Churches in Australia stated: 'Even if the case of *Nulyarimma* is before the High Court – and there is nothing to say the High Court will actually give them leave to appear – it is not a good reason, just because a case is before the High Court, for Parliament not to pass a Bill of this nature'. *Transcript of evidence*, National Council of Churches in Australia, p. 47

Similarly, the Law Council of Australia commented: '… we urge the government and indeed every Member of Parliament not to turn their backs on this initiative but rather to grasp it with both hands and make any changes they see fit; but do not delay the passage of a Bill to implement our obligations'. *Transcript of evidence*, Law Council of Australia, p. 131

> It seems to me that, if for no other reason, we ought to take into account certainty in law as an argument for a genocide bill … .
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> Lawyers seem to me to be stretching for extraordinary arguments. … [Litigants] wish to avoid the genocide argument partly because I think they feel it is safer but also – if I may make this observation, which is purely an *ex cathedra* observation – there are many Australians who do not want to engage in confronting the issue of genocide. It is just unpalatable; it is just in a sense unthinkable.[16]

3.19 A strong objection to the passage of an anti-genocide law ahead of judicial consideration was expressed by the Sovereign Union of First Nations Peoples of Australia. It submitted that a miscarriage of justice is being effected by considering the draft Bill while the legal process, to establish whether there is a domestic law for the prevention and punishment of genocide, has not been completed (namely, the prospect of the *Nulyarimma* case being appealed to the High Court).[17]

Adequacy of existing laws

3.20 As recently as in September 1999, the Office of the Attorney-General elaborated on the position of the current Government and previous Governments in the following terms:

> The Government does not view Australia as being in breach of its obligations under the Convention. The common law and the criminal codes of the States and Territories provide adequate punishment for acts identified by the Convention as genocidal and are sufficient to fulfil our international obligations in relation to the Convention.[18]

3.21 This advice noted that, in addition to the Convention, Australia is also involved in other initiatives to prevent and punish genocide. Particular reference is made to the *War Crimes Act 1945*, which provides for the prosecution in Australia of persons accused of acts of genocide in Europe during World War II. The advice commented that the language of the Act, which defines war crimes, is taken directly from Article II of the Convention.

3.22 The Office of the Attorney-General, in this document, referred also to Australia's enactment of the *International War Crimes Tribunals Act* 1995 and *International War Crimes Tribunals (Consequential Amendments) Act* 1995 which enable Australia to assist and comply with requests from two international Tribunals established by the United Nations Security Council, for the Former Yugoslavia and Rwanda. Australia has provided judicial officers to these Tribunals.

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16 *Transcript of evidence*, Centre for Comparative Genocide Studies, p. 16

17 *Submission No. 32*, Sovereign Union of First Nations Peoples of Australia p. 1 (unbound). See also footnote 13 above

18 Letter of 15 September 1999 from Office of the Attorney-General to Amnesty International Australia. See *Submission No. 7*, Amnesty International Australia, p. 90

3.23 Despite the Government's view that it has complied with its obligations, most submissions argue that these various enactments only amount to partial and limited incorporation of the Convention into domestic law.[19] For example, although the *War Crimes Act* 1945 imports from Article II of the Convention a definition of genocide, the specific criminal acts relating to the groups listed in the Convention definition are omitted from the Act. The main difficulty with this legislation is that its jurisdiction is limited in both time and place. It applies only to war crimes committed during World War II and is limited to the European theatre of the War.[20]

3.24 Further, although the *War Crimes Act* facilitates the punishment of genocidal acts, it does so in circumstances limited to the conduct of hostilities associated with a war. This ignores the fact that acts of genocide, historically, have taken place in times of 'peace' as much as in the context of full-scale, militarised wars.[21] It can be argued, therefore, that the *War Crimes Act* fails to give effect to the Genocide Convention by not proscribing genocide at all times and wherever it occurs.

3.25 With regard to the argument that Australia's common law and criminal code in different jurisdictions provide adequate penalties for the commission of the sorts of acts set out in the Convention, these only partially address the acts listed in the Convention. For example, the Law Council of Australia stated in evidence that:

> While aspects of genocide are criminalised under Australian law – for example, murder - we have put it in our submission that Australia's criminal law is inadequate in several crucial aspects: firstly, because genocide is a crime that focuses on attacks on groups of people that threaten the existence of the groups as such – in contrast, our criminal laws are concerned primarily with wrongs done to individuals; and, secondly, and most importantly, as Canada has recognised in its law, publicly inciting people to

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19 For example, Amnesty International Australia comments: 'The critical reason for the mismatch between the Convention offence of 'genocide' and Australian domestic law, is the group-directed character of genocide. All the related offences in Australian law refer only to the means by which genocide is effected. All of them are individualised. It may indeed be doubted whether evidence concerning 'group' destruction, either of intention or consequences, would be admissible in their prosecution. Against that background, it may be doubted whether any offences included in our domestic law would invariably cover 'causing serious mental harm to members of the group'; 'inflicting on the group conditions of life calculated to bring about its physical destruction'; 'imposing measures intended to prevent births within the group'; or 'forcibly transferring children of the group to another group' even when, in these instances, the conduct was accompanied by the necessary intent to destroy. A difference exists in the rules of jurisdiction between 'genocide' and related offences under Australian domestic law. The principal rule of jurisdiction in the case of domestic offences is territorial so that, in general, there is no jurisdiction to deal with an extra-territorial offence. Jurisdiction in the case of 'crimes against humanity' is universal. … For all these reasons there is no warrant for the view that existing Australian law adequately implements the Convention. …' *Submission No. 7*, Amnesty International Australia, pp. 88-89

20 The *War Crimes Act* 1945, in Section 5 of Part II-Interpretation, defines 'war' as '(whether or not involving Australia or a country allied or associated with Australia) in so far as it occurred in Europe in the period beginning on 1 September 1939 and ending on 8 May 1945'

21 For example, the actions of the Khmer Rouge in Kampuchea against their own people after 1975, and the conflict between Hutus and Tutsis in Rwanda in 1995

> commit the crime of genocide is not criminalised. Although there is some overlap with hate crime legislation the overlap is not an adequate overlap.[22]

3.26 The Committee explored the extent to which existing anti-discrimination legislation in Australia, such as the Racial Discrimination Act and the Sex Discrimination Act, might provide some form of protection against the sorts of crimes envisaged by the Bill. The Committee noted the response of the Attorney-General's Department to a question, taken on notice at the public hearing on 16 May 2000. The Department stated:

> If acts that may constitute genocide or war crimes also amount to unlawful discrimination within the meaning of Commonwealth anti-discrimination legislation, civil remedies may be available under that legislation. Under the *Racial Discrimination Act 1975*, it is unlawful for a person to do any act involving a distinction, exclusion, restriction of preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in any field of public life. Under the *Sex Discrimination Act 1984*, it is unlawful for a person to discriminate against someone on the ground of the sex, marital status, pregnancy or potential pregnancy in areas such as employment, education, accommodation and the supply of goods and services. Similarly, under the *Disability Discrimination Act 1992*, it is unlawful to discriminate against someone on the ground of disability in areas such as employment, education, access to premises, accommodation and the supply of goods and services. These Acts mostly apply to discrimination occurring within Australia.
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> Contravention of these Acts gives an aggrieved person the right to lodge a complaint with [HREOC]. The Commission can inquire and attempt to conciliate the complaint. If the complaint is not resolved to the satisfaction of the complainant he or she can initiate a civil action in the Federal Court, or in the Federal Magistrates Court once it is in operation. If the court finds that there has been unlawful discrimination it can make various orders for civil remedies including that compensation be paid to the complainant. Similarly, complaints may be able to be made under State and Territory anti-discrimination legislation which, if successful, would also provide for the award of civil remedies.
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> To the extent that acts that may be considered to be war crimes or acts of genocide are also offences against the criminal laws of the Australian States and Territories, there may be entitlements to remedies under State and Territory legislation that provides for compensation for persons who suffer loss as a result of criminal acts.[23]

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22 *Transcript of evidence*, Law Council of Australia, p. 132

23 *Submission No. 36*, Attorney-General's Department, (unbound) at p. 1

Enhancing laws

3.27 This leads to another issue, namely whether the Commonwealth anti-discrimination laws could be enhanced instead of passing the Bill into law. Witnesses to the Inquiry generally felt that this would be an incomplete measure, as these laws only partially address the areas covered by the Convention. For example, the Executive Council of Australian Jewry commented that it would regard those Acts as complementary to any legislation such as the proposed Bill.[24]

3.28 A similar point was made by the Australian Council for Lesbian and Gay Rights (ACLGR), who stated:

> I would like to point out one obvious gap in our Commonwealth legislation – that is, not having any comprehensive legislation protecting all Australian citizens on the ground of their sexuality from discrimination. We have one fairly ineffective provision of the HREOC Act which allows the Human Rights Commission to investigate discrimination on the grounds of employment in terms of sexuality, but only to investigate and report, nothing else. … .[25]

3.29 The ACLGR expanded on this statement at the Melbourne public hearing. In response to a question Mr Rodney Croome, Co-Convenor of the ACLGR commented that strengthened anti-discrimination legislation would not take the place of an anti-genocide law 'because the … Bill has very particular aims and there will people who have genocidal intent and activity against sexual minorities regardless of other laws'.[26]

International implications of the Bill

3.30 The Committee considered arguments suggesting that Australia may be placing itself too far ahead of the international community by passing the Bill with its proposed amendments and enhancements, thereby possibly encountering difficulties with international attitudes and cooperation.

3.31 Most submissions agree, in principle, with the proposed expansion of the Convention definition set out in the Bill.[27] A commonly expressed view is that such

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24 *Transcript of evidence*, Executive Council of Australian Jewry, p. 28

25 *Transcript of evidence*, Australian Council for Lesbian and Gay Rights, p. 157

26 *Transcript of evidence*, Australian Council for Lesbian and Gay Rights, p. 157

27 More detailed discussion of the individual elements of the Bill's definition is contained in Chapter 4. Supporters in principle of an expanded definition include Dr Leadbetter, *Submission No. 2*; Human Rights and Equal Opportunity Commission, *Submission No. 4*; Amnesty International Australia, *Submission No. 7*; B'nai B'rith, *Submission No. 13*; Mr Tully, *Submission No.17*; Women's Legal Service SA, *Submission No. 18*; the Centre for Comparative Genocide Studies, *Submission No. 19*; the Victorian Council for Civil Liberties, *Submission No. 20*; Mr Greg McIntyre, *Submission No. 22*; the Anglican Diocese of Sydney, *Submission No. 23*; the National Council of Churches in Australia, *Submission No. 25*; Mr Andrew Mitchell, *Submission No. 26*; and Ms Alison Vivian and Mr Manuel Calzada, *Submission No. 28*. Opponents of amending the definition include, in particular, Mr Ross MacGregor, *Submission No. 1*; the Christian Democratic Party, *Submission No. 8*; the Executive Council

extension is justifiable and commendable in light of advances in human rights thinking globally since 1948.[28] The expanded definition, substantially broader than the Convention's drafters could agree upon,[29] could be supported by reference to other international conventions that protect fundamental rights and freedoms based upon gender, sexuality, political affiliation or disability. These international instruments include the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; the Declaration on the Rights of Disabled Persons; the Convention on the Rights of the Child; and the International Covenant on Economic, Social and Cultural Rights.

3.32 Although there is not at present an international treaty directed solely at sexual orientation, the United Nations Human Rights Committee in *Toonen v Australia* (1992) held that a Tasmanian criminal law prohibiting sexual relations between same-sex partners was an arbitrary interference with privacy, contrary to Article 17 of the ICCPR. That Committee also noted that "sex" in Article 24 (which prohibits discrimination against children on various grounds) and in Article 26 (which prohibits discrimination in the equal protection of the law) could be taken as including "sexual orientation".

3.33 HREOC, in common with the majority of witnesses, did not believe that the expanded definition would raise international concerns. Mr Sidoti stated:

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of Australian Jewry, *Submission No. 9*; the Returned & Services League, *Submission No. 10*; the Uniting Church of Australia, *Submission No. 21*; and the National Civic Council, *Submission No. 27*

28 For example, Mr Greg McIntyre states: 'If a view were taken, … as it may be, that the definition of those who may be affected by genocide in the Bill is broader than was contemplated by the international community in adopting the Genocide Convention, the adoption of a broader definition than is suggested by the … Convention can be supported by reference to other international Conventions which protect fundamental rights and freedoms based upon gender, sexuality, political affiliation or disability. Such fundamental rights and freedoms are addressed in the following United Nations Conventions: Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; Convention on the Elimination of All Forms of Discrimination Against Women; Declaration on the Rights of Disabled Persons; Convention on the Rights of the Child; International Covenant on Economic, Social and Cultural Rights. … Many of the general rights set out in the ICCPR are repeated in the CROC and the DRDP in relation to the specific classes to which they relate. Although there is not presently a treaty directed solely to sexual orientation, the Human Rights Committee in *Toonen v Australia*, Communication No 4888/1992 (UN Doc CCPR/C/50/D/488/1992) held that a Tasmanian criminal law prohibiting sexual relations between same-sex partners was an arbitrary interference with privacy, contrary to ICCPR, Article 17. It also noted (at para 8.7) that 'sex' in Art.24 (which prohibits discrimination against children on various bases) and in Article 26 (which prohibits discrimination in the equal protection of the law) are to be taken as including 'sexual orientation'.' *Submission No. 22*, Mr Greg McIntyre, pp. 314-317

29 One aspect of the Bill's definition which is broader than that of the Convention relates to the types of groups included. The groups that the Bill encompasses are not limited to those only with stable, immutable characteristics. In particular, the group based on 'political affiliation' is arguably an 'optional' rather than 'inevitable' grouping. For this reason, political groups were not included in the Convention. Further, from a practical viewpoint, the drafters of the Convention wished to ensure that the final text would be such as to secure the widest possible acceptance by states parties. See Patrick Thornberry, *International Law and the Rights of Minorities*, at p. 69

> … [T]hose groups are properly included within the definition of genocide simply because of contemporary experience. We are talking about the experience of the last 50 or 60 years.[30]

3.34 Amnesty International Australia also took the view that no problems with regard to international cooperation would occur as a result of expanding the Convention definition to include the proposed four additional groups. Amnesty commented:

> I think they [the four new groups] would be complementary. Again, with regard to the comments earlier about the Racial Discrimination and Sexual Discrimination Acts, they would be complementary. I do not think there would be problems. If it is an extraditable offence in Australia, the person can be extradited but the indictment would have to happen overseas, and if those crimes involved an unidentifiable group and met 'genocide', which is a very high test, that would be included in the Convention as it already stands.[31]

3.35 Nonetheless, some submissions express caution at the possibility of expanding the Convention definition. For example, the Law Council of Australia commented:

> … [T]he Law Council view is that, to the extent that this Bill departs from the definition contained in the Genocide Convention, we would counsel caution. … [T]hese extended provisions about political affiliation, gender, sexuality or disability are not encompassed in the original Convention. … [T]o do otherwise raises severe constitutional issues about the power of the Federal Parliament to legislate.
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> … We are not against the introduction of those words, but we would not object to their removal either.
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> … We see constitutional problems when you depart from the terms of the Convention. They are not insurmountable, but ultimately it is a matter that Parliament should consider very carefully and decide accordingly.[32]

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30 The Human Rights and Equal Opportunity Commission addressed the issue of international attitudes to expanded domestic legislation in the following terms: 'I certainly would not see it as going out the front and taking the lead on this. Many other states have already legislated in relation to genocide. We would not be out front internationally in criminalising genocide. Certainly even the practice in relation to the Nuremberg War Crimes Tribunal [of 1946] indicates an accepted international practice of trying genocide. We see the same kind of approach being adopted now with the specialist tribunals being established by the United Nations. So I would see us as in fact reflecting, in the passage of a bill like this, our continuing commitment to the domestic implementation of international human rights treaty provisions, principles, standards and obligations – certainly not a radical step by any means.' *Transcript of evidence*, Human Rights and Equal Opportunity Commission, p. 5

31 *Transcript of evidence*, Amnesty International Australia, p. 38

32 *Transcript of evidence*, the Law Council of Australia, pp. 134, 135, 142, 143. In its written submission, the Law Council differs from the view of other witnesses with regard to international developments relevant to an expanded Convention definition, stating: 'Although there are strong policy and justice-based reasons for expanding the definition of genocide fifty years after the original Convention, there is

3.36 Similarly, the Uniting Church in Australia, while supportive of the Bill, indicated a preference for retaining the wording of the Convention definition in the interests of clarity and simplicity. The Uniting Church commented:

> We have expressed the view that we prefer the wording of the Convention as a method of avoding confusion, and that there are issues of discrimination looking at other groups – which is in the actual Bill but not in the international Convention – which perhaps could be handled in other ways. …
>
> … [T]he first principle that we looked at is that of coherence between the international Convention and the definition of 'genocide' as proposed in the Bill. We felt it was better to basically comply with the international Convention and that the issues that are raised by the addition of those other words perhaps could be addressed in another way. Maybe over time it is something that needs to be addressed at the international level. Our initial response was that perhaps this would create unnecessary confusion, particularly with the definition of genocide pertaining mainly to ethnicity.[33]

3.37 The Victorian Council for Civil Liberties (VCCL) also expressed reservations with regard to the expanded definition, commenting:

> The Council has endorsed the expanded definition but does note that that should be done with caution. Certainly, we acknowledge that there is a certain desirability that all nations follow the one definition. … So, in the sense that we are simply expanding the definition here rather than changing the core of it – we are simply expanding and making a wider definition – that is not so much of a problem.[34]

3.38 As for the issue of whether the amended definition in itself is desirable, the VCCL conceded that:

> [T]here is no doubt that many people will criticise it as overexpanding the definition – that, by including groups based on sexuality or disability, it will not really capture what the essence of genocide was, especially in the light

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little movement in international law towards encompassing emergent social or political groups. Some delegates at the Preparatory Committee on the Establishment of an International Criminal Court called for the extension of the definition of genocide to include social and political groups (see International Criminal Court, *Press Release l/2762*, 'Preparatory Committee for the Establishment of an International Criminal Court discusses definitions of "genocide", "crimes against humanity"', 2nd meeting, 25 March 1996). However, ultimately, the Diplomatic Conference adopted the definition of genocide in the Convention (see Article 6, ICC Rome Statute, adopted 17 July 1998).' Further, the International Criminal Tribunal for Rwanda in the *Rutaganda* judgment (ICTR, 6 December 1999) noted … that 'at present, there is no generally and internationally accepted precise definitions of the term "group" for the crime of genocide'. The Trial Chamber stated that 'each of these concepts must be assessed in the light of a particular political, social and cultural context'. … *Submission No. 29*, Law Council of Australia, p.430

33 *Transcript of evidence*, Uniting Church in Australia National Assembly, pp. 160, 162

34 *Transcript of evidence*, Victorian Council for Civil Liberties, p. 98

> of the Holocaust of the end of the Second World War when the concept came to prominence. The Council acknowledges that there is that danger of a certain dilution of the concept perhaps, but says that the protective umbrella of the definition is desirable in itself".[35]

Constitutional implications of the Bill

3.39 With regard to the question of the Constitutionality of amending an agreed international Convention, a number of witnesses to the inquiry expressed reservations about the Parliament's power to pass the Bill without further consulting the States and Territories, and signatories to the Convention.

3.40 Strong objection to the Bill on the ground of constitutional uncertainty was raised, in particular, by the Christian Democratic Party, which stated in evidence that:

> We strongly condemn these proposed amendments to the Australian Genocide Convention Act 1949 which we believe is a backdoor process intended to amend the United Nations Genocide Convention 1948. …[36]

3.41 The Christian Democratic Party referred to the process of amending international treaties by means of conferences and other meetings, and argued that, in an Act implementing a treaty, the Constitution does not permit the Commonwealth to go outside the powers of a UN Convention. The Christian Democratic Party holds that the Constitution has deliberately left these issues to the power of the various State Parliaments. The Reverend Nile stated:

> The Commonwealth Parliament can only implement these UN Conventions by using the 'make treaties' provision in the Commonwealth Constitution. However, we believe, and many other commentators believe, this treaty power was never intended in the first place to apply to international or UN Conventions but to a treaty between Australia and another nation – New Zealand, UK, USA and so on.[37]

3.42 By contrast, the question of existing powers under the Constitution enabling a broader definition than that contained in the Genocide Convention was addressed in particular by the Centre for Comparative Genocide Studies, commenting in its evidence that:

> The external affairs power is a purposive power, so when the High Court interprets that power it provides what the European Court of Justice terms a 'margin of appreciation'. In other words, it leaves to the discretion of

35 *Transcript of evidence*, Victorian Council for Civil Liberties, p. 98

36 *Transcript of evidence*, Christian Democratic Party, p. 58

37 *Transcript of evidence*, Christian Democratic Party, p. 58

> Parliament to consider, in line with cultural sensitivities and things like that, the manner in which such a law will be implemented domestically.[38]

3.43 The Law Council of Australia similarly commented that:

> We see Constitutional problems when you depart from the terms of the Convention. They are not insurmountable but ultimately it is a matter that Parliament should consider very carefully and decide accordingly.[39]

3.44 The Attorney-General's Department, in response to a question on notice, provided the following advice on this issue:

> In implementing a treaty by domestic legislation, the Government is not required, either under international law or domestic law, to enact the exact language of the treaty. The validity of the legislation will depend, in this respect, on whether the legislation as framed is reasonably appropriate and adapted to the purpose of implementing the treaty obligations. That would be a matter for consideration in each individual case.
>
> Australian governments have taken various approaches to legislation implementing treaty obligations. In some cases, the legislation provides that the treaty or more usually certain provisions of the treaty are to have the force of law in Australia. This approach was taken in the *Diplomatic Privileges and Immunities Act 1967* which provides that certain Articles of the Vienna Convention on Diplomatic Relations 1969 are to have the force of law. In other cases, the legislation is recast in ordinary legislative language. An example would be the *Sex Discrimination Act 1984*, which implements some provisions of the Convention on the Elimination of All Forms of Discrimination against Women, but does not use the language of the Convention. Similarly, the *World Heritage Properties Conservation Act 1983* proscribes various activities on world heritage sites, in more explicit terms than the terms of the treaty it implements, the Convention for the Protection of the World Cultural and Natural Heritage; the validity of the Act was upheld by the High Court in *Commonwealth v Tasmania* ((1983) 158 CLR 1).
>
> Senator Coonan referred in the Committee's hearings to the criminalisation of bribery. In that case the issue was the implementation in Australian law of the OECD Convention Against Bribery of Foreign Public Officials in International Business Transactions, under which there was a minimum requirement to create extraterritorial jurisdictional coverage for nationals of

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38 *Transcript of evidence*, Centre for Comparative Genocide Studies, p. 23 The Centre commented further that: 'For example, if you have five particular provisions, the Commonwealth may choose to omit two. That would be the margin of appreciation provided by the court. It would still determine that law as valid. It would be the same when it comes to the inclusion of political groups. Naturally, they will mask their intentions in judicial reasoning, but there is a common view that things like that should be left to the Parliament. Courts are often unwilling to make value judgments as to the reasons why Parliament sought to include or not include a particular provision or a particular word of an international agreement.'

39 *Transcript of evidence*, Law Council of Australia, p.143

> parties to the Convention for certain offences. The implementation of the Convention in Australian law (Division 70 of Chapter 4 of the Criminal Code) goes further than the minimum requirement in the Convention, and extends the jurisdictional coverage to Australian residents in respect of conduct occurring wholly outside Australia.[40]

3.45 The Attorney-General's Department was also asked whether the Constitution would support the extended definition of genocide contained in the draft Bill. Having taken the question on notice, the Department replied:

> The answer to this question requires the Department to give legal advice to the Committee, which the Department is unable to do. However, the Department can say that any legislation enacted by the Commonwealth Parliament must fall within one of the subjects for which the Parliament has power to make laws under the Constitution. A Constitutional issue would arise as to whether it would be a lawful exercise of the external affairs power under section 51(xxix) of the Constitution to enact legislation which extended the terms of an international treaty.

Conclusions

3.46 The Committee has considered carefully the issues raised in the above discussion and it is satisfied:

- that genocide is not a criminal offence in Australia at present;
- that Australia has yet to fulfil its international obligations in respect of implementation of the Genocide Convention;
- that it is open to Parliament to proceed to consider domestic anti-genocide legislation separate from judicial consideration of whether genocide is a crime; and
- that, although existing anti-discrimination laws could be further strengthened in order to cover issues raised by the draft Bill more adequately, such laws can only ever complement rather than substitute anti-genocide laws.

40 *Submission No. 36*, Attorney-General's Department, (unbound at p. 2)