CHAPTER 4

THE BILL AS IT AMENDS THE CONVENTION

Extending the definition of genocide

4.1 The Committee considered the question of the proposed amendments to the Genocide Convention contained in the Bill. The issue attracting most comment from witnesses centred on the expansion of the definition of genocide to include the additional groups based on gender, sexuality, political affiliation or disability.[1]

4.2 Witnesses before the inquiry generally argued that extension of the definition of genocide is justifiable on the ground that the suggested expanded definition is appropriate as it seeks to enhance the effect of the Convention by taking account of international developments over the past fifty years. It was generally accepted that any areas in which the Bill might prove to be deficient could be addressed at a later time through the process of judicial review.[2] For instance, Professor Alice Tay, HREOC President, commented in evidence:

> We do not pre-empt the scope of the definition of genocide, though we suggest that it includes those features and nature identified by the Convention – 'that genocide … is a crime under international law' and includes acts, conspiracy to commit genocide, incitement to genocide, attempt and complicity in genocide.
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> The interpretation of that definition is for future courts. The whole essence of an anti-genocide law is that an issue is triable. The violators can be called to account for their acts and they shall know that this is so. Our

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1 For example, the Centre for Comparative Genocide Studies commented: We have tried at length to come to grips with the vexed problem of what is genocide in the international legal definition. It is a flawed definition, as I am sure you are aware. We can explore the flaws if you wish, but even after something like 30 or 40 years of serious study by scholars around the world into the definition, the International Criminal Court did not hesitate for more than 60 seconds, I gather from various delegates to that Rome Convention, in deciding in future the International Criminal Court will adopt holus-bolus the Genocide Convention definition of genocide. That came somewhat as a surprise to me. I thought the time had come, certainly after all the research, to repair the flaws in the in the definition. But this is not to be. My understanding is that the reason for not retraversing the definition is that many of the nation states that subscribed to the Convention in 1948 and that subsequently would have the opportunity come their way to reconsider their support for international genocide would not have signed the new definition in the International Criminal Court. … (*Transcript of evidence*, p. 11).

2 For example, Ms Harris of the National Council of Churches in Australia stated: 'In most cases it is going to be for a court to judge [genocide claims], and it is going to depend on the level of proof that the prosecution is able to bring. In may respects these are not issues that need to vex the Committee because having the legislation is the important part. As long as it is good, solid legislation, prosecutions and courts will nut out a lot of those other issues later on, as they have done. We are fortunate with regard to the fact that we now have a lot of case law from the Rwandan prosecutions on how to prosecute genocide.', *Transcript of evidence*, National Council of Churches in Australia, p.46

> judicial system is good enough to do that and we have sufficient confidence in and respect for it to do the proper thing.[3]

4.3 However, a number of witnesses, who otherwise supported the Bill in principle, expressed concern at the possibility of undermining the group focus of the Convention by separately listing identified groups who could be targets of genocide. For example, the Executive Council of Australian Jewry commented:

> The view that our Councils adopted was to stick as closely as possible to the Convention. That is why we have not supported the changes. If we are going to change the area of naming the subject groups, our change would be not to name any, because we do not know which sort of person would be the next victim of a potential genocide. ... [4]

4.4 Mr Greg McIntyre argued a similar view in the following terms:

> [T]he definition [in the Bill] could read 'a group of people as a group'. I would suggest that, the way it is defined in the Bill at the present time, what you have is a very general definition of genocide which effectively points to the issue of people being part of a group creating the crime.[5]

4.5 Dr Leadbetter, in his evidence, expanded on the reasoning of the same position, commenting that:

> Judicial determinations of what constitutes a group will set the precedents within Australian common law, at any rate, as to the interpretation of this law. …
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> The problem with the present [Genocide Convention] definition is its exclusivity – that is, it sets a series of groups in stone and allows no departure from them. A number of submissions to you, and my own arguments today, have underscored the inadequacy of that as an instrument in the contemporary world.[6]

4.6 It is important to reiterate, in the context of the above discussion, a point made earlier in this report, namely, that the Bill differs significantly from the Convention to the extent that the Bill's definition of genocide is an open list of groups: it includes the words "including, but not limited to," in relation to the categories of groups that could be targets of genocide. By contrast, the Convention definition is a closed list, limited

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3 *Transcript of evidence*, Human Rights and Equal Opportunity Commission, p. 4

4 *Transcript of evidence*, Executive Council of Australian Jewry, pp. 27-28 The Council commented further: 'Unfortunately, as Professor Tatz pointed out in his submission, the Soviet Union had a particular group in mind that they wanted excluded so they were not included at the time the original Act came in. I do not know if people would have perceived some of the groups that have been victims. Look at a situation like Rwanda where Belgian labels, which were almost random labels 70 years earlier, became the basis for a genocide.'

5 *Transcript of evidence*, Mr McIntyre, p. 204

6 *Transcript of evidence*, Dr Leadbetter, p. 176

to destruction, in whole or in part, of groups based on nationality, ethnicity, race or religion.

Additional groups: 'sexuality', 'gender'

'Sexuality'

4.7 The new groups in the Bill which, for a variety of reasons, have elicited the most comment are those of 'sexuality' and 'gender'. The Christian Democratic Party and the Returned & Services League (RSL) were opposed to these additional groups, arguing that their acceptance in the Bill would pave the way for other practices such as homosexual/lesbian birthing and adoption of children.[7]

4.8 The RSL argued in its written submissions that 'sexuality' is a "thinly disguised vehicle for promoting homosexual rights". The principal concerns of the RSL appear to be that homosexuals could argue that restrictions on public debate are likely to cause 'serious mental harm' to members of the group, and that protecting homosexuals from 'measures intended to prevent births within the group' could provide a foundation for lesbian access to in vitro fertility programs.[8]

4.9 The Australian Council for Lesbian and Gay Rights (ACLGR) addressed substantive concerns raised by other witnesses regarding the validity of including 'sexuality' and 'gender' in the Bill. With respect to this broader question, the ACLGR stated at hearing:

> We believe that, if we have a look at the development of international human rights law, that provides a compelling argument for the inclusion of sexuality in the Bill. … [T]he inclusion of sexuality in the Bill is consistent with developments in international human rights jurisprudence right across the world.[9]

4.10 The ACLGR, in its submission, referred to a number of cases heard by the European Court of Human Rights in which that Court has made it clear that the European Convention on Human Rights now recognises sexuality as a ground for discrimination in areas such as privacy and the right to equality before the law. The submission also refers to similar decisions by other international bodies, such as the Council of Europe and the Conference on Security and Cooperation in Europe. The submission cites policies condemning discrimination and persecution on the grounds of sexuality adopted by major non-governmental organisations such as Amnesty International, the Women's International League for Peace and Freedom, and the International Commission of Jurists. Further, the ACLGR notes, "perhaps most

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7 See *Submission No. 8*, Christian Democratic Party, pp. 93-104; *Submission No. 10*, The Returned and Services League, pp. 140-157. Ms Eliana Freydel Miller mounted an argument against the inclusion of 'sexuality' on the ground that this conflicts with the ethical and moral teachings of the Jewish faith. See *Submission No. 5*, pp. 50-59; *Transcript of evidence*, Ms Miller, pp. 91-93

8 *Submission No. 10*, The Returned and Services League, pp. 144-145

9 *Transcript of evidence*, Australian Council for Lesbian and Gay Rights, p. 146

importantly and most relevantly", the case of *Toonen v Australia* before the United Nations Human Rights Committee in which that Committee interpreted the International Covenant on Civil and Political Rights to prohibit sexual discrimination in areas such as the right to privacy and the right to equality before the law.

4.11 The ACLGR also comments that successive Australian governments have translated the developments in international human rights jurisprudence into domestic law, and incorporated them into the government's interpretation of Australia's international obligations and its human rights advocacy. Examples given of relevant actions are the lifting of the ban on homosexual personnel in the Australian Defence Forces; judicial interpretation of the definition of 'particular social group' in the Refugees Convention to include people persecuted on the basis of their sexuality; the passage of the *Human Rights (Sexual Conduct) Act* 1994; and statements against sexual discrimination by the Australian government in a number of United Nations fora, including the World Conference on Human Rights in 1993 and at subsequent annual sessions of the United Nations Commission on Human Rights. The ACLGR comments further that the "current [Australian] government has also made bilateral representations on sexuality discrimination and persecution to China, Romania and Brazil". It concludes:

> So, clearly, there is a recognition by our Federal Government and by successive governments of the growing place of sexuality in international human rights jurisprudence and the relevance of that to Australian domestic law.[10]

4.12 The ACLGR also places the inclusion of sexuality in the Bill in an historical context as an acknowledgment of the reality of genocidal acts against sexual minorities, citing the persecution of homosexual men and women by Germany before and during World War II.

4.13 With regard to the concerns raised by the Christian Democratic Party and the RSL about the perceived threat to children posed by homosexuals, the ACLGR states:

> There are no provisions in the Bill which relate to the legal recognition of same-sex relationships or the adoption of children. Clause (e) prevents the children of homosexual people being systematically taken away from us, but that is not the same as granting us the rights to adopt those children.[11]

4.14 The Centre for Comparative Genocide Studies addresses this issue in similar terms, commenting that:

> … [T]he inclusion of protected groups based on … criteria such as sexuality has drawn much criticism from the RSL and the Reverend Fred Nile [of the Christian Democratic Party]. Criticisms of those sorts are often ill-founded

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10 *Transcript of evidence*, Australian Council for Gay and Lesbian Rights, p. 147

11 *Transcript of evidence*, Australian Council for Gay and Lesbian Rights, p. 148

> and should fall on deaf ears because what the law prohibiting genocide does grant is not necessarily a substantive right like freedom of speech or freedom of association … It grants a more limited but nevertheless significant right. And that is a basic right to exist as a member of a political group. It is not a catalyst for gay rights or any other type of political lobbying or stunt making, as has been suggested by some parties. It is a very limited right.[12]

'Gender', 'sex'

4.15 Distinctions between 'gender' and 'sexuality', and 'sex', were raised by the Victorian Council for Civil Liberties (VCCL) in its evidence, commenting:

> I suppose there has been a bit of a conceptual shift over the last couple of decades that gender has become the more inclusive concept. My understanding of the concept is that gender refers to psychological characteristics that are associated with biological sex – where sex is the biological category such that you can have a spectrum between ultra masculinity and ultra femininity, and everyone could be placed somewhere along that scale, whereas for most human beings their sex is either male or female.[13]

4.16 The VCCL argues, therefore, that, in terms of a category, masculine and feminine are relatively indeterminate whereas the concept of 'sex' as a biological category is a much more clear-cut and identifiable factor in attempting to define a distinct group of people.[14]

4.17 This view was supported by the ACLGR, who commented at a public hearing:

> … [The VCCL] put up quite a compelling case for including 'sex'. And … perhaps the word 'sex' would be a more appropriate word than 'gender', given international human rights jurisprudence. So we would support the inclusion of 'sex'.[15]

'Political affiliation'

4.18 The proposed new group based on 'political affiliation' also attracted some comment from witnesses. The prevailing view in support of including political groups

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12 *Transcript of evidence*, Centre for Comparative Genocide Studies, p. 19

13 *Transcript of evidence*, Victorian Council for Civil Liberties, pp. 97-98

14 The Victorian Council for Civil Liberties concluded: 'If you had to choose one or the other, I think 'sex' would be most preferable. 'Gender' could be used in circumstances where someone might say, 'My sex is male but my gender is largely female'. Indeed, it could be such groups of people might fear that they are more likely to be the target of some kind of persecution. Various transvestites or whoever it might be might feel they would be ill served by not having that particular category recognised. In that sense, doubling up, so to speak, with sex and gender might seem a little superfluous but there is that group which could be protected by that', *Transcript of evidence*, Victorian Council for Civil Liberties, p. 98

15 *Transcript of evidence*, Australian Council for Gay and Lesbian Rights, p. 149

was articulated by the Centre for Comparative Genocide Studies at hearing. The Centre commented that it has argued very strongly for a repair of the omission of political groups from the definition of victim groups. It based its position on the historical fact that the reason political groups were omitted from the original Convention was due to a categorical refusal by the Soviet Union to accede to the Convention if political groups were mentioned.[16]

4.19 The Centre, as did other submissions, also raised the issue of the decision of the House of Lords in the case of Senator Pinochet, and the refusal of the British prosecutor to the request of a Spanish magistrate that Senator Pinochet be charged under the Genocide Convention for the alleged attempt by his regime to exterminate Chile's political left.[17] The British prosecution decided against pursuing the charge in view of the fact that political groups could not be considered within the Convention.[18]

4.20 Mr Andrew Mitchell also spoke in support of including the political group in the Bill, stating that:

> I believe that it is quite important that the definition for us does cover political genocide. … I believe it is quite important to include that group. For example, much of the murder perpetrated by the Khmer Rouge was aimed at destroying actual political groups and would not have fitted the Genocide Convention definition. That example illustrates the importance of including political groups as a protected group.[19]

4.21 Dr Leadbetter expanded upon the issues raised by the example of genocide in Cambodia, commenting that this situation presents particular difficulties for analysis as it was a unique occurrence of auto-genocide, a people turning upon itself. In effect,

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16 The Centre commented: 'This is because of the Soviet record of what happened to kulaks, the land-owning peasants, between the two World Wars and also the people whom Stalin conveniently labelled as the enemies of the people. We know that some 30 million people died in this process. The Soviets would simply not have come at it on this basis. We then go to the 1950s where half a million people were massacred in a genocidal sweep in Indonesia because they were labelled Communists. There are dozens and dozens of people who are targeted because they are political groups.' *Transcript of evidence*, Centre for Comparative Genocide Studies, p. 17. In further comment on the inclusion of political groupings, the Centre referred to a perceived paradox in international law. The Refugee Convention (United Nations Convention on the Status of Refugees 1951) provides protection on grounds of political persecution which allows those who survive genocidal actions, perpetrated because of a person's political opinion, to seek refuge. By contrast, the victims of such crimes of genocide have no recognisable action to take against this offence. *Transcript of evidence*, Centre for Comparative Genocide Studies, p. 18

The argument here appears to be that the Refugees Convention includes well-founded fear of persecution due to political opinion as a ground for seeking protection. Therefore, individual survivors of a genocidal act targeting groups based on political affiliation could seek refugee status; however, the perpetrators of that act could not be charged under the Convention, to the extent that their intent to destroy the group was based on the political affiliation of the members of that group.

17 *Transcript of evidence*, Centre for Comparative Genocide Studies, p. 18. The issue is also discussed in *Submission No. 28*, Alison Vivian and Manual Calzada, pp. 412-415

18 See *Transcript of evidence*, Centre for Comparative Genocide Studies, p. 18

19 *Transcript of evidence*, Mr Mitchell, p. 115

the principal objective of the Pol Pot regime was to recreate Cambodia as Democratic Kampuchea and, to that end, they sought to destroy all symbols of pre-revolutionary Cambodia.[20]

'Disability'

4.22 Submissions to the inquiry in support of extension of the definition as proposed by the Bill generally expressed no objection to the inclusion of a new category of group based on 'disability'. The National Council of Churches in Australia alluded to the historical precedent of disabled people and the elderly being systematically eliminated in Nazi Germany.[21]

4.23 Some discussion in this regard centred on a hypothetical question of whether the imposition of measures intended to prevent births within a group of women of child-bearing age who have a disability such as an intellectual impairment could constitute genocide under the Bill.[22] The conclusion appeared to be that, in the absence of any evidence that the child in this case would necessarily be disabled in the same way as the parent, there would not be the intention or effect of actual destruction of the group as such. Given the lack of any generational aspect to the group (in the sense that it is by no means certain that a particular form of disability would continue into subsequent generations of the group), this hypothetical situation would not amount to genocide.[23]

4.24 Nevertheless, this example served to illustrate some of the complexities raised by the legislation.[24]

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20 Dr Leadbetter stated: 'They sought to destroy the cities, they sought to destroy the elites, they sought to destroy peoples they perceived as intellectuals. … [A]nybody who wore spectacles was liable for arrest and summary execution because intellectuals wore spectacles. There are a number of religious groups who would fall under the definition, but otherwise significant numbers of the Cambodian population fall outside the definition, despite the demonstrable phenomenological fact, the demonstrable historical fact, that a genocide occurred. It is simply not comprehended *in toto* by the United Nations definition. … [It] does not include, for example, economic groups. Economic groups were targeted. It does not include social groups. Social groups were targeted. They are the sorts of things that fall outside the United Nations definition and would fall outside this legislation if … [it] simply adopted the United Nations definition unamended.' *Transcript of evidence*, Dr Leadbetter, p. 178

21 The Reverend Gill of the National Council of Churches in Australia commented: 'I referred in my introduction to the Holocaust, and the two groups that come to mind in the context, in addition to the Jewish people, are homosexual and handicapped people, both of whom were caught up in the same horror.' *Transcript of evidence*, National Council of Churches in Australia, p. 48

22 See *Transcript of evidence*, Victorian Council of Civil Liberties, p. 105, and *Transcript of evidence*, Mr Mitchell, pp. 118-119

23 Both Dr Tudor and Mr Mitchell arrived at this conclusion at a public hearing. Ms Alexis Fraser, however, appeared to differ with that view, stating: 'With respect to government departments which, in the 1960s and 1970s gave Depo Provera to severely retarded young women so as to prevent them being exploited sexually, as they are prone to be, and to be able to be impregnated easily, those public health workers and public health formulators were acting with the best of intentions at the time, but they would be, or could be, caught by the expanded view of genocide.' *Transcript of evidence*, Ms Fraser, p.200

24 On a separate matter related to disability, the Reverend Nile of the Christian Democratic Party spoke to the suggestion that genocide include 'euthanasia and infanticide', commenting: 'It could be in the case

‘A distinct group of people including, but not limited to,’

4.25 The Bill amends the Convention definition by introducing the words “a distinct group of people including, but not limited to,” in respect of the eight groups listed as targets of destruction. This amendment creates a paradox, having the potential both to open up, as well as to narrow, the application of the Bill. While the addition of “but not limited to” goes beyond the Convention by foreshadowing the possibility of future groups being identified under the law, the qualification of “distinct” could lead to confusion over interpretation and thus lessen the effectiveness of the instrument.

4.26 A number of submissions to the inquiry point to the possible difficulties that could be generated by this amendment. The Law Council of Australia, in its written submission, comments:

> [T]he Bill states that other groups, not expressly mentioned in the new definition, may be victims of genocide. Genocide is ‘not limited to’ the groups listed, opening up a potentially wide field of judicial interpretation.
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> While the definition of genocide is expanded in the Bill, it is simultaneously limited in a different sense. Whereas the Genocide Convention refers to acts committed against certain defined ‘groups’, the Bill confines the crime to acts committed against ‘a distinct group of people’. It is conceivable that the term ‘distinct group’ might be interpreted more narrowly than the general term ‘group’. This restriction could make it difficult to successfully prosecute an offender within an Australian jurisdiction who would otherwise be held culpable under international law. It could give rise to difficult questions of proof (for example, ‘distinct’ to whom – the perpetrator, the victim, or the group?). The prosecution in such cases has enough difficulty proving the existence of a ‘group’, let alone that it must be a distinct one. The [Law Council of Australia] accordingly recommends the term ‘distinct’ be deleted from the Bill. …[25]
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> The [Law Council] recommends strongly that the words ‘including, but not limited to’ be deleted. These words violate the principle of legality enshrined in *nullem crimen sine lege* [‘there can be no crime without a corresponding law’]. The crime of genocide should be strictly defined and the groups spelled out in the definition.[26]

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of a young person who has got cancer, who is in tremendous pain and so on, but I was thinking of the cases in Holland when we made that point. The latest suggestion that has been raised by some people is that where babies have been born with disabilities, the state should pass a law making it legal to take the lives of those disabled children, which we obviously do not support. To us that is infanticide.’ *Transcript of evidence*, Christian Democratic Party, p. 69

25 *Submission No. 29*, Law Council of Australia, p. 429

26 *Submission No. 29*, Law Council of Australia, p. 432

'As such'

4.27 The proposed definition in the Bill omits the words 'as such' from the Convention definition, which reads:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

4.28 Some submissions argue that omitting the words 'as such' reduces the effectiveness of the Bill. For instance, Dr Leadbetter comments that the purpose of these words in the Convention definition was to clarify the intent of the perpetrator. The purpose in committing genocide is not necessarily to kill people; the objective is the elimination of the group identity. Dr Leadbetter, in his written submission, states:

> The United Nations definition recognises this by … inclusion in its list of genocidal acts occurrences which are not individually lethal. The words need to be restored to the definition offered in the proposed legislation in order to clarify the nature of the offence which the legislation seeks to comprehend and describe.[27]

4.29 HREOC raises similar concerns, commenting that:

> Destruction of a group strongly connotes physical destruction. Destruction of a group 'as such' envisages that the members of a group may survive but lose their group identity and affiliation.[28]

4.30 The VCCL also calls for reinstatement of the words 'as such' as their presence in the Convention definition presumably clarifies "that it is the national, ethnical, racial or religious group *itself* that is at issue and not simply the individual members thereof".[29]

'Intent'

4.31 The Committee considered the question of intent in the course of the inquiry, in particular seeking the views of witnesses with regard to specific intent as opposed to general intent. The general position was that, while the crime of genocide is of such gravamen that it ought to demand the highest level of proof, it will inevitably be an issue to be considered and further refined by the courts. For example, HREOC commented:

> It is the courts ultimately that will be drawn on the question. Our view is that the status of the Genocide Convention itself should form the basis of legislation here in Australia. As international and domestic law develops,

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27 *Submission No. 2*, Dr Leadbetter, pp. 10-11

28 *Submission No. 4*, Human Rights and Equal Opportunity Commission, pp. 38-39

29 *Submission No. 20*, Victorian Council for Civil Liberties, p. 296

> the courts will increasingly spell out the nature of the intent – and, in my view, appropriately so – taking account of the actual experiences before the courts of individual cases of alleged genocide. …[30]

4.32 The National Council of Churches in Australia (NCCA), in particular, indicated in its submission that the 'intent' required by the Convention definition imposes a threshold that is 'arguably near impossible' to be met in Australian courts. The NCCA commented:

> The level of proof should be very high for something of this nature. That is fine. It should be as high as murder and perhaps higher when it deals with intention to destroy a particular group.[31]

4.33 In this context, Mr Andrew Mitchell raises the issue of 'intent' and the concept of 'negligent genocide. Mr Mitchell states:

> In relation to the mental element, the intent requirement in the definition under the Genocide Convention is unnecessarily onerous and should be relaxed. This requirement has proved a significant hurdle for groups seeking to pursue genocide claims, and governments defending claims brought by their indigenous populations invariably argue that this requirement has not been met. The intent requirement should be widened to include negligent genocide, for example, in order to protect indigenous populations from negligent economic policies which have the effect of destroying them as a group. This would be consistent with the most recent jurisprudence of the International Criminal Tribunal for Rwanda which has recognised negligent genocide.[32]

4.34 Mr Mitchell has commented further:

> … [T]here is some uncertainty as to precisely what the intent requirement is under international law for the purposes of the Genocide Convention. Indeed, some would argue that, as a matter of international law, it is not necessary to change the intent requirement as we have submitted, because the intent requirement as it already stands does cover negligent genocide. However, our submission is that, for the sake of certainty, it should be clarified to cover negligent genocide. With respect to safeguards for individuals accused, it would be possible to set the standard as something

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30 The Human Rights and Equal Opportunity Commission commented further: 'There is not very much international law on it at the moment. I think that we will see, particularly with the establishment of the International Criminal Court, which I hope will come into effect shortly, the development of international jurisprudence. Our preference would be to leave it to the courts to develop their jurisprudence of intent as cases come before them.' *Transcript of evidence*, Human Rights and Equal Opportunity Commission, p. 8

31 *Transcript of evidence*, National Council of Churches in Australia, p. 50

32 *Submission No.26*, Mr Mitchell, p. 343

> being gross negligence or criminal negligence – a standard of negligence higher than simple civil negligence.[33]

4.35 Dr Leadbetter, however, presents an opposite view, stating:

> … [G]enocide needs to be comprehended principally as a crime of intent. That is, when we look historically at genocides, no genocide historically has ever been successful. So when one looks at, for example, the most egregious case, which is the Holocaust, there were a number of survivors.
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> When one looks at more contemporary cases, for example when one looks at the situation in East Timor or in Cambodia, again there are considerable survivors. So we are not looking at an act which has been successfully encompassed, but at the same time we are not envisaging raising a charge of attempted genocide, but genocide, because what the crime does, what the word seeks to encompass, is not a series of acts of mass murder but acts of mass murder or other acts with the intent to destroy a distinct group of people. The criminality surely must lie, for genocide to occur as opposed to murder or mass murder or any of those other acts which have all been discussed, in the intent itself as expressed in the act. That is what I mean by genocide as a crime of intent.

4.36 In response to the question whether what has been referred to as 'negligent genocide' is really a misnomer, Dr Leadbetter commented:

> Yes, it is. My belief is that one cannot commit genocide by accident.[34]

Retrospectivity

4.37 The issue of retrospective effect of the Bill, and an appropriate date for a retrospectivity provision, elicited divergent responses from witnesses. One view appeared to be that the heinousness of the crime of genocide, and its well-established status as a customary norm of international law, ought to override any reservations regarding retrospective legislation in principle.[35] Flowing on from this view, proposed dates from which the Bill should have effect reflect the longstanding nature of genocide as a crime of *jus cogens*.

4.38 HREOC recommends that the Bill should be amended to permit the prosecution of alleged perpetrators of genocide from 11 December 1946, when the United Nations General Assembly resolved that genocide was an international crime.[36] This view was shared by the Centre for Contemporary Genocide Studies,

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33 *Transcript of evidence*, Mr Mitchell, p. 114

34 *Transcript of evidence*, Dr Leadbetter, pp. 171-172

35 For example, *Submission No. 29*, Law Council of Australia, p. 424

36 *Submission No.4*, Human Rights and Equal Opportunity Commission, pp. 42,44

who argued that from December 1946 onwards, genocide acquired the status of customary international law.[37]

4.39 However, the Centre points out that the obligation for Australia to legislate came into being when the Genocide Convention gained entry into force in 1951. For this reason, it was suggested that the strongest foundation for retrospective operation would begin in December 1951.[38]

4.40 There is general consensus that, despite arguments against retrospectivity in criminal legislation (as an affront to natural justice), genocide is a crime of such enormity and notoriety that prosecutions under retrospective legislation are unlikely to take offenders "by surprise". For instance, the Law Council of Australia states:

> The [International Law] Section **supports** the view that the criminality of genocide has been so widely recognised as heinous and grave from 1948 onwards that no individual since that time could have acted under any belief to the contrary, or have mistaken the criminal character of his or her actions.[39]

4.41 Some submissions suggest that, since the Genocide Convention has been binding on Australia since 12 January 1951, this should be the date for retrospective application.[40] Other submissions suggest 1949 as the date of Australia's adhesion to the Convention.[41]

4.42 Mr MacGregor in his submission proposes retrospective application to 1 July 1972, as the date by which "the last of the old, discriminatory special legislation in Australia empowering the arbitrary removal of some indigenous children had been repealed".[42]

4.43 Several submissions draw a nexus between retrospectivity of the Bill and Reconciliation in Australia, with particular reference to the issue of forcible removal of Indigenous children.[43] Some submissions express concern that "retrospectivity would invite a generation of political trials that the public would find intolerable", causing the legislation to become "an embarrassment".[44] Others believe that this is an

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37 *Transcript of evidence*, Centre for Comparative Genocide Studies, p. 12

38 *Transcript of evidence*, Centre for Comparative Genocide Studies, p. 13

39 *Submission No. 29*, Law Council of Australia, p.424

40 *Submission No. 26*, Mr Mitchell, p. 348

41 *Submission No.24*, Catholic Social Justice Council of Western Australia, p. 327

42 *Submission No.1*, Ross MacGregor, p.3

43 For example, *Submission No. 1*, Mr MacGregor, pp. 5-6; *Submission No. 2*, Dr Leadbetter, pp. 13-14; *Submission No. 4*, Human Rights and Equal Opportunity Commission, p. 19; *Submission No. 20*, Victorian Council for Civil Liberties, pp. 297-298

44 *Submission 2*, Dr Leadbetter, p. 14

inevitable consequence of inserting a retrospective provision. For example, the Victorian Council for Civil Liberties states:

> VCCL does not wish to pre-judge the various positions that might be taken in any such debate, but does submit that such an issue is one that Australia should discuss sooner or later and should not shirk. The proposed legislation clearly provides an appropriate context and prompt for that debate, and the opportunity to amend the Bill so as to provide for retrospectivity should not be passed up for fear of controversy.[45]

4.44 A few submissions, such as the Centre for Comparative Genocide Studies and the Catholic Social Justice Council of WA, emphasise that a retrospectivity provision would enable Australia to take action against perpetrators of genocide in events throughout the world during the past fifty years,[46] including even in the most recent past.[47]

4.45 The Law Council of Australia comments in this regard that there may be an argument that the removal of indigenous children in recent years constituted genocide at international law, and possibly at domestic law if genocide were found to be a crime in domestic law. The Council notes that if the Bill applies retrospectively, then governments and their employees may be liable for genocidal acts of removal.[48]

4.46 The Executive Council of Australian Jewry, while agreeing in principle that the legislation should be retrospective, made a deliberate decision not to nominate a date of retrospective application. The Council stated:

> It is going to be difficult for anybody who has the responsibility to define that to do so. … We believe that if there were people who were involved in crimes against humanity – people involved in genocide – living in this country, the Bill itself should not work out the cut-off date. Just as we fought against the imposition of a statute of limitations on the prosecution of Nazi war criminals in Europe, we have not seen time as being the important factor in this. … [49]

4.47 Others, by contrast, argued a view in favour of limited retrospectivity of the draft legislation. For instance, Dr Leadbetter commented, in evidence at hearing, that:

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45 *Submission No.20*, Victorian Council for Civil Liberties, p.298

46 The Centre for Comparative Genocide Studies states: '[Giving the Bill] a purely prospective operation would omit and exclude from its jurisdiction every genocidal event of the twentieth century. As the ongoing outrage regarding unconvicted Nazi war criminals demonstrates, "impunity for genocide is now an enormous issue" [Professor Colin Tatz]' (*Submissions*, p. 268)

47 The Catholic Social Justice Council of Western Australia states: 'If the Bill is not made retrospective it would not apply to acts of genocide which have occurred in recent years and especially in East Timor.' See *Submission No. 24*, The Catholic Social Justice Council of Western Australia, p.327

48 *Submission No. 29*, Law Council of Australia, p. 447

49 *Transcript of evidence*, Executive Council of Australian Jewry, p. 32

> The aim of this legislation is not to be an instrument of Reconciliation but to be an instrument whereby Australia fulfils a commitment made in 1949. If this legislation is intended to be an instrument of Reconciliation then it does not address that substantive issue within the framing of the law.[50]

4.48 For this reason, Dr Leadbetter brings limited support to retrospective application of the Bill only in cases where the genocide has occurred outside Australia. He does not support domestic retrospectivity, describing it as 'a minefield'.[51] Otherwise, he believes that there is still purpose to anti-genocide legislation. In oral evidence, he commented:

> Not only does it fill the gap which has been left unfilled for 50 years in passing the legislation which the Parliament committed itself to in 1949, but it also makes a clear international stand about where Australia stands on that particular question.[52]

4.49 The VCCL was also prepared to support the Bill becoming law without retrospective application, stating:

> Retrospectivity is not an essential or a stumbling block; it is simply, in our view, a desirable appendix to the Bill.[53]

4.50 Ms Alexis Fraser, in her oral evidence, argued against retrospectivity of the legislation on the ground that the Convention definition has been amended, stating:

> Because you have gone for an inclusive definition, and because you have gone for a definition that is wider than the Convention, retrospectivity is contra-indicated and, in many senses, is unfair to anybody who may be caught by the legislation in the future.[54]

Extraterritoriality

4.51 The Bill, as it stands, covers extraterritoriality under Sections 6 ('Application') and 10 ('Only Australian citizens or persons present in Australia may be prosecuted'). However, although the draft extends to acts done or omitted to be done outside Australia, it does not apply to citizens of other countries not present in Australia. Therefore, the Bill does not reflect the universal jurisdiction that attaches to genocide,

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50 *Transcript of evidence*, Dr Leadbetter, pp. 172-173

51 *Transcript of evidence*, Dr Leadbetter, p. 179

52 Dr Leadbetter added: 'Australia has given a great deal of assistance to International Criminal Tribunals, particularly those involved in the trying of war crimes currently in Europe. This will simply add weight and add merit to that. It will also make it clear to any further committers of genocide that there is no safe haven here. That was a very big gap for the last 50 years. Australia has been a safe haven for war criminals – we know that; there is no doubt about that – and the very least we can do is to make sure that that situation does not persist.' *Transcript of evidence*, pp. 179-180

53 *Transcript of evidence*, Victorian Council for Civil Liberties, p. 109

54 *Transcript of evidence*, Ms Fraser, p. 200

which is unrestricted by territorial and nationality principles, and imposes a limitation upon the genocide prosecutions that Australia could bring.

4.52 With regard to East Timor in particular, the Bill would permit the prosecution of acts of genocide committed during the recent events where an offender is present within Australia or is an Australian citizen. Indonesian or East Timorese nationals (following the full independence of East Timor) who are present in Australia may therefore be liable for prosecution.

4.53 In the case of perpetrators outside Australia who do not fall within the jurisdiction of the Bill, prosecution could be initiated by an International Criminal Tribunal or by local East Timorese authorities. Further, jurisdiction under the Bill would be activated by the extradition of perpetrators of genocide by arrangement with Indonesian authorities.

4.54 The extraterritoriality provisions of the Bill are also of particular significance in relation to extradition and the double criminality rule (by which an act constitutes a crime in the jurisdictions of two countries), where a person's surrender may be demanded by a state in respect of acts committed in a third state.

4.56 Submissions that commented on the extraterritorial application of Australian law generally agreed that the Bill should have universal jurisdiction, reflecting the status of the prohibition of the crime of genocide as a peremptory norm under customary international law. For example, Mr Andrew Mitchell, in his oral evidence, argued for universal jurisdiction of the legislation in order to maximise the scope of its application. Mr Mitchell commented:

> It is not my submission that Australia should try to assume the role of a global policeman. However, I believe this legislation should provide Australia with maximum flexibility in relation to the types of prosecutions that it wants to bring and therefore should not limit its extraterritorial application to the region which it is in.[55]

4.57 Mr Mitchell argues that the Bill's extraterritorial application should have global coverage; even if unlikely to be exercised, it is important that Australia maintains that flexibility. Mr Mitchell contends that this is quite consistent with the universal jurisdiction attaching to the crime of genocide, which states that it is a crime that all states have an interest in preventing and prosecuting, regardless of where the events occur.

4.58 In this regard, Mr Mitchell points to an aspect of Section 10 of the Bill that requires amendment, namely:

> 'A person shall not be charged with an offence against this Act unless the person:

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55 *Transcript of evidence*, Mr Mitchell, p. 113

(a) is an Australian citizen; or

(b) is present in Australia.'

4.59 Mr Mitchell comments that this could lead to "the quite curious result that, if a non-citizen committed genocide in Australia and then fled overseas, they would not be able to be extradited to Australia on the basis of alleged genocide, because they could not be charged with that crime". [56]

4.60 In relation to East Timor, Mr Stephen Tully comments that propositions of international law relating to individual criminal responsibility and the nature of the conflict itself are directly relevant considerations. However, the submission notes that it may be doubted whether governmental action adopted to suppress a group's cultural identity properly constitutes genocide *per se*. Moreover, the difficulty of establishing the requisite intent is a further significant obstacle in the application of the Convention to the circumstances of East Timor.[57]

4.61 The VCCL counsels against prosecuting under the proposed legislation any alleged acts of genocide arising out of "the recent horrendous events in East Timor". It contends that there is a serious question raised as to Australia's "moral authority" to pass judgment over any pro-Jakarta militia or Indonesian military personnel accused of genocide. In this event, it would be preferable that such charges be heard under East Timorese law or in the appropriate international court.[58]

4.62 The VCCL said that it supported extraterritorial application to Australian citizens only, whether the act was committed in Australia or outside Australia. It stated:

> Parallel with the child sex legislation[59], it is appropriate that we regulate, so to speak, our own citizens wherever they may be when they are involved in serious moral crimes, and this would be an appropriate instance in this case. In terms of our capacity to try non-Australians for genocide committed outside of Australia, that is [an extradition matter] … perhaps an issue which would be more appropriately dealt with by an international court; that if Australia is simply technically well placed to deal with it, it could certainly, with the appropriate legislation, make itself available if there should be such prosecutions stemming from East Timor. There may be an issue that it should not be an Australian court, as such, trying it, but it could be very practical to have the court that does try it in Australia, perhaps staffed largely by Australians but sitting as an international court. So there

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56 *Transcript of evidence*, Mr Mitchell, p. 113

57 *Submission No. 17*, Stephen Tully, p.31

58 *Submission No. 20*, Victorian Council for Civil Liberties, p.299

59 See *Crimes Act 1914* (as amended 1999): Part IIIA – Child Sex Tourism: 50AD 'Who can be prosecuted for an offence committed overseas'. The Act allows for prosecution of an Australian citizen or resident of Australia. Note that 'resident of Australia' is more restrictive than 'a person in Australia'

> is that difference of extraterritoriality there. That would be a subject of different legislation. [60]

Specific implementation issues

Gradation of genocide

4.63 The Centre for Comparative Genocide Studies has paid particular attention to the issue of the different levels of genocidal acts described in the Convention and the Bill, namely the "coequation of Article 2 from (a) to (e) which conflates and coequates physical killing of people with things like sterilisation of people and the enforceable removal of children". The Centre commented in oral evidence:

> … [W]e have spent an inordinate amount of time analysing what you are calling gradations of genocide. … This is really a matter for subjective opinion. Let me put it to you this way: during the Turkish genocide of Armenians from 1915 to 1922, Armenian children could be saved if they agreed to forcible transfer to Turkish Muslim families. I would argue, from a very personal point of view, that to be alive is to be alive, even if you are forced to become a Muslim Turk. This is very different from physical killing. Yet these are independently acts of genocide of co-equal seriousness in the international Convention, in the International Criminal Court.[61]

4.64 The Centre raises similar definitional concerns in respect of Article 2(b), 'causing serious bodily or mental harm to members of the group' and (c) 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'. Significant questions arise as to meaningful distinctions between bodily and mental harm, what constitutes a part of a group, and what part of it needs to undergo the various processes envisaged by the legislation for the actions to be called genocide. The extent of the dilemmas posed by these terms is highlighted by the evidence of Professor Colin Tatz of the Centre, who commented that, in his entire experience, he had never yet seen a case, either contemplated or brought before a court or international tribunal, on the basis of Article 2(b) or (c) in the Convention definition. [62]

Particularity and causation

4.65 Ms Alexis Fraser has identified specific issues of particularity and causation that, according to her submission, have not been adequately addressed by the Bill. These issues relate to identifying a single act, within a potentially large number of actions, sufficiently substantiated to allow a court to be satisfied that a charge of

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60 *Transcript of evidence*, Victorian Council for Civil Liberties, pp. 100-101

61 *Transcript of evidence*, Centre for Comparative Genocide Studies, p. 19

62 *Transcript of evidence*, Centre for Comparative Genocide Studies, p. 19

genocide has been proven and to be able to convict the perpetrators. Ms Fraser comments:

> The ad hoc Tribunal for the former Yugoslavia, set up by Chapter 7 of the UN currently sitting in The Hague, has had similar problems with particularity and causation. They have issued a number of rulings of law on the way through to their present position. They are operating under European law and they do not have the same disadvantages, if you like, that we do using the common law adversarial model. We will have more problems than they have encountered because of the different system of law under which we are operating. It therefore behoves us to make sure that the legislation we put into place is useable by an ordinary Australian court.[63]

4.66 Ms Fraser expresses concern at the interpretation that is placed on evidence of the type that could be expected in a genocide hearing, referring specifically to the case of *S v. the Queen* 1989. That case dealt with prosecution of a series of sexual assaults by a father against his child. In its judgment that the convictions could not stand, the High Court found that a court needs to be able to distinguish each particular act that will be the subject of a conviction so that it is clear that all 12 members of a jury are deliberating upon the same act and that the conviction is referable to a clearly identified circumstance. Ms Fraser states:

> Genocide will not be prosecuted in respect of, for the most part, one-off events. Historically, the experience of both Rwanda and the Yugoslavia ad hoc Tribunals shows that it is a series of events, whether it be massacres in one village or a series of military decisions that took all the males from a number of villages. It is those types of very complicated fact situations that will be the subject of genocide charges.
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> … [A] very substantial effort must be made to overcome the present state of the law in Australia about background offences and the inability of a particular victim to isolate one clear event so that the jury are satisfied that they are convicting in respect of the same event. Both Queensland and the Northern Territory have attempted to overcome the problem in respect of sexual offences against children by introducing laws that make it an offence to maintain an unlawful sexual relationship with a child. … That is a somewhat cumbersome attempt to overcome particularity. In my view, it is not particularly successful, but it is that type of legislative solution that I am recommending that the Committee consider if they are going to attempt to enact genocide as a criminal offence in Australia.[64]

Alternative verdicts

4.67 Section 12 of the Bill enables a jury, where it is not satisfied that a person is guilty of the offence charged under the legislation, but is satisfied of his or her guilt of

63 *Transcript of evidence*, Ms Fraser, p. 197

64 *Transcript of evidence*, Ms Fraser, p. 198

a different (alternative) offence that would have constituted an offence under a law in force in that part of Australia at that time, to find the person not guilty of the offence charged but guilty of the alternative offence.

4.68 Ms Alexis Fraser has described this alternative verdict mechanism as "cumbersome".[65] She argues that, in its current form, the mechanism presents a jury with the "impossible" task of dealing with multiple systems of criminal responsibility in the one trial, particularly if a genocide trial were conducted in a co-jurisdiction, namely Tasmania, Northern Territory, Queensland, and Western Australia. Ms Fraser comments:

> It is more than just explaining to the jury the different bases of criminal responsibility. It is a cultural matter. Juries and residents of co-jurisdictions are used to code cultures in criminal law and, with common law jurisdictions, their populations are likewise inculcated with common law cultural precepts. So for a jury to be given a jurisprudence lecture, basically, in the jury charge so that they move from a common law system to a code system when considering the alternative verdicts, would simply be too difficult for a jury to understand. Psychologists tell us that, when you are speaking to the average jury collectively, you have to reduce your remarks so that the average nine-year old can understand what you are saying. To have this system set up within the legislation is something else that sets the legislation up to fail and, in my view, it is unconscionable of us to continue to put into the laws of Australia pieces of legislation that are unworkable.[66]

4.69 Other witnesses to the inquiry support this view of the difficulties associated with an alternative verdict provision. For example, Mr Greg McIntyre, in oral evidence, commented:

> [W]ith Clause 12, our suggestion really is that what is being attempted there is perhaps just too difficult a task. … You might do better to just leave Clause 12 alone and leave it … to the State and Commonwealth authorities, who may have a duty to prosecute offences which have some similarity of fact situation, to coordinate their efforts rather than trying to find some formula for dealing with that.[67]

Penalties

4.70 The Bill, in Section 9, lists penalties of life imprisonment for persons found guilty of an offence under the law (apart from publicly urging the commission of an act of genocide, for which the penalty is imprisonment of up to 10 years). A number of witnesses have proposed variations upon the sentences listed that may accommodate the issue of gradation of genocide crimes. In this regard, the Centre for

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65 *Transcript of evidence*, Ms Fraser, p. 198

66 *Transcript of evidence*, Ms Fraser, p. 198

67 *Transcript of evidence*, Mr McIntyre, p. 205

Comparative Genocide Studies has referred to the United States' anti-genocide legislation as a useful precedent, commenting:

> [T]here is one novel element present in that legislation and that is the fact that not only are criminal punishments prescribed for the breach of particular acts but also there are fines involved. I will give you a hypothetical example. If the Bill was to operate retrospectively in Australia and the Australian Government was to be implicated through its endorsement of forcibly removing Indigenous children, for example, often it would be difficult, considering that states perpetrate genocide and are responsible for its prosecution as well, to find an actual perpetrator of genocide. So in those cases, obviously an injustice has been created, but it is often difficult to succeed in prosecuting an individual. The other option, of course, is a monetary remedy such as compensation or a fine imposed against the Commonwealth as an entity, instead of punishment that is confined to an individual.[68]

4.71 Other witnesses[69] similarly argue for civil provisions for lesser crimes of genocide (such as 'cultural genocide', or 'ethnocide', which is not encompassed by either the Convention or the Bill)[70] to supplement the criminal provisions of the legislation. Some submissions[71] have suggested that this could be a preferable alternative way of dealing with the issue of past enforced transfer of Aboriginal children should the Bill apply retrospectively.

4.72 In this regard, the Law Council of Australia has stated its preference to avoid costly, ongoing and emotionally painful Stolen Generation litigation. Therefore, the Council has recommended that if the Bill applies retrospectively, non-adversarial settlement of claims is preferable to litigation. The Council also recommends that the Commonwealth should explore other options, such as a national apology and/or compensation, or a national truth and justice commission, in addition to considering the findings of the *Bringing them Home* Inquiry, the current inquiry into the Stolen

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68 *Transcript of evidence*, Centre for Comparative Genocide Studies, pp. 13-14

69 For example, *Submission No. 4*; Human Rights and Equal Opportunity Commission, *Submission No. 25*, National Council of Churches in Australia, and *Submission No. 29*, Law Council of Australia

70 A number of submissions call for the inclusion of 'cultural genocide' or 'ethnocide', including: *Submission No. 3*, Dr Irene Watson, *Submission No. 14;* Mr Larry Walsh;, *Submission No. 15;* Mr Anthony Amis; *Submission No. 18*, Women's Legal Service SA Inc; *Submission No. 26;* Mr Mitchell and *Submission No. 28*, Alison Vivian and Manual Calzada

71 For example, the National Council of Churches in Australia comments: 'It may be time for countries such as Australia to consider some civil provisions that provide a range of injunctions and remedies such as compensation, declarations and UN hearings that fit into the definition of cultural genocide. Cultural genocide has been defined by the United Nations as "the suppression of the culture of a targeted group, where members of the group are forced to assimilate into the dominant culture." This may also be a more appropriate definition for Australia's indigenous population, if, as the judges in *Nulyarimma*'s case suggest, it is arguably near impossible for Australian indigenes to meet the threshold of "intent" required by the Convention definition.' *Submission No. 25*, National Council of Churches in Australia, p. 333

Generation by the Senate Legal and Constitutional References Committee, and of the reconciliation document of the Council for Aboriginal Reconciliation.[72]

4.73 Nevertheless, the Committee noted that the Law Council has not developed a firm position on the above views. In response to the question whether it is tenable to exclude from the operation of the Bill any genocide claims advanced by Aboriginal people without offending the *Racial Discrimination Act*, Dr Crock of the Law Council stated:

> The Law Council makes no submission on these matters as far as the impact on Aborigines is concerned. We have not had the time to consult together sufficiently to present a unified position on that, and therefore I would beg your forgiveness in not answering the question.[73]

Suggested inclusion of 'cultural groups'

4.74 The Committee noted that a number of submissions raised the issue of including cultural genocide within the Bill's definition. In this context, reference was also made to including negligent genocide, for example in order to protect indigenous populations from negligent policies that have the effect of destroying them as a group.

4.75 The drafters of the Genocide Convention considered the question of 'cultural genocide' due to the linkage between 'genocide' and 'protection of minorities'. They believed that the preservation of a group's spiritual and moral unity should be protected against drastic measures aimed at the rapid and complete disappearance (often in the guise of 'progress' and 'modernisation') of the cultural, moral, and religious life of the group.[74]

4.76 However, governments involved in negotiating the Convention were uneasy with the concept of cultural genocide which they construed as inviting the risk of political interference in their domestic affairs.[75] The issue was extensively debated at the time and, in the event, arguments in its support did not prevail. Those opposed to including cultural genocide complained of the vagueness of the concept. It could not be defined with sufficient precision to be included, and would be subject to abuse, reducing the value of the Convention by transforming it into an instrument suitable for exploitation by political propaganda. It was generally agreed that cultural genocide was better suited to human rights and minorities instruments (hence its subsequent inclusion in international instruments such as the ICCPR).[76]

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72 *Submission No.29*, Law Council of Australia, pp.423-424

73 *Transcript of evidence*, Law Council of Australia, p. 139

74 Patrick Thornberry, *International Law and the Rights of Minorities*, p. 71

75 Patrick Thornberry, *International Law and the Rights of Minorities*, pp 71-72

76 Patrick Thornberry, *International Law and the Rights of Minorities*, p.72