

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

Advisory Report on the Criminal Code Amendment (War Crimes) Bill 2016

Parliamentary Joint Committee on Intelligence and Security

November 2016
CANBERRA

© Commonwealth of Australia

ISBN 978-1-74366-571-8 (Printed Version)

ISBN 978-1-74366-572-5 (HTML Version)

This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Australia License.



The details of this licence are available on the Creative Commons website:
<http://creativecommons.org/licenses/by-nc-nd/3.0/au/>.

Contents

Membership of the Committeev

Terms of referencevii

List of recommendationsix

The Report

1 Introduction.....1

 The Bill and its referral.....1

 Conduct of the inquiry3

 Rationale for the Bill.....3

2 Issues and analysis.....7

 Part 1 – Members of organised armed groups7

 Defining ‘organised armed groups’10

 Defining ‘membership’ of organised armed groups.....11

 Committee comment.....17

 Part 2 – Proportionality in non-international armed conflict.....19

 Committee comment.....23

 Part 3 – Minor technical amendment.....24

 Part 4 – Application of amendments25

 Other matters raised in evidence.....26

Concluding comments28

End Matter

A. List of submissions29

B. Witnesses appearing at public and private hearings31

Membership of the Committee

Chair

Mr Michael Sukkar MP

Deputy Chair

Hon Anthony Byrne MP

Members

Senator David Bushby

Hon Mark Dreyfus QC, MP

Senator David Fawcett

Mr Andrew Hastie MP

Hon Dr Mike Kelly AM, MP

Senator Jenny McAllister

Senator Bridget McKenzie

Senator the Hon Penny Wong

Mr Jason Wood MP

Terms of reference

On 12 October 2016, the Attorney-General referred the Criminal Code Amendment (War Crimes) Bill 2016 to the Committee for public inquiry.

List of recommendations

Recommendation 1

- 2.67 The Committee recommends that the Criminal Code Amendment (War Crimes) Bill 2016 be passed by the Parliament.

1. Introduction

The Bill and its referral

- 1.1 On 12 October 2016, the Minister for Immigration and Border Protection, the Hon Peter Dutton MP, introduced the Criminal Code Amendment (War Crimes) Bill 2016 (the Bill) into the House of Representatives.
- 1.2 The Minister stated that the Bill will amend Division 268 of the Criminal Code to align Australian domestic law with international law in relation to the treatment of members of organised armed groups in non-international armed conflict.¹
- 1.3 Division 268 of the Criminal Code gives effect to Australia's obligations as a party to the *Rome Statute of the International Criminal Court* (the Rome Statute).
- 1.4 Schedule 1 of the Bill contains four parts. Part 1 will amend the war crime offences in sections 268.70, 268.71 and 268.72 of the Criminal Code relating to murder, mutilation and cruel treatment of persons in the context of a non-international armed conflict so that the offences apply only if

¹ Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 12 October 2016, p. 11. The Explanatory Memorandum states (p. 3) that non-international armed conflict 'is an armed conflict which involves one or more non-State organised armed groups'.

- the person or persons are **neither** taking an active part in the hostilities **nor are members of an organised armed group**, and
- the perpetrator knows of, or is reckless as to, the factual circumstances establishing that the person or persons are **neither** taking an active part in the hostilities **nor are members of an organised armed group**.²

1.5 Part 2 will also amend sections 268.70, 268.71 and 268.72 to apply the international humanitarian law principle of proportionality in relation to attacks on military objectives in non-international armed conflicts. The offences in these sections would not apply if the death or injury of a person or persons occurs in the course of, or as a result of, an attack on a military objective; and at the time the attack was launched:

- the perpetrator did not expect that the attack would result in the incidental death of, or injury to, civilians that would have been excessive in relation to the concrete and direct military advantage anticipated, and
- it was reasonable in all the circumstances that the perpetrator did not have such an expectation.³

1.6 Part 3 contains a minor technical amendment to remove the term ‘military’ from paragraph 268.65(1)(a) of the Criminal Code, which makes it an offence to use protected persons as shields. The amendment corrects an unintended oversight and will bring this paragraph in line with international humanitarian law.

1.7 Part 4 outlines application of the amendments. Part 1 will apply to conduct engaged in on or after the commencement of this item, being the day after the Act receives Royal Assent. Parts 2 and 3 will apply to conduct engaged in before, on or after the commencement of this item.

1.8 In his second reading speech, the Minister summarised the intent of the Bill:

The amendments will provide the Australian Defence Force (the ADF) with the legal certainty needed to target members of organised armed groups with lethal force, including in the context of current ADF operations against Daesh

²Items 1, 3 and 5 of Schedule 1 to the Bill. Emphasis added.

³Items 8, 9, 10 and 11, of Schedule 1 to the Bill.

in Syria and Iraq. They also reflect the reality that such groups are akin to regular armed forces, and their members should therefore receive treatment equivalent to members of regular armed forces under Australian domestic law.⁴

- 1.9 The Attorney-General, Senator the Hon George Brandis QC, wrote to the Committee on 12 October 2016 to refer the provisions of the Bill for inquiry and report. He requested that the Committee, so far as possible, conduct its inquiry in public and that it report to Parliament by 18 November 2016.

Conduct of the inquiry

- 1.10 The Chair of the Committee, Mr Michael Sukkar MP, announced the inquiry by media release on 14 October 2016 and invited submissions from interested members of the public. Submissions were requested by 2 November 2016.
- 1.11 The Committee received 3 submissions, which are listed at Appendix A.
- 1.12 The Committee held one public hearing and one private hearing in Canberra on 7 November 2016. Details of the hearings are included at Appendix B.
- 1.13 Copies of submissions and the transcript of the public hearing can be accessed on the Committee's website at www.aph.gov.au/pjcis. Links to the Bill and Explanatory Memorandum are also available on the Committee's website.

Rationale for the Bill

- 1.14 The Bill was foreshadowed by the Prime Minister, the Hon Malcolm Turnbull MP, in a statement to the Parliament on 1 September 2016. The Prime Minister stated that amendments to the Criminal Code were required to address 'a legal anomaly' and bring domestic laws into line with international norms. The Prime Minister explained:

⁴Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 12 October 2016, p. 11.

Under international law, all members of an organised armed group such as Daesh can be targeted with lethal force, subject of course to the ordinary rules of international humanitarian law. This is a reasonable and conventional approach adopted by the armed forces of our key allies across the world. But there is a legal argument that Australia's domestic law is more restrictive than international law. This legal risk posed a major challenge to the effectiveness of our operations.⁵

1.15 The Leader of the Opposition, the Hon Bill Shorten MP also addressed the Parliament, stating that

it has become clear to our Defence Force that there may be an ambiguity between international law and our domestic laws. When we are dealing with Daesh and the factories where they make this equipment, where they cache their supplies and where they get their fuel trucks and logistical elements, it is important that we deal with this issue to make sure that our ADF, by some quirk or anomaly of domestic law, are not subjected to legal repercussions merely because we did not deal with the issue and update our laws as our ADF are dealing with a difficult and changing environment.⁶

1.16 The Bill therefore amends Division 268 of the Criminal Code

to expressly recognise the distinction that exists at international law between civilians and members of organised armed groups.⁷

1.17 In evidence to the Committee, representatives of the Department of Defence and Attorney-General's Department explained the need to recognise organised armed groups in Australian law:

Under international humanitarian law, different categories of actors in armed conflict exist. One of those categories are members of organised armed groups. The existence of organised armed groups is acknowledged in the conventions and the additional protocols to the Geneva conventions, and they are dealt

⁵Hon Malcolm Turnbull MP, Prime Minister, *House of Representatives Hansard*, 1 September 2016, p. 237.

⁶Hon Bill Shorten MP, Leader of the Opposition, *House of Representatives Hansard*, 1 September 2016, p. 242.

⁷Mr John Reid, First Assistant Secretary, Office of International Law, Attorney-General's Department, *Committee Hansard*, 7 November 2016, p. 5.

with differently from civilians in an armed conflict. It is important then to identify an organised armed group in a non-international armed conflict in order to make appropriate targeting decisions and in order to protect the civilian population but to distinguish the civilian population from the members of the organised armed group. Currently Australian domestic law does not have provision for the targeting of members of organised armed groups. This amendment is intended to introduce that category of actor into a non-international armed conflict and to make those persons targetable on the basis of their membership of an organised armed group.⁸

- 1.18 When asked to provide examples of circumstances where the existing law has precluded Australia from undertaking a particular activity, Major General John Frewen, Head of Military Strategic Commitments at the Department of Defence, pointed to operations in Iraq and Syria:

[We are] dealing with an entity the likes of which we have not had to deal with before, which is: Daesh operates as a state-like entity and maintains conventional military forces the likes of which other state entities do. The current legislation does not take into account that we can be confronting a conventional military force that does not belong to a state. Therefore it gets treated as a non-international armed conflict as opposed to the international law that would apply around an international armed conflict. Where this becomes problematic for us in a targeting sense is that—I will give you a generic style of example—presently we can go after those directly and actively engaged in combat operations: combatants, the sorts of people that you can imagine are engaged in the intimate business of fighting. What the current legislation does not permit you to do then is to target the people who are engaged in support of the combatants. ...

In the context of Iraq and Syria, an example might be that you could have a Daesh combat formation—let us say a group of armoured vehicles, tanks, which are very clearly there for one purpose, which is conducting military-style use-of-force operations. But they are very dependent on logistics sustainment, such as fuel. Under the current legislation, if a fuel truck is engaged in the resupply of those vehicles, the argument can be made that the driver of the logistics sustainment vehicle is not a direct and active participant in hostilities and, therefore, ambiguity exists as to whether that individual is targetable. At the moment, because of the ambiguity we would not target that

⁸Mr Reid, Attorney-General's Department, *Committee Hansard*, 7 November 2016, p. 5.

fuel truck because of the presence of that individual. Under the amendments, a judgement could be made that that individual was indeed a member of the organised armed elements of Daesh and would therefore become targetable.⁹

- 1.19 The Committee was informed that the amendments reflect Australia's experience with non-international armed conflicts and organised armed groups, obtained since the existing Criminal Code provisions were enacted in 2002. Representatives of the Attorney-General's Department considered that while State practice has developed since that time, international law has not changed.¹⁰
- 1.20 The Department noted that the policy intent of the proposed amendments is not solely for the purpose of current conflicts, but 'is intended to be a principled piece of legislation that will go forward'.¹¹
- 1.21 The remainder of this report will discuss specific issues raised by participants in the inquiry about elements of the Bill.

⁹ Major General John Frewen, Head, Military Strategic Commitments, Department of Defence, *Committee Hansard*, 7 November 2016, pp. 5–6.

¹⁰ Mr Reid, Attorney-General's Department, *Classified Committee Hansard*, 7 November 2016, pp. 6–7.

¹¹ Mr Reid, Attorney-General's Department, *Committee Hansard*, 7 November 2016, p. 6.

2. Issues and analysis

2.1 This chapter discusses issues raised by participants in the inquiry regarding the specific elements contained in Schedule 1 to the Bill, which include:

- Part 1 – Members of organised armed groups,
- Part 2 – Proportionality in non-international armed conflict,
- Part 3 – Minor technical amendments, and
- Part 4 – Application of amendments.

Part 1 – Members of organised armed groups

2.2 Part 1 of the Bill amends the war crime offences in sections 268.70, 268.71 and 268.72 of the Criminal Code relating to murder, mutilation and cruel treatment of persons in the context of a non-international armed conflict. These offences carry a maximum penalty of imprisonment for life or imprisonment for 25 years, depending on the specific offence. The Attorney-General's written consent is required for any prosecution to take place, and the offences may only be prosecuted in the Attorney-General's name.¹

2.3 Currently, the offences apply to actions taken against persons who 'are not taking an active part in the hostilities', and when the perpetrator knows of, or is reckless as to, the factual circumstances establishing this. Under the amendments in the Bill, the offences would be further limited to apply only if

¹Criminal Code, section 268.121.

- the person or persons are **neither** taking an active part in the hostilities **nor are members of an organised armed group**, and
- the perpetrator knows of, or is reckless as to, the factual circumstances establishing that the person or persons are **neither** taking an active part in the hostilities **nor are members of an organised armed group**.²

2.4 The term ‘members of an organised armed group’ is not defined in the Bill. However, the Bill includes amendments for the purpose of each offence to state that

the expression *members of an organised armed group* does not include members of an organised armed group who are *hors de combat*.³ [emphasis in original]

2.5 A further amendment in the Bill provides that, for the purposes of Division 268 of the Criminal Code (genocide, crimes against humanity, war crimes and crimes against the administration of the justice of the International Criminal Court),

the expression *civilian* does not include a person who is a member of an organised armed group.⁴ [emphasis in original]

2.6 The Explanatory Memorandum states that the Bill is intended to reflect ‘the distinction that exists at international law’ between civilians and members of an organised armed group:

Under international law, members of organised armed groups are recognised as a category distinct from civilians, such that they do not benefit from the protections afforded to civilians. All members of such an organised armed group can be targeted with lethal force at any time, subject to the ordinary rules of international humanitarian law. Accordingly, this Bill amends

²Items 1, 3 and 5 of Schedule 1 to the Bill. Emphasis added.

³Items 2, 4 and 6 of Schedule 1 to the Bill. Existing provisions in the Dictionary of the Criminal Code provide that a person is *hors de combat* if (a) the person is in the power of an adverse party; and (b) the person: (i) clearly expresses an intention to surrender; or (ii) has been rendered unconscious or is otherwise incapacitated by wounds or sickness and is therefore incapable of defending himself or herself; and (c) the person abstains from any hostile act and does not attempt to escape.

⁴ Proposed section 268.125, item 7 of the Bill.

Division 268 to clarify that the war crimes offences in sections 268.70, 268.71 and 268.72 will not apply where the person targeted is a member of an organised armed group.⁵

- 2.7 When asked by the Committee to provide examples of why the amendments in the Bill were necessary, Major General Frewen explained that the current legislation does not permit the Australian Defence Force to target people who are engaged in support of combatants. He explained:

In our parlance we talk about combatants. We then talk about combat support—things like providing engineering. Then you have combat service support, which can include things like logistics and other forms of more indirect support but still fundamental to the conduct of combat operations.⁶

- 2.8 Major-General Frewen noted that targeting of individuals involved in such support functions for organised armed groups was permitted by international law, and that while Australia's main coalition partners and key allies operated to the 'full extent of international law' current legislation 'inhibits' Australia from doing the same.⁷

- 2.9 Professor Tim McCormack agreed with the rationale for the Part 1 amendments expressed in the Explanatory Memorandum. He cautioned, however, that this was not a universally held view and noted the existence of an alternative view that that 'all people are civilians and only those taking a direct part in hostilities can be lawfully targeted with lethal force'.⁸

- 2.10 Professor McCormack added that the Rome Statute of the International Criminal Court—which Division 268 of the Criminal Code is intended to implement—is 'silent on the view to be taken on the legal status of fighters from an organised armed group in a non-international conflict'. While it is possible that the Rome Statute 'impliedly endorses the approach inherent in the proposed amendment', Professor McCormack submitted:

⁵ Explanatory Memorandum, p. 3.

⁶ Major-General Frewen, Department of Defence, *Committee Hansard*, 7 November 2016, p. 5.

⁷ Major-General Frewen, Department of Defence, *Committee Hansard*, 7 November 2016, p. 6.

⁸ Professor McCormack, *Submission 3*, p. 2.

My primary observation is that the amendment reflects a valid view of international humanitarian law but that, whereas the rest of Division 268 implements crimes within the Rome Statute, here the proposed amendment constitutes a departure from that approach. There is no reason in principle why Australian implementation of Rome Statute crimes cannot include material additional to that in the Rome Statute, particularly where the additions provide helpful clarification on the scope of the law. My desire is to explicitly identify that the proposed amendment goes beyond, but is not inconsistent with, the terms of the Rome Statute.⁹

Defining ‘organised armed groups’

2.11 The Explanatory Memorandum states that ‘all members of an organised armed group can be targeted with lethal force, for so long as they remain members of that group, subject to the ordinary rules of international humanitarian law’. The Explanatory Memorandum provides the following guidance as to how an ‘organised armed group’ is to be defined:

The existence of an ‘organised armed group’ in a non-international armed conflict will be determined by reference to the facts in existence at the time. The key indicia are at least a minimal degree of organisation, the existence of some kind of command structure, and the existence of a collective purpose that is related to the broader hostilities and involves the use of force. Relevant factors in this regard may include:

- the issuance of orders;
- the ability to procure, transport and distribute arms;
- the capacity to launch coordinated actions between units;
- the ability to recruit new members; and
- the capacity to provide military training.

An organised armed group may exist within a larger entity or group. For example, an entity may have a political wing, and armed wing, and administrative wing and/or a religious wing. Whether or not the entire entity can be considered an organised armed group will depend on the organisation, control structure and actions of the entity and of its various parts. When the

⁹ Professor McCormack, *Submission 3*, p. 3.

entity in question is composed of distinct element, only those that engage in hostilities qualify as organised armed groups.¹⁰

2.12 Following questioning by the Committee at the private hearing, the Attorney-General's Department explained that the definition of 'organised armed group' adopted by the Government has its origins in the Additional Protocols to the Geneva Conventions.¹¹

2.13 At the public hearing, the Committee questioned government departments on how the definition of 'organised armed group' outlined in the Explanatory Memorandum would apply in relation to the current conflict against Daesh in Iraq and Syria. The Attorney-General's Department explained:

The legislation obviously does not deal solely with the conflict we are fighting now. It is intended to be a principled piece of legislation that will go forward. But if you were to apply it to our current conflict, as the Major-General has said, the organised armed group that the Australian government is characterising here is Daesh. It is not those elements of Daesh that are performing those civil functions, the local council type functions, that we understand Daesh is carrying out. The organised armed group is a military sub-wing, a sub-element of Daesh which is carrying out combat functions and is progressing an armed conflict. ...

An organised armed group is linked to a conflict; it is linked to progressing a struggle; it is linked to all of the tests that are laid down in both the Geneva Conventions and the Additional Protocols to the Geneva Conventions.¹²

Defining 'membership' of organised armed groups

2.14 The Explanatory Memorandum provides the following guidance as to how the term 'members of an organised armed group' used in the Bill is intended to be interpreted:

¹⁰ Explanatory Memorandum, p. 8.

¹¹ Mr John Reid, First Assistant Secretary, Office of International Law, Attorney-General's Department, *Classified Committee Hansard*, 7 November 2016, p. 5.

¹² Mr Reid, Attorney-General's Department, *Committee Hansard*, 7 November 2016, p. 6.

‘Membership’ of an organised armed group is a question of fact, to be determined on the basis of all reasonably available information and intelligence. While a person’s function—what that individual does, the role they play, and the extent of that role in contributing to the military aims or objectives of the organised armed group—will provide a strong indication as to whether or not that individual ‘belongs’ to the group, organised armed groups often have a membership structure based on more than mere function.

Insofar as function is an indicator of membership, an assessment as to whether the person is involved in combat, combat support or combat service support functions similar to those functions that support a State’s armed forces is appropriate. Indicia of such functions may include:

- carrying arms openly;
- exercising command of the organised armed group or elements of it;
- giving or taking orders or acting on instructions from the organised armed group;
- direct involvement in achieving the military aims or objectives of the organised armed group; and
- other activities indicative of membership in an organised armed group which could include intelligence gathering, maintaining communications or providing engineering or logistics support.¹³

2.15 In his Second Reading Speech, the Minister for Immigration and Border Protection added that the degree of certainty that a decision-maker must have as to whether a person is or is not a member of an organised armed group would be ‘reasonable belief’—the standard adopted by international tribunals.¹⁴

2.16 In his submission to the Committee, Professor Ben Saul expressed a concern about the absence of a definition for ‘members of an organised armed group’ in the Bill, noting that

¹³ Explanatory Memorandum, pp. 8–9.

¹⁴ Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 12 October 2016, p. 12.

[i]n the absence of further definition, there is a risk that the current language of the Bill could be over-expansively interpreted to enable the targeting of persons connected with armed groups who are not actually performing a continuous combat function, contrary to [international humanitarian law].¹⁵

- 2.17 Professor Saul noted that there had been ‘considerable controversy’ in international humanitarian law about the targeting of members of organised armed groups. He referred the Committee to the International Committee of the Red Cross (ICRC)’s *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009), which states that a member of an organised armed group is not regarded as a civilian where the person individually assumes a ‘continuous combat function’. Professor Saul therefore recommended that the Bill be amended to instead refer to ‘members of an organised armed group *who perform a continuous combat function*’.¹⁶ [emphasis in original]
- 2.18 The ICRC document, which was also provided to the Committee in a submission from the ICRC Mission in Australia and cited in the Minister’s Second Reading Speech,¹⁷ supports the concept of members of an organised armed group not benefitting from the protection afforded to civilians.¹⁸ It provides the following rationale for using ‘continuous combat function’ as the test to determine membership of an organised armed group:

In [international humanitarian law] governing non-international armed conflict, the concept of organized armed group refers to non-State armed forces in a strictly functional sense. For the practical purposes of the principle of distinction, therefore, membership in such groups cannot depend on abstract affiliation, family ties or other criteria prone to error, arbitrariness or abuse. Instead, membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State

¹⁵ Professor Saul, *Submission 1*, p. 1.

¹⁶ Professor Saul, *Submission 1*, pp. 1–2.

¹⁷ Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 12 October 2016, p. 12.

¹⁸ International Committee of the Red Cross (ICRC), *Submission 2 – Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (2009), pp. 71–72.

party to the conflict. Consequently, under [international humanitarian law], the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities.¹⁹

- 2.19 The ICRC document goes on to state that international humanitarian law makes a distinction between members of an organised armed group with a continuous combat function, and those individuals who ‘continuously accompany or support an organized armed group but whose function does not involve direct participation in hostilities’, who

remain civilians assuming support functions, similar to private contractors and civilian employees accompanying State armed forces. Thus, recruiters, trainers, financiers and propagandists may continuously contribute to the general war effort of a non-State party, but they are not members of an organized armed group belonging to that party unless their function additionally includes activities amounting to direct participation in hostilities. The same applies to individuals whose function is limited to the purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside specific military operations or to the collection of intelligence other than of a tactical nature.²⁰

- 2.20 The Committee notes that the approach to membership of an organised armed group outlined in the ICRC interpretive guidance document has not been uncontested. In particular, concerns have been raised about the practical relevance of the guidance, noting that it would allow ‘enablers’ — such as persons who make improvised explosive devices, recruit operatives, or act as part of a personal security detail to senior leadership figures — to benefit from the same protections against attack as civilians. It has been argued that the guidance ‘effectively would forbid many operations previously considered uncontroversial’ and as a result would likely be

¹⁹ ICRC, *Submission 2 – Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (2009), p. 33.

²⁰ ICRC, *Submission 2 – Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (2009), pp. 34–35.

‘disregarded by many, if not most, of the States and armed forces of the world’.²¹

2.21 Given this contention, the Committee was interested to explore the differing concepts of membership of an organised armed group with witnesses at its hearings.

2.22 At the private hearing, in response to the Committee’s questions, the Attorney-General’s Department explained the rationale for the Government’s position on this issue:

[W]e have broadly taken the same approach as we would in relation to state armed forces: that those who are taking an active combat role are clearly members of an organised armed group, and those who are taking a combat support role directly supporting the combat functions, and those who are doing combat service support, are all part of that group—are members of that group. But essentially the question is not so much about function; it is about membership. The question of function might be relevant to someone’s membership, but once you have identified the armed group it is really by virtue of that membership that those individuals are targetable. The question of what they are doing in that armed group is a secondary question and would only be relevant to trying to work out whether they are a member.²²

2.23 The Committee was provided at its private hearing with examples of situations in which either the existing legislation or a ‘continuous combat function’-based approach to membership of an organised armed group would constrain the ability of the Australian Defence Force to attack legitimate military targets.²³ It was also noted that the Australian Defence

²¹ Daniel McBride, ‘Who is a Member? Targeted Killings against Members of Organized Armed Groups’, *Australian Year Book of International Law*, 30 (2013), pp. 47–91. See also Kenneth Watkin, ‘Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance’, *New York University Journal of International Law and Politics*, 42 (2010), pp. 641–695.

²² Mr Reid, Attorney-General’s Department, *Classified Committee Hansard*, 7 November 2016, p. 5.

²³ *Classified Committee Hansard*, 7 November 2016, pp. 2–3.

Force operated under a policy of not targeting civilians and not targeting locations in which civilians are present.²⁴

- 2.24 At the public hearing, Professor Saul told the Committee that he welcomed the Bill and supported its intention to provide certainty for Australian armed forces in combat operations.²⁵ He noted that, based on military manuals and state practice, most states accept the concept of membership of armed groups. However, he explained there were three dominant approaches to the ‘lively debate’ over how the concept of membership of an organised armed group should be defined:

The first is that all members of armed groups, regardless of whether they perform a direct combat function or a support role in the background—not involved in active fighting—can be targeted. This is an approach which draws an analogy with international armed conflict and treats members of non-state armed groups in the same way that members of national militaries are treated in international armed conflicts ... That is the most liberal—or expansive—approach.

The second approach is more restricted, and I think this is reflected in the Israeli Supreme Court’s approach, as well as the [ICRC], and that is that only members of armed groups who are assuming a continuous combat function can be targeted, and everybody else—the cooks, the cleaners and so on—cannot be targeted.

There is then a kind of view which is in-between. I think this view is reflected by one of the leading experts in this area, Nils Melzer, who has written a book, *Targeted Killings in International Law*, and who was one of the principal drafters in the ICRC study on guidance on direct participation in hostilities. His approach is, so far as regular non-state armed groups are concerned—those groups which are really like state forces because they wear uniforms, they control territory and are very easy, most of the time, to identify who the members of the group are—that all members of those groups can be targeted. But if an armed group is more irregular, which is unfortunately the case with many of the armed groups that we confront today, then only those members

²⁴ *Classified Committee Hansard*, 7 November 2016, p. 6.

²⁵ Professor Saul, *Committee Hansard*, 7 November 2016, pp. 1–4.

who are—to go back to the ICRC’s approach—performing a continuous combat function can be targeted.²⁶

- 2.25 Professor Saul said that it was ‘not clear’ in the Bill or the Explanatory Memorandum which of these approaches was intended to apply in the Bill.²⁷
- 2.26 The Attorney-General’s Department explained that the position the Australian Government had taken was that membership of an organised armed group ‘is defined by membership—you are either a member or you are not’. Responding to the suggestion of a ‘continuous combat function’-based test for membership, the Department noted:

[W]e have constrained the existence of the organised armed group quite narrowly to ensure that we will only pick up, as the EM says, that armed sub-element of a larger group. As a matter of practicality, this may get you to a very similar point as applying a continuous combat function test to membership, but in our view it is important that the definition of membership does not turn on function ... Function is relevant, and it might be relevant to determining whether someone is or is not a member, but it is not the determining characteristic ...

[B]ecause of the way in which we have constrained the existence of the group ... you are going to end up in a conservatively sized group—but all members of that group will be targeted, and that is entirely consistent with [international humanitarian law].²⁸

Committee comment

- 2.27 The Committee notes that this Bill concerns a nuanced and technical area of international law and, as such, the Committee received only a small number of submissions. Amongst the submissions received, there was clear support for the Bill’s intent of recognising members of an organised armed group as distinct from civilians and more analogous to members of State armed forces. It was apparent, however, that there is a divergence of views on the

²⁶ Professor Saul, *Committee Hansard*, 7 November 2016, p. 1.

²⁷ Professor Saul, *Committee Hansard*, 7 November 2016, p. 2.

²⁸ Mr Reid, Attorney-General’s Department, *Committee Hansard*, 7 November 2016, pp. 7–8.

question of how membership of an organised armed group should be defined.

- 2.28 The position outlined in the Explanatory Memorandum is that a person's membership of an organised armed group is a matter of fact, and is not constrained by whether or not that person has a 'continuous combat function' in the group. This differs from the guidance promoted in the International Committee of the Red Cross's *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009).
- 2.29 However, the Committee notes that while the most appropriate approach to determining membership of an organised armed group continues to be debated, Australia's key coalition partners and allies already operate to the full extent of international law as provided for in the Bill. This approach aims to treat organised armed groups on equal footing with State armed forces, and recognises that members of those groups—whether they are direct combatants, providing combat support, or providing combat service support—are all contributing to the military effort of the group and should not be given the same protection as civilians in an armed conflict.
- 2.30 The Explanatory Memorandum also makes clear that the term 'organised armed group' is to be interpreted in a constrained way, such that persons performing civilian-type functions in territory controlled by an organised armed group would not be considered to be members of that group of the purpose of the legislation.
- 2.31 The Committee considers that the approach taken in the Bill, in which a practicable definition of membership is applied to a constrained definition of organised armed group, will provide appropriate protection for civilians while also maintaining the capacity to strike against legitimate military targets. It will also harmonise Australian law with the interpretation of international humanitarian law applied by our key allies and coalition partners.

Part 2 – Proportionality in non-international armed conflict

- 2.32 The purpose of Part 2 of the Bill is to align Australian domestic law with the international humanitarian law principle of proportionality in relation to attacks on military objectives in non-international armed conflicts.²⁹
- 2.33 Part 2 provides that the offences in sections 268.70, 268.71 and 268.72 of the Criminal Code would not apply if the death or injury of a person or persons occurs in the course of, or as a result of, an attack on a military objective;³⁰ and at the time the attack was launched:
- the perpetrator did not expect that the attack would result in the incidental death of, or injury to, civilians that would have been excessive in relation to the concrete and direct military advantage anticipated, and
 - it was reasonable in all the circumstances that the perpetrator did not have such an expectation.³¹
- 2.34 The Explanatory Memorandum states that for a defence to be made out, the perpetrator must make an assessment at the time the attack is launched that he or she reasonably expects that attack will not cause incidental civilian death or injury that is excessive in relation to the concrete and direct military advantage anticipated.³²
- 2.35 The Explanatory Memorandum notes that Australia's declaration, made upon ratification of *Protocol I Additional to the Geneva Conventions of 1949*, addresses this issue in relation to international armed conflict:³³

²⁹Explanatory Memorandum, p. 11; Mr Reid, Attorney-General's Department, *Committee Hansard*, 7 November 2016, p. 5.

³⁰ Proposed paragraphs 268.70(1A)(a), 268.71(1A)(a), 268.71(2A)(a), and 268.72(1A)(a).

³¹ Proposed paragraphs 268.70(1A)(b), 268.71(1A)(b), 268.71(2A)(b), and 268.72(1A)(b).

³² Explanatory Memorandum, p. 11.

³³ Explanatory Memorandum, p. 11.

In relation to Articles 51 to 58 inclusive it is the understanding of Australia that military commanders and others responsible for planning, deciding upon, or executing attacks, necessarily have to reach their decisions on the basis of their assessment of the information from all sources, which is available to them at the relevant time.

In relation to paragraph 5(b) of Article 51 and to paragraph 2(a)(iii) of Article 57, it is the understanding of Australia that references to the 'military advantage' are intended to mean the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack and that the term 'military advantage' involves a variety of considerations including the security of attacking forces. It is further the understanding of Australia that the term 'concrete and direct military advantage anticipated', used in Articles 51 and 57, means a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved.

It is the understanding of Australia that the first sentence of paragraph 2 of Article 52 is not intended to, nor does it, deal with the question of incidental or collateral damage resulting from an attack directed against a military objective.³⁴

- 2.36 While the declaration interpreted the requirements of a proportionality assessment in relation to international armed conflict, the Explanatory Memorandum states that 'the same interpretation would apply to interpreting the requirements of such an assessment in non-international armed conflict'.³⁵
- 2.37 Submitters commented on the proposed proportionality clauses. Professor Tim McCormack expressed the view that although the Rome Statute makes no reference to the rule on proportionality in the elements of the corresponding crimes that the current proposed amendments now identify,

³⁴ International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, Australia, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=10312B4E9047086EC1256402003FB253>

³⁵ Explanatory Memorandum, p. 12.

the inclusion of the rule in our legislation is an important clarification of the scope of the offences. Again, this proposed amendment goes beyond, but is not inconsistent with the terms of the Rome Statute. On the contrary the amendment is entirely consistent with international humanitarian law and, in fact, draws on the relevant treaty language of the 1977 Protocol I Additional to the Geneva Conventions of 1949 (to which Australia became a party in 1991).

³⁶

2.38 Professor Ben Saul considered the proposed proportionality clauses to be broadly consistent with the proportionality rule under international humanitarian law, but argued that the proportionality principle is

not confined to ‘the time the attack was launched’ (as per the Bill’s clauses) but is rather a continuing obligation that endures throughout an attack.³⁷

2.39 Professor Saul stated that:

Specifically, article 57(2)(b) of Additional Protocol I of 1977 on precautions in attack requires that ‘an attack shall be cancelled or suspended if it becomes apparent that’ it would be disproportionate. The rule reflects customary [international humanitarian law] applicable in non-international conflicts.³⁸

2.40 Professor Saul recommended that the Bill be amended to apply proportionality to ‘both the time of launching, *and the duration of*, an attack’.³⁹

2.41 In response, the Attorney-General’s Department advised that the Bill reflects the Rome Statute in relation to international armed conflict, namely that ‘the

³⁶ Professor McCormack, *Submission 3*, pp. 34. Article 51(4) of Protocol I prohibits indiscriminate attacks. Article 51(5)(b) states one type of indiscriminate attack is ‘an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’.

³⁷ Professor Saul, *Submission 1*, p. 2. See also Professor Saul, *Committee Hansard*, 7 November 2016, p. 4.

³⁸ Professor Saul, *Submission 1*, p. 2.

³⁹ Professor Saul, *Submission 1*, p. 2 (emphasis in original).

obligation exists at the launching of an attack'.⁴⁰ Mr Reid of the Department went on to state:

However it is undoubtedly true, that as an attack is continued, if any elements or aspects of that attack changed that would alter the proportionality balance.

⁴¹

2.42 Major General Frewen of the Department of Defence explained that:

We observe proportionality throughout all stages of an operation. The example that the professor gave before was of a bridge and then a bus carrying civilians moving onto the bridge. We would make an assessment that the bridge was an important military objective. We would monitor the bridge for a period of time. We would authorise a strike on the bridge and, right up to the moment of weapon release, we would continue to monitor it. If that bus appeared before the weapon was released, the pilot would not release the weapon. The example given was that the weapon had already been released and then the bus appeared. That is just an unfortunate circumstance that is portrayed there, but certainly we observe proportionality at all times—including through an operation as it unfolds.⁴²

2.43 Responding to Committee's questions, the Attorney-General's Department advised that the amendment had been drafted to

stick as closely as we can to the terms of the Rome Statute, because this Division of the Criminal Code is intended to implement Australia's obligations under the Statute. We have not considered going beyond the Statute in that sense.⁴³

2.44 Professor McCormack raised concerns about a potential unintended consequence of the Bill. In his view, the

exclusive focus in the proposed amendments on the provisions in non-international armed conflicts would create an unnecessary inconsistency with

⁴⁰Mr Reid, Attorney-General's Department, *Committee Hansard*, 7 November 2016, p. 7.

⁴¹Mr Reid, Attorney-General's Department, *Committee Hansard*, 7 November 2016, p. 7.

⁴²Major General Frewen, Department of Defence, *Committee Hansard*, 7 November 2016, p. 7.

⁴³Mr Reid, Attorney-General's Department, *Committee Hansard*, 7 November 2016, p. 7.

similar war crimes in international armed conflicts (in Subdivision D and Subdivision E of Division 268 of the *Criminal Code Act 1995*).⁴⁴

- 2.45 Professor McCormack considered the same rationale for the amendments proposed in the Bill applies to war crimes in international armed conflicts and argued that a potential unintended consequence could be

that a future Australian court interprets the lack of inclusion of the proportionality exception to the relevant war crimes in international armed conflicts as indicative of a legislative intent for the rule on proportionality not to apply. This is clearly not the case ...⁴⁵

Committee comment

- 2.46 The proposed amendments in Part 2 of the Bill are intended to introduce the principle of proportionality in relation to attacks on military objectives in non-international armed conflicts. The Committee notes that the language used in the Bill is consistent with that adopted in *Protocol I Additional to the Geneva Conventions of 1949*, which relates to international armed conflict. Further, the Committee was informed that the drafting intentionally reflects (and deliberately does not go beyond) Rome Statute provisions, again relating to international armed conflict. The Committee heard from Major General Frewen of the Department of Defence that, at an operational level, proportionality is observed at all times, including as an operation unfolds.
- 2.47 The Committee agrees that the principle of proportionality should be introduced in relation to the offences at 268.70, 268.71 and 268.72 of the Criminal Code and supports the amendment outlined in Part 2 of the Bill as drafted.
- 2.48 The Committee acknowledges Professor McCormack's comments in relation to a potential unintended consequence of the proposed amendments. The Committee notes that *Subdivision E—Other serious war crimes that are committed in the course of an international armed conflict* of the Criminal Code includes at section 268.38 the following provision:

⁴⁴ Professor McCormack, *Submission 3*, p. 4.

⁴⁵ Professor McCormack, *Submission 3*, p. 4.

(1) A person (the perpetrator) commits an offence if:

(a) the perpetrator launches an attack; and

(b) the perpetrator knows that the attack will cause incidental death or injury to civilians; and

(c) the perpetrator knows that the death or injury will be of such an extent as to be excessive in relation to the concrete and direct military advantage anticipated; and

(d) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

2.49 The Committee is concerned that any potential unintended consequences of the Bill be addressed and considers the Attorney-General's Department should examine whether it would be appropriate to make additional amendments to the Criminal Code. Other potential amendments to the Criminal Code are discussed below.

Part 3 – Minor technical amendment

2.50 Part 3 of the Bill would omit the term 'military' from paragraph 268.65(1)(a) of the Criminal Code, which makes it an offence to use protected persons as shields.

2.51 According to the Explanatory Memorandum, the inclusion of military personnel in this paragraph does not reflect the position at international law and was an unintended oversight when the provision was enacted in 2002. Military personnel are not included under the Geneva Conventions and the Additional Protocols as 'other protected persons'.⁴⁶

2.52 Professor Tim McCormack commented:

The need for the proposed 'Minor Technical Amendment' relating to s 268.65(1) of the legislation and identified in Part 3 of the Bill is clear. The

⁴⁶Explanatory Memorandum, p. 12. 'Other protected persons' are prisoners of war, medical personnel, religious personnel and persons who are *hors de combat*.

term 'military' should not have been included in the original legislation because, in the context of this particular provision, its inclusion is inconsistent with international humanitarian law.⁴⁷

2.53 The Committee supports the amendment as outlined in the Bill.

Part 4 – Application of amendments

2.54 Part 4 of the Bill provides that the amendments made by Part 1 (members of organised armed groups) will apply to 'conduct engaged in on or after the commencement' of the Act.⁴⁸ The amendments made by Part 2 (proportionality in non-international armed conflict) and Part 3 (minor technical amendment) will apply to 'conduct engaged in **before**, on or after the commencement' of the Act.⁴⁹ [emphasis added]

2.55 The Explanatory Memorandum emphasises that the Part 2 amendments do 'not entail the retrospective criminalisation of conduct not hitherto constituting an offence'. It notes that the amendments

reflect the position at international law when sections 268.70, 268.71 and 268.72 were enacted on 25 September 2002. The position at international law with respect to the principle of proportionality in non-international armed conflict has not changed in any relevant respect since that time. As a result, it is appropriate that the amendments apply to any conduct that has occurred since the commencement of the offences on 25 September 2002.⁵⁰

2.56 The Explanatory Memorandum further advises that

there are no existing or completed prosecutions which would be affected by the application of the amendments made by Parts 2 and 3 of the Schedule.⁵¹

⁴⁷ Professor McCormack, *Submission 3*, p. 2.

⁴⁸ Item 13 of Schedule 1 to the Bill.

⁴⁹ Item 14 of Schedule 1 to the Bill.

⁵⁰ Explanatory Memorandum, p. 12.

⁵¹ Explanatory Memorandum, p. 13.

- 2.57 Professor Ben Saul addressed these provisions in his submission to the Committee, noting that

[t]he international prohibition on retrospective criminal punishment can have no relevance to a domestic law that narrows but does not impose additional criminal liability.⁵²

- 2.58 The Committee has no concerns about the application provisions in Part 4 of the Bill.

Other matters raised in evidence

- 2.59 In his submission, Professor McCormack raised a small number of other matters for consideration by the Committee regarding Division 268 of the Criminal Code. These matters were outside the existing scope of the Bill and as such were not considered in detail by the Committee.

- 2.60 Professor McCormack noted that the Criminal Code currently contains offences for the war crime of ‘outrages upon personal dignity’ perpetrated against a corpse in international and non-international conflict,⁵³ derived from Article 8(2)(c)(ii) of the Rome Statute (and previously designated as ‘mutilation of the dead’). He pointed out that there had been an inadvertent narrowing of the scope of the Australian legislation for non-international conflict compared to the provision in the Rome Statute, requiring the prosecution to prove beyond reasonable doubt that a ‘the dead person or dead persons were not, before his, her or their death, taking an active part in the hostilities’. Professor McCormack suggested that this requirement should be removed from the legislation in order to prevent perpetrators from evading prosecution.⁵⁴

- 2.61 The Committee raised this issue with the Attorney-General’s Department at the private hearing. The Committee was informed that, in response to the issue being previously raised by Professor McCormack, the legislation had

⁵² Professor Saul, *Submission 1*, p. 3.

⁵³ Criminal Code, sections 268.58(2) and 268.74.

⁵⁴ Professor McCormack, *Submission 3*, pp. 15–16.

already been amended through the passage of the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015.⁵⁵ As a result, section 268.74 of the Criminal Code no longer requires that a victim was not taking an active part in the hostilities prior to their death for an offence to have been committed.⁵⁶

2.62 Professor McCormack also submitted that there was an oversight in the drafting of the Rome Statute that resulted in three particular war crimes, which appear in Article 8(2)(b) of the Rome Statute in relation to international armed conflicts, being excluded Article 8(2)(3) in relation to non-international armed conflicts. As a result, they are not included as war crimes in Division 268 of the Criminal Code. The three crimes identified were:

- the war crime of attacking civilian objects,
- the war crime of excessive incidental death, injury or damage, and
- the war crime of starvation as a method of warfare.⁵⁷

2.63 Professor McCormack submitted:

The lack of inclusion of these offences in the Rome Statute is a major impediment to the jurisdiction of the International Criminal Court and there is no reason why Australia should replicate that impediment to the jurisdiction of Australian courts in the enforcement of Division 268 of the *Criminal Code Act 1995*.⁵⁸

2.64 At the private hearing, the Attorney-General's Department advised that it was not currently considering introducing the three offences, but that if 'a more holistic review' of Australia's war crimes provisions was undertaken, it would examine 'whether or not we need to introduce other crimes that are not in the Rome Statute into our domestic legislation'. The Department added that, noting the purpose of Division 268 was to implement Australia's

⁵⁵Mr Reid, Attorney-General's Department, *Classified Committee Hansard*, 7 November 2016, p. 9.

⁵⁶ Criminal Code, sections 268.74.

⁵⁷ Professor McCormack, *Submission 3*, p. 17.

⁵⁸ Professor McCormack, *Submission 3*, p. 16.

obligations under the Rome Statute, it would be 'a little bit hesitant about going beyond the Rome Statute too far and introducing crimes that simply do not exist in the Statute, even though they might exist in custom'.⁵⁹

- 2.65 While not having examined these matters in detail, the Committee welcomes the Attorney-General's Department's undertaking to give consideration to the insertion of the additional war crimes into the Criminal Code in any future review of Australia's war crimes provisions.

Concluding comments

- 2.66 Having considered the evidence received, the Committee is satisfied that the changes proposed in the Bill are appropriate.

Recommendation 1

- 2.67 The Committee recommends that the Criminal Code Amendment (War Crimes) Bill 2016 be passed by the Parliament.**

Mr Michael Sukkar MP

Chair

November 2016

⁵⁹Mr Reid, Attorney-General's Department, *Classified Committee Hansard*, 7 November 2016, p. 9.

A. List of submissions

- 1** Professor Ben Saul
- 2** International Committee of the Red Cross
- 3** Professor Tim McCormack

B. Witnesses appearing at public and private hearings

Monday, 7 November 2016 (public hearing)

Parliament House

Canberra

Attorney-General's Department

Mr John Reid, First Assistant Secretary, Office of International Law

Ms Stephanie Ierino, Principal Legal Officer, Office of International Law

Department of Defence

Major General John Frewen, Head Military Strategic Commitments

Individual

Professor Ben Saul

Monday, 7 November 2016 (private hearing)

Parliament House

Canberra

Attorney-General's Department

Mr John Reid, First Assistant Secretary, Office of International Law

Ms Stephanie Ierino, Principal Legal Officer, Office of International Law

Department of Defence

Major General John Frewen, Head Military Strategic Commitments