Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024

31 July 2024

Committee Secretary
Senate Legal and Constitutional Affairs Committee
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By email: legcon.sen@aph.gov.au

Dear Secretary,

Inquiry into the Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024.

The Australian National University Law Reform and Social Justice Research Hub ('ANU LRSJ Research Hub') welcomes the opportunity to provide this submission to the Inquiry into the *Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024*.

The ANU LRSJ Research Hub falls within the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and social justice principles into teaching, research and study. Members of the group are students of the ANU College of Law, who are engaged with a range of projects with the aim of exploring the law's complex role in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

RECOMMENDATIONS

We make the following recommendations to the Inquiry:

1. The *Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024* should be passed.

2. The following amendments should be made, either to the bill or to the *Criminal Code Act 1995* (Cth) in future legislation:
    a. The mental element for the crime of genocide should be changed to general intent;
    b. Cultural genocide should be included as a physical element of genocide; and
    c. Section 268 of the *Criminal Code 1995* (Cth) should apply retrospectively from 1946.

3. If all other recommendations are not accepted, s 268.122 of the *Criminal Code 1995* (Cth) should be amended to be amended to provide for a more transparent and accountable form of decision-making by the Attorney-General, namely:
    a. Imposing a requirement for written reasons;
    b. Providing a list of mandatory considerations; and
    c. Providing a list of irrelevant considerations.

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I BACKGROUND

Australia ratified the *Convention on the Prevention and Punishment of the Crime of Genocide* ('the *Genocide Convention*') on 8 July 1949.[1] However, it was not until the passage of the International Criminal Court (Consequential Amendments) Act 2002 (Cth) that genocide was legislated as a crime in Australia under Division 268 of the *Criminal Code Act 1995* (Cth). Division 268 encompasses a range of offences legislated in accordance with Australia's international commitments. The section title is 'Genocide, crimes against humanity, war crimes and crimes against the administration of the justice of the International Criminal Court'.[2] The international crimes included in the division include genocide,[3] crimes against humanity,[4] war crimes,[5] and crimes against the administration of the justice of the International Criminal Court.[6]

Graham Blewitt, the former deputy prosecutor at the International Criminal Tribunal for the Former Yugoslavia and a former head of the Australian unit investigating Nazi war criminals, stated, "I believe that Australia has a reputation amongst those who have been involved in war crimes as a safe haven". [7] Since World War II, over 500 Nazi war criminals have resided in Australia, in addition to war criminals from the Khmer Rouge and Rwanda, the Afghan and Chilean secret police, and Serbians and Croatians who committed war crimes and crimes against humanity during the 1990s Balkans Wars. None of these perpetrators have ever faced criminal prosecution or been convicted for international crimes; instead, they have lived long lives in Australia.[8] Australia's demonstrated unwillingness to prosecute international crimes raises serious questions around its ability to fulfil its international obligations and prevent impunity.

Section 268.121(1) provides that proceedings under Division 268 cannot be commenced except with the written consent of the Attorney-General. Further, s 268.121(2) provides that '[a]n offence against this Division may only be prosecuted in the name of the Attorney-General'. However, the Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024 would remove ss 268.121 and s 268.122 from the *Criminal Code 1995* (Cth). Were these sections removed, it appears that prosecutions could be brought by the Commonwealth Director of Public Prosecutions, the Australian Federal Police, or by private prosecution.[9] The reasons of the High Court in *Taylor v Attorney-General (Cth)* suggests that were ss 268.121-2 repealed, private citizens, the CDPP and the Australian Federal Police, would be able to bring prosecutions.[10]

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[1] Shirley Scott, 'Why Wasn't Genocide A Crime in Australia?: Accounting For the Half-century Delay in Australia Implementing the Genocide Convention' (2004) 10(2) *Australian Journal of Human Rights* 22.

[2] *Criminal Code Act 1995* (Cth), Div 268.

[3] Ibid, Div 268, Sub-Div B.

[4] Ibid, Div 268, Sub-Div C.

[5] Ibid, Div 268, Sub-Div D, E, F, G, H.

[6] Ibid, Div 268, Sub-Div J.

[7] Dan Silkstone, 'Australia a War Criminal's Safe Haven', *The Age* (online, 5 December 2005) <https://www.theage.com.au/national/australia-a-war-criminals-safe-haven-20051205-ge1dbj.html>.

[8] Mark Aarons, *War Criminals Welcome: Australia, a Sanctuary for Fugitive War Criminals Since 1945* (Black Inc., 2001).

[9] On the latter, see *Crimes Act 1914* (Cth), s 13.

[10] [2019] HCA 30, [10].

II MERITS OF THE PROPOSED BILL

A *Removal of the Current Inappropriate Scoping of Power*

The discretion granted to the Attorney-General under s 268.121 is governed by s 268.122. s268.122 is a privative clause which excludes, to the greatest extent possible, the opportunity for judicial review of an Attorney-General's decision under s 268.121. A decision under s 268.121 is said to be 'final; … [not able to] be challenged, appealed against, reviewed, quashed or called in question; … not subject to prohibition, mandamus, injunction, declaration or certiorari'.[11] While acknowledging that courts have shown remarkable resourcefulness in avoiding exclusions of judicial review, it is equally the case that this section is unusual and extreme in its drafting and construction. This provision both lacks guidance to instruct the Attorney-General's decision, creating an overbroad discretion, and then systematically deprives a potential plaintiff of the ability to have the decision reviewed.

Adoption of the amendment would remove this power and place the prosecutorial decision in the hands of the Commonwealth Director of Public Prosecutions and the Australian Federal Police for the most part, but equally allow private prosecutions to take place, removing the risks and demerits that we set out which arise from the Attorney-General's discretion.

1 Breadth of Discretion

The Attorney-General is given no instruction of relevant and irrelevant considerations in making the decision. This scoping has been described as a 'carte blanche to determine whether a prosecution makes it to court'.[12] As Hood and Cormier note, the Attorney-General's complete discretion contrasts sharply with the way most other matters of federal criminal law are managed. For instance, the Commonwealth Director of Public Prosecutions is required to have regard to:

> 'A host of prosecutorial guidelines before making a decision about whether to prosecute a particular case. These prosecutorial guidelines ensure that the practice of the DPP is consistent and predictable which in turn helps to engender public confidence in the system'.[13]

Division 268's lack of guidance permits the Attorney-General to make the decision on any basis, or no basis at all.

The breadth of the discretion also sits uneasily with the Attorney-General's dual role as a 'political figure with responsibility in both the legislature (as a Member of Parliament) and the executive (as a Minister of the Crown)'.[14] There is evident potential for an appearance of political bias or motive in the making of such a decision. This subjects a judicial process to the sort of politicisation against which the independence of prosecutorial functions in Australia specifically seeks to guard.[15] Were the

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[11] Ibid, Div 268.122(1)(a–c).

[12] Anna Hood and Monique Cormier, 'Prosecuting International Crimes in Australia: The Case of the Sri Lankan President' (2012) 13(1) *Melbourne Journal of International Law* 1, 5.

[13] Ibid 6.

[14] Ibid 6.

[15] See generally, Rowena Johns, NSW Parliamentary Library Research Service, Independence and Accountability of the Director of Public Prosecutions: A Comparative Survey (Briefing Paper No 9/2001) 1.

decision subject to rigorous criteria and a requirement to publish reasons, the decision-making process could be scrutinised against objective standards.

2 Exclusion of review

A decision made by the Attorney-General under ss 268.121–2 is, it appears, completely immune to review by a court, both under s 75(v) of the *Australian Constitution* and under the *Administrative Decisions (Judicial Review) Act 1997* (Cth). This immunity to judicial review arises from the breadth of the discretion permitted by the Criminal Code's privative clauses and because other forms of accountability will rarely be effective for Division 268 matters.

First, the breadth of the discretion, set out above, limits the grounds of review available to challenge the decision. The inclusion of a comprehensive (or even minimal) set of relevant and/or irrelevant considerations would provide a bountiful opportunity to review decisions on grounds of failure to consider a relevant consideration or consideration of an irrelevant consideration. The potential for a jurisdictional error to arise is substantially limited by the lack of guidance on the discretion.

Second, by rendering the decision 'final; … [not able to] be challenged, appealed against, reviewed, quashed or called in question; … not subject to prohibition, mandamus, injunction, declaration or certiorari',[16] there is very little scope for a court to find it has jurisdiction to review the decision or award any relief. This means that there is no judicial check on the power. Were a decision to be made by the Attorney-General, quite apparently not in keeping with any given normative standard, there is no recourse in courts. This is prone to reduce trust in international law as a venue for seeking justice. While the explanatory memorandum to the International Criminal Court (Consequential Amendments) Act 2002 (Cth) suggested that the High Court could review this decision through the constitutional writs, it is not apparent that the Court would be able to effectively review this; following *Plaintiff M61*, it would appear that the Court will not issue mandamus when a decision-maker is under no obligation to consider making a decision, as is the case here.[17] It is also notable that the exclusions far exceed the construction of other sections of the *Criminal Code Act 1995* (Cth) which require permission of the Attorney-General.[18]

Third, the forms of political accountability that typically circumscribe ministerial discretions are unlikely to perform effectively in this context. Notionally, a Minister, like the Attorney-General, is held accountable through the political process: through accountability to the parliament and accountability in public fora such as the media. However, these forms of accountability are prone to fail for matters of international criminal conduct for several reasons. First, Australia has a generally bipartisan approach to matters of international affairs.[19] This limits the key form of parliamentary accountability through the parliamentary opposition, as the opposition rarely contests matters of foreign affairs given that there is little relief in the positions of the major parties. Moreover, while some matters of international criminal conduct do attract substantial public attention, it is apparent that many more matters are exclusively agitated by diaspora communities with little broader

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[16] *Criminal Code Act 1995* (Cth), Div 268.122(1)(a–c).

[17] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.

[18] See, eg, *Criminal Code Act 1995* (Cth), ss 82.13, 83.5.

[19] See, eg, Pijovic, Nikola, 'The Liberal National Coalition, Australian Labor Party and Africa: Two Decades of Partisanship in Australia's Foreign Policy' *Australian Journal of International Affairs* (2016) 70(5): 541

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engagement. This means engagement from media and civil society is less likely. The evidence of the truth of this claim is simply that there has not, as long as this section has been in the code, been a situation of parliamentary scrutiny or public concern causing the Attorney-General to change a decision made under this section.

B *Enhanced Accountability for International Criminals*

By repealing the requirement for the Attorney-General to give written consent for the commencement of proceedings against international criminals, the Criminal Code (Genocide, Crimes Against Humanity and War Crimes) Bill 2024 (Cth) would enhance Australia's capacity to respond to international crimes and prevent offenders from evading accountability.

Presently, the Attorney-General is strongly incentivised to refuse consent for the commencement of proceedings against international criminals under s268.121(1) *Criminal Code 1995* (Cth). Parliamentary convention prescribes that the Attorney-General should perform their legal functions independently and free from political bias.[20] However, unlike in Canada and the United Kingdom, this has not been recognised as binding legal principle in Australia.[21] Former Attorney-Generals have even expressly doubted the need for impartiality in executing their legal functions.[22] In this context, the Attorney-General's incentives as a government Minister and member of Cabinet may supersede weakly-enforced norms of independence. Not only could this jeopardise the constitutional separation of powers, but it renders the Attorney-General unlikely to consent to the prosecution of domestic and foreign international criminals.

Most saliently, the Attorney-General is unlikely to consent to the prosecution of domestic political leaders for international crimes. As a government Minister, the Attorney-General has a personal interest in enhancing the electoral prospects of their political party by preventing criminal investigations into other members of caucus. For example, the current Labor Attorney-General, Mark Dreyfus, is politically disincentivised from enabling the prosecution of fellow party members Prime Minister Anthony Albanese, Foreign Minister Penny Wong, and Defence Minister Richard Marles for accessorial liability for the genocide in Gaza, as alleged in a communiqué to the Office of the Prosecutor of the International Criminal Court, were the complainants to bring a private prosecution.[23]

The Attorney-General is also incentivised to prevent the prosecution of former officials and Ministers from other political parties. This is because commencing proceedings could embarrass Australia on the international stage, and many policies likely amounting to genocide were implemented across the political divide (including the forced removal of Aboriginal and Torres Strait Islander Children).[24] The

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[20] Gerard Carney, 'Comment – The Role of the Attorney-General' (1997) 9(1) *Bond Law Review* 1, 3.

[21] Ibid.

[22] Daryl R Williams, 'Who Speaks for the Courts?' in Australia Institute of Judicial Administration (ed), *Courts in a Representative Democracy* (Australian Institute of Judicial Administration, 1995) 183, 192.

[23] Birchgrove Legal, *Conduct of Members of the Parliament of Australia, in Relation to the Situation in Gaza, Palestine: Accessorial Liability for Genocide*, 4 March 2024 (Communiqué to the Office of the Prosecutor of the International Criminal Court Under Article 15 of the Rome Statute) <https://birchgrovelegal.com.au/wp-content/uploads/2024/03/ICC-Referral-Australian-Government-Ministers-and-Opposition-Leader-04032024_BLG.pdf>.

[24] Australian Human Rights Commission, Parliament of Australia, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Final Report, April 1997), 26.

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concerning scope of the Attorney-General's powers over whether a criminal prosecution for international crimes can commence is highlighted in the Bringing Them Home report, which found that the Stolen Generations policy was designed to control the population of Indigenous communities through various means, including the forcible removal of children.[25] This policy has been considered to amount to genocide.[26] However, there has **never** been any criminal prosecutions for international crimes committed against Aboriginal and Torres Strait Islander children.

Further, the Attorney-General is strongly incentivised to withhold their consent for the prosecution of *foreign* criminals. Commencing proceedings against foreign leaders on Australian territory may generate unwanted scrutiny towards the Australian government, impair their diplomatic relationships and undermine their international political agenda. For example, commentators speculated that Attorney-General Robert McClelland's decision to withhold consent from the prosecution of Sri Lankan President Mahinda Rajapaksa in 2011 for war crimes and crimes against humanity was motivated by political factors.[27] In particular, the Gillard government was concerned that any prosecution would undermine cooperation with Sri Lanka on reducing the number of Sri Lankan asylum seekers travelling to Australia by boat.[28] Similarly, Attorney-General Christian Porter prevented the prosecution of Myanmar leader Aung Sun Suu Kyi for crimes against the Rohingya people,[29] likely to prevent diplomatic tensions during the ASEAN leaders' meeting in Australia.

Australia's unwillingness to prosecute international criminals reflects a failure to uphold basic human principles, such as the international rule of law. This is particularly significant, since other legal mechanisms are often insufficient to hold offenders accountable for their crimes. First, international courts, such as the International Criminal Court and the International Court of Justice, are often ineffective at prosecuting international criminals. Although the *Genocide Convention* came into force in 1951, the first conviction for genocide was only delivered by the International Criminal Tribunal for Rwanda against Jean-Paul Akayesu in 1999.[30] This is likely because the jurisdiction of international courts is premised upon the consent of state parties, and supranational tribunals lack adequate enforcement mechanisms.[31] Further, other nations are often unwilling to prosecute international criminals under their universal jurisdiction, likely informed by foreign policy concerns. For example, Mahinda Rajapaksa was never tried for his alleged crimes after Australia's Attorney-General refused to prosecute.[32] As a nation which purports to care about the rule of law, we

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[25] Ibid 190.

[26] Ibid.

[27] Hood and Cormier (n 12), 14.

[28] Hamish McDonald, 'See No Evil is Australia's Way on War Crimes', *The Sydney Morning Herald* (online, 29 October 2011), cited in Hood and Cormier, 14.

[29] Ben Doherty, 'Aung San Suu Kyi Cannot Be Prosecuted in Australia, Christian Porter Says', *The Guardian* (online, 17 March 2018) <https://www.theguardian.com/world/2018/mar/17/aung-san-suu-kyi-cannot-be-prosecuted-in-australia-christian-porter-says>.

[30] Ben Saul, 'The International Crime of Genocide in Australian Law' (2000) 22(4) *Sydney Law Review* 527, 257.

[31] Ibid 258.

[32] Shravan Raghavan, 'The Wounds of Sri Lankan Tamils Can't Heal So Long As the Rajapaksas Are in Power', *Statecraft* (online, July 5 2020) <https://www.statecraft.co.in/article/the-wounds-of-sri-lankan-tamils-can-t-heal-so-long-as-the-rajapaksas-are-in-power>.

should find it unacceptable that perpetrators of the worst crimes can evade accountability by way of a veto power vested in the Attorney-General.

However, the Criminal Code (Genocide, Crimes Against Humanity and War Crimes) Bill 2024 (Cth) rectifies this problem by removing the veto power of the Attorney-General to facilitate the prosecution of international criminals. Not only would this strengthen the international rule of law, but it has the normative effect of condemning crimes against humanity and deterring future crimes.

C Fulfilment of Australia's Positive International Legal Obligations

Moreover, passing the Criminal Code (Genocide, Crimes Against Humanity and War Crimes) Bill 2024 (Cth) would ensure that Australia fulfils its obligations under international law. This is because the requirement for the Attorney-General to give written consent to commence proceedings against international criminals under Division 268 of the *Criminal Code 1995* (Cth) undermines our positive duty to enforce the prohibition of genocide under the *Genocide Convention* and customary international law.

1 *Compatibility with the Genocide Convention*

The requirement for the Attorney-General to give written consent for the prosecution of international crimes makes Australia non-compliant with our obligations under the *Genocide Convention*. Australia was the second state to ratify the *Genocide Convention* in 1948, and the agreement entered into force on January 12, 1951.[33] Under Article I, state parties recognise genocide as a crime under international law.[34] Relevantly, Article V provides that parties undertake to enact 'the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide' and other crimes.[35]

However, Division 268 *Criminal Code 1995* (Cth) only *partially* fulfils Australia's legal obligations under Article V *Genocide Convention*. Subdivision B gives effect to the *Genocide Convention* by creating the offences of genocide by 'killing', 'causing serious bodily or mental harm', 'deliberately inflicting conditions of life calculated to bring about physical destruction', 'imposing measures intended to prevent births' and 'forcibly transferring children',[36] consistent with the definition in Article II.[37] Each offence is punishable by imprisonment for life,[38] constituting an 'effective penalty' as required by Article V.[39]

However, Division 268 *Criminal Code 1995* (Cth) does not constitute 'the necessary legislation to give effect to the provisions of the present Convention' per Article V.[40] This is because s268.121

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[33] Saul (n 30), 530.

[34] *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art I ('*Genocide Convention*').

[35] Ibid art V.

[36] *Criminal Code Act 1995* (Cth), Div 268, Sub-Div B, ss268.3–268.7.

[37] *Genocide Convention* (n 34) art II.

[38] *Criminal Code Act 1995* (Cth), Div 268, Sub-Div B, ss268.3–268.7.

[39] *Genocide Convention* (n 34) art V.

[40] Ibid.

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provides that proceedings for the crime of genocide cannot be commenced without the Attorney-General's consent.[41] The Attorney-General is unlikely to grant consent to prosecute domestic and foreign leaders for international crimes due to competing political incentives (as above). This violates Article IV *Genocide Convention*, which provides that 'persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals'.[42] In fact, leaders and public officials are highly likely to escape accountability under the *Criminal Code 1995* (Cth), like Rajapaksa and Aung Sun Suu Kyi.

One counterargument is that Australia is not legally bound to enact the precise language and content of international treaties under domestic law.[43] Analogously to the *International Criminal Court (Consequential Amendments) Act 2002* (Cth), the *Diplomatic Privileges and Immunities Act 1967* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *World Heritage Properties Conservation Act 1983* (Cth) only *partially* enact international agreements.[44] This is permissible under domestic law, since legislation only constitutes an unlawful exercise of the foreign affairs power in s51(xxxix) of the *Commonwealth Constitution* if it is not reasonably appropriate and adapted to the purpose of implementing Australia's international obligations.[45] However, under international law it is no defence that the relevant acts are authorised under municipal law.[46] Australia has nevertheless failed to uphold our international obligations under the *Genocide Convention*.

2 *Compatibility with Customary International Law*

Genocide is prohibited under customary international law,[47] reflected by widespread state practice and *opinio juris*.[48] This prohibition has been recognised as a *jus cogens* norm by the International Court of Justice.[49] *Jus cogens* norms are peremptory norms of international law owed *erga omnes* from which no derogation is permitted.[50] Commentators have argued that *jus cogens* norms impose a positive *duty* on states to prosecute offenders, rather than a mere right.[51]

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[41] *Criminal Code Act 1995* (Cth), s28.121(1).

[42] *Genocide Convention* (n 34) art IV.

[43] Senate Legal and Constitutional References Committee, Parliament of Australia, *Humanity Diminished: The Crime of Genocide, Inquiry into the Anti-Genocide Bill 1999* (Parliamentary Paper No 136, June 2000) 26.

[44] Ibid 26.

[45] Ibid 27; Roach v Electoral Commissioner [2007] HCA 43 [95] (Gummow, Kirby, and Crennan JJ).

[46] Andrew Mitchell, 'Genocide, Human Rights Implementation and the Relationship Between International and Domestic Law: Nulyarimma v Thompson' (2000) 24(1) Melbourne University Law Review 15, 45.

[47] *Reservations to the Genocide Convention Case (Advisory Opinion)* [1951] ICJ Rep 15, 23.

[48] See e.g GA Res 96(I), UN Doc A/RES/96 (I) (11 December 1946).

[49] *Reservations to the Genocide Convention Case (Advisory Opinion)* [1951] ICJ Rep 15, 23; *Case Concerning the Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, 32, cited in Mitchell (n 47), 19-20.

[50] Mitchell (n 46), 19.

[51] M. Cherif Bassiouni, 'International Crimes: "Jus Cogens" and "Obligatio Erga Omnes"' (1996) 59(4) *Law and Contemporary Problems* 63, 67; Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537, 2542; M Scharf, 'Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?' (1996) 31 *Texas InternationalLaw Journal* 1, 4, cited in Mitchell (n 46) 20.

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Australia has endorsed the theory of dualism, which provides that domestic and international law are independent from each other, rather than components of a single legal order.[52] As such, international law can only be transformed into domestic law via legislation or another discretionary act to have a binding effect within Australia.[53] In this context, Division 268 *Criminal Code 1995* (Cth) partially fulfils Australia's obligation to hold perpetrators accountable for genocide. However, the requirement for the Attorney-General to give written consent to commence proceedings undermines our international responsibilities, since the Attorney-General is unlikely to prosecute government officials and foreign leaders (as above). Given the strength of *jus cogens* norms, any loophole in Australia's implementation of the prohibition of genocide likely constitutes a violation of international law.

One counterargument is that Australia fulfils its international legal obligations to prosecute the crime of genocide through other mechanisms. For example, murder, assault and conspiracy are already punishable under Australia's criminal laws.[54] Anti-discrimination legislation prohibits unequal treatment on the basis of race and other protected characteristics.[55] However, these laws are insufficient to cover all physical elements of genocide, including deliberately inflicting conditions of life calculated to cause the destruction of a group.[56] They do not address the mental element of genocide, as the requisite intent must be directed against a group rather than an individual.[57] Further, anti-discrimination legislation is primarily directed towards conciliation by the Human Rights and Equal Opportunity Commission, rather than criminal punishment.[58]

3 *Importance of Upholding International Law*

Despite widespread acknowledgement that international law is weakly enforced, there are strong normative reasons for Australia to uphold our legal obligations. Emerging from the horrors of World War II, the international legal order is premised upon the principles of justice, equality and dignity for all.[59] As a nation which has repeatedly pledged its commitment to these principles, we have a duty to fulfil our global commitments. Upholding our international legal obligations is also important for pragmatic reasons. Breaching our legal responsibilities compromises Australia's reputation on the world stage and weakens the overall legitimacy of international law.

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[52] Mitchell (n 46), 26.

[53] Ibid 27.

[54] Saul (n 30), 543.

[55] Senate Legal and Constitutional References Committee (n 43) 20.

[56] Mitchell (n 46), 22.

[57] Ibid.

[58] Saul (n 30), 543.

[59] Oxford University Press, *Max Planck Encyclopedia of Public International Law* (online at June 2011), 'History of International Law, Since World War II' [2]-[4].

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III RESPONSE TO COUNTER ARGUMENTS

A *Upholding Other International Legal Obligations*

One rationale for requiring the Attorney-General's consent for the prosecution of international crimes under s268.121 *Criminal Code 1995* (Cth) is to uphold Australia's competing obligations under international law. For example, Mr McClelland justified his decision to veto the prosecution of Sri Lankan President Mahinda Rajapaksa in order to respect head of state immunity.[60] However, this justification is insufficient because the judiciary (rather than the executive) is best-placed to evaluate Australia's legal obligations.[61] Not only are judges highly trained and experienced in applying the law, but their decisions are reviewable in appellate courts.[62] This is particularly significant given the complex and evolving nature of international law and its relationship with Australia's domestic law.[63]

B *Preventing Vexatious Cases*

Others claim that the Attorney-General's veto power is necessary to prevent vexatious cases from tarnishing the reputations of alleged offenders. This was the sole rationale given during the second reading speech for the International Criminal Court (Consequential Amendments) Bill 2002 (Cth).[64] However, the Australian legal system has adequate mechanisms to deter applicants from bringing claims without legal merit, including the tort of malicious prosecution.[65] Beyond this, the applicant's motivation is irrelevant if sufficient evidence can be adduced.[66]

C *Promoting Australia's Foreign Relations*

Perhaps the strongest counter-argument is that the Attorney-General's consent for the prosecution of international crimes is necessary to protect and promote Australia's foreign relations.[67] In a global political context characterised by realpolitik, states often retaliate against foreign governments for attempting to hold their leaders accountable under law.[68] This can have detrimental impacts on the diplomatic relationships, economic prosperity and security interests of concerned states. For example, when Belgian citizens commenced proceedings against United States President George HW Bush, Vice-President Dick Cheney, Secretary of State Colin Powell and military personnel for breaches of the *Geneva Conventions,* the US threatened to remove NATO headquarters from Brussels and refused to fund future constructions.[69] The Chinese government warned Spain of damages to the states'

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[60] 'No War Crimes Case Against Sri Lanka Leader', *ABC News* (online, 25 October 2011) <https://www.abc.net.au/news/2011-10-25/mcclelland-sri-lanka-decision/3600104>.

[61] Hood and Cormier (n 12), 10.

[62] Ibid.

[63] Ibid.

[64] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2002, 4357 (Andrew Southcott).

[65] Hood and Cormier (n 12), 11.

[66] Ibid.

[67] Ibid 11-16.

[68] Ibid 12.

[69] 'US Attacks Belgium War Crimes Law', *BBC News* (online, 12 June 2003) <http://news.bbc.co.uk/2/hi/europe/2985744.stm>.

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bilateral relationship when Spanish citizens attempted to prosecute Chinese officials for genocide and crimes against humanity in Tibet.[70] Accordingly, some commentators contend that the Attorney-General must be empowered to prevent international prosecutions, since they are best-placed to protect the national interest due to their superior knowledge of Australia's diplomatic relations.[71]

However, this justification cannot outweigh the necessity of holding alleged offenders accountable for the crime of genocide. Allowing foreign leaders to commit ethnic cleansing and extreme violence with impunity violates the very foundations of the international legal order and offends basic human values. Whilst some commentators contend that officials from less powerful states could still be prosecuted without significant international backlash,[72] this would create a pernicious double-standard whereby leaders from predominantly Western states would be exempt from prosecution. Not only would this worsen the perception that international law is a weapon of the West designed to oppress the developing world,[73] but it would undermine basic precepts of equality, justice and the rule of law.

[70] Jose Reinoso, 'China Warns Spain Pursuing Ex-President Could Damage Relations', *El País* (online, 30 November 2013) <https://english.elpais.com/elpais/2013/11/20/inenglish/1384979360_284094.html>.

[71] Hood and Cormier (n 12), 11-12.

[72] Ibid 14.

[73] Ibid 15.

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IV OTHER AMENDMENTS

Beyond removing the requirement for the Attorney-General to consent to the prosecution of international criminals, we propose several other amendments to s268 *Criminal Code 1995* (Cth).

A *Mental Element of General Intent*

Under Subdivision B of Div 268 *Criminal Code 1995* (Cth), the prosecution must prove that the offender 'intends to destroy, in whole or in part, that national, ethnical, racial or religious group, as such'.[74] This is consistent with the definition of genocide in Article II of the *Genocide Convention.*[75] In *Prosecutor v Jean-Paul Akayesu*, the International Criminal Tribunal for Rwanda found that the relevant standard of *dolus specialis* "requires that the perpetrator clearly seek to produce the act charged".[76] This high standard of intent has prevented alleged offenders from being held accountable for their crimes. For example, the International Court of Justice refrained from bringing proceedings against Paraguay in 1972, since the systematic murder of the Indigenous Aché people was primarily motivated by a desire to exploit natural resources on traditional lands.[77] The High Court of Australia found that the Howard government's 'Ten Point Plan' on native title did not indicate intent to destroy a national, ethnical, racial or religious group" on similar grounds in *Nulyarimma v Commonwealth*.[78]

To prevent impunity for international criminals, we propose that a lower standard of 'general intent' should be the mental element of genocide under Division 268 *Criminal Code 1995* (Cth). General intent would be satisfied if a foreseeable consequence of the offender's actions was the destruction of the group.[79] This is desirable, since it would encompass a greater number of acts which offend basic morality and are generally regarded as genocide. For example, it could encompass the destruction of Indigenous groups as a foreseeable consequence of their dispossession from traditional lands.[80] This is necessary to ensure accountability for government officials and justice for Indigenous peoples.

B *Physical Element of Cultural Genocide*

Moreover, we propose that cultural genocide should be included as a physical element of genocide. This refers to the destruction of traditional ways of life, including the removal of cultural objects, the suppression of native languages and other coercive assimilationist policies.[81] Whilst Merkel J warned that expanding the definition of genocide would "demean" its seriousness,[82] we submit that the destruction of traditional cultures is an egregious offence which must be adequately recognised through the framework of anti-genocide legislation. The preservation of diverse cultures is vital to

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[74] *Criminal Code Act 1995* (Cth), s268 (Div B).

[75] *Genocide Convention* (n 34) art II.

[76] *Prosecutor v Jean-Paul Akayesu (Trial Judgement)* (1998) 37 ILM 1401, 1406.

[77] Bonnie St. Charles, 'You're on Native Land: The Genocide Convention, Cultural Genocide, and Prevention of Indigenous Land Takings' (2020) 21(1) *Chicago Journal of International Law* 227, 235-236.

[78] (1999) 165 ALR 621, 670 (Merkel J).

[79] Saul (n 30), 566.

[80] Mitchell (n 46), 18.

[81] Ibid 18.

[82] *Nulyarimma v Commonwealth* (n 78), 671 (Merkel J).

promoting the richness of modern society, and protecting the mental and physical wellbeing of affected individuals. Conversely, the cultural dispossession of many Indigenous Australians has been correlated with poor health outcomes, reduced economic wellbeing and increased interactions with the criminal justice system.[83] Accordingly, cultural genocide should be included in Subdivision B of Division 268 *Criminal Code 1995* (Cth) to deter future assimilationist policies and ensure that perpetrators are held accountable for their actions.

C *Retrospective Application*

Furthermore, we propose that s268 of the *Criminal Code 1995* (Cth) should apply retrospectively from 1946. Despite the general principle that there can be no punishment without law (*nullum crimen sine lege, nulla poena sine lege*),[84] the primary justification that *ex post facto* laws unfairly disadvantage offenders does not apply under these circumstances. No person could claim that they did not know that genocide was unacceptable since at least December 1946, when the United Nations General Assembly unanimously passed Resolution 96(I).[85] The prohibition of genocide has since been acknowledged under the *Genocide Convention* and customary international law, and recognised as a *jus cogens* norm.[86] Accordingly, Parliament must ensure that historic crimes against Indigenous peoples in Australia can be tried under anti-genocide legislation. The architects and enforcers of policies compelling the removal of Indigenous children from their families must be held accountable for the long-term harm inflicted on Aboriginal communities.[87] This is not impeded by legal barriers under municipal or international law. The High Court in *Polyukhovich v Commonwealth* recognised that the *Commonwealth Constitution* does not prohibit laws of retrospective application.[88] Similarly, the Nuremberg International Military Tribunal found that the general principle of non-retrospectivity did not apply to criminal prosecutions of genocide, since it would be unjust if such egregious wrongs 'were allowed to go unpunished'.[89] Likewise, s268 *Criminal Code 1995* (Cth) must apply retrospectively to achieve justice for victims of genocide, whilst ensuring fairness to offenders.

D *Alternative Administrative Law Requirements*

If our other recommendations are not adopted, we recommend that s 268.122 be amended to provide for a more transparent and accountable form of decision-making by the Attorney-General. Specifically, we propose the following:

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[83] Bugmy Bar Book Committee, *The Bugmy Bar Book* (The Public Defender NSW, 2020) ch 7 'Cultural Dispossession Experienced by Aboriginal and Torres Strait Islander Peoples' <https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book/pdf/BBP_CulturalDispossession_chapter-Nov2020.pdf>.

[84] Saul (n 30) 547.

[85] GA Res 96(I), UN Doc A/RES/96 (I) (11 December 1946).

[86] Saul (n 30), 567-568.

[87] Australian Human Rights Commission (n 24) 192-201.

[88] (1991) 172 CLR 501, 533 (Mason CJ); 643–644 (Dawson J); 715 (McHugh J).

[89] *Judgement of the Nuremberg International Military Tribunal* 1946 (1947) 41 American Journal of International Law 172, 217, quoted in Saul (n 30) 568.

1. **A requirement to give written reasons**
   By requiring the Attorney-General give written reasons for their decision, there can be public scrutiny of the decision. This promotes the interests of transparent and accountable government.

2. **A list of mandatory considerations**
   Section 268.122 should provide a set of matters to which the Attorney-General must turn their mind. This could include, for example,
   - The severity of the alleged criminal conduct;
   - Evidence of likely criminal prosecution of the same conduct in another forum;
   - The viability of criminal prosecution in an Australian court.

3. **A list of irrelevant considerations**
   Section 268.122 should provide a set of matters which the Attorney-General must not consider, on pain of jurisdictional error. This could include, for example, domestic political ramifications.

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V CONCLUSION

Failure to enact this amendment will inflict significant damage on Australia's international reputation regarding our capability and commitment to end impunity and uphold the *Genocide Convention* and the *International Criminal Court Act 2002*. It is important to underline that Australia is also a party to the *Geneva Conventions* and has played a key role through the Attorney-General's Department and Department of Foreign Affairs and Trade in capacity building in various judiciaries around the world, especially in the Asia-Pacific.[90] Australia has also been active in efforts to combat impunity, notably through Hilary Charlesworth at the International Court of Justice and the legacies of James Richard Crawford,[91] along with being an active member in the establishment of the International Military Tribunal for the Far East (Tokyo Trials), International Criminal Tribunal for the Former Yugoslavia, and International Criminal Tribunal for Rwanda.

Should the amendment fail, we fear that it will create significant reputational damage for Australia's capability and commitment in upholding international law, undermine its contributions to the international rules-based order, and create a perception that the Attorney-General is beyond the grasp of our positive international obligations.

Yours sincerely,

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[90] See, eg, 'International Programs', *Federal Court* (Web Page) <https://www.fedcourt.gov.au/about/international-programs>.

[91] See generally, Matthew E K Neuhaus and Jarrod M Jolly, 'A Race and Rage for Order: Judge James Crawford's Legacy at the International Court of Justice' (2022) 40(1) *Australian Year Book of International Law* 245.