THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Submission in relation to the *Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes)* Bill 2024

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The NSW Young Lawyers International Law Sub-Committee makes the following submission in response to the inquiry into the *Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024*

NSW Young Lawyers

NSW Young Lawyers is a member service offered by The Law Society of New South Wales to early career lawyers within their first five years of practice or under the age of 36.

As a Committee of the Law Society of New South Wales and through its 15 sub-committees, each dedicated to a substantive area of law, NSW Young Lawyers supports practitioners in their professional and career development by giving them the opportunity to extend their network, expand their knowledge, advance their career and contribute to the profession and community.

The Sub-Committee comprises of a group of volunteers and subscribers interested in international affairs and international law (both public and private). Overall, the Sub-Committee seeks to provide a supportive environment for law students and early career lawyers to advance their career in international law and foster valuable professional and personal relationships.

Introduction and summary of recommendations

1. NSW Young Lawyers' International Law Subcommittee (**the Sub-Committee**) welcomes the opportunity to make the following submission in response to *The Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024* (**the Bill**) currently before the Parliament, which proposes amendments to Division 268.121 and 288.122 of schedule 2 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**).
2. In this submission, the Sub-Committee identifies legal issues, both at the domestic and international level, which the Sub-Committee respectfully encourages the Parliament to consider when appraising the Bill. To do so, the submission will first provide a brief history of the relevant

division of the Criminal Code, and then identify Australia's international legal obligations and explain how they are implemented through the Criminal Code, before highlighting certain legal considerations arising from the Bill, should it be passed.

3. The Sub-Committee is of the view that aligning Australia's domestic laws with its international obligations under the *Rome Statute*, and other international conventions and treaties is imperative. The Sub-Committee notes it is important for domestic laws to facilitate timely prosecutions (where practical) to help maintain the integrity of the international justice system.

History of the Criminal Code

4. Division 268 of the Criminal Code was introduced as a consequence of the enactment of the *International Criminal Court Act 2002* (Cth) (**ICC Act**). The principal object of the ICC Act is to facilitate compliance with Australia's obligations under the *Rome Statute of the International Criminal Court* (1998) (***Rome Statute***).[1]

5. According to the Explanatory Memorandum, the Australian Government inserted Division 268 to implement the *Rome Statute* to ensure that Australia "will always be in a position to investigate and, if appropriate, prosecute a person who is accused of a crime under the Statute".[2] In parliamentary debates, it was stated that the Attorney-General would be bound by "the obligations contained in Australia's domestic legislation" and the discretion was to be exercised "in accordance with the International Criminal Court Act 2002" on the basis of appropriateness.[3]

6. The consent mechanism in Division 268 is not atypical and is found in other statutes. It even applies to other offences under the Criminal Code, including offences related to national

[1] *International Criminal Court Act 2002* (Cth) (**ICC Act**), s 3(1).
[2] Explanatory Memorandum, *International Criminal Court (Consequential Amendments) Bill 2002.*
[3] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2002, 4368 (Daryl Williams, Attorney-General).

security,[4] and offences with an international focus.[5] For the most part, these provisions do not contain any express considerations that the Attorney-General must take into account in determining whether to consent,[6] except in relation to certain authorisations or defences.

7. Beyond these offence-specific consent requirements, s. 16.1 of the Criminal Code provides an overarching requirement for the Attorney-General's consent to prosecute any offence where the alleged perpetrator is not an Australian citizen, resident or incorporated body corporate and the alleged conduct occurs wholly in a foreign country. This mechanism has been previously viewed as an "absolute restriction upon the right to prosecute",[7] and was held by the High Court in *Taylor v Attorney-General* (Cth) [2019] HCA 30 (***Taylor v Attorney-General (Cth)***) as confining the persons having the capacity to prosecute to the Attorney-General and those authorised by the Attorney-General.[8]

8. There is limited, direct authority on the interpretation and function of the specific division 268 consent mechanism. In *Taylor v Attorney-General (Cth)* the High Court confirmed that the mechanism was made up of two limbs: the consent of the Attorney-General, and the proceedings being in the name of the Attorney-General. Although positioned as a case to determine the extent of judicial review of the Attorney-General's decision under division 268, the focus of the matter was on an ancillary legal issue, being whether the decision by the Attorney-General could be anything other than refusal where the request sought under section 268.121(1) was in respect of a private prosecution. This ancillary issue turned on the statutory construction of sections 13 and 268.121(1) of the Criminal Code. The High Court majority (6:1) determined that a person could not mount a private prosecution (even with the consent of the Attorney-General) in the

[4] *Criminal Code Act 1995* (Cth), div 82 (Sabotage), div 83 (Other threats to security), div 92A (theft of trade secrets involving foreign government principal), div 119 (Foreign incursions and recruitment) and pt 5.6 (Secrecy of information).
[5] *Criminal Code Act 1995* (Cth), div 70 (bribery of foreign official), div 71 (offenses against United Nations and associated personnel div 72 (International terrorist activities using explosive or lethal devices), div 73 (People smuggling offences).
[6] *Criminal Code Act 1995* (Cth), div 72 pt 72.7
[7] *Taylor v Attorney-General* (Cth) [2019] HCA 30, [24]; Australian Law Reform Commission, Standing in Public Interest Litigation, Report No 27 (1985), 194. Cf *Taylor v Attorney-General* (Cth) [2019] HCA 30, [78].
[8] *Taylor v Attorney-General* (Cth) [2019] HCA 30, [35].

name of the Attorney-General;[9] but did not answer the extent to which a decision by the Attorney-General under division 268.121(1) was subject to review.

Australia's International Law Obligations

9. Australia is party to numerous international treaties and conventions that impose obligations to prosecute and prevent genocide, crimes against humanity, and war crimes, and which are relevant to the proposed amendments. These include the *Rome Statute*[10], the Convention on the Prevention and Punishment of the Crime of Genocide,[11] the International Covenant on Civil and Political Rights (**ICCPR**),[12] and the Convention on the Rights of the Child (**CRC**).[13]

10. Under the *Rome Statute,* Australia must genuinely investigate and prosecute crimes of genocide, crimes against humanity, and war crimes.

11. Additionally, Australia is required to fully cooperate with the ICC by assisting with investigations, prosecutions, and enforcing sentences;[14] and the Rome Statute includes a requirement for national procedures to be put in place to facilitate such cooperation.[15]. Adherence to fair trial standards and the prevention of double jeopardy (ensuring individuals are not tried twice for the same offence) is also essential.[16] Additionally, domestic laws must reflect Article 27 of the *Rome Statute*, which requires that there be no impunity for serious crimes, ensuring accountability regardless of official capacity.[17]

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[9] *Taylor v Attorney-General* (Cth) [2019] HCA 30, [43] (majority), [94] (Nettle and Gordon JJ), [97]-[98] (Edelamn J).
[10] *Rome Statute of the International Criminal Court,* opened for signature 1 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).
[11] *Convention on the Prevention and Punishment of the Crime of Genocide,* opened for signature 9 December 1948, UN General Assembly, UNTS 78 (entered into force 12 January 1951).
[12] *International Covenant on Civil and Political Rights,* opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[13] *Convention on the Rights of the Child,* adopted and opened for signature 20 November 1989, UN General Assembly, UNTS 1577 (entered into force 2 September 1990).
[14] Ibid, Pt 9 Art. 86-102.
[15] Ibid, Art. 88.
[16] Ibid, Art. 20 and Art. 67.
[17] Ibid, Art. 27.

12. Finally, the principle of non-retroactivity in Article 24 ensures that individuals are prosecuted only for actions that were criminalised at the time they were committed. This principle of non-retroactivity is of particular importance when considered against the legal and political backdrop of the amendments proposed by the Bill.

13. The Convention on the Prevention and Punishment of the Crime of Genocide obliges Australia to enact legislation that criminalises genocide and ensures that perpetrators are prosecuted, regardless of where the crime was committed. This Convention also emphasises international cooperation in the suppression of genocide, underscoring the importance of extradition and legal assistance between states. Articles 6 and 7 of the ICCPR, which protect the right to life and prohibit torture and cruel, inhuman, or degrading treatment or punishment, are also particularly relevant to the prosecution of international crimes.

14. To adhere to the international commitments made in the instruments discussed above, Australia must have robust domestic laws that provide effective remedies for victims, and also hold perpetrators accountable by facilitating the prosecution of such crimes without unnecessary impediments.

15. By requiring the Attorney-General's consent to prosecute specific international crimes, sections 268.121-268.122 of the Criminal Code *prima facie* introduce a requirement prior to the commencement of prosecutions that does not feature in the *Rome Statute*. As noted in *Taylor v Attorney-General (Cth)*, the current effect of Division 268.121 is to require anyone, even those who have the statutory authority to independently commence proceedings in the name of the Attorney-General, to obtain the Attorney-General's consent to commence these prosecutions. This procedure has the potential to significantly delay what would be an already complex and lengthy process,[18] or even prevent the prosecution from being commenced. Therefore, this

[18] See e.g. the Schulz matter, which is reportedly set for committal hearing for April 2025, after an arrest in March 2023: Duncan Murray (2 July 2024) 'Hearing to test if landmark war-crime case can be tried' (AAP, News Article) <https://www.9news.com.au/national/hearing-to-test-if-landmark-warcrime-case-can-be-tried/16027984-ad7a-467b-a14e-62e1e4c1881a> (accessed 2 July 2024). We understand that the Attorney-General has "signed off" on a brief of evidence in relation to this matter, and given the progression of the matter, it is assumed that this constituted consent to prosecute per section 268.121: Sean Rubinsztein-Dunlop and Mark Willacy (20 March 2023) 'SAS veteran Oliver Schulz charged with war crime of murder over killing of Afghan man in field' (ABC Investigations) <https://www.abc.net.au/news/2023-03-20/former-sas-soldier-arrested-over-afghanistan-killing/102119554> (accessed 2 July 2024).

requirement could be viewed as conflicting with Australia's obligations under international law, where timely and consistent prosecution of serious international crimes is imperative.

16. The principle of complementarity, as outlined in the *Rome Statute*, requires States to adopt domestic frameworks to enable them to prosecute international crimes genuinely. The intention is for the ICC to be a court of "last resort", with its jurisdiction to be exercised in a way that complements, rather than replaces, the pre-existing jurisdiction held by member states. Dr Jann Kleffner[19] has discussed the potential legal avenues that can circumvent or prevent prosecution, highlighting the importance of ensuring that domestic legislation does not obstruct the objectives of the ICC and the *Rome Statute.*[20] One of the these avenues is the simple fact that member states are responsible for enforcing the crimes outlined in the *Rome Statute,* which increases risks of inconsistencies, and potential for influence by the vicissitudes of national politics.

17. During Parliamentary Debates following the Second Reading speech of the *International Criminal Court (Consequential Amendments) Bill* in 2002, Kevin Rudd (who was the Shadow Foreign Minister at the time) articulated the potential dangers of the Attorney-General's discretion under the Criminal Code. He warned against sending a message that might embolden "jurisdictions" to shield their citizens from prosecution by exploiting similar legal provisions.[21] Mr Rudd emphasised that the exercise of Attorney-General's discretion must align with Australia's obligations under the *Rome Statute,* as well as the objectives of the relevant domestic legislation, to avoid such adverse international implications.

18. The importance of Australia's role in upholding accountability and deterrence in relation to these international atrocities, in accordance with the principle of complementarity, is further emphasised by the practical difficulties faced by the ICC. As early as April 2019, the Office of the Prosecutor reported that it had received over 12,000 referrals,[22] and this number has presumably

[19] Dr Kleffner is a Professor of International Law at the Swedish Defence University, Extraordinary Professor at the Faculty of Law of the University of Pretoria, South Africa, and Senior Fellow at Melbourne Law School, Australia.
[20] Jahn Kleffner, 'Complementarity and the Obligation to Investigate and Prosecute' in Complementarity in the Rome Statute and National Criminal Jurisdictions (Oxford Academic, 2008) 235, 287-303.
[21] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2002, 4329 (Kevin Rudd).
[22] Capture of the OTP website dated 17 April 2019 (<https://web.archive.org/web/20190417092541/https://www.icc-cpi.int/about/otp>) to 1 April 2024 (<https://web.archive.org/web/20240401062944/https://www.icc-cpi.int/about/otp>) on record with New South Wales Young Lawyers International Law Sub-Committee.

only increased. Due to the magnitude of the task of investigating and prosecuting these crimes before the international community, it is critical that any country with the appropriate capabilities, such as Australia, should endeavour to maximise whatever role it can reasonably play.

19. Given the importance and nature of these obligations, private prosecutions could potentially play a role in ensuring that justice is achieved when public authorities are unwilling or unable to act. However, private prosecutions must be carefully regulated to ensure they do not undermine the consistent prosecution of international crimes, and must still adhere to the standards and requirements set out in the *Rome Statute.* The practicality of private prosecutions is considered in more detail below in relation to the rule of law and other considerations that are crucial to considering the proposed amendments in the Bill.

Additional Considerations

20. The Sub-Committee respectfully draws the Parliament's attention to the interplay of the below principles and legislative schemes with the potential removal of the consent requirement in Division 268 when considering the Bill.

Immunity under International Law for criminal offences

21. When considering the exercise of the Attorney-General's discretion to grant or withhold consent – either under the Criminal Code as currently drafted, or if the proposed amendments in the Bill were to be passed – the effect of the various immunities from criminal prosecution under international law must be considered. For individuals, these immunities are based on Australia's obligations under the Vienna Convention on Diplomatic Relations 1961 and the Vienna Convention on Consular Relations 1963, which have been codified in Australian legislation pursuant to the *Diplomatic Privileges and Immunities Act 1967* and the *Consular Privileges and Immunities Act 1972*. For foreign states, the relevant legislation is the *Foreign States Immunities Act 1985* (together, **Australia's Immunity Regime**).

22. *Prima facie*, foreign states are immune from Australia's jurisdiction in accordance with the principles of foreign state immunity. Similarly, diplomatic agents and the administrative and

technical staff of diplomatic missions are immune from arrest, detention, and prosecution for criminal matters; as are consular officials (subject to the Court's discretion to override such immunities for "grave crimes", such as those considered by this Bill).

23. As individual immunity is a by-product of State immunity, it is not for the receiving State to grant or reject immunity; instead, the existence of immunity is at the discretion of the immunity's home State. An assertion of jurisdiction by the receiving State over a party afforded immunity by virtue of their State role would violate the historic immunity afforded to foreign officials, which in many cases subsists even when the person ceases to be head of state.[23] Although there is a growing scholarly movement[24] (and arguably, a push from legal practitioners), arguing that immunity for atrocity crimes is incompatible with customary international law and should not exist, immunity continues to be a fundamental tenet of international diplomacy and will override any attempted prosecution.[25]

24. Sections 14.1 and 15.1 of the Criminal Code, which will not be affected by the Bill, define the geographical boundaries over which Australia has jurisdiction to prosecute atrocity crimes. When read alongside Australia's Immunity Regime, the abovementioned diplomatic officials are protected from prosecution.

Extraterritorial offences and the continuing application of section 16

25. The Bill looks only to remove the requirement for the Attorney-General's written consent to proceed to prosecution for offences committed within Australia (as per s. 14.1 of the Criminal Code). The Bill would have no effect on the operation of s. 16 of the Criminal Code, which provides *inter alia* that proceedings for an offence must not be commenced without the Attorney-General's written consent if the conduct constituting the alleged offence occurs wholly in a foreign country; and at the time of the alleged offence, the person alleged to have committed the offence

[23] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet* (2000) 1 AC 147.
[24] Lucas Bastin, International Law and the International Court of Justice's Decision in Jurisdictional Immunities of the State (2012) 13 *Melbourne Journal of International Law* 1, 5.
[25] *Jones v Ministry of Interior of Saudi Arabia* [2007] 1 AC 270; *Bouzari v Islamic Republic of Iran* (2004) 243 DLR (4th) 406 (Ontario Court of Appeal); *Cour de cassation*, 02-45961, 16 December 2003 reported in (2003) Bull civ n° 258, 206; *Fang v Jiang* [2007] NZAR 420. Notwithstanding the decisions of these cases, the very existence of these cases indicate a pushback within the legal profession.

is not an Australian citizen. In other words, if the proposed Bill is passed, the written consent of the Attorney-General would still be required to prosecute foreign nationals for genocide, crimes against humanity and war crimes committed overseas in accordance with the principle of Universal Jurisdiction, which Australia is required to comply with pursuant to section 268.1 of the Criminal Code.

Available avenues of judicial review under the current Criminal Code

26. The Criminal Code as currently drafted limits, but does not entirely remove, recourse to judicial review. Section 286.121 operates to the exclusion of any recourse to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (including the ability under that Act to request written reasons),[26] or to merits review before the Administrative Appeals Tribunal (or the Administrative Review Tribunal). However, Division 268.122 states that any decision of the Attorney-General made under section 286.121 is "Subject to any jurisdiction of the High Court under the Constitution". Therefore, the sole ground of review is the High Court's constitutional jurisdiction, which comprises original jurisdiction "in all matters in which a writ of Mandamus or prohibition or injunction is sought against an officer of the Commonwealth".[27]

27. Before repealing the consent provisions in their entirety as proposed by the Bill, further exploration may be necessary to properly understand:
    - the questions of standing and the viability of remedies available through this existing review mechanism;
    - the interplay of constitutional questions (such as the separation of powers); and
    - the extent to which any decision of the Attorney-General not to proceed to prosecution is reviewable under the current legislation.

28. The Attorney-General holds a substantial power in deciding whether to approve the prosecution of a case of genocide, crimes against humanity or war crimes in Australia's courts. There is currently no implied or express requirement for transparency in the Attorney-General's decision-making process, and as stated in the first reading of the Bill, there is accordingly a lack of

[26] See *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 13.
[27] *Australian Constitution*, s 75(v).

transparency in the Attorney-General's decision-making process. If the consent mechanism is to be retained, it may be worth considering:

a) requiring the Attorney-General's decision to be published (with appropriate redactions) and/or facilitating other avenues of public access to the decision, such as through freedom of information requests;
b) legislating specific considerations to which the Minister must have regard, such as in proceedings brought under section 72.7 of the Criminal code in relation to international terrorist activities using explosive or lethal devices; and/or
c) adopting guidelines outlining factors the Attorney-General will consider when deciding whether to approve a request, with a similar purpose (but plainly different considerations and context) as the *Policy guiding decision-making under the Crimes (Superannuation Benefits) Act 1989* or the *Policy guideline – factors to be considered by the Attorney-General when considering whether to consent to the prosecution of terrorist organisation offences in relation to Hizballah*.

29. The Sub-Committee accepts that there are sensitivities around such decisions. Where the decision concerns extraterritorial conduct, such sensitivities may arise around the potential to cause damage to the Commonwealth's international relations and may involve consideration of information that was communicated by foreign authorities in confidence. Where the decision concerns domestic conduct, such sensitivities may concern national security. However, as discussed above, the Attorney-General's decision under section 268.121 is critical to the implementation of Australia's core international legal obligations. A set of guidelines would also align the decision-making process with prosecutorial decision processes in other areas of domestic criminal law. The adoption of mandatory considerations and the publishing of the decision (subject to appropriate redactions regarding sensitive information) would increase transparency, introduce a level of accountability to the current process, and allow for a substantive pursuit of judicial review of the actual decision. The Sub-Committee considers that such changes would improve the integrity of such decisions and Australia's standing internationally.

Practicalities of private prosecutions

30. It is also important to consider the practicalities of any private prosecutions in the context of proceedings concerning allegations of "the most serious crimes of concern to the international community as a whole" as affirmed by the *Rome Statute*.[28] The significance of these crimes and the global message sent by their prosecution inherently demands high ethical and professional standards of any prosecutor throughout all stages of any investigation and prosecution. These prosecutions are critical to bringing an end to impunity and to pursuing peace, security and well-being; but the gravity of the charges and prosecutions cannot be allowed to be premature or misused, as was alleged to have taken place in the United Kingdom before the *Police Reform and Social Responsibility Act 2011* (UK).[29] The Office of Prosecutor of the ICC is subject to regulations[30] and abides by published prosecutorial policies[31] and prosecutorial strategies.[32] There is an open question as to whether the private prosecutors could be held to comparable standards, and whether the existing judicial and legal structures would be capable of ensuring any gaps are filled.

31. The same question arises in terms of the investigation of such crimes. The nature of these crimes means that such investigations often involve extensive resources, as well as significant coordination and mutual legal assistance between international bodies, such as the International Criminal Court, and other nations' legal and political systems. Without these avenues, there may be increased reliance on private investigation or other evidence-gathering methods, which have serious ethical and evidentiary problems, including whether they follow appropriate guidelines;[33] and the impact on procedural fairness principles relating to searching and disclosing inculpatory

[28] *Rome Statute of the International Criminal Court,* opened for signature 1 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) Art. 5.
[29] Sarah Williams, 'Arresting Developments? Restricting the Enforcement of the UK's Universal Jurisdiction Provisions' (2012) 75(3) *Melbourne Law Review* 368, 378. See also, David Pallister, 'Tatchell seeks Kissinger arrest in UK' (22 April 2002) *The Guardian* <https://www.theguardian.com/uk/2002/apr/22/davidpallister> (accessed 29 July 2024).
[30] International Criminal Court, Regulations of the Office of the Prosecutor (23 April 2009, Official Journal Publication) (ICC-BD/05-09).
[31] Policy on the Crime of Gender Persecution (2022); Policy on Gender-based Crimes (2023); Policy on Children (2023); and Policy on Complementarity and Cooperation (2024); Office of the Prosecutor Guidelines for Agreements Regarding Admission of Guilt (2020).
[32] Strategic Plan 2023-2025.
[33] See e.g. Office of the Prosecutor, Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organisations (21 September 2022).

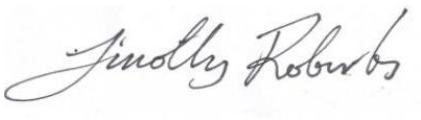
and exculpatory evidence.[34] It may be pertinent to introduce parliamentary, court or industry guidelines in relation to these offences if private prosecutions were available.[35]

32. These concerns must be properly considered prior to amending the section 268.121 so as to allow private prosecutions (at least in respect of domestic conduct, given section 16.1 would still operate in relation to extraterritorial crimes).

Concluding Comments

NSW Young Lawyers and the Sub-Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions, please contact the undersigned at your convenience.

Contact:



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[34] Dr Alexander Heinze, 'Private International Criminal Investigations' 2019(2) *Zeitschrift für Internationale Strafrechtsdogmatik* 169, 176.
[35] Current regulation of private investigators is found, at the federal level, in the *Privacy Act 1982* (Cth) and, at the state and territory level, in various legislation, for example for New South Wales in the *Security Industry Act 1997* (NSW) and *Security Industry Regulation 2016* (NSW).

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