

Senate Legal and Constitutional Affairs Legislation Committee
Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024

Attorney-General's Department

Hearing date: 30 July 2024

Hansard page: 40

Nita Green asked the following question:

CHAIR: Amnesty International appeared earlier, and they provided a submission to the committee. It suggests that the government prepare explanatory materials relating to the Rome statute. Could you just respond to that? Do relevant parts of the Attorney-General assist the government and the broader community to understand Australia's obligations under the statute or even just the offences under division 268 of the code? The submission seems to suggest there is a bit of a vacuum there, but I was curious as to what work the department does do. Ms Ierino: We can take that on notice. We share responsibility. AGD owns the domestic legislation. But DFAT leads on engagement with the ICC, so we can certainly have a look and see what is out there in terms of explanatory materials.

The response to the question is as follows:

The Explanatory Memorandum for the International Criminal Court (Consequential Amendments) Bill 2002, which inserted Division 268 into the Criminal Code, assists members of Parliament, officials and the public to understand the objectives and operation of the offences contained in Division 268 of the Criminal Code. In addition, the National Interest Analysis for the *Rome Statute of the International Criminal Court* (Rome Statute) sets out, amongst other things, Australia's obligations under the Rome Statute. Both of these documents are publicly available. There is also a range of material available about the International Criminal Court (ICC) and the Rome Statute on the ICC website.

Tied legal providers, including the Office of International Law (OIL) in the Attorney-General's Department, provide international law advice to the Government with respect to Australia's obligations under the Rome Statute. OIL also provides training to Australian officials in relation to these obligations, as appropriate.

In addition, the Government provides funding to the Australian Red Cross, through the payment of grants, to deliver a program on international humanitarian law (IHL). These grants directly support the fulfilment of Australia's obligations under the Geneva Conventions to disseminate IHL within Australia, and support the Australian Government to meet its other IHL obligations by providing education on IHL to Australian officials, the Australian Defence Force, and wider civil society. Serious violations of IHL constitute 'war crimes', which are crimes punishable by the ICC under the Rome Statute and domestically under Division 268 of the Criminal Code.

Separately, each year the Attorney-General's Department publishes, as an appendix to its annual report, a report on the operation of the *International Criminal Court Act 2002*, the operations of the ICC, and the impact of the ICC's operations on the Australian legal system.

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Paul Scarr asked the following question:

Senator SCARR: The Commonwealth Director of Public Prosecutions guidelines canvass circumstances where ministerial consent is required. It refers to the fact that there can be discussion and liaison between the Commonwealth Director of Public Prosecutions and government departments in assisting the Commonwealth Director of Public Prosecutions coming to a view. It recognises that in most cases the director and the minister of the department will probably come to the same view but that there could be an iterative process before the Commonwealth Director of Public Prosecutions refers a matter to the Attorney, say, for consent. In your experience is that how it works in practice—before the Commonwealth Director of Public Prosecutions triggers that process of formally seeking consent, there would be somewhat of an iterative process where the CDPP would liaise with relevant government departments in circumstances where this minister's consent issue is triggered?

Ms McKeag: As I said, there are a large number of offences that have a consent requirement attached, so it is fair to say that circumstances can be different as to the level of prior consultation. There are established referrals, for example, in relation to crimes at sea, where the Attorney-General's consent is also required, and that would normally be notified by way of a brief of evidence being referred to the Attorney-General's Department attached with a cover letter seeking that the matter proceed for the Attorney-General's consideration.

Senator SCARR: Before we get to that stage, presumably the Commonwealth Director of Public Prosecutions isn't necessarily going to know what is relevant in terms of national security, what is relevant in terms of foreign relations. They will be looking at from a technical legal perspective, so what to what extent will they, in discharging their obligation under their second limb, to consider the public interest, consider those issues before formally seeking consent? I am happy for you take it on notice.

Ms McKeag: I will have to take that one on notice.

The response to the question is as follows:

The prosecution of alleged Commonwealth criminal offences is the responsibility of the Office of the Director of Public Prosecutions (Cth) (CDPP).

Upon receiving a brief of evidence from the relevant investigative agency, the CDPP determines whether it is appropriate for the matter to proceed in accordance with the *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (July 2021) (Prosecution Policy). The Prosecution Policy provides a two-stage test that must be satisfied before a prosecution is commenced: first, there must be

sufficient evidence to prosecute the case; and second, it must be evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in public interest.

Where the Attorney-General's consent to prosecute is required, the Prosecution Policy states: "Although there are unlikely to be any differences of view between the person authorised to give consent and the DPP on a question whether a prosecution is required in the public interest, it is clearly desirable that there be prior consultation with the DPP where there appear to be difficult questions of fact or law involved" [2.27].

It is typically the case that the CDPP will write to the Attorney-General once they have made their assessment in accordance with the Prosecution Policy, seeking the Attorney-General's consent to the prosecution. This correspondence ordinarily includes a covering letter summarising the evidence that supports the CDPP's conclusion that the prosecution be commenced and a statement of facts.

Upon receipt of that request, the Attorney-General's Department (the department) will prepare a ministerial submission for the Attorney-General, recommending that the Attorney-General either consent or refuse consent to prosecute. This submission ordinarily contains the information provided by the CDPP, together with any other information the department considers may be relevant to the Attorney-General's decision. Once the Attorney-General's decision is received, the department conveys it to the CDPP.

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Paul Scarr asked the following question:

Senator SCARR: Just pursuing that some of the questions Senator Thorpe raised, you mentioned two cases since 2002 where the consent of the Attorney—I think you narrowed it to genocide—had been an issue and had been denied. There is a submission we received from the Australian Centre for International Justice. A number of the submissions refer to different scenarios, so I have tried to write them all down to see how many I can get and try to dovetail them with your two. The Centre for International Justice refers to these cases, so I'm interested to know if they are part of your two. The first one is—and this is from their submission, section 4—former Israeli Prime Minister Olmert in 2009.

Ms McKeag: I don't have the names of the matters before me, and I'd need to seek advice to provide statistical information reference to the name. I don't have that before me. I understand they were charges in relation to division 268.

Senator SCARR: I will give you the five cases, and you can tell me whether or not they are within the two. I will have a supplementary question which I think teases out why I am asking. If you go to section 4, it is probably easier if I just refer you to the section of the Australian Centre for International Justice submission; they list five cases. Some of those cases are referred to in other submissions, in particular the one in relation to Sri Lanka and the one in relation to Myanmar. Can I give you that homework, please. The supplementary question which flows from that is we've been talking about head-of-state immunity, so to what extent in the two cases you are referring to was consent denied on the basis of head-of-state immunity? Do you know?

Ms McKeag: My understanding is that head-of-state immunity was a factor.

Senator SCARR: In both of them?

Ms McKeag: Yes, in each matter.

The response to the question is as follows:

The Attorney-General's consent to prosecute alleged offences against Division 268 of the *Criminal Code 1995* (Cth) (Criminal Code) has been sought in relation to three individuals.

In relation to the matters of Mahinda Rajapaksa and Aung Sang Suu Kyi, the then Attorneys-General made public statements that they did not provide their consent to prosecute on the basis that the individuals were immune from Australia's criminal jurisdiction under international law.

In relation to the matter of Oliver Schulz, the Attorney-General consented to the Commonwealth Director of Public Prosecution's prosecution of an alleged offence against section 268.70(1) of the Criminal Code. This matter is ongoing.

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Paul Scarr asked the following question:

Senator SCARR: In relation to the two cases you mention, could you take on notice where the Attorney's consent wasn't granted? I think to some extent the Attorney provided reasons, notwithstanding the fact that there was no statutory obligation to provide reasons. Could you just check that and see if the Attorney did explain? Certainly, in one case I saw referred to in the submissions the Attorney explained the head-of-state immunity issue. But I would be interested to know whether or not in all the cases since 2002 the Attorney has given at least high-level reasons, notwithstanding the fact that the Attorney is not statutorily required to give reasons. Could you take that on notice?

Ms McKeag: I'll take that on notice.

The response to the question is as follows:

The Attorney-General is not required to give reasons for their decision to consent, or refuse to consent, to prosecute.

In 2011, a private citizen attempted to bring a prosecution against Mahinda Rajapaksa for alleged war crimes and crimes against humanity contrary to Division 268 of the Criminal Code. In 2018, a private citizen attempted to bring a prosecution against Aung Sang Suu Kyi for alleged crimes against humanity contrary to Division 268 of the Criminal Code. In relation to both matters, the then Attorneys-General made public statements that they did not provide their consent to prosecute on the basis that the individuals were immune from Australia's criminal jurisdiction under international law.

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David Shoebridge asked the following question:

Senator SHOEBRIDGE: They point out two examples where the lack of a substantive ongoing body to investigate war crimes, crimes against humanity or genocide has created difficulties. The first is in relation to the failure to prosecute Jagath Jayasuriya, a senior military commander in Sri Lanka who oversaw a significant part of the hostilities at the end of the war in Sri Lanka, which ended in 2009, and is considered by many to be a notorious war criminal for that reason. He was in Australia for a number of months, a decade later, at the end of 2019. Detailed briefs were provided to the Australian Federal Police by a number of bodies, including the ACIJ, and then the AFP said that, because of an administrative error, they never directed those briefs or concerns to anybody in the AFP to actually investigate it. Are you aware of that background?

Ms McKeag: I think we would need to take that on notice.

Senator SHOEBRIDGE: I suppose I was asking Mr Malone.

Mr Malone: As Ms McKeag said, I'm not familiar with the specifics of that individual matter, and it would be difficult for us to comment on individual matters, especially those investigated or primarily dealt with by the AFP. But we are happy to take it on notice.

Senator SHOEBRIDGE: In this case not investigated by the AFP, even though they were put on notice with a detailed dossier. That isn't a matter the department looked at in any way in preparation of their submission? Is that what I'm meant to understand? You had no regard to that quite recent and notorious failure to prosecute in Australia?

Mr Malone: Any actions the department took in relation to that particular circumstance you refer to we would have to take on notice.

Senator SHOEBRIDGE: Could you come back on what if any notice the department had of General Jayasuriya's presence in Australia, what if any notice it had about the dossier and the concerns about war crimes and what if any action taken was by the department during the two-odd months he was in Australia in relation to potential criminal liability. You will take that on notice?

Mr Malone: We will take that on notice. I would note, as has been canvassed at this hearing and throughout the day, the department has policy and legal responsibility, but investigative and prosecutorial responsibility ultimately falls to the AFP and CDPP. In relation to those specific matters you have referred to, we'll come back on notice.

The response to the question is as follows:

The Attorney-General's Department (the department) has not identified any records that indicate the department was aware of Jagath Jayasuriya's presence in Australia in 2019.

The investigation of alleged crimes against Division 268 of the *Criminal Code 1995* (Cth) is a matter for the Australian Federal Police (AFP).

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David Shoebridge asked the following question:

Senator SHOEBRIDGE: In relation to the prosecution of Oliver Schulz, a former SAS officer, was the Attorney's consent sought or obtained?

Ms McKeag: That offence has a requirement for the Attorney-General to provide consent.

Senator SHOEBRIDGE: I know that. Was consent and obtained?

Ms McKeag: My understanding is that consent has been obtained.

Senator SHOEBRIDGE: When was that done?

Ms McKeag: I would have to take that on notice.

Senator SHOEBRIDGE: Was a brief provided to the Attorney?

Ms McKeag: A brief would have been provided to the Attorney-General if consent was sought and obtained, but I would need to take that on notice.

The response to the question is as follows:

The Commonwealth Director of Public Prosecutions sought the Attorney-General's consent to prosecute Oliver Schulz for an alleged offence contrary to subsection 268.70(1) of the *Criminal Code 1995* (Cth) on 21 July 2022.

The Attorney-General's Department provided a brief to the Attorney-General in relation to the matter on 24 July 2022. The Attorney-General's consent to prosecute was provided on 27 July 2022.