

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

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I am an 88 year old woman who has been very concerned about the history and present conditions and status of First Nations peoples in Australia, since I first saw residents of Lake Tyers in Victoria as a child, and could hardly believe that such poverty could exist in our 'fair' land. Many years later (spurred by the Mabo judgement in 1992) I joined a support group in Canberra, which included more experienced people from whom I could learn, and sometimes we were fortunate to have First Nations guest speakers. And, of course, the Tent Embassy is also there in front of Old Parliament House as a source of often shocking information. I have travelled in the Northern Territory and visited remote communities in the 1990s. After moving to Melbourne in 2010 I joined the 'concerned Australians' group to continue my interest, and to contribute in any way possible, given old age and ill health. 'concerned Australians' is an effective support group formed in reaction to the Howard government **Northern Territory Emergency Response 2007** (NTER), which was clearly in breach of international law as evidenced, amongst other indicators, by the fact that the government suspended the **Racial Discrimination Act (1996)** to allow it. I am not a lawyer, but have worked as a public servant, often dealing with legal matters.

I am making this submission because I believe that, under the terms of the **UN Genocide Convention 1948** (The Convention), which Australia ratified at the time with the bipartisan support of the Chifley government and the Menzies opposition, we need a statutory domestic law that *fully* implements our responsibilities under the Convention. Successive governments delayed signing the Convention into domestic law, 'whether...as a matter of neglect or purposeful inaction'(note 1). The excuse given, when the issue was raised, was along the lines that legislation already existing in domestic law covered the crime of genocide sufficiently. This was confirmed by the Secretary of the Department of Foreign Affairs and Trade, John Burton in 1949 (note 2), despite the fact that there was no provision for genocide as such under existing laws of the Commonwealth and States, and that their relevant legislation differed in significant ways.

In this submission, I am not going to enter into contentious argument about the definition of the word 'genocide' or produce evidence of acts of genocide committed by our nation. This would be irrelevant to the present issue of the **Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024**. Such matters would be referred for consideration to the International Criminal Court (ICC). As stated above, I am not a lawyer; nor am I a historian. And the ground has been sufficiently covered by historians like Henry Reynolds 'Why Weren't We Told?', 'The Forgotten Wars', 'The Other Side of the Frontier' etc. and Marguerita Stephens 'Banbu-deen: the Years of Terror', and David Marr in his recent book 'Killing for Country'. And by the horrifying, still incomplete work, of University of Newcastle Professor Lyndall Ryan and the Colonial Frontier Massacre Project Team in compiling evidence for the massacre map of Australia. And, not least, by the oral and written testimony of First Nations victims and survivors and their families. However, in a democracy, it is essential that all citizens should take an active interest in the actions (and also the inaction) of their governments. Otherwise a so called 'democracy' can degenerate into a corrupt autocracy, or at least a government which is 'captive' to certain interests. Democracy is a work in progress, and that requires the attention and effort of all of us.

The Convention was finally enshrined in domestic law in 1995, almost 50 years after Australia signed the Convention, when the **Criminal Code Act 1995** (Criminal Code) became law.

Unfortunately, a glaring problem with our domestic law on genocide remains: it is that it is only the Attorney General (AG) who can bring such a case to be tried by the ICC. The AG has power of veto, known as his 'fiat'. To my mind this 'fiat' could be, or could be perceived to be, a clear conflict of interest. The Independent Senator's Bill addresses this problem.

The Bill in question, now subject to Senate inquiry, seeks to repeal clauses 268.121 and 268.122 of the Criminal Code.

268.121 invests the AG with the power of a 'fiat', enabling him/her to refuse or accept a case; for which decision no explanation need be given.

268.122 states that the decision of the AG is final, beyond appeal or review or question or any other legal impediment.

This is the crux of the matter. As stated already above, I consider the power given to the AG is undemocratic, and should not be legally sanctioned as it is in the Criminal Code.

The government should have no difficulty in voting for the proposed amendments, if it is confident that its policies and their implementation do not fall within the provisions of the amended Act. If it votes against these simple democratic amendments it may be assumed that the government is aware of failings that it wishes to conceal from rigorous legal examination. The Labor government was elected on a platform of transparency and accountability. We are still waiting for signs that their promises will be fulfilled.

My understanding is that only cases of genocide that occurred after Australia signed the Rome Statute on 1 July 2002 are capable of prosecution in the ICC. The horrors of the past from 1788 until 2002 would not be liable to prosecution in the ICC, in this case. But more recent policies and their enactment could and should be examined. i.e. those that have occurred since 1 July 2002. To take one egregious example: ***The Northern Territory Emergency Response 2007*** could be found to have caused 'serious bodily or mental harm to members of the group'; and, previously, the policy of removal of children from their families, as described in the ***'Bringing Them Home Report' 2002*** is a clear example of 'forcibly transferring children of the group to another group', given that the practice continues to this day under another name and pretext. The ongoing lack of implementation of many of the 339 recommendations of the ***Aboriginal Deaths in Custody Report 1991*** is another area needing examination.

Recommendation: That the ***Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) 2024*** be carefully examined by the Committee of Inquiry and proceed to the vote in both houses of Parliament. I hope that these simple but critical amendments will become law.

Sincerely

Nicola Coles
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member of 'concerned Australians'

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Note 1: Statement of the Human Rights Subcommittee of the Joint Parliamentary Committee on Foreign Affairs, Defense and Trade ,1992.

Note 2: Letter from John Burton, Secretary of the Department of Foreign Affairs to the Department of the AG, 30 March 1949.