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

1. This submission was drafted by Professor Sarah Williams (UNSW Sydney), Dr Emma Palmer (Griffith) and Dr Natalie Hodgson (Nottingham). We are researchers and teachers of international criminal law. Our qualifications are set out at Annex A.

I. Introduction, purpose and potential impact of the amendments

2. This Bill seeks to repeal ss 268.121 and 268.122 of the *Criminal Code Act 1995* (Cth).

3. By repealing s 268.121, the Bill seeks to remove the requirement for the Attorney-General to consent to the prosecution of an offence under Division 268 of the Act, which contains the offences of genocide, crimes against humanity, and war crimes (international crimes) and 'crimes against the administration of justice of the International Criminal Court' (ICC). It would also remove the requirement that prosecutions only occur in the name of the Attorney-General and the allowance for arrests, charges, remand, or release on bail to occur without Attorney-General's consent, since such consent will no longer be required.

4. By repealing s 268.122, the Bill removes the proscription that Attorney General's consent is final and must not be challenged or subject to judicial review.

5. Our submissions draw a distinction between international crimes committed *within* Australia and/or committed by Australian nationals based on territoriality and nationality jurisdiction, and crimes committed *outside* Australia by non-nationals to which the principle of universal jurisdiction applies. We suggest that different legal and policy factors apply.

6. We support removal of the requirement for Attorney-General's consent for crimes committed within Australia and/or by Australians. For universal jurisdiction crimes, we support replacement of the requirement for Attorney-General's consent with a requirement for the consent of the Commonwealth Director of Public Prosecutions (CDPP).

7. The proposed changes will facilitate the prosecution of international crimes within Australian courts even where not committed in Australia or by Australian nationals, consistent with Australia's obligations under treaty and customary international law and as a supporter of the ICC and international criminal justice. The amendments are consistent with the growing use of universal jurisdiction globally, while enhancing the independence and transparency of the investigation and prosecution of international crimes in Australia.

II. Australia's international obligations and domestic legal framework

8. Australia has international obligations to prosecute international crimes arising from customary international law and treaties to which Australia is a party. Australia is required to criminalize international crimes in domestic law and has done so by adopting Division 268. Division 268 applies only to conduct committed on or after 28 June 2002. Conduct committed before that date cannot be prosecuted by Australian courts under that Division. The current proposals do not address this 'gap' in Australia's domestic legal framework.

9. Australia is required to exercise jurisdiction to investigate and prosecute international crimes in Australian courts where those crimes have been committed in Australia and/or by Australians. Australia has confirmed this position, stating that 'primary responsibility for investigating and prosecuting serious international crimes rests with the State in the territory of which the criminal conduct was alleged to have occurred, or the State of nationality of the accused' (see https://www.un.org/en/ga/sixth/77/pdfs/statements/universal_jurisdiction/12mtg_canz.pdf).

10. Australia also accepts the principle of universal jurisdiction as 'an important complementary framework to ensure that persons accused of serious international crimes can be held accountable in circumstances where the territorial State is unwilling or unable to exercise jurisdiction'.

11. Universal jurisdiction is reflected in s 268.117 of the Criminal Code which provides that international crimes are subject to extended geographical jurisdiction (category D) under s 15.4 of the Criminal Code. This means that the offence applies regardless of whether the conduct constituting the alleged offence occurs or has a result in Australia or was committed by or against Australians.

12. There is debate as to whether a state's right to rely on universal jurisdiction is discretionary or mandatory. It is possible that – having legislated to facilitate the exercise of universal jurisdiction – Australia is under a duty to exercise that jurisdiction through domestic prosecutions. Certainly, Australia *must* prosecute any suspects found on its territory or else must extradite the suspect to another state or surrender the suspect to an international criminal court for trial.

13. Australia is also a party to the **Rome Statute of the International Criminal Court,** which entered into force for Australia on 1 July 2002. The Rome Statute is not based on universal jurisdiction but on principles of territoriality and nationality. States parties are not required to legislate for specific crimes or bases of jurisdiction; states must only legislate to enable cooperation with the ICC. The principle of complementarity specifies that a case will only be admissible before the ICC where the State is unwilling or unable genuinely to carry out the investigation or prosecution. To avoid ICC prosecutions, many states – including Australia – have passed legislation to ensure that they can prosecute international crimes domestically. Ratification of the Rome Statute and the complementarity principle was the impetus for the inclusion of Division 268 into the Criminal Code in 2002.

III. Analysis of the proposed reforms

A. Crimes committed within Australia and /or by Australians

14. At present, s 268.121, including the requirement for Attorney-General consent, applies to all prosecutions for these international crimes, even when those crimes have been committed within Australia and/or by Australians.

15. The Brereton Inquiry shows that Australians can be involved in perpetrating international crimes overseas and – as noted in the documents supporting the Bill – it is conceivable that international crimes may be perpetrated in Australia. Bringing domestic prosecutions ensures that Australia asserts its sovereign rights in relation to crimes in its territory and/or by its nationals, is consistent with Australia's international obligations and ensures that Australians will face justice here. While we explore below the reasons for greater controls in relation to prosecutions based on universal jurisdiction, we argue that these concerns do not apply or are not as relevant to prosecution of international crimes committed in Australia and/or by Australians.

16. Given the potential for official involvement or complicity in international crimes committed in Australia and/or by Australians, there is a potential if not an actual conflict of interest in the Attorney-

General retaining an effective veto over such prosecutions through the requirement for consent. The requirement for consent has the effect of shielding Australians – particularly officials and leaders – from prosecution domestically and is inconsistent with Australia's international obligations and at odds with Australia's commitment to support the international rules-based order. **We support the proposed repeal of s 268.121 in relation to prosecutions for international crimes committed within Australia and/or by Australian nationals, citizens and potentially residents.**

17. In the usual course of events, crimes under Commonwealth law are prosecuted by the CDPP. Given that prosecution of international crimes can be complex in terms of the legal tests, evidence required and the impact on the public, we suggest that the decision to prosecute international crimes committed in Australia and/or by Australians should be made by the CDPP personally or delegated to a deputy or senior trial lawyer. This is different to requiring the consent of the CDPP to prosecution. We deal with the possibility of private prosecutions for international crimes below at section IV.

18. As with other crimes under Commonwealth law, the CDPP will apply the two-step test set out in the CDPP Prosecution Policy, considering first whether the evidentiary basis is sufficient for prosecution and second assessing whether prosecution is in the public interest. Application of this test, in our view, is sufficient to protect against politically motivated or vexatious prosecutions. However, particularly where cases involve international crimes committed by Australians outside Australia, the CDPP should be encouraged to include additional factors to be considered when making this assessment in relation to universal jurisdiction to recognize the complexity of and broader public interest in such cases. The factors set out in relation to universal jurisdiction cases at para 27 below may be relevant.
19. A decision not to prosecute made by the CDPP after applying the two-stage test is likely to be acceptable to the ICC, which will recognise transparent and genuine decisions not to prosecute by national authorities, especially where those decisions are based on evidence and public interest factors.

B. Crimes committed outside Australia by non-Australians

20. International crimes committed outside Australia by non-Australians generally involve the exercise of universal jurisdiction and present additional risks that warrant a different approach. These factors include the complexity of universal jurisdiction prosecutions, the need for mutual legal assistance and cooperation with other governments, and the risk of negative impacts on Australia's international relations.

21. As already noted, presently the requirement for Attorney-General's consent under s 268.121 applies to international crimes regardless of where the crimes are committed. As discussed in A, repeal of this section removes this requirement for crimes committed in Australia and/or by Australians. However, s 16.1 of the Criminal Code provides that the consent of the Attorney-General is required for prosecution if the alleged conduct occurs wholly within a foreign country in certain circumstances. These circumstances include crimes to which s 15.4 applies (which includes international crimes) and the conduct occurs wholly in a foreign country and the alleged offender is not – at the time of the offence – an Australian citizen. Section 16.1 duplicates the requirements of s 268.121 so, **if s 268.121 is repealed, there will still be a requirement to seek the consent of the Attorney-General for prosecution for international crimes where the crimes are committed outside Australia and by those who are not Australian citizens.**

22. **We recommend the Committee use this opportunity to reform the legislative regime applicable to crimes committed outside Australia by non-Australians**. We suggest that there are four options for reform:

- Option 1: Repeal s 268.121 and make no other changes, effectively retaining an unfettered Attorney-General's fiat for prosecutions committed outside Australia by non-Australians by virtue of the application of s 16.1.
- Option 2: Retain s 268.121 and the need for consent but provide greater legislative guidance as to the factors that the Attorney-General should consider when exercising his or her discretion to give consent to the prosecution of international crimes.
- Option 3: Repeal s 268.121 and amend s 16.1 to replace the requirement that the Attorney-General consent to proceedings for international crimes committed outside Australia by non-nationals with the need for the Commonwealth DPP to consent to proceedings.
- Option 4: Repeal s 268.121 and amend s 16.1 to remove any requirement that proceedings for international crimes committed outside Australia by non-nationals be consented to, whether by the Attorney-General or any other actor.

23. **Option 1 is to support the proposed repeal of s 268.121.** As noted above, given the application of s 16.1 of the Criminal Code, the Attorney-General's consent would still be required to commence proceedings where an international crime was committed in a foreign country by a non-Australian citizen. The benefit of this option is that it removes the requirement for consent for crimes committed within Australia and/or by Australians (see A) but retains a consent requirement for universal jurisdiction cases, enabling the Attorney-General to assess the risks – or benefits – for Australia of prosecution.

24. **Option 2 is to retain s 268.121(1) and the requirement for Attorney-General's consent, but to amend s268.121 so it applies to universal jurisdiction cases only (ie not international crimes committed in Australia and/or by Australians – see A) and to reform how this requirement operates in practice.**

25. Australia accepts that 'at all times, the exercise of universal jurisdiction must be free from political motivation, discrimination and arbitrary application'. That view is inconsistent with the preservation of an unfettered requirement for Attorney-General's consent.

26. We suggest that if the requirement for consent is retained, the Attorney-General's discretion should be constrained by a duty to consider and balance a list of factors, although recognising that each decision must be taken on its own facts. These factors could be included in an amendment to s 268.121 or could be issued in the form of guidance that is made publicly available to the CDPP and Australian Federal Police and to victims and civil society organisations.

27. These factors should be open to public consultation, but could include the following:

- Nature of the alleged crimes and the identity and role of the alleged perpetrator(s) and their involvement in the commission of the crimes.
- The existent of any connections to Australia, including the presence of the accused in Australia, ties to victims and Australian diaspora.
- Whether other states have greater connections to the crimes and are willing to prosecute, in which case extradition is an option.
- Where the accused is located or resides and where most evidence and victims are located.
- The likelihood of a successful prosecution, considering factors such as available evidence, likelihood of cooperation and mutual legal assistance from other states or organisations.
- Economic cost and impact on justice system of trials in Australia.

- Other possible venues for the prosecution and whether prosecution in Australia offers the only real option for accountability.
- Diplomatic impact on Australia, Australia's reputation and Australia's national interest.
- Interests and preferences of victims, especially if the action is initiated or supported by victim communities in Australia.
- Interest of the international community in prosecution, even if not successful, recognising the expressive potential of a trial.
- Risk to victims and witnesses of continuing with trial, given limited availability to protect some witnesses and victims in a remote trial.
- Likely availability of immunity under international law immunity.

28. We also suggest that the guidance provided by the Attorney-General should be linked to a revised process, one that enables submissions by interested parties such as victims and civil society organisations and requires the Attorney-General to provide written reasons for their decision. As detailed below, we also suggest that this decision is subject to review.

29. **Option 3 is to repeal s 268.121 and remove the requirement for the Attorney-General's consent for universal jurisdiction cases, but to replace it with a requirement for the personal consent of the CDPP**. As outlined above at para 18, the CDPP would apply the two-stage test, assessing both evidence and public interest. This option removes the Attorney-General from the decision to prosecute and ensures that there is no political influence in the decision. However, it also allows a review of the decision by the CDPP, which we suggest is sufficient to reduce the risk of vexatious or politically motivated prosecutions, or those that are commenced without a sufficient evidentiary basis.

30. The two-step test is directed to 'ordinary' cases in Australia, not universal jurisdiction cases, so the CDPP could also be asked – or required – to consider guidance as to the evidentiary challenges and the different public interest in prosecuting international crimes committed outside Australia and by non-Australians, which involves a broader range of constituencies, domestic and international, and gives effect to Australia's role in enforcing ICL. The factors listed in para 27 above are a starting point for discussion.

31. We suggest that these factors should be incorporated into the CDPP prosecution policy following public consultation and consultation with the Attorney-General under s 7 of the *Director of Public Prosecutions Act 1983* (Cth) (DPP Act). Alternatively, the Attorney-General could use their power under s 8 of the DPP Act to direct the CDPP as to the factors to be considered in relation to universal jurisdiction cases. A third option is to include these factors in amendments to s 268.121.

32. We also suggest that the CDPP develop guidance for victims and civil society organisations as to the process for submitting information on the commission of international crimes to the Australian Federal Police (AFP)/CDPP and the factors that will be considered.

33. **Option 4 is to repeal s 268.12.1 and amend s 16.1 to remove any requirement that proceedings for international crimes committed outside Australia by non-nationals be consented to, whether by the Attorney-General or any other actor**. This means that decisions to investigate and prosecute will – in most cases – be taken by the AFP and CDPP, as with other crimes under Commonwealth law, after applying the two-stage test. There will not be a clear requirement for a review of the decision by either the Attorney-General or the CDPP and there will be no explicit requirement to consider a broader range of factors than for prosecutions under other parts of the Act. Given the potential complexity

and risks to Australia of universal jurisdiction cases (see para 20), we consider that applying the 'ordinary' process to such crimes may be inadequate to manage these risks.

34. This option is also linked to the potential for private prosecutions, discussed below. If the potential for private prosecutions is reactivated by the repeal of s 268.121, cases may be brought by private litigants, which increases the potential for frivolous and/or politicised private prosecutions and the risk that cases will be brought without a sufficient evidentiary basis and/or that may be harmful to Australia's interests. While these risks could be minimised by the CDPP taking over and discontinuing inappropriate proceedings, given the importance of such proceedings to many different communities, we consider that the process should have a considered review before proceedings commence or are discontinued.

35. **Recommendation: Option 3 (requiring the consent of the CDPP) is the best option for prosecutions of international crimes committed outside Australia by non-Australians.** Given the political role performed by the Attorney-General, we believe that decisions to (and not to) prosecute international crimes will have greater legitimacy if made by an independent actor. The CDPP is well-positioned to consider a range of legal and public interest factors in determining if a prosecution should proceed.

IV. Who should bring prosecutions?

36. Repealing s 268.121 also removes the requirement in subsection 2 that prosecutions may only be prosecuted in the name of the Attorney-General. This raises two related issues, both in relation to international crimes committed in Australia and/or by Australians and to universal jurisdiction cases.

37. **First, should prosecutions for international crimes continue to be brought in the name of the Attorney-General?** As noted by the High Court in *Taylor v Attorney-General of the Commonwealth* [2019] HCA 30, this is different to a requirement for consent. We consider that prosecutions for international crimes should continue to be brought in the name of the Attorney-General or the CDPP as, while these are domestic prosecutions, Australia is acting on behalf of both Australian and international communities in prosecuting these crimes.

38. **Second, should Australia expressly recognise the right of private prosecution for international crimes?** Currently, the High Court decision in *Taylor v Attorney-General of the Commonwealth* [2019] HCA 30 effectively precludes private prosecution for international crimes. This Bill presents an opportunity to reconsider the issue.

39. Private prosecutions can enhance the pursuit of international justice. Civil society organisations play an important role working with affected communities to document international crimes. Victims and witnesses may be more willing to disclose evidence to civil society organisations rather than national authorities in light of past negative experiences in their country of origin. Without a dedicated, permanent, international crimes investigative unit (beyond crimes in Afghanistan and the AFP Special Investigative Command) some civil society organisations have broader access to relevant international legal networks, evidence, and evidence-collection platforms.

40. Other issues to consider regarding private prosecutions for international crimes include:

    - Within Australia, there has been a history of civil society and political engagement with international criminal law for strategic reasons, including by making communications to the ICC's Office of the Prosecutor alleging the commission of international crimes by Australian politicians. These engagements may not have strong legal prospects but are used to generate

media attention and advocate for political and social change. Private prosecutions could be used for similarly strategic reasons.

- Some civil society organisations may lack the necessary knowledge and training to gather evidence in ways that preserves its admissibility in criminal proceedings. Therefore, there is a risk that some civil society organisations might not be well-positioned to perform prosecutorial functions.

41. There are existing mechanisms for dealing with private prosecutions that are brought on inappropriate grounds or by ill-equipped actors. In particular, under s 9(5) of the DPP Act, the CDPP has the power to take over private prosecutions and, where those proceedings are considered inappropriate, to discontinue them.

42. Additionally, and/or alternatively, these risks could be managed by requiring the consent of the CDPP prior to the issue of an arrest warrant or when other preliminary steps are taken.

43. Regardless of what is decided in relation to private prosecutions, the CDPP and AFP should consider adopting a process for victims and civil society organisations to submit information on the commission of international crimes, as well as providing public guidance on the types of information most helpful in assisting investigations and prosecutions and the criteria they will apply in making decisions. This may include – at a minimum – establishing a focal point for complaints about international crimes who can liaise with victims and civil society groups.

44. As an alternative to recognising private prosecution – or possibly in addition – the Government should consider establishing a specialist investigative and prosecutorial body for international crimes and providing sufficient funding to that body.

V. Transparency and Right to Review

45. The Bill proposes to repeal s 268.122 in its entirety. That section excludes the Attorney-General's decision to consent (or not) to prosecution from review other than pursuant to the original jurisdiction of the High Court. No similar limitations are placed on the consent of the Attorney-General as granted under s 16.1 of the Criminal Code.

46. Regardless of which approaches are taken to the prosecution of international crimes, a more transparent process is needed concerning the Attorney-General's decisions to consent to the commencement of proceedings and/or the CDPP's decisions to commence a prosecution.

47. At present, the Attorney-General is not required to provide reasons for a decision under s 268.121. If the need for Attorney-General's consent is retained, reasons for this decision should be recorded in writing and provided to any victims or other parties who have engaged with the Attorney-General prior to the decision being made. This requirement should also apply if s 268.121 is amended to require the CDPP to give consent to prosecution. The Attorney-General and/or CDPP should be required to keep a record of cases where such decisions have been made and publish these statistics annually.

48. Similarly, we believe that there should not be restrictions on victims' ability to review a decision of the Attorney-General; if the requirement for Attorney-General's consent is retained, that decision should be subject to normal judicial review processes. Judicial review will be facilitated by the adoption of specific factors the Attorney-General should take into account (see para 27 above).

49. Currently, there are limited avenues through which victims can seek review of a decision by the CDPP. The High Court has held that enabling judicial review of the decision whether or not to commence a

prosecution would be contrary to the separation of powers (*Maxwell v The Queen* (1996) 184 CLR 501, 534).

50. The Commonwealth Victims of Crime Policy states that the CDPP should keep victims informed of matters including the decision to commence a prosecution, and that the views of victims should be taken into account, where appropriate, in deciding whether or not it is in the public interest to commence – or consent to - a prosecution (art 4). The views of victims should also be taken into account, where appropriate, in deciding whether or not to discontinue a prosecution (art 7).

51. The National Legal Direction "Right of Review – Prosecutions involving child and certain other complainants", issued internally by the CDPP, entitles victims of some crimes to receive written reasons for a decision not to lay charges against an alleged offender (art 15). These victims can request the Director to review a decision not to lay charges (art 13). The offences covered by the direction include 'offences in which a victim suffers really serious physical or psychological harm' and offences involving 'slavery, servitude and forced marriage' (art 1).

52. While this is likely to include most international crimes offences, in the interests of clarity and transparency, the Direction should be amended to clarify that victims of such offences are entitled to seek review of a decision not to prosecute and/or not to consent to prosecute. The CDPP may also consider establishing a panel of senior DPP lawyers or an external expert panel to assist in making decisions on prosecutions for international crimes or to act as an independent review panel, similar to how the ICC Prosecutor recently relied on an expert advisory panel to review the evidence and analysis supporting the request for arrest warrants in Gaza.

Date: 4 July 2024

Appendix A. Author Biographies

Professor Sarah Williams is a Professor in the Faculty of Law & Justice, UNSW Sydney. Sarah is an Associate of the Australian Human Rights Institute and the Centre for Crime, Law & Justice and the Chair of the Australian Red Cross NSW IHL Committee. Sarah was previously the Dorset Fellow in Public International Law at the British Institute of International and Comparative Law (from 2008 - 2010), a Senior Legal Researcher at the UK Foreign and Commonwealth Office (from 2006 - 2007) and a Lecturer at Durham Law School, University of Durham (from 2003 - 2008). Sarah teaches international criminal law, domestic criminal law, international humanitarian law and public international law. Sarah's main research areas include international law, in particular international criminal law, international humanitarian law and international disaster law. Sarah's published research includes a monograph on *Hybrid and Internationalized Criminal Tribunals* (2012), a co-authored monograph on *The amicus curiae in international criminal justice* (2020) and various edited collections, book chapters, journal articles and submissions. Sarah is currently exploring Australia's engagement with the Genocide Convention since 1946.

Dr Emma Palmer is a Senior Lecturer at Griffith Law School, Griffith University, Queensland. Emma has published three books: *Adapting International Criminal Justice in Southeast Asia: Beyond the International Criminal Court* (Cambridge University Press), *The Amicus Curiae and International Criminal Justice* (co-authored, Hart) and a co-edited collection, *Futures of International Criminal Justice* (Routledge) released in 2022. Emma was awarded her PhD from UNSW Law in 2017, where she previously received a Masters in Law. Emma was a senior investment analyst at Macquarie Bank between 2006 and 2011. She was admitted as a lawyer in New South Wales and was a Director for Women's Legal Service NSW until 2023.

Dr Natalie Hodgson is an Assistant Professor of Law at the University of Nottingham (United Kingdom) and a member of the International Criminal Justice Unit in the Human Rights Law Centre. Natalie holds a Bachlor of Arts (Criminology) (Hons I), Bachlor of Laws (Hons I) and PhD in Law from UNSW Sydney. Natalie's research expertise includes international and comparative criminal law and procedure. In 2021, Natalie was awarded the Andrea Durbach Prize from the *Australian Journal of Human Rights* for her article 'International Criminal Law and Civil Society Resistance to Offshore Detention', which explored the strategic use of Article 15 communications to the International Criminal Court over Australia's offshore processing of asylum seekers.