Parliament of Australia,
Parliament House,
Canberra,
ACT 2600.

4 July 2024

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

Dear Members of the Senate Legal and Constitutional Affairs Committee,

Thank you for the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee on the *Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024* which would see the removal of sections 268.121-122 of the *Criminal Code.*

By way of background, we are law academics who have each researched and published on issues of public international law and international criminal law for more than a decade.[1] Of particular relevance to the proposed Bill is the academic work we have done on the prosecution of international crimes in Australia. We co-authored an article on this topic, entitled 'Prosecuting International Crimes in Australia: The Case of the Sri Lankan President' published in the *Melbourne Journal of International Law* in 2012 where we argued that sections 268.121 and 268.122 of the *Criminal Code* should be amended. Additionally, Monique Cormier has forthcoming book chapters on 'International Criminal Law in Australian Courts' and 'Universal Jurisdiction in Australia'.

We welcome Senator Thorpe's Bill. It provides an important opportunity to amend the *Criminal Code* so that Australia can play a stronger role in the prosecution of the most serious crimes of international concern: genocide, crimes against humanity and war crimes. In this submission we make a number of comments with a view to strengthening the Bill and increasing the likelihood of the Bill's successful passage into law. Our submission proceeds in three parts:

1. The Need to Increase Australia's Contribution to International Criminal Justice;
2. Retaining a Limited Role for the Attorney-General to Ensure Respect for Head of State Immunity
3. The Ability to Review the Attorney-General's Consent Power

## 1. The Need to Increase Australia's Contribution to International Criminal Justice

The international criminal justice system is dependent to a significant extent on the will and ability of states to pursue domestic prosecutions of individuals suspected of committing genocide, crimes against humanity and war crimes.[2] Although the international community has established various ad hoc international and hybrid criminal tribunals as well as the permanent International Criminal Court ('ICC') over the last three decades, these tribunals and courts are unable to hold all suspected international criminals to account because of their limited capacity and restricted jurisdiction.[3] It thus falls to states to ensure that the important goals of the international criminal justice system — including ending impunity

[1] Dr Monique Cormier is a senior lecturer at Monash University Faculty of Law and Dr Anna Hood is an associate professor at the University of Auckland Faculty of Law.
[2] See, eg, Máximo Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transitional Prosecution of International Crimes' (2011) 105 *American Journal of International Law* 1, 5; Josef Rikhof, 'Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Immunity' (2009) 20 *Criminal Law Forum* 1, 10.
[3] See generally Langer, above n 2, 4; Rikhof, above n 2, 10.

for international crimes, ensuring justice for victims and deterring people from perpetrating atrocities[4] — are upheld by pursuing the domestic prosecution of suspected war criminals.

Australia has long been a staunch advocate of the modern international criminal justice project, having supported the establishment and operation of international war crimes tribunals since the end of the Second World War.[5] Australia supported the ad hoc, special and hybrid international criminal tribunals[6] and was an early and ardent champion of the ICC.[7] It is therefore somewhat ironic that Australia has developed a reputation as a 'haven' for war criminals, with an underwhelming record of domestic investigations and prosecutions for residents suspected of committing international crimes overseas.[8]

While there are numerous and complex reasons for Australia's poor record of prosecuting international crimes, one significant hurdle that has been in place for the past 22 years is the Attorney-General's consent requirement in sections 268.121-122 of the *Criminal Code.* Under these provisions the only way that international crimes can be prosecuted in Australia is with the Attorney-General's written consent.

After the Attorney-General quashed a high profile 2018 attempt by a group of private citizens to initiate proceedings against the then-Foreign Minister of Myanmar,[9] the High Court of Australia was given the opportunity to consider the scope of the consent power when the citizens commenced a case in the Court's original jurisdiction seeking review of the Attorney-General's decision.[10] The Court declined to address the question of whether the power is subject to judicial review and instead interpreted sections 268.121-122 to mean that any prosecution of international crimes in Australia can only be *initiated* by the Attorney-General. This means that private citizens are now barred from filing prosecution applications for international crimes. The High Court effectively narrowed the already limited possible pathways to prosecution for international crimes in Australia by strengthening the Attorney-General's procedural role.[11]

In addition to the extremely narrow pathway for commencing the prosecution of international crimes in Australia, a further limitation in the system is that the Attorney-General has unfettered discretion as to whether they commence a prosecution; there are no guidelines to which they must have regard.

Restricting the commencement of prosecutions of international crimes to the Attorney-General alone and giving them complete discretion over this area is problematic because it means it is too easy for them to

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[4] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) Preamble [4]–[5]; Mirjan Damaška, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329, 331.

[5] Eminent Australian jurist, Sir William Webb, served as President of the International Military Tribunal for the Far East in Tokyo, while Australian Military Courts convened 300 trials of Japanese soldiers accused of war crimes between 1945–51. These trials were held pursuant to the *War Crimes Act 1945* (Cth), which was passed by both houses of parliament in a single day: National Archives of Australia, 'World War II War Crimes: Fact Sheet 61', www.naa.gov.au/sites/default/files/2020-05/fs-61-World-War-II-war-crimes.pdf.

[6] Through financial support and other cooperation. See, eg, Department of Foreign Affairs, *Annual Report 2010–2011* (DFAT, 2011) 106, 230; *International War Crimes Tribunal Act 1995* (Cth); *International Transfer of Prisoners Act 1997* (Cth).

[7] Hilary Charlesworth et al, *No Country Is an Island: Australia and International Law* (UNSW Press, 2006) 72; Andrew Byrnes, 'Australia and International Criminal Law' in Donald R Rothwell and Emily Crawford (eds), *International Law in Australia*, 3rd edn (Thomson Reuters, 2017) 215–18.

[8] David Humphries, 'How Australia Became a Haven for War Criminals' *The Sydney Morning Herald* (Sydney, 10 April 2010) 11; Gideon Boas and Pascale Chifflet, 'Suspected War Criminals in Australia: Law and Policy' (2016) 40 *Melbourne University Law Review* 47, 85; Mark Aarons, *War Criminals Welcome*, 2nd edn (Black Inc, 2020).

[9] Ben Doherty, 'Aung San Suu Kyi: Lawyers Seek Prosecution for Crimes against Humanity' *The Guardian* (27 March 2018).

[10] *Taylor v Attorney-General (Cth)* (2019) 268 CLR 224.

[11] Rawan Arraf, 'High Court of Australia Closes Door on Private Prosecutions in Taylor v Attorney-General' *Opinio Juris* (14 February 2020) opiniojuris.org/2020/02/14/high-court-of-australia-closes-door-on-private-prosecutions-in-taylor-v-attorney-general/.

decline to prosecute those suspected of committing international crimes and they do not have to give any reasons for their decision. What is more, there is nothing to prevent an Attorney-General's prosecutorial decisions in this space being influenced by political bias or appearing to be influenced by political bias.

In light of this, we support amending the unfettered discretion the Attorney-General currently has over the commencement of international criminal cases. In particular, we recommend that private citizens be allowed to initiate prosecutions for international crimes. This is important given that immigrant and refugee communities in Australia may have firsthand experience of international crimes committed by persons now residing in Australia. Further, in an age of globalised media where private citizens have access to information about atrocities committed abroad, they should be allowed to initiate cases that fall within Australia's jurisdiction. We do not, however, believe the Attorney-General's role in prosecuting international crimes should be removed altogether. The Attorney-General should only be empowered to stop proceedings if the person being charged with international crimes is entitled to head of state immunity under international law.

**2. Retaining a Limited Role for the Attorney-General to Ensure Respect for Head of State Immunity**

Under customary international law, heads of state are entitled to absolute personal immunity from prosecution in foreign domestic jurisdictions while they remain in office (immunity *ratione personae*).[12] Head of state immunity only applies to a very limited number of persons: heads of state, heads of government and foreign ministers. The rationale for giving these individuals such expansive procedural immunity in foreign domestic jurisdictions is to 'protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties'.[13] At present, customary international law does not recognise any exceptions to this immunity, even for international crimes.[14] It would be inappropriate and potentially highly damaging to Australia's international relations were a private individual to bring a criminal prosecution against a head of state, head of government or foreign minister who is entitled to immunity. Consequently, we believe it is important that the Attorney-General have the power to quash attempts to prosecute visiting senior dignitaries who have the protection of head of state immunity under international law.

In our view the only circumstance in which there is a need for the Attorney-General to halt the prosecution of an international crime is when head of state immunity issues arise. However, if the Australian parliament is unwilling to limit the Attorney-General's power to this circumstance and desires the Attorney-General to have more power to foreclose international criminal prosecutions, then we recommend that prosecutorial guidelines be developed. These guidelines would set out the criteria to which the Attorney-General would have to have regard when deciding whether to halt the prosecution of international crimes. The guidelines should restrict the power of the Attorney-General to prevent prosecutions in very limited, extreme circumstances. The Attorney-General should also be required to provide written reasons for any decision to quash a prosecution.

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[12] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)(Judgment)* [2008] ICJ Rep 177, [170]; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 20–1 [51]; Institut de Droit International, *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law* (Vancouver Session, 2001) arts 1–2 www.idi-iil.org/idiE/resolutionsE/2001_van
_02_en.PDF.

[13] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 20–1 [51];

[14] International Law Commission Report, *Draft articles on the immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading,* UN DOC A/77/10 (2022) arts 3 and 4.

**3. Allowing for Judicial Review of the Attorney-General's Decision to Halt Prosecutions**

If the Attorney-General continues to have a role in being able to halt prosecutions of international crimes, his or her decision should be subject to broad judicial review. Currently, section 268.122 of the *Criminal Code* restricts review of the Attorney-General's decisions on cases of international criminal law to the narrow form of review available under s 75(v) of the *Australian Constitution*[15] and prevents recourse to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*'). The *ADJR Act* not only provides broader forms of judicial review than s 75(v) of the *Constitution* but also enables individuals to require members of the executive, such as the Attorney-General, to provide reasons for their decisions.[16] A further limitation on the review of the Attorney-General's decisions in this space is that the decisions are not subject to any form of merits review by, for example, the Administrative Appeals Tribunal[17] or its soon-to-be successor, the Administrative Review Tribunal.[18]

Theoretically, the minimal forms of judicial review available under s 268.122 are unproblematic because the Attorney-General is held accountable for their decisions by both the electorate (at the ballot box) and the Parliament (in question time).[19] Both of these accountability mechanisms, however, suffer deficiencies. With respect to electoral accountability, it is highly improbable that an Attorney-General's decision to allow or disallow the prosecution of a suspected international criminal will sway voters at election time given the litany of other issues that voters have to consider.

The possibility of the Attorney-General being held to account through the mechanism of parliamentary question time is only marginally more promising. Recent research into the effectiveness of question time in Australia's national Parliament reveals that 'there is strong sentiment that Question Time is currently not delivering sufficiently on ministerial accountability'.[20] An earlier study found that Australia's question time is less effective at holding the executive to account than the question times of parliaments in Canada, New Zealand and the UK.[21] Indeed, compared with question times in these other jurisdictions, fewer questions were asked in Australian question time and of the questions asked, fewer answers were provided.[22]

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[15] Section 75(v) of the *Australian Constitution* provides the High Court of Australia with original jurisdiction 'in all matters in which a writ of Mandamus or prohibition or injunction is sought against an officer of the Commonwealth'.

[16] Section 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') provides that:

> where a person makes a decision to which this section applies, any person who is entitled to make an application to the Federal Court or the Federal Magistrates Court under section 5 in relation to the decision may, by notice in writing given to the person who made the decision, request him or her to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

[17] It should be noted that the privative clause in s 268.122 is not what prevents the Administrative Appeals Tribunal ('AAT') from reviewing the decision on its merits. Rather, it is the failure of s 268 to enliven specifically the jurisdiction of the AAT.

[18] *Administrative Review Tribunal Bill 2024* (Cth).

[19] See, eg, Law Commission (UK), *Consents to Prosecution*, Report No LC255 (1998) vi http://lawcommission.justice.gov.uk/docs/lc255_Consents_to_Prosecution.pdf.

[20] House of Representatives Standing Committee on Procedure, A Window on the House: Practices and Procedures Relating to Question Time (2021) [4.11] https://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024667/toc_pdf/AwindowontheHousepracticesandproceduresrelatingtoQuestionTime.pdf;fileType=application%2Fpdf

[21] Andrew McGowan, 'Accountability or Inability: To What Extent Does House of Representatives Question Time Deliver Executive Accountability Comparative to Other Parliamentary Chambers? Is there Need for Reform?' (2008) 23(2) *Australasian Parliamentary Review* 66, 75.

[22] Only 45 per cent of questions asked in Australian question time were answered: see ibid.

We therefore recommend that the *Criminal Code* be amended to allow the Attorney-General's decision on international criminal law prosecutions to be subject to judicial review under the *ADJR Act* and subject to merits review by the Administrative Review Tribunal when it is established.

***Summary of recommendations***

1. The Attorney-General's power to quash commencement of proceedings for international crimes should be limited to situations in which the accused person has head of state immunity under customary international law.
2. The right of private citizens to initiate prosecutions for international crimes should be reinstated.
3. If the Attorney-General's consent power is retained, written reasons should be published for any decision to refuse consent.
4. If the Attorney-General's consent power is retained, any decision to refuse consent should be subject to judicial review and merits review.

We would be very happy to provide further information about any of the points set out above and we are happy for this submission to be made public.

Yours sincerely,

Dr Monique Cormier and Dr Anna Hood