

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

Question date: 31 July 2024

Senator Lidia Thorpe asked the following questions:

1. The Attorney General's fiat, as far as we know, has been used twice since the Criminal Code was amended in 2002 to allow for prosecution of atrocity crimes: once by former AG Christian Porter against then Myanmar state counsellor Aung San Suu Kyi in 2018, and a second time by former AG Robert McClelland in 2001 against Sri Lankan PM Mahinda Rajapaksa. What were the considerations given at the time for the respective cases and why they didn't receive consent to proceed?
2. There is currently no whole of government strategy or action plan concerning international crimes, including atrocity crimes, as exists for other complex offences like terrorism and modern slavery. Has there been any consideration given or been work done to pursue such a national strategy or action plan for atrocity and other international crimes? Why not?
3. After the Afghanistan war crimes-focused Office of the Special Investigator concludes its mandate, there will be no specialised capability here to examine allegations of international crimes. Are there any considerations of the creation of a specialised unit for investigating international crimes?
4. What confidence can the Australian people have that Attorneys General who make these decisions aren't impacted by political considerations or conflicts of interest, when there is no transparency or appeals process in relation to those decisions?

The response to Senator Thorpe's questions are as follows:

1. The Attorney-General's Department does not disclose advice put to the Attorney-General in relation to requests to consent to prosecute matters under the *Criminal Code 1995* (Cth) (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.

2. Australia has robust arrangements in place to investigate and prosecute alleged offences against Division 268 of the Criminal Code.

Division 268 of the Criminal Code criminalises genocide, war crimes and crimes against humanity. Extended geographical jurisdiction applies to offences under Division 268, meaning the offences apply regardless of whether the conduct constituting the alleged offence, or a result of the conduct constituting the alleged offence, occurred in Australia. This ensures Australia has the legal capacity to investigate and prosecute serious crimes of international concern in accordance with the principle of universal jurisdiction. The effect of this principle is that every State may exercise criminal jurisdiction over individuals responsible for committing such crimes, regardless of where the conduct occurs.

The Australian Federal Police (AFP) has general responsibility for investigating alleged offending against Division 268 of the Criminal Code, while the Commonwealth Director of Public Prosecutions (CDPP) determines whether to commence a prosecution (subject to the Attorney-General providing consent) in accordance with the *Prosecution Policy of the Commonwealth*. Both the AFP and the CDPP are independent statutory authorities.

3. Investigation of alleged crimes against Division 268 is the responsibility of the AFP's Counter Terrorism and Special Investigations Command. Separately, the Office of the Special Investigator has responsibility for investigating alleged criminal conduct by members of the Australian Defence Force in Afghanistan between 2005 and 2016.
4. Consent to prosecute provisions are not uncommon across the Commonwealth statute book. As is typically the case with consent to prosecute provisions, section 268.121 of the Criminal Code does not require the Attorney-General to consider set criteria in determining whether to give consent but provides scope to consider any factors that are relevant to the particular facts and circumstances of the matter at hand. These factors may include considerations of international law (such as international law relating to immunities), international relations and whether prosecutions are being (or might be) brought in a foreign country.

Section 268.122 prevents any review of or challenge to a decision to consent or not consent to prosecute in any court other than the High Court in its original jurisdiction. This is consistent with the limits on the reviewability of other decisions at the investigative and prosecution phase, such as referral of a brief of evidence by an investigative agency and determination by the CDPP that the matter should proceed, having regard to the *Prosecution Policy of the Commonwealth*.