



Australian Government

Attorney-General's Department

July 2024

# Senate Legal and Constitutional Affairs Legislation Committee

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

### Attorney-General's Department Submission

## Introduction

The Attorney-General's Department (department) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee (Committee) Inquiry into the Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024 (Bill).

The department has portfolio responsibility for Division 268 of the *Criminal Code Act 1995* (Cth) (Criminal Code), which the Bill proposes to amend. This submission outlines the background of Division 268, the prosecution process for offences against Division 268 and the proposed amendments to sections 268.121 and 268.122 made by the Bill.

The Bill proposes to repeal section 268.121 and retrospectively repeal section 268.122 of the Criminal Code. The effect of these amendments would be that the Attorney-General's consent would not be required for proceedings brought under Division 268 (genocide, crimes against humanity, war crimes and crimes against the administration of the justice of the International Criminal Court), prosecutions would not need to be brought in the name of the Attorney-General, and the restrictions on judicial review of the Attorney-General's decision (including decisions made prior to enactment of the Bill) to give or refuse consent to institute such proceedings would be removed.

The department considers that the requirement to obtain the Attorney-General's consent and the restrictions on judicial review of the Attorney-General's decision in sections 268.121 and 268.122 are appropriate. These provisions recognise that prosecutions under Division 268 may raise international law, foreign relations, overseas proceedings and national security issues that it is appropriate for the Attorney-General to consider. Consent to prosecute provisions are a long-standing feature of the Commonwealth criminal justice framework.

## Division 268 of the Criminal Code

Division 268 of the Criminal Code was introduced by the *International Criminal Court (Consequential Amendments) Act 2002* (Cth) (Consequential Amendments Act) together with the *International Criminal Court Act 2002* (Cth) (ICC Act) to align the crimes punishable by the International Criminal Court (ICC) with offences expressly codified under Australian law, including genocide, crimes against humanity and war crimes.

The background to the enactment of Division 268 of the Criminal Code was succinctly summarised by the majority of the High Court (Kiefel CJ, Bell, Gageler and Keane JJ) in their majority judgment in *Taylor v Attorney-General* (Cth):<sup>1</sup>

*The principal object of the International Criminal Court Act is to facilitate compliance with Australia's obligations under the Rome Statute of the International Criminal Court (1998) ("the Rome Statute").*

*Enactment of the Consequential Amendments Act was against the background of the Preamble to the Rome Statute "[r]ecalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and "[e]mphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions". The Second Reading Speech for the Bill for the Consequential Amendments Act explained the main purpose of its enactment in terms of facilitating exercise of Australia's international rights under and pertaining to*

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<sup>1</sup> [2019] HCA 30 [11]-[12].

*the Rome Statute. The main purpose was said to be to create as offences against Australian law each of the offences against international law over which the International Criminal Court ("the ICC") had been given jurisdiction under the Rome Statute and thereby to enable Australia to "take full advantage of the principle and protection of complementarity". The Explanatory Memorandum accompanying the Bill further explained that "[b]y creating crimes in Australian law that mirror the crimes in the [Rome Statute], Australia will always be able to prosecute a person accused of a crime under the [Rome Statute] in Australia rather than surrender that person for trial in the ICC".*

The Consequential Amendments Act simultaneously introduced various legal principles that apply in prosecuting offences against Division 268, relevantly including sections 268.121 and 268.122 (discussed below).

The crimes of genocide, crimes against humanity and war crimes in Division 268 of the Criminal Code have Category D jurisdiction, which is defined in section 15.4 of the Criminal Code as applying whether or not the conduct constituting the alleged offence, or as a result of the conduct constituting the alleged offence, occurs in Australia. This means that Australia will have jurisdiction over the matter, regardless of where the conduct constituting the alleged offence occurred. There is no requirement that the victim or the perpetrator be an Australian citizen, resident or body corporate.

## Section 268.121

Section 268.121 of the Criminal Code provides that proceedings for offences against Division 268 must not be commenced without the Attorney-General's written consent, and can only be prosecuted in the name of the Attorney-General.

### The investigative and prosecution process

The investigation of offences against Division 268 is ordinarily undertaken by the Australian Federal Police, except in relation to alleged breaches of the Laws of Armed Conflict by members of the Australian Defence Force in Afghanistan between 2005 and 2016, which is the responsibility of the Office of the Special Investigator.

The prosecution of Commonwealth criminal offences is the responsibility of the Commonwealth Director of Public Prosecutions (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* (Prosecution Policy).<sup>2</sup> 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 the public interest. Should the CDPP determine that it is appropriate for a prosecution to proceed, the CDPP will then seek the consent of the Attorney-General before commencing the prosecution.

### Consent to Prosecute

Consent to prosecute provisions are a long-standing feature of the Commonwealth criminal justice framework. They recognise the Attorney-General's ultimate accountability for the prosecution of

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<sup>2</sup> Commonwealth Director of Public Prosecutions, [Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process](#) (July 2021).

Commonwealth offences and enable appropriate consideration of national interest factors, such as foreign relations, international law and national security. Consent to prosecute provisions are not unique to Division 268 or to the Criminal Code more generally.

Across the Commonwealth statute book, there are more than 50 different provisions that require the Attorney-General to consent to prosecutions.<sup>3</sup> These offences typically have an international, national security, or other public interest factor that warrants consideration and consent by the Attorney-General before a prosecution can proceed. There is also a general requirement under section 16.1 of the Criminal Code that proceedings for any Commonwealth offence occurring wholly in a foreign country by a person who is neither an Australian citizen nor body corporate must not be commenced without the Attorney-General's written consent. There are also a range of offences that require Ministers other than the Attorney-General to provide their consent for proceedings which may interact particularly with their portfolio responsibilities.<sup>4</sup>

The department notes that the Independent National Security Legislation Monitor recently considered the consent to prosecute provision for secrecy offences in his review of Part 5.6 of the Criminal Code and recommended that the requirement for the Attorney-General to consent to a prosecution be retained.<sup>5</sup>

The requirement for the Attorney-General to consent prior to the commencement of prosecutions for offences of the nature of those in Division 268 is also not a uniquely Australian mechanism. New Zealand,<sup>6</sup> the United Kingdom<sup>7</sup> and Canada<sup>8</sup> require the Attorney-General to consent to a prosecution being brought, and Canada requires that the prosecution only be conducted by the Attorney-General (or counsel on their behalf). This reflects an accepted view across jurisdictions with comparable legal systems that the Attorney-General—as first law officer and a senior member of the executive government—has a role in considering issues such as international law and foreign relations before these matters proceed to prosecution.

As is generally typical with consent to prosecute provisions, section 268.121 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, prosecutions that are being, or might be, brought in a foreign country, and other matters of public interest such as national security.

Relevant offences in Division 268 are subject to Category D jurisdiction, which ensures that 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 is vested with competence to

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<sup>3</sup> For example, section 123.5 of the Criminal Code provides that the Attorney-General's consent is required in prosecutions for secrecy offences under Part 5.6. Another example is section 73.5 of the Criminal Code, which provides that the Attorney-General's consent is required in prosecutions relating to people smuggling.

<sup>4</sup> Examples of this include section 105 of the *Fisheries Management Act 1991* (Cth) and section 72 of the *Insurance Acquisitions and Takeovers Act 1991* (Cth), which both state that proceedings for offences under those Acts must not be instituted without the written consent of the Minister (being the relevant portfolio minister).

<sup>5</sup> Independent National Security Legislation Monitor, [Secrecy Offences – Review into Part 5.6 of the Criminal Code Act 1995](#) (Report, May 2024) 224-225 [10.16].

<sup>6</sup> See *International Crimes and International Criminal Court Act 2000* (NZ) s 13. See also *Geneva Conventions Act 1958* (NZ) s 3(5).

<sup>7</sup> See *International Criminal Court Act 2001* (UK) ss 53(3), 54(5). See also ss 60(3) and 61(5) in relation to proceedings in Northern Ireland.

<sup>8</sup> See *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, s 9(3).

exercise criminal jurisdiction over individuals responsible for committing such crimes, regardless of where the conduct occurs. In this context, the Attorney-General's consent to prosecute is a crucial mechanism which allows for consultation and coordination to take place with other relevant countries (such as the State in which the crime took place or the State of nationality of the perpetrator) in determining whether Australia is the appropriate forum for a prosecution.

## Section 268.122

Section 268.122 prevents any review of or challenge to a decision by the Attorney-General to give consent to initiate a prosecution, or refuse consent to prosecute, in any court other than the High Court in its original jurisdiction. This is consistent with other decisions that are taken during 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, and that the Attorney-General's consent should be sought.

The rationale for section 268.122 is to preserve decisions of Attorneys-General with respect to consent to prosecute decisions. This is an important safeguard given the intentionally broad discretion that is vested in the Attorney-General within the consent to prosecute process. As noted above, section 268.121 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, prosecutions that are being, or might be, brought in a foreign country, and other matters of public interest such as national security.

There is an intentionally high threshold for the creation of retrospective laws or repealing laws that would have the effect of altering a previous right or entitlement. The effect of the amendment to repeal section 268.122, and the retrospective application of that amendment,<sup>9</sup> would be that any previous decision by an Attorney-General to give or refuse consent to prosecute an offence against Division 268 would no longer be exempt from judicial review, other than on constitutionally protected grounds. This would enable the Attorney-General's decisions on whether to give consent to be re-opened and create significant procedural uncertainty.

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<sup>9</sup> Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024 (Cth) sch 1 item 2 cl 2.