

AUSTRALIAN 
 CENTRE
FOR INTERNATIONAL
JUSTICE 

International Criminal Justice and Victims' Rights: Missing Pieces in Australia's Human Rights Framework

Submission to the Parliamentary Joint
Committee on Human Rights for its Inquiry into
Australia's Human Rights Framework

6 July 2023

About the Australian Centre for International Justice

The Australian Centre for International Justice (ACIJ) is an independent not-for-profit legal centre dedicated to seeking justice and accountability for victims and survivors of serious human rights violations. We work towards developing Australia's role in investigating, prosecuting, and providing remedies for these violations. We work with affected communities and partners locally and abroad in the global fight to end the impunity of those responsible for these violations. Our work is informed by the values of justice, accountability, human rights, dignity, courage and solidarity.

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1 Introduction

The Australian Centre for International Justice (**ACIJ**) welcomes the opportunity to make this submission to the Parliamentary Joint Committee on Human Rights (the **Committee**) Inquiry into Australia's Human Rights Framework (the **Inquiry**). Our submission focuses on the following terms of reference:

- (a) to review the scope and effectiveness of Australia's 2010 Human Rights Framework and the National Human Rights Action Plan; and
- (b) to consider whether the Framework should be re-established, as well as the components of the Framework, and any improvements that should be made.

In addition, the Committee specifically invited submissions on several matters.¹ Of these, our submission focuses on:

- (1) Whether the Australian Parliament should enact a federal Human Rights Act and, if so, what elements it should include (including by reference to the Australian Human Rights Commission's recent Position Paper); and
- (2) Whether existing mechanisms to protect human rights in the federal context are adequate and if improvements should be made.

Primary focus of submission

ACIJ's work focuses on seeking avenues for justice and accountability for victims and survivors of grave human rights abuses, including through the criminal justice system. This submission thus focuses on how international criminal justice and victims' rights mechanisms are inherently linked with human rights, and how Australia's commitment to human rights is incomplete unless it incorporates these mechanisms.

We submit that these mechanisms can be incorporated in a variety of ways:

¹ Parliamentary Joint Committee on Human Rights, 'Inquiry into Australia's Human Rights Framework', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework>.

- (1) The first part of this submission focuses on ways that Australia's 2010 Human Rights Framework and 2012 National Human Rights Action Plan can be updated to include recognition and implementation of international criminal justice and victims' rights mechanisms as a national priority.
- (2) The second part of the submission focuses on how an Australian Human Rights Act could consider victims of international crimes and serious human rights violations.

ACIJ welcomes any further opportunity to provide additional commentary or supplementary submissions to the Committee if it would assist its Inquiry.

Glossary

2010 National Human Rights Framework: a policy document created by the Australian Government in 2010, containing the key areas in which Australia sought to advance human rights.

2012 National Human Rights Action Plan: a policy document created by the Australian Government in 2012, containing the key activities that the Australian Government planned to engage in to improve human rights.

International crimes: the crimes contained in Divisions 268 and 274 of the Commonwealth Criminal Code; namely, crimes against humanity, genocide, war crimes and torture.

Recommendations

This submission argues that Australia must recognise and address the missing pieces of its commitment to human rights: international criminal justice and victims' rights mechanisms. It makes the following recommendations:

Recommendation 1

Australia's 2010 Human Rights Framework should be updated to recognise international criminal justice as a national priority.

Recommendation 2

Australia's 2012 National Human Rights Action Plan should be updated to provide for the establishment of a permanent, specialist international crimes unit.

Recommendation 3

Australia's 2012 National Human Rights Action Plan should be updated to include a commitment to ratifying and advocating for the universality of key international criminal law treaties.

Recommendation 4

Australia's 2012 National Human Rights Action Plan should be updated to include a commitment to reviewing and improving its targeted human rights sanctions framework.

Recommendation 5

The Australian Government should commit to undertake an inquiry into how the rights of victims of international crimes can be better protected in Australia.

Recommendation 6

The rights of victims of international crimes should be reflected in a future federal Human Rights Act.

2 The inherent link between international criminal justice and human rights

An Inquiry into Australia's human rights framework must grapple with what is meant by the term 'human rights' and thereby what matters properly are to be considered as part of a 'human rights framework'. Although Australia's 2010 Human Rights Framework and 2012 National Human Rights Action Plan do not specifically define the term human rights, they refer to the seven core United Nations human rights treaties to which Australia is a party:

- 1) The International Covenant on Civil and Political Rights
- 2) The International Covenant on Economic, Social and Cultural Rights
- 3) The Convention on the Elimination of All Forms of Racial Discrimination
- 4) The Convention on the Elimination of All Forms of Discrimination Against Women
- 5) The Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment
- 6) The Convention on the Rights of the Child
- 7) The Convention on the Rights of Persons with Disabilities

The 2010 Human Rights Framework states that 'these treaties reflect international agreement about the fundamental values that make up 'human rights' protected under the treaties'.² It is therefore reasonable to assume that the 2010 Human Rights Framework conceives of human rights as limited to those expressed in these core human rights treaties.

What is missing from the conception of human rights set out in the 2010 Human Rights Framework and translated into specific activities in the 2012 National Human Rights Action Plan, is the express recognition of the importance of international criminal justice in enhancing and protecting human rights.

International criminal law creates individual criminal liability for the commission of certain crimes of concern to the international community, including war crimes, crimes against

² Australia's Human Rights Framework, 2010, 4.

humanity, genocide and torture. Such crimes involve violations of key human rights obligations, including the right to life and right not to be subjected to torture.³ Impunity for such crimes is pervasive, and this impunity can represent an additional human rights violation for survivors.⁴ The emerging system of international criminal justice provides for investigations and prosecutions at the domestic and international level (including at the International Criminal Court) with a view to ending impunity and preventing reoccurrence.⁵ Criminal proceedings can also be an important aspect of reparations for survivors.⁶ When operating effectively, international criminal justice can therefore promote and protect human rights and provide tangible pathways for the punishment and prevention of human rights violations.

³ Antonio Cassese, *International Criminal Law* (Oxford University Press, 3rd ed, 2013). See also Win-chiat Lee, 'International Crimes and Human Rights' in Borhan Uddin Khan and Md. Jahid Hossain Bhuiyan (eds), *Human Rights and International Criminal Law* (Brill Nijhoff, 2022) 3.

⁴ See *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, General Comment No.3 of the Committee against Torture, CAT/C/GC/3 (19 November 2012) <https://www2.ohchr.org/english/bodies/cat/docs/gc/cat-c-gc-3_en.pdf>; Maeve O'Rourke, 'Prolonged impunity as a continuing situation of torture or ill-treatment' Applying a dignity lens to so-called historical cases' (2019) 66(1) *Netherlands International Law Review*, 101.

⁵ Preamble to the *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('**Rome Statute**').

⁶ See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 (15 December 2005) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>>, Principles I – III.

3 Improving Australia's Human Rights Framework and National Human Rights Action Plan

Australia should recognise international criminal justice as a national priority

Recommendation 1

Australia's 2010 Human Rights Framework should be updated to recognise international criminal justice as a national priority.

The Inquiry has sought submissions on the effectiveness of the 2010 Human Rights Framework, and whether it should be re-established and improved. ACIJ notes and affirms the submission of the Australian Human Rights Commission, which states that the 2010 Human Rights Framework did not meet its objectives due to the lack of mechanisms to hold the Government to account, regular independent monitoring and engagement from State and Territory governments.⁷ ACIJ also notes and affirms the submission of the Australian Human Rights Commission, which supports the establishment of a new, more robust National Human Rights Framework, in order to encourage the advancement of human rights at the national level.⁸

Given the inextricable link between human rights and international criminal law, set out above, any updated Australian Human Rights Framework must include recognition that international criminal justice is a national human rights priority. Further, any updated Action Plan should include substantial activities to improve the application and enforcement of international criminal justice within Australia and the Asia-Pacific region, as explored further below.

⁷ Australian Human Rights Commission, 'Submission: Inquiry into Australia's Human Rights Framework' (Submission, May 2023) <<https://humanrights.gov.au/our-work/legal/submission/submission-inquiry-australias-human-rights-framework>> 4.

⁸ Australian Human Rights Commission, 'Submission: Inquiry into Australia's Human Rights Framework' (Submission, May 2023) <<https://humanrights.gov.au/our-work/legal/submission/submission-inquiry-australias-human-rights-framework>> 6.

Australia must establish a permanent, specialist international crimes unit

Recommendation 2

Australia's 2012 National Human Rights Action Plan should be updated to provide for the establishment of a permanent, specialist international crimes unit.

The 2012 National Human Rights Action Plan listed a number of priority areas, including counter-terrorism, people trafficking, slavery, and slavery-like practices.⁹ A revised Action Plan should include international crimes (war crimes, crimes against humanity, genocide and torture) as a new and distinct priority area.

A key action needed to improve Australia's response to such crimes is the establishment of a permanent, specialist international crimes unit to investigate these crimes.

Australia's legal obligation to investigate and prosecute international crimes

Australia must investigate and prosecute perpetrators of grave human rights abuses, in order to comply with its obligations under international law. These obligations exist by virtue of the treaties to which Australia is a party. The four Geneva Conventions mandate that Australia is obligated to search for persons alleged to have committed any grave breaches of the Geneva Conventions, and bring those persons, regardless of their nationality, before its own courts.¹⁰ The Convention Against Torture requires that Australia take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction, as well as take measures to establish jurisdiction when the alleged offender or victim is a national, or where the alleged offender is present in any territory under its jurisdiction.¹¹ The Preamble of the Rome Statute recalls that it is the duty of every State to

⁹ Australia's National Human Rights Action plan, 2012, 17–21.

¹⁰ *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) article 49; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) article 50; *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) article 129; *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) article 146.

¹¹ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('**Convention Against Torture**') articles 2, 5 to 7.

exercise its criminal jurisdiction over those responsible for international crimes, and emphasises that the International Criminal Court is complementary to national criminal jurisdiction.¹²

Australia's codification of the crimes of the Rome Statute and the Convention Against Torture, through Divisions 268 and 274 of the *Criminal Code Act 1995* (Cth) Schedule (**Commonwealth Criminal Code**) was a first step in implementing Australia's international law obligations. Section 3(3) of the *International Criminal Court Act 2002* (Cth), consistent with the Preamble of the Rome Statute and the cornerstone principle of complementarity, emphasises the primacy of domestic jurisdiction over international crimes.

In addition to these legal obligations, Australia has evinced a clear intention to recognise and uphold the principle of universal jurisdiction. In its statement to the UN's Office of Legal Affairs of the United Nations in May 2016, the Permanent Mission of Australia to the United Nations provided:

Australia recognises universal jurisdiction as a well-established principle of international law, and a key element of efforts to ensure accountability for the most serious crimes of international concern. We welcome the opportunity to reaffirm our views on the scope and application of the principle.

...

Australia believes that, as a general rule, the State in which a crime took place (the territorial State) and the State of nationality of the perpetrator (the national State) have primary jurisdiction and responsibility to hold perpetrators to account. Each State should prohibit serious crimes under their domestic law, and exercise effective jurisdiction over those crimes when they are committed on their territory or by their nationals. In particular, the territorial State is often best placed to obtain evidence, secure witnesses, enforce sentences, and to deliver the 'justice message' to perpetrators, victims and affected communities. Nonetheless, it is a fact that many serious crimes of international concern go unpunished in the territorial and national jurisdiction, including because alleged perpetrators are allowed to leave the jurisdiction.

...

The Australian Parliament has ensured that serious crimes of international concern, including genocide, war crimes, crimes against humanity, piracy, slavery and torture (and secondary and inchoate offences relating to these crimes such as attempt, incitement, complicity, aiding and abetting), are comprehensively criminalised under Australian law, and that Australia has the legal capacity to investigate and prosecute those crimes in accordance with the principle of universal jurisdiction.¹³

¹² Rome Statute Preamble.

¹³ 'Australian Views on the Scope and Application of the Principle of Universal Jurisdiction', *Permanent Mission of Australia to the United Nations* (Note, 3 May 2016)
<http://www.un.org/en/ga/sixth/71/universal_jurisdiction/australia_e.pdf>.

The growing practice of national investigations and prosecutions of international crimes by specialist units

Internationally, there is a growing practice of national prosecutions bringing perpetrators to account for war crimes, crimes against humanity and genocide using the principles of universal and extraterritorial jurisdiction.¹⁴ TRIAL International, in collaboration with other civil society organisations, tracks the progress of universal and extraterritorial jurisdiction cases. Their most recent report highlights the increase in the use of domestic investigations and prosecutions to combat these crimes, with key findings including that there were 57 individuals awaiting trial for international crimes and 23 convictions in 2022.¹⁵

This growing practice of national investigations and prosecutions of international crimes has been supported by the parallel rise in countries which have specialised investigative and/or prosecutorial units focusing on these crimes. There are a number of studies which have assessed the effectiveness of these specialised international crimes units. The EU Genocide Network and Eurojust's 2022 Report concerning developments in the fight against impunity for core international crimes in the EU noted that 'specialised units are much better equipped to deal with the specific challenges posed by the investigation and prosecution of core international crimes. Specialised units gradually gain experience and retain knowledge within the same team, which ultimately facilitates the identification, investigation and prosecution of alleged perpetrators'.¹⁶ Likewise, the International Center for Transitional Justice's 2022 Report, which analysed the practice of specialised investigative and prosecutorial international crimes units globally, stated that 'countries with specialized units are likely to achieve considerably more success in investigating and prosecuting crimes of the past and international crimes when compared with countries without dedicated capacities'.¹⁷

¹⁴ Karolina Aksamitowska, 'War Crimes Units: Legislative, Organisational and Technical Lessons', *Asser Institute Centre for International and European Law* (Report, September 2021) <<https://www.asser.nl/media/795205/karolina-aksamitowska-war-crimes-units-legislative-organisational-and-technical-lessons-eng.pdf>> 7.

¹⁵ Shoshana Levy, 'Universal Jurisdiction Annual Review 2023', *TRIAL International*, (Report, 2023) <https://trialinternational.org/wp-content/uploads/2023/04/01_TRIAL_UJAR_2023_DIGITAL_27_03.pdf> 13.

¹⁶ EU Genocide Network and Eurojust, '20 Years On: Main Developments in the Fight Against Impunity for Core International Crimes in the EU', *EUROJUST* (Report, May 2022) <<https://www.eurojust.europa.eu/sites/default/files/assets/developments-in-the-fight-against-impunity-for-core-international-crimes-in-the-eu.pdf>> 10.

¹⁷ Howard Varney and Katarzyna Zdunczyk, 'Gearing Up the Fight Against Impunity: Dedicative Investigative and Prosecutorial Capacities', *International Center for Transitional Justice* (Report, March 2022) <https://www.ictj.org/sites/default/files/2022-03/ICTJ_Report_Specialized_Units_Web.pdf> 57.

Some notable, recent examples of universal jurisdiction investigations and prosecutions by States which have specialised investigatory units include:

In **Sweden**, the investigation, prosecution and conviction of a former Iranian prosecutor involved in the mass execution of prisoners in Iran in 1988;¹⁸

In **Germany**, the structural investigation into international crimes committed by Syrian military intelligence services, which has so far resulted in the conviction of two former members of the Syrian intelligence services, the ongoing prosecution of a former doctor who had worked for the Syrian intelligence services, and the issuing of an arrest warrant against the former head of one of the Syrian intelligence services, Jamil Hassan;¹⁹

In the **United Kingdom**, the arrest and investigation by the Metropolitan Police War Crimes team of an individual suspected of the war crime of murder of a Sri Lankan Tamil journalist in 2000, 22 years after the crime occurred in Sri Lanka;²⁰

In **France**, the conviction of a former Liberian rebel commander for complicity in crimes against humanity for acts committed during Liberia's first civil war more than 25 years ago,²¹ and the issuing of three international arrest warrants against three senior advisers to Syria's Bashar al-Assad for complicity in crimes against humanity and war crimes.²²

Absence of a specialist unit in Australia contributes to investigative failures

Australia has the legal capacity and stated commitment to investigate and prosecute serious international crimes. There appears, however, to be a gap between Australia's legal capacity

¹⁸ David Gritten, 'Swedish court convicts Iranian ex-official over 1988 executions', *BBC News* (online, 14 July 2022) <<https://www.bbc.com/news/world-europe-62162676>>.

¹⁹ 'Universal Jurisdiction Annual Review 2022', *TRIAL International* (Report, 2022) <<https://trialinternational.org/latest-post/2021-highlights-in-the-universal-jurisdiction-annual-review-ujar-released-today/>> 52.

²⁰ 'Rights Groups Welcome Arrest in the UK of Suspected Killer of BBC Journalist in Sri Lanka 22-years ago', *Redress* (Press Release, 25 February 2022) <<https://redress.org/news/rights-groups-welcome-arrest-in-the-uk-of-suspected-killer-of-bbc-journalist-in-sri-lanka-22-years-ago/>>.

²¹ Kim Willsher, 'French court convicts former Liberian rebel commander over atrocities', *The Guardian* (online, 3 November 2022) <<https://www.theguardian.com/world/2022/nov/02/french-court-convicts-former-liberian-rebel-commander-over-atrocities>>.

²² 'France to try Syrian regime officials for crimes against humanity', *Al Jazeera* (online, 5 April 2023) <<https://www.aljazeera.com/news/2023/4/5/france-to-try-syrian-regime-officials-for-crimes-against-humanity>>.

to investigate and prosecute these crimes and its structural and institutional ability and willingness to do so.

Unlike countries such as the Netherlands, Sweden, Germany, the USA and the UK, Australia does not have a permanent, specialised unit dedicated to the investigation of war crimes and other international crimes. While the Office of the Special Investigator (**OSI**) has been established to investigate potential war crimes during Australia's engagement in Afghanistan, it is a temporary unit with a limited remit.²³ The absence of a permanent, specialised investigations unit for war crimes and other international crimes means that the Australian Federal Police (**AFP**) may lack the expertise, resources and support services necessary to consistently and appropriately investigate these crimes. The potential limitations of not having a permanent, specialised international crimes unit are highlighted by the following two cases studies.

Referral to AFP for investigation of retired Sri Lankan General: In October 2019 by ACIJ, the International Truth and Justice Project (**ITJP**) and Human Rights Law Centre to investigate retired General Jagath Jayasuriya of Sri Lanka, for serious allegations of torture, war crimes and crimes against humanity committed under his command in the final phase of the Sri Lankan civil war in 2009.²⁴ Notwithstanding multiple requests for an update in relation to the request, it was not until September 2021 (two years after the initial request was made) that the AFP provided a written response which stated that the matter had not been allocated to an investigations team for review due to an 'administrative oversight'.²⁵

Referral to AFP for investigation of allegations of war crimes concerning Ben Roberts-Smith: While the defamation case substantiated, to a civil standard of proof, that Roberts-Smith was involved in the murders of three Afghan victims during his deployment to Afghanistan, the AFP investigations had to be abandoned due to issues with evidence collection and derivative use immunity arising out of the Inspector-General of the Australian Defence Force (**IGADF**)

²³ See 'Inquiry into Australia's Engagement in Afghanistan – Submission to the Senate Foreign Affairs, Defence and Trade References Committee', *Australian Centre for International Justice* (Submission, 13 October 2021) <https://acij.org.au/wp-content/uploads/2021/10/Australian-Centre-for-International-Justice-Inquiry-Submission-Australias-Engagment-in-Afghanistan_.pdf> 20.

²⁴ 'The Case Against Jagath Jayasuriya', *Australian Centre for International Justice* (Web Page) <<https://acij.org.au/our-work/international-accountability/sri-lanka/accountability-for-crimes-in-sri-lanka/case-against-sri-lankan-general-jagath-jayasuriya/>>.

²⁵ Letter from the Australian Federal Police dated 31 January 2022 <https://acij.org.au/wp-content/uploads/2022/03/2022-01-31-Correspondence-from-AFP-to-ACIJ-ITJP_wb.pdf>.

Afghanistan Inquiry, also known as the Brereton Inquiry. The investigation has now been handed over to a new taskforce, Operation Emerald, which is a joint AFP/OSI investigation.²⁶

There are many other examples of Australia being a safe haven for perpetrators of international crimes, likely due to its insufficient institutional framework to undertake robust atrocity crime investigation and prosecution. As noted in a 2009 Lowy Institute Policy Brief, it is likely that Australia is home to suspected war criminals from countries of the former Yugoslavia, Cambodia, and possibly Rwanda and East Timor.²⁷ Dual Australian-Serbian citizen Dragan Vasiljkovic lived for decades in Australia before his extradition and subsequent conviction for war crimes,²⁸ as did Zoran Tadic before he fled to Serbia, to escape extradition to Croatia for his participation and involvement in the murder and torture of 43 villagers in 1991.²⁹ As recently as 2022, there have been reports that the AFP knew of 70 suspected Yugoslav war criminals present in Australia.³⁰ The Australian Government and AFP's 'scandalous, do nothing'³¹ approach to investigating international crimes, and the need for a

²⁶ Nick McKenzie, 'Massive blow: AFP war crimes probe collapses over risk of tainted evidence', *Sydney Morning Herald* (online, 14 June 2023) <<https://www.smh.com.au/national/massive-blow-afp-war-crimes-probe-collapses-over-risk-of-tainted-evidence-20230613-p5dg7c.html>>; Ben Doherty, 'Australian federal police abandon two alleged murder investigations into Ben Roberts-Smith', *The Guardian* (online, 14 June 2023) <<https://www.theguardian.com/australia-news/2023/jun/14/australian-federal-police-abandon-two-alleged-investigations-into-ben-roberts-smith>>.

²⁷ Fergus Hanson, 'Confronting Reality: Responding to War Criminals Living in Australia', *Lowy Institute* (Policy Brief, February 2009) <https://www.lowyinstitute.org/sites/default/files/pubfiles/Hanson%2C_Confronting_reality_1.pdf> 4.

²⁸ Sacha Payne, 'Australia could have 'hundreds, if not thousands' of war criminals like Vasiljkovic', *SBS News* (online, 27 September 2017) <<https://www.sbs.com.au/news/article/australia-could-have-hundreds-if-not-thousands-of-war-criminals-like-vasiljkovic/t101h1y1y>>; 'Ex-Serbian commander Captain Dragan sentenced to 15 years over murder, torture, war crimes', *ABC News* (online, 26 September 2017) <<https://www.abc.net.au/news/2017-09-26/ex-serbian-commander-jailed-over-murder-torture-war-crimes/8990960>>.

²⁹ Jarni Blakkarly, 'Australian man to face 'shocking' war crimes charges in Croatia', *SBS News* (online, 4 February 2019) <<https://www.sbs.com.au/news/article/australian-man-to-face-shocking-war-crimes-charges-in-croatia/gl463g50r>>;

³⁰ James Baylis, 'Securing Australia from the perpetrators of atrocities', *The Strategist* (online, 20 May 2022) <<https://www.aspistrategist.org.au/securing-australia-from-the-perpetrators-of-atrocities/#:~:text=In%202022%2C%20GB%20examined%20a,the%20country%20and%20seeking%20citizenship>>; Rawan Arraf, 'Is Australia a safe haven for war criminals and torturers?', *Right Now* (online, 31 July 2020) <<https://rightnow.org.au/opinion/australia-a-safe-haven-for-war-criminals-and-torturers/>>.

³¹ Mark Corcoran, 'Lack of War Crimes Investigations 'A Scandal'', *ABC* (online, 2 April 2012) <<https://www.abc.net.au/news/2012-03-30/experts-slam-lack-of-war-crimes-investigations/3922954>>.

permanent, specialist international crimes unit, has been highlighted repeatedly in the media and by civil society.³²

³² See, for example, Tom Hyland, 'Haven for war suspects', *The Age* (online, 14 January 2007) <<https://www.theage.com.au/national/haven-for-war-suspects-20070114-ge3zje.html>>; Christopher Knaus, 'Wanted Croatian war crimes suspect lived openly under Australian government's nose', *The Canberra Times* (online, 23 April 2018) <<https://www.canberratimes.com.au/story/6077966/wanted-croatian-war-crimes-suspect-lived-openly-under-australian-governments-nose/>>; James Baylis, 'Securing Australia from the perpetrators of atrocities', *The Strategist* (online, 20 May 2022) <<https://www.aspistrategist.org.au/securing-australia-from-the-perpetrators-of-atrocities/#:~:text=In%202022%2C%20GB%20examined%20a,the%20country%20and%20seeking%20citizenship>>; Mark Aarons, *War Criminals Welcome: Australia, a Sanctuary for Fugitive War Criminals since 1945* (2020, Black Inc); Fergus Hanson, 'Confronting Reality: Responding to War Criminals Living in Australia', *Lowy Institute* (Policy Brief, February 2009) <https://www.lowyinstitute.org/sites/default/files/pubfiles/Hanson%2C_Confronting_reality_1.pdf>; Fergus Hanson and Mark Ierace, 'Legal haven for war criminals', *The Sydney Morning Herald* (online, 7 November 2009) <<https://www.smh.com.au/politics/federal/legal-haven-for-war-criminals-20091106-i22l.html>>; 'Australia a war criminals safe haven', *The Age* (online, 5 December 2005) <<https://www.theage.com.au/national/australia-a-war-criminals-safe-haven-20051205-ge1dbj.html>>; Branko Miletic, 'Welcome to Australia, beautiful one day, full of war criminals the next', *Independent Australia* (online, 31 January 2019) <<https://independentaustralia.net/life/life-display/welcome-to-australia-beautiful-one-day-full-of-war-criminals-the-next,12331>>; Rawan Arraf 'Australia needs a permanent war crimes investigation unit', *The Age* (online, 7 October 2020) <<https://www.theage.com.au/politics/federal/australia-needs-a-permanent-war-crimes-investigation-unit-20201005-p562a2.html>>; 'Media Release: The establishment of the Office of the Special Investigator is welcome and should be made permanent', *Australian Centre for International Justice* (Media Release, 12 November 2020) <<https://acij.org.au/media-release-the-establishment-of-the-office-of-the-special-investigator-is-welcome-and-should-be-made-permanent/>>; '2019 – 2010 Pre-Budget Submission', *Australian Centre for International Justice* (Submission, 28 February 2019) <https://acij.org.au/wp-content/uploads/2019/07/ACIJ-Pre-Budget-Submission_Rev2.pdf>; Human Rights Law Centre and Australian Centre for International Justice, 'Reform required to end corporate impunity: Submission to the Australian Law Reform Commission's Review into Australia's corporate criminal responsibility regime', *Australian Centre for International Justice* (Submission, 31 January 2020) <<https://acij.org.au/wp-content/uploads/2020/02/HRLC-and-ACIJ-ALRC-Corporate-Criminal-Responsibility-Submission.pdf>>; 'UN Universal Periodic Review of Australia's human rights performance: Joint NGO report', *Australian Centre for International Justice* (Media Release, 22 July 2020) <<https://acij.org.au/un-universal-periodic-review-of-australias-human-rights-performance-joint-ngo-report/>>; 'Advancing International Justice in Australia Structural and Institutional Reform', *Australian Centre for International Justice* (Web Page) <https://acij.org.au/our-work/policy-and-law-reform/advancinginternational-justice-in-australia/>; Bruce Jones, 'War Crimes Unit 'Must Be Retained'', *The Sun-Herald* (online, 15 May 1994) <link.gale.com/apps/doc/A296259917/STND?u=unimelb&sid=bookmark-STND&xid=c61600e4>; Gideon Boas and Pascale Chifflet, 'Suspected War Criminals in Australia: Law and Policy' (2016) 40(1) *Melbourne University Law Review* 46; Konrad Kwiet, 'A Historian's View: The War Crimes Debate Down Under' (2010) 24 *Dapim: Studies on the Shoah* 319; John Stapleton's 2009 Lowy Institute Report, as referenced by Eliana Chiovetta, 'Essay: A Sad Legacy', *Australia/Israel & Jewish Affairs Council* (Essay, 1 September 2022) <<https://aijac.org.au/australia-israel-review/essay-a-sad-legacy/>>; Gideon Boas and Pascale Chifflet, 'Inconsistency bedevils Australia's prosecution of war criminals', *The Conversation* (online, 4 October 2016) <<https://theconversation.com/inconsistency-bedevils-australias-prosecution-of-war-criminals-66039>>; David Macgregor, 'Bringing War Criminals to Justice in Australia' (2007) 32(3) *Alternative Law Journal* 154; Mark Ierace SC, 'Proposal: An Australian War Crimes Unit' (9 March 2014); Tim McCormack, 'If I Were Attorney-General', *Human Rights Law Centre* (Bulletin Number 50, June 2010); Fergus Hanson, 'Confronting Reality:

Shortcomings in Australia's capacity to investigate international crimes and serious human rights abuses reinforces impunity and denies access to justice to victims present in the region and within Australia's diaspora communities.

Australia can address the gap in its Action Plan, which currently ignores international criminal law concerns, by making a commitment to enforcing the international criminal law provisions in the Commonwealth Criminal Code and contributing to addressing the challenges posed by for grave crimes. The first step towards meeting this commitment should be the establishment of a specialist, permanent investigations unit that is primarily tasked with investigating the international crimes offences in the Commonwealth Criminal Code.

Such a unit should adopt the best practices of similar units around the world, particularly in respect of committing to the principles of transparency, independence, cooperation with international agencies and civil society amendment to the organisations, and having a victim-centric approach where possible through providing witness protection and a nuanced gender, cultural and trauma informed practice. This would ensure that Australia is fully compliant with its international obligations to investigate and prosecute serious international crimes. It would also help to retain the knowledge and experience of complex international crimes investigations gained through the work of the OSI; provide a clearer mechanism to break the cycle of impunity currently enjoyed by perpetrators in the region; and, most importantly, create an avenue for survivor communities in the region and in Australia's diaspora communities to seek justice.

Australia must commit to ratifying and advocating for the universality of key international criminal justice treaties

Recommendation 3

Australia's 2012 National Human Rights Action Plan should be updated to include a commitment to ratifying and advocating for the universality of key international criminal law treaties.

Ratification of key international criminal law treaties

The 2012 National Human Rights Action Plan includes 'Australia's international human rights commitments' as a priority area. It outlines various commitments that Australia planned to make in relation to various human rights treaties, and funding for different organisations to aid in the promotion of human rights in the region.

ACIJ recommend that an updated Action Plan affirm Australia's commitment to considering and ratifying key international criminal law treaties and amendments. These include:

- The Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression;
- The International Convention for the Protection of All Persons from Enforced Disappearance;
- The Ljubljana-Hague Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and other International Crimes; and
- The Crimes Against Humanity Treaty (once finalised).

All of these treaties and amendments, once ratified and incorporated into Australian law, will advance Australia's commitment to international criminal justice and human rights in different ways.

Australia's long overdue ratification of the amendments to the Rome Statute to recognise the crime of aggression, and implementing the crime within the Commonwealth Criminal Code, will finally help to ensure that this grave crime will not go unpunished. Likewise, consideration of the ratification of the International Convention for the Protection of All Persons from Enforced Disappearances – which the 2012 National Human Rights Action Plan contained reference to – will provide a pathway for recognition of this crime and inclusion of it within Australia's domestic criminal law framework. The Ljubljana-Hague Convention, which Australia has already publicly supported, will make it easier for States to cooperate during their domestic investigations of atrocity crimes. The Crimes Against Humanity Treaty, which is still under consideration by the Sixth Committee, will firmly entrench the responsibility of States to investigate and prosecute these crimes.

As such, an updated Action Plan should include Australia's commitment to considering and ratifying these key international criminal law treaties.

Advocating for the universality of key international criminal law treaties

The efficacy of the emerging system of international criminal justice relies on the cooperation and involvement of as many States as possible. Australia should therefore commit to advocating for the universality of key international criminal law treaties.

As a priority, Australia could focus on promoting the universality of the Rome Statute, and in particular, accession by States in our region. Broadening the jurisdiction of the ICC will limit the number of safe havens available to perpetrators. It will also create obligations upon States Parties to cooperate with the ICC, for example, to act upon warrants for the arrest of suspects.³³ Furthermore, it will help to ensure pathways to justice for survivors and affected communities.

Asia-Pacific States are under-represented in the membership of the ICC, with only 35% of States in the 'Asia-Pacific Group of States' being parties to the Rome Statute.³⁴ Notable absences from our region include: Bhutan, Brunei, China, India, Indonesia, Laos, Malaysia, Myanmar, Nepal, New Caledonia, North Korea, Pakistan, Palau, Papua New Guinea, Philippines, Singapore, Solomon Islands, Sri Lanka, Thailand, Tonga, Tuvalu and Vietnam.

Thailand signed the Rome Statute in October 2000 but has not ratified the Statute. The Philippines signed in December 2000 and ratified in August 2011 but notified the Secretary-General of their decision to withdraw from the Rome Statute on 17 March 2018 with effect from 17 March 2019.³⁵ The ICC still has jurisdiction to consider crimes committed before the Philippines withdrawal, and indeed continues to investigate the extrajudicial killings and other

³³ The ICC currently lists 14 defendants as being "at large", subject to outstanding arrest warrants issued by the ICC, which does not include the most recent arrest warrants issued against Russian President Vladimir Putin and Commissioner for Children's Rights Maria Lvova-Belova for alleged crimes committed in Ukraine. See 'Defendants', *International Criminal Court* (Web Page) <https://www.icc-cpi.int/defendants?f%5B0%5D=accused_states%3A329>; 'Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova', *International Criminal Court* (Press Release, 17 March 2023) <<https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>>.

³⁴ International Criminal Court, 'Joining the ICC: Asia-Pacific States' (2022) (Web Page) <<https://www.icc-cpi.int/sites/default/files/2022-09/universality-asia-eng-v.11-web.pdf>>.

³⁵ 'Rome Statute of the International Criminal Court, Rome, 17 July 1998', *UN Treaties* (Web Page) <<https://www.icc-cpi.int/victims/republic-philippines>>.

crimes during former President Rodrigo Duterte's time as mayor and president³⁶ on the basis that these crimes were allegedly committed prior to the Philippines withdrawal from the Rome Statute. The Philippines has filed a notice of appeal in relation to the ICC's jurisdiction.³⁷

In 2012, an ABC news article reported comments from former President of the ICC, Judge Sang-Hyun Song, urging Australia to use its influence to encourage States in the region to become signatories to the ICC.³⁸ The article also included comments from the Department of Foreign Affairs (**DFAT**), which stated that it was 'convening a roundtable aimed at encouraging Pacific Islands states to accede to the Rome Statute, and those already party to the Statute to implement their obligations'.³⁹

More recently, there has been a call for major States that have ratified the Statute, including Australia, to play a role in encouraging non-member States in the region to ratify or accede to the Rome Statute.⁴⁰ This is consistent with broader calls for the Rome Statute's universality in the region.⁴¹

It is unclear whether the Australian Government is currently involved in any activities aimed at encouraging States in the region to accede to the Rome Statute. An updated Action Plan should include a commitment to advocating for the universality of key international criminal law treaties, with a focus on the Rome Statute, within our region. Such a commitment could meaningfully enhance the efficacy of the international criminal justice system.

³⁶ 'International Criminal Court's Philippines Investigation: Questions and Answers from Human Rights Watch', Human Rights Watch (Web Page, 13 February 2023) <<https://www.hrw.org/news/2023/02/13/international-criminal-courts-philippines-investigation#didntthe>>.

³⁷ 'Information for Victims – Republic of the Philippines – The situation in the Philippines', International Criminal Court (Web Page) <<https://www.icc-cpi.int/victims/republic-philippines>>.

³⁸ Lexi Metherell, 'Australia urged to seek Asian recruits for ICC', *ABC News* (online, 14 February 2012) <<https://www.abc.net.au/news/2012-02-14/australia-urged-to-help-boost-icc-members/3830038>>.

³⁹ Lexi Metherell, 'Australia urged to seek Asian recruits for ICC', *ABC News* (online, 14 February 2012) <<https://www.abc.net.au/news/2012-02-14/australia-urged-to-help-boost-icc-members/3830038>>.

⁴⁰ Asia-Pacific Centre for the Responsibility to Protect and the University of Queensland, 'The Rome Statute in the Asia-Pacific', *Asia-Pacific Centre for the Responsibility to Protect* (Report, August 2021) <https://r2pasiapacific.org/files/7362/2021_THE_ROME_STATUTE_IN_THE_ASIA_PACIFIC.pdf> 22.

⁴¹ Coalition for the International Criminal Court, 'Asia-Pacific: A Region with a lot to Offer' (Online) <<https://www.coalitionfortheicc.org/countries/asiapacific>>; Parliamentarians for Global Action, 'The Challenge: Fighting Against Impunity for International Crimes', *Campaign for the Universality and Effectiveness of the Systems of the Rome Statute of the International Criminal Court (ICC)* <<https://www.pgaction.org/ilhr/rome-statute/>>; Parliamentarians for Global Action, 'Why the Asia-Pacific', *Asia-Pacific Working Group* (Web Page) <<https://www.pgaction.org/ilhr/rome-statute/asia-pacific-working-group.html>>.

Australia must commit to reviewing and improving its targeted human rights sanctions framework

Recommendation 4

Australia's 2012 National Human Rights Action Plan should be updated to include a commitment to reviewing and improving its targeted human rights sanctions framework.

Sanctions are an important tool for holding human rights violators accountable,⁴² and therefore form an essential aspect of Australia's human rights framework and revised Action Plan. As acknowledged in ACIJ's submissions to the Inquiry into whether Australia should examine the use of targeted sanctions to address human rights abuses,⁴³ criminal investigations and prosecutions are not always feasible in all situations and in circumstances where perpetrators may otherwise enjoy impunity, 'targeted sanctions can be a powerful and transformative tool in an architecture of accountability'. This is because, as Professor Ben Saul notes, targeted sanctions 'are important in stigmatising and deterring violators, bringing pressure for accountability, expressing solidarity with victims, and reaffirming a global commitment to human rights'.⁴⁴

On 8 December 2021, Australia's Magnitsky-style thematic sanctions regime came into effect. The amendments to the *Autonomous Sanctions Act 2011* (Cth) mean that the autonomous sanctions regime, established under the *Autonomous Sanctions Regulations 2011* (Cth), can now address themes including serious violations or serious abuses of human rights and activities undermining good governance or the rule of law.⁴⁵

⁴² See, for example, European Parliament Resolution 2019/2580 (RSP) of 14 March 2019, on a European Human Rights Violations Sanctions Regime <www.europarl.europa.eu/doceo/document/TA-8-2019-0215_EN.html> [12].

⁴³ 'Submission: Australian human rights sanction regime', *Australian Centre for International Justice* (Submission, 23 March 2020) <<https://acij.org.au/submission-australian-human-rights-sanctions-regime-magnitsky/>> [33]; Australian Centre for International Justice, 'Inquiry into an Australian Human Rights Sanctions Regime', *Joint Standing Committee on Foreign Affairs, Defence and Trade* (Submission, 28 February 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/MagnitskyAct/Submissions> [33].

⁴⁴ Ben Saul, 'Opinion: What Australia can do about Iran's killing, torture and rape of brave women', *The Sydney Morning Herald* (online, 27 November 2022) <<https://www.smh.com.au/world/middle-east/what-australia-can-do-about-iran-s-killing-torture-and-rape-of-brave-women-20221124-p5c14u.html?btis>>.

⁴⁵ 'Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Act 2021', *Australian Government Department of Foreign Affairs and Trade* (Web Page, 8 December 2021) <<https://www.dfat.gov.au/news/news/autonomous-sanctions-amendment-magnitsky-style-and-other-thematic-sanctions-act-2021>>.

Australia's adoption of these targeted human rights sanctions laws and regulations was a step in the right direction. However, the success of Australia's targeted human rights sanctions regime depends now on the effectiveness of its implementation and operation. Australia must make a commitment to reviewing and improving its targeted human rights sanctions framework. Such a commitment could address certain deficiencies in the framework, such as the inconsistent approach to sanctions designations, the lack of a clear process for the contribution and submission of information from civil society organisations, unnecessary limitations on the definition of 'serious violations or serious abuses of human rights', the failure to specify the regulatory regime for serious violations of international humanitarian law, the lack of an oversight mechanism, and insufficient transparency in relation to the grant of sanctions permits and sanctions enforcement.

Australia must close gaps in access to justice for victims of international crimes

Recommendation 5

The Australian Government should commit to undertake an inquiry into how the rights of victims of international crimes can be better protected in Australia.

The 2012 National Human Rights Action Plan includes 'access to justice' as a priority area, describing in detail the legal protections, remedies, and support services available to victims of domestic crimes at the State and Territory level.⁴⁶

However, it fails to acknowledge or address the rights of victims of international crimes. Further, as set out below, the rights of victims of international crimes are currently overlooked in Australia's legal and institutional frameworks.

Given the complexity of issues to be addressed to give effect to the rights of victims of international crimes, there is a need for the Australian Government to not only consider how the rights of victims of international crimes will fit into an updated Human Rights Framework and Action Plan, but more broadly, to determine what legal and institutional mechanisms will best ensure the creation, protection and advancement of these rights. A public inquiry would be best placed to explore these matters comprehensively. An inquiry could devote sufficient resources to considering key issues such as access to reparation and compensation, access to information, victim participation and access to support services.

The section below highlights the major relevant gaps in Australian law and practice in respect of these issues.

Access to reparation and compensation

The right of victims of human rights violations to 'adequate, effective and prompt' reparation is well established in international law.⁴⁷ Australia has an international legal obligation to

⁴⁶ Australia's National Human Rights Action Plan, 2012, 5.

⁴⁷ *Universal Declaration of Human Rights*, GA Res 217 (III), UN GAOR, UN Doc A/810 (10 December 1948) art 8; *International Covenant on Civil and Political Rights*, opened for signature on 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976) arts 2(3), 9(5) ('**ICCPR**'); *Convention Against Torture* art 14(1); *Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGA Res 60/147, A/RES/60/147 (16 December 2005), [11(b)], [15] ('**UN Principles on Reparation**'); *Declaration of Basic*

ensure the availability of reparation to victims of gross violations of international human rights law and serious violations of international humanitarian law, for acts or omissions that are attributable to the State.⁴⁸ States should also 'endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations'.⁴⁹ Compensation is the most common reparation measure afforded for remedying harm arising from international crimes,⁵⁰ but there are a wide range of other measures including rehabilitation, restitution, satisfaction and guarantees of non-repetition.⁵¹ To satisfy their international law obligations, States are required to develop formal or informal procedures for victims to claim and receive remedy, including by establishing 'judicial and administrative mechanisms'.⁵² The procedure must be 'expeditious, fair, inexpensive and accessible'.⁵³

Australia lacks compliance with these obligations. This is because there are extremely limited mechanisms currently in place in Australia for victims of international crimes to obtain reparation. While victims of international crimes could attempt to seek reparation pursuant to section 21B of the *Crimes Act 1914* (Cth), which provides that a court may order an offender of a Commonwealth crime to make reparations by way of monetary payment or otherwise, to the victim for 'any loss suffered, or any expense incurred' as a result of the crime,⁵⁴ their success could be undermined by several limitations. First, a reparation order can only be issued if the defendant has been convicted of a federal offence, or if the offence is proven against the defendant but they are discharged without conviction. In Australia, Divisions 268

Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res 40/34, A/RES/40/34 (29 November 1985), [4] ('**UN Principles of Justice**').

⁴⁸ *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83 UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) art 31('**Responsibility of States for Internationally Wrongful Acts**'); UN Principles on Reparation, [1(c)], [3(d)]; [11(b)]; [12(d)], 15-18; *UN Principles of Justice*, [5], [12], [19].

⁴⁹ UN Principles on Reparation art 16.

⁵⁰ For examples of the provision of compensation for human rights and international humanitarian law violations see Carla Ferstman, 'Implementing the Brereton Report Recommendations: Reparations for Afghan Victims of Australian Special Forces Abuses' (Expert Opinion Prepared for the Australian Centre for International Justice, 28 November 2022) in Australian Centre for International Justice, *Afghanistan Inquiry: Assessing the Australian Government's Response* (Report, 29 November 2022), 12-15; Octavio Amezcua-Noriega and Clara Sandoval, *Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections* (Briefing Paper No.1, August 2011), 9.

⁵¹ UN Principles of Reparation 18; *Responsibility of States for Internationally Wrongful Acts* art 34; Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the ICCPR*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [16].

⁵² UN Principles of Justice [5]; UN Principles on Reparation [12(d)].

⁵³ UN Principles of Justice [5].

⁵⁴ *Crimes Act 1914* (Cth) s 21B(1)(c), s 21B(d).

and 274 crimes (the international crimes offences) are rarely investigated and prosecuted. Second, reparation orders are discretionary even if an offence is proven and the offender is convicted.⁵⁵ Third, Section 21B(2) makes clear that an offender cannot face imprisonment for a failure to pay the amount ordered by the court.

Outside of this flawed mechanism, options for reparation are limited. For example, while all States and Territories in Australia have victims of crime compensation schemes,⁵⁶ there is no compensation scheme for federal offences, leaving international crimes offences unaccounted for. The negative impact of this is demonstrated by the experiences of Afghan and Yazidi victims in cases with a link to Australia.

Afghan victims of alleged war crimes by Australian Special Forces have not yet received compensation. In November 2020, the Inspector-General of the Australian Defence Force Afghanistan Inquiry Report recommended *prompt* compensation for Afghan survivors and families of victims.⁵⁷ While the Department of Defence has expressed that it is supervising intra-departmental consultations regarding the recommendation,⁵⁸ the Government is yet to release a compensation plan. It remains unclear whether reparation experts are involved in the design of the plan and the ongoing consultations, and what measures are in place to ensure that the plan meets international standards and will be implemented.

The case of Yazidi survivors highlights the inability of victims of international crimes to access support schemes available in Australian States and Territories. In New South Wales, victims of an 'act of violence' are eligible for compensation and other forms of support such as

⁵⁵ Ibid s 21(B)(1)(a)-(b).

⁵⁶ See, eg, *Victims of Crime Assistance Act 1996* (VIC); *Victims' Charter Act 2006* (VIC); *Victims of Crime Act 2001* (SA); *Victims of Crime (Statutory Compensation) Regulations 2019* (SA); *Victims of Crime (Financial Assistance) ACT 2016* (ACT); *Victims Right and Support Act 2013* (NSW); *Victims of Crime Act 1994* (WA); *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Assistance Act 2006* (NT); *Victims of Crime Assistance Act 1976* (Tas); *Victims of Crime Rights and Services Act 2006* (NT); 'Criminal Injuries Compensation: Victims of Crime', *Government of Western Australia* (Web Page, 2 March 2023)

<https://www.wa.gov.au/organisation/departments-of-justice/commissioner-victims-of-crime/criminal-injuries-compensation-victims-of-crime>; 'Financial Assistance for Victims of Crime', *Queensland Government* (Web Page) <https://www.qld.gov.au/law/crime-and-police/victims-and-witnesses-of-crime/financial-assistance>;

⁵⁷ Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report* (November 2020) 41 [76].

⁵⁸ Response Letter from Department of Defence to the Australian Centre for International Justice, 2 September 2022; Daniel Hurst, 'Australian Government Misses Compensation Deadline for Victims of Alleged War Crimes', *The Guardian* (online, 24 April 2022), https://www.theguardian.com/australia-news/2022/apr/24/australian-government-misses-compensation-deadline-for-victims-of-alleged-war-crimes?utm_term=6264af24c8464f49169882624d21aef9&utm_campaign=GuardianTodayAUS&utm_source=esp&utm_medium=Email&CMP=GTAU_email.

counselling under the *Victims Rights and Support Act 2013* (VRSA). Five Yazidi women applied to the NSW Commissioner of Victims' Rights for victim support under VRSA.⁵⁹ They were allegedly subjected to acts of violence including enslavement, torture, and sexual violence by an Australian citizen, Khaled Sharrouf.⁶⁰ Sharrouf was a resident of NSW, who after serving time for terrorism offences, left Australia in 2013 and joined Da'esh (Islamic State).⁶¹ The applicants' request for support was dismissed on the basis that support under VRSA is not available to them because the acts of violence did not occur within NSW.⁶²

Moreover, it was reported that the NSW Crime Commission began attempts to seize assets belonging to the offender in 2016.⁶³ Sharrouf was never prosecuted for international crimes to trigger the mechanism under section 21B of the *Crimes Act 1914 (Cth)*, for claiming compensation from the perpetrator. Sharrouf was reportedly killed in 2016.⁶⁴ Several

⁵⁹ 'Australia High Court Declines to Provide Reparations to Yazidi Victims of Enslavement, Sexual Violence and Crimes Against Humanity Perpetrated by an Australian Foreign Fighter of so Called "Islamic State"', *Hogan Lovells* (Press Release, 30 April 2021) <https://www.hoganlovells.com/en/news/australia-high-court-declines-to-provide-reparations-to-yazidi-victims-of-enslavement-sexual-violence-and-crimes-against-humanity-perpetrated-by-an-australian-foreign-fighter-of-so-called-islamic-state>; Tatyana Eatwell and Jessie Smith, 'Yazidi Survivors of Torture by IS Submit Complaint to UN Committee Against Torture', *Doughty Street Chambers* (Web Page, 24 March 2023) <https://www.doughtystreet.co.uk/news/yazidi-survivors-torture-submit-complaint-un-committee-against-torture>; Daniel Hurst, 'Yazidi Women Fail in Claim for Compensation in Australia for Actions of ISIS Fighter Khaled Sharrouf', *The Guardian* (Online, 14 April 2021) <https://www.theguardian.com/australia-news/2021/apr/14/yazidi-women-fail-in-claim-for-compensation-in-australia-for-actions-of-isis-fighter-khaled-sharrouf>.

⁶⁰ Ibid.

⁶¹ 'Australia High Court Declines to Provide Reparations to Yazidi Victims of Enslavement, Sexual Violence and Crimes Against Humanity Perpetrated by an Australian Foreign Fighter of so Called "Islamic State"', *Hogan Lovells* (Press Release, 30 April 2021) <https://www.hoganlovells.com/en/news/australia-high-court-declines-to-provide-reparations-to-yazidi-victims-of-enslavement-sexual-violence-and-crimes-against-humanity-perpetrated-by-an-australian-foreign-fighter-of-so-called-islamic-state>; 'NSW Victims' Compensation Denied for Violence Committed Outside Sydney', *Human Rights Law Centre* (Web Page, 24 March 2021) <https://www.hrlc.org.au/human-rights-case-summaries/2021/5/25/nsw-victims-compensation-denied-for-violence-committed-outside-nsw>.

⁶² *DRJ & Ors v Commissioner of Victims Rights & Anor* [2021] HCASL 53; [2020] NSWCA 242; For case summary see 'NSW Victims' Compensation Denied for Violence Committed Outside Sydney', *Human Rights Law Centre* (Web Page, 24 March 2021) <https://www.hrlc.org.au/human-rights-case-summaries/2021/5/25/nsw-victims-compensation-denied-for-violence-committed-outside-nsw>.

⁶³ 'Australia High Court Declines to Provide Reparations to Yazidi Victims of Enslavement, Sexual Violence and Crimes Against Humanity Perpetrated by an Australian Foreign Fighter of so Called "Islamic State"', *Hogan Lovells* (Press Release, 30 April 2021) <https://www.hoganlovells.com/en/news/australia-high-court-declines-to-provide-reparations-to-yazidi-victims-of-enslavement-sexual-violence-and-crimes-against-humanity-perpetrated-by-an-australian-foreign-fighter-of-so-called-islamic-state>.

⁶⁴ Daniel Hurst, 'Yazidi Women Fail in Claim for Compensation in Australia for Actions of ISIS Fighter Khaled Sharrouf', *The Guardian* (Online, 14 April 2021) <https://www.theguardian.com/australia-news/2021/apr/14/yazidi-women-fail-in-claim-for-compensation-in-australia-for-actions-of-isis-fighter-khaled-sharrouf>.

requests by the ACIJ and others, to access information held by the Commission about the reportedly seized assets, have been refused.⁶⁵ Sharrouf's assets (if any) should have been used to provide compensation to the applicants and other identifiable victims of his crimes. Unable to exercise their rights in Australia, the applicants have filed a joint complaint against Australia to the UN Committee Against Torture engaging Australia's international law obligations to provide redress to survivors of torture, enslavement, and sexual violence.⁶⁶

The experiences of Afghan and Yazidi survivors demonstrate the pressing need for making avenues available to victims of international crimes to access reparation, including compensation. An inquiry into access to justice for victims of international crimes, should assess what procedures, mechanisms, or programmes are needed at the Commonwealth level, to ensure Australia is meeting its international legal obligations.

Access to information

Victims of gross violations of international human rights law and serious violations of international humanitarian law have a right to accurate, detailed, and timely information.⁶⁷ International human rights law requires that victims be kept informed of their rights in seeking redress, the mechanisms and support services available to them, and the scope, timing, and progress of proceedings and their outcome.⁶⁸

In Australia, there is no clear strategy or mechanism in place to undertake outreach and communication with victims of international crimes. Other jurisdictions such as Sweden and the Netherlands take a proactive public information approach. For example, the Swedish Police publishes information about its war crimes investigations on its website in Swedish and

⁶⁵ 'Australia High Court Declines to Provide Reparations to Yazidi Victims of Enslavement, Sexual Violence and Crimes Against Humanity Perpetrated by an Australian Foreign Fighter of so Called "Islamic State"', *Hogan Lovells* (Press Release, 30 April 2021) <https://www.hoganlovells.com/en/news/australia-high-court-declines-to-provide-reparations-to-yazidi-victims-of-enslavement-sexual-violence-and-crimes-against-humanity-perpetrated-by-an-australian-foreign-fighter-of-so-called-islamic-state>.

⁶⁶ Daniel Hurst, 'Yazidi Women Fail in Claim for Compensation in Australia for Actions of ISIS Fighter Khaled Sharrouf', *The Guardian* (Online, 14 April 2021) <https://www.theguardian.com/australia-news/2021/apr/14/yazidi-women-fail-in-claim-for-compensation-in-australia-for-actions-of-isis-fighter-khaled-sharrouf>.

⁶⁷ UN Principles of Justice [6(a)], [15]; UN Principles on Reparation [11(c)], [24]; United Nations Office on Drugs and Crime, 'Topic Three – The Right of Victims to an Adequate Response to their Needs', *UNDOC* (website) <https://www.unodc.org/e4j/zh/crime-prevention-criminal-justice/module-11/key-issues/3--the-right-of-victims-to-an-adequate-response-to-their-needs.html>.

⁶⁸ *Ibid.*

12 additional languages.⁶⁹ Its specialised war crimes unit uses several channels to inform witnesses and affected communities about its work, such as the diaspora community in Sweden and civil society groups that are in regular contact with asylum seekers, as well as producing leaflets and posters in multiple languages explaining the unit's mandate.⁷⁰ The Netherlands Public Prosecution Service publishes about its international crimes investigations and cases on its website in multiple languages and has staff in its war crimes unit responsible for external communications.⁷¹ No such efforts and measures exist in Australia. The AFP and the Commonwealth Director of Public Prosecutions (**CDPP**) only provide general information about their work in the 'international context' without addressing international crimes and their victims.⁷²

The CDPP recognises that 'it is important that victims understand the criminal process and their role in that process', noting that the 'responsibility for informing victims about that process falls on both investigative and prosecution agencies.'⁷³ The CDPP's Victims of Crime Policy states that 'victims should, on request, be kept informed of the progress of the prosecution and the prosecution process in a timely manner [...]'.⁷⁴ We are yet to see how the CDPP applies this policy in relation to victims of international crimes. In March 2023, the AFP and the OSI announced the first arrest of a former member of the Australian Defence Force in connection to their investigations into alleged war crimes by Australian forces in Afghanistan. There is no indication that survivors and victims' families have been informed about this arrest and broadly of the ongoing investigations.

There is therefore a need to assess and elucidate how existing public information policies and practices apply to victims of international crimes and what other measures Australian investigative, prosecutorial, and judicial authorities need to take to improve their approach.

⁶⁹ 'War Crime - Swedish Police efforts', *Polisen* (Web Page) <https://polisen.se/en/victims-of-crime/war-crime---swedish-police-efforts/>.

⁷⁰ Ibid.

⁷¹ 'International Crimes', *Netherlands Public Prosecution Service* (Web Page) <https://www.prosecutionservice.nl/topics/international-crimes>.

⁷² 'International Work', *Commonwealth Director of Public Prosecutions* (Web Page) <https://www.cdpp.gov.au/about-us/international-work>; 'Our Work Overseas', *Australian Federal Police* (Web Page) <https://www.afp.gov.au/what-we-do/our-work-overseas#information-for-the-public>.

⁷³ 'Victims and Witnesses', *Commonwealth Director of Public Prosecutions* (Web Page) <https://www.cdpp.gov.au/victims-and-witnesses>.

⁷⁴ Australian Federal Prosecution Service, 'Victims of Crime Policy' (Factsheet) https://www.cdpp.gov.au/system/files/202103_Victims_of_Crime_Policy.pdf [4] ('**CDPP Victims of Crime Policy**').

Victim participation

Essential to improving access to justice is creating opportunities for victims to engage and participate in the criminal justice process. Victim participation concerns giving victims a voice – an opportunity to tell their story, have their views heard, and be listened to.⁷⁵ Doing so can help provide victims a sense of agency, empowerment, validation and acknowledgement of the hardship they have experienced as a result of an offence.⁷⁶ Participation may take various forms including consulting and having input into prosecutorial decisions, making representations to the courts, and giving evidence as a witness.⁷⁷

Australia allows victims of federal crimes to participate in limited ways in the criminal process. The Prosecution Policy of the Commonwealth requires ‘the views of any victims, where those views are available, and where it is appropriate, to be considered’ about decisions to commence and continue a prosecution, to agree to a plea of negotiation, or to decline to proceed with a prosecution after a committal.⁷⁸ The CDPP’s Victims of Crime Policy also recognises that victims have an important role in the prosecution process.⁷⁹ It states that decisions concerning offences resulting in serious harm and death require ‘careful

⁷⁵ Brandon Hamber and Patricia Lundy, ‘Lessons from Transitional Justice? Toward a New Framing of a Victim-Centered Approach in the Case of Historical Institutional Abuse, Victims & Offenders’ (2020) 15(6) *International Journal of Evidence-based Research, Policy and Practice* 744, 761, 748; Ian Edwards, ‘An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making’ (2004) 44(6) *British Journal of Criminology* 967, 975; Malini Laxminarayan, ‘Procedural Justice and the Psychological Effects of Criminal Proceedings: The Moderating Effect of Offense Type’ (2012) 25 *Social Justice Research* 390, 396.

⁷⁶ Brandon Hamber and Patricia Lundy, ‘Lessons from Transitional Justice? Toward a New Framing of a Victim-Centered Approach in the Case of Historical Institutional Abuse, Victims & Offenders’ (2020) 15(6) *International Journal of Evidence-based Research, Policy and Practice* 744, 752-753; ‘Victims of Crime in the Criminal Trial Process: The Victim as a Participant in the Criminal Trial Process’, *Victorian Law Reform Commission* (Web Page, 15 July 2021) <https://www.lawreform.vic.gov.au/publication/the-role-of-victims-of-crime-in-the-criminal-trial-process-report-2/3-the-victim-as-a-participant-in-the-criminal-trial-process/> [3.22].

⁷⁷ Ian Edwards, ‘An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making’ (2004) 44(6) *British Journal of Criminology* 967, 974; ‘Victims of Crime in the Criminal Trial Process: Participation’, *Victorian Law Reform Commission* (Web Page, 15 July 2021) <https://www.lawreform.vic.gov.au/publication/the-role-of-victims-of-crime-in-the-criminal-trial-process-report-2/7-participation/#:~:text=Sexual%20offence%20victims%20may%20appear,out%20a%20victim%20impact%20statement> [7.4], [7.61].

⁷⁸ Australian Federal Prosecution Service, ‘Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process’ (Policy) <https://www.cdpp.gov.au/system/files/Prosecution%20Policy%20of%20the%20Commonwealth%20as%20updated%2019%20July%202021.pdf> [5.4].

⁷⁹ CDPP Victims of Crime Policy [3].

consultation with the victims and in the case of the deceased their immediate family'.⁸⁰ In such matters, '[a] victim may seek written reasons for such a decision and request a review of such a decision.'⁸¹ Moreover, at the sentencing stage, courts must take into account where relevant and known to the court, 'the personal circumstances of any victim of the offence', 'any injury, loss or damage resulting from the offence', and any victim impact statement.⁸²

Australia needs to afford greater participation to victims of international crimes in processes underway in Australia. It is still unclear how the CDPP applies its policies in relation to international crimes victims. For example, there is no indication as to whether it will seek the views of Afghan victims in the ongoing prosecution of alleged war crimes by Australian forces in Afghanistan.

Moreover, international best practice suggests that victim engagement should not be limited to prosecutorial and sentencing stages of a criminal trial, and that victims should have an opportunity to participate in all appropriate stages of the proceeding where their interests are affected.⁸³ Further inquiry is needed on how Australia can improve victim engagement and participation in processes concerning international crimes, consistent with the Australian legal system.

Access to assistance and support services

It is important that victims of international crimes have general access to assistance and support services. The UN Principles on Reparation underscores that States should provide proper assistance to victims seeking access to justice.⁸⁴ The UN Principles of Justice also provides that '[v]ictims should receive the necessary material, medical, psychological and social assistance' and be informed about the available health and social services and other assistance.⁸⁵ The Rome Statute contains several provisions aimed at protecting victims' well-being. Article 68 mandates that the Chambers 'take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims.' Article 43(6)

⁸⁰ Ibid [8].

⁸¹ Ibid.

⁸² *Crimes Act 1994* (Cth) s 16A(2).

⁸³ Rome Statute art 68(3); UN Principles for Justice [6(b)] (emphasis added); International Criminal Court, *Victims Before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the ICC* (Booklet) 16.

⁸⁴ UN Principles on Reparation [12(c)].

⁸⁵ UN Principles of Justice [14].

establishes the Victims and Witnesses Unit, which provides counselling and other support measures to victims and witnesses.

In Australia, the CDPP's Witness Assistance Service (**WAS**) provides assistance to witnesses and victims of federal offences, including giving updates on the prosecution's case and information about the legal process and court procedures.⁸⁶ WAS' resources are limited and is currently only available to specific categories of victims listed in the CDPP's referral guideline, which does not mention victims of international crimes.⁸⁷ However, the guideline indicates that victims of offences which have resulted in physical or psychological harm and family members of a person who has died as a result of any alleged offences can also be referred to WAS.⁸⁸ In ACIJ's view, the guidelines should unambiguously include survivors and families of victims of international crimes with a link to Australia.

The AFP has Community Liaison Teams to engage with the general community and also administers the National Witness Protection Program.⁸⁹ However, it is unclear what measures are in place to support victims of international crimes during the investigative stage.

Therefore, there is need for clarification on what types of assistance are currently available to international crimes victims at different stages of a criminal proceeding, whether and how they can access existing services such as the CDPP's WAS, and what other specialised measures are required to provide appropriate (e.g., culturally-sensitive) support to such victims.

⁸⁶ Australia's Federal Prosecution Service, 'Witness Assistance Service Referral Guideline' (Guideline, July 2021) <https://www.cdpp.gov.au/system/files/2021%20WAS-Referral-Guidelines.pdf>.

⁸⁷ Ibid [6]

⁸⁸ Ibid.

⁸⁹ 'Community Engagement', *Australian Federal Police* (Web Page) <https://www.afp.gov.au/what-we-do/community-engagement>.

4 Consideration of victims of international crimes in a future Human Rights Act

Recommendation 6

The rights of victims of international crimes should be reflected in a future federal Human Rights Act.

ACIJ supports the establishment of an Australian Human Rights Act as proposed by the Australian Human Rights Commission (hereafter referred to as the 'model Human Rights Act').⁹⁰ As explained by the Commission, an Australian Human Rights Act will enhance the legal protection of rights in Australia, provide individuals with an avenue to pursue legal remedies when their rights have been breached, embed transparent human rights-based decision-making, and help ensure that Australia implements its international legal obligations fully into domestic law.⁹¹

The Commission's recommended model Human Rights Act incorporates rights derived from multiple international human rights law instruments including the ICCPR and the Convention on the Rights of the Child⁹² ACIJ notes that the ICCPR and Convention on the Rights of the Child, as well as several other international human rights law treaties to which Australia is a party, recognise a right to a remedy for victims.⁹³ Victims' rights are not mentioned, however, in the model Human Rights Act's proposed list of rights for inclusion.⁹⁴

The Commission proposes that a 'participation duty' be introduced into the model Human Rights Act, requiring public authorities 'to ensure the participation of certain groups and individuals in relation to policies and decisions that directly or disproportionately affect their rights',⁹⁵ as well as 'equal access to justice duty' imposing a positive obligation on public authorities 'to provide sufficient assistance, interpreters and disability support to individuals

⁹⁰ Australian Human Rights Commission, *Position Paper: A Human Rights Act for Australia* (Position Paper, 2022).

⁹¹ Ibid 45-59.

⁹² Ibid 17.

⁹³ ICCPR art 2(3); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 39; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) art 6; *Convention Against Torture* art 14; *Rome Statute* arts 68, 75.

⁹⁴ Australian Human Rights Commission, *Position Paper: A Human Rights Act for Australia* (Position Paper, 2022) 112-113.

⁹⁵ Ibid 21.

navigating the justice system'.⁹⁶ The model Human Rights Act also provides for a positive duty on public authorities to act compatibly with human rights when making decisions, and the ability for persons to make complaints or bring claims seeking remedies on the basis of a breach of rights.⁹⁷

Care should be taken to ensure that the jurisdiction of the Human Rights Act is not unduly limited in a way that prevents victims of international crimes from seeking recourse in accordance with the provisions of the Act. Victims of Australia's international crimes offences may in many cases reside outside Australia. This is the case for Afghan victims of alleged war crimes committed by Australian special forces and the Yazidi victims of deceased Australian citizen Sharrouf. Afghan and Yazidi victims have suffered harm and loss as a direct result of the wrongful conduct committed by Australian citizens and/or soldiers and thus should have standing to access justice and complaint mechanisms in Australia. Limiting the scope of the application of the model Human Rights Act to persons residing in Australia or persons subject to Australia's effective control⁹⁸ would exclude many victims of international crimes from these mechanisms. The Human Rights Act would be better served by a less restrictive jurisdictional test, simply requiring that the complaint or claim have a nexus with Australia.

In determining the content of a Human Rights Act for Australia, regard must be had to incorporation of provisions on the rights of victims (including of international crimes), and the jurisdictional scope must be wide enough for these victims to seek recourse under the Act's complaint and claim mechanism where their complaints or claims have a sufficient link to Australia. This would help to bring the Commonwealth's approach to victims of crime in line with the general practice in Australian States and Territories and international human rights standards.

⁹⁶ Ibid 22.

⁹⁷ Ibid Chapter 6.

⁹⁸ Ibid 243.

5 Conclusion

Our submission canvasses a wide range of matters that the Australian Government must include in updating its Human Rights Framework and Action Plan, and potential creation of a Human Rights Act. These matters are united by the fundamental, underlying concept that international criminal justice and victims' rights are a crucial aspect of Australia's human rights considerations. The Australian Government must not lose this opportunity to address its past failures and properly incorporate international criminal justice in its reinvigorated human rights regime.