AUSTRALIAN CENTRE FOR INTERNATIONAL JUSTICE

Barriers to Justice: The Prosecution of International Crimes in Australia

Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024

26 July 2024

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 Senate Legal and Constitutional Affairs Legislation Committee (the **Committee**) Inquiry into the *Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024* (the **Bill**).

The Bill seeks to amend the Criminal Code, attached to Schedule 1 of the *Criminal Code Act 1995* (Cth) (the **Criminal Code**), to provide that the consent of the Attorney-General not be required for proceedings relating to genocide and related atrocity crimes; and remove the restrictions on review of decisions of the Attorney-General to give or refuse consent to institute proceedings for such offences.

While Australia considers itself a strong proponent of international criminal justice,[1] it has historically faltered in its commitment to domestically pursue accountability for international crimes.[2] This submission focuses on addressing some of the legal and practical challenges that have impeded prosecutions of such offences, including the requirement to obtain consent from the Attorney-General under section 268.121 of the Criminal Code and the restriction against ordinary judicial review of such decisions.

Australia's obligations to investigate and prosecute international crimes 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.[3] The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 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

1 Permanent Mission of Australia to the United Nations, 'Australian Views on the Scope and Application of the Principle of Universal Jurisdiction', (Note, 3 May 2016).

2 For a detailed discussion on Australia's history of war crimes prosecutions relevant to the Second World War pursuant to the *War Crimes Act 1945* (Cth) and the *War Crimes Amendment Act 1988* (Cth), please see Gideon Boas and Pascale Chifflet, 'Suspected War Criminals in Australia: Law and Policy,' *Melbourne University Law Review*, 2016, (40:46).

3 *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.

present in any territory under its jurisdiction.[4] The Preamble of the *Rome Statute of the International Criminal Court* (**Rome Statute**) recalls that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, and emphasises that the International Criminal Court (**ICC**) is complementary to national criminal jurisdiction.[5]

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.[6] 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 36 new cases for international crimes and 16 convictions in 2023.[7]

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. Comparatively, Australia's capabilities to investigate and prosecute international crimes under universal jurisdiction require significant strengthening.[8] This submission proposes recommendations to overcome some existing barriers in order to ultimately enhance accountability mechanisms. In addition to the recommendations to repeal or amend the Attorney-General's consent, ACIJ also recommends significant structural changes to Australia's investigative mechanism. While it is a commonly held view, including by proponents of this Inquiry, that the barrier to prosecution is the presence of the Attorney-General's consent, ACIJ believes that the first significant barrier to the prosecution of these serious offences is the willingness and capability of Australian authorities to conduct investigations and bring prosecutions.

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

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4 *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.

5 Rome Statute Preamble.

6 Karolina Aksamitowska, 'War Crimes Units: Legislative, Organisational and Technical Lessons', *Asser Institute Centre for International and European Law* (Report, September 2021) 7.

7 *TRIAL International*, et al, 'Universal Jurisdiction Annual Review 2024', (Report, 2024) 16.

8 Australian Centre for International Justice, 'Challenging Impunity: Why Australia Needs A Permanent, Specialised, International Crimes Unit', (Report, 2023).

Glossary

International crimes: the ACIJ's reference to 'international crimes' refer to those atrocity crimes which have been criminalised under federal Australian law pursuant to Divisions 268 and 274 of the Criminal Code; namely, genocide, crimes against humanity, war crimes and torture.

> *Genocide*: certain acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.
>
> *Crimes against humanity*: certain acts committed as part of a widespread or systematic attack directed against any civilian population.
>
> *War crimes*: certain acts committed during an international or non-international armed conflict, in violation of the *Geneva Conventions* and other laws and customs applicable to international and non-international armed conflicts.
>
> *Torture*: any acts by which severe pain or suffering is intentionally inflicted on a person, to punish, obtain information, intimidate or coerce or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Universal jurisdiction: a legal concept that allows states to investigate and prosecute certain criminal offences regardless of the place where they were committed and the nationality of the perpetrator or the victim. Universal jurisdiction applies to egregious international crimes, including those listed above. It arises from the idea that certain crimes are so grave that they affect the international community as a whole and that perpetrators of these crimes should not benefit from impunity.

Recommendations

The ACIJ makes the following recommendations:

Recommendation 1

Sections 268.121 and 274.3(1) of the Criminal Code be repealed, such that the consent of the Attorney-General will no longer be required for proceedings commenced under Division 268 and Division 274. Additionally, section 16.1 should be amended to exclude the requirement of the Attorney-General's consent for both Division 268 and Division 274 (torture) offences.

Recommendation 2

In the alternative to Recommendation 1, the Attorney-General's discretion under section 268.121 be amended to be subject to an appropriate legislative test that could include public interest considerations such as the seriousness of international crimes, the rights of victims to access justice and Australia's obligations under international law to prosecute such crimes. Reasons for the decision of the Attorney-General in exercising their discretion should be accessible to the public. This test should also apply to Division 274 offences.

Recommendation 3

Repeal the restrictions on review or appeal of a decision of the Attorney-General under section 268.122 of the Criminal Code to give or refuse consent to institute proceedings for an offence under Division 268 such that any such decision can be subject to review or appeal, particularly under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Recommendation 4

The Attorney-General should issue a new Ministerial Direction to the Australian Federal Police (**AFP**) under subsection 37(2) of the *Australian Federal Police Act 1979* (Cth), to include the investigations of international crimes as an area of focus. The Australian Government should further ensure that the AFP have sufficient resources, training and technical support to pursue such investigations.

Recommendation 5

Australia must establish a permanent specialised international crimes unit.

2. Legislative Background

Legislative background to crimes against humanity and other offences

The *International Criminal Court Act 2002* (Cth) (**ICC Act**) was enacted to give effect to Australia's obligations under the Rome Statute. Section 3(1) of the Act, provides that its principal purpose is to "facilitate compliance with Australia's obligations under the Statute".

Consequently, the *International Criminal Court (Consequential Amendments) Act 2002* (Cth) (**ICC Consequential Amendments Act**) amended the Criminal Code to incorporate international crimes that are also within the jurisdiction of the ICC. This amendment created a new Chapter 8 in the Criminal Code, titled "[o]ffences against humanity and other related offences", which included Division 268, titled "[g]enocide, crimes against humanity, war crimes and crimes against the administration of the justice of the International Criminal Court". Accordingly, the offences under Division 268 largely reflect articles 6, 7, and 8 of the Rome Statute.

The following are outlines of the offences created by Division 268 of the Criminal Code:

i. **Subdivision B** creates offences each of which is called a ***genocide***;

ii. **Subdivision C** creates offences each of which is called a ***crime against humanity***;

iii. **Subdivisions D, E, F, G** and **H** create offences each of which is called a ***war crime***;

(1) **Subdivision D** creates offences known as war crimes that are grave breaches of the Geneva Conventions and of Protocol 1 to the Geneva Conventions;

(2) **Subdivision E** creates offences known as other serious war crimes committed in an international armed conflict;

(3) **Subdivision F** creates offences that are war crimes that are other serious violations of common article 3 to the Geneva Conventions committed in an armed conflict that is not an international armed conflict;

(4) **Subdivision G** creates offences that are war crimes that other serious violations of the laws and customs applicable in an armed conflict that is not an international armed conflict;

(5) **Subdivision H** creates offences that are war crimes that are grave breaches of Protocol I to the Geneva Conventions;

iv. **Subdivision J** creates offences that are *crimes against the administration of the justice of the International Criminal Court*; and

v. **Subdivision K** – 'Miscellaneous' includes important provisions relating to jurisdictional and other procedural issues.

Offences prior to the commencement of the Rome Statute

Prior to the enactment of the offences of the Rome Statute in the Criminal Code, only 'grave breaches' of the 1949 Geneva Conventions were offences against the Commonwealth of Australia and were contained in Part II of the *Geneva Conventions Act 1957* (Cth) (**Geneva Conventions Act**). Subsection7(1) (now repealed) provided:

> A person who, in Australia or elsewhere, commits a grave breach of any of the Conventions or of Protocol I is guilty of an indictable offence.

Subsection 7(3) (repealed) provided that section 7 applied to persons regardless of their nationality or citizenship. Subsection 7(6) further provided that "an offence against this section shall not be prosecuted in a court except by indictment in the name of the Attorney-General or of the Director of Public Prosecutions". Whilst it is unclear whether, embedded within this, was a requirement for consent by the Attorney-General or the Director of Public Prosecutions, no criminal proceedings ever commenced under the Act.[9]

Although Part II of the Geneva Conventions Act was repealed by Schedule 3 of the ICC Consequential Amendments Act, this repeal does not prevent its application to crimes occurring from 1957 to 25 September 2002. According to established principles of statutory interpretation, the repeal of part of an Act does not affect its previous operation with respect to any investigation, legal proceeding or remedy that arises under the Act unless the repealing statute intends otherwise.[10] The Explanatory Memorandum to the ICC Consequential Amendments Act made clear that any persons committing crimes prior to the repeal of that Part, could still be prosecuted by the Geneva Conventions Act.[11]

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9 Gillian Triggs, 'Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law,' *Sydney Law Review*, 2003 (25:507) at 519.

10 Ben Saul, 'Prosecuting War Crimes at Balibo Under Australian Law: The Killing of Five Journalists in East Timor by Indonesia', *Sydney Law Review*, 2009 (38:83) at 109.

11 Explanatory Memorandum, International Criminal Court (Consequential Amendments) Bill 2002 (Cth) at 21. The Explanatory Memorandum referenced section 8 of the *Acts Interpretation Act 1901* (Cth), which has now been

Extraterritorial jurisdiction

Section 268.117 of the Criminal Code is titled '[g]eographical jurisdiction' and provides that section 15.4 applies to genocide, crimes against humanity and war crimes. Section 15.4 of the Criminal Code reads:

> **15.4 Extended geographical jurisdiction—category D**
>
> If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:
>
> (a) whether or not the conduct constituting the alleged offence occurs in Australia; and
>
> (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia

Sections 268.117(1) and 15.4 are intended to establish universal jurisdiction over the aforementioned offences and represent the broadest geographic scope within the Criminal Code. As section 15.4 does not prescribe any residency or citizenship requirements, presumably Australian courts can exercise absolute universal jurisdiction over genocide, crimes against humanity and war crimes.

Legislative background to torture offences

In 1989, Australia ratified the Convention Against Torture (the **Convention**) through the enactment of the *Crimes (Torture) Act 1988* (Cth) (**CTA Act**). In reviewing Australia's implementation of the Convention in 2008, the UN Committee Against Torture recommended that Australia provide an adequate definition of torture and specifically criminalise the offence across Federal, State and Territory laws.[12] The Committee further criticised the CTA Act for not fully implementing the obligations under articles 16 and 4 of the Convention, which call for States Parties to criminalise conduct amounting to cruel, inhuman or degrading treatment or punishment.[13]

In 2010, Australia amended the Criminal Code, introducing Division 274 titled, 'Torture' through the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth). The amendment added section 274.2 to the Criminal Code, which contains two offences

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repealed by Schedule 1 of the *Acts Interpretation Amendment Act 2011* (Cth) and replaced by section 7.

12 Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Concluding Observations of the Committee Against Torture: Australia*, UN Doc CAT/C/AUS/CO/3 (22 May 2008) at [8]-[9].

13 Ibid at [8]-[9] and [18].

of torture. The criminalisation of torture has been limited to perpetrators engaging in conduct in the capacity of a public official, individuals acting in such capacity or acting at the instigation, consent or acquiescence of a public official. This language reflects article 1 of the Convention, which states "such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". Some legal commentators have suggested that Australia's approach to criminalisation has been conservative and reflects, at best, the minimum standard prescribed by the Convention.[14]

3. Background to the Attorney-General's consent

The current Bill calls to repeal sections 268.121 and 268.122 of the Criminal Code. The Explanatory Memorandum to the Bill provides that these amendments are proposed to allow proceedings to commence "without the potential bias of a government".[15]

Section 268.121 provides the procedural requirements relating to the Attorney-General's consent. It states that proceedings under Division 268 of the Criminal Code relating to genocide, crimes against humanity, war crimes and crimes against the administration of the justice of the International Criminal Court, require the written consent of the Attorney-General, in whose name the prosecution can only commence. However, the provision expressly allows for a person to be "arrested, charged, remanded in custody, or released on bail, in connection with an offence under this Division before the necessary consent has been given".[16] Relevantly, any amendment to repeal section 268.121 would require consideration of section 16.1 of the Criminal Code which further provides that the Attorney-General's consent is required for prosecution if alleged conduct occurs wholly in a foreign country in certain circumstances.

Section 16.1 reads in full:

> (1) Proceedings for an offence must not be commenced without the Attorney-General's written consent if:
>
> (a) section 14.1, 15.1, 15.2, 15.3 or 15.4 applies to the offence; and
>
> (b) the conduct constituting the alleged offence occurs wholly in a foreign country; and
>
> (c) at the time of the alleged offence, the person alleged to have committed the offence is neither:

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14 Greg Carne, 'Is Near Enough Good Enough? – Implementing Australia's International Human Rights Torture Criminalisation and Prohibition Obligations in the Criminal Code (Cth)', *Adelaide Law Review*, 2012, (33:255) at 256.

15 Explanatory Memorandum, Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024 (Cth), 8.

16 Section 268.121(3), Criminal Code.

(i) an Australian citizen; nor
(ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

(2) However, a person may be arrested for, charged with, or remanded in custody or released on bail in connection with an offence before the necessary consent has been given.

The Attorney-General's consent requirement is imposed for a number of offences in the Criminal Code, these include:

- Division 70 – Bribery of foreign public officials (required under certain circumstances)
- Division 71 – Offences against United Nations and associated personnel
- Division 72 – Explosives and lethal devices (specifically, subdivision A concerning international terrorist activities using explosive or lethal devices)
- Division 73 – People smuggling and related offences (specifically, subdivision A concerning people smuggling offences)
- Division 82 – Sabotage
- Division 83 – Other threats to security
- Part 5.2 – Espionage, foreign interference, theft of trade secrets and other related offences
- Division 115 Criminal Code – Harming Australians (e.g., murder, manslaughter, causing serious harm)
- Division 119 – Foreign incursions and recruitment
- Part 5.6 – Secrecy of information
- Division 270 – Slavery and slavery-like offences (required under certain circumstances or where defendant is under 18)
- Division 272 – Child sex offences outside of Australia (where defendant under is 18)
- Division 273 – Offences involving child abuse material outside Australia (where defendant under is 18)
- Division 273B – Offences concerning the protection of children (where defendant is under 18)
- Division 274 – Torture (required under certain circumstances)
    - Division 474 – Telecommunications offences (specifically, subdivisions D, H and HA which relate to use of carriage service for extremist violent material and where defendant under is 18)
- Division 490 – False dealing with accounting documents (required under certain circumstances)

Rationale for the Attorney-General's consent

While the Explanatory Memorandum for the ICC Consequential Amendments Bill[17] did not detail why the Attorney-General's consent requirement was necessary for Division 268 offences, the historical justification for such consent has been that certain prosecutions could potentially impact Australia's international relations or national security, necessitating government to government contact.[18] Additionally, the consent has been justified as a safeguard against inappropriate prosecutions.[19]

The role of the Commonwealth Director of Public Prosecution

The Commonwealth Director of Public Prosecutions (**CDPP**) exercises discretion to institute prosecutions for offences against the Commonwealth in accordance with the CDPP prosecution policy.[20] The CDPP also reserves the right to decide whether to proceed with, take over or decline a private prosecution in accordance with the same policy.[21] In determining whether to prosecute, the following two-stage test must be satisfied:

(1) whether there is sufficient evidence to justify the institution of a prosecution including whether there is reasonable prospect of securing a conviction; and

(2) whether it is evident from the facts of the case, and all surrounding circumstances, that the prosecution would be in the public interest.

The process of obtaining the Attorney-General's consent would ordinarily be sought once the CDPP has exercised the discretion noted above. This process is typically initiated by an AFP investigation. This was confirmed to ACIJ in writing from the Attorney-General in February 2020.

The CDPP's decision on whether to prosecute and the Attorney-General's consent are non-reviewable

Under Australian law, decisions in connection with the prosecution process are not subject to judicial review. Authority for this proposition is found in the High Court judgement of *Maxwell v The Queen* (1996) 184 CLR 501, where Gaudron and Gummow JJ stated at [26]:

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17 Explanatory Memorandum, International Criminal Court (Consequential Amendments) Bill 2002 (Cth).
18 Australian Law Reform Commission, 'Secrecy Laws and Open Government in Australia' (2010, Report 112) < >.
19 Correspondence dated 4 March 2019, from the Attorney-General's Department to the Human Rights Law Centre, in response to the report published by the Human Rights Law Centre, 'Nowhere To Turn: Addressing Corporate Abuses Overseas' (January 2019). Correspondence provided to ACIJ from HRLC.
20 *Director of Public Prosecutions Act 1983* (Cth) ss 6, 9; see also CDPP Prosecution Policy at [2].
21 *Director of Public Prosecutions Act 1983* (Cth) ss 9(5) and 9(5A).

> It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute, ... decisions as to the particular charge to be laid or prosecuted. The integrity of the judicial process - particularly, its independence and impartiality and the public perception thereof - would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what. [Footnotes omitted]

Similarly, pursuant to section 268.122, decisions of the Attorney-General in respect of consent to commence prosecutions under Division 268 are not subject to judicial review except under limited circumstances under the High Court's original review jurisdiction pursuant to section 75(v) of the Constitution of Australia. Section 268.122 is emblematic of what is known as a 'privative clause'. These clauses are included in legislation to exclude or limit judicial review of administrative decision making.

Review of the Attorney-General's consent for Division 274 offences

Decisions of the Attorney-General in respect of consent to commence prosecutions pursuant to Division 274 are indeed subject to judicial review. This was expressly intended by parliament as outlined in the Explanatory Memorandum of the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill 2009* (Cth):

> The Attorney-General's decision in relation to consent is judicially reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[22]

This is a welcome distinction in comparison to the privative clause found in Division 268, which significantly limits the review of decisions of consent by the Attorney-General.

4. Historic use of the Attorney-General's consent

The use of the Attorney-General's consent, and requests for consent to prosecutions pursuant to Division 268 have been limited in number. The majority have been widely reported in the media and are well-known.

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22 Explanatory Memorandum, Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill 2009, at 8.

The history and use of this consent provision are informative. From open-source data and information obtained under Freedom of Information (**FOI**), there have only been five requests to commence prosecutions made to the Attorney-General since 2002 under Division 268. There have been no requests related to Division 274.[23] The following is a brief survey of those requests.

Former Israeli Prime Minister Ehud Olmert - 2009

On 3 December 2009 a request for consent under Division 268 was made by a Palestinian rights advocacy group, Australians for Palestine, for the prosecution of Ehud Olmert, a former Israeli Prime Minister. The group were aware of the presence of Mr Olmert in Australia, who was visiting in a personal and private capacity at the time. They made a formal request to the Attorney-General, Robert McClelland, copying in Prime Minister Kevin Rudd and Deputy Prime Minister Julia Gillard, urging him to give "consent to a case for prosecution against Ehud Olmert for war crimes".[24] Australians for Palestine alleged that Division 268 applied to Olmert and that he had ultimate responsibility for the conduct of Israel's military during its assault on Gaza in 'Operation Cast Lead' between December 2008 to January 2009. The group advised that given Olmert no longer held office, legal issues of immunity did not arise.

The Attorney-General responded on 22 December 2009 to the request, well after Olmert had left the country. He advised that the AFP is responsible for the investigation of war crimes allegations and that although taken seriously, war crimes committed overseas are difficult to investigate. In addition, given that Olmert, other witnesses and evidence were located offshore, it would be difficult for the AFP to investigate. McClelland advised that it is also necessary for Australia to respect the sovereignty of foreign countries, adding that "the investigation and prosecution by the country in which the criminal conduct occurred will generally be the most appropriate and effective way to bring an alleged war criminal to justice".[25] He reiterated Australia's position in relation to calling for the proper investigation into allegations of violations of human rights and international humanitarian law and Australia's involvement at the UN Human Rights Council and Security Council in that regard. The Attorney-General then concluded that it is "crucial that these serious matters are dealt with properly".[26]

The group neither sought to initiate a private prosecution against Ehud Olmert during his visit to Australia (whilst they waited for a response from the Attorney-General), nor pursued a review of

23 Response received in relation to an FOI application made to the Attorney-General's Department on 16 March 2018.
24 Sonja Karkar, Letter to the Attorney-General, 3 December 2009.
25 Robert McClelland, Attorney-General of Australia, Letter to Sonja Karkar, 22 December 2009.
26 Robert McClelland, Attorney-General of Australia, Letter to Sonja Karkar, 22 December 2009.

the Attorney-General's decision. It's not clear if the group were advised of an option to pursue a private prosecution.

In December 2012, the Attorney-General's Department released documents in response to a FOI request broadly seeking access to copies of documents in relation to the Department's handling of the consent request.[27] Unfortunately, the documents do not reveal much beyond concerns about any potential public relations impact. Correspondence from the AFP is included in the documents released, which indicated that the AFP referenced the difficulty of investigating the matter.

Sri Lankan President, Mahinda Rajapaksa – 2011

On 20 October 2011, Mr Arunchalam Jegastheeswaran, an Australian citizen of Tamil background, sought the Attorney-General's consent for a private prosecution. Mr Jegastheeswaran worked in field hospitals in North East Sri Lanka in the later stages of the war in 2009. The private prosecution was filed in the Melbourne Magistrates' Court, for charges to be laid against Mahinda Rajapaksa, who at the time was Sri Lanka's President. The Court authorised the issue of a charge against Mr Rajapaksa. Mr Rajapaksa was due to visit Australia in late October for the Commonwealth Heads of Government Meeting in Perth.

On 25 October 2011, the Attorney-General, Robert McClelland, announced that he was not providing consent to prosecute on the basis that Rajapaksa, as Sri Lanka's President and head of state, enjoyed the immunities extended in the *Foreign States Immunity Act 1985* (Cth) (**FSI Act**) and the *Diplomatic Privileges and Immunities Act 1967* (Cth). A certificate under section 40 of the FSI Act was issued as evidence certifying that Rajapaksa was Sri Lanka's head of state and was immune from prosecution.

The individual never sought review of the decision. Ultimately, it is submitted that it is more appropriate for questions of head of state immunity, as a matter of Australian and international law, be reserved for the consideration and determination of an Australian court.[28]

The case of Aung Sang Suu Kyi – 2018

On 16 March 2018, Daniel Taylor acting on behalf of members of the Australian Rohingya community filed a private prosecution seeking an indictment for crimes against humanity offences

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27 Attorney-Generals' Department, *Documents relating to a letter to the Attorney-General request consent to prosecute former Israeli Prime Minister, Ehud Olmert, for war crimes*, 11 December 2012.

28 For further discussion, please see Anna Hood and Monique Cormier, 'Prosecuting International Crimes in Australia: The Case of the Sri Lankan President' (2012) 13 *Melbourne Journal of International Law* 1.

in the Criminal Code against Aung Sang Suu Kyi who at the time was in Australia for the Association of Southeast Asian Nations (**ASEAN**) events held in Sydney.[29] The complaint alleged the crimes against humanity of deportation or forcible transfer of the Rohingya population and "…that Ms Suu Kyi has failed to use her position of authority and power, and, as such, has permitted the Myanmar security forces to deport and forcibly remove Rohingya from their homes".[30]

The Attorney-General, Christian Porter, issued a press release on 17 March 2018 declining to give consent to this prosecution, stating that:

> Aung San Suu Kyi has complete immunity, including from being served with court documents because under customary international law, heads of state, heads of government and ministers of foreign affairs are immune from foreign criminal proceedings and are inviolable – they cannot be arrested, detained, or served with court proceedings.[31]

Following the Attorney-General's decision, the legal team involved in bringing the case sought review of the decision in the High Court, seeking to raise arguments in relation to Suu Kyi's immunity from prosecution. [32]

As noted above, although section 268.122 retains a privative clause, the High Court maintains its original jurisdiction to review administrative decisions. Ultimately the High Court did not consider the question of jurisdictional immunity raised by the case, and instead decided, that the ability to institute private prosecutions for an offence under Division 268 was precluded by virtue of the requirement in section 268.121(2), mandating that the offence be prosecuted in the name of the Attorney-General.[33]

Jagath Jayasuriya – 2019

In May and June 2019, retired Sri Lankan General Jagath Jayasuriya visited Australia. Jayasuriya was the Security Force Commander of operations in the Vanni region of Sri Lanka, which was

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29 Ben Doherty, 'Aung San Suu Kyi: lawyers seek prosecution for crimes against humanity', *The Guardian*, 17 March 2018.
30 See brief available here.
31 Ben Doherty, 'Aung San Suu Kyi: lawyers seek prosecution for crimes against humanity', *The Guardian*, 17 March 2018.
32 Ibid.
33 *Taylor v Attorney-General for the Commonwealth* (2019) 268 CLR 224, 238. For a critical analysis of the case, see Rawan Arraf, 'Before the High Court of Australia: The Case of Aung San Suu Kyi', *Opinio Juris* (Blog Post, 10 June 2019); Rawan Arraf, 'High Court of Australia Closes Door on Private Prosecutions in Taylor v Attorney-General', *Opinio Juris* (Blog Post, 14 February 2020).

the main scene of hostilities during the final phase of the civil war between September 2008 and May 2009. As the Commander, Jayasuriya had overall control of the offensives in Vanni and was responsible for coordinating the attacks on the region. The offensives and attacks were marked by widespread and systematic human rights abuses, including torture and summary executions.

Jayasuriya was photographed at a 'war hero' commemoration event in Melbourne where he was the guest of honour, and he was also photographed at Melbourne International Airport.

On 24 June 2019, the International Truth and Justice Project (**ITJP**), in collaboration with ACIJ, wrote to the AFP requesting an urgent meeting, advising that Jayasuriya, whose responsibility for war crimes is well-documented, may have been in Australia and was likely to return. Regrettably, the request for an urgent meeting was not granted.

On 1 October 2019, the ITJP, ACIJ and the Human Rights Law Centre (**HRLC**) submitted a formal request to the AFP to investigate Jayasuriya for serious allegations of torture, war crimes and crimes against humanity committed under his command. The formal request consisted of a 55-page draft indictment with over 4000 pages of exhibits, including testimony from 40 witnesses and survivors. The request notified police that there were more witnesses available in Australia, and that Jayasuriya was likely to be in the country again later in the month.

On 17 October 2019, the AFP advised that the matter was being progressed to the Attorney-General's office.

On 21 November 2019, ACIJ, ITJP and HRLC wrote to the Attorney-General advising that they were aware the matter was currently before him possibly for his consent to prosecution.

In the six-page letter, the organisations provided detail on: the legal basis on which a prosecution can be brought; Australia's legal obligations with respect to investigating and prosecuting allegations of international crimes; the background of the evidence-gathering work that was undertaken by experienced international investigators and prosecutors; examples of other national legal systems that were investigating and prosecuting perpetrators of international crimes; and that there were no other prospects for prosecution of Jayasuriya in Sri Lanka or any other country or international court.

The organisations also requested that the Attorney-General refer the matter to the CDPP for pre-brief advice and requested that "on commencement of an investigation from the [AFP] and any subsequent request from the [CDPP], to grant your consent to the prosecution of Mr Jayasuriya".

The organisations firmly stated:

> We note that according to long-standing practice, your consideration would be informed by the advice of the CDPP and any request the Director may make to you to give consent to a prosecution. We note your consistent remarks in relation to this process and procedure in which you affirm the independent decision making process undertaken by the CDPP in accordance with the prosecution policy of the Commonwealth. We therefore request that the matter be urgently referred to the CDPP for pre-brief advice to the AFP. This is to ensure that the proper process is undertaken and that you have the benefit of that advice in the course of this process. [Footnotes omitted]

On 2 February 2020 we received a response from the then Attorney-General, Christian Porter, who advised:

> …as, a general matter, the investigation and prosecution of criminal conduct is a matter for the AFP and CDPP. These agencies undertake their functions independently of government.
>
> Decisions around whether to investigate an allegation or refer a brief of evidence to the CDPP are a matter for the AFP. I am aware the AFP is able to request pre-brief advice from the CDPP where it considers necessary. The decision to commence a prosecution is a matter for the CDPP and is taken in line with its *Prosecution Policy of the Commonwealth*. It would be inappropriate for me or my department to intervene in these processes. **Generally, my consent would be sought once the CDPP has decided there is a public interest in a prosecution**.[34] [Emphasis added]

The response from the Attorney-General clearly advised that it was the responsibility of the AFP to investigate and the CDPP to prosecute as agencies independent of government and it would be inappropriate for him to intervene in these processes. The response also indicated that the Attorney-General acts on the advice of the CDPP to give consent to a prosecution.

As foreshadowed, Jayasuriya was present in Australia in October and November 2019, but due to the AFP's failure to take the formal request to investigate seriously, no action was taken against him. ACIJ and ITJP sought updates on multiple occasions from the AFP. On September 2021, almost two years after the formal request was submitted, the AFP stated that due to an 'administrative oversight', the matter had not been allocated to an investigations team for review.

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34 The Hon Christian Porter MP, Attorney-General of Australia, 2 February 2020, Private correspondence, available on request.

On 31 January, the AFP provided a written response giving five reasons as to why they would not commence an investigation into Jayasuriya's conduct. A list of those reasons and an analysis of the unsatisfactory nature of those reasons can be found in our report 'Challenging Impunity: Why Australia Needs A Permanent, Specialised, International Crimes Unit'.

The case study of retired Sri Lankan General Jagath Jayasuriya also serves as a good illustration of how the lack of a permanent, specialist unit may contribute to the mishandling of international crime cases within Australia. The complete description of events can be found on the ACIJ website.[35]

Oliver Shulz – 2023

In March 2023, the Office of the Special Investigator (**OSI**) announced that a joint investigation with the AFP resulted in former Special Air Service (**SAS**) officer Oliver Shulz being charged with one count of the war crime of murder. Shulz is the first person to be charged following the establishment of the OSI in late 2020 to investigate allegations of war crimes by Australian special forces in Afghanistan occurring over the period 2005 to 2016. The OSI was set up following the Inspector-General of the Australian Defence Force Afghanistan Inquiry (**Brereton Inquiry**). The OSI's mandate was not limited to referrals of the incidents investigated by the Brereton Inquiry and indeed Shulz' incident was not investigated by the Inquiry as it was an incident revealed in March 2020 by the Australian Broadcasting Cooperation's Four Corners program. In the program, footage showed an Afghan civilian being shot by an SAS operator in an Uruzgan wheat field. The incident occurred in 2012 when Shulz was deployed in Afghanistan with the Australian Defence Force. He is accused of shooting the Afghan civilian while he was laying on the ground in the wheat field having been mauled by a dog.

Shulz was arrested in NSW and initially remanded in custody. He has since been granted bail. It is assumed that the Attorney-General's consent was sought prior to the charge being issued.

35 'Case Again Sri Lankan General Jagath Jayasuriya', *Australian Centre for International Justice* (Web Page).

5. Recommendations

Australia should remove the requirement of the Attorney-General's consent for the prosecution of international crimes

Recommendation 1

Sections 268.121 and 274.3(1) of the Criminal Code be repealed, such that the consent of the Attorney-General will no longer be required for proceedings commenced under Division 268 and Division 274. Additionally, section 16.1 should be amended to exclude the requirement of the Attorney-General's consent for both Division 268 and Division 274 (torture) offences.

While it is not submitted that every case concerning international crimes would face a political hurdle to prosecute, the requirement for consent *could risk* politicising the prosecution of international crimes, thereby undermining the pursuit of justice and the overarching goal to end impunity. A common response to criticisms of the Attorney-General's consent is that such a requirement does not pose a barrier to investigation or prosecution as a suspected perpetrator can be investigated, arrested, charged, and either remanded in custody or released on bail before the Attorney-General's consent is granted. However, such a response does not sufficiently address the potential for political bias or the appearance of political bias in quashing prosecutions concerning international crimes. Indeed, one need not search far to conjure examples of when such consent could be problematic, including in situations where Australian officials and members of government could themselves be complicit or seek to avoid scrutiny. It is possible that political considerations could intrude upon the decision-making process, making the requirement of consent inappropriate.

Repealing the requirement of consent under sections 268.121 and 274.3(1) (and correspondingly amending section 16.1 to exclude Divisions 268 and 274 offences), would inevitably affect the application of the High Court's finding in *Taylor v Attorney-General (Cth)*,[36] which precluded the commencement of private prosecutions for international crimes. In any case however, it is submitted that Australia should recognise the right of private prosecutions for international crimes. The risks of frivolous or vexatious proceedings could be mitigated by the right of the CDPP to intervene in a private prosecution under section 9(5) of the *Director of Public Prosecutions Act 1983* (Cth). As stated under paragraph 4.10 of the CDPP Prosecution Policy, where a question arises of whether the power under section 9(5) should be exercised to intervene

[36] (2019) 268 CLR 224.

in a private prosecution and the private prosecutor indicates opposition to this course, the private prosecutor is permitted to retain the conduct of the prosecution unless certain circumstances apply, including where "to proceed with the prosecution would be contrary to the public interest - law enforcement is necessarily a discretionary process, and sometimes it is appropriate for subjective considerations of public policy, such as the preservation of order or the maintenance of international relations, to take precedence overstrict law enforcement considerations".[37] In addition, credibly sought private prosecutions are typically intended to respond to urgent situations where perpetrators are known to be in the jurisdiction on a temporary basis and responses from police to act may be slow and insufficient to apprehend accused persons in time.

In the alternative, Australia should limit the discretion of the Attorney-General regarding decisions to consent to prosecutions of international crimes

Recommendation 2

In the alternative to Recommendation 1, the Attorney-General's discretion under section 268.121 be amended to be subject to an appropriate legislative test that could include public interest considerations such as the seriousness of international crimes, the rights of victims to access justice and Australia's obligations under international law to prosecute such crimes. Reasons for the decision of the Attorney-General in exercising their discretion should be accessible to the public. This test should also apply to Division 274 offences.

As it currently stands, the Attorney-General's discretion under section 268.121 is too broad and subject to insufficient accountability and review mechanisms.[38] The discretion is unfettered, with no requirement to consider any specific factors or guidelines in granting or denying consent to prosecute section 268 offences.[39] Ultimately, the lack of legislative test or guidance against which the Attorney-General can quash a prosecution undermines the efficacy of the international criminal justice system, which is significantly dependent on the will of states to domestically prosecute suspected perpetrators of international crimes.[40]

37 CDPP Prosecution Policy, [4.10(c)].
38 Anna Hood and Monique Cormier, 'Prosecuting International Crimes in Australia: The Case of the Sri Lankan President' (2012) 13 *Melbourne Journal of International Law* 1, 239.
39 Ibid.
40 Ibid.

In the alternative, Australia should recognise the right to review the Attorney-General's decision on whether to provide consent to prosecutions of international crimes

Recommendation 3

Repeal the restrictions on review or appeal of a decision of the Attorney-General under section 268.122 to give or refuse consent to institute proceedings for an offence under Division 268 such that any such decision can be subject to review or appeal, particularly under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Reviews under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) allow for a broader form of judicial review than that allowed by the High Court's original jurisdiction. Should the Attorney-General's consent remain, section 268.122 should be repealed in its entirety to ensure sufficient review mechanisms are available to affected parties. This amendment would be consistent with the available mechanism for review pursuant to torture offences under Division 274.

Australia should recognise international criminal justice as a national priority

Recommendation 4

The Attorney-General should issue a new Ministerial Direction to the AFP under subsection 37(2) of the *Australian Federal Police Act 1979* (Cth), to include the investigations of international crimes as an area of focus. The Australian Government should further ensure that the AFP have sufficient resources, training and technical support to pursue such investigations.

Recommendation 5

Australia must establish a permanent specialised international crimes unit.

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 to investigate and prosecute these crimes and its structural and institutional ability and willingness to do so. As outlined in our introduction, the first barrier to a prosecution is the absence of an investigation into allegations of international crimes. This would significantly improve with the establishment of a specialised permanent international crimes investigations unit.

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 OSI has been established to investigate potential war crimes during Australia's engagement in Afghanistan, it is a temporary unit with a limited remit.[41] The absence of a permanent, specialised investigations unit for war crimes and other international crimes means that the AFP may lack the expertise, resources and support services necessary to consistently and appropriately investigate these crimes.

The mishandling of the Jayasuriya matter by the AFP is but one example which highlights some obstacles to effective investigation of international crimes in Australia and emphasises the need for a permanent, specialised unit to investigate these crimes. Had such a unit been in place in 2019, the AFP's 'administrative oversight' and unconscionable delay in reviewing the evidence against Jayasuriya may have been avoided, leading to a real chance of his apprehension while present in Australia.

The 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. The crucial step towards achieving this would be the establishment of a specialist, permanent investigations unit that is primarily tasked with investigating the international crimes offences in the Criminal Code.

6. Conclusion

The Australian Government should take this opportunity to address the legal and practical challenges within the existing framework for prosecutions of international crimes to fully comply with its international obligation and advance truth, accountability and justice.

41 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) 20.