



Submission to Senate Legal and Constitutional Affairs Committee

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

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Submitted by
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About Amnesty International

Amnesty International is a global movement of more than 10 million people who take injustice personally. We are campaigning for a world where human rights are enjoyed by all.

We investigate and expose the facts, whenever and wherever abuses happen. We lobby governments as well as other powerful groups such as companies, making sure they keep their promises and respect international law. By telling the powerful stories of the people we work with, we mobilise millions of supporters around the world to campaign for change and to stand in the defence of activists on the frontline. We support people to claim their rights through education and training.

Our work protects and empowers people – from abolishing the death penalty to advancing sexual and reproductive rights, and from combating discrimination to defending refugees' and migrants' rights.

We help to bring torturers to justice, change oppressive laws, and free people who have been jailed just for voicing their opinion. We speak out for anyone and everyone whose freedom or dignity are under threat.

We are impartial and independent of any government, political persuasion or religious belief and do not receive funding from governments or political parties.

Amnesty International is a proud People Powered movement founded on the work of volunteers and activists all around the country. More than 500,000 Amnesty International supporters live in Australia.

1. Summary

1.1 Amnesty International Australia (AIA) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee regarding the Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024.

1.2 As outlined in the explanatory memorandum, Australia enshrined many of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (the Convention) in 2002 when the Criminal Code Act 1995 ('Criminal Code') was amended after Australia became a signatory to the Rome Statute of the International Criminal Court (the Statute), making it an offence to commit crimes punishable by the International Criminal Court (the Court) as crimes in Australian law.

1.3 The adoption of the the Statute on 17 July 1998 and its entry into force on 1 July 2002 represented not only the establishment of a new permanent International Criminal Court but, moreover, a new system of international justice that seeks to integrate efforts at both the international and national level to end impunity for the worst possible crimes.

1.4 While the Court has been one of the twentieth century's most important creations in the struggle against impunity for the worst crimes known to humanity, the way in which states - including Australia - have implemented their obligations has undermined the effectiveness of the Court.

1.5 The recommendations contained in this submission go towards ensuring that Australian laws and regulations are amended so that Australia can provide the broadest cooperation with the ICC to ensure that it can achieve its crucial role effectively.

2. Recommendations

AIA recommends that

- 1) s 268.121(1) of the Criminal Code be amended to limit the scope of the Attorney General's powers over cases concerning international crimes by establishing clearer guidelines (in line with Australia's obligations under the Statute), as well as a right to appeal the Attorney General's decision, to be heard by courts empowered to review these decisions in a in a timely, fair and effective manner;
- 2) the Australian Government develop and implement effective training programs for officials on the implementation of the Rome Statute; and
- 3) Amnesty International recommends that immunity of officials from prosecution for crimes under international law be eliminated and that in keeping with customary international law, no statutes of limitations are permitted.

3. Bars to Prosecution

3.1 Specific to this Bill and the focus on this submission is Amnesty International's concern that Australian legislation requires the Attorney General's consent to prosecute a political official.

3.2 Although it has been argued that such consent is given in the Attorney General's role as a professional prosecutor, rather than as a political official, and is in keeping with common law doctrine, Amnesty International is concerned that such a requirement risks creating the perception that prosecution decisions in cases involving crimes under international law have been made for political reasons.

3.3. These issues are of greater importance in a country such as Australia, where unlike elsewhere where the position of Attorney General carries a level of independence and autonomy from the government of the day, the position of Attorney General in Australia is a ministerial position, is not required to have legal training and is frequently a member of Cabinet.¹

3.4 For this reason, and to avoid these negative perceptions, it's vital that countries such as Australia develop and implement effective training programs for officials on the implementation of the Statute, conducting an intensive training program for politicians, judges, prosecutors, defence lawyers, police and military, and justice and foreign affairs officials on their obligations.

3.5 Notwithstanding this training taking place, Amnesty International has further concerns regarding the lack of guidelines or criteria around the decision making process of the Attorney General in this respect and the absence of any right to appeal a negative decision - or for that matter a requirement for the Attorney General to provide any compelling reason for their decision.

3.6 Amnesty International argues that this is a measure that extends immunities to perpetrators and can have the effect of preventing the discovery of the truth and preventing a determination of guilt or innocence.

3.7 It is for these reasons that the 'Guidelines on the Role of Prosecutors' were developed and adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders.²

3.8 The Guidelines specifically state that in respect to discretionary functions:

*"the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution."*³

3.9 In this respect, Amnesty International would support the specific inclusion of guidelines within s 268.121(1) of the Criminal Code that would narrow the scope of the Attorney General's discretionary powers and provide clearer guidelines (in line with Australia's obligations under the

¹ Anna Hood and Monique Cormier, 'Prosecuting International Crimes in Australia: the Case of the Sri Lankan President,' Melbourne Journal of International Law 235, 2012, available at,

https://law.unimelb.edu.au/_data/assets/pdf_file/0010/1687249/Hood-and-Cormier.pdf

² the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 'Guidelines on the Role of Prosecutors,' adopted 07 September 1990, available at, <https://www.ohchr.org/sites/default/files/prosecutors.pdf>

³ Ibid.

Statute) as well as a right to appeal the Attorney General's decision, to be heard by courts empowered to review these decisions in a in a timely, fair and effective manner.

3.10 Lastly, Amnesty International notes that while outside the parameters of the present Bill, the Australian Parliament should also move to ensure that immunity of officials from prosecution for crimes under international law are eliminated and that in keeping with customary international law, no statutes of limitations are permitted.

3.11 Article 27 (1) of the Statute provides that it:

“shall apply equally to all persons without any distinction based on official capacity” and that official capacity, whether as a head of state or any other capacity “shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence”.⁴

3.12 Article 27 (2) provides that:

“immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”⁵

3.13 It will be essential for states such as Australia wishing to avoid the Court asserting jurisdiction over cases they are investigating or prosecuting to ensure that any existing immunity under national law with respect to crimes under international law based on official capacity of their own officials or foreign officials be eliminated. It should be possible to prosecute any official regardless of nationality or rank under national law for such crimes and, in accordance with the Statute, to surrender any official to the Court.

3.14 Furthermore, Article 29 of the Rome Statute provides that:

“the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”⁶

3.15 In this, state parties such as Australia must ensure that their legislation is consistent with Article 29, which will help ensure that Australian courts, not the Court, try such crimes.

Recommendation 1: Amnesty International recommends that s 268.121(1) of the Criminal Code be amended to limit the scope of the Attorney General's powers over cases concerning international crimes by establishing clearer guidelines (in line with Australia's obligations under the Statute), as well as a right to appeal the Attorney General's decision, to be heard by courts empowered to review these decisions in a timely, fair and effective manner.

Recommendation 2: Amnesty International recommends that the Australian Government develop and implement effective training programs for officials on the implementation of the Rome Statute

⁴ *Rome Statute of the International Criminal Court*, opened for Signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

⁵ *Ibid.*

⁶ *Ibid.*

Recommendation 3: Amnesty International recommends that immunity of officials from prosecution for crimes under international law are eliminated and that in keeping with customary international law, no statutes of limitations are permitted.