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Senate Legal and Constitutional Affairs Committee
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Re Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024

Dear Secretary

Constitutional invalidity of s.268.121(2) requiring its effect to be read down to comply with the Constitution, as per s.15A of the Acts Interpretation Act 1901.

1. The purported restriction by s.268.121(2) of prosecutions under Div 268 Subdivision B to be commenced only by those authorized to prosecute in the name of the Attorney General, is contrary to the intent of the Genocide Convention and the Rome Statute through which the Parliament obtains its power under the External Affairs power s.51(xxi) of the Constitution, to enact Div 268 Subdivision B.
2. It is contrary to the obligation in the Genocide Convention to prohibit, prevent, and punish the Crime of Genocide, that the authority to prosecute should be strictly limited to only the Attorney General and the Director of Public Prosecutions (DPP), where the authority of the DPP to prosecute at all is constrained by the political imperative to obtain consent of the Attorney General. In short, the DPP is not an independent prosecutor and that role can only be fulfilled by not restricting the capacity of individuals to bring private prosecutions, in respect of which the AG may give, or withhold, consent.

3. Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide states¹
Article I The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.
4. The primary obligation therefore under the Genocide Convention is the prevention of genocide, and where this has failed, the punishment of it.
5. The Crime of Genocide is also codified as a prohibition in Article 6 of the Rome Statute of the International Criminal Court.² Such requirement for punishment is rendered at nought when the Attorney General as effectively the singular person who may initiate prosecutions, has expressed views which are partisan in respect of an ongoing genocide. In the present case the Attorney General at the United with Israel Rally on 13th October 2023 stated, inter-alia³ “ Australia stands as one with Israel ... And we always will.”
6. Such partisanship in respect of the genocide is inherently political and these political opinions of the AG cannot be a basis for the screening out of the matter of genocide from the jurisdiction of the High Court of Australia and the Chapter III courts including the State Courts constituting “competent tribunals” for the purpose of Article VI of the Genocide Convention for the prosecution according to law of those charged with genocide⁴.
7. Similarly in respect of the Aboriginal/First Nations people of Australia, there would never be a prosecution in the name of the Attorney General against the Government of the day or any prior government for that matter for the crime of genocide because the AG may be the very person accused

¹ https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

² <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>

³ <https://www.markdreyfus.com/media/speeches/united-with-israel-rally-mark-dreyfus-kc-mp/>

⁴ https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

of the genocide. Further, victims of the genocide lack the capacity to force the AG to bring such a prosecution and hence the efficacy of the Genocide Convention and the Rome Statute is destroyed.

8. The AG should not be the sole gatekeeper of the prosecution of the crime of genocide. This is particularly brought into focus with respect to Aboriginal people who are the protected group, who have been subjected to genocide by the group of which the Attorney General as a non-indigenous Australian inevitably belongs.
9. Saul writes about this group nature of the crime as follows⁵:

Genocide by its nature is a group-orientated crime, perpetrated by one group against another. ... It consequently requires different but inter-related actions by numerous people within a group against another, including the crucial mobilising function of hate publicity.
10. Saul writes that in Musema ICTR (27 January 2000) at 62 *“The Chamber held that ‘an accused is liable for complicity in genocide if he [sic] **knowingly and voluntarily aided or abetted or instigated one or more persons in the commission of genocide,** while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such’: 7183.*
11. In the Report “Anatomy of a Genocide”, of 25th March 2024 - **Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese*** found that the crime of genocide has been perpetrated by the State of Israel (“Israel”) in the oPt, against the Palestinian people in the Gaza Strip, since 7 October 2023 [A/HRC/55/73]⁶.

⁵ *Saul* (supra), 2000 Sydney Law Review 24 The International Crime of Genocide in Australian Law at 559-560 and citing Prosecutor v Rutaganda ICTR (6 December 1999) at 75

⁶ <https://www.ohchr.org/en/documents/country-reports/ahrc5573-report-special-rapporteur-situation-human-rights-palestinian>

12. Yet it is patently clear that as a person who claimed at the Zionism Victoria's United with Israel Rally on 13th October 2023⁷ to be of Jewish faith, the Attorney General Mr Dreyfus has a right under Israeli law of Return to the rights and privileges of a citizen or subject of the State of Israel, which he has not renounced, nor has he declared prior to his nomination for election to the Parliament or since, and he is in direct contravention of s.44 of the Constitution thereby. His website as at 28th April 2024 states:

THE HON MARK DREYFUS KC MP

ATTORNEY-GENERAL

CABINET SECRETARY

MEMBER FOR ISAACS

UNITED WITH ISRAEL RALLY

CAULFIELD, MELBOURNE

13 OCTOBER 2023

I am here tonight representing the Prime Minister and the Australian Government.

And I am also here as a member of the Australian Jewish community. Melbourne's Jewish community. Our community.

Tonight, we mourn the greatest loss of Jewish life in a single day since the Holocaust. ...

Many of us here this evening are the children or grandchildren of Holocaust survivors. I am the son of a Holocaust survivor.

And it is unbearable to comprehend how, given all we have endured as a people over our long history, this could be happening again.

⁷ <https://www.markdreyfus.com/media/speeches/united-with-israel-rally-mark-dreyfus-kc-mp/>

13. At the same time as the AG is personally entitled to the rights and privileges of a citizen or subject of the State of Israel, it is improper that he be the adjudicator of the crime of genocide thereby. It is patently clear that he has adopted as a protected group under the genocide convention, his belief that there is a group identified as “the Jewish people” which are protected under the Genocide convention from being subjected to Holocaust, but it is equally apparent from his silence concerning Palestinians that he does not consider them to be a protected group.
14. Thus the Attorney General’s complete power as gatekeeper depriving the Courts of jurisdiction over matters of genocide affecting Palestinians, or any other group who constitute a protected group under the Genocide Convention including Aboriginal Australians, if the AG does not consider them to be a protected group.
15. The AG’s entitlement to the privileges and entitlements of a citizen or subject of the State of Israel comes from the Jewish Law of Return. The Jewish Agency states⁸

Among the global Jewish population, the number of Jews in Israel is 7,080,000 (compared to 6,950,00 in the previous year), while about 8.25 million live outside Israel (including approximately 6 million in the United States). ... When also including those who are eligible for Israeli citizenship under the Law of Return, the global total rises to 25.5 million people, of which 7.5 million are in Israel and 18 million live outside Israel.

...

The following are updated estimated Jewish population figures from additional countries as of January 2022, reflecting the core Jewish community and not those eligible for Aliyah under the Law of Return:

- ...Australia: 118,200

...Since 1929, The Jewish Agency for Israel has been working to secure a vibrant Jewish future. It was instrumental in founding and building the State of Israel

16. Wikipedia states of the “Law of Return”⁹:

⁸ <https://www.jewishagency.org/jewish-population-rises-to-15-3-million-worldwide-with-over-7-million-residing-in-israel/>

⁹ https://en.wikipedia.org/wiki/Law_of_Return viewed and accessed 29.12.202 at 10.39am ACST.

See also <https://en.wikipedia.org/wiki/Aliyah>

The Law of Return (Hebrew: חוק השבות, ḥok ha-shvūt) is an Israeli law, passed on 5 July 1950, which gives Jews, people with one or more Jewish grandparent, and their spouses the right to relocate to Israel and acquire Israeli citizenship.[1] Section 1 of the Law of Return declares that "every Jew has the right to come to this country as an oleh [immigrant]". In the Law of Return, the State of Israel gave effect to the Zionist movement's "credo" which called for the establishment of Israel as a Jewish state.

17. It is not possible for the current Attorney General as a person holding such rights and entitlements of a citizen of the State of Israel to be perceived to be unbiased in the assessment of whether the Palestinian people constitute a protected group under the Genocide Convention and whether that right has been violated.
18. The obligation to prevent genocide not been fulfilled. Accordingly the obligation under the Genocide Convention, is the prevention of further genocide and the punishment of the crime of Genocide which has already occurred.
19. These circumstances are illustrative of how the purported effect of s.268.121(2) of the Criminal Code (Cth) exceeds the legislative power of the Commonwealth under the external affairs power s.51(xxix) of the Constitution, by violating the fundamentally juridical character of the punishment of the crime of genocide.
20. It is particularly noteworthy that s.268.121 was not subjected to any Constitutional argument against its validity in *Taylor v AG*. For the reasons below it would be unconstitutional to seek to apply those restrictions to s.80.2D.
21. The purported effect of s.268.121(2) of the Criminal Code (Cth) exceeds the legislative power of the Commonwealth under the external affairs power s.51(xxix) of the Constitution, by violating the fundamentally juridical character of the punishment of the crime of genocide including its ancillary of direct and public incitement to genocide.
22. There is a Constitutional requirement that the Chapter III Courts not be effectively denied jurisdiction by the means of political filtering of matters

which is the politization of the prosecutorial function, without judicial oversight. This would be impossible to avoid in the case where only a single individual has complete control over prosecution.

23. The Genocide Convention has at its heart the need to protect usually minority groups, from elimination. Such groups are regularly disempowered and hence would not occupy the AG position. Moreover, by definition the minority groups subjected to genocide are also subjected to exclusion from the mechanisms of political power.
24. Broad and liberal standing to bring such prosecutions against incitement and advocating genocide is essential in order to prevent the crime of genocide – the first and foremost obligation under Article 1 of the Genocide Convention.
25. Limiting standing to a single individual suppresses the law and promotes impunity, even if that single individual is the Attorney General.
26. If the AG were to be the only person in the known universe who could initiate or prosecute or consent to a charge for the crime of advocating genocide and inciting it, then the prohibition of genocide would be strictly a political discretion rather than a universal *jus cogens* peremptory norm.
27. The capacity of private prosecutors to bring cases of genocide to the Court, in the first instance is essential to maintain the jurisdiction of the Chapter III courts including the High Court.
28. In the field of genocide, the High Court itself is not structured to undertake prosecutions and it relies on the State Courts to provide the judicial infrastructure thus freeing the High Court to fulfil its natural role in criminal matters as the appellate court of last resort. Its original and appellate jurisdiction over the crime of genocide would be rendered nugatory by the investiture in the singular person of the AG the control and filtering power to prevent any and all such matters reaching the Courts.
29. In such circumstances the jurisdiction of the High Court over the crime of advocating genocide would be rendered futile if it were subject to a veto by the AG through the withholding of consent. The universal jurisdiction

of the prohibition on the crime of genocide and obligation to punish it, is neutered through parsing all ‘matters’ of genocide through the bottleneck of the absolute discretion of one man or woman in the position of Attorney General.

30. The prevention, and punishment of the crime of Genocide and its ancillary incitement to genocide is at its root the very basis of the judicial power, for without it there is no society to speak of.
31. The High Court retains an incident of the judicial power to prevent genocide and to punish it however it requires that there be no unnatural or unlawful prevention of legal “matters” concerning incitement to genocide coming before it.
32. The jurisdiction of the High Court (and the State Supreme Courts) over genocide and incitement to genocide would be jurisdictions without subject matter, if that subject matter is excluded at the outset by the AG retaining unreviewable and complete discretion over prosecutions.
33. The jurisdiction of the High Court (and the State Supreme Courts) is without subject matter, if that subject matter is excluded at the outset by the AG retaining unreviewable and complete discretion over prosecutions.
34. It is the intention and requirement of the Genocide Convention that there be access to the courts for the victims of crimes of genocide and incitement to genocide, including through actions taken by other members of the community for the benefit of victims of genocide, including the deceased.
35. The powers of the DPP and AG to take over any or all of such matters is clearly there to ensure there is no abuse of process.
36. Article V of the Convention requires that legislation enacted to implement the obligations under the Convention, must in accordance with the Constitution of the State Party, give effect to the provisions of the Convention:

Article V The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide

effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

37. The acts in article III include incitement to genocide.
38. To give effect to this Treaty based prohibition on incitement to genocide, requires effective access to justice. Section 51(xxix) of the Commonwealth Constitution, as interpreted in *Commonwealth v Tasmania* (1983) 158 CLR 1 (hereinafter *The Tasmanian Dam Case*), requires that the implementing legislation should not be contrary in its effect to the requirements of the Treaty being implemented¹⁰.
39. s s.15A of the Act Interpretation Act 1901. That section provides:

Construction of Acts to be subject to Constitution

Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

40. It is also the intent of the Criminal Code as a whole that Australia retains in all cases primary jurisdiction to prosecute. Noting that the crime of advocating genocide refers to genocide as defined in s.268 of the Criminal Code, it is noteworthy that the former Attorney General Mr Williams in the second reading speech introducing Division 268 into the Criminal Code said that the jurisdiction of the Court was intended to be the primary jurisdiction for the prosecution of such offences¹¹:

¹⁰ Saul (supra) at footnote 18 notes “ There is no Commonwealth general constitutional head of power to enact criminal laws, so criminal law is primarily the concern of the states. Commonwealth criminal laws must be justified under other heads of power: see David Brown, David Farrier, David Neal & David Weisbrot, *Criminal Laws* (1990) at 8.”

¹¹

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansardr%2F2002-06-25%2F0058;query=Id%3A%22chamber%2Fhansardr%2F2002-06-25%2F0064%22>

A fundamental element of the International Criminal Court statute is its recognition that it is the primary duty of every state to exercise its national criminal jurisdiction over these crimes.

...

The International Criminal Court (Consequential Amendments) Bill makes every crime under the International Criminal Court statute also a crime under Australian law.

In addition, if the amendments to the Criminal Code contained in the International Criminal Court (Consequential Amendments) Bill 2002 are enacted, Australia will have primary jurisdictional coverage over all the crimes within the jurisdiction of the ICC, wherever committed.

This would enable Australia to take full advantage of the principle of complementarity in the ICC statute, under which Australia retains primacy of jurisdiction in cases in which we are willing and able to investigate and prosecute.

41. In *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 at 17 the High Court found that a longstanding authority should be reopened to consider the Constitutional validity of the legislation in question.

The weight of the consideration of continuity and consistency in the application of constitutional principle ultimately compels the conclusion that leave to reopen the constitutional holding in Al-Kateb should be granted.

42. In *Taylor v Attorney-General* (Cth) [2019] HCA 30 the Constitutional validity of the implication of s.268.121(2) that it exhibited a contrary intention for the purpose of s 13 of the Crimes Act such that a private prosecution was not available, was not challenged or considered.
43. The Parliament should proceed on the basis that s.268.121 of the Criminal Code must be read down to not exceed the legislative powers of the Parliament.

44. Punishment of the Crime of Genocide is an obligation *erga omnes* including from Article 1 of the Genocide Convention, and codified as a prohibition in Article 6 of the Rome Statute of the International Criminal Court¹². The primacy of jurisdiction of the Chapter III courts, including the State Courts exercising Commonwealth Jurisdiction over this crime, in order to have any meaning, requires that private prosecutions be issued and if the Attorney General with-holds consent, the High Court is not lacking in jurisdiction to intervene.
45. Therefore I request that the bill be passed.

Dated this 28th day of April 2024

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¹² <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>

End Notes:

In the Report “Anatomy of a Genocide”, of 25th March 2024 - **Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese*** addresses the crime of genocide as perpetrated by the State of Israel (“Israel”) in the oPt, specifically in the Gaza Strip, since 7 October 2023. [A/HRC/55/73] states¹³:

Summary

After five months of military operations, Israel has destroyed Gaza. Over 30,000 Palestinians have been killed, including more than 13,000 children. Over 12,000 are presumed dead and 71,000 injured, many with life-changing mutilations. Seventy percent of residential areas have been destroyed. Eighty percent of the whole population has been forcibly displaced. Thousands of families have lost loved ones or have been wiped out. Many could not bury and mourn their relatives, forced instead to leave their bodies decomposing in homes, in the street or under the rubble. Thousands have been detained and systematically subjected to inhuman and degrading treatment. The incalculable collective trauma will be experienced for generations to come.

By analysing the patterns of violence and Israel’s policies in its onslaught on Gaza, this report concludes that there are reasonable grounds to believe that the threshold indicating Israel’s commission of genocide is met. One of the key findings is that Israel’s executive and military leadership and soldiers have intentionally distorted jus in bello principles, subverting their protective¹⁴

¹³ <https://www.ohchr.org/en/documents/country-reports/ahrc5573-report-special-rapporteur-situation-human-rights-palestinian>

¹⁴ <https://www.ohchr.org/en/documents/country-reports/ahrc5573-report-special-rapporteur-situation-human-rights-palestinian>