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

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ANTAR is proud to acknowledge and pay our respects to First Nations Peoples as the traditional owners of the lands on which we work across the continent.

About ANTAR

ANTAR is a national advocacy organisation working for Justice, Rights and Respect for Australia's First Nations Peoples. We do this primarily through campaigns, advocacy and public education.

ANTAR campaigns for the principles of the Uluru Statement from the Heart, including the establishment of a Makarrata Commission to oversee national agreement-making and truth-telling processes, as well as for the self-determination of First Nations Peoples. We actively support state and territory-based voice, treaty and truth-telling.

ANTAR engages in national advocacy across various policy and social justice issues affecting First Nations communities, including cultural heritage protection; justice reinvestment, over-incarceration and raising the age of criminal responsibility; child safety, development and wellbeing; anti-racism campaigns, native title and land rights, and closing the life equality gap.

ANTAR is a foundational member of both the Close the Gap Campaign and Change the Record Campaign Steering Committee, and an organisational and executive committee member of Just Reinvest NSW. ANTAR has been working with First Nations communities, organisations and leaders on rights and reconciliation issues since 1997. ANTAR is a non-government, not-for-profit, independently funded and community-based organisation.

“Genocide is a gradual process and may begin with political disenfranchisement, economic displacement, cultural undermining and control, the destruction of leadership, the break-up of families and the prevention of propagation. Each of these methods is a more or less effective means of destroying a group. Actual physical destruction is the last and most effective phase of genocide.”

Raphäel Lemkin[1]

“...use of the term 'genocide' to describe the colonial experience has been met with skepticism from some quarters... Yet the political posturing and semantic debates do nothing to dispel the feeling Indigenous people have that this is the word that adequately describes our experience as colonised peoples.”

Larissa Behrendt (Euahleyai/Gamillaroi)[2]

Introduction

ANTAR welcomes the opportunity to provide commentary and reflections on the Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024. Given the context of settler colonialism in Australia – both historical and ongoing – as well as urgent questions concerning Australia’s role in the current global failure to halt mass atrocities in Gaza, this Bill is both timely and critical.

[1] Introduction to the Study of Genocide in the Social Science, Unfinished manuscript, (1953-9)

[2] Larissa Behrendt, ‘Genocide: the distance between law and life’, *Aboriginal History* Volume 25 (2001): 132.

As a non-partisan advocacy organisation working for treaty, truth, justice, rights and respect for First Nations Peoples, ANTAR is concerned with the current barriers to justice that sections 268.121 and 268.122 of the *Criminal Code Act 1995* (Cth) (the Act) engender in respect to victims of atrocity crimes. In particular, ANTAR is concerned with how these laws function to undermine First Nations Peoples seeking justice for historical and ongoing acts of genocide committed against their peoples. The drafting and operation of s.268.121 and s.268.122 is indicative of the kind of violent logic that underpins the settler colonial project on which so-called Australia is founded. The existence of these legislative barriers to justice for First Nations Peoples is also indicative of systemic and structural disadvantages that disproportionately affect First Nations Peoples in Australia.

ANTAR is critical of the Australian State's decision to wait 53 years after ratifying the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (the Convention), before introducing the crime of genocide into domestic law. ANTAR is also critical of the Australian State's failure to make offences of genocide under Division 268 of the Act retrospective in operation. Similarly, the inclusion of s.268.121 and s.268.122 in the Act is questionable, at least to the extent that these provisions grant a representative of the State the power to block prosecution for acts of genocide. These actions all run counter to the Australian State's responsibilities under international law to prevent and punish atrocity crimes wherever and whenever they may occur.

In electing not to have Division 268 of the Act operate retrospectively – meaning that acts of genocide occurring prior to the passing of the *International Criminal Court (Consequential Amendments) Bill 2002* (Cth)(the Bill) could not be prosecuted within Australia – the Australian State effectively safeguarded itself against being prosecuted for its own historical acts of genocide. In this way – and despite the many formal apologies, admissions of wrongdoing and pledges to move forward with respect for First Nations Peoples – Australia remains a nation fundamentally unable or unwilling to admit

that our founding was based on the genocide of Aboriginal and Torres Strait Islander Peoples.

ANTAR believes that all Australians must come to terms with our shared history before genuine reconciliation can occur between First Nations Peoples and non-Indigenous Australians, wherefrom we can hopefully move forward together as a nation (or many Aboriginal and Torres Strait Islander nations within a nation). For governments to refuse to recognise the truth of Australia's genocidal history, it either requires a great deal of wilful blindness, or perhaps an ideological belief that such behaviour is morally defensible when employed in the name of 'nation building' (ie. aimed at reinforcing the sovereignty and/or economic prosperity of the nation). This is a common and arguably essential feature of the settler colonial project.

ANTAR notes that the Bill seeks to address the barriers to justice for victims of genocide that are created by s.268.121 and s.268.122 of the Act. These provisions together are known as the Attorney-General's fiat (the Fiat), which authorises the Cth Attorney-General to unilaterally withhold or withdraw consent for proceedings for atrocity crimes brought within Australia. The Fiat can be exercised without the application of any criteria. Further, the Cth Attorney-General's decisions are final and they have no requirement to provide reasons for their decisions which "must not be challenged, appealed against, reviewed, quashed or called into question"[3].

In placing this level of unfettered discretion in the hands of an individual – particularly a representative of the Crown and the Australian Government (i.e. the likely accused in prosecutions for acts of genocide against First Nations Peoples) – not only does the Fiat give rise to a significant conflict of interest, but it therein arguably serves to undermine the Rule of Law in Australia. In this context, ANTAR supports the removal of the Fiat so that any individual may be given the chance to have their case heard by a court without political

[3] *Criminal Code Act 1995*, Australian Government Federal Register of Legislation, s 268.122

interference, and so that First Nations Peoples might seek the justice that they deserve and that is their right.

By its design, the Fiat can serve to protect the Australian State from prosecution. Not only this, but any attempt on the part of First Nations Peoples to seek justice under Division 268 of the Act will likely be treated by the State as a threat and summarily quashed. This is a stark reminder of a truth that Aboriginal and Torres Strait Islander Peoples have known since invasion: that in the eyes of the settler colonial state, the sovereignty, culture and lives of First Nations Peoples are less important than upholding the interests of the State. On this view, the Fiat can be seen as an example of how Australia—a nation built on principles of white supremacy—continues to suffer from a legacy of racially biased institutional and legislative frameworks that suppress First Nations Peoples to this day.

Accordingly, ANTAR fully supports the proposed amendments to the Fiat, including removal of the Fiat and allowing judicial review of previous decisions of the Cth Attorney-General under s.268.121 of the Act.

In the remainder of this submission, ANTAR addresses the proposed amendments in the Bill considering three major points:

1. That it should be accepted by the Australian Government and by the wider Australian community that a genocide was carried out by the Australian State against First Nations Peoples on the lands we now call Australia, and that a reasonable case can be made that atrocity crimes are continuing through forced child removal, deaths in custody, over-representation of First Nations Peoples in detention as well as by deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (including destruction of Country);
2. That the 1997 Bringing Them Home Report successfully made the case that the separation of Aboriginal and Torres Strait Islander children from their families was an act of genocide, according to the terms of the 1948 Genocide Convention, and that all Australian Governments have failed to

fully implement its recommendations or to be held accountable for such; and

3. That the continued lack of implementation of recommendations from landmark truth-telling processes such as the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families and the Royal Commission into Aboriginal Deaths in Custody – as well as the lack of proper reparations and the Australian Government's continuation of both practices – underscores the urgent need for a national truth and justice commission to bring to light the historical and continuing violence being committed against First Nations Peoples in Australia.

Recommendations

1. Pass the Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024 in its entirety, removing the Attorney-General's fiat and allowing for judicial review of decisions made under s.268.121 of the Act since 2002;
2. Implement the recommendations from the Bringing Them Home report and the Royal Commission into Aboriginal Deaths in Custody in full;
3. Amend the *Criminal Code Act 1995* (Cth) to include genocide as a retroactive offence, thus allowing victims of past atrocities – including First Nations victims – to seek justice; and
4. Establish a national Truth and Justice Commission as a matter of urgency to inquire into the historical and continuing acts of violence against First Nations Peoples and the impacts of these injustices on First Peoples.

Context

Polish lawyer and Holocaust survivor Raphäel Lemkin coined the term 'genocide' in 1944 in his book *Axis Rule in Occupied Europe* and led the

campaign to have genocide recognised and codified as an international crime. Lemkin wrote about genocide as typically comprising of two phases: the destruction of the cultural and social life of the 'oppressed group' and the imposition of the national pattern of the 'oppressor'.[4] Using Lemkin's foundational work, Article II of the United Nations 1948 Genocide Convention defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such":

a. Killing members of the group;
b. Causing serious bodily or mental harm to members of the group;
c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d. Imposing measures intended to prevent births within the group;
e. Forcibly transferring children of the group to another group.[5]

It is worth noting that whilst the Convention relied heavily on Lemkin's work as one of the three main experts making up the United Nations Secretariat, the definition of genocide set out in Article II of the Convention is a much-reduced version of the text that was originally prepared by the Secretariat experts. These experts originally divided genocide into three categories: physical, biological and cultural.[6] Cultural genocide was ultimately excluded from the scope of the Convention, with one exception: "forcible transfer of children from one group to another", which was included as a punishable act. This exclusion has particularly powerful implications for First Nations Peoples worldwide, whose relationship to culture and land is foundational to life.[7]

For Lemkin, genocide was defined as "a coordinated plan of different actions aimed at the destruction of the essential foundations of the life of national

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[4] Raphäel Lemkin, *Axis Rule in Occupied Europe* (1944): 147.

[5] United Nations Office on Genocide Prevention and the Responsibility to Protect, 'Definitions: Genocide', nd.

[6] Professor William A. Schabas, 'Convention on the Prevention and Punishment of the Crime of Genocide', United Nations Audiovisual Library of International Law (July 2008)

[7] For more on the importance of the concept of cultural genocide to First Peoples, see: Damien Short, 'Cultural genocide and indigenous peoples: a sociological approach', *The International Journal of Human Rights* Vol. 14, No. 6 (2010)

groups, with the aim of annihilating the groups themselves".[8] The objectives of such a coordinated plan would be "the disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups".[9]

In the context of Australian history, the question of genocide was most notably addressed by the Australian Human Rights Commission's 1997 Bringing Them Home report. This landmark report investigated the policies and practices of First Nations child removal in the nineteenth and twentieth centuries – what has become known as the Stolen Generations – and argued that these practices fell within the legal definition of genocide used in the 1948 United Nations Genocide convention. Specifically, the report argued that a primary objective of the forcible removal of First Nations children was to interrupt and destroy the chance that a child's community had to perpetuate itself in that child. In this sense, the systematic removal of children and their transfer to non-Indigenous families and institutions could be understood as aimed at the destruction, in whole or in part, of the essential foundations of the life of Aboriginal and Torres Strait Islander people- in other words genocide.[10]

Genocide: the Australian case

Whilst it is beyond the scope of the current Inquiry to detail how the treatment of First Nations Peoples in Australia since invasion constitutes genocide, it is ANTAR's position that it clearly and unequivocally does. This reality seems almost irrefutable when considering 'White Australia's black history'– from the massacres of the Frontier Wars and mass land dispossession, to eras of

[8] Raphäel Lemkin, *Axis Rule in Occupied Europe* (1944) as quoted in Echoes and Reflections, 'Teaching about Genocide' (2023)
[9] ibid
[10] Bringing Them Home Report, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Australian Human Rights Commission (April 1997): 190.

genocidal protectionist and assimilationist policies and the Stolen Generations, toward the current reality of so-called reconciliation with an ever-widening gap in socio-economic and health outcomes and ever-increasing numbers of First Nations child removals, over-incarceration and deaths in custody; all the while continuing the destruction of Country, including First Nations cultural heritage and sacred sites.

There is an abundance of evidence of the logic of elimination in the attitudes of early colonists. Volumes of government documentation (e.g. statutes, policies, reports and correspondence) can be found confirming the genocidal intent of the state in respect to First Nations Peoples in Australia. This was put on the judicial record in 1998 by Justice Kenneth Crispin who said, as part of proceedings in the ACT Supreme Court, "there is ample evidence to satisfy me that acts of genocide were committed during the colonisation of Australia."[11]

By way of further example, the so-called Chief Protector of Aborigines in Western Australia between 1915 and 1940, A.O. Neville, developed a 'three-point plan' for dealing with the 'problem' of First Nations Peoples in Australia:

> "...first, the "full bloods" would die out; second, take "half-castes" away from their mothers; third, control marriages among "half-castes" and so encourage intermarriage with the white community. ... In this way, it would be possible to "eventually forget that there were ever any Aborigines in Australia."[12]

In the recent context of the 2023 Voice to Parliament Referendum in Australia, we saw the propagation of assimilationist thinking in the 'No' campaign strategy. This destructive thinking was particularly evident in respect to the 'vote no to the voice of division' campaign slogan. This was an obvious and concerning attempt by conservative Australians to re-enliven assimilationist ideology, seeking to undermine the ability of First Nations People to be

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[11] Supreme Court of the ACT 1998, no. 457, par. 73. as cited in Colin Tatz, *Australia's Unthinkable Genocide* (2017)

[12] Colin Tatz, Genocide, p 25 as quoted in Paul R Bartrop, 'The Holocaust, the Aborigines, and the bureaucracy of destruction: an Australian dimension of genocide', *Journal of Genocide Research* 3:1 (2001): 77.

recognised as independent, sovereign and self-determining Peoples. It is not hard to make connections between some of the 'No' campaign arguments (in particular, those arguments linked to the third reason to vote no in the official 'No' Referendum pamphlet), and the wording in the official assimilation policy which was defined at the 1961 Native Welfare Conference of Federal and State Ministers, and adopted as policy by all Australian Governments at the time:

> "The policy of assimilation means that all Aborigines and part-Aborigines are expected to attain the same manner of living as other Australians and to live as members of a single Australian community, enjoying the same rights and privileges, accepting the same customs and influenced by the same beliefs as other Australians." [13]

What the above examples reflect, is that the very structure of settler colonialism in Australia (starting with invasion, which is itself ongoing) is a textbook case of genocide, based as it is on the logic of elimination. As scholar Patrick Wolfe argues, settler colonialism strives for the elimination and dissolution of First Nations societies in order to erect a new colonial society on the expropriated land base.[14] In other words, the settler colonial project in Australia destroys to replace.

The imposition of the national pattern of the oppressor

The establishment of the new colonial society is what Lemkin conceived of as the second stage of genocide: the imposition of the national pattern of the oppressor, which early settler colonists in Australia saw as an inevitable aspect of the 'onward march of civilisation'.[15] During this stage, Lemkin writes, the imposition "may be made upon the oppressed population which is allowed to

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[13] Cited in H Reynolds, *Aborigines and Settlers: The Australian Experience 1788-1939*, Cassell Australia, Sydney (1972): 175

[14] Patrick Wolfe, 'Settler colonialism and the elimination of the native', *Journal of Genocide Research* Volume 8 Issue 4 (2006)

[15] Registrar-General Henry Jordan refers to the 'onward march of civilisation' which will see the 'extinction' of the Aboriginal race. For more, see 'Census of Queensland 1881'

remain, or upon the territory alone, after removal of the population and the colonisation of the area by the oppressor's own nationals."[16]

This imposition of a new national pattern, according to Lemkin, takes place through various 'techniques' of genocide, be they political, social, cultural, economic, biological, physical, religious and/or moral.

These techniques include but are not limited to:

- the attempted destruction of local institutions of self-government and systems of governance in favour of the oppressor's pattern of administration;
- the changing of names and inscriptions of buildings, roads and streets, as well as names of communities and localities to the oppressor's form;
- the removal of native inhabitants from their home in order to make room for settlers;
- forbidding the use of local languages and a rigid control of all cultural activities;
- the destruction of the foundations of the economic existence of a population (including through impoverishment through dispossession from land and a daily fight for physical survival by lowering the standard of living);
- policies of depopulation that include separation of males from females, forced labour, and under-nourishment of parents;
- endangering of health; and
- the disruption of national and religious education of children by enrolling them in institutions and organisations run by the oppressor.[17]

Many of these techniques can be seen in the Australian case, where the settler colonial project established and (often violently) imposed its language, systems

[16] Raphäel Lemkin, *Axis Rule in Occupied Europe* (1944): 79.

[17] Raphäel Lemkin, Chapter IX: 'Genocide: A New Term and New Conception for Destruction of Nations' in *Axis Rule in Occupied Europe* (1944)

of law and governance, economic and educational institutions as well as its religious, cultural and moral foundations on the local First Nations populations.

Genocide: according to who?

In deciding whether grounds exist for criminal proceedings in respect of an act of genocide, there should exist an obligation to consider not just the legal but the moral nature of the offender's acts against the victim. As Euahleyai/Gamillaroi Professor of Law Larissa Behrendt argues, by using narrow formulations of legal questions, the law often concludes that what is morally wrong is not necessarily legally wrong. In this way, the law can sometimes function to conceal the truth of a matter.[18]

That genocidal acts towards First Nations Peoples in Australia may have been legally sanctioned makes them no less genocidal, nor morally defensible. As Behrendt argues, the moment at which the colonial legal system was powerless to prevent or punish frontier violence perpetrated by white men against First Nations Peoples, it became complicit in the colonial agenda of conquest, dispossession, violence and genocide.[19]

ANTAR implores the Australian Government to recognise the inherent deficiencies in the dominant conceptions of genocide in both international and Australian law, wherein such conceptions are based on narrow definitions that do not include the destruction and loss of culture (ie cultural genocide). These definitions also fail to account for the destruction of or systematic violence toward non-human animals, land, water, and ancestral beings – all of which are indivisible from what it means to be human and can constitute forms of genocide according to the metaphysics and world view of First Nations Peoples in Australia.

[18] Larissa Behrendt, 'Genocide: the distance between law and life', *Aboriginal History* Volume 25 (2001): 142.
[19] Behrendt, 'Genocide', 146.

Consider the view of 'land as life' articulated in Kombumerri and Wakka Wakka philosopher Mary Graham's work, in which kinship extends to land. Graham writes:

> "The land is a sacred entity, not property or real estate; it is the great mother of all humanity. The Dreaming is a combination of meaning (about life and all reality), and an action guide to living. The two most important kinds of relationship in life are, firstly, those between land and people and, secondly, those amongst people themselves, the second being always contingent upon the first. The land, and how we treat it, is what determines our human-ness."[20]

In ANTAR's view, the approach of the Australian State to codifying its responsibilities under the Convention, and its working understanding of what constitutes genocide, does not adequately account for First Nations ontologies, perspectives and lived experiences. As such, in deciding whether to grant or withhold consent for proceedings of genocide, ANTAR suggests that the Cth Attorney-General (noting that ANTAR strongly disapproves of the Cth Attorney General exercising this function) or an independent legal representative, such as the Officer of the Commonwealth Director of Public Prosecutions (CDPP), should be required to consider and take into account First Nations understandings and experiences of collective life, of Country, and of culture.[21] As Andrew Woolford argues in his book *This Benevolent Experiment*, the genocide concept must be accountable to the variety of Indigenous experiences and knowledges.[22]

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[20] Mary Graham, 'Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews', *Australian Humanities Review* (2008)

[21] Woolford argues that the separation between "cultural" and "physical" forms of destruction is a modernist contrivance that contends that such neat categories in fact exist and one that collapses under a more detailed investigation of Aboriginal experiences of destruction. For more, see Andrew Woolford, 'Ontological Destruction: Genocide and Canadian Aboriginal Peoples', *Genocide Studies and Prevention: An International Journal* Vol. 4: Issue 1 (2009).

[22] Andrew Woolford, *This Benevolent Experiment: Indigenous Boarding Schools, Genocide, and Redress in Canada and the United States*, University of Nebraska Press (2017): xxi.

"The chasm between the use of the term 'genocide' as a descriptor of experience by Indigenous people and the refusal of the legal system to consider those acts as amounting to genocide says more about the conceptual leaps that still need to be made in the institutions of Australian society and those in positions of power than any delusion about the past by Indigenous people."[23]

Forcibly transferring children

Raphäel Lemkin defined genocide to include "deliberate separation of families for depopulation purposes subordinated to the criminal intent to destroy or to cripple permanently a human group".[24] It is notable that the forcible removal or transfer of children from one group to another, originally conceived of as a technique of cultural genocide, was retained in the UN Convention's terms where other aspects of cultural genocide were excluded. This is particularly relevant in the context of Australia, where the forcible removal of First Nations children has been an integral element of settler colonisation since 1788.

The devastating effects of mass and ongoing child removals reverberates through First Nations children, families and communities in the form of intergenerational trauma, grossly disproportionate socio-economic disadvantage and immense disparity in physical and mental health outcomes. The 1997 Bringing Them Home report estimates that between one in three and one in ten First Nations children were removed from their families in the period between 1910 and 1970, and points out that not one First Nations family has escaped the effects of forcible removal.[25]

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[23] Behrendt, 'Genocide', 146.

[24] Raphäel Lemkin, "Genocide as a crime under International Law", *American Journal of International Law*, 145, (1947): 147.

[25] Bringing Them Home Report, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Human Rights and Equal Opportunity Commission (1997): 37.

The predominant aim of First Nations child removals (at least historically) was the absorption or assimilation of the children into the wider, non-Indigenous community so that their unique cultural values and ethnic identities would disappear – "Christianising and civilising" the children.[26] Accordingly, the Stolen Generations and their descendants, as well as those that suffered dislocation and loss of identity attempting to avoid the abduction of their children by the state, can be understood to be the victims of genocidal policy.[27]

An oft-cited defence of early colonial child removal policies was that the removal of First Nations children – as well as their placement into non-Indigenous communities, families or institutions – was welfare-driven and being done for the purpose of protection. The National Inquiry into the Removal of Aboriginal and Torres Strait Islander Children from their Families considered the applicability of the Genocide Convention where the destruction of a particular culture and its family institutions was believed to be in the best interests of the children or where child removal policies were intended to serve multiple aims. The Inquiry found that an act or policy still constitutes genocide where it is motivated by a number of objectives. As Robert van Krieken argues, there is nothing to prevent the pursuit of 'welfare' to simultaneously be comprehensible as 'genocidal'.[28]

In order to constitute an act of genocide, the destruction of a group need not be solely motivated by animus or hatred.[29] In fact, several scholars have convincingly argued that benevolence and destruction can be understood not as pure opposites but as potentially related terms. Andrew Woolford, one such scholar writing on forced assimilative schooling for Indigenous children in North

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[26] See Anna Heibich, 'Genocide and the Forcible Removal of Aboriginal Children in Australia, 1800–1920', in *The Cambridge World History of Genocide*, Cambridge University Press (2023)

[27] Dr Sarah Pritchard, 'Reconciling the Stolen Generation', *Polemic* Volume 8 Issue 1 (1997): 13.

[28] Robert van Krieken, 'Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation', *Oceania* Volume 75 Issue 2 (2015): 139.

[29] Matthew Lippman, 'The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later' *Temple International and Comparative Law Journal* Vol 8 No 1 (1994): 22-23.

America, points out that discourses of benevolence were underwritten by a settler colonial desire for land, resources and national consolidation.[30]

This 'benevolent' child removal practice continues today, with states and territories possessing the power to investigate families of vulnerable children who have been, or are at risk of being, abused, neglected, or otherwise harmed, or whose parents the state or territory declares are unable to provide adequate care or protection for their child.[31] This can include legal intervention to remove a child. While the responsibility to protect the most vulnerable members of our society is, in theory, the expression of a reasonable duty of care, the disproportionate removal of First Nations children in particular – given the history of colonial child removal under the guise of protection – is alarming.

Current numbers of First Nations children being removed from their families by the Australia State has risen in the past decade, largely due to higher rates of surveillance of First Nations families, systemic racism, structural inequalities, as well as mandatory reporting.[32] First Nations children make up 37 percent of the total out-of-home care population but are only 6 percent of the total child population in Australia, and are 10.5 times more likely to be removed from their families than non-Indigenous children (the highest rate of over-representation ever recorded).[33]

In Victoria, for example, hundreds of notifications are made against First Nations mothers about unborn babies each year, of which at least one in five result in the child being removed before they are three months old.[34] In evidence to the Yoorrook Justice Commission, the Victorian Government recently acknowledged that over half of all child protection notifications made against First Nations families were unsubstantiated, and that racism was a

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[30] Andrew Woolford, *This Benevolent Experiment: Indigenous Boarding Schools, Genocide, and Redress in Canada and the United States*, University of Nebraska Press (2017): 3.

[31] Child Protection Australia 2020-21, Australian Institute of Health and Wellbeing, 2022.

[32] BJ Newton, Ilan Katz, Kathleen Falster et al,, 'Why are First Nations children still not coming home from out-of-home care?' *The Conversation*, 9 June 2023.

[33] Family Matters Report 2023, SNAICC – National Voice for our Children (2023)

[34] Sue-Anne Hunter, 'Pregnant Aboriginal women are living in fear due to Victoria's unborn child protection notifications', Yoorrook Justice Commission, 8 June 2023.

contributing factor.[35] In NSW, 40 percent of children in out-of-home care are First Nations children – nearly 10 times the rate of non-Indigenous children – with a recent major review of the child protection system finding that child protection workers regularly gave misleading evidence to the children's court, and often took the most traumatic option of removing First Nations children (including newborns) from their families, and operated in a "closed system" without transparency.[36]

The above actions of governments in Australia, whether defensible in their view or not, clearly run contrary to the associated objective of the National Closing the Gap target on child protection, which is to reduce the number of First Nations children in out-of-home care (OOHC) by 45 percent by 2031.[37] First Nations-led research at the University of New South Wales has shown that where possible, reunification of First Nations children with their birth parents or community is best practice, yet the reality is that First Nations children are being forcibly removed, put in care and not returned home in unprecedented numbers.[38]

In ANTAR's view, the continued removal and institutionalisation of First Nations children in statutory OOHC (and juvenile detention facilities) is in direct contravention of the Genocide Convention under Article II e) Forcibly transferring children of the group to another group. This practice also runs in direct conflict with the United Nations Declaration on the Rights of Indigenous Peoples and the United Nations Convention on the Rights of the Child.

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[35] Sue-Anne Hunter, 'Pregnant Aboriginal women are living in fear due to Victoria's unborn child protection notifications', Yoorrook Justice Commission, 8 June 2023.

[36] Family is Culture, Independent Review of Aboriginal Children and Young People in OOHC in NSW, NSW Government Communities and Justice (2019); Lorena Allem, 'Alarming rate': removal of Australia's Indigenous children escalating, report warns', The Guardian, 16 November 2020.

[37] Closing the Gap Targets and Outcomes: Outcome 12, National Agreement on Closing the Gap, nd.

[38] Bring Them Home, Keep Them Home: reunifying Aboriginal families, University of New South Wales, 25 October 2022.

The Attorney-General's fiat

Section 268.121 of the *Criminal Code Act 1995* provides:

> (1) Proceedings for an offence under this Division must not be commenced without the Attorney-General's written consent.

Section 268.122 of the *Criminal Code Act 1995* further provides:

> (1) Subject to any jurisdiction of the High Court under the Constitution, a decision by the Attorney-General to give, or to refuse to give, a consent under section 268.121:
>
> (a) is final; and
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> (b) must not be challenged, appealed against, reviewed, quashed or called in question; and (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari.

As previously stated, ANTAR considers the Fiat to represent a significant conflict of interest that undermines the very intent of the Convention to prevent and punish the crime of genocide. ANTAR believes that victims of genocide must be given the chance to have their case heard by a court without political interference. Whether or not proceedings for an offence should be commenced should not be determined by a representative of the State, particularly when the State is likely to be the accused in such proceedings.

No individual should have unfettered authority to prevent a prosecution for genocide and/or other atrocity crimes from proceeding, not even where there might be perceived international relations or national security implications. By giving the Cth Attorney-General a power of veto over proceedings brought under Division 268 of the Act, it is ANTAR's view that the Australian State has compromised the operation of the Convention within Australia. The inclusion of the Fiat also suggests that the supremacy of the nation state and the promotion of the nation building project are more important to the Australian State than its obligations to prevent and punish genocide under international law. As a

member of the international community, Australia made a moral promise to never again allow genocidal atrocities to be inflicted upon humanity. Compromising this promise, whether in actuality or optics alone, is plainly unacceptable.

A note on retrospectivity of criminal laws

"...from 1946 laws and practices which, with the purpose of eliminating Indigenous cultures, promoted the removal of Indigenous children for rearing in non-Indigenous institutions and households were in breach of the international prohibition of genocide. From this period many Indigenous Australians were victims of gross violations of human rights."[39]

Bringing Them Home Report[40]

ANTAR acknowledges Article 15.1 of the International Covenant on Civil and Political Rights which states:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

And while genocide itself was not a crime in Australian legislation until 2002, ANTAR notes that retroactivity is permitted under the terms in Article 15.2, which states:

> "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed,

[39] Bringing Them Home Report, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Australian Human Rights Commission (April 1997): 241.
[40] Introduction to the Study of Genocide in the Social Science, Unfinished manuscript, (1953-9)

> was criminal according to the general principles of law recognized by the community of nations".

Similarly, the Australian Law Reform Commission (ALRC) states that:

> "retrospective criminal laws may be justified where the law in question prohibits behaviour that could never have been considered innocent, legitimate or moral"[41].

It is ANTAR's position that genocide, as one the gravest of crimes against humanity and an act of utter moral depravity, is behaviour that could never be considered innocent, legitimate or moral. As such, laws enacting the offence of genocide should always have a retrospective operation without limitation. This position speaks to more than the Rule of Law within a nation, it speaks to a higher order moral imperative that underpins the very sanctity of human life. Whilst ANTAR acknowledges that there are significant challenges in adopting retrospective criminal laws, not least of which is the risk of undermining the Rule of Law in a jurisdiction, we note that there is precedent for such, with the Australian Parliament creating a retrospective criminal law in the example of the *War Crimes (Amendment) Act 1988* (Cth).

Even where the Australian Government is unwilling to support the retrospective operation of criminal laws relating to acts of genocide, ANTAR argues that the Australian State was bound by its duty to investigate and punish crimes of genocide from at *least* 11 December 1946 onwards. This date is when the United Nations General Assembly resolved that genocide was a crime under international law. This was confirmed in a 1999 submission by the The Human Rights and Equal Opportunity Commission to the to the Senate Legal and Constitutional References Committee regarding its Inquiry into the Anti-Genocide Bill 1999, in which they state:

> There can be no doubt that from at least 11 December 1946 the forcible removal of Indigenous children, with relevant intent, violated the

[41] Traditional Rights And Freedoms—Encroachments By Commonwealth Laws (ALRC Report 129), Australian Law Reform Commission (2016): 360.

> international prohibition of genocide and could properly be punished under legislation introduced in Australia now. The relevant intent is not malice or ill will but the intent "to destroy, in whole or in part, a national, ethnical, racial or religious group". Whether or not the perpetrators thought they were acting for the benefit of the individuals or the group concerned is not relevant to culpability, only to penalty.[42]

Truth and justice

It has been well established that in order to facilitate true justice for First Nations Peoples, as well as much needed healing between Aboriginal and Torres Strait Islander and non-Indigenous Australians, a truthful examination of our unjust and violent shared history must take place. This has been most recently articulated in the Uluru Statement from the Heart, which calls for a Makarrata Commission to supervise a process of agreement making and truth-telling between the Australian Government and First Nations Peoples. And yet, for many decades, the Australian Government has failed to facilitate the necessary structural change to properly implement the recommendations from landmark truth-telling inquiries and processes such as the Bringing Them Home report and the Royal Commission into Aboriginal Deaths in Custody.

In their action plan released 20 years after the Bringing Them Home report, the Aboriginal and Torres Strait Islander Healing Foundation commented on how the Australian Government's non-implementation of key Inquiry recommendations has become a dominant theme over many years:

> "In the past 25 years—a generation in fact—we have had the Royal Commission into Aboriginal Deaths in Custody, the Bringing Them Home report and Reconciliation: Australia's Challenge: the final report of the Council for Aboriginal Reconciliation. These reports, and numerous other Coroner and Social Justice Reports, have made over 400

[42] https://humanrights.gov.au/our-work/submission-anti-genocide-bill-1999 p20

recommendations, most of which have either been partially implemented for short term periods or ignored altogether."[43]

To remedy this, ANTAR urges the Australian Government to follow through on its commitment to establish a national Truth and Justice Commission to inquire into the historical and continuing acts of genocide against First Nations Peoples and the impacts of these injustices on First Nations Peoples.

Furthermore, ANTAR believes that the proposed changes in the Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024 will facilitate truth-telling, allowing individuals to bring forward their cases and their accounts of genocide to a court of law without the risk of political interference.

Conclusion

ANTAR thanks the Committee for the opportunity to express our support for the Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024, and for the opportunity to comment more broadly on the history of state-led genocide against First Nations Peoples in Australia.

We hope that this submission has cast a necessary spotlight on the lack of implementation of recommendations from landmark truth-telling processes such as the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families and the Royal Commission into Aboriginal Deaths in Custody. ANTAR vehemently believes that the full implementation of these recommendations would catalyse structural reform that is both necessarily decolonising and justice-focused.

ANTAR hopes that the arguments that we have put forward will encourage the Australian Government to consider the ways in which it may be shielding itself from accountability under Division 268 of the *Criminal Code Act 1995* (Cth) and

[43] Bringing Them Home 20 years on: an action plan for healing, Aboriginal and Torres Strait Islander Healing Foundation (2017): 47.

thereby failing to meet its obligations under international law and its obligations to afford justice to First Nations Peoples in Australia.

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