ICC
Submission No. 18.3

# INTERNATIONAL CRIMINAL COURT
## DRAFT OF AUSTRALIAN IMPLEMENTING LEGISLATION
## OPINION

On 30 August 2001 the Attorney-General released an exposure draft of legislation to implement the Statute of the International Criminal Court.

A number of legal questions arise.

1. No Amelioration of the I.C.C. Statute. The draft legislation does not in any respect ameliorate or mitigate the provisions of the I.C.C. Statute or overcome any of the objections to that Statute. It is important to understand that it could not in fact do so. The I.C.C. Statute is overriding. It overrules and negates any attempt by a ratifying state to modify its terms. Hence any attempt by Australia to ameliorate the Statute's provisions or to provide any protection whatsoever against its overriding of Australian sovereignty would be entirely ineffectual.

2. No Power of the Commonwealth to Ratify the Statute. In a Joint Opinion dated 1 August 2001 by Mr. Charles Francis Q.C. and myself it was made clear that the Australian Constitution does not permit Australia to ratify the I.C.C. Statute. That Statute is inconsistent with section 49 of the Constitution, and the case falls outside the external affairs power in section 51 (xxix): and see also Chapter III of the Constitution. A copy of the Joint Opinion is appended hereto.

   The draft legislation does not (and indeed could not) overcome this constitutional inability to ratify.

   The I.C.C. Statue would require an amendment of the Constitution in order to be ratified, in accordance with the referendum procedure set out in section 128.

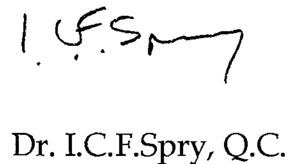
3. Validity of Proposed Legislation. The general constitutional objection to ratification and to enabling legislation has been noted at 2, supra. Even if

the Constitution were amended pursuant to the referendum procedure in section 128, implementing Australian legislation would be invalid to the extent that it did not follow precisely the requirements of the I.C.C. Statute. Because that Statute would have an overriding force, any material departures or differences in the implementing legislation might give rise to an argument that Australia was unwilling or unable genuinely to carry out any prosecution and would moreover constitute a failure to comply with the Statute.

Because no amendment to the Constitution is contemplated, and hence Australia cannot ratify the Statute, questions as to the legality and effectiveness of the implementing legislation are academic, and need not be pursued here. However there is no reason to suppose that significant portions of the implementing legislation in the terms introduced by the Attorney-General would not, in event of an enabling amendment of the Constitution, be invalid.

4. In Terrorem Provisions of Proposed Legislation. It is noted that the amending legislation sets out at length provisions for the provisional arrest of Australians and for their general arrest and surrender at the request of the I.C.C., as well as for remanding Australians, for granting search warrants and carrying out searches including strip searches, for the surrender of Australians to the I.C.C., for the taking of evidence in Australia, for the compelling of Australians to attend to answer questions or produce documents, for the imposition of penalties upon Australians, for the seizure or freezing of property of Australians, for investigations in Australia by I.C.C. prosecutors, for fining Australians and ordering them to make reparation, for the extradition of Australians and for many other

matters detracting substantially from the general liberties of Australians. In this regard the amending legislation may be seen to emphasise the substantial reductions of sovereignty that the I.C.C. Statute involves and the drastic powers of the I.C.C. that are proposed.



Owen Dixon Chambers,
Melbourne
18 September 2001

Dr. I.C.F.Spry, Q.C.

INTERNATIONAL CRIMINAL COURT

LIMITATIONS OF COMMONWEALTH POWERS

JOINT OPINION

We have been requested to advise whether the Commonwealth is empowered to ratify (which term here includes the enactment of effectuating legislation) the 1998 Statute of the International Criminal Court. We note that if the Commonwealth ratifies, it must ratify the Statute as a whole. The Statute cannot be ratified in part or subject to exceptions or reservations.

In our opinion the Commonwealth is not empowered by the Australian Constitution to ratify the Statute, and indeed express terms of the Statute are contrary to the Constitution.

First, we note that the proposed International Criminal Court ("the I.C.C."), to be set up in The Hague, will have an extraordinarily wide jurisdiction which is in many respects vague and uncertain. "Crimes against

humanity" are to extend to various "inhumane acts" causing "great suffering" or serious injury "to mental or physical health", "genocide" is to extend to various acts "causing serious bodily or mental harm" to members of a group and "war crimes" are to extend to "outrages upon personal dignity, in particular humiliating and degrading treatment". The I.C.C. will, in its sole discretion, be able to over-ride national courts (including the High Court) by the simple device of finding (on any ground, whether well-founded or not) that the relevant state is "unwilling or unable" genuinely to carry out a prosecution. The "official capacity" (such as that of a government minister, legislator or public servant) of a person will not exempt him from criminal liability, nor will any immunities that are conferred upon him by national legislation.

Secondly, the I.C.C. Statute is clearly inconsistent with section 49 of the Australian Constitution. That section provides for "powers, privileges, and immunities" of the members of the Commonwealth Parliament. In effect, section 49 prevents legislators from being sued or prosecuted for carrying out their functions. Therefore ratification of the I.C.C. Statute's attempted negation of this Constitutional protection is prevented by the Constitution. Indeed, ratification of any provisions removing section 49 protection could not be achieved without an amendment of the Constitution under section 128.

Thirdly, for convenience we set out a relevant passage from the I.C.C. Ratification Manual which deals with the manner in which a constitutional amendment was effected in France in view of three areas of conflict between the I.C.C. Statute and the French Constitution:

> "For example, the Constitutional Council of France identified three potential areas of conflict between the Rome Statute and the French Constitution . . . The French Government decided to adopt the

following constitutional provision, which addressed all three areas of conflict: 'The Republic may recognise the jurisdiction of the International Criminal Court as provided by the treaty signed on 18 July 1998.' . . .The advantage of this type of constitutional reform is that it implicitly amended the constitutional provisions in question, without opening an extensive public debate on the merits of the provisions themselves."

Fourthly, the foregoing is sufficient to demonstrate that a section 128 amendment to the Constitution is required for any ratification of the I.C.C. Statute. However, in addition, further Constitutional objections should be raised:

(1) In so far as ratification is sought to be supported by section 51 (xxix) (the "external affairs" power) it is at least very doubtful whether that paragraph applies. The range of the external affairs power has varied greatly according to changes in attitude amongst various High Court justices. Sir Garfield Barwick C.J., for example, accorded that power an extremely wide ambit, and his views have been followed generally by many other members of the Court. However, first, there have been a number of recent changes in the composition of the High Court, and it may well be that some of the new appointees do not favour the broader construction of the external affairs power, and, secondly, the I.C.C. Statute represents a more extreme case than any comparable treaties that have been considered by the High Court. Under the Statute all Australian judicial proceedings and executive acts could be over-ridden in regard to a very broad range of uncertainly defined criminal offences, and there are strong arguments that this could not be supported by the external affairs power, especially since the Statute contains provisions

that are inconsistent with the Australian Constitution. It is certainly our opinion that the external affairs power could not support ratification of the I.C.C. Statute. And there is no other possible empowering paragraph in section 51 or elsewhere in the Constitution.

(2) Further, Chapter III of the Constitution requires the judicial power of the Commonwealth to be vested in "the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction". There are clearly substantial arguments that Chapter III (and especially section 71) merely enables the Commonwealth Parliament to confer jurisdiction upon Australian courts or at least that it does not enable the Commonwealth Parliament to confer upon foreign courts such as the proposed I.C.C. extensive jurisdiction over Australian nationals and extensive powers to over-ride Australian courts. In our opinion Chapter III does not permit ratification of the I.C.C. Statute.

(3) Further, a related difficulty arises under section 80 of the Constitution, which guarantees trial by jury "on indictment of any offence against any law of the Commonwealth". (The proposed I.C.C. will not permit trial by jury.) We do not express any concluded view on the implications of section 80 in the present case, but note that it provides further evidence of the dangers that would arise on an illegitimate construction of the external affairs power or an attempted over- riding of other provisions of the Constitution.

For the reasons that we have set out in regard to section 49, section 51 and Chapter III of the Constitution a treaty purportedly removing the legislative protection set out in section 49 and purporting to confer the extremely wide powers that are set out in the I.C.C. Statute cannot validly be

ratified without first amending the Constitution appropriately under section 128.

C.F.

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1 August 2001

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