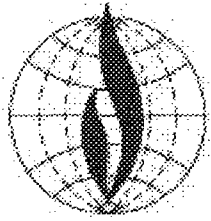


ICC
Submission No. 219-1



INTERNATIONAL COMMISSION OF JURISTS

AUSTRALIAN SECTION
QUEENSLAND BRANCH

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Committee Secretary
Joint Standing Committee on Treaties
Parliament House
CANBERRA ACT 2600

Dear Committee Secretary

INTERNATIONAL CRIMINAL COURT – COMMENT ON BILLS

We refer to our previous submissions to your committee in relation to the ratification of the Statute of the International Criminal Court.

We were invited by the Attorney- General's department to make comments on the draft legislation and we **enclose** our submission in this regard.

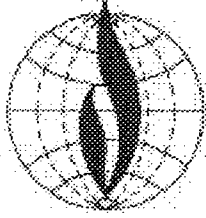
We note with much disappointment that Australia has missed out on being one of the first 60 countries to ratify the Rome Statute. We are particularly concerned that the legislation is fast-tracked through Parliament so that Australia can still participate in the first meeting of the State Parties in September 2002. As I am sure you are aware, the first meeting will decide on the ICC's administration, including financial matters and the appointment of judges.

Australia has played an integral and leading role in the lead up to the Rome Conference in the Preparatory Commission and in, among other things, chairing meetings to increase the level of acceptance of the Statute. It is a shame that Australia might miss out on the opportunity of continuing to be involved and influential in the development of the ICC due its failure to ratify the Statute in time.

The Queensland branch of the International Commission of Jurists recommends the adoption of our minor suggestions and strongly encourages the fast-tracking of the ICC Bills through Parliament.

Yours faithfully

Carla Klease
Secretary of the Queensland Branch



International Commission of Jurists

Australian Section

QUEENSLAND BRANCH

SUBMISSION REGARDING THE *INTERNATIONAL CRIMINAL COURT* *BILL 2000 (Cth)*

By Sam Garkawe, Cherie Orevich, Stephen Burton and Bill Markwell, on behalf of the Queensland branch of the International Commission of Jurists.

Introduction

The *International Criminal Court Bill 2001 (Cth)* ('the Bill') is one of two Bills that is intended to facilitate Australia's compliance with the international obligations it will have assuming it ratifies the Rome Statute of the International Criminal Court 1998 (the 'Rome Statute'). The Bill concerns cooperation between Australia and the future International Criminal Court ('ICC') in a wide variety of areas. These include requests by the ICC for the arrest and surrender of persons, the provision of records and/or documents, the seizure of 'tainted' property and forfeiture of proceeds of international crimes, transfers of prisoners and the enforcement in Australia of sentences imposed by the ICC. The second Bill in the package, the *International Criminal Court (Consequential Amendments) Bill 2001 (Cth)*, is intended to ensure that Australian domestic criminal law will include the crimes that are presently within the jurisdiction of the ICC (genocide, crimes against humanity and war crimes). An appraisal of this Bill will not be included in this submission.

The Bill is quite lengthy, consisting of 177 sections and 135 pages of legislation. Our analysis is thus not intended to be comprehensive, but will highlight what we see as main points in the Bill. The Bill will be examined in numerical order.

Recommendations

The Queensland branch of the International Commission of Jurists submits that the Bill strikes a successful balance between preserving the integrity of the Rome Statute and safeguarding the Australian national interest. Other than some minor suggestions listed below, we urge the Government to ratify the Rome Statute and enact the Bill (with its accompanying legislation) as soon as possible to ensure that Australia can still participate in the first meeting of the ICC and can have a say in the administration of the ICC.

The minor amendments recommended by the branch include:

- a request through the International Criminal Police Organisation under section 9(1)(b) should be made in writing;
- Section 64 should:
 - provide for evidence to be taken on affirmation instead of oath if requested by the witness;
 - specify that evidence not taken under oath or affirmation before a magistrate should not be afforded the same weight as evidence that is taken under oath or affirmation;

- provide for the capability of review of the magistrate's discretion to take evidence not on oath or affirmation;
- questioning conducted under section 69 should be conducted by counsel assisting the magistrate, rather than by the magistrate directly;
- proof of service under Division 7 of Part 4 should be shown by an affidavit of service rather than a certificate being forwarded to the Attorney-General; and
- the civil liberties safeguards provided to persons being questioned under section 70 should also apply to persons who are arrested under section 124.

Part 1 of the Bill - Preliminary

Article 1 of the Rome Statute establishes the ICC as a permanent institution with the power to exercise jurisdiction over persons for the most serious crimes of international concern. Article 5 lists these as genocide, crimes against humanity, war crimes, and when a definition can be agreed upon, aggression. Both this article 1 and the Preamble specifically provide that the ICC shall be complementary to national criminal jurisdiction. It is important that the Bill repeats this key element in section 3(1). This crucial point is taken further in section 3(2), which states without ambiguity that the Bill 'does not affect the *primary* (emphasis added) right of Australia to exercise its jurisdiction with respect to crimes within the jurisdiction of the ICC'. Australia has, and will continue to have, a duty to address the heinous crimes that will be within the ICC's jurisdiction.

The definitions in the Bill set out in Section 4 includes as the definition of 'international crime' those crimes that fall within the jurisdiction of the ICC under Article 5 of the Rome Statute.

Section 7 of the Bill states that Chapter 2 of the *Criminal Code* (Cth) ("the Code"), which sets out the general principles of criminal responsibility that apply to all Commonwealth offences, also will apply to all offences created by the Bill.

Part 2 – General Provisions relating to requests by the ICC for cooperation

Section 9 makes reference to a request for cooperation being sent in writing to the Attorney-General which is the appropriate manner of a request as set out in Article 87 of the Rome Statute. However, section 9 also provides an alternative of making the request through the International Criminal Police Organisation or other appropriate regional organisation, and it does not specify that this request must also be made in writing. We would suggest that it should.

Part 3 – Requests by the ICC for arrest and surrender of persons

Section 23 of the Bill provides that following a request by the ICC for Australia to arrest an accused person, upon arrest that accused person may then apply for bail. The Rome Statute at Article 59 contemplates this. The same language is used to set out the matters to be taken into account in making a decision to grant interim release.

It is our recommendation that no further detail be included in the Bill as to how a person might be granted interim release pending his or her trial before the ICC.

Part 4 – Other requests by the ICC

Divisions 1 and 2 of Part 4 of the Bill contain all the indicia required where there is documentation accompanying a request for cooperation by the ICC to the respective Nation State (in this case Australia). It is noted that section 49(1) (e) of the Bill contains the word “regulations”, which does suggest that more legislation is to be drafted. Article 89 paragraph 3 of the Rome Statute authorises a person being surrendered to the court to be transited through one state’s territory to another. The indicia required here is again repeated in section 49 (2) of the Bill, although sub paragraphs 3(c);3(d) and 3(e) of Article 89 have been deleted.

The general provisions for the request for cooperation are found in the Rome Statute at Article 87, whilst Article 86 imposes a general obligation to cooperate and Articles 90, 91, 93 and 99 also deal with cooperation generally and other requests for cooperation and execution of requests.

The purpose of Division 3 is to facilitate requests for cooperation between the ICC and Australia and other nations. There shall always be two competing tensions in such requests, namely preserving the spirit of the Rome Statute and ensuring that its purpose for which it was agreed upon is enshrined in federal legislation, and on the other hand ensuring that Australia’s internal and external security interests are also preserved.

Australia has protected its sovereignty by making it mandatory in section 50 (1) of the Bill to refuse to provide disclosure of information to the ICC if the originator of the information is not a party to the Rome Statute and refuses to consent to the disclosure of the information or documents. It is submitted that this section (together with section 135(4)) is aimed at protecting the security of Australia’s alliance with the United States, who will in all probability not be a party to the Rome Statute. Section 50(2) of the Bill provides the Attorney General with discretion to refuse a request for cooperation in different circumstances.

In section 51 Australia’s sovereignty is protected by the Bill providing the Attorney General with the discretion to postpone an execution of request in various circumstances. On the other hand, it is submitted that the integrity of the Rome Statute is maintained, as the wording in the final part of section 51(1) states “... if and only if”.

Section 53 of the Bill provides that the Attorney General, where an ongoing Australian investigation or prosecution would be interfered with, may postpone a request for cooperation.

A significant portion of the remainder of Division 3 also deals with competing interests, and it is submitted that the integrity of the Rome Statute is preserved in these sections in that the response from the Attorney General is mandatory, while in the other sections the response is discretionary. Australia is thus able to safeguard its sovereignty with the spirit of the Rome Statute being maintained.

In summary, Division 3 is important in this Bill as it proceeds to do exactly what it says, namely restrict the provision of assistance to the ICC. It is submitted that this division preserves the integrity of the Rome Statute, while at all times maintaining the sovereignty of the Nation State.

The only problem that is foreseen in Division 5 (taking evidence or producing documents or articles) is in section 64(1)(b), where a magistrate taking evidence from a person has a discretion to take the evidence on oath. Allowance should be made for those witnesses who wish to give evidence on affirmation instead of oath. It is submitted that any evidence not taken on oath or affirmation before a magistrate should not be given the same weight as evidence that is taken on oath or affirmation. It is further submitted that the magistrate's discretion to allow evidence not on oath or affirmation should be capable of being reviewed.

In Division 6 of Part 4 of the Bill, the only real area of concern is found in section 69(4)(a). This section provides that a magistrate has a discretion to question a person if the ICC requests assistance in questioning the said person, and the Attorney General is satisfied that the request relates to an investigation of the person that is being conducted before the ICC.

Although the usual safeguards for the person's civil liberties are contained in section 70, it is submitted that this form of questioning should be conducted by counsel assisting the magistrate, rather than the magistrate directly, as is usual in a coroner's inquiry.

Division 7 of Part 4 relates to the Service of Documents and it is submitted that this Division should provide for an Affidavit of Service, rather than a certificate being forwarded to the Attorney General stating that the document has been served. It is further submitted that the usual proof for the service of any legal document within the jurisdictions of the Australian legal system is a sworn affidavit, and the Bill should make the same provision.

No comments are made in relation to Divisions 9 and 10 of Part 4 of the Bill.

The only comment made in relation to Division 11 of the Bill (Search and Seizure) is a positive one in that the Attorney General must be satisfied as to the genuineness of the ICC request, and is the only person that can authorise a search warrant. Section 77 then authorises a police officer to apply for a search warrant in relation to certain premises in order to search for evidentiary material that the police officer reasonably suspects is located on the premises. This then is a two-stage process and a person's civil liberties are protected by at least ensuring the Attorney General provides the first authorisation. This can be compared with the general search provisions of the Bill already outlined, and also section 120 where a police officer may search a "conveyance" in emergency situations without a search warrant.

No comments are made in relation to Division 12 of Part 4 of the Bill.

No comments are made in relation to Division 13 of Part 4 of the Bill.

Division 14 deals with the identification tracing and freezing or seizure of tainted property.

Sections in this Division provide that a restraining order against property can be obtained by an application which is supported by an affidavit of a police officer and which states that the officer believes that the defendant committed the crime. The procedural safeguard in this section is that the court must be satisfied there are

reasonable grounds for the officer holding that belief before such a restraining order can be made.

In section 82(7) provision has been made for the court to require undertakings from the DPP in relation to damages or costs, or both. It is submitted that this is an important provision and may go some way in preventing frivolous claims from the prosecuting authority.

All of the other sections within this Division appear to be reasonable.

Division 15 of Part 4 of the Bill relates to other types of assistance. The only comment to be made is in relation to section 96(2), where it is mandatory for the Attorney General to refuse a request under three circumstances. First, if Australian law prohibits the request, and secondly the ICC does not modify the request according to Article 93 (3) of the Rome Statute, and finally, if assistance cannot be provided in a way referred to in Article 93 (5) of the Rome Statute.

Both the above-mentioned paragraphs are "alternative dispute resolution" type clauses and shall go some way to resolving any impasse that may occur between Australia and the ICC.

Division 16 is a miscellaneous Division, and it is submitted that section 98 is a worthwhile provision in that a request for assistance from the defendant must be dealt with in the same manner as a request for assistance from the prosecution. This will be of great benefit for impecunious defendants to help provide funding for their defence.

It is submitted that section 99 in its present form is quite ambiguous and difficult to read. This section states that the restrictions raised by article 72 of the Rome Statute, which concerns the protection of national security information, may be invoked if there is a request for assistance under articles 93, 96 and 99.

The only other concern that should be raised is in section 124 of the Bill (persons to be informed of the grounds of arrest). No provision has been made for a person to be cautioned as to their right to silence and legal representation on arrest under this section in the same way as is provided for in section 70 for a person who is to be questioned. It is submitted that this is a fundamental rule of our criminal justice system that should also be applied to the arrest provisions of this Bill in addition to the questioning provisions of Division 6 of Part 4. This is so that the rules of natural justice be applied to defendants and/or, on the other hand, to prevent defendants escaping the law by drawing upon a technicality that could have been prevented.

Part 5 - Investigations or Sittings of the ICC in Australia

Part 5 of the Bill allows the prosecutor to conduct investigations in Australia, and for the ICC to have sittings in Australia.

Part 6 - Search, Seizure and Powers of Arrest

Part 9 of the Rome Statute deals with International Cooperation and Judicial Assistance of State parties with the ICC.

Article 86 sets out the general obligations of the state parties to cooperate:

"States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court"

Article 93(h) states:-

*" States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:
(h) The execution of searches and seizures"*

It is within the above framework that the Bill proposes to include a legislative scheme that contemplates powers of Search, Seizure and Arrest in connection with the investigation of crimes that fall within the jurisdiction of the ICC.

Section 104 of the Bill outlines the circumstances in which a warrant will be issued to search premises or a person, and section 105 sets out what must be contained in any such warrant.

Provisions in Part 6 of the Bill deal with the powers of officers to seize items found on someone's person, on a premises or conveyance. Part 6 does not only authorise an officer to seize evidential material specified in the warrant, but also any other thing found on either the premises or the person that an officer believes on reasonable grounds to be:-

- (i) evidential material;
- (ii) things relevant to an indictable offence against an Australian law; or
- (iii) other things found in the course of the search that the executing officer or a police officer assisting believes on reasonable grounds to be seizable items. (sections 106 & 107)

The first two sub-sections allowing officers to seize additional items found at the premises are qualified by the requirement that the officer believes on reasonable grounds that seizure of the items is necessary to prevent their concealment, loss or destruction or their use in committing a crime within the jurisdiction of the ICC or an indictable offence against an Australian law. This is a reasonable safeguard which does not unduly expand the powers of officers to seize items related to offences under Australian law. The third sub-section which allows officers to seize additional items in the course of their search is limited to "seizable items". A "seizable item" means anything that would present a danger to a person or could be used to assist a person to escape from lawful custody. Officers have been given broad powers to seize property whilst executing a search warrant issued under the Bill. Obviously it is of vital importance that officers involved in searches relevant to such heinous crimes are empowered to seize any evidence of these crimes.

Part 7 & 8 – Information provided in confidence by third party and Protection of Australia's national security interests

These parts concern requests by either the ICC or another state (or an inter-governmental/international organisation) for confidential information or documents

that Australia holds. Again, these provisions successfully balance Australia's national security interests with its obligations under the Rome Statute. In all request situations, the Attorney-General must seek the consent of the provider of the information or documents. In circumstances where the state providing the confidential information/documents consents to the information/documents being provided, Australia must hand them over to the ICC subject to this not prejudicing Australian national security interests. In making his assessment, the Bill appropriately forces the Attorney-General to consult with the ICC, and if pertinent, the defence, but ultimately the decision resides with the Attorney-General. Where the state does not consent, but that state is a party to the Rome Statute, the Bill allows the situation to be resolved in accordance with article 73 of the Rome Statute. Where the state doesn't consent and is not a party to the Rome Statute, Australia is bound by its obligation of confidentiality and will thus not provide the information.

Part 9 – Transportation of persons in custody through Australia

This part provides for the cooperation of Australia in the transportation of persons in custody (who are either being surrendered to the ICC by another state or have already been sentenced by the ICC) through Australia. Generally speaking, provided the ICC has provided adequate details, Australia must allow for the transportation. However, in situations where the transportation through Australia would delay or impede the surrender of the person, then the Attorney-General cannot authorise the transportation.

If there is an unscheduled landing of an aircraft in Australia with a person in custody on board, the Bill specifies that the Attorney-General must detain the person and allows the ICC 96 hours to provide a request for transportation, failing which the person is to be released. Ninety six hours seems a reasonable period of time (if not generous) to give the ICC, failing which it seems fair that the person, who has not been convicted of any crime in Australia, should be discharged.

Parts 10 & 11 – Enforcement in Australia of reparation orders made and fines imposed by the ICC and Forfeiture of the proceeds of international crimes

These parts are mainly geared towards helping make the provision of reparation to victims of international crimes more of a reality by ensuring Australia cooperates in enforcing relevant orders of the ICC. Reparation for victims is a concept that we strongly endorse, subject to the legislation ensuring that the rights of offenders are not violated. The Bill specifies that provided that the ICC has made an order for reparation, fine or for the forfeiture of proceeds, and there are no remaining rights of appeal by the perpetrator, then the Attorney-General must authorise the DDP to register the relevant order in the appropriate court. The court is then obliged to register this order, provided it receives a copy of the ICC's duly authenticated order (a faxed copy will be suitable initially, but the original order must be provided to the court within 21 days).

It is noted that Division 14 of Part 4 provides for the temporary seizing or freezing of assets of a person who has been, or is about to be, charged with a crime before the ICC or has been convicted by the ICC of the crime. This Division will prevent offenders from hiding their assets in the intervening period before reparation orders can be enforced (that is, until all appeal rights have been exhausted).

Part 12 – Enforcement in Australia of sentences imposed by ICC

This part appropriately allows for those who have been sentenced by the ICC to prison sentences to serve all or some of their sentences in Australia. Such an arrangement is entirely reasonable, particularly where it is an Australian citizen who has been sentenced by the ICC. The Bill provides that the Attorney-General can make such a request and later withdraw the offer, and that he or she has a wide discretion as to any conditions that may be imposed on the ICC. The Bill also allows the relevant State Minister of the State where the proposed prison is located a wide discretion as to whether to accept or reject the arrangement, in which case the Attorney-General may seek the consent of another State Minister. Divisions 2 and 3 of this Part also appear to be reasonable, in that they provide for the transfer of such prisoners to Australia and the enforcement of their sentences respectively. In respect of the latter, prisoners are deemed to be federal prisoners and subject to federal laws in this respect, with the important exception being those laws which allow for the release of prisoners on parole or release under pre-release permit schemes (section 162 (4), (5) and (6)).

Parts 13 & 14 – Requests by Australia to ICC and other Miscellaneous matters

The two remaining parts of the Bill appear to present no major problems and thus no comments are provided, except for section 174, which allows for persons who might be parties to proceedings under the Bill to apply for legal assistance from the Attorney-General. The section gives the Attorney-General a wide discretion to grant, deny or conditionally grant such legal assistance. We strongly believe that unless there are exceptional circumstances it is in the interests of justice that anyone accused of the type of crimes that fall under the ICC's jurisdiction should have the benefit of legal assistance at all times.