

ICC Submission No.248.....

Law Institute



Victoria

Office of the President

470 Bourke Street
Melbourne 3000 Australia
DX 350 Melbourne
GPO Box 263C
Melbourne 3001

**CONFIRMATION
OF FAX**

Telephone (03) 9607 9366
Facsimile (03) 9607 9542
E-mail president@liv.asn.au
Website www.liv.asn.au

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YOUR REFERENCE

ENQUIRIES

N Hogg
(03) 9607 9374
E-mail: nhogg@liv.asn.au

Mr Paul McMahon
Secretary,
Joint Standing Committee on Treaties
Parliament House
CANBERRA ACT 2600

BY FAX TO (02) 6277 4827

Dear Sir/Madam,

Submission On the International Criminal Court

The Law Institute of Victoria wishes to submit to the Joint Standing Committee on Treaties (JSCOT) that it is in the national interest for Australia to ratify the Statute of the International Criminal Court (the Statute).

The Law Institute accordingly urges JSCOT to recommend to Parliament that Australia:

1. Ratify the Statute as soon as possible, and in any event before 2 July 2002;
2. Actively participate in the first meeting of the Assembly of States Parties;
3. Enact implementing legislation to give full effect to the Statute in Australia; and
4. Use its influence to promote the ratification of the Statute by other States, especially States in our region.

1. Ratification of the Statute

The Law Institute endorses the submission of the Law Council of Australia (International Law Section) in its submission to JSCOT dated 20 December 2000.

As set out in the Law Council's submission, the establishment of the Court is a landmark in international law that warrants Australia's strong support.



The Court has the potential to make a major contribution to international peace and security. It can provide justice to the victims of the most serious crimes, punish those who have committed them, bring retaliatory violence to an end and provide effective deterrence. The ICC also represents an opportunity to Accused persons to have those allegations tested and determined in a fair and just manner, subject to appropriate procedural regulation and scrutiny.

The Court will have jurisdiction to try individuals alleged to have committed the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes. These crimes are listed in Article 5 of the Statute and defined in the following Articles. The Court will also be at the forefront of the development of international law, for example, through prosecutions for the crime of aggression once this crime becomes subject to the Court's jurisdiction.

The text of the Statute has been drafted – with significant input from Australia – to enable the Court to operate fairly and effectively, with due respect to State sovereignty.

The Statute does not detract from legitimate State sovereignty. The Preamble to the Statute in Article 1 states that the Court is complementary to State legislation. Under the Statute, responsibility for investigating and prosecuting crimes lies with the country in which the crime is committed or the country of nationality of the offender. Under Article 17, the Court may assume jurisdiction only if that country has not acted and can be shown to be unable or unwilling genuinely to do so.

The Statute provides procedural fairness for accused persons, for example, by requiring the Court to conduct a trial in the presence of the accused person under Article 63. The Court must also act fairly and expeditiously with respect for the rights of the accused and due regard for the protection of victims and witnesses (Article 64).

The maximum penalty is life imprisonment, not capital punishment. The Statute also provides for forfeiture of proceeds of crime under Article 75 and reparation for victims under Article 77.

The Court will be independent and comprise judges chosen by States Parties “from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices” in accordance with Article 36.

The Court will be permanent and therefore not subject to the limitations of the ad hoc International Criminal Tribunals established for the former Yugoslavia and Rwanda. These limitations include delays in establishing ad hoc tribunals, their narrow focus and, since they are established after the event, their potentially limited deterrent effect.

The Statute operates prospectively from its establishment in accordance with Article 11; it does not have retrospective effect.

With the deposit of several ratifications earlier this month, the Statute now has more than 60 ratifications and can enter into force. The speed with which they were deposited evidences strong international support for the Court.

By ratifying the Statute, Australia will make a worthwhile commitment to international peace and security and demonstrate the value it places on the rule of law in achieving these objectives. It will also contribute to a system designed to protect persons engaged in armed conflict, including Australian defence personnel engaged in combat overseas.



Australia has always been at the forefront of international human rights initiatives. For example, Australia played a key role in the drafting of the UN Charter and was a member of the drafting Committee for the Universal Declaration of Human Rights. By actively supporting the ICC, Australia will continue this proud history in the development of international law and the protection of human rights.

2. Participation in first meeting of the Assembly

The first meeting of the Assembly of State Parties to the Statute is expected to be convened in early September 2002. During the meeting, State Parties will discuss important matters for the operation of the Court, including the rules and procedures for the nomination and election of judges and the Prosecutor. States that ratify the Statute before 2 July 2002 will have full voting rights at the meeting.

By ratifying the Statute at an early date, Australia will show the strength of its support for effective international institutions and will be in a position to participate in the first meeting of States Parties, which will influence the future direction of the Court.. Australia's experience in assisting with drafting the Statute will enable it to make a strong contribution to this meeting

3. Enactment of supporting legislation

The *International Criminal Court Bill 2001* and the *International Criminal Court (Consequential Amendments) Bill 2001* have been prepared to give effect to the Statute in Australia.

The draft *International Criminal Court Bill 2001* states that it is a bill "for an Act to facilitate compliance by Australia with obligations under the Rome Statute of the International Criminal Court, and for other purposes". This Bill makes provision for dealing with requests by the Court for cooperation, arrest and surrender of persons and other matters.

The draft *International Criminal Court (Consequential Amendments) Bill 2001* introduces into Australia statute law prohibitions against crimes against humanity, war crimes and crimes against the administration of the justice of the Court.

The legislation in its current detailed form is to be commended and our comments on the draft legislation are of a relatively limited nature.

Firstly, the Law Institute endorses the recommendations made by professor Tim McCormack in the submission of the Australian Red Cross to JSCOT. In short, those recommendations are:

- a) That the implementing legislation should be worded to stress more strongly the 'primacy' of Australia's right to exercise its national criminal jurisdiction with respect to crimes within the jurisdiction of the ICC.
- b) That the explanatory memorandum accompanying the implementing legislation specify that the jurisdictional competence of Australian Courts in respect of grave breaches of the Geneva Conventions will continue in relation to the period from 1957 until the enactment of the *International Criminal Court (Consequential Amendments) Bill*, at which time Part II of the *Geneva Conventions Act 1957* will be repealed.



- c) That the definition of rape in the Australian legislation be broadened to reflect the approach taken in the International Criminal Court Draft Elements of Crimes such that:
- i) the issue of lack consent may not be critical where the sexual act has taken place in a coercive environment, i.e when the sexual penetration was "committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power ... or by taking advantage of a co-ercive environment, or... committed against a person incapable of giving genuine consent."
 - ii) the definition of rape also encompass the situation where a victim is forced against their will to sexually penetrate another person - whether or not that other person is consenting to the penetration.
- d) That care is taken to delete any repetition of specific offences in the proposed Subdivisions H,D and E of the legislation. (In some instances the elements are disparate, which may potentially lead to objection by defendants where they are prosecuted under the offence with the less onerous elements.)

The other important issue is that legal assistance for accused persons be guaranteed. Where the resources of the State are pitted against the individual, particularly in relation to prosecutions for such grave offences, adequate legal representation is critical and should be funded by the State if required. It appears that legal assistance should be available through either the Legal Aid Commissions or the Attorney General's department. However, the right to adequate and appropriate legal representation, state funded if necessary, should be clearly outlined in the legislation as a pre-condition to any prosecution taking place.

4. Encouragement of ratification by other States in our region

The effectiveness of the Court will increase as more and more States ratify the Statute. It is regrettable that with the exception of New Zealand, States in our region have not yet ratified the Statute. After Australia has ratified the Statute, other States may follow our example and, in any event, Australia will be in a position to encourage all States in our region also to ratify.

We would be pleased to provide assistance in connection with the matters raised in this letter and welcome any request you care to make for specific input on the draft legislation to give effect to the Statute in Australia.

Yours faithfully,


David Faram
President
LAW INSTITUTE OF VICTORIA