

**GOVERNMENT RESPONSE TO THE JOINT STANDING
COMMITTEE ON TREATIES
INQUIRY INTO THE STATUTE OF THE
INTERNATIONAL CRIMINAL COURT**

JOINT STANDING COMMITTEE ON TREATIES INQUIRY INTO THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Recommendation 1

The Committee recommends that, subject to other recommendations incorporated elsewhere in this report, Australia ratify the Statute of the International Criminal Court (Paragraph 3.8).

Accepted. Australia ratified the Statute of the International Criminal Court (ICC) on 1 July 2002.

Recommendation 2

The Committee recommends that Clause 3 (2) of the International Criminal Court Bill be amended to read:

Accordingly, this Act does not affect the primacy of Australia's right to exercise its jurisdiction with respect to crimes within the jurisdiction of the ICC (Paragraph 3.32).

Accepted. The ICC Statute is based on the principle of complementarity, and the Government considers that this principle is a vital safeguard to the interests of States that are Parties to the ICC Statute.

The Government amended the statements of the principle of complementarity in section 3 of the *International Criminal Court Act 2002* and section 268.1 which has been inserted into the *Criminal Code* by the *International Criminal Court (Consequential Amendments) Act 2002* to better reflect Australia's position on the principle of complementarity.

Recommendation 3

The Committee recommends that Section 268.1 (2) of the International Criminal Court (Consequential Amendments) Bill be amended to read:

(2)(i) It is the Parliament's intention that the jurisdiction of the International Criminal Court is to be complementary to the jurisdiction of Australia with respect to offences in this Division that are also crimes within the jurisdiction of that Court.

(ii) Accordingly, this Act does not affect the primacy of Australia's right to exercise its jurisdiction with respect to offences in this Division that are also offences within the jurisdiction of the ICC (Paragraph 3.34).

Accepted. See response to Recommendation 2 above.

Recommendation 4

The Committee recommends that the Government of Australia concur with the preamble of the Statute which notes that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes and that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.

The Committee further recommends that, in noting the provisions of the Statute of the International Criminal Court, the Australian Government should declare that

- **it is Australia's right to exercise its jurisdictional primacy with respect to crimes within the jurisdiction of the ICC, and**
- **Australia further declares that it interprets the crimes listed in Articles 6 to 8 of the Statute of the International Criminal Court strictly as defined in the *International Criminal Court (Consequential Amendments) Bill* (Paragraph 3.37).**

Accepted. The Government made a declaration on ratification of the ICC Statute setting out Australia's understanding of the principle of complementarity, how that principle has been applied in the *International Criminal Court Act 2002* and Australia's interpretation of the crimes in the ICC Statute.

Recommendation 5

The Committee recommends that the *International Criminal Court Bill* and the *International Criminal Court (Consequential Amendments) Bill* be introduced into Parliament as soon as practicable subject to consideration of recommendations elsewhere in this report (Paragraph 3.50).

Accepted. The *International Criminal Court Bill 2002* and the *International Criminal Court (Consequential Amendments) Bill 2002* were introduced into Parliament on 25 June 2002 and passed on 27 June 2002.

Recommendation 6

The Committee recommends that:

- **the Australian Government, pursuant to its ratification of the Statute, table in Parliament annual reports on the operation of the International Criminal Court and, in particular, the impact on Australia's legal system; and that**

- **these annual reports stand referred to the Joint Standing Committee on Treaties, supplemented by additional Members of the House of Representatives and Senators if required, for public inquiry.**

The Committee envisages that, in conducting its inquiries into these annual reports, it would select a panel of eminent persons to provide expert advice (Paragraph 3.57).

Accepted. The Government included an obligation to table an annual report in Parliament in section 189 of the *International Criminal Court Act 2002*. The Government notes that the referral of reports tabled in Parliament to Committees is a matter for Parliament.

Recommendation 7

The Committee recommends that the Attorney-General review clauses 268.13 and 268.58 pertaining to the crime of rape in the International Criminal Court (Consequential Amendments) Bill 2001 and harmonise the definitions with the approach taken in the *Elements of Crimes* paper in a manner consistent with Commonwealth criminal law (Paragraph 3.60).

Accepted. The Government amended the definitions of rape in clauses 268.14, 268.59 and 268.82 (previously 268.13, 268.58 and 268.81) of the *International Criminal Court (Consequential Amendment) Act 2002*.

Recommendation 8

The Committee recommends that the Attorney-General review the legislation to ensure that the responsibilities required under Article 27 of the Statute are fully met either in the proposed bills or in current applicable legislation (Paragraph 3.63).

Noted. Article 27 of the ICC Statute provides that it shall apply equally to all persons without any distinction based on official capacity. It also provides that immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Australian law does not provide for any immunities or special procedural rules for persons based on their official capacity, other than those required by our obligations under international law, for example the Vienna Convention on Diplomatic Relations, implemented in the *Diplomatic Privileges and Immunities Act 1967*.

The ICC Statute recognises the existence of these obligations and provides in article 98 that "(t)he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third

State for the waiver of the immunity.” This provision is reflected in section 12 of the *International Criminal Court Act 2002* which the Committee has reviewed.

The *International Criminal Court Act 2002* and other Australian legislation fully meet Australia's responsibilities under articles 27 and 98 of the Statute.

In addition to dealing with immunities attaching to official capacities, paragraph 3.62 also referred to the legislation articulating “a position on the statute of limitations”. There is no time limitation for the commencement of a prosecution for an offence against a law of the Commonwealth for which the maximum penalty is imprisonment for more than 6 months (Subsection 15B(1) of the *Crimes Act 1914*).

Recommendation 9

The Committee recommends that the Attorney-General ensure that the *International Criminal Court (Consequential Amendments) Bill* does not limit the jurisdiction of Australian courts with respect to crimes under Part II of the *Geneva Conventions Act 1957*, for the period between 1957 and the commencement of the proposed legislation. The Committee further recommends that the *Explanatory Memorandum* for the proposed legislation state clearly how coverage of these crimes for the intervening period is to be provided (Paragraph 3.65).

Accepted. This situation is covered by section 8 of the *Acts Interpretation Act 1901* and this has been explained in the *Explanatory Memorandum* for the *International Criminal Court (Consequential Amendments) Bill 2002*.

Recommendation 10

The Committee recommends the Attorney-General review Subdivisions H, D and E of the *International Criminal Court (Consequential Amendments) Bill* to ensure consistency in the definition of offences (Paragraph 3.68).

Accepted. The Government has reviewed the crimes contained in Subdivision H with a view to removing those crimes that duplicate crimes contained in Subdivisions D and E. A series of duplicate crimes were deleted from the Exposure Draft of the *International Criminal Court (Consequential Amendments) Bill*, namely clauses 268.95, 96, 98, 99, 102, 103, 104 and 107.

Recommendation 11

The Committee recommends that Attorney-General review the *International Criminal Court Bill* and the *International Criminal Court (Consequential Amendments) Bill* in relation to the matters listed in paragraph 3.67 [sic] of this report (Paragraph 3.70).

The matters referred to in paragraph 3.69 are:

“A number of other issues were raised in evidence, which are presented here with the purpose of alerting the Attorney-General’s Department to these issues, when it reviews the proposed legislation before its presentation to the Parliament. These were:

1. there should be time constraints on issuing arrest warrants – cl 21 and 22 of the ICC Bill are deficient because they do not impose time limitations like those under Article 59 of the Statute;
2. that cl 102 be amended to extend privileges and immunities to ICC officials not named in Article 48(2) of the Statute;
3. that in defining torture as a war crime the consequential amendments bill has the effect of broadening the crimes ambit rather than following the approach in the Statute;
4. the need for consideration of Australia’s commitment to the minimum age for conscription, which is set at 15 under the Statute and the consequential amendments bill, although Australia’s commitment under the Convention on the Rights of the Child sets the age at 18 years;
5. that there is adequate protection in the legislation to ensure persons are not held on remand for unduly long periods when they are charged for ICC crimes;
6. that there is adequate provision under the legislation for legal aid within Australia and some similar provision under the Statute where a case is heard by the ICC; and
7. that the passage of legislation relating to the proceeds of crime (the *Proceeds of Crime Bill 2002* and the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002*) currently before the Parliament, will not have a major impact on complementary clauses in the final ICC legislation.”

[numbers added for ease of reference]

Noted. The Government has considered the issues raised by the Committee.

1) Article 59 does not contain any time limits on the issue of arrest warrants. It obliges Australia to “immediately take steps to arrest the person”. The Government does not consider that any amendment to clauses 21 and 22 of the *International Criminal Court Bill 2002* (now sections 20 and 21 of the *International Criminal Court Act 2002*) is warranted.

2) The privileges and immunities of officials of international organisations are dealt with in regulations under the *International Organisations (Privileges and Immunities) Act 1963*. Now that Australia has ratified the Statute and the Acts have been passed, the Government will make regulations to provide privileges and immunities to the officials identified in Article 48 of the Statute. The Assembly of States Parties has adopted the *Agreement on the Privileges and Immunities of the Court*, which extends privileges and immunities to a wider range of officials than Article 48. The Government is currently considering becoming a Party to the *Agreement on the Privileges and Immunities of the Court*.

3) The definition of "torture" as a war crime in the *International Criminal Court (Consequential Amendments) Act 2002* is drawn strictly from the definition of the war crimes of torture in the *Elements of Crimes* paper. The Government therefore does not agree that this definition broadens the ambit of these crimes beyond the Statute.

4) In developing the crimes contained in the *International Criminal Court (Consequential Amendments) Act 2002*, the Government has drafted the provisions to mirror the definitions of crimes in the Statute and the *Elements of Crimes* paper to take full advantage of the principle of complementarity. Accordingly, the Act criminalises the conscription of children under the age of 15. This is consistent with the Convention on the Rights of the Child, which obliges Australia to take all feasible measures to ensure that children under the age of 15 do not take a direct part in hostilities.

The Government is aware that the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict prohibits the conscription of children under the age of 18 years. Australia signed the Protocol on 21 October 2002 and is currently considering ratification. The definitions of crimes in the *International Criminal Court (Consequential Amendments) Act 2002*, for the purposes of complying with Australia's obligations under the Statute and the principle of complementarity, do not represent a Government position on a minimum age for the conscription or use of children in armed conflict, or on ratification of the Optional Protocol.

The Defence Instruction promulgating the Australian Defence Force's compliance with the terms of the Protocol was jointly signed by the Chief of the Defence Force and the Secretary of Defence on 28 June 2002. The Government will bring the matter of Australian ratification of the Protocol before the JSCOT.

5) If a person is arrested in Australia and charged with an offence under Division 268 of the Commonwealth Criminal Code, then that person will be subject to the same laws governing the holding of that person on remand as any other person who has been arrested and charged with a serious Commonwealth criminal offence.

If a person is arrested in Australia at the request of the ICC so that the person can be surrendered to the ICC and charged with an ICC crime, then the holding of that person on remand is governed by Division 3 of Part 3 of the *International Criminal Court Act 2002*. If a person is arrested pursuant to a request from the ICC for provisional arrest, then a magistrate must release that person after 60 days unless a request for surrender has been received or the magistrate is satisfied that a request for surrender will be received within a specified period (section 26). A person who is arrested has the right to apply for bail (which may be granted in special circumstances) (section 23). The Attorney-General also retains a general discretion to order that a person be released from custody (section 25). The Government considers that these provisions properly balance Australia's obligations under the Statute with the need to ensure that persons do not spend unduly long periods on remand.

6) Where a person is charged in Australia with a crime in Division 268 of the *Criminal Code* (which was inserted by the *International Criminal Court*

(*Consequential Amendments*) Act 2002), then that person will have the same rights to legal aid as any other person charged with a Commonwealth criminal offence.

Section 185 of the *International Criminal Court Act 2002* allows a person who is involved in proceedings before a magistrate regarding detention under that Bill to apply to the Attorney-General for legal assistance.

Article 67 of the Statute sets out the rights of an accused person in a trial before the ICC. These rights include, in paragraph (1)(d), the right to legal assistance including the right “to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it”.

7) The Government amended the *International Criminal Court Bill 2002* to ensure that the provisions on the tracing, freezing and forfeiture of proceeds of crimes were, to the extent applicable, consistent with current Commonwealth policy as set out in the *Proceeds of Crime Act 2002* and the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002*. These amendments are now reflected in the *International Criminal Court Act 2002*.

The new provisions replaced Division 14 of Part 4 and Part 11 of the Exposure Draft of the *International Criminal Court Bill*. Because of the revised structure, there is no longer any requirement for amendment to the *Proceeds of Crime Act 1987* (the *International Criminal Court Act 2002* contains all necessary provisions) and Schedule 6 of the Exposure Draft of the *International Criminal Court (Consequential Amendments) Bill* was deleted.