

2002

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**INTERNATIONAL CRIMINAL COURT (CONSEQUENTIAL AMENDMENTS) BILL 2002**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,  
the Honourable Daryl Williams AM QC MP)

## **INTERNATIONAL CRIMINAL COURT (CONSEQUENTIAL AMENDMENTS) BILL 2002 OUTLINE**

This Bill amends the *Criminal Code Act 1995* (Criminal Code) to:

- create offences in Australia that are the equivalent of the crimes of genocide, crimes against humanity and war crimes in the International Criminal Court Statute, so that Australia retains the right and power to prosecute any person accused of a crime under the Statute in Australia rather than surrender that person for trial in the International Criminal Court;
- create offences in Australia relating to crimes against the administration of justice of the International Criminal Court; and
- establish various legal principals to be applied in prosecuting these offences, such as command responsibility, the defence of superior orders, jurisdiction and Parliament's intention that the jurisdiction of the International Criminal Court is to be complementary to Australia's.

The Bill also makes consequential amendments to the *Director of Public Prosecutions Act 1983*, the *Geneva Conventions Act 1957*, the *Migration Act 1958*, the *Telecommunications (Interceptions) Act 1979* and the *Witness Protection Act 1994*.

### **FINANCIAL IMPACT STATEMENT**

There are no direct financial impacts from this Bill.

## NOTES ON CLAUSES

### List of Abbreviations

|          |  |
|----------|--|
| Code     | Criminal Code  |
| Covenant | International Covenant on Civil and Political Rights |
| ICC      | International Criminal Court                         |
| ICC Act  | International Criminal Court Act 2002                |
| Statute  | Rome Statute of the International Criminal Court     |

### Clause 1: Short title

The short title of this Act is the *International Criminal Court (Consequential Amendments) Act 2002*.

### Clause 2: Commencement

This clause provides that sections 1, 2 and 3 of this Act commence on the day on which the Act receives Royal Assent.

Schedules 1 to 7 of this Act commence on the day on which the operative parts (Parts 2 to 14) of the ICC Act commence.

Section 2 of the ICC Act states that Parts 2 to 14 of that Act commence on a day to be fixed by Proclamation, but that such a date shall not be prior to the day on which the Statute enters into force in Australia. If Parts 2 to 14 of the ICC Act have not commenced within 1 month of the Statute entering into force in Australia, then they commence on the first day after the end of the 1-month period.

The amendments in the Schedules to this Act and the provisions in the ICC Act must come into force promptly after the entry into force of the Statute in Australia to ensure Australia's compliance with its obligations under the Statute and its ability to take full advantage of the principle of complementarity.

### Clause 3: Schedule(s)

This clause provides that, subject to the commencement provision, each Act that is specified in a Schedule is amended as set out in that Schedule.

### Schedule 1- Criminal Code Act 1995

The purpose of this Schedule is to amend the Criminal Code to ensure that all offences under the Statute are offences under Australian law. The Statute is based on the principle of complementarity. This means that the ICC only has the jurisdiction to try a person if the state or states that also have the right to try that person are unable or unwilling to genuinely investigate and prosecute. By ensuring that the crimes in the Statute are crimes against Australian law, Australia ensures that it will always be in a position to investigate and, if appropriate, prosecute a person who is accused of a crime under the Statute – we will never be “unable” to. Australia will therefore maintain the right to prosecute a person in Australia rather than surrender that person for trial in the ICC. The proposed new provisions will:

- create a series of new offences called genocide, crimes against humanity and war crimes;
- create a series of new offences that constitute crimes against the administration of justice of the ICC;
- set out the legal principles to be applied when interpreting the new offences;
- insert relevant definitions into the Dictionary of the Criminal Code;

- provide that proceedings under the Division may not be brought without the consent of the Attorney-General and that the Attorney-General's decision to give consent or refuse to do so may not be challenged in any court other than the High Court; and
- deal with a number of miscellaneous matters

The crimes in this schedule are based closely on the way that the ICC crimes are defined in the draft text of the Elements of Crimes. These crimes have been formulated consistent with Commonwealth criminal law policy, with a focus on detailing the precise conduct which is prohibited in express terms, and the mental elements that are required. Where there is already an analogous crime in the Criminal Code, or where a similar crime has been considered by the Model Criminal Code Officers' Committee, then these existing definitions have been used to ensure consistency.

Because of the international nature of the crimes that are set out in this Division, and the nature of the international obligations that they reflect, it has been necessary to define some of these crimes by referring to standards set in the relevant international instruments. The intention of this Division is not that the perpetrator must have had any knowledge of the international instrument, or of the standards that it contained. If the perpetrator has violated the standard, then this satisfies that element of the crime.

Each of the crimes also sets out the penalty that applies to the specific offence. These penalties represent the maximum penalty that can be imposed, and the court can impose any penalty not exceeding the penalty prescribed (s. 4D(1) *Crimes Act 1914*)

#### **Item 1**

This Item alters the heading of Chapter 8 of the *Criminal Code*, inserting “**and related offences**”, to reflect the addition of new offences under Division 268 (see Item 2).

#### **Item 2**

This Item inserts a new Division 268 into Chapter 8 of the Criminal Code. This Division is divided into Subdivisions A to K, which set out the purpose of the new Division (A), define the new offences that constitute Genocide (B), Crimes Against Humanity (C), War Crimes (D to H), the crimes against the administration of justice of the ICC (J) and other miscellaneous provisions (K).

### **Division 268 – Genocide, crimes against humanity, war crimes and crimes against the administration of the justice of the International Criminal Court**

#### **Subdivision A – Introductory**

##### Proposed Section 268.1: Purpose of Division

This proposed section sets out the purpose of Division 268. In particular, it makes it explicit that it is Parliament's intent that the jurisdiction of the ICC is complementary to the jurisdiction of Australia over the crimes that are set out in Subdivisions B to J. By creating crimes in Australian law that mirror the crimes in the Statute, Australia will always be able to prosecute a person accused of a crime under the Statute in Australia rather than surrender that person for trial in the ICC.

##### Proposed Section 268.2: Outline of offences

This proposed section sets out the contents of the various Subdivisions that create the crimes:

- Subdivision B creates the offences of “genocide”;
- Subdivision C creates the offences of “crimes against humanity”;
- Subdivisions D, E, F, G and H create the offences of “war crimes”; and
- Subdivision J creates the “offences against the administration of justice of the ICC”.

#### **Subdivision B – Genocide**

The purpose of Subdivision B, proposed sections 268.3 to 268.7, is to create offences in Australian law which reflect each form of the crime of Genocide set out in Article 6 of the Statute.

The crimes consist of various acts, when they are committed with the intent to destroy, in whole or in part, a particular national, ethnical, racial or religious group, as such. This definition of genocide is drawn from the *Convention for the Prevention and Punishment of the Crime of Genocide 1948*, to which Australia is a party.

The following acts constitute genocide when they are committed with the intent to destroy particular national, ethnical, racial or religious group, in whole or in part:

- Killing (proposed section 268.3);
- Causing serious bodily or mental harm, including torture, rape, sexual violence or inhuman or degrading treatment (proposed section 268.4);
- Deliberately inflicting conditions of life calculated to bring about physical destruction. This includes depriving people of essential resources such as food or medical services, or systematic expulsion from homes (proposed section 268.5);
- Imposing measures to prevent births (proposed section 268.6); or
- Forcibly transferring children to a different national, ethnic, racial or religious group (proposed section 268.7).

In each case the maximum penalty is life imprisonment.

### Subdivision C – Crimes against humanity

The purpose of this Subdivision C, proposed sections 268.8 to 268.23, is to create offences in Australian law that mirror each form of Crimes Against Humanity identified in Article 7 of the Statute.

These crimes are various acts when they are committed as part of a widespread and systematic attack against a civilian population. The crimes must also be a result of either a state or organisation's policy to commit that attack. In addition, the perpetrator must know that the act is part of a larger attack on a civilian population, or intend it to be part of such an attack.

The various acts do not constitute crimes against humanity if they are committed in isolation, or by an individual with no link to a state or organisational policy.

The acts that can constitute crimes against humanity in these circumstances are:

- Murder (proposed section 268.8);
- Extermination, namely causing death by indirect methods such as depriving people of access to food and medicine (proposed section 268.9);
- Enslavement (proposed section 268.10). The definition of "exercises any or all of the powers attaching to the right of ownership" also includes situations where that exercise results from a debt or contract made by the person, to maintain consistency with the definition of "slavery" in section 270.1 of the *Criminal Code*;
- Deportation or forcible transfer of populations, where the perpetrator knows the facts that give the people the legal right to remain where they are (proposed section 268.11);
- Imprisonment or other severe deprivation of physical liberty in violation of the relevant principles of the Covenant (proposed section 268.12);
- Torture, namely the inflicting of severe physical or mental pain on a person in custody. Any pain or suffering that is solely a result of, inherent in or incidental to lawful punishment does not constitute torture (proposed section 268.13);
- Rape, including any form of sexual penetration (proposed section 268.14). This offence has been based on the Model Criminal Code Officers' Committee report definition of sexual penetration. The definition of "consent" has expanded the circumstances in which a person does not consent to the act to ensure that it will cover all of the circumstances set out in the Elements of Crimes paper;
- Sexual slavery (proposed section 268.15). This is based on the definition of "sexual servitude" (section 270.4 of the *Criminal Code*), however because of the circumstances in which this crime may occur the provision of the sexual service does not have to be of a commercial nature;
- Enforced prostitution, namely where the perpetrator causes a person (or more than one person) to engage in sexual acts without the person's consent, and intending that the perpetrator or a third person will gain an advantage, such as financial benefit, from the provision of the service. The definition of "consent" is the same as the definition in the offence of "rape", and the crime also applies where the perpetrator is reckless as to whether there is consent (proposed section 268.16);
- Forced pregnancy, where the perpetrator confines a woman who was forcibly made pregnant with the intention of affecting the ethnic composition of a group (proposed section 268.17). This proposed section cannot affect the law of any Australian State or Territory, such as any law relating to abortion or contraception (proposed section 268.17(3));
- Enforced sterilisation, where the perpetrator permanently prevents a persons from being able to reproduce without either that person's consent or medical justification (proposed section 268.18);
- Sexual violence. The purpose of this crime is to cover sexual crimes, or the perpetrator causing people to engage in sexual acts without their consent, that are equally as serious as the crimes in proposed sections 268.14 to 268.18, but do not fall within those proposed sections. The definition of "consent" is the same as the definition in the offence of "rape", and the crime also applies where the perpetrator is reckless as to whether there is consent (proposed section 268.19);
- Persecution. This is only a crime if it is committed in conjunction with genocide, a war crime or one of the other acts that could constitute a crime against humanity. Persecution is the severe deprivation of a fundamental right, contrary to international law, based on that person's membership of a certain political, racial, national, ethnic, cultural, religious or gender group. If it is universally recognised under the relevant provisions of the Covenant that other categories of groups also require this protection, they are also included (proposed section 268.20);
- Enforced disappearance of persons. This is where a person is abducted or detained for a long period without legal protections with the authorisation or acquiescence of a government or political group, and that government or political group refuses to acknowledge or give information about the person. This crime can be committed where the perpetrator abducts or detains the victim, or where the perpetrator knowingly or recklessly refuses to acknowledge or give information about a detained person with the authorisation or acquiescence of the

- Apartheid, namely where the perpetrator commits an act that could constitute a crime against humanity, or an act of similar gravity, against a person in the context of an institutionalised regime of systematic racial oppression with the intent to maintaining that system (proposed section 268.22); or
- Other inhumane acts which cause great suffering or serious injury to mental or physical health and are similar in character to one of the acts that could constitute a crime against humanity (proposed section 268.23).

#### **Subdivision D – War crimes that are grave breaches of the Geneva Conventions and of Protocol I to the Geneva Conventions**

The purpose of Subdivision D, proposed sections 268.24 to 268.34, is to create offences in Australian law that mirror the various War Crimes that are grave breaches of the Geneva Conventions and are identified in Article 8(2)(a) of the Statute.

The crimes consist of various acts when they are committed in the context of an international armed conflict against a person or property protected under one or more of the Geneva Conventions or the Additional Protocol I to the Geneva Conventions. The perpetrator must know facts that give the person or property the protected status under one of the Conventions or the Protocol however the prosecution does not need to prove that perpetrator actually knew of the relevant provision of the Geneva Convention or the First Protocol that sets out that protection.

Previously the acts that are categorised as war crimes in this Subdivision were crimes against Australian law, regardless of whether they are committed in or outside Australia, under Part 2 of the *Geneva Conventions Act 1957*. Part 2 of the *Geneva Conventions Act 1957* will be repealed by this Act (Schedule 3, Item 1) and the crimes that it created are now contained in this Subdivision and in Subdivisions E and H of this Act.

The acts that can constitute war crimes in this Subdivision in these circumstances are:

- Wilful killing of a protected person (proposed section 268.24);
- Torture of a protected person for the purpose of obtaining information or a confession or for punishment, intimidation, coercion or discrimination (proposed section 268.25);
- Inhumane treatment of a protected person, namely the infliction of severe physical or mental pain or suffering (proposed section 268.26);
- Biological experiments on a protected person which seriously endanger the physical or mental health of that person and are not medically justified and carried out in that person's best interests (proposed section 268.27);
- Wilfully causing great physical or mental pain or suffering, or serious injury to, a protected person (proposed section 268.28);
- Destruction and appropriation of property that is protected under one of the Conventions or the Protocol and is not justified by military necessity. The destruction or appropriation must be extensive, unlawful and wanton (proposed section 268.29);
- Compelling a protected person to serve in the armed forces of an enemy or otherwise fight against their own country or forces (proposed section 268.30);
- Denying a protected person a fair trial (proposed section 268.31). Paragraph (1)(b) sets out the articles of the Third and Fourth Geneva Conventions that contain the judicial guarantees that are required for a fair trial. If the perpetrator denies the victim these judicial guarantees and protections, it does not matter whether the perpetrator knew that he or she was violating the Geneva Conventions by doing so;
- Unlawful deportation or transfer of a protected person to another location or country (proposed section 268.32);
- Unlawful confinement of a protected person (proposed section 268.33);
- Taking a protected person hostage and threatening to kill, injure or continue to detain that person in an effort to compel a government, organisation, person or group to act (or refrain from acting) in return for the protected persons' release (proposed section 268.34).

#### **Subdivision E – Other serious war crimes that are committed in the course of an international armed conflict**

The purpose of Subdivision E, proposed sections 268.35 to 268.68, is to create offences in Australian law that mirror the serious War Crimes that are committed during international armed conflicts and are identified in Article 8(2)(b) of the Statute.

These crimes are not grave breaches of the Geneva Conventions (see Subdivision D), but they are considered to be serious violations of the customary international law of armed conflict. Many of these are drawn from Additional Protocol I to the Geneva Conventions, to which Australia is a party, and therefore many of the crimes in this

Subdivision are already crimes in Australian law under Part II of the *Geneva Conventions Act 1957* (which will be repealed by Schedule 3 of this Act).

The crimes consist of various acts when they are committed in the context of, and are associated with, an international armed conflict. These acts are:

- Directing an attack against civilians (either individuals or as a population) (proposed section 268.35) or targets that are not military objectives (proposed section 268.36);
- Directing an attack against people or facilities that are either providing humanitarian assistance or are involved in a United Nations peacekeeping mission (proposed section 268.37);
- Launching an attack knowing that it will cause excessive death or injury to civilians or civilian facilities, or serious long-term environmental damage, when compared with the military advantage to be gained from the attack (proposed section 268.38);
- Attacking an undefended town or building that isn't a military objective (proposed section 268.39) or a person that is "*hors de combat*" (proposed section 268.40). A definition of "*hors de combat*" is inserted into the Dictionary of the *Criminal Code* by item 16 of this Schedule – it means a person who is in the power of the enemy, has surrendered or is unable to defend himself or herself because of sickness or injury, and who does not attempt to escape or injure the enemy;
- Illegally using the flag or uniform of the enemy, the United Nations, the distinctive emblems of the Geneva Conventions or the truce flag, to cause death or serious injury to the enemy (proposed sections 268.41 to 268.44);
- Transferring parts of the perpetrator's civilian population into occupied territory, or transferring all or part of the population of an occupied territory either within or outside that territory (proposed section 268.45);
- Directing an attack against protected objects (such as religious, charitable, educational, historic buildings or hospitals) (proposed section 268.46);
- Subjecting a person who is in the power of the enemy to mutilation or medical or scientific experiments that are not medically justified and in the interests of the person and that kill or seriously endanger the health of the person (proposed section 268.47 and 268.48);
- Attacking a person after the perpetrator had lead that person to believe that they were entitled to protection (proposed section 268.49);
- Ordering that no survivors are to be taken (proposed section 268.50);
- Seizing and destroying certain protected property of the enemy without military justification (proposed section 268.51);
- Depriving enemy citizens of their legal rights (proposed section 268.52);
- Forcing enemy citizens to fight against their country (proposed section 268.53);
- Pillaging, namely taking property for personal use (proposed section 268.54);
- Using poison or gases that cause death or serious injury as a weapon or certain bullets that are prohibited by the *Hague Convention* (proposed sections 268.55 to 268.57);
- Severely humiliating, degrading or otherwise violating a person or the bodies of the dead (proposed section 268.58);
- Rape, including any form of sexual penetration (proposed section 268.59). This offence has been based on the Model Criminal Code Officers' Committee report definition of sexual penetration. The definition of "consent" has expanded the circumstances in which a person does not consent to the act to ensure that it will cover all of the circumstances set out in the Elements of Crimes paper;
- Sexual slavery (proposed section 268.60). This is based on the definition of "sexual servitude" (section 270.4 of the *Criminal Code*), however because of the circumstances in which this crime may occur the provision of the sexual service does not have to be of a commercial nature;
- Enforced prostitution, namely where the perpetrator causes a person (or more than one person) to engage in sexual acts without the person's consent, and intending that the perpetrator or a third person will gain an advantage, such as financial benefit, from the provision of the service. The definition of "consent" is the same as the definition in the offence of "rape", and the crime also applies where the perpetrator is reckless as to whether there is consent (proposed section 268.61);
- Forced pregnancy, where the perpetrator confines a woman who was forcibly made pregnant with the intention of affecting the ethnic composition of a group (proposed section 268.62). This proposed section cannot affect the law of any Australian State or Territory, such as any law relating to abortion or contraception (proposed section 268.62(3));
- Enforced sterilisation, where the perpetrator permanently prevents a persons from being able to reproduce without either that person's consent or medical justification (proposed section 268.63);
- Sexual violence. The purpose of this crime is to cover sexual crimes, or the perpetrator causing people to engage in sexual acts without their consent, that are equally as serious as the crimes in proposed sections 268.59 to 268.63, but do not fall within those proposed sections (proposed section 268.64);

- Using civilians, or other protected persons to shield a military objective from attack (proposed section 268.65). The other protected persons are prisoners of war, medical personnel, religious personnel and persons who are *hors de combat*;
- Intentionally attacking a person, building or other object that is using the distinctive emblems of the Geneva Conventions (proposed section 268.66). A definition of “distinctive emblems of the Geneva Conventions” is inserted into the Dictionary of the *Criminal Code* by item 9 of this Schedule;
- Starving civilians as a method of warfare (proposed section 268.67). This includes preventing relief supplies provided for under the Geneva Conventions. In such a case, the perpetrator must know or be reckless about preventing the relief supplies, but they do not need to know that the supplies were provided for under the Geneva Conventions;
- Using children who are under 15 years old in combat or conscripting or enlisting children who are under 15 years old (proposed section 268.68). The perpetrator must have known, or been reckless about, the fact that the children were under 15 years old.

#### **Subdivision F – War crimes that are serious violations of article 3 common to the Geneva Conventions and are committed in the course of an armed conflict that is not an international armed conflict**

The purpose of Subdivision F, proposed sections 268.69 to 268.76, is to create offences in Australian law that mirror the War Crimes that are serious violations of common article 3 of the Geneva Conventions, committed during internal or domestic armed conflicts and are identified in Article 8(2)(c) of the Statute.

The crimes in this Subdivision consist of various acts when they are committed during a non-international armed conflict against a person who is not taking an active part in hostilities.

The perpetrator must know the facts that establish that the person is not taking part in hostilities. A person who is not taking an active part in hostilities specifically includes a person who is “*hors de combat*” (defined in the Dictionary, see item 16 of this Schedule below), civilians, medical and religious personnel (defined in proposed section 268.69 to include non-confessional, non-combatant military personnel carrying out similar duties to religious personnel).

The acts that are war crimes under this Subdivision when committed against a person who is not taking an active part in hostilities are:

- Murder (proposed section 268.70);
- Mutilation (proposed section 268.71);
- Torture (proposed section 268.73) or otherwise inflicting severe mental or physical pain (proposed section 268.72);
- Severely humiliating, degrading or otherwise violating a person or the bodies of the dead (proposed section 268.74);
- Taking such a person hostage and threatening to kill, injure or continue to detain that person in an effort to compel a government, organisation, person or group to act (or refrain from acting) in return for the protected person’s release (proposed section 268.75);
- Sentencing or executing such a person without a fair trial (proposed section 268.76).

#### **Subdivision G – War crimes that are other serious violations of the laws and customs applicable in an armed conflict that is not an international armed conflict**

The purpose of Subdivision G, proposed sections 268.77 to 268.92, is to create offences in Australian law that mirror the War Crimes set out in Article 8(2)(e) of the Statute. These are the war crimes that are serious violations of the laws and customs of war, even when committed during internal or domestic armed conflicts, but that are not contained in Article 3 of the Geneva Conventions (those war crimes are set out in Subdivision F, above).

Most of the crimes created in this Subdivision are taken from the Second Protocol to the Geneva Conventions. The acts that can constitute war crimes under this Subdivision if they are committed during a non-international armed conflict are:

- Directing an attack against civilians (either individuals or as a population) (proposed section 268.77);
- Intentionally attacking a person, building or other object that is using the distinctive emblems of the Geneva Conventions (proposed section 268.78). “[D]istinctive emblems of the Geneva Conventions” is defined in the Dictionary (see item 9 of this Schedule below);

- Directing an attack against people or facilities that are providing humanitarian assistance or are engaged in United Nations approved peacekeeping missions (proposed section 268.79);
- Directing an attack against protected objects (such as religious, charitable, educational, historic buildings or hospitals) (proposed section 268.80);
- Pillaging, namely taking property for personal use (proposed section 268.81);
- Rape, including any form of sexual penetration (proposed section 268.82). This offence has been based on the Model Criminal Code Officers' Committee report definition of sexual penetration. The definition of "consent" has expanded the circumstances in which a person does not consent to the act to ensure that it will cover all of the circumstances set out in the Elements of Crimes paper;
- Sexual slavery (proposed section 268.83). This is based on the definition of "sexual servitude" (section 270.4 of the *Criminal Code*), however because of the circumstances in which this crime may occur the provision of the sexual service does not have to be of a commercial nature;
- Enforced prostitution, namely where the perpetrator causes a person (or more than one person) to engage in sexual acts without the person's consent, and intending that the perpetrator or a third person will gain an advantage, such as financial benefit, from the provision of the service. The definition of "consent" is the same as the definition in the offence of "rape", and the crime also applies where the perpetrator is reckless as to whether there is consent (proposed section 268.84);
- Forced pregnancy, where the perpetrator confines a woman who was forcibly made pregnant with the intention of affecting the ethnic composition of a group (proposed section 268.85). This proposed section cannot affect the law of any Australian State or Territory, such as any law relating to abortion or contraception (proposed section 268.85(3));
- Enforced sterilisation, where the perpetrator permanently prevents a persons from being able to reproduce without either that person's consent or medical justification (proposed section 268.86);
- Sexual violence. The purpose of this crime is to cover sexual crimes, or the perpetrator causing people to engage in sexual acts without their consent, that are equally as serious as the crimes in proposed sections 268.82 to 268.86, but do not fall within those proposed sections (proposed section 268.87);
- Using children who are under 15 years old in combat or conscripting or enlisting children who are under 15 years old (proposed section 268.88). The perpetrator must have known, or been reckless about, the fact that the children were under 15 years old;
- Ordering that civilians be displaced, unless the displacement is required for the security of the civilians or imperative military necessity (proposed section 268.89);
- Attacking a person after the perpetrator had lead that person to believe that they were entitled to protection (proposed section 268.90);
- Ordering that no survivors are to be taken (proposed section 268.91);
- Subjecting a person to mutilation or medical or scientific experiments that are not medically justified and in the interests of the person and that kill or seriously endanger the health of the person (proposed sections 268.92 and 268.93);
- Seizing and destroying certain protected property of the enemy without military justification (proposed section 268.94).

#### **Subdivision H – War crimes that are grave breaches of Protocol I to the Geneva Conventions**

The purpose of Subdivision H, proposed sections 268.95 to 268.101, is to create offences in Australian law to cover grave breaches of Protocol I to the Geneva Conventions. The crimes set out in this Subdivision are not crimes under the Statute. These crimes had previously been crimes in Australian law under the *Geneva Conventions Act 1957*. The relevant Part of the *Geneva Conventions Act 1957* is repealed by this Act (see Schedule 3 Item 1), and therefore the crimes contained in the *Geneva Conventions Act 1957* that are not also crimes under the Statute are created as crimes under Australian law in this Subdivision.

The following acts constitute war crimes under this Subdivision when they are committed against a person who is in the power of, or detained by, the enemy as a result of an international armed conflict:

- Subjecting a person to an unjustified medical procedure that endangers the person's health (proposed section 268.95);
- Removing blood, tissue or organs from a person (unless for transfusion or skin graft with the person's consent) (proposed section 268.96);
- Attacking a site that contains "dangerous forces" (for example a dam) if it results in death or serious injury to civilians (proposed section 268.97);
- Attacking a demilitarised zone or an undefended town or building if it results in death or serious injury to civilians (proposed section 268.98);
- Unjustifiably detaining the population of civilians or members of their families, except those in an

- Apartheid (proposed section 268.100); and
- Directing an attack against recognised historical monument, work of art or place of worship. The target must be part of the heritage of the people, and must have been recognised and protected as such (for example by a competent international organisation) (proposed section 268.101).

### **Subdivision J – Crimes against the administration of the justice of the International Criminal Court**

Subdivision J, proposed sections 268.102 to 268.114, creates a series of offences in Australian law that constitute crimes against the administration of the justice of the ICC. Article 70 of the Statute sets out the crimes against the administration of justice that the ICC has jurisdiction over, and paragraph 4(a) of that article obliges Parties to the Statute to create parallel crimes in their own law.

The crimes created by this Subdivision are:

Proposed Section 268.102: Perjury, namely where a person makes a false sworn statement in a proceeding before the ICC (“an ICC proceeding”) and is reckless as to whether or not the statement is true. The crime also extends to interpreters where they give a sworn interpretation of a statement which is false or misleading.

Proposed Section 268.103: Falsifying evidence. This includes:

- creating false evidence to influence the decision to commence an ICC proceeding or the outcome of an ICC proceeding; or
- knowingly using false evidence where the person is reckless as to whether or not the evidence will influence the commencement or outcome of the ICC proceeding.

Proposed Section 268.104: Destroying or concealing evidence, with the intention to influence the decision to commence an ICC proceeding or the outcome of an ICC proceeding.

Proposed Section 268.105: Deceiving a witness, with the intention that the witness will then give false evidence or withhold evidence in an ICC proceeding. This also applies to deceiving a third person with the intention that the witness will withhold or give false evidence.

Proposed Sections 268.106 and 268.107: Corrupting and threatening witnesses or interpreters.

A person must not either offer or provide a benefit to a person, or cause or threaten to cause a detriment to a person, with the intention that either that person or another person will:

- not attend the ICC proceedings as a witness or interpreter;
- give false evidence;
- withhold evidence; or
- give a false or misleading interpretation.

A person also must not ask for, receive or agree to receive a benefit (for themselves or for any other person) with the intention that either that person or another person will:

- not attend the ICC proceedings as a witness;
- give false evidence; or
- withhold evidence.

Proposed Section 268.108 and 268.109: Preventing witnesses or interpreters or production of things in evidence.

A person must not intentionally prevent another person attending an ICC proceeding as a witness or interpreter, or from producing an item as evidence (if they are obliged to produce it).

Proposed Section 268.110: Reprisals against witnesses.

A person must not cause, or threaten to cause, a detriment to a witness or interpreter because of something that the witness or interpreter has done, or that the perpetrator believes that they have done. Causing the detriment must itself be illegal for it to constitute an offence under this proposed section. This proposed section does not apply if the witness or interpreter committed perjury.

Proposed Section 268.111: Reprisals against officials of the ICC.

A person must not cause, or threaten to cause, a detriment to an official of the ICC because of something that either that official or any other official of the ICC has done, or that the perpetrator believes that the relevant official has done.

Proposed Section 268.113: Receipt of a corrupting benefit by an official of the ICC.

An official of the ICC may not receive or agree to receive a benefit, or ask for a benefit for themselves or for someone else, with the intention of influencing their official duties.

Proposed Section 268.114: Subdivision not to apply to certain conduct

Sections 22 and 29 of the ICC Act provide that the Attorney-General must issue a certificate before the arrest or surrender a person in response to a request from the ICC. This proposed section ensures that a person whose conduct results in a refusal or failure to issue such a certificate (including an Attorney-General who refuses to issue the certificate) or who acts or fails to act based on the absence of a certificate has not committed any crime against the administration of justice under Australian law.

**Subdivision K – Miscellaneous**

Subdivision K, proposed sections 268.115 to 268.124, establishes a series of legal principles that are to be used when interpreting and prosecuting offences under Division 268, and other miscellaneous provisions to facilitate the application of this Division.

Proposed Section 268.115: Responsibility of commanders and other superiors

This proposed section sets out the principles by which people in command of the perpetrators of offences can be held criminally responsible for the acts of their subordinates. It is important to ensure that the persons ultimately responsible for the commission of the crimes under the Statute and this Division do not escape punishment because they did not directly commit the offences. It is also important to ensure that a commander whose subordinates have committed, or are suspected of having committed, such crimes takes steps to have those crimes investigated and the perpetrators punished.

The proposed section implements the principals of command responsibility established in Article 28 of the Statute.

The proposed section states that a military commander is criminally responsible for genocide, crimes against humanity or war crimes that are committed by people under their control where the commander:

- knew, or should have known, that their forces were committing or about to commit the crimes; and
- did not take all reasonable and necessary steps to prevent the crimes being committed or hand the matter to the proper authorities for investigation and prosecution of the offenders.

If a superior is not a military commander, or effectively a military commander, they will be criminally responsible for genocide, crimes against humanity or war crimes that are committed by people under their authority and control where:

- the superior knew that the crimes were being or about to be committed by their subordinates, or ignored that information;
- the acts that constituted the crimes were within the superior's authority and control; and
- the superior did not take all reasonable and necessary steps to prevent the crimes being committed or hand the matter to the proper authorities for investigation and prosecution of the offenders.

Proposed Section 268.116: Defence of superior orders

This proposed section establishes the limits on the circumstances in which a person accused of a crime under this Division can claim that they were ordered to perform the relevant acts and that this constitutes a defence to the criminal charge. The proposed section implements the principles of this defence in Article 34 of the Statute.

Under this proposed section, a person who is charged with genocide or crimes against humanity (i.e. charged with an offence under Subdivisions B or C) cannot claim that they were ordered to commit the acts by a superior in order to avoid criminal responsibility.

If a person is charged with war crimes (i.e. charged with an offence under Subdivisions D to H), then the fact that they were ordered to commit the act will only protect them from criminal responsibility if they were under a legal obligation to obey the person giving the order, they did not know that the order was unlawful and the order was not manifestly unlawful.

Proposed Section 268.117: Geographical jurisdiction

This proposed section provides that the offences in this Division apply to all conduct, regardless of whether the conduct or the effect is within or outside of Australia.

If a person is charged with a crime against the administration of justice of the ICC (Subdivision J) then that person has a defence if they are not Australian, the conduct occurred completely outside of Australia and the conduct does not constitute an offence where it occurred.

Proposed Section 268.118: Double jeopardy

This proposed section ensures that a person who has been tried in the ICC cannot be tried in Australia for the same offence or for the same conduct.

Proposed Section 268.119: Offences related to exercise of jurisdiction of International Criminal Court

This proposed section makes it an offence to contravene an order of the ICC while it is sitting in Australia or intentionally hinder the ICC while it is performing its functions in Australia.

Proposed Section 268.120: Saving of other laws

This proposed section provides that this Division is not intended to exclude or limit any other Commonwealth, State or Territory law.

Proposed Section 268.121: Bringing proceedings under this Division

Proposed subsection (1) provides that proceedings under this Division can only be commenced with the Attorney-General's written consent, and proposed subsection (2) provides that any such proceedings can only be carried out in the name of the Attorney-General.

Proposed subsection (3) provides that a person may be arrested, charged and remanded in custody or released on bail for an offence under this Division before the consent has been given. This is to ensure that any delay in obtaining written consent from the Attorney-General will not delay the arrest of a person or allow a person to escape, and that it also will not result in a person being unduly held on remand.

Proposed Section 268.122: Attorney-General's decision in relations to consents to be final

This clause prevents any review of or challenge to a decision by the Attorney-General to give consent to initiate a prosecution, or refuse consent to prosecute, in any court other than the High Court through the prerogative writ provisions in section 75 of the Constitution.

Proposed Section 268.123: Legal representation

This proposed section provides a person accused of a crime under this Division with the same rights to legal representation as a protected prisoner of war has under the *Geneva Conventions Act 1957*. The accused has the right to legal representation, and if the accused has had legal representation for less than 14 days the court must adjourn the trial to ensure that 14 days has elapsed since the lawyer was instructed. If the accused does not have a lawyer, the court must assign a counsel and/or solicitor to represent the accused's interests.

Proposed Section 268.124: Proof of application of Geneva Conventions or Protocol I to the Geneva Conventions

This proposed section allows the Minister for Foreign Affairs to issue a certificate if a question arises as to whether any of the Geneva Conventions or Protocol I applies in proceeding under this Division. Such a certificate is *prima facie* evidence of any matter relevant to whether the Convention or the Protocol applies. These questions may involve matters of foreign policy and will often have political or international implications. In such cases, the Government will be able to provide evidence of these matters in the form of a certificate, but that evidence can still be disproved.

**Item 3**

This Item inserts a definition of the term *attack directed against a civilian population* into the Dictionary of the Code and provides that an attack against a civilian population means a course of conduct involving the multiple commission of any one or more proscribed inhumane acts (see Item 18) against any civilian population pursuant to, or in furtherance of, a state or organisational policy to engage in that course of conduct, consistent with the definition in article 7(2)(a) of the Statute.

**Item 4**

This Item inserts a definition of the term *benefit* into the Dictionary of the Code and provides that a benefit includes any advantage and is not limited to property.

**Item 5**

This item inserts a definition of the term *Covenant* into the Dictionary of the Code and provides that a reference to the Covenant means the International Covenant on Civil and Political Rights. A copy of the Covenant is in Schedule 2 to the *Human Rights and Equal Opportunity Commission Act 1986*.

**Item 6**

This Item inserts a definition of *crime against humanity* into the Dictionary of the Code and provides that a crime against humanity means an offence under Subdivision C of Division 268 of the Code.

**Item 7**

This Item inserts a definition of *crime against the administration of justice of the International Criminal Court* into the Dictionary of the Code and provides that a crime against the administration of justice of the International Criminal Court means an offence under Subdivision J of Division 268 of the Code.

**Item 8**

This Item inserts a definition of the term *detriment* into the Dictionary of the Code and provides that a detriment includes any disadvantage and is not limited to personal injury or to loss of or damage to property.

**Item 9**

This Item inserts a definition of the term *distinctive emblems of the Geneva Conventions* into the Dictionary of the Code and provides that distinctive emblems of the Geneva Conventions means the emblems, identity cards, signs, signals, insignia or uniforms to which subsection 15(1) of the *Geneva Conventions Act 1957* applies.

**Item 10**

This Item inserts a definition of the term *evidence* into the Dictionary of the Code and provides that evidence includes anything that may be used as evidence.

**Item 11**

This Item inserts a definition of the term *First Geneva Convention* into the Dictionary of the Code and provides that the First Geneva Convention means the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted at Geneva on 12 August 1949, a copy of the English text of which (not including the annexes) is set out in Schedule 1 of the *Geneva Conventions Act 1957*.

**Item 12**

This Item inserts a definition of the term *Fourth Geneva Convention* into the Dictionary of the Code and provides that the Fourth Geneva Convention means the Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted at Geneva on 12 August 1949, a copy of the English text of which (not including the annexes) is set out in Schedule 4 of the *Geneva Conventions Act 1957*.

**Item 13**

This Item inserts a definition of the term *Geneva Conventions* into the Dictionary of the Code and provides that Geneva Conventions means the First Geneva Convention, the Second Geneva Convention, the Third Geneva Convention and the Fourth Geneva Convention.

**Item 14**

This Item inserts a definition of *genocide* into the Dictionary of the Code and provides that genocide means an offence under Subdivision B of Division 268 of the Code.

**Item 15**

This Item inserts a definition of *Hague Declaration* into the Dictionary of the Code and provides that the Hague Declaration means the Hague Declarations Concerning the Prohibition of Using Bullets which Expand or Flatten Easily in the Human Body, and was adopted at the Hague on 29 July 1899.

**Item 16**

This Item inserts a definition of *hors de combat* into the Dictionary of the Code and provides that a person is *hors de combat* if they are in the power of the enemy, they have surrendered or are unable to defend themselves because of sickness or injury, and they do not attempt to escape or injure the enemy.

**Item 17**

This Item inserts a definition of *ICC Statute* into the Dictionary of the Code and provides that the ICC Statute means the Statute of the International Criminal Court done at Rome on

17 July 1998, a copy of the English text of which is set out in Schedule 1 to the *International Criminal Court Act*

**Item 18**

This Item inserts a definition of *international armed conflict* into the Dictionary of the Code and provides that international armed conflict includes military occupation.

**Item 19**

This Item inserts a definition of *International Criminal Court* into the Dictionary of the Code and provides that International Criminal Court means the International Criminal Court established under the ICC Statute.

**Item 20**

This Item inserts a definition of *interpreter* into the Dictionary of the Code and provides that an interpreter includes a person who interprets, signs or other things made or done by a person who cannot speak adequately for the purpose of giving evidence in a proceedings before the ICC.

**Item 21**

This Item inserts a definition of *proscribed inhumane act* into the Dictionary of the Code and provides that a proscribed inhumane act means any act as described in a number of provisions in Division 268.

**Item 22**

This Item inserts a definition of the term *Protocol I to the Geneva Conventions* into the Dictionary of the Code and provides that Protocol I to the Geneva Conventions means the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), done at Geneva on 10 June 1977, a copy of the English text of which is set out in Schedule 5 of the *Geneva Conventions Act 1957*.

**Item 23**

This Item inserts a definition of the term *Protocol II to the Geneva Conventions* into the Dictionary of the Code and provides that Protocol II to the Geneva Conventions means the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the protection of victims of non-international armed conflicts, done at Geneva on 10 June 1977.

**Item 24**

This Item inserts a definition of the term *Protocols to the Geneva Conventions* into the Dictionary of the Code and provides that Protocols to the Geneva Conventions means Protocol I to the Geneva Conventions and Protocol II to the Geneva Conventions.

**Item 25**

This Item inserts a definition of the term *Second Geneva Convention* into the Dictionary of the Code and provides that the Second Geneva Convention means the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, adopted at Geneva on 12 August 1949, a copy of the English text of which (not including the annexes) is set out in Schedule 2 of the *Geneva Conventions Act 1957*.

**Item 26**

This Item inserts a definition of the term *sworn statement* into the Dictionary of the Code and provides that a sworn statement means an oral statement made on oath or affirmation or a statement in a document verified on oath or affirmation.

**Item 27**

This Item inserts a definition of the term *Third Geneva Convention* into the Dictionary of the Code and provides that the Third Geneva Convention means the Geneva Convention relative to the Protection of Prisoners of War, adopted at Geneva on 12 August 1949, a copy of the English text of which (not including the annexes) is set out in Schedule 3 of the *Geneva Conventions Act 1957*.

**Item 28**

This Item inserts a definition of the term *threat* into the Dictionary of the Code and provides that a threat includes a threat made by any conduct, whether explicit or implicit and whether conditional or unconditional.

**Item 29**

This Item inserts a definition of *war crime* into the Dictionary of the Code and provides that a war crime means an offence under Subdivision D, E, F, G or H of Division 268 of the Code.

### **Schedule 2 – Director of Public Prosecutions Act 1983**

#### **Item 1**

The purpose of this Item is to amend the *Director of Public Prosecutions Act 1983* (s. 6(1)(k)) to enable the Director of Public Prosecutions to appear in hearings under the ICC Act.

### **Schedule 3 – Geneva Conventions Act 1957**

#### **Item 1**

The purpose of this Item is to delete the Part of the *Geneva Conventions Act 1957* that makes a grave breach of any of the Geneva Conventions or Protocol I a crime in Australia. These crimes are now set out in greater detail in Subdivisions D and H of Division 268 of the *Criminal Code*.

Although this item deletes the Part of the *Geneva Conventions Act 1957* that made the various grave breaches crimes under Australian law, any grave breach of the Geneva Conventions or of Protocol I can still be prosecuted in Australia regardless of when the alleged breach took place.

From the date of the commencement of this Act, the crimes are covered by the new Division 268 of the *Criminal Code*. Therefore any acts that are committed after that commencement date can be prosecuted under the *Criminal Code*. Even though Part II of the *Geneva Conventions Act 1957* will be repealed once this Act commences, if a person has committed a crime under that Part prior to its repeal they can still be prosecuted under the *Geneva Conventions Act 1957* (see section 8 of the *Acts Interpretation Act 1901*).

### **Schedule 4 – Migration Act 1958**

#### **Items 1 and 2**

The purpose of these Items is to allow the Attorney-General to issue a certificate to allow a person who is not a citizen of Australia to enter Australia, or to remain in Australia, if they are required for the purposes of the ICC Act.

### **Schedule 5 – Mutual Assistance in Criminal Matters Act 1987**

#### **Items 1 and 2**

The purpose of these Items is to allow the Attorney-General to obtain information on financial transactions in Australia from the Australian Transaction Reports Analysis Centre if the ICC requests it, and to provide such information to the ICC, in the same manner that such a request from another country is currently dealt with under the *Mutual Assistance in Criminal Matters Act 1987*.

**Schedule 6 – Telecommunications (Interception) Act 1979**

**Item 1**

This Item includes proceedings under Division 5 of Part 4 of the ICC Act (Taking Evidence or Producing Documents or Articles) and proceedings of the ICC held in Australia under Part 5 of the ICC Act within the definition of “exempt proceedings” under the *Telecommunications (Interception) Act 1979*. The purpose of this is to allow evidence gathered under the *Telecommunications (Interception) Act 1979* to be given as evidence in those proceedings.

**Schedule 7 – Witness Protection Act 1994**

**Items 1, 2 and 3**

The purpose of these Items is to insert a new s. 10A in the *Witness Protection Act 1994* to allow the Attorney-General and the Commissioner of the Australian Federal Police to consider, and arrange for, the inclusion of a person in the National Witness Protection Program at the request of the ICC in the same manner as any other person in the NWPP.