

2002

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**INTERNATIONAL CRIMINAL COURT BILL 2002**

EXPLANATORY MEMORANDUM

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

## **INTERNATIONAL CRIMINAL COURT BILL 2002**

### **OUTLINE**

The purpose of this Bill is to allow Australia to comply with the international obligations that it will incur upon ratification of the ICC Statute.

The ICC Statute was adopted by a Conference of Plenipotentiaries in Rome on 17 July 1998 and has been signed by 139 countries – Australia signed the Statute on 9 December 1998. The Statute establishes a permanent International Criminal Court to try individuals accused of “the most serious crimes of concern to the international community as a whole”, namely genocide, crimes against humanity and war crimes (Article 5). The ICC will also try individuals accused of the crime of aggression, once the States that are parties to the Statute agree upon a definition of aggression. If the Statute is amended to include the crime of aggression, a State Party may decline to accept it, in which case the ICC may not exercise jurisdiction over it in respect of the nationals of that State or in respect of crimes committed in that State’s territory. The Statute will enter into force on 1 July 2002.

The Statute contains obligations on State Parties to it to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court” (Article 86). The obligations to cooperate with the ICC are contained in Part 9 of the Statute, and include, amongst other things, requests for the:

- arrest or provisional arrest of a person and the surrender of a person to the ICC;
- identification and location of a person or items;
- taking or producing evidence, including expert reports;
- questioning any person being investigated or prosecuted;
- service of documents;
- facilitating people to voluntarily appear before the ICC;
- temporary transfer of prisoners to the ICC;
- examination of places or sites;
- execution of searches and seizures
- provision of records and documents;
- protection of victims or witnesses;
- preservation of evidence; or
- assistance with the forfeiture of property related to crimes within the jurisdiction of the ICC.

This Bill contains provisions allowing Australia to comply with its international obligations on ratification by putting in place procedures to comply with requests for assistance or the enforcement of sentences.

The Bill also contains provisions to ensure Australian sovereignty is protected.

In particular, it affirms the primacy of Australian law and declares that no person can be arrested on a warrant issued by the Court or surrendered to the Court without the consent of the Attorney General. Review of the Attorney-General’s discretion will be strictly limited to prerogative remedies within constitutional limits

Part 2 of the Bill contains general provisions governing requests for cooperation by the ICC.

Part 3 of the Bill deals with requests from the ICC for the arrest and surrender of persons, including that the Attorney-General must not issue a notice allowing for the arrest, or provisional arrest of a person nor a warrant for a person's surrender for a crime unless the Attorney-General has in his or her absolute discretion, signed a certificate that it is appropriate to do so.

Part 4 of the Bill deals with other types of requests from the ICC, such as identifying or locating persons or things; taking evidence; serving documents; examining sites; protecting victims and witnesses and preserving evidence; identifying, freezing and seizing tainted property.

Part 5 of the Bill authorises the ICC to conduct investigations or hearings in Australia and sets out its powers while in Australia.

Part 6 of the Bill deals with searches, seizures and arrests.

Part 7 of the Bill sets out how Australia is to deal with a request from the ICC for information that we have received in confidence from a third party.

Part 8 of the Bill sets out the procedures for protecting Australia's national security interests.

Part 9 of the Bill deals with the transportation through Australia of persons in custody.

Part 10 of the Bill deals with the enforcement in Australia of any fines or reparation orders made by the ICC.

Part 11 of the Bill deals with the forfeiture of the proceeds of international crimes.

Part 12 of the Bill deals with the enforcement in Australia of sentences imposed by the ICC, including the transfer of prisoners to Australia.

Part 13 of the Bill sets out the procedure for Australia to make a request to the ICC.

Part 14 of the Bill covers miscellaneous matters, including dealing with costs or requests and creating offences against this Bill.

#### **FINANCIAL IMPACT STATEMENT**

The Bill is expected to have little impact on Commonwealth expenditure or revenue in the short term. The longer term impact of the Bill will depend on how many active prosecutions and investigations the ICC undertakes, which will determine the number and nature of requests for assistance that Australia receives from the ICC and on whether the ICC ever sits in Australia. These resource implications cannot be quantified at this stage, however it is expected that they can be met from existing resources.

It is considered highly unlikely that the ICC would ever sit in Australia.

The purpose of this Bill is to enable Australia to ratify the Statute of the International Criminal Court. If Australia ratifies the Statute, it will have an obligation to make annual financial contributions to the running of the Court. The contribution for Australia in the first year is expected to be approximately \$2.5 million.

## NOTES ON CLAUSES

### List of Abbreviations

ICC	International Criminal Court
Interpol	International Criminal Police Organisation
Statute	Rome Statute of the International Criminal Court

### Part 1 - Preliminary

#### Clause 1: Short title

This clause provides that the short title of this Act is the *International Criminal Court Act 2002*.

#### Clause 2: Commencement

This clause provides that Part 1 of the Act commences on the day on which the Act receives Royal Assent.

Parts 2 to 14 of the Act commence on a day to be fixed by Proclamation, but that date shall not be prior to the day on which the Statute enters into force in Australia. If Parts 2 to 14 of the 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.

This Act must come into force promptly after the Statute enters into force in Australia to allow Australia to comply with its international legal obligations.

If Parts 2 to 14 of the Act are to commence on a day before sections 3 to 338 of the *Proceeds of Crime Bill 2002* commence, then Division 14 of Part 4 and Part 11 of this Act will not commence until immediately after sections 3 to 338 of the *Proceeds of Crime Bill 2002* commence. This is necessary because Division 14 of Part 4 and Part 11 of this Act refer to and rely on provisions of the *Proceeds of Crime Bill 2002*.

#### Clause 3: Complementarity of jurisdictions

The Statute establishes the principle of complementarity, meaning that the ICC only has jurisdiction in a case where a State is unwilling or unable to genuinely investigate or prosecute a crime. States that are willing and able to do so maintain the primary right to exercise their jurisdiction. This clause reiterates that Parliament's intention is that the jurisdiction of the ICC is to be complementary to the jurisdiction of Australia, and that this Act and Australia's ratification of the ICC Statute does not affect the primacy of Australia's right to try crimes which are within the jurisdiction of the ICC. These crimes will also be crimes in Australian law as a result of the enactment of the *International Criminal Court (Consequential Amendments) Act 2002*.

#### Clause 4: Definitions

This clause defines various terms used in the Act.

#### Clause 5: Act to bind Crown

This clause confirms that the Act binds the Crown in right of the Commonwealth and each of the States.

#### Clause 6: External Territories

This clause extends the Act to each external Territory of Australia.

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

~~Clause 7: What constitutes a request for cooperation~~

This clause defines a *request for cooperation* as a request by the ICC for assistance with any of the following, in connection with an existing or proposed investigation or prosecution:

- Arrest (including provisional) and surrender of a person pursuant to an ICC warrant or judgement;
- Identification and location of a person or items;
- Taking or producing evidence, including expert reports;
- Questioning any person being investigated or prosecuted;
- Service of documents;
- Facilitating people to voluntarily appear before the ICC;
- Temporary transfer of prisoners to the ICC;
- Examination of places or sites;
- Execution of searches and seizures
- Provision of records and documents;
- Protection of victims or witnesses;
- Preservation of evidence;
- Assistance with the forfeiture of property related to crimes; and
- Any other assistance that is not prohibited by law to assist in the investigation and prosecution of crimes in the ICC and enforcement of orders.

Subclause (2) confirms that the Act does not prevent informal assistance being given outside the terms of the Act.

#### **Clause 8: How requests for cooperation are to be made**

This clause provides that a request for cooperation from the ICC must be made in writing to the Attorney-General (or to a person that the Attorney-General has authorised to deal with requests for cooperation) through the diplomatic channel, Interpol or another appropriate regional organisation.

#### **Clause 9 Urgent requests for cooperation and requests for provisional arrest**

This clause provides that an urgent request for cooperation or a request for the provisional arrest of a person can be made in any written form. Such a request must be followed by a formal request as set out in clause 8 as soon as practicable.

#### **Clause 10 Execution of requests**

This clause provides that any request for cooperation must be carried out in accordance with procedure set out in Australian law (namely this Act), and that if the request asks that it be executed in a manner that is not prohibited by Australian law then the Attorney-General must use his or her best efforts to execute the request in that manner.

This clause does not apply to clauses 106(1) or 107 of this Act, which allow the Prosecutor to execute certain requests for cooperation or conduct investigations in Australia.

#### **Clause 11: Consultations with the ICC**

This clause provides that if there is, or might be, a problem with executing a request for cooperation then the Attorney-General must consult with the ICC without delay.

The Attorney-General cannot refuse a request for cooperation under Article 93(1) of the Statute (requests other than for the arrest, provisional arrest or surrender of a person) unless the Attorney-General has consulted with the ICC to see whether the assistance could be provided later, in another manner, or subject to conditions. One of these conditions could be that information is kept confidential and only used to generate new evidence, but the clause allows the Attorney-General to waive any conditions at a later date.

#### **Clause 12: Request that may raise problems relating to Australia's international obligations to a foreign country**

This clause sets out the procedure that the Attorney-General must follow if he or she believes that a request for cooperation will conflict with Australia's obligations to another country.

The Attorney-General must consult with the ICC. If the Attorney-General then believes that executing the request will not conflict with Australia's obligations to any other country Australia will comply. If the Attorney-General believes that executing the request will conflict with Australia's obligations to another country then Australia will

**Clause 13: Confidentiality of request**

This clause provides that a request for cooperation and any supporting documents must be kept confidential, unless the request cannot be executed without disclosing some of the information.

If the ICC asks that information be handled in a certain manner to protect the safety or well-being of a victim, potential witness or their family, then the information must be handled in that manner.

**Clause 14: Response to be sent to ICC**

The purpose of this clause is to ensure that the Attorney-General promptly informs the ICC of the outcome of any request for cooperation, and informs the ICC of the reasons if Australia has postponed or refused the request, or has otherwise been unable to comply with it.

It also provides that documents or evidence that are sent to the ICC are sent in their original language and form, and that documents or evidence that are in response to an urgent request for cooperation must be sent to the ICC urgently.

**Clause 15: Attorney-General must take into account ICC's ability to refer matter to Assembly of States Parties or Security Council**

This clause provides that when the Attorney-General is considering a request for cooperation, the Attorney-General must take into account the fact that if the ICC finds that Australia has refused to comply with a request for cooperation then the ICC may refer the issue to the United Nations Security Council or the Assembly of States Parties.

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

**Division 1 – Preliminary**

**Clause 16: Application of Part**

This clause provides that this Part of the Act (Part 3) applies to a request for the arrest and surrender of a person or the provisional arrest of a person.

Other requests for cooperation are dealt with in Part 4.

**Division 2 – Documentation to accompany request**

**Clause 17: Documentation for request for arrest and surrender of person for whom warrant of arrest has been issued**

This clause sets out the information that is required to accompany a request from the ICC to Australia for the arrest and surrender of a person for whom a warrant of arrest has been issued. Further documents may be added by regulations. The information required by this clause is consistent with Australia's extradition policy, as set out in the *Extradition Act 1988* and regulations made under that Act.

**Clause 18: Documentation for request for arrest and surrender of person already convicted**

This clause sets out the information that is required to accompany a request from the ICC to Australia for the arrest and surrender of a person who has already been convicted by the ICC.

**Clause 19: Documentation for request for provisional arrest**

This clause sets out the information that is required to accompany a request from the ICC to Australia for the provisional arrest of a person.

**Division 3 – Arrest of persons**

**Clause 20: Arrest following request for arrest and surrender**

This clause provides the process by which a magistrate is to issue a warrant for the arrest of a person at the direction of the Attorney-General, if a request from the ICC for that person's arrest and surrender complies with Division 2 (clauses 17 or 18). The Attorney-General may give the notice to the magistrate directing the magistrate to issue the arrest warrant if the Attorney-General has issued a certificate under clause 22.

**Clause 21: Arrest following request for provisional arrest**

This clause provides the process by which a magistrate is to issue a warrant for the arrest of a person at the direction of the Attorney-General, if a request from the ICC for that person's provisional arrest complies with Division 2 (clause 19). The Attorney-General may give the notice to the magistrate directing the magistrate to issue the arrest warrant if the Attorney-General has issued a certificate under clause 22.

**Clause 22: Certificate by Attorney-General**

This clause provides that the Attorney-General must not direct the magistrate to issue an arrest warrant unless the Attorney-General has first signed a certificate that it is appropriate to arrest that person. This clause ensures that the Attorney-General retains the absolute discretion to determine when a person in Australia is arrested on behalf of the ICC. An example of when the Attorney-General might refuse to direct that a magistrate issue an arrest warrant is where Australia was willing and able to prosecute that person.

**Clause 23: Remand**

This clause provides the process for the remand of a person arrested under a warrant issued under clauses 20 or 21.

Subclause (1) provides that the arrested person must be given a written notice setting out the crime that they are charged with and the conduct that is alleged to form the basis for that charge.

The person must be brought before a magistrate, and subclause (2) states that the magistrate must be satisfied that the arrested person is the person in the warrant and that they were arrested in accordance with the Act, including being told why they are being arrested.

If the magistrate is not satisfied of the matters set out above, then the person must be released (subclause (3)). Otherwise, the magistrate must remand the arrested person in custody unless there are special circumstances to release them on bail (subclauses (4) and (5)).

**Clause 24: Procedure following application for bail**

This clause provides the process to be followed if an arrested person applies for bail, whereby the Attorney-General must notify the ICC, and the magistrate must consider any recommendation by the ICC.

**Clause 25: Release from remand on the Attorney-General's direction**

This clause sets out the circumstances in which the Attorney-General must direct a magistrate to release an arrested person from custody or from the conditions of bail. The Attorney-General also retains a general discretion to release a person from remand if the Attorney-General believes for any reason that the remand should cease. This could be used to release a person from remand if they will not be surrendered. This clause does not prevent a person who has been released from being re-arrested if the ICC sends a new request for their arrest to Australia.

**Clause 26: Release from remand after certain periods**

This clause provides for a magistrate to review the remand of a person who has been provisionally arrested (clause 21) if the Attorney-General has not, within 60 days of their arrest,

**Clause 27: Application for search warrants**

This clause provides the grounds on which a police officer may apply for a search warrant in relation to a crime within the jurisdiction of the ICC and the procedure which the officer must follow to obtain a search warrant. Part 6 of this Act deals with search warrants in detail.

**Division 4 – Surrender of persons**

**Clause 28: Surrender warrants**

This clause provides that the Attorney-General may issue a surrender warrant for any person remanded under Division 3, except where this Division provides otherwise. A surrender warrant authorises the surrender of the person named in the warrant to the ICC.

**Clause 29: Certificate by Attorney-General**

This clause provides that the Attorney-General must not issue a surrender warrant unless the Attorney-General has first signed a certificate that it is appropriate to surrender that person. This clause ensures that the Attorney-General retains the absolute discretion to determine when a person in custody in Australia is to be surrendered to the ICC. An example of when the Attorney-General might refuse to surrender a person is where Australia was willing and able to prosecute that person.

**Clause 30: Surrender warrant may take effect at a later date**

This clause provides that where a person has been sentenced for a different crime in Australia and is serving that sentence in prison, the Attorney-General may either issue a surrender warrant that takes effect when the person is released from prison, or issue a temporary surrender warrant, after consulting with the ICC.

**Clause 31: Refusal of surrender**

This clause provides that in certain circumstances the Attorney-General can refuse to surrender a person.

The Attorney-General must refuse to surrender a person if the ICC determines that the case against the person is inadmissible because the person has already been tried for the same crime (clause 33(4)), because the person is currently being investigated or prosecuted for the same crime (clause 35(3)) or that the case is inadmissible for any other reason (clause 36(3)).

The Attorney-General also has a discretion to refuse to surrender a person if there is a competing request from another country that is not a party to the Statute to extradite that person (clauses 39 and 40).

**Clause 32: Postponement of execution of request for surrender**

This clause sets out the circumstances in which the Attorney-General can delay the surrender of a person. It also clarifies the effect of such a delay, and the procedure for a person whose surrender has been delayed to apply to be released from detention.

**Clause 33: Previous proceedings against person sought**

This clause sets out the procedure to be followed if a person claims that they have already been tried, by the ICC or by a genuine and impartial national court, for the same crime or conduct that they are currently charged with.

**Clause 34: Ongoing Australian investigation or prosecution involving different conduct**

If the surrender of a person would interfere with an Australian investigation or prosecution of different conduct (from the conduct that the ICC is investigating or prosecuting), this clause gives the Attorney-General the discretion to either proceed with the surrender of the person or delay the surrender until the Australian proceedings have been completed.

**Clause 35: Person being investigated or prosecuted in Australia for the same conduct**

This clause sets out the procedure relating to the surrender of a person if Australia challenges the jurisdiction of the ICC to try that person because Australia is investigating or trying that person for the same crime or has already investigated the person and has decided not to prosecute them.

**Clause 36: Challenges to admissibility in other cases**

This clause provides that if there is any other challenge to the jurisdiction of the ICC, the Attorney-General may postpone the surrender of the person until the ICC has resolved the challenge to jurisdiction.

**Clauses 37, 38 and 39: Request from ICC and a foreign country relating to same conduct**

These clauses set out the procedure to be followed by the Attorney-General where a foreign country and the ICC request the extradition or surrender of a person for the same conduct or crime. The process differs depending on whether the foreign country is a party to the Statute (clause 38) or not (clause 39).

The Attorney-General must notify the ICC and the foreign country of the fact that they have both sought the extradition or surrender of the person for the same conduct (clause 37).

If the foreign country is a party to the Statute then clause 38 applies. This provides that the ICC must make an expedited determination on whether the case is admissible, taking into account the fact that the foreign country is also investigating or prosecuting the same conduct. If the ICC determines that the case is admissible, then the person must be surrendered to the ICC. If the ICC determines that the case is not admissible, or does not make an expedited determination, then the person may be extradited (subject to the *Extradition Act 1988*).

If the foreign country is not a party to the Statute then clause 39 applies. If Australia is not under an international obligation to extradite the person, then the same process as in clause 39 applies. If Australia is under an international obligation to extradite the person, then the Attorney-General must decide whether to surrender the person to the ICC or extradite the person to the foreign country. In making that decision, the Attorney-General must take into account the timing of the requests, the interest of the foreign country in the crime and the possibility of later surrender by the foreign country to the ICC.

**Clause 40: Request from ICC and a foreign country relating to different conduct**

This clause set out the procedure to be followed by the Attorney-General where a foreign country and the ICC request the extradition or surrender of a person for different conduct or crimes. The process is very similar to that in clause 39.

If Australia is not under an international obligation to extradite the person, then priority must be given to the request from the ICC. If Australia is under an international obligation, then the Attorney-General must decide whether to surrender the person to the ICC or extradite the person to the foreign country. In making that decision, the Attorney-General must take into account the factors that are set out in clause 39, plus the relative seriousness of the conduct that the requests for surrender and extradition relate to.

**Clause 41: Notification of decision on extradition to foreign country**

This clause provides that if Australia decides to extradite a person to a foreign country rather than surrender that person to the ICC for the same crime or conduct, and the extradition does not proceed, then the Attorney-General must inform the ICC. This is to allow the ICC to make another request for the surrender of that person.

**Clause 42: Detention following surrender warrants**

This clause provides that if a person is on bail when a surrender warrant is issued, that person must then be remanded in custody to allow the warrant to be executed.

**Clause 43: Contents of surrender warrants**

This clause sets out the information that must be contained in a surrender warrant.

**Clause 44: Execution of surrender warrants**

This clause imposes an obligation to execute the surrender warrant according to its terms.

**Clause 45: Release from remand**

This clause gives a person who is remanded in custody because a surrender warrant has been issued the right to

that there is a reasonable cause for the delay in executing the warrant, including danger to the persons life or health, then it shall not order the release of the person.

**Clauses 46 and 47: Effect of surrender to ICC on person's terms of imprisonment and Expiry of Australian sentences while under ICC detention**

These clauses apply to persons who were serving sentences in prison in Australia for unrelated offences and are surrendered to the ICC.

Clause 46 sets out that time spent in detention in Australia in relation to a surrender warrant, and time spent in detention by the ICC will count as time served towards the Australian sentence. If the person is convicted of a crime by the ICC, time spent serving a sentence imposed by the ICC does not count as time served towards the Australian sentence. Similar rules for Australian prisoners who are temporarily transferred to the ICC to assist with an investigation or give evidence are contained in clause 75.

Clause 47 states that if a person's Australian sentence expires while the person is in detention under the ICC, the Attorney-General must immediately inform the ICC.

**Clause 48: Waiver of rule of speciality**

If a person has been surrendered to the ICC by Australia for certain conduct or crimes, the ICC cannot prosecute that person for different conduct or crimes without the consent of Australia. This clause gives the Attorney-General the power to give this consent, and the power to ask for further information from the ICC to assist in deciding whether to give the consent.

## **Part 4 – Other requests by ICC**

### **Division 1 – Preliminary**

#### **Clause 49: Application of this Part**

This clause provides that Part 4 of the Act applies to any request for cooperation by the ICC that is not a request for the arrest and surrender of a person or the provisional arrest of a person (such requests are dealt with in Part 3).

### **Division 2 – Documentation to accompany request**

#### **Clause 50: Documentation for request**

This clause sets out the information that is required to accompany a request for cooperation from the ICC to Australia. Additional information is specified if the request is for the transit of a person through Australia.

### **Division 3 – Restrictions on provision of assistance**

#### **Clause 51: Refusal of assistance**

This clause sets out the circumstances in which the Attorney-General can refuse a request for assistance by the ICC. This clause does not deal with refusal of a request for arrest and surrender or request for provisional arrest – those requests are dealt with under Part 3.

The Attorney-General must refuse a request by the ICC for Australia to provide information that Australia received on a confidential basis from a foreign country or organisation if that foreign country or organisation is not a party to the Statute and does not consent to the information being disclosed. This situation is covered in clause 142.

The Attorney General may also refuse a request for cooperation in the interests of national security (see Part 8 of this Act) or if there is a competing request from a foreign country (clauses 59 and 60).

#### **Clause 52: Postponement of execution of request**

This clause sets out the circumstances in which the Attorney-General may postpone the execution of a request for assistance by the ICC.

#### **Clause 53: Procedure if assistance precluded under Australian law**

Clause 11 of this Act requires the Attorney-General to consult with the ICC if there is any problem with executing a request for cooperation.

This clause provides that if a request for cooperation is initially prohibited in Australia, but after consultation between the Attorney-General and the ICC the request is modified so that it can be carried out in Australia (i.e. under this Act), then the Attorney-General will then consider the modified request.

#### **Clause 54: Postponement where ongoing Australian investigation or prosecution would be interfered with**

This clause allows the Attorney-General to postpone complying with a request for cooperation if it would interfere with an ongoing Australian action relating to different conduct. The Attorney-General must first consider whether the assistance could be provided immediately, but subject to conditions. If it cannot, the Attorney-General must agree to the period of the postponement with the ICC, and it must be no longer than is necessary to complete the domestic prosecution or investigation. If the ICC then requests the preservation of evidence, then the Attorney-General must consider that request. Such a request would also be made under this Part.

#### **Clause 55: Postponement where admissibility challenge**

This clause sets out the manner in which the Attorney-General is to deal with a request for cooperation in a variety of circumstances where the ICC is considering a challenge to the admissibility of the case to which the request for cooperation relates.

These clauses set out the manner in which the Attorney-General must deal with a situation where a foreign country and the ICC both request cooperation from Australian authorities. The Attorney-General must first consult with the ICC and attempt to comply with both of the requests, even if this requires the Attorney-General to delay or attach conditions to either or both of the requests.

If the Attorney-General cannot comply with both requests, the manner in which the requests must be dealt with depends on whether the foreign country is a party to the ICC Statute and whether the requests for cooperation relate to the same conduct or to different conduct.

**Clause 61: Notification to ICC of decision refusing request by foreign country**

This clause sets out that if Australia has notified the ICC that it has received a competing request from a foreign country, and the ICC has determined that the case is not admissible, if Australia later refuses the request for cooperation from the foreign country the Attorney-General must inform the ICC of this refusal.

**Clause 62: Requests involving competing international obligations**

This clause provides that if the subject of a request for cooperation is under the control of a foreign state or an international organisation, then the Attorney-General must inform the ICC. This will allow the ICC to approach that other state or organisation to request its consent for the cooperation to be given.

#### **Division 4 – Identifying or locating persons or things**

##### **Clause 63: Assistance in identifying or locating persons or things**

This clause covers a situation where the ICC requests assistance from Australia in identifying and/or locating a person or a thing, and the Attorney-General is satisfied that the person or thing may be in Australia and that this relates to an investigation or proceeding in the ICC. In these circumstances, the Attorney-General shall authorise the “appropriate authority” to identify and/or locate the person or thing and report back to the Attorney-General.

“Appropriate authority” is defined in clause 4, and is an officer of the Commonwealth or an Australian Federal Police officer or a State police officer.

#### **Division 5 – Taking evidence or producing documents or articles**

##### **Clause 64: The Attorney-General may authorise the taking evidence or the production of documents or articles**

This clause covers a situation where the ICC requests assistance from Australia in taking evidence or obtaining a document or item in Australia. The Attorney-General must be satisfied that the evidence can be taken or articles produced in Australia and that this relates to an investigation or proceeding in the ICC. In these circumstances, the Attorney-General shall authorise in writing the taking of the evidence or production of the documents or items and the sending of them to the ICC.

##### **Clause 65: Taking of evidence**

This clause sets out the procedure to be followed by a magistrate in taking evidence. The magistrate must record the evidence on writing or in any other form that the magistrate considers appropriate. For example, if the evidence was taken by video link, then the magistrate might decide to record the evidence by video rather than by written transcript.

##### **Clause 66: Producing documents or other articles**

This clause sets out the procedure to be followed by a magistrate in the production of documents or other articles. Where documents are produced, the magistrate may send copies of the documents that the magistrate has certified to be true copies to the Attorney-General rather than the originals.

##### **Clause 67: Legal representation**

This clause allows a person that an ICC investigation or proceeding relates to or their legal representative to be present at the taking of evidence in Australia under clause 65, but they do not have to be present.

In proceedings for the taking of evidence or the production of documents or other articles in Australia (clauses 65 and 66), the magistrate may allow:

- the ICC or prosecutor;
- the person who the ICC investigation or proceeding relates to; or
- the person who is giving the evidence or producing the documents or other articles

to be legally represented. The fact that a magistrate may allow a person to be legally represented does not **oblige** the magistrate to inform the person of the proceeding or allow the person or their legal representative to be present.

##### **Clause 68: Form of certificates**

This clause requires a certificate that is sent by the magistrate to the Attorney-General under clauses 65 or 66 to state who was present when the evidence was taken or the documents or other articles were produced, including any legal representatives.

##### **Clause 69: Compellability of persons to attend etc.**

This clause allows the magistrate in a hearing under Division 5 to exercise the same powers to compel a person to give evidence or produce documents as they could in a domestic criminal proceeding in that State or Territory. Witnesses therefore have the same obligations and protection that they would have in domestic proceedings.

The person who is being investigated or prosecuted in the ICC cannot be forced to give evidence, and any other person cannot be required to answer a question or produce a document or article unless the person could be required to do so by the ICC.

### **Division 6 – Questioning of person being investigated or prosecuted**

#### **Clauses 70 and 71: Assistance in questioning persons and Procedure where a person questioned**

Clause 70 sets out the procedure to be followed where the ICC requests assistance in questioning a person who is being investigated or prosecuted by the ICC and that person may be in Australia.

Clause 71 specifies that before a person is questioned under clause 70, they must be informed that they are being investigated or prosecuted for a crime under the Statute and of their rights to remain silent, to have legal representation present during questioning and that if they cannot afford legal assistance then it may be provided for them. This clause also confirms that a person who is being investigated or prosecuted by the ICC cannot be forced to answer a question.

### **Division 7 – Service of documents**

#### **Clause 72: Assistance in arranging service of documents**

This clause sets out the procedure where the ICC requests assistance in serving a document relating to an investigation or proceeding by the ICC on a person who may be in Australia. These documents can include a summons to a witness or summons to a suspect.

This clause also creates an offence of failing to comply with a summons, to a witness or a suspect, which is served under this clause. The maximum penalty for this offence is imprisonment for up to 12 months.

### **Division 8 – Facilitating the voluntary appearance of persons (other than prisoners) as witnesses or experts before the ICC**

#### **Clause 73: Persons (other than prisoners) assisting investigation or giving evidence**

This clause provides that if the ICC requests that Australia assist in facilitating a person to voluntarily appear before the ICC to assist with an investigation or give evidence, and that person is in Australia and is not a prisoner, then the Attorney-General shall make travel arrangements for that person to the ICC. The Attorney-General must first be satisfied that the person is in Australia and has consented to assist the ICC or give evidence.

### **Division 9 – Temporary transfer of prisoners to the ICC**

#### **Clause 74: Prisoners assisting investigation or giving evidence**

This clause sets out the procedure where the ICC requests that a person who is a prisoner in Australia be temporarily transferred to the ICC to assist with an investigation or give evidence. The procedure that the Attorney-General must follow depends on whether the prisoner is a State prisoner, a federal prisoner or both, and on whether the prisoner is on parole or not.

#### **Clause 75: Effect of removal to foreign country on prisoners' terms of imprisonment**

This clause provides that a prisoner is given credit towards their sentence for any time spent in custody overseas while they have been temporarily transferred to assist the ICC under clause 74.

### **Division 10 – Examination of places or sites**

#### **Clause 76: Assistance in examining places or sites**

This clause sets out the procedure where the ICC requests assistance in examining a place or site in Australia that

### **Division 11 – Search and seizure**

#### **Clause 77: Attorney-General may authorise applications for search warrants**

This clause provides that the Attorney-General is to authorise a police officer to apply for a search warrant, if it is required to comply with a request for assistance from the ICC in relation to an investigation or proceeding before the ICC.

The search warrant must be in relation to “evidential material”, which is defined in clause 4 to be a thing, including in electronic form, that is relevant to a crime within the jurisdiction of the ICC.

#### **Clause 78: Applications for search warrants**

This clause sets out the procedure to be followed by a police officer in applying for a search warrant where that officer has been authorised to apply for a search warrant under clause 77.

Search warrants are dealt with in Divisions 1, 2 and 3 of Part 6 (clause 111 to 128).

### **Division 12 – Provision of records or documents**

#### **Clause 79: Facilitating the provision of records or documents**

This clause sets out the procedure where the ICC requests assistance in the provision of records or documents that may be in Australia and that relate to an investigation or proceeding before the ICC.

### **Division 13 – Protecting victims and witnesses and preserving evidence**

#### **Clause 80: Protecting victims and witnesses and preserving evidence**

This clause sets out the procedure where the ICC requests assistance to protect victims or witnesses or preserve evidence that relates to an investigation or proceeding before the ICC. If the assistance requested by the ICC is not prohibited by any Australian law, then the Attorney-General must authorise the appropriate authority (as defined in clause 4) to execute the request, and the authority must send a report on the execution of the request to the Attorney-General.

### **Division 14 – Identification, tracing, and freezing or seizure, of proceeds of crimes within the jurisdiction of the ICC**

#### **Subdivision A - Preliminary**

This Division establishes a regime for making restraining orders, production orders, monitoring orders and notices to produce under the *Proceeds of Crime Bill 2002* in response to requests for assistance from the ICC. Restraining orders can be made where a person has been, or is about to be, charged with a crime under the Statute or has been convicted of such a crime (“the defendant”). This regime is materially the same as the regime for making these orders that will be inserted into the *Mutual Assistance in Criminal Matters Act 1987* by the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002*.

This ensures that the procedures, rights and safeguards for restraining orders relating to the property of people who have been charged with, are about to be charged with, or have been convicted of crimes within the jurisdiction of the ICC are the same as for serious Commonwealth crimes. It also ensures that the assistance given to the ICC is the same as the assistance that Australia already provides to foreign courts and police authorities.

#### **Clause 81: Application of Division**

This clause provides that Division 14 applies where the ICC makes a request for the identification, tracing, and freezing or seizure, of tainted property in relation to a crime within the jurisdiction of the ICC, provided that the Attorney-General is satisfied that a person is about to be charged, has been charged, or has been convicted of a

### **Subdivision B – Restraining orders**

#### **Clause 82: Applying for and making restraining orders**

Subclauses (1) and (2) provide that, if the request from the ICC in clause 81 involves making a restraining order, the Attorney-General will authorise the DPP to apply for a restraining order in the appropriate court.

Subclauses (3) and (4) provide that, if the DPP is authorised under subsection (1), then the DPP may apply for a restraining order under the *Proceeds of Crime Bill 2002*, and provide that Part 2-1 of that Bill applies to both the application and any order. Subclause (5) modifies the operation of Part 2-1 of the *Proceeds of Crime Bill 2002*.

#### **Clause 83: Excluding property from restraining orders**

This clause enables restrained property to be recovered in certain circumstances. It enables a third party who was not involved in the commission of the offence to which the forfeiture order relates, to have his or her interest in the property excluded from the restraining order. To be successful, the property must not be the proceeds of the offence within the meaning of the *Proceeds of Crime Bill 2002*. Under that Bill, property ceases to be proceeds if acquired by a person for value and without knowledge that it was proceeds of the offence (eg an innocent third party).

The clause also enables property to be excluded if the restraint of the property would cause financial hardship or it is otherwise in the public interest to do so, regardless of whether the applicant for the exclusion order is the subject of the order or a third party.

#### **Clause 84: When restraining order ceases to be in force**

Subclause (1) provides that if a restraining order is made because a person is going to be charged with a crime in the ICC, and that person is not charged with such a crime within 1 month of making the order, then the restraining order expires.

Subclause (2)(c) to (f) set out the other circumstances where a restraining order will expire earlier, namely:

- 28 days after the charge on which the restraining order was based is withdrawn, if the person has not been charged with a related crime within the jurisdiction of the ICC by then;
- 28 days after the person was acquitted of the charge on which the restraining order was based, if the person has not been charged with a related crime within the jurisdiction of the ICC by then;
- when the property that is the subject of the restraining order is forfeited; or
- when the restraining order is revoked.

### **Subdivision C – Production orders relating to crimes within the jurisdiction of the ICC**

#### **Clause 85: Requests for production orders**

This clause provides that, if the request from the ICC in clause 81 involves making an order for the production of a property-tracking document (which is defined in clause 4), the Attorney-General will authorise the DPP to apply for a production order in the appropriate court.

#### **Clause 86: Applying for and making production orders**

Subclauses (1) and (2) enable an authorised officer to seek a production order under the *Proceeds of Crime Bill 2002*, and that Part 3-2 of that Bill is to apply to both the application and any subsequent order.

Subclause (3) disapplies certain provisions in Part 3-2 for the purposes of a production order made on request of a foreign country, and amends the application of certain other provisions in Part 3-2.

#### **Clause 87: Retaining produced documents**

This clause provides that an authorised officer may retain a property-tracking document obtained as a result of a production order until the Attorney-General provides written directions on how to deal with the document. It is clear from subclause (2) that such a direction may include forwarding that document to the ICC.

### **Subdivision D – Notices to financial institutions**

This clause sets out the procedure that must be followed where the Attorney-General or a senior Departmental officer gives a notice to a financial institution requiring the production of information or documents relevant to certain matters.

Under this clause, a specified officer may give a written notice to a financial institution requiring the production of any information or documents relevant to certain account and transaction information. The notice must not be issued unless the officer reasonably believes that giving the notice is required to determine whether to take action under this Division (Division 14 of Part 4 of the ICC Act) or under the *Proceeds of Crime Bill 2002* in connection with proceedings under this Division, or in relation to proceedings under this Division or the *Proceeds of Crime Bill 2002*.

**Clause 89: Contents of notices to financial institutions**

This clause sets out what a notice issued under clause 88 must contain. First, it must state that the officer giving the notice believes that giving the notice is required to determine whether to take action under this Division or the *Proceeds of Crime Bill 2002* in connection with proceedings under this Division, or in relation to proceedings under this Division or the *Proceeds of Crime Bill 2002*. It must also specify the name of the financial institution, the kind of information or documents required to be provided, and the form and manner in which that information or those documents are to be provided. Further, it must also state that the information or documents must be provided within 14 days of the notice.

If the notice specifies that information about the notice must not be disclosed, it must also set out the effect of the offences in clause 92 (disclosing existence or nature of a notice) and 93 (failing to comply with a notice).

**Clause 90: Protection from suits etc. for those complying with notices**

This clause provides that a financial institution or one of its officers, employees or agents are protected from any action, suit or proceeding in relation to any action taken by the institution or person in relation to its or their response to a notice under clause 88, or in the mistaken belief that action was required under such a notice. The same parties are also protected from prosecution for money laundering offences in respect of the information provided in response to a notice under clause 88.

**Clause 91: Making false statements in applications**

This clause creates the offence of providing a false or misleading statement in relation to an application for a notice to a financial institution. The offence applies whether the statement is given orally or in a document or other form. The maximum penalty which can be imposed in relation to this offence is 12 months imprisonment, a fine of 60 penalty units, or both.

**Clause 92: Disclosing existence or nature of notice**

This clause creates an offence where a person who has been given a notice under clause 88 discloses the existence or nature of the notice, where the notice specifies that information about the notice must not be disclosed. The maximum penalty which can be imposed in relation to this offence is 2 years imprisonment, a fine of 120 penalty units, or both.

**Clause 93: Failing to comply with a notice**

This clause creates an offence where a person fails to comply with a notice given under clause 88. The maximum penalty which can be imposed in relation to this offence is 6 months imprisonment, a fine of 30 penalty units, or both.

**Subdivision E – Monitoring orders relating to crimes within the jurisdiction of the ICC**

**Clause 94: Requests for monitoring orders**

This clause provides that, if the request from the ICC in clause 81 involves making an order that a financial institution give information about transactions through an account with that financial institution in Australia, the Attorney-General will authorise the DPP to apply for a monitoring order in the appropriate court.

**Clause 95: Applying for and making monitoring orders**

Subclauses (1) and (2) provide that, if the Attorney-General has authorised the DPP to apply for a monitoring order under clause 94, an authorised officer can seek a monitoring order under the *Proceeds of Crime Bill 2002*, and that Part 3-4 of that Bill is to apply to both the application and any subsequent order.

Subclause (3) amends the application of certain provisions in Part 3-4 for the purposes of a monitoring order made pursuant to a request from the ICC.

**Clause 96: Passing on information given under monitoring orders**

This clause provides that information gained under a monitoring order must be passed to the Attorney-General or a specified officer of the Attorney-General's Department as soon as practicable after the enforcement agency receives the information.

**Subdivision F – Search warrants relating to proceeds of crime and property-tracking documents**

**Clause 97: Requests for search warrants**

This clause provides that, if the request from the ICC in clause 81 involves issuing a search warrant for the proceeds of a crime within the jurisdiction of the ICC or a property tracking document, the Attorney-General will authorise the DPP to apply for a search warrant in the appropriate court.

Subclause (2) allows the search warrant to be sought in any State or Territory in which some or all of the proceeds of crime or the property-tracking documents are reasonably suspected of being located.

**Clause 98: Applying for and issuing search warrants**

If the Attorney-General has authorised the DPP under clause 97, then subclauses (1) and (2) enable an authorised officer to seek a search warrant under the *Proceeds of Crime Bill 2002*, and that Part 3-5 of that Act is to apply to both the application and any subsequent order.

Subclause (3) disapplies provisions in Part 3-5 of the *Proceeds of Crime Bill 2002* which provide for an incidental power of seizure and provides for the retention and return of seized property (those matters are dealt with in clauses 99 and 100 of this Bill) and also amends the application of certain other provisions in Part 3-5.

**Clause 99: Seizure of other property and documents**

This clause authorises the incidental seizure of other things when executing a search warrant issued under clause 98, where it is believed that seizure is necessary to prevent the thing's destruction, loss or concealment, or its use in an offence.

Specifically, the provision enables the seizure of a thing reasonably believed to be a property-tracking document and the proceeds of the crime within the jurisdiction of the ICC to which the warrant relates but which is not of the kind specified in the warrant. If there is another search warrant in force under Part 3-5 of the *Proceeds of Crime Bill 2002* in relation to a crime within the jurisdiction of the ICC, a thing reasonably believed to be a property-tracking document related to that offence and proceeds of the offence may also be seized. In addition, if the authorised officer finds something he or she reasonably believes to be relevant to the criminal proceedings in respect of the crime within the jurisdiction of the ICC, or will afford evidence in relation to an Australian offence, that thing may be seized.

**Clause 100: Return of seized property to third parties**

This clause provides for property (other than property-tracking documents) that is seized under a search warrant to be returned to a person who claims an interest in that property.

The person must apply to the court which issued the search warrant. To order the return of the property the court must be satisfied that the applicant is entitled to the return of the property, that the property is not the proceeds of the crime within the jurisdiction of the ICC, and that the person suspected of committing the relevant offence has no interest in the property.

However, if the person is not the person who is believed to have committed the offence, the person must also...

**Clause 101: Dealing with seized property (other than property-tracking documents)**

This clause provides how to deal with property seized under a warrant issued in relation to a crime within the jurisdiction of the ICC and which is not evidence of an Australian offence or a property-tracking document.

Subclause (2) establishes the general rule that seized property must be returned if a restraining order has not been made (Subdivision B) or a forfeiture order has not been registered (Part 11) in an Australian court within 30 days of the seizure.

If a restraining order is made within the 30 day period, the head of the agency whose officer seized the property must ensure that the property is given to the Official Trustee in accordance with a direction of the court that the Official Trustee take custody and control of the property. If the court has made no such direction, but has ordered under subclause (6) that the head of the relevant agency may retain the property, that person must retain the property in accordance with the restraining order (see subclause (3)).

Where property is given to the Official Trustee under subclause (3), the *Proceeds of Crime Bill 2002* applies to that property as if it were “controlled property” (which is defined in the *Proceeds of Crime Bill 2002* as property in relation to which the Official Trustee must exercise the powers, and perform the duties, conferred or imposed on it, in relation to property of which a court has ordered the Official Trustee to take custody and control).

Subclauses (5) and (6) provide that where a restraining order has been made under Subdivision B in relation to a crime within the jurisdiction of the ICC, the head of the relevant enforcement agency may apply to the court to retain the property. The court may grant such an order if satisfied that retention of the property is necessary for it to be dealt with in accordance with the relevant restraining order. The order may be for so long as the property is required to be retained.

Subclause (7) requires the head of the relevant agency to deal with seized property still in his or her possession when a forfeiture order is registered in Australia under Part 11 of this Bill in accordance with the terms of that order.

**Clause 102: Dealing with seized property-tracking documents**

This clause provides that an authorised officer may retain a property-tracking document obtained as a result of a search warrant for a period up to one month, pending the Attorney-General providing written directions on how to deal with the document. Subclause (2) provides that such a direction may include forwarding that document to the ICC.

**Division 15 – Other types of assistance**

**Clause 103: Other types of assistance**

This clause sets out that if the ICC makes any request for assistance that is not dealt with in the Divisions above, then the Attorney-General must authorise the appropriate Australian authority to execute the request unless the request is prohibited by Australian law and the ICC does not either modify the request or agree to conditions so that the request does not conflict with Australian law.

The Australian authority must then execute the request and send a written report to the Attorney-General.

**Division 16 – Miscellaneous**

**Clause 104: Effect of authorisation to execute request**

This clause allows the Attorney-General to refuse or postpone a request for assistance (on the grounds set out in clauses 51 and 52) at any stage, even if the Attorney-General has authorised the request to be executed by an Australian authority, provided that the Attorney-General has not sent a formal response to the ICC.

**Clause 105: Request may relate to assistance sought by defence**

This clause clarifies that a request from the ICC to assist the defence must be treated the same way as a request from the ICC to assist the prosecution.

### **Clause 106: Prosecutor may execute request**

This clause allows the ICC prosecutor to directly execute a request for cooperation in Australia where this is necessary for the request to be successfully executed in limited circumstances, where the request does not involve any compulsory measures and:

- after consultation with Australian authorities and subject to any reasonable conditions that they impose; or
- if a crime has been committed in Australia and the ICC has decided that the case is admissible, then after all possible consultations with Australia.

If the crime was not committed in Australia, then if the Attorney-General thinks that there is any problem with the prosecutor directly executing the request then the Attorney-General must consult with the ICC to resolve the problem.

This clause also clarifies that the procedures for the protection of confidential information relating to national security (Part 8 of this Act) apply to the execution of a request for cooperation.

## **Part 5 – Investigations or sittings of the ICC in Australia**

### **Clause 107: Prosecutor may conduct investigations in Australia**

This clause authorises the ICC prosecutor to conduct investigations in Australia in accordance with the procedures for requesting assistance or cooperation, or where the ICC Pre-Trial Chamber has authorised the prosecutor to take specific investigative steps because there are no functioning authorities or judicial systems to implement a request for assistance or cooperation.

### **Clauses 108, 109 and 110: ICC sittings in Australia, ICC's powers while sitting in Australia and ICC may require witnesses at sittings in Australia to give undertakings as to truthfulness of their evidence**

These clauses authorise the ICC to sit in Australia for the purpose of carrying out its functions under the Statute and its Rules, and to exercise its functions and powers under the Statute and Rules (including requiring witnesses to swear to the truth of their evidence) while in Australia.

## **Part 6 – Search, seizure and powers of arrest**

Part 6 is based on the scheme for search, seizure and powers of arrest that applies in relation to the International Criminal Tribunals for the Former Yugoslavia and Rwanda under the *International War Crimes Tribunal Act 1995* (Part 7, clauses 47 to 77).

### **Division 1 – Search warrants**

#### **Clause 111: When search warrants can be issued**

Subclauses (1) and (2) authorise a magistrate to issue a warrant authorising the search of premises, ordinary search or frisk search of a person where an application has been made (under clause 27 or 78). The magistrate must be satisfied that there are reasonable grounds for suspecting that evidential material is at the premises or in the possession of the person, or will be within 72 hours. If the warrant was applied for by electronic means (see clause 116) then this time period is 48 hours (subclause (3)).

Subclause (4) states that the person applying for the warrant must inform the magistrate if there is any suspicion that firearms may be required in the execution of the warrant, and also state the grounds for that suspicion. This is intended to alert the magistrate to the possibility of violence.

Subclause (5) states that any member or special member of the Australian Federal Police that applies for a warrant must inform the magistrate if they have previously applied for a warrant for the same person or premises. This is intended to curtail the opportunity for forum shopping in applying for search warrants in relation to persons or premises.

Subclause (6) authorises a magistrate in New South Wales or the Australian Capital Territory to issue a warrant in relation to persons or premises in the Jervis Bay Territory. This is because there is no magistrate resident in the

Subclause (7) allows a magistrate in one State to issue a search warrant in relation to persons or premises in that State or an external territory. If it is not possible to predict where a person is, a magistrate can issue a search warrant for a person anywhere in Australia.

A magistrate may also issue a search warrant in relation to persons or premises in another State or the Jervis Bay Territory if the magistrate is satisfied that there are special circumstances that justify such a warrant. This is to allow the issue of a warrant that must be executed in a number of jurisdictions simultaneously – it would be undesirable if an application had to be made in each jurisdiction individually, especially if the officers with the relevant knowledge are located in one jurisdiction.

#### **Clause 112: Contents of warrants**

Subclause (1) sets out the matters which must be specified in a search warrant. Paragraph (e) sets out the maximum times that a warrant may remain in force, which must be specified in the warrant, which is 48 hours if the warrant was applied for by electronic means (see clause 116), and 7 days in other cases. Subclause (2), however, clarifies that this time limit does not prevent further search warrants being issued for the same person or premises.

Subclause (3) sets out additional matters that the magistrate is to specify in a search warrant relating to premises. Paragraph (a) requires the magistrate to specify that the warrant authorises the seizure of items that aren't specifically identified in the warrant if those items are evidential material or are relevant to an indictable offence against Australian law and the items must be seized to prevent them being concealed, lost, destroyed or used in the commission of a crime.

Paragraph (b) requires the magistrate to specify whether the warrant authorises the ordinary or frisk searching of a person who is at or near the premises that the warrant is issued for. This is to ensure that the magistrate specifically considers whether such a power to search persons is appropriate.

Subclause (4) sets out additional matters that the magistrate is to specify in a search warrant relating to persons. Paragraph (a) is very similar to paragraph (3)(a), and requires the magistrate to specify that the warrant authorises the seizure of evidential material found on the person being searched or in a vehicle that the person recently used. Paragraph (b) requires the magistrate to set out what kind of search is authorised – a frisk search or an ordinary search.

#### **Clause 113: The things authorised by a search warrant in relation to premises**

This clause sets out the activities that are authorised by a search warrant in relation to premises. It also specifies that if a search warrant states that it must be executed between certain times, then the search warrant must not be executed outside of those times.

#### **Clause 114: The things authorised by a search warrant in relation to persons**

This clause sets out the activities that are authorised by a search warrant in relation to persons. It also specifies that if a search warrant states that it must be executed between certain times then it must not be executed outside of those times, and that if the warrant specifies the type of search that is authorised then no other type of search may be performed.

#### **Clause 115: Restriction on personal searches**

This clause clarifies that a warrant cannot authorise a strip search or search of a person's body cavities.

#### **Clause 116: Warrants may be issued by telephone etc.**

This clause authorises a police officer to apply for a search warrant by telephone, fax, telex or other electronic means in an urgent case where the delay of applying for the warrant in person could frustrate the execution of the warrant. The clause also sets out the procedures for applying for a warrant in these circumstances.

#### **Clause 117: Formalities relating to warrants issued by telephone etc.**

This clause sets out the procedures for the issuing of a warrant applied for by telephone or other electronic means (clause 116). The magistrate must tell the officer applying for the warrant the terms of the warrant and the day and time that it was signed, and the officer must complete a copy of the warrant in those terms.

The officer must send his or her copy of the warrant to the magistrate, along with any information that was used in the application that was not sworn, no later than the day after the expiry of the warrant. The magistrate is to attach these documents to the copy of the warrant that the magistrate signed. If the warrant must be proved in any court proceedings, then the copy of the warrant signed by the magistrate must be produced or the court must assume that the powers in the warrant that were exercised were not properly authorised.

## **Division 2 – Provisions relating to execution of search warrants**

### **Clause 118: Availability of assistance and use of force in executing a warrant**

This clause allows the executing officer to obtain any reasonable and necessary assistance in executing the warrant. The executing officer or a police officer may use reasonable and necessary force against a person or thing in executing the warrant. A person who is authorised to assist in the execution of the warrant but who is not a police officer may use reasonable and necessary force against a thing, but not against a person.

### **Clause 119: Copy of warrant to be shown to occupier etc.**

This clause provides that when a search warrant is executed, the executing officer must identify themselves and a copy of the warrant must be made available to the person being searched or the occupier (or a person apparently representing the occupier) of the premises being searched, if the occupier (or his or her representative) is present.

### **Clause 120: Specific powers available to officers executing warrants**

This clause authorises an officer executing a search warrant to take photographs and video recordings of the premises and things found at the premises in certain circumstances.

This clause also sets out the circumstances in which the execution of a warrant can be resumed after an interruption.

### **Clause 121: Use of equipment to examine or process things**

Subclause (1) allows an officer executing a search warrant to bring equipment to the premises to determine whether things are liable to be seized.

Subclause (2) sets out the circumstances in which things may be taken from the premises to examine or process them and determine whether they are liable to be seized. Subclause (3) provides that if things are removed for processing or examination then the executing officer must, where practicable, inform the occupier where and when the processing or examination will take place and allow the occupier (or his or her representative) to be present.

Subclause (4) sets out the circumstances in which the executing officer may use equipment that is already at the premises to examine or process a thing and determine whether it is liable to be seized.

### **Clause 122: Use of electronic equipment at premises**

This clause allows the executing officer or an officers assisting (both defined in clause 4) to use any electronic equipment at the premises being searched to access evidential material. The officers must believe on reasonable grounds that the equipment can be used without damaging it.

If the officer finds evidential material by operating the electronic equipment, they may seize the equipment, disc, tape or other associated device, or they may print the relevant material and seize the printed hard copies, or they may copy the relevant material onto another disc or storage device and seize that.

Subclause (3) sets out a preference for printing out or copying the evidential material and seizing the duplicate that is created – the equipment itself can only be seized if it is not practicable to print or copy the material, or if possession of the equipment could constitute an offence against Australian law.

The officer may secure the equipment by locking it up or placing it under guard if the officer believes on reasonable grounds that evidential material may be accessible by operating the electronic equipment, but that expert assistance is required to operate the equipment and that a failure to secure the equipment might result in the evidential material being destroyed or interfered with. The equipment can be secured for up to 24 hours, and the officer must give notice of their intention to secure the equipment for up to 24 hours to the occupier of the premises.

If the officer believes that expert assistance will not be available within 24 hours then the officer can apply to a magistrate for an extension. The officer must give the occupier notice in relation to applying for such an extension, and the occupier is entitled to be heard by the magistrate during the application.

**Clause 123: Compensation for damage to electronic equipment**

This clause provides for compensation to be paid to the owner of electronic equipment if that equipment is damaged in certain circumstances.

**Clause 124: Copies of things seized to be provided**

This clause states that if an officer executing a warrant seizes an item that can be readily copied, then the officer must provide a copy to the occupier (or a person apparently representing the occupier) as soon as practicable if that person requests a copy. The officer does not have to provide a copy if possession of the item seized could constitute an offence against Australian law, or if the officer is seizing a copy of information that has been taken from electronic equipment, leaving the original, under clause 122(2)(b) or (c).

**Clause 125: Occupier entitled to be present during search**

This clause entitles the occupier of premises that are being searched (or a person apparently representing the occupier) to observe the search, provided that he or she does not impede the search. The occupier observing the search does not prevent more than one part of the premises being searched at the same time.

**Clause 126: Receipts for things seized under warrant**

This clause requires a receipt to be issued for any item that is seized or removed to process or examine it (under clause 121(2)). One receipt may cover more than one item. This allows the officer to issue a receipt for a class of items if appropriate, rather than issue an individual receipt for each item.

**Division 3 – Stopping and searching conveyances**

**Clauses 127 and 128: Searches without warrant in emergency situations and How a police officer exercises a power to search without a warrant**

Clause 127 applies where a police officer suspects on reasonable grounds that there is evidential material in or on a vehicle, vessel, aircraft or other conveyance and that he or she must stop and search the vehicle and seize the material to prevent the material being concealed, lost or destroyed. The officer must also believe that the circumstances are so urgent and serious that he or she must act without a warrant.

In these circumstances the officer may stop, detain and search the vehicle the vehicle. The officer may also seize any evidential material, or material that is relevant to an offence against Australian law, found in or on the vehicle if that is required to prevent the concealment, destruction or loss of the material and the circumstances are serious and urgent.

Any of the powers under clause 127 must be exercised subject to the limitations in clause 128, which sets out the manner in which a police officer can search a vehicle without a warrant.

**Division 4 – Arrest and related matters**

The clauses contained in this Division set out the powers that police officers have when arresting a person under this Act, or pursuant to a warrant issued under this Act. They provide the powers, and set guidelines for the exercise of those powers, in relation to matters such as entering premises, use of force, searching persons and premises and seizing items.

**Clause 129: Power to enter premises to arrest person**

This clause provides that if a police officer has the power to arrest a person and the police officer believes on reasonable grounds that a person is on the premises, then the police officer may enter the premises for the purposes of searching for and arresting that person. This section also authorises the police officer to use such force as is

Generally, the police officer may enter the premises at any time. However, if the premises is a “dwelling house” (which is defined in subclause (3)) then the police officer may not enter between 9pm and 6am unless the officer believes on reasonable grounds that it would not be practicable to arrest the person at any other time or that it is necessary to prevent the concealment, loss or destruction of evidentiary material.

**Clause 130: Use of force in making arrest**

This clause sets out guidelines for the use of force in arresting a person under this Act or pursuant to an arrest warrant issued under this Act. Only force that is reasonable and necessary to make the arrest or prevent the escape of the person can be used. Subclause (2) specifically sets out the circumstances in which a police officer can use force that is likely to cause death or grievous bodily harm to the person.

**Clause 131: Persons to be informed of the grounds of arrest**

This clause requires a police officer to inform a person that he or she is arresting under this Act, or pursuant to a warrant issued under this Act, of the reasons for the arrest, of the crime in relation to which the person is being arrested, at the time of the arrest. The person does not need to be informed in precise or technical language, provided that they are informed of the substance of the crime or the reason for the arrest.

This requirement does not apply if the arrested person should, in the circumstances, know of the reasons for the arrest or if the arrested person’s actions make it impracticable to inform them.

**Clause 132: Power to conduct a frisk search of an arrested person**

If a police officer who has arrested a person, or who is present during an arrest, suspects on reasonable grounds that they should frisk search the person to determine whether they are carrying any “seizable item”, then this clause authorises the police officer to frisk search the person at or soon after the arrest and seize any “seizable item” that is found. “Seizable item” is defined in clause 4 to mean anything that would present a danger to a person or that could be used to assist an escape.

**Clause 133: Power to conduct an ordinary search of an arrested person**

If a police officer who has arrested a person, or who is present during an arrest, suspects on reasonable grounds that the person is carrying any “seizable item” or any evidential material which relates to the crime that the person was arrested for, then this clause authorises the police officer to conduct an ordinary search the person at or soon after the arrest and seize any “seizable item” or evidential material that is found.

**Clause 134: Power to conduct a search of arrested person’s premises**

If a police officer arrests a person at the premises, or who is present during such an arrest, then the officer may seize items that are in plain view at the premises if the officer believes on reasonable grounds that the items are “seizable items” or evidential material which relates to the crime for which the person was arrested.

**Clause 135: Power to conduct an ordinary search or strip search**

Once a person who has been arrested has been brought to a police station, if no ordinary search of the person has already been conducted (see clause 133) a police officer can perform an ordinary search.

A police officer may conduct a strip search of the person if the officer suspects on reasonable grounds that the person has a “seizable item” or evidential material which relates to the crime that the person was arrested for, or that examining the person’s body will provide evidence of their involvement in a crime. The police officer must also suspect on reasonable grounds that the strip search is necessary to find that evidence or item.

A strip search must be approved by a police superintendent (or higher rank). If the superintendent refuses to approve the search, they must record their reasons.

In any case, a person may consent to a strip search.

**Clause 136: Rules for conduct of strip search**

This clause sets out the rules that govern any strip search conducted under clause 135.

## **Division 5 – General**

### **Clause 137: Conduct of ordinary searches and frisk searches**

This clause provides that, if practicable, frisk searches and ordinary searches must be conducted by a person who is the same sex as the person being searched. An officer assisting who is not a police officer cannot take part in a frisk search or ordinary search.

### **Clause 138: Announcement before entry**

This clause provides that before any person enters premises to arrest a person, a police officer must announce that he or she is authorised to enter the premises and give any occupant a chance to let the police officer enter, unless there are reasonable grounds to believe that immediate entry to the premises is necessary to ensure the safety of a person or to effectively execute the warrant.

### **Clause 139: Offences relating to telephone warrants**

This clause creates offences relating to preparing and executing warrants obtained by telephone. These offences are intended to prevent abuse of telephone search warrants, and are punishable by up to 2 years imprisonment.

It is an offence under this section to knowingly state the name of a magistrate unless that magistrate issued the warrant, or to knowingly depart materially from the matters authorised by the magistrate, in a form under clause 116 (this clause deals with issuing warrants by telephone). It is also an offence to purport to execute or present a form of a warrant under clause 116 that the person knows has not been approved by a magistrate or that differs in a material particular from the form authorised by a magistrate, or to send to a magistrate a form of warrant under clause 116 that is not the form that the person purported to execute.

### **Clause 140: Retention of things seized**

This clause sets out how any items that are seized under this Part by a police officer must be dealt with. The police officer that seizes the item must deliver it to the Commissioner of the AFP. The Commissioner must inform the Attorney-General that he or she has the item. The Attorney-General can direct the Commissioner, in writing, how to deal with the item, and this direction may be to send the item to the ICC. The Attorney-General must direct the Commissioner to return the item if there is no longer any reason for its seizure, or it will not be used in evidence in the ICC or in any Australian criminal proceedings (unless the item is forfeited or forfeitable to the Commonwealth or there is a dispute over the ownership of the item).

### **Clause 141: Magistrate may permit a thing to be retained**

This clause allows the Commissioner of the AFP to apply to a magistrate for an order allowing the Commissioner to continue to retain an item that has been seized in certain circumstances.

## **Part 7 – Information provided in confidence by third party**

### **Clause 142: Disclosure of information provided in confidence by third party**

Subclause (1) provides that if the ICC requests information that was provided to Australia in confidence, the Attorney-General must seek the consent of the foreign state or organisation that provided the information before giving it to the ICC.

If the information was provided by a state that is a party to the Statute, then if that state consents to the information being disclosed the Attorney-General must give the information to the ICC (subject to the procedures for protecting Australia's national security interests) (subclause (2)). If a state that is a party to the Statute informs the Attorney-General that they will resolve whether or not to disclose the information directly with the ICC, then the Attorney-General must inform the ICC of this (subclause (3)).

If the information was provided by an international organisation or a state that is not a party to the Statute, and they do not consent to the information being disclosed to the ICC, then the Attorney-General must inform the ICC that he or she is unable to disclose the information because of a pre-existing obligation of confidentiality (subclause (4)).

### **Clause 143: Request for Australia's consent to disclosure**

This clause provides that if Australia has provided information to another country on a confidential basis, and that country requests that Australia consents to the information being disclosed to the ICC, then the Attorney-General must either consent to the disclosure or undertake to resolve the matter with the ICC directly to ensure that Australia's national security interests are protected (the procedures for which are set out in Part 8).

## **Part 8 – Protection of Australia's national security interests**

### **Clause 144: How national security issues are to be dealt with**

This clause states that if any issue arises relating to Australia's national security interests at any stage of a proceeding before the ICC then it must be dealt with under Part 8 of the Act and in the method set out in Article 72 of the Statute, which covers protection of national security information.

### **Clause 145: Request for cooperation involving national security**

This clause states that any request for cooperation which appears to involve the disclosure of information which may prejudice Australia's national security interests must be dealt with under the procedures set out in clauses 148 and 149. If these procedures do not resolve the request, then the Attorney-General may refuse to comply with the request or authorise the disclosure of the information.

**Clause 146: Request to disclose information or documents involving national security**

This clause states that if a person refuses to disclose information or documents, or refers a request for information or documents to the Attorney-General, on the basis that the disclosure would prejudice Australia's national security interests, then the Attorney-General must determine whether he or she believes that the disclosure would prejudice Australia's national security interests.

If the Attorney-General believes that the disclosure would prejudice Australia's national security interests, then (as in clause 145) the request must be dealt with under the procedures set out in clauses 148 and 149. If these procedures do not resolve the request, then the Attorney-General may refuse to comply with the request or authorise the disclosure of the information.

**Clause 147: Other situations involving national security**

This clause states that if the Attorney-General believes that any other disclosure of information (other than those mentioned in clauses 145 and 146) would prejudice Australia's national security interests, then that matter must be dealt with under the procedures set out in clauses 148 and 149.

Subclause (2) specifically refers to a situation where the Attorney-General learns that information or documents that relate to Australia are being, or are likely to be, disclosed in any proceeding before the ICC. This subclause authorises the Attorney-General to intervene in the proceeding, in accordance with the Statute, to resolve the issue of protecting Australia's national security interests. If the matter is not resolved by the intervention and the procedures in clauses 148 and 149, then the Attorney-General may refuse to authorise the disclosure of the information.

**Clause 148: Consultation with ICC required**

This clause states that if the Attorney-General believes that disclosure of information may prejudice Australia's national security interests, he or she must consult with the ICC, and the legal representative of the defendant, to determine whether there is any way that the request or use of the information can be modified so that it does not prejudice Australia's national security interests.

**Clause 149: Procedure where no resolution**

This clause states that if, after consulting with the ICC under clause 148, the Attorney-General decides that no conditions or other means will allow the information to be disclosed without prejudicing Australia's national security interests then the Attorney-General must inform the ICC of the specific reasons for the decision (unless the reasons would themselves prejudice Australia's national security interests).

Subclause (2) sets out limited circumstances in which the Attorney-General must consult with the ICC after a decision that the information cannot be disclosed has been made.

## **Part 9 – Transportation of persons in custody through Australia**

### **Clause 150: Transportation of persons in custody through Australia**

This clause sets out the obligations for the transport of a person in custody through Australia. Such a person may be being surrendered to the ICC, or have been sentenced to imprisonment by the ICC and is being transferred between States to serve that sentence.

Subclause (2) sets out the information that must be contained in a request from the ICC to transport a person through Australia who has been surrendered by a foreign country to the ICC, or has been sentenced to imprisonment and is being transported to or from the ICC or between countries. The Attorney-General must authorise such a request from the ICC provided that it contains this information and is made to the Attorney-General in writing or through InterPol.

Subclause (3) states that the Attorney-General must not authorise a request to transport a person who is being surrendered by a foreign country to the ICC through Australia if transporting the person through Australia will impede or delay their surrender.

Subclause (4) states that no authorisation is required for a prisoner to be transported through Australian airspace without any landing, and subclause (5) sets out the procedures if there is an unauthorised landing during such a transit.

## **Part 10 – Enforcement in Australia of reparation orders made and fines imposed by ICC**

### **Clauses 151 and 152: Assistance with enforcement of orders for reparation to victims and orders imposing fines**

These clauses state that if the ICC orders that a convicted person make reparations to their victims or pay a fine, and requests that Australia give effect to this order as a fine or forfeiture order, then the Attorney-General shall authorise the DPP to apply to register the fine or order for reparations unless the conviction or the penalty are being appealed.

### **Clause 153: Registration of order**

Subclause (1) states if the DPP applies to register an order after being authorised under clauses 151 or 152, then the court must register the order and must also direct the DPP to publish the fact that the order has been registered in an appropriate manner and time.

Subclause (2) states that the court must register a copy of the order that has been authenticated by the ICC, however subclause (3) states that a facsimile copy of an authenticated order is acceptable.

### **Clause 154: Effect of order**

Subclauses (1) and (2) state that, once registered, an order for reparation to victims can be enforced as an order for the payment of money into court and an order for a fine can be enforced as an order by the court imposing that fine. In each case, the orders are to have effect and be enforced as if they were made on the day that they were registered in the court.

Subclause (3) states that if the order was registered by registering a facsimile copy of the order, then unless an authenticated copy of the order is registered in the court within 21 days the registration ceases to have effect.

## **Part 11 – Forfeiture of proceeds of international crimes**

### **Clause 155: Requests for enforcement of forfeiture orders**

This clause states that if the ICC requests that Australia give effect to an order for a person to forfeit property that is believed to be in Australia, and the Attorney-General is satisfied that the person has been convicted of the relevant crime by the ICC, then the Attorney-General shall authorise the DPP to apply to register the order.

### **Clause 156: Registration of order**

Subclause (1) states that if the DPP applies to register an order after being authorised under clause 155, then the court must register the order.

Subclause (2) sets out that the DPP must give notice to people who may have an interest in the property with a power for the court to make directions if needed, including the persons the subject of the order. Subclause (3) provides that the application must, however, be considered *ex-parte* if the DPP requests the court to do so.

Subclause (4) states that the court is to register a copy of the order that has been authenticated by the ICC, however subclause (5) states that a facsimile copy of an authenticated order is acceptable. If the court does register a facsimile copy of the order, then unless an authenticated copy of the order is registered in the court within 21 days the registration ceases to have effect (subclause (6)).

This procedure to allow the provisional registration of facsimile copies of forfeiture orders is the same procedure that applies to reparation orders and fines (clause 153), and the same procedure that is used for registration of similar orders under the *International War Crimes Tribunal Act 1994* (section 46)

### **Clause 157: Effect of order**

Subclause (1) provides that a forfeiture order that has been registered (under clause 156) has effect as if it was made by the court under the *Proceeds of Crime Bill 2002* at the time of registration.

Subclause (2) amends the effect of clause 68 of the *Proceeds of Crime Bill 2002* in relation to this Bill. Clause 68 of the *Proceeds of Crime Bill 2002*, as amended by this subclause, provides an exception to the rule that property specified in a forfeiture order vests absolutely in the Commonwealth at the time the order is made. Clause 68 will now operate in these cases so that property specified in a forfeiture order where a joint owner of the property died before the forfeiture order was made, but after the DPP applied for registration of the forfeiture order under this Bill, is taken to have vested in the Commonwealth immediately before the person's death. Any restraining order is also taken to have continued to apply to the property as if the person had not died. The effect of this provision is that the property does not form part of the deceased's estate.

Subclause (3) enables the Attorney-General to give directions for the disposal of property the subject of a registered forfeiture order. This subclause is subject to the operation of the provisions in clause 158 regarding the property interests of innocent third parties.

Subclause (4) disapplies certain parts of the *Proceeds of Crime Bill 2002* which do not have practical application to the enforcement of forfeiture orders under this Act.

### **Clause 158: Effect on third parties of registration of foreign forfeiture orders**

This clause enables third parties who were not involved in the commission of the offence to which the forfeiture order relates, to either have their interest in the property transferred to them by the Commonwealth or to be recompensed for their interest in the forfeited property. To be successful, the property must not be the proceeds of the offence within the meaning of the *Proceeds of Crime Bill 2002*. Under that Bill, property ceases to be proceeds if acquired by a person for value and without knowledge that it was proceeds of the offence (eg an innocent third party).

If the person was given notice or appeared at the hearing where the forfeiture order was made, he or she may only apply if given leave by the court. Applications should be made within six weeks of the forfeiture order being registered in the court; however, the court may give leave to apply in certain circumstances.

### **Clause 159: Forfeiture may be treated as pecuniary penalty order**

If the Attorney-General cannot give effect to a forfeiture order (for example because the person has disposed of the property that was to be forfeited), this allows the forfeiture order to be treated as a pecuniary penalty order under the *Proceeds of Crime Bill 2002*. The pecuniary penalty order will be for the same amount as the value of the property to be forfeited as specified in the order of the ICC or, if there is no such order, the value of the property to be forfeited in the opinion of the Attorney-General.

Subclause (4) provides that the procedures for enforcing a pecuniary penalty order under Division 4 of Part 2-4 of the *Proceeds of Crime Bill 2002* apply to the enforcement of a forfeiture order that is treated as a pecuniary penalty order under this clause (with certain modifications specified in paragraphs (a) to (c)).

## **Part 12 – Enforcement in Australia of sentences imposed by the ICC**

### **Division 1 – Preliminary**

#### **Clause 160: Australia may agree to act as State of enforcement**

This clause states that the Attorney-General may notify the ICC that Australia agrees to allow persons sentenced to imprisonment by the ICC to serve their sentences in Australia. The Attorney-General can impose conditions on accepting prisoners in the notification of acceptance, and subclause (2) sets out some of the conditions that may be imposed.

Any conditions that are imposed can be withdrawn by the Attorney-General at any time by notifying the ICC.

#### **Clause 161: Withdrawal of agreement to act as State of enforcement**

This clause allows the Attorney-General to withdraw the notification under clause 160 (that Australia will be a State of enforcement) at any time by notifying the ICC that Australia is no longer prepared to accept persons sentenced to imprisonment by the ICC.

Subclause (2) clarifies that this withdrawal does not affect any ICC prisoner that Australia has already accepted to serve their sentence of imprisonment in Australia.

#### **Clause 162: Designation of Australia as place for service of sentence**

This clause states that if Australia is accepting ICC prisoners (i.e. the Attorney-General has given notification that Australia will accept prisoners under clause 160 and has not withdrawn this notification under clause 161), and the ICC sentences a person to imprisonment and designates Australia as the State where the sentence is to be served, then the Attorney-General must consider whether to accept this designation of Australia. In considering whether to accept this designation, the Attorney-General can request further information from the ICC.

#### **Clause 163: Governmental consent to acceptance of designation**

This clause sets out the process to be followed before the Attorney-General can accept the designation of Australia from the ICC. The Attorney-General must first determine which State it is most appropriate for the prisoner to serve their sentence in. The Attorney-General must seek the consent of the relevant State Minister and provide all information that he or she has received from the ICC to the State Minister.

The State Minister must inform the Attorney-General in writing as soon as possible whether he or she consents to the prisoner serving their sentence in that State, and if he or she does consent, detailing which prison, hospital or place the sentence is to be served in and any other relevant matters.

If the State Minister informs the Attorney-General that he or she does not consent to the prisoner serving their sentence in that State, then the Attorney-General may seek the consent of a different State.

#### **Clause 164: Acceptance of designation**

Subclause (1) sets out the conditions that must be satisfied before the Attorney-General can accept the designation of Australia as the place for the ICC prisoner to serve their sentence:

- the Attorney-General must be satisfied that the ICC has agreed to any conditions imposed (see clause 160);
- a State Minister must have consented to the sentence being served in that State; and
- if the prisoner is not an Australian citizen, then the Minister administering the *Migration Act 1958* must have consented to the person serving their sentence in Australia.

Subclause (2) states that, when accepting the designation, the Attorney-General must notify the ICC whether the written consent of the prisoner (or their representative) to serve their sentence in Australia is required. If this consent is required, the Attorney-General must ask the ICC to inform Australia when the consent has been obtained.

### **Division 2 – Transfer to Australia of ICC prisoners**

#### **Clause 165: Issue of warrant for transfer to Australia**

This clause states that the Attorney-General may issue a warrant, in the statutory form, for the transfer of an ICC prisoner to Australia if the conditions in clause 164 (including the written consent of the prisoner if required) have been complied with.

**Clause 166: Warrants for transfer to Australia**

This clause sets out the contents of a warrant of transfer issued under clause 165. It also sets out the conduct that such a warrant authorises or requires escort officers and other officials to perform.

Subclause (4) authorises the Attorney-General to give any direction or approval that is required to ensure that the warrant is executed in accordance with its terms.

**Clause 167: Cancellation of warrant**

Subclause (1) allows the Attorney-General to cancel a warrant of transfer that was issued under clause 165 at any time before the prisoner leaves the country where he or she is being held in custody.

Subclause (2) states that the Attorney-General must cancel the warrant of transfer if the ICC cancels the designation of Australia or decides not to accept any of the conditions set by the Attorney-General, or if the Minister administering the *Migration Act 1958*, the relevant State Minister or the prisoner (or their representative) withdraw their consent.

**Division 3 – Enforcement of sentences**

**Clause 168: Sentence enforcement in Australia**

This clause gives the Attorney-General the power to determine that the sentence of imprisonment made by the ICC be enforced against the prisoner once he or she is transferred to Australia under this Part.

**Clause 169: Duration and nature of enforced sentence**

This clause states that the sentence that is enforced in Australia must not be harsher than the sentence imposed by the ICC, and specifically the sentence must not be for a longer period or involve a more severe deprivation of liberty than the sentence imposed by the ICC.

**Clause 170: Directions about enforcement of sentences**

This clause gives the Attorney-General the power to give directions regarding the duration and legal nature of the sentence of imprisonment that is to be enforced. These directions cannot make the sentence harsher (clause 169), and the sentence can only be reduced if the ICC has reviewed the sentence and decided that the sentence should be reduced.

Subclause (3) gives the Attorney-General the specific power to give directions regarding reviewing the mental condition and treatment of a mentally impaired prisoner.

In considering a direction under this clause, subclause (4) gives the Attorney-General a wide power to seek information and consider opinions from any source that he or she thinks fit. Subclause (4) also sets out sources to which the Attorney-General may have particular regard.

**Clause 171: No appeal or review of sentence of imprisonment imposed by ICC or of sentence enforcement decisions of Attorney-General**

This clause prohibits an ICC prisoner transferred under this Part from appealing against either the sentence imposed by the ICC or the decision about the enforcement of the sentence by the Attorney-General.

**Clause 172: ICC prisoner transferred to Australia**

Subclause (1) states that once an ICC prisoner has been transferred to Australia, they are taken to be a federal prisoner and their sentence of imprisonment is taken to be a federal sentence.

Subclause (2) states that if the ICC prisoner served any part of their sentence before they were transferred to Australia, that is taken to be served under the sentence that is enforced in Australia. This means that any time that the prisoner has served before being transferred to Australia is deducted from the time that they have to spend in prison in Australia.

Subclause (3) states that an ICC prisoner who has been transferred to Australia may be detained in a prison or hospital or other place while serving their sentence of imprisonment. Subclause (4) applies all relevant laws and practices in Australia relating to the detention of prisoners to an ICC prisoner once they have been transferred to Australia, provided that they do not conflict with this Part. Subclause (5) gives examples of some of these practices including transfer of prisoner, conditions and prison programs.

Subclause (6) specifically excludes laws and practices relating to parole or other early-release schemes from applying to an ICC prisoner. This is because the sentence that an ICC prisoner serves in Australia can only be reduced in accordance with a decision by the ICC (clause 170(2)).

**Clause 173: Other matters relating to ICC prisoners**

Subclause (1) gives an ICC prisoner the right to communicate confidentially with the ICC.

Subclause (2) gives a Judge or other staff of the ICC the right to visit an ICC prisoner without anyone else being present, except for a representative of the ICC prisoner.

Subclause (3) states that the Attorney-General must inform the ICC if the ICC prisoner is transferred from a prison to a hospital or other place, or from one hospital or other place to another.

**Clause 174: Pardon, amnesty or commutation of sentences imposed on ICC prisoners transferred to Australia**

This clause provides that an ICC prisoner who is serving their sentence in Australia may be pardoned, granted an amnesty or have their sentence of imprisonment commuted if that would be available for an offence against Australian law and if the ICC agrees.

If the ICC notifies the Attorney-General that the ICC prisoner may be pardoned, granted an amnesty or have their sentence commuted, then the Attorney-General must make an order that the ICC prisoner be released from the imprisonment ordered by the ICC if an order for the pardon, amnesty or commutation of the sentence is made. This allows the ICC to give Australia the discretion as to whether to grant the amnesty, pardon or commutation of sentence.

If the ICC notifies the Attorney-General that the ICC has overturned the prisoner's conviction, or that the prisoner has been pardoned by the ICC or had their sentence commuted by the ICC then the Attorney-General must order that the ICC prisoner be released from the imprisonment ordered by the ICC. In these cases, the ICC has already either overturned the conviction, pardoned the prisoner or commuted the sentence and Australia must give effect to this.

**Clause 175: ICC prisoner may apply to be transferred from Australia to a foreign country**

This clause gives an ICC prisoner who has been transferred to Australia the right to apply to the ICC to be transferred from Australia to another country to serve the remainder of his or her sentence. The ICC will then decide whether to change the state in which the prisoner is to be detained under Article 104 of the Statute. The prisoner will continue to serve their sentence in Australia unless and until the ICC orders that the prisoner be transferred to another state.

**Clause 176: How ICC prisoner is to be transferred**

This clause states that if the ICC orders that an ICC prisoner is to be transferred to another state to serve the remainder of their sentence, then the Attorney-General may issue a warrant authorising the transfer of the prisoner to the foreign state for this purpose. Subclause (4) sets out the contents of the warrant.

**Clause 177: Special rules in certain cases**

Subclause (1)(a) states that an ICC prisoner who is serving a sentence in Australia may be extradited to another country pursuant to the *Extradition Act 1988* on release from their sentence, or during their sentence for a temporary period.

Subclause (1)(b) states that an ICC prisoner who is serving a sentence in Australia may be required to remain in Australia after the completion of the sentence imposed by the ICC to serve a sentence that has been imposed on the prisoner under Australian law.

The ICC must consent if the extradition (under subclause (1)(a)) or the prosecution or punishment (under subclause (1)(b)) is related to conduct that occurred before Australia was designated by the ICC as the country where the prisoner would serve their sentence (under clause 162(1)(c)). This consent is not required if the prisoner has been released from prison and voluntarily remains in Australia for more than 30 days, or leaves Australia and voluntarily returns.

**Clause 178: Extradition of escaped ICC prisoner**

Subclause (1) applies the *Extradition Act 1988* to a situation where a person who has been imprisoned in a foreign country by the ICC escapes and is found in Australia, and that foreign country requests that Australia surrender the person.

Subclause (2) allows the Attorney-General to request the extradition of a person under the *Extradition Act 1988* if that person was serving a sentence from the ICC in an Australian prison and escapes to another country.

**Part 13 – Requests by Australia to ICC**

**Clauses 179 and 180: Application of Part and Request by Attorney-General**

These clauses authorise the Attorney-General to request assistance from the ICC in connection with an investigation or prosecution that is being undertaken in Australia regarding conduct which is a crime under the ICC Statute or is an indictable offence in Australia. Such assistance could include obtaining statements, documents or other evidence that has been gathered during an ICC investigation or trial, or questioning people detained by the ICC.

**Part 14 – Miscellaneous**

**Clause 181: Attorney-General's decisions in relation to certificates to be final**

This clause prevents any review of or challenge to the decision by the Attorney-General to issue, or not to issue, a certificate under clauses 22 or 29 in any court other than the High Court through the prerogative writ provisions in Section 75 of the Constitution.

**Clause 182: Arrest of persons escaping from custody or contravening conditions of recognisances**

Subclauses (1) and (2) authorise a police officer to re-arrest a person who has escaped custody which was authorised under this Act or has breached (or is about to breach) a condition of their bail, even if the officer does not have a warrant.

Subclauses (3) and (4) state that the officer must bring the person before a magistrate as soon as practicable. If the magistrate is satisfied that the person has escaped from custody which was authorised under this Act or has breached (or is about to breach) a condition of their bail then the magistrate may issue a warrant to return the person to custody.

**Clause 183: Aiding persons to escape, etc.**

This clause applies the provisions of the *Crimes Act 1914* (s. 46 – Aiding prisoner to escape; s. 47A - Rescuing a prisoner from custody etc.; and s. 48 - Harboursing etc. an escapee) which cover rescuing, aiding the escape of or harbouring a criminal to persons who rescue, aid the escape of or harbour a person who is in custody under this Act or has been arrested pursuant to this Act.

**Clause 184: Cost of execution of requests**

This clause states that the Commonwealth must pay the cost of dealing with a request for cooperation, except for the costs that the Statute provides that the ICC will pay. The costs that the ICC will pay under the Statute are the cost of:

- travel and security of witnesses or experts;
- travel and security if an Australian prisoner is temporarily transferred to assist the ICC (see clause 73);
- interpretation, translation and transcription;
- any reports requested by the ICC; and
- transport of a person being surrendered to the ICC (and associated costs).

If there are extraordinary costs associated with executing a request for cooperation, Australia can consult with the ICC about who should pay those costs.

**Clause 185: Legal assistance**

This clause allows the Attorney-General to grant legal or financial assistance to a person if they are going to be involved in a legal proceeding under this Act, including giving evidence or producing documents and proceedings related to detention under this Act.

**Clause 186: Arrangements with States**

This clause permits the Commonwealth to make arrangement with the States, Territories and Norfolk Island regarding the administration of this Act. Any such arrangement must be published in the Government Gazette.

**Clause 187: Delegation**

This clause allows the Attorney-General to delegate certain function or powers that he or she has under this Act to senior officers of the Attorney-General's Department. The Attorney-General can delegate any of his or her powers or functions except for those relating to a request for cooperation that may raise problems with Australia's international obligations to a foreign country (clause 13), the arrest and surrender of persons to the ICC (Part 3), the protection of Australia's national security interests (Part 8) and the enforcement of ICC sentences in Australia (Part 12).

**Clause 188: Regulations**

This clause provides for a general regulation making power, but also specifies that regulations may be made in respect of the information that may be provided to ICC prisoners regarding the enforcement of their sentences in Australia. The regulations may also create offences against the regulations, but the penalty may not exceed a fine of 10 penalty units (which is currently a maximum penalty of \$1,100).

**Clause 189: Annual report**

This clause obliges the Department (meaning the Attorney-General's Department - see section 19A of the *Acts Interpretation Act 1901*) to publish an annual report on the ICC. This report will be tabled in Parliament as an

*Service Act 1999*. The Department will consult with other Departments where relevant in the preparation of the report.

This report will cover the operation of this Act, the operation of the ICC and the effect of the operations of the ICC on Australia's legal system. Such a report will allow Parliament to monitor the activities of the ICC to ensure its consistency with Australia's national interest.