

Crimes against humanity

34 The Commission requests States to provide information, by 31 January 201[6], on

- (a) whether the State's national law at present expressly criminalizes "crimes against humanity" as such and, if so
- (b) the text of the relevant criminal statute(s),
- (c) under what conditions the State is capable of exercising jurisdiction over an alleged offender for the commission of a crime against humanity (e.g. when the offense occurs within its territory or when the offense is by its national or resident), and
- (d) decisions of the State's national courts that have adjudicated crimes against humanity

AUSTRALIA'S RESPONSE

- (a) "Crimes against humanity" are expressly and comprehensively criminalised under Australian law.
- (b) These offences are currently prohibited under Division 268 of the *Criminal Code Act 1995* (the Criminal Code), extracted below
- (c) These acts are offences whether or not the conduct constituting the alleged offence occurs in Australia, and whether or not the victim or the offender was an Australian citizen, resident or body corporate (referred to as unrestricted category D jurisdiction, which is defined in section 15 4 of the Criminal Code). Section 268 121 of the Criminal Code provides that proceedings for any offence under Division 268, including crimes against humanity, must not be commenced without the written consent of the Commonwealth Attorney-General
- (d) Along with other States, Australia was involved in prosecuting crimes (including crimes against humanity) in relation to events that took place in during the Second World War. Some of these prosecutions took place in Australia under the *War Crimes Act 1945* (Cth). There has been no prosecution before an Australia court in relation to crimes against humanity offences since the conclusion of these proceedings in the early 1950s

Relevant extracts of the Criminal Code

Criminal Code Act 1995 (Cth)

Subdivision C—Crimes against humanity

268 8 Crime against humanity—murder

A person (the *perpetrator*) commits an offence if

- (a) the perpetrator causes the death of one or more persons, and
- (b) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population

Penalty Imprisonment for life

268.9 Crime against humanity—extermination

(1) A person (the *perpetrator*) commits an offence if

- (a) the perpetrator causes the death of one or more persons; and
- (b) the perpetrator's conduct constitutes, or takes place as part of, a mass killing of members of a civilian population, and
- (c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population

Penalty Imprisonment for life

(2) In subsection (1)

causes the death of includes causes death by intentionally inflicting conditions of life (such as the deprivation of access to food or medicine) intended to bring about the destruction of part of a population

268.10 Crime against humanity—enslavement

(1) A person (the *perpetrator*) commits an offence if

- (a) the perpetrator exercises any or all of the powers attaching to the right of ownership over one or more persons (including the exercise of a power in the course of trafficking in persons, in particular women and children), and
- (b) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population

Penalty Imprisonment for 25 years

(2) In subsection (1)

exercises any or all of the powers attaching to the right of ownership over a person includes purchases, sells, lends or barter a person or imposes on a person a similar deprivation of liberty and also includes exercise a power arising from a debt incurred or contract made by a person

268.11 Crime against humanity—deportation or forcible transfer of population

(1) A person (the *perpetrator*) commits an offence if

- (a) the perpetrator forcibly displaces one or more persons, by expulsion or other coercive acts, from an area in which the person or persons are lawfully present to another country or location, and
- (b) the forcible displacement is contrary to paragraph 4 of article 12 or article 13 of the Covenant, and
- (c) the perpetrator knows of, or is reckless as to, the factual circumstances that establish the lawfulness of the presence of the person or persons in the area, and
- (d) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population

Penalty Imprisonment for 17 years

(2) Strict liability applies to paragraph (1)(b)

(3) In subsection (1)

forcibly displaces one or more persons includes displaces one or more persons

- (a) by threat of force or coercion (such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power) against the person or persons or against another person, or
- (b) by taking advantage of a coercive environment

268.12 Crime against humanity—imprisonment or other severe deprivation of physical liberty

(1) A person (the *perpetrator*) commits an offence if

- (a) the perpetrator imprisons one or more persons or otherwise severely deprives one or more persons of physical liberty, and
- (b) the perpetrator's conduct violates article 9, 14 or 15 of the Covenant; and
- (c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population

Penalty Imprisonment for 17 years

(2) Strict liability applies to paragraph (1)(b)

268.13 Crime against humanity—torture

A person (the *perpetrator*) commits an offence if

- (a) the perpetrator inflicts severe physical or mental pain or suffering upon one or more persons who are in the custody or under the control of the perpetrator, and
- (b) the pain or suffering does not arise only from, and is not inherent in or incidental to, lawful sanctions, and
- (c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population

Penalty. Imprisonment for 25 years

268.14 Crime against humanity—rape

(1) A person (the *perpetrator*) commits an offence if

- (a) the perpetrator sexually penetrates another person without the consent of that person, and
- (b) the perpetrator knows of, or is reckless as to, the lack of consent, and
- (c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty. Imprisonment for 25 years

(2) A person (the *perpetrator*) commits an offence if

- (a) the perpetrator causes another person to sexually penetrate the perpetrator without the consent of the other person, and
- (b) the perpetrator knows of, or is reckless as to, the lack of consent, and
- (c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population

Penalty Imprisonment for 25 years

(3) In this section

consent means free and voluntary agreement

The following are examples of circumstances in which a person does not consent to an act

- (a) the person submits to the act because of force or the fear of force to the person or to someone else,
- (b) the person submits to the act because the person is unlawfully detained,
- (c) the person is asleep or unconscious, or is so affected by alcohol or another drug as to be incapable of consenting,
- (d) the person is incapable of understanding the essential nature of the act,
- (e) the person is mistaken about the essential nature of the act (for example, the person mistakenly believes that the act is for medical or hygienic purposes),
- (f) the person submits to the act because of psychological oppression or abuse of power,
- (g) the person submits to the act because of the perpetrator taking advantage of a coercive environment

(4) In this section

sexually penetrate means

- (a) penetrate (to any extent) the genitalia or anus of a person by any part of the body of another person or by any object manipulated by that other person, or
- (b) penetrate (to any extent) the mouth of a person by the penis of another person; or
- (c) continue to sexually penetrate as defined in paragraph (a) or (b)

(5) In this section, being **reckless** as to a lack of consent to sexual penetration includes not giving any thought to whether or not the person is consenting to sexual penetration

(6) In this section, the genitalia or other parts of the body of a person include surgically constructed genitalia or other parts of the body of the person

268.15 Crime against humanity—sexual slavery

(1) A person (the **perpetrator**) commits an offence if

- (a) the perpetrator causes another person to enter into or remain in sexual slavery; and
- (b) the perpetrator intends to cause, or is reckless as to causing, that sexual slavery, and
- (c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population

Penalty Imprisonment for 25 years

(2) For the purposes of this section, **sexual slavery** is the condition of a person who provides sexual services and who, because of the use of force or threats

- (a) is not free to cease providing sexual services, or
- (b) is not free to leave the place or area where the person provides sexual services

(3) In this section

threat means

- (a) a threat of force, or
- (b) a threat to cause a person's deportation, or

- (c) a threat of any other detrimental action unless there are reasonable grounds for the threat of that action in connection with the provision of sexual services by a person

268.16 Crime against humanity—enforced prostitution

(1) A person (the *perpetrator*) commits an offence if

- (a) the perpetrator causes one or more persons to engage in one or more acts of a sexual nature without the consent of the person or persons, including by being reckless as to whether there is consent, and
- (b) the perpetrator intends that he or she, or another person, will obtain pecuniary or other advantage in exchange for, or in connection with, the acts of a sexual nature, and
- (c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population

Penalty. Imprisonment for 25 years

(2) In subsection (1)

consent means free and voluntary agreement

The following are examples of circumstances in which a person does not consent to an act

- (a) the person submits to the act because of force or the fear of force to the person or to someone else,
- (b) the person submits to the act because the person is unlawfully detained,
- (c) the person is asleep or unconscious, or is so affected by alcohol or another drug as to be incapable of consenting,
- (d) the person is incapable of understanding the essential nature of the act,
- (e) the person is mistaken about the essential nature of the act (for example, the person mistakenly believes that the act is for medical or hygienic purposes),
- (f) the person submits to the act because of psychological oppression or abuse of power,
- (g) the person submits to the act because of the perpetrator taking advantage of a coercive environment

threat of force or coercion includes

- (a) a threat of force or coercion such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, or
- (b) taking advantage of a coercive environment

(3) In subsection (1), being reckless as to whether there is consent to one or more acts of a sexual nature includes not giving any thought to whether or not the person or persons are consenting to engaging in the act or acts of a sexual nature

268.17 Crime against humanity—forced pregnancy

(1) A person (the *perpetrator*) commits an offence if

- (a) the perpetrator unlawfully confines one or more women forcibly made pregnant, and
- (b) the perpetrator intends to affect the ethnic composition of any population or to destroy, wholly or partly, a national, ethnical, racial or religious group, as such, and
- (c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty. Imprisonment for 25 years

(2) In subsection (1)

forcibly made pregnant includes made pregnant by a consent that was affected by deception or by natural, induced or age-related incapacity

(3) To avoid doubt, this section does not affect any other law of the Commonwealth or any law of a State or Territory

268.18 Crime against humanity—enforced sterilisation

(1) A person (the **perpetrator**) commits an offence if

- (a) the perpetrator deprives one or more persons of biological reproductive capacity, and
- (b) the deprivation is not effected by a birth-control measure that has a non-permanent effect in practice, and
- (c) the perpetrator's conduct is neither justified by the medical or hospital treatment of the person or persons nor carried out with the consent of the person or persons; and
- (d) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population

Penalty Imprisonment for 25 years

(2) In subsection (1)

consent does not include consent effected by deception or by natural, induced or age-related incapacity

268.19 Crime against humanity—sexual violence

(1) A person (the **perpetrator**) commits an offence if

- (a) the perpetrator does either of the following
 - (i) commits an act or acts of a sexual nature against one or more persons,
 - (ii) causes one or more persons to engage in an act or acts of a sexual nature,

without the consent of the person or persons, including by being reckless as to whether there is consent, and

- (b) the perpetrator's conduct is of a gravity comparable to the offences referred to in sections 268 14 to 268 18, and
- (c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population

Penalty Imprisonment for 25 years

(2) Strict liability applies to paragraph (1)(b)

(3) In subsection (1)

consent means free and voluntary agreement

The following are examples of circumstances in which a person does not consent to an act

- (a) the person submits to the act because of force or the fear of force to the person or to someone else,

- (b) the person submits to the act because the person is unlawfully detained,
- (c) the person is asleep or unconscious, or is so affected by alcohol or another drug as to be incapable of consenting,
- (d) the person is incapable of understanding the essential nature of the act,
- (e) the person is mistaken about the essential nature of the act (for example, the person mistakenly believes that the act is for medical or hygienic purposes),
- (f) the person submits to the act because of psychological oppression or abuse of power,
- (g) the person submits to the act because of the perpetrator taking advantage of a coercive environment

threat of force or coercion includes

- (a) a threat of force or coercion such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, or
- (b) taking advantage of a coercive environment

(4) In subsection (1), being reckless as to whether there is consent to one or more acts of a sexual nature includes not giving any thought to whether or not the person is consenting to the act or acts of a sexual nature

268.20 Crime against humanity—persecution

(1) A person (the ***perpetrator***) commits an offence if

- (a) the perpetrator severely deprives one or more persons of any of the rights referred to in paragraph (b), and
- (b) the rights are those guaranteed in articles 6, 7, 8 and 9, paragraph 2 of article 14, article 18, paragraph 2 of article 20, paragraph 2 of article 23 and article 27 of the Covenant, and
- (c) the perpetrator targets the person or persons by reason of the identity of a group or collectivity or targets the group or collectivity as such, and
- (d) the grounds on which the targeting is based are political, racial, national, ethnic, cultural, religious, gender or other grounds that are recognised in paragraph 1 of article 2 of the Covenant, and
- (e) the perpetrator's conduct is committed in connection with another act that is
 - (i) a proscribed inhumane act, or
 - (ii) genocide, or
 - (iii) a war crime, and
- (f) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population

Penalty Imprisonment for 17 years

(2) Strict liability applies to

- (a) the physical element of the offence referred to in paragraph (1)(a) that the rights are those referred to in paragraph (1)(b), and
- (b) paragraphs (1)(b) and (d)

268.21 Crime against humanity—enforced disappearance of persons

(1) A person (the ***perpetrator***) commits an offence if

- (a) the perpetrator arrests, detains or abducts one or more persons, and
- (b) the arrest, detention or abduction is carried out by, or with the authorisation, support or acquiescence of, the government of a country or a political organisation, and
- (c) the perpetrator intends to remove the person or persons from the protection of the law for a prolonged period of time, and

- (d) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population, and
- (e) after the arrest, detention or abduction, the government or organisation refuses to acknowledge the deprivation of freedom of, or to give information on the fate or whereabouts of, the person or persons

Penalty Imprisonment for 17 years

(2) A person (the *perpetrator*) commits an offence if

- (a) one or more persons have been arrested, detained or abducted, and
- (b) the arrest, detention or abduction was carried out by, or with the authorisation, support or acquiescence of, the government of a country or a political organisation, and
- (c) the perpetrator refuses to acknowledge the deprivation of freedom, or to give information on the fate or whereabouts, of the person or persons, and
- (d) the refusal occurs with the authorisation, support or acquiescence of the government of the country or the political organisation; and
- (e) the perpetrator knows that, or is reckless as to whether, the refusal was preceded or accompanied by the deprivation of freedom, and
- (f) the perpetrator intends that the person or persons be removed from the protection of the law for a prolonged period of time, and
- (g) the arrest, detention or abduction occurred, and the refusal occurs, as part of a widespread or systematic attack directed against a civilian population, and
- (h) the perpetrator knows that the refusal is part of, or intends the refusal to be part of, such an attack

Penalty Imprisonment for 17 years

268.22 Crime against humanity—apartheid

A person (the *perpetrator*) commits an offence if

- (a) the perpetrator commits against one or more persons an act that is a proscribed inhumane act (as defined by the Dictionary) or an act that is of a nature and gravity similar to any such proscribed inhumane act, and
- (b) the perpetrator's conduct is committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups, and
- (c) the perpetrator knows of, or is reckless as to, the factual circumstances that establish the character of the act; and
- (d) the perpetrator intends to maintain the regime by the conduct; and
- (e) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population

Penalty Imprisonment for 17 years

268.23 Crime against humanity—other inhumane act

A person (the *perpetrator*) commits an offence if

- (a) the perpetrator causes great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act, and
- (b) the act is of a character similar to another proscribed inhumane act as defined by the Dictionary, and
- (c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population

Penalty Imprisonment for 25 years