



AFP

Better Practice Guide on Investigating War Crimes, Crimes Against Humanity and Genocide

Date of initial endorsement: 22 November 2024

Date of last review: 16 July 2026

Endorsed by: AC Cyber & Special Investigations Command

Owner: Commander Special Investigations

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Identifier: FGC24042

IPS status: Redacted

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This document is a functional governance instrument as defined in the AFP Commissioner's Order on governance (CO1).

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Purpose

This better practice guide provides guidelines for AFP appointees regarding the investigation of allegations of war crimes, crimes against humanity and genocide.

This better practice guide is not intended to deal specifically with allegations of criminal offences committed by members of the Australian Defence Force in Afghanistan between 2005 to 2016. For more information, please see the Office of the Special Investigator section below.

Introduction

War crimes, crimes against humanity and genocide are core international crimes involving serious violations of international human rights law and international humanitarian law. These crimes are enshrined in Australian legislation under Division 268 of the *Criminal Code Act 1995* (Criminal Code) which criminalises conduct falling within each of the above-named categories.

These offences were inserted by item 2 of Schedule 1 to the *International Criminal Court (Consequential Amendments) Act 2002* (Cth). Under Division 268 of the Criminal Code, Australia has jurisdiction to investigate the myriad of crimes which constitute war crimes, crimes against humanity, genocide and crimes against the administration of justice of the International Criminal Court that occur onshore and offshore after 26 September 2002.

<https://classic.austlii.edu.au/au/journals/JCULawRw/2021/2.html> The Geneva Conventions of 1949, which form the basis of much of the current international law of armed conflict – being the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*; <https://classic.austlii.edu.au/au/journals/JCULawRw/2021/2.html> the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; <https://classic.austlii.edu.au/au/journals/JCULawRw/2021/2.html> the Geneva Convention relative to the Treatment of Prisoners of War; <https://classic.austlii.edu.au/au/journals/JCULawRw/2021/2.html> and the Geneva Convention relative to the Protection of Civilian Persons in Time of War <https://classic.austlii.edu.au/au/journals/JCULawRw/2021/2.html> – were given effect in Australia by the *Geneva Conventions Act 1957* (Cth). For alleged grave breaches of the four Geneva Conventions 1957 and Additional Protocol I that occurred between 1957 and 2002, the *Geneva Conventions Act 1957* (Cth) may apply or, for alleged war crimes committed in Europe during the Second World War (between 1 September 1939 and 8 May 1945 inclusive), the *War Crimes Act 1945* (Cth) may apply.

The AFP has the specialist skills to conduct these investigations or to support investigations or prosecutions being undertaken by foreign jurisdictions or appropriate international criminal mechanisms. Our investigators are well placed to evaluate the likelihood of obtaining evidence to satisfy the elements of the above Australian offences. In addition, the AFP is aware of the mechanisms that may be required to protect witnesses and to secure sufficient admissible evidence (often foreign evidence) at trial in consultation with the Commonwealth Director of Public

Prosecutions (CDPP) and the Attorney-General's Department (AGD), as Australia's central authority for international crime cooperation (mutual legal assistance and extradition).

The investigation and prosecution of offences in Division 268 of the Criminal Code present a range of challenges for investigators. Their factual and legal complexity leads to unique challenges for investigators, many of which are exacerbated by the fact the investigation may require collection of evidence, access to victims, crime scenes and witnesses that are located outside of Australia.

These crimes may also be investigated by the country where the alleged crimes occurred or through international criminal mechanisms, courts or tribunals, such as the International Criminal Court (ICC) in appropriate circumstances. Where foreign jurisdictions seek assistance from the AFP to investigate allegations of war crimes, requests must be made through established formal channels and/or established police to police arrangements.

The AFP have implemented the following guidelines regarding the investigation of war crimes, crimes against humanity and genocide to enable investigative action to be conducted in a consistent and transparent way. These guidelines should be followed when a report has been made to the AFP to investigate suspected perpetrators of such crimes.

Reports to AFP

Reports of alleged war crimes, crimes against humanity and genocide should be received by the National Operations State Service Centre via an [AFP Report a Crime form](#). As a result, when a report of crime is received, the AFP will assess the information and commence an investigation if appropriate. Reports can be received from a variety of sources such as:

- Other Commonwealth departments or agencies, including AGD, Department of Foreign Affairs and Trade, and Department of Defence;
- AFP International Command including foreign law enforcement partners;
- Members of the public including witnesses and next of kin of alleged victim;
- Non-government organisations;
- News media organisations; and
- State and territory police.

Current Legislation

Division 268 of the Criminal Code creates offences relating to genocide, war crimes, crimes against humanity and crimes against the administration of the justice of the ICC. The Division commenced on **26 September 2002**. The jurisdiction of the ICC is complementary to the jurisdiction of Australia with respect to the offences set out in Subdivisions B to K of Division 268. Section 3(2) of the *International Criminal Court Act 2002* (Cth) (ICC Act) provides that the ICC Act does not affect the primacy of Australia's right to exercise its jurisdiction with respect to crimes within the jurisdiction of the ICC.

Offences in Division 268 of the Criminal Code – Genocide, crimes against humanity, war crimes and crimes against the administration of the justice of the International Criminal Court

- Subdivision A—Introductory;
- Subdivision B—Genocide;
- Subdivision C—Crimes against humanity;
- Subdivision D—War crimes that are grave breaches of the Geneva Conventions and of Protocol I to the Geneva Conventions;
- Subdivision E—Other serious war crimes that are committed in the course of an international armed conflict;
- Subdivision F—War crimes that are serious violations of article 3 common to the Geneva Conventions and are committed in the course of an armed conflict that is not an international armed conflict;
- Subdivision G—War crimes that are other serious violations of the laws and customs applicable in an armed conflict that is not an international armed conflict, and
- Subdivision H—War crimes that are grave breaches of Protocol I to the Geneva Conventions.

For offences in Subdivisions B to H of Division 268, section 15.4 of the Criminal Code (Extended geographical jurisdiction – Category D) applies.

- Subdivision J—Crimes against the administration of the justice of the ICC.

For offences in Subdivision J of Division 268, section 15.3 (Extended geographical jurisdiction – Category C) applies.

Availability of the defence of superior orders limited to war crimes

The defence under s 268.116(3) of the Criminal Code, Defence of superior orders, is available as a defence to war crimes, that being offences set out in Subdivisions D to H of Division 268. The defence at s 268.116(3) is not available for genocide and crimes against humanity, those being offences set out in Subdivisions B and C of Division 268 respectively.

AFP Response

To determine the AFP's response to a report of crime, a preliminary investigation should be conducted addressing key considerations.

Preliminary Investigation

A preliminary investigation will address the following matters to determine the viability of continuing an Australian criminal investigation:

Applicable legislation and offences

1. The dates of the alleged offence/s are relevant to applicable legislation and determining the extent and scope of any potential Australian criminal investigation. When did the alleged conduct occur?
 - a. For allegations of genocide, crimes against humanity, war crimes and crimes against the administration of the justice of the ICC that occurred after 26 September 2002, Division 268 of the Criminal Code is applicable.
 - b. For allegations of war crimes and grave breaches of the Geneva Conventions including Additional Protocol I that occurred *prior* to 26 September 2002, the following offences may apply:
 - i. For alleged grave breach/es of any of the Geneva Conventions or of Additional Protocol I, the *Geneva Conventions Act 1957* (Cth) may apply. Section 7 of the *Geneva Conventions Act 1957* (Cth) creates an offence for a person (regardless of their nationality or citizenship) who, in Australia or elsewhere, commits a grave breach of any of the Geneva Conventions or of Additional Protocol I. To establish an offence under section 7, the conduct must: (1) have taken place in the context of an international armed conflict or in a situation of partial or total occupation of a territory by a foreign military; and (2) be committed against a person or property (protected by the Geneva Conventions or Additional Protocol I). In addition, the conflict must be between two or more states that are parties to the Geneva Conventions, or the territory occupied must be that of a signatory to the Geneva Conventions.
 - c. For allegations involving Australian citizens or residents of Australia who are alleged to have committed war crimes in Europe during the Second World War (between 1 September 1939 and 8 May 1945 inclusive), the *War Crimes Act 1945* (Cth) may apply.
2. Undertake due consideration of the dates of the alleged incident/s and the potential offences that may or may not be available. Due to the complexity of the law of armed conflict and the above legislation, it is recommended that any determination is based on advice from AFP Legal.

Identifiable suspect

3. Is the suspect named or identifiable?
 - a. If not, is there a realistic prospect of identifying the suspect?
4. Will suspect identification require enquiries in Australia or in a foreign jurisdiction?
 - a. If suspect identification requires enquiries to a foreign jurisdiction, will the foreign jurisdiction provide assistance in relation to identifying the suspect, either through mutual legal assistance or through police-to-police cooperation? Consult with AFP International Command and/or the International Crime Cooperation Central Authority (ICCCA) to determine the appropriate method of engagement with the foreign jurisdiction as appropriate.
 - i. If the foreign jurisdiction will not provide assistance in relation to identifying the suspect, are there any other reasonable means of obtaining evidence of

identification? If not, then it may not be possible to identify the suspect and so an effective investigation cannot at this stage be carried out.

- ii. If the foreign jurisdiction will provide assistance in relation to identifying the suspect, and travel to the foreign country is required as part of suspect identification, can the AFP carry out a safe and effective investigation in that country? Factors which may not allow a safe and effective investigation will include: (1) the country being involved in armed conflict; (2) the country being politically unstable; and/or (3) risk of harm to victims or witnesses. If a safe and effective investigation in the foreign country cannot at this stage be carried out, then it may not be possible to identify the suspect.

Nationality and location of a named and identifiable suspect

5. Is the named/identifiable suspect an Australian citizen or resident of Australia?
6. Is the suspect in Australia? Are there reasonable grounds to suspect that the suspect is present in Australia?
 - a. If the suspect is not in Australia, is the suspect in a country from which Australia can extradite? Consult with ICCCA as appropriate when determining this. If not, do the circumstances warrant continued investigation, noting prosecution may only occur when there is a reasonable prospect of the suspect returning to Australia voluntarily or traveling to a jurisdiction from which Australia can extradite?
 - b. If the suspect is not in Australia, are there reasonable grounds to suspect that the suspect will come to Australia? If not, then the AFP may refer to the Department of Home Affairs for potential future immigration action, considering victim and witness safety issues.

Identification of victims/witnesses where a suspect is named/identifiable and either an Australian citizen/resident or present or likely to be present in Australia

7. Are victims/witnesses named or identifiable?
 - a. If so, are they in Australia or overseas?
 - i. If overseas, are they in a country which will provide assistance, through either through mutual legal assistance or through police-to-police cooperation? Consult with AFP International Command and/or the ICCCA to determine the appropriate method of engagement with the foreign jurisdiction as appropriate.
 - (1) If they are in a country which will not provide assistance, can they be interviewed in a third country, considering victim and witness safety issues?
 - (2) If they are in a country which will not provide assistance, and an investigation is deemed to be impracticable, then the AFP may refer to the Department of Home Affairs for potential future immigration action, considering victim and witness safety issues.
 - b. If not, is there a realistic prospect of identifying the victims/witnesses?
8. Will victim/witness identification require enquiries in Australia and/or a foreign jurisdiction?

- a. If victim/witness identification requires enquiries to a foreign jurisdiction, will the foreign jurisdiction provide assistance in relation to identifying the victims/witnesses, either through mutual legal assistance or through police-to-police cooperation? Consult with AFP International Command and/or the ICCCA to determine the appropriate method of engagement with the foreign jurisdiction as appropriate.
 - i. If the foreign jurisdiction will not provide assistance in relation to identifying the victims/witnesses, are there any other reasonable means of obtaining evidence of identification? If not, then it may not be possible to identify the victims/witnesses and so an effective investigation cannot at this stage be carried out.
 - ii. If the foreign jurisdiction will provide assistance in relation to identifying the victims/witnesses, and travel to the foreign country is required as part of victim/witness identification, can the AFP carry out a safe and effective investigation in that country? Factors which may not allow a safe and effective investigation will include: (1) the country being involved in armed conflict; (2) the country being politically unstable; and/or (3) risk of harm to victims or witnesses. If a safe and effective investigation in the foreign country cannot at this stage be carried out, then it may not be possible to identify the victims/witnesses.

Consultation with the International Criminal Court and ad hoc tribunals

9. Are there any existing or historical investigations in relation to the incident, relevant to the report of crime?
10. Are there any existing or historical investigations in relation to the identifiable suspect?
11. Are there any existing or historical investigations in relation to any identifiable victims/witnesses?

Complaints in other jurisdictions or to an international criminal mechanism (including the International Criminal Court and ad hoc tribunals)

12. The party making the report of crime to the AFP should be asked whether they have made a complaint about the suspect in any other jurisdiction or to an international criminal mechanism.
 - a. If so, has an investigation taken place or is there an ongoing investigation?
 - i. If there is an effective ongoing investigation in a more appropriate jurisdiction or by an international criminal mechanism, the AFP is likely to decide not to open a separate investigation. Any decision not to investigate by the AFP will be reviewed upon receipt of new information.

Continued Investigation

If the above considerations support continued criminal investigation, the AFP will decide whether a safe and proportionate investigation is feasible.

In cases where there is a connection to Australia and a foreign jurisdiction is investigating or a prosecuting, due consideration should be given to whether the AFP should enter into a joint investigation.

Although issues of immunity do not preclude investigations into persons in office, this may be a factor the AFP will consider when considering whether to investigate.

Most investigations on genocide, crimes against humanity and war crimes will be categorised as *sensitive investigations* and subject to the [AFP National Guideline on Sensitive Investigations](#). Sensitive investigations may require additional oversight achieved through investigative engagement strategies, additional oversight within a Command and may require a submission to the [Sensitive Investigations Oversight Board](#).

Further considerations

Information Sharing

It is important to determine if an incident is being investigated by the country where it occurred. In addition, there may be other foreign law enforcement agencies investigating the incident. In these cases, police-to-police enquiries may be made to assist in determining the need for an investigation by the AFP, as well as the need and content of any formal mutual assistance requests. International Command can provide advice and assistance with directing enquiries via the AFP International Network.

Guidelines apply where AFP appointees are considering providing police-to-police assistance and co-operation, including sharing information in relation to an identified person/s, regardless of nationality, that could result in the death penalty being imposed or may place them in danger of being subjected to torture or cruel, inhuman, or degrading treatment or punishment in a foreign jurisdiction. See Death Penalty and Torture considerations and links to the National Guidelines below.

Double Jeopardy

At the commencement of any investigation involving genocide, crimes against humanity, war crimes and crimes against the administration of justice of the International Criminal Court, investigators need to determine whether there are any other investigations being carried out by other jurisdictions.

Section 268.118 of the Criminal Code provides that a person cannot be tried by a federal court or a court of a State or Territory for an offence under Division 268 if the person has already been convicted or acquitted by the ICC for an offence constituted by substantially the same conduct.

Investigators should consult with AFP Legal if unsure as to the requirements in circumstances where double jeopardy may be a concern.

Death Penalty & Torture Considerations

Death penalty guidelines apply where AFP appointees are considering sharing information with, or co-operating with, a foreign jurisdiction in relation to an identified individual that could result in the death penalty being imposed. Refer to the [AFP National Guideline on international police-to-police assistance in death penalty situations](#) and/or contact AFP International Command or the relevant AFP International Post for advice.

Additionally, guidelines apply where AFP appointees are considering providing police-to-police assistance and cooperation, including sharing information, in situations where there are substantial grounds for believing an identified person/s, regardless of nationality, may be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment in a foreign jurisdiction. Refer to [AFP National Guideline on offshore situations involving potential torture or cruel, inhuman or degrading treatment or punishment](#) and/or contact AFP International Command or the relevant AFP International Post for advice.

Physical mistreatment of prisoners or detainees, as well as conditions of detention, may constitute cruel, inhuman or degrading treatment or punishment. AFP appointees need to be mindful when assisting foreign police regarding their treatment of detainees and the methods used to obtain statements or confessions. Immediate escalation and notification to the AFP Executive is required should you become aware of any potential occurrence of torture.

Seeking Pre-Brief Advice from the Commonwealth Director of Public Prosecutions

The AFP may engage with the CDPP for advice on any questions of law that arise during the investigation of an alleged offence against Commonwealth law. This service is available in matters that are sensitive, significant, complex or major, that are of particular importance to the AFP's enforcement strategy, that have significant resource implications or that are likely to have an impact on a broader class of cases.

The CDPP regards the provision of pre-brief advice to partner agencies as a valuable practice that is in the interests of both the CDPP and agencies. Pre-brief legal advice on prosecution related issues may pertain to areas such as the choice of charges, the elements of offences, any substantive impediments to proving the offence and how these might be addressed, identifying witnesses who could be approached and lines of enquiry that might assist, options for scoping the investigation, the seriousness of the offending and any likely public interest considerations.

Pre-brief advice should be sought prior to making an arrest for offences in Division 268 of the Criminal Code. Advice should be sought by completing the [CDPP Pre-Brief advice template](#).

For further information on pre-brief advice, please refer to the CDPP's [Guidelines for dealings between Investigators and the Commonwealth Director of Public Prosecutions](#).

Attorney-General's Consent Required for Prosecution

Section 268.121(1) of the Criminal Code provides that proceedings for an offence under Division 268 must not be commenced without the Attorney-General's written consent. Section 268.121(2) provides that offences under Division 268 may only be prosecuted in the name of the Attorney-General. Requests for the consent of the Attorney-General will be undertaken by the CDPP and will involve the CDPP case officer preparing a minute to the Director. If approved, a background paper will be prepared for the Attorney-General's Department's consideration. Once the background paper has been cleared through the Attorney-General's Department the consent paperwork will be provided to the Attorney-General for consideration. Consent requests generally take at least 3 – 4 weeks to be processed.

For the avoidance of doubt, s 268.121(3) provides that a person may be arrested, charged, remanded in custody, or released on bail, in connection with an offence under Division 268 before

the necessary consent has been given by the Attorney-General. However, this subsection does not alter the requirements set out in s 268.121(1) or s 268.121(2).

Where the AFP appointee is considering arresting a person for a Division 268 offence **before** the Attorney-General's consent has been provided, AFP Legal must be consulted in advance of any arrest.

Other Investigative Bodies

Office of the Special Investigator

The Office of the Special Investigator (OSI) is an independent Executive Agency within the Attorney-General's portfolio established on 4 January 2021. The OSI is responsible for addressing potential criminal matters raised in the [Inspector-General of the Australian Defence Force's Afghanistan Inquiry Report](#). In conjunction with the AFP, the OSI investigate allegations of criminal offences under Australian law, arising from or related to any breaches of the Laws of Armed Conflict, by members of the Australian Defence Force in Afghanistan from 2005 to 2016. For more information about the Office of the Special Investigator, please visit the [OSI official website](#).

International Criminal Court

The ICC is an independent, permanent court that tries persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity, war crimes and the crime of aggression. The ICC does not have retrospective jurisdiction and therefore does not have jurisdiction over crimes committed before 1 July 2002, when the Rome Statute entered into force. The ICC may exercise jurisdiction over genocide, crimes against humanity and war crimes only if they were committed on the territory of a State Party or by one of its nationals (unless the situation is referred to the Court by the UN Security Council, or if a State declares that it accepts the jurisdiction of the Court). However, the ICC will not have jurisdiction unless the relevant State is unwilling or unable to genuinely investigate or prosecute a matter.

Other Key Stakeholders

Attorney-General's Department

The Attorney-General's Department's Office of International Law can provide specialised legal advice on matters of public international law within Government. ICCCA in the International Cooperation Unit is responsible for the making of mutual assistance requests and extradition requests. Criminal Law Section has policy responsibility for Division 268 and manages requests to prosecute.

Department of Foreign Affairs and Trade

The Department of Foreign Affairs and Trade can provide advice on specific countries and conflicts and may also provide legal advice on matters of public international law. DFAT are

responsible for obtaining a certificate from the Minister for Foreign Affairs and Trade under section 268.124 of the *Criminal Code* if required.

Department of Home Affairs & Australian Border Force

The Department of Home Affairs and the Australian Border Force are responsible for immigration and travel movements to Australia, including screening new arrivals in Australia. Particular attention is paid to those from regions where armed conflicts have led to human rights abuses, war crimes and other serious violations of international law. Where criminal investigation outcomes cannot be realistically pursued, information on suspected perpetrators can be provided to the Department for consideration of any visa or immigration decisions.

Further advice

Queries about the content of this document should be referred to the AFP Strategy and Coordination Team on [s.47E\(d\)@afp.gov.au](mailto:s.47E(d)@afp.gov.au).

Resources

Legislation

- [Criminal Code Act 1995](#) (Cth)
- [Geneva Conventions Act 1957](#) (Cth)
- [International Criminal Court \(Consequential Amendments\) Act 2002](#) (Cth)
- [War Crimes Act 1945](#) (Cth)

AFP Governance

- [AFP National Guideline on information management](#)
- [AFP National Guideline on international police-to-police assistance in death penalty situations](#)
- [AFP National Guideline on offshore situations involving potential torture or cruel, inhuman or degrading treatment or punishment](#)
- [AFP National Guideline on sensitive investigations](#)
- [Better Practice Guide on Managing Victims of Crime](#)

Other

There are numerous organisations with an interest in the investigation and prosecution of those who allegedly commit war crimes, crimes against humanity and genocide. Some examples of organisations that may be able to provide useful background information include Amnesty International, Human Rights Watch, Australian Centre for International Justice, Coalition for the International Criminal Court, and Global Witness.

Shortened forms

Shortened form	Full form
AFP	Australian Federal Police
AGD	Attorney-General's Department
CDPP	Commonwealth Director of Public Prosecutions
ICC	International Criminal Court
ICCCA	International Crime Cooperation Central Authority
OSI	Office of the Special Investigator

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