

1987

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

War Crimes Amendment Bill 1987

Explanatory Memorandum

(Circulated by the Authority of the Honourable Lionel Bowen
MP, Deputy Prime Minister and Attorney-General)

WAR CRIMES AMENDMENT BILL 1987GENERAL OUTLINE

This Bill amends the War Crimes Act 1945 (the Act) to provide for the prosecution of Australian citizens or persons resident in Australia alleged to have committed war crimes. The amendments will apply the Act to war crimes committed in the course of the World War 2, whether in Australia or overseas, by any person. The period covered is from 1 September 1939 (generally recognised as the commencement of World War 2) to 29 October 1945 inclusive (recognised in other Australian legislation as the end of that period of hostilities).

The Bill abolishes trials for war crimes by Military Tribunal, providing instead for their trial by civil courts. For an act committed overseas to be a war crime, it must have been such that if it had occurred in Australia, it would have been an offence against Australian criminal law at that time and in addition must be shown to be linked to a war or conflict in the manner set out in the Bill. Although acts that satisfy these tests would be war crimes at international law, Australian courts will not be required to apply international law to determine whether a war crime has been committed.

The Bill specifically excludes any defence based on 'superior orders', consistent with proceedings at Nuremburg, but does provide that it is a defence if it is shown that the act alleged to be the offence was permitted by the laws of war and was not under international law a crime against humanity.

The maximum penalty for an offence against the Act as amended involving a wilful killing will be imprisonment for life or any lesser term, and for any other offence, up to a maximum of 25 years imprisonment.

FINANCIAL IMPACT

It is not anticipated that the Bill will occasion any additional costs to the Government. The cost of any prosecutions will come from the budgetary allocation for the Director of Public Prosecutions, who will be conducting prosecutions under the Bill.

As a measure associated with the Bill, the Government has set up a Special Investigations Unit to investigate alleged war criminals in Australia. The budget for the Unit for this financial year is approximately \$830,000.

NOTES ON CLAUSES

Clause 1 - Short Title etc.

Formal.

Clause 2 - Commencement

The legislation will come into operation on the day it receives the Royal Assent.

Clause 3 - Repeal of Preamble

This provision repeals the Preamble to the War Crimes Act 1945.

Clause 4 - Amendment of enacting words

This provision is consequential.

Clause 5 - Insertion of Heading

This provision is formal.

Clause 6

This provision repeals section 3 to 14 of the War Crimes Act 1945 and substitutes the following proposed provisions:

Proposed section 3 - Application

This provision provides for the Bill to apply to external territories and extraterritorially.

Proposed section 4 - Effect of this part

This provision ensures that the interpretative provisions of the Bill have effect except so far as a contrary intention is indicated.

Proposed section 5 - Interpretation

This provision is definitional. 'War' is defined to mean a war, whether declared or not; any other armed conflict between countries, or a civil war or similar armed conflict. The war or armed conflict need not involve Australia or a country allied or associated with Australia.

The definition has been confined temporally to the period 1 September 1939 to 29 October 1945 inclusive, and geographically to the recognised theatres of war, including in the Pacific theatre, to avoid doubt, New Guinea and Northern Australia. The date 1 September 1939 is the commencing day for the purposes of the Nuremburg Tribunal's jurisdiction to try war crimes and is adopted in the Bill on that basis. The date 29 October 1945 has been treated as the day on which World War 2 hostilities ceased (cf Veterans' Entitlements Act 1986 s35).

The intention behind the expanded definition of 'war' is to encompass all serious crimes committed in the course of hostilities during the relevant period.

Proposed section 6 - Serious crimes

This provision lists Australian criminal law offences in force during the period covered by the Bill which, if committed in the manner set out in proposed section 7, will be war crimes for the purposes of the Bill. The intention is to characterise in terms already found in Australian law the acts which constitute war crimes under international law.

Proposed subsection 6(1) contains a list of offences which in general describe actual offences existing under the laws of each State and Territory as in force from time to time during the relevant period. Paragraph 6(1)(h) is intended to address

the elements necessary to constitute offences referred to in the preceding paragraphs, but not expressly included in the terms of those offences. Paragraph 6(1)(j) is intended to address any discrepancies in the description of offences. Paragraph 6(1)(k) applies aiding and abetting provisions to an offence referred to in the preceding paragraphs.

Proposed subsection 6(2) allows a court to have regard to any defence which would have been available in a proceeding for a State or Territory offence involving similar acts.

Proposed subsection 6(3) deems an act done at a particular time outside Australia to be a serious crime for the purposes of the Bill where, had it been done at that time in some part of Australia, it would be a serious crime by virtue of subsection 6(1) under a law in force at that time in that part of Australia. The provision does not require a nexus between the defendant and the part of Australia that is chosen: it is sufficient that the act would have constituted an offence under the law of one or other of the States or internal Territories.

Proposed subsection 6(4) makes the deportation or internment of a person in a death camp or slave labour camp a serious crime. The intention is to ensure that events occurring in Europe in relation to the deportation or internment of persons on racial, political or religious grounds, are covered.

Proposed subsection 6(5) creates inchoate offences in relation to matters dealt with in proposed subsection 6(4). The provision enables the extension of proposed subsection 6(4) to secondary parties.

Proposed subsection 6(6) is enacted to avoid doubt.

Proposed section 7 - War crimes

The scheme of proposed section 7 provides that a serious crime as defined in proposed section 6 will constitute a war crime if it was committed in connection with hostilities or

occupation of territory, or if it was committed in the course of political, racial or religious persecution or as part of a pattern of destruction of a national, ethnic, racial or religious group, and its commission was linked temporally and geographically to hostilities or occupation.

Proposed subsection 7(1) provides that a serious crime (as defined in proposed section 6) constitutes a war crime if it was committed in the course of hostilities in a war; in the course of an occupation; in pursuing a policy associated with the conduct of a war or with an occupation, or on behalf of or in the interests of a power so engaged.

Proposed subsection 7(2) provides that, for the purposes of subsection 7(1), a serious crime is not committed in the course of hostilities in a war or occupation merely because the crime is only incidentally or remotely connected with the hostilities or occupation.

Proposed subsection 7(3) provides that a serious crime is a war crime if committed in a country in the course of political, racial or religious persecution, if the country was involved in a war, or was occupied, at the time of commission. This formulation derives in part from Article 6(c) of the Nuremburg Charter.

Proposed section 8 - Effect of sections 6 and 7

This provision relates to the statutory interpretation of the proposed sections 6 and 7 and is intended to ensure that the generality of section 6 or 7 is not limited by the terms of that provision, and that only section 6 or 7 determine what is a serious crime or a war crime.

Proposed section 9 - War Crime to be an indictable offence

Proposed subsection 9(1) provides that a person is guilty of an indictable offence against the Bill if the person committed a war crime (as defined by the Bill) during the relevant period, whether within or outside Australia.

Proposed subsection 9(2) provides that provisions in the Crimes Act 1914 relating to aiders and abettors, attempts, and conspiracy, do not apply in relation to an offence against the Bill, which creates its own inchoate offences in proposed paragraph 6(1)(k) and proposed subsection 6(5).

Proposed section 10 - Punishment

The maximum punishment for an offence will be, where the act involves the wilful killing of a person, imprisonment for life or for any lesser term, and for any other offence, up to a maximum of 25 years imprisonment.

Proposed section 11 - Only Australian citizens and residents to be prosecuted

This provision is self-explanatory.

Proposed section 12 - Who may prosecute

A prosecution for an offence may only be commenced by the Attorney-General or the Director of Public Prosecutions. The nature of the offences in the Bill make it desirable to exclude the possibility of private prosecutions.

Proposed section 13 - Jurisdiction of courts and choice of law

Proposed subsection 13(1) amends the application of section 68 of the Judiciary Act 1903 so that a court of an external territory is not invested with jurisdiction to try a person for a war crime.

Proposed subsection 13(2) addresses the jurisdiction of State or Territory courts to try offences against the Bill. Offences arising out of acts done in Australia must be dealt with in the State or Territory where they occurred by virtue of section 80 of the Constitution.

Proposed subsection 13(3) provides that in respect of an act committed overseas alleged to be a war crime, in any proceeding in respect of that act the onus lies on the defence to establish any defence that would have been available to the defendant on trial for an offence arising out of the same act if it had been committed in Australia at that time.

Proposed section 14 - No defence of superior orders

The intention of this provision is to exclude a defence based on orders issued by a superior authority. The provision states, however, that where a defendant in fact acted under orders of his or her Government or of a superior, that fact may be taken into account in determining the proper sentence.

Proposed section 15 - Defence based on laws, customs and usages of war

This provision is intended to ensure that a person who performed an act regarded under international law as acceptable when performed in the course of war (including as a combatant) has a defence in proceedings for an offence against the Bill.

Proposed section 16 - Alternative verdicts

This provision ensures that where the offence charged would, by virtue of a law in force in a part of Australia at the time of commission or of trial, be subject to an alternative verdict provision under that law, the jury may acquit the accused of the offence charged and convict him or her of the alternative offence.

Proposed section 17 - Certain provisions enacted to avoid doubt

This provision is self-explanatory.

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