

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

(As read a first time)

WAR CRIMES AMENDMENT BILL 1987

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1987

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
HOUSE OF REPRESENTATIVES

Presented and read a first time, 28 October 1987

(Attorney-General)

A BILL

FOR

An Act to amend the *War Crimes Act 1945*

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

Short title etc.

5 1. (1) This Act may be cited as the *War Crimes Amendment Act 1987*.

(2) In this Act, "Principal Act" means the *War Crimes Act 1945*¹.

Commencement

2. This Act shall come into operation on the day on which it receives the Royal Assent.

10 **Repeal of Preamble**

3. The Preamble to the Principal Act is repealed.

Amendment of enacting words

4. The enacting words of the Principal Act are amended by omitting "therefore".

Insertion of heading

5. Before section 1 of the Principal Act the following heading is inserted:

“PART I—PRELIMINARY”.

6. Sections 3 to 14, inclusive, of the Principal Act are repealed and the following section and Parts are substituted: 5

Application

“3. This Act extends to all external Territories and has extra-territorial operation according to its tenor.

“PART II—INTERPRETATION

10

Effect of this Part

“4. The provisions of this Part have effect for the purposes of this Act, except so far as the contrary intention appears in this Act.

Interpretation

“5. Unless the contrary intention appears: 15

‘act’ includes omission;

‘do’ includes make;

‘occupation’ means an occupation of territory arising out of a war;

‘person’ means a natural person, whether or not the person is or has ever been: 20

(a) an Australian citizen;

(b) a resident of Australia;

(c) a British subject; or

(d) a citizen of a country allied or associated with Australia in relation to the conduct of a war; 25

‘proceeding’, in relation to an offence, means:

(a) a proceeding for commitment for trial in respect of the offence; or

(b) a prosecution on indictment for the offence;

‘war’ means: 30

(a) a war, whether declared or not;

(b) any other armed conflict between countries; or

(c) a civil war or similar armed conflict;

(whether or not involving Australia or a country allied or associated with Australia) in so far as it occurred: 35

(d) in the period beginning on 1 September 1939 and ending on 29 October 1945; and

- (e) in Europe, the Atlantic, Northern Africa, the Middle East, Asia or the Pacific (including New Guinea and Northern Australia).

Serious crimes

- 5 “6. (1) An act is a serious crime if it was done in a part of Australia and was, under the law then in force in that part, an offence, being:
- (a) murder;
 - (b) manslaughter;
 - (c) causing grievous bodily harm;
 - 10 (d) wounding;
 - (e) rape;
 - (f) indecent assault;
 - (g) abduction, or procuring, for immoral purposes;
 - (h) an offence (in this paragraph called the ‘variant offence’) that
15 would be referred to in a preceding paragraph if that paragraph contained a reference to:
 - (i) a particular intention or state of mind on the offender’s part; or
 - (ii) particular circumstances of aggravation;
20 necessary to constitute the variant offence;
 - (j) an offence whose elements are substantially the same as the elements of an offence referred to in any of paragraphs (a) to (h), inclusive; or
 - (k) an offence of:
 - (i) attempting or conspiring to commit;
 - (ii) aiding, abetting, counselling or procuring the commission of;
25 or
 - (iii) being, by act or omission, in any way, directly or indirectly, knowingly concerned in, or party to, the commission of;
 - 30 an offence referred to in any of paragraphs (a) to (j), inclusive.
- “2) In determining for the purposes of subsection (1) whether or not an act was, under the law in force at a particular time in a part of Australia, an offence of a particular kind, regard shall be had to any defence under that law that could have been established in a proceeding
35 for the offence.
- “3) An act is a serious crime if:
- (a) it was done at a particular time outside Australia; and
 - (b) the law in force at that time in some part of Australia was such that the act would, had it been done at that time in that part, be a
40 serious crime by virtue of subsection (1).
- “4) The deportation of a person (whether or not across frontiers) to, or the internment of a person in, a death camp, a slave labour camp, or a

place where persons are subjected to treatment similar to that undergone in a death camp or slave labour camp, is a serious crime.

“(5) Each of the following is a serious crime:

- (a) attempting or conspiring to deport or intern a person as mentioned in subsection (4); 5
- (b) aiding, abetting, counselling or procuring the deportation or internment of a person as so mentioned;
- (c) being, by act or omission, in any way, directly or indirectly, knowingly concerned in, or party to, the deportation or internment of a person as so mentioned. 10

“(6) For the purposes of subsections (3), (4) and (5), the fact that the doing of an act was required or permitted by the law in force when and where the act was done shall be disregarded.

War crimes

“7. (1) A serious crime is a war crime if it was committed: 15

- (a) in the course of hostilities in a war;
- (b) in the course of an occupation;
- (c) in pursuing a policy associated with the conduct of a war or with an occupation; or
- (d) on behalf of, or in the interests of, a power conducting a war or engaged in an occupation. 20

“(2) For the purposes of subsection (1), a serious crime was not committed:

- (a) in the course of hostilities in a war; or
- (b) in the course of an occupation; 25

merely because the serious crime had with the hostilities or occupation a connection (whether in time, in time and place, or otherwise) that was only incidental or remote.

“(3) A serious crime is a war crime if it was:

- (a) committed: 30
 - (i) in the course of political, racial or religious persecution; or
 - (ii) with intent to destroy in whole or in part a national, ethnic, racial or religious group, as such; and
- (b) committed in the territory of a country when the country was involved in a war or when territory of the country was subject to an occupation. 35

Effect of sections 6 and 7

“8. (1) Nothing in section 6 or 7 limits the generality of anything else in that section.

“(2) An act is not a serious crime or a war crime except as provided in section 6 or 7, as the case may be. 40

“PART III—WAR CRIMES

War crime to be indictable offence

“9. (1) A person who:

(a) on or after 1 September 1939 and on or before 29 October 1945;

5 (b) whether within or outside Australia; and

(c) whether as an individual or as a member of an organisation;

committed a war crime is guilty of an indictable offence against this Act.

“(2) Sections 5 and 7, and paragraph 86 (1) (a), of the *Crimes Act 1914* do not apply in relation to an offence against this Act.

10 **Punishment**

“10. (1) The punishment for an offence against this Act involving the wilful killing of a person is imprisonment for life or for any lesser term.

“(2) The punishment for any other offence against this Act is imprisonment for not more than 25 years.

15 **Only Australian citizens or residents to be prosecuted**

“11. A person shall not be charged with an offence against this Act unless he or she is:

(a) an Australian citizen; or

(b) a resident of Australia or of an external Territory.

20 **Who may prosecute**

“12. An offence against this Act may only be prosecuted in the name of the Attorney-General or the Director of Public Prosecutions.

Jurisdiction of courts and choice of law

25 “13. (1) Section 68 of the *Judiciary Act 1903* applies in relation to an offence against this Act as if a reference in that section to a Territory did not include a reference to an external Territory.

“(2) Where a person is charged with an offence against this Act, then, for the purposes of:

30 (a) determining whether a court of a State or internal Territory has jurisdiction in relation to the offence;

(b) an exercise of jurisdiction by such a court in relation to the offence;

(c) a proceeding connected with such an exercise of jurisdiction; and

(d) an appeal arising out of, or out of a proceeding connected with, such an exercise of jurisdiction;

35 this Act has effect, in relation to an act that is, or is alleged to be, the offence, as if a reference in subsection 6 (3) or section 16 to a part of Australia were a reference to that State or Territory.

“(3) Where:

- (a) it is sought in a proceeding for an offence against this Act to establish for the purposes of subsection 6 (2) that a particular defence could have been established in a proceeding (in this subsection called the ‘other proceeding’) for an offence; and 5
- (b) in the other proceeding, the onus of establishing the defence would have lain on the defendant;

then, in the first-mentioned proceeding, the onus of establishing that the defence could have been established in the other proceeding lies on the defendant. 10

No defence of superior orders

“14. The fact that, in doing an act alleged to be an offence against this Act, a person acted under orders of his or her government or of a superior is not a defence in a proceeding for the offence, but may, if the person is convicted of the offence, be taken into account in determining the proper sentence. 15

Defence based on laws, customs and usages of war

“15. Subject to section 14, in a proceeding for an offence against this Act it is a defence if it is established that the doing by the defendant of the act alleged to be the offence: 20

- (a) was permitted by the laws, customs and usages of war; and
- (b) was not under international law a crime against humanity.

Alternative verdicts

“16. (1) This section has effect where:

- (a) a person (in this section called the ‘accused’) is charged with an offence (in this section called the ‘offence charged’) against this Act; 25
- (b) the offence charged is alleged to be an act that, under the law in force in a part of Australia at the time of the act, was, or would have been had it been done in that part at that time, an offence of a particular kind; 30
- (c) on the accused’s trial for the offence charged, the jury:
 - (i) is not satisfied that the accused is guilty of the offence charged but is satisfied that he or she is guilty of a different offence (in this section called the ‘alternative offence’) against this Act; and 35
 - (ii) is satisfied that the alternative offence is an act that, under the law in force in that part at the time of the last-mentioned act, was, or would have been had it been done in that part at the last-mentioned time, an offence of another kind, being an offence referred to in a paragraph of subsection 6 (1); and 40
- (d) by virtue of the law in force in that part at the time referred to in paragraph (b) or at the time of the trial, a person charged with an

offence of the kind referred to in paragraph (b) could in certain circumstances be found not guilty of the last-mentioned offence but guilty of an offence of the kind referred to in subparagraph (c) (ii).

5 “(2) The jury may find the accused not guilty of the offence charged but guilty of the alternative offence.

“(3) If the jury does so, it shall, when returning its verdict, tell the judge that it is satisfied as mentioned in subparagraph (1) (c) (ii) and specify to the judge the kind of offence referred to in that subparagraph.

Certain provisions enacted to avoid doubt

10 “17. Subsection 6 (6) and section 14 are enacted to avoid doubt.”

NOTE

1. No. 48, 1945.

