



# War Crimes Amendment Act 1988

No. 3 of 1989

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## An Act to amend the *War Crimes Act 1945*

[Assented to 25 January 1989]

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

### Short title etc.

1. (1) This Act may be cited as the *War Crimes Amendment Act 1988*.
- (2) In this Act, "Principal Act" means the *War Crimes Act 1945*<sup>1</sup>.

### Commencement

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

### Substitution of Preamble

3. The Preamble to the Principal Act is repealed and the following Preamble is substituted:

"WHEREAS:

- (a) concern has arisen that a significant number of persons who committed serious war crimes in Europe during World War II may since have entered Australia and become Australian citizens or residents;

- (b) it is appropriate that persons accused of such war crimes be brought to trial in the ordinary criminal courts in Australia; and
- (c) it is also essential in the interests of justice that persons so accused be given a fair trial with all the safeguards for accused persons in trials in those courts, having particular regard to matters such as the gravity of the allegations and the lapse of time since the alleged crimes:".

**Insertion of heading**

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

**"PART I—PRELIMINARY".**

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 Sections 3 to 14, inclusive, of the Principal Act are repealed and the following section and Parts are substituted:

**Application**

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

**"PART II—INTERPRETATION**

**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:

'act' includes omission;

'do' includes make;

'occupation' means:

- (a) an occupation of territory arising out of a war; or
- (b) without limiting the generality of paragraph (a), an occupation of territory in Latvia, Lithuania or Estonia as a direct or indirect result of:
  - (i) the agreement of 23 August 1939 between Germany and the Union of Soviet Socialist Republics; or
  - (ii) any protocol to that agreement;

'person' means a natural person, whether or not the person is or has ever been:

- (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;

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'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:

- (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 in Europe in the period beginning on 1 September 1939 and ending on 8 May 1945.

**Serious crimes**

"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;
- (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 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; 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; or
  - (iii) being, by act or omission, in any way, directly or indirectly, knowingly concerned in, or party to, the commission of;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 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 serious crime by virtue of subsection (1).

“(4) The deportation of a person 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);
- (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.

“(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:

- (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.

“(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;

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:
  - (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.

- “(4) Two or more serious crimes together constitute a war crime if:
- (a) they are of the same or a similar character;
  - (b) they form, or are part of, a single transaction or event; and
  - (c) each of them is also a war crime by virtue of either or both of subsections (1) and (3).

**Effect of sections 6 and 7**

“8. (1) Subject to subsection 7 (2), nothing in section 6 or 7 limits the generality of anything else in that section.

“(2) An act may be a serious crime by virtue of one of more of subsections 6 (1), (3), (4) and (5), but not otherwise.

“(3) A serious crime may be a war crime by virtue of either or both of subsections 7 (1) and (3), but not otherwise.

“(4) Two or more serious crimes may together constitute a war crime by virtue of subsection 7 (4), but not otherwise.

**“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 8 May 1945; and
- (b) 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.

**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.

**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.

**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**

“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:

- (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;

this Act has effect, in relation to an act that is, or is alleged to be, the offence, as if:

- (e) a reference in subsection 6 (3) or section 18 to a part of Australia were a reference to that State or Territory; and
- (f) without limiting subsection 6 (2), all defences under the law in force in that State or Territory when the person is charged with the offence had been defences under the law in force in that State or Territory at the time of the act.

“(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
- (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.

“(4) Nothing in Part II or subsection 9 (1) shall be taken to exclude, limit or otherwise prejudice:

- (a) the application in proceedings for offences against this Act of the normal rules of evidence and procedure that apply in proceedings for offences against the laws of the Commonwealth; or
- (b) any of the powers of a court in respect of proceedings for offences against the laws of the Commonwealth, including, but not limited to, the powers of a court to take action to prevent an abuse of process.

“(5) Where, on the trial of a person for an offence against this Act, the person satisfies the judge, on the balance of probabilities, that:

- (a) the person is unable to obtain evidence that he or she would, but for the lapse of time or some other reason beyond his or her control, have been able to obtain;

- (b) the person's inability to obtain that evidence has substantially prejudiced, or will substantially prejudice, the preparation or conduct of his or her defence; and
- (c) the interests of justice require the making of an order under this subsection;

the judge may make such order as he or she thinks appropriate for a stay of proceedings for the offence.

“(6) Nothing in subsections (4) and (5) limits the generality of anything else in those subsections.

### **Objection to venue**

“14. (1) This section applies where a proceeding for an offence against this Act is being held in a State or internal Territory.

“(2) The defendant may apply to the magistrate or judge for an order that all proceedings for the offence be held in another State or internal Territory.

“(3) An application may only be made:

- (a) as soon as reasonably practicable after the defendant is charged with the offence; or
- (b) at such later time as the magistrate or judge allows.

“(4) If an application is made, the magistrate or judge shall, unless he or she is satisfied on the balance of probabilities that the defendant, when charged with the offence:

- (a) was a resident of the State or Territory referred to in subsection (1); or
- (b) was not a resident of that other State or Territory;

order that all proceedings for the offence be held in that other State or Territory.

“(5) An order under this section is subject to appeal or review to the same extent, and in the same manner, as any other order or decision by the magistrate or judge made in the proceeding.

“(6) For the purposes of this section, the Australian Capital Territory and the Jervis Bay Territory constitute a single Territory.

### **Effect of order for change of venue**

“15. (1) This section applies where:

- (a) a proceeding for an offence against this Act is being held in a State or internal Territory; and
- (b) the magistrate or judge orders under section 14 that all proceedings for the offence be held in another State or internal Territory.

“(2) The magistrate or judge may order that the defendant be taken, as soon as practicable, in the custody of a specified person, to that other State



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or Territory and there delivered into the custody of a person having authority to arrest him or her.

“(3) The magistrate or judge may make such further orders as he or she thinks necessary to facilitate the carrying into effect of an order made under subsection (2).

“(4) While the order under section 14 is in force:

- (a) a proceeding for the offence shall not be held except in that other State or Territory; and
- (b) the defendant is not entitled to apply to a magistrate or judge in that other State or Territory for an order under section 14 in relation to the offence.

**No defence of superior orders**

“16. Subject to subsections 6 (2) and 13 (2), 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.

**Defence based on laws, customs and usages of war**

“17. (1) This section has effect for the purposes of a proceeding for an offence against this Act.

“(2) Subject to section 16, it is a defence if the doing by the defendant of the act alleged to be the offence:

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

“(3) To avoid doubt, the doing of the act by the defendant was permitted by the laws, customs and usages of war if it was reasonably justified by the exigencies and necessities of the conduct of war.

“(4) The defendant is not entitled to rely on a defence under subsection (2) unless there is evidence of the existence of the facts constituting the defence.

“(5) However, if there is such evidence, the onus of establishing, beyond a reasonable doubt, that those facts either do not exist or do not constitute the defence lies on the prosecution.

**Alternative verdicts**

“18. (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;
- (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;

- (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
  - (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
- (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).

“(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.

### **Legal assistance**

“19. (1) A person who has been, or is about to be, charged with an offence against this Act may apply to the Attorney-General for assistance under this section.

“(2) If the Attorney-General is satisfied that in all the circumstances it is appropriate and reasonable to grant an application made under this section, he or she may authorise the provision by the Commonwealth to the applicant of such legal or financial assistance in connection with a proceeding for the offence as the Attorney-General determines.

“(3) An authorisation under subsection (2) may be made subject to such conditions (if any) as the Attorney-General determines.

“(4) In considering an application made under this section, the Attorney-General shall have regard to any hardship to the applicant that refusal of the application would involve.

“(5) As soon as practicable after deciding to refuse an application made under this section, the Attorney-General shall give the applicant a written notice that:

- (a) sets out the decision and the reasons for it; and

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- (b) requests the applicant to consent in writing to a copy of the notice being laid before each House of the Parliament in accordance with subsection (6).

“(6) Where an applicant gives a consent in writing pursuant to a request under subsection (5), the Attorney-General shall cause a copy of the notice to which the consent relates to be laid before each House of the Parliament within 15 sitting days of that House after the Attorney-General receives the consent.

**Certain provisions enacted to avoid doubt**

“20. Subsection 6 (6) and section 16 are enacted to avoid doubt.

**Annual report**

“21. (1) The Attorney-General shall, as soon as practicable after 30 June in each year:

- (a) cause a report about the operation of this Act during the year ending on that 30 June to be prepared; and
- (b) cause a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after the report is prepared.

“(2) A report under subsection (1) shall include particulars of:

- (a) how many suspected offences against this Act were under investigation during the year;
- (b) how many prosecutions for alleged offences against this Act were begun during the year;
- (c) the resources available during the year for the purposes of investigating such suspected offences and carrying on such prosecutions; and
- (d) the timetable for finalising:
  - (i) investigations of such suspected offences; and
  - (ii) such prosecutions.

**Persons accused of war crimes not to be extradited unless *prima facie* case established**

“22. (1) Subject to Part II, an expression has the same meaning in this section as in the *Extradition Act 1988*.

“(2) Subsection (3) applies where, in proceedings that are conducted in a State or Territory under section 19 of the *Extradition Act 1988* in relation to a person, the magistrate is satisfied that there are substantial grounds for believing that an extradition offence for which the extradition country concerned seeks the person's surrender is constituted by conduct constituting an offence against this Act.

“(3) For the purposes of the *Extradition Act 1988*, the person is not eligible for surrender in relation to the extradition offence unless the

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magistrate is satisfied that there has been established a *prima facie* case that the person committed the offence against this Act, in other words, that there is evidence that, if uncontroverted, would provide sufficient grounds:

- (a) to put the person on trial in a court of that State or Territory for the last-mentioned offence; or
- (b) for inquiry by such a court in relation to the last-mentioned offence.

“(4) For the purposes of subsection (3), subsection 13 (1) shall be disregarded.

“(5) This section has effect despite any law or treaty.”

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**NOTE**

1. No. 48, 1945.

[*Minister's second reading speech made in—  
House of Representatives on 28 October 1987  
Senate on 26 November 1987*]