

1988

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE HOUSE OF REPRESENTATIVES

CRIMES (TORTURE) BILL 1988

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General
The Hon. Lionel Bowen, MP)

CRIMES (TORTURE) BILL 1988

OUTLINE

1. The purpose of this Bill is to establish Australian jurisdiction over acts of torture committed outside Australia where the offender is found within Australian territory. The acts of torture covered by the Bill are those defined in Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

2. The Bill creates a federal offence of torture to cover proscribed acts committed outside Australia. Any act of torture committed within Australia is not covered by the Bill since the laws of the States and Territories are considered adequate to deal with such acts. The federal offence is defined by reference to the law of the State or Territory in which the alleged offender is prosecuted.

3. The effect of the Bill is to enable Australian ratification of the Convention.

FINANCIAL IMPACT STATEMENT

4. The proposals put forward in this Bill should have no impact on Government expenditure in the foreseeable future.

ABBREVIATIONS

5. The following abbreviations are used in this Explanatory Memorandum

Bill: Crimes (Torture) Bill 1988

Convention: United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

NOTES ON INDIVIDUAL CLAUSES

Clause 1: Short title etc

Clause 2: Commencement

6. This clause provides for commencement on a day to be fixed by Proclamation.

Clause 3: Interpretation

7. This clause provides definitions of several phrases used in the Bill. The effect of these definitions is to ensure that the legislation will apply across the full range of conduct to which the Convention applies. In particular, the definition of "act of torture" draws upon the language of Article 1 of the Convention and makes it clear that the exception in the definition relating to acts arising from, inherent in or incidental to, lawful sanctions is limited to such acts as are not inconsistent with the International Covenant on Civil and Political Rights to which Australia is a party.

Clause 4: Application

8. This clause extends this Act to all external territories and gives the Act extra-territorial operation according to its tenor.

Clause 5: Effect of this Act on other laws

9. Subclause 5(1) makes clear that this Act is not intended to exclude or limit the operation of any other Commonwealth, State or Territory laws.

10. Subclause 5(2) provides protection against double jeopardy, so that where any conduct by a person is an offence against this Act and also against any of those laws referred to in subclause 5(1), any conviction or acquittal of the person for either of the offences renders that person not liable to be convicted of the other of those offences.

11. Subclause 5(3) similarly ensures that, where a person has been convicted or acquitted in a country outside Australia for an offence against the law of the country in respect of any conduct, that person is not liable to be convicted for an offence against this Act in respect of that conduct.

Clause 6: Offence of torture

12. This clause creates the federal offence of torture which is committed where a person commits an act of torture, as defined in the Convention, outside Australia. It is a necessary requirement that the act would have been contrary to the laws of an Australian State or Territory if it had been committed in that State or Territory.

13. In accordance with the definition of 'torture' in the Convention, it is a necessary element of the offence that the offender be either a public official or a person who is acting at the instigation of, or with the consent or acquiescence of, a public official.

14. The penalty to be imposed upon conviction is the same as would have been applicable if the person had committed the offence against the relevant Commonwealth, State or Territory law.

15. Subclause 6(2) ensures that defences available under the law of the relevant part of Australia will also apply to offences against this Act.

Clause 7: Only Australian citizens or persons present in Australia may be prosecuted

16. This clause limits the classes of persons who may be prosecuted under this legislation to Australian citizens and persons present in Australia.

Clause 8: Prosecutions

17. Subclause 8(1) requires the consent in writing of the Attorney-General to be obtained before proceedings for an offence against this Act can take place.

18. Subclause 8(2) permits steps preliminary to prosecution to be taken prior to the giving of consent by the Attorney-General to prosecution under subclause (1).

19. Subclause 8(3) ensures that nothing in subclause (2) prevents the discharge of the accused if proceedings are not continued within a reasonable time. This meets our treaty obligations under paragraph (1) of Article 6 of the Convention.

Clause 9: Jurisdiction of courts and choice of law

20. Subclause 9(1) enables jurisdiction to be exercised in a State or Territory where the act, if it had been committed in that State or Territory, would have constituted an offence against the law then in force in that State or Territory. It has the practical effect of limiting the choices the prosecution may exercise in relation to the conduct of cases under this legislation by ensuring that, where a choice of jurisdiction has been made, the substantive and procedural law that is to be applied must also be that of the chosen jurisdiction.

21. Subclause 9(2) places upon the accused the onus of establishing that a defence would be applicable pursuant to subclause 6(2) if, under the law of the relevant part of Australia, that onus lies on the accused in similar proceedings.

Clause 10: Alternative verdicts

22. The effect of subclause 10(1) is that, where a person is charged with an offence against this Act and the jury is satisfied that, although the accused has not committed the offence charged, he or she has nonetheless committed another offence against the law of the relevant part of Australia, the jury may find the accused not guilty of the offence charged but guilty of the alternative offence providing such an alternative verdict is available in the chosen jurisdiction.

23. Subclause 10(2) requires a jury to inform the judge of certain matters when it finds that an alternative offence has been proved.

Clause 11: No defence of exceptional circumstances or superior orders

24. This clause precludes the raising by a person charged under this Act of a defence based upon necessity arising out of a state of war, a threat of war, circumstances of internal political instability or public emergency or any other exceptional circumstance or based upon orders from a superior officer or public authority. However, such claims are permitted under this clause to be taken into account in mitigation of sentence.

Clause 12: Section 38 of the Judiciary Act

25. This clause excludes the operation of Section 38 of the Judiciary Act 1903 in relation to matters arising under this Act, including any questions of interpretation of the Convention for the purposes of the Act. The effect of this provision, therefore, is to remove any impediment to the exercise of jurisdiction by State and Territory courts.

Clause 13: Assistance under Article 6 of the Convention

26. This clause gives legislative effect to the entitlement of a person, other than an Australian citizen, who is taken into custody in respect of an alleged offence under this Act, to communicate with appropriate diplomatic or consular representatives in accordance with paragraph 3 of Article 6 of the Convention.

