



Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill 2009

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Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill 2009

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House: House of Representatives

Portfolio: Attorney-General

Commencement: On the day after the Royal Assent.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The purpose of the Bill is to:

- amend the *Criminal Code Act 1995* (the Criminal Code Act) to include a specific torture offence, and
- amend the *Death Penalty Abolition Act 1973* (Death Penalty Abolition Act) to extend the application of the current prohibition on the death penalty to state laws to ensure that the death penalty cannot be reintroduced anywhere in Australia.

Torture prohibition

On 8 August 1989, Australia ratified the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (UNCAT).¹ The UNCAT requires states to take effective measures to prevent torture within their borders, and forbids states to return people to their home country if there is reason to believe they will be tortured. The UNCAT is supplementary to Article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

1. The text of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment can be viewed at <http://www.hrweb.org/legal/cat.html>

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According to the UNCAT, '*torture*' means:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.²

In summary, the definition contains four essential criteria:

- the involvement of a public official, at least by acquiescence
- the infliction of severe physical or mental pain or suffering
- intention to inflict severe physical or mental pain or suffering, and
- that it is for a specific purpose, such as extracting a confession or information.

Furthermore, the prohibition against torture is absolute and, according to the UNCAT, no exceptional circumstances whatsoever, including state of emergency or war or an order from a public authority, may be invoked as a justification of torture.³

Current state of the law

To ratify the UNCAT in Australia, the *Crimes (Torture) Act 1988* was enacted by the Commonwealth Parliament. According to the Explanatory Memorandum for that Bill its purpose was 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.

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.⁴

Under the terms of the UNCAT, a Committee against Torture (the Committee) was established. Australia is required, under Article 19 of the UNCAT, to submit compliance

2. Article 1, UNCAT.

3. Article 2, UNCAT.

4. Explanatory Memorandum, Crimes (Torture) Bill 1988, p. 2.

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reports to the Committee every four years. The Committee issued ‘Concluding Observations on Australia’ following a review of Australia’s compliance with the UNCAT at its 40th Session in Geneva in May 2008.⁵ In that report, the Committee recommended, amongst other things, that Australia should ensure that torture is adequately defined and specifically criminalised at the federal, state and territory levels in accordance with Article 1 of UNCAT.

This Bill is a direct response to that recommendation.⁶

Debate about the scope of the UNCAT’s definition

Torture is not a modern day phenomenon. It has been argued that:

An understanding of the concept of torture cannot be separated from the legal practices that have shaped its meanings and implications ... Torture is rooted in European legal reform of the seventeenth and eighteenth centuries. The growth of judicial torture in medieval Europe was not simply the product of arbitrary and capricious politics, but rather a desire to create legally reliable evidence.⁷

There is evidence, for instance, of its use in Northern Ireland in the 1970s⁸ and Israel in the 1990s.⁹ More recently, following the events in New York on 11 September 2001 (9/11) and the ongoing threat of terrorist attack, there has been considerable debate about the merits or otherwise of torture as an interrogation tool. This debate is sometimes couched in terms of a ‘ticking bomb hypothetical’—that is, whether terrorists in custody

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5. Committee Against Torture, *Concluding Observations of the Committee Against Torture on Australia*, 15 May 2008, viewed 22 January 2010
<http://www.hrlrc.org.au/files/CX9F5DW2WB/Australia%20CAT%20COBs.pdf>
 6. The full text of the Australian Government’s response is able to be viewed at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(084A3429FD57AC0744737F8EA134BACB\)~Australian+Government+Response+to+Four+Concluding+Observations+of+UN+Committee+Against+Torture+-+May+2009.pdf/\\$file/Australian+Government+Response+to+Four+Concluding+Observations+of+UN+Committee+Against+Torture+-+May+2009.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)~Australian+Government+Response+to+Four+Concluding+Observations+of+UN+Committee+Against+Torture+-+May+2009.pdf/$file/Australian+Government+Response+to+Four+Concluding+Observations+of+UN+Committee+Against+Torture+-+May+2009.pdf)
 7. T Kelly, ‘The UN Committee Against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty’, *Human Rights Quarterly*, Vol. 31, No. 3, August 2009, pp. 777–800 at p. 781.
 8. Report of the Committee of Privy Counsellors Appointed to Consider Authorised Procedures for the Interrogation of Persons Suspected of Terrorism 1972, viewed 25 January 2010, <http://cain.ulst.ac.uk/hms0/parker.htm>
 9. Report of ruling by Israel High Court of Justice, 6 September 1999, viewed 25 January 2010, http://www.btselem.org/english/torture/HCIJ_Ruling.asp

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could/should be tortured to reveal information regarding an imminent threat to innocent life.¹⁰

In this context, some writers advocate the use of torture to gather information ‘to avert grave risk’.¹¹ Others suggest a regulatory regime of rules-with-exceptions for torture in the same way that other evils, such as the use of lethal force by police officers, are regulated.¹² These writers have some support. In a BBC survey of 27 000 people in 25 countries in October 2006,¹³ more than one out of three people in nine of those countries, including the United States of America, considered a degree of torture to be acceptable if it saved lives.¹⁴ The results of the survey showed that 75 percent of the Australians polled were against any form of torture. Whilst no democratic country has, thus far, moved to legalise torture,

... there is a greater readiness among governments that would never practise torture themselves to use information which less squeamish states have obtained—through torture.¹⁵

By comparison, those against the use of torture argue that it does not work—that the information provided by victims of torture is unreliable—and that it will lead to a slippery slope of further abuse because authorised techniques can be exceeded and are sometimes used even after they have been officially withdrawn.¹⁶ At the heart of this absolute rejection of torture lies a moral objection to the infliction of suffering and pain.¹⁷ A rigorous, deontological¹⁸ view of morality requires the rejection of a morally wrong action, even if it is thought that such an action would be a means to a morally good end.

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10. P Rumney and M O’Boyle, ‘The torture debate’, *New Law Journal*, Vol. 157, No. 7296, November 2007, p. 1566.
 11. M Bagaric and J Clarke, *Torture: when the unthinkable is morally permissible*, State University of New York Press, Albany, 2007, p. 34.
 12. E Posner and A Vermeule, *Terror in the balance: security, liberty and the courts*, Oxford University Press, New York, 2007, chapter 7.
 13. ‘One third support some torture’, *BBC news*, 19 October 2006, viewed 22 January 2010, <http://news.bbc.co.uk/2/hi/6063386.stm#table>
 14. ‘Is torture ever justified?’, *The Economist*, 22 September 2007, pp. 61–62 at p. 61.
 15. *Ibid.*
 16. P Rumney and M O’Boyle, ‘The torture debate’, *New Law Journal*, Vol. 157, No. 7296, November 2007, p. 1566.
 17. T Kelly, ‘The UN Committee Against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty’, *Human Rights Quarterly*, Vol. 31, No. 3, August 2009, pp. 777–800 at p. 780.
 18. ‘Deontology’ is the study of the nature of duty and obligation.

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Despite the definition of ‘*torture*’¹⁹ contained in the UNCAT, the legal concept of torture has not been either unified or coherent. Within the international community there have been important and ongoing conflicts over the threshold of the severity of pain and cruelty, the role of intention, the identity of perpetrators and the positive obligations of states to prevent torture.²⁰ This Bill does not make the definition any clearer and these issues will always be significant in political, moral and international spheres.

Infliction of pain and suffering

During the drafting of Article 1 of the UNCAT, the US and UK governments pushed to strengthen the required intensity of pain or suffering by adding the word ‘extremely’ before ‘severe’,²¹ to better distinguish between acts which constitute torture and those which constitute cruel, inhuman or degrading treatment or punishment. However this move was defeated. According to Manfred Nowak, UN Special Rapporteur on Torture:

... the severity of pain or suffering ... is not a criterion distinguishing torture from cruel and inhuman treatment. [Rather] whether cruel or inhuman treatment can also be qualified as torture depends on the fulfilment of the other requirements in Article 1; mainly whether inhuman treatment was used for any purpose spelled out therein.²²

Intent

Article 1 of the UNCAT requires that the perpetrator ‘intentionally’ causes severe pain or suffering before the act qualifies as ‘torture’. This means that purely negligent conduct will never come within the definition of torture.

Purpose

The requirement of a specific purpose is the most decisive criteria distinguishing torture from cruel or inhuman treatment.²³ Not every purpose is sufficient. The purpose must have something in common with the purposes expressly listed in Article 1 of the UNCAT, that is:

19. Although the UNCAT speaks of ‘*torture*’ in general terms, it takes many forms including beating, electric shock, rape and sexual abuse, mock execution or threat of death, prolonged solitary confinement, sleep and sensory deprivation, shackling interrogees in contorted painful positions or in painful stretching positions, and applying pressure to sensitive areas, such as the neck, throat, genitals, chest and head. See M Bagaric and J Clarke, *op. cit.*, p. 12.

20. T Kelly, *op. cit.*, p. 781.

21. M Nowak, ‘What Practices Constitute Torture?: US and UN Standards’, *Human Rights Quarterly*, Vol. 28, 2006, pp. 809–841 at p. 819.

22. *Ibid.*, pp. 821–822.

23. *Ibid.*, p. 830.

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- extracting a confession
- obtaining information from the victim or a third person
- punishment
- intimidation and coercion, or
- discrimination.²⁴

The Australian context

In the Australian context, these issues were part of the ongoing debate arising out of the detention of Australian citizens Mamdouh Habib and David Hicks by the United States of America who were both transferred to US custody following their apprehension in Pakistan in October 2001 and in Afghanistan in December 2001, respectively.²⁵ Their cases are the most publicised examples of Australians being recently subjected to torture. It was not until 10 June 2004 that David Hicks was charged with conspiracy to commit war crimes, attempted murder and aiding the enemy. Mr Habib was released on 28 January 2005 on the basis that there was insufficient evidence to lay charges against him.²⁶

On 15 February 2006, a joint report²⁷ was submitted by five holders of mandates of special procedures of the Commission on Human Rights who had been jointly following

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24. For example, 'caste-based' discrimination such as that which has been reported in Nepal. See Centre for Human Rights and Global Justice, Statement before Committee Against Torture, 8 November 2005, viewed 29 January 2010, <http://www.chrgj.org/docs/CHRGJ%20Statement%20to%20Committee%20Against%20Torture%20on%20Nepal.pdf>
 25. D Melham, MP, 'Adjournment speech: torture', House of Representatives, *Debates*, 21 June 2007, p. 170, viewed 25 January 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2007-06-21%2F0263%22>
 26. N Brew, J Millar, R Jordan and S Harris Rimmer, *Australians in Guantanamo Bay: a chronology of the detention of Mamdouh Habib and David Hicks*, Parliamentary Library, Canberra, 29 May 2007, viewed 27 January 2010, http://www.aph.gov.au/library/pubs/online/Australians_GuantanamoBay.htm
 27. The reporters were the Chairperson of the Working Group on Arbitrary Detention, Ms L Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Mr L Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr M Nowak; the Special Rapporteur on freedom of religion or belief, Ms A Jahangir and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr P Hunt.

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the situation of detainees held at the United States Naval Base at Guantanamo Bay since June 2004.²⁸

That report states that on 16 April 2003, the United States Secretary of Defense authorised the use of the following:

- removal of incentives, that is, comfort items
- exposure to extreme temperatures and deprivation of light and auditory stimuli
- altering the environment to create moderate discomfort by, for example, adjusting temperature or introducing an unpleasant smell
- adjusting the sleeping times of the detainee by reversing sleep cycles from night to day, and
- isolating the detainee from other detainees while still complying with basic standards of treatment.²⁹

In recommending that the United States close down its Guantanamo Bay facility, the report further states:

On the interviews conducted with former detainees, the Special Rapporteur concludes that some of the techniques, in particular the use of dogs, exposure to extreme temperatures, sleep deprivation for several consecutive days and prolonged isolation were perceived as causing severe suffering. He also stresses that the simultaneous use of these techniques is even more likely to amount to torture. The Parliamentary Assembly of the Council of Europe also concluded that many detainees had been subjected to ill-treatment amounting to torture, which occurred systematically and with the knowledge and complicity of the United States Government. The same has been found by Lord Hope of Craighead, member of the United Kingdom's House of Lords, who stated that "some of [the practices authorized for use in Guantánamo Bay by the United States authorities] would shock the conscience if they were ever to be authorized for use in our own country."³⁰

Although the United States Government denied allegations of torture,³¹ both David Hicks³² and Mamdouh Habib³³ alleged they were tortured during their detention. Whilst

28. *Situation of detainees at Guantanamo Bay*, 15 February 2006, viewed 27 January 2010, http://www.globalsecurity.org/security/library/report/2006/guantanamo-detainees-report_un_060216.htm

29. *Ibid.*, paragraph 50.

30. *Ibid.*, paragraph 52.

31. M Wilkinson, 'White House and Pentagon deny allegations' *The Age*, 2 December 2004, p. 4.

32. No attributed author, 'Hicks drugged and beaten', *Australian Financial Review*, 11 December 2004, p. 4; No attributed author, 'Ex-inmate says Hicks told him of torture',

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their specific allegations remain undetermined, the findings of the United States District Court for the District of Columbia in the recent matter of *Fouad Mahmoud al Rabiah v United States* would seem to put beyond doubt that, in fact, conduct amounting to torture was practised at Guantanamo Bay.³⁴

Death Penalty prohibition

Background

Since Federation in 1901, only 114 persons have been legally executed in Australia.³⁵ The abandonment of the death penalty both in Australia and overseas was gradual,

beginning with a reduction in the use of cruel and tortuous executions, through the curtailment of a range of corporal punishments, eventually to the cessation of public executions and finally to the abolition of the death penalty itself.³⁶

Queensland was the first state to abolish the death penalty in 1922. The last state to do so was Western Australia in 1984.³⁷ Even before its formal abolition though, there was a practice of commuting the death sentence, although this varied from state to state, depending on the policy of the government of the day.³⁸

Under Commonwealth law, the death penalty was abolished in 1973 by section 4 of the *Death Penalty Abolition Act 1973*. Section 5 of that Act effectively substituted any reference to the punishment of death in a Commonwealth statute with a reference to the punishment of imprisonment for life.

The second important step for Australia was its October 1990 ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR)

The Age, 24 November 2006, p. 4; and T Allard, 'Hicks tells of torture and abuse inside Guantanamo' *The Age*, 2 March 2007, p. 1.

33. No attributed author, 'Habib torture possible', *Hobart Mercury*, 15 February 2005, p. 4.
34. *Fouad Mahmoud al Rabiah v United States* 25 September 2009, viewed 27 January 2010, <http://www.pillsburylaw.com/siteFiles/News/1259B22146574C540A8871C2C3131CA2.pdf>
35. I Potas and J Walker, *Capital Punishment*, Australian Institute of Criminology, February 1987, p. 1, viewed 21 January 2010, <http://www.aic.gov.au/documents/F/6/D/%7BF6D67388-75E0-4CBC-8181-E0BF0204D3CF%7Dti03.pdf>
36. D Indermaur, 'Changing attitudes to the death penalty: an Australian perspective', *Current Issues in Criminal Justice*, Vol. 17, No. 3, March 2006, pp.444–450 at p. 445.
37. I Potas and J Walker, op. cit., p. 2.
38. M Kirby AC CMG, 'The High Court and the death penalty: Looking back, looking forward, looking around', *Australian Law Journal*, Vol. 77, 2003, pp. 811–819 at p. 812.

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which effectively accepts that capital punishment is contrary to human rights and human dignity.³⁹ According to former High Court Justice Michael Kirby, ‘it represents an obstacle to any attempt on the part of a State or Territory of Australia to restore capital punishment’.⁴⁰

This Bill will extend the application of the current prohibition on the death penalty to state laws to ensure that the death penalty cannot be reintroduced anywhere in Australia.⁴¹

Debate about the death penalty

In 2003, the public and political reaction to the death sentence for Bali bomber Amrozi revived capital punishment as an issue in Australia.⁴² Then Prime Minister, John Howard MP, is reported as stating that

The death penalty for Bali Bomber Amrozi should be carried out... [and] so far as the imposition of the death penalty is concerned, it will not be the intention of the Australian government to make any representation to the Government of Indonesia that that penalty not be carried out.⁴³

Then Opposition Leader, Simon Crean MP, also did not oppose the death sentence.⁴⁴ These reactions were at odds with Australia’s stated commitment under the Second Optional Protocol to the ICCPR to abolish the death penalty not only in Australia, and to lobby against the death penalty internationally on international law grounds. However, it should be noted that the death penalty debate for countries other than Australia is a slightly different debate because of the political and diplomatic tensions that arise from Australia telling another country how to treat its own citizens or how to frame its own laws.

Mr Howard was subsequently reported as calling for a national debate on the reintroduction of the death penalty, suggesting that it be ‘raised by state oppositions as an election issue’, and that it could be ‘pursued at a state political level’.⁴⁵

Despite reports that a poll taken in 1999 indicated that 54 per cent of Australians believed that Australia should have the death penalty at that time, the response by state politicians

39. Preamble, Second Optional Protocol, viewed 21 January 2010, <http://www2.ohchr.org/english/law/ccpr-death.htm>

40. M Kirby AC CMG, ‘The High Court and the death penalty’, op. cit., p. 817.

41. Explanatory Memorandum, p. 2.

42. A Webster, ‘PM sparks death debate’, *Sunday Age*, 10 August 2003, p. 5.

43. M Forbes, ‘Howard; death penalty should be carried out’, *The Age*, 8 August 2003, p. 6.

44. Ibid.

45. C Banham and R Wainwright, ‘PM ignites death penalty furore’, *Sydney Morning Herald*, 9 August 2003, p. 1.

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to Mr Howard's suggestion was largely unfavourable.⁴⁶ In a more recent poll, taken in August 2009, a clear majority of Australians (64 per cent), said that imprisonment should be the penalty for murder compared to just 23 per cent who said that the penalty should be death.⁴⁷

However, the issue of the death penalty was in the news again in December 2005 following the hanging of Australian Nguyen Tuong Van in Singapore,⁴⁸ and the death sentences pronounced on some members of the 'Bali Nine' in Indonesia in 2006.⁴⁹

The nature of the debate

The arguments against the death penalty seem to be compelling:

- it is brutal. The current methods are:
 - hanging which can take as long as nine minutes before death occurs
 - lethal injection which may take place in front of an audience, and
 - shooting⁵⁰
- judges and juries make mistakes. It is too late to reverse the decision or compensate the prisoner for a miscarriage of justice after the death sentence has been carried out.⁵¹
- capital punishment does not rehabilitate offenders.⁵² This was particularly the case with Nguyen Tuong Van who was 'young, contrite and with no criminal record'.⁵³
- it is not an effective deterrent. According to Lex Lasry QC, who was a member of Nguyen Tuong Van's defence team:

46. A Bolt, 'Amrozi taps anger', *Herald Sun (Melbourne)*, 11 August 2003, p. 19.

47. Roy Morgan Research, August 2009, viewed 29 January 2010, <http://www.roymorgan.com/news/polls/2009/4411/>

48. Editorial, 'How Australia failed Nguyen Tuong Van: rescue bid too little too late', *Sydney Morning Herald*, 1 December 2005, p. 14.

49. M Forbes, 'Execution shock for Bali nine', *The Age*, 6 September 2006, p. 1.

50. L Lasry QC, 'Australia and the death penalty: are we really against it?', *Capital Punishment*, June 2006, pp. 58–61 at p. 59.

51. The most famous case is that of Timothy Evans who was hanged in England in 1950 for the murder of his infant daughter. An official inquiry conducted 16 years after the hanging determined that his daughter had been killed by his co-tenant, serial killer John Christie. Evans was subsequently granted a posthumous pardon.

52. I Potas and J Walker, op. cit., p. 5.

53. D Indermaur, op. cit., p. 445.

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In the US, even as the use of the death penalty continued to decline, the number of murders and the national murder rate dropped in 2004. According to the *FBI Uniform Crime Report* for 2004, the nation's murder rate fell by 3.3 percent.⁵⁴

Nevertheless, there may be a certain public ambivalence to the question of the imposition of the death penalty which has arisen since the events of 9/11. In the context of the 'war on terror' the community may yet question whether the death penalty is, in fact, an appropriate punishment for terrorist acts if they were to be carried out on Australian soil.⁵⁵

Committee consideration

The Selection of Bills Committee resolved that this Bill not be referred to Committee for inquiry⁵⁶ and it would seem that there is bipartisan support for the Bill.

Financial implications

According to the Explanatory Memorandum, the amendments in this Bill will have no impact on Government revenue.⁵⁷

Main provisions

Amendments relating to torture

Item 1 of Schedule 1 of the Bill amends the Criminal Code by inserting **proposed sections 274.1–274.7** into Chapter 8 which contains offences against humanity.

Proposed section 274.2 creates the criminal offence of torture in the same terms as Article 1 of the UNCAT.⁵⁸ Under **proposed subsection 274.2(1)**, a person (referred to as the perpetrator) commits an offence if he or she:

- (a) engages in conduct that inflicts severe physical or mental pain or suffering on a person⁵⁹

54. L Lasry QC, *op. cit.*, p. 59.

55. C Banham and R Wainwright, *op. cit.*

56. Selection of Bills Committee, *Report 18 of 2009*, 26 November 2009, paragraph 3.

57. Explanatory Memorandum, p. 2.

58. **Proposed section 274.1** defines the term '*convention*' to mean the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations at New York on 10 December 1984, and provides that the use of an expression in the Bill has the same meaning as the same expression in the Convention.

59. The requirement that a perpetrator 'engages in conduct' is consistent with the terms of section 4.1 of the Criminal Code which defines the physical elements of a criminal offence.

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- (b) the conduct is engaged in for any of the following purposes:
- to obtain from the victim or from a third person information or a confession
 - to punish the victim for an act which the victim or a third person has committed or is suspected of having committed
 - to intimidate or coerce the victim or a third person, and
- (c) the perpetrator engages in the conduct in their capacity as a public official whilst acting in an official capacity or at the instigation, or with the consent or acquiescence, of a public official.

A second criminal offence is created by **proposed subsection 274.2(2)** in similar terms except that the conduct described in paragraph (b) is based on discrimination of any kind. The relevant fault element is contained in section 5.6 of the Criminal Code and is referred to as ‘ulterior intention’ which focuses on a defendant’s intention to bring about a particular result.⁶⁰ It is not necessary to prove that the result actually eventuated.

The requirements of **proposed paragraphs 274.2(1)(c)** and **274.2(2)(c)** provide that an integral component of the offence is the involvement of a public official or person acting in an official capacity. The requirements of these paragraphs will be satisfied whether the person in question actually tortures the victim, or instigates the act of torture, or consents to, or acquiesces in it.⁶¹

The maximum penalty for both of the offences is imprisonment for 20 years.

Under **proposed subsection 274.2(3)**, absolute liability applies in respect of proposed paragraphs 274.2(1)(c) and 274.2(2)(c) which requires that the perpetrator must be a public official, or a person acting in an official capacity, or acting at the instigation, or with the consent or acquiescence of a public official or other person acting in an official capacity.⁶² The effect of this provision is that no fault element needs to be proved in respect of the alleged offence, and the defence of mistake of fact is not available.

Proposed subsection 274.2(5) states that the extended geographical jurisdiction— (Category D) provisions in existing section 15.4 of the Criminal Code will apply to the offence, meaning the offence will apply

60. Explanatory Memorandum, p. 6.

61. Note also that Part 2.4 of the Criminal Code has the effect of extending liability to the ancillary offences of attempt, complicity and common purpose; innocent agency; incitement and conspiracy.

62. Absolute liability is detailed in section 6.2 of the Criminal Code.

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- whether or not the conduct constituting the alleged offence occurs in Australia, and
- whether or not a result of the conduct constituting the alleged offence occurs in Australia.

Where the conduct outlined in **proposed section 274.2** occurs wholly outside Australia, proceedings must not take place except with the written consent of the Attorney-General. Nevertheless an arrest warrant may be issued and executed; a person may be arrested for the offence; charges may be laid and the person may be remanded in custody or on bail prior to the Attorney-General's consent being given: **proposed section 274.3**.

Consistent with the absolute prohibition on torture in the UNCAT, **proposed section 274.4** provides that it is not a defence in a proceeding for the criminal offence of torture that:

- the relevant conduct was done out of necessity arising from the existence of a state of war, a threat of war, internal political instability, a public emergency or any other exceptional circumstance, or
- the accused acted under orders of a superior officer or a public authority in engaging in the relevant conduct.

However those matters may be taken into account in determining the proper sentence if the accused is convicted of the offence.

Proposed section 274.6 specifically provides that proposed Division 274—Torture does not exclude or limit the concurrent operation of any other law of the Commonwealth or any law of a state or territory. As a result, existing state or territory provisions in relation to torture, such as section 320A of the *Criminal Code Act 1899 (Qld)*, will continue to operate where relevant.

A 'double jeopardy' safeguard is contained in **proposed section 274.7** so that a person who is convicted or acquitted of a torture offence in another country, cannot be convicted of an offence under the torture provisions created by this Bill.

Items 2 and 3 of Schedule 1 of the Bill omit existing references to torture in the Criminal Code which are inconsistent with the definition of torture contained in **proposed section 274.2**.

Item 4 is a consequential amendment which repeals the whole of the *Crimes (Torture) Act 1988*.

Australian courts will presumably have recourse to the international jurisprudence regarding torture when construing these provisions, which so clearly stem from an international context, with specific international instruments.

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Amendments relating to the abolition of the death penalty in Australian states

Schedule 2 of the Bill amends the Death Penalty Abolition Act to extend its application to offences under state law(s). In particular **item 5** inserts **proposed section 6** which specifies that the punishment of death must not be imposed as the penalty for any offence under state law(s). The Death Penalty Abolition Act already applies to Commonwealth, territory and Imperial criminal laws.

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