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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**CRIMES LEGISLATION AMENDMENT (TORTURE PROHIBITION AND
DEATH PENALTY ABOLITION) BILL 2009**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Robert McClelland MP)

CRIMES LEGISLATION AMENDMENT (TORTURE PROHIBITION AND DEATH PENALTY ABOLITION) BILL 2009

GENERAL OUTLINE

This Bill amends the *Criminal Code Act 1995* (Cth) and the *Death Penalty Abolition Act 1973* (Cth).

This Bill enacts in the Commonwealth Criminal Code a specific Commonwealth torture offence which would operate concurrently with existing offences in State and Territory criminal laws. The Bill also abolishes the death penalty throughout Australia, by amending the Death Penalty Abolition Act to apply to State criminal laws.

These measures are further described below.

PURPOSE

The purpose of Schedule 1 is to replace the existing offence of torture in the *Crimes (Torture) Act 1988* (Cth) (the 1988 Act) with a new offence in the Criminal Code. The new offence is intended to fulfil more clearly and explicitly Australia's obligations under the United Nations (UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention). Australia signed the Convention on 10 December 1985, and ratified it on 8 August 1989.

As a party to the United Nations Convention Against Torture, Australia must ensure that all acts of torture are offences under domestic criminal law. Australia meets this obligation, as acts falling within the Convention's definition of torture are offences under State and Territory criminal laws. These acts include the infliction of bodily harm, murder, manslaughter, assault and other offences against the person. Also, the 1988 Act implements Australia's obligations under the Convention to extend Australia's jurisdiction to persons suspected of having committed acts of torture outside Australia. The 1988 Act criminalises acts of torture committed outside Australia, only when committed by Australian citizens or other persons who are subsequently present in Australia. Acts of torture that are committed anywhere in the world during the course of an armed conflict or as a crime against humanity are currently criminalised under the Criminal Code Act.

In recent years, the UN Committee Against Torture has called on nations to enact a specific torture offence. In its Concluding Observations on Australia, issued in May 2008, the UN Committee Against Torture recommended that Australia enact a specific offence of torture at the federal level.

Mindful of the Committee's recommendation, the Government is enacting a new offence of torture in the Criminal Code, which will criminalise acts of torture committed both within and outside Australia. As the new offence will result in the redundancy of the 1988 Act, the 1988 Act will be repealed. Giving the offence extraterritorial application is intended to reflect a key aim of the Convention, which is

to end impunity for torture globally. In enacting such an offence, the intention is to demonstrate the Government's condemnation of torture in all circumstances.

The offence is intended to operate concurrently with existing State and Territory offences. For this reason, Schedule 1 makes clear that the enactment of the new offence is not intended to exclude or limit the concurrent operation of any other law of the Commonwealth or any law of a State or Territory.

Although the new offence of torture applies to public officials both within and outside Australia, it is not anticipated to affect legitimate law enforcement and intelligence-gathering activities routinely carried out by federal, State and Territory Government agencies in the course of their duties.

The purpose of Schedule 2 is to extend the application of the current prohibition on the death penalty to State laws (in addition to Commonwealth, Territory and Imperial criminal laws to which the Death Penalty Abolition Act already applies). This will ensure the death penalty cannot be reintroduced anywhere in Australia. It will thereby safeguard Australia's ongoing compliance with the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (to which Australia became a party on 2 October 1990).

Such a comprehensive rejection of capital punishment will also demonstrate Australia's commitment to the worldwide abolitionist movement, and complement Australia's international lobbying efforts against the death penalty.

FINANCIAL IMPACT STATEMENT

The amendments in this Bill have no impact on Government revenue.

NOTES ON CLAUSES

Clause 1: Short Title

This clause provides that when the Bill is enacted, it is to be cited as the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2009*.

Clause 2: Commencement

This clause sets out when the various parts of the Act are to commence.

Clause 3: Schedule(s)

This is a formal clause that enables the Schedules to amend Acts by including amendments under the title of the relevant Act.

Schedule 1—Amendments and repeal relating to offence of torture

Part 1 – Main Amendment

Item 1 – Amendments to Criminal Code Act 1995

This Item adds a new Division 274 at the end of Chapter 8 of the Commonwealth Criminal Code. The Division is intended to create an offence of torture in the Commonwealth Criminal Code, which will replace the existing offence of torture in the *Crimes (Torture) Act 1988* (Cth) (the 1988 Act). As the new offence will result in the redundancy of the 1988 Act, the 1988 Act will be repealed.

Section 274.1 – Definitions

Section 274.1(1) will make it clear that references in Division 274 to the Convention refer to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention), which was adopted by the UN General Assembly on 10 December 1984, and which entered into force on 26 June 1987. Given the ready availability of the text of the Convention on the Internet, it has not been annexed to the Bill as it was to the 1988 Act.

Article 1(1) of the Convention provides that:

For the purposes of this Convention, 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.

Article 1(2) provides that ‘[t]his article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.’

Section 274.1(2) will provide that, where there is a reference in Division 274 to phrases in the Convention, those phrases have the meaning that they have in the Convention as this new Division is intended as a direct implementation of the international prohibition in the Convention.

Section 274.2 – Torture

Section 274.2 will set out a restatement of the crime of torture as prohibited by the Convention. Subsections 274.2(1) and 274.2(2) will set out the offence provisions.

Subsection 274.2(1) will make it an offence to engage in conduct which inflicts severe physical or mental suffering, for a certain prohibited purpose or purposes by, or with some involvement on the part of, a public official, as defined in the Convention.

The phrase ‘severe physical or mental pain or suffering’ reflects article 1(1) of the Convention, which refers to ‘severe pain or suffering, whether physical or mental’. As indicated in section 274.1(2), the phrase ‘severe physical or mental pain or suffering’ is intended to have the same meaning as it has in the Convention. The requirement that the pain or suffering be ‘severe’ indicates a high threshold.

Paragraph 274.2(1)(a) will use the phrase ‘engage in conduct’ with the definition in subsection 4.1(2) of the Criminal Code in mind. Subsection 4.1(2) of the Criminal Code provides that ‘conduct’ means ‘an act, or omission to perform an act or state of affairs’, and that ‘engage in conduct’ means ‘do an act’ or ‘omit to perform an act’. Although torture is defined in the Convention as ‘any *act* by which severe pain or suffering, whether physical or mental, is intentionally inflicted...’, relevant conduct could include deliberate omissions which could inflict severe pain or suffering such as denial of nutrition, clothing or medical care.

Paragraph 274.2(1)(b) will list the purposes for which the relevant conduct must be engaged in if it is to amount to torture. In summary, these are the purposes of obtaining information or a confession from the person or from a third person; punishing the person for an act which that person or a third person has committed; intimidating or coercing the person or a third person; for any reason based on discrimination of any kind; or for a purpose related to one of the aforementioned purposes. The inclusion in sub-paragraph 274.2(1)(b)(iv) of the phrase ‘for a purpose related to a purpose mentioned in subparagraph (i), (ii), (iii)’ is intended to give effect to the phrase ‘for such purposes as’ in the definition of torture in article 1 of the Convention, while also balancing the requirement for specificity in criminal law legislation.

Paragraph 274.2(1)(c) will 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 paragraph 274.2(1)(c) 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. The reference to a person ‘acting in an official capacity’ is intended to encompass certain non-State actors who are exercising authority comparable to government authority. For example, they may belong to a political organisation exercising de facto authority over a particular region of a country. Although the Dictionary to the Criminal Code contains a definition of public official, it is intended that this paragraph be interpreted according to the relevant international law, in accordance with subsection 274.1(2). It is envisaged that that the types of officials listed in the (non-exhaustive) Criminal Code definition would also be considered public officials under international law, but the international definition would also encompass, for example, foreign public officials and some persons exercising pseudo-governmental authority.

Although the new offence of torture applies to public officials both within and outside Australia, it does not affect legitimate law enforcement and intelligence-gathering activities routinely carried out by federal, State and Territory Government agencies in the course of their duties.

To establish this offence, the prosecution would, in accordance with section 5.6 of the Criminal Code, need to prove beyond reasonable doubt that:

- the person intentionally inflicted severe pain or suffering, whether physical or mental, on another (the victim)
- the person did so intending to obtain information or a confession from the victim or from a third person, to punish the victim for an act which he/she or a third person committed, or to intimidate or coerce the victim or a third person, and
- did so in the capacity of a public official or acting in an official capacity or at the instigation, consent or acquiescence of a public official or person acting in an official capacity.

In the case of 274.2(1)(b) and 274.2(2)(b), the relevant fault element is ulterior intention. Ulterior intention is a fault element that exists independently of any physical element. Ulterior intention focuses on a defendant's intention to bring about a particular result and it is not necessary to prove that the result actually eventuated. For example, in paragraph 274.2(1)(b)(i) the prosecution must prove that the defendant intended to engage in conduct for the purpose of obtaining information or a confession from a victim or from a third person. The prosecution will not have to prove that the defendant actually obtained information or a confession, just that they intended to for that purpose.

Absolute liability will apply to the element of the offence in paragraph 274.2(1)(c). Paragraph 274.2(1)(c) 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.

Absolute liability is set out in section 6.2 of the Criminal Code. The effect of applying absolute liability to an element of an offence means that no fault element needs to be proved and that the defence of mistake of fact is not available. Accordingly, if it can be proved that the defendant was in fact a public official, or was acting at the instigation, or with the consent or acquiescence, of a public official, or other person acting in an official capacity, the prosecution will not be required to prove that the defendant *knew* he/she was a public official, or that the defendant knew that he/she was acting at the instigation, or with the consent or acquiescence, of a public official or other person acting in an official capacity.

Absolute liability is appropriate and required for this element of the offence because involvement by a public official is a necessary circumstance under article 1 of the Convention. Furthermore, this element does not go to the substance or essence of the culpability of the offence. Strict liability is insufficient in this instance, because it is inappropriate for a mistake of fact as to the involvement of a public official to be available as a defence to torture. This is consistent with Commonwealth criminal law practice, as described in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

Under subsection 274.2(2), it will be an offence for a public official, or person acting in an official capacity, or a person acting at the instigation, or with the consent or acquiescence, of a public official or other person acting in an official capacity, to engage in conduct which inflicts severe physical or mental pain or suffering on a person, where that conduct is engaged in for any reason based on discrimination of any kind.

The phrase ‘for any reason based on discrimination of any kind’ mirrors the phrase in article 1(1) of the Convention. As indicated in section 274.1(2), the phrase in the Bill is intended to have the same meaning as it has in the Convention.

Section 5.6 of the Criminal Code will apply automatic fault elements to the physical elements of the offence set out in paragraphs 274.2(2)(a) and (b).

Subsection 274.2(2) differs from the offence created by 274.2(1) only in the ulterior intent (purpose of the torture set out in paragraph 274.2(2)(b)) which must be proven. In practice, this means the prosecution will need to prove beyond reasonable doubt that:

- a person intentionally inflicted severe pain or suffering, whether physical or mental, on another (the victim), and
- intended to engage in that conduct for a discriminatory reason, and
- did so in the capacity of a public official or acting in an official capacity or at the instigation, consent or acquiescence of a public official or person acting in an official capacity.

Subsection 274.2(3) will provide that absolute liability applies to paragraphs 274.2(1)(c) and 274.2(2)(c). The application of absolute liability to these elements of the offence is described above.

Australia is obliged under article 4(1) of the Convention to criminalise attempts to commit torture, as well as complicity or participation in torture. Ancillary offences, which are defined in Part 2.4, Division 11 of the Criminal Code, apply automatically to Division 274. The five kinds of ancillary offences are attempt; complicity and common purpose (aiding, abetting, counselling or procuring); innocent agency; incitement, and conspiracy. The fault elements for these ancillary offences are set out in sections 11.1 to 11.5 of the Criminal Code. For example, by operation of sections 11.6 and 11.1 of the Criminal Code, an attempt to commit torture will be punishable as though the torture had been committed, and incitement to torture or conspiracy to torture will be punishable in accordance with sections 11.4 and 11.5 of the Criminal Code. A person who aids, abets, counsels or procures torture—that is, someone who is complicit in torture—will be taken to have committed torture and be punishable accordingly, by operation of section 11.2 of the Criminal Code.

Article 4(2) of the Convention requires that ‘[e]ach State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.’ Accordingly, the maximum penalty prescribed for an offence against this Division is imprisonment for 20 years. This penalty reflects the gravity of the offence of torture. There are comparable penalties in legislation both overseas (in the United

Kingdom, Canada and New Zealand) and in Australia (torture offences in Queensland, the Australian Capital Territory and Norfolk Island, as well as offences of similar gravity elsewhere in the Commonwealth Criminal Code).

Subsection 274.2(4) is in similar terms to the 1988 Act (paragraph 3(1)(b)), namely that severe pain or suffering that arises only from, inherent in or incidental to lawful sanctions that are not inconsistent with the articles of the International Covenant on Civil and Political Rights does not constitute torture.

Subsection 274.2(5) will give the offence Category D extended geographical jurisdiction, as provided for in section 15.4 of the Criminal Code. That is, the offence applies:

- 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.

This is intended to ensure the broadest possible extraterritorial jurisdiction under the Criminal Code for the present offence, in recognition of the serious nature of the crime of torture and its widespread condemnation internationally.

Section 274.3 – Prosecutions

Subsection 274.3(1) will require the Attorney-General's written consent to commence proceedings if the conduct constituting the alleged offence of torture occurs wholly in a foreign country.

Subsection 274.3(2) will require that a person may be arrested for, charged with, or remanded in custody or released on bail in connection with an offence under Division 274 before consent to prosecute has been granted.

Subsection 274.3(2) will provide that subsection 274.3(2) does not prevent an accused person from being discharged, if the proceedings are not continued within a reasonable time.

The Attorney-General's decision in relation to consent is judicially reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Section 274.4 - No defence of exceptional circumstances or superior orders

In accordance with articles 2(2) and (3) of the Convention, neither exceptional circumstances nor orders from a superior officer will be permitted as a defence under Division 274. This provision mirrors section 11 of the 1988 Act. If, however, the accused person is convicted of an offence of torture, the fact that the conduct constituting the offence was done in exceptional circumstances or under orders from a superior authority, may be taken into account in determining the proper sentence.

Section 274.5 - Jurisdiction of State/Territory courts preserved

This provision ensures that proceedings under Division 274 may be instituted in State and Territory courts. Its equivalent in the 1988 Act is section 12.

Section 274.6 – Concurrent operation intended

This section will provide that Division 274 is not intended to exclude or limit the concurrent operation of any other law of the Commonwealth or any law of a State or Territory.

Acts which would constitute torture are prohibited under the laws of each State and Territory, although only a small number of jurisdictions currently have a specific offence of torture. This provision will ensure that State and Territory laws can still apply to relevant conduct, if appropriate.

Section 274.7 – Double jeopardy

This section is intended to prevent re-prosecution for torture based on the prohibitions on double jeopardy in the common law and international human rights law.

Part 2 – Other Amendments

Items 2 and 3 – Amendments to section 71.13 of the Criminal Code

These items will omit from Division 71 of the Criminal Code (Offences against UN and associated personnel) the reference to torture, as it does not conform to the Convention definition and has the potential to cause confusion with the definition of torture in subsections 274.1(1) and (2).

It does not alter the substance of the aggravated offence in section 71.13(1)(a).

Part 3 – Repeal

Item 4 – The whole of the Act

This Part will repeal the 1988 Act in its entirety.

Schedule 2—Amendments relating to the abolition of the death penalty

This schedule will amend the *Death Penalty Abolition Act 1973* (the 1973 Act).

Item 1 - Title

Item one will amend the long title of the 1973 Act to include a reference to the laws of the States and Territories, in addition to the existing reference to the laws of the Commonwealth and ‘other laws in relation to which the powers of the Parliament extend’ (a reference primarily to Imperial laws which may still apply in Australia).

The long title will now be as follows:

An Act to abolish Capital Punishment under the Laws of the Commonwealth, of the States and of the Territories, and under certain other Laws in relation to which the Powers of the Parliament extend.

Item 2 – Application

This item will insert a new subsection 3(3) into the 1973 Act to specify that section 6 of the Act (to be inserted by item 5) is to apply to State laws.

It will also amend subsection 3(4) to remove an obsolete reference to pending proceedings.

Item 3 - Liability

This item will amend section 4 of the 1973 Act to specify that no one is liable to the punishment of death for any offence in relation to, and in relation to offences under, the laws of the Commonwealth and of the Territories, and, to the extent to which the powers of the Parliament permit, in relation to, and in relation to offences under, Imperial Acts.

Section 4 (together with section 5) will have the effect of prohibiting a court from sentencing an offender to death. In effect, it would override any provision of Commonwealth, Territory or Imperial law which purported to authorise the death penalty.

Item 4 – Substitution of life

This item will maintain the previous application of section 5, just as item 3 does for section 4. Section 5 will provide that if, under a law of the Commonwealth, a Territory or an Imperial law, ‘a person is liable to the punishment of death, the reference to the punishment of death shall be read, construed and applied as if the penalty of imprisonment for life were substituted for that punishment.’

Item 5 - Imposition

This item will insert a new section 6 into the 1973 Act which applies to all relevant Commonwealth, State, Territory and Imperial laws. In contrast to section 4, which is intended to deal with any existing provisions that may provide for the death penalty, section 6 is intended to prevent the death penalty from being imposed in the future. That is, section 6 is intended to prevent the death penalty from being reintroduced into the law in any Australian jurisdiction, to ensure ongoing compliance with the Second Optional Protocol to the International Covenant on Civil and Political Rights.