



Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010

No. 37, 2010

An Act to amend the *Criminal Code Act 1995* and the *Death Penalty Abolition Act 1973*, and for related purposes

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

Contents

1	Short title.....	1
2	Commencement.....	2
3	Schedule(s).....	2
Schedule 1—Amendments and repeal relating to offence of torture		3
Part 1—Main amendment		3
<i>Criminal Code Act 1995</i>		3
Part 2—Other amendments		7
<i>Criminal Code Act 1995</i>		7
Part 3—Repeal		8
<i>Crimes (Torture) Act 1988</i>		8
Schedule 2—Amendments relating to the abolition of the death penalty		9
<i>Death Penalty Abolition Act 1973</i>		9



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An Act to amend the *Criminal Code Act 1995* and the *Death Penalty Abolition Act 1973*, and for related purposes

[Assented to 13 April 2010]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010*.

2 Commencement

This Act commences on the day after this Act receives the Royal Assent.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments and repeal relating to offence of torture

Part 1—Main amendment

Criminal Code Act 1995

1 At the end of Chapter 8 of the *Criminal Code*

Add:

Division 274—Torture

274.1 Definitions

- (1) In this Division:

Convention means 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.

Note: The text of the Convention is set out in Australian Treaty Series 1989 No. 21 ([1989] ATS 21). In 2010, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

- (2) An expression that is used both in this Division and in the Convention (whether or not a particular meaning is given to it by the Convention) has, in this Division, the same meaning as it has in the Convention.

274.2 Torture

- (1) A person (the ***perpetrator***) commits an offence if the perpetrator:
- (a) engages in conduct that inflicts severe physical or mental pain or suffering on a person (the ***victim***); and
 - (b) the conduct is engaged in:
 - (i) for the purpose of obtaining from the victim or from a third person information or a confession; or

- (ii) for the purpose of punishing the victim for an act which the victim or a third person has committed or is suspected of having committed; or
 - (iii) for the purpose of intimidating or coercing the victim or a third person; or
 - (iv) for a purpose related to a purpose mentioned in subparagraph (i), (ii) or (iii); and
- (c) the perpetrator engages in the conduct:
- (i) in the capacity of a public official; or
 - (ii) acting in an official capacity; or
 - (iii) acting at the instigation, or with the consent or acquiescence, of a public official or other person acting in an official capacity.

Penalty: Imprisonment for 20 years.

- (2) A person (the *perpetrator*) commits an offence if the perpetrator:
- (a) engages in conduct that inflicts severe physical or mental pain or suffering on a person; and
 - (b) the conduct is engaged in for any reason based on discrimination of any kind; and
 - (c) the perpetrator engages in the conduct:
 - (i) in the capacity of a public official; or
 - (ii) acting in an official capacity; or
 - (iii) acting at the instigation, or with the consent or acquiescence, of a public official or other person acting in an official capacity.

Penalty: Imprisonment for 20 years.

- (3) Absolute liability applies to paragraphs (1)(c) and (2)(c).

Note: For absolute liability, see section 6.2.

- (4) Subsections (1) and (2) do not apply to conduct arising 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 (a copy of the English text of which is set out in Schedule 2 to the *Australian Human Rights Commission Act 1986*).

- (5) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against subsection (1) or (2).

274.3 Prosecutions

- (1) Proceedings for an offence against this Division, where the conduct constituting the alleged offence occurs wholly outside Australia, must not take place except with the consent in writing of the Attorney-General.
- (2) Even though a consent in accordance with subsection (1) has not been given in relation to an offence against this Division:
- (a) a person may be arrested for the offence, and a warrant for the arrest of a person for the offence may be issued and executed; and
 - (b) a person may be charged with the offence; and
 - (c) a person so charged may be remanded in custody or on bail;
- but no further step in proceedings referred to in subsection (1) is to be taken until such a consent has been given.
- (3) Subsection (2) does not prevent the discharge of the accused if proceedings are not continued within a reasonable time.

274.4 No defence of exceptional circumstances or superior orders

It is not a defence in a proceeding for an offence under this Division that:

- (a) the conduct constituting the offence 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
- (b) in engaging in the conduct constituting the offence the accused acted under orders of a superior officer or public authority;

but the circumstances referred to in paragraphs (a) and (b) may, if the accused is convicted of the offence, be taken into account in determining the proper sentence.

274.5 Jurisdiction of State/Territory courts preserved

For the purposes of section 38 of the *Judiciary Act 1903*, a matter arising under this Division, including a question of interpretation of

the Convention, is taken not to be a matter arising directly under a treaty.

274.6 Concurrent operation intended

This Division 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.

274.7 Double jeopardy

If a person has been convicted or acquitted in a country outside Australia of an offence against the law of that country in respect of any conduct, the person cannot be convicted of an offence under this Division in respect of that conduct.

Part 2—Other amendments

Criminal Code Act 1995

2 Paragraph 71.13(1)(a) of the *Criminal Code*

Omit “torture”, substitute “the deliberate and systematic infliction of severe pain over a period of time”.

3 Subsection 71.13(4) of the *Criminal Code* (definition of *torture*)

Repeal the definition.

Part 3—Repeal

Crimes (Torture) Act 1988

4 The whole of the Act

Repeal the Act.

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

Death Penalty Abolition Act 1973

1 Title

After “**Commonwealth**”, insert “, **of the States and of the Territories,**”.

2 Subsection 3(4)

Repeal the subsection, substitute:

- (3) Section 6 also applies in relation to, and in relation to offences under, the laws of the States.
- (4) This Act applies in relation to offences referred to in subsections (2) and (3) committed before, on or after the commencement of this Act.

3 At the end of section 4

Add “referred to in subsection 3(2)”.

4 Section 5

Omit “in relation to which this Act applies”, substitute “referred to in subsection 3(2)”.

5 At the end of the Act

Add:

6 Death penalty must not be imposed

The punishment of death must not be imposed as the penalty for any offence referred to in subsection 3(2) or (3).

*[Minister's second reading speech made in—
House of Representatives on 19 November 2009
Senate on 24 February 2010]*

(224/09)

10 *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act*
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