

Country File
AUSTRALIA



Last updated: **September 2010**

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| Region | Asia Pacific |
| Legal system | Common law |
| UNCAT Ratification/ Accession (a)/ succession (d) | 8 August 1989 |
| Relevant Laws | <p>Federal laws:</p> <ul style="list-style-type: none"> • Criminal Code Act 1995 - as amended by the Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010 <p>State laws:</p> <ul style="list-style-type: none"> • Crimes Act 1900 – Australian Capital Territory • Criminal Code Act of 1899 – Queensland • Criminal Code Act of 2007 – Norfolk Island |
| Relevant Articles | <p>Federal laws</p> <ul style="list-style-type: none"> • Prohibition of Torture: • Definition of Torture: Sections 268.13, 268.25, 268.73, 274.1, 274.2 of the Criminal Code Act 1995 • Penalties: Sections 268.13, 268.25, 268.73, 274.2, 274.4 of the Criminal Code Act 1995 • Others: <ol style="list-style-type: none"> 1. Defences: Section 274.4 of the Criminal Code Act 1995 2. Jurisdiction: Sections 15.4 and 274.2(5) of the Criminal Code Act 1995 3. Lawful Sanctions: Section 274.2(5) of the Criminal Code Act 1995 <p>State laws</p> <ul style="list-style-type: none"> • Prohibition of Torture: |

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| | <ul style="list-style-type: none"> • Definition of Torture: <ul style="list-style-type: none"> - Section 36 of the Crimes Act 1900 (ACT) - Section 320A of the Criminal Code Act (QLD) - Section 95 of the Criminal Code Act 2007 (Norfolk Island) • Penalties: <ul style="list-style-type: none"> - Section 36 of the Crimes Act 1900 (ACT) - Section 320A of the Criminal Code Act (QLD) - Section 95 of the Criminal Code Act 2007 (Norfolk Island) • Others: <ol style="list-style-type: none"> 1. Lawful Sanctions: Section 36 Crimes Act 1900 (ACT) |
| Languages Available | <ul style="list-style-type: none"> • English (official language) |
| Other Relevant Information | <ul style="list-style-type: none"> • Legislative sources: <ul style="list-style-type: none"> ▪ Australian federal legislation is available at: http://www.comlaw.gov.au/ ▪ Australian Capital Territory Legislation is available at: http://www.legislation.act.gov.au/ ▪ Queensland legislation is available at: http://www.legislation.qld.gov.au/OQPChome.htm ▪ Norfolk Island legislation is available at: http://www.info.gov.nf/ • UN Committee against Torture For comments and recommendations on the legislation of Australia by the UN Committee against Torture, see http://www2.ohchr.org/english/bodies/cat/sessions.htm <i>Please note that these comments may have been rendered obsolete by more recent changes to the State party's law and/or practice. APT strongly recommends verification with official sources.</i> |

Relevant Articles – AUSTRALIA

ENGLISH

Criminal Code Act 1995 - as amended by the Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010

Chapter 2 General principles of criminal responsibility

Part 2.2 The elements of an offence

Division 6 Cases where fault elements are not required

6.1 Strict liability

- (1) If a law that creates an offence provides that the offence is an offence of strict liability:
 - (a) there are no fault elements for any of the physical elements of the offence; and
 - (b) the defence of mistake of fact under section 9.2 is available.
- (2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:
 - (a) there are no fault elements for that physical element; and
 - (b) the defence of mistake of fact under section 9.2 is available in relation to that physical element.
- (3) The existence of strict liability does not make any other defence unavailable.

6.2 Absolute liability

- (1) If a law that creates an offence provides that the offence is an offence of absolute liability:
 - (a) there are no fault elements for any of the physical elements of the offence; and
 - (b) the defence of mistake of fact under section 9.2 is unavailable.
- (2) If a law that creates an offence provides that absolute liability applies to a particular physical element of the offence:
 - (a) there are no fault elements for that physical element; and
 - (b) the defence of mistake of fact under section 9.2 is unavailable in relation to that physical element.
- (3) The existence of absolute liability does not make any other defence unavailable.

Part 2.3 Circumstances in which there is no criminal responsibility

Division 9 Circumstances involving mistake or ignorance

9.2 Mistake of fact (strict liability)

- (1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if:
 - (a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and
 - (b) had those facts existed, the conduct would not have constituted an offence.
- (2) A person may be regarded as having considered whether or not facts existed if:
 - (a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and
 - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

Note: Section 6.2 prevents this section applying in situations of absolute liability.

Part 2.7 Geographical jurisdiction

Division 15 Extended geographical jurisdiction

15.4 Extended geographical jurisdiction - category D

If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:

- (a) whether or not the conduct constituting the alleged offence occurs in Australia; and
- (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.

Note: The expression **offence** is given an extended meaning by subsections 11.2(1) and 11.2A(1), section 11.3 and subsection 11.6(1).

Chapter 8 Offences against humanity and related offences

Division 268 Genocide, crimes against humanity, war crimes and crimes against the administration of the justice of the International Criminal Court

Subdivision C Crimes against humanity

268.13 Crime against humanity - torture

A person (the **perpetrator**) commits an offence if:

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- (a) the perpetrator inflicts severe physical or mental pain or suffering upon one or more persons who are in the custody or under the control of the perpetrator; and
- (b) the pain or suffering does not arise only from, and is not inherent in or incidental to, lawful sanctions; and
- (c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.

Subdivision D War crimes that are grave breaches of the Geneva Conventions and of Protocol I to the Geneva Conventions

268.25 War crime - torture

- (1) A person (the *perpetrator*) commits an offence if:
 - (a) the perpetrator inflicts severe physical or mental pain or suffering upon one or more persons; and
 - (b) the perpetrator inflicts the pain or suffering for the purpose of:
 - (i) obtaining information or a confession; or
 - (ii) a punishment, intimidation or coercion; or
 - (iii) a reason based on discrimination of any kind; and
 - (c) the person or persons are protected under one or more of the Geneva Conventions or under Protocol I to the Geneva Conventions; and
 - (d) the perpetrator knows of, or is reckless as to, the factual circumstances that establish that the person or persons are so protected; and
 - (e) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for 25 years.

- (2) Strict liability applies to paragraph (1)(c).

Subdivision F War crimes that are serious violations of article 3 common to the Geneva Conventions and are committed in the course of an armed conflict that is not an international armed conflict

268.73 War crime - torture

- (1) A person (the *perpetrator*) commits an offence if:
 - (a) the perpetrator inflicts severe physical or mental pain or suffering upon one or more persons; and
 - (b) the perpetrator inflicts the pain or suffering for the purpose of:
 - (i) obtaining information or a confession; or
 - (ii) a punishment, intimidation or coercion; or
 - (iii) a reason based on discrimination of any kind; and
 - (c) the person or persons are not taking an active part in the hostilities; and

- (d) the perpetrator knows of, or is reckless as to, the factual circumstances establishing that the person or persons are not taking an active part in the hostilities; and
- (e) the perpetrator's conduct takes place in the context of, and is associated with, an armed conflict that is not an international armed conflict.

Penalty: Imprisonment for 25 years.

- (2) To avoid doubt, a reference in subsection (1) to a person or persons who are not taking an active part in the hostilities includes a reference to:
 - (a) a person or persons who are *hors de combat*; or
 - (b) civilians, medical personnel or religious personnel who are not taking an active part in the hostilities.

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.
- (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.

Crimes Act 1900 – ACT

Part 2 Offences against the person

Section 36 Torture

- (1) In this section:
- act of torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person—
- (a) for such purposes as—
 - (i) obtaining from the person or from a third person information or a confession; or
 - (ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed; or
 - (iii) intimidating or coercing the person or a third person; or
 - (b) for any reason based on discrimination of any kind; but does not include an act 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 (being the covenant a copy of the English text of which is set out in the *Human Rights and Equal Opportunity Commission Act 1986* (Cwth), schedule 2.
- (2) A person who—
- (a) is a public employee or acting in an official capacity; or
 - (b) is acting at the instigation, or with the consent or acquiescence, of a public employee or a person acting in an official capacity;

and who commits an act of torture is guilty of an offence punishable, on conviction, by imprisonment for 10 years.

Criminal Code Act of 1899 – Queensland

Schedule 1 The Criminal Code
**Part 5 Offences against the person and relating to marriage
and parental rights and duties**
Chapter 29 Offences endangering life or health
Section 320A Torture

- (1) A person who tortures another person commits a crime.
Maximum penalty—14 years imprisonment.
- (2) In this section—
pain or suffering includes physical, mental, psychological or emotional pain or suffering, whether temporary or permanent.
torture means the intentional infliction of severe pain or suffering on a person by an act or series of acts done on 1 or more than 1 occasion.

Criminal Code Act of 2007 – Norfolk Island

Chapter 3 Offences against the person
Part 3.3 Offences endangering life and health
Section 95 Torture

- (1) In this section:
act of torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person—
- (a) for such purposes as—
- (i) obtaining from the person or from a third person information or a confession; or
 - (ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed; or
 - (iii) intimidating or coercing the person or a third person; or
- (b) for any reason based on discrimination of any kind;

but does not include an act 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 (being the covenant a copy of the English text of which is set out in the *Human Rights and Equal Opportunity Commission Act 1986* (Cwlth), Schedule 2.

- (2) A person who—
- (a) is a public employee or acting in an official capacity; or

(b) is acting at the instigation, or with the consent or acquiescence, of a public employee or a person acting in an official capacity;

and who commits an act of torture is guilty of an offence punishable, on conviction, by imprisonment for 10 years.