

IS NEAR ENOUGH GOOD ENOUGH? – IMPLEMENTING AUSTRALIA’S INTERNATIONAL HUMAN RIGHTS TORTURE CRIMINALISATION AND PROHIBITION OBLIGATIONS IN THE *CRIMINAL CODE* (Cth)

ABSTRACT

The welcome domestic implementation of Australia’s international torture criminalisation and prohibition obligations in the *Criminal Code* (Cth) is important in the creation of general torture offences, but also reflects critical contemporary features of Commonwealth human rights policy and the resetting of Australia’s relationship with the United Nations human rights system. The legislative and policy choices made provide signals for future human rights endeavours. These choices confirm that modest changes to the legislative drafting would have asserted a more exemplary foundation for Australian international human rights advocacy and set a higher standard for the development of a domestic human rights framework.

I INTRODUCTION

The Commonwealth Parliament, in response to a set of Australia’s international human rights obligations relating to the prohibition of torture and the death penalty, has enacted significant legislation in the form of the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) (*Act*), introducing div 274 torture offences into the *Criminal Code Act 1995* (Cth) sch 1 (*Criminal Code* (Cth)).¹

This article focuses upon the torture prohibition and criminalisation reforms in the *Act*,² and this is important because a general Commonwealth offence of torture has been enacted for application within Australia for the first time.³ More broadly,

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¹ Division 274 (Torture) comprises ss 274.1–274.7 inclusively of the *Criminal Code* (Cth) and is enacted by sch 1 of the *Act* (Amendments and repeal relating to offence of torture).

² In contrast, sch 2 of the *Act* — dealing with amendments relating to the abolition of the death penalty — amended the *Death Penalty Abolition Act 1973* (Cth) to extend the existing Commonwealth prohibition of reintroduction of the death penalty applying in Commonwealth and territory jurisdictions, to the jurisdictions of the states.

³ See the discussion of earlier Commonwealth torture offences under Part III(A) below.

the reforms signal distinctive characteristics from contemporary Commonwealth human rights policy, responses to Australia’s international human rights obligations, and raise issues about a renewed engagement with the United Nations human rights system and its institutions.

The article briefly appraises the recent and relevant human rights policy context from which the domestic torture prohibition offences have emerged. This appraisal includes legislative and other responses to the *National Human Rights Consultation Report*,⁴ matters indicative of Australia’s re-engagement with the United Nations human rights system and institutions, the complementary Australian commitment to become a party to the *Optional Protocol to the Convention Against Torture*⁵ and the influence of the re-emergence of torture in the war on terrorism.

Prior to assessing the criminalisation of torture in Australian domestic law, the article examines previous Commonwealth torture offences, along with contemporary developments from Australian international human rights, procedural and convention obligations under the *Convention Against Torture*⁶ and the *International Covenant on Civil and Political Rights*.⁷ A series of topical legal analyses of the principal features of the Australian criminalisation of torture, as fulfilling those international obligations, is subsequently pursued.

These individual analyses of the *Act’s* torture criminalisation provisions confirm that various opportunities existed to more expansively engage with and implement Australia’s international human rights obligations under the *Convention* and the *ICCPR*. Instead, on several occasions, the government opted for a narrower legal drafting than either necessary or desirable. Greater legislative detail and reach might have been applied to implement international obligations in a manner both more cogent and exemplary. The contemporary Australian government emphasis in protecting human rights based upon parliamentary sovereignty and executive government responses, translates in the *Act* to a cautious accommodation of the *Convention* international human rights obligations. The legislative content choices made in the *Act* reflect that a fairly narrow template for legislative implementation has been adopted.

This express governmental preference for parliamentary sovereignty and parliamentary processes for the domestic protection of human rights, over a statutory charter of rights, also mean that the *Act’s* present choices hold broader

⁴ National Human Rights Consultation, *National Human Rights Consultation: Report* (Attorney-General’s Department, 2009) (*‘National Human Rights Consultation’*).

⁵ *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2373 UNTS 237 (entered into force 22 June 2006) (*‘Optional Protocol’*).

⁶ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (*‘Convention’*).

⁷ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (*‘ICCPR’*).

significance. The enacting assumption in the *Act* acknowledges the international human rights *Convention* obligation, but through precise and conservative legislative drafting. The *Act* forms an indicator for both future drafting and processes for implementing other international human rights convention obligations and how the statements of compatibility and the role of the Parliamentary Joint Committee on Human Rights⁸ might operate.

This domestic criminalisation of torture affords, from the government's perspective, certain strategic benefits: a conservative, uncontroversial drafting focusing on the instant human rights topic, rather than prompting deliberation about broader human rights implementation; a more straightforward passage of legislation and neutralising points of opposition to that legislation; the ability to positively respond to United Nations treaty committees by pointing to concrete enactments directly linked to the conventions; and a simple compliance with the s 51(xxix) external affairs power constitutionality requirements, providing greater robustness of the legislation in the event of constitutional challenge.

Equally, however, this legislative methodology can be seen as hesitant in implementing Australia's human rights convention obligations, hinting that more could be done, with exemplary opportunities declined. This, in turn, might adversely influence perceptions of the government's claims of re-engagement with United Nations human rights obligations and institutions as being muted by political temperament and calculation.

Conclusions are reached in this article about the legislative and policy choices made in the implementation of Australia's torture criminalisation obligations, as well as providing signals about future endeavours. The *Act* would have been enhanced by adopting the additional measures identified in the article's legislative analyses.⁹ Such improvements would have provided a more substantive human rights legislative and policy orientation as a precursor to implementing Australia's Human Rights Framework generally, and, in particular in the operation of the two key elements of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

II THE AUSTRALIAN NATIONAL AND INTERNATIONAL HUMAN RIGHTS POLICY CONTEXT OF THE DOMESTIC CRIMINALISATION OF TORTURE

The Commonwealth domestic criminalisation of torture is more readily comprehended within recent broader Australian national and international responses to human rights issues. In particular, the domestic criminalisation of torture is best considered within the context of the Rudd/Gillard government's

⁸ Section 8 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) requires members of parliament, when introducing legislation or creating a disallowable instrument, to table a Statement of Compatibility with Australia's human rights obligations. Section 4 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) establishes a Parliamentary Joint Committee on Human Rights for the scrutiny of legislative instruments.

⁹ See Part III below.

legislative and executive human rights engagement, including re-engagement with United Nations human rights institutions and conventions, along with the potential international influence of an exemplary Australian role in implementing human rights obligations in comparison with the practices of other nations.

The emergence of torture as an interrogative response in the war on terror is also an important background factor to its domestic criminalisation. The salient point is that the Act emerges within a broader, articulated Australian government human rights agenda that is both ambitious and progressive, but that the domestic criminalisation of torture is an example of an international human rights obligation interpreted, responded to, and implemented through modest legislative and policy measures.

A Australia’s National Human Rights Consultation and the Human Rights Framework

Accordingly, governmental legislative and policy responses to the Brennan Committee report, the *National Human Rights Consultation Committee Report*, provide important attitudinal and practical indications of the Government’s methodology in the protection of human rights, mirrored in characteristics of the Act. The Brennan Committee report was released on 8 October 2009,¹⁰ therefore preceding the passage of the Act.¹¹ The Australian government response to the Brennan Committee report followed a few weeks after the Act’s enactment and coincided with the launch of Australia’s human rights framework.¹²

The Australian government rejected the Brennan Committee Report recommendation that Australia adopt a federal statutory Human Rights Act.¹³ Instead, the government’s response was crafted around the Brennan Committee recommendation that ‘the Federal Government develop a national action plan to implement a comprehensive framework’.¹⁴ That comprehensive framework

¹⁰ See Robert McClelland, ‘The Protection and Promotion of Human Rights In Australia’ (Media Release, 8 October 2009) <http://pandora.nla.gov.au/pan/21248/20091120-0012/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_FourthQuarter_8October2009-ReleaseofNationalHumanRightsConsultationReport.html>.

¹¹ The *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) was enacted on 11 March 2010.

¹² See Robert McClelland, ‘Australia’s Human Rights Framework’ (Media Release, 21 April 2010) <<http://pandora.nla.gov.au/pan/21248/20111214-1249/www.attorneygeneral.gov.au/Mediareleases/Pages/2010/Secondquarter/21April2010AustraliaHumanRightsFramework.html>>.

¹³ The *National Human Rights Consultation*, above n 4, recommended, inter alia, that Australia adopt a federal Human Rights Act, that it be based on a dialogue model, that it should incorporate several non derogable civil and political rights, that it also should include a range of additional civil and political rights, with these additional rights being subject to a limitation clause: at xxix–xxxviii.

¹⁴ Ibid, xxix, Recommendation 2.

emerged as Australia's Human Rights Framework,¹⁵ the launch of which afforded the opportunity for announcing that only limited and selected aspects of the *National Human Rights Consultation Report* would be adopted, reflecting a strong reliance on, and confirmation of, parliamentary practices and parliamentary sovereignty for human rights protection in preference to the judicial articulation of human rights.

In understanding the broader Australian government context of this limited and selected application of human rights principles, contemporaneous with the criminalisation of torture legislation, various insights are available that reflect this reliance upon parliamentary practices and parliamentary sovereignty.

First, there was an acknowledgment of Australia's obligations under the seven core United Nations international human rights treaties to which Australia is a party.¹⁶ Of particular relevance to the criminalisation of torture were the *Convention* and the *ICCPR*. Further, two measures¹⁷ from the *National Human Rights Consultation Report* were adopted, namely a Parliamentary Joint Committee on Human Rights,¹⁸ and the requirement that Parliamentarians, when introducing a Bill into Parliament, present a statement of the human rights compatibility¹⁹ of the legislation against the seven core international human rights treaty obligations.²⁰

¹⁵ Robert McClelland 'Address to National Press Club of Australia — Launch of Australia's Human Rights Framework' (Speech delivered at the National Press Club, Canberra, 21 April 2010) <http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2010_21April2010-AddresstotheNationalPressClubofAustralia-LaunchofAustraliasHumanRightsFramework.html>.

¹⁶ Namely, the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICECSR*'); *Convention for the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD*'); *Convention for the Elimination of Discrimination Against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) ('*CEDAW*'); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*CAT*'); *Convention on the Rights of the Child*, opened for signature 20 November 1969, 1577 UNTS 3 (entered into force 2 September 1990) ('*CROC*'); and *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('*CROPD*').

¹⁷ *National Human Rights Consultation*, above n 4, made 31 recommendations.

¹⁸ *Ibid*, Recommendation 7.

¹⁹ *Ibid*, Recommendation 6.

²⁰ See respectively pt 2 and pt 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). The Act passed the Parliament on 25 November 2011, was assented to on 9 December 2011, for commencement on 4 January 2012. See Robert McClelland, 'Passage of Legislation to Improve the Protection of Human Rights' (Media Release, 25 November 2011) <<http://pandora.nla.gov.au/pan/21248/20111214-1249/www>>.

This legislatively focused position displays a clear emphasis upon parliamentary sovereignty and a parliamentary-based assessment of Australia’s compliance with its international human rights obligations. It treats cautiously the introduction of international human rights principles into Australian human rights legislation, insulating that introduction from the judicial interpretive development that would flow from a statutory charter of rights. Instead of a judicial interpretive clause, the function of the courts is limited to determining Parliament’s purpose and intent through the *Acts Interpretation Act 1901* (Cth), now supplemented by a court’s ability, under that legislation,²¹ where there is an ambiguity, to refer to the further Parliamentary material in the form of the reports of the Parliamentary Joint Committee on Human Rights.²² The consequences of this legislative approach in limiting the judicial role means that reference to a body of international and comparative human rights jurisprudence, deriving from articles of the seven core human rights treaties, is made contingent on and susceptible to the political views of the Parliamentary Joint Committee.

Three further prominent commitments in the Human Rights Framework²³ consciously avoid any judicial involvement in expounding human rights. All of these measures indicate a strong emphasis upon parliamentary sovereignty and Parliament’s role in assessing Australia’s human rights obligations and excluding a prominent role for direct judicial interpretive development giving effect to the

attorneygeneral.gov.au/Mediareleases/Pages/2011/Fourth%20Quarter/25-November-2011---Passage%20of%20legislation%20to%20improve%20the%20protection%20of%20human%20rights.html>; Robert McClelland, ‘Royal Assent for Legislation to Improve the Protection of Human Rights’ (Media Release, 9 December 2011) <<http://pandora.nla.gov.au/pan/21248/20111214-1249/www.attorneygeneral.gov.au/Mediareleases/Pages/2011/Fourth%20Quarter/9-December-2011---Royal-Assent-for-legislation-to-improve-the-protection-of-human-rights.html>>; Nicola Roxon, ‘Human Rights Check for New Laws’ (Media Release, 4 January 2012) <<http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/First%20Quarter/4-January-2012--Human-Rights-check-for-new-laws.aspx>>. The Parliamentary Joint Committee on Human Rights will be established by a resolution of appointment in the Autumn 2012 Parliamentary sittings.

²¹ See *Acts Interpretation Act 1901* (Cth) s 15AB(2)(c). Section 15AB(1)(b) states that:

Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material (b) to determine the meaning of the provision when (i) the provision is ambiguous or obscure.

²² See the reporting function of the Parliamentary Joint Committee on Human Rights to both House of Parliament under ss 7(a), (b) and (c) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

²³ Namely investment of \$12 million in education initiatives, combining federal anti-discrimination laws into a single Act and creating an annual NGO Human Rights Forum to enable comprehensive engagement with non government organisations on human rights matters: McClelland, ‘Address to the National Press Club of Australia’, above n 15.

non-derogable right of freedom from torture and cruel, inhuman and degrading treatment or punishment.²⁴

The *Act's* domestic criminalisation of torture is therefore grounded within that parliamentary/executive model of the Australian Human Rights Framework for human rights protection and promotion, and the present government's rejection of a statutory charter of rights. The model's reliance on legislative measures and associated policy development and implementation has several features consistent with the present government's re-engagement with international human rights obligations and with the United Nations human rights system.

Legislative enactment enables the Australian government to present itself positively and responsively within the United Nations human rights system of States Parties reports to the *Convention* Committee and the Human Rights Committee, as well as in other human rights forums. In enacting separate pieces of legislation such as the present Act, implementing human rights obligations relating to torture whilst rejecting the more enlarged judicial role afforded by a charter of rights, concrete evidence is provided to United Nations treaty bodies of changed Commonwealth approaches to human rights issues, exceeding aspirational declarations of re-engagement with the United Nations human rights system.²⁵ This preferred reliance upon specific, precise legislation as in the case of the domestic criminalisation of torture, once enthusiastically anticipated by the Committee Against Torture,²⁶ has subsequently prompted the Committee Against Torture to raise follow up issues²⁷ prior to the submission of the fifth periodic report of Australia,²⁸ regarding the

²⁴ See *National Human Rights Consultation*, above n 4, xxxv, Recommendation 24:

The Committee recommends that the following non derogable civil and political rights be included in any Federal Human Rights Act, without limitation: Protection from torture and cruel, inhuman or degrading treatment. A person must not be — subjected to torture or treated or punished in a cruel, inhuman or degrading way or subjected to medical or scientific experimentation without his or her full, free and informed consent.

²⁵ See Robert McClelland, 'Australia and International Human Rights: Coming in from the Cold' (Speech delivered at the Human Rights and Equal Opportunity Commission, Sydney, 23 May 2008) <http://pandora.nla.gov.au/pan/21248/20081120-1617/www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches_2008_HumanRightsandEqualOpportunityCommission.html>; Robert McClelland, 'Human Rights under a Rudd Labor Government — What will be different?' (Speech delivered to the Banks/Barton FEC Regional Forum, Sydney, 17 November 2008) <http://pandora.nla.gov.au/pan/21248/20081120-1617/www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches_2008_17November2008-HumanRightsUnderaRuddLaborGovernment-Whatwillbedifferent.html>.

²⁶ Committee against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Concluding Observations of the Committee Against Torture: Australia*, UN Doc CAT/C/AUS/CO/3 (22 May 2008) 2 [8].

²⁷ Committee against Torture, *List of Issues Prior to the Submission of the Fifth Periodic Report of Australia*, UN Doc CAT/C/AUS/Q/5 (15 February 2011).

²⁸ Australia's Fifth Periodic Report under the Convention Against Torture is due in 2012: see Human Rights Council Working Group on Universal Periodic Review, *Compilation Prepared by the Office of the High Commissioner for Human Rights in*

adoption of a federal human rights act including a prohibition against torture.²⁹ Minimal legislative drafting for implementation may also prompt questions about the sincerity and commitment of the government’s human rights agenda, including whether there is a full commitment to the principles of the *Convention*.

In translating those obligations into legislation, given the notorious character of torture, the government is placed in a politically advantageous position which makes its criminalisation of torture difficult to criticise. Furthermore, attention is focused on the instant subject matter of torture, in place of the broader and more contentious issue of the role of international human rights law — in the form here of implementation of *Convention* articles — and re-engagement with the United Nations human rights treaty system.

The conservative legislative drafting technique in the domestic criminalisation of torture is further tailored in response to the legal parameters set by the High Court of Australia’s treaty implementation aspect of the s 51(xxix) *Commonwealth Constitution* external affairs power.³⁰ Its drafting avoids an extended scope of the torture criminalisation provisions which would have been constitutionally underpinned by the more contentious non-treaty aspects of the s 51(xxix) external affairs power.³¹

accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1 Australia, UN Doc A/HRC/WG.6/10/AUS/2 (15 November 2010) 5.

²⁹ The Committee Against Torture ‘noted that the State Party does not have a constitutional or legislative protection of human rights at the Federal level ie a Federal Bill or Charter of Rights protecting, *inter alia*, the rights contained in the Convention’. It recommended that ‘The State party should continue consultations with regard to the adoption of a Bill of Rights to ensure a comprehensive constitutional protection of basic human rights at the Federal level’: Committee against Torture, *Concluding Observations: Australia*, above n 26, 2 [9].

³⁰ This comprises *first* the existence of a sufficiently specific treaty obligation which directs the general course of action to be taken by signatory states, in contrast to aspirational, recommendatory and hortatory statements in treaties: *Commonwealth v Tasmania* (1983) 158 CLR 1; *Victoria v Commonwealth* (1996) 187 CLR 416, 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) (*‘Industrial Relations Case’*). The requirement of an identifiable treaty obligation was more recently confirmed by three judges who discussed the external affairs power issue in *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 95 126–8 (Hayne and Kiefel JJ) (especially at 127) and 157–68 (Heydon J) (especially at 162). *Secondly*, a proportionality test is applied so that the enacting measures are reasonably capable of being considered appropriate and adapted to give effect to Australia’s obligations under the *Convention*: *Industrial Relations Case* (1996) 187 CLR 416, 486–8 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *R v Tang* (2008) 237 CLR 1, 21 (Gleeson CJ), 27 (Gummow J), 54 (Hayne J), 64 (Heydon J) (Crennan and Kiefel JJ agreed with Gleeson CJ).

³¹ Namely, (i) relations with other countries and international organisations: *R v Sharkey* (1949) 79 CLR 121; *New South Wales v Commonwealth* (1975) 135 CLR 337 (*‘Seas and Submerged Lands Case’*); *XYZ v Commonwealth* (2006) 227 CLR 532; *Thomas v Mowbray* (2007) 233 CLR 307; (ii) matters physically external to Australia: *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Horta*

B Renewing Australia's Relationship with the United Nations and its Human Rights Institutions

The domestic criminalisation of torture is properly considered as enacted within the context of the Rudd/Gillard government's desired renewal of Australia's relationship with the United Nations and its human rights institutions. In publicly articulated terms, this includes matters such as re-engagement with United Nations human rights institutions³² and adopting other formal United Nations human rights mechanisms,³³ to deliberately distinguishing the present government's international human rights based policies from those of the predecessor Howard government.³⁴ The domestic criminalisation of torture can also be presented by the government as comprehensively fulfilling Australia's obligations under the *Convention*,³⁵ and as a positive response to Concluding Observation recommendations made

v Commonwealth (1994) 181 CLR 183; *Industrial Relations Case* (1996) 187 CLR 416; *XYZ v Commonwealth* (2006) 227 CLR 532; *Pape v Commissioner of Taxation* (2009) 238 CLR 1; and (iii) matters of international concern: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*'); *XYZ v Commonwealth* (2006) 227 CLR 532.

³² See McClelland, 'Australia and International Human Rights: Coming in from the Cold', above n 25; McClelland 'Human Rights under a Rudd Labor Government — What will be different?', above n 25; Robert McClelland, 'Invitation to United Nations Human Rights Experts' (Media Release, 7 August 2008) <http://pandora.nla.gov.au/pan/21248/20081120-1617/www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2008_ThirdQuarter_7August2008-InvitationtoUnitedNationshumanrightsexperts.html>; Kevin Rudd, 'Australia's Engagement in Improving Global Human Rights' (Speech delivered to the Australian Government NGO Forum on Human Rights, Parliament House, Canberra, 22 June 2011) <http://www.foreignminister.gov.au/speeches/2011/kr_sp_110622.html>. Re-engagement with the United Nations human rights system involved becoming a party to some international instruments opposed by the previous government, an open invitation made to Special Rapporteurs and Working Groups under the Human Rights Council to visit Australia, and the nature of Australia's participation in, and responses made to Universal Periodic Review, before the UN Human Rights Council.

³³ These activities include ratifying the *CROPD* and acceding to the Optional Protocol to the *CROPD*; acceding to the Optional Protocol to the *CEDAW* and signing the Optional Protocol to the *CAT*.

³⁴ See, eg, McClelland, 'Human Rights under a Rudd Labor Government — What will be different?' above n 25; Alexander Downer, Daryl Williams and Philip Ruddock 'Improving the Effectiveness of United Nations Committees' (Media Release, 29 August 2000) <http://www.foreignminister.gov.au/releases/2000/fa097_2000.html>; Alexander Downer and Daryl Williams, 'Progress Made to Reform UN Treaty Bodies' (Media Release, 9 March 2006) with attachment, 'Reform of the United Nations Human Rights Treaty Body System: Australian Initiatives' <http://www.foreignminister.gov.au/releases/2006/joint_ruddock_un_treaty_bodies_090306.html>.

³⁵ See Robert McClelland, 'Passage of Legislation to Prohibit Torture and the Death Penalty' (Media Release, 11 March 2010) <http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_FirstQuarter_11March2010-PassageofLegislationtoProhibitTortureandtheDeathPenalty.html>.

in relation to the art 19 State Party reporting process under the *Convention*.³⁶ In turn, the domestic criminalisation of torture has prompted the Committee Against Torture to seek further specific information on the adequacy of the definition and criminalisation of torture and application of the *Convention* within Australia and extraterritorially.³⁷

An important engagement with United Nations human rights institutions was the Universal Periodic Review of Australia before the Human Rights Council in the first months of 2011. Australia’s participation in this Universal Periodic Review was noticeable for the particular commitments and undertakings made during the review, both in the opening statement³⁸ and in the closing remarks.³⁹ The content of Australia’s report⁴⁰ for Universal Periodic Review included commentary upon

Introducing a specific Commonwealth offence of torture will fulfil Australia’s obligations under the United Nations Convention Against Torture to ban all acts of torture, wherever they occur.

³⁶ See Committee against Torture, *Concluding Observations: Australia*, above n 26, 2 [8]–[9]:

The State party should ensure that torture is adequately defined and specifically criminalized both at the Federal and States/Territories levels, in accordance with article 1 of the Convention. ... The State party should fully incorporate the Convention into domestic law, including by speeding up the process to enact a specific offence of torture at the Federal level.

³⁷ Committee against Torture, *List of Issues*, above n 27, 1 [1].

³⁸ These new commitments were the establishment of a full time Race Discrimination Commissioner in the Australian Human Rights Commission; the tabling in Parliament of concluding observations made by UN treaty bodies to Australia, as well as recommendations made to Australia in the UPR; establishing a systematic process for the regular review of Australia’s reservations to international human rights treaties; and providing a contribution of \$2.35 million to the UN Office of High Commissioner for Human Rights in 2011 to help promote and protect human rights, particularly in the Asia Pacific region: Kate Lundy, ‘Opening and Closing Remarks at the United Nations Human Rights Council for Universal Periodic Review 28 January 2011’ (Speech delivered to the UN Human Rights Council UPR Review Panel, Geneva, 28 January 2011) <http://pandora.nla.gov.au/pan/21248/20110723-0001/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2011_FirstQuarter_28January2011-OpeningandclosingremarksattheUnitedNationsHumanRightsCouncilfortheUniversalPeriodicReview.html>.

³⁹ The further commitments made were an intention ‘to consult extensively with the Australian Human Rights Commission and non-government organisations, reflecting on the UPR process and considering how recommendations can best be addressed’; ‘to establish a publicly accessible, online database of recommendations from the UN human rights system, including recommendations made by UN human rights treaty bodies to Australia as well as recommendations made to Australia in the UPR’; and ‘the Australian Government will use the recommendations made during UPR and accepted by Australia to inform the development of Australia’s new National Human Rights Act Plan’: Lundy, above n 38.

⁴⁰ Human Rights Council, Working Group on Universal Periodic Review, 10th sess, *National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1 — Australia*, UN Doc A/HRC/ WG.6/10/AUS/1 (5 November 2010).

Australian government action in relation to the enactment of the torture offences.⁴¹ The inclusion of this information in the Australian report under the discussion of '[r]ight to life, liberty and security of the person,'⁴² prefacing various other measures outlining the development of civil and political rights, gave prominence to the criminalisation of torture in Australia's first Universal Periodic Review report to the Human Rights Council. Domestic compliance of Australia's laws with its international obligations under the *Convention* was also raised in other documentation associated with Universal Periodic Review, but without specific reference to the domestic criminalisation of torture.⁴³

In relation to further engagement with United Nations institutions, the most significant contemporary factor is Australia's bid for a non permanent elected seat on the United Nations Security Council for 2013–14. Within this bid, emphasis has been made of the human rights related aspects that Australian elected membership of the Security Council would provide,⁴⁴ as well as the constructive role that Australian membership would occasion.⁴⁵ Consequently, the domestic criminalisation of torture in response to *Convention* obligations, and any positive Convention Against Torture Committee Concluding Observations, are amongst many human rights developments that bolster credibility in the Australian bid for a non permanent Security Council seat.

C *Australia and the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

A further important contextual matter relating to the domestic criminalisation of torture is the related development of Australia's signature to⁴⁶ and prospective

⁴¹ Ibid [101]:

In addition, the *Criminal Code Act 1995* was amended to include a specific torture offence at the Commonwealth level. This is intended to better fulfil Australia's obligations under the CAT to ban all acts of torture, wherever they occur.

⁴² Ibid.

⁴³ See Human Rights Council Working Group on Universal Periodic Review, above n 28, [51] item 12.

⁴⁴ Rudd, 'Australia's Engagement in Improving Global Human Rights', above n 32; Kevin Rudd, 'Australia's Foreign Policy Priorities and Our Candidature for the UN Security Council' (Speech delivered at the National Press Club Canberra, 1 June 2011) <http://www.foreignminister.gov.au/speeches/2011/kr_sp_110601.html>; Stephen Smith, 'A Modern Australia For a New Era' (Speech delivered at the Australian Strategic Policy Institute National Security Dinner, Sydney, 9 April 2008) <http://www.foreignminister.gov.au/speeches/2008/080309_nsd.html>.

⁴⁵ Smith, 'A Modern Australia for a New Era', above n 44; Rudd, 'Australia's Foreign Policy Priorities and Our Candidature for the UN Security Council', above n 44; Rudd, 'Australia's Engagement in Improving Global Human Rights', above n 32.

⁴⁶ See Robert McClelland and Stephen Smith, 'Australia Takes Action Against Torture' (Media Release, 22 May 2009) <<http://www.foreignminister.gov.au/releases/2009/joint-torture-090522.html>>; Robert McClelland, 'Human Rights: A Moral Compass' (Speech delivered to The Lowy Institute For International Policy, Sydney, 22 May 2009) <<http://pandora.nla.gov.au/pan/21248/20091120-0012/www>>.

ratification of the *Optional Protocol*.⁴⁷ The *Optional Protocol* establishes a Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.⁴⁸ It also ‘obliges parties to allow periodic international inspections of its places of detention, and to establish formal mechanisms to enable regular examination of the treatment of persons in places of detention’.⁴⁹ States are also required under art 17 of the *Optional Protocol* to establish National Preventive mechanisms, as ‘independent national bodies for the prevention of torture and ill-treatment at the domestic level’.⁵⁰ Obligations exist under *Optional Protocol* for states parties to grant to National Preventive mechanisms minimum powers⁵¹ and access rights.⁵² The Commonwealth government is presently engaged in consultations and negotiations with the states

attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_SecondQuarter_22May2009-HumanRights-AMoralCompass.html>; Robert McClelland and Stephen Smith, ‘Reaffirming Our Commitment to International Human Rights Obligations’ (Media Release, 21 April 2010) <http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_21April2010-ReaffirmingOurCommitmenttoInternationalHumanRightsObligations.html>; *Australia UPR National Report*, above n 40, [39]: ‘Australia signed the Optional Protocol to the CAT in 2009 and is proceeding towards ratification’. See also *Concluding Observations: Australia*, above n 26, [6], where the CAT Committee ‘notes with appreciation the State party’s commitment to become a party to the Optional Protocol to the Convention’.

⁴⁷ *Optional Protocol to CAT*.

⁴⁸ See *Optional Protocol to CAT*, pt II. The subcommittee has an operational function of visiting all places of detention in States Parties, and an advisory function which consists in providing assistance and advice to both States Parties and National Preventive Mechanisms: Office of the High Commissioner for Human Rights Information Document ‘Optional Protocol to the Convention Against Torture (OPCAT) Subcommittee on the Prevention of Torture’ <<http://www2.ohchr.org/english/bodies/cat/opcat/index.htm>>.

⁴⁹ McClelland, ‘Human Rights: A Moral Compass’, above n 46.

⁵⁰ Office of the High Commissioner for Human Rights Information Document, above n 48.

⁵¹ Article 19 of the *OPCAT* states:

The National preventive mechanisms shall be granted at a minimum the power

- (a) to regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;
- (b) to make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;
- (c) to submit proposals and observations concerning existing or draft legislation.

⁵² Article 20 of the *OPCAT* states:

In order to enable the national preventive mechanisms to fulfil their mandate, the States Parties to the present Protocol undertake to grant them

and territories for the establishment of National Preventive mechanisms,⁵³ and ‘is committed to ratifying the *Optional Protocol* as a matter of priority’.⁵⁴ A number of countries participating in the Universal Periodic Review in 2011 for Australia recommended early ratification by Australia of the *Optional Protocol*.⁵⁵

D *The Influence and Impact of the Emergence of Torture in the War on Terrorism*

A further influence over the domestic criminalisation of torture has been the international prominence of the practice of torture in the ‘war on terrorism’, following the terrorist attacks on the United States in September 2001. Evidence is found in the statements of the Commonwealth Attorney General about the absolute prohibition on torture in international law⁵⁶ and the practice of torture in response to terrorism⁵⁷ as informing both the decision to enact a specific domestic offence of torture, and as informing and influencing the government’s actions to sign the *Optional Protocol*.⁵⁸

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- (a) access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;
 - (b) access to all information referring to the treatment of those persons as well as their conditions of detention
 - (c) access to all places of detention and their installations and facilities
 - (d) the opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information
 - (e) the liberty to choose the places they want to visit and the persons they want to interview; and
 - (f) the right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.

⁵³ McClelland, ‘Human Rights: A Moral Compass’, above n 46.

⁵⁴ Human Rights Council, *Report of the Working Group on the Universal Periodic Review Australia*, UN Doc A/HRC/17/10 (24 March 2011) [31]. See also Craig Emerson, Acting Minister for Foreign Affairs and Nicola Roxon, ‘Gillard Government Moves to Ratify *OPCAT*’ (Media Release, 28 February 2012) <http://foreignminister.gov.au/releases/2012/kr_mr_120228.html>.

⁵⁵ Human Rights Council, *Australia UPR National Report 2011*, above n 54, [86.1]–[86.6]. These states include Denmark, New Zealand and Mexico.

⁵⁶ McClelland, ‘Human Rights: A Moral Compass’, above n 46, ‘Convention Against Torture’.

⁵⁷ McClelland, ‘Human Rights: A Moral Compass’, above n 46:

Not least, the international community has faced the challenges of combating a resurgent threat of terrorism since the attacks of 11 September 2001 ... The prohibition of torture must remain a constant point on the moral compass that guides any civilized nation state. On this basis, Australia’s commitment to the prohibition of torture must remain clear, even as we face new and emerging challenges. Torture compromises a nation’s moral leadership and this jeopardizes a nation’s capacity to combat terrorism and counter-terrorism ... It destroys exactly what countries are claiming to defend — the dignity and freedom of human beings.

⁵⁸ McClelland, ‘Human Rights: A Moral Compass’, above n 46, ‘Optional Protocol to the Convention Against Torture’; McClelland and Smith ‘Australia Takes Action

Consequently, the creation of the div 274 *Criminal Code* (Cth) torture offences emerges particularly against the background of the infliction of torture and cruel, inhuman and degrading treatment of detainees at Abu Ghraib and Guantanamo Bay,⁵⁹ as well as the United States rendition of detainees to other states in order to gain terrorism intelligence.⁶⁰ The treatment afforded in United States custody to Australian nationals David Hicks and Mamdouh Habib provides examples of the use of such practices.⁶¹ These examples and practices bear no lineal link to the introduction of the Commonwealth legislation.⁶² However, statements made by the Commonwealth Attorney General about the absolute prohibition on torture in international law⁶³ and the practice of torture in response to terrorism⁶⁴ clearly inform the decision to enact a specific domestic offence of torture and further influenced the government’s actions to sign the *Optional Protocol*.⁶⁵ The emergence of torture in the war on terror is an important background influence not only upon Australian legislators but also on the functions of the UN Committee Against Torture⁶⁶ in its activities and deliberations.

Against Torture’, above n 46.

⁵⁹ See Philippe Sands, *Lawless World America and the Making and Breaking of Global Rules* (Allen Lane, 2005) ch 9; Michael Ratner and Ellen Ray, *Guantanamo What the World Should Know* (Scribe Publications, 2004); Seymour Hersch, *Chain of Command: The Road From 9/11 to Abu Ghraib* (Allen Lane, 2004); Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005); Philippe Sands, *Torture Team: Deception, Cruelty and Compromise of Law* (Palgrave Macmillan, 2008).

⁶⁰ See Stephen Grey, *Ghost Plane the Untold Story of the CIA’s Torture Programme* (Scribe Publications, 2007); John Parry ‘The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees’ (2005) 6 *Melbourne Journal of International Law* 516.

⁶¹ See Greg Carne ‘Neither Principled nor Pragmatic? International Law, International Terrorism and the Howard Government’ (2008) 27 *Australian Yearbook of International Law* 11, 24–31.

⁶² Indeed, the type of abuses committed by United States personnel, if committed by Australians, would have been caught by the *Crimes (Torture) Act 1988* (Cth). Reference to such examples is made in the course of parliamentary debate: see Commonwealth, *Parliamentary Debates*, House of Representatives, 22 February 2010, 36 (Ms Vamvakinou), 40 (Dr Kelly).

⁶³ See McClelland, ‘Human Rights: A Moral Compass’, above n 46, ‘Convention Against Torture’.

⁶⁴ Ibid ‘Changing Environment’:

Not least, the international community has faced the challenges of combating a resurgent threat of terrorism since the attacks of 11 September 2001 ... The prohibition of torture must remain a constant point on the moral compass that guides any civilized nation state. On this basis, Australia’s commitment to the prohibition of torture must remain clear, even as we face new and emerging challenges. Torture compromises a nation’s moral leadership and this jeopardizes a nation’s capacity to combat terrorism and counter-terrorism ... It destroys exactly what countries are claiming to defend — the dignity and freedom of human beings.

⁶⁵ Ibid ‘Optional Protocol to the Convention Against Torture’; McClelland and Smith, ‘Australia Takes Action Against Torture’, above n 46.

⁶⁶ For example, as reflected in the drafting of *General Comment 2 on Implementation of article 2 by States Parties of the Convention Against Torture and Other Cruel,*

Of greatest notoriety in the United States legal framework purporting to authorise the use of ‘enhanced interrogation techniques’⁶⁷ was the memorandum of 1 August 2002,⁶⁸ approved by Jay S Bybee, Assistant Attorney General, who was later appointed to the US Court of Appeals for the 9th Circuit. The most distinctive characteristic of the Bybee Memorandum of 1 August 2002 is its overarching creative license of justifying as permissible interrogation techniques under United States law, by strictly confining the legal definition of torture.⁶⁹ The memorandum identifies the requirement of a high threshold of suffering under that definition of torture⁷⁰ in order to satisfy the requirements of the United States Code offence:⁷¹

The *Convention*,⁷² by using the words ‘severe pain or suffering’ in the art 1 definition, is considered by Bybee as ‘reinforcing our reading of Section 2340 that torture must be an extreme act’.⁷³ Likewise, the distinction in the *Convention*

Inhuman Or Degrading Treatment Or Punishment (UN Doc CAT/C/GC/2/CRP.1/Rev.4) (24 January 2008); and that on 22 November 2001, the Committee adopted a statement in connection with the events of 11 September which was sent to each State Party to the Convention (UN Doc A/57/44, paras 17–18).

⁶⁷ The term used by United States authorities to describe interrogation practices which inevitably called into question their compliance with the prohibitions on torture and on cruel, inhuman or degrading treatment or punishment.

⁶⁸ Memorandum from Jay S Bybee to Alberto R Gonzales (Counsel to the President), 1 August 2002 (*Standards of Conduct for Interrogation under 18 USC §§ 2340–2340A*) (*Bybee Memorandum of 1 August 2002*) in Greenberg and Dratel, above n 59, 172. For analysis of the *Bybee Memorandum of 1 August 2002*, see Jeremy Waldron, ‘Torture and Positive Law: Jurisprudence for the White House’ (2005) 105 *Columbia Law Review* 1681. Bybee also provided other important memoranda providing a broader framework for the detention, transfer and interrogation of persons in the war on terror: see Memorandum from Jay S Bybee to Alberto R Gonzales (Counsel to the President) and William J Haynes II (General Counsel of the Department of Defense), 22 January 2002 (*Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees*) <<http://www.torturingdemocracy.org/documents/20020122.pdf>> (regarding application of the Geneva Conventions in Afghanistan to members of al Qaeda and the Taliban militia); Memorandum from Jay S Bybee to William J Haynes II (General Counsel, Department of Defense), 13 March 2002 (*Re: The President’s power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations*) <<http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20020313.pdf>>.

⁶⁹ As Waldron observes, ‘[t]he fifty pages of the Bybee memorandum give what some have described as the most lenient interpretation conceivable to the Convention and other antitorture provisions’: Waldron, above n 68, 1704.

⁷⁰ Physically causing organ failure, impairment of bodily functions or death, or causing significant psychological harm of significant duration: *Bybee Memorandum of 1 August 2002*, above n 68.

⁷¹ 18 USC § 2340 (1994) makes it a criminal offence for any person outside the United States to commit or attempt to commit torture.

⁷² Bybee, above n 68, 184:

Because Congress enacted the criminal prohibition against torture to implement CAT, we also examine the treaty’s text and history to develop a fuller understanding of the context of Sections 2340–2340A.

⁷³ *Ibid.*

between torture and other acts of cruel, inhuman and degrading treatment or punishment⁷⁴ is leveraged in the Bybee memorandum to support the necessity of an exceptional conduct threshold to constitute torture.⁷⁵

Consistent with this emphasis given to the distinction between torture and cruel, inhuman and degrading treatment or punishment, the memorandum then claims that both the US Executive and Congressional branches acted on the basis that ‘torture included only the most extreme forms of physical or mental harm’.⁷⁶ The Bybee memorandum also restrictively cites the Reagan administration understanding that the art 16 term ‘cruel, inhuman or degrading treatment’ means ‘the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.’⁷⁷ This has the effect of restricting the reach of art 16.

The Bybee memorandum consistently and tendentiously confines the legal meaning of torture to extreme acts, differentiating cruel, inhuman and degrading treatment or punishment as being at the opposite end of the spectrum, thus not forming any binding international obligation and being merely consistent with similar words in the United States *Constitution*. Waldron describes this framework as permitting interrogators to

⁷⁴ Article 16 of the *CAT* establishes a states party obligation to ‘prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1’.

⁷⁵ Bybee manipulates this distinction to claim that the extreme circumstance of torture is ‘at the farthest end of impermissible actions’ and that states are only obliged to prevent, but not criminalize, lesser acts, leaving ‘those acts without the stigma of criminal penalties’: Bybee, above n 68, 185.

⁷⁶ *Ibid* 187. Upon ratification of the Convention, the US Senate’s advice and consent was made subject to the understanding

(1)(a) That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict *severe* physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm. Bybee states that this understanding’s use of ‘severe’, made at the time of the first Bush administration, supports the view that there is no substantive difference in this understanding with the understanding proposed by the Reagan administration, that the pain be ‘excruciating and agonizing’: at 188.

⁷⁷ *Ibid* 187. Upon actual ratification of CAT, the United States entered the reservation That the United States considers itself bound by the obligation under article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment’ only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.

A similar reservation was entered by the United States upon its ratification of the *ICCPR*, in relation to the non derogable obligation of art 7 of the *ICCPR*: ‘[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. United States Reservation 3 to the *ICCPR* states:

(3) That the United States considers itself bound by article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States.

[w]ork somewhere along the continuum of the deliberate infliction of pain, and the question is: Where is the bright line along the continuum where the specific prohibition on torture kicks in? If we cannot answer this, Bybee fears, our interrogators may be chilled from any sort of deliberate infliction of pain on detainees.⁷⁸

Waldron identifies Bybee⁷⁹ as ultimately settling upon the extreme, severe level of physical or mental pain, as identified in the discussion above. In establishing the level of physical or mental pain and suffering, Waldron criticises Bybee's analysis as inherently problematic,⁸⁰ distorting the application of the pain threshold in the comparisons used.⁸¹ The enabling character of the Bybee memorandum's interpretation of the interaction of *Convention* obligations with the United States Code offence, to legally support the enhanced interrogation techniques of the Bush administration, is succinctly summarised towards the end of the opinion and in its conclusion⁸²

Shortly after taking office, the Obama administration issued Executive Order 13491 Ensuring Lawful Interrogations,⁸³ which followed a 2009 Department of Justice memorandum⁸⁴ notifying the withdrawal or suspension of a number

⁷⁸ Waldron, above n 68, 1705.

⁷⁹ *Ibid* 1705–6.

⁸⁰ The severity and extremity of pain as identified by Bybee as constituting torture is arrived at by drawing upon the words of a medical administration statute — something of entirely different purposes (namely defining an emergency medical condition for the purpose of providing medical attention in the reasonable expectation that the absence of immediate medical attention that level of pain and its consequences would be produced) and context to a torture offence statute: *ibid* 1707.

⁸¹ 'To sum up: Bybee takes a definition of 'emergency condition' (in which severe pain happens to be mentioned), reverses the causal relationship required between the emergency condition and organ failure, and concludes — on a matter as important as the proper definition of torture — that the law does not prohibit anything as torture unless it causes the same sort of pain as organ failure': *ibid* 1708.

⁸² Bybee, above n 68, 191. The Conclusion to the Memorandum reiterates the earlier claims about torture being at the extreme end of the spectrum, involving severe pain and suffering — points said to be corroborated by the negotiating and ratification history — and then adds the facilitative findings that under

the circumstances of the current war against al Qaeda and its allies, application of Section 2340A to interrogations undertaken pursuant to the President's Commander in Chief powers may be unconstitutional. Finally, even if an interrogation method might violate Section 2340A, necessity or self defense could provide justifications that would eliminate any criminal liability: at 214.

⁸³ Executive Order 13491 of 22 January 2009. Section 1 of the Order stated that

All executive directives, orders and regulations inconsistent with this order, including but not limited to those issued to or by the Central Intelligence Agency (CIA) from September 11, 2001 to January 30 2009, concerning detention or the interrogation of detained individuals, are revoked to the extent of their inconsistency with this order.

⁸⁴ Memorandum for the Files from Stephen G Bradbury (Principal Deputy Assistant Attorney-General), 15 January 2009 (*Status of Certain OLC Opinions Issued in*

of legal opinions issued after 9/11.⁸⁵ Amongst these legal opinions was the Bybee Memorandum of 1 August 2002, which was also recorded as having been previously withdrawn,⁸⁶ as were previous disagreements with specific assertions in the Bybee memorandum of 1 August 2002.⁸⁷

E *Australian Support for Legalising Torture in the War on Terror*

Significantly, the issue of torture in the contemporary terrorism law context also emerged in Australian public debate through two Deakin University law academics and a former head of the National Crime authority advocating the legalisation of torture as a response to terrorism.⁸⁸ Whilst the legislative debates about Australian

the Aftermath of the Terrorist Attacks of September 11, 2001 <<http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20090115.pdf>>.

⁸⁵ ‘We nevertheless believe it appropriate and necessary to confirm that the following propositions contained in the opinions identified below do not currently reflect, and have not for some years reflected, the views of OLC. This Office has not relied upon the propositions addressed herein in providing legal advice since 2003, and on several occasions we have already acknowledged the doubtful nature of these propositions’: *ibid*.

⁸⁶ ‘OLC has already withdrawn ... the 8/1/02 Interrogation Opinion’. See Memorandum to the Deputy Attorney General from Daniel B Levin (Acting Assistant Attorney General, Office of Legal Counsel), 30 December 2004 (*Re: Legal Standards Applicable under 18 USC §§ 2340–2340A*) <<http://www.justice.gov/olc/18usc23402340a2.htm>>.

⁸⁷ Namely ‘The August 1, 2002, memorandum reasoned that “any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander in Chief authority in the President.” I disagree with that view’: *Responses of Steven G Bradbury, Nominee to be Assistant Attorney General for the Office of Legal Counsel, to Questions for the Record from Senator Edward M Kennedy* (24 October 2005) cited in Bradbury, *Re: Status of Certain OLC Opinions Issued in the aftermath of the Terrorist Attacks of September 11, 2001*, above n 84, 3. *Responses of Steven G Bradbury, nominee to be Assistant Attorney General for the Office of Legal Counsel, to Questions for the Record from Senator Richard J Durbin* (24 October 2005) cited in Bradbury, *Re: Status of Certain OLC Opinions Issued in the aftermath of the Terrorist Attacks of September 11, 2001*, above n 84, 3–4:

The federal prohibition on torture ... is constitutional, and I believe it does apply as a general matter to the subject of detention and interrogation of detainees conducted pursuant to the President’s Commander in Chief authority. The statement to the contrary from the August 1, 2002 memorandum ... has been withdrawn and superseded, along with the entirety of the memorandum, and in any event I do not find the statement persuasive.

⁸⁸ Mirko Bagaric and Julie Clarke, ‘Not Enough Torture in the World? The Circumstances in Which Torture Is Morally Justifiable’ (2005) 39 *University of San Francisco Law Review* 581; Mirko Bagaric, ‘A Case for Torture’, *The Age* (Melbourne), 17 May 2005, 13; Mirko Bagaric and Julie Clarke, ‘Tortured Responses: Physically Persuading Suspects Is Morally Preferable to Allowing the Innocent to Be Murdered’ (2006) 40 *University of San Francisco Law Review* 703. Mirko Bagaric and Julie Clarke, *Torture: When the Unthinkable is Morally Permissible* (State University of New York Press, 2007). See also ‘Torture

domestic criminalisation of torture omit reference to these opinions, strong opposition emerged in the then Federal Opposition Leader's rebuke of a Liberal backbencher who expressed similar views suggesting the acceptability of torture in exceptional circumstances.⁸⁹

III CRIMINALISING TORTURE IN AUSTRALIAN DOMESTIC LAW

A *The Relationship of the Act to Earlier Commonwealth Torture Offences*

The Commonwealth's earlier offences relating to torture⁹⁰ were significant for their narrow application and specificity of circumstances. That restricted legislative approach was reflected in the former Australian government position that 'it was clear from consultations between state and federal governments that Australian laws were already consistent with obligations under the Convention'.⁹¹ This statement referred to the belief that the general criminal laws of the states, territories and the Commonwealth fulfilled Australia's obligations under the *Convention*.

A plausible argument existed that the existing legislative provisions failed to fully implement the international human rights obligations of arts 2 and 4 of the *Convention*. Indeed, that argument was supported by the Concluding Observations of the CAT Committee on Australia's third state party report,⁹² which recommended more extensive legislative prohibitions against torture and against cruel, inhuman and degrading treatment.

The narrow scope of the then existing torture offences was commented upon in the Parliamentary debates leading to the passage of the present legislation.⁹³

Acceptable, Says Former NCA Chief', *Sydney Morning Herald* (Sydney), 22 May 2005, describing Peter Faris QC's support of torture in some circumstances.

⁸⁹ The backbencher was Michael Johnson MHR who then partly retracted earlier comments: see Max Blenkin and Stephen Johnson, 'Govt Urges Turnbull to Reject Torture', *Sydney Morning Herald* (Place of Publication), 25 August 2009. See also academic opposition to the Bagaric and Clarke proposals: Rodney Allen, 'Torture Criminality and the War On Terror' (2005) 30 *Alternative Law Journal* 214, 216–17; Desmond Manderson, 'Another Modest Proposal' (2005) 10 *Deakin Law Review* 640.

⁹⁰ *Crimes (Torture) Act 1988* (Cth); *Criminal Code* (Cth) ss 268.13, 268.25, 268.73.

⁹¹ Committee Against Torture, *Consideration of Reports submitted by States Parties Under Article 19 of the Convention: Second Periodic Report of Australia* (UN Doc CAT/C/25/Add.11) (19 October 1999) [8] (heading B). A list of criminal offences and civil wrongs in all Australian jurisdictions for acts constituting torture and other cruel, inhuman or degrading treatment or punishment is contained in Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Third Periodic Report of Australia*, UN Doc CAT/C/67/Add.7 (7 April 2005) appendix 1.

⁹² *Concluding Observations: Australia*, above n 26, [8] (on art 1 obligations), [9] (on art 2 obligations), [18] (on art 4 obligations).

⁹³ Commonwealth, *Parliamentary Debates*, House of Representatives, 19 November 2009, 4 (Robert McClelland); see also an identical statement in Commonwealth,

The *Crimes (Torture) Act 1988* was repealed by pt 3 of the *Act*⁹⁴ as the extended geographical reach of Category D jurisdiction,⁹⁵ applying to the torture offence in the Act, rendered its limited geographical coverage redundant. Amendments to the *Criminal Code* in 2002⁹⁶ implementing the *Rome Statute of the International Criminal Court*⁹⁷ had earlier created Commonwealth offences of torture applicable as a crime against humanity⁹⁸ and in two situations of armed conflict- international

Parliamentary Debates, Senate, 24 February 2010, 82 (Penny Wong). The *Crimes (Torture) Act 1988* (Cth) offences were restricted to acts of torture committed outside Australia by Australian citizens or persons subsequently within Australia. The *Criminal Code 1995* (Cth) criminalized torture committed as a crime against humanity or during an armed conflict.

⁹⁴ See *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) pt 3. Section 6 of the *Crimes (Torture) Act 1988* (Cth) formed the basis of allegations by Mamdouh Habib that in aiding, abetting, counseling and procuring acts of torture committed by Pakistani, Egyptian and United States personnel outside Australia, officers of the Commonwealth in turn committed the torts of misfeasance in public office and intentional but indirect infliction of harm: *Habib v Commonwealth* (2010) 113 ALD 469.

⁹⁵ Discussed under K *Extending The Geographical Reach and Ancillary Offence Application of The Crime of Torture* below.

⁹⁶ See *International Criminal Court (Consequential Amendments) Act 2002* (Cth). Schedule 3 of this Act repealed pt II of the *Geneva Conventions Act 1957* (Cth). The predecessor provisions to the *Criminal Code* provisions — namely s 7 of the *Geneva Conventions Act 1957* (Cth) — were also used to argue that acts of torture had been committed by or at the behest of agents of foreign states (Pakistani, Egyptian and United States personnel outside of Australia), forming the basis that in aiding, abetting, counseling and procuring these acts, officers of the Commonwealth in turn committed the torts of misfeasance in public office and intentional but indirect infliction of harm: *Habib v Commonwealth* (2010) 113 ALD 469.

⁹⁷ The *Rome Statute of the International Criminal Court*, under art 5, limits jurisdiction of the Court to four most serious crimes: genocide, crimes against humanity, war crimes and the crime of aggression. Article 7, para 1(f) of the *Rome Statute of the International Criminal Court* includes torture as a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

⁹⁸ *Criminal Code* (Cth) s 268.13. Division 268 is prefaced with the heading ‘Genocide, crimes against humanity, war crimes and crimes against the administration of justice of the International Criminal Court’, and sub-div C of div 268 is prefaced with the heading ‘Subdivision C — Crimes against humanity’ and directly implements, as separate offences, the contents of art 7, para 1(a)–(k) of the *Rome Statute for the International Criminal Court* as ss 268.8–268.23 of the *Criminal Code* (Cth), including the torture offence under s 268.13.

armed conflict⁹⁹ and non international armed conflict.¹⁰⁰ These torture offences derived from the international humanitarian law *Geneva Convention* foundations.¹⁰¹

This origin is distinct from the international human rights foundation of the *Convention* for the *Act*,¹⁰² and its implementation in div 274 of the *Criminal Code* (Cth). The earlier, and more specific offences of torture of div 268 of the *Criminal Code* (Cth), with a heavier penalty of 25 years imprisonment, now exist alongside the new torture offences of div 274 of the *Criminal Code* (Cth) introduced by the *Act*, implementing the *Convention* which provide for a penalty of 20 years imprisonment. The criminalisation of torture is expanded in the new legislation, but in implementing Australia's international obligations under the *Convention* a fairly conservative drafting approach is adopted in extending the range of *Criminal Code* (Cth) torture offences beyond the existing offences with their international humanitarian law foundations.

⁹⁹ *Criminal Code* (Cth) s 268.25. Section 268.25, the war crime–torture offence, falls under the heading of sub-div D of div 268 — War crimes that are grave breaches of the Geneva Conventions and of Protocol 1 to the Geneva Conventions (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) 8 June 1977. Torture is established as a grave breach of the Geneva Conventions: see art 50 (Convention I), art 51 (Convention II), art 130 (Convention III), art 147 (Convention IV).

¹⁰⁰ *Criminal Code* (Cth) s 268.73. Section 268.73, the war crime–torture offence, falls under the heading of sub-div F of div 268 — War crimes that are serious violations of the common Art 3 of the Geneva Conventions and are committed in the course of an armed conflict that is not an international armed conflict. Common Art 3 of Geneva Conventions (I), (II), (III) and (IV), states, *inter alia*, that ‘the following acts are and shall remain prohibited at any time and in any place whatsoever ... (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture’.

¹⁰¹ This origin is evident in the Subdivision headings of div 268, as mentioned under footnotes 101 and 102 above, and in the distinctions made in the respective s 268.25 and s 268.73 offences between international armed conflict and non international armed conflict. Geneva Conventions I, II, III and IV (see Common Art 2) and Protocol I of 1977 apply to situations of international armed conflict; Common Art 3 of Geneva Conventions I, II, III and IV and Protocol II of 1977 apply to situations of non international armed conflict.

¹⁰² In the sense that the *CAT* falls within the taxonomy of the United Nations treaty based human rights system, and the associated treaty based bodies, associated with the other human rights treaties — the *ICCPR*, the *ICECSR*, the *CERD*, the *CEDAW*, the *CROC*, the *CROPD*, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 September 1990, 2220 UNTS 3 (entered into force 1 July 2003) and the *International Convention for the Protection of All Persons from Enforced Disappearance* opened for signature 20 September 2006, Doc A/61/488 CN 737.2008 (entry into force 23 December 2010).

B Interpreting and Articulating the Obligations Under the Convention and the General Comment of the Committee Against Torture

Australia is a party to the United Nations *Convention*¹⁰³ — for present purposes, the principal legal obligations arise under art 2¹⁰⁴ and art 4¹⁰⁵ of the *Convention*, drawing upon the definition of torture in art 1 of the *Convention*.¹⁰⁶

Several commonly understood preventative obligations exist under art 2 of the *Convention*. The effective prevention of torture extends beyond a formal legal prohibition.¹⁰⁷ Prevention must extend to territory under the jurisdiction of the State, including its territorial sea, ‘ships flying its flag, aircraft registered in the State concerned as well as platforms and other installations on its continental shelf’.¹⁰⁸ The torture prohibition is absolute — that is non derogable¹⁰⁹ — highlighting the seriousness of the activity and the customary international law recognition of torture as a *jus cogens*.

The Committee’s views about the requirements for compliance with art 2 of the Convention have strengthened over time. The Committee’s *General Comment No 2*,¹¹⁰ details basic requirements for domestic legislative¹¹¹ implementation — ‘States parties must make the offence of torture punishable as an offence under its criminal law, in accordance, at a minimum, with the elements of torture as defined in art 1 of the Convention, and the requirements of art 4.’¹¹²

¹⁰³ Above n 6. Australia ratified the *CAT* on 8 August 1989. For a broad overview of the *Convention* at the time of its coming into force, see Maxime Tardu, ‘The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (1987) 56 *Nordic Journal of International Law* 303.

¹⁰⁴ Article 2(1) states that ‘[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction’.

¹⁰⁵ Article 4(1) states that ‘[e]ach State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture’. Article 4(2) states that ‘[e]ach State Party shall make these offences punishable by appropriate penalties which take into account their grave nature’.

¹⁰⁶ Article 1 of the *Convention* is extracted Part III(E) below. The presence of a definition of torture in the *CAT* is to be contrasted with the absence of such a definition in the *ICCPR* and in the *European Convention of Human Rights*.

¹⁰⁷ Herman Burgers and Hans Danelius, *The United Nations Convention against Torture — A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff Publishers, 1988) 123.

¹⁰⁸ *Ibid* 123–4.

¹⁰⁹ *Ibid* 124.

¹¹⁰ *CAT General Comment No 2*, above n 66.

¹¹¹ Article 2(1) of the *CAT* states ‘[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction’ (emphasis added?).

¹¹² *CAT General Comment No 2*, above n 66, [8].

Particular caveats arise in *General Comment 2* about implementation of the preventive legislative measures of art 2 by States Parties — the risk of legislative gaps, falling short of proper implementation of Convention obligations;¹¹³ the seriousness of the nature of torture demanding that prosecution as torture rather than for ill treatment;¹¹⁴ and that a distinct offence of torture should be created in domestic law as a method advancing Convention objectives of prohibition, deterrence and culpability,¹¹⁵ as well as underlining the special gravity of such conduct.¹¹⁶ It is further mentioned that ‘the Committee recognizes that broader domestic definitions also advance the object and purpose of the Convention so long as they contain and are applied in accordance with the standards of the Convention, at a minimum,’¹¹⁷ confirming that Convention arts 1 and 4 provide a non-exhaustive starting point for the domestic criminalisation of torture.

Some of the issues relating to domestic implementation mentioned in *General Comment 2* are further reinforced by the international experience of States parties of art 4, again providing a perspective on the Australian legislative drafting. Particular focus on art 4 relates to the requirement to amend domestic criminal laws,¹¹⁸ the requirement of adoption of the art 1 definition of torture¹¹⁹ and the recommendation of a distinct, separately defined offence of torture.¹²⁰ This last mentioned aspect has been variously responded to, including states parties claims that the obligation is satisfied by existing legislation, that a separately defined offence of torture has been introduced, and that offences of torture have been partly implemented on the basis of externality of application or implementation of relevant obligations under the *Rome Statute for the International Criminal Court* or under the *European Convention on Human Rights*.¹²¹

Other points confirm and reflect how torture should be criminalised. The obligation to criminalise in domestic law all acts of torture must be in accordance with the

¹¹³ ‘Serious discrepancies between the Convention’s definition and that incorporated into domestic law create actual or potential loopholes for impunity ... the Committee calls upon each State party to ensure that all parts of its Government adhere to the definition set forth in the Convention for the purpose of defining the obligations of the State’: *ibid* [9].

¹¹⁴ *Ibid* [10].

¹¹⁵ *Ibid* [11].

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid* [9].

¹¹⁸ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford University Press, 2008) 233.

¹¹⁹ Nigel Rodley and Matt Pollard, ‘Criminalisation of Torture: State Obligations Under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (2006) 2 *European Human Rights Law Review* 1, 4; Nowak and McArthur, above n 118.

¹²⁰ Antonio Marchesi, ‘Implementing the UN Convention Definition of Torture in National Criminal Law (with Reference to the Special Case of Italy)’ (2008) 6 *Journal of International Criminal Justice* 195, 196, 197; Nowak and McArthur, above n 118.

¹²¹ See these points mentioned by Marchesi, above n 120, 198–9.

requirements of art 4 of the *Convention*. Such criminalisation must follow the art 1 definition of torture.¹²² The obligation to domestically criminalise torture extends to the criminalisation of activities of attempt, participation and complicity related to torture, as these matters are circumstances conducive to torture.¹²³ These associations mirror an aspect of the art 1 definition, namely the intentional infliction of severe pain or suffering, whether physical or mental, ‘at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity’.¹²⁴ The serious, non derogable nature of the torture prohibition is reinforced by the obligation to make all of these torture offences punishable by ‘appropriate penalties which take into account their grave nature’,¹²⁵ in turn reflecting ‘similar articles in the *Conventions* regarding hijacking, sabotage against aircraft, attacks on diplomats and the taking of hostages’.¹²⁶

These identified characteristics from *General Comment 2*, international experience of states parties and academic commentary confirm, by contrast, the more restricted and conservative legislative drafting of the Australian government in the criminalisation of torture. Opportunities existed for the Australian government to more substantively fulfil the *Convention* obligation to take effective *legislative* measures to prevent acts of torture in any territory under its jurisdiction — but the present legislation adheres closely to a straightforward textual implementation of the relevant *Convention* provisions, instead of a more extensive domestic definition and application as raised in the General Comment.¹²⁷ The *Act* takes a clinical approach to the implementation of the art 2 and art 4 obligations, with legislative

¹²² Burgers and Danelius, above n 107, 129. This reinforces and particularises the legislative obligation in art 2.

¹²³ Ibid 129–30. The aspects of attempt, complicity and participation in torture, also requiring criminalisation under art 4 of the *Convention Against Torture* are respectively criminalised by the generic provisions of pt 2.4 of the *Criminal Code* —

s 11.1(1) Attempt

A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed;

s 11.2(1) Complicity and common purpose

A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly;

s 11.2 A (1) Joint commission

If:

(a) a person and at least one other party enter into an agreement to commit an offence; and

(b) either

(i) an offence is committed in accordance with the agreement ... or

(ii) an offence is committed in the course of carrying out the agreement ...

the person is taken to have committed the joint offence referred to in whichever of subsection (2) or (3) applies and is punishable accordingly.

¹²⁴ *CAT* art 1.

¹²⁵ *CAT* art 4, para 2.

¹²⁶ Burgers and Danelius, above n 109, 130.

¹²⁷ *CAT General Comment No 2*, above n 66, [9].

drafting closely replicating the textual provisions of the *Convention*. This approach will be discussed under the several more specific headings which follow.

C The Influence of the States Party Reporting Process and the Concluding Observations Under the Convention in the Australian Criminalisation of Torture

The states party reporting process under the *Convention* can be seen as *prompting* minimal legislative reforms *directly in response to* Convention Committee Concluding Observations in relation to Australia. Bearing in mind the formal states party obligations under arts 2 and 4 of the *Convention*, Australia's states party reports to the *Convention* Committee¹²⁸ and its Concluding Observations directly informed both the decision to enact Commonwealth torture offence legislation and the content of that legislation.

Under art 19 of the *Convention*, states parties to the *Convention*, such as Australia are obliged to submit periodic reports to the CAT Committee¹²⁹ on the measures they have taken to give effect to their undertakings under the *Convention*.¹³⁰ These reports are 'considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned'.¹³¹

In Australia's second periodical report to the CAT Committee,¹³² it was submitted that it was not necessary to introduce domestic legislation implementing torture offences.¹³³ In its Concluding Observations on Australia's second periodical report,¹³⁴ the CAT Committee merely recommended that 'The State party ensure

¹²⁸ Subsequently referred to as the CAT Committee.

¹²⁹ The CAT Committee is established under art 17 of the *Convention*.

¹³⁰ Article 19(1) states that

States Parties shall submit to the Committee ... reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken.

¹³¹ *CAT* art 19(3).

¹³² Committee Against Torture, *Second Periodic Report Australia*, above n 91.

¹³³ *Ibid* [8] — this was on the basis that state and federal laws 'were already consistent with obligations under the Convention'. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 19 November 2009, 4 (Robert McClelland); Commonwealth, *Parliamentary Debates*, Senate, 24 February 2010, 82 (Penny Wong):

In previous periodic reports to the UN Committee against Torture, Australia has stated that it meets its obligations under the convention on the basis that acts falling within the convention's definition of torture are offences under state and territory criminal laws. These acts include, for example, the infliction of bodily harm, murder, manslaughter, assault and other offences against the person.

¹³⁴ Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Concluding Observations on Second Periodic Report Australia*, UN Doc A/56/44 (21 November 2000).

that all States and territories are at all times in compliance with its obligations under the Convention’.¹³⁵

In Australia’s third periodical report to the CAT Committee in 2005,¹³⁶ following on from the 1999 claim of state party compliance with the domestic torture prohibition obligations,¹³⁷ it was asserted, in response to earlier Committee recommendations, that criminal offences, civil wrongs and statutory investigation mechanisms ensured compliance with *Convention* obligations.¹³⁸ The CAT Committee is then referred to Part One of Australia’s Second and Third Report for further background information on the implementation and adoption of the *Convention* in Australia.¹³⁹

The Concluding Observations of the Committee against Torture to the Third Periodic Report of Australia¹⁴⁰ are noticeable for their more detailed appraisal and requests for conformity with the *Convention* obligations for Australia to create domestic criminal offences for torture and to protect against torture as part of formalised rights protection.¹⁴¹ The fact that these issues were highlighted by the Committee in 2008 was a primary reason for drafting and introducing the torture offences,¹⁴² aside from the textual obligation contained in the *Convention*¹⁴³ itself under arts 1, 2 and 5.

¹³⁵ Ibid [53(a)].

¹³⁶ Committee Against Torture, *Third Periodic Report of Australia*, above n 91.

¹³⁷ Committee Against Torture, *Second Periodic Report of Australia*, above n 91, [8] (heading B).

¹³⁸ Committee Against Torture, *Third Periodic Report of Australia*, above n 91, [11].

¹³⁹ Ibid [11]–[12] under the heading ‘Implementation of the Convention — Legal status and implementation of the Convention in Australia.’ An extensive Appendix, detailing Offences and Penalties by State, Territory and Commonwealth jurisdictions, encompassing torture type behaviour, was attached to the report.

¹⁴⁰ Committee Against Torture, *Concluding Observations: Australia*, above n 26.

¹⁴¹ Ibid [8] Observation and recommendation: the Committee expressed its concern about the lack of a federal torture offence and gaps in criminalisation in State and Territory laws, [9] Observation and recommendation: the Committee expressed its concern about the lack of a constitutional or legislative federal Bill or Charter of Rights protecting, inter alia, rights contained in the Convention.

¹⁴² See Commonwealth, *Parliamentary Debates*, House of Representatives, 19 November 2009, 4 (Robert McClelland); Commonwealth, *Parliamentary Debates*, House of Representatives, 22 February 2010, 30 (Robert McClelland); Commonwealth, *Parliamentary Debates*, Senate, 24 February 2010, 82 (Penny Wong); Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2010, 1186 (Michael Keenan); Commonwealth, *Parliamentary Debates*, House of Representatives, 22 February 2010, 47 (Slipper).

¹⁴³ See Robert McClelland, ‘Australia Takes Action Against Torture And The Death Penalty’ (Media Release, 19 November 2009) <http://pandora.nla.gov.au/pan/21248/20091120-0012/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_FourthQuarter_19November2009-AustraliaTakesActionAgainstTortureandtheDeathPenalty.html>; ‘Passage of Legislation to Prohibit Torture and the Death Penalty’, above n 35.

What is striking about each of the Australian government responses is that they are reactions to higher standards of *Convention* obligations interpreted by the Committee over time — indicating a reactive and minimal legislative approach, rather than a pro-active or exemplary approach, to ensure conformity with *Convention* obligations. The Australian legislative changes emerged primarily as functional responses to a changed pattern of interpretation of *Convention* obligations by the Committee, which also affected other States parties to the *Convention*.

D *Parallel International Torture Prohibition Obligations for Australia* —
The International Covenant of Civil and Political Rights

The *Convention* acknowledges the existence and operation of other international instruments on torture.¹⁴⁴ This inclusive approach permits other international obligations Australia has relating to the prohibition of torture, as providing an alternative or supplementary foundation for domestic legislation, and inviting wider and more extensive legislation.

Australia is also a party to the *International Covenant of Civil and Political Rights*¹⁴⁵ and the *First Optional Protocol to the ICCPR*,¹⁴⁶ the latter allowing individual communications regarding claimed breaches of *ICCPR* rights to be made to the Human Rights Committee. art 7 of the *ICCPR*, a non-derogable article,¹⁴⁷ states that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. The non-derogable character of art 7 again reflects the seriousness of torture as a breach of international human rights law, and its *jus cogens* status in customary international law.

There are some important definitional characteristics for art 7 of the *ICCPR*. Whilst guidance as to the meaning of torture under art 7 of the *ICCPR* may be obtained from art 1 of the *Convention*,¹⁴⁸ two important distinguishing characteristics exist in art 7 of the *ICCPR*. Its prohibition against torture is not confined to

¹⁴⁴ See *CAT* art 1(2): ‘This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application’ (following on from the definition of torture), art 16(2): ‘The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion’.

¹⁴⁵ Australia ratified the *ICCPR* on 13 August 1980.

¹⁴⁶ Australia acceded to the First Optional Protocol to the *ICCPR* on 25 September 1991.

¹⁴⁷ Article 4(1) of the *ICCPR* permits derogation from *ICCPR* articles in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed from, other than those articles listed in art 4(2). Article 7 of the *ICCPR* is a non-derogable article listed in art 4(2) of the *ICCPR*.

¹⁴⁸ See Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases Materials and Commentary* (Oxford University Press, 2nd ed, 2005) 196.

circumstances of public official or official capacity involvement.¹⁴⁹ Furthermore, cruel, inhuman or degrading treatment or punishment is included within the art 7 prohibition,¹⁵⁰ of particular significance given art 7’s non-derogable status,¹⁵¹ and its protections fall within the instruments contemplated by art 16(2) of the *Convention*.¹⁵²

The formal states parties obligations under art 7 are several. In particular, General Comment 20 on art 7 of the *ICCPR* makes a number of points about domestic legislative arrangements and obligations of states parties.¹⁵³ Further, in its Concluding Observations on the fifth periodic report of Australia under the *ICCPR*,¹⁵⁴ the Committee noted the lack of protection of *Covenant* rights at the

¹⁴⁹ That is, art 7 of the *ICCPR* does not include the art 1 *CAT* requirement that the 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. See Manfred Nowak, *The UN Covenant on Civil and Political Rights CCPR Commentary* (N P Engel, 2nd ed, 2007) 161–2, describing the omission of official capacity as constituting a horizontal effect in the protection against torture.

¹⁵⁰ The omission from the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) of a further offence of engaging in cruel, inhuman and degrading treatment or punishment is discussed under *J Failing To Legislate About Conduct Conducive Towards Torture — Cruel, Inhuman And Degrading Treatment Or Punishment* below. Cruel and inhuman treatment is differentiated from the art 1 *CAT* definition of torture through either a lack of one of the essential elements of torture or a falling short of the requisite severity or intensity of inflicted suffering: see Nowak, above n 149, 162–3. Degrading treatment is associated with the humiliation of the victim, from either the victim’s perspective or the perspective of others: *ibid* 165.

¹⁵¹ The non-derogable articles of the *ICCPR*, including art 7, are found in art 4 of the *ICCPR*.

¹⁵² Article 16(2) of *CAT* states, ‘The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment which relates to extradition or expulsion’.

¹⁵³ Paragraphs 2 and 8 of *ICCPR General Comment 20* highlight the duty to provide legislative and other preventative and punitive measures against prohibited art 7 acts, whether in an official or private capacity, and noting that these obligations are supplemented by the positive humane treatment obligations of art 10 of the *ICCPR*. Article 2 para 2 of the *ICCPR* further states that

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provision of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

¹⁵⁴ Human Rights Committee Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, *Concluding Observations of the Human Rights Committee of Australia Fifth Periodic Report* (UN Doc CCPR/C/AUS/CO/5) (2 April 2009).

Federal level and a lack of comprehensive legislative protection of the *Covenant* across all jurisdictions in the Federation.¹⁵⁵

The precise drafting of the legislation,¹⁵⁶ and the Parliamentary debates surrounding passage of the legislation, confirm that reliance was placed upon implementation of the *Convention* articles rather than art 7 of the *ICCPR*.

Nonetheless, art 7 of the *ICCPR* provides an alternative foundation to support domestic legislation and indeed more broadly drafted legislation than was presently enacted through reliance upon the treaty implementation aspect of the s 51(xxix) external affairs power.

Again, by declining to invoke a more general international obligation in the form of the *ICCPR*, the Government has conservatively criminalised torture by reference to more limited public based circumstances.¹⁵⁷ It also excluded a separate criminalisation of cruel, inhuman and degrading treatment, conduct frequently conducive of and preparatory to torture. The omission in the legislation of an offence of engaging in cruel, inhuman or degrading treatment or punishment strongly indicates a failure to more comprehensively draft the legislation to capture actions of a lesser nature conducive to, or preparatory towards, torture, and for which an adequate treaty basis in both the *ICCPR* and the *Convention* exists for domestic implementation.¹⁵⁸

E *The Nature of the Torture Offences Created in the Criminal Code (Cth)*

As indicated, the div 274 *Criminal Code (Cth)* offence closely implements the articles of the *Convention*, with particular reliance upon the meaning of torture in art 1 of the *Convention*.¹⁵⁹ The definition of torture in art 1 of the *Convention* has been recognised as comprising several characteristics. These include the fact that the concept of torture requires a certain threshold of suffering,¹⁶⁰ that mental as

¹⁵⁵ Ibid para 8. See also ibid para 21, raising issues directly concerning art 7 of the *ICCPR*. The opportunity to domestically implement *ICCPR* articles in Commonwealth law in the form of a Commonwealth statutory charter of rights, following the National Human Rights Consultation Committee report, was rejected by the Federal Government in April 2010: see McClelland, above n 15.

¹⁵⁶ In particular, the use of the categories public official, acting in an official capacity, acting at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity, and for any reason based on discrimination of any kind, derive directly from the language of art 1 of the *Convention*.

¹⁵⁷ Adhering to the art 1 *Convention* criterion that ‘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’.

¹⁵⁸ This aspect is examined in detail in Part III(J) below.

¹⁵⁹ Refer to the various elements of the art 1 definition of torture in the *Convention*.

¹⁶⁰ Described by Joseph, Schultz and Castan, above n 148, 196 as ‘a certain severity in pain and suffering’; by Burgers and Danelius, above n 107, 117 as ‘the infliction of severe pain or suffering’; Nowak, above n 149, 161.

well as physical suffering is included,¹⁶¹ that the act of torture has to be inflicted intentionally,¹⁶² that the torture must be inflicted for a prescribed purpose¹⁶³ and that the infliction of pain and suffering be done by or at the instigation of, or with the consent of, a public official or other person acting in an official capacity.¹⁶⁴

That the *Convention’s* definition of torture is very closely implemented in the two offences respectively created under ss 274.2(1) and (2) of the *Criminal Code* (Cth) is evident from the text of those provisions which incorporate the distinctive definitional elements mentioned immediately above.¹⁶⁵

The close adherence to the language of art 1 of the *Convention* fulfils the basic criminalisation obligations set out in art 4 and elaborated in the *Convention* General Comment 2, including avoiding gaps or omissions — in that sense, the scope of the *Criminal Code* offences is the *minimum Convention* standard presently required and is confirmation of the conservative drafting approach adopted by the Commonwealth.

F Defences

The application of absolute liability to the physical status of the three categories of person¹⁶⁶ who engage in the proscribed conduct in paras 1(c) and 2(c)¹⁶⁷ of section 274 of the *Criminal Code* (Cth), makes incontrovertible that factual status aspect *in the belief of the alleged perpetrator*, by excluding the availability of a mistake of fact defence from that physical element.

Section 6.2 of the *Criminal Code* (Cth) states:

¹⁶¹ Joseph, Schultz and Castan, above n 148, 196; Burgers and Danelius, above n 107, 117.

¹⁶² Joseph, Schultz and Castan, above n 148, 196; Burgers and Danelius, above n 107, 118.

¹⁶³ Joseph, Schultz and Castan above n 148, 197; Burgers and Danelius, above n 107, 119; Nowak, above n 149, 161. The purposes listed in art 1 of *CAT* are illustrative and indicative, but not exhaustive.

¹⁶⁴ Joseph, Schultz and Castan, above n 148, 198; Burgers and Danelius, above n 107, 119; Nowak above n 149, 161; Nigel Rodley, ‘The Definition(s) of Torture in International Law’ (2002) 55 *Current Legal Problems* 467, 484–5; Rodley and Pollard, above n 119, 6.

¹⁶⁵ Refer to the text of the s 274.2 (1) and s 274.2 (2) *Criminal Code* (Cth) torture offences.

¹⁶⁶ Namely, a perpetrator engaging in 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: *Criminal Code* (Cth) ss 274.2(1)(c), (2)(c).

¹⁶⁷ See *Criminal Code* (Cth) s 274.2(3): ‘Absolute liability applies to paras (1)(c) and (2)(c)’.

- (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

In addition, the non-derogable nature of the prohibition against torture¹⁶⁸ is highlighted in arts 2(2) and 2(3) of the *Convention*:

- (2) No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture
- (3) An order from a superior officer or a public authority may not be invoked as a justification of torture

Articles 2(2) and 2(3) of the *Convention* is implemented by sub-ss 274.4(a) and (b) of the *Criminal Code*, which prohibit the availability of necessity¹⁶⁹ and superior orders as defences to the torture offences, and merely allow those matters to be taken into account in determining sentencing.¹⁷⁰

Significantly, the words ‘or any other exceptional circumstance’ have been included in s 274.4(a) of the *Criminal Code*, these words being outside of the precise wording of art 2(2) of the *Convention*. This represents a rare legislative implementation exceeding minimal requirements. The inclusion of necessity and superior orders merely as mitigating circumstances for sentence has been argued as offending the non derogable prohibition against torture, because mitigation only occurs at sentencing, after a finding of guilt, and does not therefore justify the torture inflicted.¹⁷¹

G *Limiting the Range of Purposes for Torture in the New Offences?*

Paragraph (iv) of s 274.2 of the *Criminal Code* (Cth), stating ‘for a purpose related to a purpose mentioned in subparas (i), (ii) or (iii)’,¹⁷² in providing an extension

¹⁶⁸ See Nowak and McArthur, above n 118, 120:

Article 2(2) CAT was primarily meant to stress the non derogable nature of the prohibition against torture ... States parties are not permitted to derogate from their obligation to respect and ensure the absolute prohibition against torture ... Article 2(3) is primarily directed at criminal courts not to accept any defence by the accused based on a superior order (no justification of torture by the judicial branch in individual cases).

¹⁶⁹ Arising from the existence of a state of war, threat of war, internal political instability, public emergency or any other exceptional circumstance: *Criminal Code* (Cth) s 274.4(a).

¹⁷⁰ Article 2 of CAT is considered to reinforce the absolute, non-derogable character of the prohibition of torture: Burgers and Danelius, above n 107, 124.

¹⁷¹ Nowak and McArthur, above n 118, 125.

¹⁷² These purposes being ‘obtaining from the victim or from a third person information or a confession’ (s 274.2 (1)(b)(i)); ‘punishing the victim for an act which the victim

of purposes, reflects the *indicative*, rather than *conclusive*,¹⁷³ listing of torture purposes in art 1 of the *Convention*. The legislative drafting of the Commonwealth offence has not gone further in specifically indicating *other types of purpose*, an opportunity clearly open under the *Convention*.

The question then arises as to the scope of the other types of purpose which were open for inclusion as prohibited purposes in the *Criminal Code* (Cth). Academic commentary,¹⁷⁴ based on an assessment of the 1975 UN Declaration and the *Convention travaux préparatoires*, suggests that the types of purpose are not indeterminate. Instead, the *Convention* phrase ‘such purposes’ only includes those purposes which have common characteristics with the four listed purposes in art 1 of the *Convention*.¹⁷⁵

Within these parameters, it may have been possible to include further general prohibited purposes within the new *Criminal Code* (Cth) offences — for example, to broadly cover situations where severe pain and suffering is inflicted in circumstances connected to the pursuit of state interests and where direct or indirect control is being exercised over the victim. Such purposes would be consistent with a domestic implementation of a sufficiently specific *Convention* obligation. This omission is again reflected in its conservative drafting approach, relying on the words ‘for a purpose related to a purpose mentioned in subparas (i), (ii) or (iii)’¹⁷⁶ rather than broader words reflecting the more general purposes identified in the academic commentary.

The distinguishing characteristic of the three specific purposes for which torture is perpetrated in the s 274.2(1) *Criminal Code* (Cth) torture offence is contrasted with the distinguishing feature of ‘any reason based on discrimination of any kind’ in the s 274.2(2) *Criminal Code* (Cth) torture offence. The latter offence focuses on the activity of torture for any possible reason sourced in a distinguishing characteristic, such as race, colour, sex, language, religion, political or other opinion, national or

or a third person has committed or is suspected of having committed’ (s 274.2(1)(b)(ii)); ‘intimidating or coercing the victim or a third person’ (s 274.2 (1)(b)(iii)).

¹⁷³ Article 1 — ‘the term ‘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’ (emphasis added); Joseph, Schultz and Castan, above n 148, 197.

¹⁷⁴ Burgers and Danelius, above n 107, 118–19; Nowak and McArthur, above n 118, 74–7.

¹⁷⁵ It has been stated that such purposes ‘should ... be understood to be the existence of some — even remote — connection with the interests of the policies of the State and its organs’ or refer to a situation in which the victim of torture is a detainee or a person ‘at least under the factual power or control of the person inflicting the pain or suffering and where the perpetrator uses this unequal and powerful situation to achieve a certain effect’: Burgers and Danelius, above n 107, 118–19; Nowak and McArthur, above n 118, 74–7.

¹⁷⁶ *Criminal Code* (Cth) s 274.2(1)(b)(iv).

social origin, property, birth or other status.¹⁷⁷ As such, the offence is directed to circumstances of the application of torture — that is severe mental or physical pain or suffering — with a discriminatory reason, rather than an identified consequence or objective. This legislative drafting methodology is effective, as the reason for the engaging in torture, namely discrimination, remains as constituting *any discrimination*, not confined to common discrimination identifying phrases in UN Human Rights documents. However, the rationale for including two distinct offences, one omitting discrimination¹⁷⁸ and the other including discrimination,¹⁷⁹ has been questioned by the Committee.¹⁸⁰

H *Penalty Reflecting the Seriousness of the Activity of Torture*

The seriousness of the activity of torture — as reflected in the non derogable status of the crime,¹⁸¹ its *jus cogens* character¹⁸² and in the *Convention* obligation to create penalties proportionately appropriate to such gravity,¹⁸³ is confirmed in the penalty of imprisonment for 20 years applied to both s 274.2 *Criminal Code* (Cth) offences.

This penalty for the s 274.2 *Criminal Code* torture offences is the same as a range of other serious offences in the *Criminal Code* (Cth), such as intentionally causing

¹⁷⁷ See the common discrimination identifying phrases in the *Universal Declaration of Human Rights* art 2 and in art 2 of the *ICCPR*. This terminology is commonly used in United Nations human rights documentation.

¹⁷⁸ *Criminal Code* (Cth) s 274.2(1).

¹⁷⁹ *Criminal Code* (Cth) s 274.2(2).

¹⁸⁰ Committee Against Torture, *List of issues prior to the submission of the fifth periodic report of Australia*, above n 27, ‘Specific Information on the implantation of articles 1 to 16 of the Convention, including with regard to the Committee’s previous recommendations’.

¹⁸¹ Article 2(2) of *CAT*: ‘No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency.’; *ICCPR* art 4(2).

¹⁸² For discussion of the unqualified, peremptory norm status of torture see Malcolm Evans, ‘Torture’ (2006) 2 *European Human Rights Law Review* 101, 103; Malcolm Evans and Rod Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Clarendon Press, 1998), 63–4.

¹⁸³ Article 4 (2) of *CAT*: ‘Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature’. Burgers and Danelius, above n 107, 129 state that ‘In applying article 4 it seems reasonable to require, however, that the punishment for torture should be close to the penalties applied to the most serious offences under the domestic legal system’.

serious harm to an Australian citizen or resident of Australia,¹⁸⁴ aggravated robbery,¹⁸⁵ various war crimes,¹⁸⁶ and offences of trafficking in persons.¹⁸⁷

I *Conduct Exempted from the Criminalisation of Torture*

Paragraph 4 of s 274.2 of the *Criminal Code* (Cth) provides greater specificity in relation to circumstances exempted from the torture offence in the phrase ‘conduct arising only from, inherent in, or incidental to lawful sanctions’¹⁸⁸ by including the phrase; ‘that are not inconsistent with the articles of the International Covenant on Civil and Political Rights’.¹⁸⁹ The offence accordingly recognises that Australia’s domestic implementation of the *Convention* obligations properly exists alongside other international human rights law obligations, as recognised in para 2 of art 1 of the *Convention*.¹⁹⁰

In addition, the inclusion of the reference to the articles of the *ICCPR* in s 274.2(4) of the *Criminal Code* (Cth) indicates that the interpretation adopted for the meaning of the art 1 ‘lawful sanctions’ requires that sanctions must comply with both national law and international law.¹⁹¹ This interpretation of the requirement of compliance with national and international law is consistent with the position of prominent Western nations in the drafting stages of the *Convention* and subsequently in declarations of interpretation.¹⁹²

¹⁸⁴ *Criminal Code* (Cth) s 115.3.

¹⁸⁵ *Criminal Code* (Cth) s 132.3.

¹⁸⁶ *Criminal Code* (Cth) s 268.46 (attacking protected objects), s 268.66 (attacking persons or objects using the distinctive emblems of the Geneva Conventions), s 268.79 (attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission), s 268.80 (attacking protected objects), s 268.81 (pillaging).

¹⁸⁷ *Criminal Code* (Cth) s 271.3 (Aggravated offence of trafficking in persons), s 271.6 (aggravated offence of domestic trafficking in persons).

¹⁸⁸ See *Criminal Code* (Cth) s 274.2 (4), which implements directly the final sentence of the art 1 CAT excluding some circumstances from definition of torture: ‘It does not include pain or suffering arising only from, or inherent in or incidental to lawful sanctions’.

¹⁸⁹ *Criminal Code* (Cth) s 274.2 (4).

¹⁹⁰ Article 1(2) of *CAT*: ‘This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application’. See also art 16(2) regarding conduct falling short of torture:

The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

¹⁹¹ See Rodley and Pollard, above n 119, 5; Nowak and McArthur, above n 118, 84.

¹⁹² Nowak and McArthur, above n 118, 84:

interpretation which has been advocated by a number of predominately Western governments during the drafting process and by means of declarations of interpretation ... the word ‘lawful’ refers to both domestic and international law. In other words, a government may only invoke the lawful sanctions clause if a certain sanction is in conformity with its own domestic law and with international law.

Even on this interpretation, however, the question arises as to the scope of the international law requiring conformity.¹⁹³ The legislation, in restricting itself in the international lawful aspect to the *ICCPR*, omits inclusion of any of the other five core human rights instruments to which Australia is a party,¹⁹⁴ as highlighted at the release of the Government's *Human Rights Framework*.¹⁹⁵ This is another example of a restrictive approach in drafting implementing legislation.

The reference to the articles of the *ICCPR* in s 274.2(4) clearly facilitates the importation of the jurisprudence of the Human Rights Committee on *First Optional Protocol* communications, *Second Optional Protocol* communications, the Human Rights Committee's Concluding Observations on States Parties Reports and the

General Comments on *ICCPR* articles, in assessing conduct relating to lawful sanctions.

*J Failing to Legislate about Conduct Conducive Towards Torture —
Cruel, Inhuman and Degrading Treatment or Punishment*

Interestingly, the *Act* does not criminalise acts that fall short of the *Convention* definition of torture,¹⁹⁶ namely acts involving cruel, inhuman or degrading treatment or punishment. The *Convention* does not specifically create a textual obligation to criminalise these lesser acts.¹⁹⁷ Instead, art 16 of the *Convention* uses the more general term of 'prevent' in relation to identified obligations in arts 10, 11, 12 and 13. Nor does the *Convention* define what constitutes cruel, inhuman or degrading treatment or punishment.¹⁹⁸

Rodley and Pollard, above n 119, 5, cite Italy, Netherlands, the United Kingdom and the United States as declaring this position at adoption of the *Convention*, and Switzerland as subsequently making such a declaration.

¹⁹³ Or as Nowak and McArthur, above n 118, 84 state: 'But what are the relevant standards of international law?'

¹⁹⁴ The *ICECSR*, *CEDAW*, *CERD*, *CROC* and *CROPD*.

¹⁹⁵ See McClelland, above n 15; Robert McClelland, 'Enhancing Parliamentary Scrutiny of Human Rights' (Media Release, 2 June 2010) <http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_2June2010-Enhancingparliamentaryscrutinyofhumanrights.html>.

¹⁹⁶ See the discussion under Part III(D) above.

¹⁹⁷ Article 16 (1) of *CAT* states that:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The art 2 and art 4 *CAT* obligations to take legislative measures are confined to torture. See also Burgers and Danelius, above n 107, 149, noting the textual absence of a states parties obligation to legislate against this treatment or punishment.

¹⁹⁸ Cruel and inhuman treatment is differentiated from the art 1 *CAT* definition of torture through either a lack of one of the essential elements of torture or a falling

The formal obligations under art 16 of the *Convention* have been identified as one of prevention within states territorial jurisdiction of ‘acts of cruel, inhuman or degrading treatment or punishment not amounting to torture, where such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’.¹⁹⁹ Unlike art 1, the infliction of cruel, inhuman or degrading treatment or punishment need not be for a specified purpose.²⁰⁰ In addition, the ‘victims of acts referred to in art 16 must be understood as consisting of persons who are deprived of their liberty or who are otherwise under the factual power or control of the person responsible for the treatment or punishment.’²⁰¹

Two further points are worth highlighting. General Comment 2 of the Committee Against Torture identifies a clear link between these lesser activities and torture,²⁰² with a distinctive torture offence advancing the *Convention*’s overarching aim of preventing torture and ill-treatment.²⁰³ Secondly, in the Concluding Observations of the Committee Against Torture to the Third Periodic Report of Australia, the art 4 *Convention* obligations were considered to highlight the nexus between the two forms of conduct, warranting the introduction of a specific lesser offence.²⁰⁴

short of the requisite severity or intensity of inflicted suffering: see Nowak, above n 149, 162–3. Degrading treatment is associated with the humiliation of the victim, from either the victim’s perspective or the perspective of others: see Nowak, above n 149, 165. See also Malcolm Evans ‘Getting to Grips With Torture’ (2002) 52 *International and Comparative Law Quarterly* 365, 375–6: ‘[Art 16] acts fail to qualify as acts of torture for the purposes of the Convention either because they did not involve a sufficiently severe degree of pain or suffering or because they were not inflicted for a purpose’; Joseph, Schultz and Castan, above n 148, 209: ‘no specific definitions of ‘cruel’, ‘inhuman’ or ‘degrading’ treatment have emerged under the ICCPR or CAT. The requirements of severity, intention, and purpose are presumably applied more leniently in determining whether such treatment has occurred’. The contestability and indeterminacy of the phrase ‘inhuman and degrading treatment’ raises a series of interpretive possibilities: see Jeremy Waldron, ‘Inhuman and Degrading Treatment: The Words Themselves’ (2010) 23 *Canadian Journal of Law and Jurisprudence* 269.

¹⁹⁹ Burgers and Danelius, above n 107, 149.

²⁰⁰ Ibid 150.

²⁰¹ Ibid 149.

²⁰² *CAT General Comment 2*, above n 66, [3] describes the obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment as ‘interdependent, indivisible and interrelated’ and that as ‘the conditions that give rise to ill-treatment frequently facilitate torture ... the measures required to prevent torture must be applied to prevent ill-treatment’. *CAT General Comment 2* therefore clearly contemplates the criminalisation and other measures in relation to such conduct.

²⁰³ *CAT General Comment 2* above n 66, [10]–[11].

²⁰⁴ Committee Against Torture, *Concluding Observations: Australia*, above n 26, [18]. The *Convention* preventative obligation in relation to torture and its nexus with cruel, inhuman or degrading treatment or punishment led the Committee to assert that the lesser conduct ‘has likewise a non-derogable nature under the Convention’.

There is nothing in art 16 of the *Convention* which excludes domestic criminalisation of cruel, inhuman or degrading treatment or punishment falling short of the *Convention's* definition of torture.²⁰⁵ Accordingly, the omission to include such an offence in the *Criminal Code* amendments indicates an unnecessarily narrow view of the practical issues of the prevention and prohibition of torture — by failing to create a specific offence for conduct known to be related to, conducive towards and preparatory for, torture. The legislative changes to the *Criminal Code* are insufficiently preventative, taking an overly restricted approach by not creating a specific offence against such incremental conduct. The omission of this broader offence appears simplistically linked to the absence of a textual obligation in the *Convention* to criminalise.²⁰⁶

In the alternative, art 7 of the *ICCPR* provides a further foundation for the criminalisation of cruel, inhuman and degrading treatment.²⁰⁷ *General Comment* 20 on art 7 of the *ICCPR* contemplates both criminalisation and other measures against such conduct.²⁰⁸ The linkage between cruel, inhuman or degrading treatment and torture, suggests that a more anticipatory, preventative approach would have been to enact an offence covering the lesser conduct. This offence would draw upon the preventive obligation on a state within its territory of such acts²⁰⁹ and be reinforced by the *Convention* acknowledgment of obligations in other international instruments prohibiting cruel, inhuman or degrading treatment or punishment.²¹⁰ The omission in the legislation of an offence of engaging in cruel, inhuman or degrading treatment or punishment is confirmatory of a legislatively conservative approach. The fact that cruel, inhuman or degrading treatment is not defined in either the *Convention* or under the *ICCPR* would not prevent a suitable legislative definition from being formulated from the relevant committee jurisprudence and the respective *General Comments*. Indeed, the earlier *UN Declaration Against Torture*²¹¹ stated that alleged perpetrators of well founded

²⁰⁵ Indeed, art 16 obliges states to take preventative measures, and makes a *non exclusive reference* to obligations contained in arts 10, 11, 12, 13 of the *Convention*.

²⁰⁶ For discussion of the lack of obligation under the *Convention* to criminalise ill treatment — that ‘States are therefore not required to lay down the offence of inhuman treatment as a crime in domestic law and apply the principle of universal jurisdiction to these forms of ill-treatment’ — see Nowak and McArthur, above n 118, 571.

²⁰⁷ See also the related discussion under the heading ‘D *Parallel International Torture Prohibition Obligations For Australia* — The International Covenant of Civil and Political Rights’.

²⁰⁸ See *ICCPR General Comment 20*, above n 153, [8]:

The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. State parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.

²⁰⁹ See *CAT* art 16(1).

²¹⁰ See *CAT* art 16(2).

²¹¹ *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* GA Res 3452,30th sess (UN Doc A/10408) (9 December 1975).

allegations of cruel, inhuman or degrading treatment or punishment shall be subjected to criminal, disciplinary or other appropriate proceedings.²¹²

K *Extending the Geographical Reach and Ancillary Offence Application of the Crime of Torture*

In giving emphasis to implementation of the *Convention’s* Art 5 universal jurisdiction obligations²¹³ in establishing jurisdiction, the Act applies the broadest category of Category D Extended geographical jurisdiction,²¹⁴ to the s 274.2 of the *Criminal Code* (Cth) torture offences. It makes, however, proceedings for torture offences allegedly having occurred outside Australia, subject to the consent in writing of the Commonwealth Attorney General.²¹⁵ The Committee has queried whether this consent requirement amounts to an adequate and specific criminalisation of torture in accordance with *Convention* obligations.²¹⁶ The Attorney General’s consent in writing requirement is possibly susceptible to a perception of potential political influence and raises questions of international comity and good relations with foreign states, when the conduct of foreign nationals raises a prima facie case relating to the torture offences.

Furthermore, the div 274 of the *Criminal Code* (Cth) torture offences are ‘not intended to exclude or limit the concurrent operation of any other law of the

²¹² Ibid art 10.

²¹³ Article 5 of the *CAT* states:

- (1) Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases
 - (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
 - (b) When the alleged offender is a national of that State
 - (c) When the victim is a national of that State if that State considers it appropriate
- (2) Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

²¹⁴ *Criminal Code* (Cth) s 15.4:

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.

²¹⁵ *Criminal Code* (Cth) s 274.3 (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’.

²¹⁶ Committee Against Torture, *List of issues prior to the submission of the fifth periodic report of Australia*, above n 27: Specific information on the implementation of Arts 1 to 16 of the Convention, including with regard to the Committee’s previous recommendations, [1]. Extraterritorial jurisdiction issues for Australian victims of torture abroad had previously been raised by the *CAT* Committee: see *Concluding Observations: Australia*, above n 26, [19].

Commonwealth or any law of a State or Territory'.²¹⁷ This reflects the obligations of Art 5(3) of the *Convention*²¹⁸ by acknowledging the overlap of the Commonwealth torture offences with other more general, non specific criminal offences under Commonwealth, State and Territory law.

The *Convention* through Art 4 also extends state party criminal liability obligations²¹⁹ of attempts to commit torture and complicity or participation in torture.

These obligations are also implemented by the application of pt 2.4 of the *Criminal Code* (Cth) to the s 274.2 *Criminal Code* (Cth) torture offences — ss 11.1,²²⁰ 11.2²²¹ and 11.2A²²² of the *Criminal Code* (Cth) provide various extensions of criminal responsibility to *Criminal Code* (Cth) offences such as the torture offences.

IV CONCLUSION

The criminalisation of torture in Australian domestic law through the introduction of torture offences in div 274 of the *Criminal Code* (Cth) is a welcome practical affirmation of Australia's international human rights obligations under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. This measure is one of several human rights initiatives expressing re-engagement with the United Nations human rights system, ranging from specific convention based measures²²³ to the seeking an elected seat on the

²¹⁷ *Criminal Code* (Cth) s 274.6. A prohibition against double jeopardy for the same conduct is contained in s 274.7 of the *Criminal Code* (Cth).

²¹⁸ Article 5(3) states that 'This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law'.

²¹⁹ Article 4 states that

(1) Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture

(2) Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

²²⁰ A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.

²²¹ A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

²²² Joint commission: (1) If (a) a person and at least one other party enter into an agreement to commit an offence; and (b) either: (i) an offence is committed in accordance with the agreement (within the meaning of subsection (2)); or (ii) an offence is committed in the course of carrying out the agreement (within the meaning of subsection (3)); the person is taken to have committed the joint offence referred to in whichever of subsection (2) or (3) applies and is punishable accordingly.

²²³ Robert McClelland and Stephen Smith, 'Reaffirming Our Commitment to International Human Rights Obligations' (Media Release, 21 April 2010) <<http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorney>

Security Council, in part to actively promote human rights. The criminalisation of torture under Commonwealth law is also an important symbolic rejoinder to the international emergence of torture as an intelligence gathering response in the war on terror. It will also enable Australia to respond cogently and positively about its *Convention* obligations in its 2012 states parties reporting process. Along with other convention based measures, it affirms to the international community that Australia gives due consideration to its international human rights obligations, including United Nations human rights conventions.

Significantly, the legislative enactment implementing the obligations of one of Australia’s identified seven core international human rights conventions, is an expression of the central operating principle of the government’s human rights policy and Human Rights Framework, with its distinct emphasis upon parliamentary sovereignty and parliamentary interpretation and assessment of human rights by rejecting an enhanced judicial role in interpreting rights through a statutory charter of rights.

An analysis of the scope and reach of the *Act*, assessed against the actual possibilities open under the *Convention* and the *ICCPR* to domestically implement obligations under the s 51(xxix) external affairs power, has revealed that several opportunities for more broadly drafted criminalisation provisions have not been taken up. Individual analyses of the torture criminalisation provisions have demonstrated unnecessarily restrictive legal drafting, confirming that narrower human rights policy choices have been settled upon in the language of the *Act*. Telling examples of this practice have been identified under this article’s various analyses regarding the criminalising of torture in Australian domestic law.

Within the domestic and international contextual factors discussed around the emergence of the torture criminalisation legislation, and the expressed international and domestic Australian government directions of human rights policy and legislation, the *Act* therefore signals an identifiable disposition and methodology. This is manifested mainly, but not altogether consistently, in a close textual implementation in legislation of the immediate *Convention* obligations, tending towards a minimal, literal compliance with the *Convention* obligations. It indicates that the corollary of the Government’s policy choice in rejecting domestic implementation of *ICCPR* articles through the introduction of a statutory human rights charter, may well emerge as a minimal, hesitant and cautious legislative expression of those *Convention* obligations.

It is too early to determine whether the present practices in the *Act* are properly predictive of a broader principle. Other examples of Australian human rights legislative development may test whether the present Australian government

general.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_Second_Quarter_21April2010-ReaffirmingourCommitmenttoInternationalHumanRightsObligations.html indicating ‘a range of initiatives the Government has already taken to further engage with the international community to protect and promote human rights at home, in our region and in the rest of the world’.

also favours minimal legislative responses elsewhere and whether the legislative responses the present *Act* should be seen as a methodological template. A specific immediate example is Australia's commitments made arising from the 2011 Universal Periodic Review, to accept, or accept in part 137 of 145 recommendations, with 'a number of recommendations focused on Australia's international human rights obligations and domestic implementation of those obligations, which had been used to inform the development of the National Human Rights Action Plan that was currently underway'.²²⁴

A more general example is in how, applying Parliamentary practice, discretion, interpretation and the application of requisite international human rights law expertise, the legislative functions of the Parliamentary Joint Committee on Human Rights²²⁵ and the requirement of Statements of Compatibility²²⁶ with human rights for bills and for legislative instruments, will be carried out. The skeletal functions of the Parliamentary Joint Committee,²²⁷ and the Statements of Compatibility²²⁸ provide a very significant scope for Executive determined and discretionary minimal interpretations of both legislative scrutiny and accountability based human rights functions, similar to the approach in the *Act*. This possibility is made real by the fact that the phrase 'human rights' is defined in the *Human Rights*

²²⁴ Peter Woolcott, Permanent Representative of Australia to the United Nations Office at Geneva, *Consideration of the Outcome of Universal Periodic Review of Australia*, Human Rights Council (8 June 2011) in UN document 'Human Rights Council adopts outcomes of Universal Periodic Review on Myanmar, Australia and Georgia' <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11124&LangID=E>>; Human Rights Council *Report of the Working Group on the Universal Periodic Review Australia* (UN Doc A/HRC/17/10) (24 March 2011) 'II. Conclusions and/or recommendations 86.1 to 86.145'.

²²⁵ See *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) pt 2.

²²⁶ *Ibid* pt 3.

²²⁷ In relation to the Parliamentary Joint Committee on Human Rights, under s 6 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) 'All matters relating to the powers and proceedings of the Committee are to be determined by resolution of both Houses of Parliament'. Under s 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Committee's functions are

- (a) to examine Bills for Acts, and legislative instruments, that come before either House of Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- (b) to examine Acts for Compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- (c) to inquire into any matter relating to human rights which is referred to it by the Attorney General, and to report to both Houses of the Parliament on that matter.

²²⁸ In relation to Statements of Compatibility, a statement must be prepared in respect of a bill intended to be introduced into the Parliament (s 8(1)) and that statement must be presented to the Parliament when the bill is introduced (s 8(2)). The statement of compatibility only has to 'include an assessment of whether the Bill is compatible with human rights': s 8(3). It is neither binding on any court or tribunal (s 8(4)), and a 'failure to comply with this section in relation to a Bill that becomes an Act does not affect the validity, operation or enforcement of the Act or any other provision of a law of the Commonwealth' (s 8(5)).

(Parliamentary Scrutiny) Act 2011 (Cth) as ‘the rights of freedoms recognised or declared’ by the seven United Nations human rights conventions to which Australia is a party²²⁹ and that the definition clearly contemplates Australian reservations and statements upon the seven conventions.²³⁰

What becomes clear is that the *Act* could have done more to provide a resounding legislative expression of Australia’s commitment to the criminalisation of torture. As discussed, the *Act* would have been strengthened by the adoption of several, modest enhancements tweaking and extending the reach of the criminalisation measures and ancillary provisions. Such changes would beneficially impact upon the operational scope of the *Act*, asserting a more prohibitory approach by removing appearances of legislative hesitation and uncertainty, and in strongly demonstrating re-engagement with the United Nations human rights system. This would then set a higher benchmark for the development of Australia’s Human Rights Framework and an exemplary foundation for Australian advocacy of human rights in international forums.

²²⁹ See McClelland, ‘Enhancing Parliamentary Scrutiny of Human Rights’, above n 195; *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3 definition.

²³⁰ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3(2): In the definition of human rights in subsection (1), the reference to the rights and freedoms recognised or declared by an international instrument is to be read as a reference to the rights and freedoms recognised or declared by the instrument as it applies to Australia.