THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: MM: VK: 1305459

24 May 2010

Hon Robert McClelland
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney-General,

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

The NSW Law Society's Human Rights Committee ('Committee') refers to *the Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill 2009* recently passed by both houses of Federal Parliament. The Committee refers in particular to s 274.2 of that Act that creates an offence of torture and s 274.3 concerning prosecutions of offences.

The Committee congratulates the Government on introducing and passing legislation creating the offence of torture and abolishing the death penalty in line with the requirements of the Second Optional Protocol to the *International Covenant on Civil and Political Rights.*[1]

However, the Committee notes with concern that s 274.3 of that Act prevents prosecution for offences of torture committed within Australia's jurisdiction but outside of Australia without the consent in writing of the Attorney-General. The Committee queries the requirement in s 274.3 of written consent by the Attorney.

It is now the practice in this country that decisions to prosecute serious criminal offences be made by prosecutors independent of executive governments. As you will be aware, this provision is generally respected in all State and Territory jurisdictions including at the Federal level, with few exceptions.

One exception which has been criticised is the need for the Attorney-General's consent to prosecute treason and sedition offences. The Committee notes, however, it is proposed to repeal that provision (s 80.5 of the *Criminal Code 1995*) in your *National Security Legislation Amendment Bill 2010* which is currently before the Parliament. If the Attorney's consent is not necessary in relation to the prosecution of those offences, then written consent by the Attorney should also not be required for prosecutions under s 274.3.

Further, the Committee brings to the Attorney's attention Article 2(2) of the *Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*[2] which states:

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[1] The International Covenant on Civil and Political Rights, adopted 16 Dec 1966, entered into force 23 Mar.1976,999 UNTS 171.

[2] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 Dec.1984, entered into force 5 Sept 1991, GA Res 39/46, 39 GAOR, Supp (No.51), UN Doc A(39) 51 at 197 (1984). Australia is a party to this convention.

> No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification of torture.

The Committee also refers to General Comment No. 2 of the Committee Against Torture which in commenting on the obligations contained in Article 2 states:

> Article 2, paragraph 1, requires that each State party shall take effective measures to prevent acts of torture not only in its sovereign territory but also "in any territory under its jurisdiction." The Committee has recognized that "any territory" includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. The reference to "any territory" in article 2, like that in articles 5, 11, 12, 13 and 16, refers to prohibited acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control. The Committee notes that this interpretation reinforces article 5, paragraph 1 (b), which requires that a State party must take measures to exercise jurisdiction "when the alleged offender is a national of the State." The Committee considers that the scope of "territory" under article 2 must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention.

The Committee further notes that the preamble to the *Rome Statute of the International Criminal Court*[3] states:

> ...it is the duty of every State to exercise its Criminal jurisdiction over those responsible for international crimes.[4]

Thus it is arguable also that Australia has international legal obligations to prosecute instances of torture outside of Australia.

Given the disturbing reports that have been given in the media of the so-called practices of "extraordinary rendition" in other countries, whereby persons suspected of terrorist offences have been deprived of their liberty and taken to second countries to be tortured by that second country's officers with the connivance of the first country, the Attorney will appreciate that the concerns that the Committee raises above are of contemporary and practical concern. The Committee would therefore be grateful for your explanation for the requirement in s 274.3 of written consent by the Attorney.

Yours sincerely,

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Mary Macken
President

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[3] The Rome Statute of the International Criminal Court 2187 UNTS 90, entered into force 1 July 2002.
[4] The Committee notes the decision of the Paris Court of Appeal in the Qadafi Case on 20 October 2000 which held that the effect of this statement and other in the Rome Statute was that State Parties had an obligation to prosecute the international criminal offences such as torture.