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The Australia Police State: When Torture Might be Allowed Down Under

By Dr. Binoy Kampmark
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One of the least convincing arguments ever submitted for any consideration is the idea that "people don't do that sort of thing". It is against their nature. It is against a perceived code. It has the weak standing of a gentleman's agreement, a sort of arrangement made on the cricket greens trodden upon by chaps wearing white flannels. You simply don't play dirty, because you have a strict ethical system that trumps any chance of that happening.

The disconcerting nature of this is evident in the debate surrounding Australia's National Security Legislation Amendment Bill (No. 1), a demon-like creation of the conjurer and Attorney-General, Senator George Brandis. Its problems are so numerous it should sink under the weight of its own ominousness. It suggests a further criminalisation of whistleblowers, leakers and journalists and also gives a rather bright green light to intelligence officials to run riot in paramilitary fashion against enemies of the state.

Brandis can't see what the fuss is about. "Under no circumstances has ASIO ever or would ASIO ever be authorised to torture."[1] But the sentiment here is that of impossibility – Australians, and indeed Australian intelligence services – would not engage in a form of conduct that would run foul of the UN Torture Convention and an assortment of other laws. "This is not something that any Australian government agency, no matter what the circumstances, could ever do."

The opposition, meeker than ever, did express some concern, though it was obviously not expressed very heatedly, if at all, when such Labor figures as Tanya Plibersek, Penny Wong and John Faulkner were scrutinising it. The Shadow attorney general, Mark Dreyfus, treated the problem as one of minor scribbling and wording, suggesting the precise conundrum a state faces when it wishes to roughen suspects or obtain intelligence.

"It might be a matter of just a simple amendment that can be made to this legislation which is being debated in the parliament next week that absolutely puts beyond doubt that there's no immunity anywhere in Australian law that could in any way suggest that any Australian government employee could engage in an act of torture." At the stroke of a pen, the problem, for Dreyfus, would disappear, an astonishingly empty legal analysis if ever there was one.

The problem here is the wording of exemption in the bill itself. That it stipulates those circumstances of exoneration so clearly (under section 35K), is a suggestion that anything short of that will be within the margins of the law. Intelligence and regulatory agencies would only be liable in actions that cause death or serious injury to any person; involve the commission of a sexual offence against any person or cause significant loss of, or serious damage, to property.

This is the classic legislative pitfall – the specific stipulations invariably create the doors of exception, or as Paul Sheehan has observed, those "150 shades of grey, ranging from ethical ambiguity to outright black ops". Those exceptions are simply dismissed as remote possibilities, and even impossibilities by the "Australian values" brigade.

The only senator who seems to have provided any sliver of merit to the debate has been the quizzical Senator David Leyonhjelm, one of the politicians who holds the balance of power in the chamber. Brandis has naturally dismissed his fellow senator's claims of impending Stasiland as "absolute rubbish" – after all, he doesn't understand the unwavering qualities of the law abiding spirit inherent in the intelligence and security establishment. Radicalised Muslims are naughty; ASIO agents never are.

Again, Brandis seeks refuge in procedural formulae, rather than the consequences of the bill's wording. He deems it sufficient that a bipartisan committee examined the bill twice, not once taking issue with the scope of the immunity from prosecution, the shoddy compensation regime, and the lessening of oversight.

Instead, Brandis claims that the new laws will bring ASIO in line with the Australian Federal Police, and its operations, which is in itself a troubling problem. By that very observation on Brandis' part, ASIO is being given a broader policing scope, one that involves interrogation, detention, and good old psychological mauling.

Leyonhjelm differs from the nasty conventional wisdom in spectacular fashion. He has spoken of receiving legal advice that this bill, passed in its current form, would leave the way open to a torture system. And he also sees it spreading like uncontrollable bacilli in the security state. "Any torture would not be limited to a terrorist suspect but could extend to anyone associated with a suspect, including family members."[2] Those acts inflicted on the individuals in question would further be compounded in their injuriousness by the fact that they had to be kept secret. Whatever happens, speak no evil.

As the bill winds its way to the vote, the amendments are promising to be few and toothless. The Attorney General has all the cards at this point, and is determined to convert ASIO into a playground bully with policing potential. The Australian Federal Police have every reason for being miffed at this, as do the civil libertarians.

Dr. Binoy Kampmark was a Commonwealth Scholar at Selwyn College, Cambridge. He lectures at RMIT University, Melbourne. Email: bkampmark@gmail.com

Notes

[1] http://www.news.com.au/national/asio-torture-ruled-out-of-new-national-security--laws-proposed-by-george-brandis/story-fncynjr2-1227065133866

[2] http://www.smh.com.au/federal-politics/political-news/antiterror-laws-will-open--door-to-torture-says-senator-david-leyonhjelm-20140918-10inlj.html

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