

Truth takes a beating

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A few years ago it was unthinkable that a nation such as the United States would resort to torture. It was equally unthinkable that Australia would acquiesce and that our leaders would endorse techniques like sleep deprivation. September 11, 2001, changed all that.

It is past time that we moved on from the assumption that democratic nations will not use or condone torture. We should directly outlaw the practice. International law certainly requires us to do so.

The international Convention against Torture and Other Cruel, Inhuman or Degrading Treatment has been ratified by more than 130 countries, including Australia. It forbids governments from deliberately inflicting "severe pain or suffering", whether physical or mental, for purposes such as obtaining information or a confession, punishment or coercion.

Last weekend the United Nations Committee against Torture provided a wake-up call on Australia's breach of the convention. In reviewing our actions to prevent torture, the committee found major flaws in our laws and practices. Although there have been positive developments, including removing children from immigration detention and closing offshore processing centres in Nauru and Papua New Guinea, more remains to be done.

Problems found by the committee include ASIO's power to have non-suspects detained for up to a week for questioning and aspects of Australia's new anti-terror regimes of preventative detention and control orders. It was also concerned about prison conditions in Australia, including overcrowding, the disproportionate number of indigenous prisoners and the fact that mentally ill inmates are subjected to the extensive use of solitary confinement. It found that Australia must review how people are held in prolonged isolation in places like Goulburn Supermax prison.

A general problem was that even though Australia agreed to completely outlaw torture when it signed the convention, we have failed to do so. This was partially achieved when the federal Parliament passed the Crimes (Torture) Act 1988. That law creates an offence of torture, but it is very limited. It only applies where torture is committed by a public official outside Australia. Even then, a person can only be prosecuted if they are currently present in Australia or are an Australian citizen.

The federal Criminal Code also includes offences of torture that mirror crimes in the International Criminal Court. These were created to allow Australia to prosecute a person accused of such crimes in Australia rather than to surrender them for trial in the international court. While these offences apply anywhere in the world, they are limited only to torture that is part of a widespread or systematic attack on a civilian population or part of an international armed conflict.

Australian law fails to outlaw many forms of torture, including torture that occurs in Australia rather than overseas. Nor, in contrast to other nations, is there any other clear prohibition in a law like a national bill or charter of human rights. It remains possible to use evidence in Australian courts obtained through torture overseas, to extradite people to be tortured elsewhere and to rely on intelligence gained through torture.

The gap in Australian law means that governments can redefine torture for their own

national security purposes. For example, in commenting on a new process for trying people held at Guantanamo Bay, then federal attorney-general Philip Ruddock said he did not "regard sleep deprivation as torture", a statement supported by then prime minister John Howard.

Other Australians have gone further in endorsing the use of torture. In 2005, two Australian academics from Deakin Law School, Professor Mirko Bagaric and Julie Clarke, published an article entitled *Not Enough Official Torture in the World? The Circumstances in which Torture is Morally Justifiable*. The article argues that the law should be changed to permit the use of torture.

Unusually, and to their credit, these Australian academics are explicit in their support of torture and do not seek to hide behind weasel words. Hence, they argue for torture rather than US terms like "alternative interrogation techniques", "environmental manipulation", "stress positions", "sensory manipulation", "enhanced interrogation", "sleep adjustment" or "tough interrogation".

The article begins by referring to Alan Dershowitz, an American academic from Harvard Law School. He argues that torture should be lawful based on a harm-minimisation rationale. That is, torture is justified when harming someone might save many lives. As Bagaric and Clarke state, "Our argument goes one step beyond this. We argue that torture is indeed morally defensible, not just pragmatically desirable." The article finds that torture is an "excellent means of gathering information" and concludes that the law should permit torture.

The article ends on a bizarre note with a mathematical formula to determine the strength of the case in favour of torture. The torture of an individual would be permitted where the outcome of the equation exceeds a threshold level. The higher the figure, the more severe the forms of torture that would be permitted.

This is a real proposal to change the law to regulate and permit the use of torture in Australia, perhaps by bodies such as the police and ASIO. The idea has been further developed for other nations with the publication this week by the State University of New York Press of a full-length book by Bagaric and Clarke entitled *Torture: When the Unthinkable is Morally Permissible*. Their arguments will no doubt again receive a great deal of media attention.

At a time when Australia has already passed many laws that were inconceivable prior to September 11, this forces us to again ask, where will we draw the line? Australia should not look to the US for answers.

The US has squandered its claim to moral leadership when it comes to torture not only due to Guantanamo Bay and Abu Ghraib, but by its willingness to twist the law to allow government to use torture. In 2002 the Bush Administration gave itself flexibility to prosecute the "war on terror" by redefining torture to be "severe pain equivalent to that associated with organ failure or death".

Earlier this year President George W. Bush was dubbed the "torture president" after vetoing a law that would have prevented the CIA from using "alternative procedures" that fell just short of this definition. These include "waterboarding", whereby a person is held on their back, head downward with a cloth placed over their face, and water is poured into their mouth and nose. The person experiences the sensation of drowning and can be made to believe that death is imminent. The technique has been used over several centuries, including by the Spanish Inquisition, Gestapo and Khmer Rouge, in

part because it does not leave marks on the body.

The CIA has admitted to using waterboarding on three al-Qaeda suspects since September 11. In exercising his veto, Bush said that "the Bill Congress sent me would take away one of the most valuable tools in the war on terror".

Fortunately, there are signs that Australia is heading in the opposite direction. The Rudd Government is considering new laws to make torture an offence in Australia. It has said also that it will adopt the optional protocol to the torture convention. The protocol would subject Australia and its detention facilities to more rigorous international inspection. By contrast, the Howard government refused to ratify the protocol, saying that Australia was "already regarded as a leader in human rights standards".

To return to the front line of the international fight against torture, Australia also needs to legislate for a clear national prohibition on all forms of torture. The law should make it an offence for Australian officials to be involved in "extraordinary rendition", whereby people are taken to be tortured in other, less scrupulous countries. Australian law should also stop the extradition of anyone to a nation where there is a real risk that they will be tortured.

To this point, Australia has adopted an inconsistent approach. On the one hand we have made strong statements in support of human rights in places such as Tibet, while on the other we have failed to live up to our obligation to outlaw torture at home. This must change so that our international stance is matched by a strong and unequivocal domestic commitment.

If the events after September 11 have taught us anything, it is that we were wrong to assume that the legal protection of human rights is unnecessary in Australia. Like other nations, we are vulnerable at times of fear and grief to adopting and supporting deplorable practices. Australia needs laws that prohibit practices like torture so that we do not end up compromising our principles and values.

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