NATIONAL SECURITY AND
HUMAN RIGHTS

Semester 2, 2016
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Class 1 – Overview of the Course; Sources of Australia’s National Security Laws

Administration Matters:
- Class Participation (20%), In-Class test (10%), Research Essay (30%)
  - **Test example** - The definition of terrorism include a motive element?
  - **Test example** - Should civil methods be used as an alternative to criminal
    - Straight-forward questions (discussed in class) intended to show an opinion/argument backed up by evidence
  - PREPARE ANSWERS ON BROAD DISCUSSION QUESTIONS FROM CLASS
- Research essay abstract – By Tuesday 16th August
- Research Essay questions – Go through the list of topics and do some surface reading
  - Best essays have a topical anchor (why it being discussed – eg: current prominence in the last few years)
    - Try not to be too topical as the law may change over the period of the semester
  - Link between media and terrorism laws?
  - Preparatory offences – When is it ok to remove and/or limit human liberties?
    - What have we/should have we learnt/not learnt from the Mohammed Haneef case?
    - Minority groups? Privacy rights?

POTENTIAL ESSAY - Preparatory offences and especially incarceration on suspicion → Balance between protecting the community and ensuring that individual liberties are unjustifiably removed → Constitutional validity of these laws?

Inside Australia’s Anti-Terrorism Laws and Trials – Introduction:
- Australian anti-terrorism laws have only been in existence since the attacks of September 11 2001
  - Prior to this there were no national laws criminalising terrorism or conferring special powers and procedures upon police, intelligence agencies and courts to deal with terrorism cases
  - By the end of 2014, 64 separate pieces of anti-terrorism legislation had become law
    - 42 people have been charged to date (2015 published book)
- The dominant principle underpinning the anti-terrorism regime is that authorities should have sufficient powers to prevent would-be terrorists before they can inflict harm upon the community
- **ISSUE** – Striking the right balance between affording the accused a fair trial, while also protecting the confidentiality of surveillance techniques and sources, has been a problem confronted by courts around the world
- **TREND** – Australian governments have found it much more palatable to increase rather than limit or remove national security measures, tending to ignore reviews which recommend the latter course
• Australian government – “The threat of terrorism... has become a persistent and permanent feature of Australia’s security environment”
• OPINION – We should never assume that the curtailment of liberty delivers, as a matter of practical operation, a valuable enhancement of national security
  o The retainment of the polity and freedoms enjoyed by Australian’s is important considering the potential for national security laws to inhibit this

Timeline of Australian Anti-Terrorism Legislation and Major Reviews:
• March 2002 – Australia’s first package of anti-terrorism legislation was introduced in the wake of the 9/11 terrorist attacks
• December 2002 – The Terrorism (Commonwealth Powers) Act 2002 is enacted by each of the Stated to refer certain matters relating to terrorist acts to the Federal Parliament so as to enable it to make laws about those matters
• June 2003 – Bill passed by Parliament giving ASIO the ability to coercively question and detain for up to 7 days a non-suspect citizen
• June 2004 – The period in which a suspect can be interrogated by the AFP without charge is increased from 4 to 24 hours
• October 2014 – The first part of the legislative response to the problem of Australians travelling overseas to fight with terrorist organisations was passed by Parliament
• December 2015 – COAG agreed to back new laws allowing convicted terrorists who have served their sentence to remain imprisoned if they still pose a risk
• May 2016 – NSW Bill introduced to allow a court to approve detention and questioning by the police for up to 14 days without charge

Timeline of Major Terrorism Incidents – 1970s to 2009:
• 1978 – Bombing outside Hilton Hotel, Sydney
• 1980 – Assination of Turkish Consul-General and his bodyguard, Sydney
• 2001 – US September 11 Attacks
• 2002 – Bail nightclub bombings
• 2005 – London underground bombing

Timeline of Major Terrorism Incidents from 2013-2015:
• September 2014 – Significant operations to disrupt terrorism networks in Melbourne, Sydney and Brisbane
• 13 September 2014 – Australia’s terror threat level is raised from medium to high (‘terrorism attack is likely”
• 2 October 2014 – 15 year old boy shot dead a police accountant, Curtis Cheng, outside the Parramatta Police Headquarters
• 15 December 2015 – Man Haron Monis takes 18 hostages at the Lindt café

Sources of Australian Anti-Terrorism Law:
• We now have only 70 substantive pieces of anti-terrorism legislation → First was not enacted until post 9/11/2001
Class 2 – The Nature of the Threat

The Nature of the Threat:
- Official threat assessments were initially secret → They were used by government to inform policies surrounding terrorism
  - 2015 review recommended that it was obsolete and confusing to have two terrorism alert systems (one public and one private for government)
    - New Terrorist Threat Advisory System introduced November 2015
- Difficult to get the right balance between the need for secrecy to avoid unsuccessful investigation and the need to hold the government to account (which is achieved through obtaining information that justifies governmental decisions)
- Terrorism attacks are more politically motivated than religiously
  - Link to Islam is easy as significant proportions of Middle Eastern attackers (who do so as a response to Western invasion on their lands) are Islamic and small proportions claim allegiance to Islam

Stakeholders in the threat assessment – What groups might be interested (or have a desire to change) terrorism threat assessments?
- Judiciary – Judicial notice of the threat assessment necessary to challenge
- Tourism Industry
- Insurance Industry
- ASIO/Defence Industry (Army)
- Litigants/People charge with terrorism offences
- Media
- Police
- Parliamentarians – Parliamentary Joint Committee on Intelligence & Security (PJCIS)
- Minority groups and their advocacy groups (eg: AMCRAM)
- Religious groups
- Human rights/civil liberty groups
- General public
- International allies/groups
- Terrorist groups
- Stock market
- Academics
- Immigration and border authorities
- Independent National Security Legislation monitor (INSLM)

Terrorism threat assessments in the public domain:
- Publicly available terrorism threat assessments provide the public with a general appraisal of the threat of terrorism, thereby allowing individuals to make better-
informed decisions as to matters that may put them at risk in the event of a terrorist attack

- Terrorism threat assessments are used by governments in litigation to defend the expansion of legislative and executive power beyond what might in other circumstances be seen as unconstitutional
  - In parliamentary debate, assessments are used to justify the enactment of otherwise extreme measures that impact on civil liberties
- Assessments are often vague and can be impossible to verify independently
- Notorious facts and unsubstantiated assertions – Should not be able to make claims which are considered judicial notice without provided supporting evidence
- Official government reports – Redacting sensitive material or providing a mere summary of a report should not be considered enough to justify later use of such a report in court
- Terrorism threat alert systems – The government is able to set the terrorism alert system as low, medium, high or extreme without any statutory regime that empowers the decision-making process
  - Possible that a high threat alert might be relied upon to justify the suspension of important constitutional safeguards
- Problems with the current practice:
  - Australia, along with the UK and US, has not established legislative standards to inject clarity, transparency and rigour into the process of assessing terrorism threats
    - Courts and legislators are hampered from independently deciding whether the government’s claims are accurate
  - The administrative decisions that underpin official government terrorism threat level assessments may not be subject to any formal independent review
  - There is no legislative stipulation as to the matters that the executive government must take into account or the manner in which it should exercise its power to issue terrorism threat assessments
    - No government has sought to explain how terrorism level assessments might be used by a court or in a legislative process

Constitutional consequences of terrorism threat level assessments:

- The use of terrorism level threat assessments extends into the constitutional realm through the expansion of government power, and the ability to impact upon the protection of constitutional rights
- The constitution provides no specific power to make counter-terrorism laws → Government has relied on the defence power in s 51(vi) (confirmed in *Thomas v Mowbray*)
  - Purposive power which permits the Parliament to legislate with respect to any matter deemed necessary for the purpose of defending Australia