

Balancing Security and Freedoms

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Introduction

- Where to begin?
- Definitional issues – national security, terrorism, terrorist
- What is against the law?
- Powers of the State
- Issues with the reach of the law
- Dealing with emerging issues
- Are human rights relevant?
- How to ensure laws strike the right balance?



The beginning – 2001, or is it?

- 1978: Hilton bombing in Sydney
- 2001: Significant changes in Australian criminal law after September 2001
 - UNSC called on nations to strengthen their criminal laws
 - Over 50 separate counter terrorism laws have been enacted
- Since then: Lindt, Curtis Chang, Brighton Seige, Wakeley Church attack
- August 2024: Australia's general terrorism threat level is **PROBABLE** — there is a greater than fifty percent chance of an onshore attack or attack planning in the next twelve months

Definitions – what is national security?

- The 'heads of security' (ASIO Act, s 4) – the protection of, and of the people of, the Commonwealth and the several States and Territories from:
 - espionage
 - sabotage
 - politically motivated violence
 - promotion of communal violence
 - attacks on Australia's defence system
 - acts of foreign interference



- Origins of this definition come from the Hope Royal Commission

Definitions – What is terrorism? Who is a terrorist? (Cth Criminal Code, Pt 5.3)

- A terrorist act is an act, or a threat to act, that meets both these criteria:
 - it intends to coerce or influence the public or any government by intimidation to advance a political, religious or ideological cause
 - it causes one or more of the following:
 - death, serious harm or danger to a person
 - serious damage to property
 - a serious risk to the health or safety of the public
 - serious interference with, disruption to, or destruction of critical infrastructure such as a telecommunications or electricity network, water supply, airports, marine ports
- Advocating, protesting, dissenting or taking industrial action are not terrorist acts where the person doing the activity does not intend to cause serious harm to a person or create a serious risk to public safety
- Listed terrorist organisations – currently 27



What is against the law?

- Engaging in a terrorist act: s 101.1 (note concurrent operation)
- Providing or receiving training connected with a terrorist act: s 101.2
- Possessing things connected with the preparation of a terrorist act: s 101.4
- Collecting or making documents connected with the preparation of a terrorist act: s 101.5
- Do any act in the preparation or planning of a terrorist act: s 101.6

What is against the law? (cont)

- Membership of a terrorist organisation: s 102.3 (AQ, IS, JI, Hamas, Boko Haram, XRW orgs)
- Financing terrorism: s 103.1 etc
- Sedition (urging the overthrow of Australia by force or violence)
- Fighting overseas – incursions into foreign States with intention of engaging in hostile activities (there were 2 declared areas – Al-Raqqqa Province, Syria and Mosul District, Iraq – no longer in effect)
- Training the enemy

Powers of the State

- **Bail (State legislation, modified by Crimes Act 1914 (Cth))**
 - Reverse onus of proof for bail in terrorism matters
- **Control orders (Div 104)**
 - A person may be subject to a control order if the order would substantially assist in preventing a terrorist attack or if a person has trained with a listed terrorist organisation, engaged in hostile activity overseas or been convicted of a terrorism offence
 - Control all aspects of a person's movements, communications, contacts, activities
 - Last up to 12 months
- **Preventative detention orders (Div 105)**
 - If there is an imminent threat of a terrorist attack or immediately after a terrorist attack has occurred if vital evidence is likely to be lost
 - 48 hours under Commonwealth law, 14 days under State and Territory laws

Powers of the State (cont)

- **Data retention**

- Metadata is information about a communication (the who, when, where and how)—not the content or substance of a communication (the what)
- Requirement for providers to retain for 2 years
- Allows 85 law enforcement agencies access to data
- Broader than national security – child abduction

- **Post-punishment**

- Terrorism (High Risk Offenders) legislation
- Parole revocation (note mostly Cth parole – Crimes Act, Pt IB)
- Not limited to convicted terrorism offenders

Powers of the State (cont)

- **Restrictions on travel etc**

- Loss of passport, visa, security clearance

- **Citizenship**

- Loss of Australian citizenship for dual citizens - Article 15 of UDHR "everyone has a right to nationality"
- Convention on the Reduction of Statelessness – "nationality may be deprived if a person has conducted himself in a manner seriously prejudicial to the vital interests of the state"
- Conduct must have occurred since December 2015 (important common law right being recognised – retrospective laws)

- **Secrecy**

- Court and tribunal processes – National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)

Issues with the reach of the law

- Traditionally, the criminal law is concerned with punishing crimes that have been committed and not used to anticipate when criminal action *might* be taken
- Anti terrorism laws seek not only punish but also prevent terrorism acts occurring
- But, how to decide who should be subject to preventative measures?
- At what cost to basic human rights?

Dealing with emerging issues

- Radicalising prisoners
 - The management of radicalised inmates in NSW (2018)
- Lone wolves (fixated threats)
 - Victoria Police Fixated Threat Assessment Centre
- The Defence Force
 - Calling out the troops



Are human rights relevant?

- Australia is a party to the International Covenant on Civil and Political Rights and the Convention against Torture
 - Right to life
 - Freedom from torture and cruel treatment
 - No arbitrary arrest and detention
 - Privacy
 - Freedom of religion, speech, movement, association, assembly
 - Humane treatment in detention
- Australia has no national bill of rights (Queensland, Victoria and the ACT have statutory bills of rights)
- Some human rights may be limited to protect other rights: Qld s 13, Vic s 7, ACT s 28
- Common law protections – are they adequate?

How to ensure that laws strike the right balance?

- Judicial and court oversight
 - Fair and open trials
 - Discretion in sentencing
 - Access to lawyers
- Parliamentary oversight
 - PJCIS
 - PJCHR
- Independent monitors
 - National Security Legislation Monitor (INSLM) under the *Independent National Security Legislation Monitor Act 2010*
 - Inspector-General of Intelligence and Security (IGIS)

References / further reading

- Australian Government's website on National Security
<http://www.nationalsecurity.gov.au>
- A Human Rights Guide to Australia's Counter Terrorism Laws – Australian Human Rights Commission
<http://www.humanrights.gov.au/human-rights-guide-australias-counter-terrorism-laws>
- Parliamentary resources
http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security
- *National Security Law in Australia*



Some cases

- Lodhi:
 - Criminal – *R v Lodhi* [2006] NSWCCA 121; (2006) 199 FLR 303
 - Parole – *Lodhi v Attorney-General (Cth)* [2020] FCA 1383
- Khazaal:
 - Criminal – *The Queen v Khazaal* [2012] HCA 26; (2012) 246 CLR 601
 - Parole – *Khazaal v Attorney-General* [2020] FCA 448
 - Control orders – *Booth v Khazaal* [2020] FCA 1241; [2020] FCA 1528; [2021] FCA 781

Some (more) cases

- Homewood:
 - Control order: *Gale v Homewood* [2024] FCA 264
- *DPFX and Director-General of Security* [2023] AATA 2522
 - Revocation of security clearance
 - Army Reserve member

Questions?



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