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"It's the Same Old Song": Draconian Counter-Terrorism Laws and the Déjà Vu of Indigenous AustraliansMegan Davis and Nicole Watson
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1. Over the course of the past four years, the Australian government's legislative response to the terrorist attacks in New York 11 September 2001 has been controversial. Central to the legislative response package has been the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) and the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) which has been scrutinised by many sectors of the Australian community for the way in which it impinges upon the fundamental human rights of all Australians such as freedom of speech, freedom of movement and freedom of association.

2. In 2005, the Australian government proposed further counter terrorism measures in its *Anti-Terrorism (No 2) Bill 2005*. The new proposed laws included expanding the grounds upon which terrorist organisations are proscribed to also include organisations that 'advocate' terrorism [1]; a new offence of financing terrorism [2]; control orders that enable the surveillance of suspects [3]; a new preventative detention regime that enables detention to prevent the commission of a terrorist act [4] and increased sedition offences. The key objection of those who were concerned about the *Anti-Terrorism (No 2) Bill 2005* was, as the Law Council of Australia (2005, section 176) argued, that, 'protecting life and providing security must not lead to disproportionate measures. Every step taken in the name of our safety and security must be justified. Elements of the rule of law should be inalienable'. The response to this Bill, similar to post-September 11 legislation has been imbued with language describing it as 'un-Australia', 'draconian' and 'disproportionate'.

3. Indigenous peoples too have been concerned with aspects of the proposed changes in the Bill, most publicly those changes to the Sedition provisions. However the Indigenous public response has been comparatively muted. This is because of the history of Aboriginal engagement with Australian public institutions, in particular law enforcement agencies and Parliaments. This history reflects the insecurity of human rights protection in Australia and evidence that the rule of law has seldom been universal in Australia, particularly when it comes to Indigenous Australia. The LCA asserted that the rights of Australians should be protected by our Parliaments rather than being reduced by them, yet Indigenous Australians long ago dispensed with faith in the institution of Parliament as the best protector of human rights. Indeed even in recent decades, Federal, State and Territory Parliaments have legislated to reduce the freedoms and rights of Indigenous peoples that other Australians are able to exercise.

4. This paper provides a brief conspectus of the history of the curtailment of Indigenous freedoms in Australia with reference to the current debate on the anti-terrorism legislative regime. This history is an important insight into the dangers of legislative unravelling of the rule of law as well as a reminder to Australians that in fact Parliaments at the Federal and State levels are well rehearsed in limiting the exercise of fundamental rights such as protest and association. Therefore, legislation of the kind debated in 2005 may be 'disproportionate' and 'draconian' but they are far from 'un-Australian' - as this history will illustrate they are inherently Australian. Part I of this paper will provide a historical analysis of Indigenous peoples and the rule of law in Australia, in particular focusing upon the protectionist system in Queensland. Part II will highlight some aspects of the anti-terrorism measures that have caused concern for Indigenous peoples, in particular the Sedition provisions and how they may impact upon the Indigenous community.

PART 1: THE HISTORY OF INDIGENOUS AUSTRALIA AND DRACONIAN SECURITY MEASURES

5. Upon settlement Indigenous people acquired the status of British subjects. As distinct from other subjects however, Indigenous people rarely enjoyed the protection of the rule of law that underpins Australia's received Westminster constitutionalism. Rather, the rule of law was often suspended in order to enable the violent dispossession of Indigenous lands. In Queensland alone, a third of the Aboriginal population had perished by the end of the nineteenth century, due to settler violence and introduced disease (Chesterman & Galligan 1997, p. 33).

6. The conduits of state violence against Indigenous peoples were often police officers. Colonial forces such as the Border Police and the Native Police were adept at delivering retributive justice on behalf of the state. One former Native Policeman revealed their brutal tactics to a Royal Commission in 1861, '[I] didn't waste time to see whether a cow or bullock had been speared ... I don't think they can understand anything else except shooting them' (Cunneen 2001, pp. 57-58).

7. The Parliament's solution to frontier brutality was the protectionist system, in which the police continued to play the central role. The foundation of protectionism was the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld). The Act deemed senior police officers in each District to be 'protectors', who were responsible for ensuring that Aboriginal wards were not supplied with opium or alcohol and negotiating employment agreements on their behalf (Cunneen 2001, pp.57-58). Thus, Aboriginal peoples' rights and freedom to move and continue to practice traditions and customs were subject to oppression and the legislative control of Parliament (Reynolds 1982). For decades Aboriginal lives across Australia were controlled by these Protection Acts.[5]

8. The concept of protectionism had, as its genesis, a complex number of intersecting reasons - benevolent intentions, the spread of Christianity to fears that unregulated, inter-racial sex would lead to the contamination of European blood. Paranoia over 'miscegenation' is reflected in the comments of one parliamentarian who declared, 'I am of the opinion that the half-caste should be restricted in such a way as to prevent any further mixing with whites. We want our race kept white' (Queensland Legislative Assembly 1939, p. 458).

9. These kinds of comments were not uncommon in Australia and indeed were similar to those concerns expressed by Queensland and Western Australia in the lead up to the Constitutional Conventions in the late 1800's. During the Constitutional Conventions, there had been a discussion about the inclusion of a due process clause in the Australian Constitution led by Tasmanian Attorney General Andrew Inglis Clark who was influenced by the United States Constitution. Many states representatives, in particular Western Australia and Queensland objected to this because it would prevent them from discriminating against people on the basis of race. During the 1897-98 Convention, Sir John Forrest, Premier of Western Australia argued,

It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it but still it is so. I do not want this clause to pass in a shape which would undo what is about to be done in most of the colonies and what has already been done in Western Australia in regard to that class of persons.[6]

The due process clause which is known as Clause 110 was eventually transformed into a constitutional provision that protects citizens from discrimination on the basis of residence and in the course of debating this compromise it was noted that there was, 'no discrimination there based on residence of citizenship; it is simply based on colour and race'.[7] The racist sentiments that underpin the Constitution continue to define the relationship between Indigenous peoples and the state.

10. Another method used to prevent 'further mixing' between the races was the reserve system. Under section 9 of the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) the Minister was empowered to remove any 'aboriginal within any District ... [on] any reserve situated within such District, in such manner, and subject to such conditions, as may be prescribed'. Chesterman and Galligan (1997, p. 41) have argued that the most 'extraordinary aspect' of the Act was the broad ambit of regulatory power vested in the Governor in Council, which placed almost unlimited discretion in the hands of reserve superintendents and police protectors. Consequently, Indigenous wards were denied fundamental rights in the absence of safeguards taken for granted by those who continued to live under the rule of law.

11. In removing wards to reserves, the Minister was entirely free of judicial supervision or parliamentary scrutiny. Moreover detention on reserves was indefinite and the only way in which to leave a reserve was the grant of a certificate of exemption. However, as the Legislature failed to prescribe the conditions to be fulfilled in order to obtain an exemption, applications were determined according to the subjective views of those charged with administering the Act. In practice this required total submission to protectors and reserve superintendents. Historian Thomas Blake (2001, p.137) has written about the experience of one applicant from the Cherbourg Aboriginal Settlement in Queensland. Despite a lengthy work history that included two and a half years of military service, the man's application was rejected. The Superintendent's description of the applicant as 'not a good type of native' was sufficient cause to perpetuate the denial of his liberty.

The Palm Island Strike 1957

12. The power to remove wards to reserves also included the capacity to transfer wards from one reserve to another. The threat of being transferred to punitive reserves was commonly used to repress dissent in reserve communities. The Palm Island strike of 1957 is an example of the brutal manner in which the protectionist regime responded to political agitators. Established in 1918, the Palm Island Aboriginal Reserve was described by former Chief Protector, J.W. Bleakley, as a 'penitentiary for troublesome cases' (cited in Watson 1995, 151). In recording the history of the Cherbourg settlement, Blake (2001, p. 45) described how the threat of deportation to Palm Island was used to terrorise recalcitrant inmates into submission. Its reputation for barbaric administrators led to the pseudonym, 'Punishment Island'.

13. The superintendent at the time of the strike was an ex-policeman, Roy Bartlam. Bartlam was notorious for his zealous enforcement of racial segregation and severe punishments. Late arrivals to his morning roll call were automatically gaoled for two weeks (Watson 1995, p. 155). All inmates, including the elderly and pregnant women, were forced to work thirty hours per week, with rations their only remuneration (Watson 1995, p. 155). Most foodstuffs were shipped to the Island from the mainland. Whereas the European minority received ample supplies, inmates were forced to queue for leftovers. Elizabeth Clay, a member of the Palm Island community, was a child at the time of the strike and recalled her parents waiting in line for hours for essentials such as milk and vegetables (NL Watson, 2005, pers. comm., 7 December). Tensions boiled over on 10 June 1957 when Bartlam attempted to deport an inmate who had the audacity to speak back to one of the Europeans (Watson 1995, p. 158). The community rallied behind the man and declared a strike. The strike was broken on its fifth day through dawn raids on the homes of community leaders. Manacled in

leg irons the men were led with their families to a military patrol boat (NL Watson, 2005, pers. comm., 7 December). None of the strikers were charged with committing a criminal offence (Watson 1995, p. 163). Had they been charged, the inmates would have received the benefits of being tried by an impartial court and access to legal advice. But all that protectionism offered was arbitrary punishment in the form of exile to other reserves on the mainland.

The right to due process

14. While other citizens continued to enjoy procedural rights enshrined by the criminal law, reserve inmates were subject to a raft of nonsensical offences. For example, the 1945 Regulations created offences such as 'acts subversive of good order' (s. 26(2)), disobeying an order to stop dancing (s. 21(2)), and failing to comply with an order by the superintendent or police protector to reveal the contents of one's mail (s. 32(1)). Those charged had no automatic entitlement to be tried before a legitimate court. For example, s. 70(1) of the 1966 Regulations empowered the Reserve Manager, Visiting Justice and Aboriginal Courts to make orders for inmates to be detained in dormitories. Despite the title, Aboriginal Courts lacked any real independence from the State (Kidd 1997, p. 311). An example of the control exercised by the Department of Native Affairs over such courts has been provided by the late Eddie Mabo. As a teenager Mabo was tried before an Island Court for consuming alcohol and having sexual relations with a woman to whom he was not married. Bound by the policies of the Department of Native Affairs, the Court sentenced Mabo to 12 months exile from his home, Murray Island. The Department then forced Mabo to spend his exile in the Torres Strait (Russell 2005, pp. 24-25).

Restriction of the freedom of association

15. Until the early 1970s it was an offence for a person subject to the Act to leave a reserve without the permission of the reserve superintendent or police protector.[8] The *Aborigines Act 1971* (Qld) removed this offence but still curtailed the freedom of association. After 1971 entitlement to be on a reserve was dependent upon a permit, issued by the Director of Native Affairs.[9] During the Bjelke-Petersen era the permit system was used to keep political campaigners out of Aboriginal Reserves. For example, in 1979 the residence permit of a school teacher at Hopevale was cancelled because the teacher had organised a meeting between Indigenous residents and a union delegate without seeking prior departmental approval (Kidd 1997, p. 311).

16. Throughout the 1970s and early 1980s protectionism was gradually dismantled. This change was brought about by a number of factors, including the emergence of a national anti-racism movement, Commonwealth legislation such as the *Racial Discrimination Act 1975* (Cth) and the activism of Indigenous community organisations. Nonetheless, the historical role of the police in the repression of Indigenous dissent continued. In Brisbane activists who were identified as 'radical' were common targets of the pre-Fitzgerald force. Meanwhile, outside of Queensland, members of the Indigenous civil rights movement increasingly attracted the attention of the AFP and the Australian Security Intelligence Organisation (hereafter 'ASIO').

17. In Brisbane the radical elements of the Indigenous political movement were represented by the Black Panther Party. Although widely denounced by conservatives, its members helped to found many of the legal and medical services that continue to serve Indigenous communities today. One key area of concern to the Panthers was racially motivated police violence which they attempted to counter by replicating a program designed by their US counterparts, the 'pig patrol'. In the 1970s Brisbane police ran an informal quota on black arrests. In order to fill it, individual officers charged Indigenous people at random and raided hotels frequented by Indigenous patrons. Members of the 'pig patrols' literally patrolled the streets, questioned the police and documented their exchanges. Their work was used to counter police evidence in court, eventually breaking the quota.

18. The crucial role that these patrols played in countering police abuse was revealed by Brisbane community leader, Don Davidson to the author, Ward McNally (1973, pp. 117-118):

... any white person who says the pig patrol is unnecessary has no idea of what goes on in Brisbane after dark. Don Brady and I have arrived in a street to see police manhandling Aboriginal kids, bundling them into paddy wagons and carting them off to be charged with any offence that comes into their minds. But when we are around these same police nod in a friendly fashion to the kids and to us. It's sheer bloody hypocrisy, mate. We're living in a hypocritical society.

19. Outside of Queensland a pan Aboriginal movement thrived, culminating in the Aboriginal Tent Embassy. On Australia Day in 1972 Prime Minister McMahon stated that his Government would not recognise Indigenous land rights (Robinson 1994, p. 50). In response a small group of Koori activists established the 'Aboriginal Embassy' on the lawns of Parliament House. The motivations of the Embassy evolved primarily around land justice. Their five-point plan demanded Aboriginal ownership of all existing reserves and preservation of sacred sites (Attwood & Markus 1999, p. 264). On 20 July 1972 federal police razed the tents, less than forty minutes after the Federal Government passed an Ordinance banning camping on the land (Robinson 1994, 56). In the clash that followed eight people were arrested and numerous casualties were hospitalised (McNally 1973, p. 85). The burgeoning black power movement was monitored by the Australian Federal Police and links were raised between Indigenous activists and the Communist Party of Australia which led to ASIO surveillance of community organisations such as the Redfern All Blacks Football Team (Hartley 2002).

20. It is clear from these brief examples Indigenous Australians have regularly had their freedoms restricted and that the proposed additional anti-terrorism laws while novel in that they apply to white Australians are not necessarily novel to the Australian political and legal system nor to Indigenous Australia.

THE INDIGENOUS COMMUNITY

21. The new proposed amendments are part of a package of amendments that began with the September 11 response in 2002 including the *Security Legislation Amendment (Terrorism) Act 2002* and the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*. Some of the elements of the new laws will include detention for a period of seven days with a warrant and interrogation for up to 24 hours and the crime of association by membership of a terrorist organization.

22. As alluded to in the Introduction, Indigenous peoples are not as shocked by the draconian measures taken by the Howard government as the mainstream community because of the history discussed above. There are a number of concerns that have been raised in the context of the 2005 amendments dealing with preventative detention and control orders. These include how the preventative detention measures interact with the protocols that were established as a result of the Royal Commission into Aboriginal Deaths in Custody. Moreover, the stricter sedition laws raise questions about the content of Indigenous protest manifest in calls for Aboriginal self-determination and sovereignty. Other concerns were proposals to extend powers to the army by amending the *Defence Act* and extending the powers of the Army to detain, search and use force if necessary. Apart from the historical institutional racism, it is concerning because of the very recent and public exposure of endemic racism in the Army such as the photos of soldiers dressed up like the KKK in Townsville (McIlveen 2004). Moreover it is worrying the extension of the extend stop, question and search powers for the Australian Federal Police (hereafter AFP) where there are reasonable grounds that a person might have just committed, might be committing, or might be about to commit a terrorism offence. This extension of AFP powers and how they may impact upon Indigenous communities was raised during the Senate Committee investigating the impact of the bill. It was argued that the 'discriminatory application of the powers was highly likely':

the extension of AFP powers to provide a pre-emptive authority based on what someone 'might' do, risks the discriminatory and blanket application of stop and search powers. Stop and search powers operate at the level of 'street policing' and have a history of controversial application, exposing particularly vulnerable minority communities to overpolicing and arbitrary interference. Research demonstrates such powers are routinely used for purposes other than 'apprehending criminals', such as gathering intelligence, harassment and punishment along ethnic lines. Heavy-handed forms of policing such as the regular use of stop and search powers, particularly where used in conjunction with racial profiling have proven counterproductive to terrorism investigation through the alienation of communities (Tham 2005 139).

Sedition

23. The new measures introduced by the Australian Government are amendments to the *Criminal Code Act 1995* (Cth). The original Bill was titled the *Anti-Terrorism Bill 2005* (Cth) and repealed existing sedition provisions of the *Crimes Act 1914* (Cth) and inserted five new offences of sedition.[10] Under the new amendments to the Criminal Code, the maximum imprisonment is 7 years for sedition. Some of the proposed changes of concern include that there be no requirement to prove intention to cause seditious intent, rather the urging of sedition was sufficient.

24. The new sedition provisions have caused some consternation among Aboriginal leaders because of the nature of Indigenous political claims to self-determination and sovereignty that may be construed as seditious in urging the overthrow of a constitutional order. Moreover the fact that initially it was not necessary to prove intent meant that it could arguably occur in the context of an Aboriginal protest march, for example, which is a typical expression of Indigenous protest in Australia. As many commentators have observed the provision is ambiguous and it is difficult to construe how it may impact upon Indigenous peoples. Many legal scholars argued that these laws would have impacted upon freedom fighters such as Nelson Mandela. It is for this reason - that one's freedom fighter is another person's terrorist - that concern has been expressed for the activities of some Aboriginal activism such as the Aboriginal Tent Embassy and the Aboriginal Provisional Government (Mansell 2005). Indeed, those who participate internationally in United Nations forums calling for self-determination and sovereignty of Aboriginal people may also be affected. Les Malezer, an Aboriginal leader and Chairman of the Foundation for Aboriginal Islander Research Action who participates regularly in such meetings argues that:

Sedition was all about protection of the empire ... The last person in Australia, tried and convicted of sedition was an Australian who was telling the Papua New Guineans that they had the right to be an independent state. Something that the UN forced upon Australia ten years later. But meanwhile this Australian person who told these people of their rights, was tried and convicted of sedition. We don't want that in Australia. We don't want where Aboriginal people, who are talking about our rights; through a treaty, through revision of the constitution, through recognition of our rights to self-determination, through recognition of our own territories (our ownership of our own territories) to be accused of sedition because we are fighting for that (Malezer 2005).

Conservative politicians such as Malcolm Turnbull and George Brandis have also argued that the laws go too far. According to Turnbull, the sedition provisions 'had been regarded as archaic and dead letters for many years... they are cumbersome and difficult to understand, especially for non-lawyers' and George Brandis stated that 'I am inclined to think the whole law of sedition is obsolete' (Dodson 2005).

Conclusion

25. The history of protectionism is pertinent to the current debate about anti-terror legislation because it illustrates the danger of allowing the executive to curtail human rights, in the absence of checks and balances. Indigenous people who dared to dissent have in the past been removed to punitive reserves and were subject to humiliating punishments. The history and the contemporary history of the curtailment of Indigenous rights through the legislature bolster Indigenous arguments for reform of Australia's public institutions to better protect Indigenous rights. Indigenous Australians have never had faith in the Diceyan notion that Parliament can be trusted to protect our human rights.

This paper has provided a cursory introduction to the history of race relations between Indigenous peoples and the state and how that history calls into question claims by human rights and civil liberties advocates that current counter-terrorism measures are a new development in draconian legislative measures by the state to limit the rights and freedoms of Australians. If anything, the history of Aboriginal Australia and this article serve to highlight that these laws are in fact a very Australian characteristic.

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Notes

[1] Schedule 1 of the Bill.

[2] Schedule 3 of the Bill.

[3] Schedule 4 of the Bill.

[4] Ibid.

[5] *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qd); *Aboriginal Protections Act 1909* (NSW); *the Northern Territory Aboriginals Act 1910* (SA); *the Aboriginals Ordinance 1911* (NT); *the Aboriginals Ordinance 1918* (NT); *the Welfare Ordinance 1953* (NT); *the Aboriginal and Torres Strait Islanders Affairs Act 1965* (Qd); *the Aborigines Act 1911* (SA); *the Aborigines Act 1934* (SA); *the Aboriginal Affairs Act 1962* (SA); *the Aborigines Protection Act 1886* (WA); *the Aborigines Act 1905* (WA); *the Native Welfare Act 1963* (WA).

[6] *Conventions Debates* vol 4 Melbourne 1898 p 666.

[7] *Convention Debates* vol 5 Melbourne 1898 p 1801.

[8] *Aboriginals Regulations 1945* (Qld) s 23(1)(a).

[9] *Aborigines Act 1971* (Qld) s 21.

[10] New section 80.2 to the existing offence of treason s80.1.

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