

FOREWORD

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A state's capacity to detain individuals is one of the markers of its authority and an exemplar of its monopoly of force. Within liberal democratic frameworks, this is subject to constraints, mediated through a separation of powers that purports to protect an individual from arbitrary detention and the unregulated exercise of executive power. As Rebecca Ananian-Welsh argues in this thematic component, 'liberty, equality and the rule of law' are 'constitutional values', the importance of which was underlined by Sir William Blackstone:

Of great importance to the public is the preservation of personal liberty: for if once it were left in the power of any, the highest ... to imprison arbitrarily whomever he or his officers thought proper ... there would soon be an end of all other rights and immunities.¹

It would be difficult to argue that liberal democratic states, many of which have histories of colonialism entailing multiple forms of slavery and arbitrary detention, have an unblemished record in defending such values. Nevertheless, an independent judicial system is a fundamental characteristic of liberal democracies, as is the principle that an individual should not be detained for the purposes of punishment in the absence of criminal justice due process.

This thematic component examines various forms of detention deployed in Australia which have potentially punitive consequences, but fall outside the norms of criminal justice due process by not operating specifically as a punishment following a finding of guilt by a criminal court. The first three articles address aspects of Australia's immigration detention policies that are implemented through various administrative processes for purposes that have been deemed by the High Court not to be punitive. The remaining four articles focus on forms of preventive detention that politically have been justified as necessary to protect the community from an unacceptable risk – the preventive detention of terrorism suspects prior to any criminal charges being laid and the preventive detention of sex offenders and other high risk offenders because of their previous criminal history. There are significant legal differences between these forms of detention. However, they share the characteristic of being

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¹ Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, first published 1765, 1966 ed) vol 1, 131.

introduced for strategic policing reasons determined largely in the political rather than the legal realm.

Since its introduction in 1992, Australia's policy of mandatory detention of unauthorised non-citizens has operated as a cornerstone of the border policing policies of successive federal governments. The main targets of these policies have been asylum seekers attempting unauthorised entry to Australia by boat in order to claim protection in accordance with Australia's obligations under the 1951 *Refugee Convention*.² Formally, the purposes of detention have been to facilitate the processing of applications and the removal of those persons whose applications have failed. Politically, detention has been presented as form of deterrence and a measure of various 'tough on boats' policies designed to prevent refugees seeking protection independently of the government's resettlement policies. Since August 2012, when the Gillard Labor Government reintroduced offshore processing on Nauru, the border policing regime has evolved to include: making all unauthorised arrivals liable to forced transfer to regional processing centres on Nauru or Manus Island; removing the possibility of resettlement in Australia for those determined to be refugees via the offshore processing arrangements; reintroducing temporary protection visas for those determined to be refugees who arrived prior to the offshore arrangements; and intercepting boats at sea with a view to transferring the passengers to another state. Against this background, there have been renewed concerns about human rights breaches and the harmful impacts of detention. These concerns are highlighted by the death of an asylum seeker detained on Manus Island in February 2014, the report of the Australian Human Rights Commission's *National Inquiry into Children in Immigration Detention* in November 2014,³ and the Phillip Moss *Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru* in February 2015.⁴

On a number of occasions, most notably in *Al-Kateb v Godwin*,⁵ the High Court has held that concerns about human rights do not negate the lawfulness of immigration detention, even in circumstances where there is no reasonable prospect of removal. However, in her analysis of the case of *Plaintiff S4/2014 v Minister for Immigration and Border Protection*,⁶ Joyce Chia argues that the High Court has 'for the first time clearly articulated several constitutional limits to immigration detention'. The case itself focused on the lawfulness of the temporary safe haven visa and temporary humanitarian concern visa issued to an

2 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

3 Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (Report, November 2014).

4 Philip Moss, *Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru* (Final Report, 10 February 2015).

5 (2004) 219 CLR 562.

6 (2014) 88 ALJR 847.

asylum seeker who arrived in December 2011 and was determined to be a refugee in April 2012. Although the Court found for the plaintiff, the practical impact of the decision was undermined by the reintroduction of temporary protection visas. Nevertheless, Chia suggests the case ‘casts doubt on the constitutionality’ of four categories of immigration detention: ‘detention on the grounds of security and character; detention in cases where processing is not being undertaken; unduly lengthy cases of detention; and other cases, including detention of recognised refugees for health and security checks, and those refused protection visas but not currently in the process of being removed’. She also suggests that although there is ‘some distance’ to go, that the decision ‘opens up the possibility of convergence with international human rights law and comparative state practice’.

Leaving aside the legal obstacles to such a reappraisal of detention given the wording of the *Australian Constitution* and the absence a Bill of Rights, jurisdictional issues arise as a result of the systemic shift towards offshore processing. In her article on the arrangements for asylum seekers transferred to Nauru, Azadeh Dastyari analyses the 2013 *Memorandum of Understanding* between the governments of Australia and Nauru, and argues that the so-called ‘open centre arrangements’ on Nauru constitute a form of detention that breaches both the *Nauruan Constitution* and international human rights law pertaining to arbitrary detention. In relation to the *Nauruan Constitution*, she advances two main arguments regarding the prohibition on the deprivation of personal liberty in article 5(1): first, that the restrictions on asylum seekers need to be viewed ‘cumulatively and in combination’; and secondly, that ‘prolonged detention renders detention unlawful’. In relation to international law, she focuses on the prohibitions on arbitrary detention in the *International Covenant on Civil and Political Rights*⁷ and the *Convention on the Rights of the Child*.⁸ Dastyari emphasises the effective control Australia wields over the detention processes in Nauru and argues that the Australian government should take responsibility for them.

Successive Australian governments have proven impervious to criticisms that Australia’s detention policies breach international law. Moreover, in 2012, following the High Court’s rejection of the so-called Malaysia ‘swap deal’,⁹ the *Migration Act 1958* (Cth) (*Migration Act*) was amended to enable the Immigration Minister to designate a country suitable for regional processing on the sole ground that it is in Australia’s ‘national interest’ to do so.¹⁰

7 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9(1).

8 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37(b).

9 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

10 *Migration Act* s 198AB.

Since the election of the current federal government, there have also been attempts to establish the practice of maritime detention. In their examination of *CPCF v Minister for Immigration and Border Protection*,¹¹ Patrick Emerton and Maria O'Sullivan consider the interdiction and detention of asylum seekers at sea. In this decision, the High Court upheld the legality of 157 Sri Lankan Tamil asylum seekers being detained for 29 days aboard an Australian customs vessel in June 2014, while the Australian authorities unsuccessfully attempted to negotiate their transfer to India. Because this occurred outside of Australia's migration zone, the detention could not have been lawful under the *Migration Act*. Instead, the Commonwealth relied upon section 72(4) of the *Maritime Powers Act 2013* (Cth) ('*Maritime Powers Act*'), which allows the detention of a person on a detained vessel pending their removal to any place inside or outside of Australia's migration zone. Emerton and O'Sullivan discuss recent amendments to the *Maritime Powers Act*, which has no international equivalent, and argue that 'it appears to permit interdiction operations that exceed Australia's international legal authority'. In particular, they focus on possible breaches of non-refoulement obligations, search and rescue obligations, and the prohibition on arbitrary and inhumane detention. They also raise a number of constitutional concerns including limits to executive detention regimes, the importance of time limits and the need for a constitutionally permissible purpose for detention.

Emerton and O'Sullivan note in the conclusion to their article that it 'raises broader issues about the nature and role of the state and the meaning of sovereignty.' Here, they are talking about a situation where the Australian government can effectively detain a person with no lawful status in Australia and take them on an open-ended journey to any destination. However, the remaining articles discuss forms of detention applicable to Australian citizens or residents in Australia. In relation to detention in the domestic sphere, the focus is on managing the risk, and as such, the dominant paradigm is one of risk prevention.

A logic of prevention informs detention in the anti-terrorism context. Svetlana Tyulkina and George Williams provide an overview and critique of the preventative detention orders ('PDOs') introduced at the Commonwealth and state level following the terrorist bombings in London in July 2005. As with the detention provisions of the *Maritime Powers Act*, PDOs have no international comparator, including in the United Kingdom, and Tyulkina and Williams argue there has never been a clear rationale for them. Under the Commonwealth *Criminal Code*,¹² a person detained under a PDO can be held for up to 48 hours, and under harmonised state legislation, for up to 14 days, on the suspicion of involvement in an imminent terrorist attack or if it is necessary to detain the person for the purposes of preserving evidence of a terrorist act that has occurred

11 (2015) 89 ALJR 207.

12 *Criminal Code Act 1995* (Cth) sch 1.

in the past 28 days.¹³ PDOs are issued in the absence of the subject. Those detained have limited access to outside communication, and disclosure of the existence or nature of the order can result in a prison term of up to five years. Only four PDOs have been issued – three in September 2014 and one in April 2015. Tyulkina and Williams call for the repeal of these orders given the extensive counter-terrorism powers that already exist, their lack of apparent purpose or utility and because they are ‘highly intrusive upon basic freedoms’.

Not only may the current legislative schemes for PDOs lack utility, they also raise constitutional issues. Rebecca Ananian-Welsh engages in a thorough discussion of the Commonwealth PDO provisions to argue that they ‘infringe Chapter III of the *Constitution* by involving serving judges in detention proceedings that lack the basic features of fair process’. She reviews the evolution of High Court’s case law striking down legislation purporting to allow the exercise of judicial power in ways that are incompatible with judicial independence. Following the decision in *Wainohu v New South Wales*,¹⁴ she argues that there is now a ‘single constitutional notion’ of incompatibility. In the context of preventive detention, this should incorporate a measure of fair process requiring ‘in the least, a degree of openness, equality, objectivity, and the capacity for a party to know and answer the case against them’. Ananian-Welsh concludes that Chapter III constraints might be avoided simply by removing judges from the PDO scheme and allowing the executive to administer it, for example, by giving senior police officers the power to issue all PDOs. As she notes, this would not resolve issues of due process. It might also undermine political support for the orders by removing the legal gloss associated with judicial involvement.

The preventive detention of sex offenders raises further questions of due process. Patrick Keyzer and Bernadette McSherry discuss two principal forms of preventive detention: indefinite sentences (which have a long history within Australian jurisdictions) and post-sentence preventive detention orders (first introduced in Queensland in 2003 and since replicated in a number of states). Typically, such orders are imposed towards the end of a prisoner’s sentence and can involve either further detention in prison or supervision in the community. The standard of proof required to establish an unacceptable risk of reoffending falls short of the criminal standard of beyond reasonable doubt and there is a heavy reliance on the opinions of expert witnesses such as psychologists. Keyzer and McSherry suggest that while such schemes have been held to be constitutional in Australia, they raise a number of human rights concerns, particularly those associated with arbitrary detention. The second part of their article provides an overview of a valuable Australian Research Council-funded study into the experiences of various professionals working in preventive

13 *Criminal Code Act 1995* (Cth) sch 1 ss 105.1(a)–(b), 105.4(4)–(6).

14 (2011) 243 CLR 181.

detention and supervision schemes. They identify a number of significant shortcomings in these schemes, particularly in the provision of services and programs that can help reduce risk and aid the rehabilitation of offenders.

In the final article, Tamara Tulich examines the *Crimes (High Risk Offenders) Act 2006* (NSW) that extends post-sentence orders beyond sex offenders and enables, uniquely, the granting of ex parte emergency detention orders. Tulich traces the origins of the legislation, its hasty passage through the New South Wales Parliament, and further amendments in 2013 and 2014. While the political rhetoric associated with this legislation was heavily framed around notions of risk, Tulich alerts us to the complexities of risk assessment amongst the diverse cohort of serious violent offenders affected by this legislation. She also discusses the recommendations of the New South Wales Sentencing Council on the scheme, particularly its unrealised recommendation for the establishment of an Independent Risk Management Authority. As she points out, the availability of ex parte orders raises issues of procedural fairness beyond the due process concerns canvassed in the earlier articles. There are also concerns about the civil nature of post-sentence supervision orders, the breach of which is a criminal offence punishable by up to five years' imprisonment.

Collectively, the articles in this thematic component offer rich insights into forms of detention that are subject to limited and inconsistent political scrutiny. They highlight that detention is a mechanism for control that rests increasingly on notions of risk prevention or deterrence outside of traditional justice frameworks. The conceptual tensions between risk management and punishment are likely to endure. These articles provide a valuable contribution to such discussions.