

EDITORIAL

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Liberty is a fundamental right,¹ which forms the basis of other rights.² While any kind of imprisonment has severe consequences for individual rights, detention imposed for purposes other than criminal punishment raises the question of whether these consequences are justified, and in addition, challenges key legal principles such as fair process, the separation of powers and the rule of law. This is reflected in the general rule, expressed in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, that ‘the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt’.³ However, liberal use has been made of the exceptions to this general rule, and the legal regimes for detention in Australia are numerous and varied.

Asylum seekers and other non-citizens without visas are subject to mandatory immigration detention, the validity of which has been upheld on several occasions.⁴ Individuals can be detained to prevent an imminent terrorist attack, or to preserve evidence of a recent terrorist act, for up to 48 hours by the Australian Federal Police,⁵ and for up to 14 days under state and territory legislative schemes.⁶ The continuing detention of sex offenders and other high risk offenders who have served their sentences is permitted,⁷ provided the relevant legislation does not compromise the institutional integrity of the court authorising detention.⁸ Mentally ill persons can be detained if they are unfit to be tried, if

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1 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) arts 3, 9.

2 Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, first published 1765, 1966 ed) vol 1, 130.

3 (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

4 See, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562.

5 *Criminal Code Act 1995* (Cth) sch 1 s 105.4.

6 *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) pt 2; *Terrorism (Police Powers) Act 2002* (NSW) pt 2A; *Terrorism (Emergency Powers) Act 2003* (NT) pt 2B; *Terrorism (Preventative Detention) Act 2005* (Qld); *Terrorism (Preventative Detention) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (Tas); *Terrorism (Community Protection) Act 2003* (Vic) pt 2A; *Terrorism (Preventative Detention) Act 2006* (WA).

7 See, eg, *Crimes (High Risk Offenders) Act 2006* (NSW).

8 *Kable v DPP (NSW)* (1997) 189 CLR 51; *Fardon v A-G (Qld)* (2004) 223 CLR 575.

they are acquitted on the grounds of insanity or automatism,⁹ or following a civil commitment.¹⁰ Further, in criminal justice contexts, detention is utilised for questioning¹¹ and remand.¹² In all of these cases, it is argued that restricting the liberty of the person detained is justified by the need for some form of community protection.

This thematic component aims to facilitate analysis of the theory and practice of detention, with a view to generating insights into the appropriateness of particular forms of detention and the use of detention in the Australian legal system more broadly. At the intersection of public law and criminal law, the thematic component juxtaposes perspectives on detention that may not have otherwise been considered together.

The seven articles in the thematic component focus on some of the most topical forms of detention: immigration detention, the detention of suspected terrorists and the continuing detention of high risk offenders. They explore the significance of the High Court's recent decision in *Plaintiff S4/2014 v Minister for Immigration and Border Protection*;¹³ the legality of detaining Australia's asylum seekers in Nauru;¹⁴ the detention of asylum seekers at sea prior to their entry into the migration zone;¹⁵ the purpose and appropriateness of anti-terrorism preventative detention orders;¹⁶ the relationship between anti-terrorism preventative detention orders and the separation of judicial power;¹⁷ the legal framework for and practical challenges relating to the continuing detention of sex offenders;¹⁸ and the nature and implications of post-sentence preventive detention and extended supervision of high risk offenders.¹⁹

Despite the diversity of subject matter, there are important points of resonance between the articles. To note just one example, articles relating to both

9 See, eg, *Mental Health (Forensic Procedures) Act 1900* (NSW) ss 17(3)(a), 27(a).

10 See, eg, *Mental Health Act 2007* (NSW) ch 2.

11 See, eg *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) pt 9.

12 See, eg, *Bail Act 2013* (NSW).

13 Joyce Chia, 'Back to the Constitution: The Implications of *Plaintiff S4/2014* for Immigration Detention' (2015) 38 *University of New South Wales Law Journal* 628.

14 Azadeh Dastyari, 'Detention of Australia's Asylum Seekers in Nauru: Is Deprivation of Liberty by Any Other Name Just As Unlawful?' (2015) 38 *University of New South Wales Law Journal* 669.

15 Patrick Emerton and Maria O'Sullivan, 'Rethinking Asylum Seeker Detention at Sea: The Power to Detain Asylum Seekers at Sea under the *Maritime Powers Act 2013* (Cth)' (2015) 38 *University of New South Wales Law Journal* 695.

16 Svetlana Tyulkina and George Williams, 'Preventative Detention Orders in Australia' (2015) 38 *University of New South Wales Law Journal* 738.

17 Rebecca Ananian-Welsh, 'Preventative Detention Orders and the Separation of Judicial Power' (2015) 38 *University of New South Wales Law Journal* 756.

18 Patrick Keyzer and Bernadette McSherry, 'The Preventive Detention of Sex Offenders: Law and Practice' (2015) 38 *University of New South Wales Law Journal* 792.

19 Tamara Tulich, 'Post-Sentence Preventive Detention and Extended Supervision of High Risk Offenders in New South Wales' (2015) 38 *University of New South Wales Law Journal* 823.

immigration detention²⁰ and anti-terrorism preventative detention orders²¹ refer to Justice Gummow's statement that '[t]he very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite detention at the will of the Executive'.²²

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20 Chia, above n 13, 628.

21 Ananian-Welsh, above n 17, 769.

22 *Al-Kateb v Godwin* (2004) 219 CLR 562, 612 [137] (Gummow J), quoting *Hamdi v Rumsfeld*, 542 US 507, 554–5 (Scalia J) (2004).