

**BOOK REVIEW\****Law and Liberty in the War on Terror*

Edited by ANDREW LYNCH, EDWINA MACDONALD AND GEORGE WILLIAMS

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*Law and Liberty in the War on Terror* is the outcome of a three-day conference held in July 2007 to examine the role of law in responding to the threat of terrorism. The stated purpose of the conference and now the book was to bring together different perspectives on the relationship between law and security. As with any collection of conference papers, one question that comes to mind immediately is whether the book is a mere compilation of assorted articles or whether it does in fact have a unifying theme or particular focus. With *Law and Liberty in the War on Terror*, one is pleased to find that the latter is the case. The book provides the first comprehensive and in-depth treatment of some of the most pressing questions and challenges Australia faces when responding to the threat of terrorism. The editors, Andrew Lynch, Edwina MacDonal and George Williams, have performed a fine job in organising the different contributions into a coherent and interesting whole.

The book is divided into seven parts and opens with a contribution by the former Attorney-General, Philip Ruddock, who defends the legislation introduced in the aftermath of September 11, arguing that the laws were both necessary as a preventative weapon against terrorism and proportionate, as they strike an appropriate balance between the preservation of national security on the one hand, and human rights and the rule of law on the other.<sup>1</sup> David Dyzenhaus and Rayner Thwaites pick up the theme of the rule of law and examine the role of the judiciary in times of a (perceived?) emergency with specific reference to the recent cases of *Al-Kateb v Godwin*<sup>2</sup> and *Thomas v Mowbray*.<sup>3</sup> Ben Saul and

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\* Christopher Michaelsen is a Visiting Fellow at the Faculty of Law, University of New South Wales.

1 See Philip Ruddock, 'Law as a Preventative Weapon Against Terrorism' in Andrew Lynch, Edwina MacDonal and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 3.

2 (2004) 219 CLR 562.

3 [2007] HCA 33; see David Dyzenhaus and Rayner Thwaites, 'Legality and Emergency – The Judiciary in a Time of Terror' in Andrew Lynch, Edwina MacDonal and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 9, 11ff.

Kent Roach both address the rather specific but highly important problem of inserting a motive in statutory definitions of terrorism offences.<sup>4</sup>

Part II largely deals with the question of whether the criminal justice system is sufficiently equipped to deal with the challenges associated with the threat of terrorism. Robert Cornall argues that new laws were warranted by the ‘unprecedented terrorist threat’<sup>5</sup> and opines that the new laws have been effective. Unfortunately, Cornall does not provide any justification or evidence for his claims. Instead he refers to article 3 of the United Nations’ Universal Declaration of Human Rights, that ‘Every person has the right to life, liberty and security of person’,<sup>6</sup> as creating a duty for the government to enact extensive anti-terrorism legislation<sup>7</sup> – an argument which is echoed by Geoff McDonald in Part III.<sup>8</sup> This is plainly wrong. It is widely accepted that article 3 of the Universal Declaration of Human Rights seeks to confine the power of the state to coerce individuals through arbitrary arrest and detention, and that it cannot be interpreted as referring to different matters such as a duty on the state to give someone personal protection from an attack by others, or right to social welfare.<sup>9</sup>

Cornall’s piece is followed by several excellent articles by Andrew Goldsmith, Patrick Emerton, Stephen Donaghue and Philip Boulten who critically discuss the scope of terrorism offences as well as the implications of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) (‘NSI Act’) for the right to a fair trial of terrorist suspects.<sup>10</sup> Donaghue argues that the experience to date suggests that the NSI Act is capable of operating without

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- 4 See Ben Saul, ‘The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient or Criminalising Thought?’ in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 28; and Kent Roach, ‘The Case for Defining Terrorism With Restraint and Without Reference to Political or Religious Motive’ in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 39.
  - 5 Robert Cornall, ‘The Effectiveness of Criminal Laws on Terrorism’ in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 50, 57.
  - 6 *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, 3<sup>rd</sup> sess, UN Doc A/810, 71 (1948), art 3.
  - 7 Cornall, above n 5, 54.
  - 8 Geoff McDonald, ‘Control Orders and Preventative Detention – Why Alarm is Misguided’ in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 106, 114.
  - 9 See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (1993) 161-3; Monica Macovei, *A Guide to the Implementation of Article 5 of the European Convention on Human Rights* (2002) 6; Jochen A. Frowein and Wolfgang Peukert, *Europäische Menschenrechtskonvention: EMRK-Kommentar* (1985) 53-8 with further references. Relevant case law of the European Court of Human Rights includes *Bozano v France* (9990/82) [1986] ECHR 16 (18 December 1986) and *Kurt v Turkey* (24276/94) [1998] ECHR 44 (25 May 1998).
  - 10 See Andrew Goldsmith, ‘Preparation for Terrorism: Catastrophic Risk and Precautionary Criminal Law’ in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 59; Patrick Emerton, ‘Australia’s Terrorism Offences – A Case Against’ in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 75; Stephen Donaghue, ‘Reconciling Security and the Right to a Fair Trial: The National Security Information Act in Practice’ in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 87; and Philip Boulten, ‘Preserving National Security in the Courtroom: A New Battleground’ (2007) 96.

unfairness to the accused.<sup>11</sup> The theme of the importance of a fair trial and the risk of miscarriages of justice is also addressed in Boulten's chapter. Boulten, who has acted in several cases involving some of the new terror laws, points out that the conditions for a fair trial are not favourable when an accused is arrested in a 'blaze of publicity'<sup>12</sup> and calls on all participants in proceedings involving terrorism offences to be 'exceedingly careful'<sup>13</sup> to avoid adding to the climate of fear that exists outside the courtroom.

Part III of the book then focuses on a particularly controversial aspect of Australia's anti-terrorism legislation: the preventative detention orders. Geoff McDonald argues that alarm about control orders and preventative detention is 'misguided'<sup>14</sup> and justifies Australia's regime *inter alia* by comparing it to measures adopted in other countries such as the United Kingdom, Canada, The Netherlands, France and the United States.<sup>15</sup> McDonald largely fails to appreciate, however, that the laws in these countries operate in an entirely different context, both as far as the threat scenario and the existing statutory and constitutional safeguards are concerned. McDonald's chapter closes with a defence of Australia's anti-terrorism legislation 'generally' which begs the question why the editors chose to include his piece, as it largely repeats the political rhetoric to be found in Ruddock's and Cornell's contributions. Part III continues with two well-written chapters by Justice Margaret White and James Renwick.<sup>16</sup> Providing a judicial perspective on the making of preventative detention orders White commends the Queensland expedient of appointing a Public Interest Monitor. Renwick on the other hand undertakes an interesting analysis of the constitutional validity of such orders.

In Part IV the discussions move on to address the question of whether certain human rights need to be 'traded off'<sup>17</sup> in order to achieve effective counter-terrorism measures. Katharine Gelber examines the role of the fundamental right to freedom of expression and voices concern about recent restrictions of free speech.<sup>18</sup> Sarah Joseph and Neil James address the much discussed question of whether torture is and/or should be acceptable in the context of the so-called War

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11 Donaghue, above n 10, 94.

12 Boulten, above n 10, 103.

13 *Ibid.*

14 Geoff McDonald, above n 8, 106.

15 *Ibid.* 111–3.

16 See Margaret White, 'A Judicial Perspective – The Making of Preventative Detention Orders' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 116; and James Renwick 'The Constitutional Validity of Prevention Detention' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 127.

17 Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 137.

18 See Katharine Gelber, 'When are Restrictions on Speech Justified in the War on Terror' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 138.

on Terror.<sup>19</sup> Stressing the absolute nature of the prohibition on torture and other ill treatment, Joseph provides a good overview of the arguments made in favour and against the use of torture as a legitimate weapon to combat terrorism. James discusses the idea of ‘torture by warrant’<sup>20</sup> in particular and concludes that governments should maintain the absolute prohibition of torture for legal, moral and practical reasons.

Part V provides a welcome comparative perspective to Australia’s anti-terrorism laws. Alex Conte introduces the key features of New Zealand’s anti-terrorism legislation, while Clive Walker offers a comprehensive overview of anti-terrorism legislation in the United Kingdom.<sup>21</sup> In Part VI, Waleed Aly expresses concern about the ineffectiveness of a Muslim voice in the discourse on terrorism and counter-terrorism and identifies disparate ethnicity, culture and sectarian allegiances of Australian Muslims as among the possible reasons.<sup>22</sup> Aly would probably agree with Tanja Dreher’s observation that communal fear has been heightened by racialised news reporting of terrorism, border protection and crime, which has produced a ‘climate of suspicion in which Arabs and Muslims in Australia are regularly understood as threatening.’<sup>23</sup> Discussing the challenges for journalists reporting on national security and counter-terrorism, Dreher generally calls for increased news media responsibilities which include a responsibility to apologise when significant mistakes or inaccuracies in reporting are discovered.<sup>24</sup>

The book closes with a well-written chapter by Andrew Lynch (Part VII) who rejects the idea that civil liberties and human rights can be ‘balanced’ against national security. Lynch then provides an overview of the recent Haneef affair and cleverly uses this case to highlight many concerns about Australia’s anti-terrorism laws which had previously existed only in the abstract. This makes the book all the more timely. Lynch closes by advocating an approach to security ‘which is built upon, rather than dismissive of, civil liberties’ and argues that such an approach is vital for us to be ‘still able to recognise ourselves when the dust settles.’<sup>25</sup>

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19 See Sarah Joseph, ‘Torture: The Fallacy of the Ticking Bomb’ in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 147; and Neil James ‘Torture: What is it, Will it Work and Can it be Justified?’ in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 155.

20 James, above n 19, 164.

21 See Alex Conte, ‘Counter-Terrorism Law in New Zealand’ in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 166; and Clive Walker, ‘The United Kingdom’s Anti-Terrorism Laws: Lessons for Australia’ in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 181.

22 See Waleed Aly, ‘Muslim Communities: Their Voice in Australia’s Terrorism Laws and Policies’ in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 198.

23 Tanja Dreher, ‘New Media Responsibilities in Reporting on Terrorism’ in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 211, 213.

24 Ibid 215–9.

25 Andrew Lynch, ‘Achieving Security, Respecting Rights and Maintaining the Rule of Law’ in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 232.

In conclusion, *Law and Liberty in the War on Terror* is an excellent volume containing a long-overdue analysis of key questions of Australia's counter-terrorism law and policy. Given that the purpose of the book was to examine the relationship between law and security, it would have been useful to include a chapter analysing whether there is a threat to Australia in the first place, and if so, whether this threat warrants the introduction of numerous and wide-ranging anti-terrorism laws. In addition, it would have benefited from a discussion of the position of the then Labor opposition on the various key aspects of Australia's legal regime to combat terrorism. Notwithstanding these omissions, this book is a must for anyone interested in the challenges and problems of Australian counter-terrorism law and policy. It deserves wide readership.