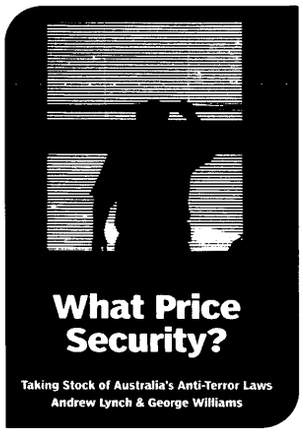
Reviews



What price security?

by Andrew Lynch and George Williams, UNSW, 2006; pp96

$16.95

What Price Security? Taking Stock of Australia's Anti-Terror Laws

This book is written for the 'interested citizen' and aims to be 'short' and 'topical', providing 'a straight-forward guide to the major counterterrorism laws' passed in Australia since 11 September 2001. Written in plain English and providing a brief summary and analysis of Australia's principal legal responses to terrorism, it successfully achieves its aims.

Lynch and Williams chart the extraordinarily swift development of the edifice of anti-terrorism legislation in Australia—from no specific legislation in 2001 to 37 new laws (and growing) five years later. The book explains the legal meaning of terms like 'terrorist organisation' and 'terrorist act'; outlines the government's terrorism related powers, including in relation to monitoring, questioning, detention and issuing control orders; summarises a number of the key terrorism offences; and assesses the impact of the anti-terrorism laws.

The authors critically analyse Australia's anti-terrorism laws by asking whether the laws 'grant our intelligence and law-enforcement agencies the powers they need to protect us' against the threat of terrorism while at the same time preserving 'basic freedoms and access to justice'.

This approach emphasises balance and proportionality. These concepts recur frequently throughout the book and seem to be the criteria against which the authors assess Australia's anti-terrorism laws. They are well-chosen criteria for two main reasons. First, one of the fundamental requirements of international law is that national governments must not act in a way that interferes disproportionately with human rights. Second, this approach allows the Australian government to respond robustly to the very real threat of terrorism without losing sight of other important, and sometimes competing, concerns.

The authors' general thesis may be summed up in their statement: 'While Australia needs anti-terror laws, they must be the right ones.' This reflects the importance of balance and proportionality. It also means that the laws must be carefully crafted, following detailed scrutiny and consultation, and must not impinge unduly on the human rights and democratic values for which Australia stands. In this light, Lynch and Williams point to a number of problems with Australia's anti-terrorism laws, including that:

- the laws represent 'reactive law-making', in that new laws seem to be hastily introduced after every overseas terrorist attack;
- the processes of parliamentary scrutiny and community consultation were not properly followed in passing the laws; and
- the laws, as a whole, do not do enough to protect human rights.

Lynch and Williams also observe that it is important to be 'realistic about what new laws can achieve'. Even a police state with draconian laws cannot stamp out terrorism completely—indeed, this can contribute to feelings of repression and mistrust, which help incubate terrorism. Consequently, there are strong pragmatic reasons to address terrorism through a combination of carefully considered laws and other means that tackle the causes of terrorism, such as education and the encouragement of inter-community dialogue.

A crucial question is whether the anti-terrorism laws are a successful deterrent. At the very least, this book leaves the reader sceptical of the oft-cited assertion that, as there has been no successful terrorist attack on Australian soil since the intense legislative activity in 2001, the laws must be 'good'. (Even if by 'good' one means 'effective', such an assertion would be like my saying, "I wear a pink t-shirt to discourage dogs from biting me. As I have never been bitten by a dog, my pink t-shirt must be protecting me.") Refuting this simplistic argument is important—not least because it also carries the corollary that, if there were a terrorist attack in Australia tomorrow, this would not prove the anti-terrorism laws to be necessarily 'bad'.

Readers are likely to take at least three things from this book. First, it provides a good summary of the raft of anti-terrorism laws that has been introduced between 2001–2006. Second, the book assesses whether the anti-terrorism laws strike the right balance, particularly in relation to the protection of human rights. Third, the book suggests how these laws could be improved, emphasising the importance of close scrutiny and proper process.

△ Edward Santow

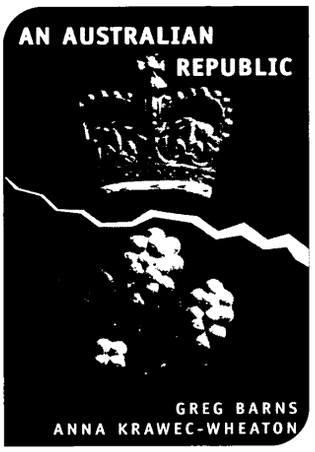
An Australian Republic

The referendum on the question of an Australian republic was defeated in 1999. The causes of the plebiscite's failure—the divisions in the ranks of republicans, which divisiveness exposed them to monarchist attacks, and the roles various political actors played in the process—have been comprehensively canvassed in a number of texts. An Australian Republic by Greg Barns (a former Chairman of the Australian Republican Movement (ARM) and Anna Krawec-Wheaton seeks to say something new about the fall. It succeeds.

In this book, Barns and Krawec-Wheaton analyse the 1999 referendum in the broader context of the history of the republican movement. However, the book does not merely traverse old ground. It undertakes to lay conceptual and practical foundations for the republican campaign by analysing and explaining three pre-conditions, the presence of which, the authors argue, are vital to the success of any attempt to effect constitutional change into a republic. The book is forward-looking and therefore instructive.

Each chapter deals with one of these essential preconditions. The first of these, the authors argue, is that there must be widespread receptiveness and enthusiasm for a republic. That is, the Australian people must recognise that "it's time" to embrace constitutional change. This chapter links the arrival of the collective, apparently spontaneous "it's time" sentiment with the development of an independent Australian identity. For the authors, transformation into a republic indicates something more than mere constitutional change; rather, it is inextricably linked with deeper questions of identity. They argue that Australian identity has outgrown its monarchic past. A new description of the Australian identity is based more on shared values—namely a commitment to democracy, to tolerance and a diverse society, and the centrality of egalitarianism—than any conservative identification with an imperial or colonial past.

Mobilising the troops, that is bringing together politically diverse groups that make up the republican ranks, will certainly be a difficult task. This is the second precondition for success. The authors' argument is that division in republican ranks was the major cause of the defeat in 1999 and that it should not happen



An Australian Republic

By Greg Barns and Anna Krawec-Wheaten, Scribe Publications, 2006; pp 144

$22.00

again. These divisions arose from the different visions that groups have of the form of the Australian republic; while the more left-leaning republicans opted for a plebiscite model, whereby the head of state would be chosen directly by the people, conservatives envisioned a politician-appointed head of state, because they could not accept a competing source of political power elected by the people. The divisions remain to republicans' dismay.

In addition to this analysis, the authors look at a number of case studies in practical campaign tactics and tools, which, they say, may come in handy in any future push for a republic. They specifically focus on Howard Dean's 2004 campaign for the Presidency of the United States and the campaigners' successful use of technology to create a groundswell of grass roots support for the candidate.

The final factor that the authors argue would produce a result for the republican camp is the presence and support from political leaders sympathetic to the republican cause. Unsurprisingly, the role of political leaders is pivotal to the outcome of constitutional change. The focus of this chapter is on two leaders, whose vision of Australia determined their position vis-à-vis a republic: the visionary (former Prime Minister Paul Keating) and the protector (Prime Minister John Howard). The first strove to forge and sustain a new Australian identity, an inclusive Australia, while the second sought to protect an historical heritage, spawned from an imperial past and perpetuated by the memory of the Australian dead on Gallipoli. The role of the leaders is inseparable from their position on the identity question; the positions taken by these leaders on the best constitutional form to reflect their views on the identity question divide republicans. The leaders of this fractious movement must come together and reflect the values that underpin the push for constitutional change. The most important of these is total commitment to democracy.

Democracy, ultimately, is the subject the book ends on. It is suggested that the key to success of the republican cause is deliberative democracy; that is, the Australian people participating not only in answering the questions put to them by politicians with a 'yea' or 'nay', but also being actively involved in setting the questions from the beginning. The aptness of this suggestion cannot be doubted; it complies with the values that the republican movement supports. Constitutional change from constitutional monarchy to a republic can succeed only if political manipulation in the process of change is minimised or, if possible, rendered totally ineffectual.

The book is quite short but well written and interesting. It gives an insider's view into the machinations behind the curtains of the republican movement because both authors have been involved in the ARM for a long time. The authors deal with delicate questions of values and identity well, reflecting clarity of thought often absent from political arguments on the republic and its related identity debates. The suggestions that the authors espouse are sensible and well thought out. Dedication to the democratic process underpins these suggestions. Indeed, the authors' final words are: "The difference between federation and the republic is that if 'we' make it happen, it will not be political and opinion leaders who are the architects of success, but all of 'us'".

△ Pouyan Afshar Mazandaran

The History of Australian Corrections

'The History of Australian Corrections' is an overview of the penological history of Australia. Sean O'Toole argues that Australia's penal history did not start with the transportation of offenders to New South Wales as a penal colony in 1788, but with the punishment systems in Europe. He goes on to trace the beginning of Australia's correctional system from the punishment in the ancient world through to modern day corrections.

According to David Garland, punishment is not just a mechanism for dealing with offenders, but a complex social institution that helps characterise as well as influence the nature of our society, social relations and cultural sensibilities.[1] Correctional systems are thus inextricably linked to the social factors and cultural values of the community at the time. In *The History of Australian Corrections*, O'Toole canvasses some of those social and cultural factors that have shaped Australian corrections.

Part 1 of the book tracks the gradual transition of punishment from infliction of bodily pain to punishment of the mind. It shows that the functions of prison have changed from a place of pre-trial detention and coercion to an institution of punitiveness—with imprisonment being a form of punishment in itself—and rehabilitation. The concept of a prisoner has evolved from being perceived as an 'enemy of the state', to a 'broken or damaged machine in need of moral repair' and eventually to a 'citizen'. Prison design also changed from a functional, unremarkable structure to a fortified establishment consisting of isolated, single cells. The book identifies some of the social and political forces that have impacted on Australia's penal system, including the heavy influence of prisoner management ideas from abroad, growing public concern about prison conditions and brutality, and prisoners' unrest that resulted in numerous Royal Commissions and other inquiries into the system.

Two separate chapters examine some important social aspects that have contributed to the diverse nature of corrections in Australia, including: the historical development of alternatives to imprisonment, such as parole and probation; and the punishment of Indigenous people, women, juveniles and the mentally ill. The author acknowledges that a history of corrections should be read together with the development of institutions similar to prisons (eg, mental hospitals, asylums and children's homes)—these are only briefly mentioned in the book.

In Part 2 of the book, O'Toole summarises some of the significant events in the development of individual corrections systems in the states and territories. The primary focus here is the state and territory prison systems, although some alternatives to prison, such as early attempts at a probation system in Tasmania, are noted.

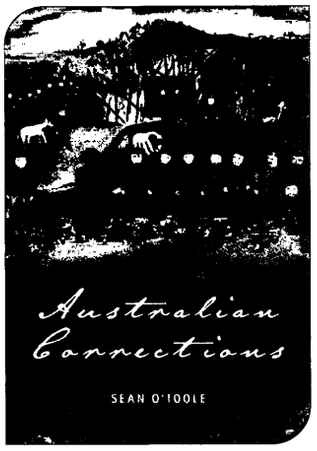
The book is written in a highly accessible style and contains a number of features that help sustain the reader's interest. In the introductory section there is a short timeline showing some of the historical events that occurred between 1796 and 2005. Throughout the book are short biographies of a number of influential figures in Australian penal history, including: Captain Alexander Maconochie, the Superintendent of Norfolk Island who introduced a humane, rewards-based prison management system in the mid-19th century that was ahead of its time; Samuel Barrow and John Price, prison administrators who were notorious for advocating the brutal treatment of prisoners during their reigns over the Victorian penal establishment in the 1850s; and Dame Phyllis Frost, a community welfare worker and philanthropist who campaigned tirelessly for improved conditions for women in prisons in the later half of the 20th century. The book also contains a number of interesting records and photographs, such as a ticket-of-leave (an early form of parole) issued by the Victorian Penal Department in 1860, prisoners' record cards and photographs of prison architecture.

Overall, *The History of Corrections* is a well-written and readable introduction to many of the diverse aspects of the development of punishment and corrections in Australia.

△ Huette Lam

Endnotes

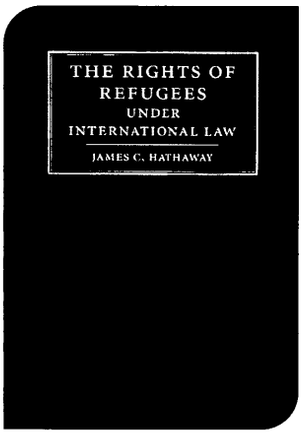
1. D Garland, *Punishment and Modern Society: A Study in Social Theory* (1990).



The History of Australian Corrections

by Sean O'Toole, UNSW, 2006; pp 236

$39.95



The Rights of Refugees under International Law

By James C Hathaway, Cambridge University Press, March 2006; pp 1,200

$140

The Rights of Refugees under International Law

Professor James Hathaway observes that there is an 'ongoing and quite extraordinary transnational judicial conversation about the scope of the refugee definition'. The Rights of Refugees under International Law *forms part of another transnational conversation on the same subject—one that is conducted by academics and commentators more generally. There are, of course, other such conversations—most notably, a political one among legislators and government officials. Hathaway's text is particularly valuable, however, because he tries to bring together these parallel transnational conversations, showing how they can and should intersect.*

The concept of *transnationality* is fundamental to understanding the controversies at the heart of refugee law. By legal definition, a person cannot be a refugee unless he or she has crossed a national border. A refugee's legal rights derive their ultimate basis from international law and, in particular, the Refugee Convention.[1] Nation states that are party to this convention may choose to pass laws to supplement the rights provided for in the convention, but international law does not permit states to derogate from those convention rights.

It is, therefore, important that there is some consistency in how the various parties to the Refugee Convention interpret its provisions. This is recognised explicitly by Hathaway and it is also embodied in the structure of his text. The fact that Hathaway surveys a broad spectrum of views on refugee law and practice—ranging from New Zealand in the south to Sweden in the north—is not hollow erudition; it demonstrates a thorough, scholarly approach taken to this transnational issue.

In determining the legal rights of refugees, Hathaway opts to 'defer neither to literalism nor to state practice'. Instead he interprets 'refugee and other human rights treaties in the light of their context, objects and purposes'. This approach is both sensible and jurisprudentially orthodox. Moreover, it reduces the risk that he will be accused of departing from a dispassionate, objective analysis.

Hathaway's stated goal is 'to give renewed life to a too-long neglected source of vital, internationally agreed human rights for refugees'. He states that the foundation of these rights is 'anchored in legal obligation, and ... is accordingly detached from momentary considerations of policy and preference'. This approach seems to emphasise two key propositions:

(1) Refugees, though unable to enjoy the rights usually associated with citizenship, nevertheless possess the most important of those rights by virtue of being human.

(2) Nation states do not uphold the rights of refugees purely out of largesse (with the corollary that largesse may be withheld); rather, states uphold refugees' rights because they have legally committed to do so.

A thread that runs through the text is the question of how to hold states accountable for their obligations to refugees. This is a point at which there is often considerable divergence between the political conversation and the judicial/academic conversation. Put simply, a lawyer (or a judge or an academic) may be good at demonstrating refugees' rights *on paper* but they are all dependent on a government to make those rights tangible. This issue is brought to a head in the epilogue, which contains some of Hathaway's most forceful critique of the current treatment of refugees.

In one sense, Hathaway's goal is a large one: discerning the rights of refugees and the obligations of states to uphold those rights. From another perspective, he is more modest. He does not cover in depth some of the critical emerging issues of refugee law—like what to do about the growing number of 'internally displaced persons' (that is, people who are essentially refugees in their own country and so do not fit within the Refugee Convention's legal definition of 'refugee'). However, it should be acknowledged that such omissions are consistent with Hathaway's original aim, which is to discuss the law as it is now.

Hathaway's text is impeccably researched and referenced, clearly explained and highly persuasive. It is, in short, excellent.

△ Edward Santow

Endnotes

1. That is, *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 2545, (entered into force 22 April 1954), supplemented by the *Protocol relating to the Status of Refugees*, 31 January 1967, 606 UTS 8791 (entered into force 31 January 1967).