



Civil Liberties

The Price? Eternal Vigilance!

Carolyn Richards,
Ombudsman for the Northern Territory

YOU CAN ONLY PROTECT YOUR LIBERTIES IN THIS WORLD BY PROTECTING THE OTHER MAN'S FREEDOM. YOU CAN ONLY BE FREE IF I AM FREE.

CLARENCE DARROW

A PATRIOT MUST ALWAYS BE READY TO DEFEND HIS COUNTRY AGAINST HIS GOVERNMENT.

EDWARD ABBEY

VIGILANCE IS THEREFORE CONSTANTLY REQUIRED TO PRESERVE AUSTRALIA'S LIBERTIES... THE STRUGGLE FOR CIVIL LIBERTIES IS A JOURNEY THAT IS NEVER ENDING.

JUSTICE MICHAEL KIRBY

THE WHOLE AIM OF PRACTICAL POLITICS IS TO KEEP THE POPULACE IN A CONTINUAL STATE OF ALARM (AND HENCE CLAMOROUS TO BE LED TO SAFETY) BY MENACING THEM WITH AN ENDLESS SERIES OF HOBGOBLINS, ALL OF THEM IMAGINARY.

H.L. MENCKEN

The Northern Territory is the only Territory or State in Australia that does not have an organisation that monitors legislation and policies, advocates for the enhancement of civil liberties and speaks out if freedoms or rights are diminished or ignored. There is no house of review in the Northern Territory and, with the exception of the Anti-Discrimination Commissioner and the Ombudsman; no independent authority to speak out if there is a risk of civil liberties being overridden

by Government or the bureaucracy.

The profile of civil liberties in western democracies, including Australia, has changed markedly over the past decade. Following the September 11th 2001 attack on the twin towers in New York, Australia joined other democratic countries in enacting laws to detect and combat terrorism. Long-established liberties enjoyed by Australians and enshrined in the Common Law were removed for persons who were terrorist suspects. The desirability

of protecting national security was deemed to justify measures being taken against suspected terrorists including incarceration without a right to apply for bail as soon as practically possible, limiting access to legal representation and, limiting natural justice by not disclosing fully the reason for an arrest. Orders limiting a person's freedom of association and movement were introduced without proof beyond reasonable doubt of any offence having been committed but rather because of the future likelihood of a

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possible offence or criminal activity occurring.

The rising number of non-authorised immigrants arriving in Australia led to legislation enabling a person, in some circumstances, to be held in detention indefinitely without trial and without having committed any offence against the law of Australia.

Added to these developments, the increasing sophistication and the expanding power of organised criminals, especially in connection with drugs, people trafficking and money laundering, has led to new laws which, although desirable and necessary to combat such activities, have the potential to be misused by law enforcement and other agencies to encroach unreasonably on people's civil liberties, usually motivated by zealotry.

Such altruism can sometimes blur the recognition that when exercising the discretion to invoke a power that encroaches on a person's civil liberty, there has to be some proportionality between the intrusion on liberty and the mischief or level of criminality involved.

An example of this is a person's right to privacy. *The Telecommunications Act* (Cwlth) prohibits a carrier from releasing information about a customer's identity, usage, phone number, address or any matter at all. There is blanket protection of a person's privacy associated with telecommunications. However, the *Telecommunications (Interception and Access) Act* provides for a number of exceptions. By the same token it provides safeguards against the risk of abusing that power to gain information, and on use of information obtained. To intercept a communication ('phone tapping' in common parlance) requires a warrant from a Court. For that to occur, it must be a 'serious' offence.

The Court must consider the degree of interference with a person's privacy and the gravity of the offence, under Section 46. The Applicant for the warrant must report back to the Court about



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the effectiveness of the warrant. Information obtained from use of the warrant can only be used for specified purposes and, if not used, must be destroyed within a limited time. All records are inspected by the Ombudsman (or other independent monitor in some States) and the Ombudsman reports to the Attorney-General who in turn reports to the Commonwealth Attorney-General. The Commonwealth Attorney-General tables a statistical report every two years. This regime for intercepting communications has good checks and balances.

By contrast, access to call charge records are almost open slather. Call charge records are a list of telephone numbers called from a particular phone. Reverse call charge records are a list of numbers from which calls to a particular

number were made. There is virtually no oversight or check on whether or not those agencies who access call charge records do so appropriately or not. No warrant is required. There is no minimum level of offence to act as the benchmark. The use of the power and the purpose for which it was used is not disclosed to anybody. Persons who can access the call records include those investigating any criminal offence as well as persons protecting public revenue or enforcing a law imposing a pecuniary penalty.

Statistics about the number of times access to telephone call records is requested and granted are provided to the Commonwealth Attorney-General's Department and a report is tabled in the Commonwealth Parliament annually. The last report

Organisations that accessed call charge records for public revenue purposes for the year ended 30 June 2009

Aust. Building & Construction Comm	14
ASIC	148
Australian Customs	1096
Australia Post	298
Australian Taxation Office	645
Centrelink	1926
Child Support Agency	192
Consumer Affairs Victoria	441
Qld.Environment Protection Agency	50
State Revenue offices	224
Office of Fair Trading NSW	658
NSW Dept of Primary Industries	81
Workcover Qld	6 (previous year 41)
Territory Revenue Office	1



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to the Commonwealth Parliament for the year ended 30 June 2009 shows the organisations that accessed call charge records for public revenue purposes are included in the table on page 31.

A total of 7,014 authorisations were made in that year for organisations, other than police, to have access to telephone call charge records. Once the telephone numbers have been identified each subscriber whose number appears can be identified, as can their address.

A bill is currently before the Commonwealth Parliament to allow access for further purposes, such as in connection with finding a missing person. The Australian Privacy Foundation, the Queensland Council for Civil Liberties and the New South Wales Council for Civil Liberties made a submission to the Senate Legal and Constitutional Affairs Committee with respect to the proposed amendments. According to the submission, the amendments, which were referred to by the Government as 'fine tuning', have the effect of giving radically dangerous and unacceptably broad interpretation to the concept of 'national security'. The concept of national security has hitherto been separated from law enforcement but the Australian Privacy Foundation and the civil liberties councils are of the view that the amendments open the way for the intrusive powers deemed necessary for national security to now be used for law enforcement within Australia.

People may have differing views on whether that is desirable or not, but we might be reminded of the words of Cheyenne:

One of the most dangerous forms of human errors is forgetting what one is trying to achieve.

Or, as Benjamin Franklin said:

They who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.

This was echoed by Mahatma Gandhi:

Those who desire to give up freedom in order to gain security will not have, nor do they deserve, either one

In the Northern Territory it is not necessary to look beyond the 'Intervention' to see what can happen when legislators decide that an end justifies any means even if those means are unfair, discriminatory and contrary to universally accepted norms of civil liberties and human rights.

There are other instances in the Northern Territory. One example is Section 128 of the *Police Administration Act*. This is a law created with the good intention of ensuring that people who become so intoxicated that they are likely to harm themselves or others are taken into protection if there is no other place or person that can look after them. The intention was

that such persons not be treated as criminals and charged with a criminal offence, but instead, be cared for.

Instead of such people being taken to sobering up shelters or taken home, 55,000 of them were placed into custody in cells in the year ended 30th June 2009. It has been told to the Ombudsman by police entrants in training at the Police College that they are taught to take people into custody, even if they are not seriously affected by alcohol, if they appear to be about to make trouble. This will enable those people to be removed from an area and help reduce offences later. The ends are probably achieved but the purpose of the legislation is perverted.

There have been a number of instances where police have found someone causing a disturbance, urinating or defecating in public or behaving offensively. Rather than charge that person with an offence they are apprehended under Section 128 and locked up until they have calmed down. This results in the arresting officer being relieved of writing up a charge, doing a statement and a subsequent brief to the prosecutor.

Section 130 of the *Police Administration Act* says that a person apprehended under Section 128 shall not be charged with an offence. It is common practice for a summary infringement notice to be written out by an apprehending officer and given to the person when being discharged from custody.

Sometimes it is put in the person's belongings and only found later. Technically, the person has not been charged while in custody but, has the intent of the legislation been complied with in the circumstances?

Under the *Motor Accident Compensation Act*, an officer in the Territory Insurance Office can make a decision about whether or not a person can receive certain payments for expenses for treatment, or to modify a residence, because of a disability. The Act specifically states that the decision-maker is not required to give any reasons for a decision. A right of review is provided for however, without knowing the reasons for the original decision if a request is denied the exercise of that right is handicapped, if not illusory.

I am sure that the Northern Australian Aboriginal Justice Association would be in a position to provide many examples of bureaucratic disregard for civil liberties, as could

a number of other organisations and individuals locally. As Dr. Kristine Klugman, President of Civil Liberties Australia, says:

"Groups like ours are able to speak up for the individual against bullies and bureaucrats who treat 'little' people with contempt. Often we can get a system or procedure fixed that otherwise would be buried or ignored. One man or woman's complaint doesn't get much response, but when it comes from an organisation like ours, known for standing up for people's rights and liberties, the authorities usually take more notice."

The people of the Territory need a local voice that speaks out about civil liberties. Indeed, the existence of a civil liberties body is a mark of the maturity of a society and of the robustness of its democracy.

The Northern Territory has aspirations to become a State but, for those aspirations to be realised, Statehood will need the acceptance and electoral support of two thirds of the Australian States and the majority of the Australian people. The Northern Territory will be called on to demonstrate that it has strength of accountability in its governing institutions, a maturity of democratic process and a framework capable of supporting independent decision making that maintains an acceptable level of human and intellectual capital. Most importantly, the Territory will need to raise the profile and the level of its civil and human rights record for it to be considered by the rest of Australia as deserving of Statehood. The establishment of a Civil Liberties Council is, in my view, a fundamental and necessary step towards building maturity into the Territory's progress towards Statehood. ●

Becoming a partner in a law firm: study probes key factors

High billings and working all hours - is that all it takes to "make partner" in a law firm?

Practising lawyers are invited to share their promotion experience in a new study by a Queensland University of Technology (QUT) doctorate candidate.

Elisabeth Hetterich is investigating the factors that influence law firms when choosing their future practice partners.

Past research has found law firms promote according to certain "patterns" of behaviour displayed by their junior lawyers.

Some of these behaviours would seem obvious such as high billings and putting in long hours, however, other studies suggest different

factors come into play such as the amount of leave male and female practitioners take.

Ms Hetterich is looking for the effect of certain behaviours on promotion outcomes including the effect of taking extended leave and working flexible hours.

She is interested in the taking of leave for an extended period, say, for a year to look after a parent, do extra study or to go overseas.

Long periods of leave could actually be beneficial to the firm when the person returns enriched and renewed by their experiences, but it is not clear yet whether it can affect promotion to partner.

Ms Hetterich, who practised as a solicitor before spending most of her career in law firm practice

management, is now working full-time on her Doctor of Business Administration at QUT.

She has seen the trend, borne out in the literature, that people are leaving the legal profession early, particularly young lawyers under 30 and wants to find out why that is.

Ms Hetteridge is also looking at the effect of mentoring and how the career of a mentored lawyer progresses.

She is seeking lawyers who hold current practising certificates to complete an anonymous, online survey on circumstances surrounding their last promotion.

To participate in the survey, go to www.lawsurvey.com.au. ●