

To what extent does the criminal investigation process balance the rights of victims, suspects and society?

Within the Australian Legal System, there is significant tension in balancing the rights of victims, suspects and society to ensure that justice can be achieved for all stakeholders. The Criminal Investigation process, as a major component of the Australian Legal System, had been moderately effective in the balancing of rights. This has been particularly evident through legislation such as the LEPR Act 2002 that gives the police, as the law enforcers, ‘certain powers to effectively fulfil their role’. However, there is significant concern amongst civil libertarians that powers contained in LEPR erode civil liberties, thus hindering the ability for justice to be achieved. Recently, additional powers have been given to the police in regard to use of technology, such as meta data and DNA, in the criminal investigation process, and enhanced powers relating to search and arrest. Furthermore, the criminal investigation process is failing to protect the rights of socially disadvantaged groups such as the Indigenous and the Mentally Ill, questioning the extent to which the enhancing power of police achieve justice.

With technology advancing, there is significant law lag as the pace of technology developed far outstrips that of law reform. This can present significant questions of whether the rights of suspects, society and the individual are being protected. The retention of meta data used to aid the criminal investigation process has been highly contested as it is considered an invasion of privacy, and thus erosive of civil liberties. The recent reform introducing the Telecommunication (Interception and Access) Amendment (Data Retention) Act 2015 states that telcos are required to retain meta data for a minimum of 2 years, with the aim of allowing criminal enforcement agencies to access this stored information to aid criminal investigations. However, this legislation allows NSW and Federal Police to access stored meta data after gaining permission of a senior officer, instead of getting a court ordered warrant. This clearly fails to balance the rights of victims, suspects and society as it erodes the separation of powers and the common law notion of the presumption of innocence. The NSW Council of Civil Liberties is highly critical as it claims it is an “invasion of privacy against all Australian Civilians”, and therefore non-compliant with the Right to Privacy contained in

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the UDHR, that of which Australia is a signatory. Despite the recent law reform, there is no proven effectiveness, as access to stored information requires little more than self-authorisation. Legal expert Alistair MacGibbon states that “Independent oversight and appropriate checks and balances are a critical part of ensuring that the confidence and support of the broader community is maintained” which illustrates the fundamental need for an impartial 3rd party in the form of judicial oversight. Due to the lack of a 3rd party that provides a check and balance, and no review on the government use of power, the protection of the rights of suspects, victims and society are limited. Furthermore, the advancement of technology greatly assists law enforcers and investigators in the criminal investigation process, with the use of DNA being a significant component. DNA has helped solve over 300 cold cases (SMH), however there is a need for oversight of the processed that are involved in DNA collection, due to inadequate quality control. Inadequate quality control allows miscarriages of justice to occur within the criminal investigation process, eroding the rights of the individual, as made clear through *R v Jama* (2008). Therefore, under examination of the use of technology in the form of meta data and DNA, the criminal investigation is lacking in regard to balancing the rights of victims, suspects and society, hindering the ability for justice to be achieved.

Police powers of arrest have proved to be a point of concern to civil liberties, as in recent years the police powers have been enhanced in relation to search and arrest, especially due to it not requiring a warrant. Nick Cowdrey states that arrest without a warrant is “a direct interference with a person's liberty”, questioning the extent to which police powers relating to search and arrest balance the competing interests of the individual, accused and society, as evidenced through the David Gundy case. In arrest, police are having legal responsibility to use whatever reasonable force is necessary. However, the Law Enforcement (Powers and Responsibilities) Amendment (Arrest without Warrant) Act 2013 (NSW) further expands powers of arrest by extending the reasons for which an arrest is lawful and removes from the previous reasoning that arrest is a last alternative. Due to this, police powers are extended to allow police to arrest without a warrant. Despite aiming to improve resource efficiency, these amendments do not balance the rights of suspects and individuals with the needs of the state to maintain adequate law enforcement. However, it has been argued that

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this increasing of police powers allows the police to deal with situations of violent crimes in a way that promotes community safety. This amendment has been criticised as being a knee jerk reaction, suggesting it was not well considered, thus limiting justice for all stakeholders. Furthermore, these reforms diminish accountability of the police force, consequently allowing the rights of victims, suspects and greater society open to abuse. However, in relation to terrorism suspects, the capability of the police to conduct covert searches without a warrant is arguably protective of the rights of society, despite its interference with personal liberties of suspects. The expansion of these powers under the Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill gives ‘the state’s police the power to conduct covert searches without the knowledge of the occupant’, demonstrating an application of the criminal investigation process that is protective of the rights of victims and society. However, Nicola McGarrity argues that these reforms were a ‘tough on crime’ approach by the parliament, as she criticised in “But what happened when politicians feel they must be seen to be doing something – anything – to respond to perceived security threats? Where are the checks and balances on abuse of power by parliamentarians in those circumstances?” Overall, the criminal investigation process in relation to powers of search and arrest presents a natural tension in balancing the competing rights of the victims, suspects and society.

Discretion in the criminal investigation process is an essential aspect to achieving justice for all major stakeholders including victims, suspects and greater society. As mentioned in the stimulus, police have the responsibility to exercise their power responsibly, particularly when these powers impact civil liberties. In the criminal investigation process, discretion is evident in many components including reporting, investigating, arrest and charge, bail, trial, appeals. Discretion is necessary as there is a significant challenge presented in balancing the rights of citizens against police powers. Under the LEPR Act, police are given powers to use reasonable force in conducting arrests, however challenges arise in regard to the use of force when dealing with the mentally ill, presenting a need for discretion. Since 1990, 40% of police shootings killed an individual affected by a mental illness. Significant concerns over the police powers in relation to those suffering a mental illness arose due to the high profile cases of Adam Salter (2009), Roberto Curti (2012) and Elijah Holcombe (2014). In 2013, with

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police being called out to approximately 43,000 mental illness incidents, there presents fundamental need for frontline officers to have mental health training in order to use appropriate discretion in the handling of these cases. However only 10% of frontline officers in NSW have, demonstrating a failing in the criminal investigating process in regard to protecting the rights of suspects. Despite this, the use of the Coroners Court, Ombudsmen and the Police Integrity Commission ensure that police exercise powers given under the LEPR Act responsibly, in order to balance the rights of suspects, victims and society. Furthermore, under the Mental Health Intervention Unit, there has been an introduction of additional training for police, proving increasing responsiveness to issues, such as police use of force with the mentally ill, within the criminal investigation process. Overall, it can be concluded due to institutions such as the Police Integrity Commission, ombudsmen and coroner's court and the mental health intervention unit that the criminal investigation process is somewhat effective in balancing the rights of the mentally ill with police powers contained in the LEPR Act 2002.

In Summary, the examination of issues such as police use of powers in search and arrest, Meta data and DNA in the investigation process and police use of force and discretion in relation to the mentally ill, it is vital that under the LEPR Act, there are adequate protections to ensure no police abuse of power.