

CRIMINAL LAW JOURNAL

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ARTICLES

Regulating the use of telecommunications location data by Australian law enforcement agencies – Rob Nicholls and Michelle Rowland

This article sets out the regime for access to the “telecommunications data”, which includes location data and other metadata associated with communications in Australia under the recently amended *Telecommunications (Interception and Access) Act 1979* (Cth). The article examines this legislation which requires the delivery of location information to law enforcement agencies without defining “telecommunications data”. This raises the crucial question as to why Australia permits real time cell site level location information to be made available to law enforcement agencies on the authorisation of a public servant, rather than requiring approval of a judicial officer as is the case for call content warrants. This is in contrast with the United States which requires a court to find “probable cause”. At the very least, other jurisdictions require a judicial officer at the level of magistrate to be convinced that the agency needs the metadata on the balance of probabilities. In an environment where access to location data is more readily obtained by law enforcement agencies than in other countries, the article also sets out the high level of compliance with the legislative intent.

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Admissibility and use of relationship evidence in HML v The Queen: One step forward, two steps back – David Hamer

In *HML v The Queen*, the High Court considered whether relationship evidence may be admissible to provide context and/or to support propensity reasoning. Unfortunately, common ground among the judgments is difficult to find. It remains unclear whether the exclusionary rule is limited to evidence tendered for the purpose of showing the defendant’s propensity, or whether it also covers context evidence that only incidentally reveals the defendant’s propensity. There was broad agreement that evidence of uncharged sexual offences will satisfy the admissibility test, and can then be used for propensity and context. However, it is unclear how far this conclusion extends. It appears possible that evidence of grooming may be admissible for neither propensity nor context. Furthermore, a clear majority supported a proposition at odds with the logic of circumstantial proof – the jury may only use relationship evidence for propensity reasoning if sexual attraction is considered proven beyond reasonable doubt.

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Editorial

THE POLITICS OF REACTION

Tis all a Chequer-board of Nights and Days
Where Destiny with Men for Pieces plays:
Hither and thither moves, and mates, and slays,
And one by one back in the Closet lays.

The Rubaiyat of Omar Khayyam, by Omar Khayyam (translated by Edward FitzGerald) p 49

It can be an interesting exercise to contrast the divergent ways in which our politicians choose to address crime, especially the way in which they answer calls to make changes to our criminal law and processes.¹ Often they will simply react to a “crisis”. Sometimes they will instigate a meticulous and protracted program of reform. The notion of legislatively reacting to a crisis is a curious phenomenon and warrants some exploration. Clearly the impact of the media is not insignificant. In New South Wales, we have seen many recent examples: reactions to “Lebanese” gang rapes, to the Cronulla riots, to the clamour for more (and more) police powers.

In seeking to understand the phenomenon of reaction, a glance at the work of one of the world’s leading criminological and sociological theorists should prove enlightening. David Garland, in his seminal work *The Culture of Control*,² contrasts so-called “adaptive” and “non-adaptive” responses to crime. He notes that while state administration “has gone about its business of devising strategies, adapting to its limitations and coming to terms with its changing environment, the state’s political machine has repeatedly indulged in a form of evasion and denial which is almost hysterical”.³

Although Garland’s thesis is directly aimed at historical developments in the United States and Britain, it is telling how eerily familiar some of his themes might seem to our ears, creating a peculiar resonance. And so,

[d]isregarding evidence that crime does not readily respond to severe sentences, or new police powers, or a greater use of imprisonment, legislatures have repeatedly adopted a punitive “law and order” stance.⁴

In Garland’s eyes, political expediency not infrequently dominates the motivations of the key players:

Their most pressing concern is to do something decisive, to respond with immediate effect to public outrage, to demonstrate that the state is in control and is willing to use its powers to uphold “law and order” and to protect the law-abiding public ... Policymaking becomes a form of acting out that downplays the complexities and long-term character of *effective* crime control in favour of the immediate gratifications of a more *expressive* alternative. Lawmaking becomes a matter of retaliatory gestures intended to reassure a worried public.⁵

With the sound of a worried public ringing in our ears, we can turn to the work of an earlier leading criminological and sociological theorist, Stan Cohen, to revisit his notion of “moral panic”.⁶

¹ I would like to thank my friend and colleague Dr Arlie Loughnan for helping to awaken my curiosity for some rudimentary ingredients in the processes of justice.

² Garland D, *The Culture of Control. Crime and Social Order in Contemporary Society* (OUP, 2001) Ch 5. For a critique of Garland’s adaptive responses thesis, see, eg Hughes G and McLaughlin E, *Towards a New Paradigm of Sovereign Power? Community Governance, Preventative Safety and the Crime and Disorder Reduction Partnerships*, Vol 6, Selected papers from the 2003 British Criminology Conference (Bangor, June 2003).

³ Garland, n 1, p 131.

⁴ Garland, n 1, p 132. And see generally, Hogg R and Brown D, *Rethinking Law and Order* (Pluto, 1998); Weatherburn D, *Law and Order in Australia. Rhetoric and Reality* (Federation Press, 2004).

⁵ Garland, n 1, pp 133-134 (emphasis in the original).

⁶ Cohen S, *Folk Devils and Moral Panics. The Creation of the Mods and Rockers* (Paladin, 1972). For the very latest in a critique of that concept, see Garland D, “On the Concept of Moral Panic” (2008) 4(1) *Crime, Media, Culture* 9.

Cohen's thesis, nicely summarised by Poynting and Morgan, rests on seven key moments:⁷

[1] certain forms of behaviour became defined as problematic ... [2] the media [crystallized] the threat through exaggeration and stereotyping ... [3] the participation of moral entrepreneurs .. politicians, clergymen, community representatives ... [4] experts are called upon to offer strategies and remedies ... [5] the formulation of strategic responses to the problem, which entail the involvement of .. police, judiciary and welfare agencies ... [6] the condition that has been the focus of the moral panic subsidies ... [7] the legacy of the moral panic.

Not unusually, moral panics might begin with a fear, perhaps a fear of "The Other". Sometimes, even before the entrepreneurs and experts – the politicians and police – become involved, sections of society choose to take the law into their own hands. Such outbreaks of lawlessness might be termed pogroms, where the dominant culture attacks and subdues a minority it perceives as a threat. Certainly Australia has experienced its own pogroms over the years. Besides the acts of genocide perpetrated by white colonists against the indigenous population from initial settlement up until the 1920s,⁸ there were riots against and killings of Chinese on the gold-fields in the 1850s-1870s,⁹ murderous riots directed at Afghan cameleers in the 1890s,¹⁰ and race riots in Kalgoorlie in 1934 directed at southern-European immigrants.¹¹ As commentators have noted, the print media of the day certainly played its part in fostering mistrust and fear as a catalyst for the actions, or in response to them, confirming Cohen's notion of the menace being shaped for the populace by the dual ploy of hyperbole and typecasting.

Our fear of The Other continued to develop through the Menzies years (fear of Reds and the Yellow Peril) and then through the Vietnam War, the focus in that latter period initiating a fear of Boat People and then more mainstream Asian migration.

From the time of the White Australia Policy to the Vietnam War to the ignorant populism of One Nation, anti-Asian sentiment has been an unfortunate but persistent feature in sections of the Australian community.¹²

The media focus of the period was on "Asian gangs" and the "Asian drug trade",¹³ a focus whose objective was arguably "ethnicising criminality and criminalising ethnicity".¹⁴ With the advent of the first Gulf War, the media's critical tentacles began to shift from the "Asian Other" and started to zero in on "Lebanese gangs" towards the late 1990s, especially after a series of drive-by shootings in New South Wales. Politicians, including then-Premier Bob Carr,¹⁵ were quick to point the finger at The Other. In time, more politicians and commentators gleefully joined the throng.

⁷ "Introduction" in Poynting S and Morgan G (eds), *Outrageous! Moral Panics in Australia* (ACYS, 2007) p 2.

⁸ See, generally, Reynolds H, *Frontier: Aborigines, Settlers and Land* (Allen & Unwin, 1987); Rowley CD, *The Destruction of Aboriginal Society* (Penguin, 1972).

⁹ See, eg Poynting S, "What Caused the Cronulla Riot?" (2006) 48(1) *Race & Class* 85 at 90. Arguably, it was the fear of the threat of the Chinese on the gold-fields and the later Pacific Islander "kanakas" on the plantations in Queensland that gave birth to the blight of the White Australia Policy.

¹⁰ See Kabir N, "The Afghan Other" in Poynting and Morgan, n 7, pp 154-156. See also Poynting, n 9 at 90.

¹¹ See Poynting, n 9 at 90.

¹² Rowe J, "Heroin Epidemic! Drugs and Moral Panic in the Western Suburbs of Melbourne 1995-1996" in Poynting and Morgan, n 7, p 108.

¹³ See Rowe, n 12; Dreher T, "Contesting Cabramatta. Moral Panic and Media Interventions in "Australia's Heroin Capital"" in Poynting and Morgan, n 7, pp 111-124.

¹⁴ Poynting S, "Ethnicising Criminality and Criminalising Ethnicity" in Collins J and Poynting S (eds), *The Other Sydney. Communities, Identities and Inequalities in Western Sydney* (Common Ground, 2000) pp 61-76.

¹⁵ Bob Carr stated: "The people trying to destroy the Australian way of life will simply not succeed" in the *Daily Telegraph* (3 November 1998) p 5.