

THE PAPERLESS ARREST MESS

One of the first laws passed by the fledgling Northern Territory Legislative Assembly following self-government in 1978 gave police a controversial new power: to lock intoxicated people up for a few hours even if they were not suspected of committing an offence. At the time these laws were criticised for unfairly targeting Aboriginal people, and for giving police too much power. Over time, this power of police to take people into “protective custody”, as it is often called, has been restricted a bit by amendment, but it still exists, and it is used every night to sweep the streets of Alice Springs.

Nearly 40 years on, debate still rages about whether our protective custody laws have actually done any good. The families of those people have died in protective custody – and there have been a few – would no doubt strongly argue that these laws have been harmful. Certainly, the Royal Commission into Aboriginal Deaths in Custody over 20 years ago came to the firm conclusion that we should decriminalise drunkenness, and cease the practice of locking up drunks.

And then in December 2014 Parliament passed what the Northern Territory government rather misleadingly and mischievously dubbed the “paperless arrest” law. In fact, the title of the law in question is “Taking person into custody for infringement notice offence”, which is more accurate. An “infringement notice offence”, by the way, is a minor offence which until now has been dealt with by handing out an on-the-spot fine. Like the old “protective custody” law, this new law enlarges police powers to sweep the streets by apprehending and detaining intoxicated persons, almost all of whom are Indigenous. That is the clear and disturbing picture painted by Coroner Cavanagh in the findings he recently published following the inquest into the death of the first person to die in “paperless arrest” custody. Mr Cavanagh didn’t mince his words. He found that the laws are “manifestly unfair”, that they “perpetuate and entrench Indigenous disadvantage”, and recommended that they be repealed. “In my view Kumanjayi Langdon had the right to die as a free man... A civilised society does not subject its citizens to that mortification unless there are no other options”, he said. The response of Attorney-General Elferink was swift and clear: his government will not scrap this law.

In the meantime, a challenge to the validity of the law has been commenced and argued in the High Court of Australia, which has reserved its decision. At the heart of that challenge is the question of just how far police powers are allowed to extend in the Australian - and in particular, the Northern Territory - legal system. Traditionally, it is the job of the police to detect and catch suspects, and the job of the courts to decide whether they are guilty, and to punish proven offenders. Magistrates and judges are not allowed to launch their own investigations into suspected criminal activity, and police are not allowed to try and sentence their suspects. In the High Court, it was argued last week that the so-called “paperless arrest” law usurps the power of courts to try and punish, and instead confers this power on police.

Under the long-established on-the-spot fine system, a person can either pay their fine or elect to contest the charge in court, and in that way exercise their right to be presumed innocent until a prosecutor proves their guilt beyond reasonable doubt. With “paperless arrests”, however, police have the power to lock up someone liable for an on-the-spot fine for four hours, and, whether innocent or guilty, the arrested person has no right to challenge their detention. By contrast, persons arrested and charged with serious offences have the right to apply to a court for bail “as soon as practicable”.

The argument before the seven High Court judges last week was technical and complex - constitutional law is a notoriously difficult area of the law – and I am certainly not bold enough to second-guess the outcome of the case. However, a world away from the lofty edifice of the High Court in Canberra are the dark and dusty streets of towns like Alice, where police and the public alike have to deal with the harsh realities of communities afflicted by appalling levels of alcohol-related harm. As former NT Police Association President Vince Kelly said, “We can’t arrest ourselves out of this mess”. Mr Kelly was right. And we can’t paperlessly arrest ourselves out of this mess either.

Russell Goldflam

President, Criminal Lawyers Association of the Northern Territory

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