

## Electronic Surveillance, Human Rights and Criminal Justice

Simon Bronitt<sup>1</sup>

"There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to. You had to live — did live, from habit that became instinct — in the assumption that every sound you made was overheard, and except in darkness, every movement scrutinized."

George Orwell, *Nineteen Eighty-Four* (1949)

### Introduction

In his influential study of undercover policing, Gary Marx concluded that "George Orwell is not yet around the corner".<sup>2</sup> His research however has revealed a dramatic increase, both in the United States and internationally, of undercover criminal justice surveillance.<sup>3</sup> In Australia, official reports have similarly charted significant increases in the use of listening devices and wire-tapping by law enforcement

1 LLB (Hons)(Bristol); LLM (Hons)(Cantab); Senior Lecturer in Law, The Australian National University; Associate of the Australian Institute of Criminology. Peter Graboksy and Russell Smith kindly provided me with their chapters from *Crime in the Digital Age* (Federation Press, Sydney 1997) prior to its publication. I would also like to thank Peter Bailey, Fiona Wheeler and the anonymous reviewer for their valuable comments, and Susanna Ford, Paul Hibberd and Thy Huynh for their research assistance.

2 Marx G *Undercover — Police Surveillance in America* (University of California Press, Berkeley 1988) p 14.

3 For a comparative analysis of undercover surveillance see Fijnaut C and Marx G (eds) *Undercover — Police Surveillance in Comparative Perspective* (Kluwer, The Hague 1995). Electronic surveillance plays a central role in private and passive forms of policing: see Privacy Committee of NSW, *Invisible Eyes: Report on Video Surveillance in the Workplace* (1995). These issues are beyond the scope of this article.

agencies. In New South Wales, for example, there has been a 370% increase in the recorded use of listening devices by law enforcement agencies since 1989.<sup>4</sup> Moreover, a comparison of the available data on the incidence of electronic surveillance reveals that Australia, notwithstanding a smaller population, authorises more than twice as many interception warrants as Canada!<sup>5</sup>

This dramatic expansion in electronic surveillance in Australia is due to a number of factors. First, surveillance technology may be used by an increasing number of law enforcement agencies to investigate a wider range of suspect activity.<sup>6</sup> Secondly, and perhaps most significantly, the technology provides cheap and effective surveillance. The annual report on the operation of the *Telecommunications (Interception) Act 1979* (Cth) ("TI Act Annual Report") recently concluded:

The steady increase in the number of warrants issued to intercept telecommunications services can be attributed to factors such as the greater emphasis placed upon interception as an efficient and effective covert intelligence and evidence gathering process.<sup>7</sup>

But official data relate only to the *regulated* forms of electronic surveillance. They do not take account of illegal forms of electronic surveillance (the scale of which is extremely difficult to gauge),<sup>8</sup> or newer forms of surveillance which stand outside the existing legal regulatory framework (including video, call-data recording and electronic vehicle-tracking). Moreover, the data attempts to measure the effectiveness of electronic surveillance by quantifying rates of arrest, prosecution and conviction in cases where it has been used.<sup>9</sup> The high rates of conviction in particular serve to reinforce claims that electronic surveillance is an indispensable tool of criminal investigation. However, we must be cautious about this interpretation. Since juries

4 Privacy Committee of NSW, *Annual Report 1993-1994* (1995).

5 Cf *Telecommunications (Interception) Act 1979: Report for the year ending 30 June 1995* (AGPS, Canberra 1996) p 15 and *Annual Report on the Use of Electronic Surveillance 1990* (Solicitor General of Canada, Ottawa 1992) p 7. The Australian data relate to telecommunications interception, whereas the Canadian data relate to *all* forms of electronic surveillance.

6 The expansion in telecommunications interception powers is discussed in Part I below.

7 TI Act Annual Report, *op cit* p 15.

8 In 1986 the Stewart Royal Commission in NSW uncovered widespread illegal telephone tapping by NSW police: see Grabosky P *Wayward Governance: Illegality and its Control in the Public Sector* (AIC, Canberra 1989) p 47.

9 The details of the type of data which must be prepared and published are contained in TI Act, Part IX, Division 2.

do not provide reasons for convicting, the claims in the annual report that convictions were obtained "on the basis" of intercepted material are misleading.<sup>10</sup> It is simply impossible to gauge the evidential significance of intercepted material as compared to other forensic material which is available to the jury. Not only is this approach to accountability flawed, it also pays scant attention to the broader public policy concerns about the use of electronic surveillance, in particular those relating to its potential to impact negatively on human rights.

### A Normative Theory for Criminal Justice Surveillance

Debates on criminal justice reform pivot around the need to balance individual due process rights against the public interest in crime control.<sup>11</sup> But this balancing rhetoric rarely achieves its promised accommodation of competing rights and interests. In the relentless expansion of the powers of criminal investigation, suspects' rights are invariably "traded off" against the community interests in preventing, detecting and prosecuting crime. Far from attaining the rhetoric of 'perfect equilibrium', the criminal justice system consistently favours the interests of the state over the individual.<sup>12</sup>

Richard Ericson offers a further critical insight on the due process/crime control dichotomy which directly impinges on the role of surveillance in the criminal justice system. He suggests that the dominant objective of the criminal justice system is no longer crime control, but rather surveillance of both suspect populations and law enforcement agencies.<sup>13</sup> The rise of "system surveillance" has led to the widespread use of Royal Commissions to generate knowledge about crime and criminal justice issues, and to the creation of specialised criminal justice surveillance bodies such as the Queensland Criminal Justice Commission and the New South Wales Police

10 See TI Act Annual Report, *op cit* pp 27-31.

11 See for example Packer H *The Limits of the Criminal Sanction* (Stanford University Press, Stanford 1968) pp 158-169.

12 Packer's distinction between due process and crime control has been characterised as a "false dichotomy": McBarnet D *Conviction — Law, the State and the Construction of Justice* (Macmillan, London 1981). In her view, due process values often serve the interests of crime control. For example, warrants for electronic surveillance, though purportedly restricting the power of the state, licence violations of suspects' rights to silence and legal counsel: see discussion below in Part III.

13 Ericson R "The Royal Commission on Criminal Justice System Surveillance" in McConville M and Bridges L (eds) *Criminal Justice in Crisis* (Edward Elgar Publishing, Aldershot 1995) Ch 11.

Integrity Commission. Although increasing law enforcement accountability through both internal and external mechanisms is desirable, there is a danger, as Ericson warns, that system surveillance will be accomplished only at the expense of human rights: "Suspects' rights are displaced by system rights. Justice becomes a matter of just knowledge production for the efficient management of suspect populations".<sup>14</sup>

In light of these concerns, a new critical *normative* approach to criminal justice is required. Andrew Ashworth has recently proposed a fundamental reappraisal of our approach to criminal justice reform.<sup>15</sup> He suggests that balancing metaphors should be banished and instead careful consideration should be given to the justification of rights and their relative strengths. Once the aim of a given part of the criminal process (like electronic surveillance) has been determined, it is then necessary to ascertain what rights *ought* to be accorded to the affected 'stakeholders' (including suspects, defendants and victims).<sup>16</sup> As Ashworth observes, "Conflicts cannot always be avoided, and choices have to be made, but the principle should be maximum respect for rights".<sup>17</sup> Undercover policing and electronic surveillance both play a significant role in the construction of knowledge about crime.<sup>18</sup> The legal challenge is to ensure that human rights are adequately safeguarded within a law enforcement framework which is increasingly based on the systematic surveillance of both the community and law enforcement officials alike.

Part I of this article provides a brief overview of the legal regulatory framework for electronic surveillance in Australia. Parts II and III will consider the extent to which fundamental human rights — to privacy and a fair trial respectively — may be violated or circumvented by the use of surveillance technologies.

### **Part I: The Legal Regulatory Framework for Electronic Surveillance**

The proliferation of surveillance technologies has provided law enforcement agencies with new powers to intrude into our private lives, homes and workplaces.

14 *Ibid* pp 139-140.

15 Ashworth A "Crime, Community and Creeping Consequentialism" [1996] *Criminal Law Review* 220.

16 *Ibid* at 229. We may also add the rights of law enforcers, which may become critical when they themselves become the target of surveillance and investigation.

17 *Ibid* at 230.

18 On the construction of knowledge in the criminal justice system see Hogg R "Perspectives on the Criminal Justice System" in Findlay M, Egger S and Sutton J (eds) *Issues in Criminal Justice Administration* (Allen & Unwin, Sydney 1983).

Miniaturised electronic surveillance devices (including wiretaps, listening devices, video cameras and vehicle tracking devices) are affordable law enforcement tools. Compared with traditional techniques, they provide surveillance which is effective (being unobtrusive to suspects) and economical.<sup>19</sup> The technology plays an important role in facilitating deception (including entrapment) during covert operations.<sup>20</sup> It can also be used to supplement less reliable "sources" of criminal intelligence such as informers or agents provocateurs.<sup>21</sup>

The role of electronic surveillance within the criminal justice system has changed significantly over time. Wiretaps and listening devices were initially restricted to an intelligence-gathering function: the public interest in maintaining the secrecy of covert police activity dictated that tapes or transcripts of intercepted communications could not be tendered as evidence at trial.<sup>22</sup> In Australia, it remains the case that material gathered by telecommunications interception, even where obtained lawfully under warrant, is not admissible unless the legal proceedings are listed as "exempt proceedings" or where otherwise specified by legislation.<sup>23</sup>

The law in Australia dealing with electronic surveillance is governed by a patchwork of Commonwealth and State/Territory legislation. The Commonwealth has enacted legislation, the *Telecommunications (Interception) Act 1979* (Cth) ("TI Act"), regulating the interception of telecommunications for law enforcement purposes. Federal power over telecommunication interception derives from section 51(v) of the Constitution, which confers upon the Commonwealth the power to make laws with respect to "postal, telegraphic, telephonic and other like services". Although the Federal monopoly over telecommunications interception has been confirmed by the

19 The Barrett Review, *ibid*, published the following comparison of surveillance costs prepared by the Victorian Police: telecommunications interception (\$570 per day), video surveillance (\$1376 per day), listening devices (\$1630 per day), physical surveillance (\$1895 per day) and vehicle tracking (\$2772 per day): p 91.

20 See *Ridgeway* (1995) 129 ALR 41.

21 On the practice of equipping informers with listening devices see *O'Neill* (1995) 81 A Crim R 458, discussed below in Part III. However, electronic surveillance is not infallible since tapes and transcripts are susceptible to interference and tailoring: Marx, *op cit* pp 132-138, also discussed below.

22 In the UK, the bar on the use of intercepted material in legal proceedings has been enacted in legislation: *Interception of Communications Act 1985* (UK), s 9(1), discussed in *Effik* [1994] 3 All ER 458.

23 TI Act, ss 62, 74, 75, 76, 76A and 77.

High Court,<sup>24</sup> it has recently been suggested that individual States and Territories have the power to enact more stringent privacy protection for telecommunication interceptions authorised within their jurisdiction.<sup>25</sup> Outside the field of telecommunications interception, States and Territories have enacted laws regulating the use of listening devices.<sup>26</sup>

The categories of suspect activity which may be investigated using wiretaps and listening devices have been progressively widened. Initially, wiretapping was reserved to the Australian Security Intelligence Organization (ASIO) for the purpose of protecting the "interests of national security".<sup>27</sup> Telephone interception for general law enforcement purposes lacked a secure legal basis until the enactment of the *Telecommunications (Interception) Act 1979* (Cth) which authorised interceptions only for the purpose of investigating "serious narcotic offences".<sup>28</sup> Having been invoked successfully in the "War Against Drugs", the Commonwealth progressively broadened these powers, and interceptions are now available for a wide-range of offences divided into two categories: class one offences (murder, kidnapping, and narcotic offences) and class two offences (offences involving the loss of life or serious injury, serious property damage, serious fraud, corruption, organised crime and money laundering, tax evasion and computer offences).<sup>29</sup> However, it still remains the case that the bulk of electronic surveillance is directed to the investigation of

24 See *Miller v Miller* (1978) 141 CLR 269 at 276 per Barwick CJ, Stephen, Aickin and Gibbs JJ concurring.

25 See proposals contained in Legislative Assembly of Queensland, Parliamentary Criminal Justice Committee, *A Review of the Criminal Justice Commission's Report on Telecommunications Interception and Criminal Investigation in Queensland*, Report No 29 (1995), pp (iii)-(iv) and pp 20-30.

26 See for example *Listening Devices Act 1992* (ACT); *Listening Devices Act 1984* (NSW); *Listening Devices Act 1972* (SA); *Listening Devices Act 1969* (Vic).

27 The powers to issue warrants to ASIO authorising telecommunications interception and the use of listening devices are contained in separate Acts: TI Act, s 11A, and *Australian Security Intelligence Organization Act 1979* (Cth), s 26.

28 In addition, the Commonwealth has used its incidental powers in relation to customs, national security and crimes against the Commonwealth to grant Commonwealth law enforcement agencies the power to use listening devices: *Australian Federal Police Act 1979* (Cth), ss 12B-12L; *Customs Act 1901* (Cth), s 219B.

29 TI Act, s 5(1). The provisions were inserted by the *Telecommunications (Interception) Amendment Act 1995* (Cth), implementing the recommendations of the Barrett Review, *op cit*.

drug-related activity.<sup>30</sup> Moreover, these powers of interception are no longer confined to the Australian Federal Police; warrant applications may be made by the National Crime Authority or any 'eligible authority' of a State or Territory.<sup>31</sup> Indeed, the highly publicised use of video and listening devices by the Royal Commission into the New South Wales Police Service (the Wood Royal Commission) indicates that surveillance technology is used not only to detect and prosecute police corruption and illegality, but also it plays an important *deterrence* function.<sup>32</sup> This gradual "normalisation" of extraordinary investigative power is a significant trend in criminal justice reform.<sup>33</sup> Electronic surveillance, like emergency legislation adopted to combat terrorism, was initially tolerated as an exceptional measure for designated offences which were not amenable to ordinary investigative techniques. But once adopted, these "exceptional" powers become an accepted and in due course an indispensable feature of the Australian criminal justice system.

## Part II: Electronic Surveillance and the Right to Privacy

The right of individuals not to be subjected to arbitrary or unlawful invasions of their privacy or property by state officials investigating criminal activity is a fundamental human right.<sup>34</sup> Within the framework of the *International Covenant on Civil and Political Rights* ("ICCPR"), Article 17 places limits on the powers of the state to conduct covert surveillance on individuals:

- 
- 30 In 1994/95 the majority of warrant applications (482 of 739) under the TI Act related to the investigation of drug offences: TI Act Annual Report, *op cit* p 23.
  - 31 These eligible authorities include the police forces of NSW, Victoria, South Australia, as well as the NSW Crime Commission and Independent Commission Against Corruption and the Royal Commission into the NSW Police Service.
  - 32 The Royal Commission will be replaced by an independent statutory body, called the Police Integrity Commission, which has the power to investigate, prevent and detect serious police corruption. The Commission will have the power to apply for warrants authorising telecommunications interception and the use of listening devices: see *Police Integrity Commission Act 1996* (NSW). See also the proposals for a National Integrity and Investigation Commission to oversee the Australian Federal Police and National Crime Authority: ALRC Report No 82, *Integrity: But Not By Trust Alone* (1996).
  - 33 For a discussion of the normalisation of emergency legislation in the context of Northern Ireland see Hillyard P *Suspect Community* (Pluto Press, London 1993) p 263.
  - 34 Cf Canada where the right to privacy is embodied in the constitutional entitlement to be free from "unreasonable search and seizure": *Canadian Charter of Rights and Freedoms*, s 8, Part I of the *Constitution Act 1982* (Can); see also Fourth Amendment, *US Constitution*.

- (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- (2) Everyone has the right to the protection of the law against such interference or attacks.

Although electronic surveillance is yet to be considered under the ICCPR, it has been considered under the equivalent privacy right (Art 8) contained in the *European Convention on Human Rights and Fundamental Freedoms* ("ECHR"). In *Klass v Federal Republic of Germany*,<sup>35</sup> the European Court of Human Rights held that "secret surveillance over ... telecommunications is under exceptional conditions necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime".<sup>36</sup> The national courts must be satisfied that whatever system of surveillance is adopted, there exist adequate and effective guarantees against its abuse. The Court pointed out that this assessment has only a relative character: "it depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures and the kind of remedy provided by the national law".<sup>37</sup>

In *Malone v United Kingdom*,<sup>38</sup> the European Court reviewed the controls over telephone interception in the United Kingdom and their compatibility with Art 8 of the ECHR. Until this decision, domestic law had adopted a generally permissive approach to telephone tapping. As Megarry VC noted in the Court of Appeal, telephone interception "can lawfully be done simply because there is nothing to make it unlawful".<sup>39</sup> This analogy between the freedom of action which should be accorded to an individual and that which should be accorded to the State has been criticised by constitutional lawyers.<sup>40</sup> The European Court in reviewing the legality

35 (1978) 2 EHRR 214 (ECHR, Series A, No 28, 1978), see also *Kruslin v France* (1990) 12 EHRR 547 (ECHR, Series A, No 176B, 1990). See Janis M, Kay R and Bradley A *European Human Rights Law: Text and Materials* (Clarendon Press, Oxford 1995) pp 290-296 and Feldman D *Civil Liberties and Human Rights in England and Wales* (Clarendon, Oxford 1993) pp 475-492.

36 (1978) 2 EHRR 214, para 48.

37 *Ibid*, para 50.

38 (1984) 4 EHRR 330, (ECHR, Series A, No. 82, 1984), discussed in Bailey P *Bringing Human Rights to Life* (Federation Press, Sydney 1993) Ch 6.

39 *Malone v Metropolitan Police Commissioner* [1979] Ch 344 at 367.

40 Winterton G *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, Melbourne 1983) pp 120-122.

of the interception in *Malone* noted that any interference with the right to privacy protected by Art 8 must be "in accordance with the law".<sup>41</sup> The phrase, which appears in Art 8(2) of the ECHR, is not merely a procedural requirement that State must be able to justify its action under national law, either statute or common law. Rather, the phrase relates fundamentally to the *quality* of the law, requiring the interference with privacy to be compatible with the rule of law in its wider sense.<sup>42</sup> As a minimum, the criteria governing interception must be publicly available, preferably embodied in law, and provide safeguards against arbitrary action. The legal rules and administrative practice governing telephone interception in this case were not sufficiently precise to comply with these requirements.<sup>43</sup> Following this ruling, the United Kingdom Parliament enacted legislation to establish a warrant system for telecommunications interception.<sup>44</sup>

In determining whether electronic surveillance constitutes an *arbitrary* interference with privacy in breach of the Art 17 of the ICCPR, the United Nations Human Rights Committee ("HRC") would undoubtedly consider the European case law on electronic surveillance. The HRC, in a recent case reviewing the application of Art 17 to homosexual offences in Tasmania, recalled that the "introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event reasonable in the circumstances".<sup>45</sup> Reasonableness in this context means that the measure which interferes with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.<sup>46</sup> Thus, intrusion into a suspect's right to privacy will *only* be justified where it is reasonable and proportionate.

41 *Malone v United Kingdom* (1984) 4 EHRR 330, para 5 at 348.

42 *Klass v Federal Republic of Germany* (1978) 2 EHRR 214, para 55 at 235.

43 *Malone v United Kingdom*, *ibid*, paras 67-70.

44 *Interception of Communications Act* 1985 (UK). Notwithstanding the *Malone* ruling, the Act does not cover the use of listening devices by law enforcement agencies, which is still regulated by non-binding, administrative guidelines issued by the Home Office: see *Khan (Sultan)* [1996] 3 All ER 289. The use of listening devices by the security services is however regulated by statute: *Security Services Act* 1989 (UK).

45 *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/4888/1992, 4 April 1994, para 8.3, referring to an earlier view expressed on Article 17 in General Comment 16 (32), Doc CCPR/C/21/Rev 1 (19 May 1989).

46 *Ibid.*

In several respects, the present laws governing electronic surveillance in Australia fail to provide adequate protection for individual privacy and thus may constitute an arbitrary interference with privacy contrary to Article 17 of the ICCPR. As the European Court indicated in a case examining the legality of customs searches under Art 8, the proportionality question is most effectively addressed through a warrant procedure.<sup>47</sup> However, not all forms of electronic surveillance require a warrant in Australia. As many of the new forms of electronic surveillance are not yet regulated by legislation (such as video, call-data recording and electronic vehicle tracking), they may be legitimately used by law enforcement agencies provided that the legal rights of suspects are not infringed. The freedom of the state to engage in surveillance, both physical and electronic, is principally constrained by the property rights of the suspects. In *Coco*,<sup>48</sup> the High Court examined the legal powers of the police in Queensland to enter private premises in order to install a listening device. The High Court held that any interference with the common law rights of ownership can only be justified where it is authorised or excused by law, and that in the absence of an express provision in the Queensland Act authorising such trespass, a warrant could not be issued in such broad terms.<sup>49</sup>

Warrantless surveillance can take several forms. In situations of emergency, the relevant legislation may dispense with the requirement of a warrant or prior authorisation.<sup>50</sup> A more common form of surveillance which does not require a

47 In *Funke v France* (1993) 16 EHRR 297 (ECHR, Series A, No 256A 1993) the Court held that "in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law ... appear too lax and full of loopholes for the interferences with the applicant's rights to have been strictly proportionate to the legitimate aims pursued" (para 57 at 329).

48 (1994) 179 CLR 427.

49 Since the *Invasion of Privacy Act* 1971 (Qld) did not contain a clear expression of an "unmistakable and unambiguous intention to confer such a power", evidence obtained by means of the listening device was unlawful, and pursuant to s.46(1) of the Act the evidence obtained was inadmissible: *ibid* at 439. See also *McNamara* [1995] 1 VR 263.

50 TI Act, s 7(4), inserted by *Telecommunications (Interception) Amendment Act* 1993 (Cth) authorises interception of conversations without warrant in emergencies involving actual or threatened loss of life, threat of serious injury or of serious damage to property: see also *Listening Devices Act* 1984 (NSW), s 5(2)(c); *Listening Devices Act* 1991 (Tas), s 5(2)(c); *Listening Devices Act* 1990 (NT), s 11.

warrant is 'participant surveillance', which occurs when individuals make covert recordings of private conversations "to which they are party".<sup>51</sup> Even in those jurisdictions which, *prima facie*, prohibit 'participant surveillance', there are broad public interest exceptions which permit, without warrant, a party to the conversation to make a recording where it is necessary in the "public interest" or "in the course of his duty" or "for the protection of his lawful interests".<sup>52</sup> Indeed, the use of a listening device by an accomplice/informer to gather evidence against a suspect has been held to satisfy the "public interest" test.<sup>53</sup> The general effect of these legislative provisions is that a concealed listening device may be worn by either undercover police or informers for the purpose of recording incriminating conversations without the suspect's knowledge or consent.

Since 'participant surveillance' can be conducted without the prior authorisation, judicial or otherwise, the extent to which it is used by law enforcement agencies is unknown.<sup>54</sup> The danger here is that any person can be targeted for unlimited, highly intrusive electronic surveillance without law enforcement officers having first satisfied a judge or other independent person that there are reasonable grounds to believe or suspect that evidence relevant to the commission of an offence may be obtained. In *Duarte*,<sup>55</sup> the Supreme Court of Canada held that 'participant surveillance' without warrant "would undermine the expectations of all those who set store on the right to live in reasonable security and freedom from surveillance, be it electronic or otherwise".<sup>56</sup> The Court held that this expectation of privacy could only be forfeited where it is established before a court that an offence has been or will be committed and that the interception of private communication affords evidence of the offence. Accordingly, this form of "warrantless participant surveillance" breached the constitutional right to be free from arbitrary search and seizure contained in section 8 of the Canadian Charter of Rights and Freedoms.<sup>57</sup>

51 See *Invasion of Privacy Act* 1971 (Qld), s 43(2)(a); *Listening Devices Act* 1990 (NT), s 8(1).

52 See *Listening Devices Act* 1992 (ACT), s 4(3); *Listening Devices Act* 1984 (NSW), s 5(3); *Listening Devices Act* 1972 (SA), s 7(1); *Listening Devices Act* 1991 (Tas), s 5(3); *Listening Devices Act* 1969 (Vic), s 4(2).

53 *Smith, Turner and Altintas* [1994] 75 A Crim R 327 at 332 per Perry J.

54 There are no requirements to collect and publish data relating to 'participant surveillance' in Australia.

55 (1990) 53 CCC (3d) 1.

56 *Ibid* at 18.

57 Part I, *Constitution Act* 1982 (Can).

The warrant system is the principal guarantee against state abuse of electronic surveillance, and provides safeguards which must be complied with before the warrant is issued: the judge must be satisfied that there is sufficient evidence to support the application and that less intrusive means of investigation are not available.<sup>58</sup> The Barrett Review concluded that the existing statutory procedures in the TI Act are "reasonably effective in recognizing and protecting privacy interests".<sup>59</sup> However, as indicated above, many forms of surveillance do *not* require a warrant. Moreover, the existing warrant system regulating telecommunications interception gives insufficient weight to the fundamental importance of privacy. In authorising telecommunications interception for serious criminal offences (class one offences) under the TI Act, the extent to which privacy is violated is not included as a factor which the judge must take into account in issuing the warrant. Only with respect to the less serious category of offences (class two offences) is privacy stipulated as a factor that must be considered by the judge.<sup>60</sup>

Warrant applications under the Part IV of the TI Act are rarely refused.<sup>61</sup> The low number of refusals may in fact indicate that such applications are carefully prepared by law enforcement agencies and rigorously evaluated by the judges.<sup>62</sup> Conversely, it is possible that judges are experiencing difficulty in critically evaluating the validity of warrant applications. This difficulty stems from two features of the present system. First, as the application proceedings are conducted in secret and *ex parte*, the judge hears only from law enforcement officials — there is no legal representation for the person who is the target of the application. Secondly, judges who grant warrants under the TI Act and listening devices legislation are not considered to be exercising judicial power. In *Grollo v Palmer*,<sup>63</sup> the High Court confirmed that "eligible judges" designated under the TI Act to issue warrants are acting in a non-judicial capacity. In *Coco*,<sup>64</sup> the High Court similarly noted that issuing a listening device warrant is an administrative rather than judicial function. The curious position of a judge

58 TI Act, s 45. See also *Criminal Code (Can)*, s 186(1).

59 *Op cit* at p 15. Kirby P makes a similar assessment of the safeguards in the TI Act in *John Fairfax v Doe* (1995) 80 A Crim R 414 at 428.

60 TI Act, s 46.

61 In 1994/5, only 6 (out of the 698) warrants applications were refused: TI Act Annual Report, *op cit* p 15.

62 See the assessment of the Canadian procedure in the *Annual Report on the Use of Electronic Surveillance 1990*, *op cit* p 9.

63 (1995) 184 CLR 348 at 359.

64 (1994) 179 CLR 427.

exercising power *persona designata* (as a designated person) flows from the strict separation of powers doctrine inherent in the Constitution.<sup>65</sup> Whether characterised as administrative or judicial in nature, these decisions should be subject to judicial review. Despite earlier authorities deciding that warrants were unreviewable,<sup>66</sup> there is growing acceptance that the courts may properly review the basis on which warrants are issued.<sup>67</sup> The courts however are limited to the grounds for judicial review recognised by the common law.<sup>68</sup> In practice however the oversight offered by judicial review is largely theoretical. As the High Court in *Grollo* explained:

Because of the secrecy necessarily involved in applying for and obtaining the issue of an interception warrant, no records are kept which would permit judicial review of a Judge's decision to issue a warrant. Nor are reasons given for such a decision. The decision to issue a warrant is, for all practical purposes, an unreviewable *in camera* exercise of executive power to authorise a future clandestine gathering of information.<sup>69</sup>

The extent to which judicial review can be invoked depends on the retention of reliable records by those persons seeking and issuing the warrants. Arguably, in those cases where judicial review cannot be exercised because no records have been kept, the guarantee to privacy contained in Article 17(2) of the ICCPR — that “[e]veryone has the right to protection of the law against such interferences or attacks” — has been effectively denied.

The use of judges in non-judicial roles *per se* does not prevent the system meeting the objective requirements of legality imposed by international human right law. Indeed, in *Klass v Federal Republic of Germany*,<sup>70</sup> the European Court of Human Rights held that the domestic wire-tapping scheme was consistent with Art 8 of the ECHR; while the scheme did not provide for judicial review, it had strict administrative procedures for the approval of such activity and the use to which the information could be put.<sup>71</sup>

65 *Hilton v Wells* (1985) 157 CLR 57. See generally Wheeler F “Original Intent and the Doctrine of the Separation of Powers in Australia” (1996) 7(2) *Public Law Review* 96

66 See *McArthur v Williams* (1936) 55 CLR 324 (search warrant); and *Murdoch v The Queen* (1987) 37 A Crim R 118 (Court of Criminal Appeal, NSW) (listening devices warrant).

67 See McHugh JA in *Peters v A-G* (NSW) (1988) 16 NSWLR 24, and Kirby ACJ (dissenting) in *Carroll v A-G* (NSW) (1993) 70 A Crim R 162.

68 Schedule 1, para (d), *Administrative Decisions (Judicial Review) Act* 1977 (Cth) exempts from its jurisdiction decisions made under the TI Act.

69 *Grollo v Palmer* (1995) 184 CLR 348 at 367 per Brennan CJ, Deane, Dawson and Toohey JJ.

70 (1978) 2 EHRR 214.

71 *Ibid*, paras 51-53 and 55-56. See also Feldman, *op cit* p 479.

An important safeguard against arbitrary interference with privacy, which is embodied in Art 17(2) of ICCPR, is the right of individuals to challenge the grounds for the surveillance and to seek compensation for unjustified violations of privacy. The principal difficulty in meeting the obligation is that individuals in Australia may not be informed that they have been subject to electronic surveillance by law enforcement agencies. Non-disclosure, which is often mandated by the relevant statute, not only prevents suspects from challenging the grounds upon which their violation of privacy was justified, it also denies them access to material which may be relevant to their defence.<sup>72</sup> Unlike the equivalent legislation in Canada, the TI Act does not require the notification of "innocent persons" who are subject to the surveillance.<sup>73</sup> Although a similar provision was recommended by a recent review of the TI Act, there is strong resistance from the Australian law enforcement community to its adoption. The arguments against notification are weak particularly since law enforcement agencies in Canada and the United States have not found the obligation to be unduly onerous or to compromise active investigations.<sup>74</sup> Even where individuals discover that they have been subject to unlawful electronic surveillance, the common law provides only limited remedy for breach of privacy.<sup>75</sup> To address some of these concerns, the Commonwealth has recently implemented a right of civil action against any unlawful interception or unauthorised disclosure of an intercepted communication.<sup>76</sup>

72 The potential impact of non-disclosure of intercepted material to the accused's right to the fair trial is discussed below in Part III.

73 *Criminal Code* (Can), s 196(1).

74 The Canadian notification obligation requires the Attorney-General to notify persons identified in the interception authorisation within 90 days following the expiry of the authorisation: *Criminal Code* 1990 (Can), s 196(1). Between 1986 and 1990, 3821 person were notified under this provision: *Annual Report on the Use of Electronic Surveillance* 1990, *op cit* p 26.

75 The High Court rejected a general tort of breach of privacy in *Victoria Park Racing v Taylor* (1937) 58 CLR 494 at 496 per Latham CJ. Individuals may obtain some redress by invoking the statutory right to privacy in the *Privacy Act* 1988 (Cth). As yet, no complaints relating to electronic surveillance under the Act have reached the courts and disputes are resolved or settled by way of the Privacy Commissioner's powers of conciliation and mediation.

76 TI Act, Part XA, ss 107A(1)-107F. These amendments were inserted by the *Telecommunications (Interception) Amendment Act* 1995 (Cth) implementing the recommendations of the Barrett Review, *op cit* pp 63-64.

## Part III: Electronic Surveillance and the Right to a Fair Trial

The new surveillance technologies also pose a threat to another fundamental human right — the right to a fair trial which is protected by Art 14 of the ICCPR. Art 14(3) identifies the “minimum guarantees” for a fair trial. This part of the article examines how electronic surveillance may be used to undermine or circumvent some of these guarantees, namely, the rights to silence, legal counsel and the adequate disclosure of the prosecution’s case.

### The Right to Silence

A fundamental component of the fair trial is the right of the accused to remain silent. Article 14(3)(g) of the ICCPR provides that the accused has the right “[n]ot to be compelled to testify against himself or to confess guilt”. In Australian law this fundamental value is characterised as a privilege against self-incrimination. The principle *nemo tenetur accusare seipsum* (no person is bound to accuse himself or herself) originated as a means of protecting suspects from torture and oppressive interrogation, but is now recognised as a basic human right protecting personal freedom and human dignity.<sup>77</sup> The privilege provides that a person is not under a duty to answer questions or otherwise cooperate with the police or the prosecution. It has been described by the High Court as “an entitlement to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of participants and the roles that they played”.<sup>78</sup> At common law, no adverse inferences can be drawn from the accused’s decision not to cooperate, though in *Weissensteiner*<sup>79</sup> the High Court held that silence of the accused may have probative bearing on the evidence led by the prosecution, particularly in cases where the accused has not supported any hypothesis which is consistent with innocence from the facts which are perceived to be within his or her knowledge.

A wider qualification has been exacted by statute in the United Kingdom (first in Northern Ireland and subsequently in England and Wales) to allow adverse inferences to be drawn from the defendant’s silence in specified circumstances.<sup>80</sup> The

<sup>77</sup> The historical origins and modern rationale of the privilege are explored in *EPA v Caltex* (1993) 178 CLR 447.

<sup>78</sup> *Petty* (1991) 173 CLR 95 at 95; see also *Weissensteiner* (1994) 178 CLR 217.

<sup>79</sup> (1993) 178 CLR 217.

<sup>80</sup> See for example *Criminal Justice and Public Order Act 1994* (UK), s 34, following the earlier statutory modification to the right to silence effected by *Criminal Evidence (Northern Ireland) Order 1988*.

European Court of Human Rights in *Murray v United Kingdom*<sup>81</sup> has considered whether the provisions in Northern Ireland violated Art 6 of the ECHR which guarantees a fair hearing. The Court affirmed that the right to silence, both trial and pre-trial, lies at the heart of the notion of a fair hearing but concluded that these provisions, which entitled the jury to draw "common sense" inferences from silence, did not violate Art 6. As the Court observed, the national provision did not breach Art 6 since the jury was in fact prevented from convicting *solely* on the basis of the accused's decision to remain silent.<sup>82</sup> The decision to uphold the law was greatly influenced by the presence of these safeguards, although the precise delimitation between permissible and impermissible inferences from silence remains unclear.<sup>83</sup>

This fundamental value and basic human right is most directly threatened when law enforcement officials (or their agents and informers) use electronic surveillance to conduct and record covert interviews with suspects. Indeed there is authority, both in Australia and Canada, which supports the exclusion of evidence obtained in these circumstances. In *Smith, Turner and Altintas*<sup>84</sup> an accomplice/informer recorded an incriminating conversation with the defendant using a listening device supplied by the police. The use of the listening device was not unlawful because the recording fell within the "public interest" exception contained in the relevant legislation.<sup>85</sup> Although the recording was not unlawful, the Supreme Court of South Australia held that the evidence should have been excluded on the ground of unfairness — it was unfair to admit the recording at the trial because at the time the informer recorded the conversation, the police had sufficient evidence to charge the suspect and therefore should have advised him of his right to remain silent. A similar approach has been adopted in Canada, where the Supreme Court in *Brown*<sup>86</sup> held that a confession that was elicited by an undercover police officer (who had been placed in a cell next to the suspect) violated the defendant's right to remain silent, as protected by the Charter, and thus should have been excluded by the trial judge. The Supreme Court was particularly influenced by the fact that the suspect had, initially at least, expressed a choice to remain silent.

81 (1996) 22 EHRR 29 (Case No 417/1994/488/570),

82 *Ibid* at para 48.

83 See Dickson B "The Right to Silence and Legal Advice under the European Convention" (1996) 21 *European Law Review* 424.

84 [1994] 75 A Crim R 327.

85 *Listening Devices Act* 1972 (SA), s 7(2).

86 (1993) 105 DLR (4th) 199.

Not all courts in Australia have appreciated the danger that electronic surveillance poses to the right to silence. In a recent Queensland decision, *O'Neill*,<sup>87</sup> the accused, a nurse, confessed to a colleague (L) that she had attempted to kill her husband by injecting him with insulin. L reported this to the police. The police equipped L with two listening devices and directed her to initiate further conversations with the accused in order to record the confession on tape. Transcripts of the recordings constituted the principal evidence against the defendant and she was convicted and sentenced to 12 years' imprisonment. At the appeal, the accused argued that the evidence of the admissions recorded by L should have been excluded by the trial judge on the basis of unfairness. Central to this argument was the claim that L was an unidentified police agent at the time of the admission, and that since the police already had sufficient evidence to charge her, L was being used to conduct an interview indirectly without complying with the requirement to caution the suspect of her right to remain silent. The majority dismissed the appeal (Dowsett J and Pincus JA concurring). Dowsett J held that the admission of the recordings did not violate the accused's right to silence since L was not under an obligation to caution the defendant. In his view, the purpose of the caution is to advise the suspect of his/her right to remain silent so as to ensure that the person being questioned is on "equal terms" with the person in authority conducting the investigation. In this case, even though L was acting covertly on behalf of the police, there was no inequality in the relationship between L and the defendant which suggested that the defendant was under an obligation to speak.<sup>88</sup> Pincus JA held that conduct of the police in arranging to have L engage the defendant in conversation with a view to obtaining an admission of guilt was neither improper nor unfair. Undercover operations involving trickery and deception are necessary both to identify offenders and to gather incriminating evidence against them. In his view, the practice of law enforcement officers arranging matters so that incriminating conversations can be recorded posed no threat to the interests of justice, and served only to enhance the

87 (1995) 81 A Crim R 458. For a full discussion of the substantive legal and evidential issues raised by *O'Neill*, including the role of informers in covert policing: see Bronitt S "Contemporary Comment-Electronic Surveillance and Informers: Infringing the Rights to Silence and Privacy" (1996) 20 *Criminal Law Journal* 144.

88 Dowsett J observed, strictly obiter, that it would be unfair to admit confessional evidence where undercover police officers or agents had exploited the vulnerability of persons in custody, or where the suspect, though not in custody, has indicated an intention to remain silent or seek legal advice: *ibid* at 554.

reliability of the evidence and to provide corroboration of the testimony of a person who otherwise falls within a category of unreliable witnesses, such as informers or agents provocateurs.<sup>89</sup>

The real problem in *O'Neill* is not that L failed to caution the suspect, but rather that the police used L to conduct questioning on their behalf without advising, and therefore unfairly depriving, the suspect of her rights. Unfortunately for the accused in *O'Neill* neither the South Australian nor the Canadian decision was raised at trial or at the appeal. The dissenting judgment of Fitzgerald P explored at length the rationale of the privilege against self incrimination. His conclusion focuses on the fact that the defendant surrendered her right to silence because of the deliberate deception of the informer:

[Her] conduct, at police instigation, entrenched on the appellant's privilege against self-incrimination, which was a basic personal right and it did so for that express purpose. The appellant was deliberately tricked into surrendering her right to silence at the instance of law enforcement personnel by an implicit misrepresentation that (L) sought her confidence as a friend, not a police agent. That being so, in my opinion, it was unfair to the appellant to receive evidence of her recorded statements to (L) at the appellant's trial.<sup>90</sup>

But the deception by L is not the key factor in the unfairness. It is the fact that, as Fitzgerald P acknowledged in the preceding sentence, the police used L for the *express purpose* of infringing upon the defendant's privilege against self incrimination. Not all forms of deception or trickery by law enforcement officers or their agents will be improper or will cause unfairness to the accused.<sup>91</sup> As a general rule, however, once the officers have obtained sufficient evidence, objectively speaking, to establish that the person has committed the offence, the arrest (or issuing of a summons) should follow as soon as is reasonably practicable and the suspect should be cautioned. Any decision to prolong the deception in these cases carries the attendant danger that the suspect is being unfairly deprived of the right to silence, an unfairness which may trigger the exercise of the discretion to exclude crucial incriminating evidence by the

89 *Ibid* at 462. However, in this case the tapes were inaudible and had to be transcribed using special equipment and the informer's memory of the conversation. The dangers of transcript unreliability and selectivity are discussed below.

90 *Ibid* at 547.

91 See *Ridgeway* (1995) 129 ALR 41 at 53 per Mason CJ, Deane and Dawson JJ.

trial judge.<sup>92</sup> Although exclusion of this evidence is at the discretion of the trial judge, Fitzgerald P's judgment (supported by the South Australian and Canadian decisions above) suggests that trial judges should not tolerate undercover law enforcement activity which circumvents the right to silence in a deliberate or reckless manner. Although the practical importance and theoretical merit of the right to silence can be debated, it is clear that the courts should not tolerate blatant attempts by law enforcement agents to circumvent this right. If the right to silence requires modification, as has occurred in parts of the United Kingdom, then it is for the legislature to authorise such a fundamental reform.

### The Right to Counsel

Article 14(3)(b) of the ICCPR guarantees to the accused the right to "communicate with counsel of his own choosing". The fundamental importance of the lawyer-client relationship is well established in the Australian legal system, and there is a high degree of protection, both *de jure* and *de facto*, for communications between clients and their lawyers.<sup>93</sup> In *Carter*,<sup>94</sup> the High Court acknowledged the paramount importance of protecting the privacy of communications between lawyers and their clients. The rationale of the breadth of protection under the common law is not solely the importance of privacy of communications. Legal professional privilege relates more fundamentally to the proper administration of justice:

It plays an essential role in protecting and preserving the rights, dignity and freedom of the ordinary citizen — particularly the weak, the unintelligent and the ill-informed citizen — under the law.<sup>95</sup>

92 The failure to caution the suspect may render a confession made during official police questioning liable to exclusion on the ground that it has been improperly obtained: *Evidence Act 1995 (Cth/NSW)* s 139.

93 The High Court has established that a search warrant could not properly apply to communications protected by legal professional privilege: *Baker v Campbell* (1983) 153 CLR 52. However, the police may validly execute a search warrant and seize privileged material provided that, at the time of search and seizure, the officers believe that the evidential material specified under the warrant is *not* protected by the privilege: *George v Rockett* (1990) 170 CLR 104 at 119. *De facto* protection is ensured by the adoption of procedures agreed between the Law Council of Australia and specified law enforcement agencies for executing warrants over lawyers' offices: see "Search Warrant Guidelines" (1990) 25(9) *Australian Law News* 58-59. Updated guidelines were issued on 3 March 1997.

94 (1995) 183 CLR 121.

95 *Ibid* at 133 per Deane J.

The privilege is not a "mere rule of evidence, it is a substantive and fundamental common law principle".<sup>96</sup> Accordingly, the majority of the High Court rejected the accused's argument that this rule is subject to a "public interest" exception that disclosure should be allowed in a criminal trial where the information is relevant to establishing the accused's innocence.<sup>97</sup> This ruling however did not affect the established qualification that legal professional privilege cannot attach to communications which are prepared in the furtherance of the commission of fraud, an offence or an act which renders a person liable to a civil penalty.<sup>98</sup>

Electronic surveillance, if unchecked, poses a significant threat to the right to "communicate with counsel" protected by Art 14(3)(b) of the ICCPR. Under the TI Act and the various State or Territory listening devices legislation, a warrant may be issued in terms which would permit surveillance of otherwise privileged communications. It has been suggested that this anomaly should be rectified so that law enforcement agencies cannot apply for warrants authorising telecommunications interception or the use of listening devices which relate to a "legal practitioner (either at the practitioner's professional office or home), unless there is cogent evidence of the practitioner being personally involved in criminal activities".<sup>99</sup> By contrast, in Canada, judges may impose such conditions on the implementation of the authorisation for electronic surveillance as appropriate

---

96 *Ibid.* The House of Lords has held that a witness summons (ie a subpoena) could not be issued to compel the production of material which is protected by legal professional privilege: *R v Derby Magistrates' Court, ex parte B* [1995] 4 All ER 526.

97 (1995) 183 CLR 121 at 130 per Brennan J; at 136 per Deane J; at 162 per McHugh J. The House of Lords has similarly characterised this protection in absolute terms: *R v Derby Magistrates' Court, ex parte B* [1995] 4 All ER 526 at 541 per Lord Taylor CJ. By contrast, the statutory client legal privilege created by the *Evidence Act 1995* (Cth/NSW), s 123, provides that privilege does not prevent a *defendant* in criminal proceedings from adducing evidence of an otherwise protected communication.

98 Brennan J, *op cit* at 130, noted that the privilege cannot be invoked for an illegal purpose. See also the *Evidence Act 1995* (Cth/NSW), s 125.

99 See proposal contained in Legislative Assembly of Queensland, Parliamentary Criminal Justice Committee, *A Review of the Criminal Justice Commission's Report on Telecommunications Interception and Criminal Investigation in Queensland*, Report No 29 (1995), Recommendation 4, p 33 and *Report on the Review of the Criminal Justice Commission's Report on a Review of Police Powers in Queensland*, Vol V: *Electronic Surveillance and Other Investigative Procedures*, Report No 28 (1995), pp 66-68.

including *inter alia* restrictions based on solicitor-client privilege or other confidential relationships.<sup>100</sup>

At a fundamental level, the decision in *Carter* reveals the tension between different aspects of the fair trial principle protected by Art 14 of the ICCPR, namely, the right to counsel and the right to adequate disclosure of the prosecution's case. The minority in *Carter* favoured the creation of an exception in favour of the accused in situations where the production of the documents would be necessary for the proper conduct of the defence or would impede the conduct of the defence.<sup>101</sup> The legal analysis in *Carter* was framed in terms of balancing competing public interests. A more refined analysis would seek to reconcile this apparent conflict of values rather than trump one aspect of the fair trial right over another. To be sure, the right to counsel, while not paramount, requires a very high level of protection. Indeed, the accused's ability to assert violations of human rights invariably rests upon access to and the availability of legal counsel.<sup>102</sup> It is possible to maintain the absolute nature of the privilege while still protecting the fair trial principle by invoking, in appropriate cases, the inherent jurisdiction of the courts to grant a stay, permanent or temporary, to prevent an unfair trial.<sup>103</sup> Admittedly, the decision to grant either a temporary or permanent stay would be one of "last resort" as its use frustrates the public interest in bringing offenders to trial and may also undermine public confidence in the administration of criminal justice. The burden should rest with the accused to establish that the non-disclosure of privileged communications has, on the balance of probabilities, impaired their right to a fair trial.

**The Right to Disclosure**      *International / Covenant & Civil  
The ICCPR does not explicitly guarantee the right of the accused to documentation in the possession of the prosecution. Article 14(3)(b), however, protects the right of the accused to "adequate time and facilities for the preparation of his defence". It has and political right.*

100 *Criminal Code* (Can), ss 186(2) and (3), Part IV.

101 (1995) 183 CLR 121 at 156 per Toohey J; at 159 per Gaudron J.

102 As Deane J, *ibid* at 140 observed, "the suggested curtailment of legal professional privilege would inevitably, to some extent, also reduce the efficacy of the principle against self incrimination".

103 For example, the High Court has used this power to halt a trial where an indigent accused facing serious criminal allegations was denied legal aid: *Dietrich* (1992) 177 CLR 292; see "Editorial — Staying A Trial For Unfairness: The Constitutional Implications" (1994) 18 *Criminal Law Journal* 317.

been suggested that the term "facilities" includes access to the documentation necessary for the defence.<sup>104</sup> In any event, the right to disclosure of the prosecution case (including documentary evidence), although not an express guarantee, is an important implication of the right to a fair trial protected by Art 14(1).<sup>105</sup> In Canada, although there is no express constitutional requirement requiring disclosure, the Supreme Court has held that the prosecution is under a duty of disclosure to the extent necessary to ensure the accused may make "full answer and defence".<sup>106</sup> Under the common law, the extent of disclosure is essentially determined by considerations of fairness.<sup>107</sup>

The law governing disclosure in Australia is relatively undeveloped, especially when compared to recent decisions elaborating the right to a fair trial.<sup>108</sup> In the context of electronic surveillance, the prevailing view is that there are only limited obligations of disclosure on the prosecution. As a leading practitioner text on criminal procedure concludes: "In Australia, the prosecution does not have a duty to disclose, prior to criminal proceedings, that material derived from electronic surveillance will be used in prosecution".<sup>109</sup> In some circumstances, statute may prohibit the prosecution from divulging material gathered by electronic surveillance including evidence which is relevant to the accused's defence.<sup>110</sup> Even where there is voluntary disclosure by the

---

104 Noor Muhammad H "Due Process of Law for the Persons Accused of Crime" in Henkin L *The International Bill of Rights: the Covenant on Civil and Political Rights* (Columbia University Press, New York 1981) p 152.

105 *Ibid* p 146.

106 *Stinchcombe* (1991) 68 CCC (3d) 1 at 7.

107 The High Court considered prosecutorial disclosure in *Lawless* (1979) 142 CLR 659. See also *Ward* [1993] 2 All ER 577.

108 See Hunter J and Cronin K *Evidence, Advocacy and Ethical Practice* (Butterworths, Sydney 1995) p 199.

109 Schurr B *Criminal Procedure (NSW)* (Law Book Company Information Services, Sydney 1996) Ch 8, par 8.1430.

110 See *Green* (1996) 85 A Crim R 229, the Supreme Court of Western Australia held that s 63 of the IT Act prevented the accused accessing tapes of an illegally intercepted conversation for the purpose of voice identification analysis. Although s 63 has since been replaced, the IT Act continues to prohibit the disclosure and admission of intercepted material (whether or not legally obtained) in proceedings unless expressly authorised under the Act: see s 77. Regrettably, there is no general exception permitting disclosure or admission in proceedings where the "interest of justice" so require. See also *Preston* [1993] 4 All ER 638.

prosecution, in a practical sense, the volume of tape or transcript to be analysed may be overwhelming for the defence.<sup>111</sup> Furthermore, the construction of "official" transcripts in these circumstances poses the danger that the jury (which may access the transcript during its deliberations) may not adequately appreciate its potential for unreliability through omission and selectivity.<sup>112</sup> Indeed, in *O'Neill*,<sup>113</sup> since the tape recordings of the alleged confession were largely inaudible, the informer "transcribed" them over a period of several months using enhancing equipment and her own recollection of the conversation. Dowsett J held that these facts were relevant to the weight of the evidence rather than its admissibility.<sup>114</sup> The dangers of unreliability associated with transcript evidence would be better addressed through the development of a rule which would only admit this evidence where the party seeking to adduce it could establish its reliability and completeness. Alternatively, mandatory directions for transcript evidence could be devised in order to highlight these peculiar dangers of unreliability to the jury, similar to those which have developed to deal with identification evidence based on eye-witness testimony.<sup>115</sup>

The limited duty of disclosure in Australia may be contrasted with the position in Canada and the United States which imposes a statutory duty of pre-trial disclosure in all cases where the prosecution proposes to use the contents of interceptions or evidence derived from such interceptions.<sup>116</sup> Similar recommendations have been proposed in Australia.<sup>117</sup> Given the level of uncertainty in the present law of disclosure in Australia, there is a real danger that the accused's right to a fair trial may be seriously compromised.

111 Schurr B *op cit* discusses the decision of *Al Khair* (unreported, NSW Court of Criminal Appeal, 20 June 1994). The prosecution at committal tendered 166 tapes and transcripts relating to 3180 calls. Before trial, the accused sought access to tapes and transcripts of a further 3000 calls.

112 Marx, *op cit* pp 132-138.

113 (1985) 81 A Crim R 458.

114 *Ibid* at 554-556.

115 See *Domican* (1992) 173 CLR 555.

116 The US and Canadian legislation is discussed in Schurr, *op cit* at para 8.1450.

117 See proposals of the Legislative Assembly of Queensland, Parliamentary Criminal Justice Committee, *A Review of the Criminal Justice Commission's Report on Telecommunications Interception and Criminal Investigation in Queensland*, Report No 29 (1995): "That at an appropriate stage in a criminal investigation ... there be full disclosure of the existence of the warrant, any conditions attaching to its grant, the material relied upon in obtaining the grant of the warrant, and all material collected pursuant to the warrant (whether or not that material supports the prosecution case)": p 18.

## Conclusion

In Australia, there is increasing recognition of the fundamental importance of human rights to the administration of criminal justice. The ICCPR is not only a legitimate influence on the development of the common law,<sup>118</sup> it also operates as an explicit disciplinary norm which may be used in legal proceedings to judge the propriety of the conduct of law enforcement officials.<sup>119</sup> Indeed, the *Evidence Act* 1995 (Cth/NSW) explicitly states that a trial judge, in exercising the discretion to exclude evidence obtained improperly or illegally, may consider a range of factors including *inter alia* "whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights".<sup>120</sup> The disciplinary effect of this provision may be limited by the fact that human rights violations are merely one factor to be thrown in the balance in considering the exercise of the discretion.<sup>121</sup> As a result the discretion will rarely operate to exclude evidence in trials of "serious offences" or where its probative value is high (both invariably characteristics of evidence gathered by electronic means).<sup>122</sup> Moreover, evidence tainted by illegality or impropriety may not be disclosed by the police or prosecution, and consequently the misconduct may never be subject to judicial scrutiny or reprimand.

Bearing these limitations in mind, disciplinary rules must be supplemented by non-legal strategies for enhancing respect for human rights. Human rights should operate

118 *Mabo* (1992) 175 CLR 1; *Dietrich v R* (1992) 177 CLR 292. See Mason A "The Influence of International And Transnational Law on Australian Law" (1996) 7 *Public Law Review* 20.

119 See Ashworth A *Criminal Process: An Evaluative Study* (Clarendon Press, Oxford 1994) who uses the ECHR as the source of ethical principle for evaluating the law governing criminal investigation in England. It has been suggested that the ICCPR, while an important source of ethical principle in Australia, is not exhaustive of the normative principles of criminal justice: Garkawe S "Do the Federal Government's Pre-Trial Detention Laws Comply with the ICCPR" published in *ANZSIL Proceedings of the Fourth Annual Meeting* (Centre for International and Public Law, Canberra 1996) p 119.

120 *Evidence Act* 1995 (Cth/NSW), s 138(3)(f), discussed in *Truong* (1996) 86 A Crim R 188.

121 Arguments for and against the adoption of a mandatory exclusionary rule for evidence obtained in breach of the ICCPR are further explored in Bronitt S "Contemporary Comment-Electronic Surveillance and Informers: Infringing the Rights to Silence and Privacy" (1996) 20 *Criminal Law Journal* 144 at 152.

122 *Bunning v Cross* (1978) 141 CLR 54 at 79-80 per Stephen and Aickin JJ. See *Evidence Act* 1995 (Cth/NSW), s 138(3).

not only as constraints on law enforcement officials, they should also provide ethical guidance. At the international level, the importance of human rights to law enforcement practice is acknowledged in the *United Nations Code of Conduct for Law Enforcement Officials* ("UN Code")<sup>123</sup>, Art 2 of which provides:

In the performance of their duty, law enforcement officials shall respect and protect human dignity and uphold the human rights of all persons.

In the use of electronic surveillance, where legal governance is incomplete and law enforcement officials are subject only to minimal legal constraints, the UN Code and the ICCPR have the potential to play an important educative role for the law enforcement community. Regrettably, neither the UN Code nor the ICCPR significantly inform police training or debates about the future direction of policing.<sup>124</sup> Clearly, human rights deserve greater respect in the administration of criminal justice. ●

---

123 Adopted by the UN General Assembly on 17 December 1979.

124 The negligible impact of human rights on policing theory and practice is apparent in a recent collection of essays by senior police and policing experts: Etter B and Palmer M (eds) *Police Leadership in Australasia* (Federation Press, Sydney 1995). The volume pays scant attention to human rights and ethical matters, focusing instead on the future challenges to the police posed by white collar, hi-tech and transnational forms of crime. See also Kleinig J *The Ethics of Policing* (Cambridge University Press, Cambridge 1996), which devotes only one paragraph to the UN Code, concluding that "... in the member states it has never achieved the acceptance that was sought for it" (p 237).