

Privacy and QR codes

‘Have you heard?’ I asked, sliding into my usual seat at a table in a Pelham Street café, just down the block from Melbourne Law School.

Carl lifted his eyes from the pages of *Hanks Australian Constitutional Law*. ‘Heard what?’

‘That the police want to use COVID QR code data in criminal investigations.’

‘You’re kidding me!’ Carl fixed me with a glare as he slammed the heavy tome shut.

I shook my head. ‘Nope. It’s happened in Queensland and Western Australia. The Victorian Police have tried to do it as well. Three times.’

‘And what did Symes do?’

‘Our esteemed state attorney-general knocked them back. For now.’

‘That’s a relief,’ said Carl. ‘What about other states? New South Wales? South Australia?’

‘The Northern Territory and South Australian governments have prohibited the police from using QR code data. Same in New South Wales. It’s only to be used for pandemic contact tracing.’

‘Good news, but it’s not enough,’ said Carl. ‘The cops aren’t going to give up. Technology that lets them track people’s movements is just too much of a temptation for them.’

‘I agree.’

‘Then we have to do something,’ said Carl.

‘Do what?’ I replied. ‘We’re law students. What can we do?’

‘We can talk to Liberty Victoria.’

‘They’ve already issued a statement.’

‘Then we should organise something at the law school. Get the campus chapter of Amnesty involved.’

‘That’s a great idea,’ I said. ‘Perhaps a public forum on the issue. It’ll be just like old times when we were on the debating team at Melbourne High.’

‘The question is whether we’d be able to find anyone to argue in favour of police use of QR codes,’ mused Carl.

‘Dougherty,’ I replied, ‘Vice President of the Melbourne University Liberal Students Club.’

‘You mean Ken Daugherty? The one with no sense of humour?’

I laughed. ‘That’s the one. Remember he wrote that tough-on law and order article for *Farrago* last year. Perhaps he’d be willing?’

Carl shrugged. ‘I’m not sure writing an op-ed in a student newspaper means he’ll be prepared to argue his case in a public forum. But it’s certainly worth a try. We’ll see if he has the strength of his convictions.’

Three weeks later, we assembled at the David P. Derham Theatre in the Melbourne Law building to play our parts in the drama we’d orchestrated. Our idea was seized upon with alacrity by the law school student government, and with their efforts to promote publicity, our event attracted substantial public attention. Two overflow rooms were required to accommodate a crowd that exceeded the theatre’s 350-seat capacity. The attendees were an eclectic mix of students, practising lawyers, the media and activists from various Melbourne-based political organisations.

At 7.30 pm sharp, Professor Archibald kicked off proceedings.

‘Ladies and gentlemen, welcome. It’s my distinct pleasure to serve as moderator for this conversation on a public policy issue of vital importance. How should we balance the scales of safety versus liberty? If we authorise the use of QR codes for pandemic control, why not authorise them for crime control as well? The proposition we will be discussing tonight reads: “Police use of pandemic QR codes in criminal

investigations constitutes a real and present danger to Australian democracy.”

Professor Archibald paused to take a sip of water from a glass on the table in front of him.

‘My use of the term “discussing” was deliberate. We’re going to try and conduct this on a more informal basis – not an Oxford Union–style debate, but a civil discussion between two students with opposing views. Why students, I hear you ask? Why not some of Melbourne’s legal luminaries to carry each side of the argument? The answer to those questions is simple. We are the finest law school in Australia and counted among the most prestigious in the world. Our students are drawn from the best and brightest. We have faith in them. We believe that when you combine the brightest minds with the best education available anywhere, the result is guaranteed to impress. But no pressure, people.’

Archibald shot a cheeky grin at Dougherty and me, which generated a wave of good-natured laughter from the crowd. We blushed.

‘So, let’s begin with introductions. I’m Professor Morris Archibald and I teach constitutional and international law here at the law school. Both our presenters are also from Melbourne Law. Final-year students who, in a few short months, will venture forth into the real world and a career in the law. I wish them good fortune and I hope that good fortune will begin tonight. Here to argue in favour of the proposition is Mr Eli Greenspan, who first suggested this exchange of views. Arguing in opposition is Vice President of the Melbourne University Liberal Club, Ken Daugherty. Please give our speakers a round of applause.’

The audience applauded.

‘Thank you, ladies and gentlemen. The format of tonight’s event is simple. Our debaters will start with a three-minute opening statement in

alternating order. Then we'll have about forty minutes of back-and-forth before we entertain questions from the audience. The idea is to wrap this up in about an hour, so that you can get home at a reasonable time. So, without further ado, Mr Greenspan the floor is yours.'

I swallowed as I rose from my seat and walked towards the speaker's podium.

Just like moot court, I thought to myself to try to quell my nerves.

'In March 1933, newly appointed Chancellor Adolf Hitler introduced a bill into the Reichstag, the German parliament. While the "Law to Remedy the Distress of People and Reich" was its formal title, this piece of legislation has come to be commonly known as the Enabling Act. The Act put the final nail in the coffin of Weimar democracy by conferring upon Hitler the power of absolute rule by decree. The Nazis engineered its passage by arresting enough communist and socialist deputies to ensure a majority in the Reichstag.'

I paused several beats for effect.

'It's important to note that the Enabling Act legalised every measure adopted by the Nazi government. The suppression of free speech and the murder of political dissidents. The T-4 program of euthanising the disabled that was a testing ground for Auschwitz. And, yes, even the Holocaust itself. All of these abominations were perfectly legal under the authority vested in Adolf Hitler by the Enabling Act. Yet I would venture to guess that the overwhelming majority of Nazi Reichstag deputies who voted in favour of this legislation had no idea where it would ultimately lead. The lesson is that we always need to consider the long-term consequences of policies that might tempt us in the short term.'

I turned the page of my notes.

'Now, although I may be accused of satisfying Godwin's Law, I will now cite Professor Hannah Arendt's essay entitled "Rousseau and

Totalitarianism” where she writes about the similarities between Nazism and Communism. Both ideologies elevated collective obligations at the expense of individual rights. Both ideologies defined an evil “other” against whom war must be waged. Both ideologies organised the entirety of their social order towards that goal. So, if you object to my references to Hitler and the Nazi Enabling Act, feel free to substitute Lenin or Stalin and Article 58 of the Soviet Penal Code that legalised the state murder of so-called counter-revolutionaries. The dynamic is the same. It leads to an ends-justifies-means mentality that culminates in horrific human-rights abuses. We’ve all heard the saying by Lord Acton that power corrupts and absolute power corrupts absolutely. And the power that police would gain through their access to QR code data would tempt even the most righteous among us. I’ll conclude by quoting American founding father Benjamin Franklin, who said: “Those who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety.” I thank you all for your attention.’

I turned and nodded to Professor Archibald before returning to my seat.

Next up was Daugherty, the humourless Liberal wanker.

‘Ladies and gentlemen,’ he smirked. ‘My message tonight is simple. Australia is changing – and not for the better. Our courts administer slaps on the wrist to hardened criminals, and it’s not safe to go out at night without being mugged. The police should be able to access whatever resources they need to reduce crime on the streets. By the way, I don’t buy Greenspan’s argument ...’

‘Mr Daugherty, please refer to your fellow panellists with an appropriate level of civility,’ admonished Professor Archibald.

Daugherty blushed.

‘Excuse me ... I don’t buy Mister Greenspan’s argument that this legislation will transform us into a police state like Nazi Germany. It’s about public safety. Remember how we all felt when QR codes were first introduced last December. We were in the midst of a massive life-threatening pandemic. People were scared, and there was almost unanimous support for the use of this innovative technology to save lives.’

Daugherty paused and gave me an arrogant smirk as if he were about to deliver the coup de grace.

‘Ladies and gentlemen, the government has been using the QR code system for over a year, yet the skies have not fallen on Australian democracy. The very fact that we are conducting this public forum proves that my learned opponent’s fears are overblown and groundless. So then, the question becomes whether we value the safety of our girlfriends, wives, sisters and mothers in the face of crime as we do the general wellbeing of the population in the face of a pandemic. I’m here to argue that we should and we must.’

Daugherty paused to turn the page of his notes.

‘For eighteen of the past twenty-two years, Victoria has been governed by a series of Labor governments – Bracks, Brumby and now Andrews. Throughout this period, Labor attorneys-general have stacked the Victorian bench with left-leaning jurists who dispense disgustingly lax prison sentences to serial predators. Adrian Bailey raped and murdered Jill Meagher, after serving time in prison for a previous string of sexual assaults. Sean Christian Price raped and murdered teenager Masa Vukotic, after serving a five-and-a-half-year sentence for raping a mother while her children were playing in the next room. After his release from prison for a series of brutal sexual assaults, William John Watkins went

on to murder two sisters in their twenties, who were his next-door neighbours.’

Daugherty looked up and fixed his gaze on the audience.

‘These are just a few of the myriad cases in which innocent girls and women have been placed in jeopardy by the soft-on-crime philosophy of Victoria’s ALP-appointed judges. Ladies and gentlemen, I stand here today and declare without reservation that I have no faith in the ability or willingness of the Victorian judicial system to protect those among us who need protection most. We are facing a double problem in this state of both crime and a lack of punishment for crime, a problem that places Victorian women at risk. So, if providing police access to QR codes will prevent another rape or murder or prevent the next woman falling victim to a serial predator let out of prison by lettuce-leaf leftist judges, I say yes, yes, yes. Thank you very much, ladies and gentlemen.’

‘And thank you to both our speakers for their cogent and rather impassioned presentations,’ said Professor Archibald as he stood. ‘Why don’t we all express our appreciation ...’

The room once more echoed with a round of applause.

‘Thank you again,’ said Archibald. ‘Now, we’ll move into the second part of our event – a discussion between our presenters. We’ll do this for around twenty minutes before going to questions from the floor. Who would like to begin?’

I raised my hand.

‘Go ahead, Mr Greenspan.’

‘Thank you, professor,’ I said. ‘Mr Dougherty, I find it rather astonishing that you, as a card-carrying Liberal, would justify such a vast expansion of police powers. After all, aren’t you the party of limited government?’

Dougherty gave me a smirk he had doubtless perfected in the rarefied halls of his elite Scotch College secondary school. 'I have a mother and two sisters, and their safety trumps your theoretical wailing about our loss of democratic rights,' he said.

'Trumps indeed,' I snorted, triggering a spate of snickering from the crowd. I saw that even Professor Archibald cracked a smile, although he tried to hide it for the sake of the impartiality his role required.

'Besides,' I said, 'the collection of information that enables the tracking of individual people's movements is troubling enough even in the context of COVID. This pandemic is a national problem, and should be handled from Canberra. That means the Commonwealth should mandate that the states and territories must implement uniform gold-standard privacy protections to ensure the information is only used for public health purposes. That's the only way the Australian people will have confidence in these check-in apps.'

Dougherty shook his head. 'What are you worrying about? After all, Dan Andrews has given verbal assurances that COVID data will be deleted after twenty-eight days.'

Another snort from me. 'I find your line of argument bizarre. Here you are, Vice President of the Melbourne University Liberal Club, arguing that a promise from an ALP premier ... from the socialist left faction of the Labor party no less ... should be trusted. What's next? Is the lion going to lie down with the lamb? Are we all going to beat our swords into ploughshares? I'm sorry, but the premier's verbal assurances assure nothing. Without privacy protections being enacted into law, they're worthless.'

'But the Public Health Act has confidentiality provisions that prohibit a public health official from disclosing personal information,' Dougherty protested.

‘You fail to mention the exemptions within the Act that can endanger civil liberties,’ I replied. ‘Don’t you know that the law empowers public health officials to disclose health and medical information if they think ... and I emphasise the verb “think” ... it is in a person’s best interest? It’s the same story if they think disclosure is required to prevent a serious threat to a person’s life, or safety, or a threat to public health. These subjective decisions are based on subjective judgements. And I’m astonished that you cannot see the potential for abuse that results.’

Dougherty shook his head. ‘Not a big deal. Public agencies are prevented from disclosing personal information for any reason other than the specified purpose for which the information was collected. In this case, pandemic control.’

‘But you want to extend that power to the police campaign against crime,’ I sputtered. ‘Besides, there are exemptions. A government agency can disclose personal information if it suspects it is linked to unlawful activity, and disclosure is deemed a necessary part of the investigation. There’s nothing in the law that gives explicit effect to the twenty-eight-day time limit for the deletion of contract-tracing data. So, at this stage that is nothing more than a politician’s promise, and you know how often those are violated. That’s why we need a specific piece of legislation that imposes explicit restrictions on how collected data is used by government.’

‘Piffle,’ sneered Dougherty with a dismissive wave, ‘I really don’t think the government is interested in where you buy your groceries and, or at which café you get your latte. People don’t care.’

‘Well I do!’ I declared with some heat. ‘I don’t want Big Brother to be able to track my movements ... even if the bureaucrats claim it’s for the most noble of reasons. And you haven’t even considered the possible consequences in domestic abuse cases.’

‘What do you mean?’ challenged Dougherty with a frown.

I shook my head. ‘I mean that there’s nothing to stop people in positions of authority using QR code data to track their abuse victims.’

‘Then you must not be on Facebook,’ he smirked.

‘Nonsense!’ I snapped. ‘Having a Facebook account is voluntary, and even you can switch off your geographical location data. So, your pseudo-analogy falls flat.’

‘Things are getting a bit heated, gentlemen,’ chided Professor Archibald. ‘Allow me to remind you of your commitment to conduct yourselves in a civil manner – and to that end perhaps we’ll go to questions from the audience. Please keep them short and end them with that punctuation mark that signifies you’re actually asking something. In other words, questions, not comments.’

Archibald examined the audience. ‘Who’ll be first? Ah ... you there in the third row with the blue shirt.’

A young man with coke-bottle glasses stood to make himself heard. ‘My question is to Mister Dougherty. In 2010, personal data belonging to millions of Facebook users was collected by the British consulting firm Cambridge Analytica and used for political advertising. Don’t you think this is a worrisome precedent for possible abuses of what you propose?’

‘I remember that incident,’ said Dougherty. ‘I mean, I remember reading about it. I don’t actually remember the case itself because I was only thirteen years old at the time.’

Dougherty gave a cheeky grin and a gust of laughter ran through the audience. ‘But I do know that Facebook paid a massive fine over its breach of data-protection laws and its share price took a deep dive,’ he continued, his tone smug. ‘In my view, that’s an example of the system working as intended. Facebook will think twice about allowing something like that to happen again.’

‘Only one problem with that line of argument,’ I interjected. ‘The fine was less than a million dollars. A lot of money to you and me, but a mere pittance to Zuckerberg. It’s not much of a deterrent to someone with his net worth.’

‘Thank you,’ said Professor Archibald. ‘Next question? You,’ he pointed, ‘the young lady on the right in green.’

‘Thank you, Professor,’ said a dark-haired woman who seemed vaguely familiar. I think I’d seen her around campus.

‘My question is to Mr Greenspan. You argue that legislation is needed to ensure privacy protections for our personal online data. But how is that supposed to work? We read regularly about databases being hacked and personal information sold to data brokers on the dark web. So how can legislation prevent that?’

I nodded. ‘An excellent question. You’re quite correct that there’s no such thing as an infallible data storage system. That’s why we need to mandate that the databases are purged and our information is deleted regularly. At the very least we need to make sure the QR codes we use will be issued by the government, rather than a private-sector third party.’

I flashed the questioner what I thought was a winning smile. ‘It’s a complicated issue, and perhaps not one for this forum, but I’d be happy to discuss it further at another time.’

She blushed and sank down in her seat as a few guffaws broke out over my clumsy response.

We argued back and forth until the evening ended with a rousing round of applause and warm compliments over the quality of our presentations. I noted the hostility expressed through Dougherty’s body language, so I made a point of walking over and putting him on the spot by extending a hand which he shook with obvious reluctance.

I begged off post-event drinks and went home to chill in my room at Ormond College. I microwaved a packet of ramen noodles, ate them, then showered and slid beneath the covers of my bed. I racked my brain to try and recall where on campus I'd seen the questioner with no name. She wasn't a law student, but I did remember seeing her in the Baillieu Library, and a few times at the Carte Crepes. That was a café near the Medley Building where most of the university's humanities and social science programs were headquartered. I imagined her studying philosophy or French literature. She seemed the type.

How could I track her down? Ask one of the workers at Carte Crepes? Bribe someone at the library to give me her name? Suddenly I found myself wishing for any kind of technology that would help me track her down. And I knew I couldn't be trusted any more than the police with that kind of power!

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