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## The misrule of law

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The publication of the Afghan War Diary on *Wikileaks* has thrown the spotlight on the legal protection of whistleblowers. Maurice Blackburn lawyer **Lizzie O'Shea** argues that the increasing trend of western governments to detain people without charge is gaining tacit acceptance, threatening democracy and political freedoms

Julian Assange, the front man for the whistle blowing website *Wikileaks*, is arguably the most influential Australian in the world today. Shortly after the arrest of Bradley Manning, the alleged source of footage published by *Wikileaks* in April showing the killing of more than a dozen people by U.S soldiers in Baghdad, Assange disappeared when in Australia after it was rumoured that the Pentagon was 'hunting' him.

The Pentagon's apparent interest in Assange is unsurprising given what has transpired in recent days, with the release of the *Afghan War Diary*, containing over 90,000 documents. While it is undisputed that Assange has embarrassed the Pentagon, he does not appear to have committed any crime in Australia or the United States.

*Wikileaks'* security tactics have been successful in evading the Pentagon thus far, but it is troubling that Assange, an Australian citizen, felt the need to hide out in his own country. He eventually fled for the safety of Europe and last popped up in Brussels and then the UK after spending a month in hiding.

Assange was seemingly concerned that he could have been arrested and extradited to the US. He has said that he has no plans to return to the US as he has been told that it is not safe for him. But does the law offer any protection for someone like Assange - a person who is, after all, an innocent Australian citizen?

The short and somewhat surprising answer is, practically speaking, no. Modern western legal systems have a variety of mechanisms to protect citizens from the State, but our political system is demonstrating a growing disregard for these mechanisms.

Habeas corpus is the most obvious protection offered to the individual against arbitrary action by the State. This ancient principle translates literally to 'you have the body', meaning that unless the State can give a justifiable reason for holding someone, they should be released. This principle finds its origins in Chapter 29 of the 1215 Magna Carta which states; 'no freeman shall be taken or imprisoned... but ... by the law of the land.'

Unfortunately, breaches of these principles occur with reasonable regularity. Consider, for example, the case outlined in Dave Eggers' book *Zeitoun*. It tells the true story of a Syrian housepainter of the same name who was a long-time resident of New Orleans and experienced the wrath of Hurricane Katrina. Zeitoun stayed behind in the devastated city to help victims of the flooding, but within days, he was arrested by the National Guard and spent the next 23 days in a detention facility that had been hastily constructed in the downtown bus station.

He was held without charge and without access to a lawyer. But Zeitoun was one of the lucky ones, some of his neighbours spent months languishing in these makeshift prisons, despite being charged with no crime. What use are legal rights when your own government incarcerates you without charge?

Australian law recognises the need to protect individuals from arbitrary detention. There is a long-standing constitutional immunity, most recently set out in the 1992 case of *Chu Kheng Lim v Minister for Immigration*. The High Court held that imprisonment is a form of punishment that can only be handed out by courts in cases of criminal wrongdoing.

Sadly, the protection offered by this constitutional immunity has fallen short in recent years. Dr Mohammed Haneef was held for 25 days before being released without charge. While the investigation was run by the Australian Federal Police, the laws that allowed the detention of Dr Haneef were enacted by the Queensland Government. Constitutional immunity prevented the Commonwealth Government from enacting federal anti-terrorism laws that allowed for detention without charge. The states were left with the task of legislating around this pesky fundamental legal protection. The result is that we now have a legal system which allows for detention without charge or trial.

However, the biggest and most insidious offender when it comes to arbitrary detention is the Department of Immigration and Citizenship. Mandatory detention of 'unlawful non-citizens' has sadly become an accepted part of the Australian political landscape and that is set to continue regardless of the outcome of the election. Indeed, in the 2004 case of *Al-Kateb v Godwin*, the High Court permitted the indefinite, mandatory detention of unlawful non-citizens, including children. The High Court found that this kind of detention is not punitive and therefore is not covered by the constitutional immunity. This was despite submissions from medical experts about the psychological trauma of detention.

A recurring problem is the difficulty determining who has a visa and who doesn't. There have been at least 250 cases of unlawful detention of visa holders, permanent residents and Australian citizens. The enquiries launched in the wake of the scandals surrounding Cornelia Rau and Vivian Alvarez Solon found that 247 of these cases involved people who would be considered socially marginalised or vulnerable. They fell into one or more of the following categories: children, the homeless, people with mental illness, people with substance abuse problems and people with intellectual disabilities. These cases of detention seem to be entirely without legal basis but have so far barely registered on the political landscape.

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If we continue to tolerate the detention of asylum seekers and terrorism suspects, the list of those who can and will be detained at the whim of the State grows longer. Democracy and political freedom suffer as a result.

The breaching of fundamental rights and liberties paves the way for a greater social acceptance of targeting political enemies, such as Assange. As a high profile media personality, Assange's notoriety is his greatest weapon against unlawful detention. But the significance of Wikileaks' disclosures suggests that he is right to be concerned. According to the *New York Times*, the *Afghan War Diary* is evidence that despite the US spending almost \$300 billion on a nine year war in Afghanistan, the Taliban are stronger than at any time since 2001. In this context, the rule of law and protection from the arbitrary use of state power become most important.

What is most worrying is that people without such a voice, or connections to a globally powerful website like *Wikileaks*, have the most to fear.

**Lizzie O'Shea is responsible for Maurice Blackburn's Social Justice practice**

**Maurice Blackburn is acting for Dr Mohamed Haneef in his application for compensation for his wrongful detention**

Filed under: [Maurice Blackburn](#), [Afghan War Diary](#), [Wikileaks](#)

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