. . . and the judge wore blue

Brian Simpson

The new judicial power of the South Australian police.

During 1993 the Labor Government of South Australia reformed the law dealing with juvenile justice by passing the *Young Offenders Act*. It is doubtful whether the juvenile justice system needed this reform. The real explanation for why this overhaul of the juvenile justice system was deemed necessary probably has as much to do with a government using a perceived rise in juvenile crime as a diversion from other matters as it has to do with shortcomings in the system. Nevertheless, once a climate for change had been created, criticisms of the manner in which juvenile offending was dealt with easily surfaced. One of the principal concerns was noted by the Select Committee on the Juvenile Justice System which reported in November 1992 to the South Australian House of Assembly. This concern was that delays in the processing of young offenders (caused by the requirement that cases go before screening panels before making a decision to caution or prosecute) led to over-processing and the lack of immediate consequences for the actions of the young offender.[1]

Concern from some quarters about this latter aspect of the previous process may have played an important part in the reform process as the result has been a law which hands to police significant judicial power and so greater control over the juvenile justice system than they previously held. The purpose of this article is to concentrate solely on the powers of the police contained in the Act and to evaluate the extent to which those powers infringe basic notions of justice and the likelihood of the Act actually addressing the stated shortcomings of the previous system.

The legislation

Section 8 of the *Young Offenders Act* establishes a formal police cautioning system. This system operates in relation to 'minor offences'. A 'minor offence' is defined in s.4 as follows:

> 'minor offence' means an offence to which this Act applies that should, in the opinion of the police officer in charge of the investigation of the offence, be dealt with as a minor offence because of –
>
> (a) the limited extent of the harm caused through the commission of the offence; and
>
> (b) the character and antecedents of the alleged offender; and
>
> (c) the improbability of the youth re-offending; and
>
> (d) where relevant – the attitude of the youth's parents or guardians'.

The breadth of this definition and the subjective nature of various elements mean that almost any offence could be regarded as a minor offence. Clearly, the police have been given far too much discretion in determining what constitutes a minor offence. One must bear in mind that an important reason for having a cautioning system is to minimise police time on less serious matters. This suggests that the effective criteria will be what constitutes the concerns of the police and community in the area of juvenile crime at the time the young person is apprehended. A close examination of the criteria indicates that the legislation could support such an operation.

Brian Simpson teaches legal studies at The Flinders University of South Australia.

The limited extent of the harm caused through the commission of the offence

It is hard to determine the meaning of this phrase. Does it mean that a small theft is a minor offence but a large theft is not? Or does it relate to the number of victims? What if the single victim of an offence is seriously traumatised by an offence? Is that harm limited in its extent because there is only one victim or does the extent of the trauma make it less limited? All crimes must have limits on the extent of the harm they cause. Does the criteria actually refer to the degree of harm?

The character and antecedents of the alleged offender

Once again this information can be read in different ways. Where the character and antecedents (why is such an outdated word used?) indicate 'positive' traits, should the offence be regarded as minor and so dealt with by a caution or should the offence be seen as more serious because it is out of character?

The improbability of the youth re-offending

This is an absurd criteria. The police officer must determine whether it is improbable that the youth will re-offend. As the youth is being dealt with for offending it is hard to envisage that the police officer will consider that re-offending is not probable. Juvenile re-offending statistics indicate most young offenders brought to the attention of the police do not re-offend, in which case it would always be considered improbable that the young person will re-offend. But how does the police officer know that the particular young person who has been apprehended represents that statistical average?

Where relevant – the attitude of the youth's parents or guardians

When is this relevant? And why should it be? Does the embezzlement of company funds become less serious because the offender's parents shake their collective heads in disapproval? This criteria can only mean that the police perception of the likelihood of some 'good old-fashioned discipline' being administered at home will affect whether the offence is regarded as a minor one. This will no doubt mean that young people from two parent families in middle class suburbs who display the correct attitude will be cautioned while it is more likely that young people who are from broken homes, single parent families, and families with hostile tendencies towards authority will not receive the benefit of having their offences dealt with as 'minor offences'.

The definition of a 'minor offence' is not only objectionable because it hands to the police the power to determine which offences will be diverted out of the court system and dealt with by themselves. It is also inappropriate that the criteria which determine what constitutes a minor offence are so loosely worded that almost any offence could be dealt with under its terms. In addition, the legislation introduces criteria into the definition of the offence which properly belong at some other stage of the proceedings. How does one define the seriousness of an offence by reference to the character, recidivist tendencies or parents of the offender? This is the most sinister aspect of this definition: a relatively trivial offence could be converted into something other than a minor offence by the operation of this definition. This suggests that the real aim of this legislation is the targeting of 'repeat' offenders rather than a general overhaul of the juvenile justice system.

The Select Committee noted in its report that some witnesses, including members of the Aboriginal community and the South Australian Council of Social Services were concerned that if the police were given the power to impose a formal caution it was likely they would discriminate against Aboriginal and disadvantaged youth (p.24). But it appears that the Committee was more sensitive to the view of the police which was succinctly stated by a police Commander: 'The police must be sold the idea that [any] new system which [the Committee] is proposing is effective' (p.132). It was noted that the police department was generally supportive of a formal cautioning system, although the department stressed the need to have workable criteria, a process which ensured uniformity across the State and a system of record management which allowed access to the police who wished to ascertain whether a young person had had previous cautions (p.132).

The debate appeared to proceed on the basis that a formal police cautioning system would be implemented and that the only issue was how this was to be done. Despite the concerns raised about the exercise of police discretion, the only safeguards included in the new system are in the Act and internal guidelines. Such controls on the manner in which discretion is exercised pass too much control over to the police alone. This compares with the previous system where a screening panel comprised of both police and non-police members made a decision as to whether a caution or some other disposition would occur.

The judicial power of the police

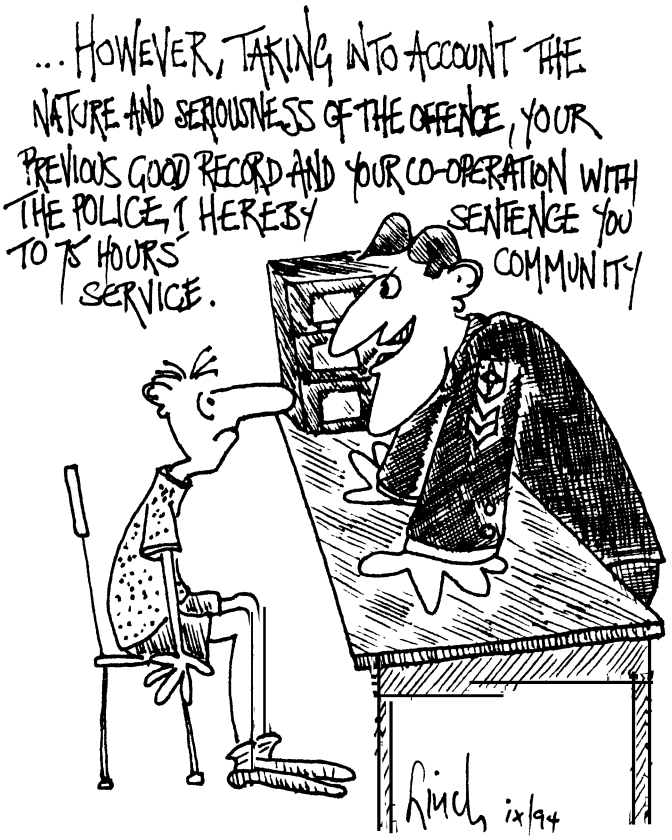
But the 'formal cautioning' system is in fact far from a cautioning system at all. As the Select Committee observed in its report, the New Zealand system which it follows is also referred to at times as a police diversionary system rather than a police cautioning system (p.132). A more precise description of the South Australian system would be a police judicial system, as one of the most pernicious features of the Act lies in the provision which empowers the police force to impose sanctions in cases which are defined as minor offences. Section 8 of the Act provides that where a police officer decides to deal with a minor offence:

> the officer may administer a formal caution against further offending and exercise any one or more of the following powers:
>
> (a) the officer may require the youth to enter into an undertaking to pay compensation to the victim of the offence;
>
> (b) the officer may require the youth to enter into an undertaking to carry out a specified period (not exceeding 75 hours) of community service;
>
> (c) the officer may require the youth to enter into an undertaking to apologise to the victim of the offence or to do anything else that may be appropriate in the circumstances of the case.

Thus police are expected to perform a judicial function as well as a prosecutorial function under this legislation. The judicial nature of the process is underlined by s.8(2) which provides that the police officer is to inform the young person of the nature of a formal caution and that it may be treated as evidence of a prior offence if the young person is subsequently dealt with for an offence. The Act also provides sentencing guidelines under s.8(4). The police officer must 'have regard to sentences imposed for comparable offences by the Court' and also to 'any guidelines on the subject issued by the Commissioner of Police'. This provision alone indicates that the process is far from being a cautionary system.

The New Zealand model

It has been asserted that the South Australian legislation has been modelled on the New Zealand *Children, Young Persons*



and Their Families Act 1989. During the hearings of the Select Committee and in the surrounding media reports of its work, much reference was made to the New Zealand Act. But the interest in the New Zealand legislation can be traced back to the influence of a former senior judge of the Children's Court who drew the Committee's attention to it as a preferable model. The Committee itself also travelled to New Zealand to examine the operation of the Act in that country. The manner in which the New Zealand model was subsequently portrayed as a useful one for South Australia itself provides interesting lessons in the process of law reform. Notably, there has been little explanation of the full extent of the New Zealand Act which outlines in detail not only the powers which police and courts have to deal with young offenders, but also the rights of young people at all stages of the legal process. The New Zealand Act also provides for a Commissioner for Children who has the general role of advocate on behalf of children. No mention of these features of the New Zealand Act was ever made in the public utterances of those who supported the New Zealand model.

The result in South Australia has been the extraction from the New Zealand system of those aspects which will appease the powerful players in the juvenile justice system. Thus the New Zealand formal cautioning system has been adopted but without the safeguards contained in that Act. For example, in New Zealand the caution cannot be used by the prosecution in any subsequent criminal proceedings against the young person (s.213). This at least recognises that a caution is an attempt to divert the young person away from the criminal justice system and is not a process which seeks to stigmatise the young person. But the South Australian legislation allows such cautions to be admitted as evidence of prior offending in subsequent proceedings and before the young person has turned 18, although such offences are to be treated as of 'minor significance' (s.58(2)). One conclusion which could be drawn from the South Australian legislation is that the formal caution process for minor offences in the *Young Offenders Act* is in fact designed to deal with offences which are far more serious than the label attached to such offences suggests. As remarked above in relation to the breadth of the definition of a minor offence, such a conclusion is open. The range of sanctions available to police officers under this process would lend further weight to this view of the process. After all, how 'minor' or 'insignificant' can an offence be when it may have led to 75 hours of community service? This must be cause for considerable concern.

Conflict with international law

The formal caution process clearly infringes Article 40 of the United Nations Convention on the Rights of the Child. Paragraph 2(b)(iii) of that article provides:

> Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
>
> . . .
>
> (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians.

The process of a formal caution cannot be described as one which determines the matter through an impartial body. It is the police who apprehend young people for an offence; it is the police who determine whether the matter is a 'minor offence'; and it is the police who then have the power to punish the young person for such offences. The fact that the young person can refuse to admit the offence and have the matter heard by the Youth Court is of little solace given the realities of the legal process. The approach can only be described as that of dangling a carrot with an extremely heavy stick attached.

Section 8 also fails to provide the young person with a guarantee of legal representation. While there is provision in the section for the presence of a guardian and for the guardian to make representations before the youth is required to enter into an undertaking, no mention is made of legal assistance. This is an important omission as the UN Convention clearly places legal counsel ahead of the presence of a guardian in the determination of matters affecting the child. The lack of counsel can have very direct consequences in the process of a formal caution. For example, on whose advice will the police officer act when having regard to sentences for comparable offences imposed by the Youth Court? It is unlikely that a young person or his or her guardian will have such information. A legal practitioner would be able to argue the appropriateness of the sentence more effectively.

The need to repeal the Young Offenders Act

The *Young Offenders Act 1993* is bad legislation. It is ill conceived and panders too heavily to certain narrow interests. The provisions which establish the formal caution process exemplify the fundamental flaws in this legislation. The police are no doubt happy with the broad discretion they have been given in this Act not just to administer a caution but to sit as judge on the young people whom they determine have committed a minor offence. It is a situation which no adult would tolerate if the police had such power in areas which directly affected them.

In the report of the Select Committee the international agreements which Australia has ratified were dismissed as being not legally enforceable in Australia unless legislation has specifically incorporated them into law (p.106). In this sense the report referred to the agreements and then effectively dismissed their relevance. When measured against the standards prescribed by

the United Nations Convention on the Rights of the Child the *Young Offenders Act* falls short in many respects.

In coming months there will no doubt be many statements made on the new laws to the effect that they are working well in addressing juvenile crime. There is also little doubt that most of these comments will come from the police and the co-ordinators of the Youth Court. For the most part the young people who are subject to the laws will be silent because many lack the resources and organisation to identify the law's failings. But if the laws remain, there will come a time when it will be accepted that the police mete out punishment and the standards contained in international agreements will seem, as the Select Committee suggested, quite irrelevant. At that point there will be no dissent because there will be no standard against which to measure the exercise of State power and therefore no basis for complaint.

The legislation may well reduce the 'delays' complained of under the previous system. But at what cost will this be achieved? Young people will no doubt be just as exposed to over-processing under this system as previously. Those who fail to perform community service imposed by the police at the 'front end' of the system will find themselves before the Court much more quickly than previously. And it is also likely that many youths will receive formal cautions with conditions attached where previously the minor nature of the offence led to a warning only. Under the previous system 87% of young people dealt with by the Aid Panels were one-off offenders (p.124). The new legislation has the potential to overkill in such instances and harden attitudes against young people instead of teaching tolerance.

The *Young Offenders Act* chips away at the fundamental notions upon which our legal system is built. The justification for the legislation was a perceived crisis in juvenile crime rates but the solution will no doubt be worse than the problem. The next generation cannot be expected to respect a legal system which denies them fairness and due process. But the concern for the whole community is that this legislation sounds a warning for everyone. As a small but seemingly influential part of the community place more emphasis on their notion of individual responsibility while disregarding individual rights and social responsibility we might well witness further attempts to eliminate the need for forums which separate the judicial from the executive functions of government. Is the *Young Offenders Act* merely the thin end of the wedge for us all?

Reference

1. *Report of the Select Committee on the Juvenile Justice System*, SA House of Assembly, November, 1992, pp.123-124.