Juvenile justice

The thickening blue wedge

Danny Sandor

Is the rhetoric of victims' rights being used to increase police powers and influence?

Police departments are like all bureaucracies; they justify their existence by expanding.[1]

The growing concern to meet the perceived needs of crime victims is manifesting itself in numerous ways across Australia and was a major campaign strategy of the recently elected Victorian Coalition Government. It will be a welcome development if implemented, through improved information resources, better funding of services to aid recovery or procedural reforms that minimise the trauma of giving evidence.

By contrast, it is distinctly offensive when an appeal to the victim lobby is used as a cloak for punitive measures or a short-cut on the just treatment of suspected offenders. This was recently the case in Victoria. Ill-conceived legislation was ushered in providing for indefinite prison sentences (the *Sentencing (Amendment) Act* 1993) and encroachments on the right of accused people not to disclose the nature of their defence (the *Crimes (Criminal Trials) Act* 1993). Grave public concerns were raised over the breach of human rights and increased costs of trial and confinement which these and other measures entail. The Government response attempted to justify the changes by claiming they would promote the interests of victims. The vast majority of professional and academic advice is to the contrary.[2]

In the juvenile justice arena, the media have been particularly prone to portraying advocates for young offenders as 'villains', 'do-gooders' and 'bleeding hearts'. The introduction of repressive laws for the sentencing of young offenders in Western Australia provided a vivid illustration.[3] Police and their respective associations have capitalised, some might argue even orchestrated, the rhetoric of the victim discourse and its conservative supporters to great effect and used both as a fulcrum for increased powers.[4] The powers they seek include but extend beyond those related to criminal investigation.[5] Police are also bidding to control programs dealing with alleged young offenders which are an alternative to having the matters heard by a Children's Court.

Handing over such control makes sense to governments which want to be seen as reducing the costs of justice. An appeal to the rights of victims can provide the appearance of a simultaneous concern for 'justice'. This enables governments to meet criticisms that such changes disregard the special nature and purpose of the juvenile justice system. The prominence of the victim discourse makes it possible for their schemes to be presented as pivoting on the rights of the victim rather than infringing on rights of the alleged offender. The community is expected to view changes as a redefinition instead of a departure from 'justice'.

Marketing new approaches to juvenile justice as representing an advance for victims is thus emerging as a disguise for cutting costs and disregarding procedural protections. The police are central players in this scenario. In considering these developments, especially for juvenile justice, it is important to begin by appreciating the dangers in permitting an offender/victim dichotomy to go unchallenged.

Dividing the world into victims and offenders

People do not simply exist in one or other of these caricatured roles. It is episodes and situations that may sometimes allow such casting. The predator in the public schoolyard can be the victim in the private back-

Danny Sandor is Convenor of the Juvenile Justice Working Group for the Youth Affairs Council of Victoria and a law graduate.

yard – and vice versa. One need only look to reports on the circumstances behind young people becoming homeless and the way they are forced to survive to see the futility of dividing up people into these categories.[6] Similarly, we can point to the over-representation of young males in both the categories of offenders and victims in surveys of reported violence. The qualification of 'reported' is significant given the disincentives to reporting sexual assault and violence in the private sphere against women.

The discourse invites generalisations about offenders as a discernible group. This risks distortion in the development of juvenile justice programs especially for young people. They have historically been the 'problematised' object of social anxiety yet their offending behaviour is for the most part minor and short-lived. In our culture, they are a vulnerable stratum of society against whom the justice system imposes 'rehabilitation' and increasingly 'retribution' on an individual basis. A more sophisticated analysis would, instead, concentrate on the situational conditions which provoke offending behaviour and, in turn, address the service gaps and the resource and policy priorities.

Likewise, it is misleading to speak of victims as a homogeneous group. A fundamental distinction should, at least, be drawn between victims of crimes against the person and victims of crimes against property. The circumstances of homeless young people are a paradigm example of how violent victimisation and structural barriers to escaping poverty precipitate property offending.[7] A different illustration of the importance of distinguishing property/violent offending is seen in the argument by McCarthy that the sentencing of perpetrators of sexual assault should not be influenced by assessing the impact of the crime on the survivor. This is because of the deflection of focus from the crime itself to the characteristics of the survivor, for example, the claim of lesser harm of sexual assault to a sex worker.[8]

The victim/offender dichotomy also invites a misuse of the language of rights. By dividing the world into victims and offenders, it becomes too easy to steal safeguards and protections from alleged or adjudicated offenders in the guise of advancing the position of victims. Such a 'Robin Hood' rights approach can be used to legitimise the abolition of safeguards accorded to suspects of crime. Encroaching on a suspect's civil liberties does not necessarily benefit victims. An example is the Bill to extend police powers to fingerprint and take body samples from suspects (the *Crimes (Amendment) Bill* 1993 (Vic.)). In the limited circumstances where police must make an application to court, the suspect would not be deemed a party and would be denied the opportunity to call or cross-examine witnesses.

The effect of these and other erosions is to demean confidence in the criminal justice system and tempt miscarriages of justice. Victims do not benefit from abrogating a suspect's due process rights or by limiting the quality and nature of information on which the court relies.

The rise of a victim-focused discourse is paralleled by a corresponding intolerance for the foibles of young offenders. The lack of formal political power available to young people makes them an easy mark for over-policing and the fabrication of 'crime waves'. Yet even a cursory glance at Victorian Children's Court statistics shows that there has been barely any change in crimes against property or the person. It is the remaining category of 'Good Order' offences which have skyrocketed and, in the main, these are revenue-producing public-transport-related matters.[9] Police figures are liable to inflate estimates because the 'cleared offence' is a frequent unit of measurement. This encompasses more than accused people found guilty. It includes formal police cautions, decisions to charge where guilt was not established, and circumstances where a reported offence was not substantiated.[10]

In the current climate however, there is less public currency in pointing to persisting structural factors such as family violence, poverty, unemployment, homelessness, and discrimination when we attempt to place juvenile offending into a realistic context. The validity of the arguments has magnified rather than diminished as young people bear the brunt of the current economic pressures. However, material conditions heighten public intolerance. At the same time, it is those very circumstances that increase the need and potential for young people to commit income-generating crime.

In such a milieu it is easy to capitalise on the distinction between the two caricatures: the violating offenders and the violated victims. The electorate is receptive to catch phrases such as 'law and order' and 'getting tough'. With 'the cost of justice' continually in the spotlight, governments are attracted to processes that by-pass courts and the concomitant responsibility to fund legal aid. Young people are easy targets for such so called reforms.

Changes in the powers, influence and budget of the police have long been a major indicator of how politicians perceive community sentiment about a hard line on crime. It now also appears to be a sign of government's assessment of the community's willingness to let police extend their role to the adjudication of young offenders.

Police and the victim discourse

A classic gambit for appearing to get tough is the extension of police powers. Already, in Victoria, police are experiencing a more sympathetic governmental climate and have invoked the victim rhetoric to support their case. In a letter to the *Age* (27.4.93), the Deputy Commissioner (Operations) Robert Falconer expressed concern that an editorial had criticised proposed wider fingerprinting powers:

> This is a complex issue which cannot be dealt with properly in an editorial or letter. We are not seeking change simply to 'save time' but because the current legislation is cumbersome, unworkable and does not operate in the interests of victims.

The 'complex' reason may well be that courts have mostly been dissatisfied with the cases put forward by police and have frequently rejected their applications.[11] The public concern for victims by police obscures another agenda: that is, to oust the current supervisory jurisdiction of the courts and, where this has not been achieved, limit the due process rights of the suspect. Yet the current statutory system of court oversight was painstakingly developed only a few years ago by an expert committee.[12]

Any increase in police powers generally will be disproportionately applied and felt by young people. They have long been one of the most over-policed segments in our community and the least able to influence policing priorities. Police already acknowledge that they use methods 'beyond their statutory or common law powers'.[13] While there is substantial literature on the misuse of existing powers, there is another facet to the police powers issue which requires immediate attention – police control of juvenile justice programs.

The cautioning of young people alleged by police to have committed an offence is a long-established program in Victoria and elsewhere. There is now an additional interest in shifting away from legal processes that respect the due process rights of offenders towards a more victim-focused approach. A much promoted model is the 'family group conference' used in Wagga Wagga, New South Wales.[14] It draws on many features from the product of New Zealand's overhaul of their juvenile justice system with one critical difference – the Wagga Wagga model puts program control in the hands of police.

The family group conference

The model is associated with a theoretical approach which favours dealing with alleged young offenders through 'citizenship ceremonies of reintegrative shaming' rather than formal court processes. According to Braithwaite:

> [T]he discussion of the harm and stress caused to both the victim and the offender's family will communicate shame to the offender for what she has done. Secondly, the intention of assembling around the offender the people who care about and respect her most is to foster reintegration.[15]

Such meetings aim to determine an agreed punishment for an alleged young offender with the involvement of his or her family. It is also intended to serve as a mechanism for making reparation to the victim of the alleged crime who is entitled to participate in the conference. Moore describes the design in the following terms:

> The focus is on an offence that has left a victim feeling insulted and demeaned. The offence can also be seen as an offence against the state or society in so far as it has breached the trust which holds together any social collectivity. Nevertheless, the most direct damage has been done to the immediate victim of the crime and that victim has the highest stake in negotiating a settlement.[16]

The subject matter of the conference must be properly understood: it is an *alleged* crime. This is because there is no testing of the evidence against the alleged offender. Participation in the conference depends on the young person 'choosing' not to have the matter brought before a court. In doing so, the conference attracts criticisms that have been made of other informal methods of dealing with young offenders.[17]

Deficits of these diversionary schemes include sexist and racist outcomes and net-widening. The overall context in which they operate is one of poor legal rights knowledge among young people and obstacles to actually exercising them. The schemes encourage young people to acquiesce to an allegation of guilt in order to avoid the stigma of court processing.

This 'choice' may well be accompanied by coercion from the alleged young offender's family. In a related fashion, data on the prevalence of family violence in the backgrounds of young offenders, particularly young women, means one must be wary of how the conference process may ignite such episodes. Braithwaite's optimistic characterisation of families as caring and respectful will too often not apply.

Theoretically too, there are concerns with the family conference and its vision of outcomes when assessed as a strategy for addressing offending behaviour by young people rather than as an opportunity for victims to confront their alleged violator. For deeply disadvantaged young people, the process merely becomes a new form of alienating shame when tangible integrative opportunities are absent. Polk suggests that:

> When adolescents are pushed well out to the boundaries of conventional society by virtue of unemployment and inadequate schools, they lack the basic commitment to conformity that is essential for the process of reintegrative shaming. Arguing for reintegrative shaming approaches may serve, in fact to deflect attention from the important social changes that are a precondition for shaming work.
>
> ...
>
> Put in other terms, attention must first be given to assuring the presence of the structural supports (decent jobs and good schools) for conventional identities before turning to a social control strategy such as reintegrative shaming.[18]

The remainder of this article argues that police management of such conferences is especially counterproductive to the intent of the model.

A policing function?

Fundamental questions arise from any push for greater police involvement in juvenile justice programs. First there is the question of whether there is any need or demand for further attention to police-driven programs for young offenders. The Wagga Wagga pilot program received prominence at the Australian Institute of Criminology Conference held in September 1992. There appeared, however, broad agreement from the participants that the major concern for the juvenile justice system was not at the early stages of contact with the

system. Rather, it was the small recidivist group who progressed into an entrenched offending lifestyle and for whom incarceration was nearly or already the last resort.

Even if there were a perceived need or demand for diversionary systems to receive greater emphasis, the reasoning behind police running such programs is unsatisfactory. One justification offered by Moore for police responsibility is that the scheme can be viewed as part of a crime prevention strategy in which the police shift to an alternative paradigm of policing.

> In co-ordinating the juvenile cautioning scheme they are not acting as gatekeepers of the criminal justice system, although they retain that important role. Rather they are acting as co-ordinators of a social justice system. [p.7]

This extended role in informal juvenile justice programs is difficult to justify while there is substantial local and nationwide concern over police violence and the failure of police to fulfil their obligations to the procedural rights of suspects. One would properly expect that ensuring police do not themselves victimise would take organisational priority over making further inroads into programs.

Moreover, there are other priorities for policing in the community that currently fail to be fulfilled, in particular the need for effective family violence intervention. As stated at the conference by the former federal Minister for Justice, Senator Tate, the family is a major learning site for violence. It typically forms the basis of juvenile justice workers' involvement when the victim becomes a young offender. A premium on effective responsiveness would seem a more far-sighted priority for crime prevention and one which better fits within the central function of policing than hosting family group conferences.

Moore identifies the special mediation skills that running a conference requires. He appreciates that:

> [i]f the sergeant in charge of the family group conference is not clearly aware of the significant differences between the paradigm of community control and state control, it may be difficult to avoid the temptation to intervene inappropriately in the conference process. Faced with one or more angry, apparently selfish and initially unrepentant young offenders it may be all too tempting to deliver an impromptu lecture on the benefits of good citizenship and other wholesome attitudes in the great tradition of the formal sergeant's caution. [p.8]

Many would have reservations as to whether the necessary mediation skills and attitude of dispassion are fostered within police organisations. Equally troubling, however, are Moore's assumptions that 'the police station is a setting that favours neither victim nor offender' and that police are as well placed as any other agent of the state to play the 'umpiring' role. It is difficult to believe that young people view police in this way, given the data on their perceptions and reports of mistreatment from a variety of sources.

In the New Zealand system, conferences are conducted by Youth Justice Co-ordinators who come from a range of backgrounds and are appointed as officers within the Department of Social Welfare. The use of conferences in South Australia is foreshadowed in the *Young Offenders Bill* 1993 (SA). Unlike the Wagga Wagga model, the legislative design provides for external scrutiny on the content and process of the conference through Youth Justice Co-ordinators being accountable to the Senior Judge of the Youth Court. On the other hand, it is of particular concern that the Bill introduces a new police cautioning program which would allow for an 'undertaking' to be made with the cautioning police officer. This can result in young offenders who 'opt' to avoid court 'undertaking' to perform up to 75 hours of community service.

Wider ramifications

There are more pervasive consequences to viewing police as just another player in the juvenile justice arena. Given the symbolic value of police activity for the victim discourse, their involvement risks sending a wrong message about rising juvenile crime. Support for new methods for diversion run the grave risk of bolstering alarmist claims of a rising juvenile crime problem when this is simply not supported by data.[19] Coventry writing of crime prevention programs generally, warns:

> In the absence of any concerted efforts in the field of community based crime prevention initiatives to seriously tackle other sites (such as the workplace or corporate sector) and other behaviours (including tax evasion, fraud and organised crime) young people will continue to be the key clientele of direct service programs and/or viewed as the chief perpetrators requiring attention . . .
>
> If community based crime prevention is limited in these respects, and available evidence suggests it is, official crime statistics and media coverage are likely to ensure that young people remain in the crime prevention spotlight.[20]

From an organisational perspective, it is a step towards the increased influence of police in the juvenile justice agenda. That influence is likely to be supported and expounded by conservative agencies which are strongly connected to police organisations.

> It is hardly surprising that police unions and police command should align themselves with the law and order lobby. What is often not recognised is their influence upon the views of apparently independent victims' groups and other lobby organisations such as SOLO (Supporters of Law and Order) and upon the vast numbers of police-organised Neighbourhood Watch Committees throughout Australia.[21]

These voices of the 'community' are the least likely to represent those who are most likely to have contact under conflictive circumstances.[22] Given their alliance and composition, such groups are predisposed to favour police-run processes for determining a sanction rather than Children's Courts.

Even if the offender/victim conference concept proposed under the Wagga Wagga scheme could satisfy other concerns, its endorsement cannot be divorced from the question of whether limited resources should be directed towards police conducting these conferences. Once the conduct of such conferences becomes a police responsibility it will not be readily relinquished. When the next call for greater police numbers is made, additional resources will be forthcoming instead of any pruning to their involvement in such programs. There will be a further rise in the power and political muscle of the force and a further reduction in the moneys available for other initiatives.

This is precisely what Victorians witnessed in the Coalition mini-budget handed down on 6 April 1993. The *Age* (6.4.93) correctly predicted:

> The 'thin blue line' is unlikely to be any thinner after the Budget is announced today. Unlike most of the bureaucracy, the police are doing more than holding their own in the spending stakes. This is due in part to a belief that law and order is under threat, and rising crime rates demand more policing. But recent figures and informed opinion provide little support for either assumption.[23]

Even so, the Treasurer, Alan Stockdale announced:

> [t]he Government remains committed to ensuring that operational police numbers are raised by 1000 during its first term in office. First steps towards this will be announced in 1993-94.[24]

No commensurate allowance has been made in other parts of the justice system to deal with the increased 'business' which will result. In fact, the special court treatment of alleged young offenders may already be in the process of being dismantled surreptitiously. Less than one month after the mini-budget it was reported that young people's cases would no longer be heard only by specially assigned Children's Court magistrates. This step has presumably been forced on the Chief Magistrate by the Victorian Government's funding priorities. Next, we might see Victoria leaving it to police to mete out penalties as is the plan for the police cautioning system in South Australia.

Conclusion

The architects of, and those implementing, police-driven programs may be well-intentioned but the advocacy and developmental interests of young people cannot be advanced by the seepage of scarce juvenile justice funds towards increased police influence in the area. Strategic responses are needed to address the developments outlined in this article. In doing so, the political currency of the victim discourse must be positively applied to the social construction of young offenders.

Decision-makers and the public at large must be constantly reminded how young offenders have been offended against. This will require frequent challenges to attempts to baldly label individuals rather than understand and deal with the environment in which events occur. A proactive role with the media will be a key component and the following three themes are particularly timely for Victoria.

First, the connection between prior or current family violence and adolescent offending needs to be widely promoted. The intense community concern about child and adolescent abuse and mandatory reporting offers an opportunity to foster greater tolerance for young offenders and prevent a repeat of the Western Australian sentencing fiasco. Second, the juvenile justice field must continue drawing attention to the prevalence of victimisation by elements of the juvenile justice system itself. This is an essential component in the challenge against the proposed growth of police powers, both investigative and programmatic. Finally, there has to be wider public understanding of how government's economic, social and legal policies can victimise young people. When services are being depleted while police resources grow, responsibility must be sheeted home to government for creating the conditions which induce offending need and behaviour.

References

1. James, Stephen, Lecturer in Criminology, University of Melbourne, quoted in the *Age* 6.4.93, p.6.
2. See the series of articles by Law Reporter Michael Magazanik commencing in the *Age* 20.4.93 and subsequent letters. As Freiberg points out, the interests of victims are actually damaged by the proposed changes (*Age*, 6.5.93, p.16).
3. Stockwell, C., 'The Role of the Media in the Juvenile Justice Debate in Western Australia', paper presented at the Australian Institute of Criminology National Conference on Juvenile Justice, 22-24 September 1992 (soon to be published as proceedings).
4. Freckelton, I., 'Sensation and Symbiosis' in Freckelton. I. and Selby. H. (eds) *Police in Our Society*, Butterworths, Melbourne, 1988; Jackson, H., 'Juvenile Justice – The Western Australian Experience', paper presented at the Australian Institute of Criminology National Conference on Juvenile Justice, above.
5. The *Crimes (Amendment) Bill* 1993 (Vic.) removes safeguards on existing police powers and extends their range. Despite fierce opposition, the Bill was read a second time on 20 May 1993. The Bill is lying over until the Spring session of Parliament. For an examination of the ramifications and strategies for opposition see Sandor, D., 'Nothing to Hide? No! Too Much to Lose', (1993) June *Youth Issues Forum*, Youth Affairs Council of Victoria.
6. Human Rights and Equal Opportunity Commission, *Our Homeless Children*, AGPS , Canberra, 1989.
7. See for example Alder, C. and Sandor, D., *Homeless Youth as Victims of Violence*, Department of Criminology, University of Melbourne, 1989; Human Rights and Equal Opportunity Commission, above.
8. McCarthy, *Victim Impact Statements – A Problematic Remedy*, 1993 Position Paper available from the Project for Legal Action Against Sexual Assault (tel 03 416 1518).
9. Attorney-General's Department Victoria, *Children's Court Statistics*, Melbourne, 1992.
10. *Victoria Police Statistical Review 1991-1992*, p.5.
11. 'The police figures obtained by the federation [of Community Legal Centres (Vic.)] also show that between June 1991 and June 1992, 8189 people refused to give fingerprints. But in the same period, the police obtained only 63 court orders compelling suspects to give fingerprints.' *Sunday Age*, 2.5.93, p. 5.
12. Victoria's current legislation, ss.464K ff *Crimes Act* (Vic.) 1958, arose from two reports issued by the Consultative Committee on Police Powers: *Identification Tests and Procedures – Fingerprinting*, Government Printer Melbourne 1987; *Body Samples and Examinations*, Government Printer Melbourne 1989. It was formed at the request of the then Attorney-General, chaired by the then Director of Public Prosecutions (now The Honourable Mr Justice Coldrey) with membership from the Victorian Bar, Victoria Police, Attorney-General's Department, Prosecutors for the Queen, the Legal Aid Commission, and the Law Institute of Victoria.
13. Community Council Against Violence, *Public Violence: A Report of Violence in Victoria*, Melbourne 1992, p.66. See Alder and others, 'Perceptions of the Treatment of Juveniles in the Legal System', National Youth Affairs Research Scheme, Hobart, 1992 which includes a survey of police in other jurisdictions on the subject of using too much force. Victorian police would not participate.
14. O'Connell, T., 'Wagga Wagga Juvenile Cautioning Programme: It May Be the Way to Go', paper presented at the AIC National Conference on Juvenile Justice, above.
15. Braithwaite, J., 'Juvenile Offending: New Theory and Practice', paper presented at the AIC National Conference on Juvenile Justice, above, p.4.
16. Moore, D., 'Facing the Consequences: Conferences and Juvenile Justice', paper presented at the Australian Institute of Criminology National Conference on Juvenile Justice, above, p. 2.
17. See Moore, above.
18. Polk, K., 'Jobs nor Jails: A New Agenda for Youth', paper presented at the AIC National Conference on Juvenile Justice, above, p.16.
19. No basis for such a claim is substantiated. See Wundersitz, J., 'Some Statistics on Youth Offending: An Inter-jurisdictional Comparison', paper presented at the AIC National Conference on Juvenile Justice, above.
20. Coventry, G., 'Dangerous Liaisons: Shaping Youth Policy by Crime Prevention Programming', paper presented at the Rethinking Policies for Young People Conference, 14-16 April 1993 (soon to be published as proceedings) p.4.
21. Freckelton, above, p.59.
22. Hogg, R. and Findlay. M., 'Police and the Community: Some Issues Raised by Recent Overseas Research', in Freckelton and Selby, above. The former Victorian Labor Government refused to appreciate this aspect to community policing in its establishment of 'Police Community Consultative Committees'. Women, young people, Kooris and people from non-English speaking backgrounds were scarcely represented.
23. The Director of the New South Wales Bureau of Crimes Statistics calculates that national 'per capita spending on police, adjusted for inflation, rose by almost 60 per cent between 1975 and 1989' (*Age*, 20.4.93, p.6). Dr Don Weatherburn suggests expenditure is driven 'more by public anxiety and ignorance than by rising crime rates'.
24. Stockdale. A., *Restoring Victoria's Finances Stage 2*, Government Printer Melbourne, 1993, pp. 5-7.