

THE COURTS, THE JUDICIARY AND NEW DIRECTIONS: THE LIMITS OF LEGISLATIVE CHANGE

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THE LAST FIFTEEN YEARS HAS BEEN A PERIOD OF REASSESSMENT AND change in juvenile justice legislation in Australia. From the 1970s two distinct strands of criticism were evident.

On the one hand, there were critics who were concerned that the system was too permissive and on the other, there were those who asserted the system reflected class bias and the motives of the original reformers were as much concerned with the control of young people whose behaviour threatened middle class values as with helping young offenders (Freiberg et al. 1988, p. 4; Morris & McIsaac 1978; Alder & Polk 1985). But the common theme of the critics was the attack on rehabilitation because of evidence of its failure, its excesses and its dangers. They pointed to the failure to protect due process rights, to levels of coercive intervention disproportionate to the offence and to a failure to distinguish between offenders and neglected children unfairly stigmatising the latter and confusing the former.

In response to such criticisms and to concern with a perceived problem of growing juvenile crime rates, there has been considerable legislative change governing young offenders. Four states have rewritten their legislation dealing with young offenders and child welfare, the two territories have new legislation, in Queensland a Juvenile Justice Bill is before Parliament and Tasmania is in the process of review. A shift in philosophy is evident. Unlike North America, this shift has not been a swing from one extreme to another, but the influence of a different model is apparent. Attempts to theorise models of juvenile justice are contentious (Youth Justice Coalition 1990, pp. 41-4). So is the attempt to fit a particular system within a particular model (Freiberg, Fox & Hogan 1988, pp. 162; 1989, p. 280). But if the conventional models of welfare and justice are accepted and it is acknowledged that they are not opposites or unidimensional concepts, the current cycle of reform to juvenile justice involves a shift from a welfare model to a justice model. This is evidenced by a new emphasis on due process procedures, personal

responsibility of offenders, splitting of welfare and criminal jurisdictions and proportionality and determinacy of sentences. But this is not the whole picture. The emphasis on reducing the number of offenders going to court by diversionary mechanisms shows the shift has not been consistent. As Seymour (1988, p. 171) points out, the desire to give young offenders special treatment has remained and focusing on the offence has not been conceived as requiring the system to turn its back on leniency, benevolence and flexibility—at least for most young offenders.

The changes in the legal framework of the juvenile justice system in relation to investigation and prosecutorial discretion reflect a mixed approach, both a shift towards justice and a welfare approach. The increased emphasis on procedural rights is a continuing trend and a positive side of the move towards a justice model. The emphasis on the goal of diversion of young offenders and attempts to adopt the least intrusive solution to juvenile offending do not reflect the ideology of the justice model, but the emphasis on due process, rights and structured decision making in relation to prosecution and caution reflects the procedural strand of the justice model. On the other hand, the emerging emphasis on individual responsibility and more punitive dispositions is a reflection of the substantive aspects or ideological content of the model (Freiberg et al. 1988, pp. 165-70).

This process of review and legislative change has been both slow and contentious. A valuable contribution to the debate was made by a study by Freiberg et al. (1988) for the Australian Law Reform Commission's sentencing reference. This not only looked at sentencing young offenders, it also described the main features of juvenile crime in Australia and analysed the statutory framework for juvenile justice in terms of the values, interests and objectives underlying the system. The gains and losses of a shift to a justice approach were discussed. In 1990 a review of the juvenile justice system of NSW was completed and published with the title, *Kids in Justice*. In Western Australia the Legislative Review committee completed and published its *Laws for the People*, a review of welfare and community services legislation dealing with young offenders. South Australia has been the latest to commence a new review with the appointment of a parliamentary select committee to review the *Children's Protection and Young Offenders Act 1979*, the administration of the Children's Court, and the adequacy and effectiveness of resources and programs. Probably nowhere has the process of legislative change been more tortuous than in Tasmania. The *Child Welfare Act 1960* has been under review since at least 1980 when the Roe Committee made recommendations for change. Although new legislation has been on the agenda since then, a Bill has yet to be introduced into Parliament.

What have been the major developments?

Police Investigation

While in recent years there have been changes to court systems and sentencing options for young offenders, modification to police procedures has been less extensive. This reflects the relative neglect of the legal regulation of police powers and the rights of a suspect in the face of police investigation in

the criminal justice system as a whole. An important change has been the attempt to protect the right to silence by giving statutory recognition to certain rights rather than merely leaving them to be dealt with by internal police instructions. Five jurisdictions (NSW, the ACT, SA, Victoria and the NT) have statutory provisions requiring the presence of a parent or independent adult when a juvenile suspect is being interviewed. In NSW and the territories a legal practitioner may take the place of the parent or guardian. In South Australia and Victoria there are statutory provisions allowing adult and juvenile suspects access to a friend or solicitor during interrogation. Although an advance on police instructions, the statutory provisions do not go far enough. For example, the Victorian requirement for parental presence does not apply to a preliminary interview and any statement in contravention may be admitted although illegally obtained. In NSW, failure to comply with presence requirements renders statements inadmissible, but is only a retrospective control on police questioning. What is needed are statutory requirements for presence and a provision for inadmissibility which applies to preliminary interviews and repeated admissions which are initially made in the absence of a parent or responsible adult. Access to legal advice should also be required during questioning. To give substance to this right there should be a requirement to inform suspects of it and provision of publicly funded duty solicitors to ensure the availability of legal advice.

To minimise stigma and reduce penetration into the criminal justice system there is a trend in favour of legislation and police instructions that seek to encourage reliance on procedures other than arrest. New South Wales and Western Australia have introduced attendance notices, simple oral or written directions requiring a young offender to appear in court on a specified date. The proposed Queensland Juvenile Justice Bill requires police to proceed by way of attendance notice rather than arrest, except in specified circumstances (Department of Family Services and Aboriginal and Islander Affairs 1992, p. 6). Other jurisdictions have statutory provisions exhorting police not to arrest unless summons procedures would not be effective and some list factors justifying arrest. But evidence showing that the Northern Territory has the highest juvenile arrest rate and of disparity within NSW in the use of attendance notices suggests that entrenched police practice as much as legislative policy directives determines juvenile arrest rates.

In NSW, Victoria, Tasmania and the Territories there are statutory restrictions on fingerprinting of juvenile offenders. A court order is required in Victoria (*Crimes Act 1958* s464) and in Tasmania there is no power to fingerprint prior to conviction (*Criminal Process (Identification and Search) Act 1976* (Tas) s3(1)). Nevertheless there is evidence that fingerprinting of children at the police station prior to conviction is common in Victoria and Tasmania despite the absence of power (Alder 1992), suggesting that legislative constraints do not necessarily have an impact on routine police practices.

Police Cautions

Recent reviews of systems of diversion for young offenders have come out in favour of legislative recognition and regulation of police cautioning rather than panels (Legislative Review Committee 1991, p. 68; Department of Community Services, Tasmania 1991, p. 22). In Western Australia both informal, on the spot cautions and written formal cautions are sanctioned by legislation which was proclaimed in August 1991. Formal cautions are not limited to first offenders and policy statements indicate that between two and three cautions can be given before a different course of action is taken. In the Territories cautioning is the subject of limited legislative controls. In other jurisdictions they are regulated by standing orders or police instructions. In NSW and Tasmania cautioning rates are low (Youth Justice Coalition 1990; Warner 1992). The Youth Justice Coalition has recommended the promotion of cautioning by statutory recognition, policy endorsement, training and state wide monitoring (Youth Justice Coalition 1991, p. 244). In Tasmania a new cautioning scheme is being developed which is anticipated could lead to a reduction of 50 per cent in the numbers of people appearing before the Children's Court (Stokes 1992, p. 13). A key feature of the Queensland Juvenile Justice Bill will be to provide a legislative base for the police system of cautioning (Juvenile Justice in Queensland 1992, p. 6).

Children's Courts

There have been a number of important changes to Children's Courts in recent years. In South Australia and Western Australia they have been given an enhanced status by the appointment of judges, in keeping with a court that has a jurisdiction that is wider than other courts of summary jurisdiction. Queensland's proposed Children's Court Bill will provide for the appointment of a Children's Court Judge. Separation of criminal and welfare proceedings occurred first in South Australia and has now been achieved in most jurisdictions in response to a just deserts approach to young offenders. In Victoria, for example, there are separate divisions of the court for care matters (the Family Division) and for criminal matters (the Criminal Division).

Desirable developments in Children's Court procedures include an emphasis on comprehension, participation and legal representation. A number of studies have found that many young offenders do not understand the proceedings in Children's Courts (New South Wales State Council of Youth 1984, p. 8; New South Wales Women's Coordination Unit 1986, p. 123; Warner 1987, p. 177; Australian Law Reform Commission 1981, p. 58; McDonald & Kunnen 1988; O'Connor 1990, p. 14.) Now all states except Tasmania and Queensland have legislation promoting comprehensibility of proceedings. Typically the legislation requires specific explanation of the ingredients of the offence charged, the allegations and their implications, and an explanation of the nature of court orders. Legislative attention has also been directed at the need to encourage participation. Just as adult defendants have been found to be frustrated by their difficulty in participating adequately in court proceedings, so have children (Freiberg et al. 1988, p. 287;

O'Connor 1990, p. 14). The *Children's (Criminal Proceedings) Act 1987* (NSW) s6(a) makes the right to be heard and the right to participate one of the governing principles and in Victoria, the *Children and Young Person's Act 1989* (Vic.) s18 lists allowing full participation as one of the procedural guidelines. Legislation soon to be considered by the Queensland Parliament will have as a guiding principle that the child should be given the opportunity to participate in and understand the proceeding (Department of Family Services and Aboriginal and Torres Strait Islander Affairs 1992, p. 6).

There has been a significant change in the attitude to legal representation in Children's Courts in the last twenty years. Until the mid 1970s lawyers were thought to hinder the work of the court and to create conflict with welfare workers. Consistent with a move towards a just deserts philosophy, there is now widespread support for legal representation in Children's Courts on the basis it will mean greater procedural and substantive justice and will advance the autonomy and accountability of young people (Freiberg et al. 1988, pp. 82). This is not say there are no problems with legal representation and a number of problems have been identified. These include co-option into the dominant ideology of the bench (Morris 1983, p. 138); criticisms of the quality and effectiveness of legal representation, especially that provided by duty counsel systems (Freiberg et al. 1988, pp. 339; O'Connor 1990, p. 15; Legislative Review Committee 1991, p. 76) and confusion about the appropriate role of lawyers in Children's Courts (Child Welfare Practice and Legislation Review Committee 1984, p. 433). Statutory recognition of the importance of legal representation is evident in provisions in South Australia and the Northern Territory which allow a children's court to make provision for legal representation (*Children's Protection and Young Offender's Act 1979* (SA), s91(4); *Juvenile Justice Act 1983* (NT) s40). The planned juvenile justice legislation for Queensland imposes a duty on the court to ensure that a young person has been given a reasonable opportunity to obtain legal representation. In Victoria the *Children and Young Person's Act 1989* makes a unique attempt to give lawyers guidance on where their primary responsibility lies, by providing in s20(9):

Counsel or a solicitor representing a child in any proceedings in the Court must act in accordance with any instructions given or wishes expressed by the child so far as is practicable to do so having regard to the maturity of the child.

Developments in relation to sentencing reflect the two strands of criticism of the welfare approach to young offenders and the tensions between them. The trend is for guiding principles in relation to sentence to stress individual responsibility and community protection as well as the needs of the offender (for example *Children and Young Persons Act 1989* (Vic.) s139(1) which is almost identical to principles contained in the South Australian and ACT legislation). In addition, recognition of the principle of proportionality and disillusionment with rehabilitation has meant indeterminate sentencing options had all but disappeared only to be resurrected in Western Australia

in the *Crime (Serious and Repeat Offenders) Sentencing Act 1992*. The trend away from custodial sentencing options is encouraged in four ways:

- by community based options (for example youth supervision orders and youth attendance centre orders in Victoria);
- by statutory recognition of the principles of frugality of punishment (for example *Children's (Criminal Proceedings) Act 1987* (NSW) s33(2)),
- by providing that a custodial order should be a measure of last resort; and
- by a requirement that reasons be given if a custodial order is made (for example *Children's Court of Western Australia Act (No 2) 1988* (WA) s26(b); *Children and Young Persons Act 1989* (Vic.) ss186(2), 188(2)).

But the view that the system has been too permissive and young offenders are often dealt with too leniently has not just been recognised by requiring courts to have regard to the need to protect the community and to ensure that a child accepts responsibility for their actions. There is evidence of a severe and punitive response to those young offenders who are perceived as being serious repeat offenders, and a trend to classify young offenders as hard-core criminal and others. The best example of this is the Western Australian *Crime (Serious and Repeat Offenders) Sentencing Act 1992*, which allows for young people who are classified as serious repeat offenders to receive a minimum of eighteen months detention if they are convicted of a prescribed violent offence. Release is to be determined by a Supreme Court judge. Juvenile crime is indeed a serious problem, but the solution to it does not lie in a getting tough approach which will not prevent or reduce crime, but will undoubtedly increase the Aboriginal detention rate. This Act stands very uneasily beside departmental policy which sees the key role in reducing offending in "preventative community based strategies, not in the formal justice system alone" (*Juvenile Justice in Western Australia 1992*, p. 17). These preventative strategies target high offending sections of the community for a community development approach, geared towards empowering the local population to address the underlying problems.

Conclusion

The revival of just deserts philosophy has had an impact on the juvenile justice system. The outcome of recent reviews of juvenile justice has resulted in a shift from rehabilitation and welfare to an emphasis on the offence and deserved punishment. At the same time recognition of the need for a separate system for young offenders has been reinforced by special measures to divert and decarcerate. What has emerged is a system which has pluses and minuses. In many Australian jurisdictions there are now systems which distinguish between young offenders and children in need of care, avoiding stigmatising the latter and frankly acknowledging, in the case of the former,

that intervention is about punishment and is not purely benevolent. There is a growing trend to seek to make ideology explicit by setting out principles to guide the exercise of powers in the system. To do so would seem to be a plus if a coherent framework for the development of policies, programs and practice is provided. But whether these statements achieve more than placating different interest groups by giving expression to a range of philosophies with unresolved tensions has been questioned (Fox 1985, p. 165). Attention to due process at the investigatory stage by the recognition and protection of the right to silence by requirements of the presence of an independent person during questioning is a definite plus.

Diversion strategies that give legislative recognition and encouragement to police cautioning and discourage the use of arrest by legislative exhortation and the provision of alternative procedures are positive developments. Legislative provisions that encourage participation of young defendants at the adjudicatory stage and seek to improve the comprehensibility of procedures are welcome. They are not an integral part of the justice model but are implicit with its concern for accurate fact finding (Freiberg et al. 1988, p. 533). There are also positive elements at the sentencing stage. The principle of proportionality is a useful limiting principle, preventing excessive efforts at rehabilitation as well as excessive punishment. Determinancy of sentences is resulting in the replacement of indeterminate committal orders and wardship with sanctions that have a known release date. And the principle of frugality of punishment seeks to ensure that the type and length of the sanction will be the least restrictive appropriate to the gravity of the offence.

In most jurisdictions there have been many improvements to the legal framework of juvenile justice. But nowhere is it adequate. Important matters are only partially or are totally unregulated and the various systems only go a short way to structured decision making. There are glaring omissions at the investigatory phase. Some important matters are regulated by internal police instructions, but given their ambiguous status (they do not create rights, but rather specify desirable practices), and their inaccessibility, legislation is to be preferred. The absence of a charter of rights for young people has been criticised. This would be particularly valuable at the investigatory stage, for currently what "rights" that can be implied are found scattered through a variety of statutes, regulations and internal police instructions. Existing requirements for the presence of an independent adult are inadequate in most jurisdictions. Prospective statutory requirements for presence drafted to cover preliminary questioning are necessary with provisions for inadmissibility in the event of non-compliance. A statutory right to the presence of a lawyer is necessary and an obligation to inform a young person of that right. Criteria for arrest and simple alternatives such as attendance notices should be introduced in all jurisdictions. The ideal of a clear requirement of parental notification of questioning, arrest, charge and caution is not met in all states. Some states lack any effective restrictions on fingerprinting of young suspects. Existing statutory provisions are not adequate to ensure that young people are not detained in police facilities, nor do they sufficiently provide for conditions that distinguish young and adult offenders. Few states have an

adequate legal framework for encouraging the use of informal and formal cautioning with clear criteria for decision making.

The limits of the formal juvenile justice system as a response to crime should be recognised. It should not be seen as the only solution to juvenile crime for it cannot hope to deal with the underlying causes. The danger of seeking the answers to juvenile crime in the formal justice system is that it inevitably leads to the superficial response of a "law and order" solution on the assumption it will be effective or at least give the appearance of doing something. A broader response which does not ignore the social and economic dimensions of juvenile crime is necessary. "Getting tough is not an adequate strategy" (Youth Justice Coalition 1990, p. 8, p. 36). It should not be forgotten that for many offences only a minority are known to the police and even less are "cleared". The formal system is only processing the tip of the iceberg. Nor should it be forgotten that far from achieving a corrective effect, getting caught up in the criminal justice system seems a primary determinant of a continued criminal career. The system neither rehabilitates nor deters. Harsh sentences will not prevent or reduce crime, but will increase detention rates.

There is another reason why the legal framework must not be viewed in isolation. There is little point in giving legal recognition to the rights of children if they cannot be asserted or are systematically ignored. There is little point in legislative exhortations to proceed by way of arrest or to reserve custody as a measure of last resort if they are systematically ignored. And the introduction of a new diversionary method as an alternative to prosecution, or an intermediate level of sanction as an alternative to imprisonment can have a "net-widening effect". The limits of a rights based approach are revealed by evidence that even when young people know of their rights, they are frequently unable to assert them and often suffer harm as a consequence of trying to do so (Brown 1984; O'Connor & Sweetapple 1988; O'Connor 1989; Alder et al. 1992). There is evidence that requirements for parental presence during questioning and restrictions on fingerprinting of children are routinely ignored (Cunneen 1990; Alder 1992). In the case of legislative measures to encourage police to use alternatives to arrest there is some evidence that entrenched police behaviour may be more important than legislative framework or policy directives. As to net widening, it has been shown that panels may increase the penetration of many young offenders into the juvenile justice system (Freiberg et al. 1988, p. 132).

Alternatives to imprisonment may be merely additions to the hierarchy of sanctions, heightening the impact of less serious offences and blurring the impact between custody and non-custodial options, at worst leading to more young people in custody rather than less (Muncie & Coventry 1989). Changes to the legislative framework are not enough. The operation of the system must be continuously monitored to assess whether the aims of the legislation are being achieved. Currently the lack of coordinated and statistical research effort into what happens when a young person is caught up in the juvenile justice system considerably impedes the development of juvenile justice policy (Freiberg et al. 1988, p. 24).

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