POWER without ACCOUNTABILITY

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Reforms to Victoria's Crimes Act.

The recent amendments to the *Crimes Act 1958* (Vic.) are generally described as having increased police powers to demand name and address, take fingerprints and to obtain forensic samples. It is just as accurate to describe the changes, the bulk of which came into effect on 1 June 1994, as having substantially reduced police accountability for the exercise of their powers. In fact this significant reduction in accountability should give rise to serious concern in the community.

Police powers and accountability

It is important to recognise that police powers are only one element in the accountability of our criminal justice system. While police accountability issues are addressed here, accountability at all stages of the process is critical.

The importance of accountability in the criminal justice system has become more critical in recent years because:

- We have increased the use and severity of on-the-spot fines. The Victorian Public Transport Corporation issued a total of 42,154 on-the-spot fines in 1992-93 (not including fines issued by the police), and has recently released a Regulatory Impact Statement which in many cases increases the maximum fines by five times or greater.[1] People have great difficulty challenging on-the-spot fines. Rarely, if ever, will legal aid (including duty lawyer services) be granted to challenge an on-the-spot fine. Many people do not have a sufficient knowledge of English to engage in the process of challenging an on-the-spot fine. Even English speakers have difficulty negotiating the system.
- Penalties for serious offences have been significantly increased under Victorian sentencing legislation. We are now looking at extensive cumulative sentences, and the possibility of indefinite sentences for some offences. Again, while there may be very good arguments for increasing such penalties, this development highlights the need for proper accountability procedures.
- Imperatives have been introduced which influence people to enter pleas of guilty when they should otherwise require the prosecution to prove its case (the economic imperative – if the number of guilty pleas in the Magistrates Courts 'slumped' from around 90% to 80% the current system would grind to a halt). A combination of the notional benefit to be derived from a plea of guilty at the earliest time, and the inability to get legal representation, particularly on minor matters, again reinforces the need for accountability at the front end of the criminal justice system.
- Limitations on the availability of legal aid, and conditions imposed by the Legal Aid Commission that aid will only be granted if a defendant pleads guilty, also raise concerns about who determines whether the prosecution has satisfied its responsibility to prove its case.
- Streamlining of the court processes, increasingly requires defendants to reveal their defence in order to justify a right to a hearing or trial, and

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can be seen to represent a shifting of the onus from the prosecution to prove their case, to defendants to justify why they should be allowed to enter a plea of not guilty. The use of Contest Mentions in the Magistrates Courts is clearly desirable in terms of court efficiency but in effect require the accused to justify their intended plea of not guilty prior to any opportunity to test the prosecution evidence. Section 11 of the *Crimes (Criminal Trials) Act 1993* (Vic.) requires the defence to reveal to the prosecution details of any expert witness statements and proposition of law, on which they propose to rely, prior to the prosecution even commencing its case to the jury. There may be very sound reasons for streamlining the court process in this way, but we cannot ignore the implications for the standards of accountability we should properly require in the criminal justice system.

Accountability for the exercise of police powers must be given primary importance in the criminal justice system. If we are unable to hold police officers properly accountable for the exercise of the powers we grant them in order to protect the broader community interest, that absence of accountability will have serious implications for individuals throughout the system. The community interest demands that the criminal justice system produce just and fair results. This means just and fair within the context of the community's interests and the individual's interests. Miscarriages of justice, whether they be in favour of or against the accused, must call into question the operation of our justice system and the accountability mechanisms within it.

The new legislation – how does it measure up?

The question which we must turn our minds to is – will we be able to hold the police accountable for the exercise of the powers they have been granted under the recent amendments to the *Crimes Act 1958* (Vic.)?

Name and address

The significance of the new name and address power is its broad applicability and the criminal sanction it carries for those found to be in breach. The power effectively gives the police the right to ask any members of the public their name and address at any time. The limitations on the power contained in the new legislation are virtually unenforceable. People who refuse to give their name and address run a grave risk of being classified as criminals for doing so.

In the current legal aid climate it is difficult to see how an individual can test whether a police officer has strayed beyond the limitations of the *Crimes Act* provision. Even if a person is fortunate to have the resources to challenge the alleged offence in court, he or she will be confronted with concepts such as the reasonableness of a police officer's belief about 'a crime about to be committed' (under s.456A(1)(a)) or about 'a person being able to assist in the investigation an offence which is suspected of having been committed' (under s.456A(1)(b)). Courts, particularly at the magistrates' level, take the view that police officers must be assumed, in the absence of compelling evidence to the contrary, to be honest. The rationale for this is that to do otherwise calls into question the operation of the entire criminal justice system.

Section 456A(4) and (5) of the new legislation provides that members of the public have been granted a reciprocal right to demand the name, rank and place of duty of the police officer who asks them to state their name and address. It is most important to recognise that this is only a reciprocal right. The new legislation does not create a general right for members of the community to ask these details of police officers.

If you watched television reporting of the Richmond Secondary College demonstration (Melbourne), you would have observed a situation where a man was being held by two police officers from behind, when a third police officer appeared to stretch over the two other officers and strike repeated baton blows to the head of the man being held. Under the new law, the police officer using the baton would not be required to give his name etc. to the man who was struck over the head, unless the police officer first asked for the name and address of that person.

The decision by the Victoria Police to require some officers to wear name tags is no compensation at all. This requirement is at the discretion of police officers. It carries no legislative force. There are, to my knowledge, no clear guidelines available to the public detailing when a police officer will be able to exercise the discretion to remove the name tag (much less any possibility that the public might have a role to play in formulating such guidelines). Previous experience suggests that demonstrations will be seen as an inappropriate place for police to wear name tags. It is interesting that in Holland the Police Complaints Commission want riot police to wear sports-style numbers so that victims of excessive force are readily able to identify their attackers (*Age* 24.6.93, p.1).

Finger printing

The new legislation removes the requirement of informed consent in relation to all people of or above the age of 15 years. Police officers will inform the person of various matters required in the legislation. If the person does not agree to give fingerprints, police will then be able to use reasonable force to take them. Section 464K of the new legislation requires authorisation for the use of reasonable force by the member in charge of the police station or a person above the rank of Sergeant.

Approximately 30,000 fingerprints were taken annually under the old legislation on the basis of the informed consent being given by the person requested. The police took very few matters before a Magistrates Court to seek an order requiring somebody to give their fingerprints.[2] Fingerprints are rarely used to detect an alleged offender and are used even less in courts as evidence. It is difficult to justify the removal of the significant level of accountability which was provided by the informed consent provision. It is not difficult to imagine less than scrupulous members of the police force hiding behind the guise of reasonable force in taking fingerprints to protect themselves from accusations of excessive and unwarranted use of violence against suspects.

For young people aged between 10 and 14 inclusive, s.464L of the new legislation provides that both the young person and their parent must consent to the taking of fingerprints. In the absence of consent from both parties, police must take the matter to the Children's Court before they can take the fingerprints. However, ss.464L and 464M(7) provide that in the Children's Court, a young person shall not be party to the application. This means that she or he will not be able to cross-examine or call witnesses, and will be effectively gagged with only a limited right to address the court on specific issues. What do we have to fear from our young people, that we must go to the extraordinary lengths of denying them the right to be a party to an application of which they are the subject?

Australia is party to the International Convention on the Rights of the Child. Article 12.2 of this Convention requires that 'the child shall in particular be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or

an appropriate body, in a manner consistent with the procedural rules of national law'. Article 40.2(b)(iv) requires that every child accused of having infringed the penal law be guaranteed the right to 'examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality'.

The new *Crimes Act* provisions for the fingerprinting of young people clearly breach Australia's obligations under this United Nations Convention, and must be challenged at the earliest opportunity. Even in the absence of such an obligation why should we accept a justice system that is so heavily weighted in favour of the investigation and prosecution arm of government at the expense of children?

Forensic procedures

The new laws retain the requirement of informed consent of the suspect in regard to forensic procedures. In the absence of that informed consent, the police must account to a court for an order directing a person to undergo a compulsory procedure. However the grounds on which a police officer can request that a suspect undergo a forensic procedure are much broader than the grounds on which a magistrate can make an order directing a suspect to undergo a compulsory procedure (compare s.464R with s.464T(3)).

The consequence of these differences is that there are significant advantages for police in 'obtaining' a suspect's informed consent to undergo a forensic procedure. Thus instead of being an accountability requirement that is designed to prevent the abuse of power, these provisions provide a significant incentive to police to intimidate suspects into providing their 'consent'. It is also worth noting that ss.464V and W provide that in some circumstances police can get an order from a magistrate over the telephone.

Again s.464T(5) of the new legislation denies the suspect the right to be a party to the application. The suspect stands virtually mute before the court, unable to cross-examine or call any witnesses. There is no serious presumption of innocence or right to test the veracity of the allegations against the accused in this provision.

It appears that we are so insecure about the ability of suspected people to call into question the veracity of police evidence, that we must give police officers special protection when making these applications to the court. Is the government so concerned about the honesty and capability of the police force that it must go to the extraordinary lengths of granting them special privileges in the courts?

The issues raised above about fingerprints and Australia's international obligations are applicable here also where a child aged between 10 and 16 years inclusive is denied the status of a party to the application for the conduct of a forensic procedure (s.464U(12)).

Article 14.3(e) of the International Covenant on Civil and Political Rights requires that 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality . . . to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'. Articles 14.1, 16 and 26 also require equality before courts and tribunals, the right to recognition as a person before the law and 'without discrimination to the equal protection of the law'.

Under s.464T(3)(f) of the new Act, the Court may only make an order directing a person to undergo a compulsory procedure if the Court is satisfied that 'there are reasonable grounds to believe that the conduct of the procedure may *tend to confirm or disprove his or her involvement in the commission of the offence*'. This is clearly part of determining a criminal charge against a person. The new provisions appear to be in clear breach of Australia's international obligations and should be subject to a challenge at the earliest opportunity.

The prejudicial weight of positive forensic samples is so great that the subject of the application should be able to test the veracity of the evidence supporting the application. The reliability of forensic samples is questionable. The foetal haemoglobin in the Chamberlain case turned out to be sound deadener; the 'nitro glycerin' on the hands of the wrongly convicted Birmingham bombers came from the plastic on playing cards. The prejudice was devastating and the scientific evidence wrong.

These provisions remove fundamental protections designed to provide a sensible and necessary balance between the rights of the individual and the role of government in prosecuting breaches of the law. The removal of these fundamental safeguards is contrary to the interests of the community because they remove any real prospect of accountability.

Strip searches

The new legislation raises very interesting questions about current Victorian practices in relation to strip searches. There is no doubt that s.464(2) of the Act intends to include strip searches within the definition of forensic procedure and physical examination. However, under s.464T(3)(e), a court order in the absence of informed consent will be limited to strip searches in relation to indictable offences where the person who committed the offence had distinguishing marks or injuries. There is a strong argument that this provision 'covers the field' and that the police will be unable to continue their existing practice of conducting strip searches at their absolute discretion, generally under the search provisions contained in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic.), ss.81 and 82.

The case of *Leigh v Cole* (1853) Cox CC at 329 is cited by Victoria Police as being authority for the proposition that police have a common law power to conduct strip searches. However *Lindley v Rutter* [1981] 1 QB 128 and *Brazil v Chief Constable* [1983] 1 WLR 1155 make it very clear that police have very limited power to conduct strip searches. In *Lindley v Rutter*, after citing Halsbury's Laws of England – 'There is no general common law right to search a person who has been arrested' – Donaldson LJ held:

> It is the duty of the courts to be ever zealous to protect the personal freedom, privacy and dignity of all [persons] . . . such rights are not absolute. They have to be weighed against the rights and duties of police officers, acting on behalf of society as a whole . . . What can never be justified is the adoption [by police] of any particular measures without regard to all the circumstances of the particular case . . . the officer having custody of the prisoner must always consider . . . whether the special circumstances of the particular case justify [a search] . . . he should appreciate that they [searches] involve an affront to the dignity and privacy of the individual . . . In every case a police officer ordering a search or depriving a prisoner of property should have a very good reason for doing so. [at pp.134 and 5]

The recent en masse strip searching undertaken by Victorian police of 463 people at a nightclub makes a mockery of the words of Donaldson LJ above. The police action gives added strength to the argument that the forensic procedures sections of the new laws should be regarded by the courts as covering the field with respect to strip searches in Victoria.

It is incongruous that we should provide detailed protection for suspects in serious criminal cases and yet happily accept that police can carry out degrading strip searches on hundreds of occasions each year at their absolute discretion in relation to trivial routine matters. Surely this must shatter a person's sense of confidence and trust in our police. These strip searches represent government-sanctioned assault on individual members of our community. These assaults are likely to affect the victims in the same way as any other victim of sexual assault based on exploitation by a greater power. I suggest too that the position of prisoners in our gaols, who are being subjected to routine and systematic strip searches, ought be no different to the position of the prisoner to which Donaldson LJ refers.

Conclusion

In a recent article Detective Sergeant John Gibson, Victoria Police, questioned whether 'ever-increasing high expectations of police accountability ironically have a repercussion of placing public safety in jeopardy'. He went on to say, 'an argument could be put that if you are doing the right thing then you have nothing to fear. Such a contention might be right if police were free from personality conflicts from within their own ranks and free from those in the criminal world who readily make false accusations for self-serving reasons'.[3]

From the perspective of balancing community interests against the interests of individual community members being investigated, it is difficult to accept that the broader community interest is served by reducing the accountability of police in the manner of the new Victorian legislation. Such a contention might be right if police were free from personality conflicts, human frailty, corruption, dishonesty and criminality within their own ranks. This is not the case, and sadly never will be. Reducing police accountability has increased the likelihood that the criminal justice system will be tainted with injustices.

This significant reduction in accountability for the exercise of police powers contained in the new legislation ought to give rise to serious concern in the community. Sadly, our media, politicians, police officers and to a large extent, the general public, seem unable to acknowledge that there are serious reasons for concern.

References

1. Regulatory Impact Statements on Transport, Public Transport Corporation Regulations 1994, undated document, Department of Transport, Victoria.
2. In the 1990-91 fiscal year Victoria Police obtained 32,972 fingerprints but obtained only 44 court orders. The corresponding figures for 1991-92 were 29,100 and 63. Figures released by Victoria Police under Freedom of Information.

LEGAL STUDIES

How accountable are our police?

Consider the two articles which deal with the accountability of police in this issue. (G. Connellan: 'Power without accountability' p.203; and B. Simpson: 'And the judge wore blue' p.207).

Questions

1. Why is it important to hold police accountable for their behaviour? Why has this become an important issue in recent years?
2. Both articles give examples of how police have been given significant additional powers in recent times. What are some of the problems associated with the exercise of these powers?
3. Do certain groups in the community appear to suffer more than others when these powers are exercised? Is this fair?
4. To what extent do international legal documents such as the United Nations Convention on the Rights of the Child provide us with some means of measuring the appropriateness of laws which grant police significant powers?
5. Do the juvenile justice laws in South Australia or the recent reforms of the law in Victoria conform to such international legal rules?
6. It is often said that if you have done nothing wrong then you have nothing to fear from increased police powers. What does this assume about the way in which police perform their duties?

Discussion

Should the police have the power to punish young offenders? What are the arguments in favour of such power being granted to the police? Are they convincing? Imagine you are a police officer. What penalties would you hand out in the following cases if the South Australian legislation applied to you?

1. A 15-year-old boy paints a graffiti slogan on the wall outside the local railway station. The boy has a slight intellectual disability and he was encouraged to graffiti by his friends.
2. A 12-year-old girl steals a chocolate bar from the local supermarket. She had $5 in her pocket at the time. She later used the $5 to buy a magazine for her sick grandmother in hospital.
3. A 14-year-old boy buys cigarettes and alcohol in contravention of the law. He bought them for his own use and without his parents' knowledge.
4. A 13-year-old girl repeatedly swears at you when you attempt to arrest her boyfriend for a serious assault. You warn her to keep quiet but she persists and you decide to take more formal action.

Compare your answers with your classmates. Are there differences? Why? Are police also likely to reach different answers? How do we prevent wide disparities in the way people are treated by the police?

Essay topic

'The police must be given adequate powers to detect and prevent crime but the parallel responsibility which police have is to be accountable for the use of such powers. Without such accountability we can never be sure that these rule enforcers are themselves acting according to the rules'. Discuss.

Further research

Can you think of any other areas in recent times which have led to questions about the accountability of police with respect to the exercise of their powers? Consider those other areas in the context of the points put forward in both of the articles mentioned above. Do similar issues arise?

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