

# OPINION

## Cops and kids

In the lead-up to the next NSW election, due by March 1995, both political parties have issued policy statements about law and order, with a focus on alleged crimes by juveniles.

Of greater interest for politicians should be the conduct of the NSW police involved in the entrapment of people, including many children, involved in the disposal of stolen property.

NSW, like other States, has approached policing in an increasingly proactive manner. Covert facilitation of crime, and audio-visual surveillance of target areas and groups, are widespread. Often the details surrounding these methods of policing are unknown to the public and unsupervised by a body independent of the police. Police are permitted to 'trap' a suspect into committing an offence and entrapment is commonly used to detect illegal drug sales, prostitution and similar consensual crimes.

### Operation Yugo

NSW Special Operations police ran a covert operation in Sydney's Inner West between November 1992 and June 1993. The operation was designed to crack down on property offences. The police opened a pawnbroker's shop which traded as 'Caesars's Trading Post' in the suburb of Marrickville. Undercover police were in a position to detect when goods suspected of being stolen were being fenced. All transactions were video-taped and conversations were recorded. Police were also in a position to encourage or facilitate the commission of crimes.

'Operation Yugo' involved entrapment of over 70 people disposing of stolen property. Many were children, including some who had never been involved in crime before, and several of those trapped claim they were encouraged by undercover police to commit an offence.

### A legitimate use of power???

Although the use of entrapment is widespread, its legitimacy is often questioned. Entrapment is recognised as a defence in the USA and in *Sherman v US* 356 US 369 (1958) the Supreme Court defined it as requiring both an inducement to commit the offence and the absence of a predisposition to commit the offence. In Australia, entrapment

is not a defence although it has arisen in a number of NSW Court of Criminal Appeal cases (see *R v Sloan* (1990) A Crim R 270, *R v Hsing* (1991) 25 NSWLR 685 and *R v Steffan*, 7 June 1993, unreported). Entrapment may be raised as a basis for staying a prosecution for abuse of process; it could be argued evidence illegally obtained should be excluded on discretionary grounds; and it has been held to be a relevant mitigating factor in sentencing.

In Operation Yugo, children charged reported that on pawning stolen goods they were then being asked to bring in specific goods. One child was told by undercover police, 'You are our best boy and we need more TVs, videos and video cameras'. The child accepted the encouragement and went on a stealing spree which resulted in 14 charges against him.

The police operation was mentioned in court but there did not appear to be any acceptance by the magistrate that the child's entrapment was a mitigating factor. Police facts sheets and selected transcripts of audio tapes did not include any of the conversations revealing any encouragement. Other examples from those charges provide damning evidence of police encouraging children to steal property and bring it to the pawn shop. Several parents of arrested children complained to the NSW Department of Juvenile Justice about the police conduct of asking for specific goods to be stolen and also that:

- goods accepted as pledges for money from children under 16 contravened s.24 of the *Pawnbrokers Act 1902* (NSW);
- children were not asked to supply any identification; and
- children were not arrested on the first occasion but encouraged to pledge more property for money over several months.

As children came before the courts on different days with different duty solicitors there has been no co-ordinated approach by defence lawyers as it was often unknown that the charges arose from Operation Yugo.

There is a reluctance to appeal from Children's Court decisions especially if the result is a non-custodial order.

Complaints about police conduct were brought to the Department of Juvenile Justice but in an internal legal officer's memo dated 10 August 1993 stated:

... while it might be said that the staff of the office are to advocate for children and protect their legal rights, I do not believe that it goes so far as becoming involved in the determination of guilt or innocence or in the assessment of the legality of the charges laid against them.

While the operation was passed by the police legal section as legal and legitimate, it remains to be seen if the Office of the Ombudsman will become involved in an investigation of the conduct.

### Kids and justice

Children should be treated differently to adults in the criminal justice system especially given their relative vulnerability and lack of life experience. They should be afforded protection in all dealings with the police. Covert operations, particularly those involving entrapment, are contrary to all other measures taken with children, and should be outlawed.

In NSW and other States there has been a move to divert children away from the formal justice system. The disadvantages of entrenchment in the system, stigmatisation and criminal associations can largely be avoided by diversionary schemes. Statistics show 60-70% of first offenders never re-offend whether they go to court or not. Police are encouraged to caution rather than charge and are investing substantial resources in pilot 'Cautioning Conferences' to be used as an alternative to court.

Operation Yugo does not sit well with the new trend. Children entrapped by Operation Yugo were diverted into the criminal justice system rather than away from it. It would have been more appropriate for police to target existing pawnbrokers dealing in stolen goods than to encourage further crimes.

Although official policy on juvenile justice is to concentrate on prevention and diversion the practice on the streets is not reflecting this. Operation Yugo and other proactive policing practices may be considered part of another direction in policing towards greater social control. This is particularly worrying given the fervour of almost evangelical dimensions attributed to police 'selling' Community Aid Panels and Cautioning Conferences. Both schemes are initiated

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ing evidence from a senior crown prosecutor that 'some [prosecutors] are more fair than others'.<sup>10</sup> However, he was loath to 'force changes' by recommending legislation. His preference was to strengthen and make more objective, existing DPP guidelines, although he conceded legislation would have to be considered if prosecutors failed to demonstrate greater objectivity and trustworthiness in providing information.

Can we afford to rely on the professional integrity of prosecutors to ensure material about informer-witnesses is passed on? Has the DPP's new informers' policy strengthened prosecutors' predilection for disclosure? John Korn is not confident:

... regrettably it's my view and I believe the view of a lot of my colleagues appearing for the defence ... that within the last five years in the DPP, there is clearly an increasing attitude of the importance of winning ... the ethos that it's important to win is I think, quite prevalent down there.

### Reviewing the index

Although the ICAC recommended the Informers Index should be 'kept under review' and 'assessed empirically', there is no mention of who will be responsible for this and when. Concerns about the operation of the index have been raised on a number of occasions by myself and David Brown, Associate Professor of Law at the University of NSW. In August 1992, the former DPP, Mr Reg Blanch refused a request from David Brown to be interviewed about the index, stating: '... I advise I do not give interviews of this nature as a matter of policy and because of the time involved'. Mr Blanch did agree to respond in writing to a series of questions about the index. In his response, he admitted his Office did not keep a record of requests from defence counsel for information from the index and was 'unaware' of whether any information from the index had been withheld from defence lawyers.<sup>11</sup> This response indicated that suitable data with which to assess the index empirically, was not being collected. David Brown wrote to the ICAC Commissioner on 17 August 1992, expressing these concerns:

I understand that a major issue dealt with at the recent ICAC informers inquiry was the need for government agencies to maintain reliable and complete records and files. I am concerned that Mr Blanch's response indicates inadequate procedures in the DPP to ensure accountability regarding the Index.

The Commission responded on 7 September 1992:

... the commission presently regards the information which it has ... as adequate for the purposes of the preparation of the report on the investigation.

More recently I put the same questions to the Acting DPP, who, like his predecessor, refused an interview 'as a matter of policy and because of the time involved' stressing in the next paragraph: 'That is not to say that my Office is not committed to openness and accountability'. Mr Howie's written response does not reveal any improvements in data-collection, claiming 'figures were not available' in response to four of my nine questions.

Mr Howie's response to a question about monitoring the index is most revealing of the DPP's perception of the purpose of the index:

Q: What systems do you have in place to monitor the effectiveness of the index? How do you know it is serving the purpose for which it was set up?

A: The basic purpose of the Index is to assist my Office to make informed decisions as to the reliability of informer witnesses ... the decision whether to call the witness is a more informed decision than would otherwise be the case.

[R.N. Howie QC, personal correspondence 12 April 1994]

### Conclusion

If the DPP is as open and accountable as Messrs Howie and Blanch would have us believe, then it should be monitoring and encouraging the use of the index. This is clearly not happening. The inaccessibility of the index is depriving defence lawyers, and more importantly, defendants, of vital information with which to vigorously test prosecution cases. The index has great potential to help realise the principle of 'full and timely' disclosure: and yet it seems hardly anyone knows about it.

The prosecutions' suppression of credible evidence tending to contradict evidence of guilt militates against the basic element of fairness in a criminal trial.

[Murphy J in *Lawless v R* (1979) 142 CLR 657 at 682].

### References

1. Independent Commission against Corruption (ICAC), *Report on the Investigation into the Use of Informers*, Vol. 1, January 1993, p.97.
2. R.O. Blanch QC, DPP, personal correspondence, 11 August 1992
3. R.N. Howie QC, Acting DPP, personal correspondence, 12 April 1994.
4. Brown, D. and Duffy, B., 'Privatising Police Verbal: The Growth Industry in Prison Informants', in K. Carrington and others (eds), *Travesty, Miscarriages of Justice*, Academics for Justice, Sydney, 1991.
5. ICAC, above, at p.97.
6. Grabosky, P., 'Prosecutors, Informants and the Integrity of the Criminal Justice System' (1992) 1 *Current Issues in Criminal Justice*.
7. R.N. Howie, QC, personal correspondence, 12 April 1994.
8. Hidden, P., *Reflections of Defence Counsel on Prison Informants*, Paper presented to University of New South Wales, Faculty of Law, Continuing Legal Education Seminar on Informers and the Criminal Law, 3 May 1993.
9. ICAC, above, at p.101.
10. ICAC, above, at p.79.
11. R.O. Blanch, DPP, personal correspondence, 11 August 1992.

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by and controlled by police. Police may be involved in entrapping a child at one end of the process and sitting in judgment at the other end with no independent review or safeguards in between.

### Conclusions

Police are gatekeepers and their role is crucial in bringing about reform. A great deal of effort has gone into policy development but it has yet to filter down to the Special Operations area, let alone constables on the street.

The fact Operation Yugo is regarded by police, and no doubt many of the public, as a success is an indication these types of activities will continue and even escalate. In May 1994 the police announced a similar 'success' involving four phony pawnshops and the arrest of more than 135 suspects.

Who will watch over police conduct? At the moment no one.

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