



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Preliminary Paper No 28

CRIMINAL PROSECUTION

A discussion paper

*The Law Commission welcomes comments on this paper
and seeks responses to the questions raised.*

These should be forwarded to:
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by Friday, 2 May 1997

March 1997
Wellington, New Zealand

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Preliminary Paper / Law Commission Wellington 1997
ISSN 0113-2245 ISBN 1-877187-01-1
This preliminary paper may be cited as: NZLC PP28

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Preface

IN 1989 THE LAW COMMISSION was asked by the Minister of Justice to review the law, structure and practices governing procedure in criminal cases. This project is a continuing one. Its purposes are, amongst other things, to ensure that criminal procedure:

- conforms to New Zealand's obligations under the International Covenant on Civil and Political Rights
- conforms with the principles of the Treaty of Waitangi
- guarantees the fair trial of accused persons
- protects the rights and freedoms of all persons suspected or accused of offences and
- provides efficient and effective procedures for the prosecution of offences and the hearing of criminal cases.

With these purposes in mind the Commission was asked to examine the law, structures and practices governing the procedure in criminal cases from the time an offence is suspected to have been committed until an offender is convicted. The reference includes reviewing decisions to prosecute and consideration of who should make prosecution decisions.

In November 1990 an issues paper on *The Prosecution of Offences* (NZLC PP12) was published and in May 1991 the former President of the Law Commission, Sir Owen Woodhouse, prepared an unpublished report for the Commission on the English and Scottish prosecution systems.

In order to elicit Māori opinion about the prosecution process the Commission sponsored a hui in Wellington in November 1994. Those who attended are listed in appendix A.

To help it consider more fully the prosecution process the Commission set up an advisory group. Its members were Hon Justice Goddard (then Deputy Solicitor-General), Judge S G Erber, John Haigh QC, Judge G A Rea (then Crown Solicitor at Napier), and Neville Trendle (Commander, Wellington Region, New Zealand Police). On the appointment of Judge Rea to the Bench, Simon Moore (Crown solicitor at Auckland) was added to the group. The Commission also consulted with the New Zealand Police, in particular, Senior Legal Adviser John Crookston, Chief Inspector Dave C Smith and Inspector Grant Middlemiss. The Commission's work has been helped by consultation with the Criminal Justice Policy Group and the Strategic Responses to Crime Group of the Ministry of Justice, and the Department for Courts.

The Commission acknowledges the help of Mr Jim Cameron, a former Deputy Secretary for Justice and former member of the Law Commission, for his work in relation to this project. It also acknowledges the work of those members of its research staff who were involved in researching, writing and preparing this paper for publication.

No draft legislation is included in this paper as the proposals raised are administrative in nature. We emphasise that the views in this paper are provisional conclusions and do not preclude further consideration of the issues.

Submissions or comments on this paper should be sent to the Director, Law Commission, PO Box 2590, DX SP23534, Wellington, by 2 May 1997, or by e-mail to Director@lawcom.govt.nz. We prefer to receive submissions by e-mail if possible. Any initial inquiries or informal comments can be directed to Christine Hickey, Senior Researcher: telephone (04) 473 3453; fax (04) 471 0959; e-mail: CHickey@lawcom.govt.nz).

Part I

INTRODUCTION

1

Review of the prosecution system

OVERVIEW OF THE PAPER

- 1 **T**HE SCOPE OF THE REVIEW of the prosecution system undertaken by this paper is set out in chapter 1. Chapter 2 is a glossary of terms used throughout the paper. Chapter 3 sets out what the Law Commission believes should be the objectives of the prosecution system, and outlines some basic assumptions on which the paper is based. Chapter 4 is a summary of the proposals which are covered in greater detail in Part IV. It also contains a summary of questions asked and issues raised throughout the paper which may assist readers to formulate comments and submissions on the proposals outlined by the Commission.
- 2 Part II, The Prosecution System, describes the historical development and evolution of the prosecution system, outlines the agencies which currently prosecute, and looks at the police discretion to prosecute and how it is exercised. Plea negotiation is also examined. The course of prosecutions through the court system is described, and issues of control and accountability in the prosecution system are examined.
- 3 Part III, Wider Issues, examines three issues – victims and their needs, te ao Māori, and restorative justice – which are central to any consideration of the criminal justice system to be considered when looking at the prosecution system.
- 4 Part IV, Options for Reform, summarises aspects of the existing system and suggests options for reforming the system to promote an official prosecution process. Subsequent chapters go on to outline the proposals in greater detail, and cover the structure of the system, the powers of prosecutors, plea negotiation, victims, control and accountability, private prosecutions, preliminary hearings, and the use of minor offence and infringement notice procedures.
- 5 Chapter 23 looks at the costs and benefits of the Commission’s proposals. At the end of the paper there are several Appendices which contain detailed information related to the prosecution system.

THE SCOPE OF THE REVIEW

- 6 The purpose of this paper is to review the legal and administrative structures, procedures and agencies involved in prosecuting criminal offenders. Prosecution is an integral part of the criminal justice system and many of the issues raised by this review have implications for the whole system – not just the prosecution

system. The gross cost of the criminal justice system, including the prosecution component is significant. In 1993–1994 it was costed at \$1 156 576 337.¹ This includes at least \$61 million for the costs of prosecutions by major prosecuting agencies such as the police and the Crown Law Office.² The essence of this review is to answer the following questions:

- Who decides whether there should be a prosecution and for what offence?
- What factors are relevant to a decision to prosecute or to continue a prosecution?
- What alternatives to formal prosecution are considered and by whom?
- If a prosecution is discontinued or a different offence charged, who makes the decision and what factors are considered?
- What other input is there into prosecution decisions?
- What accountability is there for decisions to prosecute?
- Who conducts the prosecution in court?

The review spans the time from when a suspected offence comes to the attention of an investigating agency until a person is prosecuted for the offence in court.

- 7 The review raises important issues. The question of who decides whether to prosecute involves asking how far the prosecution of offences should remain a State function, and whether private prosecutions should be retained. It also requires consideration of the present prosecution structure and alternatives to it, such as the creation of a Crown prosecution service. A related question is whether the investigative and prosecution functions of a single organisation, such as the police, should be made more distinct.
- 8 It is also important to remember that the investigation and prosecution of offences is not the exclusive responsibility of the police. The review takes into account other agencies responsible for the investigation and prosecution of a diverse range of offences, such as the Serious Fraud Office.
- 9 The prosecution of a criminal offender in court is the most public part of the prosecution process. Other parts of the process – including decisions about whether to prosecute, whether to use an alternative to prosecution, and what offence or offences the person will be charged with – are currently made in ways which provide little opportunity for independent oversight. The decisions of defendants whether or not to plead guilty, and the interactions between victims of offences and prosecutors, have been largely invisible.

MATTERS OUTSIDE THE REVIEW

Alternatives to prosecution

- 10 The review of the prosecution system focuses on the processes leading to formal prosecution in court, yet a large number of offences brought to the attention of the police and other agencies are never prosecuted. There are a variety of reasons for this; significantly, the availability of alternative procedures. As part of the description of the prosecution system in Part II there are brief descriptions of other procedures, such as family group conferences and diversion. The

¹ See appendix C.

² The Cost Implications of the Criminal Prosecution Discussion Paper Proposals, prepared by the Hunter Group for the Law Commission, referred to in this paper as the Hunter Group report (Wellington, 1996).

question of who makes the decision to use procedures other than prosecution and on what grounds is partly addressed; however, a detailed examination of alternative procedures is outside the scope of this review. The Commission is examining such procedures in its review of diversion and other alternatives to prosecution.

Related aspects of criminal procedure

- 11 The review is concerned with the structure and procedures of the prosecution system, and the duties and powers of prosecutors. It does not examine the substantive content of any decisions made, the investigation itself, or the rights of suspects and defendants. Nor does the review deal with evidentiary issues, trial procedures, the right of silence, or the right to elect trial by jury. The Commission will review some of these matters separately within its criminal procedure and evidence references.

ASSUMPTIONS OF THE REVIEW

- 12 The review of the prosecution system is based on three assumptions:
- The existing division of offences into summary and indictable offences should continue – at least in the short term.
 - The adversarial nature of prosecution in New Zealand should not be changed.
 - The discretion to prosecute should be retained.

These assumptions arise out of the practical need to avoid delaying the process of reform and to avoid the significant costs, upheaval and uncertainty that would be associated with radical change. In the Commission's view the system should not be altered more than is necessary to remove or mitigate demonstrable faults.

The division into summary and indictable offences

- 13 At present, all offences are divided into summary or indictable offences (see the definitions in chapter 2), a division which has major procedural and structural consequences for the prosecution system. However, the division is not absolute as most indictable offences can be prosecuted summarily. As part of its reference on criminal procedure the Commission is required to examine the division of summary and indictable offences. The Commission will be considering this, at least in part, in the context of its forthcoming discussion paper on juries. To progress the review of the prosecution system, the Commission has assumed for the moment that this division will remain.

The adversarial nature of prosecution

- 14 A fundamental question for resolution in the Commission's review of criminal procedure is whether the adversarial system should be replaced with an inquisitorial one, or to what extent the present adversarial system should be modified by introducing inquisitorial elements.³ The Commission has assumed that the basic adversarial nature of prosecution in New Zealand will not be changed. Further, a choice between an adversarial or inquisitorial prosecution

³ A research paper entitled "A parameter of reform: the adversarial system" is available on request from the Law Commission. It compares the adversarial and inquisitorial models.

system – two western forms of trial procedure – is probably not adequate to address Māori concerns about the criminal justice system (see chapter 11). The present adversarial system has been criticised as being alien to Māori⁴ but there is no reason to believe that an inquisitorial system would be seen by Māori as an improvement. Serious consideration of an inquisitorial system would require a fundamental examination not only of the prosecution system but of the entire system of criminal justice. It is impracticable and unnecessary to redesign the entire system in this review.

- 15 The assumption that the basic adversarial nature of the prosecution system will not be changed does not preclude particular reform proposals which introduce a non-adversarial element.

Discretion to prosecute

- 16 The maintenance of the discretion to prosecute, which is examined in chapters 7 and 16, is basic to the Commission's approach in this paper.

REFORM PROPOSALS

- 17 The Commission's proposals are set out in detail in Part IV of the paper and emphasise the need for:
- the separation of investigation and prosecution functions;
 - oversight, review and direction of the prosecution system through Crown solicitors and the Crown Law Office, and ultimately by the Solicitor-General;
 - an enhanced role for victims and
 - clear lines and forms of administrative accountability.

A summary of proposals and questions raised in this paper is provided in chapter 4.

⁴ Department of Justice, *The Māori and the Criminal Justice System: He Whaiāpaanga Hou – A New Perspective: Part 2* (Wellington, 1988); Patterson, *Exploring Māori Values* (Dunmore Press, Palmerston North, 1992) 136.

2 Glossary

MANY OF THE TERMS used in the prosecution system are not in common use, or if they are, their everyday meaning may be different from their legal meaning. Chapter 5, on the history of the prosecution system, provides some background to the modern use of certain words, but it is also helpful to consider the meaning of various terms here.

Accused see *Defendant*

Adversarial systems require the court (judge or jury) to impartially hear and decide on the facts presented in evidence by the parties to proceedings. Some degree of equality between the parties is assumed. These systems are also known as accusatory, so named because a person or representative of the community makes an accusation of criminal offending against a suspect.

An **arraignment** happens in the High Court when the defendant is read the *charge* or charges and asked to plead guilty or not guilty to the *offence* or offences contained in the *indictment*. To arraign a defendant has the same meaning. The phrase “arraigned on the indictment” in respect of indictable proceedings, is also used in this paper.

A **charge** is the formal allegation of an *offence* for which a person is arrested, or summonsed to appear before a court, and on which he or she may be tried in court. Under s 316(1) of the Crimes Act 1961 every person must be told, at the time of arrest, why he or she is being arrested. This generally means being told the *charge* or charges he or she faces.

Committal for trial The defendant is committed for trial if a *prima facie* case is established at the *preliminary hearing*. The next stage in the proceedings is the presentation of the *indictment*.

Defendant or **accused** is a person in respect of whom an *information* has been filed and not yet disposed of by withdrawal, conviction or acquittal. The defendant is sometimes called the accused, particularly if charged with an *indictable offence*.

Depositions Originally this term was used to describe the written statements of witnesses taken at the preliminary examination or hearing, but it is now used as another term for the *preliminary hearing*.

Indictable offence New Zealand has two classes of criminal offences: *summary offences* and indictable offences. Indictable offences are generally more serious.⁵ The primary meaning of indictable offence is an *offence* that will be tried in front of a judge and jury. However, most indictable offences may also be tried summarily, that is, by a judge alone.

⁵ Hodge, Doyle and Hodge *Criminal Procedure in New Zealand* (Law Book Co Ltd, Sydney, 1991, 3rd edn) 14.

Indictment An indictment is similar in nature to an *information*. It is a formal charge presented to a judge alleging that the named person has committed a specified *indictable offence*. It is used to commence a jury trial⁶ and is presented following a committal for trial.

Information and the informant The **information** is the document which is usually filed in court to initiate a criminal proceeding. It contains a sworn assertion by a named person the **informant** (usually a police officer), that another named person, the *defendant*, is suspected of having committed a specified offence. The defendant is required to plead guilty or not guilty to the *offence* contained in the information. The informant in respect of *infringement notices* is defined to include officers of government agencies and local authorities.

Infringement offence and notice The penalty for an **infringement offence** is a fixed fine. An infringement offence is defined in the Summary Proceedings Act 1957. A *defendant* will be presented with an **infringement notice** which specifies the fine he or she must pay.

Minor offence A **minor offence** is defined in the Summary Proceedings Act 1957 as a *summary offence* where the defendant is not liable to imprisonment and is liable to a fine not greater than \$500.

The term **offence** is defined in the Crimes Act 1961 s 2 as an act or omission for which anyone may be punished. It is used in the same sense in this paper.

Preliminary hearing In cases proceeding by way of *indictment* the preliminary hearing establishes whether a *prima facie* case exists against the *defendant*. Preliminary hearing is the term used in the Summary Proceedings Act 1957, this hearing is sometimes called the committal proceedings or hearing, the pre-trial hearing, or *depositions*. If a *prima facie* case exists the defendant will be *indicted* and face a jury trial.

Prima facie The literal meaning of *prima facie* is “at first sight”. In legal terms it is the test used at a *preliminary hearing* to establish whether a *defendant* will face a jury trial. A *prima facie* case is one in which a properly directed jury, relying on the evidence, could find guilt proved beyond reasonable doubt.

Prosecution Guidelines The term Guidelines is used in places for convenience to mean the Prosecution Guidelines issued by the Solicitor-General in November 1992.

The term **prosecutor**, as used in this paper, refers to anyone who makes a prosecution decision and conducts a prosecution. It includes police prosecutors (prosecution section officers), Crown solicitors and officers of government prosecuting agencies. Otherwise, specific terms such as police prosecutor or Crown solicitor, are used where appropriate.

A **summary offence** is generally a less serious criminal offence carrying a penalty of three months imprisonment or less. Summary offences are tried by way of summary proceedings, that is, by a judge without a jury.

⁶ An accused charged with an offence which carries a maximum penalty of less than 14 years imprisonment may apply to the High Court under s 316B of the Crimes Act 1961 to be tried by judge alone.

3

Objectives of the prosecution system

- 18 **T**HE PROSECUTION SYSTEM in New Zealand has come about by accident rather than by design. Change and development have not occurred in response to pre-defined and agreed general principles, nor have the broad implications of changes for other parts of the criminal justice system been considered. This chapter sets out what should be, in the Commission's view, the objectives of the prosecution system. The present system needs to be assessed with regard to these objectives, while also having regard to the scope of review. Proposals for reform need to be formulated in areas where the system does not meet these objectives, and must be tailored to meet those objectives.

THE GOALS OF CRIMINAL JUSTICE

- 19 The criminal justice system in its widest sense includes the criminal law, the agencies which enforce that law and prosecute offenders, the courts in their criminal jurisdiction (including juries, witnesses, victims, prosecutors and defence counsel), the range of sentences available when a defendant pleads guilty or has been convicted, and the institutions that carry out those sentences. The prosecution system is an important component of the criminal justice system, and it is essential that the objectives of both systems support each other.
- 20 The Commission is not aware of any authoritative statement of the fundamental goals of criminal justice. There have been many proposed definitions of the purposes of criminal sanctions (ie, to punish, deter, denounce, reform etc) but beyond this remains a deeper question about why punish, deter etc. Work is being undertaken by the Ministry of Justice to develop performance measures applicable to the entire justice sector, of which the criminal justice system is a major part, however, that work is in its early stages. In as far as laws, procedures and government institutions can appropriately and adequately do so, the Commission regards the fundamental goals of the criminal justice system as:
- The protection of the peace and common good of society from the blameworthy acts of members of society who threaten or impair it.
 - The protection of all people and their property from injury by the blameworthy acts of others.
 - The bringing of offenders to justice.
- 21 The system seeks to achieve these goals by deterring offending and ensuring that those who are blameworthy are identified and dealt with in such a way as to minimise the likelihood of their offending again. Formal prosecution of those

who breach the criminal law is one way of achieving this. The central purpose of the prosecution system is to prove that the defendant did what is alleged and that this amounts to a breach of the criminal law; the purpose of the trial is to establish whether that is proved according to law. Many of the formalities and technicalities of criminal procedure arise from and are directed to these purposes.

- 22 The Solicitor-General's Prosecution Guidelines (appendix B) expressly state that the prosecution of criminal offenders is a State function, emphasising that the Attorney-General has ultimate constitutional responsibility for prosecutions. The Commission agrees: the prosecution of offences, no less than the investigation of crime and the preservation of the public peace, is a core function for which any modern State must accept direct responsibility. The State must be responsible for providing structures and means that allow the effective and efficient prosecution of offences. It must also be ultimately responsible for prosecution policies and the exercise of prosecution discretions. In the context of the wider criminal justice system, and the use of alternative procedures,
- [i]t is the Government's role to encourage and support . . . community commitment by providing resources, information and advice, and by ensuring that community and government efforts are jointly focused on a set of priorities at a national level.⁷

THE PROSECUTION SYSTEM

- 23 Within this overall framework of criminal justice, the Commission considers the following should be objectives of the prosecution system:
- to subject offenders to the processes of the law (para 24);
 - to ensure that law and practice conform to the principles of te ao Māori (the Māori dimension) and the Treaty of Waitangi (para 25);
 - to ensure that the human rights and dignity of persons suspected or accused of offences are respected and that they are not placed in jeopardy without sufficient cause (paras 26–27);
 - to ensure that the interests of victims are secured (paras 28–29);
 - to limit the use of formal prosecutions to cases where that is the only appropriate method of dealing with a person who has broken the law (para 30);
 - to ensure that prosecution decisions are made in a fair, consistent and transparent manner and that those who make the decisions are accountable (para 31);
 - to ensure the prosecution system is economic and efficient (paras 32–33); and
 - to reflect the aspirations of New Zealanders (paras 34–35).

These objectives are discussed below, however, there are tensions among them. For example, the need to convict offenders and the rights of victims are qualified by the right of defendants to a fair and public hearing.

⁷ *The New Zealand Crime Prevention Strategy* (Department of the Prime Minister and Cabinet, Crime Prevention Unit, Wellington, 1994) 4.

Offenders

- 24 The prime objective of the prosecution system, from which all others flow, is to secure the conviction of guilty offenders through lawful process while ensuring that the innocent are not convicted. A related objective, to be balanced against the rights of alleged offenders, is to encourage persons who are guilty to acknowledge their guilt at an early stage in the prosecution process.

Te ao Māori and the Treaty of Waitangi

- 25 One of the objectives of the prosecution system should be to ensure that law and practice conform to the principles of te ao Māori and the Treaty of Waitangi. The application of the principles of te ao Māori and the Treaty to criminal procedure, and more specifically the prosecution system, have not been consistently and systematically addressed in legislative and administrative reviews and reforms. The present prosecution system is a product of English and New Zealand history, and it is a part of the common law legal tradition. As a result of piecemeal reform, only recently in New Zealand have some procedures been adopted which accord to some extent with te ao Māori, for example the introduction of family group conferences for young offenders under the Children, Young Persons and Their Families Act 1989.

The rights of suspects and defendants

- 26 As required by the criminal procedure reference, the Commission must ensure that the prosecution system conforms to New Zealand's obligations under the International Covenant on Civil and Political Rights.⁸ The New Zealand Bill of Rights Act 1990 was enacted to affirm New Zealand's commitment to the International Covenant. The Bill of Rights Act provides significant protection for the rights of suspects and defendants.⁹ Section 25 provides:

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

- (a) The right to a fair and public hearing by an independent and impartial court;
- (b) The right to be tried without undue delay;
- (c) The right to be presumed innocent until proved guilty according to law;
- (d) The right not to be compelled to be a witness or to confess guilt;
- (e) The right to be present at trial and to present a defence

Sections 23–24 and 26–27 also provide important rights for suspects and defendants in the investigation and prosecution processes.

- 27 The protection of the rights of suspects and defendants is a proper objective of the prosecution system. While this review does not directly examine those rights, it is important to ensure that the structures and procedures of the prosecution system do not diminish them except where sufficient reason demands. Fundamental premises underlying the assumption that formal

⁸ NZTS 1978 No 19, AJHR 1979 A 69; AJHR 1984–1985 A 6.

⁹ Note that the corresponding provisions of the International Covenant on Civil and Political Rights are not entirely synonymous with those in the New Zealand Bill of Rights Act 1990. Compare for example article 9(2) and 9(3) of the Covenant with s 23(2) and 23(3) of the New Zealand Bill of Rights Act 1990.

prosecution remains adversarial in nature (see paras 12 and 14) are that:

- both parties are represented by legally trained counsel with defendants' right to counsel provided for under s 24(f) of the New Zealand Bill of Rights Act 1990; and
- both sides of the case are fully argued before a neutral adjudicator.

The interests of victims

- 28 Traditionally, the criminal law has been viewed as being concerned with the State's interests in the preservation of peace and order, and civil law as being concerned with providing redress and compensation to individual victims. In the past the criminal justice system has marginalised victims of offences. Today, public opinion is shifting, however, with victims' issues receiving attention and support across a broad political spectrum.
- 29 Restoring and satisfying the victims of crime is a proper and important objective of the prosecution system, and can be seen as part of the broader aim of criminal justice to protect the peace and common good of society. However, crimes against the individual victim are also acts against society as a whole. The interests of the victim need to be balanced against the other objectives of the prosecution system.

Limiting the use of formal prosecution

- 30 Not all detected breaches of the criminal law are followed by formal prosecution. Prosecutors are obliged to consider whether the public interest requires a prosecution in a particular case. For serious offences, the public interest will normally require a prosecution, but in other cases the goals of criminal justice may be better achieved without formal prosecution. For example, education about the law might be more effective than prosecution in preventing breaches of the criminal law, or a different kind of procedure, such as diversion or a family group conference, may be more appropriate:

These more informal community-based punishments, if they are imposed with the consent of the offenders, are frequently preferable to prosecution, since they do not entail the latter's delay, cost and stigma. They may also be more attractive than formal court punishments because they involve dispositions of more immediacy and relevance to offenders.¹⁰

In other instances, the public interest in prosecution may be outweighed by the harm to the offender, the victim or the public.

Fairness, consistency, transparency and accountability

- 31 Promoting fairness, consistency, transparency and accountability as objectives in the exercise of prosecution decisions is a key aspect of this review. When measuring the existing system against these objectives it is clear that many decisions relating to prosecution occur in private, and few mechanisms for control and accountability exist. These objectives are the basic elements of justice and there will only be public confidence in the system if they are pursued.

¹⁰ *Report of the Royal Commission on Social Policy/Te Komihana A Te Karauna Mo Nga Ahautanga-A-Iwi* (April 1988) vol IV, 206.

Efficiency and economy

- 32 The resource costs of the criminal justice system are high. While exact figures are not readily obtainable, an examination of the costs of government agencies that play a significant part in the system shows the 1993–1994 gross direct costs attributable to the administration of criminal justice, plus such indirect costs as are easily identifiable, as \$1 156 million.¹¹ Even after deducting the very large costs of administering custodial and non-custodial sentences and enforcing monetary penalties, the costs were \$872 million. This figure does not include defendants' costs not paid for by legal aid, the costs of prosecutions by local bodies or private agencies, the loss suffered by victims, or the costs of security measures.
- 33 The review of practices and procedures to minimise costs is an important aspect of the Commission's task, however, this objective must be balanced against the other objectives of the prosecution system. Efficiency and economy should not be attained at the expense of compromising the quality of criminal justice, the rights of suspects and defendants to fair procedures and a fair trial, or the interests of victims. Nor should any changes compromise the objective of preventing offences and convicting offenders, which are the practical objectives of the criminal justice system.

The aspirations of New Zealanders

- 34 In 1988 the Royal Commission on Social Policy stated:¹²
In the institutions of justice, as in other areas of social policy, it is vital that procedures are seen to be acceptable and fair not only from a majority point of view, but also from the perspective of minority groups and of the consumers of the system, who might otherwise be without the power or resources to have their voices heard.
As part of the wider criminal justice system, the prosecution system should be flexible enough to respond to the different needs of communities in New Zealand, without compromising its other objectives. This involves, for example, recognising the rights and needs of mentally ill suspects, and providing alternatives to prosecution for young offenders.
- 35 The Commission's own statement of purpose says that its aim is to help achieve law that reflects the heritage and aspirations of the peoples of New Zealand. In its work the Commission wishes to recognise the Treaty of Waitangi as the founding document of New Zealand. The Commission also takes account of community and international experience.

¹¹ An elaboration of this and following figures, and the basis on which they were compiled, is contained in appendix C.

¹² Royal Commission on Social Policy (1988) vol IV, 197.

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Summary of proposals and questions

PROPOSALS

36 **T**HIS CHAPTER SUMMARISES the Commission's proposals for the reform of the prosecution system with cost implications of the proposals outlined in chapter 23. In some of the areas discussed in chapters 15–22 the Commission has formed only tentative views and invites comments on the options set out in the paper. In most areas, however, the Commission has indicated its preferred option for reform. We are also interested in comments on these proposals. Throughout the following chapters we have included questions about our proposals as a guide for those who wish to make submissions on the paper. For ease of reference, all of these questions are grouped in a summary in the second half of this chapter.

Structure of the prosecution system

- A separate Crown prosecution service is not a good option for New Zealand. Instead, the present system should be improved by further separating investigative and prosecution functions.
- The role of Crown solicitors as independent prosecutors should be developed and strengthened by the increased oversight of the Solicitor-General through the Crown Law Office.
- An autonomous, national, career-orientated prosecution service should be established within the police. It should be responsible for reviewing charging decisions, referring appropriate cases to Crown solicitors and conducting summary prosecutions. Its officers should have the power – subject to the instructions of the head of the service – to discontinue proceedings, divert, amend charges, and substitute summary for indictable informations and vice versa.
(See chapter 15.)

Prosecutors' powers

- Once the initial charging decision has been made, Crown solicitors should take over all indictable proceedings from the police and other prosecuting agencies. Crown solicitors should take over some summary proceedings in accordance with guidelines to be formulated by the Crown Law Office in conjunction with the police and other prosecuting agencies.
- The Solicitor-General and Crown solicitors should be able, in exceptional cases (other than a private prosecution), to direct or veto a prosecution. They should have the power to discontinue prosecutions, divert, amend charges, and substitute indictable for summary procedures and vice versa.
- The first stage of the test for determining whether to proceed with a prosecution should be whether there is a reasonable prospect of conviction,

bearing in mind that in some classes of case a prima facie test would be sufficient.

- All prosecutors, including those in prosecuting agencies, should be bound by the Prosecution Guidelines.
(See chapter 16.)

Charge negotiation

- The Prosecution Guidelines regulating charge negotiation should be expanded to adequately cover issues of fairness, consistency, transparency and accountability.
(See chapter 17.)

Victims

- The position of victims in the prosecution system should be strengthened. The Victims of Offences Act 1987 should be reviewed, and the Prosecution Guidelines should be amended so that prosecutors have an obligation to consult with victims and to provide them with information about the prosecution's progress. All prosecuting agencies should take account of victims' interests.
(See chapter 18.)

Control and accountability

- All prosecutions other than private prosecutions should be brought in the name of the Crown; and any authority a prosecution agency has to prosecute should derive by delegation from the Attorney-General.
- A unit should be established in the Crown Law Office with the primary purpose of overseeing the prosecution system and monitoring compliance with the Prosecution Guidelines.
- The Police Complaints Authority Act 1988 should be amended to clarify that prosecution decisions of the police are reviewable by the Police Complaints Authority on the same basis as other discretions.
- The law should be clarified to ensure all prosecution decisions are subject to an effective form of judicial review.
- Section 20 of the Serious Fraud Office Act 1990, which provides immunity from judicial review for the prosecution decisions of the Director of the Office, should be repealed.
(See chapter 19.)

Te ao Māori

- Not only the prosecution system but also the criminal justice system are criticised as failing to accommodate Māori interests. An examination of the whole criminal justice system is likely to be required to meet Māori concerns.
(See chapter 11.)

Private prosecutions

- Private prosecutions, as an important safeguard against State failure to prosecute, should be retained. However, the leave of the court should be required before a private prosecution may be commenced.
(See chapter 20.)

Preliminary hearings

- Preliminary hearings should be retained but prosecution evidence should be accepted in the form of a written statement without a preliminary hearing unless personal attendance is required by the court. Cross-examination of witnesses should be by leave of the court and only for limited, recognisable and practical reasons.
(See chapter 21.)

Minor offence and infringement notices

- Formal prosecutions and the trial process should only be used when necessary. A good case exists for enlarging the minor offences and infringement notice procedures.
(See chapter 22.)

QUESTIONS

Chapter 9: The prosecution in court

- Q1 Should a s 347 Crimes Act 1961 discharge be exercised similarly to the English appellate procedure or would doing so wrongly usurp the jury's function? (para 175)
- Q2 Should there be a right of appeal in respect of a discharge under s 347? (para 176)

Chapter 11: Te ao Māori and the Treaty of Waitangi

- Q3 Should the proposals in paras 254 and 257 be enacted immediately, or should they be deferred until a broad-based examination of the criminal justice system – as outlined in para 258 – is undertaken? What other administrative changes to improve the place of Māori in the criminal justice system could be made immediately?
- Q4 Should there be a full review of the criminal justice system with a view to meeting Māori concerns? If so, what body is best placed to undertake such an examination? (para 258)

Chapter 13: Restorative justice

- Q5 How might adopting restorative justice principles influence the proposals in this paper for the reform of the prosecution system? (para 312)

Chapter 15: The structure of the prosecution system

- Q6 Should there be a discretion to prosecute? (para 320)
- Q7 Are there options for reform of the structure of the prosecution system other than the three outlined in paras 329–330 that should be considered?
- Q8 Should prosecution services be privatised? (para 336)
- Q9 Is establishing an independent Crown Prosecution Service an appropriate solution in the New Zealand context? Which offences could be prosecuted by a Crown prosecution service? Should police or officers of government agencies make all the initial charging decisions? (para 341)

- Q10 Should the role of Crown solicitors as independent public prosecutors be developed? (para 346)
- Q11 Should Crown solicitors have a duty to take over indictable proceedings? (para 348)
- Q12 Should Crown solicitors ever make initial charging decisions? (para 349)
- Q13 Should the mode of appointment and the tenure of Crown solicitors be changed? (para 350)
- Q14 Should police continue to prosecute summary offences? (para 352)
- Q15 Should a more autonomous national police prosecution service be created? (para 357)
- Q16 Should all members of the police prosecution service be legally qualified? (para 358)
- Q17 Should a unit be established in the Crown Law Office to monitor the prosecution system? What should its functions be? (para 363)

Chapter 16: The powers of the prosecutors

- Q18 Should Crown solicitors, police and government agency prosecutors have the power to discontinue prosecutions? (para 369)
- Q19 If Crown solicitors have a power to discontinue a prosecution, should they also have a power to divert offenders? (para 370)
- Q20 Should Crown solicitors have the power to direct or veto prosecutions? (para 373)
- Q21 Should the Solicitor-General alone have such a power? (para 373)
- Q22 When should prosecutors be able to exercise their powers? (para 374)
- Q23 Should all prosecutors be bound by the Solicitor-General's Prosecution Guidelines ? (para 377)
- Q24 Should the reasonable prospect of conviction test be used to guide prosecutors deciding whether to prosecute? (para 379)
- Q25 Should the public interest factors in the Prosecution Guidelines be reviewed? What is their utility? (para 382)
- Q26 Should a prima facie test be sufficient in certain circumstances? (para 384)
- Q27 Should the Attorney-General (or the Government) be able to direct or influence prosecution policies? (para 385)

Chapter 17: Plea negotiation

- Q28 Should charge negotiation be recognised by legislation? If so, what should be in that legislation? (para 401)
- Q29 Should the Prosecution Guidelines regulating plea negotiation be expanded and made more specific? If so, what additional guidelines should be included? (para 407)
- Q30 Should the *New Zealand Law Society Rules of Professional Conduct for Barristers and Solicitors* be amended to provide defence counsel with guidance on their

responsibilities when entering charge negotiations on behalf of a client?
(para 408)

Chapter 18: Victims

- Q31 Should the Victims of Offences Act 1987 be amended to give victims' interests greater weight by creating enforceable rights and methods of enforcement?
(para 410)
- Q32 Should the Ministry of Justice co-ordinate policy making and service delivery?
(para 411)
- Q33 Should the Victims of Offences Act 1987 be reviewed? What issues need to be taken into account in such a review? (para 412)
- Q34 Should the Prosecution Guidelines and prosecuting agency guidelines be reviewed with a view to giving more prominence to victims' interests? What matters should such reviews take into account? (para 416)

Chapter 19: Control and accountability

- Q35 Who should have ultimate responsibility for prosecution policies and decisions?
(para 422)
- Q36 Should the power to prosecute be formally delegated by the Attorney-General? To whom should the power to prosecute be delegated? (para 429)
- Q37 Should all prosecutions be in the name of the Crown? What are the appropriate boundaries? (para 431)
- Q38 Should the Police Complaints Authority have the power to review prosecution decisions of the police? (para 433)
- Q39 Should all decisions to prosecute or not to prosecute, including those of the Serious Fraud Office, be judicially reviewable? (para 435)

Chapter 20: Private prosecutions

- Q40 If prosecuting offences is regarded as a central function of the State, should private prosecutions be retained? Are there currently problems with prosecutions by private agencies? (para 439)
- Q41 Should private prosecutors be required to give security for costs? (para 444)
- Q42 Should all private prosecutors be required to seek the leave of the court before bringing a private prosecution? If not, in which class of case should leave be required? If leave is refused, should there be a right of appeal to the High Court? (para 445)

Chapter 21: Preliminary hearings

- Q43 Should preliminary hearings be retained if the Commission's proposals are adopted? If so, in what form? (para 452)

Chapter 22: Minor offences and infringement notice procedures

- Q44 Should greater use be made of minor offence and infringement notice procedures? (para 454)

PART II

THE PROSECUTION SYSTEM

Part II of the paper describes the historical development and current operation of the prosecution system.

5

History and development of the prosecution system

The New Zealand prosecution system developed from the English system of the mid-nineteenth century, and retains many of the characteristics of that system. Some of the significant changes made in England, notably the introduction of the Director of Public Prosecutions, have not been adopted.

- 37 **T**HE PURPOSE OF THIS PART OF THE PAPER is to provide a general description of the prosecution system in New Zealand. Like many of New Zealand's legal institutions, the prosecution system has its roots deep in the strata of the English past. It is difficult to understand the system's terminology and structures without some knowledge of its history. This chapter gives a brief overview of the history of the prosecution system, from its beginnings in medieval England to developments both in England and New Zealand in the nineteenth century. Most of the discussion is confined to the prosecution of more serious (ie, indictable) offences, since the more significant changes to the prosecution system have occurred in relation to these types of offences.

DEVELOPMENTS IN ENGLAND

The grand jury

- 38 In medieval England the grand jury was responsible for the investigation of serious crime and for initiating its prosecution in court. Members of the grand jury were people of the neighbourhood where the crime had been committed. They were expected to have some knowledge of the circumstances of the crime and were put under oath to disclose the truth. The grand jury presented the accused person to a justice of the King's Bench (appointed by the Crown for the purpose of maintaining peace in the King's realm). The charge against the accused was contained in a document called the indictment, and the accused was arraigned on the indictment and then tried.
- 39 Originally the grand jury took the initiative in its investigation of serious criminal offences, its members provided the evidence on which the charge could be based. However, over time the grand jury came to rely on the ability or willingness of victims or their families to bring offenders before it. By the sixteenth century the expectation that members of the grand jury knew all the

facts of the case, and were bound by oath to tell the Crown those facts, had changed to an expectation that they knew none of the facts and only relied on evidence presented to them. The grand jury's function had been transformed into a "screening-out" role. They made a judicial determination whether the indictment laid before them with supporting evidence was a "true bill" – that is, whether on the evidence the accused should be tried on the charge in the indictment.

Justices of the peace

- 40 The changing function of the grand jury meant that others were required to investigate serious crimes and provide the evidence for the indictment. A number of different people undertook this responsibility, including local constables (the forerunners of today's police officers), but the primary role of investigation and prosecution was eventually taken up by Crown-appointed justices of the peace. Under the Justices of the Peace Act 1361 it was the duty of justices to "pursue and arrest" offenders. It became the practice of justices in their investigation of offences to question the accused and witnesses.
- 41 In the sixteenth century two important statutes were enacted laying down justices' duties and pre-trial investigative procedures in relation to serious criminal offences. Constables became subordinate to the justices and exercised power subject to the justices' oversight and control. Justices' inquiries were conducted in private. Evidence collected from witnesses by a justice was required to be put in writing; these written statements of witnesses were called depositions. The suspect was not entitled to give evidence, nor to be present while the evidence of other witnesses was being taken, nor even to see the depositions.
- 42 In theory, any private citizen could charge a person with an offence and bring the accused before the grand jury. However, in practice most of the burden fell on the justices of the peace. They conducted the investigative work and did not appear before the grand jury unless they thought there was a good case. In such circumstances the grand jury was left with little to do except commit the accused for trial.

The preliminary examination

- 43 In the early nineteenth century the nature of the justices' pre-trial inquiry was in the process of change; the investigative proceeding was becoming a judicial one. Constables began to independently undertake the investigation of offences. By the mid-nineteenth century justices were conducting an essentially public judicial inquiry to determine whether or not there was at least a prima facie case against the accused before he or she was committed to trial for an indictable offence. Legislation enacted in 1836 entitled the accused to inspect the depositions, and the Administration of Justice Act 1848 essentially codified the justices' new form of preliminary examination. The change in function of the justices' preliminary examination made the grand jury's judicial proceedings entirely redundant although the grand jury was not abolished until 1933.¹³

¹³ Alongside the preliminary examination was the coroner's inquest, the vehicle for investigating suspicious deaths. The coroner sat with a jury, and in England a coroner may still sit with a jury. Trial upon a coroner's inquisition was abolished in New Zealand by s 385 (1) of the Criminal Code Act 1893. In New Zealand, the coroner's jury was formally abolished in 1951.

The police

- 44 The establishment from 1829 of disciplined professional police forces throughout England coincided with changes in the nature of preliminary examinations. With a serious decline in the standards of private prosecutions,¹⁴ and with no alternatives available, by default the police gradually acquired the roles of investigator and prosecutor.¹⁵ In some respects the former role of constables as assistants to the justices made it natural for the police to assume these functions, although there was no formal political decision for them to do so.

The Director of Public Prosecutions

- 45 Even until the late nineteenth century there was still no systematic public prosecution of indictable offences. The majority of indictable offences were still prosecuted by private organisations or citizens.¹⁶ In 1879 the office of the Director of Public Prosecutions was created, however, for many years the Director's powers were rarely used. It was only with the enactment of the Prosecution of Offences Act 1908 that the Director's office really began to develop.¹⁷ The Director and staff of the office intervened in important and difficult criminal proceedings or those in which special circumstances required the prosecution of a particular offender. They were not concerned with routine prosecution decisions or the conduct of routine cases. In 1985 a complete system of public prosecution was established comprising the Crown Prosecution Service headed by the Director of Public Prosecutions.

DEVELOPMENTS IN NEW ZEALAND

- 46 When New Zealand became a British colony in 1840, what was essentially the English prosecution system of the time was introduced. A significant exception was the system of Crown prosecutors and solicitors: unlike England, New Zealand has not established a Director of Public Prosecutions office nor a Crown Prosecutions Service.

The grand jury and the preliminary examination

- 47 The system of grand juries was introduced to New Zealand in 1844. The grand jury's function was the same as in England: to determine judicially whether the accused should be tried.
- 48 The changes made in England by the Administration of Justice Act 1848 were adopted in New Zealand in 1858. This formally recognised the preliminary examination as being in the nature of a judicial proceeding, although some inquisitorial elements may have remained. In the absence of any counsel or

¹⁴ Maitland, *Justice and the Police* (Macmillan, London, 1885) 148: "prosecutions were compounded, prosecutions were instituted for vexatious purposes, cases came to trial in an unprepared state".

¹⁵ Williams, "Prosecution Discretion and Accountability of Police" in Hood (ed) *Crime, Criminology and Public Policy* (Heinemann, London, 1974).

¹⁶ See Humphreys, *A Book of Trials* (Heinemann, London, 1953) 141.

¹⁷ A detailed and readable account of the origin and development of the Director of Public Prosecutions' office is contained in Rozenburg, *The Case for the Crown* (Equation, Wellingborough, 1987).

solicitor for the accused, it was said to be highly desirable for justices to make enquiries, question witnesses, and compel the attendance of witnesses as seemed necessary or likely to ensure a complete and satisfactory investigation of the charges brought before them. Justices could also listen to statements which were not strictly admissible in evidence. This was justified on the basis that the inadmissible evidence could lead to other admissible evidence or evidence tending to explain the case.¹⁸

- 49 As in England, the preliminary examination by justices made the grand jury's inquiry redundant; however, it remained in existence until 1961. The preliminary examination has evolved into what is known today as the preliminary hearing, conducted by a legally trained judge or by lay justices of the peace.

The police

- 50 The first specific legislation allowing for the establishment of a police force was enacted in 1846.¹⁹ There are, however, few records of the development of police prosecutions in New Zealand. It seems that the duty to bring arrested persons before a justice (also sometimes called a magistrate) ensured the involvement of police as prosecutors in summary, ie, minor, cases. By 1864, the police were also expected to act as prosecutors in indictable cases, up to and including the justices' preliminary examination.²⁰ Once the accused was committed for trial at the preliminary hearing the committal papers were usually sent to a Crown solicitor or prosecutor who would review the case and present it at trial.

Crown solicitors and prosecutors

- 51 Crown prosecutors have been appointed almost from the establishment of British law in New Zealand. The office was apparently modelled on that of New South Wales. Originally, one of the functions of Crown prosecutors was similar to that of the grand jury in England: the Supreme Court Ordinance 1841 provided that an indictment signed by a Crown prosecutor (or the Attorney-General) was equivalent to the finding of a "true bill" by a grand jury, ie, that the accused should stand trial on the charge in the indictment.
- 52 The office of Crown prosecutor was discontinued in 1844 when the system of grand juries was introduced into New Zealand. The aggrieved party, ie, the victim, was bound over²¹ to prosecute indictable offences. A short while later,

¹⁸ See Johnston, *New Zealand Justice of the Peace* (2nd ed, Government Printer, Wellington, 1870) vol 1, 220.

¹⁹ Section 1 of the Constabulary Force Ordinance 1846 provided that:

[i]t shall be lawful for His Excellency the Governor to cause a sufficient number of fit and able men to be embodied to serve as an armed police force . . . to act as Constables . . . for preserving the peace, and preventing robberies and other felonies, and apprehending offenders against the peace.

²⁰ The regulations regarding Crown solicitor practice upon a committal stated, in the *New Zealand Gazette* (8 March 1864) that in all prosecutions, except in special cases, the management of cases in the usual manner before the justices of the peace will be left to the police.

²¹ The victim was required to enter into a bond to prosecute, the bond was liable to be forfeited to the Crown if the victim did not prosecute the offence: *New Zealand Gazette* (27 February 1844).

however, the practice was adopted of appointing private practitioners as Crown solicitors to act as counsel for the prosecution in indictable cases.²²

- 53 In 1858 District Courts were established; the District Courts Act 1858 s 145 provided that indictable cases could be tried in a District Court by a jury of twelve on an indictment signed by a Crown prosecutor (or the Attorney-General). This indictment had the same effect as if it had been presented by a grand jury. From this time, it became the practice to appoint Crown prosecutors for District Courts; Crown solicitors, on the other hand, dealt with indictable cases in the Supreme Court (now the High Court). District Courts gradually ceased to function in the late nineteenth century, and it seems that the appointment of Crown prosecutors, as distinct from Crown solicitors, gradually ceased as well.
- 54 A Crown solicitor or prosecutor would prosecute an indictable case when the party bound over to prosecute (by 1864 this was usually a police officer) did not wish to conduct the prosecution. However, it seems that the Crown solicitor or prosecutor was not obliged to attend the preliminary examination, nor conduct the prosecution in its earlier stages.²³
- 55 In 1909 jury trials in District Courts were officially discontinued when the remaining court districts were abolished by proclamation (the empowering legislation was not repealed until 1925 by the District Courts Abolition Act).²⁴ In 1981 the title of District Court was revived and bestowed on the magistrates' courts in recognition of their major role in the judicial system; magistrates became judges, and provision was made for jury trial in District Courts.

Chapter 6 describes the main organisations and people who prosecute criminal offences. Chapter 15 contains the Commission's proposals for changes to the structure of the prosecution system.

²² The first known appointment, of John Poynter at Nelson, was recorded in the New Zealand Gazette in 1847.

²³ See the regulations regarding Crown solicitor practice upon a committal: New Zealand Gazette (8 March 1864); Johnston (1870), 219.

²⁴ The minor criminal jurisdiction of resident magistrates had steadily extended: their title was changed to "magistrate" in 1893 and virtually all appointments were limited to practising barristers or solicitors. All jury trials could be conveniently conducted in the Supreme Court, and the work of district courts atrophied.

6

Prosecutors

A number of public entities, most significantly the police, prosecute offences. Private prosecution of offences is possible, although rare.

- 56 **T**ODAY MANY DIFFERENT PUBLIC ENTITIES, and a few private bodies, are involved in the prosecution of criminal offences in New Zealand. The police, Crown solicitors, the Attorney-General and the Solicitor-General are all involved in the prosecution of general crime. A relatively new government agency, the Serious Fraud Office, prosecutes serious or complex fraud. Other government agencies administering statutes, eg, relating to safety and tax, are responsible for prosecuting offences created by those statutes.
- 57 As well as their prosecution functions, the police, the Serious Fraud Office and other government agencies have significant investigative functions and powers. They may decide both whether to investigate an offence and whether or not to prosecute.

POLICE

Investigative and prosecution functions

- 58 The police have a responsibility for the general preservation of the peace, for the investigation and detection of crime, and for the apprehension of offenders. This is reflected in their own mission statement.²⁵ However, no statute confers or ever has conferred any prosecution function on the police; nor does any statute directly refer to such a function, although some enactments assume that the police have it. Their constituting Act, the Police Act 1958, is silent as to any role or function of the police.
- 59 In practice, the police are responsible for the initial decision whether or not to prosecute a breach of the general criminal law, and they may choose an alternative to prosecution, such as a caution or diversion. If the police decide to initiate a prosecution, they may choose the offences to be charged and

²⁵ The NZ Police Corporate Plan 1994–1995 sets out the police mission statement as follows:
To serve the community by reducing the incidence and effects of crime, detecting and apprehending offenders, maintaining law and order and enhancing public safety.

whether to proceed summarily or by indictment – where that is an option. They are guided by the Police General Instructions.²⁶

- 60 Nearly all summary cases are prosecuted by the police, and the police appear at the preliminary hearings of most cases proceeding indictably. In every case proceeding indictably the police officer ceases to be the prosecutor once the defendant is committed for trial. At that point, the Crown solicitor usually presents an indictment.²⁷

Administrative organisation

- 61 The New Zealand Police is a single national body, headed by the Commissioner of Police who is appointed by the Governor-General. The police organisation is divided administratively into two branches: the uniform branch and the criminal investigation branch. Within the uniform branch is a prosecution section, its purpose being to conduct prosecutions through the court process.
- 62 Police prosecutors are usually uniform branch sergeants who are assigned to the prosecution section of a particular station for about two years.²⁸ This period may be extended, although it generally is not. Opportunities for promotion within the prosecution section are almost non-existent, and full-time prosecuting is not a desired posting for police sergeants. There is a belief that all sergeants should experience prosecution as part of their career development, but that such experience is not important of itself and only serves as a means of improving sergeants' prospects for other – more meaningful – postings.²⁹
- 63 Police officers assigned to the prosecution section do not receive any extra legal training beyond the studies they have undertaken as cadets or recruits and for their sergeants' examinations. While attached to the section, most officers are sent to an in-service course dealing with specific prosecution issues.³⁰ There is no organised ongoing training strategy. Some prosecutors are highly skilled and competent, but there are significant numbers who are not.³¹
- 64 Concern has been expressed by District Court judges that the standard of prosecutions conducted by the police in some instances is inadequate, particularly in relation to sufficiency and presentation of evidence, advocacy and knowledge of the law.³²

²⁶ Section 30(1) of the Police Act 1958 empowers the Commissioner to issue general instructions, not inconsistent with the Act or regulations made thereunder, and requires all members of the police to “obey and be guided by those instructions”. The General Instructions are published in the Police Gazette. Despite the common law rule that any person may prosecute, the Police Act and the General Instructions by their wording clearly assume that the Commissioner has the power to control police prosecutions.

²⁷ Although the Attorney-General, the Solicitor-General, or in the case of a private prosecution, an informant, may present an indictment: Crimes Act 1961 s 345(2).

²⁸ Stace, “The police as prosecutors” in Cameron and Young (eds), *Policing at the Crossroads* (Allen & Unwin, Wellington, 1990) 139.

²⁹ Tutt, *A Review of Police Prosecution Services* (Strategic Policy and Resources Review Unit, Planning and Policy, Police National Headquarters, Wellington, 1995) 9–10.

³⁰ See Stace (1990) 139.

³¹ Tutt (1995) para 6.10.

³² See “Survey of Judicial Satisfaction with Police Prosecution Services”, Annual Report of the NZ Police 1993–1994, 99–106. “Survey of Judicial Satisfaction with Police Prosecution Services”, The Departmental Forecast Report 1995/1996 (Planning and Policy, New Zealand Police, 1996) shows a higher level of satisfaction, although in terms of advocacy and knowledge of the law there is still room for improvement.

SERIOUS FRAUD OFFICE

- 65 The Serious Fraud Office is a government agency set up in the aftermath of the stock market collapse of 1987. The belief behind its establishment was that special expertise and powers were needed to detect and investigate the many suspected instances of serious or complex commercial fraud. The Serious Fraud Office Act 1990 recognised the establishment of the Office and gave it and its Director far-reaching investigative powers and immunities.
- 66 The Serious Fraud Office Act 1990 does not contain an exclusive definition of what constitutes serious or complex fraud.³³ Section 8 of the Act states that for the purpose of determining whether any suspected offence involves serious or complex fraud, the Director may, among other things, have regard to:
- the suspected nature and consequences of the fraud;
 - the suspected scale of the fraud;
 - the legal, factual, and evidential complexity of the matter; and
 - any relevant public interest considerations.
- 67 There is no duty to investigate or take proceedings relating to any particular case of fraud. The Director may exercise any power under the Serious Fraud Office Act 1990, even if the police or another agency are already investigating a suspected offence or have initiated proceedings in relation to that offence. The Director can also investigate a suspected offence even if it occurred before the establishment of the Serious Fraud Office or before the Act came into force.³⁴ Further, the Director has the power to take over cases from the police which the Director believes – on reasonable grounds – to involve serious or complex fraud. The Director can also require the Commissioner of Police to provide any information relevant to the case. If the Commissioner declines to provide that information, the Director may refer the matter to the Solicitor-General whose determination is binding.³⁵
- 68 As the above description indicates, the Director of the Serious Fraud Office has a very wide discretion to investigate and take proceedings. In practice, the Director monitors and reviews investigations performed by staff of the Office who conduct the investigations. The Director makes the final decision whether to take proceedings. A “high standard” of evidence is required in order to commence a prosecution, and a prima facie test is considered to be insufficient. The Director takes public interest factors into account as well as likely defences, however, there is no specific formula. A significant number of the cases investigated by the Office are not prosecuted despite the existence of a prima facie case. (Issues of jurisdiction and of evidence outside New Zealand may also create difficulties.³⁶)
- 69 Following committal at a preliminary hearing an indictment is filed in the name of the Solicitor-General and the trial proceeds in the ordinary way. However, prosecutions are conducted by members of the Serious Fraud Prosecutors Panel

³³ Section 2 of the Serious Fraud Office Act 1990 defines “serious or complex fraud” as including a series of connected incidents of fraud which, if taken together, amount to serious or complex fraud.

³⁴ Serious Fraud Office Act 1990 s 50.

³⁵ Serious Fraud Office Act 1990 s 11.

³⁶ Report of the Serious Fraud Office: Te Tari Hara Taware for the year ended 30 June 1995, AJHR E 40, 8.

comprised of barristers and solicitors appointed by the Solicitor-General after consultation with the Director.³⁷

OTHER GOVERNMENT PROSECUTING AGENCIES

- 70 Apart from the police and the Serious Fraud Office, a range of other public bodies prosecute offences. They include central government agencies such as government departments and ministries, and more independent Crown entities.³⁸ For convenience this paper describes them as prosecuting agencies. (appendix D refers to a survey by the Commission of the investigative and prosecution procedures of government agencies.)
- 71 Government agencies administer a wide range of legislation relating to, among other things, animals, consumer protection, customs, environmental protection, dangerous substances, firearms, fisheries, gaming, health, immigration, liquor licensing, occupational safety, road traffic, social welfare and taxation. The criminal offences created vary in seriousness from major taxation fraud to the breach of local body litter bylaws.
- 72 The practice followed by prosecuting agencies when making prosecution decisions varies considerably. Most prosecuting agencies take public interest factors into account, in addition to evidentiary factors, when deciding whether or not to prosecute. Public interest factors, when they are considered, are disparate and only a few agencies refer specifically to the Solicitor-General's Prosecution Guidelines (see appendix B) when making prosecution decisions. Many prosecuting agencies see the Guidelines as targeting general criminal indictable offences rather than the offences relevant to the particular contexts within which government prosecuting agencies operate.
- 73 The division of investigative and prosecution functions within government prosecuting agencies is also inconsistent. The initial decision to prosecute for an offence may often be made by an officer of the agency after another officer has conducted an investigation. However, the investigation and the decision to prosecute may be made by the same person, in which case the decision to prosecute will often be confirmed by a supervisor. The decision to prosecute is usually made at management level and an in-house solicitor or a Crown solicitor may sometimes be consulted. However, if the decision is made at a lower level, it may be done in consultation with a more senior officer of the agency. The Department of Labour, for example, does not separate investigative and prosecution decisions except in relation to investigations by occupational, health and safety investigators (when the office solicitor makes the prosecution decision). On the other hand, Customs and the Commerce Commission have distinct divisions between investigation and prosecution.
- 74 Cabinet directions³⁹ state that government prosecuting agencies must conduct prosecutions in-house, or they must be conducted by Crown solicitors or solicitors from an independent specialist firm approved by the Crown Law Office. An officer of the agency may conduct both the prosecution in summary

³⁷ Serious Fraud Office Act 1990 s 48.

³⁸ There is also a variety of local bodies, but the Commission has not examined their prosecution practices.

³⁹ Cabinet Directions on Crown Legal Business 1993.

proceedings and the preliminary hearing in indictable proceedings, although the agency will often instruct a Crown solicitor to do so or refer the matter to the police. Practice varies among agencies and cost is a factor in deciding who conducts a prosecution. In practice, it is rare for government prosecuting agencies to charge suspects with offences which proceed indictably.

- 75 The number of prosecutions conducted by government prosecuting agencies is small in proportion to the total number of prosecutions (see appendix D para D3). Generally, conviction rates are high (see appendix D para D5), however, concern has been expressed by Crown solicitors about the standards of defended summary prosecutions conducted by legally untrained officers of government agencies. There is sometimes a lack of legal knowledge on the part of government agency officers; or a misunderstanding of the necessary legal elements to be proved; or evidence is not properly adduced; or there is an inability to cross-examine and detect errors and weaknesses in the defence case and submissions (see the survey of Crown solicitors, appendix E para E16). On the other hand, at a meeting held at the Commission in February 1996, government prosecuting agencies expressed concern about the service they receive from some Crown solicitors, in particular, about the conduct of prosecutions by junior staff solicitors, lack of continuity, and poor administrative practices.

PRIVATE PROSECUTIONS

- 76 The vast majority of prosecutions are brought by the police or some other public agency. Legally, there is also scope for the prosecution of offences by private individuals and agencies, however, private prosecutions are infrequent.
- 77 Summary prosecutions are sometimes brought by private agencies such as local authorities – the Society for the Prevention of Cruelty to Animals, the Real Estate Institute of New Zealand, and the Licensed Motor Vehicle Dealers Institute – but rarely by private citizens. Private agencies are often recognised or established by statute and either have the responsibility for the enforcement of particular enactments or have assumed it. The offences they charge are, on the whole, very minor.
- 78 In theory, the prosecution of an indictable offence may be conducted privately. Section 345(2) of the Crimes Act 1961 provides that an indictment may be presented by a private agency or citizen, and s 346 deals with the situation where a private prosecutor fails to present an indictment. In practice, however, the private prosecution of indictable offences remains almost unknown in New Zealand.

CROWN SOLICITORS

Appointments and conduct of cases

- 79 At each of the sixteen High Court centres where jury trials are held, a Crown solicitor is appointed by warrant by the Governor-General to conduct the Crown business at the court.⁴⁰ Most of this Crown business consists of criminal

⁴⁰ Valuable information about the practice of Crown solicitors and a number of recommendations for change are contained in Laurenson and Taylor, *Review of Crown Solicitors' Structure for the Solicitor-General* (Crown Law Office, Wellington, 1992) (referred to in this paper as the Laurenson-Taylor report).

prosecutions. Only one person holds a warrant in each centre at any time. The appointments of Crown solicitors are “at pleasure”, ie, they may be revoked at any time, but in practice it seems that they are only ever revoked at the holder’s request. Crown solicitors are almost always barristers and solicitors in private practice in the town where the High Court is situated.⁴¹

- 80 While each appointment is a personal one, a member of the same firm habitually succeeds a retiring Crown solicitor. Often this process has continued for several generations. It is justified on the ground of continuity of experience; only in that firm is extensive prosecution work likely to have been done.
- 81 Crown solicitors do appear personally in some prosecutions, but the volume of cases in the courts means that this is possible only in a small proportion of cases in the larger centres.⁴² Consequently, it is the practice for most Crown solicitors to brief partners and staff solicitors of their firm to appear for the Crown and conduct prosecutions.
- 82 Each High Court centre also has a panel of barristers and solicitors selected and appointed by the Solicitor-General (from outside the Crown solicitor’s firm) to conduct trials on the instructions of the Crown solicitor. The size of the panels varies from 16 in Auckland to one in some of the smaller centres. To achieve a reasonable turnover, and to allow defence lawyers the opportunity to gain prosecution experience, appointments are for a term of three years. Throughout the country Crown solicitors, rather than panel counsel, conduct the majority of prosecutions.

Prosecution functions

- 83 In 1992 the Solicitor-General issued guidelines to Crown solicitors for the conduct of prosecutions (appendix B contains the full text of the Guidelines). The Guidelines describe the functions and responsibilities of Crown solicitors, and the Attorney-General and Solicitor-General, in relation to criminal prosecutions.
- 84 In practice, almost all prosecutions are brought by the police or by officers of government agencies, and the decision to prosecute usually rests with them. The Crown solicitor seldom has the opportunity to influence the initial decision to initiate proceedings, the choice of charges, the choice of procedures (summary or indictable), or the conduct of the preliminary hearing.
- 85 Once proceedings are commenced, the police or government agency will sometimes consult a Crown solicitor for advice about whether a prosecution is well founded. The role of the Crown solicitor is to advise rather than make the initial decision to prosecute (Guidelines para 2.5). This practice of consultation varies and appears to some extent to depend on personalities, the state of the relationship between the Crown solicitor and the police or government prosecuting agency, and the budget constraints of the respective agencies.

⁴¹ At present the Crown solicitor at Christchurch also acts at Greymouth. Two individual Crown counsel from the Crown Law Office in Wellington are appointed as Crown solicitors at Nelson and Blenheim. Some have a de facto deputy who is a partner in the Crown solicitor’s firm. Only Auckland has a full-time administrative officer.

⁴² For example, in Auckland the Crown solicitor appeared in roughly 2% of the prosecutions in 1993, compared with roughly 50% in Whangarei.

- 86 Summary proceedings, and preliminary hearings in indictable proceedings, are ordinarily conducted by the police or the government agency. Occasionally, however, the police or a government agency will instruct a Crown solicitor to act on its behalf.⁴³ Strictly speaking, the legal relationship at this point is one of legal adviser and client. Crown solicitors should exercise the initial discretion to prosecute, although in practice it seems that Crown solicitors do not generally consider this should be the case (compare Guidelines paras 2–5 with appendix E paras E17–19).
- 87 Most cases proceeding indictably come to the notice of a Crown solicitor only once the defendant is committed for trial. At this point the Crown solicitor may present an indictment to the court. The Crown solicitor has the power to exercise afresh the discretion to prosecute, entirely independently of the police or any other agency that initiated the prosecution. If the Crown solicitor decides that the prosecution should not proceed then there are various ways to discontinue the prosecution, depending on the court where the indictment is to be presented and the stage that the proceeding has reached (Guidelines, para 7.2). Crown solicitors may:
- invite defence counsel to apply for a discharge under the Crimes Act 1961 s 347;
 - make a Crown application under s 347;
 - seek a stay of proceedings from the Solicitor-General: Crimes Act 1961 s 378; Summary Proceedings Act 1957 ss 77A and 173;
 - withdraw the indictment; or
 - choose not to lead evidence.
- (See appendix E para E15.)
- 88 In practice, Crown solicitors rarely discontinue prosecutions on public interest or evidentiary grounds. Several factors may contribute to this. First, although views vary, Crown solicitors generally regard their discretion as a narrow one. Most Crown solicitors believe it is their duty to prosecute every offence disclosed in the depositions.⁴⁴ Second, proceedings are strongly driven by initial charge decisions made by the police officer in charge of the case. By the time Crown solicitors receive the papers it is difficult to bring a case to its end, or to alter its character, eg, by proceeding with a wholly different charge or bringing summary proceedings, instead of indictable proceedings. Third, Crown solicitors may decide that a case could be strengthened and ask for further police investigation, or request that better or more first-hand witnesses be found.

THE ATTORNEY-GENERAL AND SOLICITOR-GENERAL

- 89 Both the Attorney-General and the Solicitor-General are independent law officers of the Crown. They have the responsibility of ensuring that prosecuting agencies and their officers behave with propriety and in accordance with principle of the law when carrying out their functions. To this end, the

⁴³ See the Cabinet Directions on Crown Legal Business 1993. Police General Instruction C149 states that the District Commander has a discretion to request a Crown solicitor to conduct the preliminary hearing in the case of murder, and conduct proceedings in the case of a serious assault against a police officer acting in the execution of his or her duties. In the case of prisoners charged with assaulting prison officers, the District Commander must engage a Crown solicitor to conduct the proceedings.

⁴⁴ Laurenson-Taylor report, paras 7.27–7.28.

Prosecution Guidelines were formulated to set out clearly the bases on which the Attorney-General and the Solicitor-General expect prosecution decisions to be made.

- 90 The appointments of the Attorney-General and Solicitor-General are prerogative ones. From the advent of responsible government in 1856 the Attorney-General has almost always been a politician and a member of the Cabinet. The present office of Solicitor-General was instituted in 1875. He or she is the chief executive of the Crown Law office; as a prerogative office it is held “during pleasure”, ie, it may be revoked at any time, but in practice tenure and independence are secure.
- 91 The Crown Law Office aims, in the words of its mission statement, to ensure that the operations of the executive government are conducted lawfully and that the government is not prevented, through legal process, from lawfully implementing its chosen policies.⁴⁵ Apart from the prosecution of offences, the Office’s activities include advice and litigation in constitutional and civil matters.
- 92 The Attorney-General occupies a unique constitutional place in New Zealand as both a member of the Executive and of Cabinet, and as an independent officer of the Crown. Theoretically the situation is anomalous, with an inevitable conflict between the Attorney’s political and semi-judicial roles. Safeguards lie in tradition, convention and the character of those who hold the office. The solution in many countries within the common law tradition is to divorce the office from the political government, as was done in New Zealand between 1867 and 1875. But there are disadvantages in the Crown’s principal law officer being outside the executive government.
- 93 The Attorney-General, as the senior law officer of the Crown, has the ultimate responsibility for the Crown’s prosecution processes and is, by convention, free from political direction when making decisions in relation to prosecutions. However, because of the conflicting roles of the Attorney-General as an independent law officer of the Crown and a member of the Executive government, the practice is for the Solicitor-General to exercise the prerogative and statutory powers of the Attorney-General on a day-to-day basis. In doing so the Solicitor-General is not an agent or delegate.⁴⁶ Nonetheless, some decisions are made by the Attorney-General, including ones with strong political overtones.⁴⁷ No perfect answer has been found.
- 94 The Attorney-General and the Solicitor-General have several significant powers relating to the prosecution of offences. In respect of some relatively uncommon offences, the consent of the Attorney-General or Solicitor-General is necessary before a prosecution can be brought (see appendix F). They also have the power under s 345(3) of the Crimes Act 1961 to present an indictment directly – an “ex officio” indictment – without a preliminary hearing or, in a case where the defendant has been discharged following a preliminary hearing, give written

⁴⁵ Report of the Crown Law Office for the year ended 30 June 1995, 1995 AJHR E 33, 3.

⁴⁶ Section 4 of the Acts Interpretation Act 1924 provides that statutory references to the Attorney-General include the Solicitor-General.

⁴⁷ For example, in the Rainbow Warrior case, a decision was made in 1991 to stay all outstanding charges after the decision not to seek the extradition of Gerald Andries, a suspected saboteur, from Switzerland.

consent to the presentation of such an indictment. This power is rarely exercised, and in such circumstances the Crown will usually seek the leave of the court to present the indictment (Guidelines para 5.3).

95 The Attorney-General and Solicitor-General have the power to bring any criminal proceedings to an end by filing a stay of proceedings in court.⁴⁸ The Prosecution Guidelines characterise the power as a common law right recognised by statute (Guidelines para 6.1). This power is sparingly exercised, but can, and has been, exercised to stay private prosecutions.⁴⁹ Generally, proceedings will be stayed in three situations (Guidelines paras 6.1–6.4):

- when a jury is unable to agree in two trials;⁵⁰
- when the prosecution has been commenced wrongly, or when the circumstances have so altered since it began as to make its continuation oppressive or unjust; and
- where the charge is stale or the situation is “untidy”, eg, the defendant is convicted on a serious charge but the jury has disagreed on less serious charges.

As to the court’s power to review the decision to stay or not, see paras 229–231.

96 In addition, the Solicitor-General will sometimes grant immunity to a person believed to have committed an offence if, for example, that person is willing to give important evidence against someone charged with a related serious offence. This immunity is an undertaking that if proceedings are brought they will be stayed.⁵¹

Chapters 15 and 16 contain the Commission’s proposals for changes to the structure of the prosecution system and the powers of prosecutors. Chapter 21 contains proposals related to private prosecutions.

⁴⁸ See Crimes Act 1961 s 378 (after committal), Summary Proceedings Act 1957 s 173 (indictable cases before committal) and Summary Proceedings Act s 77A (summary cases).

⁴⁹ See, for example, *Amery v Solicitor-General* [1987] 2 NZLR 292.

⁵⁰ After a second inconclusive jury trial the Crown solicitor must refer the matter to the Solicitor-General for a consideration of a stay. A stay will be directed unless certain listed conditions apply, including exceptional circumstances which make a trial desirable in the interests of justice. See Prosecution Guidelines, para 6.3a and *R v Barlow* (1995) 13 CRNZ 503; [1996] 2 NZLR 116.

⁵¹ See *R v Macdonald* [1980] 2 NZLR 102, [1983] NZLR 252.

7

Police discretion to prosecute

The police have a discretion whether or not to prosecute offences. Other discretions are also exercised at all stages from the reported commission of an offence until proceedings have come to trial. Such discretions are a long-established feature of the criminal justice system in New Zealand.

97 **T**HE POLICE INVESTIGATE AND PROSECUTE the greatest number of general criminal offences in New Zealand. They have a broad discretion about:

- whether or not to investigate an offence;
- what procedure to use to commence formal proceedings;
- whether to divert an offender or use another procedure;
- whether the necessary evidence is available to justify formal prosecution; and
- what kind of proceedings are in the public interest.

This wide discretion means that a high proportion of reported offences are never formally prosecuted. Of the 216 026 general criminal offences reported to and cleared by the police in 1994–1995, 104 868 adult offenders were prosecuted.⁵²

98 This chapter describes the path to formal prosecution, and the range of police practices, procedures and decisions, which affect whether or not an offender is prosecuted.⁵³

⁵² Report of the New Zealand Police for the year ended 30 June 1994, 1994 AJHR G 6, 89–90. The figure for cleared offences was calculated as 42.9% of the 503 558 offences reported to the police in the 1994–1995 period. In the same period, 3 179 young offenders were prosecuted in the Youth Court: Tutt (1995) *A Review of Police Prosecution Services* (Police National Headquarters, Wellington, 1995) figure 2. These figures do not include traffic offences (769 479) or situations police respond to which are recorded as “incidents” (550 277). See also appendix G of this paper: The courts’ criminal business: a quantitative summary.

⁵³ Other prosecution agencies have their own prosecution practices and procedures which do not necessarily mirror those of the police.

REPORTED OFFENCES

- 99 No one knows how many offences are committed in New Zealand; the number is likely to be very much greater than that reported.⁵⁴ Offences come to the attention of the police in different ways with a large proportion of offences brought to their attention by victims' complaints. However, even the victims of more serious offences may not report the offence to the police. In some cases, the victim may not realise that there has been an offence, eg, undiscovered theft, child victims of sexual assaults, or fraud. In other cases, reporting may be seen as pointless, eg, property offences are often reported only because the insurer requires it. With family violence the victim may believe that the police will regard it as trivial, be intimidated into silence, or simply not wish to get the offender into trouble.
- 100 An unknown but probably high proportion of traffic offences come to light as a result of active enforcement programmes. Traffic offences formed more than half of all offences reported to police in 1994–1995. Otherwise, crimes discovered by the police themselves tend to be public order offences, offences encountered during police patrols or raids, or offences discovered as a result of interviewing suspects.

EARLY ELIMINATION OF CASES

- 101 A large proportion of suspected offences are not prosecuted by the police because officers consider that either no formal action can or should be taken, or that an informal warning or caution to the suspected offender is sufficient.
- 102 The police may not take formal action after a complaint because:
- no offence has been disclosed; or
 - the complainant regards the matter as resolved, or perhaps not worth pursuing; or
 - the officer considers that there is insufficient evidence to sustain a prosecution.⁵⁵
- 103 When a complaint is made and recorded by police as an “offence” it may still be eliminated from the system by the Early Case Closure procedure.⁵⁶ This procedure is designed to avoid the automatic following up of cases where subsequent investigation is bound to fail. Whether or not a case is closed may also depend on resources available at the time, and on local police policy in relation to the investigation and prosecution of particular types of crime. If there are no viable leads either at the time the complaint is initially received, or at the conclusion of the preliminary investigation, then a supervisor may approve a recommendation by the investigating officer that the case be closed. But if an officer for any reason – including “any intuitive reason” – believes the case should be investigated, then use of the Early Case Closure practice is discouraged (Police General Instruction C94(2)).

⁵⁴ According to Young, Cameron and Brown as little as 40% of crime is reported (*The Prosecution and Trial of Adult Offenders in New Zealand* (Young and Cameron Policy Consultants, Wellington, 1990), para 7.6).

⁵⁵ Young, Cameron and Brown, para 9.3.

⁵⁶ Early Case Closure is dealt with in Police General Instructions C93–C96.

- 104 When an offence comes to the notice of the police and the offender is present, the police officer may make a judgment about whether or not to arrest that person. Arrests for some minor offences are officially discouraged: Police General Instructions A297 and A298 discourage arrests in certain circumstances for minor offensive behaviour and language offences, and for minor controlled drug offences.⁵⁷ Generally, when considering arrest without warrant, a police officer must decide
- whether prosecution is the best way of resolving the matter or if there is a more appropriate alternative such as a warning, caution, counselling or referral to another agency. (Police General Instruction A291(2))
- 105 If a young offender comes to the attention of the police, the offender may be warned or cautioned, or referred to the Youth Aid section. In exercising their discretion about what course of action to take, the police are required to take into account the public interest (Police General Instructions Y58(2)(b), Y58(2)(c) and Y58(2)(d)), but must also consider whether a warning – instead of prosecution – is sufficient (Children, Young Persons and Their Families Act 1989 s 209). Generally, a young offender cannot be arrested unless that is necessary for the prevention of further offending, the absconding of the young person, or the interference with witnesses and evidence (Children, Young Persons and Their Families Act 1989 s 214). Even if the young offender has been arrested, Police General Instruction Y63(3) provides:
- where . . . the arrest action achieves its immediate purpose, ie, to prevent further offending, the member in charge of the station shall consider whether it is necessary to charge . . . or release the offender . . . and deal with the matter by way of a warning or reporting the matter to Youth Aid

THE DECISION TO PROSECUTE

- 106 Some individual decisions to prosecute may be influenced by non-prosecution policies. For example, there have in the past been non-prosecution policies in respect of attempted suicide and women who procure their own abortion. Such policies are not necessarily bad or improper, and may be considered to be in the public interest. The Police General Instructions and the Prosecution Guidelines both acknowledge and make explicit certain general prosecution policies. Budget constraints and budget allocation decisions by police regional commanders may also affect prosecution policies in a practical way.
- 107 Prosecution may not automatically follow the making of a complaint, the identification of a suspected offender, the investigation of an offence, or even the arrest of a suspected offender. All public prosecution agencies, including the police, have a discretion whether or not to prosecute an offence.

The Solicitor-General's Prosecution Guidelines

- 108 The Prosecution Guidelines (see appendix B) guide prosecutors in exercising their discretion to prosecute a particular offence. According to the Guidelines there are two limbs to the discretion to prosecute. A prosecutor must first determine whether there is a *prima facie* case; if there is, the prosecutor must then consider the public interest in pursuing the prosecution.

⁵⁷ Instruction A111 is also relevant to a decision whether to arrest for minor offences.

Pre-requisites for prosecution

Evidential sufficiency

- 109 The first issue is what amounts to “sufficient evidence” to justify a prosecution. This is itself expressed in two parts (Guidelines para 3.1). First, the prosecutor must be satisfied that there is admissible and reliable evidence that an offence has been committed by an identifiable person. Second, the evidence must be strong enough to establish a prima facie case, that is, if it is accepted by a properly directed jury, the jury *could* find guilt proved beyond reasonable doubt.⁵⁸
- 110 However, under the head of public interest, the Guidelines incorporate a more stringent test of sufficiency of evidence (para 3.3.1). They state that
ordinarily the public interest will not require a prosecution to proceed unless it is more likely than not that it will result in a conviction.
The Guidelines go on to point out that this assessment will often be difficult. Where it is not possible to say with confidence that a conviction is more likely to result than an acquittal, then it may be appropriate to proceed with the prosecution. This test allows the prosecutor to judge whether, in light of all the circumstances, he or she considers that the evidence will be accepted by the court. The credibility of witnesses will be an important consideration at this point, as will the strength of likely defences.
- 111 In effect therefore, the Guidelines embody a “balance of probabilities” test that resembles the test applied in England and Australia. They stress, however, that in some circumstances a prosecution might still be justified even if the “likelihood of conviction” test is not satisfied (Guidelines para 3.3.1). For example, prosecution might be the appropriate course when the public interest in seeing justice being done is relatively strong. The public interest may indicate that some classes of offending (eg, driving with excess breath or blood alcohol levels) may require prosecution almost invariably if there is a prima facie case.⁵⁹

Public interest factors

- 112 What kind of factors are taken into account when determining the public interest in the prosecution of an offence? Some considerations are likely to be almost decisive; others are merely some of many factors to be taken into account. Paragraph 3.3.2 of the Guidelines provides many examples, but makes it clear that they are not exhaustive. They include:
- the seriousness or triviality of the offence, ie, whether the conduct really warrants the intervention of the criminal law;
 - all mitigating or aggravating circumstances;
 - the age and the mental and physical health of the defendant;
 - the staleness of the offence;
 - the effect of non-prosecution on public opinion;
 - the obsolescence or obscurity of the law;

⁵⁸ This formula follows judicial statements of the test, eg, *Police v Borick* (1989) 5 CRNZ 620.

⁵⁹ Guidelines para 3.3.1. Glanville Williams makes the point that in certain types of cases, eg, prosecution of officials, a prosecution may be proper even when conviction is not very probable: “Discretion in prosecuting” [1956] Crim LR 222.

- whether prosecution might be counterproductive (eg, by enabling the defendant to be seen as a martyr);
- the availability of proper alternatives to prosecution;
- the prevalence of the offence and the need for deterrence;
- the attitude of the victim; and
- the willingness of the defendant to co-operate in the prosecution of others.

A prosecution decision must not, however, be influenced by the defendant's colour, race, ethnic or national origins, sex, marital status or any other ground on which discrimination could be claimed. Similarly, the prosecutor's personal views, the possible political advantages or disadvantages to the government or any political organisation, or the possible effects on the reputation or prospects of those responsible for the prosecution decision must not influence the decision (Guidelines para 3.3.4.).

- 113 The Police General Instructions also provide guidance about the prosecution of a number of different offences. Various public interest factors underlie these Instructions. They allow for considerable latitude in relatively minor cases and require consultation or referral to another officer in others. Police are directed to exercise "a proper discretion" about prosecuting under legislation which punishes conduct that "otherwise contains little moral wrong", where the offence is "trifling and does not prejudice public order" (Police General Instruction C146(6)).

The discretion to prosecute in practice

- 114 When the offender is on the scene and there is evidence of an arrestable offence, the police officer usually arrests that person. In the larger centres, junior and inexperienced police officers operate with a considerable degree of autonomy at this point in the process. There appears to be a tendency for such officers to arrest suspected adult offenders rather than consider alternatives such as cautioning.⁶⁰ Police rarely use a summons as a method to commence prosecutions as it is regarded as a time-consuming and paper-intensive system.⁶¹
- 115 The arrested suspect is taken to the watch-house at the police station⁶² and delivered to the watch-house keeper. If the arrest – and by implication the prosecution – is approved by the officer's supervisor, a charge sheet will be completed by the watch-house keeper. Supervisors do not normally overrule an arrest, unless there is insufficient evidence to support the charge. It is rare for an arrest to be terminated on the grounds of triviality or because the prosecution is not in the public interest.⁶³ (Because of operational pressures, the prosecution file prepared by the officer in charge of the case may not be reviewed by a supervisor at this stage but instead will go straight to the prosecution section.)
- 116 The officer in charge of the case completes the prosecution file to the stage where the case can be dealt with for the first time in a District Court. He or she makes the decision about what offences the offender will be charged with.

⁶⁰ Tutt (1995) 4–7.

⁶¹ Tutt (1995) 7, para 4.2.16.

⁶² This is the registration area of the cells at the police station.

⁶³ Tutt (1995) paras 4.3.2–4.3.4.

The Solicitor-General's Prosecution Guidelines do not contain any instructions about how this decision should be made. The decision about charges affects:

- the form of the proceedings;
- whether the defendant will be able to elect trial by jury; and
- the penalty which can be imposed on the offender if convicted.⁶⁴

117 The prosecution file includes a recommendation by the officer in charge of the case on whether there should be a prosecution for the selected charge. The prosecution section officer reviews the file to see if there is a prima facie case and whether prosecution is desirable. Most prosecutions section officers make decisions independently from the officer in charge of the case, but some, it seems, are apparently unduly influenced by the arresting officer's preference.⁶⁵

118 A study of police practice in the 1980s found that while the police use the prima facie test when deciding whether or not to prosecute, they are reluctant to take evidentiary considerations into account under the public interest test.⁶⁶ The police state that they now apply a prima facie test and then ask whether the intervention of the criminal law is justified, applying the public interest factors in the Guidelines. There has been, however, a tendency for the police to see prosecution as an almost automatic consequence of arrest.⁶⁷

The choice of summary or indictable charges

119 Most prosecutions are commenced formally by laying an information at a District Court. Once the police have made a decision about charges there is sometimes an opportunity to elect between the summary and indictable forms of information and therefore the form of proceedings.⁶⁸ The indictable form of information is typically chosen to keep joint offenders together (one offender may have committed a purely indictable offence, and another an indictable offence triable summarily), or to ensure a number of offences by a single offender are tried together (there may be several charges, one of which is a purely indictable offence). It might also be a decision which follows from knowledge of the offender's criminal record, eg, it may be considered appropriate to try a repeat-offender indictably. The Prosecution Guidelines and the Instructions do not contain any instructions about how this decision should be made. The procedures are controlled to some extent by case law.⁶⁹

⁶⁴ Sections 5 and 7 of the Criminal Justice Act 1985 are relevant. There is a general limitation on the length of imprisonment that can be imposed. The court must consider the desirability of keeping offenders in the community in so far as that is practicable and consonant with promoting the safety of the community (s 7). However, this is subject to the requirement in s 5 that people convicted of offences with a maximum penalty of two years imprisonment or more, and who used violence, must have a full-time custodial sentence imposed upon them.

⁶⁵ Tutt (1995) para 4.3.5.

⁶⁶ Stace, *The Prosecution Process in New Zealand* (Institute of Criminology, Victoria University of Wellington, 1985).

⁶⁷ Young, Cameron and Brown, para 11.4.

⁶⁸ The second schedule to the Summary Proceedings Act 1957 contains the summary and indictable information forms.

⁶⁹ For example, the decision in *Hodges v Police* (1987) 2 CRNZ 652, that informations alleging separate offences cannot be heard together. See also *Police v Rangi* [1992] DCR 92, *R v Police* (High Court, Auckland, 30 July 1990, CP 1089/90); [1990] BCL 1462.

- 120 The choice of information is usually made by the officer in charge of the case in consultation with his or her supervisor, however, on some occasions a Crown solicitor may be consulted. The primary consideration is whether the facts justify the selection of the particular information. A secondary consideration may be whether there are mitigatory factors which would suggest that a less serious summary charge, with a correspondingly lighter maximum penalty, is more appropriate than an indictable charge which is, on the facts, a possibility. The choice of information is a tactical decision, but it is also made with a view to the convenience of witnesses, the costs of duplicating hearings, and considerations of general efficiency (eg, there is a tendency to select summary informations to avoid the expense of jury trials).

ALTERNATIVES TO PROSECUTION

- 121 If police consider a person has committed an offence, they may decide that it is more appropriate for the particular offender not to be prosecuted; a number of alternatives exists, including warnings, mediation, or counselling. The use of alternatives to formal prosecution in court will, however, depend on the offender and the offence that has been committed.

Police pre-trial diversion

- 122 After formal proceedings are initiated the police may select the defendant for diversion.⁷⁰ The defendant must have admitted guilt, agreed to the diversion process, and entered into an agreement to complete the requirements of diversion. The case is adjourned until the conditions of diversion have been fulfilled. The police then offer no evidence in court and the prosecution is withdrawn or dismissed.
- 123 The decision to divert is made by a prosecution section officer who is designated the diversion co-ordinator under the Diversion Guidelines. The criteria for diversion are that:
- the offender should have no previous convictions, or where there are previous convictions there should be special circumstances which make diversion appropriate;
 - the offence must not be a serious one;
 - the offender must admit guilt, show remorse and be prepared to make reparation to the victim;
 - the victim must always be consulted about the proposal to divert the offender and serious consideration given to his or her views;
 - the police officer in charge of the case must also be consulted and serious consideration given to his or her views; and
 - the offender must agree to diversion.

⁷⁰ For the months May and June 1996 in the Wellington district, 11% of defendants were diverted (information supplied by G Middlemiss, Inspector, Prosecutions Section, Wellington). Police national statistics do not record offenders who have been diverted, and Ministry of Justice statistics record withdrawals and dismissals without recording the reason for them. An unpublished research paper prepared for the Crime Prevention Unit suggested that in 1994 the number of diverted offenders was possibly as high as 11 000 (information supplied by J C Crookston, Senior Legal Advisor, Police).

- 124 The diversion co-ordinator has a discretion as to the conditions to be imposed on the diverted offender. For example, the offender may be given a warning and advice that further offending will be prosecuted, or be required to do all or any of the following:
- apologise to the victim,
 - make reparation or pay compensation to the victim,
 - attend professional counselling,
 - carry out community work.

Family group conferences

- 125 It is a principle of the Children, Young Persons, and Their Families Act 1989 that children or young people⁷¹ who have committed offences should not be prosecuted if there are alternative means for dealing with the matter: s 208(a). A family group conference will be held for young people who have offended, if they are not diverted.
- 126 The function of the family group conference is to arrive at an outcome related to the young person's offending that is satisfactory to all the parties present at the conference. Those entitled to attend a family group conference include the child or young person in respect of whom the conference is held, the young person's family or hapu or whanau, the Youth Justice Co-ordinator, a member of the police (usually a Youth Aid officer), the victim, a lawyer or youth advocate, and a social worker: s 251.
- 127 The family group conference has wide powers to make decisions or recommendations, and to formulate plans. Under s 260 the group may decide:
- to continue or discontinue proceedings against the young person;
 - that the offender make reparation to any victim;
 - that an appropriate penalty be imposed on the young offender.
- The possible options for penalty include a written or verbal apology, community work, work undertaken for the victim, a payment of money to the victim, a donation to a charitable cause, or the imposition of a curfew on the offender. The recommendation of a family group conference must be reviewed by the Youth Court; the Youth Court need not accept the recommendation of a conference, but usually does.

Minor offences and infringement notices

- 128 The minor offence procedure can be used for any summary offence which does not attract a sentence of imprisonment or a fine of more than \$500.⁷² A notice, rather than a summons to appear in court, is issued to the defendant detailing the offence with which he or she is charged and of his or her rights. A defendant is not required to appear in court unless he or she wishes to do so, either to deny the charge, or for some other reason such as to apply for a discharge without conviction.⁷³ If a defendant denies the charge a summons is issued

⁷¹ Section 2 of the Act defines a child as a boy or girl under the age of 14 years. A young person is defined as a boy or girl of or over the age of 14, but under 17 years, but does not include any person who is or has been married.

⁷² Summary Proceedings Act 1957 s 20A.

⁷³ Criminal Justice Act 1985 s 19.

and the summons procedure is then followed. If defendants choose to plead guilty they may make written submissions on an appropriate penalty.

- 129 The infringement notice procedure⁷⁴ is, in practice, almost entirely restricted to minor traffic offences, such as parking offences. The penalty for an infringement offence is a fixed fine. Usually a notice alleging the offence and advising the defendant of his or her rights is issued, and the defendant has the opportunity to avoid prosecution by admitting guilt and paying the fine. Otherwise the defendant must give notice within 28 days that he or she wants to appear before a court to deny the charge, or admit the charge but make submissions about penalty. If the fine has not been paid after 28 days a reminder notice is sent. This notice gives the defendant a further 28 days in which to pay the fine. After this period has expired without payment the District Court will make an order for payment, including court costs. No true criminal conviction is considered to exist against those who pay or who are found guilty of an infringement offence.

Discretion not to proceed

- 130 A complete withdrawal of the prosecution is unlikely to be considered in the public interest. However, for a minor offence, a prosecution section officer may determine that the defendant meets the criteria for diversion. In respect of traffic offences a defendant may make representations to the officer in charge of traffic prosecutions that the offence should not be prosecuted. A discretion not to proceed is exercised only in the least serious cases.

In chapter 16 the Commission proposes the retention of the discretion to prosecute. A reasonable prospect of conviction test is proposed.

The greater use of minor offence and infringement notice procedures is proposed in chapter 22.

⁷⁴ Summary Proceedings Act 1957 s 21.

8 Plea negotiation

Plea negotiation may relate to charges or sentences and is often controversial; other variants include sentence indication. However, in the form of charge negotiation, it does occur in New Zealand, and under strict conditions is accepted as legitimate in the Solicitor-General's Prosecution Guidelines. Charge negotiation is the focus of this chapter.

- 131 **P**LEA NEGOTIATION IS THE MORE FORMAL TERM used to describe what is popularly called plea bargaining; it is a direct result of the existence of a discretion to prosecute. Once a decision has been made to bring charges, or after charges have been laid but before trial, the prosecution and the defence may both make concessions in order to reach an agreement that the defendant will plead guilty. There may be direct negotiation between the investigating officer and the defendant, or between the prosecutor and defence counsel.
- 132 The result of such a plea negotiation is that the defendant pleads guilty and appears before a judge to be sentenced. Plea negotiation is a logical result of an adversarial system in which the parties determine the issues and conduct the proceedings without judicial intervention. It raises a number of significant issues in relation to the objectives of the prosecution system; these are discussed in chapter 17.
- 133 Informal plea negotiation in both summary and indictable cases does occur in New Zealand, however, there is little detailed information about the extent to which it occurs. It involves private discussions between the parties and the court has no involvement or knowledge of the content of plea negotiations. The practice of plea negotiation also varies. The description in this chapter is a general one and, therefore, may not describe the practice in a particular district. The best available information comes from a study conducted in the early 1980s.⁷⁵

⁷⁵ Stace, *The Prosecution Process in New Zealand* (Institute of Criminology, Victoria University of Wellington, 1985). Field work was conducted over one year, recording pleas and charges laid in the Wellington, Lower Hutt and Henderson District courts in 1981–1982. Lawyers, judges, police and defendants were also interviewed.

DIFFERENT FORMS OF PLEA NEGOTIATION

Charge negotiation

- 134 Most plea negotiation in New Zealand is informal charge negotiation where the prosecution and the defence come to an agreement about the charges to which the defendant will plead guilty. In return for a plea of guilty, the prosecutor may be willing to reduce the number of charges faced by the defendant, charge him or her with a less serious offence, or amend the summary of facts on which the charge is based.
- 135 If the facts of the case permit selection from a wide range of charges, there may be room for negotiation of the charge or charges. However, this may provide a temptation for prosecutors to deliberately overcharge to encourage a plea offer in return for dropping some charges.⁷⁶
- 136 On some occasions, a more serious charge may be withdrawn in return for a guilty plea to a lesser charge, although sometimes this conceals a defect in the more serious case. On the other hand, some offences are inherently more difficult to prove than others; in such cases, it may be better for the prosecution to accept a plea to a lesser offence than attempt to achieve a conviction that is only theoretically sustainable. A common criticism of this type of charge negotiation is that it may tempt prosecutors to bluff the defence into an unjustified plea.
- 137 Sometimes the defendant may be prepared to admit the commission of the offence, but may object to the role ascribed to him or her in the summary of facts. In such a case the prosecutor may amend the summary of facts to accord with a description of the offence on the basis of which the defendant is prepared to plead guilty. The offence remains the same, but the sentence will reflect the lesser degree of culpability disclosed in the summary of facts.
- 138 In other cases the police may undercharge, ie, charge for a lesser offence than can be justified on the evidence.⁷⁷ This is usually the result of a unilateral decision by the officer in charge of the case that the suspect is more likely than not to plead guilty to the lesser charge. It is a form of tacit charge negotiation which our discussions with defence lawyers suggest may possibly be the most common practice of all.
- 139 In summary proceedings charge negotiation is an accepted part of the prosecution process. The Stace study in the 1980s found that
[t]he police are open to representations that charges be withdrawn or modified but, except when confronted with convincing evidential reasons, are unlikely to consider favourably such requests unless there are exceptional circumstances The most common reason why [police prosecutors] agreed to some modification was because of perceived evidentiary difficulties. Many modifications for this reason were initiated by the prosecution; others occurred following defence representations. Such defence representations might refer to other issues which appeared to influence the exercise of the prosecution discretion.⁷⁸

⁷⁶ See Solicitor-General's Prosecution Guidelines, appendix B para 7.5d

⁷⁷ See appendix E para E23 for the opinions of Crown solicitors surveyed.

⁷⁸ Stace (1985) 85.

It is difficult to determine whether or not police follow the Prosecution Guidelines in respect of charge negotiation. The Police General Instructions do not contain express guidelines about the conduct of charge negotiations.

- 140 In indictable proceedings Crown solicitors have a discretion under s 345 of the Crimes Act 1961 about what charges to present in the indictment, and under the Prosecution Guidelines they are required to exercise afresh their discretion to prosecute; this permits the possibility of charge negotiation. However, it is the general practice of Crown solicitors (subject to their responsibility to limit the indictment to reasonable proportions and to consider laying specimen counts), to formulate charges for all the offences disclosed in the depositions. This practice may sometimes hinder effective charge negotiation. Nevertheless, it seems that Crown solicitors are still amenable to approaches by defence counsel before the indictment is presented: charges might or might not be altered to conform to what the parties agree could be proved beyond reasonable doubt.

Sentence negotiation

- 141 In some jurisdictions sentence negotiation occurs when the prosecutor and defence counsel reach an agreement about the most appropriate sentence for the defendant, in return for a guilty plea. The agreement is either directly submitted to the judge for approval or is presented to the judge as the prosecutor's recommendation. The judge retains a discretion to reject the agreement. As a general rule there is no true sentence negotiation in New Zealand⁷⁹ as the judge has sole power to determine the sentence for the defendant.
- 142 There are, however, indications that the courts might find some forms of sentence negotiation acceptable. In *Commerce Commission v NZ Milk Corporation Ltd* [1994] 2 NZLR 730, a case involving a hybrid of criminal and civil procedure under the Commerce Act 1986 s 80, the prosecution sought orders that the defendants pay the Crown certain penalties: the parties agreed that there had been a breach of the Commerce Act 1986 and agreed on a penalty amount. This agreement was submitted to the court for its approval. The court did not dispute this procedure; indeed the Chief Justice explicitly adopted Australian authority which states that the procedure adopted was both proper and not uncommon.⁸⁰
- 143 While in New Zealand there is no direct negotiation of a lesser sentence in return for a guilty plea, it may be that the likely sentence is a significant factor when negotiating takes place before the charges are laid. For example, the choice of a summary offence as opposed to an indictable offence will have implications for the maximum term of imprisonment that can be imposed for the particular offence. However, negotiation at such an early stage would be unusual. Many cases are conducted on legal aid and counsel is not assigned until after the charge has been laid.

⁷⁹ It is prohibited by the Prosecution Guidelines para 7.5c.

⁸⁰ *Trade Practices Commission v Allied Mills Industries Pty Ltd (No 4)* (1981) 37 ALR 256, 259.

Differential sentencing

- 144 Differential sentencing is a tacit form of plea negotiation. It is the common judicial practice of reducing sentence by taking into account the defendant's guilty plea and the stage at which it was made. Differential sentencing recognises the public interest, often including the interest of the victim, in avoiding the time, expense and ordeal of a trial, as well as securing the conviction and punishment of the offender.
- 145 In relation to differential sentencing, the Court of Appeal has provided guidance for the sentencing of offenders who plead guilty. It has stated that a guilty plea may justify a reduced sentence.⁸¹ Factors to be taken into account include the timing of the plea, whether it saved the victim from testifying, and the likelihood of conviction. However, a judge is not always bound to make an allowance for a guilty plea especially when it does not reflect contrition.⁸² A Practice Note issued by the Chief Justice, Sir Thomas Eichelbaum, sets out as a general principle that sentence will be discounted for a guilty plea but that the discount will diminish after the defendant's first appearance and diminish further after the first call-over.⁸³ This principle is subject to the sentencing judge's discretion.

Sentence indication

- 146 The hope of a significant reduction in sentence in return for an early plea of guilty has led to the practice in some countries of sentence indication. The belief is that many defendants plead guilty earlier if they have knowledge of the expected sentence and a guarantee of its reduction for an early plea. In England, an informal practice of sentence indication exists. The prosecution and defence counsel approach the judge in chambers for a preliminary indication of sentence upon the hypothesis of a guilty plea. Defence counsel then gives that information to the defendant, who in the circumstances usually pleads guilty. However, the informality of the practice and the lack of formal records of the process have led to misunderstandings.⁸⁴ In New South Wales, a formal sentence indication pilot scheme was established where sentence indications were given in open court. The indication hearing took place between the arraignment and the trial. The final evaluation of the scheme by the NSW Bureau of Crime Statistics and Research concluded that the scheme had failed to produce either earlier or more frequent guilty pleas. The scheme also had an unintended consequence: it appeared that those who had a sentence indication were treated as leniently, if not more so, than those who pleaded guilty earlier.⁸⁵
- 147 There is no established formal sentence indication in New Zealand. There are reports of judges in chambers indicating to defence counsel, in the prosecutor's presence, the likely nature of the sentence if a guilty plea were to be entered.

⁸¹ See *R v Te Pou* [1985] 2 NZLR 508; *Waretini* (unreported, Court of Appeal, 24 May 1988, CA 364/87); *Hatata* (unreported, Court of Appeal, 9 June 1988, CA 58/88).

⁸² See, for example, *R v Beri* [1987] 1 NZLR 46.

⁸³ *Lawtalk* 449, 5 February 1996, 13.

⁸⁴ See the English case *R v Turner* [1970] 2 QB 321.

⁸⁵ Sentence Indication Scheme Evaluation (New South Wales Bureau of Crime Statistics and Research, 1995).

But sentence indication involving informal and unstructured discussions between counsel and the trial judge has been strongly criticised by the Court of Appeal, given the absence of settled guidelines covering plea negotiation involving a judge.⁸⁶

- 148 Sentence indication also occurs as part of a case management pilot scheme in the Auckland District Court which uses status hearings for summary cases which are headed for a defended hearing. The aims are
- to reduce the number of adjournments,
 - to ensure the appropriate plea is entered as soon as possible, and
 - to reduce the time taken to hear each case by limiting the evidence to the facts in issue.

Preliminary evaluation of the scheme indicates that sentence indication is occurring in a significant number of status hearings.⁸⁷ Victims may attend status hearings and the hearing is never before the judge who will conduct the trial. If the plea is changed to guilty then sentencing may be carried out either at the same status hearing, or at a new status hearing in front of the same judge at a later date.⁸⁸

GUIDELINES ON PLEA NEGOTIATION

Prosecutors

- 149 The Prosecution Guidelines acknowledge that charge negotiation is consistent with the requirements of justice, in the following circumstances:
- No charge negotiation should be initiated by the prosecutor.
 - No proposed charge negotiation should be entertained by a prosecutor unless:
 - there is a proper evidential base for the charges intended to be proceeded with and, conversely, there is not evidence which would clearly support a more serious charge;
 - the charges to be proceeded with fairly represent the criminal conduct of the defendant and provide a proper basis for the court to assess an appropriate sentence;
 - the defendant clearly admits guilt with respect to those charges which are to be proceeded with.
 - The prosecutor must not agree to promote or support any particular sentencing option.
 - The prosecutor must not overcharge to promote charge negotiation.
 - In all cases the charge negotiation must be approved by the officer in charge of the police prosecution section (or the senior legal officer of the prosecuting government agency), and, after committal for trial, by the Crown solicitor

⁸⁶ *R v Reece and others* (unreported, Court of Appeal, 22 May 1995, CA 74-78/95) 3-4.

⁸⁷ Interim Evaluation of the Status Hearings Pilot at the Auckland District Court, Department for Courts, 1996.

⁸⁸ The Department for Courts received an evaluation report on status hearings prepared for them by Maggie Jakob-Hoff, Margaret Millard and Bruce Cropper: Evaluation of the Status Hearing Pilot Operating at the Auckland District Court, November 1996. The report concluded that status hearings are an effective caseload management system with potential for use for summary cases in other courts, as well as for more serious cases. However, the continuation and expansion of status hearings may have repercussions for the way law is practised in New Zealand, and these may need to be fully debated.

personally. In cases involving homicide, sexual violation or Class A drug dealing offences the Solicitor-General must approve the arrangement.⁸⁹

The rule that charge negotiation must not be initiated by the prosecutor exists to avoid the suggestion that Crown solicitors overcharge to encourage charge negotiation. Inquiries suggest that, contrary to the rule, prosecutors do initiate charge negotiations.

- 150 In deciding whether to accept charge negotiations, the prosecutor must have regard to the following factors (Guidelines para 7.6):
- the possible co-operation of the defendant in the prosecution of other defendants;
 - whether the probable sentence is appropriate for the criminal conduct;
 - the desirability of a quick end to the case;
 - the strength of the prosecution case;
 - the effects of testifying on witnesses;
 - whether the defendant had made reparation; and
 - the avoidance of delaying other pending cases.

However, the Guidelines are silent on whether the prosecutor is required to consider public interest factors relevant to the decision to prosecute – which might suggest a lesser charge than the evidence strictly supports – or the interests of the victim.

Defence counsel

- 151 There are no guidelines governing the conduct of plea negotiations by defence counsel. The *New Zealand Law Society Rules of Professional Conduct for Barristers and Solicitors* (4th ed, 1996) require defence counsel when advising on pleas to ensure that clients make informed decisions (rule 10.05), but otherwise contain no guidance on how the plea negotiation situation might be handled. Anecdotal information suggests that the practice of defence counsel in different districts varies, depending on their personal relationships with prosecutors and police, as well as their own level of professional experience.

In chapter 17 the Commission proposes that the Prosecution Guidelines should be amended to better regulate charge negotiation.

⁸⁹ Prosecution Guidelines, paras 7.4 and 7.5.

9

The prosecution in court

Until criminal proceedings are begun with the filing of an information in court, the prosecution process takes place in private and without significant scrutiny. It is almost wholly controlled by the investigating agency. Once an information is filed it changes its character and the process becomes essentially public. It follows a course which depends very much on whether the prosecutor has decided to file a summary or an indictment-form information.

- 152 **T**HE PARTS OF THE PROSECUTION PROCESS described in chapters 7–8 mainly occur in private and are largely controlled by the agency investigating and prosecuting the offence. Once criminal proceedings are commenced, however, a prosecution comes into the public arena of the court. Various court procedures and judicial powers may then affect the course of that prosecution.

INITIATING PROCEEDINGS

“Laying” the information

- 153 A criminal proceeding is usually begun by “laying” an information and filing it in the office of a District Court. In the information a named person (the informant) swears that he or she suspects a named person (the defendant) of committing a specified offence. The information must contain “such particulars as will fairly inform the defendant of the substance of the offence with which he [or she] is charged”: Summary Proceedings Act 1957 s 17.
- 154 There are two main exceptions to the rule that all criminal proceedings are commenced by filing an information:
- Where a person has been arrested without a warrant, and no information has been laid, particulars of the charge against him or her are set out in a charge sheet, which is presented to the court when the defendant comes before it. The Summary Proceedings Act 1957 applies to each entry on a charge sheet as if it were an information: s 12(2)–(3).⁹⁰

⁹⁰ The charge sheet procedure is also typically used where the police arrest a suspect on a warrant issued after an information has been laid in another place, so that they do not know what it contains. This does not accord strictly with s 12 and is presumably based on the fiction that no information has been laid.

- Under the minor offence and infringement notice procedures (Summary Proceedings Act 1957 s 20A and 21) proceedings are normally commenced by the informant filing a notice of prosecution containing the information required by s 20A. This notice is served on the defendant instead of a summons.

- 155 The basic rule is that any person may lay an information – and so be an informant – and prosecute summary cases; in indictable cases they may prosecute up until the defendant’s committal for trial.⁹¹ In practice, informations are almost always laid and summary cases conducted by the police, or by an officer of a government agency administering the Act, regulation or bylaw which creates the offence being prosecuted. Some statutory exceptions require an information for certain offences to be filed by an officer of the government agency which enforces the statute;⁹² these offences are not among those normally prosecuted by the police. In respect of a few crimes, the consent of the Attorney-General or the Solicitor-General is required before proceedings can be commenced (see appendix F), or the leave of a High Court judge is required.⁹³
- 156 The informant in a summary case, and in an indictable case at the preliminary hearing, may appear and conduct the case personally or be represented by a lawyer. If, however, he or she is a constable or an officer or employee of a Department of State or of a local body, any other constable, officer or employee, as the case may be, is entitled to appear: Summary Proceedings Act 1957 s 37. This marks one of the few distinctions in our law between private and other prosecutions.
- 157 When the information is laid the District Court registrar, or a District Court judge, may issue either a summons to the defendant to appear in court, or a warrant to arrest the defendant: Summary Proceedings Act 1957 s 19(1). Sometimes, registrars exercise discretion and decline to issue a summons or arrest warrant.⁹⁴ This usually occurs when the informant is a private individual. The registrar’s refusal may be reviewed by a District Court judge.
- 158 When the defendant appears, the information is presented to the court. A defendant who is arrested without warrant, and who cannot immediately be brought before a court, may be released on police bail with a summons to appear. In that case, an information must be filed as soon as practicable and at the latest within seven days (Summary Proceedings Act 1957 s 19A), or the police may use the charge sheet procedure.

THE FORM OF PROCEEDINGS

- 159 There is a sharp distinction between summary and indictable proceedings and the form of the proceedings is determined by how the information is laid. The

⁹¹ Summary Proceedings Act 1957 s 13. See also paras 76–78.

⁹² See, for example, the Machinery Act 1950 s 34; Health and Safety in Employment Act 1992 s 54; Weights and Measures Act 1987 s 36; Insolvency Act 1967 s 129. Section 129 of the Insolvency Act imposes a duty on the Assignee to initiate prosecutions but does not explicitly take away the right of any other person to prosecute.

⁹³ See, for example, Crimes Act 1961 ss 102(3), 103(3); Maternal Mortality Research Act 1968 s 16; Health Act 1956 s 126B; Tuberculosis Act 1948 s 24.

⁹⁴ See *Daemar v Soper* [1981] 1 NZLR 66.

form of the information will depend on what offence is alleged and, subject to that, which form the informant chooses. If a defendant elects trial by jury⁹⁵ then the offence will be tried indictably.⁹⁶

Summary proceedings

- 160 Summary offences are heard in a District Court before a judge without a jury, or in a few cases before justices of the peace. For most summary offences, the maximum punishment is a fine, or in some cases imprisonment for up to 3 months. If it exceeds that length then the defendant, with two exceptions, may elect trial by jury.⁹⁷
- 161 Many indictable offences may be tried summarily, if the informant makes that choice.⁹⁸ However, the court may decline to try the offence summarily (Summary Proceedings Act 1957 s 44). Since almost every indictable offence carries a maximum sentence of more than three months imprisonment,⁹⁹ the defendant also has the option to elect trial by jury.

Withdrawal of the prosecution in summary cases

- 162 The police prosecutor may seek the leave of the court to withdraw the information (Summary Proceedings Act 1957 s 36), or present no evidence, in which case the prosecution is dismissed. Because of the volume of cases being heard, the police prosecutor has little opportunity to review the prosecution file on his or her own initiative, or consult the officer in charge of the case. The police prosecutor's decision is usually made as a result of indications made by defence counsel either informally or at a pre-trial conference, or because the prosecutor becomes aware of evidence that persuades him or her that the prosecution would fail.

Indictable proceedings

- 163 Indictable proceedings are commenced by filing an indictable information at a District Court. A relatively small number of major crimes are purely indictable offences and *must* proceed indictably.¹⁰⁰ Otherwise the informant,

⁹⁵ Under the Summary Proceedings Act 1957 s 66, a defendant charged with certain offences may choose to be tried by judge alone or by a jury.

⁹⁶ The distinction between summary and indictable offences and proceedings is a complex one. See Hodge, *Doyle and Hodge Criminal Procedure in New Zealand* (3rd ed, Law Book Co, Sydney, 1991).

⁹⁷ See the Summary Proceedings Act 1957 s 66, and the New Zealand Bill of Rights Act 1990 s 24(e). Under s 43 of the Summary Offences Act 1981 there is no right to elect trial by jury in respect of the offences of assault in the Summary Offences Act 1981 ss 9–10.

⁹⁸ Section 6(1) of the Summary Proceedings Act 1957 gives the District Court summary jurisdiction in respect of all the indictable offences listed in the First Schedule of the Act.

⁹⁹ The few significant exceptions are the offences of theft, of receiving stolen property or obtaining property by any other crime, where the property does not exceed \$100 in value and the maximum penalty (if no other punishment is prescribed) does not exceed three months imprisonment: Crimes Act 1961 ss 227(d), 258(1)(c).

¹⁰⁰ See the offences listed in appendix H.

for some offences, may choose to proceed indictably rather than summarily, or the defendant may elect trial by jury: Summary Proceedings Act 1957 s 66. There is a preliminary hearing and, if the defendant is committed for trial, an indictment is then presented to a judge in a District or High Court. On rare occasions the Attorney-General – whose function is, in practice, exercised by the Solicitor-General – may exercise the power to present an indictment when there has been no preliminary hearing or where the defendant has been discharged as a result of that hearing.¹⁰¹ Indeed, any informant may file an indictment at this stage with the written consent of a High Court Judge: Crimes Act 1961 s 345(3).

The preliminary hearing

- 164 Where an offence is to be tried indictably, in almost all cases there is a preliminary hearing in a District Court, normally before justices of the peace but sometimes before a District Court judge. The main purpose of the preliminary hearing is to establish whether the evidence is sufficient to put the defendant on trial.¹⁰² The test is whether a prima facie case has been established; the preliminary hearing is essentially a screening-out process, and if the prosecution can establish its case without calling all available witnesses it may do so.¹⁰³ A secondary purpose of the preliminary hearing is to inform the defendant of the case against him or her.
- 165 The parties may agree that some or all of the evidence be given in writing without the need to call witnesses. If all the evidence consists of written statements or exhibits, a defendant who is represented by a barrister or solicitor may agree to waive the hearing and accept committal for trial, a process known as “committal on the papers” (Summary Proceedings Act 1957 ss 160A, 173A). The prosecution, however, is not obliged to accept committal on the papers and may prefer to call its witnesses at the preliminary hearing.¹⁰⁴
- 166 The court conducting the preliminary hearing has an inherent power to stay proceedings where the procedure is so flawed that it would be an abuse of process to conduct even a preliminary hearing, even though the informant has sufficient evidence to warrant committal.¹⁰⁵

¹⁰¹ Under s 345(3) of the Crimes Act 1961 the Attorney- or Solicitor-General may present an ex officio indictment or may seek the leave of the court to do so. The latter seems to be the preferred procedure. See for example, *Police v Borick* (1989) 5 CRNZ 620. See also *R v Manu Makiafi* (unreported, High Court, Auckland, 24 November 1994, T 283/94) where leave was obtained to indict a person who had been charged with sexual violation along with seven others, but whose absence from New Zealand had prevented him from being a party to the preliminary hearing.

¹⁰² This purpose, which is implicit in the Summary Proceedings Act 1957, was confirmed by the Court of Appeal in *W v Attorney-General* [1993] 1 NZLR 1, 6.

¹⁰³ See, however, *R v Haig* [1996] 1 NZLR 184, 190, where the High Court stated that wherever possible the Crown should call the witnesses at depositions that it intends to call at trial.

¹⁰⁴ See *Phillips v Drain* [1995] 1 NZLR 513. In cases where a videotaped interview of a child witness has been made, in accordance with the requirements of the Evidence (Videotaping of Child Complainants) Regulations 1990 SR 1990/164, the videotape will be admitted as evidence at the preliminary hearing. The child witness is not required to attend the hearing.

¹⁰⁵ See *R v Telford Justices, ex p Badham* [1991] 2 QB 78, and *Police v D* [1993] 2 NZLR 526, 530. The example given in the latter case was one where the defendant had already been convicted and punished for the offence charged.

- 167 The Law Commission considered the functions of the preliminary hearing in its report on *Criminal Procedure: Part One: Disclosure and Committal* (NZLC R14, Wellington, 1990) paras 116–139, recommending that preliminary hearings be modified. In August 1996 the Department for Courts proposed the abolition of preliminary hearings. (Preliminary hearings are considered in more detail in chapter 21.)

Committal for trial

- 168 If a prima facie case is established at the preliminary hearing, then the defendant is committed for trial in either the High Court or a District Court.
- 169 Indictable offences are categorised into three “bands”. The most serious offences, notably murder, are always tried in the High Court. Those at the lower end of the spectrum are always tried in the District Court. Offences in the “middle band”, which are serious offences,¹⁰⁶ are committed to the High Court and then allocated by a High Court judge to either the High Court or a District Court for trial.¹⁰⁷ The High Court judge makes a decision on the papers, whether to transfer the case to the District Court,¹⁰⁸ and must consider
- the gravity of the offence charged,
 - the complexity of the issues likely to arise in the proceedings,
 - the desirability of the prompt disposal of trials, and
 - the interests of justice generally.¹⁰⁹

In practice, a large number of trials for “middle band” offences are transferred to District Courts for trial.

Filing the indictment

- 170 When the defendant is committed for trial, the prosecution becomes a matter for the Crown solicitor who has the opportunity to exercise afresh the discretion to prosecute. This includes deciding whether there is a prima facie case. The Crown solicitor then files the indictment in the court and the trial follows.
- 171 A discharge at the preliminary hearing on one or some charges, on the basis that a prima facie case has not been found, does not prevent an indictment being later presented on those charges: *R v Carberry* [1992] 2 NZLR 184. If the defendant is discharged on all charges, however, an indictment cannot be presented except by the Solicitor-General or by leave of a High Court Judge under the Crimes Act 1961 s 345, although the information may be relaid and the proceedings begun afresh. In practice, once a defendant is committed for trial it is usual for the Crown solicitor to file an indictment only on charges where the court has found a prima facie case. Crown solicitors may also add a

¹⁰⁶ These are listed in Part II of Schedule IA of the District Courts Act 1947. They include sexual violation and attempted sexual violation, wounding with intent, aggravated wounding or injury, kidnapping and aggravated robbery.

¹⁰⁷ Summary Proceedings Act 1957 s 168AA.

¹⁰⁸ The papers are, in practice, the written depositions together with information sought from counsel pursuant to the Practice Note of 10 August 1995. The right to apply for a transfer of proceedings under the District Courts Act 1947 s 28J does apply to cases in the “middle band” if a case is transferred to a District Court for trial.

¹⁰⁹ Summary Proceedings Act 1957 s 168AA(3).

charge which has not been the subject of the preliminary hearing, provided it is disclosed in the depositions.¹¹⁰

Section 347 directions

- 172 Before the trial commences the judge has the power under s 347(1) of the Crimes Act 1961 to direct that no indictment be filed or that the defendant not be arraigned on the indictment. In either case the judge may discharge the defendant. In practice, s 347(1) discharges are almost never made on the judge's initiative but happen as the result of an application, almost always by the defendant. Under s 347(3) of the Crimes Act the judge may direct that the defendant be discharged at any stage of the trial. Any discharge under s 347 is deemed to be an acquittal: Crimes Act 1961 s 347(4).
- 173 This power to discharge a defendant was enacted in 1961 as a consequence of the abolition of the grand jury and its power, after committal, to find "no bill" when a bill of indictment had been put before it. It has become a significant part of the prosecution process. One Crown solicitor has informed us that he sometimes invites defence counsel to apply under s 347 where he considers that on public interest grounds a prosecution should not proceed.
- 174 The primary purpose of s 347 is to screen out weak cases. Its general language has been the subject of varying judicial views.¹¹¹ The test now accepted is whether a properly directed jury could properly convict on the prosecution evidence; if not, then the judge should stop the case.¹¹² Moreover, a defendant may be discharged under s 347(1) where it is clear that any offence proved would call only for a nominal penalty: *R v Hillhouse* [1965] NZLR 893. The courts have stressed that their powers under s 347 are not to usurp the jury's role as the arbiter of fact, but as the Court said in *Re Fiso* (1985) 1 CRNZ 690: "the existence of the discretion must be seen as one of the methods of control of a jury trial conferred upon the Court".
- 175 Such an approach is consistent with the practice on appeal following conviction. In *R v Ross* [1948] NZLR 167, 173, Smith J cited with approval the following statement of principle:
- To establish that a verdict is unreasonable or cannot be supported having regard to the evidence, it is not sufficient merely to show that the evidence given at the trial only amounted to a weak case against the appellant, or that the Judge of the Court of trial had some doubt about the sufficiency of the case and has given a certificate on that ground, though that is a material factor in the case. If there was evidence to support the conviction it will not be quashed even though the members of the Court of Criminal Appeal themselves feel some doubt about it. The verdict must be such that no reasonable jury could properly find upon the evidence given. The Court of Criminal Appeal will not usurp the functions of the jury.

¹¹⁰ See Prosecution Guidelines paras 5.1, 5.2; *R v Thomas* (1947) 32 Cr App R 50; *R v Davis and Haines* (1910) 12 GLR 700; *R v Roe* (1966) 51 Cr App R 10; *R v Johnston* [1959] NZLR 271.

¹¹¹ See for example the *Queen v Myers* [1963] NZLR 321 and *Long v R* [1995] 2 NZLR 691, 696.

¹¹² *R v Galbraith* [1981] 2 All ER 1060; *R v H* (1993) 11 CRNZ 407; *Re Fiso* (1985) 1 CRNZ 690; *R v H* [1996] 2 NZLR 487.

The English Criminal Appeal Act 1968 s 2(1) reflects a different policy:

- ... the Court ... shall allow an appeal against conviction if they think—
(a) that the [conviction] should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory ...

In *Reg v Cooper (Sean)* [1969] 1 QB 267, it was held that the Court must ask whether it is content to let the matter stand as it is, or whether there is not some lurking doubt in their minds making them wonder whether an injustice has been done. The Court's reaction may not be based strictly on the evidence and can be produced by the general feel of the case.

Should a s 347 Crimes Act 1961 discharge be exercised similarly to the English appellate procedure or would doing so wrongly usurp the jury's function?

- 176 There is no reliable information to show how often defendants are discharged under s 347. Section 347 might be used more freely if a discharge under it did not amount to an acquittal, which is not subject to appeal, and which prevents the prosecution from bringing fresh charges.¹¹³

Should there be a right of appeal in respect of a discharge under s 347?

Abuse of trial process

- 177 Section 347 applications also provide a convenient opportunity to consider claims of abuse of process, ie, that to continue the proceedings would be unfair or oppressive or otherwise damage public confidence in the administration of justice. To some extent, therefore, s 347 overlaps with the court's inherent power to stay proceedings on the ground of abuse of trial process.
- 178 The court has an inherent jurisdiction to stay proceedings to prevent abuse of process. In *Moevao v Department of Labour* [1980] 1 NZLR 464, 482, the Court explained the abuse of process doctrine in this way:

The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor in relation to the prosecution that the Court processes are being employed for ulterior purposes or in such a way (for example, through multiple or successive proceedings) as to cause improper vexation or oppression. The yardstick is not simply fairness to the particular accused ... That may be an important consideration. But the focus is on the misuse of the Court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so constitutes an abuse of the process of the Court.

¹¹³ The Department for Courts in its August 1996 proposal to abolish preliminary hearings considered that s 347 applications might be used more frequently if preliminary hearings were abolished.

179 To some extent abuse of process applications may overlap with arguments that the New Zealand Bill of Rights Act 1990 has been breached.¹¹⁴ Note also that the exercise of the District Court's jurisdiction to order a stay is amenable to judicial review under the Judicature Amendment Act 1972 as the exercise of a statutory power (ie, under s 347 of the Crimes Act 1961).¹¹⁵

MANAGEMENT OF PROCEEDINGS

180 Caseflow management is a concept which originated in the United States. It involves the co-ordination of court processes and resources to ensure the prompt and efficient disposition of cases. In New Zealand the Courts Consultative Committee¹¹⁶ has encouraged the implementation of caseflow management. To oversee its development in the courts, a National Caseflow Management Committee was established in 1994. It has concentrated particularly on case management in civil proceedings, but it also has responsibilities for criminal proceedings.

181 In the management of criminal proceedings the courts have traditionally played an almost entirely passive role. This is changing, and devices such as call-overs of a list of pending trials and pre-trial conferences are now being used. The management of criminal proceedings are the subject of a Practice Note for criminal jury trials issued in 1991¹¹⁷ which states the general objectives of a pre-trial conference or call-over as:

- allowing counsel and the judge to obtain a realistic idea of the pleas that may be entered;
- obtaining some agreement as to admission, evidence to be read, and disputed areas;
- obtaining realistic estimates of the trial's duration; and
- allocating a trial date.

182 At a pre-trial conference both prosecution and defence counsel appear in court and are expected to inform the court of matters that will have a bearing on the length of any defended hearing.

183 The use of pre-trial conferences and call-overs, and their nature and content, have largely been a matter for each particular court.

184 Some other case management procedures have been adopted on the initiative of certain judges. For example, status hearings were introduced in the Auckland

¹¹⁴ See *Adams on Criminal Law* (Robertson (ed), Brooker & Friend, Wellington, 1992), Ch 4.3.13. See too, for example, *R v Barlow* (unreported, High Court, Wellington, 22 September 1995, M 250/94). Private prosecutors are not immune; see *Taylor v Sand* (unreported, High Court, 18 December 1995, T 28/93) in which the court held that the private prosecutor's inaction or misdirected action amounted to an abuse of process and "undue delay" under the New Zealand Bill of Rights Act 1990 s 25.

¹¹⁵ See *Attorney-General v District Court at Nelson & Anor* (unreported, High Court, Nelson, 19 December 1995, M 27/95) 3-4.

¹¹⁶ An advisory committee, chaired by the Chief Justice and under the joint auspices of the Minister of Justice and the Minister for Courts.

¹¹⁷ *Lawtalk* 343, February 1991; *Garrow and Turkington's Criminal Law in New Zealand* (Garrow (ed), Butterworths, Wellington, 1996) S345B. The Practice Note was issued by the Criminal Practice Committee which, like the Courts Consultative Committee, is an advisory committee chaired by the Chief Justice under the joint auspices of the Minister of Justice and the Minister for Courts.

District Court in October 1995. Status hearings operate only in summary cases and aim to save time, reduce the backlog of cases, and ensure that there are fewer adjournments at defended hearings. A status hearing takes place after a plea of not guilty has been entered and operates like a pre-trial conference. It provides for the disclosure of evidence, clarification of the facts in issue and an opportunity for defendants to change their pleas if they wish. Sentence indication also takes place at the status hearing. The Auckland executive judge has stressed that status hearings do not amount to plea negotiations condoned by the court.¹¹⁸ The Department for Courts has set up a committee to monitor the status hearings.¹¹⁹

- 185 In February 1996 the Chief Justice, Sir Thomas Eichelbaum, issued a Practice Note on case management of criminal jury trials in the High Court (based on a pilot scheme which operated in the Wellington region from October 1995).¹²⁰ The Practice Note directs courts to process new cases more effectively by:
- ensuring that criminal jury trials are disposed of within a reasonable time;
 - reducing delays and minimising applications under the New Zealand Bill of Rights Act 1990 s 25(b) to strike cases out because of unreasonable delay; and
 - setting cases on a firm and predictable path as soon as they enter the court system.
- 186 A Practice Note for a pilot case management scheme for criminal jury trials in the Wellington District Court has been issued by the Chief District Court Judge.¹²¹ Its primary objective is also to set cases on a firm and predictable path. Both this Practice Note and that for High Court jury trials set out time frames for:
- call-overs – within a maximum seven weeks of committal;
 - processing legal aid applications;
 - processing pre-trial applications; and
 - the commencement of trials.
- 187 The first statutory regulation of the management of criminal cases is the Crimes Amendment Act (No. 2) 1995.¹²² These provisions of the Act require Crown solicitors to file an indictment within 42 days of a defendant being committed for trial. Upon application the trial judge may grant an extension of the time limit, having regard to certain matters specified in the Act.¹²³ If no indictment is filed within the 42 days, or the period of any extension, the defendant may be discharged and the discharge is deemed to be an acquittal.
- 188 The amendments to the Summary Proceedings Act 1957¹²⁴ which extended the powers of court registrars are also having a significant impact on the management of cases, by freeing up judge time.

¹¹⁸ “Justice On The Fast Track”, *New Zealand Herald*, Auckland, 10 February 1996, 7.

¹¹⁹ Preliminary evaluation of the status hearings pilot scheme was done by the Department for Courts in March 1996.

¹²⁰ *Lawtalk* 449, 5 February 1996.

¹²¹ Dated 8 March 1996, effective from 1 April 1996.

¹²² Which inserted ss 345A–345D and 346 into the Crimes Act 1961.

¹²³ See *R v Tamati* (unreported, High Court, Rotorua, 7 August 1996, T 14/96).

¹²⁴ The Summary Proceedings Amendment Act 1995 came into force on 1 April 1996.

Control and accountability

Many prosecution decisions are made in private. Mechanisms for control over prosecutions and public accountability of prosecutors are few.

189 **T**HE PROSECUTION SYSTEM is relatively flexible and informal. Discretions exist at all stages of the investigation and prosecution of an offence. Decisions about prosecution are made by prosecution agencies outside of public proceedings and can have a great impact on property, livelihood and liberty. How are prosecutors accountable for the decisions they make? What mechanisms exist to control and review decisions to prosecute or not to prosecute? This chapter discusses the extent to which the decisions of prosecutors are subject to control and review. The Commission's conclusion is that while some legal and administrative mechanisms for controlling and reviewing prosecution decisions do exist, many are weak or unclear or are not consistently complied with.

190 Apart from the formal administrative and legal processes for accountability described in this chapter, public criticism may be influential in compelling a review of policies and decision-making processes. This is particularly so if there has been judicial criticism of a prosecution decision or a prosecution process. In other cases, an opportunity for public discussion, assessment and criticism of decisions and policies may be the only means of achieving accountability.¹²⁵

ACCESS TO INFORMATION

191 Three important avenues exist to enable those who are the subject of prosecution decisions to obtain access to relevant information.

192 The first is that the Crown has a common law duty to disclose relevant information to the defence in the interests of justice: *R v Hall* [1987] 1 NZLR 616. This duty continues to exist independent of the Official Information Act 1982¹²⁶ and the Privacy Act 1993. Applications to the court for disclosure, other than those made pursuant to statutory authority, will be determined on principles of fairness.

¹²⁵ The Official Information Act 1982 and the Privacy Act 1993 provide avenues for disclosure of information about the prosecution process. In the case of the Serious Fraud Office, those avenues are limited by the application of the Serious Fraud Office Act 1990 ss 36–44.

¹²⁶ See, for example, *R v Connell* [1985] 2 NZLR 233.

- 193 The second is the ability to obtain a statement of reasons, under the Official Information Act 1982, for any decision or recommendation made affecting an individual or corporate entity. The Act applies to information held, and decisions and recommendations made, by Ministers, government departments, and a wide range of specified public sector organisations. Under s 23, there is a right for any individual or entity affected by a decision or recommendation to seek a written statement of:
- the findings on material issues of fact;
 - a reference to the information on which those findings were based (although this may be withheld where good reason exists to do so); and
 - the reasons for the decision or recommendation.
- 194 Individuals affected by a prosecution decision may include, for example, the victim as well as the person suspected of committing the offence.
- 195 Crown solicitors are not specified as organisations to which the Official Information Act 1982 applies. The Office of the Ombudsman has taken the view that a Crown solicitor is not, by virtue of holding that office, an “independent contractor” for the purposes of s 2(5) of the Act, although he or she may be in the circumstances of a particular case. Crown solicitors hold their office pursuant to a warrant of appointment from the Sovereign, and consequently the “Crown” engages their services and not the executive government. Actions taken by a Crown solicitor in prosecuting indictable crime are pursuant to statute – Crimes Act 1961 – and consequently do not require any engagement by a Minister of the Crown, department or organisation for the purpose. Accordingly, there is no contractual relationship between the Crown solicitor and a Minister of the Crown, or a department or organisation, and s 2(5) of the Official Information Act does not apply. However, this does not preclude a Minister of the Crown, or a department or organisation from engaging a Crown solicitor, or any other solicitor, to do some work on a contractual basis. In that case the Ombudsmen are likely to see s 2(5) as applying to information held by the Crown solicitor in the same way as if it were held by any other solicitor.
- 196 The third avenue is the right of access to personal information under the Privacy Act 1993 or, in the case of corporate entities, the Official Information Act 1982.¹²⁷ The Privacy Act applies to any agency, public or private.¹²⁸ It may, therefore, be used to seek information held by any prosecution agency where the person seeking the information is an individual.
- 197 This right has been widely and routinely used as a means of pre-trial discovery in criminal cases since the decision of *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385. It may also be used to seek information about prosecution decisions.

INTERNAL REVIEW

Police

- 198 The New Zealand Police is a hierarchical organisation with ranks of officers, the Commissioner of Police being of the highest rank. Police regulations oblige every member of the police to obey the applicable region and district orders,

¹²⁷ Privacy Act 1993, Principle 6; Official Information Act 1982 s 24(1).

¹²⁸ Although Principle 6 is expressed in terms of a “right” only in the case of public sector agencies.

and the lawful commands of a superior; it is a disciplinary offence to disobey such a command. Police must also obey and be guided by the Police General Instructions and the Commissioner's circulars.¹²⁹

- 199 There is some uncertainty as to whether police officers have a personal power – as citizens and not police officers – to prosecute, and therefore, whether they can be subject to the commands of superiors in exercising that particular power. The possibility of an independent power to prosecute is said to arise out of the historical office of the police as constables with common law powers to enforce the law, and the position of police officers as officers of the Crown.¹³⁰ The Police Act 1958 s 5(5) and (6) recognises these historical antecedents when it states that the Commissioner of Police has all the rights, duties and powers of an employer in respect of all members of the police, but that this does not limit or affect the powers and duties conferred or imposed on the office of constable by common law or enactment. However, it is not clear whether the common law powers of constables to enforce the law ever included an independent power of prosecution.¹³¹ Today, most of the powers of police officers are conferred by statute and do not include an independent power to prosecute. In relation to the status of police as officers of the Crown, constitutionally there is no difficulty with a hierarchy of independent Crown officers, in which some are subject to the directions of others. This is the norm for all disciplined forces. The police are in fact organised on this basis, and regulations and guidelines reinforce this structure.
- 200 During the process of investigating an offence, the decisions made by the officer in charge of the case may be reviewed in some manner by that officer's supervisor and a prosecutions section officer. For various reasons these checks provide only a limited measure of internal control of the discretion to prosecute. First, both supervisors and prosecution section officers rarely take account of public interest factors. Second, prosecution section officers may be influenced by the arresting officer's preference for prosecution and therefore not make independent decisions to prosecute. Third, there is a common belief that the Crimes Act 1961 s 316, which sets out the duties of arresting officers, makes it desirable for a prosecution to proceed whenever an arrest is made.

Serious Fraud Office

- 201 Section 30 of the Serious Fraud Office Act 1990 provides that
- in any matter relating to any decision to investigate any suspected case of serious or complex fraud, or to take proceedings relating to any such case or any offence against this Act, the Director shall not be responsible to the Attorney-General, but shall act independently.

¹²⁹ Police Regulations 1992 SR 1992/14 regs 5, 9(1). A further instance of not following police policy may lead to disciplinary action.

¹³⁰ See *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General* [1994] 3 NZLR 720, 727.

¹³¹ See the articles by Cameron and Orr in *Policing at the Crossroads* (Cameron and Young (eds), Allen & Unwin, Wellington, 1986). For comment on the English position see Marshall, *Police and Government: The Status and Accountability of the English Constable* (Metheun, London, 1965), and Lustgarten, *The Governance of Police* (Sweet and Maxwell, London, 1980).

The Office has developed its own guidelines and they are contained in a protocol agreed with the police. Accordingly, Serious Fraud Office prosecutions do not follow the Solicitor-General's Prosecution Guidelines prior to committal for trial.

- 202 The police must notify the Office of cases in the following situations:
- The complaint involves an actual or potential fraud in excess of \$500 000.
 - The facts, law or evidence are of great complexity; for example, the complaint could include international financial transactions or computer manipulation or other complex methods indicative of the commission of an offence.
 - The complaint is of great public interest or concern and/or involves a public figure.¹³²

Other government prosecuting agencies

- 203 It appears that the practice of reviewing prosecution decisions internally varies greatly among different government agencies (see appendix D). Often more senior officers of the organisation will be involved in the decision to prosecute: they may be consulted about the decision or required to confirm it. The legal division of an agency may be consulted, but this is not a standard practice. The degree of separation between investigative and prosecution functions within individual government agencies also affects the efficacy of mechanisms for the control and review of prosecution decisions, a greater degree of separation engendering more independent prosecution decisions.

Crown solicitors

- 204 Crown solicitors are not part of any administrative or disciplinary hierarchy. They operate autonomously with some supervision by the Solicitor-General and the Attorney-General. The Solicitor-General undoubtedly can properly direct the prosecution decisions of Crown solicitors.¹³³ In practice, such intervention is rare. Crown solicitors are guided by the Prosecution Guidelines, but the practice of individual Crown solicitors and their perception of their role as prosecutors or legal advisers varies. There is no systematic monitoring of Crown solicitors' adherence to the Guidelines.
- 205 In 1992 the Crown Law Office commissioned a review of the structure of the Crown solicitor system. The resulting report,¹³⁴ the Laurenson-Taylor report, recommended that the Solicitor-General – to ensure accountability – implement a formal review of all Crown solicitor warrants on a regular basis. The Solicitor-General has accepted this recommendation and work has begun to collect and assess qualitative and quantitative data relating to the operation of the Crown

¹³² Report of the Serious Fraud Office/Te Tau Taware for the year ended 30 June 1995, 1995 AJHR E40, 6–7. For a recent example see “Judges charged with fraud”, *Independent*, Auckland, 20 September 1996, 2.

¹³³ In 1924 the Attorney-General, Sir Francis Bell, invoked the principle that the Attorney-General is responsible for the ultimate control of all prosecution decisions when he disagreed with a Crown solicitor over the need to call a certain witness. This instance suggests that a high degree of direction may be proper.

¹³⁴ Laurenson and Taylor, *Review of Crown Solicitors Structure for the Solicitor-General* (Crown Law Office, Wellington, 1992).

solicitor system. Crown solicitors are now required to supply the Solicitor-General with detailed statistical information about prosecutions handled in their offices.

- 206 Regulation 9 of the Crown Solicitors Regulations 1994 (SR 1994/142) gives the Solicitor-General power to take any matter or business out of the hands of a Crown solicitor. This right has only occasionally been used, usually where conflicts of interest have arisen, or where there has been criticism of pre-trial or trial decisions by a Crown solicitor. The Solicitor-General or Attorney-General could also take administrative steps to revoke a Crown solicitor's warrant, since Crown solicitors hold office "at pleasure". This step would only be taken in cases of misconduct, incapacity or gross incompetence.
- 207 The Laurenson-Taylor report also recommended that a senior person in the Crown Law Office be appointed to supervise Crown counsel in the criminal team. The present practice is for this person to be the Deputy Solicitor-General.

EXTERNAL REVIEW

The Police Complaints Authority

- 208 In 1988 the Police Complaints Authority was established by statute as an independent body to receive complaints alleging any misconduct or neglect of duty by any member of the police, or concerning any police practice, policy, or procedure affecting the person or body of persons making the complaint in a personal capacity: Police Complaints Authority Act 1988 s 12(1). If the Authority decides to investigate a complaint, it must form an opinion whether any decision, recommendation, act, omission, conduct or policy was contrary to law, unreasonable, unjustified, unfair or undesirable.¹³⁵
- 209 Since its establishment, the Police Complaints Authority has received a range of complaints concerning the exercise of the discretion to prosecute. The Authority stated in its 1995 report that complaints about police prosecution decisions have increased.¹³⁶ The complaints are most often under three heads: the failure to prosecute, the laying of charges when there should have been no prosecution, and the laying of charges that are too severe. Complaints have also been made about diversion decisions.
- 210 The Authority regards the exercise of the discretion to prosecute as an operational decision of the police.¹³⁷ Prosecution decisions are generally not reviewed by the Authority unless there is evidence of material bias, bad faith, failure to carry out an adequate investigation which might have affected the exercise of the discretion, or some other convincing reason giving rise to possible misconduct or neglect of duty.¹³⁸ Inconsistencies in prosecution

¹³⁵ See Police Complaints Authority Act 1988 ss 27(1), 28(1). Note that unlike the Ombudsmen Act 1975 s 22(1), the Authority has no power to decide that a decision was "wrong".

¹³⁶ Report of the Police Complaints Authority for the year ended 30 June 1995, (1995) AJHR G 51, 18. See also the Report of the Police Complaints Authority for the year ended 30 June 1996, (1996) AJHR G 51, 36-38 for examples of cases where prosecution decisions have been the subject of complaints to the Authority.

¹³⁷ Report of the Police Complaints Authority for the year ended 30 June 1995, (1995) AJHR G 51, 19.

¹³⁸ Report of the Police Complaints Authority (1995) fn 142.

decisions will not lead to a review of prosecution decisions by the Authority. Nor will the Authority review policies and practices relating to cautioning and warnings, or to diversion – ie, the wide discretions exercised by police before they decide whether or not to prosecute.

- 211 If the Authority does review a decision, it will only intervene if the decision was so unreasonable that no reasonable agency could have made such a decision.¹³⁹

The Ombudsmen

- 212 Ombudsmen are independent officers of Parliament appointed under the Ombudsmen Act 1975 to investigate the acts, omissions, decisions and recommendations of central and local government departments and organisations. Those acts, omissions, decisions and recommendations must relate to a matter of administration or affect a person in his or her personal capacity. The public bodies subject to the Ombudsmen Act 1975 are listed in the First Schedule to the Act. They include the Serious Fraud Office, the Crown Law Office and other government agencies and local authorities, but not Crown solicitors or the police.¹⁴⁰
- 213 Prosecution decisions made by those agencies subject to the Ombudsmen Act 1975 are classed as matters of administration and, therefore, may be the subject of a complaint. The Ombudsmen may make recommendations for appropriate action and report their findings in the case of a decision which:
- appears to have been contrary to law; or
 - was unreasonable, unjust, oppressive or improperly discriminatory; or
 - was in accordance with a rule of law or provision of any Act, regulation or bylaw or practice that is, or may be, unreasonable, unjust, oppressive, or improperly discriminatory; or
 - was based wholly or partly on a mistake of law or fact; or
 - was wrong.¹⁴¹
- 214 Under s 22(3) of the Ombudsmen Act 1975, the Ombudsmen may make a variety of recommendations including that the agency's decision be varied, that the practice on which the decision was based be altered, or that the law be altered.
- 215 A few prosecution decisions have been investigated by the Ombudsmen, involving both decisions to prosecute and not to prosecute. There are not enough cases for any general principles to emerge. However, complainant's expectations that there would not be a prosecution¹⁴² and unreasonable delays in bringing a prosecution, have influenced some recommendations.

¹³⁹ It is guided by the principles stated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230.

¹⁴⁰ The jurisdiction of the Ombudsmen to review the decisions of police was removed in 1989 when the Police Complaints Authority was established.

¹⁴¹ Ombudsmen Act 1975 s 22(1).

¹⁴² See, for example, Ministry of Transport Case no W27170 reported in the *10th Compendium of Case Notes of the Ombudsmen* (vol 1, Office of the Ombudsmen, Wellington, June 1992).

Crown solicitors

- 216 Crown solicitors have no oversight or control of summary proceedings conducted by police prosecutors or others, but they may influence decisions to prosecute these proceedings if they are consulted by the police or prosecuting agency. However, while Crown solicitors may be capable of influencing a decision, they have no power to decide whether or not to prosecute in summary proceedings. They are able to exercise some control over whether or not indictable proceedings are continued, but in practice there is little scope for them to do so, until after committal.

The Attorney-General and the Solicitor-General

- 217 The Prosecution Guidelines state that the Attorney-General and the Solicitor-General have responsibility for overseeing the prosecutions conducted by the police and other public prosecution agencies. The Attorney-General and the Solicitor-General also have the power to stay proceedings. In practice, however, they exercise no real control on a day-to-day basis over summary prosecutions conducted by the police or other agencies. The power to stay proceedings is rarely exercised in either summary or indictable proceedings.

JUDICIAL CONTROL

Control of the trial

- 218 The courts have no opportunity to control the initial discretion to prosecute. Before an information is filed the courts have no function, except in cases of abuse of process,¹⁴³ the only exceptions being a few offences which require the leave of a High Court judge before an information may be filed (see para 171). During the course of a trial, several procedures are available which allow a court to control the course of the prosecution. At the preliminary hearing, for example, a court may find that there is no prima facie case or, at the trial, direct that no indictment be presented or that the defendant be discharged: Crimes Act 1961 s 347. These controls apply to proceedings conducted by all prosecution agencies, including private agencies and the Serious Fraud Office.

Judicial review

The conduct of prosecutions

- 219 The prime method of judicial control is not judicial review but the exercise of powers under the Crimes Act 1961 s 347: *C v Wellington District Court* [1996] 2 NZLR 395. The courts generally stress the importance of the prosecutor's independence in the operation of the criminal justice system. It follows that, in the absence of abuse of process, the courts will not review the conduct of a prosecution in court. For example, a prosecutor's decision to call or not to call particular witnesses at a preliminary hearing is not justiciable.¹⁴⁴ The prosecutor's decisions regarding the conduct of a trial are considered matters

¹⁴³ *Grayburn v Laing* [1991] 1 NZLR 482; *Jago v District Court of New South Wales* (1989) 63 ALJR 640.

¹⁴⁴ See *Phillips v Drain* [1995] 1 NZLR 513.

of personal judgment, rather than the “exercise of a judicial discretion or the exercise of a discretionary power”.¹⁴⁵

220 The prosecution decisions of the Serious Fraud Office are specifically exempt from judicial review under s 20 of the Serious Fraud Office Act 1990. This provision was included in the Act on the assumption that prosecution decisions generally were not subject to judicial review.¹⁴⁶ This assumption requires revision in the light of *C v Wellington District Court* [1996] 2 NZLR 395 and *R v Bedwellty Justices, ex p Williams* [1996] 3 WLR 361 (HL) per Lord Cooke of Thorndon. It seems that the prosecution decisions of other government agencies may be reviewable: example *Hallett v Attorney-General* [1989] 2 NZLR 87; *Hallett v Attorney-General No 2* [1989] 2 NZLR 96.

221 The position in relation to the prosecution decisions of the police, Crown solicitors and the Attorney-General and Solicitor-General is not clear. English cases provide only limited assistance in view of the different statutory provisions.¹⁴⁷

222 Section 27 of the New Zealand Bill of Rights Act 1990 must also now be a significant factor in determining whether judicial review is available.¹⁴⁸ Subsection (2) provides:

Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for the judicial review of that determination.

It is open to argument first, whether a prosecutor is a public authority, and second, whether a prosecutor makes a determination in the sense intended in s 27(2).¹⁴⁹

¹⁴⁵ *Richardson v R* (1974) 48 ALJR 181, 182.

¹⁴⁶ The Department of Justice report to the Justice and Law Reform Select Committee (6 April 1990, 16) stated:

We agree that the power of review should not be different from the position in relation to ordinary criminal investigations. This would mean that the decision whether or not to investigate or not to prosecute a suspected criminal offence would not be open to judicial review.

¹⁴⁷ For recent developments in English law see, for example, Hilson, “Discretion to Prosecute and Judicial Review” [1993] Crim LR 739; *R v Manchester Crown Court and Ashton, ex p DPP* [1993] 1 WLR 1524; [1993] 4 All ER 928; 98 Cr App R 461 (HL) and *R v Maidstone Crown Court ex p Clark* [1995] 1 WLR 831.

¹⁴⁸ In *R v Barlow* (unreported, High Court, Wellington, 22 September 1995, M 250/94) it was contended that s 27 could provide a basis on which a decision by the Solicitor-General not to stay proceedings may be judicially reviewed. The Court held that the Solicitor-General had not exercised his decision in any manner which could be said to breach s 27 and declined to consider whether and on what basis such a decision could be reviewed under s 27.

¹⁴⁹ The High Court in *R v K* [1995] 2 NZLR 440, 447, held that s 27(1) did not extend to the prosecutor’s role. Even assuming for the purposes of argument that a prosecutor is a “public authority”, the court stated that such a person does not make a “determination” of the accused’s rights. See also *R v Barlow* in which the court’s comments regarding s 27 were much less certain.

Non-prosecution policies

- 223 The police may properly adopt non-prosecution policies but the courts do have the power to judicially review the application of those policies – and departures from them – in particular cases: *R v Metropolitan Police Commissioner ex p Blackburn* [1968] 2 QB 118; [1968] 1 All ER 763; *R v Chief Constable, ex p L* [1993] 1 All ER 756. A decision could be set aside on the ground that no reasonable prosecution agency could have adopted such a policy.¹⁵⁰ In an extreme case, the selective or limited prosecution of offences could amount to the executive government illegally dispensing with compliance with the law, contrary to the Bill of Rights 1688 s 1.¹⁵¹

Police prosecution decisions

- 224 The law in relation to judicial review of a police decision to prosecute lacks authority, however, in principle the jurisdiction exists and the issue is as to its exercise (see authorities cited in para 220). Merely because a power is a prerogative one does not mean that it is not subject to judicial review. The New Zealand Court of Appeal has stated (obiter dictum) that statutory and prerogative powers to prosecute would normally be subject to review: *Kumar v Immigration Department* [1978] 2 NZLR 553.¹⁵² The test is whether the subject matter is justiciable: *Burt v Governor-General* [1992] 3 NZLR 672. In England decisions to prosecute, and decisions to prefer a less serious charge, may be judicially reviewed.¹⁵³
- 225 There are no New Zealand cases on whether a police decision not to prosecute in an individual case is judicially reviewable. However, in England it is established that a decision not to prosecute is judicially reviewable: *R v General Council of the Bar, ex p Percival* [1991] 1 QB 212.¹⁵⁴
- 226 It seems that prosecution decisions may be reviewed on two grounds by the courts. The first is the *Wednesbury* ground of unreasonableness. A successful review on *Wednesbury* grounds is, however, likely to be very rare. The second ground is the legitimate expectation that a policy will be followed or, that in ignoring a policy, the police failed to take into account a relevant consideration. Questions will arise about whether there is a policy, and whether it is sufficiently detailed to be used in review proceedings.

¹⁵⁰ See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230.

¹⁵¹ In force in New Zealand by virtue of s 1 and the First Schedule of the Imperial Laws Application Act 1988. In *R v London County Council, ex p the Entertainment Protection Association* [1931] 2 KB 215, a non-prosecution policy was held to contravene the 1688 Bill of Rights and was therefore illegal. The principle that the executive government cannot dispense with compliance with the law was applied in New Zealand in *Fitzgerald v Muldoon* [1976] NZLR 615.

¹⁵² See, however, *Moevao v Dept of Labour* [1980] 1 NZLR 464.

¹⁵³ See *R v Inland Revenue Commissioner, ex p Mead* [1993] All ER 772 and *R v General Council of the Bar, ex p Percival* [1990] All ER 137 respectively.

¹⁵⁴ In *Schokker and anor v Federal Commissioner of Taxation* (1996) 33 ATR 458 the Federal Court of Australia held that a decision of the Commissioner not to prosecute is judicially reviewable.

Crown solicitor prosecution decisions

- 227 The position in New Zealand concerning the judicial review of Crown solicitors' prosecution decisions is unclear. The High Court in *Saywell v Attorney-General* [1982] 2 NZLR 97, held that the decision of a Crown solicitor to present an indictment, and the content of such an indictment, are immune from judicial review. The decision is based, in part, on the principle that the Crown solicitors' statutory power to present an indictment is in the nature of a prerogative power and therefore not reviewable.¹⁵⁵ This view has been overtaken by *CCSU v Minister for Civil Services* [1985] AC 374, and *Burt v Governor-General* [1992] 3 NZLR 672. *Burt* was followed by *Reg v Secretary of State for the Housing Department, ex p Bentley* [1994] QB 349.
- 228 In England, recent cases have held that, in principle, the decision of the Crown Prosecution Service to continue proceedings initiated by the police is reviewable. However, it would require an exceptional case for the court to find in fact that the decision was unreasonable or not in accordance with policy.¹⁵⁶

Attorney-General and Solicitor-General prosecution decisions

- 229 The Supreme Court held in *Daemar v Gilland* [1979] 2 NZLR 7, that a stay of proceedings entered by the Solicitor-General could not be reviewed under the Judicature Amendment Act 1972. Since the decision in *Saywell* the Court of Appeal has accepted as arguable the view, that a decision to stay proceedings involves the exercise of a statutory power and would be reviewable. However, this view was given in the absence of opposing argument and the case was decided on other grounds: *Amery v Solicitor-General* [1987] 2 NZLR 292.
- 230 There are no decisions directly on the question whether the Solicitor-General's decision *not* to stay proceedings is amenable to review. In *R v Barlow* (1996) 13 CRNZ 503; [1996] 2 NZLR 116, the High Court commented that it is arguable whether a decision to enter a stay could be judicially reviewed.¹⁵⁷
- 231 In a 1995 English case it was held that there was no jurisdiction for judicial review of a decision of the Solicitor-General – taken on behalf of the Attorney-General – not to bring proceedings against newspapers for contempt of court.

¹⁵⁵ The Court also commented that it is not desirable that the Court should appear to exercise a supervisory role in determining what criminal prosecutions it should hear and determine; functions of prosecutors and judges should not be blurred. It held that the combined effect of the inherent jurisdiction of the High Court to order a stay of proceedings, and the Crimes Act 1961 provisions, meant there was no need for a separate jurisdiction to review prosecution decisions of a Crown solicitor.

¹⁵⁶ See, in addition to the cases listed in para 220, *R v Chief Constable of Kent and another, ex p GL* and *R v Director of Public Prosecutions, ex p RB* (1991) 93 Cr App R 416, and *R v DPP, ex p Langlands-Pearse* (unreported but discussed in an article by Peter Osborne in (1992) 43 NILQ 178).

¹⁵⁷ The Solicitor-General had refused to stay proceedings after two inconclusive jury trials. He decided that because of the seriousness of the charges (double murder), and the public interest in it, it required a verdict. The accused applied, unsuccessfully, for an order, under the inherent jurisdiction of the court, to stay the third trial. The Court was not asked to undertake a review of the Solicitor-General's decision, nor was the case an appeal from that decision. The Court held that there was no right of appeal to the courts against the decision of the Solicitor-General not to enter a stay.

The court commented that the Attorney-General has a unique constitutional position, and that if the office had been simply created by statute, and did not historically consist of prerogative powers, the situation may be different.¹⁵⁸

Conclusion

- 232 There seems no reason for judicial review to be available for decisions to prosecute or to continue a prosecution, and not available for decisions *not* to prosecute or to withdraw a prosecution. In both cases the discretion is the same although the result of its exercise differs. Indeed, the case in favour of judicial review of a decision *not* to prosecute is the stronger.¹⁵⁹ Once a prosecution is begun, the court has oversight of it and has powers under the New Zealand Bill of Rights Act 1990, the Crimes Act 1961 s 347, the doctrine of abuse of process, and because it controls the trial process. These remedies for bad or mistaken prosecution decisions are not available where a discretion *not* to prosecute has been exercised. Judicial review is perhaps the only effective remedy for improper exercise of this discretion.

The tort of misfeasance in a public office – police

- 233 A decision by the police to prosecute or not to prosecute an offence may be challenged through the tort of misfeasance in public office. *Garrett v Attorney-General* [1993] 3 NZLR 600, 603–604, and *Whithair v Attorney-General* [1996] 2 NZLR 45, 55–56 suggest that the elements of this tort are that a public officer has caused damage to a plaintiff by

- (a) a deliberate act or omission actuated by malice; or
- (b) a deliberate act knowingly in excess of official powers

Recklessness can suffice: *Garrett v Attorney-General* (unreported, CA, 19 December 1996, 129/96).

Malice exists if the holder of the public office exhibited ill will or spite towards the plaintiff, or acted in the knowledge that the relevant power was absent or being used for purposes which it did not authorise: *Elguzouli-Baf v Commissioner of Police* [1995] 1 All ER 833, 840; *Vermeulen v Attorney-General* [1986] LRC (Const) 786, 824. These stringent requirements make the tort of misfeasance in public office difficult to prove and for this reason it is rarely successfully argued.

Cause of action under the New Zealand Bill of Rights Act 1990

- 234 The boundaries of the cause of action for breach of the New Zealand Bill of Rights Act 1990 recognised by the Court of Appeal in *Simpson v Attorney-General* [1994] 3 NZLR 667 (*Baigent's Case*) are unclear. It has been recently applied in respect of a District Court judge's failure to give an unrepresented defendant a right to be heard during sentencing: *Upton v Green and Attorney-General* (unreported, High Court, Christchurch, 10 October 1996, CP 91/94).

¹⁵⁸ *R v Solicitor-General, ex p Taylor*, *The Times*, 14 August 1995, (Queen's Bench Divisional Court); compare with the authorities cited at para 227.

¹⁵⁹ See Goddard J (a former Deputy Solicitor-General), "Explaining Prosecution Decisions Publicly" (1996) NZLJ 355, 356.

Award of costs in a criminal prosecution

- 235 In principle, the prospect of an adverse award of costs can be an effective deterrent against commencing an unreasonable prosecution. However, the power to award costs to an acquitted defendant has been used sparingly.
- 236 The Costs in Criminal Cases Act 1967 allows the court to order that the defendant be paid a just and reasonable sum towards the cost of the defence.¹⁶⁰ Three basic principles govern the award of costs in s 5(3)–(5):
- There is no presumption for or against the award of costs in any case.
 - Costs are not to be granted simply because the defendant has been found not guilty or the information has been dismissed or withdrawn.
 - No defendant is to be refused costs simply because the proceedings were properly brought and continued.
- 237 Ordinarily costs are granted in favour of a defendant but they are not paid by the prosecutor: Costs in Criminal Cases Act 1967 s 7(1).¹⁶¹ However, if the court considers that a prosecution agency has acted negligently or in bad faith in bringing, conducting or continuing a prosecution, it may award costs against the agency: Costs in Criminal Cases Act 1967 s 7(2).
- 238 The system for awarding costs in criminal cases is currently under separate consideration by the Commission as part of its criminal procedure reference.

POLITICAL ACCOUNTABILITY

- 239 The Attorney-General is constitutionally responsible for the oversight of all criminal prosecutions – both public and private which may be controlled by stay of proceedings directed under ss 77A and 173 Summary Proceedings Act 1957 and s 378 Crimes Act 1961. Public prosecutions are brought by officers of government departments in which prosecution policies exist and individual decisions to prosecute are made. The issue of political involvement in such decision-making therefore requires consideration.

Police

- 240 The accepted view is that the police are independent of all political control in relation to prosecutions. The Police Act 1958 does not subject the Commissioner of Police to any control or direction by the Minister, and differs in this respect from legislation constituting other departments of government. The Minister of Police may not require the Commissioner to prosecute in any individual case; nor may the Minister require the Commissioner to implement particular prosecution policies – although this has been queried. The Police Regulations 1992 (SR 1992/14) reg 3(1) make the Commissioner responsible to the Minister for
- (a) the general administration and control of the Police, and
 - (b) the financial management and performance of the Police.

¹⁶⁰ Appeal costs may be recovered as well as trial costs. Under s 4 the court may order the defendants to pay the prosecutor's costs.

¹⁶¹ When the prosecution is conducted by or on behalf of the Crown by police and government agencies, the costs are to be paid by the Department for Courts. This was intended to cover prosecutions. In other cases costs are to be paid by the informant.

- 241 In Parliament, the Minister of Police does not accept responsibility for the prosecution decisions of the police. On occasions when questions have been asked in Parliament, the Minister has stated that those decisions were made by the police independently of the government.¹⁶²
- 242 While the Attorney-General has the ultimate responsibility for the Crown's prosecution processes, the Attorney-General's relationship with the police is obscure. By convention and in practice the Attorney-General takes an approach similar to that of the Minister of Police.
- 243 The Justice and Law Reform Select Committee of Parliament is an avenue of political control of the police. Under Standing Orders, this committee may examine the policy, administration and expenditure of departments and government agencies including the police.¹⁶³ The Committee may resolve to require the Commissioner of Police to provide it with a report on any matter affecting the policy or administration of the police, and there is no reason to suppose that this excludes law enforcement or prosecution policies. Questions relating to prosecution decisions have been asked but have not been followed up.

Serious Fraud Office

- 244 Like the police, the Serious Fraud Office is not subject to political control. Under the Serious Fraud Office Act 1990 ss 29–30 the Director exercises power independently and is only responsible to the Attorney-General for the general oversight of the administration of the Office in terms of the State Sector Act 1988.

Other government prosecuting agencies

- 245 The statutory autonomy possessed by the police and the Serious Fraud Office does not extend to prosecution decisions of other government prosecuting agencies. At most they are free of executive direction in individual cases. The practice is that the Minister for the particular department answers questions in Parliament relating to the law enforcement decisions of his or her officers. This differs from the position in England, where “political Ministers” are excluded from prosecution decisions. Instead, the Attorney-General accepts responsibility for all Crown prosecutions brought by government agencies other than those brought by the police or the Serious Fraud Office.

Crown solicitors

- 246 The Attorney-General bears the ultimate constitutional responsibility for the prosecution of all offences. However, the question of political accountability of the Attorney-General for prosecution decisions of Crown solicitors does not seem to have arisen. Regulation 9 of the Crown Solicitors Regulations 1994 (SR 1994/142) provides for the Solicitor-General to take any matter or business out of the hands of a Crown solicitor, and on rare occasions this has been done. On the other hand, Crown solicitors hold an independent office under the Crown.

¹⁶² See, for example, 501 NZPD (1989) 12801 and 12810.

¹⁶³ Orders of the House establishing Select Committees, Standing Orders of the House of Representatives, 1996.

Prosecution policies

- 247 The view that the executive government should not attempt to influence prosecution policies is an extension of the principle that it must not intervene in the making of individual prosecution decisions. The ability to affect policies has been thought inconsistent with the autonomy of the police, but the constitutional basis for denying such ability is not certain. It has been said to be supported by *R v Commissioner of Police of the Metropolis, ex p Blackburn* [1968] 2 QB 118, and to rest on the proposition that every constable (which includes the Commissioner) holds an independent office under the Crown. This argument is open to the objection that it would equally prevent the Commissioner of Police, or senior officers, from laying down prosecution policies. In principle, however, executive power to impose prosecution policies could be seen as opening the way to undue or improper intervention, or to the exercise of illegal dispensing power by the executive. (This second danger could equally arise from police or departmental policies of general non-prosecution.)
- 248 Nevertheless, the view that would exclude governments from influencing prosecution policies is comparatively modern; it may not always be followed strictly in New Zealand. Its application to the prosecution policies of other government agencies, which do not have the same independence as the police, is less clear. Indirectly, government power to allocate resources to specific purposes might affect prosecution policies.¹⁶⁴

Proposals which the Commission considers will ensure greater control over the prosecution system and accountability of prosecutors are outlined in chapter 19.

¹⁶⁴ See discussion by Edwards in *The Attorney-General, Politics and the Public Interest* (Sweet and Maxwell, London, 1984) 393–402. See also Brookfield, *The Attorney-General and the Staying of Proceedings* [1978] NZLJ 467. Orr in *Policing at the Crossroads* (Cameron and Young (eds), Allen & Unwin, Wellington, 1986) refers to the cases of the overstayers and of the Springbok tour as instances where a government was certainly, but to an undetermined extent, involved in enforcement policies, 55–58.

PART III

WIDER ISSUES

Part III examines the interests of Māori and victims in the criminal justice system, and outlines the concept of restorative justice.

11

Te ao Māori and the
Treaty of Waitangi

The prosecution system, as a part of the criminal justice system, is criticised as not meeting the interests of Māori. An examination of the whole criminal justice system based on Māori concerns is likely to be necessary to address these issues.

- 249 ONE OF THE REQUIREMENTS of the Commission's criminal procedure reference is to ensure that the law relating to criminal investigations and procedures conforms to the principles of the Treaty of Waitangi. In making its recommendations the Commission also has a statutory duty to take into account te ao Māori (the Māori world or dimension).¹⁶⁵
- 250 The Commission considers that ensuring that law and practice incorporate te ao Māori and conform to the principles of the Treaty of Waitangi is an objective which has fundamental implications for the criminal justice system as a whole. The focus of this paper – the prosecution process – is only one part of the criminal justice system. The relationship between the Treaty of Waitangi, te ao Māori and criminal procedure raises profound and difficult issues. In the limited scope of this paper on prosecutions a broad analysis of issues relating to Māori and the criminal justice system cannot be undertaken.
- 251 The Commission has made some preliminary inquiries, which included sponsoring a one-day hui for a number of Māori working with Māori in the criminal justice system (for participants see appendix A). There was a consensus that many Māori believe the criminal justice system as a whole is defective in that it does not take account of Māori values nor meet Māori needs. The hui participants were people of experience, with practical knowledge of the impact of the criminal law and the criminal justice system on Māori. They identified seventeen matters of concern. These matters arose in the context of oral discussion and did not purport to be a systematic critique. However, they embody firmly held views and feelings expressed by respected Māori.
- 252 The criticisms ranged from aspects of the prosecution system, to fundamental characteristics of criminal justice in New Zealand and to the substantive criminal law. Two general comments may initially be made. First, the range

¹⁶⁵ Law Commission Act 1985 s 5(2)(a).

and scope of these complaints demonstrate the nature of the problem; even those that fall within the prosecution topic, or other Commission projects, exemplify much deeper concerns. The heart of the matter is that many Māori appear not to have confidence in the present system of criminal justice. Second, however, many of these criticisms are not made only by Māori. The criticisms identified may be summarised:

- (1) Most prosecution decisions are made by Pakeha.
- (2) The exercise of police discretion (whether to prosecute) needs to be better planned, better controlled, and more consistent.
- (3) The system emphasises the State's interests, and the needs of individual victims and offenders can be overlooked. The victim or the offender can feel alienated, demeaned and traumatised because he or she has not been listened to. Undue emphasis on court procedure can emphasise this feeling.
- (4) In small communities Māori know each other and are effectively excluded from jury service if the defendant is Māori.
- (5) The right of silence in this context is a foreign concept for Māori – the right to speak and be heard is valued.
- (6) Punishment is given disproportionate weight in comparison to reconciliation and healing between the victim, offender and whanau, as well as in comparison to the potent effect of whakamā (shame).
- (7) Imprisonment is a futile and counterproductive punishment for many Māori.
- (8) Māori often “opt out” of the process to get it over with, eg, by pleading guilty rather than participate in an alien institution.
- (9) Winning under the adversary system is more important than reconciliation and healing.
- (10) Court rituals and procedures are not relevant to Māori, eg, gowns, excessive formality, over-elaborateness.
- (11) The system is based on beliefs alien to Māori, eg, concentrates on procedure (such as the rules of evidence) rather than people.
- (12) Repeated mispronunciation of Māori names and words adds to Māori alienation.
- (13) Some lawyers unnecessarily formalise and lengthen the process for money.
- (14) Some Māori believe that the Treaty secures the right to an indigenous justice system for the tangata whenua.
- (15) The offences in the Crimes Act 1961 and the Summary Offences Act 1981 do not sufficiently correspond with, or reflect, Māori values.
- (16) Because the system is alien many Māori are ignorant of it, and cannot make it work for them.
- (17) The system fails to acknowledge or deal with the likelihood that where Māori are convicted, but believe themselves innocent, they will carry a particular grievance because they have been dealt with by an alien system.

- 253 The Commission has not yet analysed the concerns expressed above and can offer no comment upon them at this stage. We think it probable that an examination of the whole criminal justice system will be required to respond to Māori concerns. The Commission is aware that these and similar concerns have been expressed by many Māori. For example, many of the same issues were identified by Māori women consulted for the Commission's Women's Access to Justice project. Such concerns cannot be addressed within the limited context of this study of the prosecution process.

- 254 However, three of the concerns, although small and partial in relation to the overall concerns expressed, are directly relevant to the prosecution process. First, in relation to the concern that most prosecution decisions are made by Pakeha (1), the Commission considers that the evidence already available justifies an immediate recommendation. The Commission proposes that:
- Police prosecutors should be trained in tikanga Māori, with a view to improved understanding of and sensitivity to Māori cultural values. The recruitment of more Māori police and of Māori police prosecutors should be encouraged.
 - The appointment of Māori within the Crown prosecution system should be encouraged. Appropriate recruitment policies should be adopted by the Crown Law Office and firms which act as Crown solicitors. All Crown solicitors should receive training in tikanga Māori with the hope of improving understanding of and sensitivity to Māori cultural values.
- Second, the concern expressed over the exercise of police discretion to prosecute (2) is a prominent theme of this paper and of our proposals in relation to police prosecution decisions (although within the context of this paper we make no comment on other types of police decisions). Our pending issues paper on diversion and alternatives to prosecution will take the matter further.
- Third, chapters 12 and 18 of this paper deal with concern (3) so far as it relates to victims.
- 255 Other issues to some extent are or will be the subject of consideration in other current Law Commission projects. In a forthcoming discussion paper on juries the issue of Māori serving on juries (4) is considered. A final report on the right of silence and the privilege against self-incrimination (5) will be published in 1997.¹⁶⁶ An issues paper on alternatives to prosecution (6)–(8) will be published in 1997. Restorative justice, the subject of (7)–(9), is being examined by the Ministry of Justice.¹⁶⁷ The Commission is liaising with the Ministry on this issue. The remainder of the concerns lie outside the Commission's reference on criminal procedure and other current work.
- 256 Outside of these reviews, the Commission considers that a proper application of the principles of the Treaty of Waitangi and te ao Māori to criminal procedure raises fundamental issues which can only be considered adequately in a broad-based examination of the criminal justice system. That system, in all its facets, impinges deeply on Māori. In relation to Pakeha, Māori are disproportionately represented as offenders and under-represented as decision-makers in the criminal justice system.¹⁶⁸
- 257 There are specific, practical proposals which the Commission believes could be instigated immediately to relieve some of the concerns of Māori. However, the following proposals do not address adequately the serious issues in relation to te ao Māori, the Treaty of Waitangi and the criminal justice system. The Commission further proposes:

¹⁶⁶ See *The Privilege Against Self-Incrimination* (NZLC PP25, Wellington, 1996) ch 4.

¹⁶⁷ See also ch 13 of this paper. The Ministry's discussion paper on Restorative Justice contained little discussion specific to Māori.

¹⁶⁸ However, the imprisonment statistics for Māori are consistent with figures for indigenous and ethnic minority populations world-wide.

- The initiatives of judges to improve their understanding of and sensitivity to Māori cultural values should be emulated by court staff and lawyers.¹⁶⁹ Training should be ongoing.
- Judges, counsel and court officials should be able to pronounce Māori words and names correctly.¹⁷⁰
- The involvement of more Māori personnel in court processes as judges, Justices of the Peace, lawyers and court staff should be actively encouraged.

Should the proposals in paras 254 and 257 be enacted immediately, or should they be deferred until a broad-based examination of the criminal justice system – as outlined in para 258 – is undertaken? What other administrative changes to improve the place of Māori in the criminal justice system could be made immediately?

CONCLUSION

- 258 The prosecution system operates within the criminal justice system. Reform of the whole criminal justice system to incorporate te ao Māori and the principles of the Treaty of Waitangi is beyond the scope of this paper. The Commission is aware of the importance of the issues. It believes that an examination of the whole criminal justice system is likely to be required to meet Māori concerns, as we have indicated. The Commission, in consultation with its Māori Committee, is considering means to that end, which includes consideration of the body best placed to undertake such an examination.

Should there be a full review of the criminal justice system with a view to meeting Māori concerns? If so, what body is best placed to undertake such an examination?

¹⁶⁹ See also the *Report of the Courts Consultative Committee on He Whaipaanga Hou* (Department of Justice, 1991) 40.

¹⁷⁰ See also the *Report of the Courts Consultative Committee on He Whaipaanga Hou* (Department of Justice, 1991) 20–21.

12

Victims' interests

This chapter discusses the position of victims in the criminal justice system. It goes on to examine how victims' needs are catered for within the prosecution system, in particular by the police and Crown solicitors.

INTRODUCTION

- 259 **A** PRIMARY OBJECTIVE of the prosecution system should be to ensure that victims' interests are secured. However, historically victims' interests have not been to the fore in the criminal justice system. The State assumes the responsibility for investigating and prosecuting all reported crime, on behalf of victims and society in general. The only role a victim has is that of being a witness for the prosecution. Critics point out that victims are thus marginalised and their interests subsumed to society's wider interests.¹⁷¹ Participation in State-controlled processes can cause "secondary victimisation", leaving victims worse off than if they had not reported the offence.¹⁷²
- 260 Recent debate on the needs of victims suggests that a new understanding of the nature of the relationship between the victim and the State is necessary: To the victim, the offence is a personal matter requiring restitution of harm suffered, while to the State it is a violation of criminal law, requiring a consistent, predictable and equitable response under the law.¹⁷³ Victims' groups call for the victim to become an integral part of the prosecution process so that the personal involvement is properly acknowledged.
- 261 This raises the question of the correct balance between the personal and the public aspects of criminal offending. It is important to take a balanced approach to improving the position of victims. If the role of victims in the criminal justice system is expanded, the existing rights of offenders (eg, to a fair trial) and society's interest in criminal justice being publicly administered must not be unduly compromised.

¹⁷¹ Christie argues that the state has stolen the victim's conflict with the offender and the victim needs to be re-involved in the criminal justice system: "Conflicts as Property" (1977) *British J Crim* 17.

¹⁷² Corns, "Criminal Proceedings: An Obligation or Choice for Crime Victims" (1994) 13 *Univ Tas LR* 358.

¹⁷³ *Towards Equality in Criminal Justice*: final report of the Victims' Task Force (Ballin (chair), Victims' Task Force, Wellington, 1993) 35.

- 262 The difficulty of balancing victims' interests and offenders' rights in the current system is illustrated by the question of delay. In general, victims have an interest in seeing the alleged offender tried, whether the trial is delayed or not. However, it is usually important for a victim that the trial take place within a reasonable time. Before a trial victims must cope with stress and anxiety due to uncertainty about whether the offender will be convicted. Generally, the longer the delay between offence and trial, the more stressful it is for victims. Pre-trial applications may substantially delay the eventual trial date. Victims are not systematically kept informed of pending applications and their potential for delaying a trial. Delay can also adversely affect witnesses' memories.
- 263 In 1985 the General Assembly of the United Nations adopted the Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power (appendix J). The Declaration provides that victims are entitled to prompt redress.¹⁷⁴ A victim's interest in a trial without delay is not recognised by the courts, nor by the Victims of Offences Act 1987. However, if a defendant's right to a speedy trial is recognised, the similar interests of the victim may be met.
- 264 New Zealand passed the Criminal Injuries Compensation Act 1963 providing compensation for victims of violent crimes.¹⁷⁵ Since the 1970s various community groups have been formed to assist victims of violent crime, such as Women's Refuges, Help Centres and Rape Crisis Centres.
- 265 Legislation has been enacted in New Zealand recognising the needs of victims in the criminal justice system: the sentence of reparation was introduced in the Criminal Justice Act 1985;¹⁷⁶ and in 1987 the Victims of Offences Act was enacted "to make better provision for the treatment of victims".¹⁷⁷ The Victims of Offences Act, which has its origins in the Declaration, contains a number of statements of principle on how victims should be treated by agents of the criminal justice system. The Act created the Victims' Task Force, which was established for a 5-year term to assist in and monitor the implementation of the Act's principles. Victim Support groups began developing throughout New Zealand in 1987, with the encouragement of the police¹⁷⁸ and the Victims' Task Force. Victim Support is an independent, community-based organisation, reliant principally on trained volunteers. It works in partnership with the police to respond to the needs of victims,¹⁷⁹ and provides a 24-hour, 7-day a week service of early crisis intervention; most clients are referred on to other support services (such as Women's Refuge) and counsellors.

¹⁷⁴ See Articles 4–6. New Zealand was a co-sponsor of the Declaration.

¹⁷⁵ That Act was superseded by the Accident Compensation Act 1972, which has now been replaced by the Accident Rehabilitation and Compensation Insurance Act 1992.

¹⁷⁶ Criminal Justice Act 1985 ss 11 and 22. Reparation is intended to be a sentence of first resort in cases involving emotional harm or loss of or damage to property.

¹⁷⁷ Wording from the long title of the Act.

¹⁷⁸ Commissioner's Circular 1990/14 suggested that while the police were not responsible for forming Victim Support groups they would probably need to act as the catalyst in initiating public support in the initial stages, and to support the services by using them. By 1997 there was a network of 77 Victim Support groups throughout the country affiliated to the New Zealand Council of Victim Support Groups.

¹⁷⁹ The Memorandum of Understanding and Draft Police Policy – Victims of Crime V33(2), demonstrates the close relationship between police and Victim Support groups.

- 266 In its final report in 1993 the Victims' Task Force reported that while some progress had been made there were still significant gaps in services to victims of crime.¹⁸⁰ It noted confusion amongst existing agencies about the boundaries of their roles in respect of victims, and made a number of recommendations which it believed would overcome the problems.
- 267 In November 1993, the Department of Justice launched the Victims' Court Assistance pilot scheme.¹⁸¹ The main focus of the scheme was on victims' need for information and support at all stages of proceedings. It was seen by Victim Support groups as complementary to the work undertaken by them. The pilot scheme employed six Victims' Court Assistants over a 9-month pilot scheme in Otahuhu, Rotorua, Wellington and Dunedin. Assistants were expected to work with court staff, Community Corrections, police and community groups to
- inform victims of the progress of the case,
 - inform victims of available services,
 - assist victims to participate in the justice system,
 - assist courts in dealing with victims,
 - assist other relevant agencies as appropriate, eg, Community Corrections, and
 - undertake community education.
- 268 An evaluation of the pilot scheme concluded the scheme generally met its objectives successfully. From September 1996 the scheme, known as Court Services for Victims, was extended to also operate in Whangarei, Auckland, Henderson, Hamilton, Napier, New Plymouth, Palmerston North, Porirua, Christchurch and Invercargill. It is envisaged that eventually the scheme will operate nationwide.¹⁸²
- 269 Since the scheme is now managed by the Department for Courts, it may be possible to track cases through the court system so that victims can systematically be informed of the outcome of their cases.

WHO IS A VICTIM?

- 270 Victims of crime have been described as "primary victims" – the actual targets of the offence, and "secondary victims" – the family, friends, neighbours and workmates of the primary victim¹⁸³ who are distressed by the crime and who may become fearful themselves. The UN Declaration on Victims of Crime defines "victim" to include family members and dependants of all victims, not just those of deceased victims.¹⁸⁴ This explicit recognition that the families of all victims also suffer trauma

¹⁸⁰ *Towards Equality in Criminal Justice*.

¹⁸¹ After the restructuring of the Department of Justice responsibility for the scheme was transferred to the newly created Department for Courts.

¹⁸² For information on and evaluation of the scheme, see *Evaluation of the Victims' Court Assistance Pilot Scheme* (draft), Department of Justice, Wellington, 11 November 1994; *Job description for Victims' Court Assistants*, Department of Justice, Wellington; and *Victims' Court Assistance – An Evaluation of the Pilot Scheme*, Department of Justice, Wellington, May 1995.

¹⁸³ Consedine, "Restorative Justice", Australian and New Zealand Society of Criminology Conference, January 1996.

¹⁸⁴ See appendix J, cls A1–A3.

would appear to accord more with the Māori view that an offence affects the victim's whānau as much as the victim.

271 The Victims of Offences Act 1987 s 2 defines a victim more narrowly than the UN Declaration:

[A] person who, through or by means of a criminal offence (whether or not any person is convicted of an offence), suffers physical or emotional harm, or loss of or damage to property; and, where an offence results in death, the term includes the members of the immediate family of the deceased.

Police and Victim Support groups¹⁸⁵ regard the Victims of Offences Act s 2 definition as too limited for their purposes. Draft police policy on victims of crime for example, recognises that anyone who suffers emotional harm as the result of a crime, such as bank tellers who witness an armed robbery, should be considered victims.¹⁸⁶

VICTIMS OF OFFENCES ACT 1987

272 The Victims of Offences Act 1987 goes some way towards recognising victims' interests in the criminal justice system, however, it does not contain enforceable rights nor, generally, impose duties.¹⁸⁷ The Act is merely a declaration of principles for the treatment of victims within the legal system. The Victims' Task Force¹⁸⁸ described ss 3–11 of the Act as outlining "what treatment victims might expect to receive".¹⁸⁹ Under the Act victims might expect:

- to be treated with courtesy, compassion and respect for their personal dignity and privacy (s 3);
- to have access to welfare, health, counselling, medical and legal assistance responsive to their needs (s 4);
- to be informed, at the earliest practicable time, of the services and remedies available to them, and of available protection against unlawful intimidation (s 5);
- to have access to information about
 - the progress of the investigation,
 - which charges are to be laid or the reasons for not laying charges,
 - their role as a witness for the prosecution, and
 - details of the proceedings (s 6);
- to have any property held for evidentiary purposes returned promptly (s 7);
- that arrangements should be made to ensure that the sentencing judge is

¹⁸⁵ Police work closely with Victim Support groups throughout the country. Aspects of operational arrangements between the two organisations are covered in a Memorandum of Understanding.

¹⁸⁶ Draft police policy on victims of crime, para V30(3); see also the Memorandum of Understanding. Police policy on victims of crime was being updated when this paper was published. We have relied on a draft version of the policy received in August 1996.

¹⁸⁷ Section 8 allows a judge to order a prosecutor to provide a victim impact statement.

¹⁸⁸ This was created by s 13 of the Act to monitor the Act's implementation. The Task Force ceased to operate on 31 March 1993, when it produced a final report, *Towards Equality in Criminal Justice*, for the Minister of Justice. There is now no one body which has accepted responsibility, and put into place systems, for monitoring the effectiveness of the Act, although it is administered by the Ministry of Justice.

¹⁸⁹ *Report on the Progress of the Victims' Task Force, 1989* (Victims' Task Force, Wellington).

informed of any effects of the offence on the victims by way of victim impact statements (s 8);¹⁹⁰

- that their address is not unnecessarily disclosed in court (s 9);
- that, in cases of sexual violation or other serious assault or injury, their views on the defendant's release on bail are conveyed to the court (s 10); and
- that, in cases of sexual violation or other serious assault or injury, they be given the opportunity to request notification of an offender's release or escape from penal custody (s 11).

- 273 The lack of accountability and consistency in delivery of services and information to victims identified by both the Victims' Task Force and the Department of Justice may be reinforced by the absence of a duty imposed on any particular body for ensuring the needs of victims are met. For example, s 4 simply states that victims should have access to appropriate support services; there is an assumption that such services exist, but there is no indication of which agency is responsible for supplying or funding those services.

WHAT DO VICTIMS NEED?

Different victims – different needs

- 274 The needs of victims will differ: many will wish to be fully involved in decision-making in their cases; others may be content with being kept informed; while yet others will wish for very little involvement and contact with the legal system. The type of victimisation may also be relevant to the kind of involvement a victim wishes to have, eg, the bank customer witness to armed robbery may not wish to be notified of the release of the offender from custody. Also, the effect of an offence on a particular person is not always related to the type of offence and is unpredictable. Just because a crime may be a relatively minor one it cannot be assumed the impact on the victim is also minor.¹⁹¹ Likewise, merely because a crime is a serious one, it cannot be assumed the impact on the victim will also be serious.
- 275 Certain types of victims are generally considered to have special needs. These include children,¹⁹² the elderly, victims of white collar crime, victims of residential burglary, victims of violent offences in general, victims of family violence,¹⁹³ and victims of sexual offences. In addition, a victim's gender, sexuality, ethnicity and other personal characteristics are likely to affect their reaction to their victimisation. The justice system must be sensitive and responsive to the needs of individual victims, and different types of victims.

¹⁹⁰ A 1994 amendment empowers a sentencing Judge to direct the prosecutor to provide such a statement.

¹⁹¹ Wallace, *Victim Impact Statements: A Monograph* (Department of Justice, Wellington, 1989) 16.

¹⁹² The Summary Proceedings Amendment (No 2) Act 1989 made special provision for child complainants of sexual abuse to give evidence.

¹⁹³ The Police Family Violence Policy has been operating since 1987, one of its main aims being to protect victims of family violence.

Five categories of need

- 276 In 1993 the Department of Justice undertook research into victims' needs to assess the impact of the changes made by the Victims of Offences Act.¹⁹⁴ It identified five categories of need, which, if met, may restore victims' sense of self-worth and enable them to get on with their lives:
- information,
 - involvement and participation,
 - protection and privacy,
 - support, and
 - reparation and/or compensation.¹⁹⁵

Information

- 277 Information provided to victims, about support and welfare services, about decisions made in relation to their case, and about the operation of the criminal justice system, lets victims make choices. It is fundamental to victims' recovery.¹⁹⁶
- 278 Of all the needs expressed by victims the need for case-related information and assistance is the most common.¹⁹⁷ There are a large number of decisions made in the investigation, prosecution and sentencing processes about which victims may wish to receive information, such as:
- caution decisions;
 - charging decisions, including what charges are laid, the reason those charges were chosen, and why charges are amended;
 - whether to offer diversion;
 - whether to support or oppose a bail application;
 - whether to accept a plea of guilty to a lesser charge; and
 - whether to seek reparation.
- Victims may also need information in appropriate cases about bail conditions and the availability of protection from unlawful intimidation.
- 279 Victims need information about the courtroom and the trial process, including what will be expected of them as a prosecution witness. Basic information on how the system works is useful for most victims. For example, they need to understand the purpose of preliminary hearing, the Crown solicitor's involvement in indictable cases, and the role of the prosecutor in acting for the State and not the victim.

¹⁹⁴ Although acknowledging progress for victims since the Act was passed in 1987, the report noted that information provided to victims was still inadequate, and that they were unable to participate in the system. It also found a lack of consistency in victim services, and a lack of culturally appropriate services.

¹⁹⁵ *Victims' Needs (An Issues Paper)* (Department of Justice Policy and Research Division, Wellington, 1993) 9–10.

¹⁹⁶ *Victims' Needs (An Issues Paper)*, 29.

¹⁹⁷ *Victims' Needs (An Issues Paper)*; and *Victims' Court Assistance: An Evaluation of the Pilot Scheme* (Department of Justice Policy and Research Division, Wellington, February 1995)

- 280 However, information alone may not be enough. Recent research on rape victims shows that even if the court process was explained to them, information alone was not enough to prepare victims for the trial.¹⁹⁸ For example, some rape victims have commented on the insufficiency of their contact with the prosecutor before the trial. This feeling was especially marked in cases where there was an acquittal, but was common in other cases. It was clear that some of the victims did not understand that the prosecutor is not “their lawyer”, and many did not feel adequately prepared as a witness.¹⁹⁹
- 281 In the survey conducted by the Commission (appendix E), Crown solicitors were divided on the question of whether they should see victims at all before the trial. Some referred to the Victims of Offences Act 1987, as well as to an understanding that Crown solicitors should have pre-trial contact with child victims of sexual abuse. Two Crown solicitors considered that it was clearly improper to interview victims or witnesses before trial about the evidence, for fear of being seen to influence their testimony by the interview, or being seen to coach them.

Involvement and participation

- 282 Involvement and participation by victims in their cases is empowering and can be part of the recovery process.²⁰⁰ Involvement might include being consulted about decisions related to the case, such as bail and diversion decisions, and the ability to have some input into sentencing decisions.
- 283 The victim impact statement,²⁰¹ which is presented to the sentencing judge, is currently the most common method of putting the victim’s experience before the court. It has, therefore, a symbolic role, as well as being able to provide facts which may not have previously been revealed in the conduct of the trial.²⁰² Sentencing judges frequently require a victim impact statement, especially in more serious cases.

Protection and privacy

- 284 Protection of victims includes prevention of re-victimisation or secondary victimisation by the investigative and court processes, as well as protection from intimidation by offenders and their associates and family. Protection from intimidation is significant in cases involving violence, especially family violence and sexual assault and violation. Areas of concern to victims include ensuring that:

¹⁹⁸ McDonald, “Women’s Experience of the Court Process”, unpublished paper presented at the Rape: Ten Years Progress? Conference, Wellington, March 1996.

¹⁹⁹ McDonald.

²⁰⁰ *Victims’ Needs (An Issues Paper)*, 31.

²⁰¹ Victims of Offences Act s 8.

²⁰² *Report on the Progress of the Victims’ Task Force*, 4.

- bail conditions or protection orders are upheld;
- they have safe places to live, eg, refuges;
- safe and separate waiting areas are provided in courts;²⁰³
- there are safe and appropriate ways of giving evidence;²⁰⁴ and
- in extreme cases, police protection is given.²⁰⁵

285 Victims also have a number of concerns about protecting their privacy as much as possible in the essentially public court process. If sensitive information is more widely disseminated than is necessary for proper handling of the case, secondary victimisation can occur. Victims are likely to wish to keep their addresses from an offender, and perhaps ensure their names are not publicly released. As far as possible they may wish to keep personal details private, eg, information in medical or psychological reports which is not directly relevant to proving the offence, or which is not attributable to the offence. Victim impact statements should only be available for defence counsel just prior to sentencing, and not be able to be copied or retained by an offender.²⁰⁶

Support

286 Appropriate support can help feelings of fear, isolation and vulnerability, and also with more practical matters, such as new locks on doors and windows.²⁰⁷ Support includes the availability and adequacy of welfare and counselling assistance, as well as the treatment victims receive from various people and groups with whom they come into contact. Some commentators believe that the inadequacies of the justice system would be partly alleviated by providing victims with advocates²⁰⁸ to ensure that they are supported and can participate in the system. Some of these needs may be met if victims have support people in court with them. This sometimes happens now, especially in cases of sexual violence.²⁰⁹

²⁰³ Apart from the need for case-related information and assistance, the need for safe areas within the court is the second most commonly expressed need: *Victims' Needs (An Issues Paper); Victims Court Assistance: An Evaluation of the Pilot Scheme*.

²⁰⁴ See *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, Wellington, 1996).

²⁰⁵ Police policy on victims of crime, para V34, advises police to reassure victims/witnesses, if they have fears about intimidation, that legal remedies exist and to advise them of local procedures.

²⁰⁶ There have been examples of prison inmates circulating victim impact statements in prison and using them to intimidate victims. See concern about confidentiality expressed in articles in *Lawtalk* 366 and 424. See for example "Rape victim suicide to be investigated", *Dominion*, Wellington, 5 August 1996, 1. The Law Commission's Women's Access to Justice consultation process has also heard concern expressed by women who have been subject to domestic violence that some abusers will 'punish' a woman for making a victim impact statement.

²⁰⁷ *Victims' Needs (An Issues Paper)*, 27.

²⁰⁸ The type of advocacy envisaged for victims is based on social work ideas, rather than legal ideas. It refers to "intervention on behalf of an individual or groups with institutions to secure or enhance a needed service or entitlement": *Towards Equality in Criminal Justice*, 8.2.5.

²⁰⁹ Rape Crisis provides this service as do some Women's Refuges and family violence abuse intervention programmes, such as HAIP (Hamilton Abuse Intervention Programme). *The Evidence of Children & Vulnerable Witnesses* (NZLC PP26, Wellington, 1996) ch 6, proposes the use of support persons for some witnesses. Court Services for Victims and Victim Support volunteers may also undertake this role.

- 287 Victim Support groups usually see victims only at an early stage in the reporting or investigation of a crime although in some areas groups will provide ongoing support for an individual victim. In other areas Victim Support groups run formal court assistance and support schemes. Victim Support groups are housed within police stations and receive daily statistical information from police about victims of crime.²¹⁰ In some areas of the country, Victim Support group workers undertake work which police would normally carry out, such as the preparation of victim impact statements.²¹¹ Victim Support works with all victims, not just those whose cases proceed through court.

Reparation and compensation

- 288 The objective of reparation and compensation for loss or harm suffered is to restore victims, as far as possible, to their pre-offence position.²¹² A discussion of the adequacy of present arrangements for reparation and compensation is beyond the scope of this paper.

VICTIMS' NEEDS AND THE PROSECUTION PROCESS

- 289 During the course of a prosecution a victim has significant contact with the police and Crown solicitors. Other prosecution agencies, such as the Serious Fraud Office, at times also deal with victims.²¹³ These agencies have all responded, to varying degrees, to the emphasis placed on victims' needs by the Victims of Offences Act 1987. For instance, both the police and Crown solicitors are advised to treat victims with courtesy and compassion.²¹⁴ Crown solicitors are generally considered to treat victims with courtesy and compassion,²¹⁵ and most show sensitivity and awareness of the victim's situation in assisting at trial, especially in the case of children.²¹⁶ The Victims' Needs survey in 1993 concluded that victims were generally treated with courtesy by the police.²¹⁷

Statutory responsibilities

- 290 Various sections of the Victims of Offences Act 1987 can be interpreted to place responsibility on prosecutors to meet victims' needs. However, the Act is silent as to who exactly is responsible and this is one aspect in which it tends to be inadequate in practice.

²¹⁰ See the draft police policy on victims of crime, para V47 about privacy considerations.

²¹¹ The draft police policy on victims of crime, para V38, makes the statements the responsibility of the officer in charge of the case.

²¹² *Victims' Needs (An Issues Paper)*, 37.

²¹³ Victims of white collar crime were identified by the Victims' Task Force as requiring special consideration. The Task Force worked with the Serious Fraud Office which has established links with Victim Support groups: *Towards Equality in Criminal Justice*, 44.

²¹⁴ Draft police policy on victims of crime, paras V31 and V32; Prosecution Guidelines, para 11.1.

²¹⁵ *Victims' Needs (An Issues Paper)*, 44.

²¹⁶ *Towards Equality in Criminal Justice*, 44.

²¹⁷ *Victims' Needs (An Issues Paper)*, 44.

- 291 For example, s 5(1) requires police, officers of the court and health and social services personnel to give victims information on services and remedies available to them. However, since no one agency is given the responsibility by the Act for ensuring that such information is supplied to the victim, it is possible that each agency could rely on the other to supply it, with the result that no adequate information is delivered. Also, s 5 does not define what should be available to victims by way of “protection from unlawful intimidation”.
- 292 Section 6 does not state which prosecuting agency should undertake the information giving roles, or whether the lines of responsibility should be different in summary and indictable cases.
- 293 Section 8 gives no guidance on appropriate administrative arrangements for presenting victim impact statements to the court and it does not suggest which agency might make such arrangements. Nor are arrangements for maintaining the confidentiality of victim impact statements mentioned.
- 294 Section 9, which provides that a victim’s address should not be unnecessarily disclosed in court, only deals with one of the privacy concerns victims typically have. Other privacy concerns, such as consideration of name suppression to protect the identity of the victim, are not covered.
- 295 Section 10 gives no guidance on who should ensure that any fears the victim might have are identified, nor whether those fears should be presented to the court orally or in writing. The word “serious” in relation to assault or injury is not defined.²¹⁸ The victim has no right to put his or her own views on whether the defendant should be granted bail before the court.
- 296 The interest of victims in the speedy disposition of their cases is not recognised by the Act (see para 262).

Prosecution Guidelines

- 297 The Solicitor-General’s Prosecution Guidelines (appendix B) contain some guidance for Crown solicitors on their responsibilities to victims, although not in any great detail. In particular:
- Although public interest factors are taken into account in exercising the discretion whether to prosecute an offence – and one of those factors is the attitude of the victim of the alleged offence to a prosecution (para 3.3.2) – there is no guidance on what weight should be placed on this.
 - The Guidelines do not suggest that other aspects of prosecution decision-making, such as charging decisions, should be discussed with the victim.
 - Decisions to stay proceedings or withdraw or amend charges may have a very serious effect on victims, especially if victims feel they are not believed to the extent that would sustain a conviction. Careful explanation by the prosecutor is essential in these cases. The Guidelines do not suggest that the victims’ interests and views should be taken into account before any decision, nor that they be informed of such decisions.
 - The provisions on plea negotiation (paras 7.1–7.6) require a prosecutor to consider how the process of giving evidence may affect witnesses, and whether the defendant has made reparation. These provisions do not, however, explicitly require a prosecutor to consider the interests of the victim, nor to consult with the victim, in deciding whether to accept a plea.

²¹⁸ Compare with draft police policy on victims of crime, para V42.

- The Guidelines exempt Crown solicitors from responsibility for conveying information to victims, as required by the Victims of Offences Act 1987 s 6, by explicitly stating that they are not prosecuting authorities for the purposes of the Act (para 11.3). Instead the police are stated to have the responsibility for ensuring s 6 information is conveyed to the victim (paras 11.3–11.4).
- The Guidelines restate the essence of s 10, which requires that a victim's views on bail are conveyed to the judge by the prosecutor but the Guidelines do not state who should obtain victims' views, how this should be done or whether victims' views should be conveyed orally or in writing.
- No mention is made of the importance of Crown solicitors meeting victims who will be witnesses and explaining the trial process, courtroom practice, the role of the victim as a witness, and the role of the Crown solicitor as prosecutor.²¹⁹
- The interest of victims in a speedy disposition of their cases is not recognised by the Guidelines. There is no duty to inform victims of pre-trial applications or other factors which might delay the case.
- There is no recognition that victims of different types of offences, eg, victims of sexual violation may have special needs.

Police practice

- 298 The police have developed a number of useful practices to assist victims and since 1991 have had a training programme on their responsibilities to victims.²²⁰ Their practice is in many respects aimed at meeting victims' needs.

Police Pre-trial Diversion Guidelines

- 299 Police Pre-trial Diversion Guidelines clearly recognise that the exercise of the discretion to offer diversion remains with the police. However, the police must obtain an informed view from the victim and seriously consider the victim's views on the appropriateness of diversion when exercising their discretion. The discussion with the victim should include a full explanation to the victim of the likely conditions to be imposed on the offender and the advantages of diversion. While the victim's views about diversion are not binding on the police, diversion cannot proceed unless the offender agrees.²²¹

Police policy on family violence

- 300 Since 1987 it has been police policy to arrest violent offenders in family situations.²²² The paramount consideration of the policy is protection of the victim. This is achieved, in part, by ensuring that the offender is dealt with in the criminal justice system. The policy recognises and attempts to ensure that police respond sensitively to the fact that victims in family violence situations are often reluctant to prosecute or to give evidence (see para 99).

²¹⁹ This was recommended in *Report on Victim Issues 1994* (New Zealand Law Society, Wellington, 1994).

²²⁰ *Towards Equality in Criminal Justice*, 44.

²²¹ Police Pre-trial Diversion Guidelines 27/9/94, paras e and g.

²²² See *Ten-One* 121, 12 July 1996, for the Police Family Violence Policy, effective from 1 July 1996. Offenders are generally charged with "assault on a child, or by a male on a female" under the Crimes Act 1961 s 194.

Draft police policy on victims of crime

- 301 There is comprehensive police policy on victims of crime (in draft form at the time this paper was published) which inform police how the Victims of Offences Act 1987 should guide their practice. The policy on victims of crime and the Police Family Violence Policy are proactive in meeting victims' needs in a number of respects.²²³ For instance, the draft policy on victims of crime includes the following:
- Police prosecutors are given the responsibility to ensure that victims who will give evidence are familiarised with the courtroom and court procedure. The draft policy suggests that police should arrange for Victim Support or the Court Services for Victims' staff to undertake this task.²²⁴
 - The draft policy recognises the responsibility of the police for ensuring victims' views about their safety are put before the court in bail decisions, as required by the Victims of Offences Act s 10. The draft policy states that the meaning of "serious assault or injury" in s 10 is unclear and that the victim's views on bail should be put before the court in all cases where violence or threatening behaviour has occurred, as well as where victims have genuine fears for their safety.²²⁵
 - The draft policy contains comprehensive guidance on the preparation of victim impact statements in every case where a victim wishes one to be prepared. The responsibility to prepare the statement is placed on the police, although it is recognised that Victim Support groups may assist. Confidentiality concerns are recognised.²²⁶
- 302 However, police prosecution practice may still not adequately or systematically meet victims' needs. For instance:
- There is no explicit requirement that any bail conditions, eg, to stay away from the victim, should be conveyed to the victim by the police.
 - There are times when a victim, although having made a complaint, may not wish the prosecution to proceed for various reasons, including fear of the offender or a reluctance to go through the court process. The draft policy does not suggest how these situations should be handled.
 - The interest of victims in a speedy disposition of their cases is not recognised by the draft policy. There is no duty to inform the victim of any factor which may delay the trial.
 - The draft policy recognises the special needs of victims of residential burglary, witnesses to bank robberies, and the families of homicide victims.²²⁷ However, no specific reference is made to the special needs of other groups of victims, such as victims of sexual violation or child victims of sexual abuse.²²⁸

²²³ However, the two policies do not refer to one another.

²²⁴ Draft police policy on victims of crime, para V32.

²²⁵ Draft police policy, para V42.

²²⁶ Draft police policy, paras V38, V39–V50.

²²⁷ Draft police policy, paras V44, V45 and V48.

²²⁸ The draft policy does recognise that parents of child victims of sexual abuse are also "victims" who must be notified of the release or escape from custody of an offender: para V43.

- 303 The challenge is to design a prosecution system which can give a proper place to victims and deal sympathetically with their needs while also giving proper emphasis to the other objectives of the system, notably the rights of the offender.

The Commission's proposals for addressing some of the deficiencies identified in this chapter are discussed in chapter 18.

Restorative justice

A restorative justice policy, with its community-centred approach to crime, would have major implications for the criminal justice system and for the prosecution process as a part of that system.

- 304 **R**ESTORATIVE JUSTICE IS AN APPROACH to crime which is or has been central to many cultures, including Māori, and which is enjoying renewed support. In recent times in New Zealand there has been an increasing interest in restorative justice.²²⁹ The Ministry of Justice published *Restorative Justice: A Discussion Paper* (October 1995) which sets out some options for and implications of restorative justice in New Zealand.
- 305 Restorative justice emphasises the acceptance of guilt and responsibility. It is based on reparation which encompasses actions which attempt to repair the damage caused by the crime, either materially or symbolically.²³⁰ It involves the victim, offender and community. Elements of restorative justice can be found within the present system of criminal justice. One example is the system of family group conferences for young offenders which incorporates restorative processes and outcomes even though it was not primarily designed as a restorative system.
- 306 Restorative justice is defined by Marshall:
 as a way of dealing with victims and offenders by focusing on the settlement of conflicts arising from crime and resolving the underlying problems which cause it. It is also, more widely, a way of dealing with crime generally in a rational problem solving way. Central to restorative justice is recognition of the community, rather than criminal justice agencies, as the prime site of crime control.²³¹

²²⁹ See for example Brown, "Empowering the Victim in the New Zealand Youth Justice Process: A Strategy for Healing" (8th International Symposium on Victimology, Adelaide, 1994); Consedine, *Restorative Justice: Healing the Effects of Crime* (Ploughshares, Lyttelton, 1995); McElrea, "The New Zealand Youth Court: A Model for Development in Other Courts" (National Conference of District Court Judges, Rotorua, 6–9 April 1994); Stewart, "The Youth Court in New Zealand: A New Model of Justice" (Legal Research Foundation 34, Auckland, 1993).

²³⁰ *Restorative Justice: A Discussion Paper* (Ministry of Justice, Wellington, October 1995) 6.

²³¹ *Restorative Justice*, 6.

- 307 Restorative justice is generally based on three beliefs:
- crime results in harm to victims, offenders and communities;
 - not only government, but victims, offenders and communities should be actively involved in the criminal justice process; and
 - in promoting justice, the government should be responsible for preserving order, and the community should be responsible for establishing peace.²³²
- The attraction of restorative justice is that it may be better able to meet the objectives of the criminal justice system, or at least some of them, than the current approach.
- 308 Restorative justice may at the same time respond to the interests and concerns of victims, offenders and communities in the following ways:
- Victims – restorative justice provides victims with support, restitution, opportunities for healing, and the ability to influence the outcome of their complaints.
 - Offenders – restorative justice holds offenders accountable and prevents re-offending by making offenders acknowledge and become aware of the consequences of their offending. It also provides targeted programmes or interventions to address contributing factors to re-offending.
 - Communities – restorative justice reduces crime and increases public confidence in the criminal justice system by involving community-based groups (cultural, family, religious, educational, etc) in Victim Support and offender-based programmes and other interventions.
- 309 The consequences of adopting restorative justice as a central objective of the prosecution system would extend to the whole criminal justice system. Restorative justice programmes may be used at different stages of the criminal process – pre-trial, post-conviction and post-sentencing. Restorative justice places significant emphasis on reparation, the role of the victim and the families of both the offender and the victim, and the more liberal use of alternatives to the formal and rigid process of trial and sentence. Some of the objectives of the prosecution system set out in chapter 2 encapsulate elements of the philosophy of restorative justice. In particular, the focus is on the interests of victims and on limiting the use of formal prosecution to appropriate cases. However, those objectives are to be achieved within a prosecution system underpinned by values and objectives which are different to those of restorative justice.
- 310 Our current criminal justice system has a number of sometimes competing objectives for offenders: punishment, retribution, deterrence, incapacitation, denunciation, and reform. To the extent that restorative justice objectives might come to predominate over other current punishment objectives, particularly retribution and incapacitation, there are implications for the adversary system. To the extent that the punitive element might disappear as a feature of the criminal justice system, the rationale for the law's emphasis on protecting the rights of defendants might be weakened. At present, procedures, evidentiary rules and presumptions are weighted in favour of defendants. It can be argued that at least in part the reason for this is to protect a defendant against the potentially severe consequences of conviction – loss of property and/or liberty. The same imbalance does not exist in civil actions, where the object is to secure compensation. Thus, under a restorative justice regime the balance between victim and offender might well shift.

²³² *Restorative Justice*, 8.

- 311 The adoption of restorative justice programmes as a response to adult offending in New Zealand might also contribute to a more culturally relevant response to offending by providing traditional decision-making models and approaches for Māori and other groups.²³³ A restorative justice system is likely to supplement or replace State-run programmes with community-based programmes. However, as the Ministry's paper points out, there is not necessarily more agreement among Māori than among Pakeha (or other groups) that restorative justice programmes are more appropriate than the present system.
- 312 The Ministry of Justice paper on restorative justice was widely distributed and submissions were called for by the end of May 1996. A report to Cabinet is due in the first half of 1997. The Commission is consulting with the Ministry of Justice about the outcome and the implications for the prosecution system.

How might adopting restorative justice principles influence the proposals in this paper for the reform of the prosecution system?

²³³ *Restorative Justice*, 53.

PART IV

OPTIONS FOR REFORM

Verdict on the prosecution system

The present prosecution system has substantial defects. Change should be made in a coherent and principled way building on and reforming existing structures rather than replacing them.

313 **T**HE NEW ZEALAND PROSECUTION SYSTEM in 1997 is essentially the English system of the mid-nineteenth century, modified in various ways by piecemeal changes. The Commission's impression is that, by and large, the system is effective and respects human rights. It is capable of processing large volumes of cases effectively and reasonably quickly and results in the successful prosecution of large numbers of people who have committed offences. About 70% of the prosecutions that are begun result in conviction. The clearance rate²³⁴ of "reported non-traffic offences" in 1993 was 38% and in 1994 and 1995, 43%.²³⁵ These figures must, of course, be approached with caution. What is a realistic measure of successful prosecutions in an effective system? A very high proportion of successful prosecutions might suggest under-prosecution rather than efficiency; the converse test is whether prosecutions are unnecessarily begun or continued. No precise answer is possible. There seems to be no public or professional perception that large numbers of people are wrongly convicted. On the other hand, the absence of systematic, separate consideration of whether there are reasonable grounds to prosecute, and whether it is in the public interest for a prosecution to proceed, supports a suspicion that some prosecutions are brought unnecessarily.

STRENGTHS OF THE CURRENT SYSTEM

- 314 The current system has the following positive features:
- The prosecution process is independent and free from improper executive control or influence.
 - It is generally acceptable to those who administer it, and to the public. In contrast to the dissatisfaction that produced radical change in Australia and England, there has been little public or professional criticism in New Zealand.

²³⁴ An offence is cleared if it is prosecuted, or if the investigation disclosed no offence, or a decision not to prosecute was taken. An offence is not cleared if no offender is located.

²³⁵ Report of the New Zealand Police for the year ended 30 June 1993; 1994; 1995.

- It is familiar. Familiarity is not always a strong argument against change, but the outcome of change is often uncertain. A new prosecution structure would have to be administered – at least initially – by those who were used to the current system. Difficulties in the transition from one structure to another might have disadvantageous consequences.
- It is relatively flexible and informal. There is scope for flexibility in individual cases. It is open to change and development, examples being the issue in 1992 by the Solicitor-General of the Prosecution Guidelines, the development of the police adult pre-trial diversion scheme, pre-trial discovery, and pre-trial conferences.
- There is a degree of specialisation. The police and Crown solicitors prosecute the general run of criminal cases and other bodies prosecute specific offences under statutes which are relevant to their functions. It makes sense for the bodies which administer such statutes to also prosecute the offences under them.
- It is not excessively expensive. In 1993–1994 the police and traffic prosecution services cost \$23 million²³⁶ and the criminal costs of the Crown Law Office – much the greatest part being payments to Crown solicitors – \$13 million.²³⁷ These costs are small in relation to the overall costs of the criminal justice system.

DEFECTS IN THE CURRENT SYSTEM

315 Against these strengths, however, are a number of defects, some of them serious:

- The legal forms are not in line with the reality. Except after a committal for trial, all prosecutions are in the name of the informant, an individual police or prosecuting agency officer, and not in the name of the police, the prosecuting agency or the Crown.
- Investigation and prosecution functions are often carried out by the same agencies. The police and members of other agencies with investigative functions are judging the decisions of their colleagues. This, while convenient, does not present the appearance of objectivity in prosecution decision-making.

In almost every summary case initiated by the police the decision to prosecute, and the choice of the charge or charges, are made by officers of the branch – criminal investigation or uniform – that has investigated the complaint or made the arrest. Within the uniform branch of the police decisions are often made by junior arresting officers without regular review by their seniors. Officers of the prosecution section seldom have the opportunity to review a case. Indeed, the primary purpose of the prosecution section is to present the prosecution case in court.

- Distinct from the question of whether there is a *prima facie* case, there is no effective system for considering whether, and if so how, the discretion to prosecute or refrain from prosecuting should be exercised.²³⁸

²³⁶ For details of police costs see appendix C.

²³⁷ For details of Crown Law Office costs see appendix C.

²³⁸ The issue will be raised in the forthcoming Commission issues paper on diversion and alternatives to prosecution. However, it is apparent that much prosecution occurs by default, the prosecuting authority considering only the first question and ignoring the second, crucial public interest consideration. The Commission's preliminary work indicates that this is a significant contributing factor to unnecessary pressure on the criminal prosecution system which entails avoidable expense and anguish.

- Decisions and policies are not always consistent from place to place or time to time. The Solicitor-General's Prosecution Guidelines leave much to discretion and individual approach. Crown solicitors are limited in the extent to which they can bring about consistent policies. Police Regional and District commanders are permitted to manage their own areas, and the allocation of funds to specific areas according to local needs may affect prosecutions.
- Crown solicitors have differed among themselves about the nature of their responsibilities. All see themselves to some extent as having a control and a buffer role. Most categorised their functions in this area as "guiding" the police, adding from the options offered in our questionnaire either "supporting" or "controlling", and sometimes both.²³⁹ A few drew a distinction between their roles as Crown solicitor and as solicitor for the police or a prosecuting agency in summary matters. In relation to this latter role, one Crown solicitor felt unable to interfere with the decision to prosecute in individual cases.²⁴⁰
- The degree to which Crown solicitors in different districts are consulted by police and by government agencies varies; it appears to depend to some extent on personalities and the state of the relationship with the police. Some Crown solicitors thought that police budget constraints might be relevant. One Crown solicitor, who does not charge for informal advice given at an early stage, finds that the police are eager to seek it. The perception of others is different.
- Crown solicitors accept that they have a discretion to drop, alter or amend charges. The Prosecution Guidelines state that Crown solicitors should consider afresh each case coming to them, but it is uncertain what this means in practice. The Solicitor-General has the power to stay proceedings, but it is rarely exercised. In 1992, Judges expressed concern that Crown solicitors were not using a sufficient degree of judgment in formulating charges, and that the level of charging was often too high in situations where lesser charges might attract a plea of guilty and available sentences were sufficient.²⁴¹ However, some Crown solicitors thought that in certain types of cases the police undercharged.²⁴²
- Crown solicitors often come into a case at too late a stage. This point was made by many Crown solicitors and by the Crown Law Office. The police and departments are free to consult the Crown solicitor at any time, but most indictable cases come to the Crown solicitor's knowledge only after a committal for trial. As a result they have no opportunity to influence the initiation of proceedings, the choice of summary or indictable procedures, the choice of charges, or the conduct of the preliminary hearing. By the time Crown solicitors receive the papers it is often difficult to bring a case to an end, or to alter its character radically (eg, by proceeding with a different charge or taking a summary, rather than an indictable path).

That does not imply that Crown solicitors are limited to screening out cases. For instance, they take initiatives to strengthen the case to be presented at

²³⁹ Appendix E para E18.

²⁴⁰ Appendix E para E19.

²⁴¹ Laurenson-Taylor, *Review of Crown Solicitors' Structure for the Solicitor-General* (Crown Law Office, Wellington, 1992) 57.

²⁴² Appendix F para F5.

the trial by asking for further police investigation or for a search for better, or more first-hand, witnesses. In the Commission's view, this is proper and desirable.

- Neither the Solicitor-General nor Crown solicitors have any effective control over summary prosecutions or ways to monitor them, except in the unusual case where the prosecuting agency chooses to consult a Crown solicitor.
- Supervision and accountability are areas of much uncertainty:
 - The relationship between the police and the Attorney-General is obscure. It is the Attorney-General who is constitutionally responsible for the enforcement of the criminal law but the Minister of Police normally answers Parliamentary questions about police prosecution decisions.
 - How far the Solicitor-General can direct Crown solicitors is unclear. Neither the Solicitor-General nor Crown solicitors can direct the police.
 - The historical view that every sworn police officer is autonomous, and exercises an independent discretion, does not conform to modern reality. Nor is it clear whether this proposition applies to prosecution decisions. In practice authority within the police force is hierarchical and prosecution decisions are made in accordance with the General Instructions given under the Police Act 1958.
 - There is little internal review of police prosecution decisions; and the Police Complaints Authority has not accepted this function.
- Related to this is the question of prosecution policies. At present the power to decide such policies seems to be accepted as a valid power of the police or other enforcement agencies, without any ministerial control. It is doubtful whether this should be so, although there are arguments on both sides. Ultimately, decisions about how the law should be enforced have important public interest implications. Partly it is a matter of allocating limited resources, and partly it is a matter of the social good or harm that may result. Governments neither can – nor should – be indifferent to such matters.
- There is untrammelled scope for private prosecutions. While they potentially serve as a desirable check on executive – including police – neglect, misjudgment or impropriety, they also have the potential for abuse, and lack the safeguards of public prosecutions.
- A dichotomy exists between the stages before and after an information is filed. Before an information is filed the court has no function, except possibly in a case of gross abuse. But once an information has been filed prosecutors lose, in theory, almost all power of control. They may withdraw or amend an information only if the court permits: it is the court that decides if there is a prima facie case to go to jury trial even though the prosecutor will already have put his or her mind to this. The test of sufficiency of evidence for committal is narrower than the one which, according to the Prosecution Guidelines, is to be normally applied by Crown solicitors. If Crown solicitors judge that the proceedings should not continue at all, they can apply to the court for a Crimes Act 1961 s 347 discharge. Such stays of proceedings are, however, extremely rare.
- Alternatives to formal prosecution are inadequate. Once a case comes to a Crown solicitor after committal it goes to trial in the absence of either a guilty plea or a direction by the court under s 347 of the Crimes Act 1961. No middle course is open. Diversion decisions (including for this purpose the police warning) are taken at relatively low police levels, usually before,

or soon after, a charge is laid. They are unlikely to be even considered if the charge itself is serious.

- Despite recent reforms, the system pays insufficient attention to the victim as an integral actor in the prosecution process.
- The system pays insufficient attention to te ao Māori.

CONCLUSION

- 316 The Commission suggests that the existing prosecution system does not fully meet many of its objectives and believes that it is less efficient than it might be. There is reason to think that some cases unnecessarily go to trial; some cases go further through the process than they might; some are unnecessarily prosecuted; others are less well prepared than they should be. To the degree that these inefficiencies can be reduced without substantially greater expense, cost-efficiency may be improved. The merging of investigation, arrest and prosecution functions in the police, and the fact that the police conduct almost all summary prosecutions, can give the appearance of unfairness. So too can the relative indifference of the process towards victims of offences. Partly because of the system's high degree of decentralisation there is inconsistency in decisions. Lines of accountability are uncertain and the mechanisms for oversight and control inadequate. The question of consistency with te ao Māori and the Treaty of Waitangi seems to relate less to the prosecution system itself than to the wider criminal justice system which determines its features.
- 317 In the Commission's opinion, it is not enough to deal with these faults by piecemeal changes. The prosecution system needs to be considered as a whole and reformed according to coherent principles.

Chapter 4 summarises the Commission's proposals for reform of the prosecution system. Chapters 15–22 outline the proposals in greater detail.

Proposals on the structure of the prosecution system

The present prosecution system does not adequately meet the important objectives of promoting fairness, consistency, transparency and accountability. It is also less efficient than it should be. This chapter considers the extent to which the structure of the system hinders the attainment of these and other objectives and outlines how the structure of the prosecution system can be improved.

- 318 **T**HE VAST MAJORITY OF DECISIONS to prosecute criminal offences are made within a single organisation, the New Zealand Police, without adequate internal or external review of discretionary decisions. Prosecution and charging decisions for both summary and indictable offences are strongly driven by the police officer in charge of the case. The Serious Fraud Office and other government agencies also make both investigative and prosecution decisions in relation to the offences they prosecute. Procedures for the control and review of those prosecution decisions vary. Crown solicitors do have prosecution responsibilities in indictable cases, but usually only after the defendant has been committed for trial.
- 319 How do we make the decision about which option for reform of the structure of the system is best in light of the stated objectives of the prosecution system, the present structure of the system and the interests and resources already invested in it, and the problems with the present system? Our approach – determined to some extent by considering the nature of the prosecution function and recent trends overseas – is to make a clearer distinction between investigative and prosecution functions by vesting them in separate agencies. In the Commission’s view, the fundamental principle underlying any reform is that the prosecution of criminal offences remains a central responsibility of the modern State.

THE NEED FOR A DISCRETION TO PROSECUTE

- 320 The problems relating to fairness, consistency, transparency and accountability are created in large part by the existence of a broad discretion to prosecute. Should there be a discretion to prosecute at all? It can be argued that prosecution

should be automatic: justice would be seen to operate in an impartial way and the scope for discrimination and possible corruption generated by selective prosecution would in theory be minimised.²⁴³

- 321 However, there are strong arguments against the concept of automatic prosecution:
- While the discretion whether or not to investigate a suspected offence remains there is no advantage in eliminating the discretion to prosecute.
 - Automatic investigation and prosecution would put a much greater strain on the resources available for law enforcement. Resources will always be limited and discretions are necessary to enable the resources to be used effectively and efficiently.
 - Alternatives to prosecution, such as taking no action, warnings or diversion, may often be more effective methods of promoting the aims of criminal justice. A discretion to prosecute allows those alternatives to be considered.
- 322 In the Commission's view, the discretion to prosecute should be retained. It provides valuable flexibility in the system. However, appropriate structures and criteria are required for the control and review of prosecution decisions in order to achieve fair and consistent decisions, as well as transparency and accountability.

Should there be a discretion to prosecute?

SEPARATING INVESTIGATION AND PROSECUTION FUNCTIONS

The difference between investigation and prosecution decisions

- 323 Once an investigating or arresting officer has conducted an investigation and formed the opinion that a particular person has broken the law, a new and different set of questions has to be asked. Should that person be prosecuted and if so for what offence? Is formal prosecution the proper response? Is the evidence (whatever test is used) sufficient? Are there public interest aspects that point towards or against prosecution? If more than one charge is available, which is or are the most appropriate, given the nature and seriousness of what the suspect has done? Should the prosecution be proceeded with summarily or by way of indictment?
- 324 The opinion of a skilled and experienced investigating police officer, on the matters relating to the prosecution decision, is likely to be valuable. However, those matters are different from the decisions involved in the process of investigation and arrest. The UK Royal Commission on Criminal Procedure report²⁴⁴ expressed the opinion that:
- [a] police officer who carries out an investigation, inevitably and properly, forms a view as to the guilt of the suspect. Having done so, without any kind of improper motive, [that officer] may be inclined to shut his [or her] mind to other evidence

²⁴³ See Toombs, "Prosecution – In the Public Interest?" Australian Institute of Criminology seminar, November 1984.

²⁴⁴ Chaired by Sir Cyril Philips, 1981.

telling against the guilt of the suspect or to overestimate the strength of the evidence . . . assembled.²⁴⁵

Prosecution decisions, after initial charging are, in the Commission's view, best made by a person who is detached from the investigation process.

The reasons for separating investigation and prosecution functions

- 325 Separating investigation and prosecution functions and vesting them in different agencies has been recommended overseas as a good method of introducing more accountability and transparency into prosecution decisions. A separate evaluation of the case by someone who is independent, and seen to be independent, of the investigation process:
- helps to ensure the prosecution decision is not prompted by bias or prejudice,
 - lessens the chance of corruption or improper motives, and
 - brings greater independent judgment to bear.
- 326 Commonsense, experience and practical realities suggest that an absolute wall cannot be erected between investigation and prosecution decisions. It is inevitable that prosecution decisions will be based to some extent on information provided by the investigating agency; they will never be independent decisions in an absolute sense. For example, the English Crown Prosecution Service (CPS) relies on the police construction of the case, rather than on the raw police files, when making prosecution decisions. Initial charging decisions continue to be made by the police, although they may seek prior advice from the CPS. Yet, this police involvement has not prevented the CPS from making independent decisions about whether or not to prosecute. Indeed, the number of cases discontinued by the CPS was initially a source of friction in its relationship with the police.²⁴⁶
- 327 The problem of balancing the independence of decision-making in principle against the practical necessities of information-gathering and resource limitations will always be difficult to resolve. If the prosecutor has no formal role in the investigation, he or she must depend on the police for the information on which prosecution decisions are based. On the other hand, investigators should be free to seek advice from prosecutors during the course of their inquiry. The Commission believes that this practice would be more efficient and should in no way compromise the independence of prosecution decisions.
- 328 The arguments for separating investigation and prosecution functions, and entrusting them to different agencies, are also relevant to the question of who should conduct the prosecution in court. The essential weakness in the existing system was expressed by the late Justice Rabone in the following manner:
- Fortunately it is not often that one now sees in New Zealand a police or traffic officer opening the case for the prosecution, calling and examining the civilian witnesses, and then himself passing from the bar to the witness box to give evidence.

²⁴⁵ The New Zealand case *R v Coghill* [1995] 3 NZLR 651, provides an indirect example of this point. The Court of Appeal found that the police had some degree of responsibility in providing the media with information about the defendant which could have been prejudicial to his right to a fair trial, and the right to be presumed innocent until proved guilty (Bill of Rights Act 1990 s 25(a), 25(c)).

²⁴⁶ Woodhouse, Commission internal research paper, "Prosecution Processes in Great Britain", (NZLC, Wellington, 1991) 69.

Such a situation, however, demonstrates the worst aspects of police or traffic officers acting as prosecutors . . .

The evil of partiality is mitigated when the prosecutor's . . . sole function is prosecuting before magistrates. But the risk remains. It is in the interests of the police that there should exist a strong bond of loyalty between individual officers, but if that extends to notions that one, the prosecutor, should not "let down" the other, the informant, then impartiality must be in jeopardy.²⁴⁷

WHAT OPTIONS FOR REFORM SHOULD BE CONSIDERED?

- 329 In the Commission's view there are three broad options for reform:
- privatising prosecution services;
 - establishing an independent Crown prosecution service; or
 - building on and adapting the present structure of the prosecution system.
- 330 Within each option there are many possible variations. For example, a Crown prosecution service would not necessarily deal with all, or most, summary cases, and it might or might not be responsible for prosecuting offences under numerous special statutes. Similar issues arise when considering how to improve the present Crown solicitor system. Again, a Crown solicitor system does not preclude the appointment of salaried Crown solicitors. Indeed, two individual salaried Crown counsel based in Wellington are Crown solicitors at Blenheim and Nelson.

Are there options for reform of the structure of the prosecution system other than the three outlined in paras 329–330 that should be considered?

A privatised prosecution system

- 331 Privatisation as an option for reform would be consistent with other recent changes in the State sector. The performance of public functions, such as prosecution, may be seen as "contestable", ie, open to the competition generated in the market place and the efficiency gains that may flow from that. There are already large private elements within the present system. Most Crown solicitors themselves are lawyers in private practice and operate their practices as private legal firms. Panels of other lawyers in private practice have recently been formed to conduct some prosecutions. It is also possible for private persons and agencies to commence and conduct prosecutions for almost all offences.
- 332 Further privatisation would therefore be an extension rather than an innovation. The police and other agencies might be free to engage the services of any counsel they chose. It could consist of encouraging private prosecutions for both summary and indictable offences. More radically, the making of prosecution decisions as well as the conduct of prosecutions might be contracted out. The public interest could be protected by the conditions of the contract; the Attorney-General and Solicitor-General might retain the residual power to stay proceedings; no doubt in exceptional cases they could themselves take charge of the proceedings.

²⁴⁷ Rabone, "The Scottish System of Prosecutions – is Sutherland's Law an Exportable Commodity? – a New Zealand View", Fifth Commonwealth Law Conference, Edinburgh 1977.

- 333 This would in effect be a reversion to the situation in England in the nineteenth century. One widely acknowledged weakness of that system was the lack of centralised public prosecution. Such a situation has never existed in New Zealand, and would be contrary to the general trend overseas which is to strengthen the public aspects of prosecution.
- 334 In the Commission's view, the making of prosecution decisions is not an area where the economic principle of competition should predominate. Public interest factors rather than cost ought to be paramount; there is a need for consistency of decision-making. It may be that a privatised system could be devised that would enable these aspects to be adequately taken into account. However, most of the defects of the present system are not of a nature that a private prosecution system would be likely to cure. Unless care were taken, it could exacerbate them.
- 335 Contracting out the conduct of prosecutions in court is not open to the same objections. The use of outside counsel could become more liberal without offending any principle – this currently occurs under the control of the Crown Law Office and Crown solicitors. Against that, if the contracting out of prosecutions in court became more widespread the investment of experience and resources represented by Crown solicitor's firms might be impaired. There might also be a danger that investigating agencies which contracted out their prosecution work would see themselves as the solicitors' clients, entitled to direct prosecution decisions which would be contrary to principle.
- 336 The virtue of the use of prosecution panels is to extend more widely the privilege of appearing for the Crown. It mitigates the Crown solicitors' monopoly and exposes counsel involved, who would otherwise act only as defence counsel, to the responsibilities of prosecution. Concurrently it imbues the prosecution with defence perspectives of the process which would otherwise be unavailable. It therefore reduces the undesirable polarity which can develop between Crown and defence counsel. While the Commission does not consider that the private elements of the present system should be enlarged in any structural way,²⁴⁸ it considers that the panel system should be maintained. Further, it considers that the Crown Law Office should monitor this aspect by collecting regular statistics on the number, nature and duration of panel briefs to ensure that there is a proper balance.

Should prosecution services be privatised?

An independent Crown prosecution service

- 337 In the last ten years independent Crown prosecution services have been established in England and in all Australian states. Comparable and older systems are found in many common law or part common law countries – the system of procurators fiscal (local public prosecutors) in Scotland. If a Crown prosecution

²⁴⁸ None of the responses to *The Prosecution of Offences: an issues paper* (NZLC PP12, Wellington, 1990) advocated privatisation as an option for the prosecution system.

service were to be established in New Zealand, it would have primary responsibility for the prosecution of criminal offences and employ salaried Crown prosecutors to conduct criminal prosecutions in the name of the Crown. Crown prosecutors would be responsible for their prosecution decisions through a director of public prosecutions to, perhaps the Solicitor-General, but ultimately the Attorney-General. Crown prosecutors would have powers to control prosecutions, including a power to discontinue prosecutions, and the ability to amend charges and the form of proceedings. The policy of briefing experienced local practitioners outside a prosecution service to conduct cases in court could continue to whatever extent was thought fit.

- 338 Crown prosecutors could make prosecution decisions and conduct prosecutions in all summary and indictable cases (other than those prosecuted privately). On the other hand, a prosecution service might be restricted to indictable cases and certain types of summary cases, with police and government agencies remaining responsible for the initial investigation and charging decisions. However, there may be some kinds of cases where the input of a prosecution service would be appropriate: charging standards could be developed by a prosecution service to assist police and other agencies in their charging decisions as is currently the case in England.
- 339 The Commission was initially attracted to the idea of an independent and self-contained Crown prosecution service (see *The Prosecution of Offences* NZLC PP12, Wellington, 1990). In administrative terms it matches and complements a national police force. It might improve consistency of decisions, the quality of decision-making generally, and permit clear and considered policies to be applied. This could also allow for a proper degree of local discretion. Reviewing initial charging decisions earlier ought to result in greater efficiency: prosecution would be limited to appropriate cases and the rights of suspects would be better protected by the independent consideration of prosecution decisions. The existence of a distinct agency responsible for prosecutions, and a formal delegation of the power to prosecute from the Attorney-General should create clearer and greater lines of accountability.
- 340 There are some significant differences between New Zealand's system and the former English one. Crown solicitors, in particular, play a key role in the New Zealand prosecution system and are an institution unique to this country, and many of the factors which led to reform in England (eg, extremely high acquittal rates and decentralised local police forces) are not present in New Zealand. The English CPS was built on the long-established office of the Director of Public Prosecutions. With no equivalent office in New Zealand this option is more radical than it was in England.
- 341 The efficiency and economy of introducing a Crown prosecution service into New Zealand is difficult to determine. It might result in efficiencies because of earlier and independent consideration of cases by Crown solicitors. However, a prosecution service would require a considerable investment in employing full-time, legally-trained prosecutors to prosecute summary and indictable cases. This would involve the transfer of large resources from the police, government agencies, private law firms and possibly the Serious Fraud Office, as well as a likely increase in overall cost.

Is establishing an independent Crown Prosecution Service an appropriate solution in New Zealand? Which offences could be prosecuted by a prosecution service? Should police or officers of government agencies make all the initial charging decisions?

Improving the present structure

342 It is essential for investigative and prosecution decisions to be made more distinct and independent, but this can be achieved by building on and improving the present system. We adopt in this context the Commission's point made in relation to the court system:

For good constitutional and practical reasons, we should build on the enduring features of that system while enabling it to adjust to the new circumstances.²⁴⁹

The introduction of a Crown prosecution service is not the Commission's preferred option for reform. In the Commission's view, the proposals in this chapter and chapter 16 have many of the advantages of a prosecution service, but without the significant resource costs that would accompany it.

Crown solicitors as independent public prosecutors

343 Problems arise in the present system because Crown solicitors become involved in the prosecution of indictable offences at a relatively late stage in the proceedings. As a result, their ability to exercise a real and independent discretion to prosecute is limited. Nor do they have all the powers and duties required of an independent public prosecutor. The Commission proposes that the role of Crown solicitors as independent public prosecutors be expanded, with earlier involvement in cases and a greater ability to control cases. Chapter 16 sets out the necessary powers and duties of Crown solicitors in this regard.

344 The Commission favours the development and strengthening of the Crown solicitor system under the general oversight of the Solicitor-General. The issues here involve both the powers and responsibilities of Crown solicitors and how they and others see their role.

345 If necessary improvement in this area, as proposed by this paper, does not occur the Commission will wish to re-examine the options for more radical reform.

346 Under the Commission's proposals police and other prosecuting agencies would still make the initial charging decisions in indictable and summary cases. Legislation may be necessary to clarify the requirement that a Crown solicitor confirm a prosecution does not affect the police power to arrest and charge suspected offenders.

Should the role of Crown solicitors as public prosecutors be developed?

347 If accountability is to be built into the structure of the present system, and independence of prosecution decision-making improved, Crown solicitors should take over all indictable criminal proceedings instituted by the police or

²⁴⁹ *The Structure of the Courts* (NZLC R7, Wellington, 1989) para 20.

other prosecuting agencies as soon as an indictable information has been filed in court or the defendant has elected trial by jury. They would review cases and decide whether or not a prosecution should continue, or be discontinued, or whether the defendant should be diverted. Crown solicitors – or counsel briefed by them – would conduct the preliminary hearings as well as the trial proceedings. An exception would be private prosecutions (see chapter 20).

- 348 Crown solicitors, as public prosecutors, must be free of executive intervention or direction in particular cases. Like the Solicitor-General, Crown solicitors should be made expressly subject to the Official Information Act 1982 in respect of their prosecution functions.

Should Crown solicitors have a duty to take over indictable proceedings?

- 349 For practical and efficiency reasons, as a general rule there seems no justification for Crown solicitors to make the initial decision about what charges should be laid. The development of charging standards should overcome any difficulties arising out of Crown solicitors' reliance on information compiled by the police to make prosecution decisions.²⁵⁰ In summary and indictable cases of unusual sensitivity or difficulty, it would be appropriate for police to refer cases (before charging the suspect) to Crown solicitors who would be able to direct or veto a prosecution.²⁵¹

Should Crown solicitors ever make initial charging decisions?

- 350 The Laurenson-Taylor report considered the question of appointment and tenure in some detail and recommended against significant changes. The Commission does not see any need to alter the mode of appointment. To emphasise the importance and independence of the office, Crown solicitors should continue to be appointed by the Governor-General on the Attorney-General's recommendation.²⁵² They should moreover ordinarily be experienced practitioners in private practice in the town where the appropriate office of the High Court is situated (but not necessarily always). There is more room for different opinions as to the term of appointment. Appointments are now held "at pleasure", which by convention gives security of tenure. The alternative would be appointment for fixed and renewable terms, with provision for grounds on which the appointment could be revoked. Excessive security of tenure could be a barrier to changes that were appropriate for reasons of competence and efficiency. But such changes might be possible as much with "at pleasure" as with fixed-term appointments. The Commission does not feel that, on the whole, there is a strong case for departing from the current position.

²⁵⁰ This has been the solution in England: see Ashworth and Fionda, "Prosecution Accountability and the Public Interest" [1994] Crim LR 894.

²⁵¹ For example, where proceedings are contemplated against members of the police for acts done in relation to the exercise of their powers.

²⁵² Because of the rule that the Governor-General must act on the advice of a responsible minister, the formal advice on the appointment (or hypothetical dismissal) of a Crown solicitor must be given by the Attorney-General.

Should the mode of appointment and the tenure of Crown solicitors be changed?

- 351 The appointment of Māori Crown solicitors and panel counsel in High Court centres should be encouraged. Appropriate recruitment policies should be adopted by the Crown Law Office and firms which engage in Crown prosecution work. Crown solicitors should receive training in tikanga Māori with the hope of improved understanding of and sensitivity to Māori cultural values (see chapter 11).

An autonomous national police prosecution service

- 352 At present the police prosecute the bulk of summary cases. The transfer of summary prosecution decisions, and the conduct of summary cases, away from the police would require substantial enlargement of Crown solicitors' offices or the briefing of more private counsel. This would entail a significant increase in costs. Even if enough qualified lawyers and support staff were recruited, it is likely that the less serious cases would tend to have a low priority and delays might result.

Should police continue to prosecute summary offences?

- 353 An autonomous and career-orientated national police prosecution service would replace the current police prosecution service, and would be administratively distinct from the criminal investigation and uniform branches of the police. Its creation would address present problems while avoiding large costs and upheavals and would provide more independent prosecution decisions by the police. There should be an express rule in the Prosecution Guidelines (and the Police Operations Manual) stating that officers in charge of the case cannot conduct the prosecution.²⁵³
- 354 Prosecutors in the police prosecutions service would be responsible for:
- reviewing and, if necessary, amending the initial charging decisions made by investigating and arresting officers, or discontinuing prosecutions (guided by the Solicitor-General's Prosecution Guidelines and charging standards developed by the Crown Law Office monitoring unit in conjunction with the police);
 - conducting summary prosecutions; and
 - referring certain types of summary and indictable cases to Crown solicitors to make the charging decision and conduct the prosecution.
- 355 Guidelines to facilitate the oversight of summary cases may be necessary and might include the following:

²⁵³ In a few of the smaller centres in New Zealand it may be necessary for the police to make new administrative arrangements providing for independent prosecutors. For example, in the Chatham Islands there is at present only one police officer who investigates and conducts prosecutions; under the proposed structure an independent prosecutor could be sent from the "mainland" on the occasions where the officer in charge of the case decides to proceed with a prosecution.

- The Solicitor-General may indicate that certain types of summary cases, or summary proceedings in certain circumstances, should be referred to the Crown solicitor immediately after the information is filed (as if they were indictable).
- In the ordinary course, general oversight of summary prosecutions should be exercised by the head of the police prosecution service, who should be responsible (other than in administrative and operational matters) to the Solicitor-General.
- The Solicitor-General should be able to intervene in particular cases and refer them to the appropriate Crown solicitor.
- There should be continuing links and consultation between police prosecutors and the Crown solicitor.

356 It is questionable whether, in the police prosecution service, the line of control and accountability should run from the officer in charge of the prosecution branch in a district to the district commander and then to the Commissioner, or directly to a national head of the prosecution service and then to the Commissioner. The first better fits the present organisational pattern of the police, and is reinforced by the current trend towards greater district autonomy. The second is more consistent with the principle of separation, and the Commission favours it. In any event, it would seem inappropriate and to negate the separation principle, for a district commander to be able to direct or veto prosecution decisions. A national structure for the service would also promote consistency.

357 The advantages of an autonomous national police prosecution service include the ability of police prosecutors to handle a large volume of files in a flexible way and to a satisfactory standard, and to follow through police policies (such as that on family violence) from arrest of an offender to disposition of the case in court.

Should a more autonomous national police prosecution service be created?

358 For some time it will be impracticable for all police summary prosecutions to be conducted by legally qualified prosecutors. However, officers of the police prosecution service should be encouraged to acquire legal qualifications. In the long term this will improve the standard of police prosecutions.

Should all members of the police prosecution service be legally qualified?

359 Police prosecutors should be trained in tikanga Māori, with a view to improved understanding of and sensitivity to Māori cultural values. The recruitment of more Māori police and of Māori police prosecutors should also be encouraged (see chapter 11).

Prosecutions by other agencies

360 One matter on which our inquiries showed a strong divergence of view is the standard of prosecutions by prosecuting agencies other than the police and the Serious Fraud Office. A number of Crown solicitors were highly critical of the

quality of some departmental prosecutions, and wished to see a return to the pre-1987 practice whereby members of the Crown solicitor's office conducted such prosecutions except where the Solicitor-General had given the department approval to use its own officers. By contrast, departmental solicitors generally told us that they had often had poor service from some Crown solicitors' offices under the previous arrangement.

- 361 The percentage of successful prosecutions by prosecuting agencies in recent years has been good – at least as high as for the police (see appendix D). While the Commission accepts the principle that the prosecution powers of all departments do and should derive from the Solicitor-General, it doubts whether a return to the earlier system is justified. It does see advantage in co-ordination and monitoring of prosecutions by the Crown Law Office and closer liaison and the sharing of experience between the Crown Law Office, Crown solicitors and government prosecuting agencies. Training courses to improve the quality of prosecution decisions and the conduct of prosecutions might well be considered. In any event, the Solicitor-General should continue to have the authority to issue appropriate guidelines and directions to prosecuting agencies.

Expanding the role of the Crown Law Office

- 362 The Commission considers there is a need to enhance the ability of the Crown Law Office to oversee and monitor the working of the prosecution system, this would continue and develop what is already happening. The Commission suggests that an officer directly responsible to the Solicitor-General should have administrative charge and oversight of the prosecution system. He or she should be an experienced criminal lawyer and the position should probably be full-time.
- 363 The Commission further suggests that there should be a small unit in the Crown Law Office to assist this officer. Under the officer's control the unit should perform the following functions:
- Oversee the operation of the prosecution system and report to the Solicitor-General on compliance with the Prosecution Guidelines by Crown solicitors, police and government agencies.
 - Collect information about prosecution decisions to enable prosecution decisions throughout the country to be evaluated and efficiently co-ordinated, and to detect any inappropriate prosecution practices.
 - Co-ordinate the Prosecution Guidelines with the guidelines of other prosecution agencies.
 - Formulate charging standards for use by the police and other prosecution agencies, in consultation with those agencies.
 - Provide guidance to Crown solicitors, police and other prosecution agencies in certain difficult types of prosecutions, eg, recovered memory cases.
 - Make recommendations to the Solicitor-General on directions to prosecution agencies.
 - Monitor and evaluate the performance of Crown solicitors including measuring "customer" satisfaction, eg, victims and prosecuting agencies which instruct Crown solicitors.
 - Monitor and evaluate administrative and legislative reforms.

- Liaise and co-ordinate with other government policy organisations, prosecuting agencies, the police, Ministry of Justice and the Department for Courts, including receiving policy advice from appropriate agencies when formulating policy and guidelines.

Should a unit be established in the Crown Law Office to monitor the prosecution system? What should its functions be?

Proposals on prosecutors' powers

For Crown solicitors, police prosecutors and officers of government agencies to be effective as independent prosecutors, an expansion of their powers is required. This also has implications for the relationship of the police and government agencies with Crown solicitors.

364 **T**O COMPLEMENT THE IMPROVEMENTS to the structure of the prosecution system proposed in chapter 15, prosecutors' powers need to be clarified and expanded so that prosecutors can operate independently from investigating agencies.

A power to amend charges or change the form of the information

365 Prior to a defendant's committal for trial, Crown solicitors have a limited ability to influence the nature of the charges in an indictable form information. With the proposal that Crown solicitors take over indictable cases at an earlier stage in proceedings, the Commission also proposes that the power of Crown solicitors to direct as to the charges and the form of the information be clearly stated by arrangement between the Solicitor-General and the police.

366 Police prosecutors of the proposed national police prosecution service would have responsibility for a case as soon as an information is filed in court (although in difficult cases prior consultation with the Crown solicitor should be encouraged). The prosecutor should first consider whether the form of the information should be changed. If the information is in indictable form, it should be referred immediately to the Crown solicitor. If it is in summary form, the prosecutor should review the charges and, if necessary:

- alter them,
- arrange for diversion, or
- discontinue the proceedings as he or she thinks appropriate.

With the creation of a national police prosecution service, there will be a need to clearly establish that police in the prosecution section alone have the responsibility and power to amend charges and the form of the information. Prosecutors in other agencies should have the same powers as the police to amend the charges and the form of the information.

A power to discontinue prosecutions

- 367 At present, Crown solicitors do not have the power to discontinue prosecutions; only the Solicitor-General (or the Attorney-General), guided by the Prosecution Guidelines, may stay proceedings. Other prosecutors also have no express power to discontinue proceedings, although in practice they do so by deciding not to present evidence or withdrawing an information with the leave of the court.
- 368 The Commission proposed that all prosecutors should have the express power to discontinue a prosecution. To ensure certainty, transparency and consistency this power should be formally exercised. The criteria guiding the exercise of the power should be set out in the Prosecution Guidelines and prosecutors should be required to record reasons for a decision to discontinue. In the UK the Prosecution of Offences Act 1985 s 23(7) provides the defendant with the right to insist that a trial continue if a Crown prosecutor decides to discontinue the prosecution. In the Commission's view, such a right is unnecessary. If there is a discontinuance, the defendant can make a complaint to the Police Complaints Authority or the Solicitor-General or publicise his or her case in the media. It may be that the Solicitor-General would reserve to him- or herself the power to discontinue – at least in certain types of case or at certain stages of the proceeding. If a prosecution were discontinued, this would not prevent a fresh information from being filed. However, the filing of a fresh information would be subject to any New Zealand Bill of Rights Act 1990 limitations regarding undue delay or double jeopardy, as well as the Crimes Act 1961 provisions ss 358 and 359.
- 369 Having a power of discontinuance does not mean that a prosecutor, confronted with a case in which the evidence is weak, ought automatically to discontinue it. Further investigations might be indicated, or consideration of what further evidence is required to supplement what is already in the police briefs.

Should Crown solicitors, police and government agency prosecutors have the power to discontinue prosecutions?

A power to divert offenders

- 370 At present, diversion is based on rather narrow grounds and provides only limited opportunities for police prosecutors to recommend diversion. If Crown solicitors are to review prosecution decisions at an earlier stage in proceedings, it is logical for them to be able to divert offenders. The Commission is at present examining diversion and other alternatives to formal prosecution. Proposals arising out of that project may enlarge the meaning of diversion and offer a wider range of alternatives, in addition to prosecution, amongst which Crown solicitors, and police prosecutors, can choose.

If Crown solicitors have a power to discontinue a prosecution, should they also have a power to divert offenders?

A power to direct or veto prosecutions

- 371 In New Zealand neither Crown solicitors nor the Attorney-General or Solicitor-General make original prosecution decisions in the sense of directing or vetoing a particular prosecution. The Prosecution Guidelines state that “it is never for the Solicitor-General or the Crown solicitor to make the initial decisions to prosecute; it is their function to advise”.²⁵⁴ This practice rests on convention rather than law. The common law doctrine that any person may file an information applies to these officers as much as to any citizen.
- 372 In the Commission’s view, for efficiency reasons, initial charging decisions should continue to be made by the agency that has investigated the offence but, to ensure the quality and consistency of these decisions, charging standards should be developed by the Crown Law Office in consultation with the agency. However, in exceptional circumstances, especially where a perception of independence or other public interest factors are of great importance, the decision to prosecute or not to prosecute may most properly be made by a Crown solicitor (or by the Solicitor-General). This power should be explicitly recognised, perhaps in the Prosecution Guidelines. Examples might include where a suspected offender holds an important or sensitive office in or connected with the enforcement agency, or where there are significant international aspects.
- 373 Although neither the Attorney-General nor Solicitor-General can veto a prosecution, they may enter a stay of proceedings in any criminal case, bringing the case to an end.²⁵⁵ The Commission proposes that prosecutors (including police prosecutors) should be able to discontinue a prosecution once begun. Reasons should be recorded for discontinuances. Good sense suggests that the Crown should be able to do directly what it can accomplish indirectly. A power to veto is thus logical. However, this proposal raises two issues: whether a power to veto should be confined to the Solicitor-General; and whether, despite a veto, a private prosecutor should be able to commence criminal proceedings with the leave of a court (see chapter 20).

Should Crown solicitors have the power to direct or veto prosecutions? Should the Solicitor-General alone have such a power?

When would prosecutors’ powers be exercised?

- 374 At present a prosecutor may drop charges or amend charges after committal, as long as those charges presented in the indictment are supported by evidence in the depositions. There seems no reason why this power should be curtailed, however, a distinction may need to be drawn between the power to amend charges and the power to discontinue. In the Commission’s view, the power to discontinue should be exercisable as follows:

²⁵⁴ Appendix B para 2.5.

²⁵⁵ This veto power was extended to summary proceedings in 1965 to meet concerns that New Zealand could not give an assurance that the person extradited would not be charged with any other offence. This assurance is required by British law as a pre-requisite to extradition.

- in indictable proceedings,
 - at any time before the defendant is committed for trial,
 - between committal and indictment, with the leave of the court,
 - after a jury disagreement;
- in summary proceedings, at any time before a plea is entered.

When should prosecutors be able to exercise their powers?

- 375 It may be necessary to implement a rule requiring prosecutors to review a case and make a decision about the prosecution within a certain period of receiving the files – say, ten days. Such a rule could be part of caseflow management administrative requirements.

THE DECISION TO PROSECUTE

- 376 The purpose of the Prosecution Guidelines is to set out how the Attorney-General and Solicitor-General expect the power to prosecute to be exercised. There is, however, a lack of certainty about how closely the present practice of the police and prosecuting agencies follow, or is bound by, the Guidelines. The Commission’s proposal is that all prosecutors should be bound by the Guidelines; this would ensure consistent and fair prosecution decisions. However, there are issues in relation to the delegation of prosecution powers to prosecuting agencies, as well as the fact that the Guidelines as presently drafted are geared towards indictable cases.
- 377 The Solicitor-General should regularly review and revise the Prosecution Guidelines. From time to time the Solicitor-General may need to issue more specific directions, either on particular offences or practices, or addressed to particular classes of prosecutor.

Should all prosecutors be bound by the Solicitor-General’s Prosecution Guidelines?

A reasonable prospect of conviction

- 378 The Commission proposes a prosecution should proceed only if there is a reasonable prospect of a reasonable jury convicting the defendant. In other common law jurisdictions the prima facie test is not regarded as a sufficient test.²⁵⁶ The view of the Law Reform Commission of Canada is relevant:

The prima facie test rule, we feel, is inadequate because it allows no scope for considering the credibility of witnesses. A public prosecutor may be aware of facts making it highly unlikely that the prosecution’s key witness will be believed. . . .

²⁵⁶ In England, for example, the test under the Crown Prosecution Service Code for Crown prosecutors is whether there is “a realistic prospect of conviction”. This means that “a jury, or a bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant” (Crown Prosecution Service, London, 1994 ed). The test applied in New South Wales and the Australian Commonwealth is the similar “reasonable prospect of conviction” (see *Prosecution Policy and Guidelines* (NSW 1993); *Prosecution Policy of the Commonwealth*).

It would be wrong to clog the courts with prosecutions that an experienced prosecutor fully expects to fail simply because there is some evidence on each element of the offence.²⁵⁷

- 379 Under the reasonable prospect of conviction test, prosecutors would take into account the following:
- whether there is admissible, substantial and reliable evidence that an identifiable person has committed a criminal offence;
 - the availability, competence²⁵⁸ and credibility of witnesses, and their likely impression on the arbiter of fact;
 - the admissibility of any confession or other evidence;
 - likely or known defences; and
 - any other factors which in the prosecutors' view could affect the likelihood of conviction.

Should the reasonable prospect of conviction test be used to guide prosecutors deciding whether to prosecute?

Whether the public interest requires prosecution

- 380 Public interest factors are important and should continue to be consistently considered by prosecutors. Even if there is a reasonable prospect of conviction, the prosecutor must then consider whether the public interest requires a prosecution. Some factors may increase the need to prosecute while others may suggest another course of action. Deciding on whether a prosecution is in the public interest is not simply a matter of adding up the number of factors for or against prosecution: it is an important, and sometimes difficult, balancing decision in which each case is decided on its merits after an overall assessment.
- 381 The Prosecution Guidelines set out sixteen factors (para 3.3) which may arise for the prosecutor to consider in determining whether the public interest requires a prosecution. Some public interest factors, such as the age or health of the offender, could weigh either for or against prosecution depending on the circumstances of the offence and the offender. Other factors, notably the seriousness of the offence, will require consideration to be given to a number of aspects of the offending. For instance, the United Kingdom Crown Prosecution Service Code for Crown Prosecutors suggests that factors which tend to increase the seriousness of an offence may include the use or threat of the use of a weapon or violence; the defendant being in a position of trust; or the offence being motivated by any form of discrimination against the victim's ethnic or national origin, sex, religious beliefs, political views or sexual orientation.²⁵⁹
- 382 The Commission believes the existing public interest factors should be reviewed and is interested in hearing views on the relevance and utility of the existing factors outlined in the Prosecution Guidelines (para 3.3).

²⁵⁷ Working Paper 62, 1990, 81.

²⁵⁸ See *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, Wellington, 1996).

²⁵⁹ Crown Prosecution Service Annual Report 1994–1995.

Should the public interest factors in the Prosecution Guidelines be reviewed? What is their utility?

- 383 The guidelines of the police and other agencies need where possible to be integrated and made consistent with the Prosecution Guidelines. There also needs to be a wider focus in the Guidelines on summary as well as indictable offences. One of the functions of the proposed Crown Law Office monitoring unit is to co-ordinate the Guidelines with the guidelines of other prosecution agencies.
- 384 In some cases, however, a prima facie case should be enough to warrant a prosecution. The public interest suggests that some types of offence (which may vary from time to time) may call for prosecution even if a conviction is not very probable. The Guidelines use the example of driving with excess breath or blood alcohol; another example might be alleged offences of corruption by public officers.

Should a prima facie test be sufficient in certain circumstances?

PROSECUTION POLICIES

- 385 The Commission has not yet formed a view on this issue and would welcome comments on the influence or power to direct prosecutions that the Attorney-General (or government) should have. There would probably be universal agreement that no Minister or government should be able to influence prosecution decisions in individual cases. Such a power would clearly be inconsistent with the rule of law. But it is not so obvious that Ministers, or the Attorney-General, or Ministers through the Attorney-General, should have no ability to influence or indeed direct general prosecution policies. In issuing the Prosecution Guidelines the Solicitor-General exercises some influence of a general nature. For instance, the present Guidelines indicate that charges of excess breath or blood-alcohol should be prosecuted wherever a prima facie case exists. Beyond that, the rigour with which particular laws are enforced, the concentration of resources on particular types of offences, and the degree to which offences are best prosecuted or dealt with in other ways, are matters of public interest. Would it be improper, for example, for the Minister of Revenue to receive power to direct the Commissioner of Inland Revenue as to prosecution policy? What about a political push not to prosecute a certain offence? Certainly, an attempt to bring about discriminatory or arbitrary policies would be improper.

Should the Attorney-General (or the Government) be able to direct or influence prosecution policies?

Proposals on charge negotiation

Charge negotiation occurs in private, and the extent to which it occurs is difficult to accurately determine. Should charge negotiation be permitted? If so, how and to what extent should it be regulated? While there are some dangers inherent in charge negotiation, the Commission believes that properly regulated charge negotiation does further the objectives of the prosecution system.

386 **T**HE DISCUSSION IN THIS CHAPTER is largely confined to charge negotiation. The Commission's view is that different considerations apply to forms of plea negotiation other than charge negotiation, in particular sentence negotiation. Sentence discounting and indication are more relevant to the sentencing process than the prosecution process. However, we realise that the latter influences the former and we welcome comment on this approach to the topic.

CONSISTENCY WITH THE PROSECUTION SYSTEM'S OBJECTIVES

387 The fundamental preliminary question is whether the practice of charge negotiation should continue at all. Does it satisfy the objectives of the prosecution system? There are many objections to charge negotiation, but against those objections some significant advantages need to be considered.

Efficiency and economy

388 The most significant advantage of charge negotiation is reduction in cost by the avoidance of expensive trials, and the increase in efficiency attained by securing the conviction and punishment of the offender without the uncertainty and time of the trial. If charge negotiation was to be made illegal, we would have to accept the social and monetary costs of prosecuting many more offences. There is also the "half-a-loaf argument": that it is better to secure a conviction on a lesser charge than to risk a complete acquittal. If, for example, there is evidence on which a jury could convict the defendant of robbery, but on which it could well acquit, and the evidence for the lesser charge of theft is strong but a conviction is not certain then the acceptance by a prosecutor of a guilty plea to theft will avoid the danger that if the robbery charge is prosecuted, the defendant will be found not guilty.

Rights of the defendant

- 389 The objective of economy and efficiency in the administration of criminal justice must be weighed against other objectives of the prosecution system. An objection that has been made to charge negotiation is that the defendant is denied the judicial process. Charge negotiation can create pressures on defendants to plead guilty in the hope that their sentence will be reduced. It has been suggested that an innocent defendant may plead guilty to a lesser charge rather than run the risk of conviction at trial.
- 390 There is also the question of informed consent. Do defendants know all the facts when they plead guilty in return for some concession by the prosecution? The present criminal disclosure regime achieved by the operation of the Privacy Act 1993 and the Official Information Act 1982 limits the prosecutor's ability to bluff the defendant. Also, experienced defence counsel are likely to know when a trial will probably be a waste of time, or even counterproductive, from the point of view of the sentencing interests of the defendant. In charge negotiation the defendant has the opportunity to influence the charges he or she is to face and may be more willing to plead guilty to one certain charge (eg, fighting in a public place as opposed to assault).

The interests of the victim

- 391 No New Zealand research deals specifically with victims' interests in charge negotiation. Sallman makes the point that in Australia when victims are consulted about charge negotiations, it tends to be done on the basis of expediency: an experienced prosecutor develops a skill in detecting those cases in which accepting a guilty plea to a lesser charge without victim consultation will lead to victim complaints, and consults in those cases. Conversely, when no such danger is foreseen, the victim's views are generally not sought.²⁶⁰
- 392 Charge negotiation has advantages for victims. It avoids the stress which accompanies testifying. It also allows for the speedier resolution of cases: private property can be returned more quickly to the victim, and reparation, if ordered, paid earlier. On the other hand, charge negotiation may leave victims feeling worse off. A victim who is not consulted (or even told) about a charge negotiation is likely to feel betrayed, even if objectively the prosecutor has achieved all that could have been achieved by a trial, and the victim has been spared the trauma of testifying. Some victims want the heaviest sentence possible to be imposed on the defendant to reflect the seriousness of the offence. More weight and respect is seen to be given to the crime if a full prosecution is conducted and the defendant's guilt proved in court. In the worst type of case, victims' personal safety may be compromised if potential "dangerous offenders" are not sentenced as they might have been if the case had proceeded to trial.

²⁶⁰ Sallman's article, "The role of the victim in plea negotiations", National Symposium on Victimology (Grobosky (ed), Australian Institute of Criminology, Canberra, 1982), deals with the Australian experience and has an avowedly victim-centred approach. His conclusions seem broad enough to be applicable to the New Zealand situation.

Fairness, consistency, transparency and accountability

- 393 Charge negotiation is not a public or open practice. It takes place in private between the prosecutor and defence counsel, often without the defendant being present. The same is true of many prosecution decisions, notably the initial selection of charges. However, fears have been expressed that improper bargains may be struck or that negotiation agreements may not be kept. The solution in Canada is to require the fact that charge negotiation has occurred to be disclosed in court and the defendant to be questioned about the charge negotiation. This process may expose false pleas of guilty, however, it does not deal with the problem of prosecutors accepting pleas for lesser charges than the evidence discloses. The judge does not have the power to instruct the prosecutor to lay more serious charges. An alternative approach, rather than requiring charge negotiations to be disclosed in court, is for charge negotiation to be governed by administrative and ethical rules.

Conclusion

- 394 Charge negotiation is recognised in the Prosecution Guidelines as being consistent with the requirements of justice, within certain limitations (Guidelines para 7.4). The Commission agrees that charge negotiation does not in itself conflict with the ends of the criminal justice system and the prosecution system (see chapter 2). However, alterations to the Guidelines are necessary in certain respects and are discussed in paras 402-407. Before entering into that discussion, we consider briefly whether charge negotiation should be regulated by legislation or left solely to administrative guidelines.

STATUTORY REGULATION OR ADMINISTRATIVE GUIDELINES?

- 395 Various jurisdictions have tried different means of controlling the more unacceptable consequences of charge negotiation. Some American states such as Alaska, have banned charge negotiation altogether. Jurisdictions such as Canada have drafted legislation to control charge bargains. In England, Wales and Scotland, control has taken the form of directives by the courts, or by the Lord Advocate. The English Crown Prosecution Service has a code for Crown counsel which guides prosecutors in the exercise of their discretion. In New Zealand, the Prosecution Guidelines issued by the Solicitor-General, and rulings by the Court of Appeal have imposed some controls,²⁶¹ but there is little remedy for breach of these rules.
- 396 As the 1989 recommendations of the Law Reform Commission of Canada indicate, legislation or administrative guidelines might include all or any of the features set out below:²⁶²
- Recognition that it is acceptable for prosecutors and defence counsel to enter into charge negotiations.
 - Restrictions on the types of inducements to plead guilty that can be offered to suspects.
 - Provision for the victim's and suspect's rights.

²⁶¹ See note 81.

²⁶² *Plea Discussions and Agreements*, Working Paper 60.

- Clarification of the extent to which charge negotiations or agreements can be referred to in court or disclosed in other contexts.
- The role of, and restrictions on, judges in presiding over or monitoring charge negotiations.
- The enforceability of charge negotiations.

397 In making its recommendations the Canadian Law Reform Commission said:²⁶³

In our view, the principles of fairness, clarity and accountability demand, by and large, that the [charge] negotiation process be given a statutory framework. As we have suggested in previous Reports, we consider the primary vehicle for promoting the goals of certainty, uniformity and equality (all of which flow from the above-stated principles) to be that of legislation. Given the considerable extent to which the informality of [charge] negotiation has contributed to its unsavoury reputation, we believe the imposition of some legislative controls to be particularly appropriate.

398 The Commission invites comment on whether charge negotiation should be legislatively recognised in New Zealand, and if so, what the legislation should cover.

399 In our preliminary research on diversion as one of the alternatives to prosecution, we have formed an initial impression that the broad discretions exercised by prosecutors would benefit from legislative authorisation and legislative checks and balances. There are similarities between charge negotiation and pre-trial diversion. Under current practice both can be initiated administratively by the police when a decision has been made that there is sufficient evidence to charge a suspect with an offence, and both require the suspect to admit guilt.

400 However, charge negotiation differs from diversion in essential ways. First, penalties or restrictive conditions cannot be imposed in the course of charge negotiations. Whatever charges are laid, the offender is still sentenced by the courts and, accordingly, independent judicial scrutiny is maintained. Second, the choice to divert an offender involves a more fundamental discretion than charge negotiation. Diversion is an alternative to formal prosecution, whereas charge negotiation focuses on the charges laid and, indirectly, the sentence imposed. These differences may suggest that the case for legislative regulation is stronger for diversion than it is for charge negotiation.

401 Our preliminary view is that, at present, charge negotiation need not be regulated in legislation for two principal reasons:

- Significant or widespread abuses of charge negotiation practices have not come to light in New Zealand.
- It is desirable to await developments in sentencing indication and sentencing discounting, now occurring in Judges' chambers and in status hearings,²⁶⁴ with a view to comprehensively regulating all forms of charge negotiation in legislation, if necessary.

Should charge negotiation be recognised by legislation? If so, what should be in that legislation?

²⁶³ *Plea Discussion and Agreements*, 39.

²⁶⁴ Described in ch 8 paras 147–148.

EXPANDING THE PROSECUTION GUIDELINES

- 402 In the Commission's view, charge negotiation can be a valuable function in promoting the efficiency of the system, by eliminating any unnecessary features or practices and by minimising time and expense. However, two aspects of the Prosecution Guidelines may be unduly restrictive and hamper the attainment of early guilty pleas in appropriate cases, and we invite comment on them.
- 403 First, the present restriction on a prosecutor supporting any particular sentencing option (Guidelines para 8.3) might unnecessarily inhibit the willingness of defendants to plead guilty and could also prevent the views of victims being taken into account. There may be room in the Guidelines to let a prosecutor make a greater range of responses to sentencing representations made on behalf of the defendant. However, charge negotiations should probably not include express agreement as to a particular sentence, as the prosecutor could not guarantee that the sentence agreed upon would be that ultimately imposed by the sentencing judge.
- 404 Second, the restriction on laying a lesser charge than the evidence supports (Guidelines para 7.5b1) may at times contradict the ability not to charge at all if the public interest so demands (para 3.3). The reasoning behind para 3.3 could in fact support the bringing of a lesser charge. Cases may occur when this course of action is reasonable. If the public interest sometimes justifies not bringing a charge at all (para 3.3), then it may also justify a lesser charge than the one originally considered.
- 405 The Guidelines prohibit prosecutors initiating charge negotiations (para 7.5a), apparently to prevent overcharging. We have been told by legal practitioners that in some summary cases the police do initiate charge negotiations. If such practice exists it should be stopped. The possibility of abuse is obvious.
- 406 In some respects the Guidelines do not, in the Commission's view, regulate charge negotiation in sufficient depth. The Commission believes that the following features need to be addressed by the Solicitor-General, in consultation with the New Zealand Law Society, the criminal bar, the police, and other prosecution agencies:
- To promote fairness, judges who take part in charge negotiation should not also take part in other proceedings in respect of the defendant.
 - To promote fairness and consistency,
 - charge negotiation guidelines should apply to all public prosecution agencies, rather than solely to Crown solicitors; and
 - prosecutors should endeavour to ensure, in the course of negotiations, that suspects in similar circumstances receive equal treatment.
 - To promote fairness and efficiency, the restriction (Guidelines para 7.5b1) on laying a lesser charge than the evidence supports, should be removed. It does not recognise that cases may occur when this course of action is reasonable. If the public interest sometimes justifies not bringing a charge at all then it may also justify a lesser charge than the one originally considered. Consideration should be given to explicitly authorising the bringing of a lesser charge when this assists the protection of society or the safety of a particular person.

- To ensure transparency and accountability in the exercise of charge negotiation discretions, prosecutors should be required to record on the file the outcome of charge negotiations.
- To ensure that the human rights and dignity of suspects are respected, there should be:
 - an express prohibition on prosecutors initially laying more charges or more serious charges than the circumstances warrant so as to obtain leverage in charge negotiations;
 - an express prohibition on prosecutors making any offer, threat or promise, the fulfilment of which is not a function of his or her office;
 - an express prohibition on deliberate misrepresentations;
 - a requirement that prosecutors offer suspects entering charge negotiations a reasonable opportunity to seek legal advice and to have their counsel present; guidance should be given to prosecutors regarding their obligations when entering charge negotiations with an unrepresented defendant; prosecutors should not enter charge negotiations with represented suspects, except when counsel is present;
 - where reasonably practicable, an entitlement for suspects to be present at charge negotiations concerning them, should they so wish (based on an informed decision on advice from counsel); and
 - an express obligation on prosecutors to safeguard the confidentiality of any defence admissions or disclosures in the course of charge negotiations.
- To ensure that the interests of victims are secured to the maximum extent possible, prosecutors should be expressly required to make all reasonable endeavours:
 - to take into account the victims' views and interests in considering whether and on what terms charge negotiations should be conducted; and
 - without compromising the confidentiality obligation above or the safety of any person, to inform the victim of the outcome of any charge negotiations made and the justification for those negotiations.

407 The Commission welcomes submissions on whether the Solicitor-General's Prosecution Guidelines should also regulate:

- the situation where a charge negotiation has not been honoured by the prosecution or the defence, or where it was based upon a significant misapprehension;
- the extent to which, if at all, reference to charge negotiations should be able to be made in open court; and
- the extent to which, if at all, the judge should be able to determine whether the defendant understands the substance and consequences of the charge negotiation and whether improper inducements were offered to the defendant.

Should the Prosecution Guidelines regulating charge negotiation be expanded and made more specific? If so, what additional guidelines should be included?

GUIDELINES FOR DEFENCE COUNSEL

- 408 There are no current guidelines for the conduct of charge negotiations by defence counsel. A recent Australian Institute of Judicial Administration report²⁶⁵ contains a number of recommendations concerning the obligations of defence counsel.

Should the *New Zealand Law Society Rules of Professional Conduct for Barristers and Solicitors* be amended to provide defence counsel with guidance on their responsibilities when entering charge negotiations on behalf of a client?

²⁶⁵ *Pleading Guilty: Issues and Practices* (Victoria, 1995) 178; see also Mack and Anleu, "Guilty Pleas: Discussions and Agreements", (1996) 6 J of Judicial Admin 8, 13.

Proposals to meet victims' interests

Ensuring victims' needs are met within the criminal justice system requires that prosecutors pay greater attention to victims and may require victims to have recognised rights.

INTRODUCTION

409 **W**HILE THE WAY VICTIMS ARE TREATED within the criminal justice system has improved, problems remain. Victim Support groups, police, Crown solicitors, Court Services for Victims and community groups such as Women's Refuge and Rape Crisis, all assist victims. However, there is a lack of national consistency and co-ordination of the services. This chapter proposes changes to the prosecution system, particularly to the role of prosecutors, to further victims' interests while also respecting offenders' rights. Victims' interests are affected not only by the prosecution system, but by the whole criminal justice system, and a range of changes could be made. Some changes we refer to are not strictly within the scope of our review of the prosecution process.

410 The needs of victims exist and warrant concern. The statements of principle in the Victims of Offences Act 1987 recognise victims' needs, however, it is less clear whether victims should have rights. Offenders have rights to minimum levels of treatment and services as recognised in the New Zealand Bill of Rights Act 1990; conceptualising victims' needs as rights means, however, not only that they would have a moral claim to State help, but that the State would have an obligation to ensure that their rights are upheld.²⁶⁶ In New Zealand victims are considered merely to have needs and do not have rights. However, there is considerable force in the suggestion that victims' interests will not be fully catered for unless they are elevated to the level of rights. We agree with the recommendation of the New Zealand Law Society, and of the Victims' Task Force, that the Victims of Offences Act 1987 be reviewed with a view to giving greater weight to victims' interests by creating rights and methods of enforcement.²⁶⁷ There are issues of resources which would arise out of enhanced procedures for protecting and assisting victims.

²⁶⁶ Mawby, "Victims' needs or victims' rights: alternative approaches to policy making" in Maguire and Pointing (eds) *Victims of Crime: A New Deal* (OUP, Milton Keynes, 1988).

²⁶⁷ *Report on Victim Issues*, (New Zealand Law Society, Wellington, 1994) 6. However, there are issues which may have an impact outside the justice system. For example, s 4 which states that victims should have access to welfare, health, counselling, medical and legal assistance responsive to their needs, if elevated to a right would have an impact on all the services mentioned in the section.

Should the Victims of Offences Act 1987 be amended to give victims' interests greater weight by creating rights and methods of enforcement?

- 411 To date no single government department has had overall responsibility for victims of crime. This has resulted in gaps in existing services for victims,²⁶⁸ a lack of co-ordination of, and lack of information about, existing services. We endorse the proposal that the Ministry of Justice develop a uniform policy for provision of services to victims. We suggest that the Ministry is the appropriate body to lead policy on services to victims.

Should the Ministry of Justice co-ordinate policy making?

VICTIMS OF OFFENCES ACT 1987

- 412 We propose that the whole Victims of Offences Act be reviewed by the Ministry of Justice. The Act covers aspects of the criminal justice system outside the scope of the Commission's consideration of the prosecution system; however, we suggest that the review should include consideration of the following:
- Whether the definition of "victim" in s 2 should be expanded.
 - Whether the Act should be amended to make provision for information (ss 5–6 and 11) to be given to a representative of the victim when the victim is incapacitated, either through illness or injury, and when the victim is a child. A victim's representative may also be able to assist in conveying a victim's fears of intimidation for the purposes of bail decisions (s 10), and in compiling victim impact statements (s 8).
 - Whether the Act should specify what is meant by the "available protection against unlawful intimidation" referred to in s 5.
 - Whether the agencies which are intended to carry out functions under the Act need to be more clearly defined. For example, "prosecuting authority" in s 6 could be defined so that it is clear whether it includes police, Crown solicitors and other government agency prosecutors. Similarly, the meaning of "officers of the court" in s 6 could be made clear.
 - Whether s 6 should be amended so that police, Crown solicitors and other prosecutors have an obligation to seek the victim's views, as well as to give information on:
 - the choice of whether to prosecute or dispose of the matter alternatively, eg, by diversion, caution or witness immunity;
 - the withdrawal or amendment of charges; and
 - a stay of proceedings.
 - Whether s 8 should give some guidance on what would be "appropriate administrative arrangements" for ensuring victim impact statements are prepared and presented.
 - Whether the Act should specifically impose a duty on prosecutors to prepare victim impact statements, to specified standards, in every case, and with the consent of the victim.

²⁶⁸ Department of Justice Paper to Cabinet Committee on Social and Family Policy, "Victims of Crime: Review of Services", Soc (95(9)), 28 February 1995.

- Whether the Act should address victims' confidentiality concerns by clarifying that victim impact statements remain the property of the court and should not be retained by the parties after sentencing.
- Whether victims should be empowered to make their own written or oral statement about the impact of the offence on them to the sentencing judge, within appropriate parameters.
- Whether s 9, which states that a victim's address should not be unnecessarily disclosed in court, should specify the circumstances in which it will be contrary to the interests of justice not to disclose a victim's residential address.²⁶⁹
- Whether victims' interest in having their names suppressed should be dealt with in the Act.
- Whether the types of offences specified in s 10, for which a victim's views must be sought on the release of an alleged offender on bail, should be widened. For instance, perhaps family violence, any threats to kill or injure, and any other cases where a victim has genuine fears about his or her safety should be included. The meaning of "serious" could also be clarified.
- Whether the victim's views on bail should be conveyed to the court by the victim personally.

Should the Victims of Offences Act 1987 be reviewed? What issues need to be taken into account in such a review?

SOLICITOR-GENERAL'S PROSECUTION GUIDELINES

- 413 In line with our proposal that the role of the Crown Law Office in monitoring prosecution decisions be enhanced, the Commission suggests that the Prosecution Guidelines be amended to give more prominence to prosecutors' obligations concerning victims.
- 414 The review should take account of the following:
- The need to clarify for decisions whether or not to prosecute the relationship between victims' interests and the public interest. For instance, the United Kingdom Code for Crown Prosecutors states that:
The Crown Prosecution Service acts in the public interest, not just in the interests of any one individual. But Crown Prosecutors must always think very carefully about the interests of the victim, which are an important factor, when deciding where the public interest lies.²⁷⁰
 - The need to clearly allocate responsibility to seek victims' views and impart case-related information between police, Crown solicitors and other prosecuting agencies (see para 412).
 - The need before trial, for a specific person, or division, within each prosecuting agency to have responsibility for victim liaison.²⁷¹

²⁶⁹ Victims' groups also suggest that there are circumstances in which the addresses of prosecution witnesses other than the victim should not be disclosed in court.

²⁷⁰ Annual Report of the Crown Prosecution Service, April 1994 – March 1995 from the Director of Public Prosecutions to the Attorney-General (London, 1995) para 6.7

²⁷¹ Consideration should be given to whether this role could be met by prosecutors contracting with Victim Support groups or Court Services for Victims.

- Whether, once an alleged offender is committed for trial, Crown solicitors should have responsibility for liaising with victims and imparting information.
 - The need for the Guidelines to emphasise and specify the prosecutors' responsibility for preparing a victim to appear in court as a witness. The Guidelines should address the difference between on the one hand keeping a witness informed and ensuring that the witness is adequately prepared to testify, and, on the other hand coaching a witness. The former should be specifically encouraged and the latter discouraged.
 - Whether the Guidelines should state that victims, in general, have an interest in trials taking place within a reasonable time.
 - The need to give guidance to prosecutors in relation to specific types of offending. For instance, the Guidelines could contain recommendations on dealing with:
 - family violence cases;
 - historic sexual abuse cases;
 - sexual assault cases generally; and
 - cases where there are special credibility issues related to the complainant, due to his or her age, or mental capacity.
 - The need for the Guidelines to provide detailed guidance to police prosecutors on the preparation of victim impact statements.
- 415 So far as possible, guidance for the police and other government prosecuting agencies should be included in the Prosecution Guidelines.

GUIDELINES FOR OTHER PROSECUTION AGENCIES

- 416 Statements on duties owed to victims which are consistent with those contained in the Prosecution Guidelines and the Victims of Offences Act 1987 should be included in police and other prosecuting agency guidelines.

Should the Prosecution Guidelines and prosecuting agency guidelines be reviewed to give more prominence to victims' interests? What matters should such reviews take into account?

Proposals to increase control and accountability

Prosecuting criminal offences is a central function of the State. Prosecutors should therefore be accountable for the manner in which they exercise their discretion to prosecute. Their decisions should be fair, consistent and transparent.

417 **T**HE COMMISSION BELIEVES that the proposals for reform of the present system outlined in chapters 15–18 will ensure that the objectives of the prosecution system are better achieved. In particular, the reform of the present structure of the prosecution system and the powers of prosecutors outlined in chapters 15 and 16 will increase the independence of prosecution decisions. The following discussion describes in more detail how the further reforms this chapter proposes would improve the control of, and accountability for, prosecution decisions.

THE ROLE OF THE ATTORNEY-GENERAL AND SOLICITOR-GENERAL

- 418 The Prosecution Guidelines state that the Attorney-General has ultimate responsibility for the Crown's prosecution processes.²⁷² Responsibility implies the ability to control and the means to make control effective. In fact, the convention is for the Solicitor-General to control prosecution processes on a day-to-day basis. The degree to which the Attorney-General may become involved in particular matters may vary with the holder of the office.
- 419 Should the primary responsibility for prosecutions be vested formally in the Solicitor-General or continue in the Attorney-General? The usual and traditional approach is for the Attorney-General to have responsibility but there are exceptions. Thus, when the Crown was given the right to appeal against sentence, the power was vested in the Solicitor-General.
- 420 In favour of the existing position is the status of the Attorney-General as a member of Parliament and of the Cabinet with overall responsibility for major aspects of the administration of justice. This includes the responsibility for

²⁷² Prosecution Guidelines, para 2.3.

appointing judges, advising Parliament whether legislation conforms with the New Zealand Bill of Rights Act 1990, and generally performing the traditional function of overseeing the Crown's constitutional responsibilities for maintaining the rule of law.²⁷³ The Attorney-General does sometimes make decisions personally in relation to prosecutions and clear conventions exist as to the exercise of these powers. These may well be a sufficient safeguard against abuse, but not necessarily against the public perception of political motivation. The express vesting of responsibility in the Solicitor-General would reinforce the perceived independence of the prosecution process from executive control.

- 421 Ministerial accountability to Parliament should be preserved. This is compatible with vesting prosecution powers in the Solicitor-General, as it is with the numerous instances of statutory officers – even within the public service – having prosecution powers. The issue is addressed in the Serious Fraud Office Act 1990, and a variation of the formula in that Act suggests itself as useful if there is support for this change.
- 422 Wherever power is vested, the Commission suggests that the Attorney-General – not any other Minister – should answer to Parliament for the administration of prosecutions. Responsibility for charging and law enforcement actions before charging would remain where it now is – with the police and other prosecuting agencies. A clarification of the constitutional position along these lines would be of substantial value. In New Zealand this issue has been the subject of very little, if any, discussion.

Who should have ultimate responsibility for prosecution policies and decisions?

Delegation of the prosecution function

- 423 In England the Director of Public Prosecutions is by statute “subject to the supervision of the Attorney-General”, who in turn considers him- or herself answerable in Parliament for the policy applied by the Crown Prosecution Service, and for decisions and actions that the Attorney or the Director takes. The position was stated in 1986 by the then Attorney-General Sir Michael Havers:

I shall remain answerable in Parliament for decisions or actions that I or the Director of Public Prosecutions and his headquarters staff take on prosecution matters and for the policy that is applied by the Crown Prosecution Service in the handling of particular cases. . . . However I do not think it appropriate to answer in Parliament for the intrinsic merits of particular decisions taken by local prosecutors unless the Director's headquarters staff have in fact been involved in the case in question. Insofar as cases in which the Director's headquarters staff have been involved are concerned, I propose . . . as a general rule [to confine] answers to the basis of the decision in the particular case . . .²⁷⁴

²⁷³ See Chen and Palmer, *Public Law in New Zealand* (OUP, Auckland, 1993), on the role of the Attorney-General.

²⁷⁴ Quoted in Rozenburg, *The Case for the Crown* (Equation, Wellingborough, 1987) 183. Here, the distinction between central and local decisions seems a pragmatic, rather than a logical – or constitutional – one.

- 424 In the Commonwealth of Australia the Attorney-General retains ultimate political responsibility for the office of the Director of Public Prosecutions in that he or she is empowered to give or furnish directions or guidelines to the Director, which must be tabled in the Parliament.²⁷⁵
- 425 Accepting that prosecution is a State function requires the establishment of clear lines of control and accountability. The formal delegation of the prosecution function from the Attorney-General to the Solicitor-General, the Commissioner of Police, and chief executive officers of government agencies would seem to be appropriate. They could then make the appropriate sub-delegations in accordance with the relevant provisions of the State Sector Act 1988, and in the case of the police, the Police Act 1958.²⁷⁶ This proposal would fundamentally change the present system of accountability. The Commissioner of Police and the Director of the Serious Fraud Office would be less independent and more accountable to the Attorney-General for the performance of their prosecution functions.
- 426 A delegation to the Commissioner of Police would be an express recognition of the Commissioner's responsibility to the Attorney-General (through the Solicitor-General) for all police prosecutions. Any doubt about the existence of an independent power of police officers to prosecute should be removed by legislation expressly stating that police officers do not have such a power. This is needed in order to be able to establish internal lines of accountability with confidence.
- 427 Chief executive officers would be responsible to the Attorney-General (through the Solicitor-General) for the performance of their prosecution functions, rather than to the usual responsible Minister.
- 428 Some difficulty might arise in determining which agencies connected with the government or Crown should have prosecution powers delegated to them. Where should the boundary between public and private prosecutions be set? This problem has been exacerbated by recent changes in the public sector: there is now a range of entities with varying degrees of independence from the government. Non-government entities are also being created to prosecute certain types of offence. For example, regional health authorities have created Health Benefits Limited, one purpose of the company being to prosecute fraud by medical practitioners. It may be necessary to approach the issue on a case-by-case basis.
- 429 A further potential difficulty concerning delegated authority to prosecute is that Crown solicitors do not appear to come within the sub-delegation framework envisaged by the State Sector Act 1988. Crown solicitors are unlikely to be employees, within the meaning of s 14(2) of the Act, to whom sub-delegations from chief executive officers and then to employees are authorised.²⁷⁷ To ensure that the Solicitor-General, through Crown solicitors, has the degree of oversight of departmental prosecutions contemplated by the Commission, it may be necessary to give separate legislative authority to the Attorney-General or Solicitor-General to delegate or sub-delegate certain of

²⁷⁵ Director of Public Prosecutions Act 1983 (Aust) s 8.

²⁷⁶ See ss 28 and 41 of the State Sector Act 1988, s 55A of the Police Act 1958.

²⁷⁷ The exceptions are the two Crown solicitors in Blenheim and Nelson, who are employed by the Crown Law Office.

his or her prosecution functions to Crown solicitors. Alternatively, a more fundamental change could be made, vesting all statutory prosecution powers in the various contexts in which prosecutions arise – at least initially – in the Attorney-General. For example, the Attorney-General would have direct legislative authority for fisheries prosecutions, rather than that authority being vested at first instance in the Chief Executive Officer of the Ministry of Fisheries.

Should the power to prosecute be formally delegated by the Attorney-General? To whom should the power to prosecute be delegated?

Prosecutions in the name of the Crown

- 430 At present, except in indictable cases after committal for trial, all prosecutions are in the name of an individual informant who seldom conducts the prosecution and often has no personal knowledge of it. He or she is simply a nominee of the police or other prosecution agency. This derives from the historical fiction that all prosecutions are brought by private individuals. The Commission believes the correct principle to be that prosecution is a public function, the ultimate responsibility lying with the Attorney-General on behalf of the State. The bringing of criminal prosecutions by private persons and agencies has an historical basis and is justified for constitutional reasons but in doing so they act on behalf of the State. This is as true of summary as of indictable proceedings; there seems no good reason why prosecutions proceeding on indictment are “Crown cases” but those proceeding summarily are not. The legal forms should reflect this more closely. On that footing, all prosecutions, other than private prosecutions, should be in the name of the Crown or the police.
- 431 However, there are problems with boundaries. What is to be regarded as a Crown agency for this purpose? Some Crown entities, eg, the Commerce Commission see themselves as independent of the Crown. And what if a Crown agency is also the defendant?²⁷⁸

Should all prosecutions be in the name of the Crown? What are the appropriate boundaries?

A MONITORING UNIT IN THE CROWN LAW OFFICE

- 432 Under the Commission’s proposals in chapter 15, the creation of a monitoring unit in the Crown Law Office would play a key role in enhancing the fairness, consistency and transparency of prosecution decisions. It would monitor all prosecutors’ compliance with the Solicitor-General’s Prosecution Guidelines.

²⁷⁸ Or, for that matter, the Crown itself. Criminal liability of the Crown could result from implementation of the Law Commission’s proposed removal of the presumption that the Crown is not bound by statutes: see *A New Interpretation Act: to avoid Prolixity and Tautology* (NZLC R17, Wellington, 1990, ch IV). See also *Report of the Commission of Inquiry into the Collapse of a Viewing Platform at Cave Creek near Punakaiki on the West Coast* (1995 AJHR H2, 90 and 92). These issues are currently the subject of separate consideration by the Government.

THE JURISDICTION OF THE POLICE COMPLAINTS AUTHORITY

- 433 Charging and prosecution decisions, including decisions *not* to prosecute, made by the police and officers of the police prosecution service, should be reviewable by the Police Complaints Authority on the same basis as the Authority's ability to review the exercise of other discretions. The Police Complaints Authority Act 1988 may need to be amended to clarify this.

Should the Police Complaints Authority have the power to review prosecution decisions of the police?

JUDICIAL REVIEW

- 434 Judicial review is discussed in chapter 10, paras 219–232. Comments are invited on the question of whether in principle all decisions to prosecute or not to prosecute should be judicially reviewable. The question whether judicial review should also be available for other decisions made in the prosecution process, notably stays of proceedings and (if the Commission's proposals are implemented) discontinuance, needs consideration.
- 435 In any event, if judicial review is to be available, all prosecuting agencies should be amenable to judicial review on a similar footing. At present the prosecution decisions of the Serious Fraud Office are expressly exempt from judicial review. The Commission proposes that s 20 of the Serious Fraud Office Act 1990 be repealed to remedy this anomaly.

Should all decisions to prosecute, or not to prosecute, including those of the Serious Fraud Office, be judicially reviewable?

Proposals on private prosecutions

The ability of private entities and individuals to commence a prosecution is a safeguard against the misuse of public power. However, it carries its own dangers and does not fit well into a prosecution system which requires certain standards of fairness, consistency, transparency and accountability. Control is desirable.

- 436 PRIVATE PROSECUTIONS PROVIDE an important safeguard for the aggrieved citizen against capricious, corrupt or biased failure or refusal to prosecute offenders against the criminal law.²⁷⁹ The Commission is not aware of any such cases in recent times in New Zealand, but there are instances in England showing that this is more than theoretical.²⁸⁰ The possibility of private prosecution may also further protect victims' interests as some private prosecutions may be instigated by or on behalf of the victim of an offence if a public prosecution agency declines to prosecute.²⁸¹
- 437 Aside from the principle justifying the existence of private prosecutions, practical considerations are relevant. Where the prosecution policies of private prosecution entities, such as the SPCA, and public prosecution agencies coincide, problems of co-ordination may arise. The policies might not, however, coincide; there might be regional variations in the prosecutions conducted by private agencies or a lack of information-sharing between private and public prosecution agencies. These problems may impact on the fairness, consistency, transparency and accountability of prosecution decisions.
- 438 The following safeguards, already present in the system, give some protection against improper Crown interference in private prosecutions:

²⁷⁹ *Gouriet v Union of Post Office Workers* [1978] AC 435, 498.

²⁸⁰ Some are mentioned in "A High Cost to be Paid for Private Justice", *Dominion*, Wellington, 29 November 1988, 7.

²⁸¹ See "Parents succeed in Lawrence committal", *The Times*, London, England, 12 September 1995. The article referred to a private prosecution taken against four people for murder after the Crown Prosecution Service declined to proceed; two defendants were committed for trial. See also Saunders, "Private prosecutions by the victims of violent crime" [1995] NLJ 1423.

- High Court judges have the power to give leave to present an indictment even if there has been no preliminary hearing or the defendant was not committed for trial at the preliminary hearing.²⁸²
- A District Court judge may review the decision of a District Court registrar not to issue a warrant or summons: *Daemar v Soper* [1981] 1 NZLR 66.

439 Despite the principle underlying the availability of private prosecutions, the potential exists for individuals acting improperly or maliciously to bring a prosecution and imperil a person's liberty. As the Prosecution Guidelines point out:

The decision to begin a prosecution against an individual has profound consequences. . . . Even if eventually acquitted, he or she will be subjected to the stresses of public opprobrium, court appearances and possibly a loss of liberty while awaiting trial. (para 1.5)

If prosecuting offences is regarded as a central function of the State, should private prosecutions be retained? Are there currently problems with prosecutions by private agencies?

EXISTING CONTROLS ON PRIVATE PROSECUTIONS

440 Some controls already exist within the present prosecution system which can curb abuse of the power to bring a private prosecution:

- A number of statutes limit the categories of informants who may lay an information, or require the consent of the Attorney-General or the leave of a High Court judge, before an information can be laid (see appendix F).
- District Court registrars may have power to decline to issue a summons or warrant of arrest.
- Judges have the power under the Crimes Act 1961 s 347 to direct that an indictment not be presented.
- Courts have the power to award costs against prosecutors under the Costs in Criminal Cases Act 1967 ss 5 and 7.
- A defendant may be able to take a civil action against the informant for malicious prosecution.
- The Attorney-General and the Solicitor-General have the power to stay proceedings.

441 If the right of private prosecution itself is a check against State power, the power of the Attorney-General and Solicitor-General (as law officers of the Crown) to stay proceedings ought to be used only very sparingly to avoid accusations that their decisions are improperly motivated. In practice, the Solicitor-General will usually exercise the power to stay in cases where a convicted offender attempts to prosecute a complainant, but not in cases where a public prosecution agency has decided not to prosecute.

442 Private prosecutions fall outside many of the other safeguards built into the present prosecution system and the reforms suggested in previous chapters. There is no assurance that an individual's decision to prosecute will have been made taking into consideration any of the relevant factors set out in the Solicitor-

²⁸² Crimes Act 1961 s 345(3).

General's Prosecution Guidelines, in particular public interest factors. An individual is not required to consider diversion, or indeed any other alternatives to a formal prosecution in court, nor is the private prosecutor subject to the usual requirements to disclose evidence to the defence.²⁸³ Further, the person who has investigated the offence may also prosecute.

OPTIONS FOR REFORM

Security for costs

- 443 Granting the courts power to require a private prosecutor to give security for costs might have a salutary effect on the private prosecutor if the proceedings were abusive or ill-founded. But it may not prevent the initiation of an unjustified prosecution if the private prosecutor has the means to provide security. In such a case, some consideration of the matter by the court would show that prosecution is unjustified. In other situations, an informant without means may be prevented from bringing a good prima facie case.
- 444 In the Commission's view, a policy requiring all private prosecutors to give security for costs would unfairly discriminate against private prosecutors who had a legitimate case but who were without the means to provide security. Nor would it solve the problem of unjustified prosecutions, unless the court was prepared to look, at least in outline, at the merits of the case.

Should private prosecutors be required to give security for costs?

Leave of the court

- 445 To require the leave of a court for the bringing of certain types of prosecution would not be a complete innovation. The Commission favours a rule that all informations filed by private prosecutors should begin with the leave of a District Court judge. Requiring the leave of a judge before a private prosecution can be commenced has the advantages of independent control, preventing unmeritorious private prosecutions while not inhibiting reasonably brought private prosecutions, and avoiding the danger of executive interference. It allows some preliminary examination of the merits of the case – in particular whether there is a prima facie case – and of the motives of the private prosecutor in bringing the prosecution. In view of the constitutional importance of the right to prosecute, the Commission proposes that an appeal to the High Court should lie against the refusal of leave.

Should all private prosecutors be required to seek the leave of the court before bringing a private prosecution? If not, in which class of case should leave be required? If leave is refused, should there be a right of appeal to the High Court?

²⁸³ This, considering the provisions of the Privacy Act 1993, may be arguable.

Proposals on preliminary hearings

The need for preliminary hearings has been questioned in the light of the advent of greater criminal disclosure. However, preliminary hearings continue to serve useful purposes and should be retained and modified rather than abolished.

THE LAW COMMISSION'S INTERIM PROPOSAL

446 **I**N 1990 THE COMMISSION made an interim proposal on preliminary hearings:

- first, that prosecution evidence be accepted in the form of a written statement unless personal attendance is required by the court, of its own motion or on the application of any party; and
- second, that cross-examination of prosecution witnesses be by leave and only for limited, recognisable, practical reasons.

The Commission proposed that prosecution witnesses should not give evidence in person or be cross-examined at the committal stage except by leave of a District Court judge, to be granted only if:

- the witness is to give evidence concerning identification of the defendant;
- the witness is to give evidence of an alleged confession of the defendant;
- the witness is alleged to have been an accomplice of the defendant; or
- the witness has made an apparently inconsistent statement.²⁸⁴

FUNCTIONS OF THE PRELIMINARY HEARING

447 The advent of an improved prosecution system, as proposed in this paper, which might be expected to screen out cases at least as well as the preliminary hearing now does, would strengthen the case for abolishing the preliminary hearing. Logically, the preliminary hearing would, like the grand jury before it, become an anachronism. Even under present practice the primary function of the preliminary hearing – to determine whether there is a prima facie case against a defendant – to some extent duplicates one of the functions of the prosecutor. Under the Commission's proposals, the test of a reasonable prospect of

²⁸⁴ *Criminal Procedure: Part One: Disclosure and Committal*, (NZLC R14, Wellington, 1990) paras 137–139. The special provisions in the Summary Proceedings Act 1957 Part VA relating to witnesses in cases alleging certain sexual offences were noted.

conviction (that a prosecutor would normally require before going ahead with a prosecution), would be more favourable to a defendant than the prima facie test that now applies to decisions to commit for trial. Moreover, the prosecutor is required to take public interest factors into account, something that the preliminary hearing, as a judicial proceeding, cannot do.

- 448 However, unlike the prosecutor's decision to prosecute, the preliminary hearing is a public process. It may suit both the defendant and the prosecutor to have a case dismissed in open court. Public confidence in the result may be greater than that in a prosecutor's decision taken in private – although the Commission's proposals in this paper would significantly increase the openness and accountability of prosecution decisions.
- 449 Another principal function of the preliminary hearing in modern times has been to inform the defendant of the Crown's case. This has to some extent been achieved outside of the hearing by the inauguration of an effective criminal disclosure regime. This operates as a consequence of the Official Information Act 1982 – and also the Privacy Act 1993 – by virtue of the decision in *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385. The Commission has proposed a more sophisticated disclosure regime which would have importance for other aspects of the prosecution system as well, eg, information before charge negotiation.²⁸⁵
- 450 The preliminary hearing does serve other legitimate purposes. Many defence counsel value it as an opportunity to see, and occasionally to cross-examine, the Crown's witnesses, and to assess the strength of the Crown's case. Prosecutors may find it beneficial to expose their witnesses to the test of a court hearing,²⁸⁶ or to have a possibly reluctant witness examined on oath before the substantive trial. In addition, a defendant confronted at the hearing with a strong prosecution case may sometimes decide the wisest course is to plead guilty, avoiding the need for a trial. This also has advantages for the complainant by avoiding the lengthier trial process.

DEPARTMENT FOR COURTS' PROPOSAL

- 451 In June 1996 the Department for Courts circulated a draft paper proposing either the modification or the abolition of preliminary hearings; its preference was for abolition. It advocated the prosecution providing briefs of evidence to the defendant and filing the matter in court, with the matter then proceeding to trial without a preliminary hearing. It argued that in cases where there is insufficient evidence, instead of a preliminary hearing, an application under the Crimes Act 1961 s 347 could be made based on the papers.

CONCLUSION

- 452 If the Commission's proposals for reform of the prosecution system were adopted, and worked well in practice, the question arises whether the preliminary hearing should remain as a standard part of indictable proceedings. The important issue is whether the preliminary hearing has valid functions not already fulfilled by

²⁸⁵ *Criminal Procedure: Part One: Disclosure and Committal*, paras 69–115.

²⁸⁶ For example, it can build the confidence of vulnerable witnesses (eg, in sexual offence cases) in the protections afforded to them in a court hearing.

other features of the proposed prosecution system. For now, the Commission believes that the preliminary hearing should be retained because it does have some valuable functions, but that the usual practice should be committal “on the papers” as suggested in our interim proposal of 1990 (see para 446 of this paper).

Should preliminary hearings be retained if the Commission’s proposals for reform are adopted? If so, in what form?

Proposals on minor offence and infringement notice procedures

Minor offence and infringement notice procedures should be used more widely.

- 453 **O**NE OBJECTIVE THAT HAS GUIDED THE COMMISSION in this review is that the formal court process and trial in criminal cases should be limited to cases where it is justified by the importance of the issue. The more generous use of the minor offence and infringement notice procedures created by ss 20A and 21 of the Summary Proceedings Act 1957 would be one means of achieving this. A working party of the government's Enforcement, Prosecution and Sentencing (EPS) task force was set up to review the scope of these two procedures. The subject is now subsumed in a wider fines review being undertaken by the Department for Courts (the EPS working party has been disbanded).
- 454 The Commission believes that a good case exists for enlarging both the minor offences and the infringement notice procedures. The Commission adheres generally to the following comments which it made to the EPS working party:
- The infringement notice procedure is not appropriate for those offences where it is desirable that the court should retain a discretion as to sentence (eg, for offences with varying degrees of culpability).
 - The minor offence procedure in s 20A of the Summary Proceedings Act 1957 should be retained because it adds something useful to the infringement notice procedure, namely the court's power to determine the actual sentence within a \$500 limit. Infringement offences, on the other hand, have set penalties.
 - The infringement notice and minor offence procedures should be reserved for non-imprisonable offences. There are arrest powers and powers of search attendant on imprisonable offences not appropriate in relation to minor offences. In the Commission's opinion no imprisonable offence ought to be regarded as minor.
 - Offences where imprisonment is provided for by law but is rarely or never imposed should be reviewed with a view to making them non-imprisonable.
 - Non-imprisonable offences should be examined to ascertain to what extent the infringement notice (currently a maximum fine of \$300) and minor offence procedures (currently a maximum fine of \$500) could be extended.

- Consideration should be given to extending the infringement notice procedure to the majority of offences punishable by no more than \$2000.
- Consideration should be given to whether the infringement notice procedure is also appropriate for all strict liability regulatory offences.

Should greater use be made of minor offence and infringement notice procedures?

The costs and benefits

- 455 **A**MONG THE PROPOSALS in this paper which have significant cost implications are
- Crown solicitors becoming involved in indictable proceedings at an earlier stage, and the strengthening of the role of Crown solicitors;
 - establishing a national police prosecution service;
 - strengthening the role of the Crown Law Office by increasing its resources to enable the further development of guidelines and monitoring; and
 - additional costs to properly inform and consult with victims.²⁸⁷
- 456 The benefits are difficult to identify or quantify in dollar terms. Most of the benefits will be intangible, such as a more equitable and principled justice system. There will, however, be more tangible or realisable benefits.

Strengthening the role of Crown solicitors

- 457 By involving Crown solicitors at an earlier stage, cases that ought not to proceed would be withdrawn before the case gets too far through the court system. This should have the effect of reducing the number of committal proceedings, thereby saving prosecution and court costs.
- 458 On the other hand, it might be assumed that some committal proceedings that now fail might succeed if the case were better prepared and presented. The earlier involvement of Crown solicitors in indictable and certain summary cases should ensure that cases which proceed to court may be fewer, should be better prepared and therefore better conducted. This may result in a more effective prosecution that optimises the use of court resources.
- 459 The prosecution system would be likely to become a more effective and efficient one, but there would be a significant increase in costs. The police meet the costs of Crown solicitors up to the committal stage, after which the costs are met by the Crown Law Office. The police would have an increase in prosecution costs which may be offset to some extent by a reduction in the Crown Law Office expenditure as costs are incurred earlier in the process. It may also restrain the backlog of cases and the growth in the number of cases before the courts.²⁸⁸

²⁸⁷ The Law Commission engaged the Hunter Group Ltd to prepare a paper, *The Cost Implications of the Criminal Prosecution Paper Proposals* (Wellington, 1996). Referred to in this paper as the Hunter Group report.

²⁸⁸ Hunter Group report.

Establishing a national police prosecution service

- 460 At present the New Zealand Police spend about \$23 million each year on prosecution services. In most large centres prosecutions are dealt with by separate prosecution sections. In the smaller centres, however, it is not cost-effective to have the same degree of separation of duties. Most police officers tend to rotate through prosecution sections usually for periods of at least 6 months. Training, however, is limited.
- 461 The Commission's proposals would increase the skills and effectiveness of police prosecutors. A national police prosecution service is likely to lead to cases being conducted more effectively, and to an improved accountability system – both of which would lead to a higher degree of confidence in police prosecutions. However, there would also be further cost: the emphasis on legal qualifications would need to be backed up by specialist prosecution and litigation training; there would also be costs involved in attracting staff with these skills and training, and in retaining skilled and experienced prosecutors.

Enhancing the role of the Crown Law Office

- 462 The creation of a monitoring unit in the Crown Law Office may require up to three staff. This will require additional dedicated resource costs. Final resource requirements are dependent upon decisions around the scope and nature of the monitoring and operational policy work.

Plea negotiation and the Solicitor-General's Prosecution Guidelines

- 463 Plea negotiation can be a very effective tool in reducing prosecution costs: it ensures conviction while avoiding the time, expense and uncertainty of trials. There may be costs in further enhancing the current Prosecution Guidelines to promote fairness, consistency, transparency and accountability in plea negotiations. This work would be undertaken by the staff of the Crown Law Office monitoring unit.

Informing and consulting with victims

- 464 Improving consultation with and the delivery of information to victims about prosecution decisions and the progress of their cases will incur costs. In terms of cost-effectiveness it is not clear whether the police or Crown solicitors, or others such as Victim Support groups or Court Services for Victims staff are the best placed to have responsibility for increasing the role of victims within the prosecution system.

Preliminary hearings

- 465 At present there is a preliminary hearing unless both parties agree not to have one, and defence counsel has the right to call every witness involved in the case. This can lead to significant cost and contributes to delay with its additional effects on cost. There is anecdotal evidence suggesting some defence counsel habitually call on all witnesses at considerable cost to the system, although the reliability of that evidence is untested. If, as the Commission proposes, there is greater use of written statements then the number and length of preliminary hearings should reduce, leading to reduced cost.

APPENDICES

APPENDIX A

Participants at the hui on Māori and the prosecution system

In November 1994 the Commission sponsored a hui on Māori and the prosecution system. The participants were:

Taki Anaru (lawyer)
Peter Birks (lawyer)
John Chadwick (lawyer)
Mere Hammond (Cultural Officer, Māori Mental Health Group)
Rei Harris (Black Power)
Joe McDougall (social worker, Youth Justice)
Yvonne Marshall (counsellor, academic)
Bill Maung (Black Power)
Hyrum Parata (lawyer)
Topsie Ratahi (community worker)
Amster Reedy (consultant)
Stu Rewiti (youth worker)
Judge Pat Savage (Māori Land Court Judge)
Annette Sykes (lawyer)
Jane Shaw (marae justice advocate)
Willie Te Kira (Youth Justice worker)

Aroha Terry (marae justice advocate) did not attend the hui but was interviewed by Commission researchers on two occasions.

APPENDIX B

PROSECUTION GUIDELINES

as at 9 March 1992
Crown Law Office
Wellington

1. Introduction
2. Who may Institute Prosecutions
3. The Decision to Prosecute
4. Consents to Prosecutions
5. Indictments
6. Stay of Proceedings
7. Withdrawal of Charges and Arrangements as to Charges
8. The Role of the Prosecutor in Sentencing
9. Witness Immunities
10. Disclosure and Discovery
11. Victims of Offences
12. Crown Appeals against Sentence
13. Case Stated Appeals

1. **Introduction**

- 1.1 Almost invariably it is the responsibility of officers and agencies of the State to investigate offences and prosecute offenders. It is the Attorney-General and Solicitor-General, as the Law Officers of the Crown, whose responsibility it is to ensure that those officers and agencies behave with propriety and in accordance with principle in carrying out their functions.
- 1.2 The State bears a dual responsibility in its administration of the criminal law. Behaviour classified as criminal has been deemed so harmful to society generally that the State, on behalf of all its citizens, accepts the responsibility to investigate, prosecute and punish those behaving in that way.
- 1.3 The State also accepts the responsibility of ensuring, through institutions and procedures it establishes, that those suspected or accused of criminal conduct are afforded the right of fair and proper process at all stages of investigation and trial.
- 1.4 Those dual responsibilities are often in tension. The individual subjected to the criminal justice process will rarely believe that it is working in his or her favour; the investigating and prosecuting agencies will not wish to see someone they believe guilty elude conviction.
- 1.5 The decision to begin a prosecution against an individual has profound consequences. The individual is no longer a suspect, but is formally and publicly accused of an offence. Even if eventually acquitted, he or she will be subjected to the stresses of public opprobrium, court appearances and, possibly, a loss of liberty while awaiting trial.
- 1.6 It is of great importance therefore that decisions to commence and to continue prosecutions be made on a principled and publicly known basis. The purpose of these guidelines is to indicate, in a general way, the bases on which the Law Officers expect those decisions to be made.

2. **Who may Institute Prosecutions**

- 2.1 Any person may institute a prosecution for an offence against the general criminal law and, with some specific exceptions, for regulatory offences. Some prosecutions require the prior consent of the Attorney-General; the procedure for obtaining that consent is outlined in section 4. Every prosecution is commenced by way of an Information laid under the provisions of the Summary Proceedings Act 1957 and the person bringing the prosecution is known as the “informant”. In practice almost all prosecutions for offences against the general criminal law are brought by the Police and those for regulatory offences by officers of Government Departments or Local Authorities.
- 2.2 In the case of prosecutions brought by Crown agencies for offences triable only on Indictment, or those on which the accused has exercised a right of electing trial by jury, the informant ceases to be the prosecutor from the point at which the accused is committed for trial. At that point the prosecution becomes a “Crown” matter and only the Attorney-General, Solicitor-General or a Crown Solicitor may lay an Indictment. The laying of Indictments is dealt with in section 5.

- 2.3 The Attorney-General as the Senior Law Officer of the Crown has ultimate responsibility for the Crown's prosecution processes. Successive Attorneys-General however have taken the view that it is inappropriate for them, as Ministers in the Government of the day, to become involved in decision making about the prosecution of individuals.
- 2.4 In New Zealand the Attorney-General and Solicitor-General have co-extensive original powers. With some specified exceptions the Solicitor-General may perform any function given to the Attorney-General. In practice the Solicitor-General exercises all of the Law Officer functions relating to the prosecution process.
- 2.5 The initial decision to prosecute rests with the Police in the case of the general criminal law, or an officer of some other central or local government agency charged with administering the legislation creating the offence. It is frequently the case that the Police or agency will consult a Crown Solicitor or the Solicitor-General for advice as to whether a prosecution would be well founded. It is however never for the Solicitor-General or the Crown Solicitor to make the initial decision to prosecute; it is their function to advise.

3. **The Decision to Prosecute**

In making the decision to initiate a prosecution there are two major factors to be considered; evidential sufficiency and the public interest.

3.1 **Evidential Sufficiency**

The first question always to be considered under this head is whether the prosecutor is satisfied that there is admissible and reliable evidence that an offence has been committed by an identifiable person.

The second question is whether that evidence is sufficiently strong to establish a prima facie case; that is, if that evidence is accepted as credible by a properly directed jury it could find guilt proved beyond reasonable doubt.

3.3 **The Public Interest**

- 3.3.1 The second major consideration is whether, given that an evidential basis for the prosecution exists, the public interest requires the prosecution to proceed. Factors which can lead to a decision to prosecute, or not, will vary infinitely and from case to case. Generally, the more serious the charge and the stronger the evidence to support it, the less likely it will be that it can properly be disposed of other than by prosecution. A dominant factor is that ordinarily the public interest will not require a prosecution to proceed unless it is more likely than not that it will result in a conviction. This assessment will often be a difficult one to make and in some cases it may not be possible to say with any confidence that either a conviction or an acquittal is the more likely result. In cases of such doubt it may be appropriate to proceed with the prosecution as, if the balance is so even, it could probably be said that the final arbiter should be a Court. It needs to be said also that the public interest may indicate that some classes of offending e.g., driving with excess breath or blood alcohol levels, may require that prosecution will almost invariably follow if the necessary evidence is available.

- 3.3.2 Other factors which may arise for consideration in determining whether the public interest requires a prosecution include:
- a the seriousness or, conversely, the triviality of the alleged offence; i.e., whether the conduct really warrants the intervention of the criminal law.
 - b all mitigating or aggravating circumstances.
 - c the youth, old age, physical or mental health of the alleged offender.
 - d the staleness of the alleged offence.
 - e the degree of culpability of the alleged offender.
 - f the effect of a decision not to prosecute on public opinion.
 - g the obsolescence or obscurity of the law.
 - h whether the prosecution might be counter-productive; for example by enabling an accused to be seen as a martyr.
 - i the availability of any proper alternatives to prosecution.
 - j the prevalence of the alleged offence and the need for deterrence.
 - k whether the consequences of any resulting conviction would be unduly harsh and oppressive.
 - l the entitlement of the Crown or any other person to compensation, reparation or forfeiture as a consequence of conviction.
 - m the attitude of the victim of the alleged offence to a prosecution.
 - n the likely length and expense of the trial.
 - o whether the accused is willing to co-operate in the investigation or prosecution of others or the extent to which the accused has already done so.
 - p the likely sentence imposed in the event of conviction having regard to the sentencing options available to the Court.
- 3.3.3 None of these factors, or indeed any others which may arise in particular cases, will necessarily be determinative in themselves; all relevant factors must be balanced.
- 3.3.4 A decision whether or not to prosecute must clearly **not** be influenced by:
- a the colour, race, ethnic or national origins, sex, marital status or religious, ethical or political beliefs of the accused.
 - b the prosecutor's personal views concerning the accused or the victim.
 - c possible political advantage or disadvantage to the Government or any political organisation.
 - d the possible effect on the personal or professional reputation or prospects of those responsible for the prosecution decision.

4. **Consent to Prosecutions**

- 4.1 A number of statutory provisions creating offences require that, before a prosecution is commenced, the consent of the Attorney-General is to be obtained. This is a function carried out in practice by the Solicitor-General (see section 2). The consent, if given, is signified by way of endorsement on the Information. Requests for consent should be directed to the Solicitor-General with full details of the alleged offence and the evidence available to be called.
- 4.2 The reasons for requiring that consent vary. In general terms however the consent requirement is imposed to prevent the frivolous, vengeful or 'political' use of the offence provisions.
- 4.3 A list of provisions creating offences for which the Attorney-General's consent is required is given in Appendix I. [Not attached, see appendix G.]

5. **Indictments**

- 5.1 The power of the Attorney-General and Crown Solicitors to present an Indictment is recognised in s.345 of the Crimes Act 1961. Almost invariably it is a Crown Solicitor who does so. In exercising that power, the Crown Solicitor acts entirely independently of the Police or other investigating agency and is not subject to their instructions.
- 5.2 A Crown Solicitor may present an Indictment “. . . for any charge or charges founded on the evidence disclosed in any depositions taken against such person . . .” A Crown Solicitor may therefore present an Indictment containing a charge different from, or additional to, that originally contained in the Information, so long as it is founded on evidence contained in the depositions. In exercising that power a Crown Solicitor is exercising, de novo, the discretion to prosecute. All factors affecting that discretion arise again for consideration.
- 5.3 Where the District Court has committed on some charges only, the prosecution has a number of options available if it wishes nevertheless to proceed to trial on the charges in respect of which there has been no committal:
- a the Crown Solicitor may exercise the power of laying an indictment under s.345 notwithstanding the lack of a committal on those charges.
 - b an application may be made to a High Court Judge for written consent to present an Indictment notwithstanding the lack of a committal on that or those charges.
 - c the Attorney-General (in practice the Solicitor-General) may present an Indictment (known as an “ex officio Indictment”) or give written consent to the presentation of an Indictment notwithstanding the lack of a committal on that or those charges.
 - d the Information or Informations on which there has been no committal may be relaid and taken to depositions again.
- 5.4 The use of an ex officio indictment or the giving of consent by the Attorney-General has been very rare and is likely to remain so.

6. Stay of Proceedings

- 6.1 The common law right of the Attorney-General to intervene in the prosecution process and to stay any prosecution from proceeding further is recognised in ss. 77A and 173 of the Summary Proceedings Act 1957 and s. 378 of the Crimes Act 1961.
- 6.2 In New Zealand the power of stay has been sparingly exercised. That conservative approach is likely to continue.
- 6.3 Generally speaking the power of entering a stay will be exercised in three types of situation:
- a where a jury has been unable to agree in two trials. After a second disagreement the Crown Solicitor must refer the matter to the Solicitor-General for consideration of a stay. Unless the Solicitor-General is satisfied that some event not relating to the strength of the Crown's case brought about one or both of the disagreements, or that new and persuasive evidence would be available on a third trial, or that there is some other exceptional circumstance making a third trial desirable in the interests of justice, a stay will be directed.
 - b if the Solicitor-General is satisfied that the prosecution was commenced wrongly, or that circumstances have so altered since it was commenced as to make its continuation oppressive or otherwise unjust, a stay will be directed.
 - c a stay will be directed to clear outstanding or stale charges or otherwise to conclude an untidy situation; e.g., where for instance an accused has been convicted on serious charges but a jury had disagreed on others less serious, or a convicted person is serving a substantial sentence and continuing with the further charges would serve no worthwhile purpose.
- 6.4 The possible circumstances which may justify a stay under heads b and c above are almost infinitely variable. In general terms however the same considerations will apply as are involved in the original decision to prosecute, always with the overriding concern that a prosecution not be continued when its continuance would be oppressive or otherwise not in the interests of justice.

7. Withdrawal of Charges and Arrangements as to Charges

- 7.1 Circumstances can change, or new facts come to light, which make it necessary to reconsider the appropriateness of the charges originally laid.
- 7.2 If after a review against the relevant criteria, it is clear that a charge should not be pursued, it should be discontinued at the first opportunity. The mode of discontinuance will depend on the court before which the charge is pending and the stage the proceedings have reached. Similarly, if it is plain that a charge should be amended, that should be done at the first opportunity.
- 7.3 If a charge is not to be proceeded with because a witness declines to give evidence and there are acceptable reasons why he or she should not be forced to do so, it will generally be preferable to ask the Court to dismiss the charge for want of prosecution. That course should be followed, rather than seeking a stay from the Solicitor-General, to ensure that the reasons for the discontinuance are publicly stated.

- 7.4 Arrangements between the prosecutor and the accused person as to the laying or proceeding with charges to which the accused is prepared to enter a plea of guilty can be consistent with the requirements of justice, subject to constraints which must be clearly understood and followed by prosecutors.
- 7.5 Those constraints are:
- a no such arrangement is to be initiated by the prosecutor.
 - b no proposal to come to such an arrangement is to be entertained by a prosecutor unless:
 - i there is a proper evidential base for the charges to be laid or proceeded with and, conversely, there is not evidence which would clearly support a more serious charge.
 - ii the charges to be proceeded with fairly represent the criminal conduct of the accused and provide a proper basis for the Court to assess an appropriate sentence.
 - iii the accused clearly admits guilt of those charges which are to be proceeded with.
 - c the prosecutor must not agree to promote or support any particular sentencing option. In every case the informant or the Solicitor-General will reserve the possibility of an appeal against sentence if the sentence imposed is considered manifestly inadequate or wrong in principle.
 - d a prosecutor must not lay charges or retain them after it is clear that they should not be proceeded with for the purpose of promoting or assisting in any discussions about such an arrangement.
 - e in the case of summary prosecutions every such arrangement must be approved by the Officer in Charge of the relevant Police prosecution section or, in the case of another Crown prosecuting agency, the senior legal officer of that agency. After committal for trial approval must be given by the relevant Crown Solicitor personally. In cases involving homicide, sexual violation or drug dealing offences involving class A drugs the approval of the Solicitor-General must also be obtained.
- 7.6 In addition to the matters outlined above a decision to enter into such an arrangement should be based on the following considerations:
- a whether the accused is willing to co-operate in the investigation or prosecution of others or the extent to which the accused has already done so.
 - b whether the sentence that is likely to be imposed if the charges are pursued as proposed would be appropriate for the criminal conduct involved.
 - c the desirability of prompt and certain despatch of the case.
 - d the strength of the prosecution case.
 - e the likely effects on witnesses of being required to give evidence.
 - f in cases where there has been a financial loss, whether the accused has made restitution or arrangements for restitution.
 - g the need to avoid delay in the despatch of other pending cases.

8. **The Role of the Prosecutor in Sentencing**

- 8.1 Until relatively recently the “traditional” view of the prosecutor’s role at sentencing prevailed; i.e., the prosecutor should maintain disinterest in the sentence imposed. That view cannot survive in the face of the Crown’s right to appeal against a sentence considered to be manifestly inadequate or wrong in principle.
- 8.2 At sentencing counsel for the prosecution should be prepared to assist the Court, to the degree the Judge indicates is appropriate, with submissions on the following matters:
- a the Crown’s version of the facts.
 - b comment upon or, if necessary, contradiction of the matters put forward in mitigation by the accused.
 - c the accused’s criminal history, if any.
 - d the relevant sentencing principles and guideline judgments.
- 8.3 Counsel for the prosecution should not press for a particular term or level of sentence. It is the Crown’s duty to assist the sentencing Court to avoid errors of principle or sentences which are totally at odds with prevailing levels for comparable offences and offenders.

9. **Witness Immunities**

- 9.1 It is sometimes the case that the Crown will need to rely upon the evidence of a minor accomplice or participant in an offence in order to proceed against an accused considered to be of greater significance in the offending.
- 9.2 Unless that potential witness has already been charged and sentenced he or she will be justified in declining to give evidence on the grounds of self-incrimination.
- 9.3 In such a case it will be necessary for the Crown to consider giving the witness an immunity from prosecution. An immunity takes the form of a written undertaking from the Solicitor-General to exercise the power of stay if the witness is prosecuted for nominated offences. It thus protects the witness from both Crown and private prosecutions.
- 9.4 It is to be noted that the only person able to give such an undertaking is the Solicitor-General.
- 9.5 The purpose of giving an immunity must clearly be borne in mind. That purpose is to enable the Crown to use otherwise unavailable evidence. In exchange for that it will, with reluctance and as a last resort, grant immunity on specified offences. In particular, the giving of an immunity is not to be seen as an opportunity for an informer to wipe the slate clean.
- 9.6 Immunities are given reluctantly and only as a last resort in cases where it would not otherwise be possible to prosecute an accused for a serious offence.
- 9.7 Before agreeing to give an immunity the Solicitor-General will almost invariably require to be satisfied of at least the following matters:
- a that the offence in respect of which the evidence is to be given is serious both as to its nature and circumstances.

- b that all avenues of gaining sufficient evidence to prosecute, other than relying upon the evidence to be given under immunity, have been exhausted.
- c that the evidence to be given under immunity is admissible, relevant and significantly strengthens the Crown's case.
- d that the witness, while having himself or herself committed some identifiable offence, was a minor participant only.
- e that the evidence to be given under immunity is apparently credible and, preferably, corroborated by other admissible material.
- f that no inducement, other than the possibility of an immunity, has been suggested to the witness.
- g that admissible evidence exists, sufficient to charge the witness with the offences he or she is believed to have committed.

9.7 In order to preserve the integrity of the evidence to be given under immunity it will almost always be desirable for the witness to have independent legal advice. Preferably that advice should be obtained before the witness signs a brief of evidence or depositions statement. Counsel for the witness should, if the witness wishes to seek immunity, obtain instructions to write to the officer in charge of the case or, if the Solicitor-General is already involved, to the Solicitor-General direct. The letter should set out in full detail the evidence able to be given by the witness but without naming him or her. If satisfied that an immunity is justified the Solicitor-General can then advise the witness's counsel that an immunity will be given. Counsel will then be able to name the witness in the knowledge that a formal immunity will be forthcoming.

10. Disclosure and Discovery

10.1 The aim of the prosecution is to prove its charge beyond reasonable doubt and it is therefore clearly in the interests of justice that accused persons are fully informed of the case against them. At present, voluntary pre-trial disclosure of information relating to the Crown case is largely a matter for the prosecutor's discretion to be exercised in accordance with the guiding principle of fairness to the accused. Nevertheless there are a minimal number of legal obligations with which the prosecution must comply.

10.2 Trial on Indictment

10.2.1 Before trial on indictment an accused person is entitled to peruse depositions taken on his committal for trial or the written statements of witnesses admitted instead of depositions. Section 183 Summary Proceedings Act 1957.

10.2.2 The prosecutor does not have to put forward all the evidence at depositions. However s. 368(1) of the Crimes Act 1961 provides that the trial may be adjourned or the jury discharged if the accused has been prejudiced by the surprise production of a witness who has not made a deposition. Therefore in practice the prosecutor should provide adequate notice of intention to call any additional witness and provide the defence with a brief of the evidence that witness will give.

10.3 **Information which the Prosecutor does not Intend to Produce in Evidence**

10.3.1 The prosecutor must make available to the defence the names and addresses of all those who have been interviewed who are able to give evidence on a material subject but whom the prosecution does not intend to call, irrespective of the prosecutor's view of credibility (*R v Mason* [1975] 2 NZLR 289). It is for the prosecutor to decide whether the evidence is "material" (*R v Quinn* [1991] 3 NZLR 146) but that decision must be reached with complete fairness to the defence.

10.3.2 In the absence of an Official Information Act request there is no general common law duty placed on the prosecution to make available to the defence written statements obtained by the Police from persons the prosecution does not intend to call as witnesses at the trial. However in "truly exceptional circumstances" the Court may exercise its discretion to order production if it considers that a refusal to do so might result in unfairness to the accused and perhaps a miscarriage of justice. *R v Mason* [1976] 2 NZLR 122.

10.3.3 A statutory exception to the general principle against production of written statements is contained in s. 344C Crimes Act 1961 which deals with identification witnesses.

10.4 **Statements made by Witnesses to be called by the Prosecution**

10.4.1 In the absence of an Official Information Act request there is no general rule of law requiring the prosecution to supply defence counsel with copies of all statements made by persons who are to be called to give evidence. An exception to this general rule is where the witness has made a previous inconsistent statement. Where there is any conflict that may be material between the evidence of a witness and other statements made by the witness the defence is entitled to see those other statements. *R v Wickliffe* [1986] 1 NZLR 4; *Re: Appelgren* [1991] 1 NZLR 431; *R v Nankervill* (CA 342/89 4 May 1990).

10.4.2 A second exception is where a statement is specifically shown to an accused for the precise purpose of noting his reaction thereto; in such cases the accused is entitled to obtain production of the statement. *R v Church* [1974] 2 NZLR 117.

10.5 **Character of Witness**

10.5.1 Before all defended trials the prosecution has a duty to disclose any previous convictions of a proposed witness where credibility is likely to be in issue and the conviction could reasonable be said to affect credibility. *Wilson v Police and Elliot* (CA 90/91 20 December 1991).

10.5.2 For trials on indictment a prosecuting agency entitled to access to the Wanganui computer should make a computer check as a matter of course. For summary trials the agency should make such a check if requested by the defence. If the prosecuting agency is in doubt about whether a conviction should be disclosed, counsel's advice should be taken. Any list of convictions should be supplied a reasonable time before trial (normally at least a week). If the prosecuting agency intends to withhold details of convictions the defence should be notified in sufficient time to enable rulings to be sought from the trial Court.

10.6 Disclosure of any Inducement or Immunity given to a Witness

The defence must always be advised of the terms of any immunity from prosecution given to any witness. Likewise the existence of any other factor which might operate as an inducement to a witness to give evidence should be disclosed to the defence. This includes the fact that the witness is a paid Police informer. *R v Chignell* [1991] 2 NZLR 257.

10.7 Identity of Informer

There will be good reason for restricting disclosure where the identity of an informer is at stake. The general principle is that the identity of an informer may not be disclosed unless the Judge is of the opinion that the disclosure of the name of the informer, or of the nature of the information is necessary or desirable in order to establish the innocence of the accused. *R v Hughes* [1986] 2 NZLR 129, 133.

10.7.1 A statutory restriction on disclosure of the true identity of undercover police officers is contained in s. 13A Evidence Act 1908.

10.8 Preliminary Hearings

Special provisions for preliminary hearings in cases of a sexual nature are set out in Part VA Summary Proceedings Act 1957. Section 185C(4) requires the prosecutor to give the complainant's written statement to the defence at least 7 days before the hearing.

10.9 Minor Offences

In the case of minor as opposed to summary offences, defined in s. 20A Summary Proceedings Act 1957, the prosecution must serve on the defence a notice of prosecution which will provide information in a brief form as to the essential nature of the charge and other relevant matters outlined in the section.

10.10 DSIR Examinations

As a matter of ethical obligation the prosecutor is required to provide access to the defence to forensic evidence prepared by the DSIR. (New Zealand Law Society, Rules of Professional Conduct, Appendix 2).

10.11 Obligations on Request under Official Information Act 1982

10.11.1 Crown Solicitors are not part of a 'department or organisation' and are not, therefore, subject to the Official Information Act 1982. While, as a matter of practical convenience, they may facilitate responses to requests for information they are not, as a matter of law, obliged to do so. The responsibility to provide information rests on the Police or other prosecuting agency and requests made of a Crown Solicitor should be referred to them. The Crown Solicitor should be advised of all information supplied to other parties.

10.11.2 Personal information i.e., that particular category of official information held about an identifiable person, is the subject of an explicit *right* of access, upon request, given to that person, unless it comes within some limited exceptions. Relevance is not the test under the Official Information Act.

10.11.3 The effect of the Court of Appeal decision in *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 is that the exercise of a defendant's right

to personal information will not ordinarily prejudice the maintenance of the law (and fair trials), as shown by the traditional disclosure of prosecution information for indictable trials. The practice should therefore be that there will be disclosure on request of briefs of evidence, witness statements or notes of interviews containing information about the defendant. Where briefs, statements or job sheets do not exist the prosecution should as a matter of practice provide to the defence a summary of the facts on which the prosecution will be based.

10.11.4 The duty will generally apply only after criminal proceedings have commenced, and information may be withheld if a specific risk (such as fabrication of evidence or intimidation of a witness) is shown. Any disputes should be determined as incidental or preliminary matters by the trial court.

10.12 The aim of pre-trial disclosure is to ensure fairness to the accused and to achieve efficiency in the prosecution process. Bearing those aims in mind, any doubt as to whether the balance is in favour of, or against disclosure should be resolved in favour of disclosure.

11. **Victims of Offences**

11.1 Victims of offences are entitled to be treated by prosecutors with courtesy, compassion and respect for their personal dignity and privacy. Section 3 Victims of Offences Act 1987.

11.2 The prosecuting authority or officers of the court (to use the language of the Act) are required to make available to a victim information about the following:

- a progress of the investigation of the offence;
- b the charges laid or the reasons for not laying charges;
- c the role of the victim as a witness in the prosecution of the offence;
- d the date and place of the hearing of the proceedings; and
- e the outcome of the proceedings including any proceedings on appeal.

11.3 For the purposes of the Victims of Offences Act, Crown Solicitors are not “prosecuting authorities”.

11.4 Responsibility for notifying the victim of these matters has been allocated as between prosecuting authorities and the officers of the court as follows:

a The Police accept that all information about actions before a prosecution is commenced are within their ambit.

b **Before verdict:**

In the case of a not guilty plea the prosecuting authorities are normally in contact with the victim until the verdict is given.

In the case of a guilty plea, the prosecuting authority which is laying the charge must inform the victim of the first date of a court appearance. At the same time it is required to hand to the victim information about the court process beyond that point, describing the processes of appeal, remand, adjournment, etc and informing the victim that it is his or her choice whether to follow the case through the court process. If the victim is unable to attend the hearing in person, he or she can obtain information from the court.

c **After verdict:**

Once a verdict has been reached the prosecuting authority will inform the victim of the outcome of the case. The letter containing the information should give further information about possible actions after the outcome: e.g., appeal and rehearing.

d **After sentence:**

The prosecuting authority should hand to the court information about the victim's name and address so that the court may notify the victim of any rehearing.

e **Appeal:**

In the case of an appeal after trial on indictment the Crown Law Office will notify the victim of the date on which it will be heard, and after the appeal, send a copy of the Judgment to the victim.

11.5 In addition to providing information about the proceedings, a prosecutor has responsibilities in relation to Victim Impact Statements. A sentencing Judge is to be informed about any physical or emotional harm, or any loss of or damage to property, suffered by the victim through or by means of the offence, and any other effects of the offence on the victim. Such information is to be conveyed to the Judge by the prosecutor, either orally or by means of a written statement. The courts have indicated that Crown Solicitors have a certain responsibility to ensure that Victim Impact Statements fulfil their proper purpose i.e., a brief description of the impact on the victim and not a supplementary statement of facts adding additional offences and circumstances of aggravation.

11.6 The Victims of Offences Act also requires that in the case of a charge of sexual violation or other serious assault or injury the prosecutor should convey to the judicial officer any fears held by the victim about the release on bail of the alleged offender.

12. **Crown Appeals against Sentence**

12.1 It is for the Solicitor-General to determine in all cases whether an appeal against sentence should be taken. In respect of sentences passed on conviction on indictment the appeal is taken in the name of the Solicitor-General; in respect of sentences imposed under the summary jurisdiction of the District Court the appeal is taken in the name of the informant, with the written consent of the Solicitor-General.

12.2 The guiding principles for prosecutors in deciding whether a matter should be referred to the Solicitor-General for consideration of a Crown appeal are whether there are good grounds to argue that:

- a the sentence is manifestly inadequate; or
- b there has been a serious error in sentencing principle.

12.3 **Manifestly Inadequate**

The sentence imposed must be manifestly inadequate: - the Crown's right of appeal is not intended to be a corrective procedure for every sentence considered to be lenient.

- 12.4 The considerations justifying an increase in sentence must be more compelling than those which might justify a reduction. Even where a sentence is found to be manifestly inadequate the court will increase it only to the minimum extent required in the interests of justice.
- 12.5 A particular sentence, or sentences generally for a particular type of crime, may be considered manifestly inadequate if they do not fulfil their deterrent or denunciatory functions. A Crown appeal may be considered where it is clear that the offence requires a heavier sentence in the public interest for the purposes of general or individual deterrence or to express community denunciation because of the nature of the offence.
- 12.6 **Error of Principle**
- Where a sentence is based upon a wrong principle the error involved must be one that is important in a sense that it is likely to have implications beyond the particular case in which it has arisen.
- 12.7 The court is reluctant to interfere if this would cause some other injustice to the offender e.g., by changing what is generally deemed a wholly inappropriate sentence to which the offender is nevertheless responding. The court is also reluctant to uphold a Crown appeal if the prosecution did not do all that could reasonably have been expected of it to avoid the error at first instance. In no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at trial. Section 389 Crimes Act 1961.
- 12.8 **Time Limits**
- Appeals against sentences imposed in the indictable jurisdiction must be filed within 10 days. The time limit for the summary jurisdiction is 28 days. Given the short time limits for filing an appeal, particularly to the Court of Appeal after trial on indictment, and the uncertainty which a Crown appeal poses for the defendant in question, the need to refer materials speedily to the Solicitor-General is paramount. For the same reason it is only in exceptional cases of unavoidable delay that the Solicitor-General will seek leave to appeal out of time.
- 12.9 The information required for consideration of appeals includes:
- a Indictment or information;
 - b notes of Evidence or Summary of Facts;
 - c copies of the Pre Sentence Report; Victim Impact Report and any other reports made available to the sentencing Judge;
 - d a list of any previous convictions;
 - e a note of the Judges or District Court Judges remarks on sentence;
 - f the comments and recommendations of the Crown Solicitor or prosecutor.
- 12.10 In general the main purpose of a Crown appeal is to ensure that errors of principle are corrected and not perpetuated and that sentences for offences of generally comparable culpability are reasonably uniform and appropriate having regard to the seriousness and prevalence of the offence.

APPENDIX C

Resource costs of the criminal justice system

- C1 The gross cost of the criminal justice system, as far as can be established, was at least \$1 156 576 337 in 1993–1994. Except for legal aid contributions, income, such as from fines or reparation, has not been subtracted from this figure.
- C2 The cost in 1992–1993 was at least \$1 011 979 838. This figure is not comparable with the 1993–1994 figure because the information available for each period differed.
- C3 The cost for each year includes the direct costs of the government agencies that play a major role in the criminal justice system²⁸⁹ and such indirect costs of these agencies as were easily obtainable. The test for the relevance of costs was whether the money would have been spent but for the existence of crime.
- C4 Major costs not included in either of the above figures are:
- those costs of the agencies that could not be separated from other costs, for example, the cost of policy advice on criminal justice matters;
 - the costs of Parliament on matters relating to the criminal justice system;
 - the costs of prosecutions by bodies other than those listed, ie, local authorities and private prosecutors (of all sorts);
 - the costs of defence counsel except as covered by criminal legal aid;
 - the costs to victims of crime;
 - other direct and indirect costs to private individuals and private organisations attributable to crime;
 - indirect costs of crime, eg, the cost of insurance and security measures; and
 - the opportunity costs of money spent on the criminal justice system.

²⁸⁹ Police, Department of Justice, Crown Law Office, Legal Services Board, Inland Revenue Department, Department of Social Welfare, NZ Customs, Serious Fraud Office, ACC, MAF, Department of Internal Affairs.

THE COSTS

Comparative table of the costs of the criminal justice system for the years 1992–1993 and 1993–1994

	1993–1994 \$	1992–1993 \$
Police		
Relevant outputs²⁹⁰		
Policing support to the community	71 313 000	61 910 000
Violence and sexual offences	91 501 000	89 539 000
Property offences	179 077 000	173 978 000
Drugs and anti-social offences	65 759 000	53 509 000
Traffic offences	108 912 000	94 738 000
Prosecution services ²⁹¹	22 889 000	36 350 000
Custodial services and enforcement of court orders	24 005 000	25 988 000
Public security services	22 410 000	17 792 000
Ministerial services and policy advice	438 000	760 000
Total costs	586 304 000	554 564 000
Department of Justice		
Policy advice: criminal justice	2 103 000	n/a
Enforcement of monetary penalties or monetary orders ²⁹²	39 016 000	} 94 706 000
Administration of community based sentences and orders ²⁹³	46 283 000	
Information services to courts, parole board and district prison boards ²⁹⁴	10 745 000	n/a
Administration of custodial sentences ²⁹⁵	199 314 000	218 873 000
Administration of custodial remand services to the courts	31 374 000	27 942 000
Criminal court processing ²⁹⁶	121 853 000	n/a
Victim's Task Force (wound up on 31 March 1993)	12 014	578 916
Total costs	450 700 014	342 099 916

²⁹⁰ This includes all the outputs of the police except for those for incidents, emergencies, disasters and licensing and vetting services.

²⁹¹ The cost of prosecution services decreased from 1992–1993 to 1993–1994 as a result of the merger of the Police and the Traffic Safety Service.

²⁹² The cost of these outputs decreased from 1992–1993 to 1993–1994 because of a substantial revaluation of Department of Justice buildings (mostly prisons). A resulting decrease in depreciation meant a decrease in the capital charge. The numbers of staff remained the same.

²⁹³ See footnote 292.

²⁹⁴ Some of these costs may be included in the “criminal court processing” costs, but the two figures have different sources.

²⁹⁵ See footnote 292.

²⁹⁶ This figure includes all the costs of criminal cases in the courts, and incorporates an apportionment of judicial salaries.

	1993–1994 \$	1992–1993 \$
Crown Law Office		
Supervision of Crown prosecutions (including fees paid to Crown Solicitors)	13 188 000	12 835 000
Conduct of criminal appeals	686 000	876 000
Total costs	13 874 000	13 711 000
Legal Services Board		
Criminal legal aid less contributions in respect of criminal legal aid	17 480 000	14 351 000
	- 466 000	- 253 000
Duty solicitor scheme	2 314 000	2 156 000
Total costs	19 328 000	16 254 000
Inland Revenue Department		
Taxpayer Audit:		n/a
Crown Solicitors' fees	50 193	
other outside counsels' fees	58 204	
legal opinions	2 803	
judicial review	40 827	
Return Management:		n/a
Solicitors' fees for;		
– failing to furnish a return	572 019	
– recovery of tax ²⁹⁷	306 929	
Total costs	1 030 975	
Department of Social Welfare		
Reduction of fraud/abuse (includes investigation, information matching, applying sanctions)	30 311 000	21 191 000
Children and Young Persons Service; youth justice actions with young offenders	30 812 000	30 476 000
Payments on behalf of Crown:		
• sexual abuse/rape crisis	n/a	3 938 000
• women's refuge programme	n/a	2 878 000
• family violence prevention programme	n/a	476 000
• victim support	n/a	83 000
Total costs	61 123 000	59 042 000

²⁹⁷ This may also include civil proceedings to recover tax owing.

	1993–1994 \$	1992–1993 \$
New Zealand Customs		
Investigation and prosecution of offences concerning imported and exported goods and excise duty (not including drugs) ²⁹⁸	2 752 000	4 055 000
Investigation of drug offences	10 676 000	11 852 000
Total costs	13 428 000	15 907 000
Serious Fraud Office		
Investigation of serious fraud	2 449 000	2 311 000
Prosecutions	1 632 000	1 680 000
Total costs	4 081 000	3 991 000
Accident Rehabilitation and Compensation Insurance Corporation		
Investigation fees	2 031 349	1 601 544
District court appeals	36 199	29 387
Private investigators fees	159 471	467 238
Appeal court	n/a	348 487
District court	n/a	7 266
Fraud administrative costs (figures apply only to a 6-monthly period)	423 329	n/a
Total costs	2 650 348	2 453 922
Ministry of Agriculture and Fisheries		
Prosecution of offences under NZ fisheries law ²⁹⁹	2 257 000	2 257 000
Total costs	2 257 000	2 257 000
Department of Internal Affairs		
Estimated total cost including the costs of the inspectorate, legal branch, and Crown Solicitors' fees	1 800 000	1 700 000
TOTAL FOR ALL AGENCIES LISTED	\$1 156 576 337	\$1 011 979 838

²⁹⁸ The cost of this output decreased as a result of a reallocation of the spread of costs for computer facilities.

²⁹⁹ These represent the vast majority of the offences that were prosecuted by MAF.

APPENDIX D

Law Commission survey of investigation and prosecution by government agencies

- D1 **A** SURVEY OF PROSECUTION PRACTICES made by the Commission initially in 1993 and updated in 1995 revealed a diverse pattern. Unfortunately, responses were themselves very uneven and there was in some cases an inability to provide quite basic information. The Commission is not confident that the statistical information presented in the appendix is accurate, although it considers the picture is substantially correct.
- D2 Altogether 21 prosecuting agencies (excluding the police) were surveyed. Between them they administer at least 120 Acts which create offences, including some with regulations that provide for offences. For example, the Ministry of Health administers and enforces 26 sets of regulations that create offences. There is sometimes overlap between agencies and the administration and enforcement of particular Acts, eg, between the Department of Conservation and the Department of Internal Affairs. The agencies, the Acts that they administer, and their prosecution practices and polices are listed below.
- D3 The number of prosecutions by most departments is small. In 1993–1994 the Corrections Operations of the Department of Justice was responsible for about 75% (about 13,000) of all prosecutions. They arose from breaches of non-custodial sentences or parole. The next most prolific prosecutor was the Inland Revenue Department, with over 1850 prosecutions, mostly child support cases. The Department of Labour instituted 657 prosecutions and the Social Welfare Department 597. Only 7 agencies instituted more than 50 prosecutions. Prosecutions by some departments vary greatly in number from year to year. Sometimes this is a result of administrative decisions to “blitz” particular sectors. Thus the Land Transport Safety Authority took about 1450 prosecutions in 1992–1993 in relation to vehicle standards but none in 1993–1994. It did not know how many prosecutions it took for other offences (most of which would have related to driving hours and keeping log books).
- D4 Most departments indicated that decisions whether to prosecute took into account public interest as well as evidentiary grounds. One mistakenly said that public interest grounds were not provided for; this is the stranger in that this agency cited a number of “public interest” grounds as influencing its decision whether to prosecute. However, the public interest grounds stated were disparate. Only three departments specifically mentioned the Solicitor-General’s Prosecution Guidelines.

- D5 Conviction rates were generally high, at least as high as those in police prosecutions. All the 41 prosecutions of the Justice Department's Commercial Affairs Division resulted in convictions. The conviction rate for Inland Revenue prosecutions was 99%, for Social Welfare (almost all benefit fraud cases), 90%, and for the Accident Rehabilitation and Compensation Insurance Corporation (ARCIC), 90%. The reasons are unknown. There may have been a conservative prosecution policy and a high standard of evidence required. Or it may have been that cases were not defended. There is no means of knowing how many defendants were represented or had legal advice. ARCIC apparently ignored public interest factors, saying that it prosecuted wherever there was clear evidence of fraud.
- D6 At the other end of the scale the Ministry of Education had a success rate of 63% and Internal Affairs (mostly gaming prosecutions), 64%. However, the numbers were small, and most of the Internal Affairs cases where the defendant was not convicted were dealt with by means of diversion.

APPENDIX E

Law Commission Survey of Crown Solicitors: Summary of findings

E1 **A**S PART OF THE RESEARCH on the prosecutions project, in July 1994 the Commission sent all Crown solicitors questionnaires about prosecution structures and practices. Part A dealt with questions of fact, the questions being largely statistical. Many of the questions could not be answered with any accuracy since most Crown solicitors do not keep statistical records of the kind sought. Respondents were asked to provide estimates of figures if necessary. This clearly affects the accuracy of the conclusions we may draw from the information. However, the opportunity given to respondents to comment on those estimated figures yielded many illuminating observations. In some cases the questions asked for responses along a “never/rarely/sometimes/frequently/always” continuum. Part B of the questionnaire dealt with matters of opinion and judgment, some of which also required responses in terms of the “never/rarely/sometimes/frequently/always” continuum. Not all Crown solicitors responded to all of the questions in the survey.

PART A: QUESTIONS OF FACT

E2 The number of cases received by Crown solicitors from various prosecution agencies following a committal for trial:

Agency	1991	1992	1993
Police	1788	2135	2312
MOT	51	41	–
Customs	–	1	–
DSW	20	26	53
MAF	–	–	1
SFO	–	–	1

Totals exclude Hamilton and Napier. Auckland’s figures account for approximately 50% of the total. The growth in the number of cases over the 3-year period varies between 12% and 20% per year.

E3 The police most often seek the opinions of Crown solicitors on cases before the preliminary hearing. Every Crown solicitor has in the past been consulted for this purpose, half of them being consulted frequently. Customs, Social Welfare, MAF, the Department of Labour and IRD consult less often, most Crown solicitors never having been consulted at all by these departments. Note, however, that it is rare for agencies other than the police to proceed indictably.

- E4 Crown solicitors' advice is not sought as a matter of course in respect of purely summary cases, nor in indictable cases prosecuted summarily. If advice is sought, it most frequently relates to the initial decision to prosecute and the selection of offences, and most seldom to the question of alternatives to prosecution and the choice of summary or indictable procedure. Where advice has been sought, it is almost always followed.
- E5 Though not the general practice, all Crown solicitors or their professional staff have appeared for the informant at the preliminary hearing of an offence being prosecuted indictably, the annual national average of such appearances (for the period 1991–1993) being just over 100. Some Crown solicitors commented that because of budgetary constraints the police now do more preliminary hearings themselves than they had in the past.
- E6 There were significant variations in the time lag before Crown solicitors received papers after committal for trial, periods ranging from one to 6 weeks. Some Crown solicitors' offices have arrangements with local police to ensure quick delivery of files.
- E7 On receipt of the papers, a Crown solicitor typically does the following:
- The file is prepared and collated with the police file.
 - The file is allocated to a senior staff member to prepare a draft indictment for later checking by the Crown solicitor (or deputy where there is one).
 - The police officer in charge of the case may be called in for discussions, which may lead to a request for further investigation.
 - The draft indictment is sent to court and defence counsel before call-over.
 - The files are taken to the pre-trial call-over where discussion takes place with defence counsel about setting down for pre-trial argument or trial.
 - The matter is set down for trial.
- E8 After receipt of the papers, Crown solicitors frequently seek further information from the police or other enforcement agency.
- E9 The proportion of cases in which Crown solicitors have presented indictments containing counts which differ from those on which the defendant was committed (by the addition of more serious charges or different kinds of charges, or by the addition of alternative charges) range from 5%–50%. The changes vary from substantial to “tinkering”.
- E10 Most Crown solicitors on occasion discuss the amendment of charges with defence counsel before or after an indictment is presented. Two Crown solicitors respond that they never do.
- E11 Crown solicitors estimate that the proportion of cases in which the judge may give a direction under s 347(1) of the Crimes Act 1961 on one of the counts in the indictment ranged between 5%–20% of cases, depending upon the centre.

Victims

- E12 Crown solicitors' experience is that victims are sometimes consulted on decisions to prosecute, usually by the police before charges are laid.
- E13 All Crown solicitors see victims who are witnesses, and some see families of victims. The purpose is to familiarise victims and witnesses with court procedure. Two Crown solicitors expressed strong views about the impropriety of interviewing witnesses about the evidence for fear of influencing their testimony and being seen to coach them.

PART B: OPINION AND JUDGMENT QUESTIONS

- E14 Crown solicitors have had a few cases where a prosecution ought not to have been brought because of insufficient evidence. There have been few cases where, in the Crown solicitor's opinion, in the interests of the victim a prosecution ought not to have been brought.
- E15 When Crown solicitors have a case which they consider ought not to have been brought (for whatever reason) and decide not to proceed, they either invite applications by the defence under s 347 of the Crimes Act 1961, seek stays of proceedings from the Solicitor-General, withdraw charges or apply for a discharge under s 347, or lead no evidence, depending upon circumstances and personal style.
- E16 Most Crown solicitors regard the present practice of the conduct of defended summary prosecutions by police as usually satisfactory, but the conduct of departmental summary prosecutions (by persons who are not legally qualified) as seldom so. The unsatisfactory aspects included a lack of legal knowledge, inability to cross-examine, lack of advocacy skills in presenting a case, inability to detect errors and weaknesses in the defence case and submissions, and an inability to consider the wider perspective.
- E17 All except two Crown solicitors think that, given reasonable resources, they should make, or review, prosecution decisions in some summary cases and in indictable cases proceeding summarily.
- E18 Most Crown solicitors see their role in relation to the police as one of providing guidance. About half believe they should control or support the police, and see themselves as a buffer between the police and the individual suspect.
- E19 Crown solicitors acting in summary proceedings for the police or other informants see themselves as having a public responsibility comparable to their role in indictable proceedings. Several noted that while the relationship was strictly that of legal adviser and client, they acted no differently in such cases. One Crown solicitor has the impression that some departmental officials feel they may get better service from a solicitor who feels free to represent departmental interests alone and who has no (assumed) public responsibilities.
- E20 Most Crown solicitors see their relationships with the police as good to excellent. Some keep a greater distance between themselves and the police than others, and emphasise the need to be independent despite disagreement by the police with their decisions.
- E21 The majority of Crown solicitors believe that they become involved in prosecutions at about the right stage, but a quarter think that it is later than desirable, particularly in frauds and in sexual offences.
- E22 Crown solicitors generally think that the police only sometimes or never overcharge, ie, charge offences which are more serious than the evidence supports or offences which considerations of public interest do not warrant, but that other enforcement agencies sometimes or frequently overcharge. In their view, departments charged with the administration of laws creating public welfare offences tend to overcharge.

- E23 Crown solicitors believe the police sometimes undercharge, most often in crimes of violence, and see this as either an inducement to defendants to plead guilty or as ignorance of the law. A majority think that other enforcement agencies never undercharge.
- E24 A majority of Crown solicitors have noticed changes in police prosecution policies in their districts during their tenure, and attribute the changes to changes in top police personnel; changes in the frequency or seriousness of offending; budgetary constraints; changes to the corroboration law for sexual offences; the formation of specialised units to deal with certain types of offending; and national initiatives (eg, against family violence).
- E25 Most Crown solicitors had discussions with the police or other enforcement agencies on prosecution policies.

Victims

- E26 Most Crown solicitors believe that victims are in most cases sufficiently informed of decisions made at various stages of a prosecution.
- E27 Although all Crown solicitors meet victims, only half believe that Crown solicitors, or members of their office, should have a responsibility to meet and talk to victims and their families. Some Crown solicitors are concerned that victims and their families might see them as their private solicitors.
- E28 A majority of Crown solicitors believe that the victim, or the family of a deceased victim, should have input into and influence on decisions to prosecute, but that this should not be determinative or even have a direct influence on the final decision.
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APPENDIX F

Prosecutions which require the
consent of the Attorney-General
or Solicitor-General

Act	Section	Offence
Antarctica Act 1960	s 3	Offences committed in the Ross Dependency or certain other parts of Antarctica, in specified circumstances.
Armed Forces Discipline Act 1971	s 74	For trial by court-martial for equivalents of treason, murder, manslaughter, sexual violation or bigamy.
Aviation Crimes Act 1972	s 18	Hijacking; crimes committed in connection with hijacking; certain other crimes relating to aircraft; taking firearms/explosives, etc, onto aircraft.
Companies Act 1955	s 173	Where the prosecution arises from an inspector's report on the affairs of a company.
	s 178	Offences relating to breaching restrictions imposed on shares or debentures.
Companies (Bondholders Incorporation) Act 1934–1935	s 3	Where a bond-issuing company fails to deliver the required statement to the Registrar of Companies within 3 months of the passing of the Act (this section is probably now effectively defunct).
Continental Shelf Act 1964	s 7	Any offence committed on the Continental Shelf.
Crimes Act 1961	s 8A	Any offence committed overseas by certain persons with New Zealand diplomatic or consular immunity
	s 10B	Prosecutions for certain less serious offences more than 10 years after their commission.

Act	Section	Offence
	s 78B	Espionage, or wrongful communication; retention or copying of official information, or conspiring or attempting to do so.
	s 106	Specified offences affecting the administration of law and justice – bribery and corruption.
	s 123	Blasphemous libel.
	s 124	Distribution or exhibition of indecent matter.
	s 230	Criminal breach of trust.
	s 400	Proceedings in certain cases for offences on ships or aircraft.
Crimes (Internationally Protected Persons and Hostages) Act 1980	s 14	Various offences against internationally protected persons, their official residences or private residences; hostage taking.
Crimes of Torture Act 1989	s 12	Offences by a public official or person acting in official capacity who commits, or is a party to the commission of, an act of torture.
Evidence Act 1908	s 48J	Contravening or failing to comply with an order restricting the production of evidence for use in or by foreign authorities.
Films, Videos, and Publications Classification Act 1993	s 144	Various offences involving objectionable or restricted publications; contravention of publication or restriction order.
Flags, Emblems and Names Protection Act 1981	s 25	Various offences relating to the New Zealand flag, Royal and Vice-Regal emblems, state emblems, royal or government patronage.
Geneva Conventions Act 1958	s 3	Committing, or aiding, abetting or procuring the commission of, a grave breach of any of the Conventions or the First Protocol.
	s 8	Using the Red Cross or other allied emblems without the authority of the Minister of Defence.
Hire Purchase Act 1971	s 27	Unreasonable exercise of right of entry.

Act	Section	Offence
Human Rights Act 1993	s 132	Inciting racial disharmony.
	s 135	Discrimination in relation to access by the public to public places, vehicles and facilities.
Maritime Transport Act 1994	s 224	To prosecute a person who is not a New Zealand citizen or resident for any offence under the Act.
Misuse of Drugs Act 1975	s 34A	To prosecute an undercover police officer for any offence under the Act or regulations.
New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987	s 15	Any offence, conspiracy or attempt to commit any offence under the Act.
Secret Commissions Act 1910	s 12	Any offence under the Act.
Submarine Cables and Pipelines Protection Act 1966	s 8	Any offence under the Act or regulations.
Summary Offences Act 1981	s 20A	Communicating official information (as defined in the Crimes Act) or conspiring or attempting to do so.
	s 42	False claim of qualifications.
United Nations (Police) Act 1964	s 4	To prosecute any member of the police for any offence committed while out of New Zealand as part of a United Nations force.
Video Recordings Act 1987	s 62	Certain offences under the Act or regulations.

APPENDIX G

The courts' criminal business: a quantitative summary

INTRODUCTION

- G1 **Q**UANTITATIVE INFORMATION on the numbers and dispositions of criminal cases in the courts was surprisingly difficult to obtain. The information obtained through the Department of Justice was unreliable, sometimes inconsistent with other figures, and on some basic questions, lacking. Some information has been collected by government departments or sections of departments for specific tasks or purposes. Crown solicitors have until recently kept few statistical records, although this is now changing. This inability to obtain an overview of what is happening is a significant weakness of the New Zealand prosecution system.
- G2 Most of the information in this chapter is derived from data collected for the Commission by the Department of Justice (now the Department for Courts), covering the period 1 July 1994 to 31 December 1994. Some of it is incomplete because a few of the smaller courts did not make a statistical return. However, this does not significantly affect totals. It should also be noted that because it was not possible to follow a batch of cases through the prosecution process, the various figures do not relate to the same matters. The information does give a general picture, but it cannot be taken as entirely accurate.
- G3 Sittings of a District Court for criminal business are held in 61 places, and in volume of business they range enormously. Jury trials are held in 20 District Court centres. High Court jury trials are held in 17 centres.

THE FORMS OF PROCEDURE

Summary offences, indictable offences tried summarily and indictable offences

- G4 The New Zealand Police annual report for the year ended 30 June 1995 records a total of 503 558 offences in the categories violent and sexual offences, property offences and drug and antisocial offences. Of these, 42.9% were "cleared", and 21.4% (107 923) were prosecuted. In the same period a total of 769 479 traffic offences and infringements were recorded. Prosecutions were in all the forms covered below.

SUMMARY OFFENCES AND INDICTABLE OFFENCES TRIABLE SUMMARILY

Initiating prosecutions

- G5 Many indictable offences may be dealt with summarily, and a large number are. There are no records of how many indictable cases triable summarily are in fact so tried, nor how many proceed indictably as a result of defendant choice. This middle category is accordingly included in both the summary and the indictable groups. The total number of cases going through the system ought not to be much different from the total of purely summary cases, indictable cases triable summarily, and purely indictable cases given in our two categories.

TABLE 1: Number of informations in summary form laid by the police and other prosecution agencies

	Summary offences	
	Purely summary	Indictable (triable summarily)
Police	58 027 (88%)	48 516 (98%)
Other agencies	7 663 (12%)	1 110 (2%)
Total	65 690 (100%)	49 626 (100%)

TABLE 2: Number of defendants prosecuted by the police and other prosecution agencies

	Summary offences	
	Purely summary	Indictable (triable summarily)
Police	40 008 (90%)	24 417 (98%)
Other agencies	4 259 (10%)	368 (2%)
Total	44 267 (100%)	24 785 (100%)

- G6 In the period 1 January 1995 to 30 June 1995 there were 195 cases begun by a submission made by a defendant on an infringement notice. The number of infringement notices issued is unknown. The number of minor offence notices issued in this period was 8 812. Infringement and minor offence notices cannot be broken down into traffic and other offences, although it is certain that most infringement notices are traffic-related. Nor is it possible to discover how many such cases lead to the issue of summonses.

Bringing summary prosecutions to an end

- G7 The Attorney-General or the Solicitor-General may stay summary proceedings under s 77A of the Summary Proceedings Act 1957. Prosecutors themselves may end summary prosecutions by either applying to the court for leave to withdraw an information, or by presenting no evidence. Prosecutors use either

of these methods to end a prosecution after a defendant has successfully completed a diversion programme. Although diversions are not recorded formally, our information (mostly anecdotal) suggests that the majority of withdrawals follow successful completion of a diversion programme.

TABLE 3: Number and proportion (expressed as a percentage of the corresponding figure in table 1) of informations withdrawn by the police and other prosecution agencies

	Summary offences	
	Purely summary	Indictable (triable summarily)
Police	6 558 (11%)	4 125 (8.5%)
Other agencies	1 071 (14%)	116 (10.5%)
Total	7 629 (11%)	4 241 (8.5%)

- G8 Table 4 gives the number of informations dismissed for want of prosecution. Some of these may be related to diversion cases, but are more likely to be cases where witnesses were unavailable or declined to give evidence.

TABLE 4: Number and proportion (expressed as a percentage of the corresponding figure in table 1) of informations dismissed for want of prosecution by the police and other prosecuting agencies

	Summary offences	
	Purely summary	Indictable (triable summarily)
Police	1 441 (2.4%)	732 (1.5%)
Other agencies	184 (2.4%)	9 (0.8%)
Total	1 625 (2.4%)	741 (1.5%)

- G9. Prosecutions may also be ended by discharge. This may occur after a plea of guilty or a conviction in terms of s 19 of the Criminal Justice Act 1985. It is equivalent to an acquittal.

TABLE 5: Number of discharges following pleas of not guilty, based on finalised summary cases (information from the central police computer at Wanganui).

Section 19 of the Criminal Justice Act 1985	267
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Summary hearings

- G10 In most summary hearings the prosecution is conducted by a police prosecutor, although the defendant is often represented by counsel. In some cases the Crown solicitor may be briefed to prosecute. The figures in table 6 indicate that for

the period 1 July to 31 December 1994, 85% of all defendants who pleaded not guilty were convicted on all or some of the charges brought against them. The difference in the conviction rates for defendants and charges is to be explained on the basis that some defendants were not convicted on all the charges brought against them.

TABLE 6: Defended summary cases

	Hearings	Convictions	Acquittals
Persons	4 400	3 780	620
Charges	7 944	6 101	824

- G11 There is no record of how many indictable cases triable summarily (see tables 1 and 2) were so heard. If purely summary cases are taken alone, only 10% of defendants pleaded not guilty leading to a hearing, the others either pleading guilty or having charges withdrawn or dismissed.
- G12 It will be noted that the total of charges preferred is greater than the total number of charges on which defendants were convicted and acquitted. This is probably a recording error. The figure of 620 (the number of defendants acquitted) is our calculation, made because figures were not supplied. Unexplained discrepancies of this nature have made statistical comparisons difficult and unreliable.

INDICTABLE CASES

- G13 A defendant charged summarily who may be sentenced to a period of imprisonment exceeding three months may (with two exceptions) elect trial by jury (s 66 Summary Proceedings Act 1957), in which case the trial is preceded by a committal hearing as if the charges were purely indictable. There is no record of how many cases were proceeded with indictably at the defendant's election.

Beginning prosecutions: informations and defendants (Indictable offences triable summarily and purely indictable offences)

TABLE 7: Number of informations laid by the police and other prosecution agencies

	Indictable (triable summarily)	Purely indictable
Police	48 516 (88%)	5 449 (95%)
Other agencies	1 110 (12%)	303 (5%)
Total	49 626 (100%)	5 752 (100%)

We do not know the source of the 303 purely indictable informations laid by authorities other than the police.

TABLE 8: Number of defendants prosecuted by the police and other prosecution agencies

	Indictable (triable summarily)	Purely indictable
Police	24 417 (98%)	2 340 (98.5%)
Other agencies	368 (2%)	33 (1.5%)
Total	22 785 (100%)	2 373 (100%)

We were unable to discover how many indictable cases triable summarily were in fact tried indictably.

Bringing indictable prosecutions to an end

- G14 Before indictable matters become Crown prosecutions – ie, before committal – a prosecutor may seek leave to withdraw an information, or the Attorney-General or Solicitor-General may enter a stay under s 173 of the Summary Proceedings Act 1957. After committal, the Attorney-General or the Solicitor-General may stay Crown prosecutions under s 378 of the Crimes Act 1961.

TABLE 9: Number and proportion (expressed as a percentage of the corresponding figures in table 7) of informations withdrawn by the police and other prosecution agencies

	Indictable (triable summarily)	Purely indictable
Police	4 125 (8.5%)	426 (7.8%)
Other agencies	116 (10.5%)	62 (20.5%)
Total	4 241 (8.5%)	488 (8.4%)

- G15 Table 10 below gives the number of informations dismissed for want of prosecution. At the purely indictable level these are unlikely to be diversion cases. They may be instances where witnesses were unavailable or declined to give evidence.

TABLE 10: Number and proportion (expressed as a percentage of the corresponding figures from table 7) of informations dismissed for want of prosecution by the police and other prosecuting agencies.

	Indictable (triable summarily)	Purely indictable
Police	732 (1.5%)	28 (0.5%)
Other agencies	9 (0.8%)	34 (11.2%)
Total	741 (1.5%)	62 (1.1%)

Preliminary hearings

- G16 Under s 153A of the Summary Proceedings Act 1957 a defendant may plead guilty to an indictable charge at any stage before or during a preliminary hearing. When a defendant does so, the proceedings may be adjourned to the District Court or the High Court for sentencing (depending on whether the offence is indictable triable summarily or purely indictable). A defendant who does not plead guilty may still do so immediately after committal for trial, in which case similar provisions apply, and the defendant will be committed for sentence to the appropriate court (s 168(1)(b)). A defendant may of course plead guilty on arraignment in the trial court, or change a not guilty plea to guilty during the course of the trial.
- G17 After committal, prosecutions may be ended by discharge under ss 347(1), 347(2), and 347(3) of the Crimes Act 1961. The court's right to discharge after conviction in terms of s 19 of the Criminal Justice Act 1985 is preserved in s 347(6) of the Crimes Act. There are no reliable figures for discharges under these sections. Figures supplied by the central police computer at Wanganui are given in table 12.

TABLE 11: Number of discharges under s 347 of the Crimes Act 1961

Section 347(1)	106
Section 347(2)	91 ³⁰⁰
Section 347(3)	156
Total	353

- G18 There are currently no clear and reliable statistics available on the numbers of preliminary hearings which lead to discharge. The Department for Courts is undertaking research on the impact of preliminary hearings.

TABLE 12: Pleas of guilty on informations in indictable form

	On appearance in court	At any time after committal proceedings	Total
Police	494	173	667
Other agencies	0	95	95
Total	494	268	762

We do not know how many of these cases were heard in the District Court.

³⁰⁰ This cannot be correct. Discharges under this provision apply to "ex officio" indictments or indictments presented by leave of the Attorney-General or the High Court. The number of these is minute.

Jury trials

G19 There were 1 511 committal hearings leading to 1 373 committals (table 11). The figure of 1 373 (table 11) may accordingly be taken to be the number of defended cases where the prosecution was either in indictable form or the defendant elected jury trial. These categories cannot be separated. There is no record of how many defendants were committed, but it may be supposed to be considerably more than 1 373. The number of defendants who pleaded guilty either on committal or at some time up to arraignment was 762 (table 13), and 353 were discharged under s 347 of the Crimes Act 1961 (table 12). Since the figures do not reflect the progress of a batch of cases through the system, the numbers are not reconcilable. Few, if any, of the cases committed for trial in the 6 month period would have reached the stage of trial within that time. The number of defendants tried and convicted or acquitted, and the number of charges on which they were convicted or acquitted, is not known.

TABLE 13: Numbers of jury trials: District Court and High Court

	Cases in which a warrant to arrest was issued	Disposed of before day of hearing	Cases disposed day of hearing before trial	Cases heard (trials)	Total
District Court	48	190	313	660	1 211
High Court	3	55	42	205	305
Total	51	245	355	865	1 516

APPENDIX H

Purely indictable offences

Offences triable only in the High Court are marked with an asterisk.

CRIMES ACT 1961

Part V – Crimes against public order

Treason and other crimes against the Queen and the State

Sections 73–74	Treason*
Section 76	Punishment for being party to treason*
Section 77	Inciting to mutiny*
Section 78	Espionage*
Section 79	Sabotage*

Seditious offences

Section 80	Oath to commit offence
Section 82	Seditious conspiracy
Section 83	Seditious statements
Section 84	Publication of seditious documents
Section 85	Use of apparatus for making seditious documents or statements
Section 90	Riotous damage

Piracy

Section 92	Piracy*
Sections 93–94	Piratical acts*
Section 95	Attempts to commit piracy*
Section 96	Conspiring to commit piracy*
Section 97	Accessory after the fact to piracy*

Slave dealing

Section 98	Dealing in slaves*
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Offences triable only in the High Court are marked with an asterisk.

Part VI – Crimes affecting the administration of law and justice

Bribery and corruption

Section 100	Judicial corruption*
Section 101	Bribery of judicial officer etc*
Section 102	Corruption and bribery of Minister of the Crown*
Section 103	Corruption and bribery of member of Parliament*
Section 104	Corruption and bribery of law enforcement officer
Section 105	Corruption and bribery of official
Section 105A	Corrupt use of official information
Section 105B	Use or disclosure of personal information disclosed in breach of section 105A*

Misleading justice

Sections 108–109	Perjury
Section 113	Fabricating evidence
Section 115	Conspiring to bring false accusation
Section 116	Conspiring to defeat justice
Section 117	Corrupting juries and witnesses

Part VII – Crimes against religion, morality and public welfare

Crimes against religion

Section 123	Blasphemous libel
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Sexual crimes

Section s128–128B	Sexual violation
Section 129	Attempt to commit sexual violation
Section 129A	Inducing sexual connection by coercion
Section 132(1)	Sexual intercourse with a girl under 12
Section 142	Anal intercourse
Section 142A	Compelling indecent act with animal
Section 143	Bestiality

Part VIII – Crimes against the person

Homicide

Sections 158–180	Murder, manslaughter, conspiracy to murder, attempted murder, etc*
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Abortion

Section 182	Killing unborn child*
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Offences triable only in the High Court are marked with an asterisk.

Section 183 Procuring abortion by any means*

Assaults and injuries to the person

Section 188 Wounding with intent
Section 191 Aggravated wounding or injury
Section 197 Disabling
Section 198 Discharging firearm or doing dangerous act with intent
Section 198A(1) Using any firearm against any law enforcement officer
Section 199 Acid throwing
Section 200(1) Poisoning with intent
Section 201 Infecting with disease
Section 203(1) Endangering transport
Section 204 Impeding rescue
Section 208 Abduction of woman or girl
Section 209 Kidnapping

Part X – Crimes against rights of property

Robbery and extortion

Section 235(1)(a) Aggravated robbery (causing grievous bodily harm)*
Section 235(1)(b) Aggravated robbery
Section 235(1)(c) Aggravated robbery (armed with an offensive weapon)*
Section 236 Compelling execution of documents by force
Section 238(1) Extortion by certain threats*
Section 240A Aggravated burglary

Criminal damage

Section 294 Arson
Section 298(1) Wilful damage
Section 301 Wrecking*

MISUSE OF DRUGS ACT 1975

Section 6 Dealing with controlled drugs (class A drugs)*
Section 6 Dealing with controlled drugs (class B drugs)
Section 10 Aiding offences against corresponding law of another country (only where subs (2)(a) applies)

Offences triable only in the High Court are marked with an asterisk.

APPENDIX I

Overseas prosecution systems

	DENMARK	THE NETHERLANDS	SCOTLAND	SOUTH AFRICA	NEW SOUTH WALES/VICTORIA	ENGLAND/WALES	CANADIAN PROVINCES
Type	Civil service (inquisitorial)	Civil service (inquisitorial)	Civil service, briefing private practitioners in superior courts	Civil service	Civil service, briefing private practitioners in superior courts	Civil service, briefing private practitioners in superior courts	Civil service or private practitioners as agents of Attorney-General
Head	Minister of Justice	Nominally Minister of Justice, effectively (non-political) Attorneys-General for 5 areas	Lord Advocate	Attorneys-General (equivalent of Director of Public Prosecutions) for each division of the court	Attorney-General, effectively Director of Public Prosecutions	Attorney-General, effectively Director of Public Prosecutions	Attorney-General or Minister of Justice for each province, effectively civil service or private Crown prosecutor
Crime investigation	Police; prosecutor input possible but deprecated	Police, subject to control by prosecutor/investigating judge	Police, subject to control by the prosecutor (procurator fiscal)	Police, with prosecutor's advice/suggestions but not control	Police	Police with prosecutor's advice/suggestions, but not control	Police
Arrest and charging	Police	Police	Police (may be controlled by the prosecutor)	Police (may be advised by the prosecutor but rare)	Police	Police (may be advised by the prosecutor)	Police, with prosecutor's approval in New Brunswick, Quebec and British Columbia
Prosecution decisions	Police for minor offences, prosecutor for all others	Police for minor offences, prosecutor for all others	Prosecutor exclusively	Prosecutor exclusively	Police for minor offences, prosecutor for all others	Prosecutor exclusively	Police for minor offences in some areas, if appointed by Attorney-General; prosecutor for all others

	DENMARK	THE NETHERLANDS	SCOTLAND	SOUTH AFRICA	NEW SOUTH WALES/VICTORIA	ENGLAND/WALES	CANADIAN PROVINCES
Basis of decision (assuming a minimum prima facie case)	Police have a discretion in minor cases; prosecutor has no discretion and must prosecute	Prosecutor has wide discretion; public interest a factor	Prosecutor has a discretion; public interest a factor	Prosecutor has a discretion; public interest a factor	Prosecutor has a discretion; public interest a factor	Prosecutor has a discretion; public interest a factor	Prosecutor has a discretion; public interest a factor
Accountability	Chief Public Prosecutor issues guidelines to prosecutors (unclear if available to public)	Attorney-General publishes guidelines to prosecutors; prosecutors' decisions judicially reviewable	Crown Office issues guidelines; prosecutor's decisions not reviewable	Attorney-General issues guidelines to prosecutors; Guidelines not published; judicial review of prosecution decisions possible but rare; Attorney-General reports annually to Parliament	Director of Public Prosecutions publishes prosecution guidelines for general information; judicial review of prosecution decisions possible but rare; Director of Public Prosecutions reports annually to Attorney-General	Director of Public Prosecutions publishes prosecution guidelines for general information; judicial review of prosecution decisions possible but rare; Director of Public Prosecutions reports annually to Attorney-General	Prosecutors are not immune from civil suits for malicious prosecution in some provinces
Victim input	May be considered but not determinative	May be considered but not determinative except in cases where a complaint by the victim required	May be considered but not determinative	May be considered but not determinative	May be considered but not determinative	May be considered but not determinative	May be considered but not determinative

	DENMARK	THE NETHERLANDS	SCOTLAND	SOUTH AFRICA	NEW SOUTH WALES/VICTORIA	ENGLAND/ WALES	CANADIAN PROVINCES
Plea bargaining	Not possible at trial; may occur to a limited extent in minor cases by charge selection/diversion choices	Not possible at trial; may occur to a limited extent in charge selection/diversion choices	Occurs; not formally regulated	Occurs; not formally regulated	Occurs; formally encouraged/regulated; sentence indication in New South Wales	Occurs; regulated by practical directives, judgments; sentence indication condemned	Occurs; sentence indication condemned
Private prosecutions	No information available	Not permitted	Permitted by leave of the High Court (rare)	Permitted upon issue of a certificate that the Attorney-General declines to prosecute and payment of security for defendant's costs	Permitted	Permitted	Permitted but Attorney-General may intervene

APPENDIX J

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

Adopted by the General Assembly resolution 40/34 of 29 November 1985

A. VICTIMS OF CRIME

- 1 “Victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.
- 2 A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term “victim” also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.
- 3 The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

Access to justice and fair treatment

- 4 Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.
- 5 Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.
- 6 The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
 - (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

- (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
 - (c) Providing proper assistance to victims throughout the legal process;
 - (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf from intimidation and retaliation;
 - (e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.
- 7 Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilised where appropriate to facilitate conciliation and redress for victims.

Restitution

- 8 Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.
- 9 Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.
- 10 In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.
- 11 Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.

Compensation

- 12 When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:
- (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
 - (b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.
- 13 The establishment strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

Assistance

- 14 Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.
- 15 Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.
- 16 Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.
- 17 In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.

B. VICTIMS OF ABUSE OF POWER

- 18 “Victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.
 - 19 States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.
 - 20 States should consider negotiating multilateral international treaties relating to victims, as defined in paragraph 18.
 - 21 States should periodically review existing legislation and practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.
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