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"*Managing Criminal Justice*"

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In a dissenting judgment in 1983, Sir Duncan McMullin said of the criminal law that "[i]t is not important that [it] should be innovative; it is important that it be certain and seen as fair in its application by citizens whose lives it affects".[1] Well, that was a simpler time perhaps. In the past decade there has been a great deal of innovation in criminal justice. Some of it has been judge-nudged. Most has been enacted by Parliament. In my remarks today I want to raise questions about whether the changes have assisted with the certainty and fairness of criminal justice. I do not attempt answers.

My focus is practice and procedure in the proof of guilt. Until comparatively recently this procedure was largely the work of judges in the exercise of what Lord Devlin in the House of Lords in 1964 described as "their power to see that what was fair and just was done between prosecutors and accused".[2] When Lord Devlin wrote, he was able to say that this process of judicial development "is still continuing".[3] At about the same time, and with similar confidence in judicial control of procedure, Sir Thaddeus McCarthy in the New Zealand Court of Appeal felt able to say that criminal practice and procedure "ought always to be under the hands of the Judges" so that they can clear away rules that are "no longer helpful but [have become] obstructive".[4] Today that responsibility is increasingly undertaken by Parliament and the executive. That is so not only in New Zealand but in jurisdictions we tend to track, such as the United Kingdom and the Australian jurisdictions. The retiring Lord Chief Justice of England and Wales reports that, as a result in the United Kingdom, there has been a "sea change" in the law.[5]

There are benefits in terms of accessibility and democratic legitimacy in enacted rules, but there are other consequences too. First, the method of common law development is a brake on abrupt changes of direction. It requires change to be incremental and to accord with the skeleton of principle that underpins law. Without similar methodological restraint, legislation is free to innovate, sometimes transform and according to wider terms of reference than purely legal policy. That leads on to the second point. In a climate of public anxiety about crime and the costs of delivering criminal justice and the transformation of the way in which government is delivered, a shift to politically enacted rules of procedure was bound to enlarge the focus beyond simply ensuring that "what is fair and just is done between prosecutors and accused". Enacted rules are concerned not only with these matters but with more instrumental ends such as efficiency, cost-effectiveness, proportionality, and are tested against wider government objectives

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1 *Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA) at 97.

2 *Connelly v Director of Public Prosecutions* [1964] AC 1254 (HL) at 1347.

3 At 1348.

4 McCarthy J in *Smith v Police* [1969] NZLR 856 (SC) at 860; and *Jorgensen v News Media (Auckland) Ltd* [1969] NZLR 961 (CA) at 994.

5 *R v Chorley Justices* [2006] EWHC 1795 (Admin) at [24] per Thomas LJ, referring to the impact of the Criminal Procedure Rules 2005 (UK).

such as inter-agency co-ordination and information-sharing and relentless attention to reducing cost. We should not expect criminal justice to be immune and it has not been. But there is room for some unease about the baby in the throwing out of the old bathwater. Finally, the move to reduce criminal justice to enacted rules has had the effect that the principles and values of criminal justice turn increasingly on how texts are interpreted. That has implications for judicial method. A good illustration I think is in the recent Supreme Court case of *R v Wichman*,[6] although you will have other examples. The importance of text also affects cross-jurisdictional comparisons and borrowings, since care must be taken with variations in legislative text and policies.[7]

The solutions adopted in a number of jurisdictions to the problems of cost and delay and the empowerment of victims in the criminal justice process include greater prosecutorial discretion in charging and diversion, wider use of summary trial, measures to incentivise early guilty pleas, relaxation of unanimity in jury trials, reverse onuses of proof, restriction of the right to elect trial by jury, adoption of preventive orders and "civil" penalties, application to criminal proceedings of modern civil case management measures, and measures to bring the victim into the criminal justice system, in a "triangulation" of the parties to whom fairness in procedure is owed. The effect has been a repositioning of criminal justice and the roles of judges and counsel. I cannot deal with all of these developments but touch on some.

A point I want to emphasise is that the shift to enacted rules governing criminal procedure is part only of the picture. It has been accompanied by institutional and administrative restructuring which has transformed the methods of delivery of criminal justice. I am speaking here about the changes to criminal legal aid, the delivery of prosecution and defence services, and changes to court administration. Much of this change has been in subordinate law and in departmental exercise of administrative levers which have put incentives on all other actors in the system to modify their behaviour. As a result, some significant developments have been brought about with very little public participation in the design (including through parliamentary scrutiny) and as a result of self-interested behaviour. Much of what is happening suits insiders in the system. I do not absolve the judges or members of the profession in this self-interest. I query whether developments have always have been sufficiently tested against fundamental values in the legal order.

The working parts of criminal justice and its ends

I have mentioned the actors within the system. Although the system we inherited was comparatively new when New Zealand was established in 1840,[8] the elements of its working parts have remained relatively constant ever since. They are judge, Crown prosecutor, and defence counsel. Public participation in criminal justice through a lay jury is of course also a signal feature (and one I think we should be keen to see preserved), but for present purposes I concentrate on the other professional elements: judge, Crown as prosecutor, and defence counsel.

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6 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753. I discuss this case in the second of the Hamlyn lectures I gave last year.

7 A matter illustrated by the covert policing cases I discuss in my second Hamlyn lecture.

8 As I have described in the first Hamlyn lecture I gave in 2016.

The institutional elements of independent prosecutor acting for the state rather than for any individual, defence counsel acting for the defendant, and the judge as umpire or impartial decision-maker in formal public hearing set up the conditions for the accusatory system of trial we have observed since 1840. The division of responsibilities allowed development of the rules of evidence and proof and the process values observed in criminal justice. Such method of proof was never cheap. It was considered a price society was willing to pay for safe proof of guilt and its public demonstration.

Glanville Williams was describing our system as well as that of the United Kingdom when he said that the central feature of British justice was the detachment of the judge.[9] I want to come on in my remarks to question whether the institutional support for the judge today and the present method of administration of the courts is risking the detachment so central to our system of criminal justice and community confidence in it.

Crown assumption of the obligation to prosecute serious crime was central to setting up the disinterestedness of the criminal justice process. "Crime is crime", as CK Allen once remarked, "because it is wrongdoing which directly and in serious degree threatens the security or well-being of society".[10] Allen's view was that it was not safe to leave crime to private redress. He thought crime must be controlled by a public authority "more powerful and less erratic than the private plaintiff". In 1842 New Zealand held its breath to see whether Maori would accept British criminal justice in the trial of *Maketu Wharetotara*.[11] What carried the day was the solemnity and care in the public demonstration of proof and the demonstration of conspicuous equality of treatment (it helped that in the same session of the court there was the trial of a European man for an assault on a Maori). It was understood that this system freed kin groups from responsibility. It depended on prosecutorial independence to act on behalf of society as a whole in obtaining right according to law and equality of treatment. Today, are we sufficiently protective of the public interest in bringing charges and obtaining right outcomes?

The third element of our system is the right to counsel. It was not fully secured in the United Kingdom until the 19th century. Its impact cannot be overstated. It transformed the dynamics of the criminal trial. The defendant no longer had to conduct his own defence and be drawn into giving his own account. The judge no longer had to pretend an obligation to look out for the interests of the defendant. The conditions were set up for development of the presumption of innocence and the responsibility of the prosecution to prove guilt. Criminal trial became an accusatorial proceeding focussed on the sufficiency of proof brought by the Crown.

It must be acknowledged immediately that there is a range of legitimate views about the extent to which lawyers should be provided at public expense to those who cannot obtain them. No one who has seen an unrepresented defendant in a serious criminal case can, however, be under any illusion about the disadvantage. It is why courts from time to time stay cases until legal representation is provided for those without the

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9 Glanville Williams *The Proof of Guilt* (2nd ed, Stevens & Sons, London, 1958) at 24–36.

10 CK Allen "The Nature of a Crime" (1931) J Comp Legis & Intl Law (3rd series) 1 at 11.

11 *Maketu's case* was the first time a Maori defendant stood trial under the British system of criminal procedure in New Zealand. He was tried before Martin CJ in the Supreme Court at Auckland.

means to pay,[12] or overturn on judicial review as unreasonable decisions of legal aid authorities declining legal aid,[13] or set aside convictions where lack of legal representation has meant that the trial has been unfair.[14] It is why the right to have legal assistance provided if the defendant does not have the means to pay for it is in many jurisdictions recognised as a human right.[15] Quite apart from the availability of counsel, administrative and financial incentives may affect the discharge of the responsibilities of counsel and impact on the ability of the criminal justice system to ensure that what is just and fair is done in criminal procedure.

The ends of criminal justice

What then are the ends of criminal justice? Formerly it was thought that they were concerned with safe convictions and fair process which ensured the integrity of the system. Lord Rodger and Sir Andrew Leggatt explained why that is so in a Privy Council appeal from New Zealand.[16] When trials are conducted according to the common law and statutory rules for fair trial, "people respect the verdicts because they have been reached in conditions which the law regards as fair". In those circumstances "observance of the rules … serves the wider public interests as well as the interests of the accused".

Minimum standards of criminal procedure include the right to be presumed innocent until proved guilty according to law",[17] "the right to a fair and public hearing by an independent and impartial court",[18] "the right to examine the witnesses for the prosecution,"[19] and the right "to the observance of the principles of natural justice", which is part of a wider "right to justice".[20] These rights are referred to in the New Zealand Bill of Rights Act, but indeed they were principles recognised as fundamental to the common law before they were put into such charters. They are part of the common law of jurisdictions which do not have enacted rights, such as most of the States of Australia.[21]

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12 *Dietrich v R* (1992) 177 CLR 293; *Powell v Alabama* 287 US 45 (1932) at 68–69; and *Giddeon v Wainwright* 372 US 335 (1963) at 343–345.

13 *Marteley v The Legal Services Commissioner* [2015] NZSC 127, [2016] 1 NZLR 633.

14 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300; *McInnis v The Queen* (1979) 143 CLR 575 at 579–580; *R v Kirk* (1982) 76 Cr App R 194 (CA); *R v Harris* [1985] Crim LR 244 (CA); see also *R v Taito* [2001] UKPC 50, [2001] UKPC 59, [2003] 3 NZLR 577.

15 International Covenant on Civil and Political Rights, art 14(3)(d); European Convention on Human Rights, art 6(3)(c); New Zealand Bill of Rights Act 1990, s 24(f); Human Rights Act 2004 (ACT), s 22(2)(f); Charter of Human Rights and Responsibilities Act 2006 (Vic), s 25(2)(f).

16 *R v Howse* [2005] UKPC 30, [2006] 1 NZLR 433 at [44].

17 New Zealand Bill of Rights Act 1990, s 25(c). The presumption of innocence exists, as Sachs J described it in *S v Coetzee* (1997) 3 SA 527 (CC) at [220] not only to protect the particular individual on trial, "but to maintain public confidence in the enduring integrity and security of the legal system".

18 Section 25(a).

19 Section 25(f).

20 Section 27.

21 Only Victoria and the Australian Capital Territory have legislative statements of rights: the Charter of Human Rights and Responsibilities Act 2006 (Vic) and the Human Rights Act 2004 (ACT). The Constitution does not contain a statement of rights although the right to fair trial has been recognised to be implicit in it: see the discussion in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, (2000) 205 CLR 337 at [80].

The values and principles applied in criminal justice therefore serve two general purposes. They minimise error in proof of guilt and they demonstrate observance of the rule of law. It is a mistake to take the view that the rules of procedure in criminal justice are rules about sufficiency of proof only. They are also minimum standards of fairness and decency required by the legal order.

This is an interconnected system. It is a bit like a cat's cradle. You cannot pull on one thread without causing movement in the whole structure. We have to keep our eye on the system as a whole and not to be blinded by immediate pressures and self-interest. Many levers are now in the hands of those who are managing for outcomes other than correctness of decision-making and fairness in process. That may be a correction that is warranted – as long as it can be reconciled with fundamental values. The Supreme Court of the United Kingdom has recently found it necessary to point out that "[t]he importance of the rule of law is not always understood".[22] Indications of such lack of understanding include:

> … the assumption [including those to be seen in government reports about court fees there in issue] that the administration of justice is merely a public service like any other, that courts and tribunals are providers of services to the "users" who appear before them, and that the provision of those services is of value only to the users themselves and to those who are remunerated for their participation in the proceedings.

It would be wrong to think that similar attitudes are unknown in New Zealand.

Modern enacted rules of criminal justice

In New Zealand, as in a number of other jurisdictions, enacted rules seek to secure the "just and timely determination of proceedings".[23] In Victoria, the reference is to "the fair and efficient conduct of proceedings".[24]

In the United Kingdom, what is "just" is now defined in the Criminal Procedure Rules to include "acquitting the innocent and convicting the guilty" and the efficient and expeditious conduct of cases in a manner that "takes into account the gravity of the offence alleged, the complexity of what is in issue, the severity of the consequences for the defendant and others affected, and the needs of other cases".[25] These objectives are imposed on all participants in the system, including the judge.

The idea of proportionality in the treatment accorded criminal cases according to whether they are "grave" or "complex" and "the needs of other cases" is a shift. The traditional view has been that any criminal conviction is always grave, both for the individual and for society. The reference to "convicting the guilty" and "acquitting the innocent" is also something of a change in focus from the view that the purpose of

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22 *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51 at [66].

23 Criminal Procedure Rules 2012 , r 1.3(b). Section 55(1) of the Criminal Procedure Act 2011 similarly stresses the need for case management discussions between prosecution and defence to "make any arrangements necessary for its fair and expeditious resolution".

24 Criminal Procedure Act 2009 (Vic), s 181

25 Criminal Procedure Rules 2005 (UK), r 1.1(2).

criminal justice is the sufficiency of proof of guilt. The traditional understanding was expressed by Baroness Hale:[26]

> Innocence as such is not a concept known to our criminal justice system. We distinguish between the guilty and the not guilty. A person is only guilty if the state can prove his guilt beyond reasonable doubt. This is, as Viscount Sankey LC so famously put it in *Woolmington v Director of Public Prosecutions* [1935] AC 462, 481, the "golden thread" which is always to be seen "throughout the web of the English criminal law". Only then is the state entitled to punish him. Otherwise he is not guilty, irrespective of whether he is in fact innocent.

Government administration

The criminal justice system today has also been affected by changes to government administration. The new public management model treats the wider criminal justice sector as an integrated system. Reducing cost, and in particular the cost of prisons and prisoner movements, is a substantial focus of this joined-up model of government. So too is sharing information. In New Zealand, the sector is referred to openly by the Ministry of Justice as a "pipeline".[27]

Modern technology is seen as providing opportunities to reduce costs and achieve better timeliness and better co-operation between public agencies. So, for example, the information generated in court proceedings is now removed into a Justice Sector "warehouse" where it is being mined for better prediction of future risk of offending. In a joint publication by Police, Ministry of Justice and the Department of Corrections concerning "segments" of the New Zealand population, there are indications of how the information is expected to assist in an "Investment Approach to Justice" to enable targeted intervention and deployment of resources. This statistical information is also likely to provide predictions of reoffending which may well be used in criminal processes and may affect the distribution of court resources. But in addition to the use of court information for statistical purposes in this way, there are more immediate impacts on court operations.

The most obvious is the use of AVL technology. Since amendment to the Courts (Remote Participation) Act 2010 earlier this year, the default position is that appearances of defendants except in cases where evidence is called will be by AVL unless a judicial officer determines that it is contrary to the interests of justice.[28] The extent of the use envisaged by Justice, Corrections and Police is indicated by advice that in Christchurch those held in the cells in the Christchurch Precinct will participate by video link to the courts in the same precinct. Similar use of video links is I understand being made in the police hubs of Hamilton and Rotorua (with defendants from around the region being processed in these hubs and appearing in the courts by video link, saving prisoner movements). I do not know to what extent these changes, which affect the character of court proceedings and the nature of public justice, have been the subject of wide public consideration. My impression is that they have been largely

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[26] *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48 at [116].

[27] Ministry of Justice "About the Justice Sector" (Updated 1 November 2016), available at <www.justice.govt.nz>.

[28] Courts (Remote Participation) Act 2010, s 8(1) (as amended by the Courts (Remote Participation) Amendment Act 2016).

administratively managed although supported by judges and practitioners. Down the track are quite ambitious suggestions that where judges and counsel are located is immaterial. Cases may be queued to be dealt with by the first available judicial officer anywhere in the country, with counsel and accused attending by video link wherever they happen to be.

There may be very good administrative sense in much of this and it may suit busy practitioners and judges and prisoners. But what it shows is that the courts in the middle of the pipeline are not seen as standing apart from the whole of government effort. They are not seen as a separate institution of government. There is risk of the blurring of the distinct role of courts.

A recent example of which I am aware is a Corrections approach to Ministry of Justice officials which led to priority being given in scheduling of cases because of a problem Corrections had in providing female remand beds. The inappropriateness of this sort of private adjustment seems not to have been understood. There is a risk of breakdown in understanding of proper boundaries.

Although it is impossible to know what really transpired, the *Red Devils case* recently considered by the Supreme Court may also indicate the dangers of informality and over-familiarity, with the police apparently thinking it appropriate to obtain judicial approval of a matter of policing operation.[29]

Further straws in the wind are the submergence of courts within the wide range of operations run by the Ministry. So in the Christchurch Precinct, it has been a battle to get signage acknowledging the presence of the High Court and District Court. It was originally proposed that police and court staff would share cafeteria facilities and have access to each other in the building in order to promote co-operation in their work. In recent discussions with the Ministry of Justice it is clear that their property strategy, part only of the wider government property strategy, is to diminish the reliance on courthouses and to make property occupied by the Ministry for all its operations multi-purpose. Again, there may be good sense in much of this and ways in which these proposals can be properly implemented. But the risk is in further Ministry management of court registries to suit other agencies and operations and a further diminishment of the visibility of courts in the community.

The responsibilities of the Ministry of Justice include not only the administration of courts and tribunals but the administration of legal aid[30] and the Public Defence Service (intended to provide legal representation in approximately 50 per cent of criminal legal aid cases).[31] It is easy to see that with such broad responsibilities the narrower values of the criminal justice system applied in the courts are not the focus and can be overlooked. Registrars and sometimes judges are reported to put pressure on counsel to advance or resolve cases within time frames set by the Ministry that may not be appropriate to meet the evidential and other issues thrown up by the particular case,

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29 *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705.

30 The former independent Legal Service Agency having been brought into the Ministry: see Hon Simon Power "Changes at Legal Services Agency" (press release, 30 November 2009), available at <www.beehive.govt.nz>.

31 Hon Simon Power "Minister Welcomes Opening of Hamilton Public Defence Service" (press release, 1 June 2011), available at <www.beehive.govt.nz>.

because of general Ministry goals such as that "all serious harm cases [will be] disposed of within 12 months".[32] There are pressures for better communication between court registries and Crown Law and other Ministry agencies. There is little agreement about where judicial administration takes over and Ministry administration leaves off. These matters of separation were flagged as problems from the time the Ministry of Justice took over the Department for Courts. They have become acute because of the erosion of the culture of courts within the Ministry.

In addition to policies designed to achieve ends that may be difficult to reconcile with the values to date accepted in criminal justice, it is necessary to acknowledge the impact on the system by the running down of resources available for criminal justice. If simply part of a cross-government belt tightening, it may be that such pressures arise out of a failure to appreciate the rule of law concerns recently raised by the United Kingdom Supreme Court in the treatment of the administration of justice as merely a public service like any other.[33] There are many straws in the wind that suggest a hostility in official circles to the view that courts do not provide a public service like any other. There may be little public buy-in to the contrary view. That puts particular responsibility on the profession to demonstrate why this attitude is dangerous to the rule of law.

It is a problem that all of us within the system – judges, prosecutors and defence counsel – are ourselves affected by the running down of resources. It is not surprising that the Ministry reports that prisoners who may lose their cells when appearing in courts, and counsel who may not be paid to travel across town or to wait for cases, and judges who may not be able to access courtrooms and who feel the pressure of the backlog, should be supporting electronic delivery to speed things up and make life easier. But who is questioning where this is going and how it affects the impartial, equal and public delivery of criminal justice?

Encouragement to plead

Only a tiny proportion of cases go to trial. And in all systems it is recognised that there are considerable savings in time and cost if guilty pleas are entered at an early stage. It is understandable then that early pleas of guilty are encouraged. But care is needed because a guilty plea waives the fair trial rights against self-incrimination and to determination of guilt.

Considerable inducements exist to plead guilty through the substantial discounting of sentences for guilty pleas now available through legislation and court decisions. The availability and ultimate effect of discounts is subject to discretionary judgments as to variables such as the time from which maximum discounts begin to diminish and whether or not to impose minimum non-parole periods. The common law has traditionally regarded admissions of guilt with suspicion when made under inducements. Just as is the case with confessions made to the police, guilty pleas may be false. They may be entered into because of a calculation of risk or simply to put an end to

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32 Ministry of Justice *Annual Report* (1 July 2015–30 June 2016) at 10, available at <www.justice.govt.nz>. An informal goal in the High Court of nine months from first appearance to trial has been abandoned after demonstration that the time was insufficient for the briefing of police witnesses and the obtaining of reports.

33 See *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51 at [66], quoted above at p 5.

uncertainty, rather than because a guilty plea is right.[34] There is a growing literature and case-law on the risks of inaccuracy in guilty pleas. Pressures for lawyers to cut corners in prosecuting and in defending by reaching deals on pleas raise the risk of such errors.

Such pressures arise in part from institutional design, such as in fee structure, but they also arise because of the relentless press of cases and remorseless scheduling in the courts in a system that is under-resourced and is transferring costs to prosecutors and defence counsel. Saved costs are one of the justifications for the sliding scale of discounts, according to when a plea is entered. Judges are brought into the process. Obtaining pleas through sentence indications is now however widely seen as an important end of case management. The discretions judges have to excuse delay in pleading and to give sentence indications mean that they operate some of the more important levers in obtaining disposal of cases through guilty pleas.

It is difficult to get a handle on whether judges are consciously or unconsciously attempting to obtain pleas by offering discounts that provide incentives. I have been surprised to hear senior judges speak of their "success" in obtaining pleas on sentence indications. It is troubling to hear senior practitioners say that at pre-trial review hearings it is not unknown for judges to interrogate defendants directly, even defendants who are represented, about the defence or the conduct of the case. Some judges are said to give sentence indications without invitation in apparent effort to move a case to resolution. It is also worrying to hear reports that counsel both for the defence and for the Crown sometimes feel under pressure from the judge when seeking necessary adjournments or when seeking further disclosure on the basis that there is little point because the defendant knows what he has done. It is difficult to know whether these reports give an accurate picture of what is happening. They are, however, commonly heard. If they indicate a shift in culture in which judges assume responsibility for managing cases to achieve prompt guilty pleas, they represent a move away from the idea of the detached judge. This is the background in which some in other jurisdictions see the modern criminal justice system as characterised by "mass production of guilty pleas" and a culture that measures the rate and timeliness of disposals as the principal marker of success.[35]

It must be acknowledged that the detachment of the judge has not always been observed in practice. But that has not been the ideal or what has been professed and achievement of disposals through sentence indications takes matters to a new level. Has there been removal of some judicial inhibitions in criminal justice? Does it pose risks for some of the values we have treated as fundamental to criminal justice?

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[34] A study of the Crown Court carried out as part of the Runciman Commission on Criminal Justice found that 11 per cent of surveyed defendants who had pleaded guilty maintained their innocence: *The Royal Commission on Criminal Justice Crown Court Study* (Research Study No 19, HM Stationery Office, 1993) at 83. See also Penny Darbyshire "The mischief of plea bargaining and sentencing rewards" [2000] Crim LR 895 at 902–904; Joan Brockman "An Offer You Can't Refuse: Pleading Guilty When Innocent" (2010) CLQ 116 at 119–122; and Christopher Sherrin "Guilty Pleas from the Innocent" (2011) 30 Windsor Rev Legal & Soc Issues 1 at 3–7.

[35] See Andrew Sanders, Richard Young and Mandy Burton *Criminal Justice* (4th ed, Oxford University Press, Oxford, 2010) at ch 8.

The public interest in proper conviction as well as the interest of the individual suggests that we should not be casual about allowing time for legal advisers to understand the facts of the case and be in a position to give proper advice which the defendant has time to consider. Rush to plea is not a goal we should be pursuing. And it should not be something that is exacerbated by case-management and understandable anxiety to move cases along and not be wasteful of resources.

Public justice?

The risk to public justice is not simply in administration of cases before the courts. It is also affected by alternative processes by which cases are managed. According to a report in 2015, 40 per cent of police apprehensions now are dealt with by alternative processes which do not lead to prosecution.[36] They include diversion[37] and formal police warnings.[38] Neither are statutory processes (although there is some recognition of diversion in legislation).[39] As a result, much offending has moved out of the supervision of the courts altogether.[40]

I have written elsewhere about these alternative methods of dealing with criminal cases.[41] They have also been the subject of a paper by Sir Ronald Young.[42] A recent report by the Independent Police Conduct Authority in New Zealand has found inconsistency in use of pre-charge warnings and disparity in the treatment of Maori and non-Maori.[43] The Authority found varying practices and lack of integration with the other

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36 See Ministry of Justice "Trends in Conviction and Sentencing in New Zealand" (2015), available at <www.justice.govt.nz>.

37 Diversion was originally available only for first offenders, but that requirement was relaxed in 2013.

38 The system was introduced in New Zealand in 2009 for offences carrying a maximum penalty of six months imprisonment. An original target that nine per cent of arrests would be dealt with by pre-charge warnings has been exceeded: see New Zealand Police "Policing Excellence Update" (7 September 2012), available at <www.police.govt.nz>; as cited in Mark O'Regan "Criminal Justice Institutions in Times of Change" (13th International Criminal Law Congress, Queenstown, New Zealand, 12–16 September 2012) at 6.

39 The only legislative acknowledgement of the process of diversion is the power to dismiss the charge on proof that a programme of diversion has been completed: see Criminal Procedure Act 2011, s 148.

40 Diversion has now been extended to cover offending carrying a maximum penalty of more than six months imprisonment . A number of police officers explained to the Independent Police Conduct Authority that "the introduction of pre-charge warnings means that diversion is generally now used for offences with a maximum penalty of more than six months' imprisonment". The Review considered that, if that is the intent, it should be made clear in policy documents: Independent Police Conduct Authority *Review of Pre-charge Warnings* (14 September 2016, Wellington) at [124]. For a defendant to receive diversion, he or she must enter into a written acknowledgement of responsibility and conditions, including any reparation or counselling or agreement to undertake a restorative justice programme. Once the conditions are fulfilled, the police prosecutor advises the court and the defendant is not required to attend the court again. Withdrawal of the charges is made by a registrar or the court on the prosecutor's application. See New Zealand Police "About the Adult Diversion Scheme", available at <www.police.govt.nz>.

41 In my third Hamlyn lecture in 2016.

42 Ronald Young "Has New Zealand's criminal justice system been compromised?" (Harkness Henry Lecture, Waikato University, Hamilton, 7 September 2016).

43 Although the Authority declined to draw the conclusion that the differential treatment was based on ethnicity it was troubled by the disparity and suggested more guidance. See Independent Police Conduct Authority *Review of Pre-charge Warnings* (14 September 2016, Wellington) at [76]–[84].

methods of dealing with offending.[44] Similar problems have been identified in the comparable out of court police warning system in England and Wales.

Police warnings and police diversion are not the only way in which cases are being resolved outside the courts. A pilot in Christchurch is trialling removal of cases by the police to community or neighbourhood panels. This method is used where warnings are thought not to be a sufficient response.[45] The cases are said to be at "the upper-level of offences that can be resolved without charge and prosecution".[46] The review of the pilot indicates that some relatively serious offending has been referred. There are plans for expansion of this pilot in particular areas.[47] Sir Ronald Young has described the panels as an alternative justice system without the protections and without the trained participants.[48] Indeed, one of the project's developers said "[w]e don't see ourselves as a legal process. We may have lawyers involved, but in their capacity as community members. We want to avoid the comparison with the courts and wider legal system."[49]

Other pilots are being undertaken for therapeutic courts and for cases of sexual violence, if the victim agrees. Further removals from the criminal justice system may be on the cards.[50] These suggestions are put forward to meet the undoubted challenges in dealing with crimes of sexual violence without re-victimising complainants and the massive under-reporting of such crimes and, in the case of therapeutic courts, to deal with some of the causes of crime. I do not underestimate the extent of the problems and the need to adopt better ways of dealing with them, but there are risks in such systems to the principle of public justice and a risk that the door is opened to unequal application of the criminal law in cases of serious offending, according to the attitude of the victim.

Pre-charge warnings, and the resolution of cases through community justice panels, have consequences for those who are dealt with under them. Offending must be admitted. Although the actual offence cannot be prosecuted once there is resolution, the admission forms part of the police record and is maintained as part of the person's

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44 Independent Police Conduct Authority *Review of Pre-charge Warnings* (14 September 2016, Wellington) at [120]–[121] and [127]–[130].

45 Lord Judge expressed misgivings about use of such panels in his 2011 speech, in case they set up a third distinctive and separate method for the administration of summary justice: see Lord Judge "Summary Justice In and Out of Court" (John Harris Memorial Lecture, Drapers Hall, London, 7 July 2011) at 17–18, available at <www.judiciary.gov.uk>.

46 New Zealand Police *Community Justice Panel in Christchurch: An Evaluation* (Alternative Resolutions Workstream, November 2012) at 2.

47 See Shaun Akroyd and others *Iwi Panels: An evaluation of their implementation and operation at Hutt Valley, Gisbourne and Manukau from 2014 to 2015* (prepared for the Ministry of Justice, 17 June 2016) at 28; and Ministry of Justice *Justice Matters* (Issue 3, June 2016) at 9, where the Ministry recoded that it is working with police "to enhance the panels through police and strengthen iwi panel processes through a range of operational improvements".

48 He expressed concern about vetting and training, the pressure on defendants to accept the process and the lack of distinction between investigative, prosecutorial, defence and judicial functions. See Ronald Young "Has New Zealand's criminal justice system been compromised?" (Harkness Henry Lecture, Waikato University, Hamilton, 7 September 2016).

49 James Greenland "Police to make decision about Community Justice Panels" (2 November 2015, New Zealand Law Society), available at <www.lawsociety.org.nz>. At present the scheme has not been expanded beyond the pilot location. A Ministry of Justice spokesperson said "[a]ny future expansion … will need to be carefully considered by justice sector leadership in terms of their benefits, effectiveness and 'fit' within the wider justice system".

50 See Law Commission *The Justice Response to Victims of Sexual Violence* (NZLC R136, 2015).

"criminal history". The person receiving a pre-charge warning is required to sign a statement acknowledging that "a record of this warning will be held by Police and may be used to determine your eligibility for any subsequent warnings, and may also be presented to the court during any future court proceedings".[51] The information obtained through these processes, including the acknowledgement of guilt, is also information which may be shared by the police with other agencies and can be used in the police vetting increasingly resorted to by public and private bodies.[52] The acknowledgement of guilt is also evidence that may be led as propensity evidence in respect of subsequent offending. These are therefore significant public law powers which potentially provide opportunities for intrusive social control of the individuals affected. There is a risk of over-criminalisation if people are incentivised into acquiescing in alternative resolution because it seems comparatively costless at the time.

It remains to be seen to what extent the courts will be drawn into supervising the use of these public powers. The suggestion that processes such as these are not part of the "wider legal system" and stand apart from it is suspect. These processes impact on the protections of human rights and the procedural protections of fair criminal process. There are issues about access to legal advice before acquiescence in the process and exercise of the choice implicit in the right to silence. It is difficult to escape the feeling that some of these apparently ad hoc developments may not have been thought through in terms of fundamental principles such as the impact on the presumption of innocence, the right to silence, and the right to legal advice. The acknowledgements of responsibility are waivers of the right to silence and the presumption of innocence given in circumstances which may not provide proper opportunity for legal advice and informed choice.

The restorative justice and rehabilitative ends these processes permit also set up conditions of inequality in application of justice because they are not programmes universally available. Even those who are supportive of the goals of restorative justice and rehabilitative courts express concern that those who do not have access to such programmes are disadvantaged by geography or by the attitude of the particular victim. Although in sentencing in New Zealand judges must consider restorative justice outcomes,[53] the availability of access to such programmes is in practice limited by financial and practical considerations. The use of "pilot" programmes in particular areas without attempt to set up universal access is inevitably discriminatory.

Conclusion

William Stuntz, in his sobering book *The Collapse of American Criminal Justice*, referred to criminal justice in the United States as a "disorderly legal order, and a discriminatory one" where justice is dispensed not according to law but according to official

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51 A copy of the "Pre-Charge Warning and Release Note" used in the Auckland pilot is available in Justine O'Reilly *New Zealand Police Pre-Charge Warnings Alternative Resolutions: Evaluation Report* (Wellington, December 2010) at Appendix 13. A similar written acknowledgement is also required by persons receiving police cautions in England and Wales: see Ministry of Justice *Code of Practice for Adult Conditional Cautions* (Stationery Office, London, January 2013) at [82].

52 See New Zealand Police "Information about vetting", available at <www.police.govt.nz>.

53 Sentencing Act 2002, s 8(j) and 10.

discretion.[54] He raises concerns about the legitimacy of such a system and points to scholarship that suggests that perceptions of illegitimacy themselves raise crime rates and exacerbate the difficulty of its control. He suggests closer attention to the fundamental value of equality before the law and more public determination of guilt, including through trial by jury. He expresses concerns about "assembly line adjudication" (in which "quick and casual" investigation and inadequate representation leads to "equally quick and casual plea bargain between lawyers").[55]

I do not suggest that our criminal justice system is in comparable crisis to that in the United States. But it is deeply worrying if the early reports on the new system of police warnings are showing indications of unequal treatment and discrimination. The criminal justice system cannot afford such taint. It shakes confidence in the system. The controversies that arise from time to time in any system if it is thought that particular offenders have received special treatment in the courts indicate that people care about equal treatment under law. They are reminders that instrumentalist aims for criminal justice may not meet community expectations and may be destructive of confidence in the system. Those controversies have arisen in cases which have taken place in courts, in public. It is not to be expected that there will be indifference to unequal treatment through the alternative ways in which criminal justice is managed today out of public sight. There is a need to ensure that the management of criminal justice does not neglect procedural safeguards and that innovation does not throw over basic principle such as in open justice and certainty, and the ability of impartial judges to do what is "fair and just".

If it is to be legitimate, the great coercive power of the state in criminal justice must be must applied in a manner that is "uniform, equal, and predictable".[56] It must also be demonstrated in public. Such process may not be speedy and it is not likely to be cheap. I do not expect criminal justice ever was speedy or cheap. Its careful observance is however best policy for a state that aspires to live under the rule of law. We are all implicated in the move to managerial justice in criminal law. We need to be careful.

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54 William Stuntz *The Collapse of American Criminal Justice* (Harvard University Press, Cambridge (MA), 2011) at 4.

55 At 57–58.

56 Roscoe Pound *The Development of Constitutional Guarantees of Liberty* (Yale University Press, New Haven, 1957) at 1.

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