Under Investigation: A Review of Police Prosecutions in New Zealand's Summary Jurisdiction

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I INTRODUCTION

"Man has always had a passion for justice. From the beginning of civilisation he has felt the urge to see right prevail and wrong punished."[1]

In earlier times, victims and their communities sought retribution, typically achieved by means such as blood feud or trial by battle or ordeal.[2] In more recent times the State has intervened in the administration of justice through the imposition of organised legal and criminal justice systems.[3] Offenders who break the State's established laws are now brought to justice in courts, before judge and jury.

The State has also taken on responsibility for prosecuting criminal offences, on the premise that an offence is a harm committed against the State and society as a whole.[4] Prosecution by the State is considered a necessary step both to protect individual citizens from crime and to preserve the State itself, for it is difficult to govern in times of anarchy.[5] However, shouldering the responsibility for prosecution also places a duty on the Crown to ensure prosecutions are handled fairly and efficiently. It is in the area of police prosecutions that the effective fulfilment of this duty becomes uncertain.

In the past two decades, the practice of allowing police to prosecute criminal cases has been the subject of intense academic examination and numerous external investigations. The New Zealand Law Commission ("the Commission") conducted its own review in 1997.[6] However, in contrast to most other common law countries,[7] which have moved away from police prosecutions, New Zealand has retained the practice in its summary jurisdiction. In this country, police decide whether to investigate, whether to initiate a prosecution or pursue alternatives, choose the charge and, where available, decide whether to proceed summarily or by indictment.[8] If the decision to prosecute is made, and the offence falls within the 'less serious' summary jurisdiction, the National Police Prosecution Service ("PPS"), will undertake the prosecution. If the goals of a prosecuting system and the role of the prosecutor are considered, however, retaining police prosecutions raises serious issues.

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[1] Brasch, *How did it begin? Customs, Superstitions and their Romantic Origins* (2 ed, 1993), 176.

[2] Paciocco, *Getting Away With Murder: The Canadian Criminal Justice System* (1999), 357

[3] For a description of the development of State prosecutions see ibid 356 to 358.

[4] Ibid 355.

[5] Ibid 356.

[6] New Zealand Law Commission *Preliminary Paper No 28, Criminal Prosecution, A Discussion Paper* (NZLC PP28, March 1997) (*"Preliminary Paper No 28"*).

[7] For example, changes have been made away from police prosecutions in the summary jurisdiction in Canada, England, the United States of America and most of Europe; see Chris Corns "Police Summary Prosecutions: the past, present and future" (Paper presented to the History of Crime, Policing and Punishment Conference convened by the Australian Institute of Criminology in conjunction with Charles Sturt University, Canberrra, Australia, 9-10 December 1999).

[8] New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, para 59.

A prosecution system typically aims to manage the prosecution of offenders from initial review of police files to conduct at trial efficiently and economically. Prosecutors must act within the prosecutor's role – as an independent, impartial Minister of Justice who adheres strictly to due process requirements.[9] In a recent New Zealand Court of Appeal judgment it was emphasised that: "Crown counsel are important participants in the dispassionate administration of criminal justice."[10] It was also stated in the High Court that "the prosecutor must call to mind his overall duty of fairness, as a 'minister of justice'".[11]

Yet it is arguable that there are deficiencies in both the impartiality of police prosecutors and their efficacy. Guidelines and training received by police prosecutors are generally weak on the need for the prosecutor to maintain a neutral role and their important ethical duties. In addition, police prosecutors typically rise to the role following several years as an operational police officer.[12] During this early time in the field, officers are inclined to develop a strong loyalty to colleagues, a sense of mission against crime and a flexible attitude to rules and due process.[13] This well-documented phenomenon, known as police culture, is generally inconsistent with the prosecutor's role as an impartial, independent Minister of Justice.

Prosecutors must review cases and decide whether they meet the evidential and public interest standards required for continuance to trial. However, it appears that these standards are not applied consistently in New Zealand.[14] Furthermore, the independence and objectivity of the review may be impaired by close contact with police, adherence to police culture and a desire to retain good relations with fellow police. These factors may lead to weak cases proceeding to trial.

Police prosecutor efficacy is a further issue. Some police prosecutors achieve high standards of professionalism and competency, yet surveys of judicial satisfaction suggest that many do not.[15] This may in part be a reflection of the fact that in general, police prosecutors are not lawyers and therefore may not possess the associated skills and experience required for legal advocacy.[16] In addition, the summary jurisdiction has grown increasingly complex,[17] and existing prosecutor training may be insufficient.

The recent introduction of the PPS has had some effect on these problems. Administratively distinct, the prosecution section is now under a different chain of command from the regular police operational structure.[18] It is unclear, however, whether this has gone far enough to address the issues of impartiality and

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9 The leading approach is found in the Canadian cases of *R v Regan* (2002) 161 C.C.C. (3d) 97 (S.C.C.) and *R v Boucher* [1955] S.C.R 16. *R v Boucher* has been cited in New Zealand cases and the need for a Minister of Justice role has also been adopted. See in particular *R v Hodges* (19 August 2003) unreported, Court of Appeal, CA, 435-02 and *R v Punnett* [2006] 1 NZLR 133 (HC).

10 *R v Hodges* (19 August 2003) unreported, Court of Appeal, CA, 435-02, [20] per Tipping J.

11 *R v Wilson* [1997] 2 NZLR 500, 509 (HC) per Eichelbaum CJ.

12 Stephanie Beck, Interview with Acting Senior Sergeant Mike Rongo of the PPS (Auckland, by phone, 20 September 2005).

13 Ashworth, *Criminal process: an evaluative study* (2 ed, 1998) 74 - 77.

14 New Zealand Law Commission, *Preliminary Paper No 28,* supra note 6, para 315.

15 Evaluation Unit Office of the Commissioner New Zealand Police, *Judicial Satisfaction Survey: July 2001-June 2002* (October 2002).

16 Approximately nineteen percent of police prosecutors have legal qualifications (28 of 146): Email from Patricia O'Shaughnessey, Office of the Police Commissioner to Stephanie Beck, 21 September 2005 ("21 September 2005").

17 Rozenes, "Prosecutorial Discretion in Australia Today" (Speech delivered to Prosecuting Justice, Australian Institute of Criminology Conference, Melbourne, Australia, 18-19 April 1996).

18 Rongo, supra note 12.

independence, given that the PPS are still police officers. Under the PPS, prosecution has become a career destination and further training is encouraged. In time, this may improve efficacy, but it appears at present that only a small number of officers have taken up such initiatives.[19]

Given these deficiencies, there appears good reason to consider further reform to the New Zealand prosecution structure. Yet change is resisted by police who wish to retain the function[20] and by the Commission who fear the increased costs that would be involved in moving to an independent prosecutorial structure.[21] These attitudes are supported by a general complacency towards the standards of summary prosecutions on the basis that they deal only with 'less serious' crime, punishable through 'minor' sanctions.[22]

However, these arguments against change contain inherent weaknesses. The fact that police wish to retain the prosecutorial function and that police prosecutions are now an accepted practice are not necessarily valid reasons to prevent reform. Several authors have also suggested that police prosecutors allow weaker cases to proceed to trial,[23] perhaps due to insufficient adherence to prosecution Guidelines and possible partiality. Time spent on such cases increases costs and the burden on the courts. Therefore, although reform will initially bring significant expenditure, improvements in efficacy over the long term may result in cost savings.

Lastly, the summary jurisdiction should not be dismissed as insignificant. For those publicly accused of a crime and their families, the consequences of prosecution are financially, socially and personally severe.[24]

Following an analysis of the different options for reform, a recommendation is made in favour of an independent Crown Prosecution Service, staffed by trained lawyers. Prosecution Guidelines should also be amended to contain role and ethical guidance and compliance regimes, along with guidelines to maintain greater openness and transparency.

II ANALYSIS OF THE ROLE OF THE PROSECUTOR AND OBJECTIVES OF A PROSECUTION SYSTEM

To be able to evaluate the effectiveness of police prosecutors it is first necessary to review what makes successful prosecutors, and the role they play in the criminal justice system. Following this, the objectives of a prosecution system will be analysed in detail to allow subsequent consideration of how well police prosecutions achieve these objectives.

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[19] O'Shaughnessey, 21 September 2005, supra note 16.

[20] Stace, "The Police as Prosecutors" in Cameron and Young (eds) *Policing at the Crossroads* (1986), 139.

[21] New Zealand Law Commission, *Preliminary Paper No 28,* supra note 6, para 341.

[22] Corns, supra note 7, 24.

[23] Rozenes, supra note 17.

[24] Savage, "Criminal Procedure: The Effect of Procedure Upon Justice" in Clark (ed) *Essays on Criminal Law in New Zealand* (1971), 97. See also Ashworth, supra note 13, 180.

Function and Role of the Prosecutor

Traditionally, the prosecutor has held the position of "accuser" in the adversary system, battling the defence before a neutral judge and/or jury.[25] The Crown also represents the public interest, as a criminal offence is viewed as a harm against the State and society as a whole.[26] This also echoes historical views that citizens were chattels of the Sovereign, gaining protection from crime only in her name.[27] Accordingly, the prosecutor is not a lawyer for the victim or the police, and must advance the interests of the State over and above their interests.

Benefits of this approach lie in the State being viewed as a disinterested party, often balancing multiple interests. It can also provide a coherent and stable approach to prosecution through policy and procedure. Lastly, it is seen to provide a just and fair approach.

Throughout the various aspects of the prosecutor's role, from review of the case to conduct at trial, a prosecutor is accountable to the court and ultimately to the public. This is due to his or her function as an independent Minister of Justice,[28] which contains three facets:[29]

> The first is objectivity [...], the duty to deal dispassionately with the facts as they are, uncoloured by subjective emotions or prejudices. The second is independence from other interests that may have a bearing on the prosecution, including the police and the defence. The third, related to the first, is lack of animus [...] towards the suspect or accused.

The prosecutor is therefore a neutral impartial force, untainted by personal views or opinions.[30] Adherence to the prosecutor's role and due process protects offenders from "overzealous or misdirected exercise of state power".[31] The prosecutor is one of the "check and balances" of the criminal justice system,[32] counterbalancing the power of the police and ensuring by independent review that only valid cases proceed to trial.[33]

A prosecutor should not be a zealous advocate.[34] The New Zealand Court of Appeal emphasised that "the Crown should lay the facts dispassionately before the jury and present the case for the guilt of the Accused clearly and analytically [...] but they must not strive for such a verdict at all costs".[35] A prosecutor must present to the Court not only facts that support the guilt of the defendant, but also those that support their innocence.[36] The focus is not on winning or losing but rather on the fair and

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[25] Mount, *The Role of the Prosecutor in New Zealand Criminal Law* <www.criminalbar.org.nz/Articles/TheroleoftheprosecutioninNewZealandcriminallaw.doc> (at 31 October 2006), 2.
[26] Paciocco, supra note 2, 355.
[27] Ibid 355.
[28] As aforementioned the leading approach is found in the Canadian cases of *R v Regan* and *R v Boucher*, see footnote 9, above.
[29] *R v Regan* (2002) 161 C.C.C. (3d) 97, 157 [156] (S.C.C.) per Binnie J.
[30] Crown Law Office, *Solicitor General's Prosecution Guidelines* (1992) 3.3.4 ("*Guidelines*") in Appendix C of the New Zealand Law Commission *Report 66, Criminal Prosecution* (NZLC R66, October 2000), infra note 114.
[31] Supra note 29, 157 [157] per Binnie J.
[32] Ibid 157-158 [152]-[158] per Binnie J.
[33] Ibid.
[34] Supra note 10, and *R v Roulston* [1976] 2 NZLR 644 (CA).
[35] Supra note 10, [20].
[36] Devlin, *The Criminal Prosecution in England* (1960), 23.

responsible performance of a serious public duty.[37] For example, prosecutors are prohibited from making inflammatory emotional or prejudicial addresses, or conducting oppressive cross-examination.[38] If such behaviour results in a real risk that the trial has been irredeemably affected, an appellate court may hold the trial to be unfair and order a new trial.[39]

To some extent, tension lies between the role of a neutral Minister of Justice and a traditional courtroom advocate, protecting the public interest with "industry, skill and vigour".[40] Some commentators acknowledge the difficulty in a dispassionate prosecutor, suggesting that "even the best of prosecutors [...] are easily caught up in the hunt mentality of an aggressive office".[41] For this reason, a strong understanding and commitment to the prosecutor's role is vital. Without it, a prosecutor ceases to play the essential role of check and balance.

Restrictions are placed on prosecutors for a number of reasons. Firstly, restrictions are needed because of the importance of a fair trial.[42] The right to a fair trial is consistent throughout the case law and is also repeated in section 25 of the New Zealand Bill of Rights Act 1990. A fair trial requires that the conduct of prosecutors in court be restrained because they can be naturally favoured by judges and juries. A prosecutor may be viewed as a valiant protector of justice and society, with the law on their side. Therefore, behaviour and comments by the Crown, especially if prejudicial or inflammatory, can have an improper impact on those judging the defendant.

Restrictions are also necessary due to the inherent power vested in the prosecutor. Having the ability to bring ordinary citizens before the court and prosecute them is to wield a mighty sword. Furthermore, the discretions contained in the prosecutor's role, such as modifying or withdrawing charges, result in even more authority. If not used wisely, this authority could be used as a tool for corruption, discrimination or oppression.

Finally, restrictions help to counteract the great resource and information imbalance existing between the State and the defendant. It is State representatives who investigate the crime, who gather the evidence against the offender, and prosecute – all with the advantage of tax dollars.

Turning to the more practical elements of a prosecutor's role, a prosecutor first becomes involved in a case upon receiving a defendant's file from the police. The prosecutor will then conduct an independent review of the case, where he or she may take into account "many factors [...] that may not necessarily have to be considered by even the most conscientious and responsible police officer".[43] Review should include an analysis of the facts, the strengths and weaknesses of the case, and potential defences the defendant may employ. "The good prosecutor [...] is sceptical

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[37] *R v Lucas* [1973] VR 693 (SC), *R v Boucher* [1955] S.C.R 16, 23-24, (1954) 110 C.C.C. 263 per Rand J.

[38] *R v Roulston* [1976] 2 NZLR 644, 654 (CA). See also GG Mitchell "No Joy in this for Anyone:" Reflections on the exercise of Prosecutorial Discretion in *R v Latimer*" [2001] 64 Saskatchewan LR, 491, 496.

[39] *R v Benedetto* [2003] 1 WLR 1545, 1565 [54] (PC). For New Zealand authority see *R v Roulston* [1976] 2 NZLR 644, 654 (CA).

[40] *R v Savion and Mizrahi* (1980), 52 C.C.C. (2d) 276, 289 (Ont. C.A.).

[41] Ulliver, "The Neutral Prosecutor" [2000] 68 Fordham Law Review, 1695, 1702.

[42] *Randall v R* [2002] 1 WLR 2237, 2242 [10] (PC(CI)). This case is cited in the New Zealand case of *R v Punnett* [2006] NZLR 133, [22] 136 (HC).

[43] Ontario, *Report of the Attorney-General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (1993) per Martin J, 117-8.

of what appears patent to others, and curious concerning details that seem trivial to the casual observer."[44]

This review is usually made in accordance with Solicitor General's Prosecution Guidelines 1992 ("the Guidelines"). These Guidelines state the levels of evidence necessary to continue to trial and public interest factors that may affect the decision to proceed.[45] The prosecutor may then make a decision to modify charges, withdraw charges or proceed to trial.[46] Prior to trial, a prosecutor will prepare the case, including determining what witnesses to call, what questions to ask and how the case should be presented.[47] At trial, the prosecutor will conduct the case on behalf of the State. As a result, he or she must present evidence against the defendant, examine witnesses, make a case argument and, if conviction is entered, give input as to sentencing.

Objectives of a Prosecution System

As stated previously, it is important to consider the objectives of a prosecution system in order to measure how well the current approach of police prosecutions achieves those objectives. The Commission has suggested that a modern, effective prosecution system will: [48]

- protect "the dignity and human rights of persons suspected or accused," while also subjecting them to the processes of the law;
- limit formal prosecution to when it is appropriate;
- "ensure prosecution decisions are made in a fair, consistent and transparent manner;" and
- ensure the system is "economic and efficient".

These objectives incorporate the two traditional goals of the adversarial justice system.[49] The first of these goals is the advancement of truth through fact finding, which includes the need for crime control and enforcement of the law.[50] The second goal relates to due process in the system. This includes protecting the rights of defendants and reducing the risk of errors of justice.[51]

III AN INTRODUCTION TO POLICE PROSECUTIONS IN NEW ZEALAND

In order to understand the difficulties with police prosecutions, it is necessary to provide a brief overview of the structure of criminal justice in New Zealand. This

[44] Ulliver, supra note 41, 1703.
[45] Crown Law Office, *Guidelines*, supra note 30, para 3.
[46] New Zealand Law Commission Report 89, *Criminal Pre-trial Processes: Justice Through Efficiency* (NZLC R89, June 2005), para 22 ("*Commission Report 89*").
[47] Mount, supra note 25, 2.
[48] New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, para 23.
[49] Note: there has been a movement towards victim interests and satisfaction as a third goal in some jurisdictions. In New Zealand, for example, this has occurred through the Victims Rights Act 2002.
[50] Stace, supra note 20, 134.
[51] Ibid 135.

includes how offenders come into the system, the summary and indictable jurisdictions and the police participants in the process. Subsequently, how prosecuting takes place and prosecution accountability mechanisms will be explained, followed by the New Zealand Law Commission review of criminal prosecutions and associated changes.

Arrest and Charging Procedures

An overview of arrest and charging procedures allows us to consider the number of checks and balances that could prevent weak or irregular cases progressing past this early stage.[52]

A prosecution usually begins with an arrest by a police officer.[53] Once back at the police station, if the officer's supervisor approves the arrest (and presumably the prosecution) a charge sheet is prepared.[54] The charge sheet contains a record of the time and date of arrest, the personal details of the arrested person and the charges against them.[55] In the rare event that the arrest is not approved, the person may be released without charge.[56]

If the arrest is approved, the prosecution file is then prepared by the officer in charge.[57] The officer in charge must make the final decision on the most appropriate charge(s).[58] The charge(s) may differ from those on the charging sheet due to further investigation or interviews with the arrested person that can reveal other offences or more information on the circumstances of arrest.[59] The prosecution Guidelines and Police General Instructions fail to provide any guidance on this final charging decision.[60] The Commission noted this to be unusual, as the chosen charge affects the form of proceedings, potential penalty, and whether a jury trial is available.[61] At this stage, the prosecution file and charge should again be reviewed by a supervisor, especially if it is a serious offence. However, in many cases, mainly due to 'operational pressures,' the file proceeds to the prosecution section without review.[62]

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[52] For a diagrammatic overview of the arrest and charging procedures see, Beck, *Under Investigation: a review of police prosecutions in New Zealand's summary jurisdiction* (LLB (Hons) Dissertation, The University of Auckland, 2006), appendix.

[53] New Zealand Law Commission, *Preliminary Paper No 28,* supra note 6, paras 114, 115. Note: a summons is also available as a method of commencing a prosecution, but it is rarely used because it is time consuming and involves lengthy administration; see also Tutt, *A Review of Police Prosecution Services* (Strategic Policy and Resources Review Unit, Planning and Policy, Police National Headquarters, Wellington, 1995) para 4.2.16.

[54] Ibid. However, the order of this process may differ slightly between police districts. The order given in the text above is that used in the Auckland district. Stephanie Beck, Interview with Senior Sergeant Malcolm Miller, Professional Standards Branch (Auckland, in person, 23 January 2006).

[55] Email from Senior Sergeant Malcolm Miller, Professional Standards Branch, to Stephanie Beck, 1 February 2006 (*"1 February 2006"*).

[56] Ibid. Other options listed by Miller include: bailed to the court on charges, held in custody, summonsed to appear before court, or released and later required to attend a Family Group Conference (if the accused person is a juvenile).

[57] New Zealand Law Commission, *Preliminary Paper No 28,* supra note 6, para 115.

[58] Ibid para 116.

[59] Miller, *1 February 2006,* supra note 55.

[60] New Zealand Law Commission, *Preliminary Paper No 28,* supra note 6, para 116.

[61] Ibid.

[62] Ibid para 115.

In terms of the checks and balances, it appears that even inappropriate or questionable arrests may not be overruled.[63] In addition, evidence suggesting irregularities in the arrest procedure rarely come to light until trial.[64] Officers also have the ability to select charges, but do so without the benefit of established guidelines, and often without review by their supervisors. As a result, problematic cases still progress to the prosecution section. Given this lack of effective checks and balances, it is increasingly important for prosecutors to adhere strictly to their independent review function.

Summary and Indictable Jurisdictions

In New Zealand the criminal justice system is split into summary and indictable jurisdictions. Summary offences, which constitute the majority of prosecutions in New Zealand, are generally viewed as less "serious" than indictable and are treated accordingly.[65] Summary offences include disorderly behaviour, causing wilful damage, resisting police and indecent exposure.[66]

Penalties for summary offences are lower than for indictable crimes, restricted to fines or imprisonment of three months or less.[67] As a result, the procedure for summary prosecutions is also less complex than for indictable cases. The trial is held before a judge alone, and the prosecution undertaken by police prosecutors.

In contrast, indictable cases consist of more serious crimes and punishments can range from more than three months imprisonment to life sentences. Trials are generally held before a judge and jury, although in some cases the defendant can elect to be tried before a judge alone.

In indictable offences, and for some complex summary offences, [68] regional Crown Solicitors are involved. Crown Solicitors are qualified legal practitioners, independent from the police, who have the authority to prosecute on behalf of the Crown.[69] They delegate work to individual Crown prosecutors.[70] These prosecutors are also trained lawyers and are subject to the control of their local Crown Solicitor and the Solicitor General.[71] Their advice may also be sought by police regarding the decision to prosecute or selection of offences.[72]

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[63] See McGonigle, *Police as Prosecutors* (LLB (Hons) Dissertation, The University of Auckland, 1996) 7, and New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, para 115.
[64] Possible reasons for this occurrence are noted in McGonigle, *Police as Prosecutors* (LLB (Hons) Dissertation, The University of Auckland, 1996).
[65] See comments in New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, 7-8.
[66] Summary Offences Act 1981 s(s) 3, 11, 23 and 27.
[67] New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, 8. These penalties are also explained in the Summary Offences Act 1981 s2 definition of "is liable."
[68] Crown Law Office, *Briefing Paper for the Attorney General* (2002) para 56, ("*Briefing Paper for the Attorney General*").
[69] This is known as holding the Crown warrant.
[70] Mount, supra note 25, 1-2.
[71] Mount, supra note 25, 1-2. The Attorney General actually holds the ultimate responsibility for prosecutions in New Zealand, but by convention, he or she does not take an active role. Instead, the Attorney General's function in overseeing and controlling prosecutions is delegated to the Solicitor General.
[72] New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, E4.

Police Participants in the New Zealand Prosecution System

While it is accurate to say that police are generally responsible for conducting summary prosecutions, it is necessary to understand that there are two types of police prosecutors.

The first are known as sworn police prosecutors. The majority of police prosecutors in New Zealand, around 87 percent, fall within this category.[73] The word 'sworn' indicates that they have taken the oath of a constable under section 37 of the Police Act 1958. The taking of this oath means that as a police officer, they have common law and statutory powers, duties and functions.[74] For example, this includes duties to preserve the public peace,[75] life and property, prevent crime and detect offenders.[76] Sworn police prosecutors must have been operational police officers for at least 18 months, before moving to the prosecution section.[77] Although some have law degrees or are undertaking study towards a degree, the majority of sworn police prosecutors have no legal training.[78]

The second group of participants are non-sworn police prosecutors. Thirteen percent of police prosecutors fall within this group.[79] Non-sworn police prosecutors are civilians who have not sworn the constable's oath and as such have not been operational police officers.[80] Generally, they do not possess the same powers or duties as sworn members of the police.[81] Rather, their membership of the police is limited to the ability to represent the police service in prosecutions. These prosecutors have a law degree and experience in practicing law.[82]

How Prosecution Takes Place

When the police prosecution section receives a file, an information will usually already have been laid at a District Court.[83] An information "contains a sworn assertion by [...] 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".[84]

The 'laying' of an information, however, does not necessarily mean a case will continue to trial. The prosecution section must review the charging officer's decision to prosecute.[85] As aforementioned, officers in the field can occasionally lose their

[73] O'Shaughnessey, 21 September 2005, supra note 16. There are 127 sworn prosecutors out of a total of 146 police prosecutors.
[74] *Laws of New Zealand* (1992) vol 21, Police, paras 2, 3, 4.
[75] Police Act 1958 s37.
[76] *Fisher v Oldham Corporation* [1930] 2 KB 364, 369.
[77] Rongo, supra note 12.
[78] O'Shaughnessey, 21 September 2005, supra note 16. Nine of 127 sworn prosecutors have legal training.
[79] Ibid.
[80] *Laws of New Zealand*, supra note 74, para 4.
[81] Ibid. See also Police Act 1958 s6(1)(a).
[82] O'Shaughnessey, 21 September 2005, supra note 16.
[83] New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, para 119. The information is laid under the Summary Proceedings Act 1957.
[84] Ibid 8.
[85] The New Zealand Law Commission has recommended that the PPS undertake earlier charge scrutiny, ideally before the charge is laid at Court. This suggestion has been positively received by the New Zealand Government, but implementation is dependant on further "policy and design work as to the practical and financial implications" of the proposal: see Ministry of Justice: Government

objectivity.[86] In addition, young or inexperienced officers may have chosen arrest over more appropriate options.[87] Cases also may have been inadequately reviewed by police in the early arrest and charging period. The police may have allowed cases that are trivial, better suited to cautioning, not in the public interest or with evidential problems to proceed to prosecution.

The prosecutor therefore has the crucial role of ensuring that only valid cases proceed to trial. Automatic prosecution, without review, would be inappropriate and oppressive.[88] It may decrease public confidence in the system and create confusion, frustration and stress for the parties involved. Lastly, it is inefficient, clogging the courts with unnecessary cases.[89]

To a certain extent, these principles are reflected in the Solicitor General's Guidelines. These guide prosecutors when making decisions, including whether to prosecute.[90] There are two limbs to the Guideline test:[91]

- *Prima facie case.*
  Before going forward with a prosecution, the prosecutor must be satisfied that "there is admissible and reliable evidence that an offence has been committed by an identifiable person". [92] The next question is whether the evidence is strong enough to establish a prima facie case i.e., if a jury accepted the evidence, could they find guilt beyond a reasonable doubt.[93]

- *Public Interest.*
  The second limb is "whether, given that an evidential basis for the prosecution exists, the public interest requires the prosecution to proceed".[94] This is a more stringent test and includes a range of factors, including the likelihood of conviction,[95] the seriousness of the offence, mitigating and aggravating circumstances, availability of alternatives, and the circumstances of the defendant and victim.[96]

The Police General Instructions also give additional guidelines in regard to the prosecution of different offences. Following review, a prosecutor may choose to continue with the prosecution or alternatively seek leave from the Court to modify the charge or withdraw the case.[97]

As aforementioned, it is important that police prosecutors adhere strictly to their independent review function. However, the Commission noted that "officers of

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Response to Law Commission Report on Criminal Pre-Trial Processes – Justice Through Efficiency www.justice.govt.nz/pubs/reports/2006/govt-response-law-commission-criminal-pre-trial/chapter-4.html para 25 (at 25 August 2006) and New Zealand, Law Commission, *Law Commission Report 89*, supra note 46, sections 2 and 3.

[86] See Ashworth, supra note 13, 74-77 on police culture and Part IV A 2 (a) of this article.

[87] New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, para 114.

[88] Savage, supra note 24, 99, 101, 102.

[89] Ibid 102.

[90] Crown Law Office, *Briefing Paper for the Attorney General* (2002), supra note 68.

[91] Crown Law Office, *Guidelines*, supra note 30, para 3.

[92] Ibid para 3.1.

[93] Ibid.

[94] Ibid para 3.3.1.

[95] Ibid.

[96] Ibid para 3.3.2.

[97] Miller, *1 February 2006* supra note 55 and New Zealand Law Commission, *Commission Report 89*, supra note 46, para 22.

the prosecution section seldom have the opportunity to review a case".[98] This failure is attributed to high workloads.[99] Further, when review is possible, it is uncertain how closely the police follow the prosecution Guidelines.[100] The Commission agreed that police use of the Guidelines is "not consistent from place to place or time to time".[101] Overseas studies suggest there is also a reliance that most cases will be relatively simple and assuming that the police have acted sensibly and professionally in regard to charge, any review need only be superficial.[102] Furthermore, perhaps due to a lack of independence, some prosecutors seem unduly influenced by the charging officer's preference, which also reduces the depth of their review.[103]

In light of this, how are prosecutors making decisions? One academic suggests that the submission of a report by police leads to "a strong presumption in favour of prosecution" on the logic that otherwise it wouldn't have been issued to them.[104] The Commission reinforces that a tendency exists for almost automatic prosecution post arrest.[105] Yet this approach is not in line with the intended purpose of prosecutorial review. It fails to satisfy the need for a thorough and independent examination of the merits of a case and, as such, may lead to serious injustice.

Accountability and Control over the Decision to Prosecute

Assuming that the aforementioned evidence is correct, it appears that police prosecutors are not adequately fulfilling their function as a review mechanism of the decision to prosecute. It is worth considering whether additional accountability mechanisms could increase prosecutors' adherence to their role, or provide a supplementary review function. Accountability may include examination of policies, rules and guidelines, and scrutiny of compliance with them.[106] It can also include supervision, a transparent and open decision-making process and provision of public avenues for challenge.[107]

The decision to prosecute is potentially subject to a number of such controls. These include the Attorney General, Solicitor General, the judiciary, judicial review, tort and the Police Complaints Authority.[108] These mechanisms are largely expensive, time-consuming legal or administrative actions, often with restricted scope. Therefore, they are unable to provide much practical control over the police decision to prosecute. This is why review by the prosecution section of the police decision to prosecute is so important. When errors occur in summary cases they can be difficult to remedy later, as "[t]hese are inevitably going to be costly and time

[98] New Zealand Law Commission, *Preliminary Paper No 28,* supra note 6, para 315.
[99] Ibid para 162.
[100] Ibid para 377. See also New Zealand Law Commission, *Commission Report 89*, supra note 46, para 90-92 which notes that minor cases, meeting evidential, but not the public interest requirements have been allowed to proceed to hearing.
[101] New Zealand Law Commission, *Preliminary Paper No 28,* supra note 6, para 315.
[102] Baldwin "Understanding Judge Ordered and Directed Acquittals in the Crown Court" [1997] Crim.L.R 536, 548.
[103] New Zealand Law Commission, *Preliminary Paper No 28,* supra note 6, para 118.
[104] Tombs, "Independent Prosecution Systems" in Zdenkowski, Ronalds and Richardson (eds) *The Criminal Injustice System* Vol 2 (1987) 98.
[105] New Zealand Law Commission, *Preliminary Paper No 28,* supra note 6, para 117.
[106] Ashworth, supra note 13, 84.
[107] Ibid.
[108] New Zealand Law Commission, *Preliminary Paper No 28,* supra note 6, 59-72.

consuming for the victims of injustice".[109] Accordingly it is better to improve the system and intervene early through a thorough and fair independent review.

New Zealand Law Commission Review of Criminal Prosecutions

Although the day to day conduct of prosecutions has remained relatively unchanged from that described above, there have been recent administrative changes in police prosecutions. These changes occurred following the Law Commission review of the New Zealand prosecution system between 1989 and 1997.[110]

In its discussion paper of 1997,[111] the Commission identified a number of defects in the system of that time. These included inconsistent prosecution guidelines, little accountability for prosecution decisions, lack of prosecution efficacy and the need for a clearer distinction between investigative and prosecutor functions.[112]

The Commission recommended the creation of a new autonomous and career-oriented agency, suggesting that this would solve some of the present problems.[113] As a consequence, a new Police National Prosecution Service ("PPS") was established on 1 July 1999. Its role was to provide for criminal prosecutions in the summary criminal and traffic areas, among others.[114] The decision to charge and selection of charges remained a decision for investigators.[115] However, prosecutors have the ability to review these charges' suitability and whether there is sufficient evidence, in accordance with the Guidelines.[116] They can also recommend further investigation if necessary and withdraw or modify charges.[117] Overall, this meant little change from the prior approach.

However, the Service is now administratively separate from other police branches. Prosecutors used to operate at a district level, within district control, but now the Service has a different, parallel chain of command.[118] Prosecutors are now responsible to the head of the PPS, who is responsible to the Police Commissioner.[119]

The PPS is also "career-orientated". Previously, for some officers, prosecution was an undesirable posting, completed merely for better career rounding before making a quick return to other police work.[120] While this still exists to some extent, there is a trend for more permanency.[121] It is also seen as a positive stepping-stone to Crown Solicitor work and the Police Legal Section.[122] Career development is encouraged through further legal training.[123]

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[109] Hogg, "Identifying and Reforming the Problems of the Justice System" in Carrington, Dever, Hoggs, Bargen and Lohrey (eds) *Travesty! Miscarriages of Justice* (1991), 267.
[110] New Zealand Law Commission, *Preliminary Paper No 28,* supra note 6, preface xi.
[111] New Zealand Law Commission, *Preliminary Paper No 28,* supra note 6.
[112] Ibid para 102 – 113.
[113] Ibid para 354.
[114] New Zealand Law Commission *Report 66, Criminal Prosecution* (NZLC R66, October 2000) 42 (*"Commission Report 66"*).
[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] Rongo, supra note 12.
[119] New Zealand Law Commission, *Commission Report 66*, supra note 114, para 114.
[120] New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, para 62.
[121] Rongo, supra note 12.
[122] Ibid.
[123] O'Shaughnessey, 21 September 2005, supra note 16.

IV ANALYSIS OF PROSECUTORIAL ROLE REQUIREMENTS

Independence and Impartiality

1 Introduction

Critiques of police prosecutions are partly based on concerns that police prosecutors are unable to be fully independent or impartial.[124] Although these concepts are closely related and often used interchangeably, each has a distinct meaning and requirements.[125] A person may be independent without being impartial and vice versa.[126]

(a) Independence

The word 'independence' focuses on the status or relationship of the decision-maker with others.[127] It reflects the idea of freedom from interference, control or allegiance with interested parties – whether from the executive, fellow police officers, the defence, the judiciary or victims.[128] "Independence involves both individual and institutional relationships."[129] For example, both the individual prosecutor and the Office of the Prosecutor must be independent.

(b) Impartiality

In contrast, impartiality refers to "the state of mind or attitude [of the decision-maker] in relation to the issues and parties in a particular case".[130] Impartiality involves the decision-maker having no personal interest in the case and "no preconceived ideas or bias".[131] It also includes treating all fairly and equitably.[132] Impartiality is therefore critical to upholding the defendant's right to due process.[133] While there are a number of tests for partiality or bias, they tend to focus on the likelihood of bias or whether a hypothetical fair-minded person would objectively suspect or gain an impression of bias.[134] The requirement of impartiality for decision-makers is therefore in line with

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[124] For example, see Corns, supra note 7, 1 and 22.
[125] *R v Valente* [1985] 2 SCR 673, 685 per Le Dain J.
[126] Alam, "Independence and Impartiality in International Arbitration – an assessment" (2004) Vol 1, Issue 2, Transnational Dispute Management para 3.3. See also supra note 125, 685 in regard to comments by Howland C.J.O.
[127] Ibid.
[128] Supra note 125, 686-687. See also Bugg "Accountability, Independence and Ethics in the Prosecution Practice" (Speech delivered at Keeping Justice Systems Just and Accountable – a Principled Approach in Challenging Times: The International Society for the Reform of Criminal Law 18th Annual Conference, Montreal, 8 August 2004).
[129] Supra note 125, 687 per Le Dain J.
[130] Ibid 687 [20] per Le Dain J.
[131] Supra note 125, 685 [14] per Le Dain J.
[132] De Los Reyes, "Case Comment: Appearance of Impartiality in the *Republican Party v White* Court's Opinion" (2003) 83 B.U.L Rev. 465, 471, citing Webster's New International Dictionary (2ed, 1950) 1247.
[133] Ibid 471.
[134] For examples of the various approaches see *R v Commonwealth Conciliation and Arbitration Commission, Ex parte Angliss Group* (1969) 122 CLR 546, 548-550, 553 (HCA) and *Goktas v Gio* (1993) 31 NSWLR 684 (CANSW). In different areas, one of these two approaches may have been

the general principles that justice should not only be done, but also be seen to be done.[135] Consequently, partiality – which can include bias or prejudice – may be actual or perceived. Actual partiality may be difficult to prove given institutional secrecy[136] and lack of clear evidence. One writer has emphasised this point, stating:[137]

> The question of bias is particularly insidious and difficult to detect, [...] even if a person, believes he or she is acting impartially and in good faith, his or her mind might be unconsciously affected by improper considerations that affect his or her judgement.

The *appearance* or suspicion of partiality is more common. In this regard, the issue is not whether any bias actually occurs, but rather the impression created.[138] It is accordingly irrelevant whether there was actual bias or prejudice. "Justice must be rooted in confidence: and confidence is destroyed when right minded people go away thinking: 'the Judge is biased'".[139]

Two particular groups in New Zealand have the potential to affect prosecutorial independence and impartiality. These are the executive and the police. It is generally accepted that New Zealand prosecutors are free from interference by the executive.[140] However, further consideration of how membership of the police impacts upon police prosecutors is required.

The Impact of the Police on Prosecutorial Independence and Impartiality

This issue relates to whether the organisation responsible for *investigating* criminal offences should also have the power to *prosecute* those same offences.[141]

Dr Chris Corns wrote that: "prosecutorial decision-making should be in the hands of an agency which is not only independent and impartial as a matter of fact, but also seen to be independent and impartial".[142] This statement highlights the need for both actual independence and impartiality and the *appearance* of it to promote confidence in the criminal justice system.

The potential for partiality or the appearance of partiality can easily arise where police are both the investigators and the prosecutors. This can be particularly relevant in cases such as traffic matters where often a police officer will also act as the main witness.[143] In contrast, actual partiality may occur due to occupational pressures, prosecutor loyalty to police colleagues and through adherence to the police worldview, which is explained in the following section.

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rejected. For a combined approach see that suggested by Lord Denning in *Metropolitan Properties Ltd v Lannon* [1968] 1 QB 577, 600.

[135] This principle is often attributed to the comments of Lord Hewart CJ in *R v Sussex Justices ex parte McCarthy* [1924] 1 KB 256, 259.

[136] Ashworth, supra note 13, 74-77 and Goldsmith, "Taking Police Culture Seriously: Police Discretion and the Limits of the Law" (1990) Vol 1, No 2 Policing and Society 91. This aspect is also explained in the later section on police culture.

[137] Leyland and Anthony *Textbook on Administrative Law* (5 ed, 2005), 390.

[138] Ibid.

[139] *Metropolitan Properties Ltd v Lannon* [1968] 1 QB 577 per Lord Denning MR cited in Wade and Forsyth *Administrative Law* (7 ed, 1994) 482.

[140] New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, para 314.

[141] Corns, supra note 7, 1.

[142] Ibid.

[143] Ibid.

(a) Police culture and its impact on prosecutorial independence and impartiality

When prosecutors are also police, they are at risk from undue influence by police culture: "a distinct body of values, attitudes, rules and practices which influences in various ways the manner in which police officers exercise their discretion".[144] This culture has been widely researched and documented, although its form and intensity varies between places and individuals.[145]

Professor Andrew Ashworth describes police culture as having four core aspects:

(i) High level of police solidarity [146]

Given the unique role of police in society – their authority and daily occupational dangers – it is not surprising that police tend to develop a sense of isolation.[147] Many feel like friends and family do not "understand and appreciate the rigo[u]rs of being a 'cop'."[148] As a result, police turn increasingly to their colleagues.[149] There is a strong "support for colleagues' decisions"[150] and an emphasis on trust. This aspect may also include a "blue code of silence" where loyalty to colleagues means incidents of police misconduct are not reported.[151] Overall, "police culture offers its members reassurance that the other officers [...] will defend, back up and assist their colleagues when confronted with external threats and that they will maintain secrecy in the face of external investigations".[152]

(ii) Macho image

A 'macho image' may be present, involving an emphasis on physical presence and a tendency towards alcoholic excess.[153] This can also include sexist or racist attitudes.[154]

(iii) Rule flexibility

Police culture incorporates the "idea that rules are there to be used and bent".[155] While laws give police the power to arrest and charge,[156] they may also be viewed as

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[144] Goldsmith, "Taking Police Culture Seriously: Police Discretion and the Limits of the Law" (1990) Vol 1, No 2 Policing and Society 91, 94.
[145] Ashworth, supra note 13, 75. For more information on police culture refer: Westmarland, "Police Ethics and Integrity: Breaking the Blue Code of Silence" (June 2005) Vol 15, No 2, Policing and Society 145, 161; Reiner *The Politics of the Police* (3 ed, 2000); Kleinig *The Ethics of Policing* (1996).
[146] Ashworth, supra note 13, 74.
[147] Ibid 74-75.
[148] Harrison, "Police Organizational Culture: Using Ingrained Values to Build Positive Organizational Improvement" (1998) Vol 3, No 2, Public Administration and Management Journal. Available at <http://www.pamij.com/harrison.html>.
[149] Ibid 5-6.
[150] Ashworth, supra note 13, 74.
[151] Cleave, "'Blue Code of Silence' Around Police Culture" *New Zealand Herald* (Auckland, New Zealand, 11 October 2005).
[152] Goldsmith, supra note 144, 93.
[153] Ashworth, supra note 13, 74-75.
[154] Ibid.
[155] Ibid.
[156] Ibid.

"impediments to proper police work".[157] Police face pressure from the public and media to get results and reduce crime,[158] as well as from senior officers and colleagues.[159] Yet there is a belief that "those expectations cannot be met when lawmakers fail to understand the realities of police work".[160]

(iv) Sense of mission

Lastly, police have been described as having a sense of mission.[161] "This is the feeling that policing is not just a job, but a way of life with a worthwhile purpose."[162] This sense of moral duty arises from the idea of serving society and 'the good' in a battle against criminal wrongdoers.[163]

Police culture is instilled in members through selection, training and operational work.[164] Candidates who possess qualities and traits similar to existing police have an increased chance of being hired.[165] Police solidarity is emphasised as recruits are taught about the danger of the job and the need to be suspicious of others.[166] Lastly, assimilation of the culture increases as recruits become operational police and are teamed with more experienced officers.[167] Researchers report some new recruits being told "in order to become a real policeman, he will have to forget everything he has learned in the classroom and conduct himself in a proper way – their way".[168]

In New Zealand, sworn police prosecutors are recruited as police officers and have undertaken police training.[169] As a result, they have spent approximately eighteen months to two years minimum as an operational 'beat' cop.[170] During this time each police officer will to some degree have adopted this police culture.[171] The aspects of police culture are generally inconsistent with a Minister of Justice role. It is the existence of this police culture that has resulted in the need for strict independence and adherence to prosecutorial responsibilities.

While many in the police are intelligent, diligent and conscientious, any influence of police culture cannot be tolerated or justified by prosecutors, as their conduct affects the rights of suspects – whose liberty, finances and reputation are at stake.[172] The problem is succinctly put by American Supreme Court Judge, Louis

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[157] Ibid.

[158] Newton, "The Place of Ethics in Investigative Interviewing by Police Officers" (1998) 1 The Howard Journal 56.

[159] Westmarland, above note 144, 161.

[160] Ashworth, supra note 13, 76.

[161] Ashworth, supra note 13, 74.

[162] Reiner, *The Politics of the Police* (3 ed, 2000), 89.

[163] Ashworth, supra note 13, 76.

[164] Harrison, supra note 148.

[165] Ibid.

[166] Ibid.

[167] Ibid.

[168] Webb and Westergren "The Detraining Syndrome" (Nov 1973) Police Chief 40 cited in Harrison supra note 148.

[169] Note: the concerns regarding police culture do not apply to the same extent to non-sworn police prosecutors as they have not trained or worked as operational police officers. However, institutional pressures and the need for an appearance of independence remain.

[170] Rongo, supra note 12.

[171] See footnote 169 above.

[172] This issue is further discussed in Ashworth, supra note 13, 83.

Brandeis: "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding."[173]

(b) Impartiality guidance for police prosecutors

Assuming that a police culture does exist in New Zealand, it would seem that sworn police prosecutors are vulnerable to its influence. However, the impact of police culture may be limited by educating prosecutors on the significance of the prosecutor's role and the ethical need for impartiality. Such training may be reinforced by a number of ethical and role guidelines for prosecutors.

In this section, the extent to which current New Zealand mechanisms provide such education and guidance will be examined. These mechanisms include the Solicitor General's Prosecution Guidelines, prosecutor training and Rules of Professional Conduct. In addition, "officer of the court" requirements, police policies, General Instructions and regulations will also be considered.

(i) Solicitor General's Prosecution Guidelines and prosecution training

As stated previously, the Solicitor General's Prosecution Guidelines apply to the review of decisions to prosecute by police prosecutors.[174] They deal mainly with sufficiency of evidence and contain little ethical or role guidance. They barely touch on impartiality, lack of self interest, upholding rights and interests of the defendant, victims and society, the adversarial model or the prosecutors' role.[175] Nor do the contents of the Basic Prosecutor Course or the Advanced Police Prosecutor Training, undertaken by police prosecutors, indicate any such training.[176] Instead, the two courses appear to focus on purely practical aspects of prosecution.

(ii) Rules of professional conduct

In general, police prosecutors are not bound by the New Zealand Law Society Rules of Professional Conduct. These rules are only applicable to barristers and solicitors.[177] However, the 19 percent of police prosecutors who do have legal degrees and are admitted as barristers and solicitors are covered by these rules.[178] The applicable Rules include Rule 9.01 that states a practitioner must prosecute "dispassionately and with scrupulous fairness".[179] Because the majority of police prosecutors are not covered by the Rules, most police prosecutors are not subject to the avenues of redress provided by the New Zealand Law Society such as supervision or the complaints and disciplinary tribunals.

[173] *Olmstead v US* 277 U.S. 438, 479 (1928) [Sup Crt].
[174] Crown Law Office, *Briefing Paper for the Attorney General*, supra note 68.
[175] Ashworth, supra note 13, 69-70.
[176] Course draft contents enclosed in Letter from Patricia O'Shaughnessey, Office of the Police Commissioner to Stephanie Beck, 27 September 2005. ("27 September 2005")
[177] New Zealand Law Society, *Rules of Professional Conduct for Barristers and Solicitors* (7 ed, 2004).
[178] O'Shaughnessey, 21 September 2005, supra note 16. Twenty-eight prosecutors out of a total 146 have legal degrees.
[179] New Zealand Law Society, supra note 177, Rule 9.01.

(iii) Officers of the court

It has been suggested that police prosecutors are still officers of the court and therefore owe a corresponding duty to the court.[180] If this suggestion were correct, police prosecutors would have a primary duty "to ensure the court is not misled and that court processes are not misused".[181] However, it is not clear what evidence there is to support this proposition, as unlike lawyers who swear an oath to the court under section 46 of the Law Practitioners Act 1982, police prosecutors do not appear to do so.[182]

(iv) Police policies, general instructions and regulations

Police prosecutors are also bound in behaviour and conduct by police policies, general instructions and regulations. Unfortunately, due to restrictions on public access to policies and general instructions, it is impossible to know the contents of these documents and the extent to which they moderate prosecution conduct.

The Police Regulations 1992 do not contain any explicit reference to the ethical conduct of prosecutors. Regulation 9(40) does however state that it is an offence to be negligent in the discharge of police duties.[183] In addition, regulation 9(42) prohibits any "act, conduct, disorder, or neglect to the prejudice of good order, morality, or discipline of the police".[184] These impliedly suggest that police must act morally and without negligence of their duties. For police prosecutors this could require strict adherence to the prosecutor's role. However, such links are relatively tenuous and it is uncertain whether these regulations would have much impact on the day to day conduct of police prosecutors.

(c) Errors of justice

As a result of the recognised lack of training and guidance on the role of a prosecutor, the capacity of such methods to fetter police culture in New Zealand is minimal. To further this discussion, it is worth considering the possible effects police culture has on the justice system and whether errors of justice may occur.

An error of justice occurs when an incorrect result is reached. This could mean that an innocent person is charged and found guilty,[185] or vice versa. It could also mean that due process rights were not upheld so that a result was not fairly or correctly reached. Typical errors are derived either through police or prosecutor action. A lack of impartiality or independence, influenced by police culture, could lead to errors of justice both in reviewing decisions to prosecute and in performing court functions.

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180 O'Shaughnessey, 21 September 2005, supra note 16.
181 Mount, supra note 25, 3.
182 O'Shaughnessey was unable to offer a firm basis for her comments at the time.
183 Police Regulations 1992 reg 9(40).
184 Ibid, reg 9(42).
185 Hogg, supra note 109, 234.

(i) Derived from police action

Errors may arise from police culture, discrimination and prejudice, or unethical police behaviour. Incidents of these may include distorting statements, suppressing favourable evidence,[186] illegal searches and fabrication of evidence.[187]

Lord Devlin observed that a police investigator does not have a quasi-judicial spirit.[188] That is not their role in the adversarial system, nor would they be as effective for society in apprehending and convicting offenders if that were the case.[189] He wrote: "[w]hen a police officer charges a man it is because he believes him to be guilty, not just because he thinks there is a case for trial".[190] Errors can arise from this belief in guilt, especially if erroneous.[191] Professor Mike McConville, a noted academic in the fields of police and criminal prosecutions, argued that once guilt has been decided by investigating officers, evidence that advances this result is gathered.[192] In contrast, opposing evidence causes uncomfortable doubts and is removed if possible – often by treating such evidence as mistaken.[193] The adversary system encourages such behaviour, as investigators seek to present the strongest possible case.[194]

Such behaviour by police may have a serious flow on effect on police prosecutors where there is a shared police culture. Therefore, problems with a case may be overlooked and prosecutors can be overly influenced by the police viewpoint. This effect is explained further below.

(ii) Derived from prosecution action

Errors of justice can also arise through unethical prosecution behaviour such as failing to disclose relevant evidence to the defence, failing to adequately review and failing to discontinue a weak case or a case not in the public interest.

Prosecutors may not discontinue a weak case or one that is not in the public interest out of a desire to show loyalty and maintain good relations with fellow police.[195] This is particularly relevant in situations where a police prosecutor decides not to remain permanently with the PPS, returning to operate alongside the colleagues whose work they had been judging. There may also be fear of a negative reaction from police.[196] Ashworth notes it takes a lot of nerve to tell police officers that a case is dropped and for many prosecutors, especially young and/or inexperienced, "it may be easier to accede to the police desire to 'run it'".[197]

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[186] Wilson, "Miscarriages of Justice in Serious Cases in Australia" in Carrington, Dever, Hoggs, Bargen and Lohrey (eds) *Travesty! Miscarriages of Justice* (1991) 9.
[187] Hogg, supra note 109, 236. A well-known New Zealand example of evidence tampering occurred in the case of Arthur Allan Thomas, where crucial evidence was fabricated. For more information on this case see: Yallop, *Beyond Reasonable Doubt* (1978).
[188] Devlin, *The Judge* (1979) 71-2.
[189] Ibid.
[190] Ibid.
[191] Wilson, supra note 186, 13.
[192] McConville, Sanders and Leng (eds) *The Case for the Prosecution* (1991) 201.
[193] Ibid 201-203.
[194] Ibid 181.
[195] New Zealand Law Commission, *Preliminary Paper No 28,* supra note 6, para 326, 328 and Ashworth, supra note 13, 78.
[196] Ashworth, supra note 13, 78.
[197] Ibid 193.

It is also difficult to deny cases which have developed considerable momentum and a large investment of police effort and time. Such cases come with an expectation that they will proceed to prosecution.[198] In addition, prosecutors may be in "agreement with the police view that the defendant deserves to be put through a trial".[199]

Weak cases may also continue as "[...] some prosecutors remain stubbornly of the view that a defendant may do the decent thing and plead guilty even though the prospects of conviction might look precarious on paper".[200] There also exists a view that because a large number of defendants do plead guilty, it may be a waste of time and energy to build a strong case every time.[201]

Some claim that prosecutors are reluctant to drop prosecutions because doing so is bad for police morale.[202] It has even been suggested that this could be one reason for keeping prosecutions within the police, as it ensures police can take advantage of the psychological benefits of prosecution.[203] Unfortunately, this is not a sound argument. Police lose prosecution control of indictable offences and seem to cope psychologically. In addition, low police morale should not be a reason for reluctance to discontinue a weak case or failing to uphold the rights of a defendant, nor to drop the impartial role of prosecutor. These values are more important.

Where the prosecutor is also a police officer, his or her objectivity may be compromised. Stace noted that "it is felt that a police prosecutor's primary allegiance is tied to the police ethic of conviction rather than the lawyer's ethic of justice".[204] However, John Murray, Chief Superintendent of Prosecution Services for South Australia suggests that even within a police department, prosecutors' detachment can be achieved.[205] He writes, "the police prosecutor in fact, tends to leave behind the investigator mentality and through time adopts the role of 'officer of the court'. The court requires it".[206] His view appears to be held by the minority.

The importance of prosecution independence and its effect on objectivity was discussed in the Supreme Court of Canada in *R v Regan.*[207] LeBel J noted that reports into significant Canadian miscarriages of justice, which sent innocent men to jail, had reiterated the importance of police and prosecutions separation.[208]

The *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin* also emphasised the Crown Prosecutors' lack of objectivity as a result of too close contact with the police.[209] Their relationship with the police "blinded them" so that they were overly influenced by evidence favouring the prosecution and were unable to objectively assess the reliability of evidence and witnesses.[210] These

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[198] Baldwin "Understanding Judge Ordered and Directed Acquittals in the Crown Court" [1997] Crim.L.R 536, 551.
[199] Ashworth, supra note 13, 78.
[200] Baldwin, supra note 198, 548.
[201] Ibid.
[202] Ashworth, supra note 13, 80
[203] McGonigle, supra note 64, 18-19.
[204] Stace, supra note 20, 144.
[205] Murray, "*The Paralegal Police Prosecutor – For How Long*?" (Paper presented at Australian Institute of Criminology Conference – Improving Access to Justice: the Future of Paralegal Professionals, Canberra,19-20 February 1990), 98.
[206] Ibid 99.
[207] Supra note 29.
[208] Ibid [66] 126.
[209] Ontario, *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin*, vol 2 (Toronto: Ministry of the Attorney General, 1998) 909-911.
[210] Ibid.

miscarriages occurred in a system unlike our own, where the police do not prosecute. It leads to the inference that our system is much more at threat from such results.

(d) Change to the PPS and subsequent effect on independence and impartiality

The Commission heralded the creation of the PPS in 1999 as a partial solution to independence and impartiality concerns.[211] This was achieved mainly through administrative separation. As a result, the PPS became a distinct, independent branch of the police. It is free from interference from the Investigative section of police and "[a]ny decision as to appropriateness of charges and whether to proceed or not now rests squarely with the PPS".[212] The next step is to then consider whether the creation of the PPS has actually solved impartiality problems.

While the PPS is now administratively distinct and prosecutors may feel a greater level of independence, the situation remains that police are prosecuting. This brings with it the inherent problems described earlier. For example, except for non-sworn prosecutors, the common police culture may remain due to indoctrination in police training and time spent as an operational police officer. Associated with this is a belief in guilt and a potential lack of objectivity. This leads to a greater likelihood of actual or perceived partiality and errors of justice. It seems unlikely that these administrative changes have created any real solutions to the issue of impartiality.

It is also unlikely that the public would see any change in the appearance of impartiality. Police prosecutors still wear a police uniform when prosecuting and in some cases are still based in the same building as the general police.[213] To the public, a different administrative line, departmental label, letterhead, and phone number do little for the appearance or reality of independence.

(e) Is there any real concern about independence and impartiality?

The Commission itself initially preferred the idea of a Crown Prosecution Service, separate from police, to solve the problems with impartiality.[214] However, it settled for the current approach mainly due to cost restrictions.[215] It seems that while the Commission now promotes the new system, its earlier preference is tacit acknowledgment that the new system is to some extent 'the poor cousin' and does not address fully, if at all, the issues of impartiality.

Submissions to the Commission in favour of a new Crown Prosecution Service, independent of police, were also made by some judges, the New Zealand Law Society and an ex-police officer among others.[216] These submissions all emphasised the need for real separation and independence.[217]

It is important to note that surveys of judicial satisfaction with police prosecutors, while giving only average results in prosecutor efficacy, are generally quite satisfied with their fairness and objectivity.[218] Some judges commented on the

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[211] New Zealand Law Commission, *Preliminary Paper No 28,* supra note 6, para 352.
[212] New Zealand Police News, "Police defend attack on integrity over Arden case," email enclosed in news release from Craig Tweedie to Joanne Charles and John Kelly, 29 September 2003 available at <http://www.police.govt.nz/news/release.html?id=1380> (at 5 September 2006).
[213] Rongo, supra note 12.
[214] New Zealand Law Commission, *Preliminary Paper No 28,* supra note 6, para 337.
[215] Ibid para 341.
[216] New Zealand Law Commissions, *Commission Report 66,* supra note 114, para 20.
[217] Ibid para 19.
[218] Evaluation Unit Office of the Commissioner New Zealand Police, supra note 15, para 2.3.1 – 2.3.2.

realism of prosecutors who would withdraw unjustified charges, however others noted that some cases were going further than they should, as prosecutors were not as objective as could be desired.[219] Judges noted that the prosecution needed more control of files and in some cases there was a reluctance to change or withdraw charges "because of the impact this might have on the officer in charge".[220] A real sense emerged that there was a large variety in prosecutor's ability, standards and approach.[221] So while a majority may be fulfilling their Minister of Justice role, some were not. These few individuals failing to fulfil their role will still affect a large number of defendants.

While the Crown Solicitors submitted against the establishment of a Crown Prosecution Service the evidence suggests they consider themselves to be a buffer between the police and suspect and that their independence was a protection of the citizen – again a tacit acknowledgment that one is needed.[222]

(f) Summary

While independence is desirable, it is inevitable that there will never be complete separation between investigators and prosecutors. When police are the investigators of offences and thus providers of information on which the prosecution relies, it is unrealistic to expect complete separation.[223] This problem cannot really be solved. It can however be reduced, by keeping an impartial mind in review. Also important are the need for strong ethical guidelines, clear illustrative guidelines on when to prosecute and an understanding of the role of the prosecutor.

Unfortunately the current system, despite the best intentions of police, is not one where independence and impartiality can easily reside. The Guidelines and training are weak on the role of the prosecutor and ethics. The Guidelines are also inconsistently applied, so that any public interest and evidential limits may be ineffective. The system also lacks an appearance of objectivity and arguably may not be impartial due to police culture and occupational pressures. The change to a new National Prosecution Service is a step in the right direction, but unfortunately does not go far enough in addressing the crucial problem of independence and impartiality.

Efficacy

1 Introduction

Efficacy is an important objective of any prosecution system.[224] A typical system will need to process an unremitting flow of defendants in an effective and timely manner. Prosecutors must be well trained and competent. They must conduct case reviews and advocate for the Crown while fulfilling a Minister of Justice role. If there is any deficiency in the performance of these functions it has a serious consequential effect on the quality of justice achieved. Defendants may proceed to trial needlessly or trials

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[219] Ibid 16-17.
[220] Ibid 37.
[221] Ibid 13.
[222] New Zealand Law Commission *Survey of Crown Solicitors: Summary of Findings* in New Zealand Law Commission, *Preliminary Paper No 28,* supra note 6, E18.
[223] Tombs, supra note 104, 99.
[224] New Zealand Law Commission, *Preliminary Paper No 28,* supra note 6, para 24.

may be extended in length due to insufficient preparation or experience. This can increase waiting times and the resource burden on the courts.

Police contend summary prosecution is a service they "perform competently" and seek to retain.[225] They have performed the role for many years and are able to process large numbers of defendants. Statistics for the year 2003-4 show the PPS to have prosecuted 129,441 people.[226] The number of charges made and consequently prosecutions brought are increasing due to changes in police policies and crime reduction strategies.[227] These include liquor bans, zero tolerance and 'anytime, anywhere' campaigns.[228] As prosecutors have such a high workload, their actions affect a large number of people. Because of this, it is important to measure the effectiveness and competency of police prosecutors.

This section will begin by analysing how prosecutors are selected and trained and the effect this process may have on prosecutors' ability, motivation and performance. Subsequently, comment is made on the operating environment of police prosecutors – the increasingly complex summary jurisdiction. The competence of police prosecutors will then be measured by considering the viewpoints of the judiciary and defence counsel. Finally, the effects of police prosecutors on the cost of prosecutions and on the adversarial system will be explained.

2 Police recruitment and early training

Traditionally, recruits have been selected on the basis of their potential ability as a patrol officer and the ability to meet the required knowledge, skills and attributes of that role.[229] Selection typically takes six weeks to six months and includes a variety of assessment methods, including:[230]

- assessment of compatibility with police competencies and values;
- physical tests such as running ability, press ups and grip strength;
- medical assessment;
- swimming ability and first aid skills;
- academic tests which measure verbal, numerical, abstract reasoning and comprehension;
- personality testing; and
- interviews.

Once selected, a 19-week training course is entered at the Royal New Zealand Police College in Porirua.[231] This involves learning driving, forensics, cultural awareness and road safety.[232] Dispute resolution, communication, teamwork and problem-solving skills are also taught.[233]

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[225] Stace, supra note 20, 139.
[226] Ministry of Justice, *Report of the Ministry of Justice - Baseline Review* (17 December 2004), 19.
[227] Ibid.
[228] Ibid.
[229] Murray, supra note 205, 98
[230] New Zealand Police, "Recruiting NEWCOPS: Assessment" <http://www.police.govt.nz/recruiting/assessment.html> (at 4 September 2006).
[231] New Zealand Police, "Recruiting NEWCOPS: The Role –Training" <http://www.police.govt.nz/recruiting/role.training.html> (at 4 September 2006).
[232] New Zealand Police, "Recruiting NEWCOPS: The Role –Training" <http://www.police.govt.nz/recruiting/role.training.html> (at 4 September 2006).
[233] Ibid.

Once this initial training has been completed, recruits are probationary constables for a two-year period.[234] During this time they must pass ten different competency areas and an Introduction to Criminal Law course.[235]

As mentioned previously, these initial selection tests and training are based on a correlation with the skills and competencies of a *patrol officer* and their job of patrolling, conducting initial police investigations and gathering information.[236] Patrol officers must also process persons in custody and respond to traffic situations.[237]

Recruitment, selection and skills training are not designed for the specific role of a police prosecutor. Interest and ability in such work is generally not considered. Murray commented that there was instead "an expectation that given the large pool of police available, some will develop an interest in this type of work".[238] This appears rather a 'hit and miss' approach. The fact that recruits have the strength, health and personality required to be a police officer does not always mean they have the ability or temperament to be a lawyer – a very different role. This is supported by Murray's research into police prosecutions in Australia.[239] He noted significant levels of absenteeism and stress-related illness among police prosecutors and concluded "some of that can be put down to square pegs in round holes [...]".[240]

In addition, researchers have noted that prosecuting is difficult and complex and consequently, "an unattractive career option" for some police.[241] The Commission also found at the time of review that prosecutions was generally an undesired posting, partly because opportunities for promotion were negligible.[242] The Commission also found "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".[243] As a consequence, questions arise as to what effects unmotivated prosecutors have on the efficacy of the criminal justice system.

It must be said however, that with the introduction of the PPS in 1999, the service has become more career-orientated. This means rather than being posted to the service, officers apply to join. This suggests that generally only those motivated and interested in the prosecuting role will apply. Nevertheless, the above concerns remain to some extent. Some officers still view the service as a temporary step in their career path.[244]

3 Prosecutor training

Training within the prosecution service is somewhat limited. Typically, newcomers will follow a more experienced prosecutor, adopting an apprentice-type 'learn on the job' approach.[245] They may also undertake the Basic Prosecutor Course and later the

[234] Ibid.
[235] Ibid.
[236] New Zealand Police, "Recruiting NEWCOPS: The Role – Job Description" <http://www.police.govt.nz/recruiting/role.jobdescription.html> (at 4 September 2006).
[237] Ibid.
[238] Murray, supra note 205, 98.
[239] Ibid 99-100.
[240] Ibid 100.
[241] Ibid 98.
[242] New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, para 62.
[243] Ibid.
[244] Rongo, supra note 12.
[245] Rongo, supra note 12.

Advanced Police Prosecutor training. Each is one week long and is taken by the Institute of Professional Legal Studies.[246]

The Basic course involves an introduction to courtroom terminology, etiquette and procedure.[247] It includes detail on submissions, opening addresses, examination in chief and cross-examination.[248] The Advanced program builds on the Basic course, focusing more on strategic preparation and analysis.[249]

Attendance at these courses depends on staff availability (around court commitments) and need.[250] Data from the Office of the Police Commissioner indicates that 121 of 127 sworn prosecutors have undertaken the Basic course, and only 24 the Advanced training.[251] This indicates that for most sworn prosecutors, a one week basic course is the extent of their prosecution training.

Dr Chris Corns argues that this minimal legal training "must impact upon the ability of the police to make informed and accurate judgements concerning matters of evidence and more generally, the appropriateness of proceeding with certain charges".[252] Murray also argued that police prosecutor training is inadequate.[253] Given the limited amount of training, it is likely much is learned on the job. This is of concern in prosecutions, where there is much at stake for all those involved in the process.

Since the Commission review and the change to the PPS there has been greater encouragement of police prosecutors to undertake legal training, in the hope of improving standards. Further training may include a law degree, Certificate in law, Diploma in law or post graduate study in any field.[254] Non-sworn prosecutors are also encouraged to attend courses run by legal organisations.[255]

At present, it appears that not many prosecutors have undertaken such further training. The PPS has been in operation for six years and yet only seven percent of sworn staff have legal degrees.[256] Three prosecutors are currently undertaking law degrees.[257] It has been suggested that such extended training is not always justified because a number of staff will transfer back to operations.[258] Yet because of the importance of the role, ongoing professional development is warranted, both for short and long term practitioners.

(a) Comparison of police prosecutor training to that undertaken by lawyers

A law degree is typically a four-year, full time university course,[259] and includes a number of important aspects necessary to being a competent prosecutor, for example

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[246] O'Shaughnessey, 21 September 2005, supra note 16.
[247] O'Shaughnessey, 27 September 2005, supra note 176.
[248] Ibid.
[249] Ibid.
[250] Rongo, supra note 12.
[251] Email from Patricia O'Shaughnessey, Office of the Police Commissioner to Stephanie Beck, 9 December 2005.
[252] Corns, supra note 7, 22.
[253] Murray, supra note 205, 98.
[254] O'Shaughnessey, 21 September 2005, supra note 16.
[255] Ibid.
[256] Ibid. At the time of writing, nine have legal degrees. In part, this number of legal degrees among prosecutors may be due to the four year length of the degree.
[257] O'Shaughnessey, 9 December 2005, supra note 251.
[258] O'Shaughnessey, 21 September 2005, supra note 16.
[259] Law Undergraduate Handbook (2005) The University of Auckland.

teachings as to New Zealand's legal system and legal method.[260] Legal method involves statutory interpretation, case analysis and principle-based reasoning. A law degree also teaches research skills, fact analysis, opinion writing, and advocacy. It involves in-depth study and assessment of subjects such as criminal and public law, criminal procedure, evidence, and legal ethics.

Furthermore, after a law degree is completed, to become a Barrister and Solicitor a graduate must complete a Professionals Course.[261] This usually takes 13 weeks onsite at a training facility or 18 weeks in the online version.[262] It covers advising, analysis, drafting and research.[263] The training incorporates trial preparation and advocacy.[264] Interviewing, mediation, negotiation and professional responsibility are also taught.[265]

While police prosecutors do receive some training, it cannot be compared to the length and depth of training given to law students.

Although it is likely that police prosecutors do gain knowledge of the criminal law through their experience as patrol officers, mere knowledge of the relevant law does not necessarily mean that those prosecuting it will be effective. Investigation and fact analysis are different skills to arguing in court and preparing cases. Prosecuting involves skills such as timing, presentation of facts and case theories, advocacy and cross-examination of witnesses.

4 Prosecuting in the summary jurisdiction

From the foregoing we have seen that police prosecutors are originally selected and trained for operational police duties. In addition, further training for prosecutorial duties is of relatively short duration. Given these factors, one may question the impact of such beginnings on police prosecutors' ability to operate successfully in the summary jurisdiction.

In most cases a defendant will plead guilty, or fail to appear.[266] In this situation it is clear a police prosecutor "can fairly and effectively deal with those cases and present the facts to the Court".[267] It is generally in regards to defended cases that efficacy concerns arise.[268]

Murray paints an interesting picture of police prosecutors in the context of a defended case.[269] Typically, a police prosecutor only has a short time to prepare due to high workloads. Often, the officer of the day is seeing the file for the first time.[270] In court, they may be opposed by experienced senior counsel.[271] Hiring such

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[260] Ibid.

[261] In accordance with the Professional Examinations in Law Regulations 1987, to be admitted to the High Court as a Barrister and Solicitor, a candidate must have passed an approved LLB or LLB (Hons) degree and have completed satisfactorily an approved Professional Legal Studies course. Post 2000, students must also have passed a legal ethics course. For more information see: Auckland District Law Society website at <http://www.adls.org> (at 30 January 2006). In accordance with the Law Practitioners Act 1982 s46 a candidate must also be of good character and a fit and proper person.

[262] Institute of Professional Legal Studies, *2006 Course Application: Information and Form.*

[263] Ibid.

[264] Ibid.

[265] Ibid.

[266] Stace, supra note 20, 145.

[267] Savage, supra note 24, 106.

[268] Ibid.

[269] Murray, supra note 205, 97.

[270] Evaluation Unit Office of the Commissioner New Zealand Police, survey, supra note 15, 22.

[271] Murray, supra note 205, 97.

qualified lawyers is not uncommon, even for 'simple offences,' as prosecution can have significant consequences for the individual involved.[272]

Issues of law and fact in summary cases can be complicated and legal battles are becoming more intense as increasingly complex and intellectual arguments are applied.[273] Some even suggest that there is even more technical argument in the lower courts due to "the absence of the jury," making life even more difficult for an unprepared police prosecutor.[274] Murray concludes that despite the more serious crimes taking the indictable path, "technical skills and knowledge are still required for the summary jurisdiction".[275] As a result, some police prosecutors are increasingly out of their depth and although complex cases can be referred to Crown Solicitors, this is generally rare.[276]

5 Measuring efficacy

The complexity of the summary jurisdiction and lack of appropriate selection and training accordingly provide obstacles to the successful performance of prosecution duties. Given these obstacles, it is necessary to examine how effective police prosecutors actually are. There are several ways in which prosecution efficacy can be measured, including the viewpoints of the judiciary and the defence.[277]

Evidence tends to indicate two ability levels of police prosecutors. In the first instance, some prosecutors develop skills rivalling experienced members of the bar.[278] Generally, this is through "dedication, intelligence and aptitude".[279] These prosecutors typically experience "pride attached in doing a difficult job well."[280] In many cases they have gained such skill through experience or have involved themselves in further training. However, there are many others who do not achieve such levels of ability and expertise. It is possible that some lack the motivation to achieve it at all.

(a) Judicial satisfaction surveys

Surveys of judicial satisfaction support this finding of significant variation in prosecutorial performance.[281] One judge commented that "[s]ome are very fair and competent. Others can best be described as bumbling, unyielding, or incompetent".[282] Another wrote "[a]part from the exception generally Police non-legal prosecutors do not perform as well as a trained, experienced lawyer".[283]

Overall, in 2001-2002, 15 percent of the judiciary were very satisfied, 66 percent only satisfied, 18 percent were neutral, and two percent dissatisfied with police prosecutions.[284]

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[272] Ibid.
[273] Rozenes, supra note 17.
[274] Murray, supra note 205, 97.
[275] Ibid.
[276] Stace, supra note 20, 139.
[277] For more information on the standards used to judge the effectiveness of police prosecutors, see: New Zealand Law Commission, *Preliminary Paper No 28,* supra note 6, 177-183. Baldwin, supra note 198; McConville, supra note 192, chapter 8; and Stace, supra note 20.
[278] Murray, supra note 205, 98.
[279] Ibid.
[280] Ibid 100.
[281] Evaluation Unit Office of the Commissioner New Zealand Police, supra note 15, 21-22.
[282] Ibid 39.
[283] Ibid 35.
[284] Evaluation Unit Office of the Commissioner New Zealand Police, supra note 15, Table 2.2.4.

The data suggests approximately 50 percent of police prosecutors are very good or good in advocacy, appropriateness of charges and knowledge of the law. Around 60 percent achieve very good or good in presentation of evidence and 70 percent of police prosecutors reach those levels regarding knowledge of procedures.

These statistics can also be read in the reverse, revealing that 50 percent, 40 and 30 percent of police prosecutors are average or poor in those areas. Real improvements are needed, especially in advocacy, appropriateness of charges and knowledge of the law. These efficacy problems may reflect the lack of extensive legal training received by prosecutors.

(b) Defence lawyers

Defence lawyers also have court contact with police prosecutors, and are in a position to judge their effectiveness. While little concern has been expressed openly by defence lawyers, this could be attributed to it not being in their best interest to expose inept prosecutors.[285] A prosecutor who allows weak cases to proceed to trial provides a defence lawyer with clients and a case the lawyer is more likely to win. This leads to the conclusion that prosecution ineptitude in court can only be to the advantage of a defence lawyer, giving them little to complain about.

6 The effect of police prosecutors

Given the numerous concerns regarding the efficacy of many police prosecutors, it is necessary to consider the subsequent effect on the cost of prosecutions and the adversary system.

(a) Effect on the cost of prosecutions

One of the main arguments made by the Commission in supporting the creation of the PPS over a prosecution service distinct from police, was that current police prosecutions were not excessively expensive and were reasonably effective.[286] Yet if the PPS is not as effective as previously thought, then it may not be as economical as believed.

Michael Rozenes, former Commonwealth Director of Public Prosecutions, states such financial expediency claims are "illusionary".[287] He suggests that police prosecutors allow for weaker, less promising cases.[288] This is possible through lack of thorough review in line with the Guidelines and impartiality concerns. Such cases are likely to increase costs.[289] Costs mount due to prosecution time and resources spent preparing and presenting a case. Any court time also involves hidden costs such as judicial time, support staff, security staff, administration costs, longer waiting times and room use. In addition, when using police officers as witnesses, they are removed from important operational duties. These all place an increased burden on the justice

[285] Corns, supra note 7, 22.

[286] New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, para 314 and 313.

[287] Rozenes, supra note 17.

[288] Ibid.

[289] An extreme case of rising costs can be seen in Victoria, Australia. Due to high workloads, police prosecutors could not attend to cases. Their cases were therefore struck out and costs awarded against the police. This added $1.62 million in 2003-4 to the cost of police prosecutions. See Farrah Tomazin "Police lose the plot in courts" *The Age* (Australia, 11 February 2005).

system. Unnecessary cases also have a wider economic effect on witnesses, the defendant and their supporters. Many may need to take time off work to attend court and defence counsel will be required. For those that cannot afford such counsel, the costs of legal aid fall on the government.

(b) Effect on the adversarial system

The adversarial system is reliant on having independent, competent advocates for the Crown and defence.[290] A weak prosecution service may imbalance this system. For example, judges have noted some police prosecutors failing to present strong arguments – "a prosecutor should not 'go overboard' but something more than simply putting the complainants' evidence to the defendant would help".[291] Judges also found that only some prosecutors would choose to make prosecution submissions in response to defence submissions.[292] Failing to do so may tilt the advantage towards the defence.

7 Summary

While some police prosecutors achieve high standards of professionalism and competency, judicial satisfaction surveys indicate that others are achieving only poor or merely adequate levels. Failing to achieve satisfactory efficacy levels could be attributed to the methods of recruitment and training, as well as the increasing demands of the summary jurisdiction. This weakness can have consequential effects on costs and the adversary system. Change to a career-orientated PPS and encouragement of further training is likely to have made some improvements in efficacy. This should increase in time as more and more prosecutors benefit from training. At present, however, it appears that for a number of reasons few individuals are actually taking up such initiatives.

V ANALYSIS OF PROSECUTION REFORM

Introduction to Reform and Arguments against Change

The objectives of a prosecution system are to bring offenders to justice, while also protecting their due process rights and reducing errors of justice.[293] A prosecution system must also be fair, consistent and effective.[294] Given the concerns regarding accountability, use of guidelines, impartiality and efficacy, it is arguable that despite the introduction of the PPS, New Zealand has still not gone far enough in improving summary prosecutions or in meeting these objectives. However, despite the deficiencies in the current system, various groups still advocate against change. Generic arguments against change are detailed below, while others which are more specific to various options for reform are detailed in later sections where appropriate.

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[290] Stace, supra note 20, 152.
[291] Evaluation Unit Office of the Commissioner New Zealand Police, supra note 15, 25.
[292] Ibid 40.
[293] New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, para 23, 24 and 31
[294] Ibid.

1 Police desire to retain the prosecution function

The police particularly insist on retention of their function as criminal prosecutors.[295] They are reluctant to relinquish this role, even though police conduct of summary prosecutions was never a planned role or core function of the police.[296] Indeed, no statute, including the Police Act 1958, actually confers this prosecution power on police.[297] Rather the power has evolved as such for 'administrative convenience'[298] and in imitation of the former English approach. It has been described as an "historical hiccup".[299] Corns argues, "the transfer of that [prosecutor] function should be regarded as a form of restoring the police to their original model, rather than the loss of a prized role".[300] The fact that New Zealand has always had police prosecutions at a summary level and it is an accepted practice is not necessarily a valid reason to resist change.

2 Complacency regarding the quality of summary justice

Another reason reform is resisted is the existence of a real ambivalence towards the quality of justice in the summary jurisdiction.[301] In part, this may be due to an "ideology of triviality"[302] regarding summary prosecutions – the idea that this jurisdiction "is unimportant and not deserving of pure principles of justice as they apply to proceedings in the higher courts".[303] This complacency is supported by public sentiment of waging a "war against crime" in which "the public accepts a few miscarriages in order to win the war".[304] Yet complacency can also be considered a threat to justice.

3 Belief that summary penalties are minor

Many consider that summary penalties are relatively minor in comparison to indictable – a fine or short stay in prison. As a result, if a miscarriage of justice occurs, these minimal consequences are not worth the expense and time involved in a change to the current system. Yet this conceptualisation is misleading, as summary justice also has significant effects. Both prosecution and conviction have "enormous symbolic power".[305] The potential for condemnation and loss of reputation is significant. One author has emphasised "to the accused it is an instrument of terror".[306]

For an alleged offender, prosecution and possible conviction can also mean great expense.[307] Prosecution and trial requires court costs and the retention of a

[295] New Zealand Law Commission, *Commission Report 66*, supra note 114, 13.
[296] Corns, supra note 7, 2.
[297] *Laws of New Zealand*, supra note 74, para 60. The prosecution power is thought to arise from the police general authority to investigate, detect crime, and arrest offenders.
[298] Corns, supra note 7, 23.
[299] Ibid 2.
[300] Ibid.
[301] See comments by Corns, supra note 7, 24.
[302] Corns, supra note 7, 24. Corns cites McBarnett *Conviction-Law, The State and the Construction of Justice* (1981).
[303] Corns, supra note 7, 24.
[304] Wilson, supra note 186, 2.
[305] Tadros, *Criminal Responsibility* (2005) 1.
[306] Ulliver, supra note 41, 1703.
[307] Savage, supra note 24, 97.

defence lawyer. The process can also involve significant stress and anxiety.[308] Time away from employment and the stigma involved in prosecution can cause loss of occupation. Furthermore, there are likely personal, social and family complications.[309]

In addition, imprisonment requires loss of liberty and autonomy.[310] No matter how short a time, imprisonment is a serious penalty. One academic notes "the harm done by incarceration is not trivial".[311] It can involve not only loss of material comforts and personal security, but exposure to predators.[312] "The rate of victimisation – assault, robbery, extortion – of prisoners is much higher than that of the general population".[313]

If convicted, the offender gains a criminal record. Such a record can leave a lasting stain on a person's life. A criminal record affects the ability to travel overseas[314] and has been found to reduce future employment opportunities considerably.[315]

This said, the introduction of the Criminal Records (Clean Slate) Act 2004 in New Zealand allows eligible individuals to conceal their convictions in some circumstances. To be eligible, individuals must only have minor convictions, have been conviction free for seven years and never been sentenced to a custodial sentence or a sexual offence.[316] This statute could apply to those convicted of summary offences and punished by fine only. However, this is not a complete solution to the problems of a criminal record, given that seven years is still a long time to wait, and disclosure of the criminal record is still required by foreign governments.[317]

4 Minimal evidence of summary-level errors of justice

Lastly, it is argued there is little documentation of errors of justice at summary level, suggesting no need for concern.[318] Yet this could be due to a general lack of research in this area and little media awareness of the problem. The low profile is likely exacerbated by the above misconception of severity, so that any errors are considered less newsworthy.[319] In addition, wrongly convicted defendants are generally "less respectable" and "less able to mobilise public support for their cause".[320] They may also have few resources to make a complaint.[321] Tom Molomby, who has researched errors of justice, suggests it is likely there are problems at this summary level as "when there is less at stake, there are generally less skilled lawyers, less skilled

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308 Ibid.
309 Ibid. See also: Ashworth, supra note 13, 180 and Hogg, supra note 109, 239.
310 Golash, *The Case Against Punishment. Retribution, Crime Prevention and the Law* (2005) 2.
311 Ibid.
312 Ibid 2-3.
313 Ibid 3.
314 Tadros, supra note 305, 2.
315 Pager "The Mark of a Criminal Record" (March 2003), Vol 108, No 5, American Journal of Sociology 937-75, 957.
316 For further information about the Act see: New Zealand Justice Department, *Criminal Records (Clean Slate) Act 2004*: What does it mean for me? (November 2004) <http://www.justice.govt.nz/pubs/other/2004/clean-slate/english-clean-slate.pdf> (at 5 September 2006).
317 Ibid.
318 Molomby "Miscarriages of Justice in Britain; The Guildford Four and the Birmingham Six" in Carrington, Dever, Hoggs, Bargen and Lohrey (eds) *Travesty! Miscarriages of Justice* (1991) 21.
319 Ibid.
320 Hogg, supra note 109, 234.
321 Molomby, supra note 318, 21.

judges, no legal aid [...]".[322] Such an argument is increasingly relevant given Sir Thomas Thorpe's recent findings that the number of errors of justice in New Zealand is underestimated.[323]

In summary, considerable evidence exists suggesting that summary justice is important and has far-reaching effects. Furthermore, in accordance with issues associated with impartiality and efficacy, it is likely errors are being made within the system. It is therefore necessary to consider alternatives and enhancements to the current regime.

Different Prosecution Approaches

Within the common law world, there is a wide array of prosecution approaches. Different systems tend to vary on three aspects:[324]

- who investigates the offence
- who initiates the prosecution
- who conducts the prosecution

1 Police domination over all aspects

This approach currently exists in New Zealand. Police investigate an offence, decide whether to prosecute and determine the charge. The PPS, generally also police, review the case and conduct the prosecution if it is a summary offence.[325]

2 Police and prosecution equal control

This approach moves away from police domination to an independent prosecution service – while still allowing police to retain some power. This system has been applied in England.

Before the mid 1980s there were three prosecuting agencies in England. These were regulatory bodies, the police and the Office of the Director of Public Prosecutions ("DPP").[326] In 1981, a Royal Commission on Criminal Prosecution recommended a change from extensive police involvement in prosecution.[327] In 1985, the Crown Prosecution Service ("CPS"), an organisation independent from police, was created.[328] It was headed by the Director of Public Prosecutions and accountable to the Attorney General.[329]

The English police retain control over investigations and the initial decision of charge and whether to prosecute.[330] This decision is later reviewed by the CPS, who may decide to proceed as charged, or modify or withdraw the charges.[331] The CPS has limited powers, as it cannot institute proceedings itself, instruct police to investigate

[322] Ibid.
[323] Taylor, "Still working for justice", *The New Zealand Herald* (Auckland, New Zealand January 21 2006) B4.
[324] Stace, supra note 20, 139.
[325] Stace, supra note 20, 138-9.
[326] Ashworth, supra note 13, 177.
[327] Ibid.
[328] Ibid 178.
[329] Ibid 178.
[330] Ibid 177.
[331] Ibid 177.

or question any person.[332] However, it can advise police on arrest or charge.[333] The Royal Commission considered this approach as a cooperative one, in which the police and the CPS would have "unity of purpose but independence of responsibility [...]"[334]

3 Greater power to prosecutors

In this third approach, police investigate independently from prosecutors. Unlike the previous two models, however, prosecutors then initiate the prosecution by deciding whether or not to prosecute. In practice, police may also make this decision, which may be 'rubber stamped' by independent prosecution services.[335] Finally, the prosecutor conducts the prosecution.[336]

This approach is generally taken in the United States of America and in Canada, with variations existing in some states and provinces.[337] It is also common in European inquisitorial systems.[338]

4 Prosecution domination over all aspects

A final approach sees police investigating an offence, subject to the superior control of the prosecutor.[339] However, in routine matters, investigation is generally left to the police, without prosecutorial interference. [340] The police arrest and charge, also under the control of the prosecutor, but the prosecutor, a qualified lawyer, decides whether to prosecute and also conducts the prosecution.[341] Aspects of this approach are evident in Scotland and the Netherlands.[342]

Potential Changes to the Current New Zealand Approach

Although there are a number of prosecution approaches described above, in most common law countries there is a trend away from police retention of prosecution powers. Modern approaches tend to favour more outwardly independent, impartial services, employing legally qualified professionals.[343] Given this trend, some options for reform are detailed below:

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[332] Ibid 178.
[333] New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, Appendix I, 187.
[334] United Kingdom Royal Commission on Criminal Procedure *Report* (HMSO, London, 1981) ch 7.8 cited in The Legal Secretariat to the Law Officers *Chapter 4: Philips Principle – its Origin and Application* <http://www.1slo.gov.uk/procrev/chapter_4.htm> para 4.10 (at 5 September 2006).
[335] Stace, supra note 20, 141.
[336] Ibid 140.
[337] Ibid 141. For examples of variations see: New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, 187 and Statistics Canada *Overview of the Prosecutions Personnel and Expenditures Survey* <http://www.statcan.ca/english/sdds/document/3322_D2_T9_V1_E.pdf> (at 5 September 2006). The latter explains that in Quebec, British Colombia and New Brunswick, police propose charges to a prosecutor, who decides what charge will be laid and whether diversion or further investigation is appropriate. In other provinces and territories, police can lay charges on their own, which are subsequently reviewed post charge by prosecutors.
[338] Stace, supra note 20, 141.
[339] Ibid 140.
[340] Ibid. Stace cites Moody and Tombs *Prosecution in the Public Interest* (1982).
[341] New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, 187.
[342] Stace, supra note 20,140 and New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, 187.
[343] Stace, supra note 20, 143.

1 An independent review agency

A variation on the current approach could be to create an independent review agency which reviews police decisions to prosecute in accordance with guidelines, before returning the case to the police for prosecution.[344] Potentially, it could also review complaints.[345] This may reduce actual impartiality because weak cases will be eliminated by an agency with no police allegiances. However, this approach does not address efficacy concerns in the conduct of prosecutions nor the appearance of impartiality – unless there is extensive public awareness of the agency and its role.

2 A privatised prosecution system

There is potential for police to 'contract out' review and conduct of prosecutions, allocating such tasks to any counsel they chose. The Commission noted that contracting out is somewhat similar to current Crown Solicitors who are often lawyers in private practice.[346] This would therefore seem to be an "extension, rather than an innovation".[347] This approach could increase prosecution efficacy and impartiality as private barristers would have the necessary expertise and independence to conduct summary prosecutions.

There are however, disadvantages to this approach. In such situations there can be reluctance by contractors to drop weak cases due to a fear of losing commissions or destroying their relationship with their paymasters.[348] Contracting out may also lead to a lack of central, coherent control and consistency.[349]

3 Establishment of a Crown Prosecution Service ("CPS")

A preferred option for change, already considered favourably by the Commission would be the establishment of a Crown Prosecution Service similar to that created in England.[350] Such a Service would employ salaried Crown Solicitors, responsible to a Director of Public Prosecutions, Solicitor General and, ultimately, the Attorney General.[351] It would have the power to prosecute both summary and indictable offences, control prosecutions and discontinue cases if necessary.[352]

Unlike the approach in Canada and the United States of America, the Commission suggested that the police would still be responsible for investigatory and charging decisions.[353] The basis of this is that the "initial decision to charge is part of the investigative function and therefore as a general rule should remain a function of the police".[354] Rozenes agrees, stating:[355]

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[344] McGonigle, supra note 64, 59.
[345] Ibid.
[346] New Zealand Law Commission, *Preliminary Paper No 28,* supra note 6, para 331.
[347] Ibid.
[348] Baldwin, supra note 198, 552-553.
[349] New Zealand Law Commission, *Preliminary Paper No 28,* supra note 6, para 335.
[350] Ibid para 333.
[351] Ibid para 337.
[352] Ibid para 337-338.
[353] New Zealand Law Commission, *Commission Report 66,* supra note 114, para 114.
[354] Ibid para A18.
[355] Rozenes, supra note 17.

> [In arrest matters] it would be neither practicable, nor appropriate to require that the decision to charge must be made by a prosecutor. [...] Although arrest and charge are distinct stages in law, in practice they are part of the same process.

He added that prosecutorial involvement in charging decisions would also increase the risk of "the prosecutor becoming embroiled in the investigation".[356]

In addition, it is suggested the prosecutor would have less knowledge than investigators of the evidence and wider circumstances of the case when deciding whether to charge and what charges were appropriate.[357]

(a) Arguments for the introduction of a CPS

Many of the arguments for the introduction of a CPS have already been made in the course of this article. The separation from police is an obvious advantage of a CPS approach as there would be greater prosecution independence, both actual and perceived. This could lead to growth of community and judicial "confidence in the integrity of the criminal justice system".[358] It would also be able to provide clear policies and consistency of decisions. Having a national prosecution service would also mean it would match the national police force.[359] With the use of legally qualified practitioners, some of which could come from the PPS, efficacy should also increase.

(b) Arguments against a CPS

However, there have been a number of arguments against the introduction of lawyers to take over the police prosecution role. These include doubts about whether lawyers would work under current prosecution working conditions and whether they would be too cautious in their approach to cases. Concerns are also raised regarding the quality of legal staff a CPS might attract and the establishment costs involved. Each argument will be detailed in turn.

(i) Prosecution working conditions

Police prosecutors currently operate under high workloads, with minimal preparation time or notice.[360] In Murray's view they can be instructed to do so because police run on a "quasi military format," where employees will do as directed.[361] He suggests most lawyers would refuse to operate under such working conditions.[362]Yet, such attention to cases could be a positive change, resulting in a higher quality of prosecutions and therefore a higher level of justice. In many surveys of judicial satisfaction, comment was made regarding the need for more time in preparation.[363]

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[356] Ibid.
[357] Ibid. However, in summons cases, prosecution consultation on charge may be pertinent.
[358] Corns, supra note 7, 26.
[359] New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, para 339.
[360] Evaluation Unit Office of the Commissioner New Zealand Police, supra note 15, 22 and New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, 52.
[361] Murray, supra note 205, 99.
[362] Ibid.
[363] Evaluation Unit Office of the Commissioner New Zealand Police, supra note 15, 22.

(ii) Caution by lawyers

Murray also argued that lawyers "would tackle the job with considerably more caution".[364] In his experience, given the limited information on which charges were laid, many lawyers would be reluctant to prosecute especially in light of potential defences.[365] Reluctance by lawyers to undertake cases with scant information is understandable. A lack of information may obscure weak cases and to continue with such little detail invites a defence ambush. Such unwillingness to proceed can actually save resources as weak cases with potential defences will be eliminated before trial. In addition, thorough investigation should arguably be undertaken anyway. The knowledge that prosecutors will not proceed without sufficient information may encourage such police behaviour.

(iii) Quality of staff

Murray also suggests that independent prosecution offices tend to have a lower quality of staff.[366] They may attract "inexperienced and transitory lawyers", who use the job to accumulate experience quickly.[367] "This can lower the esteem of the office."[368]

To some extent this is a valid criticism. It however raises a comparison of two evils. On one hand the current PPS suffers from efficacy concerns, with some staff only having had one week of training in prosecution. Impartiality problems also exist because of the close connection with police. In addition, some staff are transitory, with plans to return to operations. On the other hand, a prosecution office staffed by trained lawyers, albeit some inexperienced and transitory, would not have impartiality concerns. Arguably, this situation is less troubling than the former. There is also anecdotal evidence that younger, inexperienced lawyers tend to work harder and conduct more research in an effort to build skills and do their best for their client.

(iv) Cost

The Commission also cited cost as a significant reason against the establishment of a CPS, despite having earlier stated "efficacy and economy should not be attained at the expense of compromising the quality of criminal justice".[369]

It is likely establishment costs would be substantial and "operational costs may well exceed current expenditures in the short term".[370] To some extent, transference of the police prosecuting budget, a sum of $22,889,000 in 1993-1994[371] to a new CPS would assist in meeting these costs.

More staff will be needed, especially trained lawyers. It has been suggested, however, that while trained lawyers are expensive to hire, many of the officers in the PPS are of a senior level and attract reasonable salaries – therefore the cost disparity might not be so high.[372]

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[364] Murray, supra note 205, 99.
[365] Ibid.
[366] Murray, supra note 205, 100.
[367] Murray, supra note 205, 99.
[368] Ibid 100.
[369] New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, para 33.
[370] Corns, supra note 7, 26.
[371] New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, 165.
[372] McGonigle, supra note 64, 54.

It is also possible costs would reduce in the long term.[373] Efficacy will increase and the number of weak cases continuing to trial will be reduced. Improved preparation could also reduce the length of trials and waiting times.

An alternative approach to reducing costs could be allowing police to continue prosecuting the large number of guilty pleas. Such cases are relatively simple to conduct and there is less concern at that stage about impartiality. However, this would somewhat reduce organisational consistency.

4 Conclusion

Approaches such as the introduction of a review agency or privatisation both come with pitfalls and do not fully address current concerns. Of the different systems established overseas, those in England, America and Canada seem to have the most relevance to the New Zealand situation. They are effectively a half-way house, allowing police to retain some power as well as creating an independent, effective, prosecution service. Arguably, there is most support for the creation of a CPS, similar to England, with police retaining investigation and charging decisions. While there are a number of arguments cited against the creation of a CPS, they can be countered and are potentially outweighed by the advantages of efficacy, consistency and impartiality that such an approach brings.

Analysis of Current Prosecution Guidelines

Although reforming the current prosecution structure would ameliorate many of the existing concerns regarding prosecutions, such change would be incomplete without effective prosecution guidelines. Good guidelines are important where there is prosecution discretion as they improve consistency and reduce avenues for abuse of power. "It can seem very unfair if in one case a person is prosecuted, but in another, for apparently the same conduct, another person is not."[374] Therefore, guidelines have a role in restraining prosecution behaviour and achieving better justice.

Alternatively, if no CPS is created, reform of current guidelines may reduce some concerns. However, amended guidelines are a minimal solution, as they will not reduce the appearance of partiality.

In New Zealand, a new approach to guidelines needs to be taken. As stated earlier, there have been inconsistencies in the use and understanding of the Guidelines by the police. Furthermore, the Guidelines lack ethical and prosecution role guidance, have an indictable focus[375] and no clear indication of how compliance is ensured.

The Commission in 2000 recommended the Crown Law Office assist the numerous prosecuting agencies in creating guidelines consistent with the Solicitor General's Guidelines and mechanisms for enforcing compliance.[376] Crown Law was also to review the Guidelines used by the PPS to ensure their continued relevance to summary prosecutions.[377] Unfortunately, information received from the Crown Law Office suggests no change has been made to the previous approach.[378]

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[373] Corns, supra note 7, 26.
[374] Savage, supra note 24, 97.
[375] New Zealand Law Commission, *Preliminary Paper No 28*, supra note 6, para 376-377.
[376] New Zealand Law Commission, *Commission Report 66*, supra note 114, para A13.
[377] Ibid.
[378] Email from Amelia De Lorenzo to Stephanie Beck, 25 August 2006; email from Sally Cleghorn to Stephanie Beck, 13 December 2005.

The current New Zealand Guidelines are well-established and have a sound core. The two basic limbs of the prosecution discretion – evidential sufficiency and public interest – have significant backing and are in line with the approach of many other countries.[379] However, as detailed below, improvements could be made in the following four areas: openness and transparency, accountability and compliance, ethical and role guidance, and inclusion of policy.

1 Openness and transparency

Prosecution guidelines should be well known and understood. If they are, such guidelines become part of the public sphere and the public, Parliament, police and victims will be more likely to understand when a prosecution will occur, or why it has not.[380]

In New Zealand, the Guidelines are available to the public and may be found within the Commission's Criminal Prosecution Discussion Paper.[381] Their existence, however, is not well publicised and the general public may not be aware of them or their availability. PPS prosecutors also follow police policies, General Instructions and practice notes, none of which are available to the general public.[382] The current approach could be improved by increased publicity of the Guidelines, greater openness and an explanatory version written in plain English.

2 Accountability and compliance

Even if the Guidelines become better known and understood, if they are not used or not used consistently, then such knowledge is unhelpful. As described earlier, New Zealand suffers a lack of accountability in regards to prosecution decisions, with avenues for redress or review being difficult to access. This can be contrasted to Germany where members of the public and victims are able to request information about a particular decision not to prosecute.[383] It is therefore suggested that the Commission's 2000 recommendations to the Crown Law Office[384] are actually carried out so that some kind of compliance regime is established. Ideally, it would also allow an avenue for public complaint. In this way, use of the Guidelines may be improved, and prosecutors may be judged on their compliance and could be called to account.

3 Ethical and role guidance

Ashworth argues that any guidelines should also contain ethical principles, with clear examples where they may apply.[385] Further, the importance of such principles should be emphasised and used in educational training at all levels.[386]

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[379] Tombs, supra note 104, 93-5.
[380] Bugg "Accountability and Ethics in Prosecution Practice" (Speech delivered at Keeping Justice Systems Just and Accountable – A Principled Approach in Challenging Times: the International Society for the Reform of Criminal Law 18th Annual Conference, Montreal, 8 August 2004), 6.
[381] New Zealand Law Commission, *Preliminary Paper No 28,* supra note 6, 150-163.
[382] O'Shaughnessey, 21 September 2005, supra note 16.
[383] United Kingdom Royal Commission on Criminal Procedure, Prosecution by Private Individuals and Non-Police Agencies *Research Study* (HMSO, London, 1980) 235-236.
[384] New Zealand Law Commission, *Commission Report 66*, supra note 114, Appendix A.
[385] Ashworth, supra note 13, 205.
[386] Ibid 89.

While such ethical assistance is valuable for all prosecutors, it is especially important for sworn police prosecutors who, unlike non-sworn prosecutors, have not taken university legal ethics courses and do not have the curtailing influence of the Law Society's Rules of Professional Conduct.[387] It would also be helpful to have further guidance on the role of the prosecutor, for example emphasis on being an objective, independent Minister of Justice. This may also have some effect on impartiality concerns.

4 Policy inclusion

Finally, enhancement of the Guidelines to include prosecution policy would create greater awareness and consistency between prosecutors. For example, it appears issues such as meeting with victims, jury challenges, and plea bargains are currently left to the individual prosecutor's discretion.

VI CONCLUSION

To judge police prosecutors means to judge the police. For some, the word 'police' conjures up the idea of honest, hard working and courageous individuals. These police are proud of the way they and their colleagues succeed in doing a difficult job. Yet there are an equal number willing to offer negative stories. The media are frequently critical. Historic rape allegations against the police and delays in handling 111 calls, for example, have been recent subjects of critique.[388] Furthermore, there is evidence of problems with police culture and corruption has been shown to occur.

In New Zealand, police prosecutors exist within this same police service. Generally they have been operational police and are therefore 'favoured' or 'tainted' with the viewpoints above. In their new role as prosecutors there exists the same dichotomy of views. Police prosecutors have been praised in surveys of judicial satisfaction, but serious concerns have also been expressed in such surveys and in the Commission's discussion paper. Furthermore, this article has revealed additional problems, based on substantial academic and practical evidence.

Despite past efforts to remedy such concerns by establishing the Police National Prosecution Service, New Zealand summary prosecutions remain in a questionable state. The introduction of the PPS sought to improve both independence and efficacy of police prosecutors. In light of findings that the change may not be enough to address such concerns, the question remains "what next"?

Ideally there would be further reform. Reform is needed, as summary justice is important to those accused of crime, their families, the police, lawyers and victims. Reform is also necessary, insofar as there remains a close affiliation between the PPS and the police, through dual membership and the influence of police culture. Such an affiliation creates doubts as to actual and perceived impartiality and the ability of police prosecutors to fulfil their role as an independent Ministers of Justice.

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[387] New Zealand Law Society, supra note 177. See also supra note 261 in regards to the requirement to sit an ethics course.

[388] Elizabeth Binning "One-third of New Zealanders have little faith in police" *The New Zealand Herald* (Auckland, New Zealand, 2 May 2005).

Furthermore, potential partiality is not sufficiently moderated by accountability mechanisms or prosecution Guidelines.

In addition, although some police prosecutors have attained a high level of ability, others operate at a weak or merely adequate level. Police selection and training may affect some prosecutors' ability to cope in the increasingly complex summary jurisdiction. Any inadequacies can affect the cost of prosecutions and the achievement of justice.

Ideally, in response to the need for reform, a CPS independent from police and staffed by lawyers would be established. Such a move would address both impartiality and efficacy concerns. Unfortunately, given the resources already expended in creating the PPS, it is unlikely such a service will be introduced in the near future. Such a move is also uncertain given that it would be an acknowledgment that the current service is not as independent or effective as promoted.

Yet until the time such major change is possible, creation of a revised and expanded set of prosecution guidelines may go some way to improving the situation, if adopted by all and consistently followed.

In conclusion, while New Zealand police and justice officials should be congratulated for seeking to improve the prosecution system, there is still scope for further changes to be made.