Victoria's Project Pathfinder: In the Kingdom of the Blind ...

The Victorian Department of Justice recently released for public comment a report *Project Pathfinder: Reengineering the Criminal Justice System.* Prepared by the management accounting firm KPMG, *Pathfinder* takes aim at the administrative practices and procedures that support the criminal justice system in Victoria and that, as in most Western jurisdictions, appear on even cursory inspection to be fraught with problems of inefficiency and muddle. The objective of the *Pathfinder* project was thus to improve justice 'services,' giving specific attention to the need to 'minimise operational costs, improve the quality and timeliness of information, and streamline process flow while maintaining the integrity and independence of the criminal justice system' (p i). In turn, the aim of this comment is to provide an initial critique of the approach and thinking that lies behind this report, recognising of course that it remains for the Victorian government to accept the report's recommendations and to decide which if any it wishes to pursue.

A snapshot of the problem: Court performance data

Indicative of the inefficiencies inherent in the Victorian criminal justice process are data from its courts. Case management statistics for the 1994-95 period reveal, for instance, that of the 110,000 cases brought before the Magistrates Court in a year, something like 40% are adjourned at least once and 12% adjourned three times or more. It seems that approximately 40% of these adjournments are necessary because the defendant has been unable for one reason or another to secure adequate representation. A further 40% of adjournments are attributable to insufficiently prepared cases or inadequate dialogue between the parties. Such delays add considerably to the time it takes for a case to be finalised: each one of these adjournments adds on average 40 days to the length of the case.

Similar statistics can be found in other parts of the court system. In the County Court, only slightly more than 40% of trials commence on the day initially scheduled. What's more, cases appear to languish for long periods of time before trial – 327 days on average in the County Court – without any form of ownership or shepherding. On the basis of these sorts of figures alone process review would seem to be long overdue. Why then should the *Pathfinder* report be problematic for criminologists? There seem to be at least three reasons.

Firstly, it is most apparent from reading the *Pathfinder* report that those who wrote it have a profound lack of understanding of criminal justice, of justice reform, and of the history of both, both in Victoria and elsewhere. Secondly, the report is clearly grounded in an outdated and flawed paradigm – widely known these days as managerialism – that attempts to place ill fitting frameworks upon criminal justice. And finally, despite its claims to the contrary, this is not a report to take justice in Victoria into the future, for the terms of reference for the project precluded any attempt to look at major criminal justice issues, at principles, at values and at the wider objectives of the system, leaving a project that examines form without thought for function. Of course these issues are not entirely separate from one another, and there are elements of each in the others, but an attempt will be made here to give a sense of the way they can be seen separately and of their importance to justice in Victoria and elsewhere. Given that process matters were the focus of the report, the major emphasis of the commentary here will be upon the first of these criticisms, that the KPMG

consultants failed in important ways to understand even the basic processes of criminal justice.

Conceptual limitations

The *Pathfinder* report contains a long list of recommendations flowing from its writers' analysis of the Victorian criminal justice process. Many of these recommendations are, perhaps necessarily, of the 'motherhood statement' variety, recommending that certain structures should be established to serve particular purposes. In a number of other instances, though, there are quite specific recommendations and it is here that the almost naive way in which the KPMG consultants approached the problems of criminal justice is most tellingly revealed. Many, if not most, of these recommendations seem either to ignore or not to recognise the extensive legal and criminological literature bearing upon criminal justice issues and the history that has developed around systemic and processes analyses of justice. Despite the fact that fashionable management concepts like benchmarking and best practice are grounded in the notion that improvement emerges from the processes of testing, comparison, transfer and learning, many of *Pathfinder*'s recommendations seem to rely upon no more than their intuitive correctness or appeal for justification. This point is well illustrated by two new structures and their attendant processes recommended by KPMG for adoption. The first is a Court Program Coordination service that would provide, among other things, risk assessments for bail and a program clearing house to aid sentencing decision making. The second is a Legal Advice Service that would connect suspects or accused persons with legal assistance

Bail risk assessment

Among the tasks to be undertaken by the recommended new Court Program Coordination service would be the provision of risk assessment for bail applications. Despite its centrality and importance there in fact exists precious little research on bail risk assessment (see generally Gottfredson & Gottfredson 1988). Further, there is no surety that general risk prediction devices, such as the Wisconsin instrument currently used in the Victorian justice system, are either suitable or offer sufficient discriminative power to be of use to bail decision makers. Yet the *Pathfinder* report shows no recognition either of the significance of what is being recommended or of the possibility that development of an adequate risk assessment process for bail decisions might take considerably longer than the project's three year time line and carry significant costs in its own right. The report is in error in representing bail risk assessment as a simple process matter requiring little more than the reorganisation or collation of existing information or knowledge.

Program clearing house

Another task mooted for the Court Program Coordination service would be to provide advice to the courts on the availability of treatment and rehabilitation programs. Surely this is a good idea. Yet the recent history of program reform in Victoria also provides important insights into the problems and stumbling blocks which such a scheme will have to deal with. The history of Victoria's Intensive Corrections Order since its introduction in 1991 is a case in point. Although introduced as a substitutional option to short custodial sentences, the sentence has not received widespread acceptance by the courts and accounts for only 1% - 2% of sentences imposed in the Victorian courts (Freiberg, Ross & Tait 1996). Part of the reason for this seems to be that although the sentence places great emphasis upon connecting higher risk offenders with appropriate services and programs, in practice such programs rarely are available and, in the absence of suitable programs, the courts have been reluctant

to utilise this sentencing option. Thus, the lesson to be taken from Intensive Corrections Order experience is that programs require direct resourcing: simply offering ways of connecting offenders to programs will not work if the programs themselves do not exist or cannot bear the burden of offender numbers.

Legal advice

A key recommendation of the *Pathfinder* project is that a Legal Advice Service should be created. The purpose of this service would be to put suspects or accused persons in contact with legal advisers at the earliest possible point in the criminal justice process. The Service should be contacted whenever a suspect is taken for interview and the suspect should be able to speak to an adviser before the interview takes place. There is a large and readily accessible legal, administrative and criminological literature bearing directly upon both the practical and philosophical problems with this sort of recommendation – a literature that seems to receive no recognition here (see for example, Ericson & Baranek 1982 on the Canadian criminal process or McConville, Sanders & Leng 1991 on Britain).

The British experience is a case in point. Concern about police powers and practices had been expressed by the Royal Commission on Criminal Procedure in 1981 and the need to provide suspects with legal advice was therefore a central object of the Police and Criminal Evidence Act 1984 (otherwise known as PACE). Evaluations of PACE, however, have pointed up the very real difficulties with achieving such a goal, difficulties that ought to have been addressed in the *Pathfinder* report. The research of McConville, Sanders and Leng (1991) into police investigative activity under the PACE legislation is instructive. They found, for instance, that although a Custody Officer was appointed in each police station to look after the interests of suspects, this person was quickly co-opted by other police staff. This occurred to such an extent that in something like 10% of all cases where suspects desired legal assistance, custody officers failed to pass on the suspect's request for counsel to be contacted (p 50). Similarly, despite PACE's requirement that Custody Officers refuse interviewers the right to have an 'off the record chat' with a suspect, this important tool for securing compliance in suspects remained in common use. Furthermore, access to counsel often was used by police officers as a bargaining chip – the phone call would be made once certain information was provided by the suspect. These sorts of findings lead McConville, Sanders and Leng to reiterate some of the key themes of the Royal Commission, that police control over the construction of cases for prosecution was a key element of their operation, and to add new concern about the intransigence of these practices and the culture that aims to create and control a 'suitable' interview environment.

If the British research on PACE reveals that police powers to control these aspects of investigation are jealously guarded and have proved highly resistant to administrative and legislative control, what should be the responses of the Victorian government? The *Pathfinder* report gives no sense that such difficulties were even known to its writers and, as such, offers little of practical use to those who must deal with the real difficulties of genuine procedural reform.

The flawed framework of managerialism

Raising such questions in the current context, however, is perhaps facetious. After all, should it really be expected that generalist management accountants would view criminal justice as anything more than a simple process, susceptible to systems analysis and receptive to the trite organising principles of 'business process reengineering'? This is not to say that there is no need for economists and management accountants in criminal justice. Rath-

er, it is an argument that the goals of managerialism (productivity, cost efficiency and consumerism) are suitable to a much narrower set of objectives than the review of criminal justice operations.

Unfortunately, there is not space in this comment to do any more than touch upon this issue of analytical systems. It is nonetheless important to note that not only is managerialism but one among a number of competing understandings of how work may be organised, it is increasingly recognised to be appropriate only to a limited stage in the life of any organisation and is not, as it has been represented, a model of enduring organisational arrangements (see Quinn 1988). The subscription of public managers to this form of thinking thus reflects less upon the demands of public institutions and the services they provide than it does upon their capture by the merchants of managerialism whose services have in recent times come to achieve the status of a royal imprimatur on public documents.

Values and the structure of criminal justice

Perhaps one of the reasons for managerialist analysis failing so comprehensively to understand criminal justice in Victoria and elsewhere is that it is a product of a broader capitalist model in which value is not easily ascribed to *values*. As such, it is a perspective which sits uneasily within a domain like justice which is, at the end of the day, almost entirely about values. Seen in this light, the organisational processes of justice which provided the focus of *Pathfinder* clearly are anything but goals in their own right and can not in any sensible way be separated from the wider values and objectives of the system they are intended to reflect and articulate.

The fact that the *Pathfinder* project was precluded from examining wider justice issues and the wider context within which these processes operate has two important effects that should be mentioned in closing this comment. Firstly, it communicates very clearly to the public of Victoria that its parliament lacks both an appreciation of the social function of justice and a significant social vision for the state. Perhaps seduced by the simplicity of the business process analysis model, the Government has worked to separate out the form of criminal justice from the function it is supposed to have, seemingly suggesting that while organisational processes require continual modernisation the broad objectives and structures of criminal justice do not. It is insufficient to claim that wider issues are being considered concurrently with this project, for function must precede form if any sensible set of organisational arrangements are to be put in place.

Secondly, and finally, by setting this task of streamlining processes ahead of any considered debate on what the functions of criminal justice might be, there emerges a strong risk that Victoria could lock itself into a set of structures that might be wholly inadequate for meeting its future needs. Recalling the court statistics cited earlier, is it beyond question that the current court structure should carry justice forward into the next century? What role might there be for alternative dispute resolution procedures, such as those emerging from the restorative justice model? What, in other words, should Victoria's justice system look like in 10 years or 15 years from now? How will justice be 'done' under that view of the future? These, unfortunately, are questions upon which *Pathfinder* is resoundingly silent.

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REFERENCES

Ericson, R & Baranek, P (1982) *The Ordering of Justice: A Study of Accused Persons as Dependants in the Criminal Process*, University of Toronto Press, Toronto.

McConville, M, Sanders, A & Leng, R (1991) *The Case for the Prosecution*, Routledge, London.

Gottfredson, M & Gottfredson, D (1988) *Decision Making in Criminal Justice: Toward the Rational Exercise of Discretion,* Plenum New York.

Freiberg, A, Ross, S & Tait, D (1996) *Change and Stability in Sentencing: A Victorian Study*, The University of Melbourne, Melbourne.

Quinn, R (1988) *Beyond Rational Management*, Jossey Bass New York.