Public Accountability for Police Prosecutions

Sean McGonigle*

I: INTRODUCTION

The prosecution process in New Zealand is to a great extent dominated by the police. This is particularly obvious in the District Courts, where often the prosecutor and the only witness are uniformed police officers. In addition to this dominant role in the visible process of criminal justice, a much less visible but more important part is also played by the police; every day, police officers make arrests for offences which are triable in the summary jurisdiction. For these offences, the police make the decision whether to prosecute a suspect or deal with the matter outside the formal criminal justice process. The police also make a decision about what charges to lay and in what form. Finally, the police themselves prosecute these matters in the District Courts. These decisions have a significant impact upon the individual, but are not subject to any scrutiny by the public.

Although the majority of these decisions involve what can be termed minor criminal offending, this article will consider whether it is appropriate for the police to perform these tasks. Two key issues will be addressed: accountability and efficiency. This article will suggest that at present the police are not accountable to the public for decisions to prosecute, and that the police perform the task of prosecuting no more than adequately in the majority of cases. Falling between these two key issues is the appearance of justice in the District Court, and whether

* BA *Massey* LLB (Hons). I gratefully acknowledge the advice and helpful comments of Scott Optican, Lecturer at the University of Auckland School of Law.

prosecutions should be carried out by enforcement officers, regardless of how the decision to proceed is reached.

This article will therefore consider whether prosecutions by the police should continue to be performed by uniformed police officers, or carried out by legally trained personnel; whether the police should make the decision to prosecute or whether that should be done by some other authority; and whether the summary prosecution system should remain a police function or be part of the workload of a central prosecuting authority. The article will outline the present system of prosecutions by the police in New Zealand, and then present some criticism of that system. Drawing from this analysis, the final section will present three alternatives for the reform of the present system.

II: INITIATION OF PROSECUTIONS

Three methods are available to a police officer who wishes to bring a suspect before the courts: arrest, summons, or issue of a traffic offence notice. A brief outline of each is given.

1. Arrest

An arrest may be the result of a citizen call for service, or it may be police initiated. An arrest may occur immediately upon police attendance, or following what could be lengthy and detailed investigations surrounding an alleged offence. The overwhelming majority of cases dealt with by the police are initiated by arrest.

(a) Discretion of the Senior Sergeant

Following an arrest, the offender is processed at a watchhouse where the arrest is reviewed by the duty senior sergeant. The senior sergeant may form the view at this stage that further questioning of the prisoner and the arresting officer is necessary. If no offence is disclosed, the senior sergeant will arrange for immediate release. If the charge is wrong, the senior sergeant will instruct the officer to amend the charge accordingly.

It can be seen that the discretion present here is a very limited one. Any decision not to proceed is either because no offence was committed, or because there was no power to make an arrest. It is likely that only an obvious evidential problem will trigger a release at this stage. If the accused person and the arresting officer have different accounts of an incident, the senior sergeant is most likely to believe the officer's version. The arresting officer can easily justify the arrest in most cases.[1]

1 A similar situation was reported by Sanders, commenting on the effectiveness of the custody officer in the English process. See Sanders, "From Suspect to Trial" in MaGuire et. al. (eds.), *The Oxford Handbook of Criminology*, 799.

(b) Subsequent checks

If the arrest is accepted, the officer will prepare a file, which is generally reviewed by the section sergeant. It is then passed via the station senior sergeant to the prosecution section. If at this stage an evidential or legal problem is noticed by the reviewing officer, the prosecution section will be advised by a note attached to the file and the matter will be withdrawn when the person appears in court. Due to the number of files, however, the chances of finding a mistake of this nature are remote.[2] Assessments of the likelihood of success or the necessity of the prosecution are not made at this stage.

2. Summons

Some offences may only be reported by summons, but it is also possible in some circumstances to issue a summons as an alternative to making an arrest. Certain offences against the Sale of Liquor Act 1989 are only dealt with by summons, as are some types of public complaints, for example, minor assaults not attended by police at the time. An officer wishing to have a matter dealt with by summons will forward a file showing the extent of enquiries carried out. The file goes to the section sergeant, who may return it for further work, or forward it but not recommend prosecution. Otherwise, the file passes to the station senior sergeant, and onto the prosecution section.

3. Traffic Offences

All traffic offences require the court's involvement. A traffic offence notice will generate a summons. Alternatively, a person may elect to defend an infringement offence notice, which will bring them before the court. Files are prepared for traffic offence notices, and are forwarded in the same manner as summons files.

III: THE POLICE PROSECUTION SECTION

Once a file arrives at the prosecution section, by any of the methods detailed, the decision to proceed or not rests with a police prosecutor for that area. In each operational police district there is a prosecution section, usually housed separately from front line police, and staffed by a number of uniformed police sergeants and senior sergeants. Police prosecutors are generally sergeants before they enter the section, and they may remain in the section for many years. There are courses available for prosecutors, but attendance at these is not a prerequisite for work in

2 Senior Sergeant, Takapuna watchhouse, in dialogue with the author.

the prosecution section. The courses are attended as time permits. Aside from such courses, the skills of a prosecutor are learned through experience. Police prosecutors are not legally trained.

1. Training For Prosecutors

The training that a uniformed police prosecutor receives may be divided into two distinct areas: the training necessary to achieve the rank of sergeant (the usual minimum rank for prosecutors); and specific training as a prosecutor.

In order to be eligible for promotion, a constable must have achieved permanent appointment, which requires two years service, and must have completed the compulsory twenty post-recruit modules. These are internally assessed modules which deal with particular aspects of policing for the new constable. After these are completed, the constable must complete the examinations which are prescribed by the Police Act 1958 and the Police Regulations 1992. There are four subjects at the sergeant level: evidence, statutes, police administration, and practical police duties. The latter two subjects deal with the handling of routine police work as an NCO, and are not law oriented. The statutes course deals with the powers available to police under various enactments which police routinely encounter. The evidence syllabus details the sections of Garrow and McGechan's *Principles of the Law of Evidence* to be read by the candidate, and lists cases and statutory provisions. There are no coursework requirements, nor any lectures. Assessment is by way of a three hour closed book examination.

Specific training for prosecutors consists of two courses run by the Royal New Zealand Police College. The basic Prosecutors Course is ten days long, and aims to train those filling or about to fill prosecutor's positions. The course objectives are that the officer will be able to:[3]

(a) Understand the role and responsibilities of the Police Prosecutor in terms of courtroom etiquette;
(b) Prepare prosecution files and make arrangements necessary for courtroom hearings; and
(c) Understand the rules of evidence, and be able to conduct in practical terms, courtroom hearings (particularly for 'not guilty' pleas).

An Advanced Prosecutors Course also exists for those officers who have attended the basic course. It is three days long, and aims to provide senior prosecutors with the skills necessary to run a modern prosecution office, and in preparing for and prosecuting complex court hearings. Upon completion, the officer will be able to:[4]

3 Royal New Zealand Police College, *1995/6 Course Calendar & Training Handbook* (1995) 24.
4 Ibid.

(a) Understand the requirement of proper research and submissions to the bench;
(b) Understand the statutory defences available under New Zealand law;
(c) Enhance their ability in 'cross examination'; and
(d) Understand the practical realities of 'plea bargaining'.

There were no advanced courses scheduled by the Royal New Zealand Police College between July 1995 and June 1996.

2. Workload

Prosecutors receive a number of files at once. At the Otahuhu office, a workload of 200 to 300 files a week is usual. These may be read before court, but usually the prosecutor arrives at court, and "flies by the seat of his pants".[5] Where a person pleads guilty at first call, a prosecutor will accept the file at face value. This means no assessment will be made by the prosecutor about whether the charge was justified, or whether the matter could have been dealt with by way of a caution or diversion.

Once the prosecutor has determined which cases will be defended, those files are examined. This will often not be until the day of the hearing. If there is an evidential or technical problem which can be solved by some further investigation, it may be returned to the investigating officer for further work. If the file is so evidentially weak that a *prima facie* case is unlikely to be made, the prosecutor will suggest to the officer concerned that the file be withdrawn. The decision will effectively be made by the prosecutor, because the investigating officer will usually be junior in rank, and unable to make such assessments. Where a mistake is obvious, the prosecutor will make any necessary amendment to the information. A prosecutor will not generally "plea bargain" without consulting the officer in charge of the file. It is not the practice of the prosecutors to consider whether a charge is warranted, or whether the defendant could be dealt with in some other way; the assumption is that the defendant is guilty.[6]

Most files are arrest files. The senior sergeant at Otahuhu suggested there might be five summons files a week, but no more. It is generally assumed that, provided the evidence is adequate to support the charge, the matter will be prosecuted. The majority of matters are dealt with as guilty pleas, and over half the not guilty pleas conclude with a guilty finding.

Where the alleged offence is an indictable matter, the prosecution section will conduct the depositions. At the conclusion of the hearings, the file is passed to the Crown Solicitor. Where the matter is murder or manslaughter, the officer in charge of the file may liaise directly with the Crown Solicitor. The Crown Solicitor may be involved at an early stage, but the nature of the relationship with the police is very informal.

5 Senior Sergeant, Otahuhu prosecutions, in dialogue with the author.
6 Stace, *The Prosecution Process in New Zealand* (1985), at 110.

IV: DECISIONS TO PROSECUTE

The decision to prosecute an offender in the summary jurisdiction is effectively made by the officer who investigates the offence, in consultation with the watchhouse supervisor. The officer who charges the offender at the time of an arrest starts the chain of events which lead to the prosecution. It is clear from the literature[7] and from those police officers (both prosecutors and patrol officers) interviewed that unless there is an evidential problem, the matter will inevitably proceed to court. The prosecutors accept that the decision made by the investigating officer is correct, provided there is enough evidence to initiate the charge. This frequently allows the overloading of charges. A person may face a number of charges that arise out of the same incident, and which disclose essentially the same facts. Alternatively, a person may be charged with two similar offences, one of which carries a far greater penalty. An example is assault under the Crimes Act 1961, as opposed to the Summary Offences Act 1981. Since there is no independent review, the charges will be proceeded with by the police. The only reasons that the police will alter the charges will be in exchange for a guilty plea.

In summary matters, there is at present no independent person in the criminal justice system who can assess either the likelihood of a successful prosecution, or the desirability of proceeding. The police control the prosecution, from initial investigation to defended hearing. Further, the police prosecutors do not make this review themselves, essentially working with the information as supplied. Once the file passes the initial inspection by the watchhouse supervisor, it will inevitably proceed to court.

Aside from some Australian states, New Zealand appears to be alone in the common law world in giving the police this degree of power.[8] A comment made in regard to the pre 1985 situation in England is particularly appropriate to present day New Zealand:[9]

> The police institution...has the largely uninhibited advantage of determining prosecution policies in general, the nature of the charge in a particular case, and, indeed, the right to decide whether or not a charge is actually brought. There is no effective external curb on that process.

It was not the design of the police reformers that police should control prosecutions so completely. Early writers suggested that the roles of police and prosecutor be kept separate, "to keep the rules of justice pure".[10] In the period after 1829, the 'New Police', instituted by Sir Robert Peel, gradually began to usurp the private prosecutors, due to the expenses and time involved which discouraged private

7 See, for example, Stace, ibid.

8 O'Connor, "Controlling Prosecutions", in Basten et al (eds), *The Criminal Injustice System* (1982), at 151.

9 Brogden, *The Police: Autonomy & Consent* (1982), at 136.

10 Ibid, 137.

individuals, and the resources that were available to police. The process was adopted in New Zealand in imitation of the English process, and has now become institutionalised.

V: SOLICITOR-GENERAL'S GUIDELINES

The Solicitor-General has published the "Prosecution Guidelines for Crown Solicitors"[11] ("the Guidelines") through the Crown Law Office. The Guidelines indicate the manner in which the Law Officers (the Attorney-General acting through the Solicitor-General) expect prosecutions to be conducted. There are two primary factors to be considered when determining whether or not to prosecute: evidential sufficiency, and public interest.

Evidential sufficiency is the existence of evidence strong enough to establish a *prima facie* case. This means that "if that evidence is accepted as credible by a properly directed jury it could find guilt proved beyond reasonable doubt".[12] Normally the phrase '*prima facie*' is used to mean evidence sufficient to require an answer. The Guidelines thus impose a higher standard on prosecutors than merely ensuring a charge is not dismissed at the conclusion of the evidence for the prosecution. As will be shown later, the police often do not meet this higher requirement, preferring instead the 'bare' *prima facie* standard.

Having satisfied the first test, consideration is given to the public interest in proceeding with the prosecution. Factors considered here include: prevalence of the type of offending; personal circumstances of the offender; alternatives to prosecution; the need for deterrence; and the disproportionate consequences of a conviction. The Guidelines state that decisions are not to be influenced by religious, ethnic, or political considerations. Once again, the Guidelines emphasise that:[13]

> A dominant factor is that ordinarily the public interest will not require a prosecution to proceed *unless it is more likely than not that it will result in a conviction.*

All factors must be considered and balanced, and the prosecutor is expected to be fair:[14]

> The State also accepts the responsibility of ensuring, through institutions and procedures it establishes, that those suspected or accused of criminal conduct are afforded the right of fair and proper process at all stages of investigation and trial.

11 Crown Law Office, *Prosecution Guidelines for Crown Solicitors* (1992).

12 Ibid, para 3.1.

13 Ibid, para 3.3.1; author's emphasis

14 Ibid, para 1.3.

Further, the Guidelines stress openness in the process:[15]

> It is of great importance therefore that decisions to commence and to continue prosecutions be made on a principled and publicly known basis.

It is clear from the Guidelines that persons exercising the discretion to prosecute are acting on behalf of the state. They are expected to act in a manner consistent with that authority. The Guidelines indicate that the initial decision to prosecute rests with the police in the case of the general criminal law. The police are thus clearly intended to be covered by the Guidelines.

In situations where the Crown Solicitor is prosecuting in the summary jurisdiction, the Guidelines are applied. This is confirmed by the Crown Solicitor for Auckland. The Chief Legal Adviser of the Police Legal Section at Police National Headquarters claims that police prosecutors use the same Guidelines. In research for this article, a number of present and former prosecutors were spoken to in the Auckland area, none of whom have seen these Guidelines, and none of whom used them. If some police prosecutors do use the Guidelines, then it would seem that they consider every case more likely than not to result in a conviction. This is not what the Guidelines intended. If this is the situation, it also indicates a lack of uniformity in the prosecution system. It makes sense for both the Crown Solicitor and the police to apply the same criteria when exercising the discretion to prosecute. It also seems reasonable to expect that all police prosecutors will use the same Guidelines. This is apparently not the case, since some police prosecutors have no knowledge of the Guidelines. If the Guidelines are not considered by the prosecutor, there may be insufficient consideration given to the public interest by the police during the summary prosecution process. The conclusion to be drawn is that police prosecutors do not, in any meaningful manner, act as assessors of either the viability or the merit of proceeding with summary prosecutions.

VI: THE POLICE PROSECUTION SYSTEM

1. Advantages of the Present System: Police

The advantages to the police of having control over the apprehension and prosecution of offenders fall into two categories: 'psychological' benefits, and organisational benefits.

15 Ibid, para 1.6.

(a) 'Psychological' benefits

'Psychological' benefits may accrue to the individual officers concerned in the processing of a particular offence; and may also accrue to the department as a whole. Police work is 'result' oriented. Although there is a relative increase in what are termed "community policing" programmes, these are still not mainstream police activities. The key activities in police work, as perceived by police, are the detection and apprehension of offenders. The result of this process for officers concerned is a successful prosecution:[16]

> The honest, zealous and conscientious police officer who has satisfied himself that the suspect is guilty becomes psychologically committed to prosecution and thus to successful prosecution.

By maintaining control over the prosecution process, the police ensure that officers involved receive the psychological benefits of a successful prosecution. This validates the work of the individual officer involved in a case. This is particularly so given the large numbers of prosecutions that the police handle in the District Courts, where police officers can expect to spend most court hours. Control over prosecutions ensures that officers are able to participate directly together with the uniformed prosecutor in the prosecution of offenders.

The involvement of a uniformed police officer in the prosecution is valuable for the investigating officers, as they may perceive that the prosecutor will have the interests of the police, rather than justice, in mind. Stace notes that the assumption that the suspect charged was guilty "prevailed throughout all stages of the prosecution process".[17] He concludes that the prosecution system was "a system designed to minimise conflict".[18] Thus, there is every reason for police officers to identify police prosecutors as being primarily concerned with the police perspective. This perspective presumes that suspects are guilty, and prosecutions will proceed to that end. In addition, it may be easier for officers to discuss the case beforehand with another police officer. The officer involved in the case will know that the uniformed prosecutor is unlikely to give away too much in any plea negotiation prior to a hearing, and will generally consult before a decision is made.

(b) Organisational benefits

A successful prosecution is seen as a successful *police* prosecution, a team effort in fighting crime. The organisation as a whole benefits when an offender is successfully apprehended and prosecuted. The cumulative effect of this kind of validation is an encouragement to police officers to continue their efforts to apprehend criminals. It also entrenches the effectiveness of the present system of police prosecutions. The police are concerned with maintaining their independence from outside control in all aspects of police work. If the police lose a prosecution, there is an almost universal belief by police that the defendant was

16 'Justice' Educational & Research Trust, *Pre-Trial Criminal procedure: Police Powers and the Prosecution Process* (1979), 28.

17 Supra at note 6, at 110.

18 Ibid, 120.

still guilty, and the dismissal was due to factors beyond their influence. Defendants are "expected to lie and it [is] the judge's responsibility to be aware of that likelihood".[19] The loss of a case does not damage the team view of crime control; instead, it only serves to reinforce the view that police officers are all working towards the same goal, despite setbacks from other actors in the criminal justice process.

Organisational benefits of police control of the prosecution process are found in areas such as staffing and administration. The necessity to conduct district court prosecutions means that there is a position available as a prosecutor to experienced officers who no longer wish to carry out front line duties, or are unable to. This serves to keep the accumulated skill and experience of senior officers within the organisation, and helps the police department to foster loyalty by looking after the interests of those officers.

2. Disadvantages of the Present System

(a) Lack of accountability and openness

The principle concern in the current system is lack of accountability to either the courts or the public for police decisions to prosecute. The prosecution function is an exercise of public power on behalf of the state. The Guidelines state that decisions should be made on a principled and publicly known basis. For example, it is not known how many prosecutions are initiated simply to protect police officers who used force rather than persuasion to resolve a problem. Stace recorded that 1.2 percent of all charges laid were withdrawn before a plea was entered, while a further 2.9 percent of charges were withdrawn after a plea of not guilty was entered.[20] Reasons for withdrawal were not available for all of these, but Stace notes that at least some cases in the first category were as a result of police "bungling". Applying these percentages to the 180,477 prosecutions initiated by the police in the year ended 30 June 1995,[21] this equates to 2165 cases withdrawn prior to plea, and 5233 cases withdrawn once a not guilty plea was entered. Presumably in the latter case, had the defendant pleaded guilty at the initial hearing, the matter would have proceeded.

Similarly, it is unknown how many prosecutions are initiated to satisfy the demands of the victim, rather than to satisfy the requirements of justice. If a prosecution is initiated as the result of pressure from one member of the public, this may not mean that the public interest as a whole is served. The attitude of the victim is a factor to be taken into consideration under the Guidelines, but the Guidelines make clear that all relevant factors must be balanced.

One argument used by police to justify the control of the process is that police prosecutors are able to use their rank-derived authority to conduct prosecutions in a lawful and ethical manner. Since police supervisors cannot always exercise adequate control over junior officers, as evidenced by cases that are dismissed and

19 Ibid, 68.

20 Ibid, 13-14.

21 New Zealand Police, *Report of the New Zealand Police for the year ended 30 June 1995*, 36.

complaints to the Police Complaints Authority, it is difficult to accept this assertion. Most members of the police subscribe to the same police culture and view of the world.[22] The concept of "the thin blue line" has been well documented by many sociologists and criminologists in researching the police. The prosecution section and front line police share a 'mission' to reduce crime by apprehending criminals. It makes no difference to the public which branch of the police an officer works in, so for the police to argue that the public can rely on officers of certain rank or in certain roles (ie prosecutors) to safeguard the rights of the citizens does not carry much weight.[23] Although the system operates more or less with integrity, in that incidences of actual dishonesty or corruption are seldom reported, the lack of regard to the Guidelines indicates that the police view of the criminal justice process controls the prosecution section.

The openness of the prosecution system was considered important by the United Kingdom Royal Commission on Criminal Procedure,[24] which noted that in a Parliamentary democracy, the prosecutor should be accountable to Parliament for their decisions. Although the New Zealand Police are accountable to Parliament in terms of their general policies, and expenditure, their Annual Report does not mention any policy on prosecutions, other than to reiterate that the police are committed to improving the apprehension and detection of offenders.

Finally, the present system does not allow the public any significant input into prosecution policies. The diversion scheme, for example, is controlled entirely by the police, who alone decide which offenders will be accepted. The police are ultimately responsible to the Minister of Police, and to Parliament, but there is no mention in the Annual Report to Parliament of the guidelines which are used in prosecuting. It is not apparent from the Crown Law Office Guidelines how the Solicitor-General ensures compliance.

The present system of police prosecutions in the summary jurisdiction is not accountable to the public, either directly or through Parliament. It does not adequately give consideration to the requirements of the Solicitor-General's admonitions that prosecuting is an exercise of a public authority. Accountability to the courts arises only on the basis of the evidence presented by the police to prove their cases. The police are not required to demonstrate that the Guidelines have been adhered to.

(b) Lack of uniformity in decisions to prosecute

The police ethic of conviction, which is a part of the crime control model of criminal justice to which police generally subscribe,[25] means that the police will usually initiate a prosecution where there is a *prima facie* case. The police often express the view that they will allow the court to decide on the guilt or innocence of the individual. This view accepts that police control of the process makes it very

22 See, for example, Reiner, *The Politics of the Police* (1985) ch 3.

23 This is one of the arguments used to justify police officers investigating complaints against the police.

24 The Royal Commission on Criminal Procedure, *Report*, (1981) Cmnd 8092, para 6.55.

25 See, for example, Stace supra at note 6 at 110; and generally Packer, *The Limits of Criminal Sanctions* (1968).

easy for them to lay and pursue a prosecution. It costs the department and the individual officers nothing to take this course. It is only in very few cases that an accused will not only be acquitted, but also a court will order costs against the police or make adverse judicial comment about the officers involved. Even in such a case, the police can appeal the decision.

The New Zealand Police Annual Report to Parliament states that in 99.8 percent of informations laid, the police established a *prima facie* case.[26] On the basis of a total of 180,477 prosecutions initiated, the police failed to achieve a *prima facie* case in 360 instances. There are no figures provided for the number of successful prosecutions. Stace, in his survey of the summary jurisdiction in the 1980's, recorded that in 5 percent of cases, the charges were dismissed, and in five percent of the cases the charges were withdrawn at some stage of the proceedings.[27] Applying this to the 1995 figures, this would mean that 9,023 informations were laid, then dismissed following a hearing. Perhaps more important in the context of the present discussion, another 9,023 informations were laid, but were withdrawn by the police prior to trial. Both Stace and the United Kingdom Royal Commission note that in some cases the failure of a prosecution is not within the prosecution's control, but there is a clear residue of cases where "an acquittal ought to have been predicted in advance of trial."[28] Stace also noted the attitude of some police prosecutors was to go ahead with files they knew were likely to fail. Stace noted from his survey of police prosecutions in three geographically distinct police districts that:[29]

> [I]t became apparent that different prosecutors adopted differing standards for deciding when to proceed with a weak case and when to withdraw. Some would persist with "running the case", while others would "cut their losses".

If we accept as correct Stace's observations that some police prosecutors persist with cases they know will fail, it can be seen that the Guidelines are openly ignored by those prosecutors. Where the prosecutor does not have such a clear opinion about the outcome, there remains the fact that (given Stace's percentages) some 9,000 cases failed in the 1995 year. Some of those cases must have been in the category where success was either unlikely or uncertain. This is where the prosecution cannot say of the case that it is "more likely than not" to result in conviction, or that the evidence clearly indicated guilt beyond reasonable doubt. According to the Guidelines, prosecuting such cases is not in the public interest. The police, by concentrating on the target of merely achieving a 'bare' *prima facie* case, thereby initiate a number of prosecutions which under the Guidelines should not be brought.

If the police were complying with the requirement in the Guidelines that a *prima facie* case was required, then it could be argued that the number of cases either lost or withdrawn would not be so high. The conclusion to be drawn from

26 Supra at note 21, at 36.

27 Supra at note 6, at 109.

28 Supra at note 24, at para 6.20.

29 Supra at note 6, at 35.

this is that the term *prima facie* is used by the police to indicate a 'bare' *prima facie* case: that is, one where there is a case to answer. This definition of *prima facie* makes no assessment of the likelihood of success, but only requires sufficient evidence to justify the laying of an information. The conclusion which can be drawn is that the police prosecutors are not assessing the files in the light of the Guidelines, but are merely ensuring that the cases are not immediately dismissed. In some cases, it is clear that not even this level of scrutiny is achieved.

The criterion of public interest may be taken into account by individual police officers in their decisions to prosecute or caution offenders. There is generally no objection to such a use of discretion, provided that it is used in a consistent manner throughout the country. Since the Guidelines are not apparently used by police prosecutors, public interest factors are unlikely to be evenly applied throughout New Zealand.

(c) Lack of impartiality in court

The nature of police work may mean that the prosecutor shares many of the institutional views on the nature of the criminal justice system and the role of the police in that system. Contrary to the idea that "justice must be seen to be done", the impression may be that the courts are police courts, although no research has been undertaken. Very often, both the prosecutor and the sole witness for the prosecution will be uniformed police officers. A former Solicitor-General of New Zealand, Mr R Savage, has commented that:[30]

> [J]ustice would look as if it were being more independently administered if the prosecutor were not a police officer or traffic officer. The private citizen can scarcely be blamed for thinking that the prosecution will not be conducted with as much impartiality or detachment as it ought, if the person conducting the prosecution is also a policeman or traffic officer and so a member of the Service whose duty it is to detect the offence. Indeed in the case of traffic officers they may well also be the principal witnesses.

(d) Lack of uniformity in types of charge preferred

Another concern for many, particularly defendants, is the lack of accountability over the police decision on how to proceed. Stace notes that multiple charges arising from one incident were "fertile ground" for plea negotiations. These negotiations were focused on obtaining a guilty plea. Police officers are thus encouraged to add charges as they see fit, depending on their perception of the incident. One officer in charge of a file commented that "two charges have been laid as padding" and agreed to "withdraw them to secure the guilty pleas on the balance."[31] The resulting lack of uniformity may be because:[32]

30 Savage, "Criminal Procedure: The Effect of Procedure on Justice", in Clark (ed.), *Essays on Criminal Law in New Zealand* (1971) 106.

31 Supra at note 6, at 78.

32 Ibid at 86.

> Routine screening by prosecutors only occurred shortly before a defended hearing. Otherwise, unless some matter was drawn to their attention, a conviction on the charge as originally laid was the expected outcome of each prosecution.

Where a defendant is put to the time and trouble of defending a charge, because the police considered that it was appropriate to lay multiple charges, there is no redress if the defendant is acquitted. Stace argues that the system is designed to maximise guilty pleas, and the police ensure that defence counsel and their clients are aware that the exercise of rights will work to the disadvantage of the defendant.[33]

In terms of uniformity, the result of the police involvement in the prosecution process is that there is no real scrutiny to ensure that similar types of offending are dealt with in a similar fashion on a national basis. Instead, charging decisions by individual officers are carried through to the prosecution stage, where they are either proceeded with without consideration, or manipulated to ensure a guilty plea.

(e) Lack of adequate skills and knowledge

In the past, there has been little criticism of the ability of police officers as prosecutors. Only on rare occasions is there any public discussion of the performance of police officers as prosecutors.

The Crown Solicitor for Auckland considers that police prosecutors in the Auckland region perform their functions extremely well.[34] Comments from defence counsel interviewed by Stace expressed the view that it was necessary to develop informal personal relationships with police prosecutors in order to do the best for their clients. Some counsel, however, felt that the police were often too inflexible:[35]

> [T]hey take too deep a personal interest so that they fail to exercise their moral obligations both to society and to the defendant.

However, a degree of personal involvement on the part of prosecutors may be unavoidable, and it is a moot point whether the ethics of a prosecuting attorney are any more worthy than those of a prosecuting constable. The only point that can be made is that the former, unlike the latter, is not an employee of the same organisation that investigated the offence and apprehended the offender.

The Strategic Policy and Review Section at Police National Headquarters submitted an unpublished review of the prosecution function to the Police Executive in the middle of 1995. The review was treated as a draft document for a working party which has now been set up to look at the issues raised. At this

33 Ibid at 121.

34 Mr S Eisdell Moore, Crown Solicitor, Auckland, November 1995, in dialogue with the author.

35 Supra at note 6, at 77.

preliminary stage, the recommendations included: improved training; a move to have trained lawyers working in the prosecutions sections; and improved supervision of discretion. The draft preferred the retention of the prosecution section by the police.[36]

The New Zealand Police have conducted two surveys, in 1992 and 1994, to measure judicial satisfaction with police prosecution services. A number of categories were included in the survey, and judges were asked to rate police performance in each of these. Many judge's comments indicated concern with the lack of skills displayed by police prosecutors in their knowledge of the law, and their ability as advocates. The comments included in the published survey tended to support the idea of either legally trained police prosecutors, or of an independent prosecution service.[37]

3. Summary

Criminal prosecutions in the District Courts are controlled entirely by the police. Almost all key decisions are made by police, and there is rarely an opportunity for those decisions to be reviewed, even where a defendant is acquitted. The police view of the criminal justice system means that the ethic of conviction is paramount. Unless very good reasons exist, the police will prosecute a person who has been arrested or summonsed. There is a presumption that such a person is guilty.[38] Since in many cases arrests are made by relatively inexperienced junior officers, the entire system is driven by the decisions made by those officers.

The overall impression, however, is that the present system works adequately, because of two factors. First, the overwhelming majority of people who are prosecuted by the police plead guilty. This is essentially because they are guilty of some offending, and because the system makes it not worth their while to rigidly assert rights to a trial. Second, there has been no meaningful analysis of the police prosecution process. That this has not happened means that many of the failings of the system remain uncorrected, when they may be amenable to reform without great disruption. Possible reforms are discussed in the following section.

VII: REFORM OF THE CURRENT SYSTEM

1. Assessing the criteria for a prosecution system

The Royal Commission on Criminal Procedure in the United Kingdom was

36 Inspector John Tutt, Police National Headquarters, in dialogue with the author. The document has not been made public, and this writer has been unable to obtain a copy.

37 New Zealand Police, *Survey of Judicial Satisfaction with Police Prosecutions Services*, (1994), Appendix III "Judges Comments".

38 Stace, supra at note 6, at 15.

established to review the entire system of criminal justice, from the start of the investigation to the point of trial.[39] The Royal Commission considered how the satisfactory workings of a prosecution system ought to be judged. The Commission considered that there were three main criteria: fairness, openness and accountability, and efficiency.

A fair prosecution system is not one where an innocent person is never prosecuted, since that cannot be avoided. Rather, said the Commission, a fair system is:[40]

> [T]o ensure that prosecutions are initiated only in those cases in which there is adequate evidence and where prosecution is justified in the public interest.

The Commission emphasised that there should be a high standard of competence, impartiality, and integrity in those who operate the system, which was essential for public confidence. On the question of what constitutes adequate evidence, the Report considered the notion of a *prima facie* case. One view is that if there is enough evidence to establish such a case, then the matter should be decided by the courts, since that is their function. This is the 'bare' *prima facie* case, mentioned earlier in the discussion on the New Zealand Solicitor-General's Guidelines. A number of witnesses before the Commission pointed out, however, that if every case in which there were no higher prospects of success than a *prima facie* case provides were dealt with by the courts, there would be serious effects on trial processes.[41] Since there are delays at present apparent in the courts in New Zealand, a more careful scrutiny by police prosecutors is required. They should ensure they have evidence beyond a 'bare' *prima facie* case and should meet the requirements set out in the Guidelines.

The element of public interest takes account of the reality that it is not desirable for all offences to be prosecuted. There is no exhaustive list of factors, but: [42]

> [C]ertainly the ability of any prosecution system to take account of these considerations of humanity and of other elements of public interest is a hallmark of its fairness, provided that such criteria are applied *consistently*.

In considering the openness and accountability of a prosecution system, the Royal Commission defined the terms as the extent to which the system makes it possible for those who take prosecution decisions to be called publicly to account.[43] The prosecutor should be accountable for the efficient running and effectiveness of the agency. The prosecutor should also be accountable for the policies used in general:[44]

39 Supra at note 24, at para 1.1.

40 Ibid, para 6.9.

41 Ibid, para 6.10.

42 Ibid, para 6.11, author's emphasis.

43 Ibid, para 6.48.

44 Ibid, para 6.55.

> We believe there is a strong case in an elective system of democracy, where Parliament is the source of the law which the prosecution system has a part in enforcing, for there to be some channel of explanatory accountability to Parliament for prosecution policies in general.

The Royal Commission considered that there was no process by which those who make prosecution decisions could be held accountable. As previously discussed, there is no mention in the New Zealand Guidelines of a method for ensuring compliance, and the New Zealand Police Report to Parliament discloses no information on prosecution policies. There is no apparent channel for a member of the public to seek information regarding a decision to prosecute, and the police are clearly not accountable to the Solicitor-General for such decisions.

The efficiency of a prosecution system is concerned with the adequate preparation of files, the timely presentation of cases in court, and the use of trained professionals in the appropriate role. The system in New Zealand was criticised in these categories in the Survey of Judicial Satisfaction. As noted in the first part of this paper, the police do not use trained professionals in the prosecuting role but instead regularly move officers into and out of the prosecution section. Given the number of cases that are dismissed or are withdrawn, a case can be made for the desirability of improving the quality of police prosecutors. The Police Planning and Policy Section considered that improved training, and the presence of qualified lawyers in prosecutions sections was desirable. The judicial survey reported that the number of judges critical of police preparedness increased from 1992 to 1994 by eight percent for guilty pleas.[45] Lack of preparedness means that delays in the system are aggravated. Although not all delays in the process are due to the police, as the dominant agency in the prosecution system the police should at least be able to ensure the matters they initiated are not delayed by failures on their part.

As a result of their investigations, the Commission proposed a central prosecution agency to conduct prosecutions, subject to published guidelines, and accountable to Parliament through the Director of Public Prosecutions. The result of this recommendation was the establishment of the United Kingdom Crown Prosecutions Service in 1985

2. The Options Available

(a) A Crown Prosecution Service for New Zealand?

If New Zealand was to follow the United Kingdom, Canada, and the Federal prosecution system in Australia, then the establishment of a CPS would be necessary. This office would be controlled by a Director appointed by the Attorney-General, and would be responsible for the conduct of all prosecutions for the Crown, in both the summary courts and the High Court. The service would take over the prosecution function of the police. If the United Kingdom model was

45 Supra at note 37, at 12.

followed, this would be at the stage that the police decide to proceed with a charge. At that point, the CPS would receive the police file, and determine for themselves in accordance with the published guidelines, whether to prosecute the case, and the manner in which that should be done.

The cost of changing the system could be offset by the reduction in the police budget. In the year ended June 30, 1995, the delivery of prosecutions services cost the police $24,629,000.[46] This amount could certainly go some way towards establishing a crown attorney's office. However, a more far reaching approach would be to consider the matter in an economic light.[47] Over recent years in New Zealand, there has been a re-evaluation of many of the functions traditionally performed by government, on a 'core business purpose' approach. If such an approach was adopted with regard to the police, a possible outcome would be to find that the core business function of police is order maintenance. The law enforcement 'product' is shared with many other government departments. It could well make some sense to minimise the police function to its core purpose, at the same time devolving all other governmental prosecutions to a single CPS. Viewed in such a light, the prosecution of offences is not within the police mandate. The cumulative savings from governmental budgets for prosecutions would be sufficient, it is suggested, to establish a CPS. The question of whether the CPS would also be able to operate as a crown enterprise is more vexed. While it could tender to supply prosecution services to government departments, there would in theory be nothing to stop those departments going to other service providers. If this were the case, then the whole point of a CPS, with a clearly established chain of responsibility to comply with prosecution guidelines, would be defeated.

There appears to be little support for such an office at present. The Crown Solicitor in Auckland considers the police are performing the prosecution function well. There is no real concern expressed in the public media, or in legal or academic circles. The police themselves wish to retain the function. The police view on the current system was set out in their submission to the Law Commission regarding the discussion paper on the prosecution of offences.[48] The police do not favour a centralised independent prosecution authority because "the present system works well". The police also believe that it would be "costly without any practical improvement". They argue that New Zealand's small population and centralised police service mean that reasons used overseas to justify an independent authority are not relevant here. The preference "is to leave in place the present system".

There is some merit to the argument that a CPS will not function well with the police because it will not be clear where the authority lies in any particular case. The evidence from the United Kingdom following the establishment there of a CPS shows that some difficulty can be expected. A recent case highlights a

46 Supra at note 21, at 14.

47 I am grateful to David Burns, Director of Police Studies at Massey University, for his thoughts on this perspective. See also Reiner, "Policing and the Police", in MaGuire et. al. (eds.), supra at note 1, at 752-757.

48 Police submission to the Law Commission, dated 1 March, 1991.

49 [1993] QB 769.

potential problem. In *R v Croydon Justices, ex p. Dean*,[49] the issue was the prosecution of Dean by the CPS, after the police had represented to him that they would not prosecute in exchange for his testimony at a murder trial. The Court held that the CPS had the authority under the Act to decide on a prosecution; but in ruling that the prosecution was an abuse of process, the Court noted that an earlier degree of liaison seemed to be the solution. One commentator notes that this is of little comfort, since the CPS has no supervisory powers over the police. [50] The independence of the CPS in such circumstances appears to be undermined by police action.

A similar problem is apparent in the situation where a case is cautionable, but where a prosecution ensues. A cautionable case is one where the police consider they have some evidence of offending, but for various reasons decide not to pursue a prosecution. In the United Kingdom, there are Home Office Guidelines for dealing with such cases. Research has indicated that cases which are cautionable are being prosecuted.[51] There are two main reasons for this. First, the CPS can only act on the information provided by the police, who may not provide all the background material needed to determine whether a case is cautionable. Second, the CPS, lacking the authority to control the police, will usually continue a prosecution where the police have charged the suspect.

In order to overcome these difficulties, some commentators have called for more powers to be given to the CPS: [52]

> What we would really like to see is a Crown Prosecutor in the police station drawing the charges to be preferred on the evidence present [sic] by the arresting officer, rather as in America the officer put [sic] his case before an Assistant District Attorney.

Such a system would ensure that the police would know immediately why a different charge was preferred to the one sought by the police, and would allow the prosecutor to see what further evidence might be required. The whole process would enable police officers to see what sort of evidence is required to maintain a charge, which in turn should result in more efficient use of police resources. Finally, the decision to caution or prosecute would be made by a legally trained professional independent of the police.

(b) An enhanced police legal section

The current police legal section has a small number of sworn or non sworn staff providing advice to the police on legal issues. This section could be enhanced by the addition of further fully or partly legally-trained staff, to carry out prosecution functions. Advantages of this option include avoiding the expense of setting up a completely new CPS, and the release of a number of uniform staff with

50 Fionda, "The Crown Prosecution Service and the Police: A Loveless Marriage?" [1994] 110 LQR 376.

51 McConville & Sanders, "Fairness and the CPS", [1992] 142 NLJ 120.

52 Editorial, "Charging and the CPS", [1994] 144 NLJ 1157.

prosecution experience into other supervisory roles. This could have a beneficial effect on the quality of files making their way to the enhanced prosecution office.

Unless there was a review of the criteria for prosecution, this option would not meet all the concerns raised in this article regarding the performance of the current system. Merely replacing a uniformed prosecutor with a legally trained prosecutor will not in itself ensure consistency in the process. Prosecutorial discretion would still be an internal police matter, rather than publicly accountable. Finally, personnel currently in police legal sections are not trained or experienced as trial advocates. They are usually police officers who have obtained a law degree. In order to effectively meet the criticisms raised in this article, lawyers attached to the legal section should have some experience as advocates. This would make them more efficient than uniformed prosecutors. An appreciation of the rules of evidence together with trial experience should also assist the section in making better assessments of the merits of each case. In this way the Guidelines will be more effectively implemented, since better consideration will be given to the likelihood of success or failure. Assessment by a professional police legal section will ensure that the public interest criterion is given the weight it deserves.

(c) A Prosecution Review Authority

A Prosecution Review Authority (PRA) could resemble the system used in Europe and Canada. Citizens would be free to complain to the office, and seek reasons for the actions of any prosecuting agency. The office would need to have the ability to review the quality of prosecutions, preferably in the light of published Guidelines. The power to enter a *nolle prosequi* would give the office effective control over the police where a prosecution had been initiated, but the PRA considered that the Guidelines had not been followed. This would act as a check on current police practices of prosecuting some cases when there is little or no likelihood of success.

A PRA would need to be staffed by legally trained persons, preferably with experience in the criminal courts, and be answerable to the Attorney-General. By making this office independent of the police, the problem of accountability would be solved. As noted, although there are Guidelines at present, there is no obviously effective method for ensuring that they are complied with. Since the Guidelines are issued by the Solicitor-General, acting for the Attorney-General, it makes sense for a PRA to be responsible to that office. An annual report to Parliament, which detailed the Guidelines, and which outlined steps taken to ensure compliance, would answer the criticism that the present system is lacking in accountability.

A PRA could also develop and monitor training standards for police prosecutors, should the police choose to continue to use uniform staff the carry out prosecutions. If the police find that they are frequently overruled by the PRA, this should act as a signal to them that the present staffing of the prosecutions sections needs investigation. In both Surveys of Judicial Satisfaction discussed earlier, many comments were directed to the lack of training of police prosecutors. To a certain extent this may be the result of high rotation of staff through these sections. It seems, however, that adverse judicial comment has had no noticeable effect on this standard .[53]

53 Supra at note 37 and text. The 1994 report states that such adverse comments have in fact increased.

VIII: CONCLUSION

This article has addressed issues which arise from police control of prosecution procedure in the summary jurisdiction. The principle criticisms are: that police do not operate in accordance with the Solicitor-General's Guidelines, despite their assertion to the contrary; that the conduct of police prosecutions lacks uniformity, in that charges are proceeded with which should not be; that the public interest criteria in the Guidelines are overlooked; and that police prosecutors lack adequate skills for the tasks they perform. Judicial comments in response to surveys are critical of the standards of skills and preparation. The overall conclusion is that the decision to prosecute an alleged offender is effectively made by the investigating officer, as there is little or no supervision of the process. Police prosecutors proceed with the charges formulated by the investigating officer, assuming that the defendant is guilty.

The most important improvement would be to remove the decision to prosecute from the control of the police, and vest it in an independent legal office. This office would follow published guidelines similar to those used by the CPS in England. Its independence would be emphasised to both the public and the police. If this step were taken, it would not necessarily matter who appeared in the District Courts to conduct a prosecution. This is so because the public would know that an officer independent of the police had reviewed the matter before the appearance in court. The Crown Attorneys would be subject to freedom of information legislation, so the public could have confidence that the interests of the public, and not the police, were considered paramount.

Since a large proportion of cases in the summary jurisdiction are dealt with by a guilty plea, police could still provide prosecutors, to deal with guilty pleas and formal proof matters.[54] If a Crown Attorney's Office was established, however, it would then become desirable to have Crown Attorneys to prosecute defended matters. This would reinforce the independence of the office from police, and would remove the image of the 'police court' from the public perception. The police role would become more clearly defined, and in addition, a number of officers would be released for other duties. Alternatively, Crown Attorneys could perform all functions, which would have the advantage of not dividing courts between guilty and not guilty matters.

Such matters are merely technical or procedural points. The key issue is the accountability of the process to the public, and the realisation that the prosecution role is not just an ancillary function performed by the police because it is easiest for all involved. The decision to prosecute, especially in the summary jurisdiction, is a fundamentally important one, affecting thousands of citizens each year. It should be a decision made by a competent public body, with reasons clearly set out, and subject to review.

54 Formal proof matters are permitted by s 61 of the Summary Proceedings Act, and allow the prosecution to prove the charge in the absence of a defendant.