



Report of
MEL SMITH, OMBUDSMAN
FOLLOWING A REFERENCE
BY THE PRIME MINISTER
UNDER SECTION 13(5) OF THE OMBUDSMEN ACT 1975
FOR AN INVESTIGATION INTO ISSUES INVOLVING THE
CRIMINAL JUSTICE SECTOR

Presented to the Prime Minister
and to the House of Representatives
pursuant to section 29 of the Ombudsmen Act 1975.

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FOREWORD

The following is my report consequent on a reference directed to me by the Prime Minister to investigate the administration of the criminal justice system. The Terms of Reference directed to me are attached as **Appendix A**. By agreement the reporting date was extended to 1 December 2007. I note that my report is to be tabled in Parliament.

My investigation has been conducted in accordance with the provisions in the Ombudsmen Act 1975.

The report is comprehensive but does not purport to provide an in-depth analysis of the detailed operation of all parts of the criminal justice system. Neither resources nor time permitted an examination of that magnitude.

The report does however consider the overall operation of the system sufficient to satisfy the Terms of Reference directed to me. The views expressed and suggestions made are based on my own knowledge of that system, together with interviews I conducted and submissions I received from people who are involved in the system at the judicial, policy and operational levels. I can report that there was considerable interest in my investigation and a clearly expressed desire by all those with whom I spoke to contribute to improvements in the system right across the spectrum, ie policy development, legislation and operationally.

The criminal justice system is complex and difficult. Unfortunately the rhetoric that we hear in the media and elsewhere almost daily tends to convey an impression that there is some simple answer to crime and criminal justice. That is very far from the reality. There is no simple answer. There is no silver bullet.

This report identifies issues of policy, practice and management that need to receive ongoing focus. It is instructive to note that, up until this reference from the Prime Minister, there has been no comprehensive review of the whole of the criminal justice system and how the component parts should operate and interact to achieve the objectives of a coordinated and effective process directed to meet society's goals.

I was not asked to make recommendations. Indeed it was not appropriate in my view that an investigation of this nature should do so. Section 13(5) of the Ombudsmen Act requires that I investigate and report on the matter that is referred to me. Nevertheless, my report does make suggestions and these are matters for the government to consider and act upon as it sees fit.

Although my report deals with the spectrum of criminal justice, I have given some emphasis to issues of youth justice and crime prevention. I see these two aspects as ones that, appropriately developed and resourced, could provide significant opportunities to deal constructively and productively with the complex issues of crime and criminal justice in the fairly immediate future.

I express my concern in the report about how the issues of crime and criminal justice have become highly politicised and often the subject of uninformed and superficial public and media comment. There has been, and continues to be, a lack of constructive and clear headed public debate about the issues. As a consequence there is an absence of rational decision making based on any critical examination of the issues. This tends to act as an impediment to constructive change. This situation exists at the policy development, political and legislative stages and also importantly at the various operational levels. At the operational level the criminal justice sector operates in a climate of independence and involves the exercise of statutory authority. Judicial independence, registrarial independence, constabulary independence and decisions taken under delegated authority, all of which have a significant impact on the operations of the criminal justice system, are exercised by various people within those spheres in many different ways. Such independence is an important factor in the proper and fair operation of the system. Nevertheless the somewhat haphazard nature of some of the decision making produces unfairness and perverse consequences.

In terms of policy, legislative development, and political decision making and direction, an ideal scenario would involve an all-party agreement directed to achieve a cohesive political response to the issues of crime and criminal justice. This I accept is utopian and will not come about. I am however bound to report that the system overall, whilst not in any imminent danger of breakdown, nevertheless is, throughout the entire system, suffering from a loss of public, and

from comments made, political confidence. Because of this and other ongoing difficulties, a host of problems including morale, staff recruitment and retention emerge. These among other issues have a serious impact on the effectiveness and efficiency of the system, add to its already huge financial cost, and put the system at serious risk.

As I have noted in my report the cost of crime and criminal justice is huge. It is estimated that the economic and social cost to both the public and the government in 2003/04 was around \$9.1 billion. No doubt that figure will have increased significantly since then. The forecast budget for the core criminal justice agencies for the year 2007/08 is approximately \$2.7 billion. These are significant costs that demand a comprehensive and high level examination of all of the issues and the development of approaches that produce a better system, and reduce this huge economic cost. This will not be an easy task but I suggest one that must be undertaken.

I have considered all of the options known to me. My report suggests that a Commission of Inquiry (probably a Royal Commission is necessary and appropriate) to undertake such an examination. I have already noted that hitherto there has never been any comprehensive review of the criminal justice system.

One of the other suggestions I have made relates to the overall management of the criminal justice system. The intention of this is to provide ministers and the government with some assurance that the government's objectives for the overall management of the system, and the performance of the agencies that contribute to it, are being met in an effective and efficient manner, and that the government's goals for the system are understood and acted on. To achieve this I have suggested that a group be set up comprising ministers with direct responsibility for criminal justice activities, the chief executives of the relevant agencies, and two or three independent and experienced people.

Much of what I have said earlier, and throughout my report, will be seen as bad news. This is however not entirely the case. There is in my view much good news. As an example I note that, at least over the past two to three years, there have been significant advances in the way that the agencies have developed and

managed coordination mechanisms that has resulted in a much higher level of cooperation across the sector than previously existed. This is particularly apparent at the policy development level but improvements have also been noted at the level of operational management. The management of the courts and the work that is being done to handle increasing case numbers, particularly in respect of crime, and the planning that is under way to develop a strategy for the growth in greater Auckland, is applauded. I also observed emerging cooperation between agencies at the local level, particularly in respect of youth justice. This however is far from comprehensive. It is an area of management that the several chief executives need to provide an impetus to. Independence in the exercise of statutory powers is one thing. The exercise of that independence at the management and operational levels in a way that is not necessarily directed to the achievement of the government's goals for the sector overall and which may result in unevenness and inefficiencies, is quite different.

Finally I note with appreciation the very ready assistance that was provided to me by the various agencies and other organisations involved, whether operationally or by linkage, in criminal justice. All were enthusiastic and anxious to contribute to improving the system and processes directed towards reducing crime and providing a fair and efficient criminal justice system in which the public could have confidence. I am particularly grateful to the Ministry of Justice which took the lead role in ensuring that I was provided with any information I needed.

I also note with gratitude the assistance provided to me in carrying out this investigation by Dr Michael Stace and Ruth Allan. The task has been substantial and their contribution to the outcome has been significant.

Dated this 30th day of November 2007

A handwritten signature in black ink, appearing to read 'Mel Smith', written in a cursive style.

Mel Smith
Ombudsman

CHAPTER 1

INTRODUCTION TO CRIMINAL JUSTICE

Criminal justice is a system of legislation and practices administered by a number of organisations. It is a system of law and administration which is involved with the maintenance of social control. It is aimed at preventing and deterring criminal behaviour, apprehending and processing those who commit crimes, and sanctioning those who violate the criminal law. “Justice”, “fairness” and “the rule of law”, underpin the system’s philosophy. These principles are encapsulated in the New Zealand Bill of Rights Act 1990.

The organisations which administer the system comprise the criminal justice sector. The core criminal justice sector consists of the following departments of government:

- Ministry of Justice
- New Zealand Police
- Department of Corrections
- Crown Law Office
- Ministry of Social Development (youth offending)
- Serious Fraud Office (as it presently exists).

Some of the work of the Ministries of Education and Health involves participation in the criminal justice sector.

There are some other agencies which are closely linked to the sector. These include:

- Legal Services Agency
- The Council of Victim Support Groups
- New Zealand Law Commission.

There are a number of non-government agencies that have an interest and association with the system, eg Prisoners Aid and Rehabilitation Society, Howard League for Penal Reform, Criminal Bar Association, Sensible Sentencing Trust, and Rethinking Crime and Punishment. Local government is also involved – particularly in crime reduction through environmental and design matters, and citizen education.

Additionally there is a significant number of non-governmental organisations involved with youth, crime, victims etc.

The Ministry of Justice provided the following factual information:

- *the Sector employs approximately 29,349 staff and operates from around 518 sites around the country*
- *the Sector administers approximately 180 individual Acts of Parliament*
- *there are around 13 million electronic data transactions a year between Justice Sector agencies. These transactions are managed through 24 separate electronic data interfaces*
- *the justice data warehouse contains 325 gigabytes of criminal data and is updated daily.*

On average, every day (250 working days for Courts; 365 for the Police and Child, Youth and Family (within the Ministry of Social Development)):

- *1,168 crimes are recorded*
- *there are 3,721 road offences and infringements*
- *385 cases are referred for prosecution by the New Zealand Police*
- *more than 10 jury trials are disposed of in the District Courts*
- *8,200 people are in prison*
- *25 Family Group Conferences are convened.*

The budget allocations for the operating expenses of core criminal justice sector (expressed in \$000) are:

	01/02	02/03	03/04	04/05	05/06	06/07 estimated	07/08 forecast
Corrections	445,244	457,194	487,919	537,694	658,704	777,646	894,189
Justice (plus Courts)	258,158	289,947	278,548	311,613	364,856	384,712	435,095
Police	817,095	859,558	900,198	941,642	1,018,642	1,135,388	1,235,051
Youth Justice	49,971	54,273	64,069	68,831	83,567	95,004	96,368
Total	1,570,468	1,660,972	1,730,734	1,859,780	2,125,769	2,292,750	2,660,703

There has been an increase of 70% in the operating expenses of these core departments since 2001/02. I am advised that the increase in expenditure until the year 2003/04 was reasonably well related to the increase in the nominal GDP over that period. However, since 2004/05, the justice sector spending has grown faster than GDP.

From the figures made available to me, there has been little change in the real cost of individual staff over that time in the Department of Corrections, the Ministry of Justice (including the Courts) and the Police. The increase in the total operating expenses of each department largely reflects the substantial increase in staff numbers.

While questions can be asked about what the staff increases have achieved, of more immediate concern is the growth in capital expenditure. Figure 1 (page 10) records the capital injections in the justice sector for the years 1999 to 2008. The growth over the years 2005, 2006 and 2007 can only be described as extraordinary, or, not to put a too fine a point on it, extraordinarily worrying.

Figure 2 (page 10) compares the capital injection in the justice sector with capital injections in the Ministries of Defence, Education and Health.

A question which is sometimes raised jokingly asks which is more important to us: a hip operation or a new prison cell. Figure 2 suggests that this is not necessarily entirely a joke – it appears that we may not be able to have both.

In its briefing for the incoming minister dated October 2007, the Ministry of Justice cited Treasury Working Paper 06-04 which estimated the economic and social

cost of crime, to both the public and government, at around \$9.1 billion in 2003/04.

FIGURE 1
Capital Injections in the Justice Sector

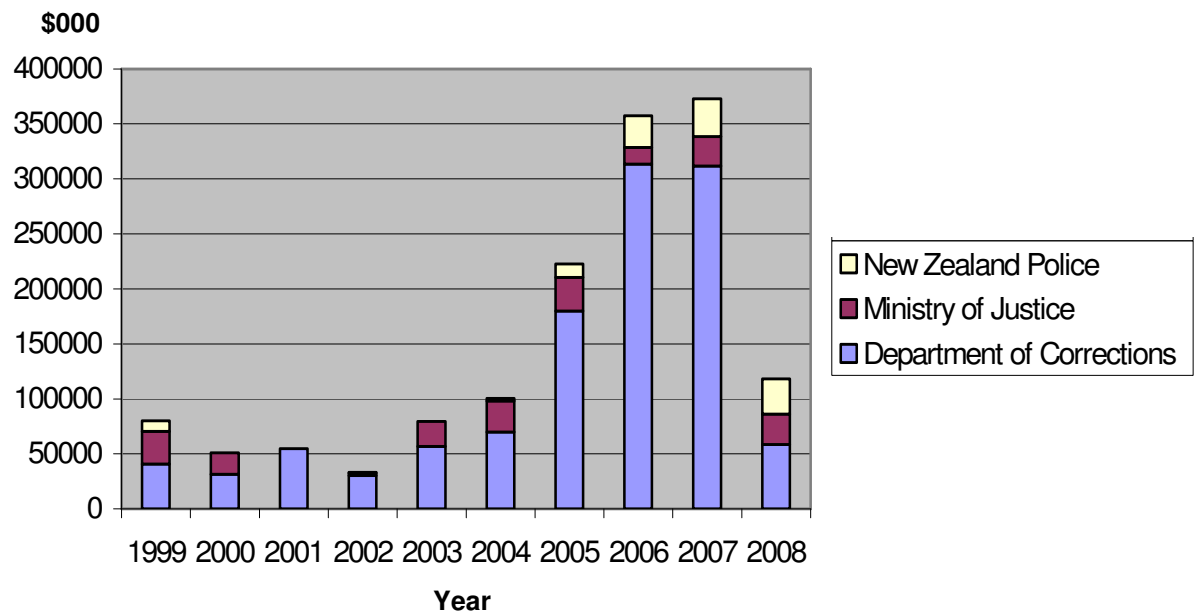
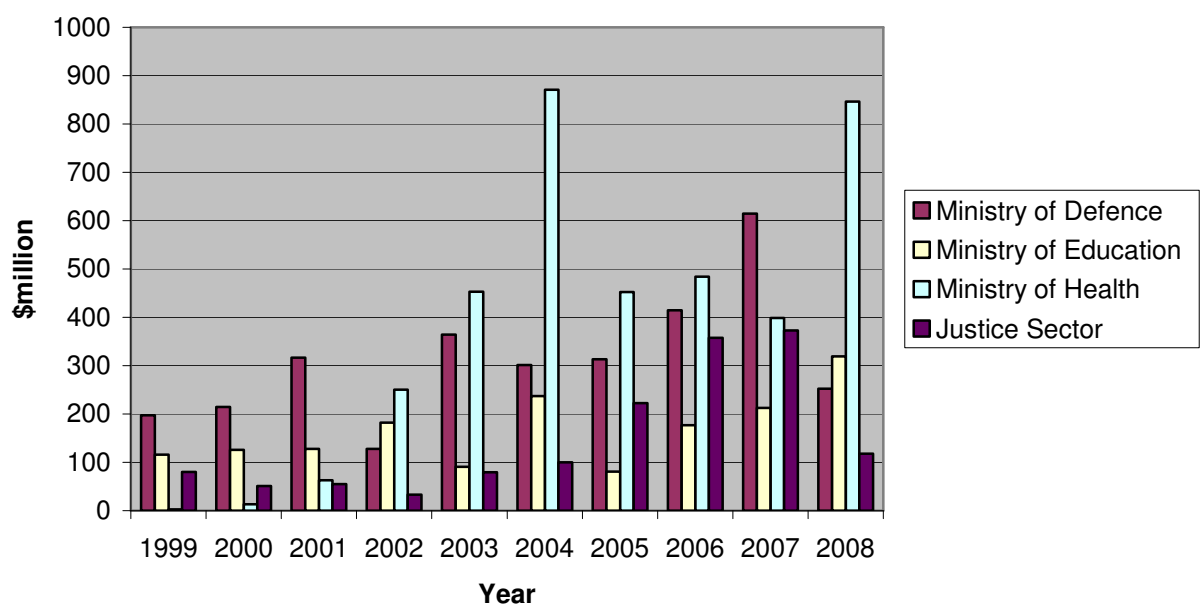


FIGURE 2
Comparison of Capital Injections by Sector



Over the years, there have been a number of inquiries into aspects of the sector's work. These include:

- Royal Commission on the Courts, 1978
- Penal Policy Review Committee, 1981
- Ministerial Committee of Inquiry into Violence, 1987
- Commission of Inquiry into Police Conduct, 2007.

In addition, there have been many reports which have investigated a specific event. The 2007 Review of NZ Parole Board's decision to release Graeme Burton on parole is a recent example of such a report. This report examined the processes which were followed prior to the release of Graeme Burton on parole and assessed their adequacy in view of his subsequent offending.

The reports listed above explored specific matters in some depth. They were usually followed by legislation in which the government, after due consideration, adopted the recommendations to the extent it considered appropriate. It is particularly significant however that there has never been a review of the whole of the sector and to ensure that policy, be it law or administration, is directed to a comprehensive objective for the sector as a whole.

Responsibility for the review of policy within aspects of the sector and recommendations for changes in practice has, in recent years, involved the New Zealand Law Commission. Some of the Law Commission reports which have dealt with criminal justice issues since 2002 are:

- Search and Surveillance Powers, 2007
- Sentencing Guidelines and Parole Reform, 2006
- Criminal Pre-trial Processes: Justice Through Efficiency, 2005
- Delivering Justice for All: A Vision for New Zealand Courts and Tribunals, 2004.

These reports have contributed to the policy and practice of the nominated aspect of the sector.

I want to comment briefly at this stage about the attitude and aptitude of those who work within the criminal justice system whom I met during this investigation and on other occasions. Yes, there are a few (fortunately only a few) whose approach to work is slovenly and (in a minute number of cases) dishonest. But most are competent and conscientious (and sometimes enthusiastic) in complying with the requirements that are imposed in their given role in the criminal justice system.

Those who displayed enthusiasm for their work in the criminal justice system had a concern for individuals which meant they defined their tasks as including a vision that criminal justice served everyone. They pursued their work with dedication which, because of their vision, often involved their leisure hours.

There is however in my view a lack of capability at both the policy and operational levels. The very significant increase in staff numbers has answered the need for increased capacity but there is a huge training need to raise the level of capability. I have read an essay delivered by Sir Geoffrey Palmer at a conference to honour Sir Kenneth Keith earlier this year. The essay is titled "Government and Advice: Reflections on the Wellington Policy-Making Culture".

Sir Geoffrey's theme is, in the main, directed at the interface between devising policy and implementing it through to legislative form. His remarks however also have particular relevance to the chasm which often exists between a policy decision, whether that policy is translated into legislation or not, and the practical implementation of that policy or legislation at the coal face.

Sir Geoffrey makes the point that bad law often results from bad policy, but also bad law frequently taints good policy because of poor legal and regulatory design. I make the point that policy or law is only as good as its implementation. If that policy or law is not able to be properly and effectively operationalised, the outcomes may be perverse or at best less than optimum. Sir Geoffrey says it is fundamentally unsound to settle the policy before addressing the legal instrument of choice. In my view it is equally unsound to be developing policy in the criminal justice system in a vacuum that does not involve and give full consideration to the operational issues that might be involved and which, in the end, will determine the

outputs of the policy/legislation. As Sir Geoffrey says, much good policy development requires interdisciplinary activity. I suggest it is essential that such “interdisciplinary activity” involve people who have practical hard core knowledge and experience of the system in operation.

In my view, based on experience, the criminal justice system, on the whole, functions adequately in comparison with other countries we relate to and there is a reasonable and developing degree of cooperation between the agencies. Nevertheless, despite the honest endeavours of the vast majority of those who work in the sector, I have encountered a number outside the sector who are sceptical about its work and question whether the public are getting value for the sector’s annual expenditure. Further, there is evidence of a lack of public and to some extent political confidence in the sector.

It is apparent that public expectations of criminal justice have changed in recent years. While expectations are always developing, they seem to have become more demanding in the past decade or so. Not only is each agency expected to do better – both on its own behalf and in cooperation with the others – but the quality of the services provided is expected to be higher. Moreover, there is also an expectation that the victim will have a more influential role in the sector’s decision making. These demands, I wryly note, often seem to be made without any appreciation of their cost or whether a more effective, efficient and fairer system will eventuate.

In view of these changing expectations and their impact on the public and political confidence in the sector, I have come to the view that it is time for the entire sector to be reviewed. It is now appropriate, I believe, for a Commission of Inquiry to examine the criminal justice sector in its entirety. It would investigate both the ongoing applicability of its philosophy and the relevance of its current practices. The Commission would have the prime task of developing recommendations which, when put into practice, will aim to restore public and political confidence in the criminal justice system and permit a rational and informed debate and consideration of this complex and expensive process.

Public confidence can be rebuilt by making sure that the system is effective, efficient and serves all communities fairly, is fair and is seen to be fair, contributes to a society in a way that allows people to feel safe and does not absorb an undue amount of public funds. These attributes can be achieved by ensuring that each agency understands its role within the sector and how they must contribute to the government's overall goals for the sector. Further, it is essential that the agencies work together to protect the innocent and provide a high standard of service for victims and witnesses. At the same time it is necessary to respect the rights of offenders. A criminal justice system which meets these standards as it reduces crime, deters criminal behaviour, apprehends and sentences offenders fairly and effectively, and in which the public has confidence, must be put in place.

I am well aware of, and appreciate, the reluctance to resort to a Commission of Inquiry to examine such issues of significant public importance. I have carefully considered the issues that surround such a proposal and have concluded that, unless we accept an inevitable "more of the same", there are few options. Criminal justice has unfortunately reached the stage where national debate is difficult. When an incident occurs the responses from the public, politicians and the media tend to polarise. The almost inevitable response of "let's pass or amend the law" is often a fruitless reaction that is piecemeal and probably not effective. There have been a number of recent cases to emphasise my point. The maxim "hard cases make bad law" is particularly appropriate.

I note in the following chapters some of the specific issues which I consider should be addressed by a Commission.

CHAPTER 2

MACHINERY OF GOVERNMENT

The core criminal justice sector comprises the Ministry of Justice, which administers the Courts through its Operations Division, the New Zealand Police, Department of Corrections, Crown Law Office and the youth justice teams in the Ministry of Social Development. From my investigation, I see no reason why there should be any changes to this structure.

I have considered whether the structure of the Department of Justice in Victoria, Australia, has anything to offer us. I believe not. The Victorian Justice Department is responsible for the following functions: police and prosecution, the court system, prison and community corrections, tribunals and agencies established to protect citizens' rights, emergency management, racing and gambling policy, and the provision of legal advice to the government. The structure includes three ministers, eight executive directors and two commissioners. I would expect a Commission reviewing the justice sector in New Zealand to investigate machinery of government issues but, as noted, I am not suggesting any changes at this stage.

I am of the view, nonetheless, that the avenues of ministerial responsibility for criminal justice in New Zealand justify some thought.

The criminal justice system in which the public have confidence is essential to enable a government to achieve its overall goals. Because of the importance of the sector both socially and economically, I consider that the sector, in addition to each department, warrants ministerial oversight by one Minister. The person would hold the warrant as Minister for the Justice Sector and would have a high ranking in Cabinet. However, because of the constitutional independence exercised by the Solicitor General, the Minister to whom the Solicitor General reports, the Attorney General, would remain separate from, and not come under the purview of the Minister for the Justice Sector.

Because of the broad range of responsibilities at present carried by each Minister, it is envisaged that individual ministers responsible for Justice, the Police, the Courts, Corrections and Youth Justice would continue to be appointed (perhaps for more than one criminal justice portfolio or with some other portfolio responsibilities outside of criminal justice). However, it would be a decision for each government as to whether the people appointed to the specific portfolios were Ministers or Associate Ministers, and whether they were in or outside Cabinet. What is important is the concept of one Minister for the sector who would ensure that each agency works together to achieve the overall justice outputs sought by the government. While this question is entirely one for the Prime Minister of the day and of course there will be political imperatives, I have nevertheless looked at the issue from a detached and pragmatic perspective.

It is the practice at present for a number of departmental chief executives to constitute a risk management audit committee within their own organisation to provide advice to their own administration and management. These bodies are however single agency and inward looking.

In order to achieve the government's goals, it is my considered view that a committee chaired by the Minister for the Justice Sector would be of considerable value. Other ministerial appointees and departmental chief executives would be the members. It would include two or three experienced members from outside the government who would have the specific task to examine proposals and advise whether all possible fiscal responsibilities had been assessed and whether the administrative requirements in regard to each policy had been foreseen. This committee would look across the entire sector and consider, amongst other things, the very sort of concerns that gave rise to my investigation.

This approach would, so far as I am aware, be novel within the machinery of government and public administration in New Zealand. I do however see the potential in such a body to assist ministers and work with senior officials in the several agencies to better manage the overall system.

I note with interest that the recent reforms in the justice sector in the United Kingdom provide for a National Criminal Justice Board (NCJB). Lord Falconer, the Lord Chancellor and Secretary of State for Justice, said:

The Ministry of Justice must work closely with the other agencies that have responsibility for other deliverers and connected policies – most notably the Home Office and police, the Attorney General and prosecutors, and social service departments. The NCJB has, in a pragmatic and focused way, driven change in the criminal justice system because of the way it has produced unity among the deliverers. We do not want too much bureaucracy. We do want to see better outcomes.

CHAPTER 3

CRIMINAL JUSTICE IN PRACTICE

There have been a number of issues facing the criminal justice system in New Zealand which have become increasingly dominant in the past decade. These are:

- New Zealand has a high and increasing incarceration rate, compared to most developed countries
- the number of prisoners – the prison muster – is growing at a considerably faster rate than the population growth
- the recent trends include less use of community sentences, more remand-in-custody, and more short-term prison sentences
- the prison muster has tended to grow faster than forecast
- substantial unplanned capital expenditure and operating expenditure increases have occurred
- media coverage of events is often extensive and frequently seeks, with minimal investigation, to ascribe culpability on to an aspect of the system.

To some extent these issues underlie the policy proposals contained in the suite of Cabinet papers known as Effective Interventions. They were released by the Prime Minister in August 2006. To provide a comprehensive picture I shall address each of the ten Effective Interventions proposals in Chapter 4.

In this chapter, I intend to comment on what I see as some of the more pressing criminal justice issues – media coverage, parole, the prison muster, and bail.

1 Media Coverage

From the outset, I want to make it plain that I do not blame the media for the publicity – both positive and negative from the criminal justice perspective – given to issues of crime and punishment. “Crime news sells newspapers” is a media truism and, at a wider level, “law and order” issues are never far from the top of the political agenda. Crime often involves human drama and is described as “low

cost copy” for the media while accompanied by a high public interest. Extensive media coverage of crime is not a recent phenomenon and, after research in 1993, the following three themes were identified:¹

- a There are substantial discrepancies between official reports of criminal activity and press reports of crime, ie distortion.
- b The media over-report serious crimes, especially murder and crime with a sexual element, ie an emphasis on violent crime.
- c The media concentrate crime reportage on events rather than issues and so crime incidents and specific crimes form the bulk of the crime news as opposed to analyses of issues.

I would add a fourth:

- d The media may be used by interest groups to harness public and political support.

As a consequence, the research observed that crime reportage “heightens the journalistic imperatives of simplification, titillation, entertainment, dramatisation and immediacy”.

These themes in the media coverage of criminal justice have become more important as the competition for television news has increased. It can also be argued that media coverage has a role in defining what, broadly, is acceptable, and unacceptable, behaviour within society.

Regardless of one’s view about the media’s coverage of crime, it must be stressed, because it is central to our democracy, that the public has a right to know what is happening within the criminal justice system and it is the media’s responsibility to inform us. At the philosophical level, there is a long history to the debate, indeed the struggle, between the freedom of expression about public

¹ Judy McGregor, *Crime News as Prime News in New Zealand’s Metropolitan Press*, Legal Research Foundation, Auckland 1993

affairs and what is appropriate in a democracy and fair legal process, and the protection of the individual reputation of those involved in such affairs. Recent cases have highlighted these issues.

There are aspects of the media coverage of crime and criminal justice which I took up with some of the people I spoke to while carrying out this investigation. There was agreement that there is an increased willingness among police officers in charge of high profile trials to comment to the media on the outcome of the case. Some police officers expressed concern about the practice and asked whether an individual officer's comments were appropriate, while others argued that it was necessary to counter the views which might be advanced on behalf of the defendant.

While I am not alone in finding the media coverage of crime and criminal justice as unnecessarily sensational and unbalanced on occasions, it is part of our environment and something that the criminal justice practitioners must learn to live with. It will, however, become a substantial issue if it hinders the ability of the justice system to administer the rule of law fairly.

There are occasional examples in our history where media coverage of an event or events creates what is now termed a moral panic. However, I do not accept that, at present, the coverage by the media of the criminal justice system is of a nature to deserve that epithet.

A Commission of Inquiry could consider the significant issues that emerge from crime reporting and the involvement of individuals from within the system.

2 Parole

In view of the activities of some former prisoners while on parole, the parole system has been the media focus on a number of occasions and, recently, has been dealt with in the legislation. Parole is a system which allows for the early release of prisoners for good behaviour. In New Zealand, in 1875, a formal

system of release with one quarter remission for hard labour inmates was enacted and gazetted in the Regulations.²

In 1911, following the establishment of the indeterminate sentence of reformatory detention, a prisons board of three to seven members was established to authorise the release of detainees on probationary licence. It remained operative until 1954.

The main distinction between remission and parole is that remission is a statutory right granted generally for good behaviour and it may or may not have a probation period attached, while parole is discretionary and almost always carries conditions. Parole is based on the assumption that the inmate has reformed and is unlikely to reoffend.

The parole system was substantially revised in 1954 and, since then, there have been a number of changes, both in regard to eligibility and the decision making process. The Parole Act 2002 introduced some major changes to both aspects, and a Parole Amendment Act 2007 has again fundamentally revised the rules relating to eligibility. The different rules will be outlined briefly as the rules regarding eligibility are those extant at the time of the sentence. Accordingly those sentenced to imprisonment before 6 May 2002 are eligible for parole under the earlier appropriate conditions.

(a) The Parole Board Structure

The structure put in place in 2002, as opposed to the eligibility criteria, applies to all prisoners seeking parole. In 2002 one national New Zealand Parole Board was established to replace the National Parole Board and the 17 District Prison Boards then operating. Until 2002, the national body dealt with inmates serving sentences of seven years or more (including life imprisonment and preventive detention) while each District Prison Board considered the case of inmates at a particular prison serving sentences between one and seven years.

² Greg Newbold, *The Problem of Prisons*, Dunmore Press, Wellington 2007

The problems which were advanced and which led to the revised structure included:

- difficulties in consistency of practice in decision making
- insufficient safeguards to protect the legal rights of prisoners
- the possible lack of board independence in view of the board membership of Corrections Department officials
- the lack of suitable training for the community board members.

The new entity created by the Parole Act 2002, New Zealand Parole Board, comprises about 20 full time members and is chaired by a Judge. The goals of the reforms are:

- 1 Greater adherence of the decision making system, and improving the quality of decision making.
- 2 Increased consistency of practice and decision making.
- 3 Increased accountability and fairness.
- 4 Increased efficiency and better management of resources.

In view of the professed need to ensure the board's independence, I find it strange that it was decided to attach the agency to the Department of Corrections for administrative purposes. That independence would have been more soundly based had the board been established either as a crown entity or, failing that, had been attached to the Ministry of Justice. Indeed this was the proposal at the time of the Department of Justice's restructuring in 1995. That is a matter which could be reviewed when the Act is next amended.

It also seems to me that in the pursuit of independence the membership of the Parole Board, as opposed to its administration, has been unnecessarily divorced from the Department of Corrections. The board is required to make an assessment of a prisoner's likelihood of reoffending while

restricted to written documentation from those who are best able to advise – staff in the Department of Corrections.

While the Parole Amendment Act 2007 allows for the chief executive of the Department of Corrections to apply to the board to make a confidential report, I am firmly of the view that there is a place for a member of the Corrections staff to sit on the board. As the member would be clearly in the minority of the quorum, the Department of Corrections would not control the board's decisions.

I base this opinion on my experience as a member of the National Parole Board when with the Department of Justice, and on my discussions with a number of others who, as Department of Justice employees, sat on District Prison Boards. The concern about board independence will also be met by the increasing numbers of parole applicants who are legally represented.

The Parole Act 2002, section 7, states that “the paramount consideration for the board in every case is the safety of the community”.

It is of course possible to mount the argument that it is very hard, and perhaps it is not possible, first, to be totally confident that a prisoner will not reoffend, and secondly, to make that assessment on the basis of behaviour displayed in the highly constrained prison environment.

Risk cannot be eliminated; but it can be minimised. And one way of doing so is for the board to include a senior member of the Department of Corrections (the Chief Executive or his delegate) who can not only outline the inmate's behaviour, but also contribute to a discussion and to the decision as to whether or not to grant parole and, if so, on what terms. The senior official, who has ultimate responsibility for the management of the parolee and the conditions attaching to parole, is then directly involved and is accountable.

(b) Victims and the Parole Board

From comments I have received, it appears that the public are poorly informed about the part that victims can play at present in the criminal justice system. Despite occasional media references to victim impact statements at the time of sentencing, and to submissions by victims to the Parole Board, knowledge of a victim's participation was not reflected in the comments made to me. I shall return in Chapter 8 to the extensive provisions now in place under the Victims Rights Act 2002.

At this point (and on the basis that action will be taken to remove the unintended consequences which flowed from an amendment unexpectedly passed in Parliament during the passage of the Criminal Justice Reform Bill) I want to point out the current rights available to victims with regard to the Parole Board.

If victims are registered under the victim notification scheme, they must be advised of an offender's pending Parole Board hearing and they are entitled to ask for certain information regarding the offender's behaviour in prison. Moreover, they are entitled to make written or oral submissions to the board. The board must give due weight to the victim's submissions. Victims must be notified of hearing decisions and release conditions that are of relevance to them. Unregistered victims may also make submissions and ask to be notified of the decision. In my opinion, the process allows victims suitable opportunities to participate in parole decisions.

(c) Eligibility for Parole

Before the Parole Act 2002 and subject to specific provisions relating to convictions for violence, prisoners were eligible for parole after one half of their sentence or 10 years, whatever was the less. In 2002, inmates serving sentences of more than two years imprisonment were eligible for parole after one third of the sentence.

After decisions in which the Parole Board had taken into account the concept of general deterrence when considering an application for parole, the Court of Appeal ruled that, in view of the requirement in s.7 of the Parole Act – safety of the community is the paramount consideration – the board should focus on assessing the risk to the safety of the community when deciding whether an applicant will be released.

General deterrence, the court ruled, was relevant at the time of sentencing and it was not relevant when the Parole Board was considering an application for parole: *Reid v New Zealand Parole Board*, CA, 29 August 2006, CA247/05.

If a recent newspaper report of one unsuccessful parole application is correct, it would seem that this decision is not necessarily being fully complied with by the Parole Board. It was reported, *The Dominion Post*, 5 September 2007, that the applicant was a model prisoner who was unlikely to pose a risk to the community and had a supportive home environment and support in the community. Nonetheless, the Parole Board said those matters were outweighed by “the nature of his offending and the views of his victim”. I shall discuss this decision further in Chapter 11 as it illustrates the competing pressures that justice sector decision makers may have to take into account in reaching a balanced decision.

Eligibility for parole has been changed substantially by the Parole Amendment Act 2007, most of which is to come into operation on a date yet to be fixed.

Essentially, parole will not be available for prisoners serving sentences of one years imprisonment or less – they will serve the sentence in full – and prisoners serving a sentence of more than one year are eligible to apply after two thirds of the sentence. A concurrent piece of legislation, the Sentencing Council Act 2007, established a Sentencing Council. One of its functions is to produce guidelines about parole in order to “promote consistency and transparency in Parole Board practice” (s.8(a)(iii)). I shall discuss the Sentencing Council later.

(d) Commentary

A parole process is an essential aspect of any prison system. At its most basic it is an incentive to inmates to conform to prison discipline. As social contexts have a part to play in most offending and as they cannot all be foreseen in advance, there is some risk attached to the release of all inmates, and the parole system has developed to minimise those risks. In some cases, probation officers are able to encourage and assist released prisoners to take the opportunities which are available in the community. In some cases, former prisoners can be required to comply with strict parole conditions. The process also allows for relatively stringent conditions to be imposed in cases where the possibility of reoffending is reasonably high in order to ensure that a prompt application for recall can be made if necessary.

Although granting or declining to grant parole is a process which must be made on the best information which is available, it remains, nevertheless, an assessment of future human behaviour, and thus includes an element of guesswork. A risk averse approach to granting parole, which lessens the chance for critical media headlines, will condemn some prisoners, who would pose little risk to the community, to longer terms in institutions and in my view the potential for rehabilitation is lessened.

3 Prison Muster

Any discussion about crime and penal policy in New Zealand inevitably touches on the prison muster, or the prison population, which is the number of people in prison at any one time. The muster is usually given both as a total number of sentenced prisoners and remandees (male and female in both categories) and as a rate – that is the number of people in prison as a proportion of 100,000 population. This ratio enables comparisons to be made with other countries. As at 1 November 2007 the number was 8,056 and the rate in New Zealand was 190 per 100,000 of the population.

The muster peaked at 8,457 on 10 September 2007. The Department of Corrections comments that it is unclear whether the decline of about 400 since then reflects seasonal factors or changes in the legislation. In view of seasonal fluctuations apparent for a number of years, this would seem to be the main reason for the recent decline.

The muster is high when compared with other countries with a similar social structure. The United States has always incarcerated people at a rate which exceeds most other countries and was 760 in mid 2006.

Some other rates per 100,000 population are:

England and Wales	148	(2007)
Australia	129	(2006)
Canada	107	(2004)
Germany	93	(2006)
France	85	(2006)
Sweden	79	(2006)

Not only is the New Zealand rate high by international standards, the muster has increased substantially since 1990. In that year, it reached 4,000. In 1997 it passed 5,000. A muster of 6,000 was reached in 2003, 7,000 in 2005 and 8,000 in 2007. The total number had doubled in 17 years.

The Ministry of Justice carries out prison population forecasts which take into account policy innovations and changes in practice. One change which is considered likely to have a major impact is the 1,000 extra police over three years and 250 support staff promised in 2005 and who will be in place by 2009. Having read a series of forecasts, it seems almost inevitable that the forecasts always underestimate the increase. A forecast in 2006, taking into account the Effective Interventions suite of policy proposals and 1,250 extra police staff, estimated that the muster will be about 9,100 in 2014. Whether this estimate can be relied on is doubtful in view of the fact that the muster at 30 June 2007 was 8,150, which after one year was already 4% above forecast. This comprised 6,410 sentenced prisoners, 2% above forecast, and 1,740 custodial remand prisoners, 12% above

forecast. In a report to the Minister dated 8 June 2007, the Department of Corrections advanced the following reasons for the incorrect forecast:

In summary, the current upward trend in the prison muster is likely to reflect a number of processes:

- it occurs as part of a long term upward trend in prisoner numbers, and in accordance with a typical seasonal variation*
- important underlying drivers including increase in the proportion of the sentence served by longer sentenced prisoners, and a long term background increase in remand receptions and remand duration*
- expected bed savings as a result of policy changes, and which were factored into the current prison forecast, have not been fully realised, which may contribute to the appearance of an unusually pronounced change*
- there has been a marked increase in the volume of offenders who have been remanded in custody, and more recently in the numbers sentenced to imprisonment*
- it has not been possible to clearly identify all of the drivers of this recent growth, although greater caution on the part of various agents within the criminal justice system may be playing a role.*

The increase in the prison muster not only has a fiscal impact, the overcrowding also affects the management of prisons. Rethinking Crime and Punishment, a group which aims to encourage debate about the use of prison, stated that the impact of overcrowding was highly disruptive on staff and prisoners, and led to a deterioration in the relationship between these groups (RECAP Newsletter, Issue 28: October 2007). It continued:

Overcrowding is often accompanied by staff shortages and budget shortfalls, resulting in the lockdown of prisoners in order to reduce cost. Prisoners are locked down for 16 to 20 hours a day, and activities are compressed into that time frame. The inevitable result – families will be unable to visit their families, opportunities for family phone calls will be

severely limited, programme hours constrained, recreational activity abandoned, and visits from mentors, counsellors and support persons severely restricted. Volunteer activity reduces from 50-75%. Prisoners are likely to resist and react to such measures, leading to breaches of discipline. The statutory requirement to provide safe, secure, humane and effective sentence management is sorely tested, and compliance with the UN Standard Minimum Rules for the Treatment of Prisoners a challenge.

The very real concern about the increasing prison muster underlies Effective Interventions and I shall consider later the expectations which some policy changes, such as electronically monitored (EM) bail, are designed to have. At this point, I want to emphasise the comment in the final bullet point above which explains that some of the higher than expected muster was a result of the “greater caution” being shown by “various agents”. This observation recurs in this report in regard to a number of decision making points within the criminal justice sector where “caution” has been the leitmotif in recent years.

4 The Bail Act 2000 and the Prison Muster

The Bail Act 2000 was enacted during the new Labour-led government’s first full year. The Act filled a party promise. Newbold³ writes:

During the 1990s, offending on bail increased to over 20 per cent. This, along with publicity over some high profile bail crimes, resulted in the Bail Act 2000 which, when brought into force in January 2001, toughened bail conditions by placing the onus on defendants to prove that bail is safe, and introduced a presumption against bail in some cases. A consequence of the act has been a larger proportion of offenders remanded in custody. Between 1991 and 2006, the number of remands as a ratio of all inmates grew from 9.7 to 20 per cent.

The impact of the Bail Act can be put another way. Between March 1997 and March 2007, the sentenced muster increased from 4,493 to 6,053, ie 35%. In the same time period the remand muster increased from 550 to 1,724, ie 214%.

³ Ibid, p.157

If the remand muster had increased at the same rate as the sentenced muster (ie at 35% rather than 214%), it would have increased by 193 to 743. The difference between equivalent rates and what actually occurred is 981 prisoners. While the reduction by 981 in the total muster at March 2007 (from 7,778 to 6,797) would not eliminate the pressure on prisons, it would reduce the fiscal demand and drop substantially the rate of prisoners per 100,000 population.

It can be argued that it is unfair to use this comparison because the Department of Corrections and the Ministry of Justice were aware of the probable impact of the Bail Bill on the muster, and predicted an increase in the average daily remand population as between 103 and 259 (Department of Corrections to Ministry of Justice, 22 February 2000). Shortly after the Bail Act came into effect, I note, the Ministry of Justice forecast the average numbers of inmates on remand in 2005 would be 1,085. It was in fact 1,394 in 2005 - 309 more than forecast.

The increase in the prison number in New Zealand – both the total number and as a rate per 100,000 population – is a central issue for the criminal justice system. As will become clear in this report the Bail Act 2000 and the Parole Act 2002 both have had a part to play in this increase, and in the past decade the muster has had a major impetus on policy development. Despite this increase and as those who are concerned about the growth in the muster have found, there is no easy solution. One of the reasons for my suggestion for a Commission of Inquiry is that it will allow an opportunity to stop and reflect as to why the punitive treadmill seems to continue to pick up speed and, it is hoped, to find constructive ways to slow it down.

CHAPTER 4

EFFECTIVE INTERVENTIONS

Effective Interventions is the title given to a suite of Cabinet papers put before and approved by the government in July 2006. They are available on the Ministry of Justice website (www.justice.govt.nz/effective_interventions/cabinet_papers).

As the Effective Interventions strategy is the government's primary response to the issues listed in Chapter 3, I intend to outline briefly and comment on the overall approach taken on the ten specific proposals. I have a number of general concerns about aspects of Effective Interventions, and these will be discussed in the following chapters. The introduction to Effective Interventions records:

This suite of papers addresses the social and fiscal costs of crime. The proposals will enable government to “stay tough, and be smarter” about crime and punishment. The suite contains:

- *Measures to reduce the underlying causes of crime in the longer term, including effective early interventions for at-risk children and their families/whanau;*
- *Measures to reduce opportunities for offending, reoffending and to enhance victims' satisfaction in the criminal justice system in the medium term;*
- *Measures to alleviate immediate pressures on prison capacity in the short term.*

The following strategy is adopted:

The proposals set out in these papers will enable government to “stay tough, and be smarter” about crime and imprisonment. There is no simple or easy answer that will reduce crime and imprisonment in the short term, at minimal cost, while maintaining community safety. The proposals take a cross sectoral and strategic approach to reducing crime, reoffending and imprisonment. They comprise complementary and mutually supporting

initiatives that protect and promote community safety, retain tough policies for serious and persistent offenders, use resources in better ways, promote victims' and society's interests in crime reduction, and make the justice system more effective.

There are smarter ways than prison to prevent crime and to make criminals accountable to their victims and society. Prison is not the most effective or efficient approach to reducing crime. Expanding alternative mechanisms may have lower social and fiscal costs. For serious repeat offenders and hardened criminals, from whom the public must be protected, there is in most cases no option other than imprisonment. For some others, the use of shorter prison sentences or non-custodial sanctions will be a smarter use of resources and improve public safety in the longer term, reduce social and fiscal costs and potentially reduce criminal offending.

In my view an essential requirement, which will certainly be “smarter”, is to ensure that there is a comprehensive range of sentences available to the courts, including appropriate and readily available treatment programmes, and that there are operational structures in place to ensure that all options are rigorously but fairly managed so that the judges are confident that their intentions are being met. The Effective Interventions overview continues:

*The criminal justice system applies to all, but needs to do far better at stemming the entry of Māori people in particular, and in managing their exit. The over representation of Māori (and to a lesser extent Pacific peoples) in the criminal justice system is both significant and long standing. **[I remark that this is a blot that needs to be erased. As I note on a number of occasions, this over representation should be an area of significant focus of any Commission.]** The root causes appear to be centred on socio-economic risk factors rather than ethnicity. The strategy centres on changes to legislation and policy that will apply to all New Zealanders, therefore it will be important to implement these initiatives in ways that are particularly effective for Māori and Pacific peoples. In particular, there is an important role for Māori and Pacific based organisations as providers of*

support, rehabilitation, reintegration, restorative justice, and other programmes.

But these programmes, I repeat, along with any other programme, must be rigorously managed, albeit with appropriate cultural arrangements.

Effective Interventions then takes note of the following:

The proposals address five key issues. The proposals have differing scope, scale and timeliness, and most contribute to multiple issues.

- 1 The most immediate issue is to address the pressure on prisons until 2011 through measures to reduce demand, such as greater use of home detention for less serious offenders.*
- 2 The better use of prisons longer term includes measures proposed by the Law Commission to manage sentences and parole.*
- 3 Addressing the precursors of crime includes the expansion of effective measures of early intervention; measures to reduce youth offending as well as expanding the availability of drug and alcohol programmes for offenders. These measures are critical to a long term, sustainable reduction in crime.*
- 4 Māori and Pacific peoples' over representation in the criminal justice system are addressed by ensuring that the measures proposed are effective for Māori and Pacific peoples and also by investigating the expansion of practical community initiatives to address offending.*
- 5 The deployment of 1,000 police has effects on the rest of the justice system, including not only crime reduction, but also increased prosecutions.*

Before considering the ten specific proposals, I observe that the Effective Interventions suite of papers is signed by the Minister of Justice on behalf of 11 other ministers of the crown. In view of the broad range of issues dealt with, it is clear that the papers had involved a substantial effort by the policy divisions of a number of government departments. Under the heading "consultation", the overview records:

The proposals set out in this paper were developed by an inter-agency group, comprising officials from Child Youth and Family, the Department of Corrections, Ministry of Justice, the New Zealand Police, the Department of Prime Minister and Cabinet, the Ministry of Social Development, the State Services Commission and The Treasury. The inter-agency group consulted with officials from the Ministry of Education, Ministry of Health, Department of Labour, the Ministry of Pacific Island Affairs, Te Puni Kōkiri, and the Ministry of Women's Affairs.

In view of the specific reference to cooperation and collaboration in my Terms of Reference I shall return later to the issue of inter-agency interaction.

At this stage, I want to express my disappointment at a lack of emphasis on youth justice and the low priority given to addressing the precursors of crime. I shall also return to both these issues (see Chapters 5 and 9).

The overview makes explicit that the central focus of the Effective Interventions package is to relieve pressure on prisons – both short and long term. Taking into account the additional police which had been approved, it was thought under current forecasts that with no new policy measures, funding would be sought for a total of 908 new prison beds in the budgets for 2007 and 2008. However, it was estimated that the Effective Interventions package would reduce the number of new beds to 426.

The ten specific proposals dealt with:

Paper 2	Crime Prevention
Paper 3	1,000 Additional Police
Paper 4	Remand in Custody
Paper 5	Restorative Justice and Community Justice
Paper 6	Community Based Sentences
Paper 7	Home Detention
Paper 8	Sentencing Guidelines and Parole Eligibility
Paper 9	Preventing Reoffending

Paper 10 Corrections' Capacity

Paper 11 Māori and Pacific Peoples

Cabinet agreed to the recommendations in the package. Its approval was made subject to a quarterly report from Justice, the Police and Corrections to those Ministers, beginning 30 September 2006. The reports for each of the first three quarters in 2007 look at the progress in the implementation of Effective Interventions. They are considered at the end of this chapter.

Paper 2 : Crime Prevention

Crime prevention is the title of the first specific policy paper in the Effective Interventions suite. It deals with three of the issues with which the Effective Interventions strategy is designed to cover, ie reducing the underlying causes of crime in the longer term, reducing opportunities for offending and reoffending, and alleviating the immediate pressures on prison capacity. The overview opines that this initiative could save “around 10 prison beds”. The executive summary of paper 2 explains that the proposal includes options to prevent crime “and hence reduce the future demand for beds”.

The crime prevention policy takes an extensive, and bold, approach when it outlines the following interventions:

Prevention level	Intervention
Primary	Early intervention for vulnerable children, their families/whanau, eg intensive home visiting, therapeutic interventions for conduct disorder, parenting support, specialised support, such as for teenage parents and their children, or for parents/children with disabilities.
Secondary	Intervening early with young offenders, eg youth justice programmes, integrated case management.
Tertiary	Addressing persistent or prolific offending, eg intensive surveillance, swift response strategies, intensive rehabilitation.

In view of the Effective Interventions' focus on adult offenders, and although support was given to the practice of early intervention, there are few new specific proposals at the primary and secondary preventive levels. This is disappointing. A prolific offenders' initiative is one specific proposal at the tertiary level which arises from this focus on crime prevention. In a paper put before the Cabinet Policy Committee in August 2007, entitled Priority Offenders, it is acknowledged that a small number of prolific offenders commit a disproportionate amount of crime. The Priority Offender Initiative is a three year plan to be implemented in five areas and aimed at individuals aged 17 and over who frequently come to the attention of the criminal justice system. The initiative "aims to reduce the offending of identified priority offenders through an active case management process that engages the individual and their family". Moreover, the paper notes, there are no extra costs as baseline resources will be used for the initial three year period and for the evaluation to be undertaken over that time.

There is reference to a similar scheme in England and Wales which, in 2004, demonstrated a 43% reduction in the cohort's offending over a period of 17 months.

The Priority Offenders paper proposes a scheme that has no financial implications and which could substantially reduce offending among a hard core group of offenders – whether Māori, Pacific peoples, and Pakeha. My immediate response is to ask why limit the plan to five locations? There is possibly either some information which has been omitted, or this is administrative conservatism at play. I observe that the plan does not involve the development of a new programme, rather it "requires agencies to enhance core business delivery through collaborative targeting and coordination of service provision". I presume therefore that fiscal considerations were not the determinant. Collaboration with existing iwi and community resources, structures and services will also be sought" (paragraph 41). It is possible that the need for inter-agency collaboration is the basis for the somewhat cautious way in which it is proposed to put the scheme into practice.

In my comments in the chapter on "Collaboration and Coordination", I refer to the Auckland Youth Support Network (AYSN). This is an inter-agency model which,

it seems, is working well in dealing with a crisis about youth gangs and accompanying violence. AYSN also demonstrates that while inter-agency cooperation might seem the logical way to deal with criminal justice issues at the operational level, successful local cooperation depends on the development of mutual trust and that occurs when a number of matters fall into place. A head office directive by itself that inter-agency collaboration is to be put in place, I acknowledge, could involve considerable effort and minimal results. I accept that it is appropriate that the Priority Offenders scheme be built up slowly to increase the possibility of successful results long term.

As an observation on inter-agency cooperation, I have no doubt that there is a tendency for people working within the criminal justice sector to focus primarily, as they should, on the department or organisation which employs them. A limited focus, however, leads to inward looking silos. From my relatively brief inquiries, I see no case for any major revisions to the machinery of government. Nevertheless a more outward focus on the part of employees has the potential to have a considerable impact on the system.

Tackling persistent or prolific offending is but one of the four issues outlined in the appendices to Paper 2 Crime Prevention. There is also a list of 13 current early interventions provided in the life of the child from pre-birth to school entry, five current initiatives to prevent and reduce youth crime (one of which is the Auckland Youth Support Network – AYSN – discussed later), and a record of some of the situational crime prevention projects recently introduced into New Zealand.

Crime prevention is neither easy nor glamorous. Nonetheless, in the long term it has the potential to have a major impact on the level of criminal activity and the demand for prison beds. In my opinion, it is worth giving greater emphasis and developing extensively so that the pressure on prisons is reduced.

I want to note some of the projects currently being undertaken by the Ministry of Justice's Crime Prevention Unit. This involves working with a large number of territorial authorities and includes iwi partnerships with four runanga and the Ngati Koata Trust. I also received information from Local Government New Zealand

about its work with the Ministry of Justice. This involved assistance in the development of safer communities as territorial authorities contribute to crime prevention through environmental design and the appointment of specialist staff to promote the social, economic, environmental and cultural wellbeing of communities. These initiatives are to be applauded and given all appropriate support. Such an approach is both constructive and rewarding.

In its report to Parliament for the period 1 July 2005 to 30 June 2006,⁴ the Ministry of Justice advised that actual expenditure for the year 2005/06 on crime prevention and community safety programmes was \$6,474,803, made up as follows:

<i>Expenditure by Funding Category</i>	<i>2005/06</i>
<i>For the year ending 30 June</i>	<i>\$</i>
<i>Partnerships</i>	
<i>Metropolitan territorial authority partnerships</i>	<i>622,222</i>
<i>Provincial territorial authority partnerships</i>	<i>935,760</i>
<i>Iwi partnerships 245,518</i>	
<i>Total Partnerships</i>	<i>1,803,500</i>
<i>Projects</i>	
<i>Community Managed Restorative Justice</i>	<i>761,919</i>
<i>Community and Sexual Violence Prevention</i>	<i>1,149,437</i>
<i>Environmental and Situational Crime Prevention</i>	<i>549,501</i>
<i>Evaluation, Research and Resource Development</i>	<i>125,599</i>
<i>Family Violence Prevention</i>	<i>85,716</i>
<i>Iwi and Pacific Peoples Crime Prevention Development</i>	<i>174,078</i>
<i>Neighbourhood-Based Safety</i>	<i>260,218</i>
<i>Vehicle Crime 149,662</i>	
<i>Youth (Community and Youth at Risk)</i>	<i>794,616</i>
<i>Total Projects</i>	<i>4,050,746</i>
<i>Restorative Justice Practice Improvement (RJPI) Project</i>	
<i>Total RJPI Project</i>	<i>620,557</i>
<i>Total Expenditure by Funding Category</i>	<i>6,474,803</i>

The Ministry is also involved in developing a comprehensive national anti-tagging strategy which, in addition to involving central government and territorial authorities, aims to work with utilities and transport providers to prevent tagging and graffiti vandalism.

⁴ Vote Justice report on Non-Departmental Outputs, Ministry of Justice, B14

Crime reduction is also an aspect of the work under way which considers organised crime. The development of and putting in place a strategy to deal with organised crime is another example of the Ministry of Justice, the Police and the Ministry of Social Development working cooperatively together.

The terms crime prevention and crime reduction are used interchangeably. It is not a high profile aspect of the criminal justice system. In its October 2007 briefing for the incoming minister, the Ministry of Justice included the following table summarising the departmental output expenses for Vote Justice.

For the year ending June 2008	Total Expenses (\$000)
Policy Advice	24,216
Sector Leadership and Support	5,639
Management of the Parliamentary Electoral System	9,728
Crime Prevention and Community Safety	1,373
Total Vote Justice	40,956

Moreover, in regard to crime reduction, accurate statistics which measure the success of a strategy are difficult to generate. Consequently, given the difficulties in measurement in a system where statistical results are important as a record of both the organisation's outputs and the individual's work performance, crime reduction may well not be given the focus it deserves. Quite simply, less crime is an outcome which should be applauded.

Paper 3 : 1,000 Additional Police

As paper 3 explains:

This paper outlines issues in the Justice sector associated with the flow-on effects of the additional 1,000 police, and recommends approaches for managing the issue.

The political reality of the promised 1,000 additional police, I observe, requires "managing". The executive summary outlines the issue:

The deployment of 1,000 additional police (including 250 community police) and 250 non-sworn staff over three years will contribute to safer

communities and enable greater resourcing of intelligence-led crime reduction policing. In the short to medium term the additional police will have consequences for the criminal justice system, mainly through an increased number of prosecutions being taken. This increase will place pressure on existing and court and prison capacity.

The paper emphasises that crime reduction is a major aspect of police strategy. By including graphs showing the decline in reported burglaries and road deaths in the previous 10 years, it is implied that the extra police will result in a decline in crime (at least in the longer term). Nevertheless, it also implied that this will not happen immediately as a high proportion of the extra police will be based north of Taupo so that part of the country is provided with the same level of service that is received elsewhere. It is also reported:

The deployment of additional police will affect prosecution numbers over the three year period. It is estimated there will be an additional 11,650 prosecutions, including 1,510 traffic prosecutions, in total over the three year period. From 2009/10 onwards it is estimated that the number of prosecutions per year will be 6,280 higher than currently. This represents a 5.2 per cent increase in prosecutions for non-traffic offences per year after the third year and a 6.4 per cent increase in prosecutions in the Auckland area.

Accordingly, by 2009/10 it will be necessary to provide:

- *four additional district court judges*
- *one more high court judge*
- *additional collections unit staff*
- *250 additional prison beds*
- *two community probation centres and 37 additional probation staff.*

I observe that experience suggests these estimates may be conservative and that there are other areas of both expenditure and economic cost to New Zealand associated with such an increase in police strength. There will be pressures on Child Youth and Family services, an increase in the number of criminal jury trials,

and an increased demand on services provided by the Legal Services Agency. The annual cost of the extra services to other justice sector agencies is estimated at \$37,230,000 when the extra police are fully in place.

I note that the Ministry of Justice is in the process of developing a computer model – the Pipeline Model – which is designed to assess the impact of a change in one part of the criminal justice system on the other parts. I applaud that development. I hope that it is more reliable than the models now used for forecasting prison musters.

The central feature of police work, I am told, is what is described as “front line policing – catching criminals”. Securing a conviction is said to be the icing on the cake. In rudimentary terms, this is the police silo.

The total number of offences reported to the police annually has remained reasonably static for the past 10 years. In spite of some public and media comments, crime is not running amok and there seems little need to deploy large numbers of the extra police into active patrol policing. While patrol work remains paramount, the extra numbers allow strategies to be developed and tested on other matters. Indeed 250 of the 1,000 additional police positions are intended to be dedicated to community policing. The concept of community policing has been around for some years.⁵ Recently, *Ten One*, the New Zealand Police Magazine, spoke about refreshing and developing community policing in New Zealand (May 2007) and argued for the allocation of new community police to “high risk communities”.

In my view there must be an emphasis on youth justice as well, and on what is often described in the media as “wannabe youth gangs”. The allocation of the extra police is a matter for the government and police management. However, given the relatively stable crime rate and the information given to me, I would like to see the walls of the police silo widened to acknowledge that “real” police work includes working with the community, especially with young people, and where

⁵ Neil Cameron and Warren Young (eds), *Policing at the Crossroads*, Allen and Unwin, Wellington 1986

crime reduction, like the reduction in road deaths, is made a target in which all police officers can take pride.

Appendix B to paper 3 concludes:

If the proposals identified in this suite of papers are effective, there should be less crime and fewer people being introduced to the formal part of the justice system.

The reduction in road deaths is cited as one reason for this. It is not noted that extra road policing and extra police powers on the road (such as vehicle impoundment) and the concurrent increase in prosecutions for traffic offences will have had a substantial role to play in the decline of road deaths. The comment that extra police in themselves will lead ipso facto to a reduction in crime is somewhat naïve. It overlooks the apprehension steps in the process. Only at the most optimistic, and ignoring the fact that much “official” crime includes crime which is reported by the public (eg burglaries) as well as that which is detected by the police (eg most traffic and liquor offences), can it be argued that the extra police will lead to a reduction in crime. That reduction, if it eventuated, would be balanced by the increased apprehension rate in view of the extra police. Therefore, it is likely that the workloads of other agencies will increase.

In my opinion, the extra police officers will inevitably result, in an ongoing way, for some additional work and cost for other organisations in the justice sector and for the costs in other sectors of the economy.

Paper 4 : Remand in Custody

Paper 4 notes that the custodial remand population has increased since 1996 and “at a slightly accelerated rate since 2001 (partly due to the Bail Act 2000 coming into force)”. The causes are said to be:

- *the number of prosecutions*
- *the higher proportion of defendants being remanded in custody for some types of offences*

- *the average time spent on remand.*

The initiatives under way, which are expected to have a “significant impact” on the remand population, include the introduction of electronic monitoring as a condition of bail and looking at ways to make pre-trial court processes more efficient.

Paper 4 also suggests that an amendment to the Bail Act 2000 to clarify the threshold for remand in custody and the relevance of breaches of bail conditions to the decision whether to “remand”, will have a modest effect on the prison population. That will avoid “an estimated 40 beds by 2011”. The report expands somewhat on the impact of the Bail Act, noting that it was enacted following an increase in offending on bail and “growing public, political and media pressure for change”. The two main changes it contained were to increase the circumstances in which the onus was on the defendant to justify a release on bail (rather than relying on prosecution to justify a custodial remand) and to provide for breaches of bail conditions to be recorded and to be available subsequently when bail was an issue.

I find it difficult to agree with this report which attempts to downplay the impact of the Bail Act 2000. While it is true that the increase in the custodial remand population is apparent from the mid 1990s, the Act not only reinforced that trend, it also raised the expectations of the public, the politicians and media. In view of the Act, the question was no longer: what was wrong with the law which granted bail to a defendant who was alleged to have committed a serious offence? Instead, at least in regard to New Zealand, it became: how on earth has that defendant been granted bail (especially given the impact of the crime on the victims) and, not infrequently, who was the judge who had done so?

An allegation that a person who is on bail for a serious offence, or for an offence of violence, has committed a similar offence is sometimes a front page story in the press or a lead item on the electronic media. And, after a few such items, cautious (risk averse) judicial decisions increase.

An amendment to the Bail Act was enacted in 2007 which allows the court more discretion in the weight it gives to a previous breach of bail conditions and, when the defendant is otherwise eligible, to deny bail only if the defendant is shown to be not merely a risk but a “serious risk”. Nonetheless, in view of the current climate with which bail is generally viewed, I express doubt whether this amendment will have a major impact in reducing the number of custodial remands.

I cannot stress enough just how important the impact of custodial remands on the prison population is.

In March 1997, the total prison muster was 4,967, comprising 4,417 sentenced prisoners and 550 on remand. Ten years later, the total sentenced prison population was 6,053, a 37% increase. The remand population was 1,724 (an increase of over 200%) out of a total muster of 7,775. If the remand population had increased at the same rate of the sentenced population, ie 37% rather than at over 200%, the remand population would be about 753, and the total prison muster would be approximately 6,786, nearly 1,000 less than the actual muster.

The Effective Interventions paper raised the Electronic Monitoring of bail (EM bail) as another method through which to reduce the use of custodial remands.

EM bail, introduced in the Auckland area in September 2006 and throughout New Zealand in November that year, is supervised by the Police Prosecution Service (PPS). The PPS advises that, as at 4 October 2007, there have been a total of 409 applications for EM bail, of which 170 were withdrawn and 185 heard. Of the 185 applications heard, 100 were declined and 85 granted, breaches totalled 17 and there are currently 38 defendants on EM bail. PPS states that 314 days is the longest serving bailee. He was returned to EM bail after sentence to await the outcome of an application for home detention.

PPS points out that an EM bailee, unlike the custodial remandee, does not under the legislation get the time spent on custodial remand taken off the length of sentence. Consequently, defendants with previous prison experience who expect

to be convicted and sentenced to prison, sometimes do not proceed with an application for EM bail.

It is possible that a recent judicial decision might put that incentive in place, as PPS notes in its weekly summary report dated 27 September 2007 that in one case the sentence was discounted by six months for time on EM bail.

It is clearly understandable that defendants, especially recidivists, who expect to receive a prison sentence see an advantage in remaining in custody. To check on the practicality of this approach, I obtained from the Ministry of Justice the statistics on the outcome of cases involving a remand in custody. The following figures were provided for 2004, 2005 and 2006:

	No of cases involving a custodial remand	No of custodial remand cases convicted	No of custodial remand cases given a custodial sentence	Percentage of custodial remand cases given a custodial sentence
2004	14,368	10,187	6,022	41.9
2005	14,753	10,426	6,462	43.8
2006	15,187	10,623	6,733	44.3

The fact that considerably less than half of all defendants, who are remanded in custody, are sentenced to a custodial sentence raises the question for me as to why they were remanded in custody in the first place. I do not intend to speculate. At the same time I also accept without question that some defendants, if remanded on bail, may either fail to appear in court later, may interfere with witnesses or may commit further offences. The Effective Interventions paper, I believe, does not address the custodial remand issue satisfactorily. As with much of the decision making in the criminal justice system, it involves balancing competing arguments. In regard to bail, the balance, taking into account the approach contained in the Bail Act 2000 and despite the adjustment in the 2007 amendment, appears to be unduly weighted against a bail decision. Whether my opinion is correct and, if so, how it can be better balanced, deserves further comprehensive examination.

Such an examination, I believe, should begin with the wide philosophical issue of what is the purpose of a remand and whether and when bail or custody is appropriate. Moreover, before the defendant is convicted, there could be clarity as to when the victim's opinion is relevant to the decision. But it must also deal with practical matters. Having set down the purposes of bail, consideration must also be given to how the decision is put into effect. It is apparent that enforcing bail conditions is now a higher priority for the police than it was in the past. Further, I was told of instances where conditions requested by the arresting police officer are imposed without adequate reflection by either the prosecutor, defence counsel or the judge. Setting highly restrictive conditions which are almost bound to be breached should only be imposed where absolutely necessary. A review of the remand conundrum is a matter of some priority taking into account, first, the careful supervision of EM bailees by specially trained staff which now occurs, and secondly, that the increased number of police will mean that all bail conditions are likely to be fully monitored.

Paper 5 : Restorative Justice and Community Justice

Restorative justice is the starting step in the youth justice process and I discuss the application of restorative justice to the adult criminal justice system in Chapter 9. At that stage I make the point that it seems somewhat arbitrary to apply restorative principles (at least initially) to offenders aged 16 years and younger, but punitive principles to offenders aged 17 years and above.

This rigid distinction, fortunately, is not always carried out in practice and processes have developed which to some extent acknowledge the applicability of restorative justice to offenders aged 17 years and above.

Probably the best known of these processes is the Police Adult Diversion Scheme which is designed essentially for the first offender. The operation of this scheme is now set out comprehensively in the police prosecutor's manual. Adult diversion incorporates restorative justice as it allows victims a role in the criminal justice system, and enables them to receive acts of reparation, apologies and possibly answers to questions they might have. The Effective Interventions proposal with regard to restorative and community justice is:

- *Staged national provision of restorative justice processes for less serious offending, as an option within the existing Police Adult Diversion Scheme (this will reinforce the diversion process, and help offenders address the causes of their offending);*
- *Staged national provision of restorative justice processes for more serious offending (this may avoid 20 to 25 prison beds when fully implemented);*
- *Staged increase in provision of restorative justice in conjunction with prisoners' re-integration into the community (this will reinforce re-integration processes, and may help reduce re-offending); and*
- *Development of a national performance framework to ensure restorative justice processes are consistent with best practice principles and enable better coordination of service provision across regions.*

These proposals are explained and it is noted that while there is no need for legislation, new funding of nearly \$4m pa will be required when the proposals are fully operating. Participation by Māori in the current restorative processes, it is said, "shows positive results". There is also mention that the concept of community justice centres is being investigated, after an evaluation of the models used in some other countries. I look at the issue of Māori offenders below as it is the heading of paper 11 of the Effective Interventions suite. I agree that community justice centres are a concept worth exploration and I will return to it in the discussion of criminal courts Chapter 10.

In regard to diversion, I support its increased use. As it involves the use of discretion reasonably well along the prosecution path, it has been made subject to guidelines to ensure that its use is consistent. I wonder however whether the increased formality has unnecessarily restricted its use to limited circumstances.

As is justified for a number of appropriate reasons, victims are now acknowledged as having a role to play within the criminal justice system. As a corollary, the structure of the system has changed and, given the increasing focus on victims, seems destined to continue to change. I explore the issue further in my discussion about victims and contend that we must now consider as to how fundamental these changes already are and how fundamental they should be allowed to come.

Paper 6 : Community Based Sentences

This is the topic discussed in paper 6 and the paper seeks approval in principle to two new community based sentences: electronically monitored curfew, and intensive supervision. Agreement is also sought to enhance the existing sentence of community work and the penalties for disqualification from driving.

The executive summary begins:

Strong and credible community based sentences, combining elements of punishment, rehabilitation and reparation, are critical to an overall strategy to reduce the prison population.

I could not agree more. To this must be added the requirements that community based sentences must be “rigorously managed with accountability by both offender and manager”. The summary describes the sentence of periodic detention, combined with probation, which was in operation for nearly forty years until abolished by the Sentencing Act 2002. The Sentencing Act established the new sentence of community work which combined periodic detention and community service. The latter sentence, which was established in 1980, was also abolished.

The summary continues:

The effectiveness of proposals included in this suite of papers (in particular, the proposal in paper 7 to establish home detention as a sentence) depends on the availability of credible community based sentences. Recent consultation with judiciary has identified judicial concern about community based sentences.

It is later noted:

Key judicial concerns are that judges do not know what the offender will actually be required to do while serving the sentence or how the community work hours will be completed. Judges have also expressed concerns that

the sentence may not commence immediately and that there are perceived delays in the arrangement of community work. This time lag may reflect the time required for the offender to be appropriately assessed and for suitable work to be arranged.

Paper 6 also comments that there was a call from the judiciary for a greater array of sanctions and for improvements to current sanctions. My inquiries disclosed similar judicial concern strongly expressed.

The concern the judiciary expressed to me goes back to wanting to combine the elements of punishment, rehabilitation and reparation. Questions were asked about the apparent lack of discipline with the sentence of community work as it currently operates. There was some understanding for the Ministry of Justice's contention that periodic detention had become too rigid in that it required offenders, who were otherwise employed on Saturday, to carry out their periodic detention sentence on that day. However, its replacements, community service first and community work later, were in many instances seen by the judiciary as "soft options" which were not appropriate for many cases.

Changes in judicial practice are apparent in the Ministry of Justice statistics which record the percentage of convicted cases resulting in each type of sentence between 1990 and 2005 (taking into account that a new recording system was put in place in 2004).

Between 1991 and 2001, community based sentences ranged between 33.8% and 30.1% of all sentences. In 2004 and 2005 the equivalent figures were 25.2% and 25.7%.

Custodial sentences for the same periods ranged from 7.3% to 8.2% between 1991 and 2001, and were 9.4% and 9.6% of all cases for 2004 and 2005.

It is difficult not to conclude that, following the changes brought about by the Sentencing Act 2002 to the type of community sentences available, the judiciary's dissatisfaction with the community options then available resulted in greater use by the judiciary of sentences of imprisonment.

Paper 6 records that the Sentencing Act 2002 set out a clear hierarchy of sentences, based on the degree of restriction contained within each one. The paper also notes the importance of the judicial response to and approval of the proposed sentences and seeks authorisation to carry out consultations with the judiciary, and report back to Cabinet, before approval is given to prepare specific legislation to provide for the new sentences.

The elements of the new sentences of home detention (proposed in Paper 7), electronically monitored curfew, and intensive supervision are outlined. Home detention is specifically devised as an alternative to imprisonment and it is estimated that it could avoid around 310 prison beds.

The danger of “net widening” is referred to as an aspect of the electronically monitored curfew. “Net widening” takes place when an offender is sentenced to a penalty further up the hierarchy than would have occurred had the sentence not been available. I sympathise with this concern, although acknowledging that it is not totally avoidable. It must be hoped, through directions in the legislation and through information to the judiciary and staff, the number who receive a sentence lower in the hierarchy upon the introduction of the new sentence are considerably more numerous than those who move the other way.

The electronically monitored curfew, it is proposed, will impose a curfew for a set number of hours a week on those whose offending shows a pattern - such as for some driving offences.

The electronically monitored curfew proposal was given legislative form in the Sentencing Amendment Act 2007 as community detention, and came into effect on 1 October 2007. The maximum term is six months and the total curfews (of a minimum of two hours each) must not exceed 84 hours per week.

Intensive supervision was devised to enable a more complex set of special conditions to be imposed than were available under the current supervision sentence. It was also intended to allow for judicial supervision of an offender’s progress while completing the sentence.

Intensive supervision was also introduced in the Sentencing Amendment Act 2007 and came into effect on 1 October as well. It may be imposed for not less than six months, or for more than two years, and may only be imposed where the conditions imposed are more than are available under the sentence of supervision. The conditions may include one which provides for the judicial monitoring of the offender's compliance with the conditions, provided the court is satisfied (s.54I(2)) "that, because of the special circumstances of the offender, this is necessary to assist the offender's compliance with the sentence".

Returning to the judicial dissatisfactions with the current sentence of community work, paper 6 acknowledges that the resources of the Community Probation Service (CPS) are at their limit in their ability to deliver the sentence. In addition to recruiting and retaining appropriate staff, it suggests a number of options to meet some of the concerns expressed. Some of the suggestions which are included in the Sentencing Amendment Act are:

- *sentences of community work of 100 hours or less must be served within six months*
- *for sentences of longer than 100 hours, at least 100 hours must be served in each six month period of the sentence*
- *the court may authorise that up to 20% of a sentence longer than 80 hours may be "spent in training in basic work and living skills".*

As for disqualification from driving, paper 6 states:

Aspects of the current penalty structure for disqualification from driving may set offenders up for failure and put them on a treadmill of offending towards imprisonment.

Long cumulative periods of disqualification and the 28 day stand down period before a disqualified driver may apply for a limited licence are given as examples of penalties that may be defied.

Nevertheless, it is added, there are also road safety goals and it is suggested that proposals should be developed with the Ministry of Transport which is responsible for the Land Transport Act 1998.

In a later paper to the Cabinet Business Committee (September 2006), the Ministers of Justice's and Corrections' suggestion that no further action be taken at present on driving disqualification was accepted. The paper pointed out that legislative amendments had been made in 2005 to meet the concerns expressed. It proposed a longer period of assessment as judges and counsel apparently were not fully aware of the amendment's "potential to address concerns around lengthy disqualification periods".

The new community based sentences proposed by Effective Interventions and given legislative effect in 2007 contain elements of discipline, rehabilitation and reparation. There has been consultation with the judiciary and I am aware that training and information programmes have been initiated. There have been substantial increases in CPS staff numbers. It is a reasonable expectation that the use of the new community based sentences will reduce the numbers sentenced to imprisonment. However, before any definite conclusion is reached, it is necessary to await a report on their use, and an evaluation of their impact on the prison muster. Evaluation in due course on their impact on the recidivism rate will also be important. It is equally important that the general public both understand and appreciate the utilitarian nature of community based sentences. All involved in the process, prosecution, judiciary, corrections officers, lawyers and the media have a part to play in this.

There is one specific aspect on which I would want information during a review – and that is whether the judiciary accept that these community based sentences contain sufficient "discipline" to justify their use as an alternative to imprisonment.

I consider that the rigid requirements of periodic detention were viewed as a discipline and the inclusion of these requirements helps to explain periodic detention's apparent popularity at the time among the judiciary.

I accept that many among the public expect that a criminal sanction will include a not insubstantial element of discipline both in order to impose a punishment on the offender and as an aspect of general deterrence to others. A review of the range of community based sentences should consider the degree to which this aspect of a sentencing philosophy is present in the sentences available and, if so, how important is it in the use of the sentence by the judiciary.

Paper 7 : Home Detention

As paper 7 notes, home detention is currently available. A court, on sentencing an offender to two years imprisonment or less may grant the offender leave, provided that it is satisfied that it is appropriate to do so in the circumstances, to apply to the Parole Board for home detention. In exceptional circumstances, or on humanitarian grounds, the court may also defer the start date of the prison sentence for two months to allow the application to be processed before the offender starts the term of imprisonment. The granting of leave to the defendant to apply for home detention by the sentencing judge is known as “front end home detention” and is addressed in paper 7. A release on home detention shortly before parole (back end home detention), and which is also granted by the Parole Board, is not affected by this proposal.

Paper 7 retains home detention but proposes that it become a sentence in its own right. It explains:

Home detention is an effective alternative for low risk offenders who would otherwise receive a short sentence of imprisonment. It provides positive support for reintegration and rehabilitation of offenders; has low rates of reconviction and reimprisonment; high compliance rates; and lower costs than prison.

It is estimated that the new sentence “will avoid 310 prison beds”. This point is elaborated on in an appendix to paper 7 which again refers to the risk of net widening. To minimise that possibility it is proposed that the law will require the judge to rule explicitly that without the option of home detention, imprisonment would have been imposed. There is also some discussion that a sentence of

home detention, unlike imprisonment in most cases, clearly increases the risk of breach, absconding and further offending. These risks are considered small and, moreover, it is noted that advances in electronic monitoring technology will increase the effectiveness of the sentence.

The purpose and structure of the new sentence of home detention is laid down in the Sentencing Amendment Act 2007 and, as with the other new community based sentences, came into effect on 1 October. It may be for a period of not less than 14 days nor longer than one year. The sentence must nominate a specific address and the occupants' consent to the offender serving the sentence in that residence is required. The offender may not leave the residence without the formal approval of the probation officer and that will be given only for a specific purpose such as going to work, to receive training, or some other purpose, such as treatment, which responds to one of the conditions of the sentence. To minimise "net widening", the Act permits the sentence of home detention only if (s.15A(1)) the court is satisfied that a less restrictive sentence is not suitable and the offender would otherwise have been sentenced to a short term of imprisonment.

In view of the availability of (front end) home detention for some years if leave was granted to apply to the Parole Board when an offender was sentenced to two years imprisonment or less, the courts and the Community Probation Service have an expectation of how it will work as a distinct sentence, and will not be embarking on a totally new venture such as with community detention.

I repeat my view that some of the increase in the number of short terms of imprisonment imposed during the past decade arose because of the probable obsolescence of periodic detention and the apparent lack, at least until now, of acceptable alternatives. Although much of the concern about the increase in prison muster focuses on the increasing number of lengthy sentences, a substantial reduction in the number of short term sentences will have a major impact on the administrative tasks carried out by corrections staff and of course would provide not insignificant fiscal and economic savings. The absence of "short termers" from the prison system permits prison management to concentrate resources better on the needs and management of longer term

prisoners. Further, it should enable those staff to ensure that the prisoners serving longer terms have access to the programmes and other services available in prisons. Along with the proposals in paper 6, I hope that my optimism about the use of community based sentences, and their impact on the prison muster, is justified.

Paper 8 : Sentencing Guidelines and Parole Eligibility

The Law Commission report, also with this title, was attached to paper 8. The Law Commission, the Minister of Justice advised, had been invited to contribute to the Effective Interventions project and its report proposed:

- *to establish an independent Sentencing Council which, as its principal function, would draft sentencing guidelines, and*
- *to reform parole to align the time served in prison with the court imposed sentence.*

The Law Commission report gave four reasons for its proposals. They are:

- *First, a Sentencing Council would broaden the base of responsibility for determining sentencing policy. Recommendations directed to this issue include the council's mix of judicial and non-judicial membership, and its consultation process.*
- *Secondly, it is expected to promote sentencing consistency, because judges would be required to adhere to the guidelines unless satisfied that this would be contrary to the public interest. Furthermore, the council would be in a position to issue guidelines in relation to the whole range of offences.*
- *Thirdly, it would give the executive greater input into sentencing policy. Avenues for executive input include provision for a formal request by the Minister of Justice for consideration of a particular issue; official observers to the council; informal dialogue channelled through the chair; and ultimately the need for the council to satisfy parliament that its guidelines should proceed. In essence, the recommended process enables*

contributions to the development of sentencing from all three branches of government – the judiciary, parliament, and the executive.

- *Finally, sentencing guidelines coupled with parole reform are a proven mechanism for managing penal resources. We recommend that this should be a key consideration for the council and for parliament: the council should undertake prison population modelling, to assess the effect of its recommendations, and to attach a forecast to each set of draft proposals. The need for compensatory sentencing changes in the light of our proposed parole reforms has already been noted; this is an issue with which a Sentencing Council can assist, and from our perspective is a strong argument in favour of the establishment of such a body. However, it should also be noted that the establishment of a council in itself will not guarantee or even indicate this outcome. Whether there is an increased or decreased demand for penal resources will be wholly dependent upon the nature of the resulting sentencing guidelines.*

With regard to parole, the Law Commission proposed that sentences of imprisonment of 12 months or less would be served in full and those serving a sentence of more than 12 months would be eligible to apply for parole after two thirds of the sentence. This, the Law Commission argued, meant greater truth in sentencing.

The report acknowledged that at present the proportion of sentence served was on average about 62%. It predicted that the proportion would increase to over 80%, adding:

... the sentences imposed in court will need to be about 25% shorter to ensure the length (as opposed to proportion) of time served is the same and avoid substantial growth in prison population.

The Law Commission's proposals were given legislative shape in the Sentencing Council Act 2007 that came into force on 1 November 2007. The relevant amendments to the Sentencing Act 2002 and the Parole Act 2002 will come into force when the sentencing and parole guidelines are ready to be issued. That will probably be some time in 2009.

The Act essentially follows the Law Commission's proposals. Nevertheless, there are three variations which could have some impact on their practical effect.

First, one of the purposes of the Sentencing Council under the Act is to (s.8(a)(iv)) "facilitate the provision of reliable information to enable penal resources to be effectively managed", rather than to have, as was originally proposed, some responsibility for the management of those resources.

Secondly, the process by which a guideline or group of guidelines may be disappplied by parliament gives more powers to parliament than was suggested initially.

Thirdly, it was proposed that the current provision which allows victims to appear before a Parole Board would be replaced by one that required submissions from victims to be in writing. That was proposed on the basis that the Parole Board essentially dealt with the risks and the mechanics of an offender's return to the community, an issue on which most victims would have little to contribute. As the Bill passed through parliament, however, the victims' rights to attend a Parole Board hearing was restored to the legislation.

I regard the creation of a Sentencing Council to formulate binding sentencing guidelines as a bold move by New Zealand's legislature. I hope it achieves the outcomes the Law Commission proposes. There has in my opinion been too much legislative tinkering with maximum sentences and eligibility for parole in the past decade or so, often as a political response to heightened public concern about a particular case. This has resulted in confusion and a lack of clarity, and has understandably allowed the growth of the "truth in sentencing" catch-cry.

The New Zealand experiment – and this description is justified given the Sentencing Council's wide ranging power and functions in comparison with most similar schemes elsewhere – must be given a chance to promote sentencing consistency and, more importantly, sentences which acknowledge penal resources. A process whereby after sentencing the offender does not report to prison until a bed becomes available is too crude, as is the operation of a parole process which is driven by muster pressures rather than inmate need (as I was

told was an occasional District Parole Board practice before their abolition in 2002). A Sentencing Council may be the honest way to respond to high musters.

I am not aware of the processes by which the Law Commission determined that the length of sentences would need to decrease by 25% to hold the muster at about the present number but, intuitively, it seems reasonable. An evaluation of the new processes will be essential to determine whether the Commission's aims are being attained or aborted in practice.

There are, nevertheless, several reasons which could prevent, or at least could divert, the Council from achieving its target regarding the prison muster. Briefly, my concerns are:

- The judiciary in a significant number of cases do not follow the guidelines, and they are entitled to take a different view "in the public interest". I observe that the judiciary, both historically and anecdotally, has treasured its independence from the legislature and the executive.
- The judiciary's faith in community based sentences is not restored by the new sentences which have been developed. As some of the new sentences are explicitly designed as alternatives to prison, the guidelines in some instances will suggest a term of imprisonment, or a community based alternative. A lack of faith in the alternative will mean a continuing high rate in the use of imprisonment.
- The requirement for parliamentary approval of the guidelines or, more accurately, the absence of parliamentary disapplication. This requirement enables a group of politicians across parties, especially in the MMP environment, to deny approval to what are regarded as "soft" guidelines.
- The Parole Board retains its focus on "community safety" when making a decision about release. I expressed some concern earlier that, despite a Court of Appeal decision, general deterrence seems to continue to play its part in the Parole Board decision making. Although the Parole Board will have its new guidelines, I retain some concern, especially given the victim's possible attendance at the Parole Board hearing and given the current approach where many inmates are now eligible to apply after one

third of the sentence, that its decisions will remain influenced by past practice and will remain too risk averse, and thus too cautious.

- The process explicitly accepts that the executive should have some role in developing the guidelines. I agree that is important, but I am a little wary that the proposal does not transparently outline the role that the executive will play.

In conclusion, I repeat my sincere hope that the Sentencing Council, and the sentencing and parole guidelines when issued and in practice, prove an effective mechanism to manage penal resources. I take that phrase to mean that the impact of the sentencing and parole guidelines will be at the best a reduction in the muster (or at least keeping the muster at the forecast level), and consequently, a decline in the demand to build new prisons.

There is, however, a long lead-in time. (Guidelines limiting the use of custodial remands, it must be observed, would have had a more immediate impact in reducing the muster.) And finally I have some hesitation whether what is undoubtedly a tidy legislative package takes sufficient account of the realities of the criminal justice system in operation. The road is unfortunately littered with good intentions that have foundered, often on the basis of one rogue case.

Paper 9 : Preventing Reoffending

Reducing reoffending, paper 9 explains, will reduce the demand for prison beds. It is proposed to achieve this goal by:

- *expanding rehabilitation and reintegrative services*
- *reviewing and improving drug, alcohol and mental health services for offenders*
- *enhancing judicial supervision of alcohol and drug treatment of offenders.*

In outlining how this final proposal will reduce reoffending, the paper states:

Strengthening judicial oversight would provide judges with the confidence to divert drug – and alcohol – dependent offenders into treatment programmes as an alternative to, or means to minimise, a sentence of imprisonment.

A wide range of programmes are advanced with the intention to reduce reoffending, including:

- *special treatment units in prison providing intensive rehabilitation programmes*
- *two further drug treatment units in prison*
- *expanding participation in market related employment and training programmes*
- *extending child sex offender treatment programmes to smaller centres, and specific offender groups*
- *expanding domestic violence programmes for offenders*
- *increasing Tikanga Māori programmes.*

The paper continues:

The Department estimates that the first three of these initiatives will avoid around 44 prison beds by 2010 and over 100 by 2012.

I applaud the expansion of the services provided. Boredom, I am told, is the pervasive mood in prison (often among both inmates and staff) and any initiatives which alleviate it must be positive. Many diverse programmes have been provided in prisons both in New Zealand and overseas but the silver rehabilitation bullet remains elusive. The proposed programmes are not cheap – the operating cost of the new special treatment units and drug treatment units is given at \$3.341m annually from 2009/10. But I believe that we as a society have a humane duty to offer a wide range of services to inmates even if the provision of these services does not stop reoffending (and only 44 prison beds are thought to be avoided by 2010). Nonetheless offenders – both as inmates and on release – have an opportunity to participate in relevant programmes and are aware of pressures on them and the external resources available. This will assist them to comply with the vow nearly all make on release not to reoffend. It is a

vow usually made with the best of intentions and now there will be additional resources available to support those intentions. With the knowledge we have about the level of drug and alcohol addiction in New Zealand and the horrendous effect this has on families, the New Zealand community in general and the economic cost to our society it is, in my view, beyond argument that we must consider treatment an absolute priority.

The interface between medical and custodial services is discussed in Chapter 7 below. It is a difficult relationship when trying to meet the demands for security and, at the same time, to deal with the problems evinced by the estimated 80% of prisoners who have exhibited a substance abuse or dependence disorder at some time in their lives. Paper 9 also notes that between 50% and 60% of offenders are affected by alcohol and/or other drugs at the time of their offending and that approximately 50% of prisoners (most of whom have a substance disorder) have a diagnosable mental disorder as well. As paper 9 points out, the links between addiction and crime, and the interface between treatment and criminal justice are complex. Differences in philosophical approaches between the disciplines add to the difficulties, but as I conclude in Chapter 7, they should be investigated further and a resolution sought.

I am pleased that the expansion of employment services for prisoners is under way. In this report, I have tried to avoid talking about reinventing the wheel and paper 9 does not explain why the employment services offered in the past fell by the wayside. It notes, nonetheless (as has been evident for some years):

International evidence shows that prisoner participation in employment programmes can reduce the three year reimprisonment rate by between 5 and 13 per cent. In recent years, the quality of employment available to prisoners has improved, but the volume has fallen.

The paper suggests an increase from approximately 40% to 60% over five years of prisoners who are involved in employment and related activity in prison. Although the type of some of the work offered to prisoners in prison sometimes verges on the meaningless, it can be argued that it alleviates the otherwise pervasive boredom. Whether or not the work in prison is productive, I am

pleased with the emphasis that has been given to the employment of prisoners as part of the Effective Interventions suite of papers. From my discussions with the Chief Executive of the Department of Corrections and his responsible senior staff I am satisfied that this programme is being given appropriate priority.

A recent Cabinet paper (July 2007) reports that the Department of Corrections has “made good progress” with implementing the prisoner employment strategy. Despite the higher than expected prison muster, there had been an increase in the past year from 40% to 44% of prisoners who were in work or training. Moreover, there was an average of 116 prisoners on release to work in June 2007, compared with an average of 27 a year previously. The paper notes:

The Department is acutely aware of the link between increased participation in the release to work programme and the related risk of offending and media interest in incidents that may occur while prisoners are on this programme. The Department is identifying and managing potential risk, and acting immediately when a prisoner's actions raise issues of community safety or threaten the security and good order of the prison. In the six months since January 2007, 323 prisoners have participated in release to work. Seventy-four (23%) of these prisoners were removed for misconduct, including 51 who tested positive for drugs or alcohol.

The paper also advises that plans are under way to increase both the quality of the work available and volume of prisoner participation in the strategy.

As the Cabinet paper explains, it is a strategy that has risks of highly adverse publicity in some circumstances. I regard it nevertheless as a strategy of considerable importance in reducing the pointlessness which pervades much of the prison environment. Risk averse decisions have a place, but risk aversion must not be allowed to dominate. The employment strategy merits encouragement. If the discipline of work, the satisfaction it provides and the acquisition of skills, can be carried over post release this measure in itself contributes to any crime reduction strategy.

Paper 10 : Corrections Capacity

Paper 10 advises that the best current estimate is that (in the absence of measures to reduce prisoners) 9,846 prison beds will be needed by September 2011. This takes into account the 1,000 extra police which have been approved. Paper 10 also reports that, based on the current building programme, only 8,938 beds will be available by that date.

While this is a substantial discrepancy, paper 10 also argues that the measures proposed by Effective Interventions reduces the gap of 908 by 480 to a total of 428. It is thus proposed that the Department of Corrections report back in Budget 2007 on the capital and associated operating costs for a further 288 permanent beds and, in Budget 2008, for the costs of another 140 permanent beds.

I have noted the ongoing under-estimation of future prison bed numbers, and the question as to whether the enthusiasm of the impact of the Effective Interventions suite of papers on the muster is excessive, is dealt with in the conclusion on Effective Interventions.

Paper 11 : Māori and Pacific Peoples

The high rate of Māori and Pacific people dealt with by the criminal justice system is dealt with in paper 11. The executive summary begins:

- *Four to five times as many Māori as Europeans were apprehended, prosecuted and convicted. Six to seven times as many Māori were given a custodial sentence or were serving prison sentences, and eleven times as many were remanded in custody awaiting trial.*
- *About twice as many Pacific peoples as Europeans were apprehended, prosecuted, convicted, or given a custodial sentence; and three times as many were serving prison sentences or remanded in custody. Half of all Pacific offenders who received a custodial sentence were convicted of a violent offence.*

It continues:

The root causes of Māori over representation in the criminal justice system appear to be centred on socio-economic factors rather than ethnicity. Being Māori does not make a person an offender; however, a significant number of Māori experience risk factors that contribute to criminal behaviour. Even though they lie outside the criminal justice sector, understanding these broader social inequalities and economic conditions is important for understanding the drivers of the Māori imprisonment rate.

Pacific peoples' over representation in the criminal justice system is not as large as for Māori, but seems to be centred on similar socio-economic risk factors.

Pointing out that the Effective Intervention proposals apply to all offenders, the paper considers the following issues have to be addressed:

- *How the government can best support Māori and Pacific peoples' communities to reduce victimisation, offending and reoffending, and improve responsiveness to programmes developed by Māori and Pacific peoples' communities.*
- *How the government can best support families/whanau of offenders who are involved in remand/bail, restorative justice and family group conferences, home detention, and prisoner reintegration.*
- *How to ensure consistency and fairness for Māori and Pacific peoples at all points in the criminal justice system where there is an element of discretion.*

The paper adds that the implementation of these proposals will involve working with Māori and Pacific peoples' communities, and investigating "the unintended consequences of discretion at various stages in the criminal justice system and unevenness of decision making". The paper includes an appendix which lists 38 programmes in selected police districts discussed at the New Zealand Police Iwi Liaison Officers Hui, and 34 crime prevention and rehabilitation initiatives funded by Te Puni Kōkiri. A reduction in the Māori crime and incarceration rate

promises so much. I note with regret that for whatever reason so little has been put into practice so far.

I intend to deal first with the statistics. The following table, taken from paper 11, records the figures for ethnic disparities from apprehension to prison, 2003 (estimated rates per 100,000):

	European	Māori	Pacific	Total NZ (per 100,000)
Police Apprehensions	3,500	15,500	6,600	5,300
Police Prosecutions	2,000	9,700	4,000	3,200
Remands in Prison	10	110	40	30
Convictions	1,400	6,300	2,700	2,400
Custodial sentence	110	770	250	210
Sentenced in prison	70	440	220	130

Similar differences are apparent in a study which investigated applications for (front end) home detention among the total of 7,600 offenders sentenced in 2004/05 to a term of imprisonment of two years or less.

The survey disclosed that 39% of New Zealand Europeans were granted leave (by the sentencing judge) to apply for home detention, while only 29.1% of Māori were granted such leave. Not all the offenders who were given leave applied, but of those who did, 19.3% of European were granted home detention at a Parole Board hearing compared to only 10.7% of Māori. The figures for Pacific offenders were not statistically different from those which applied to New Zealand Europeans. The report, *Effective Interventions: Home Detention Access* (June 2007), reaches the following conclusions:

A reasonably clear disparity was identified between Māori and New Zealand European offenders with respect to both leave to apply and approval of home detention applications. However, statistical analysis indicated that Māori offenders potentially eligible for home detention tended to present with more extensive offending histories, including failure to comply with previous sentences and orders. Such characteristics largely explained the lower rates with which Māori obtained access to home detention. After matching Māori and European offenders with similar characteristics, 3.6%

fewer Māori were given leave to apply for home detention, and 2% fewer Māori offenders were granted home detention. Decisions made by sentencing judges, and the Parole Board, thus do not appear inconsistent with relevant legislation requiring them to take account of public safety and sentence compliance considerations.

The absence of any observed under representation in the home detention muster amongst Pacific offenders was unexpected. Further research to understand this finding may potentially shed further light on reasons why Māori are under represented.

A significant number of Māori offenders failed to make applications for release on home detention, even after obtaining leave to apply. Available evidence indicated that this may have reflected offenders' reactions to the demands imposed by the application process, but it might also have reflected difficulties relating to a home address. While this might have pointed to a possible strategy for improving approval rates for Māori (ie through providing more support and assistance to Māori offenders in filing applications), under the sentence reform legislation home detention becomes a sentence in its own right, which can be expected to reduce the extent to which procedural and circumstantial obstacles intrude into the process.

Clearly, addressing the over representation of Māori in prison statistics will need to be addressed primarily through reducing the relative incidence, seriousness and persistence of offending by Māori. As such, the focus on early intervention, which seeks to prevent the commencement of criminal careers, emerges once again as a key focus for policy and service development.

I am aware that proposals for further research have been put before Cabinet to investigate the "unintended consequences" apparent in the use of discretion in the criminal justice system. In my view this should be given priority.

I have no doubt that socio-economic status has a large part to play in these findings. For example, public bars are more commonly a social venue for working people (the category into which many Māori and Pacific people fall) rather than professionals, and the police are more likely to be seen patrolling public bars than in the professional clubs and upmarket restaurants. But I do not accept that the socio-economic status explains all the differences. If that were so, I would expect that the rates for Māori and Pacific peoples to be more closely aligned.

In addition to obtaining a better understanding of the different rates, Effective Interventions proposed greater consultation and liaison with communities. In order to put this aspect into effect, a group of Māori prominent in the criminal justice arena was established by Te Puni Kōkiri. However, as far as I know and, so I am informed, much to the group's annoyance, it met only intermittently with the representatives from departments involved in implementing the Effective Interventions initiatives. I have been advised of differences of view between the Ministry of Justice and Te Puni Kōkiri. I accept that the approaches of these departments may differ but it grieves me that these differences have been allowed to impede the formulation of plans to deal with one of the more unsatisfactory aspects of our criminal justice system. Some resolution of these differences would be a major step forward.

I acknowledge that the "Māori crime rate" is not an easy issue to deal with. There are those who deny that ethnicity has any relevance – and that we are all New Zealanders and all are equal before the law – and those who consider that the inequities arise because the Treaty of Waitangi has not been fully implemented, especially in respect to sovereignty.

The approach advanced by Justice Durie, a former Law Commissioner, to a New Zealand Parole Board Conference in July 2007 suggested an approach which moves beyond simplistic slogans and hidebound ideology. He began from the fact that although Māori are only 14% of the population, they account for 43% of all convictions and 51% of the prison muster. He also noted further that research indicated that the imprisonment, compared with community sentences, did not reduce reoffending and that longer rather than shorter prison terms may in fact

increase the recidivism rate. In other words, he said, harsher penalties mean harsher criminals, and denunciation often leads to defiance not reform. While new prisons were very expensive and the public demanded longer terms, he observed that “since 1997” recorded crime had gone down about 33% while the prison muster had gone up by more than 50%. He also suggested that given the current public mood, the wise use of judicial compassion in the present climate, once the hallmark of a good judge, would now lead to public outrage.

Turning to Māori offending, he argued for initiatives that, as with successful programmes in the past, built on “resurrecting Māori autonomy and pride”. Noting that mana was a central concept in Māori thinking he advocated programmes that restored dignity, or mana.

Pointing out as well that the whanau, hapu and iwi were central to Māori culture, he questioned the relevance of many of the current programmes operating in prison, taken from overseas, which focused on the offender as an individual. He was not, he stated explicitly, advancing a form of separatism and he accepted that oversight of a policy must include people from a range of interests. But, he argued, it should not look for simple solutions – such as returning Māori offenders to the marae – which often did not work. A policy had to acknowledge history, and the demographic revolution for Māori which had occurred in the past 50 years. He concluded:

As I suggested at the beginning, studies are needed of the dynamics within communities with high Māori crime rates, of the extent of social and cultural breakdown, of the preventive programmes that have worked and those that have not and of the programmes that have worked best or worst for Māori offenders.

He envisaged a partnership of academics and tribal leaders developing research and policy on Māori offending.

The Māori offending rate is a sensitive topic that on occasions is addressed by empty rhetoric and sometimes gives rise to racist taunts. But as became apparent to me during this inquiry, there is plenty of goodwill throughout the

community. Moreover, Justice Durie's comments provide the basis of a framework on which to build a strategy to ensure that the statistics no longer are the basis for unfortunate slogans. As with other issues within criminal justice, perhaps Māori issues and youth justice being to the forefront, we need to be much more constructive and innovative than hitherto. Credible programmes must be given strong support at all levels, political and community, and certainty within the significant players in the criminal justice system.

Effective Interventions Progress

The Minister of Justice undertook to report to Cabinet quarterly on the progress of putting the Effective Intervention initiatives into effect. I have seen the reports put to Cabinet this year, the third, fourth and fifth reports.

It is emphasised in the report for the March quarter of 2007 that the central aim of Effective Interventions is to manage the prison population down by 2011.

In regard to this matter, the report states:

Prison Population Forecast

In March 2007 Justice Sector Ministers received the 2006 Justice Sector Prison Population Forecasts. The baseline prison population, which takes into account the estimated impact of Effective Interventions and the additional 1,000 police, is forecast to rise from 7,656 as at June 2006 to 9,028 by June 2014. If the expected savings from implementation of Effective Interventions initiatives are not achieved and/or the impact of the 1,000 extra police is higher than expected, the prison population could reach 9,578 by June 2014.

The forecasts assume that current policy and legal settings will continue over the period. Any police or operational changes, even of seemingly small nature, could result in a significant variance between the actual and forecast prison population and alter projections.

While the Effective Interventions package remains on track, its success in managing the forecast prison population down by 2011 is dependent on further implementation work for funded initiatives proceeding as planned. The impact of Effective Interventions on bed savings may be later or different than anticipated if, for example, the Criminal Justice Reform Bill is delayed or altered. Any reductions in Effective Interventions related savings will require additional prison beds and may require new prisons to be built.

Otherwise, by way of summary, the report records that the Effective interventions focus has shifted to implementation and, overall, “implementation of funded initiatives is on track and within budget”. In discussing a number of specific initiatives, the report raises a concern that significant further changes to the Criminal Justice Bill, which deals with the new community based sentences, could threaten the implementation date of 1 October.

That implementation date was met.

On the two initiatives about which I express some concern, the Māori offending rate and the Justice/Health interface, the report comments:

Programme of Action for Māori: Reducing offending by Māori is a long standing issue. To enhance understanding of Māori offending, and improve delivery, officials engaged with Māori providers and practitioners. Thirteen focus groups have been held with 46 Māori providers and practitioners. Fourteen focus groups have been held with Māori offenders and two meetings have been held with a Māori experts' reference group.

Interface between mental health and alcohol and other drug (AOD) services and the criminal justice system: An update report in February 2007 to the Minister of Justice and the Associate Minister of Health outlined several draft proposals to improve the way the mental health and AOD treatment needs of people within the criminal justice system are met. These include:

- *placing a nurse with mental health and AOD training in a policy station*

- *placing an AOD clinician in court to provide advice to judges*
- *establishing a new residential AOD programme for offenders in the Wellington region*
- *establishing specialist offender teams to offer services in prisons and run programmes for offenders in the community.*

Draft proposals will be discussed with key community informants and stakeholders in March 2007. Cabinet will see final proposals and cost estimates by the end of May 2007.

Apart from the questions about whether Effective Interventions would achieve its primary goal of slowing the increase in the prison muster, and thus the demand for new prison beds, the report is basically positive about progress.

The positive tone continues in the report on progress for the second quarter of 2007. It comments that the policy developmental stage is “nearing completion” and, again, the focus is “shifting towards implementation of initiatives”.

With regard to the impact on the prison muster, the summary of the report records that the electronic monitoring initiatives as a condition of bail and home detention “have only recently been implemented and are not yet generating the estimated 180 bed savings. Otherwise, the savings associated with Effective Interventions initiatives will be realised over the next three to four years as set out in the Effective interventions proposals tabled with Ministers in July 2006.”

The comment in the body of the report is somewhat more cautious where it is said that it is “too early” to state whether the estimated 550 bed savings will be achieved by 2010/11. It points out that the prison population is currently 340 (or 4%) above forecast, and that is made up of 130 (or an increase of 2%) sentenced inmates and 210 (or an increase of 12%) custodial remandees.

Under the heading, Implementation, it is recorded that the Sentencing Council Establishment Unit has circulated three sets of draft sentencing guidelines, and the first of three new drug treatment units in prison opened in May. A further two will open later in the year and the two new special treatment units in prisons are

on track to open in 2008 and 2009. The following information is given about the other two issues noted above:

Interface between mental health and alcohol and other drug (AOD) services and the criminal justice system: In May 2007 Cabinet received five papers on the criminal justice system/mental health and AOD interface recommending a range of initiatives designed to start addressing AOD or mental health needs of offenders (including Māori, women, Pacific, youth) and associated offending behaviour. The range of initiatives, collectively called the "First Steps" package, will involve reviewing and evaluating current services, establishing pilots in court and police settings, contracting additional AOD services, accelerating the development of the AOD workforce, and placing nurses with mental health and AOD training in police stations.

With the exception of police overhead costs, the First Steps proposals are to be funded through Vote: Health as the "First Steps" initiative. These proposals will be rolled out during 2007/08 and their expansion canvassed in a 2008 budget bid. An implementation plan will be provided to the Ministers of Health, Justice and Corrections on 31 July 2007.

The Ministries of Justice (lead) and Health will also commence investigation of overseas court diversion programmes (for offenders with mental health problems) and mental health courts to determine if these initiatives, or aspects of them, could be beneficial to New Zealand.

I am not aware of the progress with these investigations.

Reducing Māori and Pacific People's over representation

Programme of action for Māori: Cabinet has approved a Programme of Action for Māori which will see:

- *funding in 07/08 of a small number of Māori designed, developed and delivered interventions*

- *identification of options for funding promising providers and innovative initiatives*
- *ongoing research into the determinants of offending by Māori*
- *a research project on the impact of the exercise of discretionary powers in the criminal justice system*
- *further reporting on Māori participation in the criminal justice sector and funding sources for Māori.*

The third report, for the July to September 2007 quarter, was put before the Cabinet in October 2007. The summary reported that the Criminal Justice Reform Bill received royal assent on 31 July and the quarter had seen the continued implementation of the Effective Interventions initiatives. The new sentences came into effect on 1 October and staff had been recruited and trained. A drug and alcohol unit opened at Rimutaka Prison on 2 October. As the EM bail initiative had not produced the anticipated bed savings, the summary noted, a report on strategies to enhance uptake would be made in November.

The body of the report referred to the implementation of the “First Steps” programme dealing with the interface between health and justice. As for the programme of action for Māori, the report recorded that there were ongoing discussions between the Ministry of Justice and Te Puni Kōkiri about a programme and its providers and progress would be covered in a report to Cabinet now due at the end of October. I was advised in mid November that this report will be completed in early December.

As for the overall success of the Effective Interventions package judged against the prison population, the report noted that EM bail had not so far produced the bed savings anticipated. It is also noted that a new prison population forecast was being prepared and:

There remains a risk that the initiatives will save fewer beds than forecast, or save them more slowly. The success of Effective Interventions in slowing the growth of the forecast prison population by 2011 will depend on continuing to implement the Effective Interventions initiatives as planned.

An apparently new strategy in regard to Māori crime is dealt with under the heading New Zealand Māori Crime Prevention Strategy (NZMCRS). It involves a Police and Te Puni Kōkiri presentation of a crime reduction strategy at nine hui so far. It added:

The hui have sought to gauge Māori support for the concept, provide some background and contextual information, and begin to define Māori criminal justice profiles at the Police district/area level. Feedback to date has been overwhelmingly positive.

The report also refers to progress on Kia Puawai, a cross-government approach to providing services for children under six and their families.

CHAPTER 5

INTER-AGENCY COLLABORATION

My Terms of Reference involved specifically an assessment of the effectiveness of the cooperation between the criminal justice agencies. In accordance with the Terms, I note that the Effective Interventions suite of papers is a collaborative effort that illustrates a high degree of cooperation between the relevant agencies at the policy level. Given the extent of Māori over representation in the criminal justice system it is a matter of regret that for a number of reasons Te Puni Kōkiri was not fully involved in the development of the Effective Interventions initiatives.

I believe that it is imperative that cooperation of inter-agency groups at the operational level is established to give effect to the Effective Intervention proposals developed at the policy level. Good policy can easily founder on poor or inadequate operational implementation. I am not convinced that this has taken place throughout New Zealand to the extent necessary to ensure that the interventions are given the bold shape that they need to take to be effective.

I strongly support initiatives which make use of the skills and experience, and the appropriate legislative authority, available both across government departments, in crown entities and in non-governmental organisations. Such cooperation is possible and I want to give some examples I have observed, and there may be others, where inter-agency collaboration has led to positive results and improved outcomes for both the individual and society.

Cooperation should be a matter of obligated standard day-to-day practice and one departmental chief executive told me that on visits to districts, he quizzed his departmental officers about their relationship with similar staff in the other departments with which they worked. Sometimes, he said, it was necessary to encourage and lead staff to develop cooperative working relationships.

In addition to formal working relationships, the value of informal contacts cannot be underestimated. However, given the range of people it is sometimes necessary to work with, and the differing statutes and arrangements under which

they operate, such networking may remain superficial. Furthermore, close liaison is unlikely to occur in the cities where extensive informal relationships are often difficult to maintain. In larger cities, as well as in the smaller centres, it often depends on a senior employee with a broader vision and enthusiasm to initiate, and lead regular, focused, inter-agency meetings to ensure staff at least have sound formal relationships with staff in related agencies. Such meetings should also be obligated standard practice.

There are three examples of inter-agency cooperation which I consider indicate a positive response to specific issues and two focus specifically on criminal justice matters.

1 Youth Gangs in South Auckland

An increasing number of reports about escalating youth gang activity and increases in violent assaults in 2005 in South Auckland led for a call for significant government intervention in Counties Manukau. There were also reports of youth gang related problems in a number of other areas in New Zealand and it was hoped that the work done in Counties Manukau would lead to policy development and local practices which could be applicable throughout New Zealand.

The concern was expressed by Ministers of the Crown and the Chief Executives of New Zealand Police, Child Youth and Family (until its merger with the Ministry of Social Development on 1 July 2006), Ministry of Justice, Ministry of Education, and the Ministry of Social Development. The Ministry of Pacific Island Affairs, the Ministry of Youth Development, and Te Puni Kōkiri were also involved.

Research was undertaken from which developed strategies for improving outcomes for youth. These strategies were put into an action plan which involved the development of the Auckland Youth Support Network (AYSN). The network was a collaboration between the Ministry of Social Development (the lead department), the New Zealand Police, the Ministry of Education, Te Puni Kōkiri,

the Ministry of Justice and the Ministry of Youth Development. The Counties Manukau District Health Board was also involved. As the plan explains⁶:

This plan provides systematic, integrated, intense, targeted commitment to the children, young people, families and communities of Counties Manukau and Otahuhu. Evidence shows that if government works in partnership with non-governmental agencies, communities, and local government, much better results will be achieved.

I met the members of AYSN who explained that they are meeting the aims of the plan and are thus improving the outcomes for youth in Counties Manukau.

There are a number of matters which are relevant in concluding why this appears to be an example of, on the whole, positive and successful collaboration:

- a crisis arose (eight youth gang murders in South Auckland) and wide agreement that action was necessary
- the members were directed by their head office to participate
- the members had head office support
- the members were senior local people and membership remained reasonably constant
- the length of the plan – 18 months – allowed trust to be built up between the agencies
- the plan contained achievable cross agency goals
- the members shared a common interest in the issue – improving outcomes for youth
- the solutions had been evolved locally
- local government was involved throughout
- an information sharing protocol was developed
- regular reporting was required
- a media strategy was devised (with a sole spokesperson).

⁶ www.msd.govt.nz/work-areas/cross-sectoral-work/youth-gangs-action

While this seems a rather ordinary list for an inter-agency committee, it must be remembered that each member continued with what they called “my day job”. However, because of the factors listed, the action plan was given a high priority. Now that the plan has been put into place and is in operation, the members took a quiet pride in their achievement. In my view this is an excellent example of what is possible through positive leadership and quite independent of legislative compulsion.

In view of the importance of the group’s cooperation in putting the plan into action, there was some criticism of two agencies whose attendance was irregular. That was Te Puni Kōkiri and the Ministry of Pacific Island Affairs. The former, it was believed, had at times expressed criticism without full knowledge of what was occurring. The members noted that neither department has been a member of the initial group of chief executives and wondered whether that had coloured their later participation. This is an issue that needs to be resolved between the several chief executives.

In view of the success of AYSN, the Ministry of Social Development has appointed a National Manager, Youth Gangs. This person has a mandate from the appropriate departmental chief executives to assist in the application of the AYSN model – adapted to local requirements – to areas with a “youth gang” issue. Although the Ministry of Social Development is responsible for youth justice (ie up to the age of 17), it is accepted that youth gang members might remain members until they are in their 20s.

The National Manager considers that the Ministry of Education’s active participation in AYSN was essential in achieving its aims, and considers its involvement elsewhere is essential as well. I have noted elsewhere in this report that the Ministry of Education, while not seen as a core criminal justice sector player, does nevertheless have a significant part to play. The Chief Executive of the Ministry and her staff recognise this and, as in the example discussed above, are contributing in a positive and constructive way. The ease of obtaining educational exemptions was noted with concern in the 2003 report from the Ministry of Justice following the murder of Michael Choy by four young people and one child. This process is now being reviewed by the Ministry of Education

and it is intended, I am pleased to note, to limit the hitherto relatively easy availability of education exemptions.

2 Family Violence Inter-Agency Response System

Family violence is a totally unacceptable practice which deserves the widespread disapproval it draws and, understandably, is a concern to the government and a number of agencies, both public and non public sector.

There are a range of programmes in operation which are designed to reduce such violence or share information about programmes which do so, eg Te Rito, the New Zealand Family Violence Prevention Strategy, the Taskforce for Action on Violence within Families, Family Safety Teams, Family Violence Courts, and the New Zealand Violence Clearinghouse.

The range of these activities is impressive, indeed somewhat overwhelming, and I was unable to gain a complete understanding of the programmes offered among others by the Ministry of Social Development, the Ministry of Health, the Ministry of Justice, and the Police. The Family Violence Inter-Agency Response System, for example, lists more than 50 initiatives operating at local and national levels. It seems to me that knowledge and use of the programmes would be helped considerably should there be one agency, perhaps the Family Commission, responsible for collating the programmes, describing their function and making the information available on one dedicated website.

The Family Violence Inter-Agency Response System has been put together by the Police, the Ministry of Social Development (the Child Youth and Family Division-CYF) and the National Collective of Independent Women's Refuges. It is designed "to interrupt the cycle of violence and creates an environment for sustainable change towards safe and violence free families." It involves cooperation between the Police and CYF in that a telephone call to CYF, while the police attend a high risk incident of family violence, will bring in a social worker and the local refuge will be alerted. Further, documentation on all family violence incidents attended by the police will be completed at the end of each shift and discussed in daily telephone calls between Police and CYF.

There will be weekly meetings between Police, CYF and the local refuge to discuss the week's incidents, advise on action, exchange information and decide what assistance is appropriate. This would include making use of the community's resources.

The documentation includes a Family Violence Information Sharing Protocol developed by the Police. If the success of the scheme is dependant on the enthusiasm of the police officer responsible for the project, there will I believe be positive outcomes. It is a thoughtful and comprehensive plan which acknowledges nevertheless that both central and local leadership by each agency is necessary for its success. I continue to emphasise this throughout my report.

3 COBOP – Community Outcomes Bay of Plenty

COBOP comprises nine territorial authorities and 22 government agencies. Unlike the other two collaborative efforts discussed which focused on an aspect of criminal behaviour, COBOP is concerned with the use of community resources in achieving desired community outcomes. "Safe Communities" is one of the six subgroups and it has developed a three year plan and it meets monthly to oversee the plan's implementation. A recent achievement is that the Rotorua District Councillors have agreed to support the work required to apply for WHO (World Health Organisation) safe community accreditation.

COBOP is designed to foster better understanding of each agency's work among the participants and to have an influence both on the development of specific projects and on the development of national policy. It will also help eradicate a response heard too commonly in the criminal justice sector (and elsewhere) when an issue receives unwanted media coverage. For the outsider not employed by the agency focused on, the response is "thank goodness that's X's problem, not ours", and for the insider, "I've ticked all my boxes" suggesting that as "I have displayed neither negligence nor innovation, I cannot be held responsible".

Summary

Constructive cooperation between the components of the criminal justice system was a sentiment shared by most of the people spoken to. However, I was told of instances where cooperation was difficult to obtain as the others were confined to their “silo”. Sometimes this was said to arise from an insufficiently broad focus which others gave to their work, sometimes it was a matter of work pressures, and in other cases it was considered a matter of budgetary restrictions. An office had allocated all its funds to its specific statutory tasks or those identified in its Statement of Intent and there was nothing left to contribute to a joint enterprise. I have difficulty with the restrictive nature of this approach.

Chapter 8 covers health issues within the criminal justice system and I note the ongoing differences of opinion between the Department of Corrections and the Ministry of Health. These differences seem to have impeded the development of a constructive “whole of government” working relationship. I suggest that the treatment of offenders with personality disorders, is one area which would benefit from increased cooperation. Although there are efforts to improve cooperation, given the difference in philosophies which govern these two organisations, a resolution could well take some time and may call for appropriate political intervention.

Budgetary issues also occur in the interface between the competing demands of security and medical treatment in prison, and this could well be exacerbated should medical services in prison be transferred from the Department of Corrections to the local District Health Board. As funding of the District Health Boards is partly population based, the District Health Boards with a prison within its area may well be seeking compensation from the District Health Board where the prisoner is usually resident. There are, in addition, in my view and at the present time, other compelling arguments against any proposal to move responsibility for inmate health away from the Department of Corrections.

Sharing of information was sometimes raised as another impediment to inter-agency work, and there was a reference to the restrictions in the Privacy Act 1993. This does not need to be the problem as the sharing of information can be

met by the development of suitable protocols. As I have said the Family Violence Inter-Agency Response System has drawn up such a protocol that provides, in my view, a useful model.

As was apparent in the development of Effective Interventions, a high degree of cooperation between the staff in the head offices of government departments involved in the criminal justice sector is, on the whole, apparent. The impetus for this positive development is moot but the important thing is the recognition and acceptance, certainly at the chief executive level, that this is essential to good management and governance in the criminal justice sector. I have referred to the position of Te Puni Kōkiri in my discussion about the Effective Interventions programme to deal with the disproportionate number of Māori prisoners. As with the interface between health and corrections, much of this disjunction is based in differences in philosophy. Not only is this sad, it is having an impact on the prison muster and the development of positive programmes such as Project Mauriora, which deals with whanau violence, and those which focus on restorative justice. As I observed above, I believe that we as a country have the maturity to resolve this concern. Again this is a whole of government issue that requires strong political and public sector direction.

Criminal behaviour is essentially a social issue to which a social response is appropriate. I have commented elsewhere that the almost inevitable response of resorting to legislation is an easy option but often an unsatisfactory one and, as recent experience demonstrates, often results in unintended consequences that can have a negative impact economically and socially. As an example, reducing crime against property could involve one or more of the following:

- improved security for where the property is kept
- improved security of the property itself
- environmental design to improve crime prevention
- a faster police response
- better police equipment
- more police
- more professional prosecution
- more appropriate programmes provided by corrections

- greater legitimate opportunities for the offender
- etc, etc.

A similar list could be devised for crimes of violence and other statistically significant crimes.

The list shows that crime and criminal justice is not just a matter for the Police (catching offenders), the courts (imposing sanctions), and Corrections (administering sanctions). Much can be achieved earlier if many within the public sector agencies work together to prevent a crime taking place or to intercede to ensure that an opportunity for the crime does not arise. While criminal sanctions are appropriate in dealing with many offenders, action by the criminal justice agencies in many cases would not be necessary if concerted community action earlier had reduced the opportunity or motivation for the crime. Collaboration is challenging, but successful inter-agency cooperation and collaboration can have an important influence at a number of stages in the criminal justice system. As I noted earlier, crime prevention is neither glamorous work nor is it easy to measure. Effective crime prevention, nevertheless, can have a real impact in slowing the growth in offending and consequently in the criminal justice sector generally and prison muster in particular.

CHAPTER 6

DEPARTMENT OF CORRECTIONS

Over recent times the Minister of Corrections and the department have endured some highly scathing comment by politicians, the public, interest groups and the media. Among other matters, there has been publicity about:

- cost overruns for new prisons
- contraband in prisons
- drugs in prisons
- alleged corruption of some prison staff
- unsafe prisoner transport
- escapes
- rioting.

The department is broadly divided into the Public Prison Service (PPS) and the Community Probation Service (CPS). In regard to the latter, I heard comments from present and former probation officers that there had been a move away from supervision based on social work concepts to supervision where there was an emphasis on management control. This was accompanied by a requirement to meet targets of a mechanistic rather than of a developmental nature. Ironically, a long serving current probation officer observed that inter-agency cooperation had increased given the change in emphasis. It was noted that police officers in some locations, who acknowledged that policing had a social impact, were now working cooperatively with probation officers, who acknowledged that supervision included reasonably strict controls on behaviour.

I do not intend to dwell on what the media have described as Corrections scandals (see, eg *One News*, 30 June 2007) other than to note that this yet again illustrates a recurrent theme. The criminal justice sector has, all too often, been in the news because of some mistakes. Such mistakes, however minor and isolated in themselves, often receive considerable (sometimes sensational) publicity and are portrayed as an accumulation of systemic incompetence. As a consequence, it is not unnatural for individuals who work within the system to

adopt a cautious approach and ensure that they have complied with “the rules” should any of their decisions make the headlines on radio or television or feature on page 1 of the next day’s newspaper. A policy of risk aversion is eminently sensible in these circumstances, although it might not always necessarily be in the best interests of either the offender or the effective and efficient management of the criminal justice system.

In its briefing for the incoming Minister (dated 31 October 2007), the Department of Corrections noted that the ongoing growth in the prison population placed pressure on facilities, operations and staff. It had been necessary to recruit prison staff and probation officers to ensure that staff to offender ratios were “maintained at an appropriate level”. Because of staff increases, it added, “over 50 per cent of frontline prison staff have less than five years experience; over 50 per cent of frontline probation officers now have less than two years experience”.

Nevertheless, the briefing recorded the following achievements:

- *we have very few escapes (following an 83% reduction in escapes over the last ten years)*
- *we have the second lowest rate of serious assaults by prisoners on fellow prisoners*
- *unnatural deaths, suicides and incidents of self-harm have been declining steadily for several years, and are now lower than all but one comparison country*
- *drug usage by prisoners is declining sharply (a reduction in positive random drug tests, from 34% in 1998 to 12.7% currently)*
- *the average per day cost of housing prisoners is substantially lower than that of other countries.*

Further, rates of reconviction and reimprisonment recorded amongst offenders released from New Zealand prisons are no higher than those found in other countries with similar criminal codes and sentencing practices.

It noted that the average cost of keeping an offender in prison was \$76,639 per year.

I want to point to some developments in the Department of Corrections which should be encouraged. These include the:

- focus on prisoner reintegration into the community
- rapidly expanding inmate employment strategy
- structural reorganisation of the Department of Corrections head office
- improvements in prisoner transport
- changes in the structure to recognise particularly difficult aspects of prisoner management, eg a national health manager.

In 2005 I undertook with a colleague the Own Motion Investigation into the Detention and Treatment of Prisoners. I note the progress in regard to our recommendations about recreational and library facilities in prisons. I am however barely satisfied with the department's response to what is known as the 66% rule. Pursuant to this rule and despite prisoners sentenced after 2002 being eligible to apply for parole after one third of the sentence, the department, in 2002, set the policy that for higher risk prisoners, all sentence plan activities were scheduled to be completed by the time the prisoner had served 66% of the full sentence. This rule was established although it was acknowledged that the Parole Board would be reluctant to release prisoners until they had completed the sentence plan.

As the 66% rule could be seen as influencing the Parole Board when it came to make a decision after one third of the sentence had elapsed, it was a matter of concern to me in my role as an Ombudsman. It was subsequently a matter of discussion between the Department of Corrections and the Parole Board. As the new rule for eligibility for parole, only after two thirds of the sentence, does not apply to inmates sentenced before the specific provisions of the Parole Amendment Act 2007 came into effect, I would urge the department to meet the requirements of the Parole Board in all situations, rather than apply the 66% rule mechanistically.

The relationship between the competing demands of health and corrections remains a concern. This merits further discussion in Chapter 7.

Putting Work and Income reintegration teams into prisons improves prisoners' access to employment on release and I see this as a positive move and another example of positive inter-agency cooperation. I commented positively above about the expansion of the release to work scheme.

Commentary

A number of people spoken to expressed a view on whether, or not, the Department of Corrections should be reintegrated back into the Ministry of Justice. Those who argued for reintegration pointed to the improvements in the operation of the courts following reintegration. A number also pointed to my known strong opposition to the division of the former Department of Justice in the mid 1990s.

Having weighed the material put before me, and taking special note of the recent structural reorganisation of the Department of Corrections' head office, I am of the view that reintegration of the Department of Corrections into the Ministry of Justice, at least at this time, is not called for. In a 2005 review of the education sector the central agencies, ie State Services Commission, The Treasury and Department of Prime Minister and Cabinet, said in relation to governance and structures:

At this time there should be no major structural change, either to make into separate departments or to merge them into the Ministry. This is because of the extra burden of cost, uncertainty in a possibly lengthy transition, lack of capability in the agencies to cope with the change, and the risk to current policy implementation. Taken together with the original reasoning that led to ... being established as Crown entities and which still has validity, these outweigh the potential for better alignment and coordination, the benefits of a strong signal of change as a catalyst for improvement, and other gains from restructuring.

In my view the restructuring that has very recently occurred in the department, the level of leadership and inter-agency co-operation that is developing, and the suggestion I have made for a criminal justice sector oversight group, is the preferable option at this stage.

I have dealt separately with the Parole Board. The department is required to exercise control over an increasing number of people who arrive, and often remain, disgruntled and displaced, and it contends that it does so for the most part effectively and with some degree of humanity.

There have been significant and concerning problems within the department and these have been exacerbated by the pressures arising from the higher than forecast increase in the muster and other issues such as recruitment and training. The Effective Intervention initiatives also impose demands. While these pressures must be met with strong leadership and determination, in my opinion the department has the resources to meet them. The discussions I have had with the Chief Executive and his senior staff satisfy me that there is determination to make this part of the criminal justice system as efficient and effective as can be.

The government's recent proposal to make the Office of the Ombudsmen responsible not only for dealing with complaints from inmates, but also for investigating serious incidents and deaths in prison, in my opinion, adds weight to the recommendation that the Department of Corrections should remain a stand alone department.

When prisons were the responsibility of the Department of Justice, escapes were a reasonably regular occurrence. The popular image of escapes dwells on hostages or the use of helicopters, or at least the use of blankets tied together to get over walls or through barbed wire, and this was the focus of the feature article in *The Dominion Post* on 11 November 2007. However, most escapes in the 1990s involved no more than walking away from a work party or failing to return from weekend parole.

Nevertheless, whatever the method used to escape, the publicity is usually critical (and often sensational), and the Department of Corrections has made a major

effort to increase security or to reduce the opportunities for walking away. These efforts have been effective on the whole.

The extensive media coverage given to the “escape” of a minimum security prisoner (who walked away from a work party) and the use of the Police Armed Offenders Squad, while I am writing this report, confirms my belief that the risk averse culture which increasingly dominates the criminal justice system often lacks a sound realistic base.

Overall, experience world wide, and my own knowledge of the international picture, allows me to say that the New Zealand corrections system is no exception in having to face problems such as those that have created recent political and public disquiet.

CHAPTER 7

HEALTH ISSUES

Preventing reoffending is the heading of paper 9 of the Effective Interventions suite of papers. The three proposals advanced “to reduce reoffending and future prison bed numbers” are:

- *expand rehabilitation and reintegrative services*
- *review and improve drug, alcohol and mental health services for offenders, and*
- *enhance judicial supervision of alcohol and drug treatment of offenders.*

The report of the Ombudsmen’s Own Motion Investigation into the Detention and Treatment of Prisoners (2005) expressed concern at the adequacy of drug and alcohol treatment programmes available in prison and, more generally, at the quality of health services available in prison.

These are important issues which are highlighted by the following statistics reported by the National Health Commission with reference to the 2005 Prison Health Survey:

- *31% of males and 45% of female prisoners had a gambling problem at some stage in their lives*
- *over half of all prisoners are overweight or obese*
- *more than half reported a diagnosis of a chronic condition*
- *two thirds of inmates were smokers*
- *almost half of the prison population had experienced tooth pain while eating or drinking in the last month*
- *one in three prisoners had a history of one or more of the communicable diseases asked about (these included chlamydia or other STI, scabies and lice, hepatitis B or C, rheumatic fever and tuberculosis)*
- *almost two thirds of prisoners had suffered a head injury in their lifetime*
- *one in three prisoners was unable to see a nurse when they wanted to at some time in the previous 12 months.*

On mental health and substance abuse, the National Health Commission reported that other New Zealand studies have found:

- *grossly elevated mental health issues within the prison population as compared to the community; in particular post traumatic stress disorder (PTSD), bipolar disorder, major depressive episode and obsessive compulsive disorder*
- *89% of inmates had substance abuse and dependence issues*
- *83% of inmates with mental illness had a co-morbid substance abuse condition*
- *approximately one fifth of inmates had high levels of suicidal ideation*
- *57% of inmates had one or more personality disorders.*

Effective Interventions proposed, first, the establishment of two further general purpose special treatment units for an additional 100 high risk prisoners, and secondly, two further drug treatment units to provide programmes for an additional 200 prisoners with significant drug or alcohol dependency.

Commenting generally on drug, alcohol and the mental health services available to prisoners, Effective Interventions noted that 80% of prisoners, compared to 32% of the general population, exhibited a substance abuse or dependence disorder at some time in their lives and, excluding substance abuse and personality disorders, approximately 50% of prisoners have a diagnosable mental disorder. It was also pointed out that there was not a straight forward causal link between addiction and criminal behaviour but that “well targeted and effective treatments can reduce reoffending and imprisonment rates”. It added:

The points at which the treatment and criminal justice systems interface are complex. The treatment system focuses on improved social functioning, and physical and mental health, while the criminal justice system focuses on reducing offending. This leads to tensions and confusion in the design, targeting, and access to services at the interface between the two systems. There is also a need to develop information sharing protocols between agencies, to ensure that multiple objectives are achieved. Particular

attention is needed at the point that prisoners with substance abuse addictions are released into the community.

I am pleased to note the progress with regard to the drug treatment units and special treatment units. The first new drug and alcohol unit opened at Hawkes Bay Prison in May 2007, the second at Rimutaka Prison in October 2007, and a similar unit is planned at Springhill in July 2008. Planning for the establishment of the two special treatment units scheduled has begun. This impetus must be maintained.

What is described as the interface between mental health and alcohol and other drug (AOD) services and the criminal justice system has been more problematical. This is based on the contrasting philosophies between health and corrections: care and protection as opposed to custody and control.

As I noted when reviewing paper 9 of Effective Interventions, a programme called First Steps, and its implementation plan proposed by the Ministry of Health, went before Cabinet in late July 2007. It outlined 12 projects in three distinct settings – police stations, courtrooms and prisons.

Six projects amounted to reviewing existing schemes, four involved expanding existing schemes and the final two involved new schemes. While I find this is somewhat disappointing in view of the wide ranging health needs of prisoners, the Cabinet paper noted that innovations were impeded by the major shortage of a suitable workforce. Indeed, the plan included nine accelerated workforce development projects.

The abuse of alcohol and other drugs is a serious and ongoing concern for New Zealand society, for the Department of Corrections, and for other components of the criminal justice system. Successful treatment will most likely have some impact on recidivism and, as a result, lead to a reduction in the demand for prison beds. The abuse of alcohol and other drugs (AOD) is not a new issue and gives rise to the valid question – why has it not been addressed comprehensively earlier? For whatever reasons adequate resources might not have been made available in the past, I applaud both the plan and the process now devised and

the efforts being made to ensure that it will be implemented successfully. These developments should remain a focus for the relevant chief executives and for those involved in the funding process. Such an approach falls clearly within the “stay tough get smarter” approach to criminal justice. A quote from the Executive Director of the New Zealand Drug Foundation is pertinent. He said:

The rising level of imprisonment resulting from a decade of tough stances has been a disaster. Hope lies in learning what has worked elsewhere, and building something similar here. This is not being soft on drugs and crime – it’s being smart on drugs and crime.

In addition to dealing with the high profile issues of alcohol and other drug abuse, the people I have spoken to and the papers made available also reveal a concern that the processes in prison do not, in all cases, competently address the concerns about general health displayed by the prison population. This was an issue raised in the Own Motion investigation referred to above. In an update on the Own Motion Investigation, the Department of Corrections advised on 1 June 2007, among other matters, that:

The Prison Health Service has continued to develop and implement policies and procedures that meet professional standards for clinical practice in such topics as methadone, informed consent, medication administration, infection control, health promotion and health information management. Other clinical policies and procedures in development include health assessment, continuity of offender care, continuous improvement QA and emergency response.

I am also advised that the Ministry of Health, in conjunction with the Department of Corrections, is investigating options for the effective delivery of health care to prisoners and other offenders “in order to secure reasonable equivalence of health care with the wider community”.

In September 2007, the National Health Commission hosted a workshop entitled “What would a health promoting prison system look like?” I understand the workshop was part of the Commission’s project that will culminate in advice to the

government in due course that the administration of health in prisons should be the responsibility of the Ministry of Health, rather than the Department of Corrections, on the basis that Corrections' tasks of custody and control impede the medical ethics of care and protection. Further, the transfer of responsibility for prisoners' health from prison authorities to health authorities is apparently the accepted practice in many other jurisdictions.

The concept of a "health promoting prison" promoted by the National Health Commission maintains that the following ideals should drive the behaviour of all prison staff:

- *risks to health are reduced to a minimum*
- *prison tasks are undertaken in a caring atmosphere that recognises the inherent dignity of each prisoner*
- *health services in prison are equivalent to the health services in the community*
- *a whole prison approach to promoting health and welfare is the norm.*

To conclude on the provision of general health services and acknowledging that it might be utopian to expect a health system in itself to have a substantial impact on the rate of recidivism, I support proposals to improve the way in which the general health and AOD treatment needs of people in the criminal justice system are met. These improvements will:

- enhance the social functioning and overall health of offenders
- assist in reducing offenders' rate of AOD addiction and addiction related harm
- assist in reducing reoffending.

Provided that the promised improvements in general health, alcohol and AOD abuse occur, so that the services available to prisoners equates with what is available in the community, I do not see the need for a "first principles" review of this aspect of the criminal justice sector.

Treatment of mental health in prisons nevertheless deserves such a review. In albeit simplistic terms, there is a lack of clarity as to at what point people on the mad/bad continuum are cared for in hospital or controlled in prison. I am aware of the Memorandum of Understanding between the Ministry of Health and the Department of Corrections which outlines the respective roles and responsibilities and which deals specifically with mental health. I am also aware that the Memorandum of Understanding is monitored by a group (Offender Related Health Action Group - ORHAG) which includes representatives from the District Health Boards. The Memorandum of Understanding is supplemented by a forensic protocol which deals with the management of the acutely mentally unwell prisoner who remains in prison until a bed in a secure forensic unit becomes available. I am also aware that the protocol is being reviewed as, given the significant growth in the prison muster, the demand for secure forensic beds is outstripping availability.

In addition, there are plans to develop a primary mental health screening tool kit to be used by Corrections staff when assessing primary health needs.

A Cabinet Business Committee paper headed "A Systematic Review of the Interface between Mental Health/Addiction Treatment and the Criminal Justice System" (September 2006) had this to say:

It is particularly important that prisoners receive adequate mental health care in prison because research suggests that the incarceration of people with mental health problems can result in an exacerbation of their problems. The stressful conditions within prison can exacerbate existing mild mental disorders such as mild depression into serious conditions or can cause a mental illness to develop. In addition, prisoners with mental illness are some of the most vulnerable members of the prison population, frequently made more so by issues of intellectual disability, dual diagnosis, their youth or racial demographics, and consequently often become victims of violence while in custody.

and

In New Zealand, a prisoner with mental health needs under the care and direction of the regional forensic mental health services is either followed up in the community by that service or referred to the DHB community general mental health team. This follow up by the mental health service is crucial in ensuring continuity of care when the prisoner is released. In addition, Corrections has established reintegrative teams in prison to work with high risk offenders to address issues such as accommodation, access to assistance payment, and assistance from other agencies. These reintegrative services are available for prisoners with mental health issues however, given the stakeholders' concerns, it may be that forensic mental health services need to be more involved with the reintegrative teams for certain individuals.

I am encouraged that one group, acutely mentally ill prisoners, has been recognised. There remains, nevertheless, one significant group – that is people with severe personality disorders – who, I understand, are usually not considered appropriate for compulsory treatment, and who cannot be safely and effectively managed in the prison environment. A Cabinet Business Committee paper referred to above had this to say:

Typically these individuals have extensive histories of self harm and frequent admissions into hospital in the community. These prisoners often spend lengthy periods of time in At Risk Units, which can lead to deterioration in their condition. At Risk Units are not designed for long stay and are staffed by corrections officers rather than health professionals. Forensic care for severe personality disordered prisoners is usually offered as respite for crisis management. However, some severely personality disordered individuals may also benefit from the supported reintegration process offered in forensic care.

It is apparent that there are ongoing issues between the Department of Corrections and the Ministry of Health as to what is mental illness and what is a personality disorder. It is also apparent that Corrections staff are not trained to handle and/or treat this group and, moreover, do not have the appropriate facilities in which to treat them. On the other hand, although they may benefit

from health facilities and treatment by health staff, the traditional health view is that these people do not come within their purview. With respect, this is unsatisfactory and it seems necessary to resolve philosophical differences at least, and perhaps matters of practice, in order to reach a solution – a solution which is in the best interests of both the offender and the community. This is not simply a management issue. It is an issue of humane and appropriate care.

By way of final comment, I note that I am aware of the Auditor General's audit of Prisoners' Mental Health Delivery Service which is due to report early in 2008. I agree with the assumptions behind the audit, first, that providing mental health services to prisoners is challenging, and secondly, that the evidence shows that prisoners have a high need for mental health services. Indeed, that office estimates that while prisoners are three times more likely to require access to specialist services than the general population, some prisoners with mental illness are undiagnosed and, therefore, go untreated. As one of the Department of Corrections' outcomes is to reduce reoffending and, as the treatment of mental illness has the potential to reduce reoffending, the Auditor General is interested in ascertaining how effective the system is in delivering mental health services.

CHAPTER 8

VICTIMS OF CRIME AND RESTORATIVE JUSTICE

1 Victims Rights

It appears that there is a widespread misunderstanding about the criminal justice system's current attitude to victims. At its most extreme, this misunderstanding contends that the system puts the rights of defendants far ahead of the rights of the victims and, as a result, argues that victims must be prepared to take positive action, vigilante justice if necessary, to defend themselves, their rights and their property.

However, it is manifestly wrong to argue that victims are overlooked by the system. The developments over recent years give the lie to that. It is important as well to consider again a primary purpose of criminal justice – at least a current purpose. All offences are crimes against the state and the state, by providing a police force, has established a system which accepts reports of crimes, investigates them, gathers evidence, locates the alleged offender, and, on locating an offender, initiates criminal proceedings. The state also prosecutes the defendant and on proving the offence beyond reasonable doubt, an independent agency of state imposes the penalty and yet another agency administers it. The victim is kept informed of the process, invited to contribute a perspective at a number of points and may be the beneficiary of the penalty should it involve some form of reparation to the victim. The state acknowledges that a person – the victim – has been harmed in some way, but acts on the victim's behalf to restore the social equilibrium.

While this is a relatively simplistic explanation of the process, it includes the core aspect that any offence committed is primarily an offence against the state and its good order, and it is the state's responsibility to express, and administer, its displeasure on behalf of the entire citizenry.

In view of the increased focus on the individual victim apparent during the past decade, it is valid to ask whether this approach remains appropriate for the future. I bring this up again in the final chapter.

2 Victims Rights Act 2002

Before dealing with questions about the victim's role in the future, the following is an outline of the current rights of victims contained in the Victims Rights Act 2002. A victim is a person who has an offence committed against them or their child, or their property has been lost or damaged, or is the member of the immediate family of a person who has died or is unable to make decisions about their welfare because of the offence.

The Act lays down some general principles. If you have suffered any sort of harm (whether physical, emotional or financial) as the result of an offence, you are to be treated with courtesy and compassion and have your dignity and privacy respected. You are entitled to receive prompt information about the services and remedies that are available, and advice on the progress of any investigation and details about the court proceedings. There can be no disagreement with these principles.

In addition, prior to sentencing, the victim will be asked how the offence affected them in order that a Victim Impact Statement can be prepared. The victim is not required to provide this information, or the victim may ask that the statement be read out in court. The offender is not allowed to keep a copy of that statement. A victim can also make their views known to the Parole Board upon an offender's application for parole or home detention.

There are further rights available to victims of certain serious crimes. In these cases, the victim's views are taken into account should the defendant apply for bail, and the victim will be advised of the judge's decision.

If a victim is eligible to register under the Victim Notification Scheme, they will be kept informed in a detailed way of the offender's progress through the criminal

justice system and are entitled to appear and make oral submissions to the Parole Board.

The Act focuses on consultation. In view of some of the comments from victims and from information I have seen reported in the media, I have cause to wonder whether some victims have a higher expectation of the process, and believe that consultation means the right to make decisions.

This process under the Act is put into place by the New Zealand Council of Victims Support Groups which, in conjunction with the police, operates a nation wide service based in 75 police stations and has a base of 1,700 unpaid volunteers. It has set itself the target of having a volunteer at the scene of an incident within 45 minutes of receiving advice.

The Council, which is partly funded by the Ministry of Justice, is focusing on improving the professional quality of the volunteers. It reported that it had met with the Sensible Sentencing Trust in view of the Trust's professed interest in victims. However, unlike the Trust, it said its primary focus was providing a service to victims and it saw little point in using the media to achieve this goal. Indeed, it commented, media coverage of a victim's grief could amount to "re-victimisation", rather than assisting the victim to come to terms with the incident and "move on". The Council commented that its work involved close liaison with the police throughout the country and relationships ranged from good to excellent.

In 2005, the Council published a paper "The Way Forward: A Commitment to Victims' Rights"⁷ which contained nineteen recommendations. While some are practical concerns, such as the provision of a "victims' room" in courthouses, others raise fundamental issues regarding our system of criminal justice. These included legal representation of victims to allow their participation in trials, and the possible use of an inquisitorial process, rather than the adversarial process, during complex trials to avoid the risk of re-victimisation.

⁷ www.victimsupport.org.nz

Responding to these two specific recommendations involves a comprehensive review of criminal justice and again would be an issue for consideration by a Commission of Inquiry. There is one recommendation put forward by the council however, that reflects in my view how victims of criminal offending should be recognised. It recommends:

The introduction of a state funded scheme allowing a victim to receive reparation immediately – if it is ordered – with the state recovering the money from the offender. This scheme should also compensate victims where reparation is not available through the non-apprehension of the offender or lack of reparation order.

As I noted above, since the early 19th century and the formation of an organised police force, the state has acted on the victim's behalf in dealing with crime and criminal behaviour. From the late 20th century, the victim as an involved individual has gained increasing recognition. Apart from the question of immediate and full financial reparation, I consider that the victim is now more likely to be treated by the justice sector with the respect that is deserved than in the past. Unless there is a comprehensive review of the philosophical basis of the criminal justice system, I do not see the need for any amendment to the legislation. It is critical in my view that victims receive appropriate recognition but that the integrity of the criminal justice process is not prejudiced. The injection of a victim into the process risks jeopardising the integrity of the system at all levels in the process.

There have been some recent developments with regard to dealing with victims of family violence which have addressed some gaps. These are the Family Violence Inter-Agency Response System and the Family Violence Court. The former is described in Chapter 5. The latter is covered in Chapter 10 of this report which looks at the role of the criminal courts within the system.

These developments also deal, but only to some extent, with another concern about criminal justice: that is the essentially mono-cultural nature of victim support. The Council of Victims Support Groups is aware of the issue and

I understand it is taking steps not only to increase the number of volunteers who are versed in Tikanga Māori, but also to use volunteers from other ethnic groups.

3 Restorative Justice

It is often argued that the practice of restorative justice is one which recognises the rights of victims more so than a system founded on adversarial justice. Restorative justice is the first step used in the Youth Court and its practice there is covered in the discussion about Youth Justice (Chapter 9).

Restorative justice is defined as a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and the implications of the offence for the future⁸. Attending to the victims' situation is a primary objective of restorative justice.

While the current legislation explicitly recognises some aspects of restorative justice, by way of victim involvement, it is limited and does not⁹:

- *require restorative justice processes to be undertaken in every case (in particular, no obligation is imposed on judges to consider whether in adjournment for a restorative justice processes to occur) may be appropriate*
- *require either offenders or victims to take part in restorative justice processes*
- *impose obligations on justice sector agencies to facilitate, arrange, hold, or resource restorative justice processes*
- *require sentencing judges to give priority to restorative justice outcomes over any other factors relevant to sentencing (for example, sentencing precedent, pre-sentence reports and victim impact statements)*
- *require sentencing judges to accept or confirm restorative justice outcomes in every case where restorative justice processes have been used*

⁸ Tony F Marshall, *Restorative Justice: an overview*, Home Office London, 1999

⁹ www.justice.govt.nz/restorative-justice/

- *require the Parole Board to give priority to restorative justice processes and outcomes over any other factors relevant to parole (the safety of the community will always be the paramount consideration when considering the parole of an offender).*

4 Crime and Safety

“Fear of crime” is an issue which is sometimes raised in discussions about the role of victims. It is asserted that not only are we all potentially victims of crime, indeed we are, but that we are all potentially victims of major crimes of violence. While those statements are of course true, such events are not statistically likely. That latter statement in regard to major crimes of violence is particularly unlikely for the vast majority of us.

Surveys which explore crime victimisation are now a standard research tool and surveys were carried out in New Zealand in 1996, 2001 and 2006. The most recent recorded the following results¹⁰. A range of findings follow to enable any discussion about the role of victims to have a factual basis. The findings conclude with the respondents’ expressed degree of confidence about aspects of the criminal justice system.

i Victimisation levels

- *Four in ten people had experienced some form of victimisation in 2005. That is, they experienced a personal crime or lived in a household that was the victim of a household crime*
- *Fourteen per cent of households had one or more break-ins or attempted break-ins to their home, or a theft from within the enclosed space around it, such as the garden, driveway or shed*
- *Nine per cent of households were victims of vandalism to their household property in 2005*
- *Thirteen per cent of adults had been either assaulted or threatened*

¹⁰ New Zealand Crime and Safety Survey: 2006, Ministry of Justice, Wellington, 2007

- *Three per cent experienced a sexual offence. Women were more at risk*
- *Robbery and thefts from the person posed the lowest risks of all.*

ii Who was most at risk?

- *There was a concentration of risk among the less economically and socially well placed. Risks were consistently high for:*
 - *sole parents*
 - *those who were unemployed and/or on some form of benefit*
 - *those living in property they rented rather than owned*
 - *those in the most deprived areas of New Zealand.*
- *Other factors related to risk were:*
 - *Age – Young people aged 15-24 were at high risk across the board, and this was reflected in high risks for students and flatmates. Those aged 25-39 also experienced more crime than those in older age groups.*
 - *Marital status – Those who are single or in de facto relationships were more at risk, probably in part because they are younger. People who are divorced or separated experienced more crime too.*
 - *Ethnicity – Māori emerged as higher risk than average on all the measures, in particular confrontational crime. Pacific peoples were also at comparatively high risk, with the exception of confrontational crimes committed by partners.*

iii Who was at low risk?

The least vulnerable groups were:

- *retired people, and those aged 60 or older – though these two groups overlap of course*
- *couples with no children and people living on their own*
- *those in more rural areas of New Zealand*

- *those who owned their own home, who were much less at risk of burglary. They were also less at risk of vehicle offences than renters, but this could reflect differences in the availability of private parking spaces.*

iv *The unevenness of victimisation*

- *The total number of victimisations was very unevenly distributed. Six in ten New Zealanders reported no victimisations in 2005, but 6% reported five or more victimisations. This small minority experienced half of the offences measured by the survey. They were 15% of all victims. This refutes the notion of there being an 'average' risk. In other words, there was no uniform distribution of risk across the population.*
- *There was an especially uneven distribution across the population for confrontational crime committed by partners and people well known. For instance, just 2% of those with a partner (or those who had a partner sometime between the beginning of 2005 and the date of the survey) accounted for three-quarters of offences committed by partners.*

v *Confidence in the criminal justice system*

Respondents were asked whether the police, juries, judges, criminal lawyers, probation officers and the prison service were doing an excellent, good, fair, poor or very poor job.

- Survey respondents were most positive about the performance of the police and juries: 60% thought the police did an excellent or good job, and the figure was very similar for juries.
- The prison service was rated the lowest of the agencies. Only 40% of New Zealanders said it was doing an excellent or good job, and 21% rated its performance as poor. Ratings for probation officers were similar, with only 41% thinking they were doing an excellent or good job. The figure was 44% for criminal lawyers.

- Comparisons with the 1999 survey show a mixed picture. Ratings of the prison service and criminal lawyers show no change. Ratings of judges have improved. There was a fall in the number of people who felt probation officers and the police were performing well. In 1999, 74% rated the police as doing an excellent or good job, while 60% did so in 2006.
- Europeans and Pacific peoples have a more positive view of the police than Māori or Asians. Pacific peoples also rated probation officers and the prison service higher than other groups. Europeans gave the worst ratings to these.
- Older people were more likely to have a positive view of the police and juries. Those aged 15-24 were least positive about the police, but their ratings of judges, lawyers, probation officers and the prison service were higher than for other age groups. This is in accord with international findings.

CHAPTER 9

YOUTH JUSTICE

In 2006, there was a total of 30,451 police apprehensions of 14 to 16 year olds. This equates to approximately one in seven of all apprehensions, and the total number of police apprehensions of 14 to 16 year olds has remained stable at around 31,000 per year since the mid 1990s¹¹

In 2006, 62% of the youth apprehensions were for property offences. Violent offences comprised 12% of the apprehensions. There has been an increase in the number of youth and adult apprehensions for violent offences since 1995 – a 39% increase in youth apprehensions compared with a 22% increase for adults.

The total population of 14 to 16 year olds in New Zealand has increased by 19% since the mid 1990s and the overall youth apprehension rate in 2006 per 10,000 population was the lowest recorded since 1995. Indeed, when the population increase is taken into account, the apprehension rate for young offenders – both male and female – has declined over that period.

The apprehension of an adult for an offence is followed, almost invariably, by prosecution. That is not the situation with young offenders. Of the 30,451 youth apprehensions, only 29% (6,202) were prosecuted. (Over 60% were dealt with by Police Youth Aid or issued with a formal warning.) Finally, the population of proved cases that resulted in imprisonment has remained steady at around 60 cases per year since 2001.

In summary, youth offending has remained a static 22% of total offending over the last 10 years. About 80% of the young offenders commit about 20% of offences, and only a small percentage of offending by under 17 year olds is “serious” offending. By world standards the rates of diversion in New Zealand are high.

¹¹ A summary of Youth Justice Statistics in New Zealand: 1992 to 2006, Ministry of Justice, 2007

There are, nonetheless, about 5% of youth offenders who are described as hard core offenders. In addition to the above comments, Judge Andrew Becroft, Principal Youth Court Judge, comments that this group share the following characteristics:¹²

- *85% are male. However the number of young women who offend, especially violently, seems to be increasing*
- *70-80% have a drug and/or alcohol problem, and a significant number are drug dependent/addicted*
- *70% are not engaged with school – most are not even enrolled at a secondary school. Non-enrolment, rather than truancy, is the problem*
- *most experience family dysfunction and disadvantage; and most lack positive male role models*
- *many have some form of psychological disorder, especially conduct disorder, and display little remorse, let alone any victim empathy. Some will also have a specific learning disability, eg dyslexia, although research is required to establish the extent of this problem*
- *at least 50% are Māori and in some Youth Courts, in areas of high Māori population, the Māori appearance rate is 90%. This figure is a particular challenge to the youth justice system, and to all working with young offenders*
- *many have a history of abuse and neglect, and previous involvement with Child, Youth and Family Services.*

During my inquiry, I met with a number of police officers and some officials from a number of departments, all who worked with children and young people who were offenders or were on the fringe of offending. I was impressed, indeed in some cases overwhelmed, by their enthusiasm for and their commitment to this challenging work.

Until recently, the Department of Children, Youth and Family Services was responsible for both the care and protection of children, and for youth justice. The department was absorbed into the Ministry of Social Development in 2006

¹² Targeting Local and National Resources to Young People, Principal Youth Court Judge Andrew Becroft, 2006

and it is apparent that there has since been a significant change in the emphasis in the work undertaken. Previously, the care and protection of children, and especially a concern about battered children, was fostered at the expense of dealing with young offenders. Since the amalgamation, the care and protection focus remains in place but, in addition, youth justice has been seen as equally important and 25 youth justice managers have been appointed. Moreover, there has been a strong drive to work constructively with other agencies – both government and non-government – involved in the area. There has also been a concern to replenish the penalties available in the Youth Court – supervision, supervision with activity, and supervision with residence – to ensure that programmes exist which give opportunities to young offenders not to progress along the “serious” offender path.

I commend the Chief Executive and his staff for these initiatives and the leadership they have displayed.

The youth justice system in New Zealand is based on a set of principles in the Children, Young Persons and Their Families Act 1989. The principles and practices are consistent with the principle of restorative justice. (This concept has been explained in Chapter 8.) While every effort is made to keep young people out of the criminal justice system and imprisonment is seen as a last resort, restorative justice also holds the young person accountable for their crime. It seeks in addition to acknowledge any needs that the young person might have. Implementing restorative justice is a serious step and is given effect to in the family group conference. Because of the import of its intended impact, the group conference is not considered necessary for over 60% of apprehended young offenders for whom receiving a formal warning or taking part in Police Youth Aid diversion is considered sufficient.

About 8% of youth offenders are referred directly to a family group conference by the police, and a further 17% who are referred by the Youth Court, after an appearance in that court. There has been extensive research into this procedure and it has reported positively on the family group conference process. One of the

researchers wrote the following about crime prevention when commenting on the research findings which supported the use of a family group conference:¹³

An analysis of the background factors most likely to be associated with conviction as an adult has a number of implications for crime prevention strategies:

- *Family background: as in other research, a number of factors can be identified in the backgrounds of young people which place them at risk; potentially these can be addressed by early intervention programmes aimed at such children and young people.*
- *Early involvement with CYF, either for reasons of care and protection or because of earlier offending, is an important predictor of negative life outcomes. This finding suggests the importance of ensuring the quality and effectiveness of interventions when a child or young person first comes to the notice of CYF.*
- *A lack of school qualifications is another major factor in poor outcomes, indicating the critical impact of effective management of problems that lead to school drop out and failure.*

The level at which a young person is dealt with in the youth justice system emerges as an important factor in life outcomes. This finding underlines the importance of compliance with the diversionary principles of the Act by ensuring that children and young people are always dealt with at the lowest possible level in the youth justice system.

I am impressed with the positive developments in current operation of the youth justice system. The Chief Executive of the Ministry of Social Development and his senior staff lead a process of reinvigorating youth justice by providing leadership and resourcing. Nevertheless, ongoing concerns about the lack of educational qualifications among youths dealt with by the youth justice system, and the ease at gaining enrolment exemptions, were expressed by a number of the people spoken to.

¹³ Restorative Justice for Young People in New Zealand: Lessons from Research, Gabrielle Maxwell, in Beyond Retribution PFNZ National Conference 2006 Report, Prison Fellowship of New Zealand, 2007

I am pleased that this is also a matter of concern to the new Secretary for Education. In a circular to all schools dated 24 May 2007, she writes, “The number of young people gaining enrolment exemptions is simply too high. International research shows that young people who leave school early are at the greatest risk of poor social and economic outcomes.” I take heart from her comment. The Secretary outlines the requirements to be fulfilled before exemption will be granted so that a student can legitimately leave before the age of 16. There is work currently being undertaken relating to ongoing education and training for young people who otherwise remove themselves from formal schooling, some of whom are then attracted into anti-social activities or crime. I welcome the initiatives now being taken in this regard.

The renewed focus on youth justice in the Ministry of Social Development, the ongoing focus on Youth Offender Teams (YOTs) and the Youth Justice Leadership Group (YJLG) in the Ministry of Justice, and the review of school exemptions in the Ministry of Education is commendable. I have noted as well the enthusiasm among the police officers I met who are involved in work with children and youth. However, that enthusiasm and commitment was not so apparent through the entire police structure.

“Real” police work, I was told, essentially involves apprehending and prosecuting offenders, obtaining convictions and “getting them off our patch”. Police officers who work with children and youth attempt early intervention and stop offending before it occurs. It is not seen as “sexy” police work.

The disparity in approach to the management of youth justice between police regions has been starkly drawn to my attention. From the information and data provided to me it is clear that the strategies adopted in one region produce significantly better outcomes than the others yet I have not been told of any management direction to achieve consistency and to learn from the experiences of the region that appears to be having considerable success in reducing youth crime.

While I accept absolutely that the Commissioner of Police understands the importance of the work of youth aid officers and others who work with the young,

I have not been convinced that this is necessarily so “at the coal face” in police regions. An attitudinal change at the police district levels is in my view necessary. I was told of instances where police working with youth were assigned to other “more important” tasks in times of staff shortages. I suggest that a considerable number of the increase in police numbers should be assigned to work with children and youth, and to participate in the “strengthening families” and other inter-agency programmes currently under way. The benefits in the long term could well be considerable.

The Age of Young Offenders

Under the Children, Young Persons and Their Families Act 1989, the age of criminal liability is 10 years. However, until a young person reaches the age of 14 years, they cannot be charged with any offence in a criminal court except murder or manslaughter. Offenders aged 10 to 13 years are called “child offenders”. They can be arrested by the police and if the nature of the offence raises serious concern as to their care and protection, a family group conference can be convened and if necessary they can be dealt with in the Family Court. Child offenders are dealt with in the Family Court on the basis that their offending is caused by a lack of parental care and protection. Offenders aged 14 to 16 years are “youth offenders” and can be dealt with in the Youth Court.

I am inclined to support the suggested provision that the upper age for “youth offenders” should be increased from 16 to 17 years. I note that if New Zealand were to comply fully with the United Nations Convention on the Rights of the Child (UNCROC), the jurisdiction of the youth justice system would be extended to include 17 year olds. This is the case in most Australian states, and in 38 states in the United States.

While most youth who commit offences do not do so until they are teenagers, there must be a provision which allows serious offenders below the age of 18 years to be held accountable as adults and be subject to adult penalties. There are, unfortunately, a small number of children who, teachers and others can predict, are destined for a life in crime (they are “human time bombs”) unless early intervention programmes are available which may avert that outcome. The

principles of restorative justice are not applicable to this group by the time they have reached mid teens.

On the other hand, however, the principles of restorative justice may be appropriate for the 17 year old (and perhaps for much older offenders).

Given the extensive research into the family group conference process, and the better outcomes which are expected to result from a fully resourced youth justice restorative system, I consider two matters which require further exploration are:

- increasing the upper age at which the principles of restorative justice are adopted initially, and
- increasing the use of the principles of restorative justice in the adult courts.

There is one other much broader matter which I believe merits further consideration, and that is the age which applies when a child moves to adulthood. In view of the UN convention, I consider there is good argument for the age to be set at a person's eighteenth birthday. It is already the age for a number of transitions, and I suggest that it be set as the age of all transitions unless there is a specific reason for some other age to be applied. Accordingly, people aged 17 and below would be subject to the youth justice system and otherwise treated as a youth (which would include perhaps participation in full time education – and possibly only allowed to drive a motor vehicle in specific circumstances) unless there was a strong reason why the rule of attaining majority at the age of 18 should not apply to that specific person in those circumstances.

I conclude this chapter by saying that I cannot emphasise enough the importance of youth justice issues. I have discussed the issues as I see them and made some suggestions. However if my suggestion for a Commission of Inquiry is accepted, a strong emphasis needs to be given to this aspect of the overall system.

CHAPTER 10

CRIMINAL COURTS

1 The System

The criminal courts provide a range of services. The Operations Division within the Ministry of Justice provides the physical structures and the administration for the operation of the criminal courts. A judge presides in the criminal courtroom and the principal participants are the prosecutor and the defendant, usually represented by defence counsel.

Some others who play an active role within the courtroom include the court clerk, the officer (police or prison) responsible for the defendant while in the dock, a probation officer and perhaps a victim adviser. Witnesses are also involved in some cases. One representative or more from the media may well be in attendance, making a record of the proceedings to report in the print or on the electronic media. It is a complex and fluid situation which almost invariably runs smoothly although it is one for which no one has overall responsibility.

In 1995 the Department of Justice was divided into the Department of Corrections, the Department for Courts and the Ministry of Justice. In 2003 the Department for Courts was again amalgamated within the Ministry. A baseline review of the Ministry, focusing on the courts, was concluded in 2004. The Ministry is responsible for putting this review into effect. From the outset, I record my commendation at the way the Ministry has implemented the service improvement plan which arose from the review. I do not see any reason for changing the current structure.

When looking at the criminal courts, it is appropriate to begin with the list court, which is the District Court responsible for arrests, remands and guilty pleas. It is held daily in the larger centres and is the bread and butter of the District Court's criminal jurisdiction and indeed the criminal courts system overall. Its organisation in each court follows a similar procedure.

The crime rate, as recorded by the police, has remained relatively static for the past decade but that stability is not reflected in the caseload of the criminal courts. I am told that the increase in the list court workload arises partly from the higher apprehension rate by the police, and by an albeit slight decline in the use of police diversion. In the past, a reasonably steady number of diversions reduced the number of apprehensions which were followed by prosecution and flowed into the court. An increase in the proportion of defended cases has also added to the workload of the courts. The Ministry provided the following summary of volumes and work pressures for the court system as at April 2007.

In the last two years the High Court has experienced significant increases in new jury trial cases (by 25%) and the estimated hearing time per case (by 10%). Over the same period the District Court has had increases in new summary cases (by 10%) and jury trials cases (by 12%). Not guilty pleas have increased by 20%, depositions by 19% and cases committed for jury trial from depositions by 6%. In Auckland District Court alone, not guilty pleas have increased by 26% and jury trial cases by 33%. The Legal Services Agency has experienced a 16% increase in criminal legal aid applications and grants in the last two years.

Over the same period, disposals performance has also improved significantly. In the High Court, jury trial disposals have increased by 10% over the last two years (14% in the last year). In the District Court, jury trial disposals have increased by 8% over the last two years (13% in Auckland District Court) and summary disposals by 8% (7% in the last year).

However, gains from the courts' improved disposal performance are not being sustained in the face of the current demand pressures. As a consequence numbers of cases on hand are growing. The number of jury trial cases on hand has increased over the last two years, by 77% in the High Court and 16% in the District Court. Their median age has increased over the same period, up by 31% in the High Court and by 8% in the District Court, and numbers of depositions on hand has increased by 22%.

If the system was stable, the rate of cases filed would equate with the rate of disposals. However, the Ministry reports, that while an increasing number of cases are being dealt with given the increases in productivity, this is not keeping up with the increasing number of cases (and more complex cases sometimes involving one or more defendants) which are being filed.

To avoid queues lengthening and the creation of backlogs, the Ministry states that it is necessary, by intervening, to:

- *reduce demand (inputs); and/or*
- *increase disposals (outputs) by:*
 - *improving processes (which are in the main determined by legislation, operational practices and the way in which all those with a role in the process work together): and/or*
 - *increasing resources (which support the processes).*

While it is expected that the policies pursued by the Ministry's Crime Prevention Unit, and the Effective Intervention initiatives designed to reduce crime and reoffending, will have some effect in the demand for services, the Ministry considers that any reduction is likely to be outweighed by the impact of the 1,000 new police, many of whom it is expected will be dedicated to apprehension and will be located in the greater Auckland area. In view of demographic factors, the report adds, criminal summary volumes in greater Auckland are projected to increase by 20-30% by 2026.

There can be no question that the backlog of cases, particularly in the northern courts is unsatisfactory. Although a reduction in the demand for the services seems unlikely, there are a number of changes to process and practice being considered or under way which should increase the rate of disposals. Some of these improvements are included in the Criminal Procedure Bill, introduced into parliament some years ago but delayed, unfortunately, because, I understand, of conflicting political views. These changes include standardised disclosure by the police in criminal cases, and clarification of what is known as "middle range" offences to allow some more of the straight forward class A drug offences to be dealt with in the District Court rather than in the High Court. There are also plans

for further changes to criminal procedure to allow, among other matters, video conferencing of defendants from prison rather than requiring their presence in the courtroom.

The Law Commission has been asked to review and simplify criminal procedure which, by implementing its earlier recommended reforms, will help to reduce court workloads and trial delays. An evidence transcription service is a change of practice which is now under way. There are also ongoing improvements in the relationships among the participants in the courtroom, and this, like the transcription service, is also expected to increase the rate of disposals. The Ministry's review earlier this year concluded:

In the face of increasing demand, the Ministry is continuing to look for ways to improve disposal performance. There will be no one single lever to effect this desired change. Rather the Ministry will continue to closely monitor the issues and work on a broad range of possible solutions. These will include the initiatives discussed above. However, further opportunities will also be sought and may include:

- *work with the Legal Services Agency on their review of payments in order to ensure lawyer payment structures contain appropriate incentives for the efficient disposal of cases (and perverse incentives to prolong cases are eliminated);*
- *setting up of a cross-sector national operational managers' group to ensure alignment of strategies among all those agencies with roles in court processes;*
- *further development of case management strategies in the High Court;*
- *strengthening sector relationships at both local and regional levels; and*
- *identifying operational interfaces where greater use of technology will help justice agencies reduce risk and streamline the system (eg technology enhancements could provide solutions to court delay by allowing better linkages between agencies enabling more accurate information being available and the possible reduction of*

double handling of information including a move away from paper based material).

It is also critical that changes to the law relating to procedure and jurisdiction be moved through the legislative process as quickly as possible. The review continued:

The Ministry will also continue to develop a new culture of continuous improvement within our courts. This will require the provision of improved information to managers to enable them to have greater visibility of their issues and prompt better decision making, greater clarity of expectations and standards on the part of management, and a continued investment in improving capability, including training and support for courts people, generally.

These steps are encouraging and I want to recognise the substantial improvements which the Ministry has already put into place, and those which are planned. This reflects the view expressed to me in general by the judiciary and members of the legal profession.

Nonetheless, the court system comprises, to use the Ministry's language, a number of levers. Moreover, all these levers are unlikely to work always in unison (to take as an example the Ministry reports that the way that legal aid is allocated sometimes includes perverse incentives). To ensure that the levers are operated to reach an outcome where the system reduces demand and increases disposals in the most effective and efficient way, sometimes requires, in my opinion, a driver. Furthermore, the driver must also pursue fairness and be fully cognisant of the requirements set out in the New Zealand Bill of Rights Act 1990.

The 1978 Royal Commission on the Courts (the Beattie Report)¹⁴, recommended the establishment of a Judicial Commission which would be responsible for running the courts. Taking into account the separation of powers between the judiciary, the legislature and the executive, the Beattie Report considered that the courts "should be managed by a single authority, representative of those groups

¹⁴ Government Printer, Wellington, 1978

who have a prime interest in the pursuit of justice” (para 647). It was envisaged that the Judicial Commission’s prime function would be the unified control over case flow and the day to day administration of the courts. It would also deal with the implementation of reforms, promote uniform procedures and rules, recommend the appointment of judges, and deal with complaints.

I do not suggest the establishment of such a commission at this time. While it is not possible to call any of the parties at present a “driver”, there are currently concerted efforts by the Ministry’s Operations Division to make sure that the participants collaboratively administer their aspects of the courts system effectively.

There is no evidence that this system at present is in crisis albeit acknowledging the backlog. The system should improve if the Criminal Procedure Bill is enacted and other administrative changes are implemented and are effective. Such a cooperative process is eminently suitable when there is a substantial degree of unanimity about the operation and aims of the system. I leave open the question whether a Judicial Commission would be necessary when the interests of one of the levers diverges from the interests of the others to the extent that problems emerge. Such a commission, I observe, might have dealt with the issues earlier and thus avoided the problems which were relevant to the reintegration of courts into the Ministry in 2003.

The concept of a Judicial Commission is, I believe, worthy of further investigation.

2 Criminal Courts in Greater Auckland

In view of the growth of greater Auckland and the case load increases occurring there, a major issue facing the court system is, as described by the Ministry, the development of a greater Auckland region service delivery strategy. The Ministry has accepted the responsibility for the initial formulation of a strategy. Having developed a range of alternatives, the Ministry is in the process of informing stakeholders about the proposed strategy and its implications, and providing an opportunity for feedback.

The Ministry defined the issue in this way (27 April 2007):

Greater Auckland poses significant challenges to the delivery of quality justice services. In part this reflects that region's growing population and economic significance, its increasing crime levels and frontline police resources, and the significant diversity of Auckland. The Ministry faces a number of resource constraints in greater Auckland including the difficulty of reconfiguring its courthouses which are physically full, difficulties in recruiting and retaining staff, and a relatively inflexible business model which was developed in a different era and context. In particular, our existing model depends heavily on general courthouses for the delivery of almost all services.

While the Ministry carries a considerable responsibility for providing an infrastructure which functions to suit the court structure (and the business model) decided upon, other agencies have a major influence on the services expected. The current strategy plans for the following components:

- *a service centre capability is established to handle high volume enquiries, bulk processing and correspondence for the region;*
- *civil and family work is consolidated into separate specialist courthouses thereby providing a dedicated and appropriate forum for that work for the first time;*
- *steps are taken to improve business information and processes, including seeking to better understand the needs and preferences of the Ministry's customers, courtroom utilisation;*
- *electronic filing and an electronic court record is introduced, and*
- *a purpose built jury trial courthouse is (or two purpose built jury trial courthouses are) established to provide for the requirements of modern jury trials.*

I consider that there is also need for separate community justice centres (and such centres are acknowledged in the strategy). I recently visited the Neighbourhood Justice Centre in Melbourne, Australia, and was impressed with the range of facilities offered in an effort to link justice to the community.

I suggest this is a concept which should be investigated further to decide whether such centres have a place in Auckland (and other metropolitan areas) and, if so, how they should operate.

I am interested by the proposal for “a purpose built jury trial courthouse” for greater Auckland. The possibility of a “Crown Court” was raised by some of the people I spoke to during my investigation. The Beattie Report did not support the concept of an intermediate or Crown Court. While the thought of a “Crown Court” has many different meanings, nevertheless given the increase in criminal trials, there might be a place for part time judges. Reverting to the idea of a purpose built jury trial courthouse, I believe there is a need for some discussion as to the use of the same building for trials before High Court judges and District Court judges. The use of one building may make opaque the distinction in the seriousness of the matters dealt with by the respective courts, and may blur the independence of the High Court judges when determining an appeal from a decision made by a District Court judge when both preside in courtrooms in the same building. Again this issue should be a matter for consideration by a Commission of Inquiry.

3 The Criminal Justice Model

Adversarial justice is the foundation of New Zealand’s criminal justice. Simplistically, it is a two-sided structure where the most effective adversary is able to convince the judge or a jury that their perspective of the case is the correct one. The judge acts as an impartial referee assessing the facts and applying the rules of evidence. It is usually contrasted with the inquisitorial (or continental) system where the judge has (or judges have) a specific task to investigate the case. Beyond reporting that supporters of the adversarial system consider that it is the more impartial of the two and the supporters of the inquisitorial argue that, because of the increasing reliance of the adversarial system on negotiation between the parties (including plea bargaining), there are perverse influences within the adversarial system (such as over charging), I do not intend to discuss the merits of either.

Rather, I want to note that, while the adversarial system is the process under which high profile criminal cases are dealt with in New Zealand, most cases do not in fact go to trial. Most criminal cases start and finish in the District Court and only 11% of them proceed to a defended hearing. In the great majority of cases, the defendant either pleads guilty initially, or does so at some time before the trial. Indeed, the relatively recent practice of a sentencing discount for pleading guilty is an incentive to do so. In a small number of cases all the charges are withdrawn.

There are two aspects of the process as it currently operates which are intended to reduce the number of not guilty pleas and thus the number of cases which go to a defended hearing. These processes, it can be contended, detract from the concept of adversarial system. These aspects are status hearings and the Family Violence Court.

3a Status Hearing

A plea of not guilty is the initial response (the default response) of many defendants which, after further consideration and perhaps an evaluation of the prosecution evidence, is not infrequently changed to one of guilty. The status hearing, which is scheduled after a not guilty plea, is devised to allow the defendant, usually represented by counsel, and the prosecution to appear before a judge. At that hearing, the prosecution and the defence take part in a discussion aimed to confine the case to the issues in dispute or, where the proposed defence crumbles on hearing an outline of the prosecution case, to provide an opportunity to enter a guilty plea. The substantial waste of time and resources associated with a change of plea to guilty shortly before or on the day of the defended hearing is eliminated. Some District Courts do not hold status hearings, while in some others, I was told, the judge not only supervises but participates in the negotiation between the parties. Such judicial participation could include an indication of the likely sentence if a guilty plea is entered. Plea negotiation between prosecution and defence is increasingly recognised as a part of the criminal justice process. While this in itself justifies a review of the overall process,

participation by the judiciary I believe adds weight to the need for a public review.

3b Family Violence Court

The Family Violence Court is a judicially led response to domestic violence. It is a “problem solving court”¹⁵. It emerged to avoid the delays inherent in the adversarial system, which often meant that the case never came to court, and the courts found that police intervention into a family violence dispute without a justice system consequence, “actually sheltered recidivist offenders and emboldened first time offenders”¹⁶. The problem solving approach means that the process allows for victim participation, addresses underlying problems, seeks commitment from offenders, adopts a more collaborative rather than an adversarial process, and involves judicial supervision of the progress with plans agreed upon by the defendant in court. Again changes have been made to the traditional adversarial process and these changes are being supported by the agencies involved in the court processes. And again, while I am not advocating any major changes to the way the adversarial process responds to serious criminal behaviour, I point out these changes to the adversarial model are plainly more than merely peripheral.

4 Changes in the Practice of Criminal Law

The review I am suggesting could also examine two other changes in the practice of criminal law which have occurred in the past five years or so: they are the police prosecution service and the public defence system. Neither has seriously challenged the adversarial model, but both involve an increasingly professional role for some of the regular participants in the criminal court process.

¹⁵ The Evolution of Family Violence Criminal Courts in New Zealand, Chief District Court Judge Russell Johnson, 8 November 2005.

¹⁶ Ibid p.8

4a The Police Prosecution Service

The Police Prosecution Service (PPS) provides a specialist prosecution focus within police. It is separated from operation and governance at district level, acting as the Commissioner's agent. The PPS figures confirm the Ministry's record of an increasing workload for the criminal courts in that, despite some stability in reported crime during the past decade, prosecutions have increased by 18% over that time. The PPS projects the "general upward trajectory in prosecution volumes" to continue. The PPS is also responsible for the Police Adult Diversion Scheme, and Electronically Monitored (EM) bail.

In mid 2007, the PPS comprised, in addition to head office and regional staff, 160 prosecutors of whom 15% were non-sworn, 60 non-sworn prosecution support officers, and 30 non-sworn EM bail assessors.

I heard mostly favourable comments about the PPS during my investigation. However, its effectiveness in one district was subject to some criticism. This was contrasted with its operation in a neighbouring district where it was said to contribute positively to the efficient operation of the criminal justice system.

The comprehensive general instructions for the PPS includes a section on plea negotiation. The number of prosecutors who are non-sworn and the administrative separation of the PPS from district control raises the question of whether a totally independent prosecution service, as operates for all jury trials, is now appropriate for all prosecutions.

4b Public Defence Service

A pilot Public Defence Service (PDS) was established in the Auckland and Manukau District Courts in 2004. Comments made to me during this investigation were on the whole positive and supportive, apart from some relatively minor criticisms from the private bar. The scheme has been subject to ongoing evaluation and the report on its operation until 31 March

2007 noted that stakeholders – including judges, prosecutors, court managers, probation staff, and representatives of community groups – with views about the PDS tended to rate highly the quality of the PDS's services. They also rated the PDS highly in terms of the effectiveness of its relationships with stakeholder groups, and its ability to provide independent advice.

As for case processing, PDS cases were much more likely to have a guilty plea as a first recorded plea than were private cases (represented by the private bar), but there was little difference in plea by the end of the case. Thus, private cases were more likely to change their plea during the case, whereas PDS cases, in view of the initial guilty pleas, were unlikely to proceed to a status hearing along the defended hearing path.

In looking at case outcome, the report records that the conviction rate for PDS or private cases did not differ significantly. It appears, however, that with regard to sentencing, possibly because of the earlier guilty plea, the PDS cases may have benefited slightly more than the private cases from the sentencing discount available for an early guilty plea.

A final evaluation of the PDS scheme is due in December 2008. On the basis of the information available, and taking into account the comments of the people spoken to (including a number of PDS lawyers) I believe that serious consideration should be given to making wider use of the PDS scheme.

CHAPTER 11

OVERVIEW AND CONCLUSION

A citizens' initiated referendum was held during the 1999 general election. It asked the following question:

Should there be reform of our justice system placing greater emphasis on the needs of victim, providing restitution and compensation for them and imposing minimum and hard labour for all serious violent offences?

Almost 92% of voters returned a "yes" vote. I am surprised that the "yes" vote was not higher. How could anyone object to placing greater emphasis on the needs of victims on the one hand, or, on the other, imposing tougher sentences for violent offences? It was argued at the time that these issues were mutually exclusive, and a yes or no to one part, and a contradictory response to another was logically possible. I do not intend to discuss further the unfortunate wording of the referendum and the subsequent debate as to precisely what the 92% had voted for. Rather, the outcome and the debate illustrates the diverse range of aims, and philosophies with which the criminal justice system is required to deal.

Historically, there are a number and often competing philosophies apparent in any approach to criminal justice and two have had an influence on recent legislation and practice.

The first is described pejoratively by its critics as "penal populism"¹⁷. The critics of penal populism contend that the criminal justice system, and sentencing in particular, is manipulated by political firebrands who sacrifice criminals on the anvil of their political ambition. The evidence produced in support points to the media coverage of and public outrage at violent offending, accompanied by displays of concern and sympathy for the victim. This coverage, it is said, is encouraged and cultivated by populist politicians and other crusaders to advance their own political agenda. It is alleged that penal populism gains momentum as

¹⁷ Pratt, J., (2006) Penal Populism, London, Routledge

lobby groups bolster politicians who are known to support a “tough” approach. This media and public “hysteria” leads to longer sentences and an increasingly risk averse approach by the judiciary and other significant decision makers in the process. One of the outcomes is a rapidly increasing prison population. The advocates of penal populism, it is also argued, use whatever is the issue of the day to advance their cause. This may include not only violence and child abuse, but also the manufacture and use of P, and gangs.

Those who promote a “tough” approach maintain that it reflects widespread public opinion, and is also necessary to counter what they describe as “soft liberalism”¹⁸.

Soft liberalism, it is argued, is prevalent among criminal justice administrators and academics and its principal, and most distasteful feature, is that it puts the interests of the criminal ahead of any concern for the law abiding, especially for victims. If soft liberalism is allowed to dominate the criminal justice system, the critics maintain, we will descend into a state where law enforcement is treated with disdain, where law breaking increases and where vigilantism, unfortunately, will become both an acceptable and necessary form of self protection. The Sensible Sentencing Trust recommended David Fraser’s book to me and the book, which is highly critical of soft liberalism, openly accepts that the implementation of the tough, although necessary, policies it advances will result in a substantial increase in the prison muster.

As is usually the case with competing philosophies, the critics highlight the more extreme elements of the opponent’s point of view and advance a doomsday scenario of the outcome if the opponent’s perspective is allowed to guide policy and dictate practice. The subtleties of the opposing philosophy are obfuscated.

While neither approach has totally dominated criminal justice in the past decade, there is evidence of the competing philosophies in the criminal justice legislation enacted and the policies pursued since the 1999 referendum.

The Bail Act 2000 made bail harder to get for those charged with serious crimes and for those who had been in prison before. It was thus seen as part of the

¹⁸ Fraser, David, *A Land Fit for Criminals*, UK, The Book Guild, 2006

penal populists' agenda. However, that was not the only focus of the Act as making bail harder to get for some was countered by seemingly making bail easier for first offenders.

The Sentencing Act and the Parole Act were passed as a package in 2002. The former included some harsher penalties (penal populism), although this was offset by the introduction of home detention (soft liberalism). The latter Act also introduced parole eligibility after one third of the sentence rather than the existing two thirds (soft liberalism). However, as I noted in Chapter 6, the Department of Corrections' practice not to have inmates, who had committed serious crimes, complete the criminogenic programmes necessary as part of their parole requirements until two thirds of the sentence had elapsed, along with the board's cautious approach, seems to be evidence that the expected greater use of parole at an earlier stage of the sentence did not eventuate.

The Victim Rights Act was also passed in 2002 in response to the referendum and it provided for the use of victim impact statements when sentencing and for victims to be notified at various stages, and perhaps make a submission, as to the offender's passage through the system, and out of prison.

In view of the ongoing increase in the prison muster since 1996 (4,940 in December 1996 and 8,056 in November 2007) some of the demands of the penal populists have been fulfilled. Although there are differences in the populists' approach, when compared with that of soft liberalism, I consider that it is unduly simplistic to view any policy as a victory for one and a defeat for the other. They both may have an influence on the process but the development of policy, and the putting of that policy into practice, is much too complex to be characterised in slogans. I accept nevertheless, despite the earlier eligibility, that the Parole Act 2002 has not reduced substantially the increase in the prison population. The 2002 Act not only revised the eligibility for parole, it also reformed the structure for granting parole. The former – rules as to eligibility – did not slow or reverse the growing muster and, as noted in the section on parole in Chapter 3, have again been radically altered by the Parole Amendment Act 2007. As that part of the Act has not yet come into effect, its impact cannot be assessed. The structure for granting parole settled upon in 2002 remains intact. Another recent

legislative provision, the Sentencing Amendment Act 2007, made substantial changes to the Sentencing Act 2002 (as discussed earlier) by the introduction of new community sentences. They came into effect on 1 October 2007 and it is much too early to comment on the impact of those changes. In any event as I pointed out earlier there are a multitude of factors additional to the legislation itself that will affect outcomes, the quality of the management of community sentences being one.

In comparison with what can be seen as the ongoing evolution of New Zealand's criminal justice policy since the mid 1850s, the changes in the past decade have been extraordinarily rapid. In view of the legislative changes already enacted but yet to be implemented, this rapid change is set to continue. Nonetheless, it is not clear to me whether these changes are being followed in their entirety by the decision makers within the system. I advance one example.

In Chapter 3, I referred to a newspaper account of an inmate's unsuccessful application to the Parole Board for "back end" home detention after less than one third of the sentence had elapsed in which it was implied that the board had been influenced by the need to express "general deterrence". The Parole Board's report on the case¹⁹ refers explicitly to the Court of Appeal's ruling that general deterrence, while relevant at the time of sentencing, is not an issue for the board when considering an application for release on parole or home detention.

Thus, while the implication in the newspaper account is incorrect, the decision also displays two of the themes which are relevant to this report. They are:

- 1 The victim's influence on the decision making.
- 2 The decision maker's concern about the media's response (especially if it reports the victim's dissatisfaction).

The victim made a submission to the board – a four page statement in which she described the "impact" of the crimes "on her life" – and the decision noted that the Parole Act and the Victims Rights Act "stemmed from the referendum signed by a 92% majority of the citizens". In view of this background, the board considered

¹⁹ [www.paroleboard.govt.nz/nzpb/media/decisions/\[name of applicant\]](http://www.paroleboard.govt.nz/nzpb/media/decisions/[name of applicant])

that the victim's views had to be carefully considered. While any media response to its decision is not referred to explicitly, the board records and does not dispute the victim's submission that there would have been a "public outcry" if the initial sentence had only been one third of what was in fact imposed.

This decision also suggests that despite legislative injunctions and despite rulings and guidelines, decision makers throughout the process will emphasise those points noted by earlier decision makers which support the decision they intend to reach. I would add that this practice is not confined to the criminal justice system but can be seen both in the public and private sectors when people are required to apply legislation with which they not fully agree.

For the present exercise, the decision is relevant as it highlights the point that while legislation has a role, it seems insufficient in itself to rebuild public confidence in our criminal justice.

One of the legislative changes yet to be fully implemented involves the creation of an entirely new body, a Sentencing Council. This was introduced to the criminal justice system by the Sentencing Council Act 2007. The Council is responsible for preparing compulsory sentencing guidelines, for both District and High Court judges and the preparation of the guidelines is well under way. Measuring any impact these guidelines will have on the size of the prison population is still some years away. And as I also noted earlier, the Sentencing Council is also responsible for preparing parole guidelines.

I accept that some of the legislative changes since the referendum have given effect to what can be seen as the demands of penal populism. The result, as some of the proponents of this approach acknowledged would occur, has been a growth in the prison muster. Accordingly, given the provisions in the various Acts, the muster growth in the past decade can be considered neither unexpected nor unintended. However to use another phrase from my Terms of Reference, I consider that the consequences of some of the changes in policy and practice have been "undesirable". The increase in the prison muster is undesirable both in view of the impact of prison on offenders and their families, and in view of its demand for increased government expenditure on new prisons

and their operations. Moreover, it has been “undesirable” as there is little evidence that the changes have made us feel safer, or increased our confidence in the criminal justice system.

The growth of the prison population in New Zealand in total numbers and as a proportion of the total population reflects a similar growth in many other countries (although that has usually occurred elsewhere at a slower rate). There are exceptions, ie countries where the imprisonment rate has remained reasonably stable, and Finland is the example which has received some publicity. However, I want to consider the situation in Canada, which has more historical links to New Zealand than Finland. My comments are based on a recent article²⁰.

The rate of imprisonment per 100,000 population in Canada hovered around 100 in the 1960s. This was high in comparison to New Zealand’s rate at the time. In 2003, when New Zealand’s rate had grown to 144, it remained at just over 100 in Canada, and it continues to remain at about that rate (107 in 2004).

There are a number of similarities. For example, there had been in Canada, in response to what the authors call “tough talk”, legislative changes similar to those in New Zealand involving longer maximum sentences, mandatory minimum sentences for certain violent recidivists, an expansion of the transfer of young offenders charged with serious crime to the adult court, and a reduction in parole eligibility for convicted murderers. However, unlike the situation in New Zealand, the harsher policies and practices have had little effect on what the authors term “the level of punitiveness”.

The authors consider that the following reasons explain that response within the Canadian justice system:

- a Supreme Court of Canada decision in 1987 that the mandatory minimum sentence of seven years imprisonment for importing narcotics was a cruel and unusual punishment
- the increases in maximum penalties had little impact on practice

²⁰ “Countering Punitiveness: Understanding Stability in Canada’s Imprisonment Rate”, Anthony Doob and Cheryl Marie Webster, *Law and Society Review*, 2006

- the changes in parole eligibility had little impact as the new time for eligibility was the time which was already being served
- at the time that parole eligibility was lengthened for some offences, accelerated parole reviews were instituted for most property offences and the presumption of full parole after a third for these offences became the practice.

The authors also give the following reasons for the muted response across society to what in New Zealand has been called penal populism:

- the tough on crime movement lacked enthusiasm and did not capture the public imagination
- while Canada has its share of racial intolerance (and aboriginal Canadians are over represented in prisons) the law refers to them as a group who should not be imprisoned if other facilities are available
- Canada, historically, has shown a “deep scepticism” about the use of imprisonment as a response to crime and has displayed with regard to criminal justice policy, a “consistent culture of restraint”
- the federal system has been relevant as, on the one hand, while the federal government enact the criminal law and deal with sentencing, the provincial governments administer the process. This means that the provincial legislature might not be able to respond to a local crisis, such as reoffending by a parolee, and if the issue becomes a national one, the federal politicians can play the provincial governments off against each other.

Looking at what they consider its influence in increasing the imprisonment rate in the United States, the authors oppose the establishment of a sentencing commission to oversee sentences. They prefer to leave sentencing as a matter of judicial decision making.

Some of the Canadian experience is not applicable to New Zealand. However, I am not aware of any significant reasons why the typical Canadian’s approach to criminal sanctions should differ markedly from that of the average New Zealander. It appears that one difference that helps explain the different

outcomes is that the “tough on crime” movement in New Zealand (and in a number of other countries but not in Canada) was adopted by some community leaders who, in conjunction with a sympathetic media, have participated in the movement as a way to increase their public profile.

The notion that imprisonment is a last resort and is the place only for those who engage in the most serious acts and cannot be dealt with in the community is our traditional approach and, I believe, must be restored as the fundamental sentencing doctrine today.

In Chapter 1, I noted an apparent decline in confidence among many of the community in the criminal justice system. In Chapter 8, I referred to the 2006 Crime and Safety Survey which included the respondents’ degree of confidence in the criminal justice system. The results were compared with a similar survey in 1999 and while the ratings for the prison and probation services had remained about the same (at 40% and 41%), the number who rated the police as performing well had dropped from 74% to 60%. I consider this decline is significant.

It is possible to speculate about the reasons for this but it can be stated that whatever the reasons, the decline occurred at the same time as the rate of imprisonment was increasing.

There seems to be no simple answers to the question as to how to restore and increase confidence in the system while, at the same time, slowing the burgeoning imprisonment rate. There is a need, in my view, for both administrative and political responses.

The Effective Interventions suite of papers provides the administrative response to the social and fiscal costs of crime. The proposals, as the introduction to the suite records, enables government to “stay tough and be smarter” about crime and punishment. The overview points out that these measures are proposed:

- *to reduce the underlying causes of crime*
- *to reduce opportunities for offending and reoffending*

- *to enhance victims' satisfaction in the criminal justice system*
- *to alleviate pressures on prison capacity.*

It is worth repeating that I am impressed with the comprehensive range of measures advanced to facilitate these aims.

With regard to the significant and long standing over representation of Māori (and to a lesser extent Pacific peoples) in the criminal justice system, Effective Interventions argues that the “root causes appear to be centred on socio-economic risk factors rather than ethnicity”. Whatever the root causes, I agree with the important role the paper assigns to “Māori and Pacific based organisations as providers of support, rehabilitation, reintegration, restorative justice, and other programmes”. As I noted in my discussion on this aspect of Effective Interventions, more work needs to be done promptly to investigate the root causes and to work with the appropriate groups to establish the necessary programmes.

As for the use of imprisonment, the Effective Interventions overview observes: “Prison is not the most effective or efficient approach to reducing crime”. I agree wholeheartedly and I would like to see the reasons given in the Effective Interventions papers to substantiate this point. This does not detract from the acknowledgement made in Effective Interventions, with which I also concur, that “for repeat offenders and hardened criminals, from whom the public must be protected, there is no option other than imprisonment”.

On occasions, the media report a person advancing the proposal that a sentence to a term of imprisonment is appropriate for the purposes of rehabilitation. While there is always the occasional (and extremely rare) example of the prisoner who proclaims that the term of imprisonment was a rehabilitating experience, and a few more (although still a small proportion) who believe that the negative social stigma associated with the prison acted as a deterrent to later criminal behaviour, the majority of informed observers accept that the barren, inhumane, and psychologically destructive nature of imprisonment makes offenders more likely

to be recidivists upon release. A research report which looked at 50 studies dealing with recidivism concluded²¹:

- 1 *Prisons should not be used with the expectation of reducing criminal behaviour.*
- 2 *On the basis of the present results, excessive use of incarceration has enormous cost implications.*
- 3 *In order to determine who is being adversely affected by prison, it is incumbent upon prison officials to implement repeated, comprehensive assessments of offenders' attitudes, values, and behaviours while incarcerated.*
- 4 *The primary justification of prison should be to incapacitate offenders (particularly those of a chronic, higher risk nature) for reasonable periods and to exact retribution.*

I note that Paul Gendreau, one of the authors of this paper, spent some time with our Department of Justice in the 1990s.

Effective Interventions was prepared on the basis that the 1,000 additional police to be deployed by 2009 would have a substantial effect on the criminal justice system by increasing the numbers of prosecutions. This would involve much more work for the courts and, subsequently, for the range of services provided by the Department of Corrections. Cabinet made decisions on Effective Interventions which put into effect a variety of steps that are being carried out by the executive branch of government in the pursuit of the government's policy to "stay tough and be smarter about crime and punishment". While this work is important, the government remains responsible as well for the political steps which, I contend, are also necessary to bring the rapidly expanding prison muster spiral under control and bring it to the level where the fiscal demands of criminal

²¹ The Effects of Prison Sentences on Recidivism, Paul Gendreau and Francis T Cullen. Department of Solicitor General, Ottawa, Canada, 2006

justice meet the fiscal resources that the government, using a humane measuring stick, is prepared to make available.

Earlier this year the Ministry of Justice in the United Kingdom issued a paper entitled “Penal Policy – a background paper”²². The foreword from Lord Falconer, the Secretary for State for Justice, included the following:

An effective penal policy is one in which the public have confidence, where communities can see that justice is being done. But it is much more than that. They must see us deliver real reductions in reoffending and improvements in the way we protect them from dangerous offenders. The public needs confidence that they are being kept safe from harm, while offenders are not only being punished but are being effectively rehabilitated, and their offending behaviour addressed.

In New Zealand, the Prime Minister’s address to justice sector stakeholders on 15 August 2006 on proposed changes to the justice system contained in the Criminal Reform Bill also focused on staying tough and being smarter. It outlined what had been achieved and noted the forecast increase in the prison population to 8,956 by September 2011. She commented: “Numbers at this level are neither financially nor socially sustainable for New Zealand.” I entirely agree.

I believe that statements from politicians are necessary which challenge the “more imprisonment” panacea, and while they might advance the case for “penal populism” and “soft liberalism” when each is appropriate, these statements must also argue repeatedly that it is essential, if only on the grounds of cost, to reduce the demand for new prisons and new prison beds. In addition, I am of the view that such statements will be heard with a great deal more sympathy than is superficially apparent, as my investigation leads me to conclude that there is much wider public support for and social acceptance of an approach to offenders based on humanity, rather than retribution, than is apparent from headlines.

I accept that the political message, like the practices and processes that the administration is putting into place, can be seen as containing some degree of

²² Penal Policy – a background paper, UK Ministry of Justice, 2007

internal contradiction. “Protecting the public” is “staying tough” and suggests penal populism. “Rehabilitating offenders” is “being smarter” and hints at soft liberalism.

Nevertheless, these apparently contradictory targets can be achieved. I have pointed out that there is a need for balance and it seems to me that one way to assess the range and the depths of the attitudes advanced, as I have foreshadowed, is to establish a Commission of experienced and appropriately qualified people to investigate not only the operations of the entire criminal justice system, but to put forward explicitly the philosophies and values which should guide its policies and practices into the future.

APPENDIX A

TERMS OF REFERENCE: OMBUDSMAN INVESTIGATION INTO PRACTICAL ISSUES INVOLVING THE ADMINISTRATION OF CRIMINAL JUSTICE

Having obtained the concurrence of the Chief Ombudsman, and pursuant to section 13(5) of the Ombudsmen Act 1975, I refer the following matters to Ombudsman Mel Smith CNZM for report to the Prime Minister and thereafter to Parliament:

- 1 assess how effectively the components of the criminal justice system, including the Ministry of Justice, the Department of Corrections, the New Zealand Police and the Parole Board, work together, and whether differences in procedures in different parts of the system lead to unintended or undesirable consequences;
- 2 identify improvements that may be implemented in the short- or longer-term to improve the operation of the criminal justice system; and
- 3 identify any other issues concerning the operation or policy advice structures of the criminal justice sector that the Ombudsman believes should be brought to the attention of the Prime Minister and Parliament.

I request that you report to me by 1 September 2007, and thereafter to Parliament.

Rt Hon Helen Clark
Prime Minister