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IN SEARCH OF THE ELUSIVE: CONTROLLING THE EXERCISE OF PROSECUTORIAL DISCRETION

Submitted for the LLB (Honours) Degree at the
Victoria University of Wellington

1 September 1993

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I INTRODUCTION

The operation of the criminal justice system is of great importance, both to those immediately affected by its operation, and also to society as a whole. The values of that system should therefore reflect values generally accepted by society as a whole. Our society generally accepts that not all breaches of the criminal law should result in a criminal prosecution. Thus, those who administer the prosecution process have a discretion to prosecute or not to prosecute.

The way in which this discretion is exercised affects the quality of criminal justice, and also the way that society regards the criminal justice system. Thus that discretion should also be exercised in accordance with values and principles generally accepted by society as a whole. In the words of Lord Halsbury LC,[1]

> ...'discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done within the rules of reason and justice, not according to private opinion...; according to law and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular.

This paper will examine the prosecution process in terms of possible means of controlling the exercise of prosecutorial discretion. These various possible means of control will be evaluated in terms of the standards of

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1 Sharpe v Wakefield [1891] AC 173, 179

fairness, consistency and accountability. It sets out to measure the value of possible control mechanisms, and to identify any features of the prosecution process which inhibit the control and management of prosecutorial discretion.

II CRITERIA TO BE USED IN THE EVALUATION

Evaluation of the prosecution process and possible control mechanisms should be carried out on the basis of declared principles and standards, against which the process and those mechanisms can be measured.[2] This paper will evaluate the efficacy of the prosecution process and possible control mechanisms against the standards of fairness, consistency and accountability.

It should be noted that these are not the only possible and relevant standards against which such an evaluation could be carried out. Other similar evaluations of the prosecution process have considered factors such as efficiency and cost.[3] However, this paper will concentrate on fairness, consistency and accountability as they are standards which indicate the extent to which the prosecution process acts to serve the interests of justice for indi-

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2 See the approach of the UK Royal Commission on Criminal Procedure (1981, Command 8092) 127-128

3 See for example, above n 2, 128; Warren Young "The Crown Prosecution Service in England and Wales: Some Initial Impressions" (Unpublished paper prepared for the Law Commission, 1990) 8-10

viduals affected by the operation of the criminal justice system (as opposed to considerations such as the efficient use of public resources and funds.)

A Fairness

Fairness is an elusive concept and one which is difficult to define with any degree of certainty. What may appear fair to one person may not carry the same meaning for another. Thus, fairness may involve the weighing up of competing and conflicting considerations and values to achieve a result that is just, equitable and unbiased.

In terms of the prosecution process, it might be argued that fairness is best achieved when prosecutors are obliged to bring a prosecution in all cases in which there is sufficient evidence that a criminal offence has been committed. Under such a system of mandatory prosecution, it can be argued that all persons affected by the operation of the criminal justice system are treated in an equal manner, and that this is the fairest result for all concerned as the scope for biases and prejudices would appear to have been removed.[4]

However, others might argue that a prosecution process that operates in a more selective fashion is more fair

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4 Andrew Ashworth "Prosecutions, Police and Public - A Guide to Good Gatekeeping?" (1984) 23 Howard Journal of Criminal Justice 65, 66

than one of mandatory prosecution. It is widely accepted that selective law enforcement is both necessary and desirable in the operation of modern criminal justice systems.[5] The criminal justice system would grind to a halt if every single breach of the criminal law was prosecuted. But also, a criminal prosecution is not always the most appropriate response in every case of criminal offending. In some cases, referring the offender to social services of some kind will be more appropriate than resorting to the formal processes of criminal prosecution. And in other cases, an informal warning or formal caution may be a more appropriate and proportional response to the particular offence. A criminal prosecution can be a traumatic and expensive process for an accused person. Prosecution may also taint a person's reputation with the stigma of criminality. A person should only be subjected to the rigour of a criminal prosecution when there is adequate evidence that they have breached the criminal law, and the nature of the behaviour demands and justifies a prosecution.

Determining whether or not the behaviour in question demands and justifies a prosecution involves the weighing up of various factors for and against prosecutorial action. The

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5 See for example, above n 2, 128; above n 4, 66-67; Kevin O'Connor "Controlling Prosecutions" in John Basten, Mark Richardson, Chris Ronalds, George Zdenkowski (eds) The Criminal Injustice System (Australian Legal Workers Group NSW and the Legal Service Bulletin, Sydney, 1982) 151, 154

balance struck between these factors should be one that is just, equitable and unbiased. This paper proceeds upon the basis that fairness can be achieved through selective law enforcement if prosecutorial discretion is exercised so that such a balance is struck. Selective law enforcement requires that there be a discretion to prosecute or not to prosecute. This discretion should be exercised in a manner that strikes a balance between the interests of society in seeing that the powerful instrument of criminal prosecution is used in a way that is not unduly oppressive, and its interest in seeing that those who break the written laws of society do not go unpunished.[6] Such a balance should be a fair one in terms of prosecution decisions being just, equitable and unbiased.

B Consistency

The operation of the prosecution process should be consistent. The system should not display arbitrary and unexplainable variations in its treatment of individuals. Uniformity of policy and practice is necessary in the interests of fairness to individuals affected by the exercise of prosecutorial discretion. While a decision to prosecute or not to prosecute must necessarily be made on

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6 Kevin O'Connor "Controlling Prosecutions" in John Basten, Mark Richardson, Chris Ronalds, George Zdenkowski (eds) The Criminal Injustice System (Australian Legal Workers Group NSW and the Legal Service Bulletin, Sydney, 1982) 151, 154

the basis of the particular facts and circumstances of each individual case, it must be possible to see overall, the operation of constant principles and standards, against which each case can be measured.

Inequality and uneveness of treatment do not serve the interests of justice. In fact, equality of treatment is an important part of the concept of justice. Equality of treatment means that consistent policies and principles to guide decision-making within the prosecution process must operate within a system practising selective law enforcement. The fact that some are prosecuted for their criminal behaviour and others are not can be reconciled with the concept of equality of treatment so long as the principles and policies dictating the disposal of cases in the prosecution process are applied consistently.

A Accountability

Those who make prosecution decisions should be able to explain and justify those decisions, and they should be held responsible for the decisions that they make. Conversely, those who are affected by the exercise of prosecutorial discretion should be able to call to account the decision-makers. Accountability and the potential for it, have the consequence that decision-makers must always be concerned to make the most correct and approp-

riate decision in the circumstances, thus promoting adherence to appropriate principles and standards. Accountability also promotes the possibility of redress for those adversely affected by an incorrect or inappropriate decision in the prosecution process.

III PROSECUTION POLICY GUIDELINES

One way to control the exercise of discretion is to 'structure' the exercise of that discretion. Discretion is structured when the decision-maker is obliged to follow a certain procedure in reaching a decision.[7] Prosecutorial discretion can be structured by the imposition of a set of accepted principles to be followed in prosecutorial decision-making. Some overseas jurisdictions have structured the exercise of prosecutorial discretion by means of the introduction and publication of detailed prosecution policy guidelines.

A The Development of Prosecution Policy Guidelines

In December 1982 the Federal Attorney-General of Australia tabled in the Federal Parliament a document entitled "Prosecution Policy of the Commonwealth". This document was subtitled "Guidelines for the making of decisions in the prosecution process and the considerations upon which

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7 K Davis Discretionary Justice (University of Illinois Press, Urbana, 1971) 97-98

these decisions are made."[8] In 1986 new guidelines were issued in accordance with section 8 of the Director of Public Prosecutions Act 1983 (Aust). In 1990 these guidelines were reviewed, and revised accordingly. Thus, federal prosecution decisions in Australia are now made in accordance with publicly declared principles and standards.[9]

The development of guidelines to structure the exercise of prosecutorial discretion occurred in a similar fashion in England and Wales. In 1983 the Attorney-General released a set of guidelines intended to guide the exercise of prosecutorial discretion. Then in 1986, a revised set of guidelines was issued by the Director of Public Prosecutions under section 10 of the Prosecution of Offences Act 1985 (UK).[10]

B The Nature and Form of Prosecution Policy Guidelines

1 "Prosecution Policy of the Commonwealth"

The prosecution policy guidelines operative in the Commonwealth of Australia are, in a nutshell, a broad state-

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8 Note "Guidelines in Regard to Commonwealth Prosecutions" (1983) 57 ALJ 198

9 Commonwealth Director of Public Prosecutions Prosecution Policy of the Commonwealth (2 ed, Australian Government Publishing Service, Canberra, 1990)

10 UK Director of Public Prosecutions "Code for Crown Prosecutors" (1986) 83 Law Society's Gazette 2308

ment of the appropriate principles and considerations to be properly taken into account in the making of decisions in the prosecution process. Those decisions to be made in the course of the prosecution process, which are addressed by the "Prosecution Policy of the Commonwealth" include the decision to prosecute, the prosecution of juveniles, choice of charges, consents to prosecutions, discontinuance of a prosecution initiated by an officer of the Commonwealth, intervention in a private prosecution, mode of trial, charge-bargaining, ex-officio indictments and prosecution appeals against sentence decisions.

The fullest statement of the principles and standards relevant to the exercise of prosecutorial discretion that is contained within this document is the "Criteria governing the decision to prosecute."[11] These criteria begin with a statement of the general principles which are to apply right through the decision-making process. There is, for example, a reminder to prosecutors of the finite nature of resources available for prosecution action, and a direction that these limited resources are to be employed pursuing only those cases worthy of prosecution. There is also a reminder which stresses the importance of decisions made in the prosecution process and the necessity of making the correct decision in the interests of the victim, the suspected offender and the community at large. The objectives of fairness and consistency in the

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11 Above n 9, 3

exercise of prosecutorial discretion are also emphasised.[12]

The criteria then outlines a two-stage process in deciding whether or not to prosecute in an individual case. Firstly, prosecuting officials must consider whether the evidence is sufficient to justify the institution or continuation of a prosecution. The standard of evidential sufficiency that is required is a reasonable prospect of a conviction being secured. The matters to be properly considered in evaluating this prospect, include reliability and admissibility of the available evidence, availability and credibility of witnesses, any lines of defence open to or indicated by the alleged offender, and any other factors which could affect the prospect of a conviction.[13]

The second stage of the decision-making process according to the criteria involves the determination of whether the public interest requires a prosecution. There is express acknowledgement of the fact that the factors properly relevant to the determination of this issue will vary from case to case, but a list of factors is given nonetheless. This list includes considerations relevant to the alleged offender (such as the physical and mental health or special infirmity of the alleged offender), the circumstances of the alleged offence (such as the seri-

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12 Above n 9, 3
13 Above n 9, 3-5

ousness of the alleged offence), the consequences of initiating a prosecution (for example, considerations of cost and the likely outcome), and a number of considerations involving evaluation of community feelings and concerns.[14]

Also stated in the criteria are a list of considerations which are not to influence the decision whether or not to prosecute. These include the race, religion, sex, national origin, political association, activities or behaviour of the alleged offender or any other person involved. Also not to enter into the exercise of the discretion are personal feelings concerning the alleged offender or the victim, any possible political advantage or disadvantage to the Government or any other political party or group, or the possible effect of the decision in question on the personal or professional circumstances of those responsible for the decision to prosecute or not to prosecute.[15]

These criteria are supplemented by other criteria and considerations which are to be applied in specific types of decisions within the prosecution process. For example, there are special considerations which apply in addition to the above stated criteria in decisions regarding the prosecution of juveniles.[16]

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14 Above n 9, 5-6
15 Above n 9, 7
16 Above n 9, 7-8

2 "Code for Crown Prosecutors"

The policy statement guiding the exercise of prosecutorial discretion in England and Wales, in the opinion of Sir Thomas Hetherington, the Director of Public Prosecutions at the time of the Code being introduced, recognises the right of Crown Prosecutors to exercise their own discretion and outlines the criteria which should be applied in the exercise of that discretion. However, Sir Thomas stresses that the Code does not answer all of the questions that a Crown Prosecutor might be faced with.[17]

The Code has a similar format to the prosecution policy guidelines in operation in the Commonwealth of Australia, in that it follows a two-stage procedure. The first stage involves the evaluation of the issue of evidential sufficiency. The standard of evidential sufficiency required is whether there is a realistic prospect of a conviction. As with the Australian guidelines, the matters relevant to the determination of this issue include the appropriateness and reliability of the evidence and witnesses, and includes any lines of defence open to or indicated by the defence.[18]

The second stage of the decision-making process is whether the public interest requires that there be a prosecution.

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17 Sir Thomas Hetherington Prosecution and the Public Interest (Waterlow Publishers, London, 1989) 144, 147

18 Above n 10, 2308

As with the Australian guidelines, there is acknowledgement of the fact that the factors properly relevant to the determination of this issue will vary from case to case, although a list of factors to be considered is provided. This list includes the likely penalty, the staleness of the alleged offence, the youth of the alleged offender, the old age or infirmity of the alleged offender, the attitude of the complainant and the need to ensure that proceedings are only continued against those whose involvement goes to the heart of the issue to be placed before the court. Additional considerations are given, which are to apply in cases involving sexual offences.[19]

The Code also addresses decisions to be made in the context of the discontinuance of proceedings, plea-bargaining, charging practice, mode of trial, prosecution of juveniles, and the mode and venue of trial in cases where juveniles are involved.[20]

Thus, broadly speaking, the "Code for Crown Prosecutors" operates in a similar fashion to the "Prosecution Policy of the Commonwealth", and in fact, involve a number of similar principles and considerations to be applied in the exercise of prosecutorial discretion.

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19 Above n 10, 2308
20 Above n 10, 2310, 2312

3 The desired effect

The Attorney-General of Australia in 1990, Michael Duffy, wrote that the purpose of the "Prosecution Policy of the Commonwealth" is,[21]

> ... to promote consistency in the making of the various decisions which arise in the institution and conduct of prosecutions. DPP lawyers have considerable scope for the exercise of discretion at various stages of the prosecution process, and it is vital that they, and other Commonwealth officers engaged in law enforcement, have clear guidance in making these decisions. While this statement cannot, of course, tell DPP lawyers what their decision should be, it will help them to make the correct decision on the basis of sound judgment and the sensible exercise of discretion. The Statement will also serve the purpose of informing the public of the principles upon which the Office performs its statutory functions.

The "Code for Crown Prosecutors" states that its purpose is to "promote efficient and consistent decision-making so as to develop and thereafter maintain public confidence in the Service's performance of its duties."[22]

Thus it would seem that the primary purpose of prosecution policy guidelines is to promote consistency in prosecutorial decision-making. The guidelines provide the principles and standards, according to which decisions in the prosecution process will be made. In theory, all decisions to prosecute or not to prosecute, while being made on the basis of the particular facts and circumstances of each case, will be consistent with these governing principles and standards.

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21 Above n 9, iii
22 Above n 10, 2308

Whether or not fairness is achieved by the implementation of prosecution policy guidelines depends largely on the nature of the factors to be taken into account under the guidelines. Both the "Prosecution Policy of the Commonwealth" and the "Code for Crown Prosecutors" lay down a test of evidential sufficiency which aims to ensure that a prosecution does not proceed in the absence of an adequate and properly prepared case against an accused. Thus, the guidelines take into account the unfairness engendered by a criminal prosecution against someone when there is insufficient evidence that that person committed the offence or was criminally responsible for the offence.

The guidelines applicable in the Australian Commonwealth, and in England and Wales also require that prosecutions be in the public interest. Like fairness the 'public interest' is an elusive concept that is difficult to define with any degree of certainty, and like fairness, evaluation of the public interest involves a balancing exercise.[23] In both sets of guidelines, the factors to be taken into account in themselves appear fair. For example, to take into account such things as the seriousness of the alleged offence, the youth of the alleged offender and the wishes of the victim seems, on the face of it, to be very fair. Thus, prosecution policy guidelines

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23 See above part II A; Andrew Ashworth "The 'Public Interest' Element in Prosecutions" [1987] Crim LR 595, 596

aim to ensure that those involved in prosecutorial decision-making take into account matters which it is fair are considered. In fact the "Prosecution Policy of the Commonwealth" goes a step further and includes a list of factors which if considered would engender unfairness.[24]

Thus, in theory, prosecution policy guidelines appear to promote fairness by setting forth factors, which in the interests of fairness can be considered. However, as noted above, evaluation of both fairness and the public interest involves a balancing exercise, and therefore, the way that the various factors interact and are applied in practice will be highly relevant to the degree of fairness that can be achieved through the use of prosecution policy guidelines.[25]

To a certain extent it could also be said that prosecution policy guidelines aim to promote accountability in the prosecution process. Such guidelines set forth principles and standards, to which prosecutorial decision-makers must adhere. With the existence of declared principles and standards, individual decisions can be evaluated in light of these principles and standards to determine whether they are correct and appropriate decisions in the circumstances. Thus, those responsible for prosecutorial decision-making must be able to justify their decisions in

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24 Above n 9, 7

25 For the problems associated with the application of prosecution policy guidelines, see below part III C

terms of the policy guidelines, and those affected by decisions to prosecute or not to prosecute have notice of the principles and standards applicable in the making of the decisions affecting them. The possibility of redress for those affected by an incorrect or inappropriate decision is promoted because, with publicly declared principles and standards it should be easier to assess whether such a decision was, in fact, an incorrect or inappropriate one.

Thus, prosecution policy guidelines primarily aim to promote consistency in prosecutorial decision-making. But they also aim to promote fairness, and to a certain extent, accountability. The efficacy of such policy guidelines can only be assessed in light of the extent to which these purposes are achieved by the operation of prosecution policy guidelines. Such an assessment must necessarily consider the problems inherent in, and associated with the operation of prosecution policy guidelines.

C The Efficacy of Prosecution Policy Guidelines

Because of the wide range of circumstances in which decisions to prosecute or not to prosecute are made, prosecution policy guidelines must necessarily be framed in terms of broad principles and standards. Such broadness is arguably necessary so that the decision-maker has room to make the most correct and appropriate response in widely varying

circumstances. Also, it is very difficult, if not impossible, to reduce the factors involved in prosecutorial decision-making processes to a simple formula. However, this necessary breadth of approach that will be inherent in prosecution policy guidelines gives rise to some potential difficulties.

Firstly, difficulties may be experienced in the interpretation of the guidelines. Each decision-maker carries with them a set of personal values and experiences that will colour their approach to problem solving. Thus, decision-makers may not necessarily agree on the interpretation of broad principles and standards.

Also, approaches to applying these principles and standards to individual sets of circumstances may show divergence between different decision-makers. These potential problems have been highlighted by British commentators, especially in terms of deciding what is in the public interest. The 'public interest' is a very broad, and somewhat ambiguous phrase, which may well mean different things to different people. Definition of the public interest is likely to be a highly subjective process. This has been pointed out by some of these commentators.[26]

As well as this, assessment of the public interest may

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26 Robert Munday "The Crown Prosecution Service - A Developing Discretion" (1985) 149 JP 564

involve the weighing up of competing considerations. For example, Andrew Ashworth has noted that, while it is only fair to victims that their feelings be taken into account, there may be cases in which the victim's wishes are in conflict with other public interest considerations.[27] Where conflicts such as this arise, different decision-makers may well vary in their approach to determining the appropriate weight to be given to the particular factors. Thus, the opportunity for inconsistency arises again, although competing considerations may be less of a problem if the factors in the prosecution policy guidelines were prioritised. Guidance for decision-makers as to which factors are to carry the most weight may well eliminate some of the difficulties involved in reaching a decision where different considerations point to different conclusions.

In addition to the problems associated with the necessary breadth of prosecution policy guidelines and the interpretation of the guidelines, case 'construction' may be facilitated by the guidelines. It has been argued that criminal cases are constructed to present the particular picture which the police want to show. According to this line of reasoning, information can be structured and policy guidelines, principles and standards can be manip-

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27 Above n 4, 70

ulated to produce the desired effect.[28] This argument holds that police goals and strategies are more important and influential in the initial treatment of a case than are official policy guidelines.[29]

There is evidence which suggests that where the police wish to pursue a matter they will often do so despite the existence of guidelines which indicate that an alternative response may be more appropriate. For example, in one case which involved a fight outside a nightclub, a man was arrested for his part in the fight. The arresting officer conceded that normally the man would have been cautioned for his part in the fight, but "the reason he was charged was because we are objecting to the licence and [the club] ... and the more charges we've got the better."[30] Another police officer said that where there are no obvious grounds for a charge, but it is felt that the situation demands action on the part of the police, they could "always find something to fit the circumstances."[31]

As well as 'constructing' a case, information and guide-

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28 Andrew Sanders "Constructing the Case for the Prosecution" (1987) 14 Journal of Law and Society 229; Mike McConville, Andrew Sanders Roger Leng The Case for the Prosecution (Routledge, London, 1991); Roger Leng, Michael McConville, Andrew Sanders "Researching the Discretions to Charge and to Prosecute" in David Downes (ed) Unravelling Criminal Justice (MacMillan, Houndmills, 1992) 119

29 Mike McConville, Andrew Sanders, Roger Leng The Case for the Prosecution (Routledge, London, 1991) 105

30 Above n 29, 112

31 Andrew Sanders "Prosecution Decisions and the Attorney-General's Guidelines" [1985] Crim LR 4, 11

lines can be used and manipulated to 'de-construct' a case where the police do not wish to pursue the matter. Research material suggests that the police often play down domestic disputes which they are disinclined to follow up, despite the use of violence and any injuries which might have been inflicted. Generally, domestic incidents are regarded as 'rubbish' work by police officers and they are rarely inclined to initiate formal proceedings in respect of them (although it is possible that this pattern may have been affected by changes in policing policy in the context of domestic violence).[32]

The principal consequence of this phenomenon of 'case construction' for the operation of prosecution policy guidelines is that front-line police officers take action as they perceive that the situation demands. Generally they will proceed with the course of action which they perceive to be appropriate regardless of the course of action indicated by guidelines, principles and standards. They will simply present the information in a form which justifies their decision in terms of the relevant guidelines, principles and standards. For reasons discussed below, subsequent prosecutorial decision-makers will be largely unable to evaluate the validity of the police construction of the case.[33]

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32 Above n 29, 33-34

33 See below part IV A 4

Thus, rather than showing up defects in prosecutorial decision-making, prosecution policy guidelines may actually facilitate incorrect or inappropriate decision-making by providing grounds for front-line police officers to justify their construction of the particular case. The incorrectness or inappropriateness of the police construction is even more unlikely to be uncovered by subsequent decision-makers when that construction is framed in terms of officially promulgated principles and standards.

Much of the criticism of the criteria contained in prosecution policy guidelines has been addressed to the public interest criteria. It seems that some consider assessment of evidential material less liable to misinterpretation or manipulation than public interest considerations. One commentator has said,[34]

> Once a departure is made, as has occurred with the present Guidelines, from criteria limited to legal and evidential matters to others of social policy nature there are bound to be areas of ambiguity and controversy.

However, there are some indications that evidential matters may not be as straight forward as has been assumed. As Andrew Sanders has pointed out, it is often the mental element in an offence which will be in question. That is, often what will be contentious is whether the suspect intended to commit the alleged offence, or the

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34 Above n 26, 564

reason why they committed the alleged offence, and not the actual commission of the alleged offence.[35]

This interpretation of the mental element can be important to the disposal of a particular case. For example, where a man was alleged to have chased and beaten an eight-month pregnant woman with whom he had previously had a relationship, the woman suffered a broken nose, a cut lip and bruising. Yet the alleged offender was only charged with assault occasioning actual bodily harm. When questioned as to why the charge was not a more serious one, the arresting officer said, "There's got to be intent. He meant to hit her but not necessarily to do that amount of damage." It turned out that the interrogation in this case had been brief and no questions as to the intent of the alleged offender were asked of him.[36]

Thus, it can be seen that the evidential-sufficiency criteria were used to justify a decision taken in a case which the arresting officer viewed merely as a 'domestic'. This also illustrates the point made above, namely that the police construction of the case will present the case to subsequent decision-makers in a form which justifies the course of action which the police officer feels is appropriate. Because this case construction

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35 Andrew Sanders "Constructing the Case for the Prosecution" (1987) 14 Journal of Law and Society 229, 234

36 Above n 29, 117

is presented to subsequent decision-makers in terms of officially sanctioned criteria (in this case, the evidential sufficiency criteria), these decision-makers can not or will not look beyond this to determine the validity of the construction.

Thus, the implementation and application of prosecution policy guidelines may give rise to problems caused by the necessarily broad nature of such guidelines. These problems may impede the promotion of fairness, consistency and accountability in the prosecution process. Certainly the possibility of subjective interpretation and varying degrees of weight being given to particular criteria by different decision-makers threaten the principle of consistency. Fairness is also threatened, in that by misinterpretation of the criteria a case may go to court which should not or need not have done so. Conversely, a case may fail to reach court, when in all fairness it should have. Accountability is also threatened by the ability of decision-makers to manipulate information and guidelines to justify decisions that may not be correct or appropriate in the circumstances of the particular case.

The problems of subjective interpretation of vague and ambiguous criteria, and variations in the weight given to particular criteria by different decision-makers in the prosecution process, may be controlled by means of

staff training, consultation amongst decision-makers, detailed advice from superiors and by policy formulators being aware of everyday prosecutorial experiences and research in the area, and being prepared to review and revise prosecution policy guidelines in light of such experiences and research.[37] And as noted above, prioritising the factors contained in prosecution policy guidelines may eliminate the difficulties of competing considerations. However, the problem of the possibility of manipulation of prosecution policy guidelines to achieve desired results and to justify decisions and actions taken by front-line police officers, is far less easily controlled and solutions to this problem are far less readily apparent.

IV INTERNAL REVIEW MECHANISMS

Discretion is 'checked' when actions and decisions are subject to review or reversal by another decision-maker. 'Checking' discretion by means of internal mechanisms may include review of decisions by other decision-makers, the reference of difficult problems to superiors, the involvement of independent decision-makers in the prosecution process and appeals to superior decision-makers by aggrieved parties. Supervising and checking the exercise of discretion within the decision-making body may

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37 Andrew Ashworth "The 'Public Interest' Element in Prosecutions" [1987] Crim LR 595, 606-607

provide protection against the arbitrary exercise of discretion.[38]

In terms of prosecutorial decision-making, the 'checking' of discretion may be facilitated by means of the involvement of other decision-makers in the decision-making process, and by the giving of reasons for decisions to prosecute or not to prosecute. The giving of reasons for decisions by decision-makers may allow more effective supervision and review of decision-making, and may provide a basis for a system of appeals by aggrieved parties to superior decision-makers.

A The Role of Other Decision-makers in the Prosecution Process

Supervision and review of decisions to prosecute or not to prosecute may occur within the prosecution process. The decisions taken which initiate the prosecution (for example, the decision to arrest a suspect), may be subject to supervision and review by superior officers. But also, the decision to prosecute in a particular case may be reviewed or actually made by other prosecutorial decision-makers who are independent of the police.

1 Supervision and review by superior officers

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38 Above n 7, 142-144

In New Zealand prosecutions are initiated by means of arrest, summons or minor offence notice.[39] Therefore, cases enter the prosecution process via the exercise of discretion by individual police officers. In the case of an arrest, the initial decision which brings the case into the prosecution process is made by the initial arresting officer who is designated officer in charge of the case. This decision to arrest is subject to supervision and review by the section sergeant or the watchhouse senior sergeant when the alleged offender is first brought into the police station. The officer in charge of the case then completes an arrest file with a report to their 'line supervisor' (who will usually be a sergeant), which includes a recommendation as to whether or not to prosecute the alleged offender. Then it is usual practice for the line supervisor to sign the report and forward it to the relevant senior sergeant or detective senior sergeant. The senior sergeant or detective senior sergeant then approves the report and forwards it to the Police Prosecutions Section. The Police Prosecutions Section carry out very little active review at this stage, partly because they do not usually have the time (they will usually receive the file only a short time before the

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39 Michael Stace The Prosecution Process in New Zealand (Institute of Criminology, Victoria University of Wellington, 1985) 16-24; Warren Young, Neil Cameron, Robert Brown The Prosecution and Trial of Adult Offenders in New Zealand (Young & Cameron Policy and Research Consultants, Wellington, 1990) 11-23

defendant's first appearance in court), and partly because they will have insufficient information upon which to base such a review.[40]

With cases entering the prosecution process by way of summons or minor offence notice, the initial decision to take formal action is made by the officer in charge of the case. This officer will prepare a report for their line supervisor, which will include a recommendation as to the charge to be brought. The line supervisor then endorses or modifies this recommendation, and files containing recommendations in favour of prosecution are then sent to the Police Prosecutions Section for the final decision. Decisions against prosecution in cases involving summons or minor offence notices are sometimes made by the line supervisor, and sometimes by the Police Prosecutions Section.[41] Thus, mechanisms for the supervision and review of the initial decisions which bring a case within the prosecution process exist in New Zealand.

2 Prosecutorial decision-making by 'independent' decision-makers

In addition to supervision and review of decisions by

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40 Warren Young, Neil Cameron, Robert Brown The Prosecution and Trial of Adult Offenders in New Zealand (Young & Cameron Policy and Research Consultants, Wellington, 1990) 22, 26

41 Above n 40, 23

superior officers, prosecutorial decisions may be supervised, reviewed or actually made by other decision-makers independent of the police. An illustration of this principle in practice is the making of prosecution decisions by so-called 'independent' prosecutors, which occurs in both England and Wales, and in the Australian Commonwealth prosecution system.

In England and Wales the Crown Prosecution Service (the CPS) was introduced under the Prosecution of Offences Act 1985 (UK). Under this Act the CPS has responsibility for the conduct of all criminal proceedings (with a few specified exceptions) which are instituted on behalf of a police force. The CPS is empowered to provide legal advice to the police before charges are laid when they are specifically requested to do so by the police.[42] The CPS is also empowered to 'discontinue' proceedings following the arrest and charge of a suspect.[43]

In Australia the Office of the Director of Public Prosecutions was established by virtue of the Director of Public Prosecutions Act 1983 (Aust). The Director of Public Prosecutions (the DPP) and his or her delegates have the authority to start or stop a prosecution for any Commonwealth offence, whether or not that prosecution was initiated by a police officer, a public official or

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42 Prosecution of Offences Act 1985 (UK), section 3
43 Above n 42, section 23

a private citizen.[44]

In both England and Wales, and the Australian Commonwealth, most prosecutions are still initiated by the police.[45] But responsibility for the conduct of the prosecution lies with the so-called 'independent' prosecutor, who reviews the case as prepared by the police and may, where appropriate, amend the form of the prosecution or drop the case altogether.

3 The purpose of involving other decision-makers in the prosecution process

The decisions made by front-line police officers which impact upon the prosecution process are often made in the heat of the moment during face to face encounters with suspects, victims and complainants.[46] Supervision and review of police decision-making, and actual decision-making by independent prosecutors who are more removed form the situation which gives rise to the potential prosecution, can check any tendency to exercise discretion in accordance with emotional responses to the situation, rather than in accordance with common sense, good policing practices and officially sanctioned

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44 Director of Public Prosecutions Act 1983 (Aust), sections 6 and 9
45 Andrew Sanders "An Independent Crown Prosecution Service?" [1986] Crim LR 16; Ian Temby "Prosecution Discretions and the Director of Public Prosecutions Act 1983" (1985) 59 ALJ 197, 199
46 Above n 40, 13

principles and standards.

The role of superior officers in supervising and reviewing the actions and decisions of front-line police officers has been described by one police officer as,[47]

> The officer on the case is looking to prove the case, which is what he is paid for and we wouldn't want it any other way. He's all fired up to do just that and that's what his job is. A custody officer's job is to stand back perhaps, to look at a wider situation, to appraise the situation in a wider light and to try and make a rational decision, one step removed from being intimately involved...

The involvement of a person less emotionally involved is also an argument in favour of an 'independent' prosecutorial decision-maker. It is argued that an 'independent' prosecutor counter-balances presumptions of guilt and commitment to the prosecution which the police might form during the investigation of an alleged offence, and in initial dealings with an alleged offender.[48]

One of the key purposes in the institution of the CPS in England and Wales was to screen out weak and cautionable cases. The UK Royal Commission on Criminal Procedure had concluded that too many weak and cautionable cases

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47 Above n 29, 118. This comment was made by a custody officer in England. In England and Wales the custody officer has responsibility for suspects in custody, for ensuring that the provisions of the Police and Criminal Evidence Act 1984 (UK) are complied with, and for ensuring that the Codes of Practice are complied with. These responsibilities include authorising the release of suspects from detention, informing suspects of their legal rights, keeping detailed custody records, and the decision as to whether suspects should be charged. See above n 29, 4

48 Above n 2, 133

were being prosecuted,[49] and thus the CPS was established as an attempt to remedy this situation.

Thus, the purposes of involving other decision-makers in the prosecution process indicate that the promotion of fairness is one of the primary objectives. Supervision and review of decision-making by superior officers and prosecutorial decision-making by 'independent' decision-makers supposedly encourages more neutral decision-making, which in itself should promote fairness. The involvement of other such decision-makers also aims to ensure that only the most appropriate cases continue within the prosecution process. This would also seem to promote fairness.

It would also seem that consistency is aimed for by the involvement of other such decision-makers. Those more removed from the situation giving rise to the potential prosecution would be in a better position than those making decisions in the heat of the moment, to weigh the particular decision up against accepted principles and standards. It is constant adherence to accepted principles and standards that will promote consistency across the wide range of decisions to be taken within the prosecution process.

In addition, accountability would also seem to be pro-

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49 Andrew Sanders "An Independent Crown Prosecution Service?" [1986] Crim LR 16

moted to a certain extent. Those making decisions would have to be aware that their decisions would always be subject to supervision and review, and sometimes to modification or even reversal. Those decision-makers who frequently made incorrect or inappropriate decisions could be detected. Thus, in theory, the involvement of other decision-makers in the prosecution process would seem to promote the principles of fairness, consistency and accountability within the prosecution process.

4 The efficacy of involving other decision-makers in the prosecution process

As other decision-makers (in addition to the police) are involved in the prosecution process in most other jurisdictions in one form or another, problems thrown up by these types of control mechanisms have been identified, both in practice and by researchers. These problems must be considered in evaluating the efficacy of the involvement of other decision-makers in the prosecution process as a means of controlling the exercise of prosecutorial discretion.

There is a tendency for those supervising and reviewing decision-making to 'rubber-stamp' decisions. There are a number of possible reasons as to why this might occur. Firstly, those in supervisory roles might not have access to sufficient and adequate information to carry out any

kind of effective review. This applies not only to the supervision of decision-making by superior officers, but more especially to supervision, review and actual decision-making by so-called 'independent' prosecutors.

The difficulties inherent in reviewing the appropriateness of prosecutorial decision-making has been noted in relation to the CPS in England and Wales.[50] It has been found there that the information supplied to the CPS by the police was insufficient to allow adequate and independent review of prosecution decisions taken by the police. As one Chief Crown Prosecutor has said,[51]

> ...I feel we suffer from a lack of information. The only public interest information we get is that provided by the police files. And that may be no more than 2 or 3 lines.

An experimental program carried out in London during 1988 showed up the difficulties faced by the CPS in trying to carry out their duties without sufficient or adequate information. During the course of the program a certain group of alleged offenders were targeted, and the Inner London Probation Service provided the CPS with verified information on the personal circumstances of these alleged offenders, in order to assist Crown Prosecutors in deciding whether a prosecution was just-

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50 Above n 3, 12-15

51 S Elliman "Independent Information for the Crown Prosecution Service" (1990) 140 New Law Journal 812

ified in the public interest. The rate at which prosecutions were discontinued by the CPS rose from 1% prior to the implementation of the program, to 7% during the course of the program.[52]

This problem of insufficient information being available to those supervising, reviewing and actually making decisions so as to enable thorough and effective review of previous decisions and actions has also been noted with regard to the Police Prosecutions Section in New Zealand. The point has been made that a lack of adequate information contributes to the tendency of police prosecutors not to carry out effective review of previous police decisions.[53]

Adequate information will be necessary for any effective supervision and review of prosecutorial decision-making to occur. Otherwise supervisors and subsequent decision-makers will have their hands tied, so to speak, and may have no alternative but to rubber-stamp previous decisions.

Also a problem is the disproportionate influence that early decisions in the prosecution process will have over later ones. Researchers in various jurisdictions have noted a tendency for a 'presumption in favour of prosecuting' to dominate once prosecution proceedings

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52 Amanda J Brown "Diverting Cases from Prosecution in the Public Interest" (1992) 32 Home Office Research Bulletin 7, 9; above n 51

53 Above n 40, 26

are initiated.[54] It may well be that this presumption is largely attributable to the lack of adequate information available to later decision-makers to enable effective review of earlier decisions. But it is also possible that this is something which operates independently of a lack of adequate information. It may well be that those involved in prosecutorial decision-making form an 'occupational commitment' to pursuing prosecutorial proceedings, and are reluctant to discontinue such proceedings once they have been initiated. This presumption, whatever the reasons that cause it to operate, might be said to exist in New Zealand at present. Certainly it is rare for the decisions of officers in charge of cases to be modified or reversed.[55]

Another difficulty inherent in the effective control of prosecutorial discretion by other decision-makers in the prosecution process arises from the construction of criminal cases by front-line police officers as discussed above.[56] The control that front-line police officers exercise over the gathering of evidence gives them the opportunity to characterize the case in such a way as to justify their own decisions and actions.[57] Such constructions will usually be framed in terms of legitimate considerations and officially sanctioned principles and

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54 Above n 49, 24
55 Above n 40, 22-23
56 See above part III C
57 Above n 29, 135

standards, so that it will be difficult for subsequent decision-makers to gain a more objective view of the case. This will be especially so where those subsequent decision-makers do not have access to adequate or sufficient information to counter-act this construction process.

Thus, while in theory, supervision, review and actual decision-making by other decision-makers in the prosecution process may appear to act towards the promotion of fairness, consistency and accountability, there are problems which considerably impede the ability of such mechanisms to do so. Problems involving a lack of information being available to such subsequent decision-makers may possibly be surmounted by alternative sources of information being made available to them. This certainly strengthened the position of the CPS in London during the course of the experimental program discussed above. However, the use of such a scheme may be problematic in terms of the efficient use of resources and the extra workload created by the generation and consideration of additional information. Solutions to the problems raised by the construction of criminal cases by front-line police officers, and the existence of a presumption in favour of prosecuting are far less readily apparent.

B The Giving of Reasons for Decisions

1 The operation of reason-giving in the prosecution process

One commentator on the prosecution process has suggested that perhaps the police should be required to record reasons for failing to proceed with complaints, in order to facilitate review of such decisions.[58] This suggestion could be extended to other decisions in the prosecution process.

The giving of reasons for decisions is a means of 'structuring' the exercise of discretion.[59] But the giving of reasons for decisions can also facilitate the 'checking' of the exercise of discretion, in that it may provide a basis for the supervision and review of decisions made in the exercise of a discretionary power. Those supervising and reviewing decision-making in the prosecution process could weigh up the reasons given for the particular decision against appropriate standards and principles.

The giving of reasons for decisions may also facilitate appeals to superior officials within the prosecution process by those adversely affected by decisions to prosecute or not to prosecute. Those concerned about particular exercises of prosecutorial discretion could request that the reason for the decision be made known

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58 Above n 6, 160
59 Above n 7, 103-106

to them. If then they were aggrieved by the reason for the decision, they could appeal to a superior official in the prosecution process on the basis that the particular decision was an inappropriate one, or was deficient in some way. Thus, the giving of reasons for decisions made in the course of the exercise of prosecutorial discretion may form the basis of internal review mechanisms in more than one way.

2 The purpose of giving reasons for decisions in the prosecution process

A requirement that decisions be justified by appropriate reasons would seem to protect those affected by the exercise of prosecutorial discretion against arbitrary decision-making. Being required to give reasons for decisions means that prosecutorial decision-makers must be able to justify their decisions in terms of legitimate and appropriate principles and standards. Decisions which are not consistent with such principles and standards should then be able to be detected. Thus, on the face of it, consistency would appear to be a goal of reason-giving as a control mechanism in the prosecution process. Whether or not fairness is promoted by reason-giving in the prosecution process would depend on whether the principles and standards to which the reasons are referring are themselves fair.

The giving of reasons for decisions would also seem to aim for accountability in the prosecution process. Those making decisions would be required to give reasons for their decisions, thus facilitating supervision and review of decision-making, or appeals to superior officials in the prosecution process. Decision-makers could be called to account for their decisions, and those adversely affected by prosecutorial decision-making would have a potential means of redress.

3 The efficacy of reason-giving as a control mechanism in the prosecution process

There are some problems associated with the practice of the giving of reasons for decisions, and such problems must necessarily be taken into account in any evaluation of the efficacy of this mechanism in controlling the exercise of prosecutorial discretion.

Firstly, it may be that the reasons given for the decision involve information of a personal or confidential nature. For example, a decision not to prosecute may be justified by information regarding the alleged offender's medical history which is given to the decision-maker in confidence. Or it may be that the reason given for a particular decision may involve express or implied criticism of the character and credibility of a witness or complainant.[60] The

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60 Above n 17, 153

appropriateness of making this information available is questionable.

Secondly, the reason given for a particular prosecutorial decision may bear little relation to the true motivation for the particular decision.[61] Under section 23 of the Prosecution of Offences Act 1985 (UK), Crown Prosecutors are required to give reasons for discontinuing a prosecution. The early experiences of this practice seemed to indicate a tendency to simply make reference to parts of the "Code for Crown Prosecutors".[62]

This kind of practice gives little indication to superior decision-makers and those affected by the exercise of prosecutorial discretion, exactly what the true motivation of the decision-maker was, and which particular circumstances of the case influenced the disposal of it. Such reasons, while not necessarily disclosing what they are intended to disclose, seem to provide a sufficient justification for the decision by reference to officially sanctioned principles and standards. In other words, reasons tend to become 'routinised' and given in a formulaic fashion, thus achieving few or none of their purposes.

Thus, the giving of reasons for decisions entails some problems which may well impede the promotion of fairness,

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61 Above n 7, 105
62 Above n 37, 606

consistency and accountability within the prosecution process. The question of whether the protection of confidential and personal information, or the goal of a fair, consistent and accountable prosecution system is more important is certainly a tricky one, although it could be argued that to disclose information of a personal or confidential nature in itself constitutes unfairness. And like the problem of case construction by front-line police officers, justifying decisions by reference to officially sanctioned principles and standards as reasons for those decisions, is both difficult to detect and not easily combatted or controlled. These are problems, to which there is no easy or obvious answer.

V CONTROL OF PROSECUTORIAL DISCRETION BY THE COURTS

Courts indirectly monitor the prosecution process. If a prosecution is carried out in the absence of sufficient and admissible evidence then that prosecution should fail in court (unless the alleged offender pleads guilty). And the court has some power in its sentencing discretion to comment, indirectly as the case may be, on the appropriateness of a particular prosecution.[63] The court may also express views on the merits of a particular prosecution, which may be conveyed in the summing up to the jury, or in the power of the court to award costs.[64]

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63 Above n 6, 161
64 Above n 17, 177

This indirect influence, while it may not necessarily affect the prosecution in hand, may well affect the decisions of prosecutorial decision-makers in the bringing of similar prosecutions in the future. However, this indirect means of influence available to the court will only impact upon those cases in which prosecutorial action is taken. Those cases which do not reach court remain beyond the court's sphere of influence. Also, the ability of the courts to monitor the prosecution process in these ways is often contingent upon a plea of not guilty. And even when such a plea is entered, judicial supervision is somewhat sporadic and largely ineffective.[65]

But the court may be able to exert influence over the prosecution process in more substantial and direct ways. The power of the courts to control the exercise of prosecutorial discretion by means of judicial review and the abuse of process jurisdiction of the court will be considered here.

A Judicial Review of Prosecutorial Decision-making

Review of prosecutorial decision-making by the courts may operate at two distinct levels. Firstly, review may

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65 Neil Cameron "Developments and Issues in Policing New Zealand" in Neil Cameron and Warren Young (eds) Policing at the Crossroads (Allen & Unwin in association with Port Nicholson, Wellington, 1986) 7, 28

be aimed at prosecution policies in general, or secondly, it might consider specific instances of the exercise of prosecutorial discretion.

1 Review of prosecution policies in general

The leading case in this area is R v Metropolitan Police Commissioner, ex parte Blackburn.[66] This case dealt with the attempts of Mr Blackburn to compel the Metropolitan Police Commissioner to take action by way of prosecution against illegal gambling. The Metropolitan Police Commissioner had issued an instruction that the police were to take no proceedings against clubs for breaches of the gaming laws unless there were complaints of cheating, or the club had become the haunt of criminals. Strictly speaking, the policy was not one of non-enforcement since there were circumstances in which prosecutions might be brought. However, in court the policy was treated as effectively being one of non-enforcement, which in reality it probably was.

In Blackburn the English Court of Appeal held that the police had a wide-ranging discretion in the investigation and prosecution of offences, with which the courts could not interfere. However, it was held that police officers have a duty to enforce the law, and if, as was held to be the case in this situation, they were failing to do so,

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66 [1968] 2 QB 118

then the courts could intervene. Lord Denning MR expressed this as,[67]

> Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police of the Metropolis, or the chief constable, as the case may be, to decide in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter. He can also make policy decisions and give effect to them, as, for instance, was often done when prosecutions were not brought for attempted suicide. But there are some policy decisions with which, I think, the courts in a case can, if necessary interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than £100 in value. I should have thought that the court could countermand it. He would be failing in his duty to enforce the law.

The question of importance left open by the court in the Blackburn case is, at what point will the courts intervene to control the exercise of the discretion? Salmon LJ gave some indication. For him the point at which the courts would intervene would be where there was "a clear breach of duty ... so improper that it could not amount to an exercise of discretion."[68] The question then raised by this is, just how will the court determine whether a prosecution policy is a clear breach of duty, and how will they be able to judge what does and does not amount to an exercise of discretion?

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67 Above n 66, 136
68 Above n 66, 139

Blackburn indicates that the courts can review general prosecution policies, and they may intervene where they perceive that the policy in question amounts to a failure on the part of the police to carry out their duty to enforce the law. Blackburn, however, did not consider the question of judicial review in a specific instance of the exercise of prosecutorial discretion.

2 Review of specific prosecutorial decisions

The courts' approach to this issue has been to distinguish between discretionary powers derived from statute, and those which are a prerogative power. In Hallet v Attorney-General, Gallen J held that the exercise of a statutory power could be subject to review by the courts, while the exercise of a prerogative power could not be reviewed.[69]

In the Hallet case the decision in question was the failure of a Department of Labour inspector to prosecute Mainzeal Corporation Ltd for breaches of the Construction Act 1959 and the Construction Regulations 1961. It was held that the power to prosecute under this legislation and these regulations was a statutory power.[70] However, Henry J held that the decision in question was not reviewable, notwithstanding the fact that it was an exercise

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69 [1989] 2 NZLR 87, 91
70 Hallet v Attorney-General (No 2) [1989] 2 NZLR 96, 100

of a statutory power. The judge saw the case as one which was asking the court to review the weighing up of the factors that went to the making of the decision. Henry J shied away from any suggestion that the court should find that the defendant's obligation was to prosecute, a finding he saw as going beyond the court's proper sphere of involvement.[71] Thus, any review of a prosecution decision can not be based on a ground that requires the court to evaluate the merits of a particular decision to prosecute or not to prosecute.[72]

Certain decisions in the prosecution process have been held to be reviewable and others to be unreviewable. A prosecution decision made by a Crown Solicitor is not reviewable.[73] Similarly unreviewable, are decisions of the Solicitor-General acting as alter-ego of the Attorney-General in the making of either an original or an ex officio decision to prosecute.[74] The reviewability of both the Solicitor-General's decision to consent to a prosecution decision taken by another official,[75] and the decision to nolle prosequi[76] have been left open in New Zealand. However, the former has been held to be reviewable in Australia.[77] It has been pointed out that these latter two

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71 Above n 70, 102-103
72 GDS Taylor Judicial Review: A New Zealand Perspective (Butterworths, Wellington, 1991) 23
73 Saywell v Attorney-General [1982] 2 NZLR 97
74 Barton v R (1980) 147 CLR 75
75 Shanks v Latham Unreported, 18 February 1988, High Court Tauranga Registry M 5/88
76 Amery v Solicitor-General [1987] 2 NZLR 292
77 Buffier v Bowen (1987) 72 ALR 256

decisions may be more open to review than some of the others as they occur later than, and in review of the initial decision to prosecute, and therefore have more of an "ordinary administrative character".[78]

As far as the reviewability of police decisions to prosecute goes, the position is uncertain. It has been argued that the police have the responsibility of administering certain enactments (for example, the Crimes Act 1961 and the Summary Offences Act 1981), and are thus covered by what was said in Hallet as to the reviewability of statutory powers.[79] But given what was said in Blackburn as to the width of the discretion of the police in enforcing the law, it would seem that the court's power to intervene is very limited. Thus, it would seem that the courts will be slow to review any specific prosecution decisions made by the police.

B Abuse of Process

The court has an inherent jurisdiction to stay criminal proceedings in which an abuse of process has occurred. Lord Reid in Connelly v DPP said that "there must always be a residual discretion to prevent anything which savours of abuse of process."[80] In the same case Lord Morris

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78 Above n 72, 23
79 Above n 72, 22
80 [1964] AC 1254, 1296

of Borth-y-Gest described this inherent jurisdiction as,[81]

> ... a Court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A Court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its processes and to defeat any attempted thwarting of its processes.

The exact scope and extent of this jurisdiction has been somewhat vigorously debated.[82] In both Connelly v DPP and Humphrys v DPP,[83] there was a division of opinion amongst the members of the House of Lords as to whether a court could actually stay proceedings to prevent an abuse of its processes. However, since these cases were decided there have been many successful applications to stay proceedings on the basis that they involve an abuse of process.[84] Thus, it now seems widely accepted that a court may go so far as to stay criminal proceedings where the processes of the court have been abused.

This doctrine of abuse of process is accepted in New Zealand also.[85] In Moevao v Department of Labour Richardson J said,[86]

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81 Above n 80, 1301-1302
82 See for example, Rosemary Pattenden "The Power of the Courts to Stay a Criminal Prosecution" [1985] Crim LR 175; David M Paciocco "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept" (1991) 15 Criminal Law Journal 315
83 [1977] AC 1
84 Rosemary Pattenden "The Power of the Courts to Stay a Criminal Prosecution" [1985] Crim LR 175, 176
85 Moevao v Department of Labour [1980] 1 NZLR 464
86 Above n 85, 482

> The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under the law. It may intervene in this way if it concludes from the conduct of the prosecutor in relation to the prosecution that the Court processes are being employed for ulterior purposes or in such a way (for example, through multiple or successive proceedings) as to cause improper vexation and oppression ... [T]he focus is on the misuse of the Court processes by those responsible for law enforcement.

The power of the courts to stay criminal proceedings where the court perceives there has been an abuse of its processes has been exercised in a wide range of circumstances. One such example is multiplicity of proceedings. Connelly involved this very issue. In that case, Connelly had been charged with murder and had been acquitted at trial. Following this acquittal Connelly was indicted for a robbery which was committed at the same time and the same place as the alleged murder. The House of Lords held this to be an abuse of process. This doctrine has been accepted in New Zealand. In Amery v Solicitor-General Cooke P said, "... that to issue lesser criminal charges based on the same foundation is an abuse of the process of the Court."[87]

Another example of circumstances which have been held to constitute an abuse of process is where there has been an unreasonable delay in the course of the proceed-

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87 Above n 76, 294

ings.[88] This delay may relate to the commencement of a prosecution, as in Watson v Clarke.[89] In that case Robertson J said,[90]

> Just as there is a duty on the prosecution to bring an information or charge, so there is a duty on them to prosecute that information or charge as expeditiously as reasonably possible.

But the delay may also relate to the continuation of a prosecution. In Department of Social Welfare v Stewart Wylie J held that, [91]

> ... if the delay is so excessive as to raise a presumption of prejudice or unfairness (and whether such presumption will arise may depend on the nature of the case) then there is an abuse and the Court must act to prevent it.

However, it has been held that there is no general principle that an unreasonable delay will preclude a trial or vitiate a conviction. The relevance of the delay will depend on whether the effect of the delay has been to render the trial unfair.[92] For example, a "deliberate decision" not to prosecute in 1984, which was followed by a prosecution based on the same complaint of rape in 1992, has been held to be an abuse of process because of evidentiary prejudice which could not be overcome.[93]

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88 See J Kovacevich "The Inherent Power of the District Court: Abuse of Process, Delay and the Right to a Speedy Trial" [1989] NZLJ 184

89 [1990] 1 NZLR 715

90 Above n 89, 727

91 [1990] 1 NZLR 697, 713

92 Jago v District Court of New South Wales (1989) 168 CLR 23, 59-60; R v Accused [1991] 3 NZLR 405, 407; R v Ihaka Unreported, 22 June 1993, Court of Appeal CA 442/92

93 R v T Unreported, 1 September 1992, High Court Auckland Registry T 126/92

Criminal proceedings may also be stayed where there was an improper motive for prosecuting. In Spautz v Williams a number of private prosecutions were brought to pressure a former employer into reinstating the former employee or settling a wrongful dismissal claim. The private prosecutions were held to be an abuse of process.[94] Other examples of circumstances in which the court may stay proceedings on the basis of an abuse of process include where a prosecutorial bargain has been breached by the prosecution, where there has been an abuse of committal proceedings and where oppression at trial occurs.[95] The sets of circumstances outlined above are only examples of some of those situations in which the court may find that there has been an abuse of process.

It has been pointed out that the power of the court to stay criminal proceedings should be reserved for exceptional cases.[96] According to the authoritative statements of the doctrine there are two key requirements which must be met before the court can stay the proceedings. Firstly, there must be some serious prejudice to the defendant. And secondly, there must be circumstances, which if the trial were to continue would subvert the judicial process, and these circumstances should consti-

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94 [1983] 2 NSWLR 506, 545-546
95 See the examples given in above n 82
96 Above n 83, 26; above n 74, 36; R v Heston-Francois [1984] 1 All ER 785, 792

tute more than simple unfairness to the accused.[97] Only where these criteria are satisfied should the court intervene to control prosecutorial discretion, or more precisely, to control misuse of the discretion.

C The Purpose of Involving the Courts in the Control of Prosecutorial Discretion

It has been noted already that control mechanisms located within the prosecution process are subject to a number of difficulties in controlling the exercise of prosecutorial discretion.[98] It is possible that the involvement of the courts in the control of prosecutorial discretion may overcome some of these difficulties because of the court's lack of involvement in the prosecutorial decision-making process.

The primary virtue of the involvement of the courts is the promotion of accountability in the prosecution process. The availability of a remedy in the courts is the ultimate form of accountability for those seeking to control the exercise of prosecutorial discretion. Those making decisions in the prosecution process will potentially be subject to legal sanctions, and those affected by prosecutorial decision-making will be able to call to account the decision-makers and have a powerful potential

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97 Above n 84, 189
98 See above parts III C, IV A 4 and IV B 3

means of redress for incorrect or inappropriate decisions.

D The Efficacy of the Courts in Controlling Prosecutorial Discretion

Fairness would seem to be promoted only to a limited extent by the courts' involvement in controlling prosecutorial discretion. Unfair prosecution policies could only be challenged if they amount to a clear breach of the duty of the police to enforce the law.[99] The Blackburn decision as noted above, envisaged the scope for court intervention as being very limited and it seems unlikely that the mere fact of unfairness would be sufficient to motivate a court to intervene.

In terms of specific prosecution decisions, the power of the courts to act against unfairness is again, very limited. The courts have been very reluctant to review decisions of this nature. As was said by Woodhouse J in Police v Hall,[100]

> ... it must normally be regarded as inappropriate for a judicial officer, whether judge or magistrate, to control executive officers in their decisions as to the initiation of prosecutions. Public confidence in the essential detachment of the judiciary would be affected if they seemed to be taking a hand in the formulation of charges in the criminal courts.

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99 This would be the position if the comments of Salmon LJ in R v Metropolitan Police Commissioner, ex parte Blackburn [1968] 2 QB 118, 139 are to be taken as representative of the correct legal position in this area.

100 [1976] 2 NZLR 678, 683

As for abuse of process as a basis upon which to challenge unfair prosecution decisions, this would only apply to decisions to prosecute, and not to decisions not to prosecute. Also, abuse of process has been said to be limited to exceptional cases. Under the doctrine of abuse of process, unfairness to the accused will be insufficient to found an application to stay proceedings. Abuse of process is not so much a control of prosecutorial discretion, as a means of controlling extreme misuses of that discretion. Thus, it might be concluded that the extent to which fairness is promoted in the prosecution process by the courts' control of prosecutorial discretion is, indeed, very limited.

The extent to which consistency is promoted by the courts' control of prosecutorial discretion is also questionable. Firstly, for the issue to be dealt with by the courts it would have to have been raised by the defendant. The degree to which defendants in the criminal justice system are likely to do this is questionable, especially given the very high degree to which guilty pleas operate within the system. A study of prosecutions in New Zealand District Courts in 1981 and 1982 found that 75% of all prosecutions result in a guilty plea.[101] In addition to the high incidence of guilty pleas, very few defendants com-

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101 Michael Stace "The Police as Prosecutors" in Neil Cameron and Warren Young (eds) Policing at the Crossroads (Allen & Unwin in association with Port Nicholson, Wellington, 1986) 144, 145

plain about their treatment at the hands of the police, or challenge the validity of the behaviour of the police in any way. The general response of almost all defendants in the criminal justice system is to regard police behaviour as legitimate or as immune to challenge.[102]

Also, the power of the courts to control the exercise of prosecutorial discretion is what might be called a 'backup' solution. That is, it comes into play after an incorrect or inappropriate decision has been made. It is control from within the prosecution process that will truly promote consistency in decision-making. The power of the courts can be seen as backup when the prosecution process has failed to produce consistent and appropriate results. To have a backup for those who have been subject to unjust treatment within the prosecution process is one thing, but to rely on that backup to promote consistency within the prosecution process is another. Relying on the courts in this way means that those who have been treated unfairly or unjustly would be subjected to the stress, trauma and expense involved in going to court for a remedy when, in fact, the situation should never have arisen at all.

The reluctance of the courts to become involved in reviewing prosecution decisions, and the fact that abuse of process should be limited to exceptional cases, means that

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102 Above n 65, 28

only the most extreme and blatant misuses of power will be subject to control by the courts. The great number of incorrect and inappropriate prosecutorial decisions probably do not involve this degree of severity and, therefore, probably will not be subjected to the courts' scrutiny or control.

The value of abuse of process as a means of promoting consistency in the prosecution process is especially limited as it only operates in respect of decisions to prosecute, and will not affect incorrect or inappropriate decisions not to prosecute. For consistency to be truly promoted, all prosecutorial decision-making should be subject to the control mechanism.

Because of the limited nature of the courts' ability to control prosecutorial discretion, the extent to which accountability is promoted within the prosecution process is also accordingly limited. Those prosecution decisions which do fall within the courts' powers of control will involve high degrees of accountability, in that the decision-makers will be accountable to the law of the land. However, as noted above, the numbers of cases which fall within this sphere of control are likely to be very few, and not all inappropriate or incorrect decisions will be subject to this control.

Thus, as a means of controlling prosecutorial discretion

the courts will be effective only in some of the cases involving extreme and blatant misuses of discretion. The bulk of cases will fall outside of the courts' sphere of influence. The chances of the courts extending their control over the exercise of prosecutorial discretion are not good if the attitudes of the courts up until now are anything to go by.[103]

VI THE POLICE COMPLAINTS AUTHORITY

A The Nature and Form of the Police Complaints Authority

The Police Complaints Authority was established by virtue of the Police Complaints Authority Act 1988. The purpose of this Act was "... to make better provision for the investigation and resolution of complaints against the Police by establishing an independent Police Complaints Authority."[104]

The Authority consists of a person appointed by the Governore-General on the recommendation of the House of Representatives. Such a person must be qualified as a barrister or solicitor of the High Court, and must possess suitable legal experience for the task in hand.[105] The Authority is appointed for a term of two to five years, and may be reap-

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103 See for example, above n 76, 458-459; above n 90, 682-683; Newby v Moodie (1987) 78 ALR 603, 605

104 Preamble to the Police Complaints Authority Act 1988

105 Above n 104, section 4

pointed.[106]

Section 12 of the Police Complaints Authority Act 1988 sets out the functions of the Authority. The functions relevant to the control of prosecutorial discretion are contained within section 12(1)(a). That paragraph states that the Authority is to receive complaints alleging any misconduct or neglect of duty by any member of the Police, or complaints concerning any practice, policy or procedure of the Police which affects the complainant in a personal capacity.

Once a complaint is received, the Authority may investigate the complaint, defer action until it receives a report from the Commissioner of Police on a Police investigation, or oversee a Police investigation of the complaint. The Authority may also, upon receipt of a complaint, decide to take no action.[107] Once the Authority decides to investigate a complaint, it has some powers to require those who, in its opinion, are able to give information relating to its investigation, to give such information.[108]

Once the Authority has undertaken an investigation, or has received a report on a Police investigation, it shall form an opinion on "... whether or not any decision, recom-

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106 Above n 104, section 5(1)
107 Above n 104, section 17
108 Above n 104, section 24

mendation, act, omission, conduct, policy, practice, or procedure ... was contrary to law, unreasonable, unjustified, unfair or undesirable."[109] This opinion, along with reasons for it, is to be conveyed to the Commissioner of Police. The Authority may also, as it sees fit, convey any recommendations to the Commissioner of Police.[110]

Thus, any person adversely affected by an exercise of prosecutorial discretion by the Police, and who is aggrieved with that exercise of discretion, is able to lay a complaint with the Police Complaints Authority. In this way the Authority may have a role to play in controlling the exercise of prosecutorial discretion.

B Efficacy of the Police Complaints Authority in Controlling Prosecutorial Discretion

On the face of it, the Police Complaints Authority would appear to promote fairness within the prosecution process. The Authority can form an opinion as to a Police decision, recommendation, act, omission, conduct, policy, practice or procedure, which would cover individual exercises of prosecutorial discretion, or wider prosecution policies. Such an opinion might conclude that prosecutorial discretion was being exercised in a manner that was contrary to law, unreasonable, unjustified, unfair or undesirable.

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109 Above n 104, sections 27 and 28
110 Above n 104, sections 27 and 28

This would seem to indicate that prosecution decisions made in the absence of sufficient evidence, or those made in a manner that is contrary to accepted principles and standards, would fall within the Authority's sphere of influence.

However, there are some problems with the degree to which the Authority promotes consistency within the prosecution process. Again, like the courts, the Police Complaints Authority is only a 'backup' solution. It does not promote consistency from within the prosecution process. Instead, it is a remedy for those who have been subjected to arbitrary decision-making which should not have occurred at all.

Also, like the courts, the Authority relies on those who are aggrieved by prosecutorial decision-making to take action before it can act. A complaint must be laid to the Authority before it can contemplate action to rectify the situation. The degree to which defendants in the criminal justice system are likely to do this is unknown and uncertain, especially given the very high rate of guilty pleas that occurs within the system.

As a mechanism external to the prosecution process, the Police Complaints Authority does promote accountability to a certain extent. It is a forum independent of the prosecution process where decision-makers can be called

to account, and those aggrieved by prosecution decisions can seek redress for incorrect or inappropriate decision-making. While the Authority's powers to compel the Police to change their policies and practices are not extensive under the current Police Complaints Authority legislation, it has the power to force the Police to reconsider what they are doing and may recommend alternatives or solutions. Also, there is bound to be stigma involved for Police officers who are challenged via the Police Complaints Authority, especially when that challenge is upheld by the Authority.

Thus, the Police Complaints Authority has some value as a means of controlling the exercise of prosecutorial discretion. Its terms of reference are wide enough to catch exercises of prosecutorial discretion which are not in the interests of fairness, and as a means external to the prosecution process, it promotes accountability to a certain extent. However, the fact that it is external to the prosecution process also means that it will not necessarily promote consistency within the prosecution process. The role of the Authority is also limited by the fact that it relies on aggrieved parties to initiate its involvement. The extent to which this will occur is both unknown and uncertain.

VII CONCLUSIONS

A Identification of the Problems

This paper set out to examine the prosecution process in terms of looking at possible means of controlling the exercise of prosecutorial discretion. These various means of control were evaluated in terms of fairness, consistency and accountability. This evaluation also took into account any problems that have been or might be experienced with these possible control mechanisms. This evaluation threw up a number of factors which inhibit control of prosecutorial discretion. Any effective attempt to control the exercise of prosecutorial discretion will have to take these factors into account.

With those mechanisms which are located within the prosecution process (that is, prosecution policy guidelines, the involvement of other decision-makers in the prosecution process and the giving of reasons for decisions), certain factors tend to inhibit their effectiveness. Some problems which were noted in relation to these mechanisms can be surmounted. For example, it was noted that difficulties in relation to the interpretation of prosecution policy guidelines can be managed by such means as staff training, consultation between decision-makers and the like.[111] However, there are two problems which crop up in

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111 See above part III C

relation to mechanisms within the prosecution process, to which there is no simple or obvious solution.

Firstly, there is the potential for front-line police officers to construct or de-construct criminal cases by manipulating and structuring information, principles and standards. In this way the results that the officer desires can be justified. And secondly, there tends to be a 'presumption in favour of prosecuting' which operates within the system. Once a prosecution is initiated, it will be rare for the initial decisions to be modified or reversed, even where it may be more correct or appropriate for the case to be handled in another way.

As for those mechanisms which are external to the prosecution process, there are two main problems which inhibit their ability to control prosecutorial discretion. Firstly, these are backup solutions, in that they come into operation after an incorrect or inappropriate decision has been made. The fact that there is the possibility of redress for such decisions is a good thing, but the point is that such decisions should never have been made in the first place. And secondly, for such mechanisms to come into play, there must be action on the part of the aggrieved party. The extent to which this is likely to occur is both unknown and uncertain.

The difficulties identified in relation to external control

mechanisms may possibly be combatted and controlled. The fact that these are backup solutions does not detract from their necessity. Even if attempts are made to control prosecutorial discretion from within the system, some backup will be necessary in the interests of justice for those cases which slip through the system. And the fact that such mechanisms require action on the part of aggrived parties need not be an insurmountable problem. The public should be made aware of the principles and standards governing decision-making, and of the availability of such mechanisms for those aggrieved by decision-making.

The difficulties of case construction by front-line police officers, and of a presumption in favour of prosecuting are difficulties, to which solutions and answers are less obvious. These are problems which are rooted in the behaviour of actors within the system, but unfortunately that behaviour can not be divorced from the system. To some extent the system and its operation influence the behavioral patterns of those actors within the system.

Most individuals behave in ways that they perceive that the system demands of them. For example, the point has been made that the overwhelming majority of defendants in the criminal justice system plead guilty and that this is largely due to the working of the system which expects them to plead guilty and may work against them in the event that they decide to exercise their due process rights

and enter a plea of not guilty.[112] Similarly, the actions of front-line police officers in constructing and de-constructing criminal cases may well be seen as a response to what they perceive that the system wants of them. That is, in cases in which they perceive formal action is necessary they will do their utmost to ensure that this need is addressed by a prosecution, and in cases which they see as falling outside of the system's scope they will attempt to ensure that the case remains outside of the system. And if actors in the prosecution process operate on the basis of a presumption in favour of prosecuting, then it is likely that that presumption stems from a perception that prosecutorial action is what the system wants of them.

Thus, while the problems appear in the form of human behaviour, to some extent it will be necessary to examine and address the system also if effective control of the exercise of prosecutorial discretion is to be achieved.

B The Limitations of the Law Reform Model

The traditional response to the identification of problems in the legal system is to change the law or make more laws. However, some have questioned the extent to which this type of response will be effective when the problems are related to patterns of human behaviour.

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112 Above n 101, 153

Specifically, the efficacy of the law reform model has been questioned in relation to the regulation and control of police behaviour.[113] It has been said,[114]

> Legislators and government policy-makers have ignored the powerful working rules, linked to the particular goals of the police, which shape police conduct and decision-making. Where legal rules and working rules conflict, the latter will prevail unless there is both a real possibility of being discovered and effective sanctions for the breach of those legal rules ... Without these possibilities, legal rules become merely presentational devices which inform the police how their decisions must be presented in order to be in apparent conformity with the law.

It has been suggested that it is meaningless to make rules and pass laws without addressing the occupational working rules whom those rules and laws are aimed at.[115] In terms of the prosecution process, this means addressing the working rules of front-line police officers that influence the construction and de-construction of criminal cases, and the working rules of actors in the prosecution process that result in a presumption in favour of prosecuting.

C Repercussions for the Control of Prosecutorial Discretion

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113 Above n 28; D Dixon, AK Bottomley, CA Coleman, M Gill, D Wall "Reality and Rules in the Construction and Regulation of Police Suspicion" (1989) 17 International Journal of the Sociology of Law 185

114 Roger Leng, Michael McConville, Andrew Sanders "Researching the Discretions to Charge and to Prosecute" in David Downes (ed) Unravelling Criminal Justice (MacMillan, Houndmills, 1992) 119, 135

115 Above n 29, 198-200; Above n 114, 137; D Dixon, AK Bottomley, CA Coleman, M Gill, D Wall "Reality and Rules in the Construction and Regulation of Police Suspicion" (1989) 17 International Journal of the Sociology of Law 185, 204

If the key problem in controlling prosecutorial discretion is rooted in the behaviour of actors in the prosecution process, and if the making of rules and laws is of limited value in controlling such behaviour, then the answer to the control of prosecutorial discretion becomes even more elusive. In light of all of this, it then becomes somewhat pointless to merely outline a blueprint for an 'ideal' prosecution process. And if the behaviour of actors within the prosecution process is heavily influenced by their perceptions of what the system requires of them (as noted above), then it becomes necessary to address the issue of just what purposes the prosecution process should serve.

It has been said that,[116]

> The criminal justice process not only imposes order but reproduces a particular form of social order which involves class, race and gender biases and which differentially distributes opportunity, wealth and power between different groups in society.

Thus, the prosecution process is an integral part of a mechanism of social control and ordering, and as such can not be considered in isolation from the other parts of the criminal justice system. The prosecution process should be seen as an important part of this system which is a means of meeting the needs of offenders, victims and the wider community. For example, in cases where an offender requires treatment of some kind (such as in the case of sexual offenders), the prosecution process is a

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116 Above n 29, 208

means of getting the offender diverted to the most appropriate institution or program.

The prosecution process should not be seen as a self-contained part of the criminal justice process, and its purposes can not be overlooked. In fact, the purposes of the prosecution process, and of the criminal justice system as a whole should form an important part of the training of actors within the prosecution process. Only when the purposes of the prosecution process are clear to such individuals can they be expected to respond in ways that are consistent with those purposes. Training of this nature is important if perceptions of what the criminal justice system demands of actors within that system are to be consistent with the purposes of the system.

Control of the exercise of prosecutorial discretion is an elusive thing. It will only be achieved when the actors within the prosecution process clearly recognise the purposes of that process and recognise the forms of action that they should be taking. Until such recognition is achieved the working rules of actors within the prosecution process will continue to make control of the exercise of prosecutorial discretion an elusive concept.

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