IMPROVING NEW ZEALAND'S PROSECUTION SYSTEM: A PRACTICAL REFORM PROPOSAL TO AVOID MISCARRIAGES OF JUSTICE

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I. INTRODUCTION

This paper discusses a practical reform proposal to prevent miscarriages of justice arising from prosecutorial (or police) misconduct, namely to allow only Crown solicitors the power to lay charges relating to certain crimes. Crown solicitors would perform an analysis of the evidence obtained at an early stage of the police investigation, and make a decision whether new lines of enquiry should be followed, or existing ones built upon, prior to determining whether charges should be brought by the Crown. This would increase the quality of decision-making at the early stages of a case, reducing the potential for intervention at the appellate level on the basis of a miscarriage of justice. As we shall see, not only is this reform in keeping with sweeping policies recently adopted in England and Wales, and longer-standing policies in Canada and Australia; it also provides direct and indirect cost savings throughout the system.

Any commentary on the law concerning miscarriages of justice in New Zealand is necessarily indebted to the work of Sir Thomas Thorp[1] and his 2005 paper "Miscarriages of Justice".[2] In that paper, Sir Thomas comprehensively argues for a specialised and fully independent New Zealand authority to identify miscarriages of justice beyond the existing appellate arrangements, similar to those authorities employed in England, Wales and Scotland. This paper supports Sir Thomas' conclusions and builds upon the so-called "front end" reform he refers to by aiming to prevent miscarriages of justice from occurring in the first place.[3]

A. Definition of Miscarriage of Justice

The term "miscarriage of justice" has a diffuse meaning. At its widest, it popularly means false attribution of guilt,[4] and may encompass very minor matters. The judiciary, legal profession,

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1 Former High Court Judge, Chairperson of the Parole Board and Crown Prosecutor.

2 Thomas Thorp "Miscarriages of Justice" (Legal Research Foundation, Auckland. 2005).

3 At 79: "The identifications in overseas studies of common sources of error indicate areas likely to repay study. However, the conclusion of such indications into practical reform proposals, appropriate to New Zealand conditions, calls for detailed consideration by persons and agencies sufficiently skilled and resourced for that purpose."

4 William Young "The Role of the Courts in Correcting Miscarriages of Justice" (paper presented to Legal Research Foundation's Miscarriages of Justice Symposium, Auckland, August 2010) at 3

legislators and the media[5] usually define the term as wrongful convictions in serious criminal matters,[6] and this paper will adopt that narrower definition. It is worth noting that prosecutors may fall foul of other types of misconduct not amounting to a miscarriage of justice that go beyond the scope of this paper.[7]

"Miscarriage of justice" is not defined in New Zealand legislation, even in Acts that could be expected to address the concept, such as the Crimes Act,[8] the Evidence Act[9] or even the Supreme Court Act.[10] The central protection against miscarriages of justice is set out in s 385 of the Crimes Act (specifically mentioning "miscarriage of justice"), and courts have expended considerable effort to define the term as it appears within the context of s 385.[11]

II. Proposed Reform – Professionalisation of Charging in Cases of Serious Crime in New Zealand to Prevent Miscarriages of Justice

A. Introduction

The New Zealand criminal justice system should be reformed in respect of charging decisions in serious cases. The charges laid and enquiries followed at the early stages of a case have a significant impact at any subsequent trial, and in a way which is very difficult to undo as the trial progresses. Oversight by Crown solicitors at these early stages would ensure higher quality decision-making with improved outcomes for the criminal justice system overall. While Crown prosecutors review cases from a variety of government departments (if and when those matters enter the indictable jurisdiction), this paper concentrates solely on the practices of the police. This is primarily as a result of the generally more significant penalties associated with charges that may be laid by the police, and the seriousness of the crimes police investigate. This paper proposes the adoption of a schedule of offences that may only be laid by Crown solicitors, starting with homicide, and with the intention of expanding the list of crimes included in that schedule over time.

This paper will focus only on the indictable jurisdiction, which encompasses all serious criminal prosecutions in New Zealand. Implementing the reforms proposed in this paper in the

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5 The history of the Court of Appeal in England and Wales (and New Zealand) is inextricably linked with the media. For a discussion on this topic see Richard Nobles and David Schiff *Understanding Miscarriages of Justice: Law, the Media, and the Inevitability of Crisis* (Oxford University Press, Oxford, 2000) at 48.

6 At 16.

7 These include conduct such as participating in an abuse of the Court's processes. See *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA) or *Fox v Attorney General* [2002] 3 NZLR 62.

8 Crimes Act 1961.

9 Evidence Act 2006.

10 Supreme Court Act 2003.

11 See for example *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87 and *Petryszick v R* [2010] NZSC 105, [2011] 1 NZLR 153.

summary jurisdiction, in addition to the indictable jurisdiction, would be too costly when compared to the benefit to the criminal justice system overall.[12]

B. History of Charging Practices in England, Wales and New Zealand

It is worth examining why police in England and Wales (and by extension New Zealand) were and still are permitted to lay charges in courts at all. Historically in England, criminal prosecutions were brought by the King's subjects exercising their public duty to prosecute crime.[13] Even after the "King's peace" eventually covered the whole of the realm of England (precluding the need to petition any number of feudal lords or rural communities for justice),[14] the system still relied on the King's subjects to petition him to enforce justice in most cases.[15] In more recent centuries, English citizens were assisted by justices of the peace (members of the local gentry), who served as what we would term "amateur detectives" and pre-trial committal officers.[16]

Throughout the late 17th and early 18th centuries, an expanding number of government departments in England began to employ "institutional solicitors", who were tasked with investigating and prosecuting criminal cases in their respective areas of oversight. The entities these solicitors represented included the Treasury, the Mint, the Bank of England and the East India Trading Company.[17] This practice continues to this day, and having been adopted in New Zealand, it is commonplace to see lawyers from government departments appearing in the summary jurisdiction of District Courts throughout the country, bringing charges following their investigations, and in some cases making submissions or eliciting evidence.

After the English Parliament enacted the Metropolitan Police Improvement Bill in 1829,[18] a modern, united and disciplined police force emerged in the London metropolis,[19] and later throughout England.[20] During this period there was a decline in influence of the justices of the peace, especially as it became harder to find men of high social position to fulfil the role in metropolitan London and surrounding Middlesex.[21] For this reason (as well as others) private prosecution standards declined at this time.[22] It would not be until the establishment of a Director of Public Prosecutions (DPP) in 1879 that the English system of public prosecutions began to

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12 Arguments for limiting the role of police officers in the summary courts have been made for some time. See Sean McGonigle "Public Accountability for Police Prosecutions" (1996) 8 Auckland U L Rev 163 and Stephanie Beck "Under Investigation: A Review of Police Prosecutions in New Zealand's Summary Jurisdiction" (2006) 12 Auckland U L Rev 150. While these papers were published before the introduction of the nominally independent Police Prosecutions regime, many of the arguments made are still relevant.

13 AH Manchester *A Modern Legal History of England and Wales 1750–1950* (Butterworths, London, 1980) at 226.

14 Philip Stenning *The Modern Prosecution Process in New Zealand* (Victoria University Press, Wellington, 2008) at 27.

15 John Langbein, Renée Lerner and Bruce Smith *History of the Common Law: The Development of Anglo-American Legal Institutions* (Aspen Publishers, New York, 2009) at 31–32.

16 At 666.

17 John Langbein *The Origins of Adversary Criminal Trial* (Oxford University Press, Oxford, 2003) at 113–119.

18 Manchester, above n 13, at 221.

19 Langbein *History of the Common Law,* above n 15, at 673.

20 Law Commission *Criminal Prosecution* (NZLC PP28, 1997) at [44].

21 Langbein *History of the Common Law*, above n 15, at 666.

22 Law Commission, above n 20, at [44].

consolidate, and even then the DPP did not assume more modern duties until 1908.[23] As there was no other obvious entity to lay charges on behalf of the police in England in the mid to late 19th century, they were simply treated in the same way as the institutional solicitors. By the beginning of the 20th century, the role of the police as both an investigative *and* charging prosecutorial agency had become entrenched.

Colonial New Zealand provided comparatively less work for Antipodean lawyers than their English counterparts in the early years after nationhood.[24] New Zealand history during this era has examples of part-time Crown prosecutors for whom the title of prosecutor seems to have been but another feather in their cap. This is why we see very early New Zealand lawyers such as Sir Richard Hanson holding various roles, including Crown Prosecutor,[25] Land Purchase Officer to the New Zealand Company[26] and founding member of the Wellington Council of the Colonists.[27] Furthermore, parts of the English legal system were not feasible in Victorian New Zealand because of the limited numbers of settlers in the colony. As an example, grand juries were not used in New Zealand in certain cases that would have otherwise called for them, had they occurred in England or Wales;[28] and under this system, prosecutors themselves could present cases for trial.[29] Perhaps most significantly of all, the New Zealand legal profession was fused from its inception; all lawyers could practice as both barristers and solicitors.[30] This would play an important role in the nature of the work for Crown prosecutors as both barristers in court *and* solicitors able to receive briefs. Thus, this central part of New Zealand's legal framework arose from a lack of human resources and the need to truncate English practices that were otherwise unfeasible.

When criminal justice reform eventually did take place in England with the establishment of a DPP in 1879 (and refinement of the office in 1908), lawmakers in New Zealand did not see fit to alter the status quo, and retained the Crown solicitor model of prosecutions. Police in New Zealand appear to have always had a role in bringing those they arrest before judicial officers, and by 1864 were also expected to act as prosecutor in the summary jurisdiction. Crown solicitors have always had jurisdiction over indictable matters following the committal.[31]

An important factor preventing reform in England and Wales, but not in New Zealand, has been pressure from the English Bar (which wields considerable political power)[32] to limit the role

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23 Manchester, above n 13, at 228.

24 David Collins "The Independence of the Prosecution" (paper presented to New Zealand Legal Method Conference, Auckland, 23 October 2009) at [11].

25 This was a different role from "Crown solicitor", which did not come into existence until 1864. See *Crown Law Office Prosecution Guidelines* (1 January 2010) <www.crownlaw.govt.nz> at 2.

26 Robin Cooke (ed) *Portrait of a Profession* (AH & AW Reed, Wellington, 1969) at 24.

27 NA Foden "Wellington's First Crown Prosecutor" (1936) 12 NZLJ 256.

28 Stenning, above n 14, at 72–73.

29 Law Commission, above n 20, at [51].

30 Supreme Court Ordinance 1841 and 1844. Peter Spiller, Jeremy Finn and Richard Boast *A New Zealand Legal History: Second Edition* (Brookers, Wellington, 2001) at 250. Strictly speaking, "New Zealand developed a profession that was theoretically made up of distinctive branches but allowed for the combined practice of its members": at 251.

31 Law Commission, above n 20, at [50].

32 Kenneth MacDonald QC, former Director of Public Prosecutions in England and Wales "Independent Prosecutors and Democratic Accountability" (4 March 2012) London School of Economics <http://www.youtube.com> at approximately 8:20 minutes.

of the DPP. In England, serious prosecutions are handed to a barrister for trial and barristers have an economic incentive to keep participation of the DPP throughout the system to a minimum. For a century this model was maintained until reforms strengthened the function of the DPP in the early years of the 21st century (see II D 1 below).

We may conclude, therefore, that police participation in charging and court proceedings in New Zealand is primarily the result of apathy on the part of English government and its legal establishment in the 19th century and centuries before that time. Political pressure in England kept reforms necessary to strengthen the system from occurring until relatively recently. In modern New Zealand, actions that many would conclude as rightfully the role of the Crown are performed by police labouring under this "ad hoc" 19th century arrangement. The New Zealand Crown solicitor system functions like a hybrid of the English DPP and independent bar, and the "DPP function" of Crown solicitors has remained relatively weak. This is not the case in other comparable jurisdictions referred to below. New Zealand should adopt the reforms set out below which have taken place in England and elsewhere, modifying them to suit the New Zealand model of prosecutions, and empower Crown solicitors with greater oversight at the early stages of a case.

C. Common Causes of Miscarriages of Justice

This paper does not focus on the causes of miscarriages of justice themselves, as this topic has been comprehensively examined elsewhere.[33] What is most significant to grasp about this area is that judicial opinion and scholarship in this subject recognises there are in fact relatively few causes of miscarriages of justice. The same mistakes appear to be repeatedly made and will continue to be made, unless changes are instigated.

General categories under which miscarriages of justice fall include:

1. "Tunnel vision", where suspects or lines of enquiry are ignored because they do not fit a pre-existing theory of the case, to the detriment of the overall investigation.[34]
2. Visual misidentification, as this kind of evidence is associated with a number of wrongful convictions.[35]
3. Inadequate disclosure (usually on the part of police) resulting in unfairness to an accused.[36]
4. Unreliable or distorted scientific evidence presented to juries by prosecutors.
5. Improper use of in-custody informants, who are referred to in "almost every review of miscarriages of justice".[37]

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33 See generally Thorp, above n 2, at 79–84; or Bruce MacFarlane "Causes of Wrongful Convictions, and How to Avoid Them" in "Convicting the Innocent: A Triple Failure of the Justice System" (2006) 31 Manitoba L J 403 at 435–483; and Federal/Provincial/Territorial Heads of Prosecution Committee Working Group (Canada) "Report on the Prevention of Miscarriages of Justice" (September 2004) Department of Justice Canada <www.justice.gc.ca>.

34 *R v Dougherty* [1996] 3 NZLR 257, (1996) 14 CRNZ 145 (CA) is an example of this phenomenon. *R v Sophonow* [1984] 2 SCR 524 (SCC) is a well known Canadian example. See also Grant Hammond "The New Miscarriages of Justice" (2006) 14 Wai L Rev 1 at 2.

35 Judges in New Zealand are required to warn juries of the "special need for caution" before convicting defendants based on identification evidence for this reason: Law Commission *Evidence. Volume 2: Evidence Code and Commentary* (NZLC R55, 1999) at [398]; and Evidence Act 2006, s 126.

36 The Criminal Disclosure Act 2008 sets out a new regime in New Zealand for disclosure in an attempt to reduce the possibility of this occurring.

6. "Noble cause corruption", where prosecutors or police decide the end justifies the means of securing a conviction and conduct themselves accordingly to secure a guilty verdict.[38]
7. Flawed or false confessions and flawed interrogations.
8. Improper conduct by prosecutors during a trial; playing upon the jury's sympathy or prejudice.[39]

D. The Current Regime and Proposed Changes

At the present time, Crown solicitors do not, as a rule, make the initial decisions about what charges should be laid in criminal cases; and they cannot discontinue proceedings except generally in open court, by either withdrawing charges or by not entering evidence.[40] In most cases, Crown prosecutors first become involved after there has been a committal for trial,[41] and must file an indictment within 42 days of that committal.[42] Trial commences at some point in time after that, depending upon court resources. In practical terms, it is likely Crown prosecutors preparing for trial will first set eyes upon a case scheduled for trial some months (and in some cases years) after the initial police investigation and the laying of the original charge or charges. At this point the trial may be only weeks away.

In certain cases, Crown prosecutors will provide advice to police at the investigatory stage, for example about the legality of a search or seizure, or whether the delay from the time an offence is alleged to have taken place to the date of investigation can be justified.[43] This is often as a result of the growing importance placed on human rights and bills of rights.[44] Nevertheless, comprehensive advice from Crown prosecutors to police officers about the investigation proper, during the investigation itself, remains the exception.

Crown prosecutors examine the case and will often communicate with the officer in charge of the police investigation requesting additional evidence. This additional evidence will be necessary to argue the case as it stands so that the counts (charges) in the indictment may be proved beyond a reasonable doubt. This process is made more difficult firstly because of the lapse of time between the initial investigation, and secondly because the trial date may be only a short time away. Moreover, this system tends to create new evidence, which must be disclosed to the defence shortly before trial. These significant defects have been understood for some time. The Law Commission's 1997 preliminary paper on the subject, *Criminal Prosecution*, identified the problem in the following way:[45]

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37 Thorp, above n 2, at 80. See generally the Honourable Fred Kaufman, CM QC "The Commission on Proceedings Involving Guy Paul Morin" (1998) Ontario Ministry of the Attorney General <www.attorneygeneral.jus.gov.on.ca>; and *R v Morin* [1992] 1 SCR 771 (SCC).

38 New Zealand's most famous example of this is the Arthur Allan Thomas case. See generally RL Taylor *Report of the Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe* (PD Hasselberg, Government Printer, Wellington, 1980).

39 *R v Stewart* [2009] 3 NZLR 425 (SC) is a recent example, which cites *R v Roulston* [1976] 2 NZLR 644 (CA).

40 Crimes Act 1961, s 347.

41 Summary Proceedings Act 1957, ss 145–185.

42 Crimes Act 1961, s 345A.

43 Collins, above n 24, at [45].

44 At [45].

45 Law Commission, above n 20, at 99.

> Crown solicitors often come into a case at too late a stage. This point was made by many Crown solicitors and by the Crown Law Office. The police and departments are free to consult the Crown solicitor at any time, but most indictable cases come to the Crown solicitor's knowledge only after a committal for trial. As a result they have no opportunity to influence the initiation of proceedings, the choice of summary or indictable procedures, the choice of charges ... [b]y the time Crown solicitors received the papers it is often difficult to bring a case to an end, or to alter its character radically (eg, by proceeding with a different charge or taking a summary, rather than an indictable path).

The criminal justice system is also flawed in that it lacks a mechanism to stop a police case that has proceeded against one particular suspect and to begin an investigation against a different suspect. Such an about turn in the investigation would be no small issue. High-profile cases are routinely accompanied by intense public pressure and media interest to have charges brought against a suspect.[46] Crown solicitors would need to resist this pressure and, if necessary, delay an investigation, possibly for months in the most extreme cases. This delay must be balanced against the consequences that can follow from a determination that there has been a miscarriage of justice.

1. *Police Prosecutions in New Zealand or Quis Custodiet Ipsos Custodes?*

New Zealand currently operates a police prosecutions arrangement that was put into place following the Law Commission's report in 2000.[47] Either police officers in the traditional sense, or a small number of lawyers employed by the police (both with nominal independence) appear on behalf of the police in court to prosecute cases at the summary level.[48] This includes matters that will enter the indictable jurisdiction. The Law Commission recommended the adoption of this system for reasons of "efficiency and economy".[49] This system fails to adequately address the fundamental issues of transparency, legitimacy and independence that are necessary in a modern criminal justice system. In contrast to the Police Prosecutions Office, Crown prosecutors are "institutionally, financially and culturally separate from and independent of [the police]".[50] Any prosecution by police officers (either "sworn" or "unsworn") cannot be truly objective, as police camaraderie and cohesion preclude this. Furthermore, a police prosecutions organisation can never be seen to be objective, as Professor Stenning notes:[51]

> There has been considerable discussion about Police Prosecutors in recent years, in which questions have been raised about both competency and possible conflicts of interest in the role. Suggestions have been made that no amount of "Chinese walls" between Police Prosecutors and their other police colleagues can be adequate to ensure the necessary impartiality and objectivity required to make good prosecutorial decisions, and that by reason of their lack of legal training, Police Prosecutors are anyway inadequately equipped for prosecutorial responsibilities. Those who make

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46 Recent cases of this kind in New Zealand include *R v Kahui* HC Auckland CRI-2007-092-14990, 20 October 2007.

47 Law Commission *Criminal Prosecution* (NZLC R66, 2000) at [109].

48 "Police prosecutors do not report through the District Command structure, but directly to the National Police Service Office through the District Coordinators and Regional Managers": Stenning, above n 14, at 108.

49 Law Commission *Criminal Prosecution* (1997), above n 20, at [19].

50 Lord Justice Auld "Review of the Criminal Courts of England and Wales" (September 2001) The National Archives <http://webarchive.nationalarchives.gov.uk> at ch 10, [40].

51 Stenning, above n 14, at 109.

> such arguments commonly point to jurisdictions such as Canada and more recently England where it has been concluded that police and prosecutorial roles are fundamentally incompatible and must be separated.

Crown solicitors need to act as a check and balance on police discretion in serious cases; echoing the sentiments of "astute and cerebral jurist"[52] Lord Justice Auld, who was tasked with reviewing the criminal courts of England and Wales along with the Crown Prosecution Service (CPS) in 2001.[53] In that report he concluded the CPS needed the power to determine the initial charge, taking control of cases in a more forthright manner as occurs with the "more highly regarded Procurator Fiscal" in Scotland (see II E below). This would allow the prosecution to take control of cases from the period charges were laid (or earlier) and "fix on the right charges from the start and keep to them".[54] Lord Justice Auld was critical of the way in which the CPS did not provide advice to the police from an early stage, noting that its role is "almost wholly reactive" and that "[t]he Service is normally only brought into the picture for advice and review when the charge has been preferred or the summons issued, *and the potential for damage created*" (emphasis added).[55]

In a recent speech, former Director of Public Prosecutions for England and Wales (head of the CPS) Sir Kenneth MacDonald QC commented on the "broader and deeper role in criminal justice" being given to prosecutors in England and Wales over the last two years.[56] In his speech Sir Kenneth remarked:[57]

> By the early 1980s a consensus had at last been reached ... that it wasn't appropriate for the police to both investigate and prosecute crime. There needed to be separation. It began to be understood that the responsibility of the police for both – for investigation, and in effect decisions to prosecute had resulted in a series of miscarriages of justice.

In the same speech, Sir Kenneth noted the "extremely hostile" stance police in England and Wales took to the new arrangement, noting "[t]hey didn't want to lose power. They certainly didn't want to be supervised".[58]

A politically contentious issue remains as to what extent police should retain control of these charging decisions in England and Wales. In mid-2010 the British Conservative Party was able to form a coalition government following national elections.[59] The Conservative Party campaigned on a platform of austerity following the global recession, and newly appointed Home Secretary Teresa May announced in June 2010 that police would be permitted to charge in a greater number of investigations than had been the case.[60] However, beneath any political rhetoric is a

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52 MacDonald, above n 32, at approximately 12:54 minutes.

53 Auld, above n 50.

54 At ch 10, [12].

55 At ch 10, [37]–[38].

56 MacDonald, above n 32, at approximately 4:00 minutes.

57 At approximately 6:00 minutes.

58 At approximately 8:00 minutes.

59 United Kingdom Electoral Commission – UK General Election 2010 <http://www.electoralcommission.org.uk>; and see "Election 2010" (12 August 2010) BBC <http://news.bbc.co.uk>.

60 Keir Starmer QC "Director's letter to the Attorney General" in *Crown Prosecutor Service Annual Report 2009–2010* <www.cps.gov.uk>.

message that "statutory charging"[61] in serious cases is now a permanent feature of the criminal justice system in England and Wales. The United Kingdom House of Commons Justice Committee had earlier noted that the CPS should take a "bold and robust approach" to their role with police, challenging the police "to do better" and noting "the CPS is not a minor partner in the criminal justice system".[62] The Committee heard "strong support on grounds of principle for the charging decision to rest with the prosecutor".[63] This new era of "statutory charging" in England and Wales echoed certain Australian and Canadian reforms already in place (see II E below).

These reforms, and those elsewhere in the Commonwealth, do not coincide with the recommendation in the New Zealand Law Commission's 2000 report on the subject,[64] which stated that the Commission did not recommend that Crown solicitors take the initial charging decision. The Law Commission made its recommendations for the following reasons:

1. Efficiency and practicality and the need for immediate arrest and charge in certain cases.
2. That in accordance with the submission of the Crown Law Office, police and Crown solicitors should be distanced from initial decisions in order to maintain the necessary level of independence. In its report, the Law Commission recommended "prosecution should be separated from investigation" on the basis that separation of these two functions provides checks and balances to protect individuals.[65] The Commission noted:[66]

> A separate evaluation of a case by someone who is independent, and seen to be independent, of the investigation process:
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> –helps to ensure the prosecution decision is not prompted by bias or prejudice;
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> –lessens the chance of corruption or improper motives; and
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> –brings greater independent judgment to bear.

3. That Crown solicitors do occasionally suggest appropriate charges when requested by police.
4. That development of charging standards for police and prosecuting agencies will assist in obtaining quality and consistency in the original investigative decision to charge.[67]

With respect to the Law Commission, none of these recommendations are sustainable. The reasons this paper disagrees with the Commission's recommendation are outlined below:

1. The term "efficiency" in this context is a reference to the additional cost of employing lawyers for longer periods of time throughout the life of a case to scrutinise the charges laid. Notwithstanding this, "professionalisation" of charging decisions adds to the robustness of the criminal justice system. This is an important part of government, and additional costs may well be appropriate if it significantly enhances the quality of the system. Moreover,

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61 See generally the Criminal Justice Act 2003 (UK), pt 4.

62 "United Kingdom House of Commons Justice Committee: The Crown Prosecution Service: Gatekeeper of the Criminal Justice System: Government Response to the Committee's Ninth Report of Session 2008-09, Second Special Report of Session 2009-10" (12 January 2010) <www.publications.parliament.uk> at 6.

63 At 7.

64 Law Commission *Criminal Prosecution* (2000), above n 47, at 38.

65 See generally Law Commission *Criminal Prosecution* (1997), above n 20.

66 Law Commission *Criminal Prosecution* (2000), above n 47, at [4].

67 At 38.

professionalisation of charging decisions will result in greater efficiencies both directly and indirectly. Indirectly, as the number of miscarriages of justice should reduce as higher quality decisions with greater objectivity are made at an earlier stage of prosecutions. Direct cost savings will be made across the justice system because of the reduced likelihood of improper charging (either overcharging or undercharging).[68]

Following the introduction of "statutory charging" throughout England and Wales, there has been an increase in guilty pleas by 30 per cent, a reduction in the rate of discontinuance by the early identification of "non-viable" cases by 69 per cent, and a reduction in the rate of attrition by 23 per cent (the difference between the numbers charged and the numbers convicted).[69] These statistics are either remarkable or the result of prosecutors "cherry-picking" cases that are likely to result in conviction, depending on the point of view adopted. The truth may lie somewhere in-between. Care should certainly be taken with these figures, as research in this area from Harvard University suggests these numbers can be misleading; a prosecutor's high conviction rate may not be as a result of "being tough on crime" or doing their job well, but rather the result of "taking easy cases and letting too many criminals go without prosecuting them".[70]

If "statutory charging" is only partially successful in New Zealand, however, there is likely to be not only a significant reduction in the number of criminal cases, but a reduction in the average length of time cases are within the system, along with a corresponding reduction in costs. This reduction in costs will, of course, be offset by any additional time prosecutors spend analysing cases.

The CPS now operates a "24/7" service as part of its "Modernising and Charging Programme"[71] to give police officers in the United Kingdom the ability to obtain instructions as to the appropriate charge or charges to lay at any time. This service overcomes the practicality issue raised by the Law Commission where charges must be laid immediately, perhaps after the apprehension of a fleeing suspect. To overcome this issue, if the reforms proposed in this paper are put into place, the Crown Solicitor or a senior Crown prosecutor should be on call at all times for all districts to provide advice as to the correct charges to lay in homicide cases (see II F below). Providing advice to police whenever it is needed for homicide cases is largely in keeping with current practice. As further crimes are added to the schedule of crimes requiring prosecutorial consent, more comprehensive systems could be implemented.

Moreover, laying a holding charge until a Crown prosecutor can be located (assault for example in the case of an alleged murder) would be a suitable alternative, on those rare

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68 At 99.

69 Yvonne Moreno and Paul Hughes *Effective Prosecution: Working in Partnership with the CPS* (Oxford University Press, Oxford, 2008) at 31.

70 J Mark Ramseyer, Eric Rasmusen and Manu Raghav "Convictions Versus Conviction Rates: The Prosecutor's Choice" (Harvard Law School: Discussion Paper 611, Cambridge, MA, 2008) at 27.

71 United Kingdom House of Commons Justice Committee, above n 62, at 4.

occasions when it was necessary.[72] This is unlikely to infringe on an accused's rights under the New Zealand Bill of Rights Act,[73] as the charges that will likely follow are of such greater seriousness.

2. With respect to both the Law Commission and the Crown Law Office, the greater threat to the system is from a lack of objectivity on the part of the police and an inability for Crown prosecutors to adequately supervise the investigation, rather than the possibility that Crown solicitors' independence will be compromised. Crucially, policy-makers need to realise that the all-important framework of a case is largely set by the initial charging decisions and investigation, *irrespective of whether the Crown may later change them.* It is far more important for the system to have a check and balance on police discretion early in the development of serious cases as the experience in England, Wales, Canada and Australia shows (see II E below). The system must be able to rely on the professional accountability of Crown solicitors to maintain an adequate level of independence from the police.
3. The fact that Crown solicitors provide advice from time to time to police officers in certain cases is all the more reason to expand this part of their role, and a formalised process would provide greater transparency and accountability. If this reform were undertaken, criminal cases would have a record of the decisions made at the earliest stages of a case and guidelines could be developed to assist Crown prosecutors in advising the police. As the English experience shows, greater participation at this stage of an inquiry improves the quality of the evidence presented to the court at trial.
4. While the development of charging standards no doubt assists in improving the quality of decision-making, the task of laying charges in serious cases is one far better suited to Crown prosecutors.

2. The Crown Solicitor System Compared to the Crown Prosecution Service

Despite the reforms proposed, at the present time the system of Crown solicitors employed throughout New Zealand is preferable to the adoption of a Crown Prosecution Service model in use elsewhere in the world.[74] It goes beyond the scope of this paper to provide a comprehensive analysis of the benefits and drawbacks of the two systems, or to analyse whether the two systems might be able to co-exist. However, it is worth noting that the Crown solicitor system in New Zealand provides a number of advantages over a CPS model. These include decision-making with an arguably lower degree of political interference than in other jurisdictions,[75] an ability to attract and retain highly skilled advocates at all levels of practice, and a lesser degree of

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72 Hon Robert McClelland MP "Prosecution Policy of the Commonwealth" (November 2008) Commonwealth Director of Public Prosecutions <www.cdpp.gov.au> at [1.3]: the Australian Director of Public Prosecutions requires that prosecutors make a decision whether the prosecution is to continue in cases commenced by arrest and charge; or Auld, above n 50, at 45: "The Crown Prosecution Service should determine the charge in all but minor, routine offences or where, because of the circumstances, there is a need for a holding charge before seeking the advice of the Service."

73 New Zealand Bill of Rights Act 1990, ss 23 and 24.

74 The Law Commission in 2002 again questioned whether the current arrangements were satisfactory and "whether a stand alone, independent Crown prosecution service is required": Law Commission *Seeking Solutions: Options for Change to the New Zealand Court System* (NZLC PP52, 2002) at 105.

75 Collins, above n 24, at [31]. The level of independence may be contrasted against the systems in place in England, Australia, Canada and the United States of America in Bruce A MacFarlane QC "Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency" (December 2000) <www.canadiancriminallaw.com> at 12.

bureaucracy. Bureaucracy in prosecution work can manifest itself in various ways, from greater administration costs[76] to implementation of concepts such as "key performance indicators", which compel prosecutors to reach certain conviction targets for example, to the detriment of overall justice.

A succinct means of contrasting the two systems can be seen from the following. The United Kingdom House of Commons Justice Committee in 2010, concerning the Crown Prosecutions Service in England and Wales, recently commented:[77]

> We do not dismiss the anecdotal concerns raised from a number of quarters about the quality of CPS advocates and the systems for their deployment, such as allegations that complex cases are dumped on self-employed barristers at short notice, but regard this as evidence of a need for better case management by the CPS, rather than providing a general argument against CPS advocacy …

This may be contrasted with the New Zealand position, as described by Dame Margaret Bazley, in her report on the legal aid system in New Zealand. Dame Margaret notes the benefit of junior lawyers working together with senior lawyers on cases, performing ever more complex tasks in the trial and noting: "The Crown Solicitors still follow this kind of process, and it seems to result in a steady and sustained flow of high-quality lawyers being available to the Crown."[78]

Nevertheless, the New Zealand system does not adequately utilise the ability of Crown prosecutors to help prevent miscarriages of justice. Unlike with the CPS employed in New South Wales or England for example, New Zealand's Crown solicitors' offices employ numerous lawyers with the highest level of experience and ability. Delegating charging decisions to Crown solicitors combines the best of both systems, namely the oversight provided by a modern CPS and the ability to draw upon very experienced advocates to determine what evidence is necessary and how the case will unfold at trial.

E. Prosecutorial Functions in Various Jurisdictions

The relationship between prosecutors and police in comparable jurisdictions to New Zealand varies. While this paper primarily concentrates on the developments in England and Wales (as the most dynamic changes are occurring in that jurisdiction), it is appropriate to briefly examine the systems in other countries:

1. Scotland

Before analysing the criminal justice system in Scotland, we must recognise that it differs from the common law in significant ways and any comparison with it must be tempered accordingly. For example, concepts such as corroboration play an important part of Scottish law, much more so than they do in New Zealand.[79] Nevertheless, in Scotland the police carry out the preliminary investigation and submit a report to the local "Procurator Fiscal".[80] The Procurator Fiscal

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76 Collins, above n 24, at [30].

77 United Kingdom House of Commons Justice Committee, above n 62, at 11.

78 Margaret Bazley *Transforming the Legal Aid System: Final Report and Recommendations* (November 2009) Ministry of Justice <www.justice.govt.nz> at [305] and [306].

79 Thorp, above n 2, at 97.

80 David Walker *The Scottish Legal System: An Introduction to the Study of Scots Law* (8th ed, W Green/Sweet & Maxwell, Edinburgh, 2001) at 385.

considers this report and decides whether any action should be taken, and if so to what extent.[81] The Procurator Fiscal, along with the Crown Office in Scotland (jointly known as the COPFS) work closely with Scottish police. Specifically, the Procurator Fiscal can give directions and instructions to the police in connection with their investigation, especially where the case is serious.[82] Arguments for the adoption of aspects of the Scottish system have been made in New Zealand before.[83]

The Scottish system has a number of advantages over the system employed in New Zealand. First, the police concentrate on their core investigative role, rather than on the appropriate charge or charges to lay. Secondly, the evidence suggests miscarriages of justice occurring as a result of alleged police or prosecutorial conduct (including non-discovery) occur approximately 13 per cent less in Scottish cases as compared to those occurring in New Zealand, and approximately 30 per cent less than in England.[84]

2. Australia

At the Australian federal level, the enactment of the Director of Public Prosecutions Act 1983 (Cth)[85] established the Office of the Director of Public Prosecutions for the Commonwealth of Australia. The Director is to make prosecution decisions independently of those who were responsible for the investigation, separating the investigative and prosecutorial functions within the justice system.[86] The Australian Federal Police (or other government agency) may lay charges if the situation requires it, but ordinarily the Director of Public Prosecutions lays charges after being provided with a brief of evidence by the investigative agency in question. Investigators may be questioned by prosecutors, with prosecutors having discretion whether any charges should be laid. This system is particularly appropriate in the New Zealand context and should be considered by New Zealand policy-makers.

3. Canada

Prosecutors in Canada are not usually responsible for the initial decision to lay charges. However there are a number of exceptions to this rule and certain offences at the federal level require the consent of a provincial attorney-general to be put before the Court. Moreover, British Columbia, Quebec and New Brunswick require all charges be screened by prosecutors before they are laid in Court.[87] In British Columbia, for example, police must submit a written report to Crown counsel called an "RCC", which includes evidence and any recommended charges for the Crown to consider.[88] Most Canadian jurisdictions employ legally qualified Crown Attorneys, who are independent of the police, rather than employ police as prosecutors.[89]

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81 "How does the prosecution system work?" Crown Office and Procurator Fiscal Service <www.copfs.gov.uk>.

82 "Relationship with the Police" Crown Office and Procurator Fiscal Service <www.copfs.gov.uk>.

83 Thorp, above n 2, at 96.

84 At 97.

85 Commonwealth Consolidated Acts <www.austlii.edu.au>.

86 "Prosecution Policy of the Commonwealth", above n 72, at [1.3] and [3.2]–[3.7]; and see Director of Public Prosecutions Act 1983 (Cth), s 9.

87 Robert Frater *Prosecutorial Misconduct* (Canada Law Book, Aurora Ontario, 2009) at 18. The process in British Columbia, Quebec and New Brunswick is discussed in *R v Regan* [2002] 1 SCR 297 (SCC).

88 "BC's Prosecution Service: Frequently Asked Questions" (2 April 2009) British Columbia: Ministry of Justice <www.ag.gov.bc.ca>.

89 Stenning, above n 14, at 109.

4. The United States of America

Comparisons between the role of prosecutors in New Zealand and those in the United States of America are problematic because of the large number of jurisdictions within the United States. These jurisdictions can differ considerably from one another. However, in broad terms, prosecutors work closely with investigators prior to charge in many situations at the county,[90] state[91] and federal[92] jurisdictions, and are frequently responsible for laying charges either before a trial court or before a grand jury. The American Bar Association publishes standards for criminal justice, setting out the functions of the prosecution. Those standards state that a prosecutor "ordinarily relies on police or other investigative agencies" for investigation work, but that prosecutors have "an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies".[93] At the federal level, United States Attorneys are "authorized to request the appropriate federal investigative agency to investigate alleged or suspected violations of federal law".[94]

We may conclude, therefore, that many jurisdictions within the United States employ a system of greater cooperation between prosecutors and investigators than currently occurs in New Zealand between Crown solicitors' offices and the police.

F. Crown Solicitors to Determine Charges and Direct Prosecutions in Serious Cases

Enabling legislation should be enacted to permit only Crown solicitors the ability to lay certain charges. These would be set out in a schedule, and at first would include only homicide.[95] In time, other crimes could be added to the schedule in the incremental fashion that characterises New Zealand's prosecutorial history. The counts (charges) laid by the Crown would appear in an indictment filed by the Crown, presented to the accused shortly after arrest, and subsequently to the Court.

Homicides in New Zealand often involve a degree of consultation between police officers and Crown prosecutors. Purists may argue that this practice is improper as it does not separate Crown prosecutors' roles as advocates in court from police officers' roles as investigators. The opposite is in fact correct; the police should be kept out of charging in serious cases, focusing on their core

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90 Examples of websites for District (sometimes referred to as County) Attorneys' offices at the county level explaining their role with investigators include: New York County District Attorney Office <http://manhattanda.org/investigation-division>; and City and County of San Francisco: District Attorney <http://da.lacounty.gov/bofi.htm>.

91 For the relationship between the California Attorney General and law enforcement, see generally "Services and Information" State of California Department of Justice: Office of the Attorney General <www.ag.ca.gov/cbi>.

92 Examples of websites for United States Attorneys' offices at the federal level explaining their role with investigators include: "Law Enforcement Coordinating Committee" The United States Attorney's Office: District of Massachusetts <www.justice.gov>; and "Criminal Division" The United States Attorney's Office: Central District of California <http://www.justice.gov>.

93 "ABA Standards for Criminal Justice: The Prosecution Function" (1992) ABA House of Delegates <http://npac.state.nv.us> at Part III, 3–3.1.

94 "United States Attorneys' Manual" (July 2011) Offices of the United States Attorneys <www.justice.gov> at 9-2.010.

95 Approximately 50–70 murders occur each year in New Zealand, meaning whatever additional resources are deployed of the kind proposed in this paper in any resulting criminal case will be insignificant to the costs incurred by the system overall. See "Fiscal Year Crime Statistics" (1 October 2010) New Zealand Police <www.police.govt.nz>.

role of investigation and collection of evidence. Furthermore, police will know their actions will be subject to scrutiny at an early stage, when they must submit their case to a Crown prosecutor for analysis. Should problems with the investigation arise, they can be remedied more easily as the investigation is still relatively new, and while fresh lines of enquiry are most likely to yield additional useful evidence.

1. Powers

Crown solicitors would be given the complete police file and a summary prepared by the officer in charge of the police case, detailing the identity of the person or persons the police propose to charge and the reason why it is appropriate to charge these persons and no others, in a broadly similar way to the system in place at the federal level in Australia. One alternative possibility would be to have an Independent Police Conduct Authority member participate in the hearing, providing a high level of practical experience in the decision-making process. This would incur greater expense, but would be a more robust system, similar to the Scottish system (and certain systems employed in the United States of America) referred to above. A hearing would be held at the offices of the appropriate Crown Solicitor. The Crown Solicitor (or a senior Crown prosecutor) would have the power to question the officer in charge and, in rare circumstances, any other appropriate person. Following the hearing, the Crown prosecutor could direct that certain evidence be obtained, and in the most extreme cases direct that another suspect be investigated, or that the investigation should end. Subsequent meetings could take place, if necessary. Police officers presenting the case to the Crown in one-off meetings at the early stages of an investigation provides some level of practical separation between police and prosecutor, helping to prevent prosecutors from becoming police "team members". As the case progressed, contact between the Crown and police would increase as it does at present.

The enabling legislation required to implement this oversight would list a number of factors relevant in making these decisions about police investigations, or, alternatively, the Solicitor-General could list factors to be taken into account in either the Solicitor-General's Prosecution Guidelines or in a new document. In either situation, reasons for the decision to stop the prosecution, gather further evidence or to investigate another suspect would need to be recorded in writing and incorporated into the case file.

2. Funding

Funding for this work would be provided to Crown solicitors through the Crown Law Office, to help maintain independence from the police. Crown prosecutors are routinely asked to assist with homicide investigations; and unlike with other crimes, preparation for cases based on indictments for murder are based on "the time actually spent" in preparation for trial, rather than a proscribed maximum numbers of hours.[96] These reforms would formalise the status quo to a certain extent.

3. Authority

The Crown Solicitor would be answerable to the Solicitor-General for charging decisions, and the Solicitor-General would have the power to override the decision made by the Crown Solicitor in question. The police would be able to require reasons from the Solicitor-General as to why the Solicitor-General upheld the decision of the particular Crown Solicitor. Judicial review of the decision to prosecute would be prohibited by legislation. This is an important means of

96 Crown Solicitors Regulations 1994, reg 20(2)(b).

preventing undue delays within the system, as the proper place to challenge the Crown case is at trial.

4. Legislation

The enabling legislation necessary to give Crown solicitors these powers should be similar in many ways to the Independent Police Conduct Authority Act[97] (IPCA Act). Crown solicitors would have the power to require any person who was able to give information relating to the investigation to appear before them, although this power should be used sparingly.[98]

Section 33 of the IPCA Act holds that Police Complaints Authority proceedings are privileged. This appears to be because of the extra-judicial nature of the Police Complaints Authority's work. Crown solicitors, by contrast, would be making determinations about an ongoing investigation. As such it is appropriate that their conclusions could be later raised in court, perhaps at the subsequent trial. An appropriate safeguard, however, would be for the legislation to make clear that *the fact an issue was raised* by a Crown solicitor (or Crown prosecutor or Police Complaints Authority member) would be privileged, and that regardless of which documents were disclosed, this privilege could only be waived expressly and in writing.

Defence counsel would therefore be able to cross-examine witnesses on whether certain lines of enquiry were followed or not, but would not be able to unduly bolster that cross-examination by referring to the identity of the person making these directions to police. To allow this would have the potential to unduly influence the jury by asking them to attach more weight to certain evidence than they should. For example, simply because the Crown Solicitor required certain evidence to be obtained, and it was not (for whatever reason), is not a material fact in a trial.

III. CONCLUSION

Miscarriages of justice resulting in wrongful convictions represent a conflagration of failures for the criminal justice system. The most insidious of these cases result in an innocent party imprisoned, a guilty party remaining free and the credibility of the system itself impugned in the public mind. A century of media reporting means many New Zealanders regard these cases as representative of the entire justice system. A criminal justice system which acknowledges its shortcomings is more robust and better able to retain the confidence of the public.

An examination into the history of charging practices in England, Wales and New Zealand reveals that the system of prosecutions now in existence in New Zealand was not the result of careful planning, and remains rooted in its origins from centuries past. One of the legacies of this history is that members of the police continue to appear in New Zealand courts. This arrangement cannot provide New Zealanders with a modern, transparent and accountable criminal justice system, and prosecutorial reform is necessary for cases of serious crime.

This paper proposes permitting only Crown solicitors to lay charges in most serious cases, with legislation enacted to establish this power. The legislation would refer to a schedule of offences that may only be laid by a Crown solicitor. The first offence within the schedule would be homicide, and further crimes could be added to this list from time to time. This arrangement would stand in contrast to the present regime where the police lay charges for all crimes and a Crown solicitor may either continue with the same charges, lay different charges or, in rare

97 Independent Police Conduct Authority Act 1988 (IPCA Act).

98 IPCA Act, s 24.

instances, may decide not to prosecute. "Professionalisation" of charging is very important because the original charging decisions frame the prosecution, regardless of whether the Crown may alter the charges at a later time.

Other comparable jurisdictions around the world have criminal justice systems that operate in this way. In England and Wales, "statutory charging" has been put in place as a means of limiting the possibility of miscarriages of justice by requiring Crown Prosecution Service lawyers to lay charges in most cases. Both Australia and to a lesser extent Canada at the federal level have guidelines in place to ensure that prosecutors are able to review investigations at an earlier stage than in New Zealand, and prosecutors are often expected to lay the original charges. The New Zealand Law Commission examined this model of prosecutions in two reports and concluded that police in New Zealand should retain the ability to lay the original charges. This was because Crown solicitors had the ability to relay charges in the indictable jurisdiction, and for reasons of practicality and efficiency. These arguments are flawed, and the recent debate in England is confirmation that the New Zealand system is in need of reform.

The practical means by which this reform should be carried out involves weighing up various principles. The level of contact between investigator and prosecutor is a vexed one. The method best able to prevent miscarriages of justice, while at the same time avoiding undue costs, is similar to the way in which federal Australian investigators and prosecutors work together. As noted above, investigators there prepare a brief of the evidence collected and may be questioned by prosecutors, who have discretion whether any charges should be laid. This system results in contact between investigator and prosecutor, but sufficient separation to allow independence from one another.

New Zealand's criminal justice system was brought about by a system of "incrementalism", as this paper demonstrates. Adding to the system in the ways described above furthers this approach and provides the robustness, openness and transparency required of a system for the new century.