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Australian Institute
of Criminology

Pre-Trial Diversion for Adult Offenders

Edited by Ron Snashall

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INTRODUCTION

The Australian Institute of Criminology has had an active interest in the concept of diversion and its initiation into the Australian criminal justice system for at least eight years. In 1978 the Assistant Director (Training) Mr Col Bevan, presented a report to the working party of Correctional Service administrators responsible for prisons and community based corrections on the 'Range of Community based Correctional Programs that might be developed in Australia' In reviewing some of the existing U.S. programs Mr Bevan urged the Ministers and Administrators to learn to think without using conventional patterns. He believed that each new penal measure would fit some segment of the offending population and that the authorities should attempt, wherever possible, to avoid the stigma of conviction.

In June 1979, the responsible Ministers requested the Australian Institute of Criminology to advise on the desirability or otherwise of introducing similar schemes, (to those in existence in the U.S.A.) into Australia. Mr Bevan completed this report in time for the 1980 Ministers' meeting and provided additional support for his arguments from overseas sources.

It was envisaged that firstly, a meeting of chief crown prosecutors and secondly a conference of crown law officers and probation and parole administrators would examine the legal complications of such a scheme and the feasibility of introducing it into Australia. The meetings were held in May and June 1980 and some of the impetus for change was lost with the natural aversion of lawyers to intervening in peoples lives without formal findings of guilt. There was a further delay and a recommendation to draw up a research proposal was passed at the Ministers meeting in Auckland in May 1981. As Mr Bevan points out, in his paper in these proceedings, this research proposal was soundly defeated by Ministers at their Darwin meeting in 1982, largely due to perceived staff shortages.

For some three years little has been done in a formal sense. This current seminar is in many ways the last ditch attempt of Mr Col Bevan, before he retires, to once again air the issue and press for the inauguration of, at the least, a pilot scheme somewhere in Australia.

The conference on Pre-Trial Diversion for Adult Offenders was held at the Australian Institute of Criminology from 20-22 August 1985. Fifty-six participants from all states and territories in Australia and from New Zealand represented Community Welfare Departments, Law Reform Commissions, the Judiciary, Probation and Parole Services, Justice and Attorney-General Departments,

Departments of Correction, Academics, Medical Practitioners, Health Departments, Public Prosecutors and Police Departments.

Diversion is commonly defined as any deviation from the ordinary criminal justice process before an actual prosecution which suspends the case without the court making a judgement, and which makes the offender participate in some type of non-penal program. Support for the principle of diversion is fairly general among those who have both an interest in the criminal justice system and a concern that the system should more adequately fill its role in society.

These are many forms of diversion: some pre-trial and some post-trial. Examples of pre-trial are the unofficial warning and 'sifting' of offences and offenders that is the standard part of day-to-day police operations (the warning by the duty constable, the caution and 'let off this time!' type of warning), to the formal, legislatively based pre-trial diversion schemes that operate in many states of the USA (California, New Jersey, New York, Florida), Japan, Holland, France, West Germany, Poland and Yugoslavia. Examples of post-trial diversion include placing young offenders into the care of child-welfare departments, day attendance centres, weekend detention (prison from Friday evening until Monday morning) and parole.

What is different about the pre-trial diversion concept is that it aims to bring offenders into a new part of the formal, legislatively based legal system and deal with them <u>other</u> than by charging, conviction and then imposing a prison sentence. Of necessity the offenders must initially admit the facts (without prejudice to a later change of plea) and be prepared to enter into the diversion program. The programs are often:

1. A community service order type in which the offender performs works over a set number of hours on worthwhile projects.

2. A reparation type of program in which the offender compensates the victim to an agreed upon amount.

3. A counselling or educational program in which the offender is offered and is expected to accept professional help aimed to reduce their substance abuse/amend their behaviour.

<u>Advantages</u>

<u>To The Community</u>

1. The offender is kept out of prison, thus saving taxpayers' money and avoiding the destructive influence that prison has on most people.

2. The offender is seen to be punished in a useful way by most of the pubic when they can see community service orders being performed, money being repaid and re-education and rehabilitation taking effect.

3. The court/police/legal system is saved time and money by not having to accommodate as many cases.

4. Public confidence in the judicial system is increased as most people realise that diversion is an innovation that works. The fears that thousands of criminals will be let loose on the streets are only the concern of a fringe group of the community and successful diversion programs have demonstrated that such fears are ungrounded.

For The Offender

1. They do not go to prison and if they successfully complete the program they avoid a conviction.

2. The concept could reduce their alienation from the community and, in fact, it could facilitate their re-integration back into their local community.

The most successful overseas schemes are conducted through the office of the Public Prosecution, who makes the decision whether or not to divert. The actual day-to-day running of the programs are often done by the Probation Service, with strong links to the non-government welfare section.

It was the clear hope of the Australian Institute of Criminology that the Conference would not just result in a vigorous exchange of ideas from all those in the criminal justice field with an interest in the topic. This ground had already been covered. It was anticipated that sufficient impetus could be given to start the process of inaugurating a pilot scheme - most likely in the ACT. The events of the three day Conference and the meetings that took place in the following months between the Director of Public Prosecutions and the various government departments give cautious hope that the concept so long fostered by Mr Col Bevan will be brought into reality.

OPENING ADDRESS

Terence Syddall,
Stipendiary Magistrate,
Perth, W.A.

Pre-trial diversion has not yet received the support it deserves from Australian legislators who seem to be more afraid of the possible electoral contempt which might result from its introduction rather than of any benefit which will accrue to society as a whole by making available to those responsible for the administration of the criminal justice system another useful tool. What inroads have been made in this field have been due mainly to the persistence of Colin Bevan (1978) through the Australian Institute of Criminology, and it would be fitting if the deliberations at this seminar were to be instrumental in overcoming this political timidity and thereby bring about the desired legislative changes. Colin has expressed very well what is generally understood by the term 'pre-trial diversion'.

> ...put simply, the kind of diversion system envisaged for Australia is one in which it would be practicable for a crown or police prosecutor to suspend prosecution, before trial but after charge, in order to consult with some other agency in the community (be it community based or statutory), and undertake an arranged program of counselling, instruction, acquisition of skill, or the payment of restitution or compensation to the victim, to make a final decision about prosecution upon the successful completion of the contract. Failure to complete the 'diversion' arrangement would result in prosecution on the original charge. (Bevan, 1980, p.4).

Pre-trial diversion, in one form or another, has been operating in many countries for quite some time. In the case of Japan for many centuries and, in the case of Holland, Denmark, Sweden, Scotland and many of the American states, for periods substantial enough to assess the beneficial results which have accrued from the adoption of pre-trial diversion schemes.

It is not suggested that Australia should slavishly follow other countries in this or any other regard but neither would their practice be ignored particularly when they have proved to be effective in the reformation of offenders. Pre-trial diversion programs were implemented in some of the American states following the recommendations of the U.S. President's Commission

on Law Enforcement and the Administration of Justice, February 1967. Having waded through that report and much of the evidence received by the Commission, many of the reasons which motivated the Commission to recommend diversion programs have application here in this country. Generally speaking, Australia and the United States share the same sort of social problems, have comparable living standards, have similar political ideals and similar constitutions, and have laws which are derived from the common law of England. It is therefore interesting to look at what has been achieved within the United States of America, and examine the many articles on the subject published in the journals of the American Law Schools and in particular an article titled 'An Analysis of States Pre-trial Diversion Statutes' by Peter Sablotsky (1979, p.1).

There is a bias which distorts today's thinking: an unbridled, exaggerated individualism and an unrealistic acceptance of competitiveness as central to human nature. This, combined with the present excesses of capitalism, has done much to make criminals of many of the socially inadequates of society. Many benefits have accrued by the application of the free enterprise system, but the cost in terms of human suffering has also been considerable. There are offences committed by persons who are either unable to cope with the stresses of modern life or whose welfare is ignored or sacrificed for the benefit of those who stand to benefit from a system which their less fortunate sisters and brothers cannot handle.

DRUG OFFENCES

The indiscriminate and irresponsible prescription of drugs by some members of the medical profession has helped to create this great 'stoned-age'. A large proportion of the population has come to accept that drugs, legal or illegal, ought to be used hedonistically and not simply for medicinal purposes. There is scarcely a school in this country that does not have its teenage dope users and the number of people addicted to hard drugs grows daily.

Drug companies make huge profits from the sale of such drugs as valium, serapax, and mogadon and use unscrupulous marketing methods to push their products. Whenever possible, offenders charged with offences which are clearly out-of-character are asked whether they are taking drugs of any kind. The vast majority of young housewives and middle-aged women admit to having used valium, serapax, or mogadon for long periods, and not just small doses but ever-increasing amounts until they have lost control of themselves. These people are not criminals and should not be treated as such.

ALCOHOL OFFENCES

Huge profits are made from the sale of alcohol and yet these pedlers of misery are allowed to maintain their image of respectability through clever marketing and public relations propaganda. The connection is well established between alcohol abuse and road deaths, industrial accidents, domestic and other violence, criminal and anti-social activities, to say nothing of disease, and yet we support the easing of restrictions on its sale and use. The criminal law is relied upon to deter and punish the excessive use of alcohol knowing that the consequences of drunken comportment are usually not intended. Prohibition is not sought but a responsible attitude is expected both from the liquor industry and from governments. Courts cannot be expected to provide just solutions to problems which are largely preventable through the exercise of restraint by the alcohol industry and by government control.

OFFENCES BY ABORIGINALS

If there is one group of Australians which can claim to be the victim of the excesses of capitalism it is surely the Aboriginals. They have been dispossessed of their traditional home and hunting lands for pastoral farming and mining purposes. Modern society has taught them to prize individual rights above all else and in so doing, eroded the Aboriginal law which places greater emphasis on obligation than personal rights. The dilemma which contronts Aboriginals and those who have to administer the law - police, courts, and welfare workers - is a dilemma engendered by successive generations of business interests backed by successive generations of governments content to do nothing to remedy an impossible situation for either the Aboriginals or those who administer the law, and content, also, to be righteously indignant with one or the other section whenever inevitable conflict results in casualties. On the one hand, there are law enforcement authorities charged with a duty to enforce a single system of inflexible rules on two differing cultures, without a concomitant discretionary power to mitigate that law's application whenever justice or equity so demands. On the other hand, there are a people who can feel no respect for a law which they cannot understand, had no voice in making, no prospect of administering, and no choice of obeying their own ancient laws where conflict with the wider law exists. May of these problems would disappear if a system of pre-trial diversion were to be introduced. Counselling would create greater understanding between cultures and many of the difficulties involved in legislative recognition of Aboriginal customary law would dissolve thus allowing justice to be achieved without any threat being posed to the wider Australian law.

SHOPLIFTING OFFENCES

Thefts from supermarkets and self-service stores occupy a great deal of the time of courts. Many of the offenders are elderly, and a disproportionately large number of middle-aged women are represented almost all of whom are first offenders. Through the media, retail traders frequently call for increased penalties to act as deterrent to shop-lifters. Yet these same people continue to spend huge sums persuading people to patronise their establishments and engage psychologists to advise them on packaging and other selling techniques in order to render their goods irresistable to patrons. They know that if goods are picked up by a customer they are as good as sold and they know also that impulse shopping is much more profitable in every way than the old fashioned counter system.

If supermarkets and the like are to be permitted to continue using this method of retailing goods then it must be done with responsibility in the knowledge that their stores are open to children, weak-willed, and hungry people as well as to thieves, and it is unjust to lump all who take without paying into one criminal category.

DOMESTIC ASSAULTS

While domestic violence is no less serious than violence in other settings, there is reason to believe that criminal courts are not properly equipped to deal with many of these matters. Marriage guidance, alcohol and drug counsellors, together with the expertise available from women's refuges, may be better able to cope with domestic problems than the criminal justice system. Moreover, they are, because of their expertise and flexibility, more efficaceous than any court could hope to be in dealing with family difficulties.

The main argument for the adoption of pre-trial diversion rests upon a belief that many people are unjustly brought before the courts and the majority of these are the social inadequates: the victims of the excesses of commercial free enterprise and unbridled exaggerated individualism. Criminal law cannot continue to be relied upon as a means of dealing with social problems, because it is wasteful, ineffective, and brings the law into disrepute.

One of the reasons pre-trial diversion has become a necessity is the failure of the legal profession - lawyers and judicial officers - to provide a service which the community has a right to expect. Many of them are more concerned with nice points of law and its mechanical application than with the social problems which face the offender and the community. Indeed, it is to the shame of the legal profession, that the abuse of exclusionary clauses in contract law exist, to say nothing of tax evasion and

bottom of the harbour schemes which have proliferated, and these are just two of the many disservices the legal profession has done to the community.

It has been suggested that pre-trial diversion is unnecessary and undesirable and that it would be better to put trust in the criminal justice profession. With respect, there are very few judicial officers who are interested in social problems let alone in extending themselves to deal with deprived and under-privileged people. There are exceptions to the rule, but it will take a lot of time and training to change the attitude of the majority of judicial officers and lawyers.

Another important matter which is relevant to the introduction of a pre-trial diversion system is the cost of maintaining prisons and their inmates. The purpose of imprisonment is punishment and to keep dangerous people out of circulation. If the assumption is correct concerning the comparative lack of culpability of socially inadequate offenders, and if their offences do not involve danger, then imprisonment cannot be justified either on the ground of punishment or the safety of the public. In Western Australia a large number of people, particularly Aboriginals, are in prison for fine defaults, alcohol and drug related offences, disorderly conduct, petty stealing, and other minor offences. A similar situation probably exists in other Australian states, although Western Australia has the highest imprisonment rate of any state in Australia. Clearly, the public is being made to foot the bill for the imprisonment of people who should not be in custody at all and if pre-trial diversion were to be introduced many of these would not have to got to court, never mind prison.

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PRE-TRIAL DIVERSION FOR ADULT OFFENDERS

the Australian Institute of Criminology's Efforts

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My introduction to the criminal justice system was sudden, rude and rough. Minding my own business and doing no-one any harm one day, my attention to my work as an educational researcher and guidance officer was interrupted by a suggestion that I be seconded to the Justice Department to inaugurate an adult probation and parole service in the state of Queensland.

Supported by two male probation officers, already appointed, but who knew as little about what was to be done as I, and unsupported by any stenographical staff whatever, we set about the task of groping through a thick, dark curtain of ignorance, prejudice, antagonism, obstruction, and ridicule with which we were greeted by most people already experienced in implementing the then existing criminal justice system.

That was 25 years ago almost to the day. I was to have used only 5 years of my working life on the project. The 5 years however, shocked me deeply. I will not bore you with how or why, but I emerged 15 years later a committed prison abolitionist and a criminologist determined to persuade the criminal justice world to the view that, since criminality is a result of multiple factors, as most criminologists contend, then a multi-faceted treatment approach is essential.

I must confess I have made little progress. My task here, however, is to attempt to detail at least the steps by which the Australian Institute of Criminology has arrived at today's seminar.

At a working party of correctional services administrators held in Brisbane from 29 November to 1 December 1978 I presented a report, requested by the previous annual conference of ministers from Australia, Papua New Guinea, Fiji and New Zealand responsible for prisons and community based corrections in those countries, on 'The Range of Community Based Correctional Programs that Might be Developed in Australia'. That paper included a reference to the Kalamazoo and Flint County Citizens' Probation Authorities' Diversion Programs, the first of which was initiated

in 1965 in the state of Michigan, U.S.A. In this paper I urged the ministers to learn to think without making use of the patterns or models taken for granted in most of the textbooks. Without presenting pre-trial diversion as a panacea, it was, however, stressed that every new penal measure that can be devised will fit a certain segment of the offending population. Drawing on the support of criminological research, the writer drew the ministers' attention to the necessity to avoid, wherever possible, the stigmata of convictions.

At least the above progress report on pre-trial diversionary programs for adult offenders delivered to the working party of administrators in Brisbane resulted in a discussion among ministers at their Broome conference on 29 June 1979. That conference resolved to request the Australian Institute of Criminology to report and advise on the desirability or otherwise of introducing such diversionary programs in Australia. In a progress report presented again to a correctional services administrators meeting in November 1979 preparing for the 1980 ministers' meeting (Bevan, 1980) I again repeated the reasons why pre-trial diversion for adult offenders should be introduced in Australia, and added whatever additional supporting arguments he had gleaned in the meantime from his reading, talking and correspondence with like-minded individuals overseas. He was, for instance, able to report on the then recent Royal Commission on Criminal Procedure in the United Kingdom at which a large number of those giving evidence had used powerful argument in favour of a system of independent public prosecutors in order to distinguish more clearly the process of charging a suspect from his or her actual prosecution for the alleged offence.

It is not for me at this particular juncture in the seminar to regale you with the now well known list of arguments for and against the use of pre-trial diversion. It was in that paper, however, that the writer informed the ministers of his intention to seek, first, a meeting of chief crown prosecutors around Australia to explain to them what was in our minds, to obtain their views, and to list their concerns about the legal complications as they saw them. This meeting was to be followed as soon as possible by a conference of crown law officers and probation and parole administrators, once again to examine the feasibility of introducing the practices in question into our system. It may be appropriate to add at this point that preliminary and cursory examination by the writer of various state legislations had revealed no insurmountable obstacles.

The meeting of Australian Chief Crown Prosecutors, or their nominees, was held at the Australian Institute of Criminology in Canberra on 1 May 1980. All states and territories were represented with the exception of Western Australia. Other participants included Dr Des O'Connor, Reader, Law Department of the Australian National University, Mr Bill Clifford, the then

Director of A.I.C. and Dr John Braithwaite and Mr Ivan Potas, senior research officers of this Institute. As anticipated most prosecutors voiced concern about diversion, but they were prepared to listen attentively to the arguments of the other participants tailored to the disadvantages of the old and the advantages of the new.

Overall the prosecutors expressed the natural aversion of the lawyer to intervening in people's lives without formal findings of guilt, as they saw it, and to what they perceived as decisions made behind closed doors. They preferred on the whole the extension throughout the country of opportunities for sentencing without recording a conviction. They were divided to some extent on the question of how police departments would view the introduction of diversionary schemes, but all expressed interest in the notion of mediation and community justice centres similar to the neighbourhood justice centres in the United States, and in the news that in the middle of 1979 the New South Wales Government had approved the establishment of a pilot project of three community justice centres to be located in Wollongong, Bankstown and Redfern.

By the end of the two-day meeting, and having regard for all the difficulties involved in introducing diversionary practices into our system, the prosecutors suggested that a pilot program be instituted in the A.C.T. This, however, never eventuated. I doubt if the then head of the Deputy Crown Solicitor's Office in the A.C.T. had the heart for it.

A further move was then made by the writer by way of a two day seminar called 'Diversionary Programs for Adult Offenders' organised at this Institute on 11 June 1980. The purpose of that meeting was to propose plans for the setting up of the pilot program in the A.C.T. just referred to. It was well attended by probation and parole chiefs from around the country and those responsible for the pilot programs in community justice mediation in Sydney. The key people, namely the A.C.T. prosecutors were, however, not represented. Nonetheless, very interesting discussions were held over the two days, which served to demonstrate the willingness of probation personnel, upon whom the bulk of the work and responsibility would fall were pre-trial diversion to be adopted in this country, to foster the implementation of the measure concerned.

It was not surprising to the writer that probation personnel would display this attitude. There are no practitioners in the whole criminal justice system so broadly involved, and so intimately informed about the futilities in the system than probation officers. They are the ones whose experience with the system extends from the moment people are interrogated by police in relation to an offence to when offenders ultimately emerge from the prison system under supervision. This same

experience causes them to become intimately familiar with the whole life circumstances of the offender, his associates and his extended family. It is the probation officers whose life's work commits them to daily contact with those in our community for whom life can be largely a sexually transmitted disease.
At a working party meeting of administrators preparing for the 1981 Ministers' Conference in Auckland, the writer presented a reasonably substantial paper in a kind of desperate effort to enlist their support for pre-trial diversion.

It would not be sensible, however, to take this meeting through the arguments that were used as it can be assumed that most of you here are already at least somewhat committed to the idea of pre-trial diversion, otherwise you wouldn't be here. In general, however, the paper listed a number of the factors responsible for the then current emphasis on diversion. It also traced the history of diversion as a criminal justice concept dating from the 1967 Report of the U.S. President's Commission on Law Enforcement. It traced developments in the United States, Canada and New Zealand and drew on the personal experience of the writer, who had spent two periods of five weeks each in Japan, studying among other things the prosecutorial system there. Equal emphasis was accorded to the dangers in setting up diversion schemes. This was followed by a suggested scheme for Australia. The paper in question is available for collection at this seminar if any are interested.

The following recommendation reached the Ministers in Auckland in April/May 1981:

> As funds are limited everywhere and longer term studies must be done as opportunities offer, it is recommended that Ministers agree to the Australian Institute of Criminology drawing up a research proposal for their next meeting with the view to implementing surveys into prison and probation case-loads in this country to determine the number in each who could have been diverted with benefit to all concerned.

This recommendation was born of the writer's conviction that there were in our prison and probation populations a sizable proportion of persons who need not be there. At that stage Geoffrey Wicks (1977), had shown by a searching analysis of detention populations, male, female, adult, and juvenile in the United Kingdom how prison populations could be reduced from 39,820 in 1975 to 20,500 people who may pose some risk to the community. The Probation and Parole Officers Association of New South Wales in a discussion paper presented at an Australian Institute of Criminology seminar in December 1980 quoted a study by the Home Office of the south-east region of

the United Kingdom showing that 266 of 771 men in prison were divertable on the following criteria (Home Office Research Unit, 1978, pp.12-24).

> No serious offence against the person.
> No crime ever for considerable gain.
> No large sum earned from crime.
> No obvious competence in planning the crime.

At the same time studies conducted by the New South Wales Bureau of Crime Statistics and Research, while not able to help accurately determine the number of potentially divertible prisoners, did show that reconviction rates in the long term were substantially lower for those receiving non-custodial sentences. They also showed reconviction rates generally for robbery, assault, and sexual offenders were higher than for property, driving, and fraud. While this could easily have been anticipated, such studies gave some guidelines to those seeking to identify who may be safely and successfully diverted. It was strongly felt by this writer that the field was still open for such a study to be done in this country.

As a result of the recommendation to the Auckland meeting of ministers, the requested research proposal was made ready for the next meeting of ministers, held in Darwin in 1982. It was requested that all prison administrations in Australia make a clerical officer available to survey a random sample of new prisoners inducted to the largest prison in the state or territory over a week or a month or whatever period would prove feasible under their particular circumstances of staff availability. The survey was to involve an examination of the antecedents and circumstances surrounding the instant offence or offences in respect of each person in the sample in an effort to measure them against the four criteria listed above. From this survey it was hoped to determine what proportion of the prisoners being inducted need not have gone to prison.

As it transpired there had been an almost complete change of ministers over the previous year so that only one of the ministers present at the conference in Auckland was in Darwin. The previous group of ministers, who had begun to profit from the information placed before them, were with us no longer. The proposal for the research survey was rejected out of hand as being impracticable in the light of staff shortages throughout the prison systems.

Reeling from the shock and disappointment the writer retreated to lick his wounds, but was periodically comforted by news of kindred souls around the country also scattering seeds. I had heard of a magistrate in Western Australia, Mr Terry Syddall, courageous enough to apply his own version of diversion in his

courts, especially in relation to Aboriginal offenders. There was a child welfare worker here and there, plus an academic lawyer, plus probation officers, plus people involved in treating people with drug and alcohol addictions. Perhaps most significantly I received news by letter or phone from some of the doubting Thomases who had attended the meeting called for chief crown prosecutors, and who over the years had begun to doubt their own doubts and had obviously been at least not unaffected by the experience in Canberra.

I am hoping that this seminar will result in long confident strides along the path of workable pre-trial diversion schemes for adult offenders. Surely we have progressed beyond that state of affairs under which we were required mindlessly to pay homage to the trappings of the criminal justice system and to genuflect and bless ourselves at the sight of wigs and gowns and uniforms, and shiver and bow and scrape when confronted by those entrusted with the implementation of the criminal justice system. All of these people, judges, magistrates, police, prison officers, probation officers, and the rest, are as accountable to the community as the public servant, the teacher, the doctor, the dentist, the butcher, the baker and the candlestick maker. The law is so often an ass still prone to lash out selectively. Some might even say discriminatorily.

This seminar is to be my second last as Assistant Director of this Institute in charge of the Training Division. My last seminar is to be an exclusive meeting with Chief Probation and Parole Officers in Australia and New Zealand and I will be appealing to them to foster this movement designed to steer as many of the unfortunate grist from the mill as is sensibly possible. I will be appealing to them because it was my 15 years as a Chief Probation and Parole Officer that changed my whole thinking about offending and justice, culpability, accountability, law enforcement, sentencing, punishment, deterrence, rehabilitation and the rest. Although there are individuals among the judiciary and the magistracy, prison administrators and police for whom I have a high regard and a firm admiration, the bulk of my affection and regard belongs to probation services and those that work in them. Probation and parole officers are unjustifiably underestimated as experts in the criminal justice field by many academic criminologists, to name just one group. In truth there are few other operators in the system that experience the criminal justice system so existentially.

It is in probation services that I place my faith for the successful operation of pre-trial diversion schemes, as it will largely be their expertise which can accurately guide prosecutors in their decision making, as it is upon their expertise that courts have been able, so confidently, and for so long, to rely.

In the full knowledge that diversion has been around for some time in some form or other and has been experimented with in respect of juveniles, drug and alcohol addicts, and the mentally ill, the foregoing is the history of the kind of pre-trial diversion scheme for adult offenders that I regard as desirable in our system. I will have to leave it to somebody else to write 'finis' to the story.

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SUMMARY OF DISCUSSION

1. Definition of Diversion: once a person is charged with an offence and it goes before the Prosecutor it is envisaged that prosecutorial discretion will be exercised and the person will be referred to the assessment body (most likely the Probation Service). The Probation Service will assess the person to ascertain their suitability to undertake a program which, if successfully completed, will make it unnecessary for the case to go any further. Such a program may involve restitution in money or in kind, or instruction in an employment-orientated skill.

The Probation Service having made the assessment and worked up a worthwhile program could then recommend that prosecution proceed no further. If the Prosecutor agrees then the offender is placed on the program. The successful completion of the program is communicated to the Prosecutor who still has the final say as to whether to prosecute or not. In such a decision 'the public interest' is the dominant factor.

The offender needs legal advice at the time they make their decision to enter or not to enter a diversion program: clearly it is pointless to go into one if they are not guilty. If the offender admits guilt nd is prepared to undertake the program and then, for some reason, fails to complete the program it still must be possible for the offender to change their plea to not guilty.

2. Concern was expressed that the non-completion of the program would be seen in a negative way by the judiciary. It was concluded that this should not be a problem in that most members of the judiciary exercised balance on deciding upon current unsuccessful probation orders and the like and no reason existed for them to view diversion program failures any differently.

3. Is it a necessary condition that the potential divertee plead guilty? The preferrable position was 'I did the act', a frank admission of the facts rather than a plea of guilty. This is the position adopted by the major international review of the issue. 'Diversion and Mediation', Review Internationale, Le Droit Penal, International Conference 14-16 March 1983, Tokyo, Japan.

AN INTERNATIONAL REVIEW OF PRE-TRIAL DIVERSION

FOR ADULT OFFENDERS

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The aim of this paper is to outline some of the diversion programs that currently exist for offenders in some 20 countries. Reasons for the variety of programs and extent of useage of the concept will be canvassed.

Diversion, in this paper, refers to any deviation from the typical progression of events. Moreover, 'diversion (is) limited to any deviation from the ordinary criminal process, before an adjudication of guilt by the court, which terminates the case without a judgement rendered by the court, and which provides for the suspects participation in some form of a non-penal program' ('Diversion and Mediation', 1983, p. 893).

Carter and Klein (1976) have identified five conditions which have contributed to the rationale and growth of modern diversion:

- A recognition of the evils of the system;
- Overloads in the system;
- The possible negative effects of labels and stigmatisation;
- The recognition of the ineffectiveness of the system in controlling crime;
- The recognition of the responsibility of the community for its crime.

Flowing from such a basis the Canadian Law Reform Commission (1975) identified four functional varieties of diversion.

Firstly, community absorption: individuals or particular interest groups deal with trouble in their area, privately, outside the police and courts.

Secondly, screening where police refer an incident back to the family or the community, or simply drop a case rather than laying criminal charges.

Thirdly, pre-trial diversion, which, instead of proceeding with charges in the criminal court, refers a case out, at the pre-trial level, to be dealt with by settlement or mediation procedure.

Finally, alternatives to imprisonment, that is, increasing the use of such alternatives as absolute or conditional discharge, restitution, fines, suspended sentence, probation, community service orders, partial detention in a community based residence, or parole release programs.

Emphasis in this paper is on pre-trial diversion for adult offenders and this shares with the other varieties an attempt to minimise contact and to intervene in criminal proceedings before the offender becomes caught up in the justice system (Reker, et al, 1980).

The countries in the review all use the three discernible intervening activities which take place in the diversion process: treatment, settlement, or alternative punishment.

Treatment is an attempt to prevent further problem behaviour and may be attempted before or after offences are committed.

Settlement includes negotiating with victims or police for restitution or the dropping of charges.

Alternate punishment is an attempt to avoid imprisoning the offender. Clearly an old 'solution', but one with more pressure to utilise in the 1980s.

Some programs combine aspects of one or more of the above approaches.

LIMITS OF THE DISCRETIONARY POWERS OF THE PUBLIC PROSECUTOR

Clearly, there are limits to the discretionary power of the public prosecutor. Discretion from the trial before a penal/criminal court is possible only when the public prosecutor has the power to abstain from prosecution, although they believe that the evidence is sufficient to prove guilt. It is, therefore, of essential importance whether a given legal system is governed by either:

- The principle of legality, in which the public try to prosecute if there is a probability of conviction; or

- The principle of opportunity, in which the public prosecutor has the power to decide whether it is in the interest of the administration of justice to institute a penal action before the court or not to do so.

Generally speaking the common law type systems follow the opportunity system.

The national reports indicate that Canada, Israel, Singapore, and Venda (a South African homeland) apply the opportunity principle. This is also true of the United States, where the discretionary powers of the public prosecutor have been used to develop forms of diversion.

In some countries the public prosecutor may abstain from prosecution if it is considered that the social danger of a prohibited act is insignificant. This applies in Poland, the German Democratic Republic, and Rumania.

In both of the German Republics and in Poland minor offences and minor violations of public order contraventions are excluded from the ambit of the public prosecutor.

The public prosecutor may intervene in private complaint offences only where the victim lodges a complaint. In Finland, the Federal Republic of Germany, Hungary, Italy, Poland, Rumania, Sweden, and Yugoslavia such systems exist. The percentage of total prosecutions undertaken in this way is generally low except in Yugoslavia (in 1980, 34 per cent of the 159,000 criminal cases submitted to courts were private complaint offences).

Police 'screening', where the police refrain from reporting a petty offence is a widespread, long established practice.

In some legal systems the principle of legality applies only to adult offenders while juvenile offenders are subject to the principle of opportunity. This is the case in India, and in both the German Republics.

In both of the German Republics specific powers are granted to the public prosecutors so that a case may be terminated if the defendant fulfils certain conditions, for example, paying of monies.

INTERNATIONAL REPORTS

India

The infant democracy of India decided, for economic reasons, that a preventive program was more desirable than institutional treatment. As a result, diversion in the form this seminar is reviewing does not exist. Simple diversion for children under 15 years of age and probation are the basic methods of diversion undertaken.

Italy

In Italian criminal procedure, the prosecution is not subject to any discretionary choice, and, as a general rule, is initiated by an official. The possible avenues for diversion are in the areas of defamation, sporting law, shop-stealing offences, and, since 1974, drug abusers have been placed in detoxification and re-training schemes rather than in prison.

Federal Republic of Germany

Diversion exists on a wide scale in the Federal Republic of Germany. The principle of compulsory prosecution is in force and diversion is an exception to the fundamental duty of police and prosecutors to enforce the law by investigating all crimes which come to their notice. However, diversion is used in the field of juvenile delinquency; in the area of petty crimes committed by adults; and in the area of drug offences (only for consumers and not dealers).

Fourteen per cent of all juvenile cases are disposed of after a warning by a public prosecutor, and extensive use of programs involving the defendant in: performing a task for the purpose of making good the harm caused; doing a community service order; or repaying monies to the Treasury, or fulfilling an obligation of maintenance.

In 1981, 45 per cent of the 256,000 cases involving juvenile law were disposed of by means of diversion.

Mediation is widely used as are de facto methods that are similar to diversion. Some big companies have their own 'courts' which are able to issue a warning or exclude a worker from the social benefits of the company, reduce wages, or even order dismissal.

Public prosecutors and judges do not consider diversion as a pioneering innovation since they have practiced diversion (by other names) for a long time within the context of the formal program provided and prescribed by law. In 1980, more than one in seven of the 728,000 cases preferred by the public prosecutor were dropped by means of intervening diversion. The estimates for simple diversion add a further one in seven to the total picture.

German Democratic Republic

This nation has a general and fundamental principle of a specific non-judicial (though carefully regulated by law) intervention, serving the successful settlement of a limited individual-social conflict between the offender and society ('Diversion and Mediation' 1983, p. 943). As a result of such a stance, plus the

establishment of conflict and dispute commissions, they have a widespread and effective use of the concept of diversion. Some 20-30 per cent of all actual criminal matters are successfully dealt with by the commissons. In addition, 90 per cent of labour law disputes are finally settled by such commissions. In the area of juvenile crime some 60 per cent of reported offences are diverted by the commissions.

Israel

Israel makes relatively high usage of diversion for petty offences by the use of the following techniques:

- Adoption of the opportunity principle and the devolution of the decision to prosecute or not, to state attorneys and deputies, district attorneys, municipal attorneys, and police prosecutors.

- Mediation procedures: in the experimental stage in Jerusalem.

- Many organisations and societies have their own domestic tribunals.

- No statistics are to hand to indicate he extent of this usage.

United States of America

Traditional American arrest law assumes that police who encounter criminals, no matter what the gravity of their offences, must arrest them and produce them in court. The reality is clearly different. Screening by police officers and prosecutorial discretion are well established, and resultant diversion schemes are spread widely across the country and vary in activities, directon, and client group. The type of cases especially appropriate are:

1. cases of chronic substance abuse;

2. spouse abuse cases;

3. mentally ill minor offenders;

4. fraud cases where restitution is likely and they are first offenders;

5. some mentally ill serious offenders;

6. young offenders; or

7. unemployed offenders.

The first formal pre-trial diversion program began in 1965in Flint, Michigan, and since that time, particularly in the 1970s, the idea blossomed. It is difficult to estimate the number of programs that were or are in existence; in 1980, over 50 formal schemes were operating, and many morewere in the 'pipeline'.

A great deal of critical writing has come out in the last few years on the so called 'benefits' of diversion. What is clear from the United States experience, is that the popularity of juvenile diversion is waning and that fewer programs now exist (Osgood, et al, 1984, p. 34; Andriessen, 1980, p. 70; Lement, 1981, p. 34; Alder and Polk, 1982, p. 100; Alder, 1984, p. 400; Binder and Geis, 1984; Polk, 1984).

The reasons given are often 'net-widening', loss of due-process rights, and others. Those issues and their implications for adult diversion can be canvassed more fully later in this program.

Sweden

In Sweden the legal code allows for waiver of prosecution in four situations.

Firstly, in cases involving minor offences, for example, shopstealing, but not traffic offences where a fine is usually called for by the public interest.

Secondly, in cases where minor offences are investigated coincident with serious crimes, or where the offender has committed a series of similar crimes.

Thirdly, where prosecution is meaningless or even offensive, for example, where the suspect has become seriously injured or ill or where they are responsible for causing the death of a relative by negligence (as in a traffic accident).

Finally, in cases of mental abnormality.

In practice the effect of the rules and the operation of the child welfare boards is such that young offenders are usually not prosecuted and punished. The responsibility is diverted to social welfare agencies.

Recent changes to the legal code allow a public prosecutor to discontinue an investigation if it is believed that investigation will not result in prosecution on account of some rule of facultative prosecution or waiver of prosecution.

Interestingly, Swedish law does not allow plea-bargaining or the use of Crown witnesses.

Yugoslavia

The legal code in this country has adopted the principle of legality, and diversion is possible only with the consent of the accused and only involving minor offences.

Of interest, however, is the high use of private plaint (some 33 per cent of all cases in 1980 were from this source) and the extent to which diversion (55 per cent to 65 per cent) is the dominant 'solution' in such cases.

Mediation, before mediation councils for criminal matters, is successful in 24 per cent of cases in urban areas, and 32 per cent of cases in country areas.

Finland

Substantial use of diversion with informal intervention takes place in Finland. It can be said that if a case is not proceeded with for any reason then this will take place during the police investigation. Public prosecutors rarely use their right of diversion. In 1980, only 8,000 of a possible 500,000 offences recorded by police were waived by prosecutors. In societal terms, Finland has chosen not the operation of the criminal justice system as a general deterrent, but more fundamental social measures which it believes can prove more successful in preventing crime.

Singapore

Diversion alternatives are a valuable part of the administration of a system of criminal justice. Diversion is used in minor and juvenile matters and in cases where the gist of the offence is an omission to comply with a statutory requirement, such as 'draft-dodging'. This type of'wait and see' attitude, allows an individual a chance to perform their obligation to society, and is really covert diversion.

In 1981, 49 per cent of the 4,600 arrested drug abusers were diverted for rehabilitation. Mentally ill offenders are also diverted.

Japan

Of all nations this appears as the stronghold of diversion. In 1983 (Ministry of Justice, 1984) the public prosecutor's offices disposed of the cases of 3,371,519 suspects as follows:

Formal Trial	4.2 per cent
Summary Proceedings	69.1 per cent
Non-Prosecution	8.9 per cent
Refer to Family Court	17.8 per cent

Clearly, the public prosecutors make a careful selection to divert those who are unlikely to repeat a crime, unless the seriousness of the offence committed requires actual punishment in terms of general prevention or social justice.

Additionally, trial judges also exercise their discretion. In 1980, 60 per cent of the 76,000 defendants sentenced to imprisonment were not sent to prison but were released by the court's decision.

Union of Soviet Socialist Republics

In the U.S.S.R. comrades' courts are one of the forms of public participation in combatting breaches of law and rules of socialist community. Their significance lies not in punitive sanctions but in collective censure of offenders. They have been in existence since 1917, and there are over 300,000 such courts operating. They are agencies of public social activity and they deal with such matters as: violations of work discipline; administrative offences; offences of no great social danger; property and other civil law disputes; and amoral acts and violations of the rules of socialist community.

The majority of the cases handled by these courts can be undertaken by the corresponding peoples' court.

In addition to comrades courts there is a widespread use of juvenile commissions. No statistics are available to illustrate the comparative impact of the large number of comrades courts. Clearly, though, it is highly significant.

Thailand

Pre-trial diversion in Thailand still has very limited forms in practice, and is mainly limited to screening, diversion for mentally ill offenders and minor offences. There has been active consideration on the idea of the public prosecutor being able to issue an order of prosecutory suspension in cases where the offender confesses guilt and is willing to compensate the victim. This idea is part of the current National Five Year Plan of economic and social development.

Poland

The oldest form of diversion in Poland is diversion with mediation. It was officially introduced to court proceedings in 1960. Some 50 per cent of cases on private accusation are concluded owing to such reconciliation.

Social courts (citizens are not obliged to participate in such courts) have a vast sphere of activity such as penal law, civil law, family law, labor law, and/or administrative law. Social courts often use educational measures or perform a mediation role.

In the last two decades, the Polish legal system has accepted diversion to a much greater extent and the necessity is seen for the gradual taking over of the state's function by social organisations and workers' collectives.

Scotland

In 1968, the juvenile justice system in Scotland changed dramatically. Instead of appearing before judges in court settings, youthful offenders and their families appear at informal hearings outside the court room, where three community volunteers hear cases and help families make decisions on the needs of the young offenders involved. Some 90 per cent of the 26,000 cases in 1978 were diverted in this way. This model has been copied in the U.S.A. in both Cleveland and Cambridge, Mass. (Vorenberg, 1982, Wilson, 1980).

From February 1982, an adult pre-trial diversion scheme existed in the Ayr region of Strathclyde. Early indications are that this small scheme (147 referrals in the first year) has been successful in diverting the majority of clients from further offending (Moody, 1983).

England

There is little evidence of 'true' diversion, in the terms of our discussions. The long established English experience of cautioning is relevant, as is the change in philosophy involved in true pro-active community policing (Thorpe, et al, 1978). More recently, English probation and magistrates journals have featured debate on the issue (Goslin, 1985).

Holland

The Dutch juvenile justice system is essentially a welfare model. Much attention is given to social and psychological conditions surrounding the offence, and efforts are made to implement decisions aimed at the individual interest and needs of the juvenile. Status offences (truancy, running away, alcohol use, etc.) are not considered offences by Dutch law. It is felt that official intervention can only have negative effects, and should be avoided at any price. Police have great discretionary power although no official guidelines exist; in Amsterdam, 75 per cent of all juvenile cases are dismissed. This is similar in other areas.

The use of councils for child protection since 1956 has accelerated this process of diversion for all but the most serious offenders. Additionally, the referral to institutional care has also reduced markedly. Since the 1960s the number of children under judicial control decreased from 42,000 to 22,000, and the number of institutional placements were down from 26,000 to 14,000. All of this, despite an overall population increase.

For adults in 1981 the community service order scheme was started in eight of the 19 court districts. This has proven highly successful and is likely to be expanded (Junger-Tas, 1982).

Canada

The government of British Columbia first considered diversion in 1974, and by 1977, it was widely experimented with in Canada with more than 35 projects in operation and another 70 programs operating with diversion as a major component (Bevan, 1980). Much argumentation has taken place in the various provinces as to the pros and cons of diversion. O'Brien (1984) canvasses many of these issues: offender related issues; victim related issues; community related issues; organisational issues; and personnel issues. He concludes that 'juvenile diversion is a worthy correctional innovation' (O'Brien, 1984, p. 228).

The failure of a diversion program in Alberta, due to too many agencies (federal/provincial government and the natives organisation) trying for ultimate control over its operation, is strongly spelt out by the Native Counselling Services of Alberta (Native Counselling Services of Alberta, 1982). A clear message!

Hungary

Diversion is used in this country for such matters as minor property offences, wandering abroad, prostitution, insults against a person of authority, etc.

Rumania

The position here is similar to that of Hungary; diversion is used for offences against rules of social cohabitation, insulting behaviour, minor theft, and minor property damage.

Czechoslovakia

Diversion, once guilt is admitted, and once it is assessed that the offender is not a danger to society, is used in this country. Offences are of a minor nature, for example, shopstealing.

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Such is the brief and necessarily incomplete review of the international usage of diversion. It is hoped that this seminar will bring greater input and arguments, and add impetus to the growing pressure for the establishment of Australian pre-trial diversion schemes for adult offenders.

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SUMMARY OF DISCUSSION

1. Has the response of the system been to place the name of diversion as a label on informal diversion practices (such as police officers' 'on the street' decision making)? Yes, these long standing discretion processes are very sensible and we must not do anything to change the system. Such diversions are reasonable and in everybody's interest: victims, offenders, and the courts.

2. Does the European system of law enable diversion to fit more easily into such a system than the Australian system? It is more profitable to compare the Canadian experience where the legal system is largely comparable to the Australian experience and it seems there are no legal barriers to a replication of their successful diversion schemes.

3. Some of the recent U.S./Canadian evidence is pointing out that one of the faults of diversion is a denial of natural justice (due process). Yes, it is acknowledged that some evidence exists to support this and it is hoped that the lessons learnt from the U.S. and Canadian experiences will be translated into the Austraian schemes.

4. How successful are adult diversion schemes in overseas countries and what data is available to support the claims of success? The research gives a markedly mixed result: some programs have led to a reduction in offending and some have resulted in no change. The side effects in some U.S. studies have led to calls for abandonment of specific programs.

LEGAL ASPECTS OF PRE-TRIAL DIVERSION SCHEMES

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Consideration should be given to the character of the pre-trial diversion schemes and their place in the legal system; questions relating to the position of the person to be diverted prior to diversion; the status and position of the person after they have been diverted; and their position where the scheme of arrangement fails and they have to return to the court.

The nature of diversion has to be perceived in connection with an established legal system. One of the difficulties that the legal system, the common law system, presents is that it does not equate with the kind of inquisitorial systems referred to in other papers. The way in which the European system of law arranges matters is not necessarily appropriate for arranging matters within the Australian system. The way in which this reflects itself is best illustrated by going back to the earlier diversion conferences that asked the question, 'is diversion a practicable thing to have within our method of trial, our system of justice?'. In those deliberations one of the conclusions was that it was probably not until Australia got a system of the kind that operates in the A.C.T., a Director of Public Prosecution system, that it could work effectively.

The reason that this arises is that in the early days the link in the planning of such a scheme was seen to be with the Crown prosecutors who are generally the connection to the court from the community. But the Crown prosecutor does not get in touch with the case until a charge has been laid or heard, and the person committed or not committed. The process is well under way and the judicial system in operation. It is possible then to divert, but this often defeats the purpose of the diversion which is to keep the person out of the judicial system and not to divert at some later stage in the system.

One of the merits of diversion is that the offender is not labelled and not stigmatised or otherwise conditioned by the system of criminality in which they become entrenched. It was in an attempt to avoid that labelling and stigmatising that real merit was seen in a diversion scheme for certain classes of offenders.

There is not much point in diverting 'later-on' in the system. This can be done by way of a section 556A order which, until a recent court decision, could divert a person from a punishment system and put them into a different category of offender after determination of the matter by the court. That is not quite the diversion scheme that is envisaged. It was for this reason it was thought useful if a potential divertee was seen as early as possible so that the diversion could be made more effective by early release or early discharge from the system.

This is only practicable by those who deal early on with the alleged offender, the police or some prosecuting authority, who can intervene and transfer the person from the legal system into the welfare system, or release them.

The ACT now has the advantage of having a public prosecutor with power to prosecute all matters at all stages, not just indictable matters. This gives the touch stone for a diversion scheme to allow someone authoritative who can effectively pursue a scheme if a scheme can be properly worked out. It was that practical difficulty that stood in the way of Crown prosecutors that lead largely to the disappointment that resulted from the 1980 conference. Crown prosecutors did not see themselves as being able to intervene in the great bulk of cases, often they did not get to them until a late stage.

There is now the real possibility that the right kind of people and the right kind of institution will institute such a scheme in the A.C.T.

The other matter to look at is the idea of diversion in which a person is diverted from an already commenced process, that they have been questioned, or arrested, or are to be summonsed over the matter. They will also, and this is an important stage in the process, generally have been charged with something. In the judicial system the charging of someone with an offence, alleging against them that they have done a particular crime requires in some way that they be discharged. In the classical process they are charged, put in charge of the jury, discharged by the jury ultimately by acquittal or conviction.

The beginnings of a system, the charging of someone may be forestalled. There are possibilities that a person may be diverted even before they are charged, and before they have even entered into the process. The police officer who finds an offender, castigates them and releases them without a charge has diverted them from the system. Diversion can occur before the system commences, or at some stage during the process.

There are difficulties in diverting prior to charge. Police officers could operate in that way with a set of rules worked out from which they could decide whether to charge or to discharge

formally. However, the likelihood is that any such system will operate after a charge has been laid, and therefore the question arises of how that person will be discharged from the charge laid. In some way it has to be concluded that it can be suspended and this is probably what is meant by suspended prosecution system. This is conditional upon good behaviour, compensation or some approved works taking place. There is a wide range within the suspended prosecution system available to prosecutors. They can make any sort of appropriate condition (on advise from experienced people). On the fulfilment of the conditions, the divertee could be discharged and a formal order made that the matter is no longer current. There are problems that this will present and they will have to be faced when the system is fully worked out.

The alleged offender may want to or be induced to make confessional statements. These matters may be made in the ordinary way as if a trial were going to proceed and then tested in the ordinary way for their voluntariness and the other criteria applied. But there may be circumstances in which a person makes admissions because those admissions are necessary for diversion, that is, they are admissions under a form of inducement. To avoid the difficulties at this stage it will probably be necessary that legal representation be available.

The failure of a person to complete the conditions of diversion could raise considerable legal difficulties when the person comes back to court. The offender needs protection earlier rather than later. This raises the question of whether the alleged offender should have the right to legal representation at the commencement of interrogation, something like the American system where the protective mechanisms operate at an earlier stage and people are not interrogated unless they are represented. This is not the normal rule in the A.C.T. although children under the age of 16 are entitled to have their parents present. There is no obligation over the age of 16 to have legal representation present. In fact the contrary is the case. Legal representation may be prevented from being present.

To make a system of this sort protective as well as effective so far as the individual is concerned, the right and the possibility of access to legal representation ought to be available at an earlier stage than at present. There are dangers inherent in the high likelihood that if one were offered a diversion possibility then one would be more prepared to 'spill their guts' than they would if the likelihood was a forthcoming trial. That is one of the kinds of dangers that exist. What the offenders say by way of admissions might be excluded from consideration in any later trial. There may be ways similar to those used where a person, who on the principle of nonself-incrimination, is allowed to give evidence and that evidence can not be used in another trial. It could be that some such rule could be worked out here. But this

is not seen as a very effective way of protecting the individual or of effectively operating the criminal justice system.

There is a lot of complex material that needs to be looked through in the special cases that may come up. These should not hinder the development of the scheme but they should be borne in mind when the scheme is being developed; simply doing good for the person may ultimately not do so much good for them. One has to be careful that the result is not worse than the matter being remedied.

The other matter of concern is of a more general kind. There is a principle that there should be no punishment without law. Punishment is a loose term, welfare people and our guardians in white coats do not quite see what they are doing as punishment, but any form of deprivation of freedom, even a minimum deprivation, is some sort of punishment. Similarly, making a person do something they would not otherwise want to do is a form of punishment. If a divertee is required to do certain things, then that is inflicting punishment and inflicting punishment on a person who has not been convicted. It is inappropriate to punish the unconvicted. Before someone can be punished, there must be an order which says they are guilty. The punishment flows from that guilt. It is very important to carefully distinguish between what is done <u>to</u> and what is done <u>for</u> the person being diverted. It may seem all for their own good but often those things are very hurtful and not liked at all. Aversion therapy is an example. The idea of punishing someone who has not been convicted is distasteful, and the whole system is posited on the principle that they are not convicted. Only if they are convicted is punishment justified. If the punishment runs for six months on the diversion scheme and then they are convicted and freshly punished then this introduces the principle of double punishment. It ought to be seriously considered whether any system of diversion that introduces any element of a punitive kind so far as the individual is concerned has that danger of double punishment.

To parallel this, it seems that a lot of the current debate that has gone on in respect of arrest and the requirement by the police that they should have people detained for a period for questioning prior to their being brought before the justice, being charged, and put in the judicial system, they too are promoting a system of punishment before conviction. To arrest someone and hold them is to punish them before conviction, because that person is deprived of their liberty. Arrest is a process by which a person is supposed to be brought before the judicial system so that guilt can be determined. To deal with them otherwise than for that purpose is to punish them. The problem is punishment before conviction. Exactly the same problem arises here if the forms of what are euphemistically called 'treatment' are in fact forms of punishment. It must be

recognised that such a scheme is a type of pre-trial punishment as it is with detention and arrest.

These are highfalutin sounding things but they are very real. Though the scheme has a valuable welfare aspect and is wholesome in the sense that people are salvaged from wicked ways, the system should not lose sight of the general principles that operate; the humane principle, for example, that no one is punished except those convicted. The question is: is the breach of that principle warranted by the value gained out of the system of diversion and compulsory conduct in the period or even protective conduct in the period. But there ought to be an awareness of these kinds of difficulties. Merely feeling that it is good for someone is not a sufficient justification for overthrowing other intrinsic and entrenched principles which ought to be preserved.

The idea of the trial must be borne in mind at the time of the diversion should be restated, as well as implications for the trial mentioned above, in respect of any confessional material which may be produced by the promise of diversion.

Also, there are other considerations, for example, the effect of a failed diversion on the sentencing process. A person who is protected against the use of their confessional material will come before the court, and it must be known that the matter which is six months old may have been the subject of a diversion order. A failed diversion order may be a matter that a magistrate, even unconsciously, may take into account when sentencing and this is not proper as it compounds the problem of double punishment.

Also, the effect on the individual may be exacerbated by the sense of failure that the scheme has gone wrong and in some way the offender is inadequate. This may reinforce negative attitudes that the diversion scheme hoped to avoid. This leads to a consideration that even though one would want to impose conditions in this form of diversion that is foreshadowed, that those conditions ought not be too severe. It ought not be made impracticable for an ordinary person to cope with the sorts of things in the diversion scheme. Any minor breaches of it should not be made a matter for the failure of the diversion scheme. It should be liberally interpreted as it is run. The schemes do not deal with people who are fully adequate; they were unable to avoid the first offence and their capacity to cope with a diversion scheme should be an important point to be kept in mind.

Another consequence that needs to be considered is should there be this concentration on conditional release? There will be many cases where absolute discharge will be appropriate at the outset. This should be the norm. Everyone has the capacity to fall when the apple is ripe and unconditional release is not going to

change the state of the world at all. There should be more bravery in the use of complete release and less controlling of people. Unless it seems that some mental, social, or family matter is involved and properly advised welfare people can predict that release conditions would not only be a way of preventing reoffending but would improve the person, should conditions be considered. It is that element of a proper judgment of what is good for the offender not a proper judgment of what the community wants that should be made. The community looks after itself very well. It is the offenders that need the help. This is very much a cry from the heart but these elements need to be kept in mind when a scheme is worked out.

DIVERSION AND THE DIRECTOR OF PUBLIC PROSECUTIONS

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It is appropriate to outline the structure and function of the office of the Director of Public Prosecutions (D.P.P.) and what it may mean to this Conference.

The D.P.P. commenced in March 1984 and it performs the prosecuting role of the Commonwealth. It has offices in Melbourne and Sydney, and one of the principal stimuli for its existence was the 'bottom of the harbour' tax evasion schemes, and organised crimes involving drug offences. In February 1985 I was appointed to the position of Deputy Director for the Australian Capital Territory. The responsibility of the office is unique in Australia in that it encompasses all prosecutions. This ranges from simple offences to the importation of trafficable quantities of hard drugs to murder.

In the A.C.T. we do not have police prosecutors and the D.P.P. has the power to takeover prosecutions by Commonwealth departments. The D.P.P. therefore services a population of a little less than 300,000 in close co-operation with an efficient and honest police force, the Australian Federal Police (A.F.P.).

It is a worthwhile project to implement a pilot scheme in the A.C.T. in diversion in criminal prosecution cases and this department agrees in principle to administer such a scheme to start operating early in 1986. The idea of an A.C.T. Criminal Diversion Advisory Committee to provide detailed advise has merit and the work from the Conference could be considered by the Advisory Committee.

The advisory committee should be comprised of:

- Representatives of a welfare organisation, senior enough to be able to commit resources.
- A criminologist with experience of diversion in overseas countries.
- A person with a statistical background: to be able to monitor the pilot period. There is a need to justify the utility of diversion.
- The Chief Stipendiary Magistrate of the A.C.T.

- A non-practising lawyer, to counter-balance the impact of the other lawyers who are sometimes too close to the day to day workings of the system.

- A senior police officer, at the Deputy Commissioner level so as to be able to commit the A.F.P. to a policy standpoint.

- The D.P.P. (in consultation with the Chief Justice).

This group could agree on a sensible formula for the implementation of a pilot scheme for the A.C.T. Other states could view the scheme and think of this as another practical way of dealing with the problems they face.

Seriously, there is a problem of limited resources. The law enforcement agencies are unable to cope with organised crime and our political leaders are not convinced of the social problems that result from organised crime. Therefore expect no more resources can be expected. A utilitarian justification for a scheme of diversion is to lessen the burden on already strained resources, and by a sensible and conservative piloting of such a scheme benefits can be expected.

Some trained lawyers are apparently unable to recognise the great harm that is done to a person on the first occasion they are enmeshed in the legal system. It is difficult to understand the line of thinking that seeks to justify the proposition that punishment in the criminal justice system is of any value at all to an adult first offender as far as his or her rehabilitation or increased use to society is concerned.

If a sensible and conservative piloting of such a scheme would show that that is a wrong-headed approach then it should be prepared and embraced.

There are some other matters to consider:

- Diversion need not be limited only to minor matters;

- Similarly, there is no need to limit diversion only to first offenders.

- The idea that the institution of a diversion program should begin narrowly and use certain classes of offenders as the starting point and see how this develops is tempting, although there is no philosophical justification for it.

Balanced against these three points, the following things should be kept in mind:

1. There are limited resources available in the A.C.T., especially in the D.P.P. If the idea is to work then it should not be pitched past the available resources. The resources available here are, at the moment, modest and could only be increased if it could be demonstrated to the people in power that the scheme has borne fruit; and

2. Some areas are more easily embraced

   (a) unlawful drug users, at the serious end of the scale not the experimenting/casual use type;

   (b) the area of domestic violence where the real consideration for society is to look at the individual domestic situation and see if it can or should be salvaged or left to the sanctions of the criminal law;

   (c) in other parts of Australia the idea is already used for traffic offenders. This could formally be looked at in the A.C.T.

In the interests of beginning modestly, but at the same time having sufficient breadth of area to launch a realistic program, these sorts of areas might commend themselves as starting points.

The problems raised by Dr O'Connor are capable of solution:

- Double punishment for one breach. There is no reason to think that the offender is being punished twice; the successfully diverted offender is not being punished at all, and the unsuccessfully diverted offender could not be seen to be punished twice by nothing at all.

- How to frame the diversion contact. There is a need to do quite a deal of thinking on that.

- Protection of due-process rights. There is no reason why it would be a necessary pre-requisite for a diversion program that the person involved would need to acknowledge guilt. This is not as a necessary criteria; it may be an important psychological factor.

- Dr O'Connor's notes of warning should be heeded. However, there is no difficulty and no impediment to what is to be put forward as something which is practical. The concept does not have to be seen as a panacea before one commits oneself to try an experiment.

Positive proposals can be formulated from these discussions that are both visionary and realistic. An advisory committee could

compromise these two things, and should at the end of say this year, be able to show that any necessary legislative changes at both the Commonwealth and state level could take place so that the best of the principles of diversion (both from the Australian and overseas experiences) could be put into effect for the benefit of the Australian community.

The idea of pre-charge diversion seems to be bristling with difficulties. To combine the difficult discretions of the constable, the prosecutor, the judge, and the difficult factual decisions of the jury into the hands of one person at the front line of law enforcement seems fraught with difficulty and it is difficult to seriously entertain the argument.

Nevertheless, the powers of the Director of D.P.P. under the Act are sufficient to embark on the practical implementation of such a policy and any legislative difficulties that may arise will throw themselves up later.

SUMMARY OF DISCUSSION

1. How do you confront the problems that clearly exist with the public's expressed attitudes towards such soft options? Too often the criminal justice system has offered too little explanatory information to the police and the public to say how such a system would work and what effects it would have. Clearly the public are capable of understanding that different cases need different dispositions.

2. What happens when the program breaks down and a breach occurs? Is the pain for that breach a prosecution? Yes, it is. Especially in cases involving violence. However, you do not punish the failure to meet the conditions of the diversion program; you proceed to a trial on the original offence.

3. If you have prosecutors using their own discretion aren't you taking away a discretion from the court (in the eyes of the community) in relation to serious crime? Diversion is directed to people and not to offences and as such you can look at people and not at principles and see whether such a system helps people and does not harm the overall community at the same time. There do exist serious cases where you know that prison and the other hard options of the justice system are not appropriate for that offence and the prosecutor needs a justification for not proceeding further. Diversion is such a vehicle and the community is best served by such an approach.

INFORMAL JUSTICE

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As a result of growing dissatisfaction with the traditional criminal justice system in Australia, and elsewhere in the common law world, there has been a significant growth in informal justice approaches to resolve criminal disputes. These approaches are gathering momentum, and will no doubt continue to expand rapidly in the future.

Informal justice approaches to the resolution of criminal disputes occur when the victim and the offender work out a resolution of the problems caused by the criminal act without the intervention of the traditional criminal justice system. The two major movements in Australia which reflect this approach are mediation and private corporate justice.

What these movements reflect is a fundamental shift in conceptual approaches to the question of what is a crime. The prevailing approach (Barnett and Hazel, 1977, p. 2) is to view criminal behaviour as an act against society, and to respond to that act by reducing the incidence of criminal behaviour in the future by imposing punishment upon the offender. The justifications accepted for such punishment vary widely and include rehabilitation, incapacitation and denunciation. The criminal justice system uses adjudication to decide whether the offender did commit the criminal act, and to decide what punishment is to be imposed.

This paper will first look at some of the perceived inadequacies of the traditional system, and then look at mediation and private corporate justice which have been used to overcome some of these inadequacies.

THE TRADITIONAL SYSTEM

The traditional criminal justice system concentrates upon the offender: Is the offender guilty? How should the offender be punished? What caused the offender to commit the crime? Have the offender's rights been observed? The victim is almost ignored, being reduced to what Christie refers to as the 'trigger-off' of the system (1977, p. 3). This was when crimes came to be regarded as crimes against the central authority, against the King, and then against the state (A.L.R.C. Research Paper, 1979, pp. 39-40; Scutt, 1980, p. 29; David, 1985, pp. 88-9; Campbell, 1984;

Barnett and Hazel, 1977, p. 7). The victim's interests were then removed from the criminal justice system, and transferred to the civil system where the victim could pursue any civil remedy that was available.

With the centralisation of authority, the criminal law then focused upon the offender, and ignored the fact that many criminal acts are violations of the rights of a victim, an individual person. The criminal system depersonalised the victim, replaced that person by the state, and thus made possible the concentration upon the offender and the state's reaction to the offender.

There is a 'myth' (Barnett and Hagel, 1977, p. 9, note 1; Barnett, 1977, pp. 350-4), that this centralisation of authority arose to protect individuals from the uncontrolled violence of blood feuds. Barnett and Hagel (1977) demonstrate that blood feuds had largely been replaced by institutional forms of restitution, usually of payment of monetary compensation to the victim, or to his or her family.

The new informal justice approaches have re-personalised the victim, and view criminal acts as violating, or threatening to violate, the rights of individual victims. If the rights of victims are violated, an imbalance is created between the offender and the victim which needs to be rectified for justice to be done. There is a growing recognition that to rectify the imbalance, to undo the harm done to the victim, and to resolve the problems caused by the criminal act, should be a higher aim of justice than merely to punish the offender. As stated by the Canadian Law Reform Commission:

> ... In the past, an overwhelming emphasis was placed on the punishment or treatment of the offender; little attention was paid to the needs of the victim or the assignment of responsibility, which is at the heart of the criminal law, has mainly been directed towards establishing guilt and not towards undoing the harm done (Law Reform Commission of Canada, p. 1).

That is one inadequacy of the traditional criminal justice system that informal justice seeks to overcome.

The emphasis on the offender, and the punishment of the offender, also means that the emphasis after the criminal act is committed is on collecting evidence to convict the offender not on helping the victim overcome the trauma. Research (Challinger, 1982, p. 13; Cannavale and Falcon, 1976; McDonald, 1977, p. 298, Wallace, 1985) has shown that the traditional criminal justice system does not cater for victims' practical and emotional needs, either immediately after the criminal act, or during the justice

process itself. Victims are often interrogated in ways they find distressing, with little sympathy for their suffering. They are often involved in repeated court appearances involving delay, frustration and loss of wages. They are not informed of the progress of the prosecution, nor why a prosecution was dropped or a different charge substituted. Victims are usually not instructed in court room procedure, or in criminal procedure generally, and are not informed of the outcome of the trial. Because crimes are regarded as acts against the state, the victim is thought to be 'rightless' within the system. As stated, the victim is reduced to the 'trigger-off' of the system.

Because the criminal justice system is only concerned with the actual external criminal act, and whether the offender committed it, the victim is not allowed to tell of the effect of the act upon their whole life, nor of their feelings arising out of the act. The criminal system confines itself to the facts relevant to the actual criminal act whereas victims want to react as human beings and to tell their whole story. Schneider (1982, p. 21), states that the victim is doubly victimised; first by the criminal act of the offender, and then by societal reaction to them. A third victimisation occurs through the operation of the criminal justice system itself.

This isolation of the criminal act by the traditional criminal justice system also ignores the underlying causes of the criminal act. These may be highly relevant for resolution of the dispute, particularly where the offender and victim have an ongoing social relationship. The criminal act may be only one act in an ongoing dispute between the victim and offender. It may even be only one act in a series of reciprocal offences. The treating of one of the disputants as the victim, and the other as the offender may merely depend on who got to the police first. An understanding of the underlying causes, and of the whole dispute, may be essential to resolving the conflict between such disputants with finality. Adjudication within the traditinal criminal justice system may even be an added tension in an ongoing dispute, particularly because it labels the offender as 'wrong', inferring the victim is 'right'.

Also focusing on the isolated criminal act involving the disputants which occurred in the past, means the punishment usually does not include regulation of the disputants' future conduct towards each other. Regulation of their future conduct towards each other may be vitally necessary to prevent recurring criminal acts, particularly where the victim and offender are in an ongoing social relationship.

The depersonalisation of the dispute is further carried out in adjudication, in that the offender is often represented by a lawyer. The victim is completely represented by the state, and thus neither the victim nor the offender are given responsibility

to personally find a resolution to their own dispute which involved the criminal act. The responsibility for resolving the dispute is transferred to the judge. Today there is an increasing desire to allow individuals to govern their own life as they see fit. This tendency runs counter to the traditional system.

The traditional system is too costly in monetary terms; in legal fees, in court costs, in lost earnings whilst the disputants, and witnesses are involved in the adjudication process. Also, punishment is too costly: in the lost earning capacity of those incarcerated in prisons; who cannot financially support their dependants and themselves; and in the cost to the community to support and supervise the offenders whilst in prison, on probation, or parole, or carrying out community work.

The traditional system appears to inevitably involve lengthy delays in resolving the dispute. This removes any immediacy between the criminal act, and the eventual punishment imposed, often leaving the offender resenting the system rather than experiencing the connection between the criminal act and the punishment. Where compensation to the victim depends upon convictin of the offender, the victim is also severly disadvantaged by the delays.

Barnett (1977, p. 360) blames the punishment orientation of the traditional system for those delays. He says that 'the fear of an unjust infliction of punishment on the innocent, or even the guilty', causes elaborate safeguards to be used. The more awful the sanction, the more elaborate the safeguards. He argues that as the punitive response of the system is diminished, so would be the perceived need for such procedural protections which cause the delays.

As stated above, there is a growing recognition that punishment of the offender should not be the aim of the criminal justice system. If criminal acts are recognised as inflicting harm upon the victim, as interfering with the victim's rights, then the imbalance created should be resolved by undoing the harm to the victim. Christie suggests that the traditional system is merely a 'pain delivery' system (Christie, 1981, p. 18). Punishment is the conscious infliction of suffering or pain upon the offender. Such a system merely leaves the offender free to resent it, rather than to learn from the experience.

Such a system does not encourage the offender to 'face up to' the effect of his or her action upon the whole life of the victim. Especially where the victim is a stranger to the offender, the most the offender 'faces up to' is that, in court, they hear the immediate effect of the external act or acts that make up the actus reus of the crime. The emotional trauma the victim suffers, the societal reaction the victim suffers, and the fears the victim is left with, are not relevant in the traditional system which is only concerned with the isolated external act or acts

which constitute the actus reus of the crime charged, and with the mens rea of the offender at that time. The procedural and evidential rules are designed to exclude from the court evidence of events or facts not immediately relevant to that isolated external actus reus and the mens rea. Psychology has learnt that people must understand and fully appreciate their behaviour and its effect upon others before they can change it. The traditional system does not encourage, nor permit, this for the offender.

Modern theorists are arguing for a more constructive or creative response to the criminal act than punishment. Schneider (1982, p. 32) argues for 'creative restitution' which, he says:

> ... consists both of payments for damages, and of the development of a constructive relationship between victim and offender [and which] offers an inestimable value for the rehabilitation of the offender.

Such a resolution of the criminal dispute is also of inestimable value to the victim. It 'personalises' the dispute in contrast to the traditional system. Under 'creative restitution' the victim and offender regain control over their dispute and its resolution, and are enabled to perceive each other as people with individual characteristics. No longer can the offender see the victim as a 'faceless' member of society, and the victim cannot categorise the offender as one of 'those criminals' where they are strangers. Where they are in an ongoing social relationship (Merry, 1979, pp. 891-925), either of acquaintance, friendship, or emnity, the victim and offender are encouraged to perceive each other in new ways, and to lessen any imbalance in power between them (Community Justice Centres, 1981, p. 51). Each can perceive the other as individuals with individual motivations and personality with their own rights. This personalisation is of inestimable value to both of them, as it reduces the criminal act to an encounter between them as individuals.

The traditional system of imposing punishment on the offender offers the victim no incentive, other than revenge or duty, to report the criminal act to the police. The victim often gains nothing from the traditional system. The traditional system often does not result even in compensation for the victim where that is provided for by the present law (Kirby, 1980, p. 25). The present law* provides inadequate compensation in that the maximum amount

* Criminal Injuries Compensation Act 1967 (N.S.W.) together with Crimes Act 1900 (N.S.W. ss.437, 457, 468 and 554, Criminal Injuries Compensation Act 1983 (Vic.), Criminal Injuries Compensaton Act 1982 (W.A.), Criminal Injuries Compensation Ordinance 1983 (A.C.T.), Crimes Compensation Act 1982 (N.T.), Criminal Injuries Compensation Act 1977-82 (S.A.), The Criminal Code Act 1899 (Qld.) Chap.LXVA and Criminal Injuries Compensation Act 1976 (Tas.).

for personal injury is usually $20,000 (less in some states, and more in Queensland). Compensation is usually not provided for loss of property. Inadequate though they are, these schemes should be retained for the situations where there is an impecunious offender, or where there is no identifiable offender, or the offender is not found. None of the schemes provide for direct victim-offender decision of the amount of compensation or restitution. In each scheme a third party, a judge, or administrative official, decides the amount. The schemes adopt the authoritarian approach of the traditional criminal justice system. Victims tend to feel more victimised and helpless in this system in which they are unable to take responsibility for their own dispute and its resolution. Offenders, also, are not given the opportunity to take personal responsibility for their actions, and to negotiate a restitution they perceive as adequate. They certainly are not encouraged to ask for forgiveness.

INFORMAL JUSTICE

As a result of these inadequacies in the traditional criminal justice system in Australia there has been a strong growth of informal justice approaches as a means of resolving criminal disputes over the past decade. The major movements that illustrate this approach are mediation and private corporate justice.

Mediation (David, 1985, p. 87), refers to the system where a neutral third party, the mediator, facilitates the victim and offender who both voluntarily come before the mediator to find their own solution to their dispute. The victim and offender enter into an agreement to resolve the dispute which is unenforceable in a court. The mediator does not impose a solution upon the defendants. The victim and offender are brought together in an informal setting, at a time convenient to them, reasonably quickly after the criminal act takes place. Each is given an opportunity to state their whole story without interruption, including the underlying issues and causes. Mediators are volunteers from the community who receive some training and are, ideally, of a similar cultural and socioeconomic background as the disputants. The agreement can, and usually does, involve regulation of their future conduct.

Mediation as a system of solving criminal and civil disputes, grew out of dissatisfaction with the criminal justice system's inability to satisfactorily resolve neighbourhood disputes, and disputes between people in ongoing social relationships. The traditional system with its emphasis on punishment does not assist in maintaining these relationships and, as states, may even contribute to their destruction.

In Australia, three states have mediation available to solve disputes between people in ongoing social relationships. New South Wales and South Australia have mediation available for neighbourhood disputes and New South Wales and Victoria have mediation avalable for family disputes.

In New South Wales mediation is available in three community justice centres established by the government (originally under the Community Justice Centres (Pilot Project) Act 1980 (N.S.W.) and now continued under the Community Justice Centres Act 1983 (N.S.W.)). In South Australia, mediation is available at the Norwood Community Legal Service.

As an alternative to adjudication to settle family disputes, the Family Law Council recommended to the Australian Attorney-General that a pilot program of two Family Conciliation Centres be established; one in a semi-rural position in Victoria, and the other in an urban position in New South Wales. The first of these pilot centres opened in February 1985, at Noble Park in Victoria, and the New South Wales centre is to open in Wollongong. These centres are to provide mediation services to resolve family disputes. The aim is to empower family members to resolve their own disputes.

Mediation for neighbour disputes may also be available in Victoria soon, as in 1982 a Dispute Resolution Project Committee was set up within the Legal Aid Commission of that state. The committee was to investigate the nature and extent of disputes, currently without a satisfactory means of resolution, and whether there was a need for 'alternative dispute resolution mechanisms and structures, such as mediation procedures' (Neighbourhood Mediation Service, 1985, p. vii). The committee decided that there was a need for alternative dispute resolution for neighbourhood disputes because 'the intervention role of (existing) third parties', such as courts, police, and local government, often escalates the neighbourhood dispute into a more violent situation, or at least, contributes to the serious deterioration of relationships between neighbours'.

The Committee recommended the establishment of a pilot project of three neighbourhood mediation centres (two metropolitan and one country) for a period of three years. The centres are to be funded by the government. The disputes the centres are to handle are similar to those handled by the existing schemes in New South Wales and South Australia. The report was favourably received in Victoria, and it is anticipated it will be implemented in the foreseeable future.

Mediation is also being used, at least in New South Wales, to resolve sexual harassment disputes and the anit-discrimination agencies have used conciliatory approaches, if not pure

mediation, because they find these work better to change attitudes than adverse publicity which tends merely to polarise attitudes.

None of the above mediation schemes was set up specifically to deal with criminal offences, but all at least can deal with disputes involving minor assaults. None of the centres appear to deal with many, if any, stronger disputes. They are legally capable of doing so, since the New South Wales legislation does not limit the seriousness of disputes which can be mediated, and the South Australian centre is not legislatively established. The Victorian report suggested that any implementing legislation should not limit the types of disputes to be mediated to allow for reasonable experimentation.

An evaluation report of the New South Wales pilot project by Schwartzkoff and Morgan (1982) recommended the continuation of the centres, and evaluative studies in the United States (referred to in David 1985, p. 97), have found that, qualitatively, mediation is viewed more positively by disputants than is adjudication, but that mediation, whilst more successful than adjudication in preventing recidivism, is not satistically significantly more successful (Davis, 1982, p. 163; Garofalo and Connelly, 1980, p. 592). In disputes involving close ongoing relationships, mediation appears to be least successful, most probably because the disputants have more opportunity for continued conflict due to continued close contact between them.

Private Corporate Justice

Private justice refers to the victim and the offender resolving their own dispute without the intervention of any third party. This is the dyadic action of McGill's and Mullen (1971, pp. 5-25). This method of solving criminal disputes has always been available to victims and offenders. It is being used every time a victim does not report an offence to the police or proper authorities, but resolves the conflict with the offender directly. However, private justice is only successful if a resolution of the conflict is achieved. If there is a mere avoidance of the conflict then there is not private justice.

With the decline in community involvement of many members of society has come a decine in this method of resolving criminal disputes for private individuals. However, dissatisfaction with the delays and frustrations of the criminal justice system, and with its punishment orientation, has led many companies and institutions to resolve conflicts, where they are the victims of criminal acts, directly with the offender. Companies and institutions are increasingly using corporate private justice and by-passing the criminal justice system.

The dissatisfactions experience by commercial enterprises involved in the present system have been presented by Challinger (1982, pp. 13-18), for retailers. Retailers are dissatisfied because of the financial losses they suffer as a result of becoming involved in the system, and the waste of time involved in delayed court hearings. The poor public relations that could follow publicity about shop-theft, or when a retailer reports a particular theft to the police, also influence retailers against using the present system. This is born out by a study by Brady and Mitchell in Victoria in 1971 (Brady and Mitchell, 1971).

As Stenning and Shearing state (1984, p. 84), corporate private justice outside the criminal justice system is concerned with the prevention of future harm or loss, not punishment of the offender. It is run by victims for their benefit, by the corporations or institutions themselves, for prevention of loss or harm to them. Most of these corporate victims deal with criminal acts which affect them without utilising the traditional justice system. They do not want punishment of the offender because that does not prevent loss of profit. The sanctions they use are cost-effective economic sanctions such as restitution by an employee, dismissal from work for an employee (very important), loss of credit facilities for a customer, or loss of access to the corporations' property (such as a club or shopping mall). Stenning and Shearing illustrate the attitude of corporate justice by the following example:

> Last year, in the city of Calgary in Canada, a customer of one of the major banks succeeded in relieving its automatic cash-dispensing machines of $14,500 to which he had no legal entitlement. The aspiring thief, however, did not reckon on the sophistication of the security equipment installed to protect the bank's assets; unbeknown to him, a hidden camera had snapped an excellent full-face picture of him just as he was perpetrating his crime. This photograph, combined with the computerized records generated by the machine itself, left no doubt that he was responsible for the loss. The response of the bank to this serious theft provides an illustration of what we mean by 'corporate justice'. Instead of immediately invoking the processes of criminal justice (calling in the police, having the man arrested and charged, getting a search warrant to recover the money, etc.) the bank made contact with the man and arranged for its representative to meet with him. At this meeting, the bank official let it be known that the bank was aware that the man had 'borrowed' its money, and suggested that perhaps this 'loan' should be placed on a more regular footing through

> a formal loan agreement. The official offered a rate of interest and a repayment period which, while not overly generous, were certainly not unreasonable given the prevailing economic conditions at the time and the man's own creditworthiness in the circumstances (Stenning and Shearing, 1984, p. 80).

Stenning and Shearing go on to say corporate justice is not just concerned with minor criminal offences against property. Most Canadian corporate employee thefts are apparently not reported to the police (even of up to $500,000 on the policy of one Canadian Bank), and instances of corporate justice discovered by Stenning and Shearing include serious crimes of violence such as assaults, kidnapping, and sexual offences. That major company frauds and thefts are being dealt with by corporate private justice is illustrated by a recent report in the Sydney Morning Herald (1 July 1985, p. 15), of an apparent electronic theft of $UK 6 million from the U.K. bank. Apparently, an employee of the bank used a computer to divert the money into his own account. The bank apparently did not report the theft to the police, fearing bad publicity, but negotiated with the employee for the return of half the money. The employee also informed the bank of the weakness in their electronic system which allowed the theft to occur.

Comparable information and illustrations from Australia have been difficult to find. Obviously a study needs to be undertaken to ascertain the extent of this corporate private justice here. Stenning, in a recent unpublished seminar paper delivered at the University of Sydney Institute of Criminology, stated that it is estimated over half of all policing in Canada is now dealt with by corporate private policing. It wil be fascinating to ascertain if a similar situation exists in Australia (Williams, 1974, p. 380)*, and, if it does, why mediation and other informal dispute resolution processes are not encouraged, and made available to other offenders and victims. Why should the offenders who come through the criminal justice system be disadvantaged as compared to those who go through corporate private justice?

CONCLUSION

These are the two major informal justice movements operating in Australia. The common bond that appears to exist between them is that each is concerned with more than the isolated external criminal act itself, and they are not aimed at inflicting punishment upon the offender. They are concerned with maintaining

* Williams stated that private security 'was one of the major areas of crime prevention in Australia, United Kingdom, Canada and the U.S.A.'.

relationships either between the victim and offender in mediation, or between the victim and others in corporate private justice. The relationships that corporate private justice are concerned to maintain are between the company and the public, its clients or customers who may include the offender, and between the company and its shareholders.

The ways the movements use to maintain the relevant relationships differ with each movement. In mediation, the mediator facilitates the victim and offender to make an agreement which resolves their conflict in a way acceptable to both of them. In corporate private justice companies seek to avoid any adverse public reaction which may follow publication of the fact that the company was the victim of crime, especially serious crime. The company aims for privacy and secrecy, and also aims to maintain the relationship with its shareholders by minimising any loss of profit from the criminal act or from similar criminal acts in the future. None of these aims are achieved by prosecution and punishment through the traditional criminal justice system.

Whereas mediation involves a neutral third party to mediate fairly between the victim and the offender, corporate justice involves only the victim, the company, and the offender, an employee or a stranger. The argument that mediation may not result in truely voluntary agreements because of the inequality of power (Graycar, 1982, p. 141; Lazerson, 1982, pp. 159-60), between the victim and the offender, say between landlords and tenants, is amplified many times when applied to corporate private justice. In the latter, the corporation has more power; in economic terms, towards individual members of the public, and towards its employees. The lack of 'due process' safeguards, (ibid.) which is an objection often levelled against mediation, is much more applicable and justified when levelled against private corporate justice. Company employee offenders may be somewhat protected by union membership, but with the rise of contract employment (Sydney Morning Herald, 7 August 1985, p. 3), this limited protection is diminished.

The growth of corporate justice has much more capacity to deny offenders 'justice' than has mediation. Much work needs to be done in Australia to gauge the extent of this movement and to evaluate its' operation. Both these movements have grown out of dissatisfaction with the traditional criminal justice system. That system may well have to change to accommodate this dissatisfaction if it is to continue as the system to resolve conflicts occasioned by criminal acts, or it will have to accept that it will gradually decline.

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SUMMARY OF DISCUSSION

1. Is it true that the vast majority of cases in community justice centres are disputes that do not involve the criminal law? Yes, an argument against mediation is that many of the cases it deals with would not have been brought to the attention of the courts. Community justice centres are being used to solve disputes in an increasing number of cases where previously such cases were not being resolved. They were, in fact, being ignored until they escalated.

2. How long does mediation take? The average time is about 2 hours and the mediators are paid $15 per 2 hour dispute session. This is often evening work and so this reduces the amount of lost wages that would otherwise be incurred. There is an attempt to match the mediator to both sides, for example, for language compatibility. The training of mediators is done by TAFE and has now been reduced from 18 weekly sessions to 3 very solid weekends.

3. Is it possible for community justice centres to contribute to the control of corporate justice in Australia? If we allow white collar companies to operate outside the system why not then allow others to operate outside the system? Clearly, there is a need for regulation. The major problem for the company is the embarrassment and loss of public confidence. Such companies do not want punishment as they then do not get the money refunded. An alternative could be to go through the community justice centre: this has advantages for the community, the offender, and the victim.

A THEORETICAL CRITIQUE OF DIVERSION

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The term 'diversion' has become an important concept in the vocabulary of criminal justice over the past two decades. The sources of this popularity are multiple. For those concerned with rising costs of criminal justice procedures for removing persons from official custody are attractive from the viewpoint of cost-effectiveness. Social scientists have argued that where possible the stigmatising effects of official processing ought to be avoided. Concerned rehabilitation professionals argue that disruption of employment or educational involvement can be harmful, especially for those already made marginal by circumstance of lifestyle. Some see an already jammed and clogged system of criminal justice, and argue that one way to bring about some semblance of order is to remove cases that ought not to have been brought in in the first place. All of these points of view, and more, have fed into such important reports as the President's Crime Commission in the United States which argue for a priority being given to the diversion of offenders somewhere in the early stages of justice processing.

At the outset it needs to be pointed out that diversion is but one of a wider pattern of what might be termed 'justice system divestment'. After many decades of increasing formalisation of social control up through the early period of the 20th century, including the proliferation of criminal laws and correctional sanctions, from the 1960s onwards, questions have been raised about the appropriateness and effectiveness of such formal control procedures. Arguments have been advanced, and government policies created, around such ideas as decriminalising some offences (for example, minor drug use), searching for alternatives to custodial sentences (that is, decarceration or deinstitutionalisation), invoking alternatives to community supervision or control (for example, diversion or restitution) or perhaps even seeking ways to prevent the problems in the first instance (for a review, see Empey, 1982).

THE LOCATION ISSUE

Given this proliferation of divestment options, one of the first conceptual requirements in the analysis of diversion is to provide a clear sense of location of the process within the flow of cases within the criminal justice system (see Figure 1). In

their attempt to sort out the various possible definition suggested for the term 'diversion', Cressey and McDermott (1974) suggest that true diversion starts with a process which picks up individuals at some point after initial entry through existing justice system processing, and results in the removal from processing at some point before adjudication or the formal trial process with a finding of guilt.

WHICH OFFENDERS?

A second conceptual matter consists of the specification of which offenses, or which offenders, are to be considered eligible for the diversion process. In the case of pre-trial diversion for adults, most such programs are designed for the young, non-violent, and first offenders. For example, Senna and Siegel (1981, pp. 345-6) suggest the following criteria as common to such diversion efforts:

- The defendants may be either male or female.
- They should be between 17 and 22 (with variations) years of age.
- They are either unemployed, or underemployed, or persons whose employment would be terminated if convicted.
- They are residents of the area and have verifiable addresses.
- They are not identified as drug-dependent persons.
- They cannot be charged with felonies that do not fall under the jurisdiction of the district courts.
- They should have not more than two prior convictions.

Similarly, in a United Kingdom program (Wicks, 1977), the criteria include offenders for whom there is:

1. no serious offence against the person;
2. no crime ever for considerable gain;
3. no large sum from crime; and
4. no obvious competence in planning the crime.

THE ISSUE OF WHERE DIVERSION LEADS

The third conceptual issue concerns to what are individuals diverted? Regarding this, a first distinction is whether or not the process diverts individuals out of the system and thus away from any further action, or are the defendants referred into a program. It was the clear intention of at least some of the labelling theorists that the process of diversion should lead to non-intervention. In the words of Schur (1973): 'leave the kids

alone whenever possible' (see also Lemert, 1971). An illustration of a program for juveniles which is intended to result in such diversion into no action is the police cautioning program in Victoria which has been described recently by Challinger (1985).

Most often, however, the process of diversion, especially adult diversion, calls for diversion into programs (see discussion of Cressey and McDermott, 1974, regarding this for juveniles). If the defendants are referred into programs, then it becomes important to distinguish where these programs are located, and what they are about. Thus, a second distinction regarding the destination of diversion programs concerns whether the programs are based in what can be termed developmental in contrast to control strategies of intervention. Developmental strategies are those kinds of programs which are not designed exclusively for offenders, but which call for a broad range of clients including perhaps a great majority of non-offenders, offering these clients such options as employment, training, or education. Such programs are clearly located outside the criminal justice system, and thus meet the essential requirement for what Cressey and McDermott (1974) term 'true diversion' (which they acknowledge, however, is rarely observed in practice). These, further, are concerned with expanding opportunities to improve an individual's position within the social structural networks that underpin legitimate identities in the conventional world (for example, employment or education). These would meet the observation of Schur (1973, p. 167) that some of the most important policies for dealing with crime are not necessarily designated as crime policies.

Most often, however, diversion programs call for referral into programs that function within what can be termed control strategies. The intent of such strategies is to bring deviant or criminal behaviour under control through such procedures as counselling, therapy, or crisis intervention. The problem behaviour is thus presumed to result from underlying needs, poor self-esteem, or dysfunctional family life which are then addressed through the program intervention. As such, these are 'person-centered' rather than 'situation-centered' interventions. Given that this tends to characterise adult pre-trial diversion programs, the following questions can be addressed.

Diversion and Stigma

Firstly, do control based diversion programs avoid stigma? A major theme that runs through the literature on diversion is the notion that such approaches will reduce the labelling effects of the justice system. As Senna and Siegel (1981, p. 344) observed:

> Pre-trial diversion programs were established in the late 1960s when it became apparent that a viable alternative was needed to the highly stigmatising judicial sentences.

If, however, the only persons in the program are those referred by the justice system, then the defendants will bring that justice label into the program. If it is assumed that the individuals suffer from psychological problems which require treatment, then this assumption of personal pathology carries further stigmatising weight. If the program participation is a condition of some non-judicial alternative (this meaning that non-participation will result in direct referral into the court process), then the diversion becomes legally coercive with further consequences for stigmatisation.

On top of these, there are further problems that flow out of the organisation of the typical diversion programs. These problems derive from the observation that the diversion process is rarely, in fact, truely outside of the justice system such that it meets the criteria of Cressey and McDermott (1974) for 'true diversion'. Most often, the control-type diversion programs are funded by the justice system. Commonly, the personnel are recruited directly from positions within the traditional criminal justice system. Access to clients is directly in the control of justice agencies, which then can force the diversion program to respond to demands of justice personnel for accountability and information (or face the consequences of being cut-off from clients, which would lead to closure of the program). Funded and peopled by justice system personnel, functioning at the will and whim of that system, it is perhaps not surprising that the theoretical orientation of diversion staff regarding deviant behaviour and its control differ hardly at all from personnel located within the established system (Ruby, 1977).

What this suggests is that as long as diversion programs are based in control models there is little reason to believe that these will avoid the stigma that is argued to be problematic in terms of arrest or trial processes. Indeed, Elliott, et al., (1978) found that receiving service in a diversion program appears to produce the same level of negative change in terms of deviant self-image as does processing through more routine court and probation processes. This is not in itself an argument against diversion efforts. The question here is one of whether diversion programs meet the apparent objective of avoiding stigma.

Diversion and Net-Widening

A second question to be raised about control-type diversion strategies is: do these ultimately serve to widen, rather than narrow, the formal net of social control? As Sutherland and Cressey pointed out, when 'true diversion' occurs, the defendant is 'safely out of the official realm' of the justice apparatus (Sutherland and Cressey, 1978, p. 492). The actual record of diversion, however, suggests quite different results. Referring to Figure 2, it can be seen that at any given decision point

within the justice system (prior to trial in this case, of course), the decision to be made is whether to dismiss the defendant or refer the individual onwards for further formal action (Section A, 'Before Diversion' in Figure 2). The ideal anticipated result of diversion is that the flow into the diversion program will come exclusively from cases which previously would have been referred onward for formal processing.

The reality in terms of net-widening can take many forms (see Section C of Figure 2). On the one hand, the flows into the program, instead of coming from those who previously would have been processed, can in fact, come from three unintended sources: (i) from cases at that decision point which previously would have resulted in no action; (ii) from cases at some previous decision point which also earlier would have resulted in no action being taken; and (iii) from sources totally removed from the justice system (schools, parents, friends, neighbours, even self-referrals). While these become the referral sources for the diversion program, observe that in this extreme, hypothesised case, that the flows into further processing remain as large as when the diversion program was instituted. On the other hand, referral into the diversion program becomes part of what Wilkins (1965) terms 'deviance amplification' or what Lemert (1971) has called 'secondary deviance'. That is, this referral may actually increase the probability of further law violation, with a resultant increase in the chances of further and deeper penetration into the criminal justice process (note the arrow indicating a flow from the diversion program into the justice system). For a discussion of this phenomenon of net-widening see Alder and Polk (1985), Blomberg (1983), or Austin and Krisberg (1981).

Diversion and Due Process

A third question about diversion concerns the extent to which this process may represent a potential threat to the due process rights of defendants in the criminal justice process. Perhaps most obviously, such due process issues arise when the referral into diversion is conditional upon admission of guilt. In such a case, a defendant, at times without benefit of counsel, might be confronted with the choice of admitting guilt in order to benefit from what is seen as the 'soft option', rather that to plead innocent, and face the uncertainties of the trial process, and thus the possibility of a prison sentence. This admission of guilt, assuming for the moment that the person is innocent but feels pressured to seek a soft option, may not ultimately prove in the best interests of the defendant either if the individual does not meet the conditions established for the diversion program and thus becomes referred back into the trial process, or, if the person is apprehended for a later offence and then becomes treated as a repeat offender on the basis of the prior guilty plea.

Net-widening effects aggravate these due process problems. As the diversion program unfolds, it may be in process of transiion from an ideal program (Model B in Figure 2) of diversion away from formal processing to a net-widening form of diversion (Model C in Figure 2). In such circumstances, event the best informed defendant or legal counsel may not know that, in fact, the actual alternative to the guilty plea and referral into diversion is no further action at all. In such circumstances, the best interests of the defendant certainly may not reside in a guilty plea. One observer has concluded that:

> Although diversion was instituted under the guise of improving the network of community services and of insuring that intervention was less intrusive, it appears that the constitutional rights of divertees may have been less well protected than those who have actually been subjected to a formal court hearing (Empey, 1982, p. 483).

The Effectiveness of Diversion

A fourth question to be asked of diversion concerns the effectiveness of these in the control of further criminal behaviour. Unfortunately, the record of diversion programs, both juvenile and adult, is mixed and difficult to read. One can find certainly, evidence of positive effects of juvenile diversion (for example, see Palmer and Lewis, 1980, or the recent discussion by Binder and Geis, 1984). Unfortunately for advocates of diversions, these results can be balanced by evidence suggesting no impact (for example, Rojek and Erickson, 1981-82, or the reviews by Alder and Polk, 1985, Gibbons and Blake, 1976, or Gibbons and Krohn, forthcoming). More important, perhaps, some juvenile data suggests instances where diversion may actually contribute to higher levels of criminality after the program experience (for a review, see Alder and Polk, 1985). Comparable patterns of mixed evidence are found among adults, some programs showing positive results, other suggesting little if any effect of diversion on post-program recidivism (for a review, see Pryor and Smith 1983). It can be pointed out that regarding both juveniles and adults, in general, the more rigorous the design, the less likely it is to report positive effects for diversion (Polk, 1984).

CONCLUSIONS

The intent here has not been to question the appropriatness of diversion, since clearly in some circumstances powerful arguments can be developed for the removal of defendants from the criminal justice process. Instead, the objective of this discussion has been to point out the need to be clear regarding the goals of initiating a diversion program, and to raise questions as to whether the current record of diversion can sustain claims that

diversion is effective in avoiding stigma, reducing the net of formal social control, in adequately protecting the due process rights of alleged offenders, or in reducing subsequent levels of observed criminality. At the same time, there do remain important reasons to consider diversion programs in particular, and divestment strategies more generally.

More attention might be given to processes which either divert into 'no further action' or which are based in developmental strategies and are located well outside of the juvenile justice system (and thus meet the criteria of 'true diversion' as suggested by Cressey and McDermott, 1974). Thus, many trivial and minor kinds of problems, because of the lack of other community alternatives, tend to become caught up in a criminal justice process that is difficult to justify either in terms of its expense, or in terms of the extreme degree of punishment given the insignificant nature of the violation. For many more of these, judicious non-intervention might be expanded. For adults and juveniles, employment, education, and training programs firmly located in community agencies rather than in institutions of criminal justice needs expanded, although some of the newer resources programs being suggested in Australia would seem quite promising.

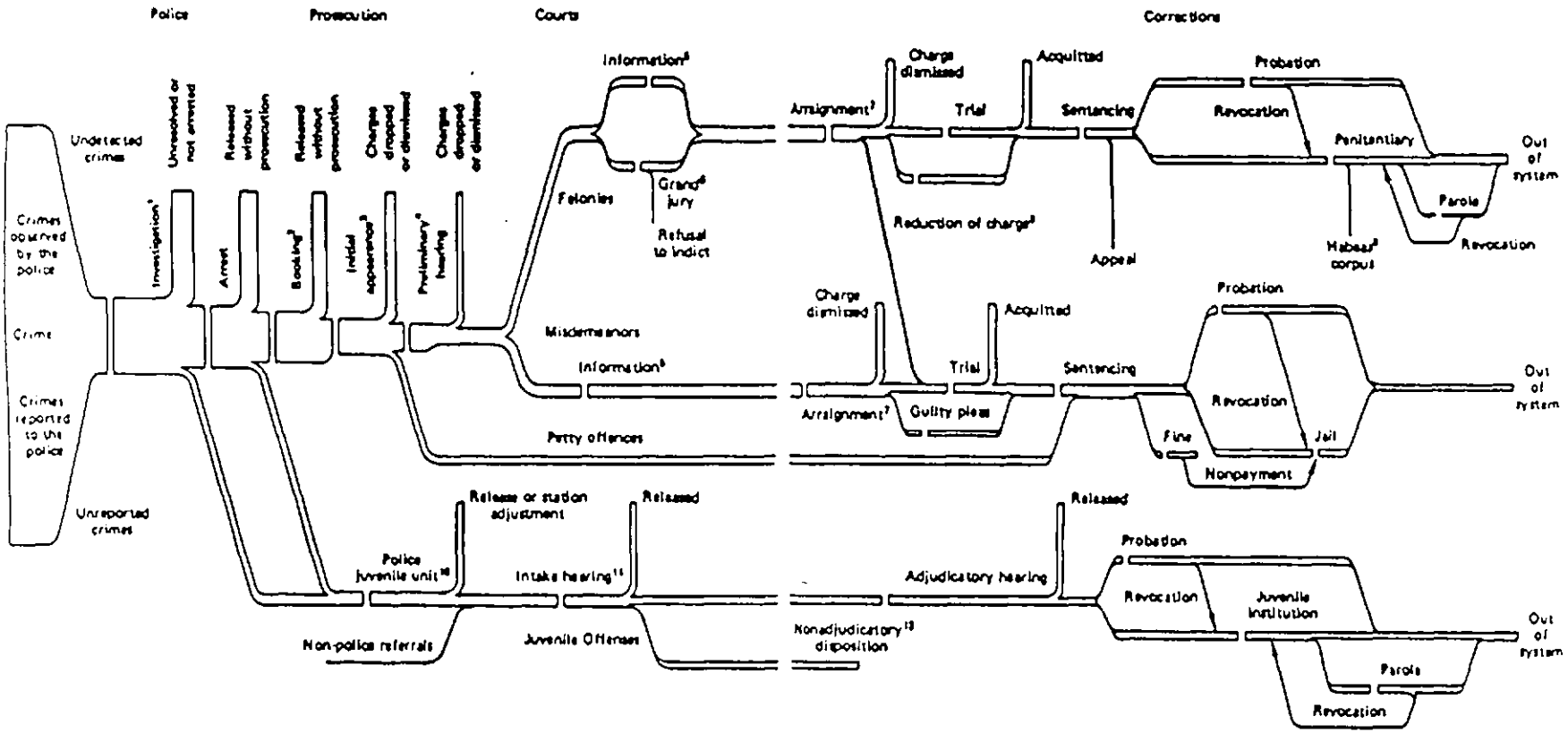
Quite apart from these observations, it would seem that reasonable arguments can be advanced for the development of new forms of community and criminal justice programs to meet the specialised needs of such offenders as those involved with drug use or sexual abuse of children. While some of these may fall appropriately within the domain of diversion programs, that is, coming after arrest and before trial, attention needs to be given to the questions raised here regarding where these programs are to be located, and what steps are to be taken to consider the problems of due process and avoidance of net-widening. Some approaches suggested for such offenders, it must be noted, actually fall after the finding of guilt, and in fact are premised on an assumption of the need to assure at least some minimum penetration of the offender into the justice process. These approaches to divestment, then, will have quite a different rationale and purpose than approaches calling for the use of non-intervention for trivial forms of law violating behaviour.

Finally, a commitment to effective evaluation needs to be advocated in the strongest terms possible. Diversion has proven to have many effects that were quite unintended. Only if an adequate (and probably expensive) assessment program is put in place can such effects be documented. There are two quite distinct levels that such evaluation should address. First, there is a need to examine the impact of the process of diversion on the individual defendants involved. Here the questions often focus on post-program impact in terms of such behaviour as recidivism.

Second, assessment of program effects must also examine the impact of diversion on the system of criminal justice processing, thus examining on a before and after basis, the various flows not only into the program, but also between relevant points within existing justice agencies (assuring, for example, that the flows into the diversion program do not leave unaffected the flows between existing justice system decision points). Put another way, an important goal in the evaluation of diversion programs is to assess whether the flow of cases into the diversion program is accompanied by a reduced, or at least altered flow of cases into more traditional processing.

If questions have been raised here, these should not be interpreted as advocating the diversion or divestment should be abandoned, since this is far from what is intended. Indeed, there can be no question but that the present tendency to over-criminalise responses to behaviour, results in problems both for the individuals involved and for the system of criminal justice. At the same time, as the objective of diverting persons from the justice system is pursued, it should be conceptually clear about what is intended to be accomplished, and that the key elements of the particular diversion process to be initiated are specified (such as its goals and location), and to clarify how such potential unintended consequences, such as net-widening or violations of due process, are to be avoided.

FIGURE 1: A General View of the Criminal Justice System



1 May continue until trial.

2 Administrative record of arrest first stage at which temporary release on bail may be available.

3 Before magistrate, commissioner, or justice of peace, formal notice of charge, advice of rights. Bodget Summary trials for petty offenses usually conducted here without further processing.

4 Preliminary testing of evidence against defendant. Charge may be reduced. No separate preliminary hearing for misdemeanors in some systems.

5 Charge filed by prosecutor on basis of information submitted by police or citizens. Alternative to grand jury indictment often used in felonies, almost always in misdemeanors.

6 Reviews whether government evidence sufficient to justify trial. Some states have no grand jury system, others seldom use it.

7 Appearance for plea. Defendant elects trial by judge or jury. If available counsel for indigent usually appointed here in felonies. Often not at all in other cases.

8 Charge may be reduced at any time prior to trial in return for plea of guilty or for other reasons.

9 Challenge on constitutional grounds to legality of detention. May be sought at any point in process.

10 Police often hold informal hearings, dismiss or adjust many cases without further processing.

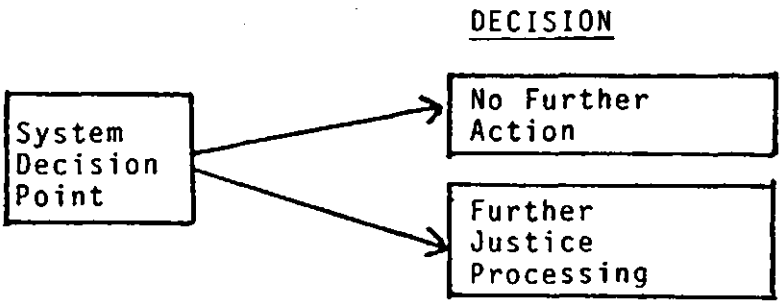
11 Probation officer decides desirability of further court action.

12 Welfare agency, social services, counseling, medical care, etc., for cases where judicatory handling not needed.

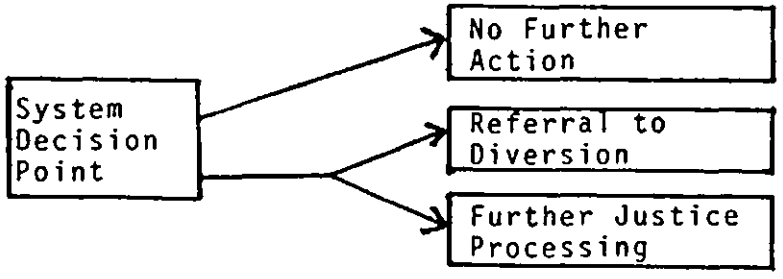
A General View of the Criminal-Justice System. This chart presents a simple yet comprehensive ne movement of cases through the criminal-justice system. Procedures in individual jurisdictions from the pattern shown here. The differing weights of line, indicating the relative volumes of cases disposed of at various points in the system, are only suggestive because no nationwide dat sort exist. SOURCE: This chart is taken from pp. 8-9 of The President's Commission on Law Enfc and Administration of Justice, The Challenge of Crime in a Free Society (Washington, D.C.: U.S. Go Printing Office, 1967). in Don C. Gibbons, Society, Crime and Criminal Behaviour (4th Ed.), Englewood Cliffs, N.J: Prentice-Hall, pp. 430-431.

FIGURE 2. Tracing the Flow of Cases Into Diversion Programs

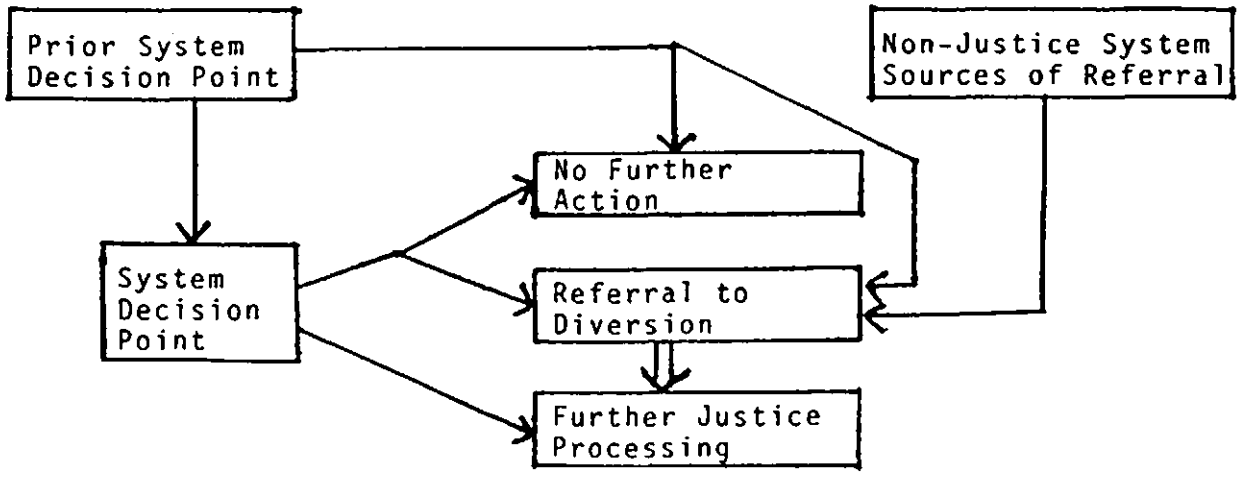
A. BEFORE DIVERSION:



B. AFTER DIVERSION (IDEAL)



C. AFTER DIVERSION WITH NET-WIDENING



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SUMMARY OF DISCUSSION

1. What are the main non-justice system sources of referrals to diversion? In the Canadian and U.S. experience it is mainly school principals, parents, friends and people straight off the street.

2. Are we suggesting diverting into a new program or working towards incorporation within existing programs in the community? The more you can use existing facilities and promote a feeling of ordinariness then the better it will be.

3. Is it possible to provide a diversion program that does not have control as its underlying factor? You have to have accountability and credibility with the court system. If you are flexible and intelligent enough then control does not have to be part of the intervention. Probation services can run the program and place the educational portions of it in TAFE colleges. This is the best way to avoid stigma. So much offender management is predicated on individual pathology. This should not happen: the macro scale is the one to operate on. It is a pity that the individual deviancy surfaces in the media and in the courts. Yes, most schemes are posited on system change rather than individual change, yet working within the criminal justice system means that our responsibility is to control individual forms of deviant behaviour. We need accountability otherwise the political system will come down on us and insist on minimum amounts of responsibility and control.

THE MANAGEMENT WITHIN THE CRIMINAL JUSTICE SYSTEM

of Heroin-involved Offenders. Recommendations for N.S.W. Based on Treatment Alternatives to Street Crimes. Proposal for a Compensation Orders Act

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This paper discusses the treatment alternatives to the street crimes programs in the United States of America and examines what can be done in the criminal justice system for people who are involved - given the assumption that involvement with narcotics in one form or another, remains a criminal offence; that heroin is not made freely available to people who want it, and that therefore, there is a reduction in crime. That is a very interesting proposition and there is a lot of current thinking along those lines, but this paper will not look at such issues. The perspective presented here is that of a probation and parole officer of 20 years experience. Probation and parole officers spent a great deal of time with people initially to build a trusting relationship; often for nil result. As the relationship develops, the officers start to say to people 'we have had this, we can not cop it any more, it is not realistic, no, we do not trust you and we do not trust you for the following reasons. These are the sorts of things that you as the offender will have to do to earn our trust'.

This has achieved quite positive responses, and is not really a soft approach. Diversion is not a soft approach either. People are put under an obligation, and are given choices under constraint. This is what life is all about; situations where the choice is between which is the more palatable. Choices are not always soft and are not always easy.

What is the treatment alternative street crimes program all about? These programs were introduced in the United States of America from 1971. They became widespread and with the impact of 'Reagan-omics' they have been cut back considerably. In some areas where they were well established they continue to function with the support of the courts. Treatment alternative street crimes programs are a form of contracting between an agency and the courts. A treatment alternative street crimes program agency is not a counselling or treatment agency as such. What they do is

assess, refer and monitor those people who come to them. It could be likened to the drug and alcohol court assessment program in New South Wales with the added components of the assessment of people in custody, an under-arrest and a monitoring function whereby a client responds to whatever in or outpatient program they are on. They are periodically checked and reported on to the court.

These programs have offered two major benefits in America over the last 12 years:

1. a system of exhaustive evaluation, referral, and monitoring of offenders whereby a major percentage of persons coming before the courts are diverted to non-pressing programs; and

2. a substantial financial saving to governments.

There do not seem to be too many problems with regard to implementation of similar programs in an Australian setting. However, there are problems that have to be addressed in terms of philosophy, and they apply to broad philosophical issues, and to probation and parole services, the agencies which end up running treatment alternative street crime program style programs. The 'help versus control' syndrome is clearly the major point, and probation officers range from each end of the spectrum on this. The difficulties that exist are not insuperable.

Reality therapy - bringing offenders face to face with aspects of their unacceptable behaviour and the consequences - helps to resolve some of the paradox. This is the experience that probation and parole officers have had. Some offenders realise this and acknowledge that they needed imprisonment, or whatever the punishment was, at that stage of their life.

There are several research findings that relate to such coercion or choice under constraint. Dr George Vaillant, an American psychiatrist specialising in drug and alcohol related problems established that a very small percentage of people who voluntarily went to hospital were successful in becoming abstinant from narcotics (Vaillant and Rasor, 1966). Also, a significant number of people who were on parole and probation, and had been strictly supervised, were successful. A 12 year longitudinal study followed, and Vaillant found that, depending on definition, 35-42 per cent of these supervised offenders had stable abstinence (Vaillant, 1966). For 20 years both voluntary hospitalisation and imprisonment failed to produce abstinence. Compulsory community supervision, usually by a parole officer, and methadone maintenance were usually more successful.

The 1983 study by Salmon and Salmon (1983) in South Jersey, United States of America, reviewed two programs: one with

voluntary admission; and one as a treatment alternative street crime program. The results of that study are fairly positive. Studies found that coercion facilitates success for certain people, particularly older, long term heroin addicts. This is important, for claims that arrest rates have been reduced, certainly arrests involved in heroin, are not often found in the literature. These studies may have loopholes, but programs are available for narcotic involved persons involving an element of coercion which for them offer their best prospect of being drug free, and which also offer the community a reduction in the sort of crime associated with narcotic drugs.

The Salmon and Salmon study also looked at the effect of treatment alternative street crime program (TASCP) style involvement with people in drug free programs and others in methadone maintenance programs. They found it was more effective for those in drug free programs in terms of arrest and abstinence but not in terms of employment.

There are, hence, methadone programs in America which are being expanded. Australia, however does not really have any similar programs except in an embryonic form, (for example the DAYCAP program in New South Wales) which is a TASCP style program. The reasons why there are no other programs are not clear to this writer. In 1981 the Rankin committee of inquiry into the legal provision of heroin in New South Wales recommended that the TASCP experience be looked at very closely with a view to the introduction of its principles in New South Wales (Parliament of N.S.W., 1981). The Probation and Parole Officers Association of New South Wales followed that up in 1983 by sending an officer to the United States to a conference of TASCP agencies. The Association believes it will be successful, yet such a program still has not been implemented. The question for probation and parole officers is whether there are ever going to be programs of an organised nature; at the moment there are not, only ad hoc, unmonitored responses which cannot be measured in terms of success or failure.

One of the big arguments against a program like this is the net widening effect and that more people are put in prison. There are a lot of questions to be answered in relation to narcotics. That alone, though, is insufficient reason not to run a program. A wider viewpoint needs to be taken including the cost to the community of crimes committed by narcotic involved individuals. Copies of the Association's paper contain a great deal more information than this paper has covered.

One final point relates to compensation. In New South Wales there is an ad hoc system of compensating victims of crime. People who have sustained some reasonably small loss as a consequence of crime have no formal process by which this type of problem is fed into the criminal justice system. The court may

hear of it and may or may not act on it. The idea of reality therapy shows that offenders may benefit from having to recompense their victims. Often nothing happens and this is a grave mistake from the point of view of community corrections, from the victims point of view, and sometimes from the offenders point of view. There is a need for a formalised program for property crimes where the loss is less than $1,000. Such a scheme should be run by a probation officer and could be used in a pre-trial diversion manner or as an alternative to imprisonment. The offender should have to consent to such an order. This would be a very positive selling point, and would reduce the number of people in prison whilst increasing community acceptance.

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SUMMARY OF DISCUSSION

1. It was thought by some participants that the Treatment Alternatives to Street Crimes Program, once in place, attracts people from an earlier point in the justice system and that this is a clear example of net widening.

2. The move to de-institutionalise has resulted, in the U.S.A., in a reduction in people in government institutions but an increase in those in private institutions. These are often purchaser-source oriented and because of the profit motive changes take place in the nature of the institutional experience: a person may be in treatment, not because they need it, but because the hospital needs the profit. The question is therefore, if you are in such an institute as part of the 'choice under constraint' method, how do you legally get out? Do you habeas corpus your way out if you are subject to cruel and unusual treatment? Some participants maintained that the solution was a high degree of public disclosure; others thought this inadequate.

PRE-TRIAL DIVERSION OF ADULT OFFENDERS

A POLICE PERSPECTIVE

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INTRODUCTION

Over the past decade there have been many significant and worthwhile changes to the criminal justice system. As this paper shows, initiatives towards pre-trial diversion for adult offenders are similarly positive. Since police are key actors in processing offenders, their perspective is entirely appropriate. However, the views expressed in this paper may not be those held by the majority of police in this country; it is therefore a police perspective rather than the police perspective.

Over the last few years there is an increased willingness by police to contribute towards debates of this kind. This can only help promote a healthy and receptive environment for change. Until relatively recently, police were clearly defensive and suspicious of change, but that mood in most quarters is now changing, and progressive police are joining with legal and social reformers to initiate change. The police should participate in its development at the earliest possible stage, rather than having change thrust upon them, not only to present a point of view, but to hear and understand the feelings of others who are concerned about the issue.

DISCRETION TO PROSECUTE

The decision of whether or not an offender will be placed in the justice system is more often than not first considered by the police. In the field it was never intended that the police be judge and jury. That is why powers of apprehension are couched in terms of only requiring 'reasonable cause to suspect' and no more. Daily, a discretion by the street police officer is exercised in favour of the offender being diverted from the justice system with a simple verbal warning. The police officer in the field is expected to exercise common sense, and sufficient initiative to identify those persons and circumstances which deserve no more than that. Given the vagaries of human nature, the problem of lack of consistency will always exist, and given a set of circumstances in another space and time, may attract a

different course. Obviously, the more serious the breach, the more likely the matter will be taken to court. Unfortunately, feedback about the operational police officer is mainly negative as only the insensitive, unbending police officers, rather than the many others who adopt a just and fair approach are heard about. In any event, there is a further screening process before the matter is prosecuted, which can result in diverting appropriate cases away from the court.

The second level in the discretionary process is in the prosecution branch where considertions amount to whether or not a conviction is likely. A sound policy for the criteria for prosecuting should exist in every prosecution branch. Appended to this paper is the prosecution policy for the South Australian Police Department. Amongst other things, it draws attention to the need to consider humanitarian grounds in whether or not a prosecution will be launched. Seriousness of the offence, youth, age, or special infirmity of offenders, the degree of their culpability in connection with the offence, and whether or not they are first offenders, are matters which are considered with the further point that, the more minor the offence the greater attention should be paid to adopting a course short of prosecution. A documented policy such as this, is the first step in bringing about a consistent practice, and accepts and cures the criticism of the Australian Law Reform Commission that 'the process of prosecutions in Australia ... is probably the most secretive, least understood, and most poorly documented aspect of the administration of criminal justice' (A.L.R.C., 1980). Since no formalised diversionary program exists, it is only the most obvious cases which are affected. The very old, the very young, and the very sick, tend in effect, to be the only ones able to benefit from the diversionary criteria. There are many others for whom the criminal sanction is entirely inappropriate, but who are, nonetheless, left for the court to work out. But as the courts have pointed out more than once, cases more appropriate for social remedy have little or no place in the courts. As Lawton L.J. said in re Dawn Clarke:

> ...Her Majesty's Courts are not dustbins into which the social services can sweep difficult members of the public. Still less should Her Majesty's judges use their sentencing powers to dispose of those who are socially inconvenient (re Dawn Clarke (1975) 61 C.A.R. 321 at 323).

The learned judge makes it clear, that even where the offence can be proved, there are obvious cases where persons suffering from mental (or even highly emotional) conditions should not appear before the court. In these instances the trauma of the judicial process can heighten and perpetuate the problem whereas a therapeutic approach of treatment or counselling can sometimes provide a cure and prevent further breaches. Curiously, prosecutors are faced with a double standard, since they are

called upon to prosecute mental patients who as inmates have committed minor assaults against other patients. The sad irony of such a prosecution is obvious since the alleged offender is already in the best and most relevant environment to receive treatment. The punitive approach here serves no good purpose.

Most of the participants at the Institute's seminar on Prosecutorial Discretion, were impressed with the highly sensitive address by Terry Syddall, S.M. (1984), and share his apprehension that the judicial system has insufficient time or means to deal properly with offenders induced to commit crime through drug addiction, alcoholism, or mental illness. But unless there is a clear avenue for an effective diversionary course for treatment or the like, the police prosecutor cannot be blamed for simply placing them before the court. Of the briefs forwarded for prosecution in South Australia, about four per cent are filed, or the offender cautioned, for reasons of triviality or the special circumstances of the case. The most common case attracting this attention is the elderly shop stealer.

PROPOSITIONS FOR CHANGE

Earlier this year, Chief Inspector Alan Porter (Victoria Police) presented a paper to the National Crime Prevention Council Seminar outlining the Victoria Police Shopstealing Warning Program (Porter, 1985). Motivated largely from considerations of saving time, the scheme allows first offender shopstealers the facility of a warning. He pointed out that in the period 1970-1979, 80 per cent of all reported shopstealers in Victoria were first offenders, 41 per cent of whom were juveniles and nearly 60 per cent of the offences involved property valued at less than $10. A survey by New South Wales and South Australian police determining juvenile offenders showed a similar pattern. In the Victorian program a criteria for eligibility for official warning has been established for an adult or juvenile offender apprehended for shopstealing, where:

- there is sufficient evidence to establish a prima facie case of larceny;
- the offender has no criminal record for an offence involving dishonesty, and has not been previously cautioned under the program;
- the person has admitted the offence;
- the offence is not one of a related series;
- the total number of individual items stolen is low;
- the total retail value of the property stolen does not exceed $50;

- there are no other circumstances indicating that a warning is not appropriate (for example, assault on staff, or theft by staff or police member); and

- the person must consent to the warning.

The formal introduction of the scheme in Victoria on 1 July 1985, followed a successful pilot project in the city of Ballarat. That experiment showed that 75 per cent of the offenders satisfied the criteria and were warned. In 81 per cent of the cases, the retail value of the property stolen was below $20 and in only 9 per cent of the cases did it exceed $50. The difference in processing time was reduced from 82 minutes (mean time) for the preparation of a brief, to 27 minutes for the warning. In his paper, Chief Inspector Porter conveyed his department's feeling that the time saved could be better served in the investigation of more serious crime.

In South Australia two separate schemes are being considered which may involve diversion. One is raised in a discussion paper from the office of the Attorney-General which seeks to have an Adult Aid Panel and a system of formal cautions for lesser offences, and it specifically has in mind shopstealing. Senior police were asked to comment on the proposals; some of these are discussed below:

1. Shopstealing is not a crime, larceny is. Why should stealing from a corporate body be any different to an individual. If a person steals a garden hose from the front of a house, is that really any different to stealing from a department Store? Steal a penny and you will steal a pound, the principle is the same. The proposal trivialises a criminal offence which carries a penalty of five years imprisonment.

The view taken here, within the context of treatment and sentencing, is too narrow. There can be no denial that shopstealing <u>is</u> a criminal offence, but the statements above tend to lose sight of the fact that an informal system of caution and diversion already exists which recognises that prosecution is not the only course. A formal diversionary or cautioning system would still leave it open for the appropriate case to be prosecuted. Some cases for prosecution will be obvious just as there will be some that are obviously not. To alleviate the concern of the authors of the above statements, by far, most of those apprehended would be prosecuted. The guidelines of the type set out in the Victorian model help the investigator to come to that conclusion. The statement also fails to take into account the apparent value of the cautioning system as outlined from the findings in New South Wales, South Australia and Victoria, which show that the majority of persons warned, never appear again in the system. Simply warning shopstealers is not new, and the policy to police and prosecute offenders has always

been a matter of degree. Over 20 years ago a Chief Constable in England had this to say about shopstealing:

> There are many cases where offences of shopstealing entail trifling values and I am not prepared to prosecute at the public expense if no good purpose can be served. Each case reported would be investigated and if it was felt that the person would not commit another similar offence, was not a persistent offender, and the value of the property was small, no further action would be taken by the police (The Times, 1963).

The South Australian model proposes diversion of lesser offences generally, and not just shopstealing as it is in Victoria. If there is to be a diversionary system at all, it should not single out a particular offence, particularly if the main driving force is simply one of saving time. Shopstealing is only one example. Many other offences which might be described as lesser or minor, warrant similar treatment. Where, in a particular case, the antecedents of the offender and the circumstances of an act of shopstealing warrant no more than a warning, the same criteria would be satisfied if the offence were for some other non-violent or less serious offence. Adding to considerations of just saving time, much more worthwhile issues should influence the decision to divert from court. As a general principle these should include:

- the circumstances under which the offender committed the crime, especially where it is a response to a life crisis situation; or
- the personal circumstances of the offender, such as age, mental and emotional stability; together with
- considerations of the value or a warning or treatment rather than punishment, and the likelihood of the person re-offending.

Police would be more than a little cautious, however, if the screening process which made this decision did not involve them. Accusations of the hard line cynical police approach are as valid as the opposite view sometimes taken of social workers as 'bleeding hearts' and naive; neither stereotype is fair. But different perspectives and skills do underline the weakness of a single disciplinary approach.

2. If the system is to treat first offenders leniently, it fails to take into account that you seldom catch the offender on the first occasion he breaches the law.

This is obvious, but it does not detract from the value of a process short of a court hearing which can bring offenders'

actions to a halt when they are eventually caught. Again the discretion of whether or not to prosecute or caution should take into account such matters. If it is the case, for example, that an individual has for years successfully avoided detection, and this is known, it would be best for the court to deal with it. It is cases like that which make police an essential part of the decision making process.

3. Normal adults are usually well aware of their actions and the consequences; unlike children, they really need no warning.

If only it were that simple. The pressures of contemporary life which induce a person to commit a crime, either through impulse or mistake often deserve special consideration especially when the offence is minor. 'There, but for the grace of God, go I', is not perhaps the proper test, but there are many circumstances currently placed before the court which would be better handled as a caution or a diversion to a counselling or treatment program.

4. Once people know there is a built-in tolerance level of one warning before being prosecuted, it will be used accordingly and standards generally will drop. A liberal policy of cautioning will reduce the deterrent value of punishment.

This is one of the serious arguments against a diversionary model. Police are in a good position to know that many individuals are prepared to take the risk if the first offence will result in (say) a bond or a warning. Offenders even admit to this. Although reports from the Victoria Shopstealing Program do not indicate this yet, it would be surprising if a pattern does not develop which shows an increase in the incidence of that crime, brought about by a consciousness to utilise the advertised warning. Like any tolerance policy for prosecution, behaviour will tend to be taken to the limit, and when the tolerance level is lowered, so too will the standard of behaviour, especially for street offences which cause a great deal of trouble for many people and not just for police. It is therefore unwise to establish a policy for a warning on the first offence. Standards of behaviour are likely to be lowered by that troublesome minority if they know they have a warning up their sleeve.

The deterrent value of punishment should not be underestimated. Some criminal groups go to great lengths to make use of the leniency of a first appearance before the court. Some organised drug distributors in this country, with an association matrix across the globe, use field operators who have no prior convictions. If/when caught, a defence counsel in court will emphasise offenders' good character and that they promise to live a honest and industrious lives. This will usually earn them a bond. They can then return to the criminal organisation knowing it will provide them with a 'desk job' for the rest of their life, and place another 'clean-skin' in the field.

DIVERSION AND THE SPECIAL CASES

Recognising that child abusers are generally not effectively deterred by a criminal sanction, the last 10 years have seen a significant change in approach to this problem. This is the other area in South Australia where a diversionary model is proposed. Formerly, the processing of such cases was entirely in the hands of the police, but most police would agree now that to simply remove the offenders from their homes and place them in the criminal process is at best a short term remedy and only successful during, and because of their absence through sentence or remand in custody. Treatment with, or instead of, punishment is a necessary consideration. The criticism that police have made over the last decade where multi-disciplinary groups have tended to decide the outcome for the child, the family, and the abuser is that the dangerous propensity of some offenders is under-estimated and their actions minimised and rationalised in terms of understandable behaviour. Social workers can lose sight of their overall brief for the protection of the child, the family, and the offender, by channelling their concerns with the abuser, albeit with good motive, and being naively optimistic about reform. Sad cases are on file which show incidents where police involvement has been too late. The multi-disciplinary approach is the best so long as each component does not lose sight of the fact that it is only a part of the decision making process. If due emphasis is placed on treatment so as to prevent further breaches, diversion is an obvious and good alternative to prosecution.

Domestic violence is another area where the criminal sanction by itself is not always the best answer. Most significantly, where offenders repeatedly come under the notice of police and other authorities, and there is a real apprehension that they will cary out threats of serious assault or homicide in the future, the system as it stands does not cater for this adequately. The major problem here is that a single reported act of domestic violence is looked at in isolation, having insufficient or no regard to the contextual relevance of the current breach with their past behaviour and their propensity for future violence. Restraint orders with the power of arrest for their breach is a positive move to remedy this, but the system still does not recognise the indicators which show a course of action which could result in the ultimate act. The full propensity of repeated acts or threats of violence is often not realised until it is too late. No single body undertakes a monitoring process which in many cases would indicate the crises ahead. Like the reasoning which gave rise to the multidisciplinary composition of Child Abuse Panels, violence should not be seen solely as a social, legal, psychological or medical phenomenon. Essentially then, the overall handling of violent or potentially violent persons should not lie solely with the police. In a paper presented to the 8th National Australian Conference and Workshop

on Mental Health (Murray, 1983), a model was put forward for such a multidisciplinary body which could:

- identify the person who is committing repeated acts of violence;
- monitor their behaviour, measure its severity, so that intervention can be at the best time;
- cause an intervention group to get to the person before they commit a further act of violence; and
- most importantly, attempt some therapy for both short and long-term remedy.

The concept was accepted enthusiastically by psychiatrists who recognise a hiatus between the criminal process and mental health, and the Minister for Health has approved and promoted the idea. The main impediment is the civil liberation issues which have modified the original proposal and slowed down its implementation.

SUMMARY

Police prosecutors already exercise a discretion which directs individuals away from court. Without a formalised process of diversion, however, the prosecutor can be excused for diverting only the most extreme cases such as senility, mental illness, and triviality, since treatment or counselling facilities are not organised alternatives. Compared to others interested in the appropriate course for an offender, police would generally adopt a relatively hard-line approach, with a high ratio towards prosecution. As J.Q. Wilson notes, being expected to make arrests, especially where the police and not the public invoke the law, the '... legalistic police style ... encourages them to take as a standard of justice one which assumes that the function of law is to punish ...' (Wilson, 1968).

One of the benefits in a multidisciplinary approach to diversion is that the various authorities, not just police, join in a common cause, and other points of view bring about a wider and healthier appreciation of the issues.

Generally, as this paper shows, a diversionary program is favoured. The plea on behalf of police is that they want to be an integral part of the process. To provide a balance, all relevant and informed points of view should be considered. In addition, to leave the police out would be to ignore the value in bringing to notice the person whose prior actions short of conviction, and generally only known to police, render them undeserving of such treatment.

APPENDIX

POLICY STATEMENT

CRITERIA FOR PROSECUTION

Criteria for decision to prosecute offenders other than children for non traffic offences.

POLICY

To ensure the best interests of the victim, the suspected offender and the community at large great care will be exercised in the discretion whether to institute or continue a prosecution. When considering the sufficiency of evidence available, regard will be given to the need to establish not only a prima facie case, but also to support a reasonable prospect of conviction. This is not to be interpreted as meaning that a prosecution will only be launched when a conviction is sure: it was never contemplated that police assume the role of the court, and it is inevitable, therefore, that some charges will fail.

Notwithstanding the quantum of evidence there will be circumstances which require, in the public interest, special consideration before instituting a prosecution. Such factors which will influence this decision can include the seriousness of the offence, the youth, age, or special infirmity of the offender, the degree of his culpability in connection with the offence, whether or not he is a first offender and the need to provide a deterrent to similar offenders. The more minor the offence, the greater the attention that should be paid to mitigating circumstances. On the other hand, due regard may be given to the prevalence of the offence and any problem which is peculiar to a particular community.

When considering the nature of the charge, care should be taken to select a charge that:

- adequately reflects the nature of the criminal conduct involved;
- can be supported by admissible evidence sufficient to sustain a conviction; and
- provides a basis for an appropriate sentence in all the circumstances of the case.

The discretionary process should be objective and dispassionate and must not be influenced by:

- the offeners's race, religion, sex, national origin, or political associations, activities, or beliefs;

- a possible political advantage or disadvantage to the government or any political party;

- personal feelings concerning the offender or the victim; or

- the possible effect of the decision on the personal or professional circumstances of the person responsible for the prosecution decision.

Since a firm and established policy has been established for traffic offences this policy refers only to non traffic matters.

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SUMMARY OF DISCUSSION

1. What distinguishes whether an offence will be diverted by a police officer on the scene or by the prosecutor? Yes, it is acknowledged that this is an inconsistent practice which is hard to remedy. The existing powers of police officers are common law powers of what they think they should do: How you regularise behaviour in the street is a difficult matter. You can set a broad list of guidelines but you cannot direct an officer not to do something. An offence once observed is to be reported; this is a police officer's duty. The guidelines may include:

- the serousness of the offence
- the age of the offender
- general circumstances of the offence
- what potential benefit an action short of a court appearance may bring to the 'offender'.

2. It was asked whether the suggestion was that the major focus of direction would be on the street. This was not the envisaged method of operation; when you talk of formal diversion you are talking of a stage one step removed from such police action.

THE NEW ZEALAND EXPERIENCE

His Honour Judge Pat Mahony
Principal Family Court Judge
New Zealand

DIVERSION: AN ATTEMPT AT DEFINITION

Diversion is a term generally used to describe the movement of a case or arrested person out of the criminal courts and into an alternative forum, for dispute, resolution or treatment. It has been applied to cases involving juveniles or youthful offenders; however, within the last 20 years it has also been applied to all offenders regardless of age.

While most authors writing in the field acknowledge that diversion is not a new idea, the majority identify the report of the President's Commission on Law Enforcement and Administration of Justice as the first to use the term and propose establishment of diversion programs. To date, no one definition of the word exists, despite the fact that many have defined it with reference to their own work. Romig refers to diversion as system intervention, while Ward says it is a non-judicial, pre-adjudicatory alternative to which offenders may be referred. Nejelski has a similar definition for diversion:

> The channelling of cases to non-court institutions, in instances where these cases would ordinarily have received an adjudicatory (or fact-finding) hearing by a court.

For some, the problem with diversion is the lack of a single understandable definition of the term. Appearing before the U.S. House of Representatives Committee on the Judiciary, Professor Daniel J. Freed, of Yale Law School, described the definitional problem in this way:

> ... it is quite evident that the term pre-trial diversion means different things to different advocates. It does not at all identify a single concept with standard, well-tested procedures for carrying it out. Some indication of the disparity in philosophies and perspectives among diversion proponents is reflected in the spectrum, of descriptions adopted by different programs and important standard writers: for example,

> diversion from the criminal justice system; pre-trial intervention; pre-trial probation; deferred prosecution; deferred preprosecution probation; and preventive rehabilitation.

Despite these criticisms, diversion is usually seen as an alternative to the 'adversary battle'. It is extra-legal and may be part of an informal process or a formal process. For example, the decision of a police officer to merely caution an offender rather than arrest him or her is generally an informal, on-the-spot decision that can be categorised as diversionary. Drug abuse or alcohol abuse programs form part of the formal process used in diversion from the courts.

The President's Commission on Crime and the Administration of Justice, first proposed the use of diversion as part of a recommendation that it was desirable to release a greater number of people following arrest and after the issuance of a citation or order for appearance. Evidence before the commission showed that many people detained were not dangerous. A large number were arrested for status offences such as public drunkeness, loitering, or other non-violent crimes. Pre-trial release and diversion of some into treatment programs was recommended as alternatives to the courts. The commission argued that the criminal justice process was not the best equipped to resolve certain human problems and disputes, and its solution was to recommend the formalisation of diversion programs.

A similar though expanded argument was made by the Law Reform Commission of Canada in its 1974 report on sentencing. Citing the fact that the majority of cases before the criminal courts involve minor thefts or problems such as impaired driving or public drunkeness, the commission concluded that: 'the luxury of an adversary battle in the criminal courts and the stigma of criminal conviction and sentence was unnecessary'.

Instead of using the adversarial battle in all criminal cases, the commission recommended the establishment of alternative forums where the emphasis was placed on settlement or conciliation. While not explicitly defining diversion, the Canadian Law Reform Commission's recommendations are clearly made with the understanding that the word means extra-judicial action or non-adjudicatory alternatives to the criminal court process.

It seems that for the most part diversion is used to describe extra-judicial action taken prior to trial; however, diversion takes place throughout the criminal justice system. There are opportunities for opting out of the criminal justice process at every step, for example, the police may exercise their discretion not to prosecute or, after conviction the judge may decide not to impose a sentence of confinement and release the defendant without further restrictions or penalties.

An attempt to refine the definition of diversion was made in a report to the Ministry of the Solicitor-General of Canada in January 1977, by Sharon Moyer, in which she examined and reviewed the literature relating to diversion from the juvenile justice system and its impact on children. She distinguished what was referred to as true diversion from the number of other concepts all of which had been labelled as diversion by different writers.

In the first place she distinguished diversion from 'decriminalisation'. It was noted that by making certain conduct no longer illegal the danger of a court appearance was removed and therefore eligibility for diversion was also removed. It was seen as being in a different category from diversion programs which attempted to halt or defer official processing.

Diversion was also distinguished from 'prevention'; a distinction made by the Americal Correctional Association in 1972 when it pointed out that prevention was concerned with deterrents from criminal activity as opposed to providing alternatives to court handling once criminal activity had been detected.

A further distinction was made for what were referred to as 'post-adjudication alternatives,' which refer to the use of community based alternative to incarceration in order to reduce the impact on the offender of the usual criminal justice process. The author, while pointing out that most authorities had chosen not to use the term diversion in that context, in Canada, on the other hand, post-adjudication measures to reduce incursion into the system had been regarded as coming within the definition of diversion, a definition which is made use of later in this paper.

A distinction is drawn between diversion and 'screening' which is seen as involving the cessation of formal proceedings and removal of the individual from the criminal justice system, whereas diversion uses the threat or possibility of conviction in order to encourage an accused person to agree to do something. Some commentators have treated the two concepts as mutually exclusive. Others have defined diversion by including screening as one aspect or type of it.

Finally, the diversion is drawn between what is referred to as true diversion as against 'minimisation of penetration'. The distinction is drawn here between those theorists, for example, the President's Commission, Nejelski, Lemert, and Cressey who say that true diversion exists only when processing within the system is finally terminated with no further threat of re-entry into the system and where a referral is made to an agency outside the system. This view, however, does not conform with the more general practice where diversion programs halt the insertion process only on condition that the person being diverted successfully completes a program which may be conducted within the system.

It seemsthat the question of definition is important because it affects the objectives one may be seeking to achieve, and it may be appropriate to adopt a different definition depending on what those objectives are. For example, later in this paper reference is made to the Royal Commission's concern that the courts in New Zealand extensively use the criminal law to deal with social problems. The objective in mind there, may be achieved by decriminilisation as a diversionary technique. The Royal Commission also referred to a wider discretion being given to prosecutors 'to screen out cases'. The discretion given to judges in the New Zealand system to discharge an offender without conviction may properly be regarded as a screening out process. An order to come up for sentence if called upon may be regarded as applying the principle of minimisation of penetration. At this point, a principle of policy recommended for New Zealand, by the Penal Policy Review Committee (1981), can be noted: 'the intervention of the penal system in the lives and rights of offenders and others should be kept to the minimum, consistent with the purpose of the sanction imposed'.

The objectives attributed to diversion are many and varied. Moyer, in her review, identifies 18 separate goals which she says are not necessarily exhaustive. Diversion is best regarded though, as a generic term covering a number of different processes which in differing ways and for a number of different reasons apply restraint in the use of the criminal law.

The category of diversion where the prosecution process is suspended in order to persuade an accused person to undertake some action or program which, if successfully completed, will prevent further processing within the criminal system also needs consideration. This paper uses the definition of pre-trial diversion as formulated by Mr CR Bevan, and a broader definition from the Solicitor-General's Department in Canada which includes post-conviction diversion.

DIVERSION IN OPERATION*

Despite the arguments against diversion, the process of screening people out of the criminal justice system goes on, even in the face of some evidence that the alternatives are not making a great difference in recidivism rates. Fortunately, there is an unwillingness to give up and so the search for solutions continues, and the establishment and operating of pilot projects goes on all over the world.

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* I am indebted to Ms Marcy Farden, the Research Officer for the District Court Judges, Wellington, New Zealand for this contribution.

Operation de Nova is one such diversion project operating in Minneapolis, Minnesota. It is an in depth program of vocational training and counselling, which is available for arrestees charged and awaiting trial. Only those between 18 and 21 years of age are eligible. They must be unemployed or underemployed, charged with non-violent offences, not mentally ill or chronically addicted to drugs or alcohol. Once eligibility and motivation is established, the prosecutor is contacted and a request is made to recommend a six month postponement of the court hearing. In cases involving more serious offences, defendants may be recommended for the program between the lower court hearing and the higher court hearing. In these cases, the court may be asked to grant postponement for a full year.

If the trainee in Operation de Novo successfully completes the course of study on work related habits and training, the case against him or her is dropped. Commenting on the effectiveness of the program, Stott said:

> At the time of reporting (Hudson, et al., 1975) 65 per cent had either done so (had their cases dropped) or had obtained and held a job. A follow-up six months after completion showed that only 4.8 per cent (267 trainees) had been charged with new offences (Stott, Delinquency: The Problem and Its Prevention, London, 1982, p. 232).

Two of the earliest American diversion projects established were the Manhattan Court Employment Project in 1967, and Project Crossroads in 1968. Both were founded on similar theories of criminal behaviour which link unemployment with violation of the law. Though originaly operated as separate programs with federal assistance, they now are fully integrated into the local court services.

Those eligible for Project Crossroads are young arrestees charged with property crime who are likely to be convicted with their first adult (18 years or over) criminal offence, generally a misdemeanour. Arrestees with a higher probability of recidivism are considered good candidates for the program. Once eligibility is established the project's paraprofessional staff visit the arrestees in their cell blocks prior to arraignment in court. If the arrestee agrees to join the project the U.S. Attorney is approached and asked whether there is an objection to acceptance of the arrests into the project.

Project Crossroads itself is an intensive mixture of counselling, job placement, and remedial education. Divertees make a commitment of 90 days to the program, although the project staff may continue to check on the progress of individuals up to one year after their arrest.

The Manhattan Court Employment Project operates along much the same lines as Project Crossroads. However, this project was begun by a non-profit private organisation, the Vera Institute of Justice, one of the early pioneers of pre-trial release and alternative prison schemes. Today, the Manhattan Court Employment Project is part of the full court services in New York City.

Projects similar to Project Crossroads and the Manhattan Court Employment Project were established in seven American cities in early 1970. Thereafter, a third round of pilot diversion projects were started in numerous locations across the U.S. as positive results began to show up in the original projects.

In 1971 a cost-benefit analysis of Project Crossroads was completed and published. The analysis attempted to measure the reduced costs to the courts, the increased productivity of the divertees and the reduction in future recidivism due to participation in the program. Each of the three factors were found to have measured more positive than negative results over the period from September 1968 to April 1970 when a total of 460 individuals were participating in the project. However, the analysis did conclude on a cautionary note, stating that while the results suggest 'that alternative approaches to the traditional judicial and correctional processes can be effective ... this does not mean that this type of program is better than other alternatives to the status quo'.

A completely different approach to diversion is taken in Hawaii where an intake service centre was established as part of a 'Correctional Master Plan' for the state. Once arrested, the individual is taken to the intake service centre where a series of diagnostic examinations are held. These tests then determine whether the arrestee is suitable for enrolment in a rehabilitative program in lieu of prosecution in the courts. This process is quasi-judicial, however, it still operates to divert arrestees out of the regular criminal justice channels.

Another diversion scheme operating in Genesee County, Michigan, began two years before the Manhattan Court Employment Project. The Genesee County Diversion Scheme is essentially a pre-prosecution probation program. It is divided into two district segments. The first segment, the Citizens Probation Authority (CPA), has its own professional staff with access to treatment programs which involve either paid or volunteer social workers. Non-violent first offenders or those who have not exhibited an established pattern of criminal behaviour are referred by the prosecutor's office to CPA for an interview and investigation. The CPA asks the arrestee whether they would like to volunteer for the program. If they choose not to, they remain within the regular criminal justice system. If the CPA is chosen, a background investigation takes place and a treatment program is

recommended. The CPA takes full advantage of all training and educational programs within the community and generally includes counselling as part of the individual program. The prosecutor then agrees to allow the offender to participate in the program under the supervision of CPA for up to one year. The prosecution is deferred for that time. After satisfactory completion of the treatment program, which may include a restitution requirement, the prosecution is dismissed and any arrest or booking records are given to the program participant.

The second segment of the program operates only for those who are accused of drug possession. They are eligible to volunteer for referral to the Genesee County Regional Drug Abuse Commission (GCRDAC), a co-ordinating agency for all drug education,

The prosecutors office refers an accused person to the justice system liaison officer at the commission. Thereafter, interviews and counselling sessions are held to determine what treatment programs are best suited to the arrestee. Legal contracts between the prosecutor's office and the treatment program chosen are entered into. It is usual for these contracts to include a provision for monthly reports on the individual's rehabilitation progress. Notification of successful termination of the program is made to the prosecutor. In those cases of unsatisfactory termination, the individual is returned to the regular criminal justice channels.

Testifying before a congressional committee, the prosecutor and initiator of the Genesee County Diversion Scheme claimed it a success after seven years of operation. An independent assessment of the Genesee County Diversion Process came to the same conclusion in 1972. The report finds the effectiveness of the program is evident in the reduced recidivism rates, reduced court costs and the unclogging of court dockets. But one of the key factors of the success lies in the very close and flexible relationship between the police, the prosecutor, and the CPA at the initial intake point.

Contrasted with the Genesee County diversion program is a less formalised diversion process operating in King County, Pennsylvania. Diversion occurs in three ways. First, liberalised standards for personal recognizance release for felony defendants means fewer people are being held before trial when they lack bail money. Second, the courts have expanded the use of deferred sentences, thus giving defendants the opportunity to clear their record through satisfactory completion of probation. Third, all indigent felony defendants are able to make use of the Public Defender's Corrections Counselling Project. The project aids clients by finding, selecting, and gaining admission to community programs. Programs are not imposed on clients. Decisions are made by the clients in consultation with their attorney and counsellor. Thereafter, the

programs developed through the process are presented to the courts at time of sentencing in the defence pre-sentence report. The King County Public Defender's Office has generally been successful in its submissions at sentencing. Over 70 per cent of the program recommendations have been accepted by the court.

While this approach does not avoid the stigma of involvement in the criminal justice system, it does ensure the protection of the individual's due process rights. In addition, the opportunities for police and prosecutional misbehaviour are removed.

In evaluating the approaches taken in Genesee County and King County, the importance of these factors must be weighed. Of course, it may be possible to devise a scheme to utilise both diversion approaches, that is, diversion by the prosecutional authority or diversion by defence counsel.

While most diversion pilot projects seem to have lost their appeal at least for now in America, it is clear that the practice still continues. It may be that diversion is well integrated into the whole process of arrest, that it has lost its novelty.

In 1982 the U.S. Government enacted into law the Pre-Trial Services Act P.L. (97-267). It mainly functioned as a re-organisation of the pre-trial probation services offered in federal courts and includes the direction that all arrestees on pre-trial release are to be assisted 'in securing supportive services' and where necessary with alcohol and drug abuse counselling. In addition, probation officers, in charge of the pre-trial services, are required to 'provide reports for U.S. attorneys for diversion purposes and supervise persons diverted under an agreement with the U.S. attorney'.

Some final observations on the American diversion projects are appropriate. First, all of the projects reviewed, regardless of size, place considerable reliance upon community resources which are used in the 'treatment' of divertees. Second, flexibility seems to be a particular characteristic of each project. Close co-operation is maintained between police, prosecutors, defence counsel, and community projects. Real effort is made to enhance the close working relationships between the staffs of each organisation. Third, there is considerable emphasis on employment and employment skills. A good job, and satisfaction with that job, and future prospects, is seen as a key to the full integration of the divertee in the community.

It is clear that while diversion has become part of the formalised process following arrest in America that problems remain. Each project evaluation ends with a cautionary note pointing to possible discrepencies in results and generally advises against establishing identical projects in other areas. In addition, many defence lawyers have expressed concern with how

diversion may affect fundamental rights of arrestees. The conclusion of one such writer is probably the best warning of what diversion could do to the system of justice:

> The diversion of individuals into programs designed to cure persons of criminal traits prior to a judicial determination that criminal activity actually took place may run counter to our basic precept that a person is presumed innocent until guilt has been proven beyond a reasonable doubt.

THE NEW ZEALAND EXPERIENCE

The Royal Commission on the Courts 1978

In 1978, a Royal Commission on the courts reported to the New Zealand Government recommending major changes to the New Zealand court system which have since been implemented. In the course of its report the commission devoted a number of paragraphs to the question of diversion because although the topic was strictly outside its terms of reference, the commission felt that it should be kept under constant review. It carried out some preliminary research and referred to the arguments for and against the use of diversionary techniques. The commission was particularly concerned at the trend to use the criminal law to deal with social problems, with the inevitable result that the criminal justice system would become debased 'and its ability to deal with serious crime debilitated'.

One member of that commission, JH Wallace, Q.C., now a High Court judge, and Chairman of the Human Rights Commission, wrote an addendum to the report expressing the need for greater public involvement in the courts system as one way of maintaining public confidence in it, and of allowing the public to see that the courts operate fairly and to the advantage of the community.

He was also concerned at the number of cases coming before the courts. He said:

> The rising tide of criminal cases (including traffic and various minor quasi criminal offences) already threaten to engulf our system. If we continue to prosecute people at an increasing rate there is a real risk that the courts will be submerged ... while many criminal offences, particularly of a serious kind, must be dealt with by way of prosecution. Study of the available statistics leads to the conclusion that our present laws require the prosecution of far too many of our citizens ... Greater emphasis must be laid upon the social measures required to prevent crime and upon remedying the consequences of criminal activity.

He stressed possible approaches to alleviate the pressures on the court system as including the introduction of a special prosecuting body of prosecution boards vested with discretion as to when to prosecute, a combining of the civil and criminal process wherever possible, and a greater emphasis on compensation for the community and the victims of crime.

Penal Policy Review 1981

Subsequently, in 1981, the then Minister of Justice, the Honourable J.K. McLay, appointed the Penal Policy Review Committee under the Chairmanship of Mr Justice Casey with wide ranging terms of reference to review penal policy and make recommendations intended to bring the criminal justice system into the 1980s.

The committee reported within the year, and in a forward to its report, noted that the terms of reference excluded consideration of pre-trial diversion of offenders away from the courts. It remarked, however, that this was a topic of such importance that it should be the subject of an independent and early inquiry and the committee made a formal recommendation to that effect.

The committee established five working parties, responsible for reporting on several of the terms of reference including that relating to community based sanctions and in relation to that term of reference one of the working parties found a way of introducing the subject of diversion.

The terms of reference contained what amounted to statements of policy. They had been drafted against a growing disquiet over the volume of criminal offending and the apparent ineffectiveness of existing sanctions.

The committee was required inter alia,

- to investigate means of increasing the availability of sanctions that keep the offender in the community (term of reference IV).

- to ensure that all penal programs take account of the need to integrate offenders into society and make the greatest use of society's existing organisations and activities (term of reference VI).

- to consider, in the light of the cultural diversity existing in New Zealand, the desirability and practicability of making proper provision for offenders of different cultural groups and the nature of any such provision (term of reference VII).

- to consider the place in the criminal justice system of victims of offending and to make recommendations as to a policy in respect of victims (term of reference VIII).

It seemed that the philosophy behind the review of New Zealand's penal policy was based on the same considerations as were in the minds of the proponents of diversion as a new response to the challenge of crime in society. The working party used the definition given to diversion by Mr CR Bevan, Assistant Director of the Australian Institute of Criminology, in a paper for the Ministers' Conference, in 1981. Mr Bevan said:

> Put simply, the kind of diversion system envisaged for Australia, is one in which it would be practicable for a Crown or police prosecutor to suspend prosecution, before trial but after charge, in order to consult with some other agency in the community, (be it community based or statutory), and, in exchange for an undertaking by the offender that he will undertake an arranged program of counselling, instruction, acquisition of skill, or the payment of the restitution or compensation to the victim, to make a final decision about prosecution upon the successful completion of the contract. Failure to complete the "diversion" arrangement would result in prosecution on the original charge.

The Solicitor-General's Department in Canada had described diversion in broader terms:

> 'The routine suspension' of further criminal justice processing at any point of decision making from first contact with police to final discharge for any pre-determined category of offender otherwise liable to such continued processing, coupled with referral to a community program ... or condition that further processing will be terminated if he fulfils obligations specified by such programs.

Broader or narrower definitions of diversion relate to the point of intervention but there are objectives common to both pre-trial diversion and that which (if you accept a broader definition) may occur at some later stage. It is on that basis that reference to what has occurred in New Zealand may be made relevant to the theme of this seminar.

The recommendations of the Penal Policy Review Committee in New Zealand led to the introduction of a new criminal justice bill into Parliament by the Minister who ordered the review. Then

there was a change of government following a snap election and the bill was re-introduced with some amendments by the present Labour Minister for Justice the Hon. Geoffrey Palmer.

That bill, which is to become operative from 1 October 1985, incorporates the main recommendations of the committee relating to sentencing by the courts. It reinforces the policy that imprisonment is a sentence of last resort; it introduces the notion that to make amends to the victim of offending may be an appropriate reason for disposing of a case without futher sanction, and it also introduces a new sentence designed to bring offenders under the direct influence and control of community agencies.

Diversionary Techniques

The bill retains the discretion for a judge to discharge an offender without penalty either on conviction or without entering a conviction (deemed to be an acquittal). There is also power for the court, instead of imposing sentence, to order an offender to come up for sentence if called upon during a specified period not exceeding one year. These provisions may in this contect be regarded as diversionary devices.

Reparation

Reparation has been elevated to the status of a sentence in its own right.

Since 1974 the New Zealand Accident Compensation Act has universal applications with respect to personal injury. The sentence of reparation then is to compensate for loss or damage to the property of another caused by any act or omission constituting an offence; it is limited to the cost of replacement or repair and does not include consequential loss or damage. There is provision for the court to obtain a report on the value of the loss, the means of the offender, the maximum they can pay, and the frequency and size of payments to be made.

An important feature of this exercise is the attempt which the probation officer involved in preparing a report must make to seek agreement between the offender and person who suffered the loss on the value of the loss and the amount the offender should be required to pay. A copy of the conditions of sentence are to be handed to the offender and to the person suffering the loss.

A sentencing judge must impose the sentence of reparation in every case where the conditions for it are available, unless the judge is satisfied that it would be inappropriate to do so.

The Justice Department in an instruction to probation officers stated:

> Until recently there has been little recognition of the needs of victims in the criminal justice system. To encourage public confidence and satisfaction with the criminal justice system, it is desirable to balance the needs of victims of property crimes against the needs of offenders. By making reparation a sentence of first resort, priority is given to the needs of the victim. Where the amount of reparation is in dispute and is above a certain level it is desirable that there be some procedures whereby the offender and victim can negotiate the value of the loss or damage and the amount payable as reparation.
>
> Unlike all other sentences reparation does not simply deal with the wrong the offender is supposed to have done to the state (or community). It attempts to redress matters between the offender and the individual who has suffered loss. Reparation will often be the only hope the victim has to get something back that he or she has lost ... Reparation, then, is an attempt (certainly an imperfect one) to meld criminal and civil procedures doing justice to offender, community and victim. To the extent that it is practicable, the hope is that by achieving greater justice for victims the perceived need for other forms of sentence will diminish.

It seems that in cases where payment of reparation would itself amount to a fair and just result the provisions just outlined could be transferred into a pre-conviction situation and become a diversionary technique in the stricter sense. Attached to this paper is a flow diagram setting out procedures for probation officers in the retaining of a reparation report together with a sample reparation report and statement of means and financial obligations of an offender.

Promise to make amends

In addition to the sentence of reparation there is a general provision giving the court a discretion to 'take into account any offer of compensation made by or on behalf of the defenant to the victim' (clause 11(1)). 'In deciding whether and to what extent any such offer of compensation should be taken into account, a court may have regard to whether or not the offer has been accepted by the victim as expiating or mitigating the wrong.'

This provision applies to any case where there is a victim and it is not limited to cases where there is loss or damage to property. There must be a large variety of circumstances where

this could be used. There is the opportunity for the use of an intermediary, and in cases where compensation is accepted as expiating the wrong, it may well be that no further intervention is required and an offender could be discharged without any sentence being imposed. Again there must be room for the use of similar techniques pre-trial as a diversionary tactic.

Community Service

Just before the Penal Policy Review Committee was set up a new sentence was introduced in New Zealand called community service. It was the first real break-away from the principle that the criminal justice system was the preserve of the state whose officials were solely responsible for the supervision of sentences.

The sentence of community service was designed so that an offender would have minimal contact with the criminal justice system. Officials spoke of such offenders brushing against the system and being deflected away from it without entering and becoming involved in it. An offender undergoing community service has to spend a specified number of hours, with a minimum of 20 and a maximum of 200, providing a service for some community agency or body at times to be arranged between the offender and the host within a 12 month period. Any direct supervision is provided by the host receiving the benefit of the service and not some state official. The offender in the first place must consent to the sentence being imposed. Community agencies acting as hosts for such service may include any hospital or any charitable, educational, cultural, or recreational institution, or any organisation or institution for old, infirm or handicapped persons.

This sentence in the way it is set up is diversionary. It can be imposed only for offences carrying a term of imprisonment. Its objectives also coincide with those assigned to diversion: minimal state intervention; maximum community involvement; a recognition of a community's responsibility for its own offenders; the use of community resources to achieve integration; and the fostering of reparation as an objective.

Offenders with Special Needs

There were three classes of offender who formed a special category in the recommendations of the Penal Policy Review Committee - the young offender, the young Maori offender, and the addict or substance user - all of whom are persistent offenders and for whom the normal range of penalties has little effect.

The portrait of the young offender as an inarticulate, educationally, socially, and economically deprived young male offender, is well known to judges and others connected with the

criminal justice system, and this is the case in New Zealand, Australia, the United States, Canada, Britain, and probably many other countries as well.

In 1983, out of 5,605 imprisoned persons in New Zealand, a total of 2,399 were between the ages of 15-20 , and a further 1,353 were between 21 and 24. Of these, 2,115 were in prison for three months or less.

The statistics show the extent of the involvement of the young male offender (very few women in New Zealand are imprisoned) in the criminal justice system. The Penal Policy Review Committee received many submissions on this group, and were told that many offenders were severly handicapped in their personal lives, illiterate or barely literate, lacking in daily living skills and general social skills, alientated from the community and hostile to it. The committee was also told that punishment in itself tends to reinforce the characteristics which induce the offending in the first place, and that what was needed was not punishment but compensation. There was no need to find ways of reintegrating these young people into the community. These concerns have a familiar ring for anyone who has considered the literature relating to diversion.

Among the young offenders mentioned above is the young Maori. The New Zealand system has not been coping at all with the young Maori offender. In 1983 of all prisoners, 1,023 were Maoris aged 15-19, and a further 905 were in the 20-24 age group. Many of these young Maori offenders have an attitude of fatalism and hopelessness as they enter a vicious circle of repeated offending followed by some court sanction and then further offending. With a few exceptions, the system has not used Maori cultural influences and support as a means of rehabilitating the offenders. The committee has recommended that this be done and the new bill explicitly provides for it.

The third class of offender causing special concern is the substance abuser; in particular, alcohol and drug abuse.

Offending in these circumstances is a direct result of the addiction; control the addiction and the offending will cease. There are a number of community agencies willing to provide treatment. They are able to attract and hold a class of offender who would not accept institutionalised treatment. For example, the Odyssey House Program, established in Sydney and Melbourne, also operates in Auckland and works very closely with the courts and the probation service.

For each of these three classes, the young offender, the Maori, and the addict, rehabilitation is a primary aim. The committee in New Zealand recommended as separate sentences the Community

Care Order, and the Community Treatment Order. These have been combined in the criminal justice bill in what is called the Community Care Order.

Community Care Order

The sentence of community care may be imposed for any imprisonable offence. It requires an offender to undergo a program for a period of up to 12 months. The terms of the program to be undergone have to be agreed between the court, the offender, and the program's representative, and form part of the order. In addition, an offender must consent to this type of sentence being imposed. The term 'program' is defined in the bill to mean one or more of the following:

a) attendance on some form of continuing bases at one or more medical, social, therapeutic, educational, or rehabilitative amenities;

b) placement within such programs as maata whangai;

c) placement in the care of members of an appropriate ethnic group, such as tribe (iwi), a subtribe (hapu), an extended family (whanau), or marae, or in th care of any particular member or members of any such group, such as an elder (kaumatua);

d) placement in the care of members of an appropriate religious group, such as a church or religious order, or in the care of any particular member or members of any such group; or

e) placement in the care of any other person or persons, or of any agency.

The sentence is designed to meet the needs of the three-fold group referred to above and is an obvious attempt to deal with the social causes of offending. It also creates a real and direct partnership between courts and community agencies which encourages such agencies to take responsibility for offenders with a view to reintegration.

This is a bold initiative. Although a post-trial measure, it incorporates some of the main objectives of diversion.

Criminal Justice Advisory Councils

Coupled with this sentence and that of community service is a provision setting up local criminal justice advisory councils: to encourage informed community interest in criminal justice policies and problems, to ensure that there are community facilities and support for offenders, and to co-ordinate departmental and community activities affecting offenders.

Each of these councils is to be chaired by a district court judge or a retired district court judge, and must have at least four lay members out of a minimum number of eight (apart from the convenor). An additional important function is to advise the Justice Department on applications from community agencies for payment of subsidies or reimbursement of the expenses to community groups involved with offenders.

Initially it is intended to set up eight such councils and increase the number eventually to 17.

Those councils hold the key to this new diversionary thrust of the criminal justice system. They have to obtain public acceptance, tap the goodwill and community resources which are there, and see that goodwill and a genuine effort does not evaporate through lack of funding. They give business efficacy to the whole deal.

A number of likely programs based on submissions considered by the working party in 1981 are:

- Life skills and social skills programs
- Literacy programs
- Vocational training and pre-employment programs
- Work co-operatives and work trusts
- Therapeutic communities and half-way houses
- Community hostels and homes
- Day training schemes
- Recreational programs
- Cultural and ethnic support schemes
- Support services organised by the churches
- Assessment and treatment facilities for drug and alcohol addicts

Cultural and Family Background

Finally, an unusual provision in this bill reflects the real determination to utilise ethnic and cultural values. Under clause 14A, an offender appearing for sentence 'may request the court to hear any person called by the offender', to speak about the 'ethnic or cultural background of the offender, the way in

which that background may relate to the commission of the offence, and the positive effects that background may have in helping to avoid further offending'. Generally the court must hear that person.

One can only speculate how that provision will be applied in practice. As indicated, it is a novel attempt to make the system relevant to those of a differing cultural background. It is aimed particularly at the Maori. At present, New Zealand is witnessing a great resurgence of Maori culture and values. If aimed particularly at the Maori. At present, New Zealand is witnessing a great resurgence of Maori culture and values. If responsible Maori people carrying mana - the esteem of their own people - come forward and speak to the court directly, Judges should give them every opportunity to be heard and match their words with appropriate action and support.

CONCLUSION

Those are the features of the New Zealand criminal justice bill. Apart from the obviously diversionary objectives in the measures outlined, some of them, at least, are translatable to a pre-trial situation.

Of course, in the main, it is untried. However, a new publication has been established 'Correctional Options' from the Ministry of Correctional Services in Ontario. By the late 1970s Ontario had embarked upon and achieved a major reorientation of its criminal justice system with explicitly diversionary objectives, involving decriminalisation, minimising state involvement with other than constant and dangerous offenders, maximising the use of community agencies and volunteers, and emphasising restitution and offender/victim reconciliation. It seems that this has not been a passing fashion but has involved a hardheaded businesslike approach, with a reorganised probation service, proper funding, and good public relations. The Canadians have also established a system for change of personnel with Britain and a number of American states. Perhaps Australia and New Zealand could be part of that network of exchange.

8.3 (a)

The Presiding Judge
District/High Court

_____

REPARATION REPORT

Name of Victim _____

Name of Offender _____

Counsel _____

Offence(s) _____
_____
_____

Present status of liable co-offenders, details (where appropriate).

_____
_____

Date of Sentence _____

1. The parties have agreed to the following:
   (a) The value of the loss(es) or damage(s) is $.....
   (b) Amount of reparation payable is $.....

2. Agreement was not reached on:
   (a) The value of the loss(es) or damage(s), or
   (b) The amount of reparation payable.

   Explanation:

3. The probation officer reports on the following:
   (a) The maximum amount that the offender is likely to be able to pay $.....
   (b) Amount of installments $.....
   Frequency ..... final installment by .....

4. Estimate by probation officer/no estimate proposed.

5. Reparation is not possible:
   (a) Victim does not want reparation.
   (b) Victim cannot be located.
   Steps taken to locate _____
   _____

6. Other relevant information _____
   _____

STATEMENT OF MEANS AND FINANCIAL OBLIGATIONS

1. NAME _____

2. EARNINGS:

Take-home pay $_____ per week or month

(If your income varies considerably, please show amount of take home pay in the last five weeks/months)

(1) $_____ (2) $_____ (3) $_____
(4) $_____ (5) $_____

ANY OTHER INCOME _____

3. DETAILS OF DEPENDANTS (NUMBER AND AGES)

4. BENEFITS/PENSION

Type of benefit _____ $_____ per week.

5. ASSETS

MOTOR VEHICLE (car/van/motor cycle/truck)
Estimated value $_____
Amount of any outstanding hire purchases $_____
Boat, caravan etc. $_____

SAVINGS

Cash $_____
On Loan (details) $_____
In Bank A/c $_____
Govt stock, shares, debenures or bonds _____ $_____

Other (specify) $_____

DETAILS/ANY OTHER ASSETS _____
_____

6. EXPENDITURE

Mortgage $_____ per week/month
Rent $_____ per week/month
Rates $_____ per quarter/annually
Insurances $_____ pa
HP/Loan Repayments $_____ per week
Gas/Electricity $_____ per week
Food/Clothing $_____ per week
Travelling Expenses for work _____
Any Other Expenses (give details) _____
_____

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SUMMARY OF DISCUSSION

1. Are the Maori elders required to disclose sacred matters when they are in the court? The Maori people are very spiritual people and there has been a great resurgence of Maori culture; the establishment of urban marae (urban sanctuary and Maori meeting places) has been prominent amongst this resurgence. Associated with this change is a scheme which has been started by the Department of Maori and Islander Affairs: Matua Whangai (system of helping through belonging or a community program of helping and caring for young people in urban areas). The Maori people themselves will take charge and take over, from the system, the young offenders who often find what the 'white man's court' system does as totally irrelevant to their needs. Maori eldrs will talk to the court of the group influence and the plans they have for the future of the offender. There are some sacred areas but it is unusual for them to intrude in the majority of cases.

2. In Australia we have an increasing degree of public criticism that the criminal law is not performing well enough and that it is not imposing relevant penalties. Governments are looking at sentencing. Was the New Zealand impetus similar? Where did the pressure for change in the New Zealand criminal justice system come from? In New Zealand we have a large number of hard liners and they are now vocal due to violent rape and murder. They believe that the courts are too soft. This is similar to the position you have in Australia. However, we discovered many people in the community who were willing to provide resources for offenders. These people have a solid base of support in the community and it is now our job to go out, community by community, to persuade people that what we are doing, in the long run, is in the interests of both the community and the offender. We have great hopes that the system of separation will have benefits to the community.

3. In New Zealand there is an over-representation of Maoris/Polynesians in your prisons and on Probation and Parole. Yet, the Penal Policy Review views prison as a measure of last resort. Compared to Victoria and New South Wales you have high imprisonment rates. With this background in mind, what are your guidelines?

(i) Crimes of Violence

In such cases there is a statutory provision to imprison.

(ii) Horrendous crimes that offend basic principles in society

These can only be dealt with by prison.

(iii) Those offenders who refuse any other provision.

In addition, there is a general provision warning judges not to imprison people unless they are a threat to the safety of the community. Property offences do not get prison unless it reaches a certain minimum dollar figure. All of this is in the new Act. There was a genuine concern for Maori input whilst the Penal Policy review was on, to such an extent that we incorporated Maori social structures into the new Act. The Maori community is, in conjunction with the Probation and Parole Service, able to look after an offender for twelve months. Such action is legally part of the order. Purists are objecting to the way we use the system.

4. Is there an amount and time limit to repayments made by offenders?

The Act recognises that achievable levels of reparation must be met - hence the use of a Probation and Parole Officer as an intermediary. Offenders who are unable to pay will not be placed on the separation scheme. Victims still have the right to proceedings before a civil court - there is a two year time limit on such action. At present we get just under 90 per cent of fines recovered, this included all sections of society and we expect a similar result from the administration of the separation scheme.

DIVERSION FROM PROSECUTION

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This paper presents practical examples of how diversion can go wrong and how unintended consequences and net widening are often the results of initiatives that were proposed and put into action to provide less punitive and more humane activities. The Western Australian Juvenile Justice system is used as an example but many of the concepts and principles underlying juvenile diversion are common to adult diversion.

One of the thrusts in a juvenile justice system is that the very concept and beginning of the juvenile justice system came into being because there were certain considerations to be taken into account when a juvenile has offended that are different considerations from those of an adult, and so for 80 years there were arenas in which to address offenders. One of the major thrusts of the juvenile court has, unfortunately, but necessarily, been the welfare agenda.

It is obvious that this agenda is one of the major reasons for the introduction of diversionary procedures and in terms of juvenile justice the welfare agendas that have proliferated, particularly over the last 25 years or so, in terms of welfare rehabilitation modes of operation, have acted to make sentencing patterns on juveniles far more harsh than they would have been if responded to on strict adherence to justice principles. Welfare should not be abolished but it does need to be balanced.

There are many complex issues in diversion. Diversion itself creates many problems, so does the overall system response to the justice arena, and that becomes clear when the number of agencies involved in the justice arena are considered: the police; the government agencies; and the judiciary; all with different mandates, all from different disciplines and with different perspectives on what their role is about. In terms of any changes in a justice system it is imperative that all the agencies communicate and discuss and negotiate the changes to be made.

From the information published and the workings of diversion in the juvenile justice arena, there are several areas where unintended consequences and net widening have proliferated.

- Loose Criteria: where the purpose, and intent, and who is to be diverted, and why, and to what has not been clearly defined and addressed.

- New programs and initiatives are introduced prior to the withdrawal of earlier programs, resulting in a doubling up and a net widening effect.

- Other major agencies have not been involved in the negotiations for change, and their practices remain as they were before the innovation. This runs counter to what is trying to be achieved.

- Where not enough account is taken of the system as a whole. Any tinkering with one section will have a spin off effect in some other part. Unless this is carefully addressed unintended consequences result.

- Finally, there is not enough public relations or public education on the nature and scope of the innovation. Change, which on the surface appears soft, is not wanted by the public, and this has a strong bearing on how governments perceive it, and how governments legislate for change.

All of these issues are fundamental reasons for the failure of diversion programs, for example, in England the Children and Young Persons Act 1969 was quite clearly aimed at deinstitutionalisation, and the setting up of alternatives and diversion programs, because of the failure to address the problems outlined above, the number of young people incarcerated doubled within two years and very many other spin-off effects took place, to the point where there is a short and sharp turnover in borstals and youth prisons.

System and agency responses, and the failure of some diversion programs in Western Australia, should be addressed.

One of the most important things to understand is that doing 'things' within the juvenile justice system, will not, in itself, change the crime rate. Diversion will provide a more humane and hopefully a more effective way of responding to juveniles. Eighty per cent of first offenders do not come back within the system, and on the second appearance another 10 per cent of that 100 per cent are lost from the system, and on the third appearance a further five per cent of that 100 per cent are again lost from the system. There then remains five per cent of perseverant serious re-offenders. There is not much possibility to reduce the crime rate when working with only five percent of the target population. Crime rates will be reduced by preventive programs that occur before entry into a justice system not once people are in it.

In 1982, Professor Eric Edwards was asked to review the Departments response to juvenile offending, and he found that Western Australia had the highest levels of juvenile incarceration in all of Australia and New Zealand (Edwards, 1982). The Western Australia rates were probably higher than the rates of both England and the United States of America and were probably closer to the rates of the U.S.S.R. This was not because there are more juvenile offenders than anyone else, it was because of a system response to offending activities by juveniles, which takes the emphasis away from the youths, and places it squarely at the feet of organisations.

The Panel System was set up in 1964 to divert first offenders to an informal process. In 1964 the idea was accepted by the Police Commissioner as it was felt to be a better system than the informal caution. Already the criteria of diverting children who would otherwise have appeared in court had been lowered in threshold to children who would have otherwise received an informal caution.

Along with that, retailer shops changed their practices and made charges mandatory so that the Panel acted to suck in a great many more of the client group than it diverted.

More recently, one of the childrens detention centres has closed, and adopted changes so that on an overall level the Western Australian incarceration levels are comparable to other Australian states. The threshold of entry into the diversion program was that a child would have been otherwise locked up by a court. What was not taken into account were the other aspects of the system responses: another aspect of the complexity of diversion. Field officers are regionally based. When a child entered an institution the responsibility for that child was transferred to the care officers of that institution. The field officers responsibility finished unless the child went onto a diversionary program. Hence, field officers did not often recommend such diversionary programs, because it was easier for them to have the children locked up, and thus off their case load.

International research has shown that the Western Australia experience is another example of a systems phenomenon; 80 per cent of offenders caught in the act will not come back into the system. The Scandanavian police have a cautionary note system which takes five minutes and in which a copy is sent to parents. Western Australia has an elaborate Panel system whereby the process is so formalised that arrests take place, charges are laid at the police station, parents are informed, and the Child Welfare Department is brought in and a Panel appearance takes place in six weeks time. It is not necessary to use all those resources on 80 per cent of the kids who will never re-offend anyway. The system is clogged and there is a need to stop

investing many of our resources on very trivial offences. There are better ways to respond to these offences.

Recent experience has shown that proposed legislation has been stopped by the government who saw it as too soft. Another cautionary note: the whole complexity of getting all the agencies together,and understanding an overall system response, can still be stopped at the legislative level.

At the moment, many children come into contact with the Panel unnecessarily; 90 per cent of all children who come before the Panel have committed offences involving less than $30. Penal itself costs $50 per child. It is expensive, intrusive and unnecessary. While there is a committment to expanding pre-court diversion because control of entry into that system is of paramount importance, what will actually be done is to add extra diversion to an already dysfunctional system. This is hard to overcome, but resources need to be focused to help the judiciary to have a better, more accountable, more credible service that can be used in their sentencing, and hopefully provide a better and more effective system.

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SUMMARY OF DISCUSSION

1. Should diversion be informal? No. It is absolutely essential that it be a decision of the Bench. In Western Australia 2,000 children per year are unnecessarily locked up in remand - this is a factor of arrest practices and not of their offence.

2. What percentage of juvenile panel cases could be diverted? In Western Australia there are some 1,600 cases each year and we believe that 80 per cent could be diverted after arrest.

3. Are we asking the criminal justice system to take on the pursuit of an endless number of trivial matters? How do we take this issue on? Clearly the community wants action. The difficulty is in getting information into newspapers. They prefer to run only the sensational stories and the other information is not seen as newsworthy.

FROM PENOLOGICAL AGNOSTICISM TO

CORRECTIONAL UNDERSTANDING

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INTRODUCTION

The problem of what a society's response should be when one of its number offends the community of which he or she is a member dates from prehistory. The responses have been many, but the solutions to social deviance have been elusive, because responses are not necessarily solutions. It is possible though, that correctional models can be designed and implemented that enable the realignment of offenders with the laws and norms of society.

A community based correctional model can be defined as any endeavour which does not proceed to extinguish the life of, or expel the offender from his or her community. Capital punishment has a good track record as far as recidivism is concerned, and expulsion by way of exile or imprisonment is a handy response to deviance, but neither practice is a solution. These traditional responses are representative of penological agnoticism, but in 1985 there should be better solutions for managing offenders.

Prisons provide refuge for anyone who subscribed to the 'out of sight, out of mind' theory, but criminologists and practitioners within the criminal justice and correctional system do not live in a political vacuum, and are politically sensitive to the issue of law and order. Any offender management model that diverts the deviant from prison is risky and vulnerable, with the diversionary model approaching collapse with each escape, each re-offence, and each fracture of a community based order. However, there are also elements within the criminal justice and correctional process that have the potential to increase rather than decrease the propensity to re-offend, and it is this aspect which leads to the commitment to diverting offenders away from the system.

Two issues can be addressed on the subject of diversion - the first is an obstacle to diversionary endeavours, the second advocates the diversionary model. Firstly, Australia's convict heritage has fostered the 'transportation mentality', and there has been a shift in the general perception of offenders and deviance. Secondly, the areas of intervention that permit diversion are discussed followed by a profile of diversionary models and practices that are, or can be, put into place.

THE TRANSPORTATION MENTALITY

Hanging is recognised as the ultimate suspended sentence in some cynical circles, but as respect for human life grew, and capital punishment was resorted to in fewer cases, prisons were soon unable to accommodate the masses of sentenced felons. The 'solution' was to be found in transportation.

Expulsion of offenders is a remarkably universal penal practice, and history records its wide utilisation. As feudal societies broke down and cities emerged, exile became a more difficult proposition and the exiled were confined within the society instead of being expelled beyond its borders. Exile presented no great cost to the community, but confinement within the community was a major undertaking.

Despite the costs, inefficiencies, and even failure of prisons to retard or arrest the recidivism of their graduates, the transportation mentality prevails. It is not suggested that prisons should be abolished as all societies need to have structures that protect citizens from their most dangerous members. Yet the communal reflex is still to evict offenders to prison, with little discrimination as to its appropriateness. The belief in the efficacy of the 'short, sharp burst of imprisonment' lurks just beneath the social surface.

The low status of the behavioural and social sciences has probably contributed to the shallow impact of research like that of Standord University's Phillip Zimbardo 14 years ago when he convincingly demonstrated the inherently pathological character of prisons. However, the preference for transporting offenders away from the offended community prevails (Zimbardo, 1971).

The hysteria that surrounds each gaol 'escape' magnifies this point. In New South Wales, where hearly all 'escapes' are more truly 'abscondings', the media, almost single handedly, caused the contraction of prison programs so that diversion from prison after the minimum effective period in custody became but a slender hope. The public were encouraged to become penologically neanderthal.

Until the transportation mentality loses its appeal, the diversion of offenders will be a demanding task for both the political advocates and community based correctional practitioners.

LARRIKINS AND PSYCHOPATHS

Another obstacle to community confidence in diversionary programs is the general perception of the seriousness of both offences and offenders. Society has experienced an attitudinal drift in regard to social deviance. Yesterday's larrikin is today's psychopath. Minor offences attract the attention of police officers, a home

report from Youth and Community Services, and a period on probation.The dividing lines between larrikinism and gross social deviancy seem to be more difficult to maintain as society is viewed through the criminal justice and correctional systems.

Larrikins are scrutinised, analysed, and fitted with permanent labels: psychopath, sociopath, antisocial personality, delinquent, thug, offender and so on. The tragedies of violent crime, and the brutal and pathological behaviour of a few felons obscures the 'normality' of larrikinism.

If social deviance is increasingly generated from the macro rather than the micro forces and influences in society, then relabelling that behaviour should be part of the process of diverting such persons to a creative future rather than social extinction.

STRATEGIES FOR DIVERSION

Criminal justice and correctional systems personnel have seen the tragic social histories of offenders who have been associated with formal welfare or probationary intervention since their childhood.

David Thorpe, a consultant to the Department of Community Welfare in Western Australia, in a discussion paper presented to the N.S.W. Department of Youth and Community Services in 1983, proposed that the 'best predictor of future delinquency is the amount of time spent in institutions' (Thorpe, 1985).

Thorpe suggested that a range of diversionary strategies can operate before the processes of arrest and court appearances occur. For instance, delaying the entry to the judicial arena can be effected by raising the age of criminal responsibility. His recommendation is 14 years. Another proposition is having a preliminary hearing before an independent magistrate of panel who would determine whether the matter should formally proceed. Thorpe's primary recommendation is that police referrals should be filtered prior to formal charges being laid and processed.

Thorpe is also convinced that the more diversionary strategies that are devised by the justice and correctional systems, the more likely they are to be inappropriately utilised. This is usually called the 'net widening' effect. He generally applauded the non-interventionist practice of the New South Wales Department of Youth and Community Service in respect of the management of non-institutionalised juvenile offenders. The theoretical position beyond the non-interventionist model is tied to the 'labelling theory'. This theory proposes that people conform, to and behave consistently with, the labels that are socially ascribed to them. Therefore, unemployed people become lazy, the slow pupil becomes slower, and the delinquent will continue to damage his or her environment. Thorpe advocates that

offenders must be delabelled, and this can be done effectively by not processing their pilgrimage through the criminal justice and correctional systems.

The first stage of diversion then, is an attempt to intercept the sequence of events that necessarily follows the formal charging of an offender. The recently introduced police cautioning of juveniles procedures in New South Wales is an application of this theoretical position.

The secondary stages of diversion relate to diversion from a custodial sentence. The utilisation of fines, deferral of sentence, community service orders, periodic detention, and so on, all intercept the imposition of a full-time custodial sentence.

The final stages of diversion also apply to prison, but relate to the earliest possible completion of the custodial phase of a sentence in order that a program of conditional liberty, usually community based, can commence. The rehabilitative models that apply in this context are not dissimilar to other diversionary endeavours.

Of course, there are also those who advocate the primacy of cultivating a social and emotional environment from birth that fosters attitudes towards self and society, that will not collapse into socially deviant behaviour. The Reverend Ted Noffs of the Wayside Chapel in Sydney has established Life Education Centres and programs specifically directed towards this end. An analysis of this diversionary exercise though, is not within the terms of reference of this paper or seminar.

MODELS FOR DIVERSION

There are three distinct courses that can be followed to divert offenders away from the criminal justice and correctional systems. Firstly, the 'caution and discharge' model, which receives the strong support of the non-interventionists and delabelling advocates. (David Thorpe suggests that such a proposition is extremely threatening to all those involved in the delivery of social welfare services; they do not fit into the scenario at all.)

Secondly, as a substitute for custodial care, diversion could involve the surveillance of the offender conditionally released to the community. If the judicial or correctional processes are to be avoided, it could be argued that the quid-pro-quo for avoiding incarceration is the erosion of complete liberty through obligations to a statutory authority such as a probation and parole service. Such obligations would fetter the freedom of the offender, requiring monitoring of their general life circumstances. There has been a contraction in the service delivery emphasis of probation and parole services from a

helping/rehabilitative posture to one of surveillance. The variables that have accelerated this process are many, but reflect the rehabilitative agnosticism that 'nothing works'. Surveillance, necessary as it is in the diversionary scene, is accepted by the community.

The final course to be followed is rehabilitation. If deviant behaviour is the product of negative influences, then acceptable behaviour can be produced through protracted exposure to positive influences.

There are numerous strategies that have been employed as an extension of this belief, but they all declare the need for the displacement of damaging and corrosive social influences. For example, social deviance is often the product of pathological family circumstances, and while fostering has been a familiar rehabilitative model for juveniles, the practice has not been considered viable for adult offenders. Is it unreasonable to expect government to train foster parents of adult offenders so that they can share in a rehabilitative exercise? Is it reasonable that they should be remunerated for their work? The parent-child language of this proposal should not be an obstacle to seriously testing its viability.

In Canada and the U.S.A. there has been substantial subsidisation of approved private agencies undertaking correctional activity on a contract or fee-for-service basis. About 30 per cent of the correctional budget in Ontario, Canada, is devoted to promoting such rehabilitative activity (Ministry of Correctional Services Annual Report 1983). The American Vision Quest organisation has been one of the most high profile in this regard.

The city of Tamworth has endeavoured to provide some probationers with involvement in outdoor programs that they contribute to by way of planning, preparation, and implementation. The creation of a challenging, constructive, and stimulating setting that demands a high level of personal interaction is fundamental to these endeavours.

The test for undertaking diversion is recidivism. The justification for the maintenance of any diversionary activity is whether it reduces or eliminates the prospect of re-offending. Sponsorship from the government or the public can not be expected unless the programs intercept offending behaviour.

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Zimbardo, Phillip (1971), 'The Stanford Prison Experiment: a simulation study of the psychology of imprisonment', Stanford University Press, Stanford.

SUMMARY OF DISCUSSION

1. The U.S.A. experience has shown that you need to be very careful of the private firms (profit making) that are getting into the delinquency business. They need to be argued for on theoretical and accountability grounds and you need to be sceptical of the glossy promises that many of them make. Nevertheless, if we believe in rehabilitation we then need to address the problems raised in the U.S. experience and create an activity which is the focal point for interaction amongst people.

2. Concern was expressed that some aspects of programs such as Visionquest have activities that are psychologically or physically threatening. Other speakers countered this concern : speakers from Western Australia spoke of the successful scheme there which resulted in reduction in offending and increases in pride, dignity and self-esteem. The New Zealand experience was so successful that the program had to stop to give their staff a rest!

3. There is a need to provide this kind of interaction within the community; it is within a community that adjustment and change takes place and the needs of offenders have to be linked to the activities otherwise we banish themn.

4. The issues of due process, justice and our responsibility to engage in supervision in the corrections area need to be constantly addressed in such programs.

CONSIDERATIONS FOR A PRE-TRIAL DIVERSION PROGRAM

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INTRODUCTION

This paper opens with considerations about self esteem. It looks at the effects on behaviour of high and low self esteem, noting that much offending can flow from poor self esteem. It goes on to look at how the use of empathy, genuineness and respect can enhance relationships and help boost a flagging self esteem.

The remainder of the paper discusses how those three elements, along with other couselling skills, could be woven into the pre-trial diversion process. Four criteria for diverting offenders are identified and traffic offenders are a likely group of offenders who would meet those criteria. Discussion goes on to look at specific ways counselling would affect the people in the program. In conclusion, the paper makes the point that skilled supervision of counsellors would be necessary.

SELF-ESTEEM

It is arguable that self-esteem is the most critical element of the human psyche. Integrity, honesty, responsibility, compassion, and love, will all flow from a person with high self-esteem. Poor self esteem in a person can account for some of the worst aspects of human behaviour which frequently results in some form of negative behaviour as that person attempts to compensate.

In her book 'Peoplemaking', Virginia Satir (1972), devotes Chapter 3 to discussing self esteem, or, as she thinks of it, POT. She sees people's supply of self worth being contained in a pot and talks of 'high pot' or 'low pot'. In that chapter she concludes with a 'Declaration of Self Esteem', which is extracted and appended to this paper. From this, a comprehensive idea of what she regards as self esteem can be gained and it also gives some indication of the self process towards maintaining 'high pot'.

People with poor self esteem have usually been the recipient of messages all their life, which tell them that they are no good, worthless, or of no consequence. The sad part is, that those conveying those messages, most often, are quite oblivious of the damage they are doing and certainly, do not do so with any such intent. Many such people will have frequent feelings of hope-

lessness and powerlessness and develop strong needs to compensate for those potentially destructive feelings. Thus, the aetiology can readily be seen of much offending. Many offences of vandalism spring from a powerful sense of impotence. Many traffic offences are committed in big, powerful cars, driven most arrogantly by drivers who are quite desparate to convince themselves, and others, that they are not so powerless and worthless as they feel. Once on this train of thought, it is not difficult to extend the ideas in a number of directions of offending.

ENHANCING RELATIONSHIPS

There is good authority from the writings of Carl Rogers (1961) and Robert Carkhuff (1969) to believe that there are three important elements in any relationship between people that will enhance the positive human aspects of such a relationship. These are empathy, genuineness, and respect. Empathy is defined as 'the helper perceives how the client is feeling and thinking and communicates with clarity this feeling and thinking back to the client'. Genuineness is defined as 'honesty and self awareness in the helper, so that all their communications (both verbal and non-verbal), with the client are in accord'. Respect is defined as 'unconditional positive regard is clearly communicated to the client', so that they know that they are accepted by the helper as they are. Given that relationships between any person in authority (the helper) and an offender (the client), contain generous proportions of these three elements, it is not difficult to see how they will boost a hungry poor self esteem and become powerful agents for change in the offender.

It is tempting to think about what could be the outcome should all arms of the criminal justice system, which would include the courts, the prison system, the police and the probation and parole services, require their staff to familiarise themselves with the use of empathy, genuineness, and respect and to bring them into all their relationships with offenders. Such a conspiracy would generate quite a potent effect on offenders, as this would emulate much of the potency known about group dynamics. One can imagine fragile self esteems being strengthened and from this, much needed renewed respect for the law being engendered.

THE FABRIC OF PRE-TRIAL DIVERSION

Clearly, all the foregoing considerations could play a vital part in any pre-trial diversion program. In setting up any such program, the need for people with skills in counselling would seem fairly basic. However, if all the staff involved with the program, who also would have contact with the offenders passing through, were imbued with the value and use of empathy, genuineness and respect, then that would add a whole new dimension to whatever the counsellors might achieve. In preparing counsellors for a diversion scheme, those three elements would form the core of their skills,

to which could be added the essence of a number of other therapies. The self responsibility of transactional analysis, the awareness of Gestalt therapy, the systems theory of family therapy, or the respect for children of parent effectiveness training, would all add valuable dimensions to the kinds of situations they could encounter.

In particular, the well equipped pre-trial counsellor would need a good working knowledge of family therapy, in order to understand fully the development of the identified offender in many cases. Of course, other procedures than counselling would be needed in the program too. Forms of instruction, acquisition of skills, or the payment of restitution or compensation to the victim, would all be useful components of the contract the offender would make to qualify for diversion. It would appear advisable for a purpose designed agency to be set up, possibly as a specialist section of a probation service, in order that the program could be properly administered.

A study done some time ago by the Home Office, of the South East Region of the United Kingdom, identified four criteria for diversion:

- No serious offence against the person.
- No crime ever for considerable gain.
- No large sum earned from crime; and
- No obvious competence in planning the crime.

Consideration of the types of offenders that meet these criteria, suggests strongly that their offending could have underlying social or medical causes that could well be rooted in poor self esteem, dysfunctional families, or very possibly, both. One particular group of offenders, already mentioned in passing, which seems to meet these criteria in many cases, is traffic offenders. Amongst traffic offenders, there are a higher proportion of people giving expression to emotional needs, than amongst almost any other offender group. For any study to be done and subsequent diversion work to be evaluated, which showed significant success with traffic offenders alone, then the program would more than justify itself on economic and community grounds. Clearly, present measures to contain traffic offending could withstand much improvement.

A THERAPEUTIC ENVIRONMENT

In putting all the foregoing together into a purpose designed pre-trial diversion agency, it seems entirely possible that something approaching a therapeutic environment could be generated; one that envelopes at least those offenders who come within its ambit. For

A THERAPEUTIC ENVIRONMENT

In putting all the foregoing together into a purpose designed pre-trial diversion agency, it seems entirely possible that something approaching a therapeutic environment could be generated; one that envelopes at least those offenders who come within its ambit. For those people, the authorities of the law could take on a new look, which, in turn would induce a renewed (or new) respect for the law. There would be a very noticeable atmosphere of respect for the clients, where they could feel their problems and struggles are heard and cared about. Clients would experience a genuineness in those authority figures they deal with, which would be a most welcome change from the patronising, or insulting regard for them that they have come to expect, all too often, in the 'authorities'. Such general experiences call be relied upon to boost flagging self esteems. Some of the particular learnings that clients would derive from counselling would be:

1. that they have more personal power than they ever suspected;

2. that they can take more responsibility for their actions;

3. that with the ability to take responsibility goes the need to accept the consequences of their behaviour: not to blame others;

4. gaining an understanding of the emotional needs they are meeting in their behaviour;

5. an ability to stand back and look at other options for meeting those needs, than by offending; and

6. some specific ways of lifting their self-esteem, quite apart from the gains they would make from the caring environment.

In conclusion, it must be clearly acknowledged that, though some quite outstanding achievements can be safely anticipated from these measures, there are certain to be many disappointments. In order that the counsellors are themselves adequately cared for, a very effective and nurturing system of supervision for counsellors would need to be a vital and integral part of the program. Such a system would have several aims:

1. nurturing and encouraging when counsellor spirits are low;

2. a means of consultancy for counsellors and ongoing learning;

3. a way for counsellors to monitor their own work, by having a sounding board, mainly to ensure the relevance of their work to the needs of the client; and

4. a means of being accountable.

APPENDIX

I AM ME

Extracted from 'Peoplemaking' by Virginia Satir.

In all the world, there is no one else exactly like me.
There are persons who have some parts like me,
but no one adds up exactly like me.
Therefore, everything that comes out of me is authentically mine because I alone chose it.
I own everything about me - my body, including everything it does,
my mind, including all its thoughts and ideas;
my eyes, including the images of all they behold;
my feelings, whatever they may be -
anger, joy, frustration, love, disappointment, excitement;
my mouth, and all the words that come out of it, polite, sweet,
or rough, correct or incorrect;
my voice, loud or soft;
and all my actions, whether they be to others or to myself.

I own my fantasies, my dreams, my hopes, my fears.
I own all my triumphs and successes, all my failures and mistakes.
Because I own all of me, I can become intimately acquainted with me.

By so doing I can love me and be friendly with me in all my parts.

I can then make it possible for all of me to work in my best interests.

I know there are aspects about myself that puzzle me, and other aspects that I do not know.
But as long as I am friendly and loving to myself, I can encourageously and hopefully look for the solutions to the puzzles and for ways to find out more about me.
However, I look and sound, whatever I say and do, and whatever I think and feel at a given moment in time is ME.
This is authentic and represents where I am at that moment in time.

When I review later how I looked and sounded, what I said and did, and how I thought and felt, some parts may turn out to be unfitting.

I can discard that which is unfitting, and keep that which proved fitting, and invent something new for that which I discarded,
I can see, hear, think, say and do,
I have the tools to survive, to be close to others, to be productive, and to make sense and order out of the world of people and the things outside of me,
I own me,
and therefore, I can engineer me.

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DIVERSION: AN INTERESTING DIVERSION?

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INTRODUCTION

The modern concept of pre-trial diversion arose like a phoenix out of the ashes of over-crowded courts and lengthy delays in coming to trial that were occurring in the United States in the late 1960s.

The implementers of these early diversion schemes acted in good faith in attempting to save offenders from the problems of prolonged detention on remand, the stigma attached to criminal conviction, and the social pathology created by prison sentences.

Despite this 'noble beginning' pre-trial diversion, although tried in many places around the world, has not met with the success that its developers had hoped. In fact, there is considerable argument advanced to support the idea that as a scheme it has been a failure in reaching its objectives.

A substantial part of the problem appears to be the confusion generated by the concept pre-trial diversion and this will be examined from three points of view: a semantic point of view; a legal point of view; and it's effectiveness as a judicial option.

Areas where pre-trial diversion and intervention would appear to be appropriate will then be outlined, plus some criteria for determining these areas, and then indications of how these schemes may be implemented.

DIVERSION: THE NAME

What is in a name? It would appear that many writers tend to confuse or use interchangeably the terms diversion and intervention. The following were the definitions put forward by the Law Enforcement Assistance Administration (LEAA) in the United States and they define each of the terms as follows:

Diversion: based on the traditional digressional authority of the prosecutor or the court, the primary function is case screening, the objective is to conserve official criminal justice resources

for those requiring close control and supervision, removing from the sanction of the court defendants who may not require a full criminal disposition (Mullen, 1974, p. 6).

The implication of this definition is that it refers to the removal of low risk cases from overcrowded courts. It also raises the issue of the definition of a low risk case. Queensland, in a recent amendment to the Criminal Code, inserted a section 657(A) which gave courts the power, in the case of trivial offences, to discharge defendants without convicting, with or without a recognisance. A later decision of the Court of Criminal Appeal in that state determined that offences, such as shoplifting, which are so prevalent in the community, could hardly be regarded as trivial, and therefore, the meaning of the word trivial was brought into some doubt.

Probation officers do not want to waste their time dealing with low risk offenders or the so-called 'cream puff' cases. It would appear that in circumstances where low risk offenders are to be dealt with by a court, and diversion appears appropriate or desirable, the police could extend their powers of discretion and give official warnings.

The functional definition of intervention as it refers to pre-trial diversion, is as follows:

Intervention: although diversion occurs, the primary function is rehabilitation, the objective is to identify defendants in need of treatment and to deliver the requisite services with the expectation of providing a more effective alternative to normal criminal justice system processing (Mullen, 1974, p. 6).

From this it may be seen that intervention implies the removal and treatment of defendants requiring some form of professional counselling or assistance. Presumably, they would represent a substantially greater level of risk to the community than those persons who might be diverted without the need for attendant intervention.

It is felt that most probation officers would gladly exchange a 95 per cent success rate with a caseload consisting mainly of low risk offenders with a 25 per cent success rate for a caseload made of substantially high risk offenders. If this were the case, the real impact of probation officers' work would become evident.

CONFUSION IN LEGAL TERMS

The writer has had a personal experience with one of the forms of pre-trial diversion, when soon after moving to Queensland, he was signalled by a police officer to the side of the road for having exceeded the speed limit. When the officer saw that the writer

was driving a government vehicle, the police officer waved the vehicle on. Despite the prospect of being dealt with by way of a fine, and after a warning, it did not stop the writer re-offending some time later, and on this occasion the 'on-the-spot' ticket was issued. The police officer rightly informed the writer that the matter could be contested in a court by not paying the fine, and allowing a summons to be issued, but the officer further reminded the writer that were a conviction recorded, an additional fine plus the cost of the summons would have to be paid, also, the conviction could prejudice the writer in relation to his office as a justice of the peace.

Given the gravity of the consequences of possible court action, the writer, who having some doubts about the spped at which he was travelling, decided to pay the on-the-spot fine.

From the above the ad hoc principles are often applied in decision making as to whether some particular action will proceed or not. The same principle applies to probation breaches for reconviction, where discretion is given to either the court or some other person outside the court system, to make the decision on whether an offender is to be returned to court for a break of his or her order.

Other forms of diversion occur where counsel has the knowledge of a sentencer who is likely to adopt a more punitive stance than others. They may divert their client away from that particular sentencer to one from whom they could hope to obtain a more favourable disposition.

These types of practices bring into question the principles of 'due process' and ' just deserts'.

In order to overcome confusion and uncertainty promoted by extensive ad hoc decision making, pre-trial diversion schemes may need to adopt the 'justice model' which is gaining considerable favour in probation services in the United States. There is the need to exercise some control on decision making in the United States because of the fact that there are some 5,000 different probation services operating under different statutory and administrative rules. It could be seen from these figures that the potential for unjust treatment of an offender is wide open if discretionary powers are large.

The 'justice model' in probation therefore has considerable appeal and some of the basic principles are outlined in the article below:

> Fundamental to a justice model is the concept that sanctions should be based on past, proven criminal behaviour ...

> Under a justice model, sanctions should be proportional to the offence ...
>
> Similarly situated offenders should be treated similarly. Equity is a major element of a justice model and utilitarian interests should not be allowed to create significant disparities in the nature or duration of sanctions.
>
> Sanctions should be clear, explicit, and if not completely definite at the point of sentencing, at least highly predictable in nature ...
>
> Sanctions should be definite punishments and not 'revocable'. If failure to comply with the conditions of a sanction occurs, legal measures consistent with the nature and severity of the non-compliance should be undertaken.
>
> Sanctions should be recognised as punishments and the punitive elements made clear ...
>
> The justice model rests on a view of offenders as responsible actors capable of responsible choice. Offenders should not be subject to manipulation as a means to an end, nor should they be unable to control what happens to them.
>
> Discretion in the application and administration of sanctions should be carefully limited and controlled and subject to review ... (Harris, 1984, pp. 30-1).

CONFUSION OVER EFFICACY OF THE DIVERSION MODEL

As indicated earlier, diversion was a reactive measure by administrators to overcrowded courts. The following articles indicate that it is used mostly inappropriately to give some advantage over the defendant on occasions by some prosecutors (Potter, 1981, p. 6).

> The Vera research confirms what many administrators of pre-trial diversion projects have been observing for years. 'Has diversion really fulfilled the promise of when we first started?' asked Richard Borys, the administrator of pre-trial services for Shelby County, Tenn. His answer, after nine years in the field, was a flat 'No'. In fact, Borys said, if a recently completed study of the Shelby County Pre-Trial Diversion Program had not been positive, the program would have been phased out. 'It's just

> too much of a hassle', Borys said. 'The clients don't care. The prosecutors don't care. Who cares?'
>
> Borys and other veterans of diversion programs complain that they have been cynically misused by most of those who have been involved with them. Judges have used them as a way to clear their court calendars. Prosecutors have used them as a way to keep control over defendants against whom they have weak cases. They have permitted defendants to believe that if they don't choose diversion they risk jail terms, when in fact there is little likelihood that they will go to jail, or even be convicted. Defence attorneys, consciously or unconsciously, have collaborated with the prosecutors by failing to advise their clients that it may be in their interest to negotiate their cases rather than accept diversion. And defendants have enrolled in the programs and then given only that minimum of co-operation necessary to get their cases dismissed.

There has long been the feeling that prisons, as a corrective measure, have been unsuccessful except for the community in that they had removed the potential offender from the environment in which they are likely to offend. As a rehabilitation tool, they could perhaps have quite the opposite to the desired effect. Recently, as a result of breaches of civil rights under the American Constitution, the state of Florida was forced to release 2,500 prisoners without any prior warning and upon a court order. This situation, as one might imagine, provided the ideal medium for research on the effect of suddenly releasing this number of prisoners.

In a longitudinal study that was conducted using the other prison inmates as a control group, matched as far as possible for offences, it was found that the recidivism reached amongst those prematurely discharged was considerably lower than for those detained for their normal full time.

Where diversion has been used, many of the statistical methods used to demonstrate the effectiveness of the scheme have been brought into question and in fairness the same might be said where the schemes have been adversely criticised.

> Unfortunately, those least motivated to try to make use of pre-trial social service programs are the defendants themselves. As Michael Smith put it: 'If you say, "Come to me and let me teach you how to read and we'll drop the charges against you", he'll say, "Sure". But few are sincere about changing

> their behaviour', Smith said. 'The only way to get sincere, motivated defendants and offenders into social service programs', he said, 'is to design programs that only accept clients who have nothing to gain from the program except the services it was intended to provide. And this can never happen', he added, 'in most existing pre-trial diversion programs' (Potter, 1981, p. 36).

POSSIBLE USE FOR PRE-TRIAL DIVERSION AND INTERVENTION

The writer is in favour of what might be styled a victim oriented diversion scheme. In this model, it would have to be demonstrated that the victim of the offence is likely to make a tangible gain as a result of the diversion, or else the diversion should not take place. There are a number of areas where this might apply.

Sexual Offending. When researching the writer's own caseload prior to the preparation of this paper, it was discovered that out of 20 or so incest offenders supervised by the writer over the past 10 years, in 75 per cent of the cases, by the time the period of parole had expired the offender was re-united with his or her spouse, and either living in the same home as the complainant, or in those cases where the complainant's age allows, the complainant had left the family situation. Most familial sexual offending is very much bound up in the family dynamics, and therefore the apportion of guilt is often extremely difficult. It would appear that if the victim of the sexual attack is to be obstracised from the family as a result of subsequent police investigation and court action, and feeling guilty over sending a loved one to prison, it represents an undesirable outcome.

While counselling may help to overcome this, if the family is to be re-united, as would appear to be the tendency, then it would probably be best that the whole family be involved in the counselling process. This could be effected through some form of diversion. It is stressed, that this is a very sensitive area, and the utmost care would have to be taken to ensure that the victim is protected at all times.

Drug Offenders. In this case the person is the victim of their own offending, and often acquire an extensive police record, when in fact, what is really required is substantial treatment. This does not refer to people involved in the sale of drugs.

For those on narcotics, the level of deceit and inappropriate behaviour adopted by these individuals to survive within the 'drug scene' is substantial. It would be better that they be dealt with more humanely, and were offered some appropriate treatment. This treatment should be both monitored and reinforced by appropriate controls.

Within Queensland, it is possible to undergo a methadone program, which is a form of legalised substance abuse with the aim of ultimately reducing or eliminating the dependence of the individual.

Drink Driving. Except where an accident occurs, the victim is the offender. Japanese authorities have claimed some success in involving repeated drink driving offenders in a therapeutic program, stressing both diet and physical fitness.

Tribal Aboriginal Offenders. Many activities that occur within a tribal situation could well be regarded as crimes by the Criminal Code, however, are not regarded in the same way within the Aboriginal culture. It is felt that some discretion should be given, where applicable, to refer some offenders to the normal processes, that they might expect because of their cultural heritage.

Sentencing Expediency. The sentencing process could be expediated in cases where offenders enter a plea of guilty to an indictable offence before a court of summary jurisdiction, which must be dealt with in a higher court, and where that higher court, were it dealing with the case, was likely to request a pre-sentence report. It is seen of some benefit for the magistrate dealing with the matter on commital, to involve the probation service with a view to limiting the higher court appearances to one only. This would save considerable financial and time for the offender and the state.

Mediation Cases. There have been cases recorded where sentencers have remanded the case so that the offender can 'make right' some harm occasioned to the victim. In this case, if the offender were to make some tangible expression of goodwill towards the victim a lighter than normal sentence could be imposed.

Up to the present time, this paper has dealt with diversion away from the criminal justice system; however, it is felt that there may be cases where it is appropriate to divert people into the criminal justice system. The classic example of this is the repeated status offender. Individuals do not necessarily become adult at the age of 17 or 18 as the law would indicate, and as a consequence there can be a discretionary period between the ages of 15 to 17 inclusive where, on the decision of an appropriately constituted panel, offenders may be diverted either into or away from the criminal justice system.

In considering all these suggested measures, any diversionary action taken in respect of offenders must be considered as part of a proposed penalty if he or she is later to be convicted and sentenced. As stressed earlier it is felt that the significant and major criteria for the use of diversion programs is the benefit to the victim who is so often overlooked in the criminal justice system.

IMPLEMENTATION

Essential elements of bringing any new scheme into operation is informing the public and the criminal justice system in advance, so that they might have ample opportunity to provide input into any scheme proposed and make improvements where this is seen as desirable. Greater use should be made of the popular media in promoting schemes of this nature. If the media are involved in the early stages of planning it is likely that they will have a far greater commitment to the success of the scheme and do much to educate the community.

Such schemes are more appropriately introduced if they are a pro-active rather than a reactive response to a particular situation.

It is essential to the development of any scheme, where that scheme effects the community at large, to develop a body of community support outside the agency introducing the scheme. This may be brought into effect by the use of voluntary committees consisting of concerned citizens who have a role of promoting the scheme to their fellow citizens, and also providing evaluation of the scheme where appropriate to the agency running it. With these types of checks or safeguards, the scheme is likely to be far more successful.

EVALUATION

Before any scheme is adopted fully, it should be subject to evaluation, and it is suggested that three possible methods of evaluation should be used. Firstly, the normal method, the methodological approach; the second being by the assessment of the community based committee mentioned previously, and the third, according to some universally accepted set of standards. In Australia, no set of standards exists in relation to the operation of community based correctional programs, and it is perhaps time that interested persons were to establish and codify standards as a means of regulating the activities of probation services.

Probation services throughout the years have been plagued by the use of recidivism as the major measure of the success or otherwise of a program. It is probably unique amongst all professions in glorifying its failures in this way. For argument sake, one never sees a score board in a solicitor's office indicating cases won, cases lost, and cases drawn. One might surmise that if such a board were present some solicitors would find it very difficult to make a living.

There is no such thing as a perfect system even within the natural sciences who claim to have hard and fast empirical laws. They are in fact in the same position as the social sciences and

claim that laws can be used because in reality the normal physical processes approximate a perfect system even though there will be errors.

Sir Robert Helpmann perhaps summed this situation up very adequately when he described naked dancing, he said 'that not even naked dancing is perfect because not everything stops when the music does'.

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SUMMARY OF DISCUSSION

1. How ad hoc should a diversion scheme be?

It was thought that clear parameters should be set down.

2. Did the success of the community service order at Toowoomba result in reduction in imprisonment rates?

Yes, and the citizens accepted community service orders as an alternative to imprisonment largely due to the attitude of the local newspapers which published positive articles.

CHILD SEXUAL ABUSE TREATMENT PROGRAM

A Report Prepared for

THE ADVISORY AND CO-ORDINATING COMMITTEE ON CHILD ABUSE

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INTRODUCTION

The sub-committee was established by the Advisory and Co-ordinating Committee on Child Abuse (ACCCA). At first, a very small group met to discuss the issues, and after two exploratory meetings, the full committee met from May until July 1984. Despite both verbal and written requests to the Convenor of the ACCCA, no written terms of reference for the sub-committee were ever received. Also, no consultative representation from the Crown Law Department was appointed to this sub-committee despite requests, and therefore, there was no official viewpoint expressed regarding the necessary changes to the law.

Five meetings of the full sub-committee and one sub-group meeting were held. Dr Barbara Meddin, Clinical Co-ordinator of the Child Abuse Review Panel, attended one meeting, and discussed her experience in Illinois, U.S.A., where she established a 'Giarretto-type' program 10 years ago.

The sub-committee, however, laboured under several disadvantages. Not one meeting was attended by all members of the sub-committee, and indeed one member only ever attended one meeting. Illness and holiday leave also interferred with the progress of the discussions. Finally some members of the committee were bound to seek departmental approval for major decisions, which meant issues were discussed at one meeting, and then changes had to be made to discussion points in the light of direction from superiors. It seems that sub-committees such as this one must consist of very senior departmental officers, who can enter into discussions, listen to arguments, then make decisions which are able to form the basis for action.

TASK OF THE SUB-COMMITTEE

The task of this sub-committee was to review the major components of a comprehensive program for treatment of child sexual abuse, based broadly on the one pioneered by Dr Henry Giarretto in California, U.S.A. This program is known as the San Jose Child Sexual Abuse Treatment Program. (CSATP).

The CSATP provides a system by which offenders and/or their families are actively encouraged to report child sexual abuse to police or protective services. They are encouraged by publicity, and by an officially-recognised self-help group, Parents United, which received public and governmental support, and is part of the formal program of counselling and treatment. CSATP is a diversionary program, with a broad emphasis on counselling and support, rather than punishment, and may be offered to suitable offenders and their families. The case is handled by the equivalent of the Crown Law Department and no final disposition of the case is made until all the family have been in the CSATP for one month. The final court verdict relies heavily on the CSATP recommendations.

The major components of the CSATP that this sub-committee discussed were: diversion programs, mandatory reporting, and counselling and treatment.

DIVERSION PROGRAMS

Criteria for Offering Diversion Programs

- Offender must admit the offence.
- Offender must be in agreement with diversion programs, and accept its terms.
- Offender must be suitable.
- It must be in the public interest that this offender is offered a diversion program.
- A contract is necessary between some legal authority and the offender, for example, assessor, judge, magistrate, regarding the conditions of the diversion program. Any breach of these conditions must be referred back to the legal authority, and suitable penalties for breach of contract must be available (as in probation orders).
- Suitable diversion programs must be available to which the offender may be referred. (Ideally, diversion programs should be available for a wide variety of offences, not just intrafamilial child sexual abuse.)

Diversion programs can be offered:

(i) post-charge, but pre-trial;

(ii) post-trial, but prior to sentencing. (In the Children's Court, some offenders are given community service orders and a suspended sentence. If the community service order is satisfactorily completed, the offender returns to court and the sentence is dismissed under section 39 of the Child Welfare Act. Perhaps some similar course of action could be considered for intra-familial child sexual abusers, who agree to undergo an integrated program of counselling, similar to the CSATP); or

(iii) post-trial and post-sentencing, as part of a rehabilitation program.

However, the crime of intrafamilial child sexual abuse is a sign of a disordered family, and involves all family members. If a diversionary program is aimed at re-ordering that family and improving the way it functions as a unit, with the offender remaining part of the family, then counselling must begin within 48 hours of disclosure.

In Western Australia, even if a man pleads guilty to charges of incest/indecent dealings with his daughter, the legal process takes weeks to complete. Once the perpetrator seeks legal representation, and realises the possible consequence of a guilty plea (for example, imprisonment), often his confession is retracted. No counselling can involve him until after the trial is over. By this time, family disorganisation has continued far too long, and subsequent therapy is often of no avail. Thus, the only option that allows diversion to occur rapidly enough to be most effective is that outlined in (i) above, a post-charge, pre-trial diversionary program.

If a CSATP post-charge, pre-trial diversionary program is to be set up in Western Australia, a suitable, senior judicial officer needs to be appointed (hereafter termed 'the assessor'). This assessor must be able to administer the diversion program as set out above, and must be able to maintain the full force of the law to prevent the offender breaking his contract to remain in the program. The assessor must also be able to move swiftly, in order that the diversion program can be implemented with 48 hours of initial disclosure. In order to be able to implement such an innovative diversion program, the assessor would need to be specially trained to understand the full implications of the CSATP.

MANDATORY REPORTING

The term 'mandatory reporting' means that specified professional people, who could be expected to learn of or suspect episodes of child sexual abuse, are bound by law to report their

knowledge/suspicion to a named authority. This authority must then be vested with the legal powers to investigate such reports, and to institute whatever therapy is necessary to remedy the abuse.

The CSATP is based on mandatory reporting of child sexual abuse, with early and active police involvement in investigation, and obtaining a confession from the offender. While some of the methods used by the Californian police are not acceptable in Western Australia, the sub-committee agreed that it is almost impossible to implement such a program successfully without a charge being laid and a confession of guilt obtained. If such a charge is not laid, although the offender confesses and takes full responsibility for the actions, in the weeks or months that follow, when counselling is hard and personal changes are necessary, the offender may withdraw from the program. Unless there are legal sanctions or penalties that can be applied, the whole therapy program could fail.

There is strong opposition to mandatory reporting in Western Australia among many health professionals. This problem might be overcome if a special unit was set up and was staffed by specially trained police and social workers.

The needs of the police and of the law often seem to be at variance with the needs of victims of child sexual abuse and their families as seen from a counselling and therapy viewpoint.

The Police/Legal Viewpoint

The needs of the police and law are:

1. immediate reporting of all incidents of suspected or established child sexual abuse to the police, so that appropriate medico-legal investigations can occur promptly, without infringement of the alleged offender's civil liberties, nor distortion or loss of potential evidence; and

2. protection of the alleged offender's legal rights to representation, and to a fair trial. The possibility of pre-trial diversion could be seen as an inducement for offenders to plead guilty, whether or not they had committed a crime, in order to spare their child the ordeal of court appearances. This could then be seen as bribery or preventing the true course of justice.

The Counselling Viewpoint

In order to be successful in helping a victim of intrafamilial child sexual abuse and their family, a very rapid start to counselling is necessary. Research shows that even 48 hours after disclosure, the family is beginning to use denial to close

its ranks, protect its stability, and maintain the status quo. If counselling is to be an effective method of therapy - and the research and statistics from the Giaretto program in the U.S.A. suggest it can be an extremely effective method of control and rehabilitation - then immediate, intensive, and urgent counselling must be instituted. For this to occur, perpetrators must acknowledge total responsibility for their actions. Thus a confession of guilt is essential to establish rapid supportive counselling within 48 hours.

If the police are involved, but their investigations do not reveal sufficient evidence for a charge to be laid, then there is no possibility of family counselling and rehabilitation, since counselling involves the offender's confession, and taking full responsibility for their actions.

If the police are involved, and their investigations do reveal sufficient evidence for a charge to be laid, then the present legal system is too protracted for constructive family counselling to occur at the point when it is most urgently needed.

However, in the view of some members of the committee, if the police are not involved in investigating all reported cases of child sexual abuse, there is the possibility that allegations of bribery or corruption could be levelled at investigating social workers. Also, the total disapproval of the community towards such behaviour is never shown. Finally, there are no immediate legal sanctions that can be applied should be offender re-offend, or withdraw from counselling.

The issue of mandatory reporting recurred time and time through the discussions. Unless all cases of established or suspected child sexual abuse are reported and investigated thoroughly, the full extent of the problem will not be revealed, and appropriate therapeutic programs will not be instituted.

The core of the problem is how best to investigate such cases to establish the truth. The police view is that they are the appropriate investigating body, and in legal terms this is true. However, child sexual abuse can be, and usually is, extremely difficult to substantiate with solid factual evidence. The victim often does not report the offence until any evidence of sexual contact has long since been washed away.

The evidence of an anxious or frightened child and the necessary questioning of their story needs to be very sensitively handled, and preferably only gone through once. Are police officers sufficiently trained in relating to children and in discussing intimate sexual matters with them. At present, probably not, though conversely, social workers and counsellors are not trained in the legal framework to obtain and secure evidence without

infringing civil liberties. A compromise could exist if a joint Police/Social Work Unit was established as the primary reporting agency, to investigate all possible cases of child sexual abuse as a team. To do this, mandatory reporting would need to be instituted, and a new unit set up to receive such reports.

COUNSELLING AND TREATMENT

The counselling aspect of CSATP involves the extensive use of volunteers, drawn from self-help groups, who work closely with professional counsellors and therapists. At present, there are no suitable self-help groups in the community, and professional counselling resources, where they exist, are extremely under staffed and over extended.

Each case of intrafamilial child sexual abuse involves at least 8-10 hours of counselling time during the first week after disclosure. Counselling contact is then maintained at an intensive level for several weeks. Each family where sexual abuse is occurring needs a male and female professional co-therapy team for optimum results, working together with volunteers who support each member of the non-functioning family.

From ACCCA statistics, it can be seen that reported instances of intra-familial child sexual abuse are increasing rapidly: there were 111 reports from July 1982 to June 1983, and 248 reports from July 1983 to June 1984. This represents an increase of 123 per cent, compared with a 38 per cent increase in reports of physical child abuse over the same period.

Professional Counselling

The Child Sexual Abuse Unit (CSAU), Department of Community Welfare, is at present a small pilot unit, and is neither meant to undertake the full counselling of all cases of intrafamilial child sexual abuse, nor can it possibly do so with its slender staff resources. Any social worker or psychologist working in that specialised area can only carry a maximum caseload of about 8-10 cases. Thus if CSAU is to supervise the management of cases of intrafamilial child sexual abuse, even working with other agencies, the staffing would need to be dramatically increased. Staff need to be specially chosen and also undergo training in order to be able to work at maximum effectiveness in such a difficult and emotional area. It is possible for victims and their families to receive counselling from many agencies, for example, private medical practitioners and psychologists, Mental Health Services staff, staff of SARC, field officers working with DCW, etc. However, if an integrated plan of therapy is to be maintained, and a standard program of counselling undertaken, one unit needs to have overall supervision of such cases. This unit would ideally be the one agency receiving reports if mandatory reporting was introduced.

Self-help Groups

Self-help groups are an integral part of the CSATP, and in California consist of individuals from families who have successfully undergone the program, together with adults who were themselves sexually abused as children. The self-help groups form a network of volunteers in the community who, under professional supervision, can be used both in a one-to-one situation and in groups, to support and counsel the offender, the victim(s), and all other members of the sexually abusing and non-functional family. These groups would initially be hard to establish, as each family strives to avoid public exposure, to maintain their anonymity.

If self-help groups are to be established, professional staff must be appointed to set up and maintain them. At least two people, preferably social workers or psychologists, and preferably one male and one female to start with, need to be appointed. These professionals need to be chosen for their special skills in the area of self-help therapy and group leadership. The Community Welfare Department, through the CSAU would be the ideal department to initiate this program, but at least two extra staff appointments would be necessary, together with suitable premises and full secretarial and support services.

CONCLUSIONS

If an integrated program of counselling existed, based on the CSATP, it could be used in all instances of established intrafamilial child sexual abuse. It could be used as a post-charge, pre-trial diversionary program, as an option when the offender is sentenced after conviction, or as part of a long-term rehabilitation program both during and after the offender's imprisonment.

Unfortunately, at the last of the sub-committee meetings, the police department representatives announced that the police department was totally opposed to any post-charge pre-trial diversionary program, although the department was not opposed to counselling after the due process of the law had been observed.

At present, with no viewpoint expressed by the Crown Law Department, yet the apparent need for legal cooperation and probable legislative changes, together with the expressed opposition to any pre-trial diversion program as expressed by the police department, it is unlikely that a legally-based CSATP will be introduced into Western Australia in the next few years.

However, since many more disclosures of intrafamilial child sexual abuse are occurring, there is an urgent need to set up counselling services for victims of such abuse, and for their families, even if this is arranged either on a voluntary basis, or as part of the legal province.

RECOMMENDATIONS

1. That CSAU be expanded to undertake supervision of integrated counselling for victims of intrafamilial child sexual abuse and their families.

2. That this integrated counselling be known to be available, so that offenders can be directed into the program as a condition of probation or parole.

3. That at least two professional staff be appointed with the specific task of setting up and supervising self-help groups.

4. That the mandatory reporting of all instances of child sexual abuse be reviewed again.

5. That a specialised and integrated unit of police and social workers be developed to investigate reports of child sexual abuse.

SUMMARY OF DISCUSSION

1. This emphasis on criminality in the child abuse area is where we go wrong. Could we begin to look at the issue on the modified European model?

- where the concept is inquisitorial rather than adversary;
- where there is an integration of counselling and judicial services.

Such a system exists in Western Australia: there is a Family Court which does not have the constitutional limitation of the other Family Courts across Australia. Is it possible to look at something like the old supervised-access custody award as part of the Family Law Act? It has some advantages:

- judicial control
- integrated services
- no adversary system.

It was thought that this was a possible direction but that the question is that it is still criminal and the problem is how do you change the law? It is also a problem for counsellors - once it is whispered that criminal charges are possible then people will not talk.

A MODEL PRE-TRIAL DIVERSION SCHEME FOR PERPETRATORS OF SEXUAL ASSAULT AGAINST CHILDREN

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INTRODUCTION

The authors were members of the New South Wales Child Sexual Assault Task Force (CSATF) established by the Premier, the Honourable Neville Wran, Q.C., M.P., in July 1984 to examine the multi-faceted aspects of child sexual assault in NSW and to recommend policies and procedures to prevent or alleviate the incidence of such offences. In all, there are 65 recommendations contained in the final report which was submitted to the Premier in March this year. It is the 65th recommendation which is the focus of this paper: 'that a pre-trial diversionary program be established for child sexual assault offenders' (CSATF Report, 1985, p. 230).

Why did the Task Force reach this conclusion? Can a special case be made for offering pre-trial diversion to such offenders? Should all perpetrators of sexual assault be diverted into a pre-trial diversion program? How could such a program be absorbed into the Australian criminal justice system? In attempting to answer these questions it is necessary to examine the peculiar characteristics of child sexual assault.

THE INCIDENCE OF CHILD SEXUAL ASSAULT

A brief overview of the incidence of such assaults reveals that although there is little empirical research of assistance in Australia, studies conducted overseas, particularly in the United States, suggest that approximately 90 per cent of child sexual assaults go unreported. Furthermore, it is estimated that between 15 per cent and 35 per cent of females have been sexually assaulted by the time they attain the age of 18. The National Centre on Child Abuse and Neglect has also found that males represent 90 per cent of the perpetrators and females represent 90 per cent of the victims of child sexual assault (CSATF Report, 1985, p. 23).

Although there appears to be no firm evidence that the incidence of child sexual assault is rising, a dramatic increase in notifications of suspected cases to the NSW Department of Youth and Community Services between 1980 (when a notification mechanism was introduced by the department) and 1984 suggests a growing community awareness of this hitherto well-hidden phenomenon. As well as revealing that for the first six months of each year notifications have risen from 9 in 1980 to 661 in 1984, an analysis of the figures shows that in each year since 1982 approximately 85 per cent of the perpetrators fell within the category of family member, close family friend, or someone otherwise known and trusted by the victim. There is littledoubt that intra-familial sexual assault accounts for a particularly high percentage all sexual assaults against children. Surveys conducted in Sydney (1979 and 1984), Adelaide (1979 and 1983) and Brisbane (1980) support this conclusion.

Although the term 'incest' is often used by commentators to describe a variety of sexual contacts between a child and a family member, it legal definition in N.S.W. is confined to sexual intercourse between specified relatives and does not cover every aspect of intra-familial sexual contact.

WHY IS CHILD SEXUAL ASSAULT UNDER-REPORTED?

It has been convincingly argued that the predominantly intra-familial nature of child sexual assault has been the primary factor contributing to its gross under-reporting and the consequent failure of governments to develop policies, programs, or laws to systematically address the issue:

> ... the nature of the incestuous relationship militates against any attempt to collect national statistics, because incest in by definition very privatised, because the consequences of disclosure are (at present) unpredictable, and because of the past institutional refusal to acknowledge the existence of incest, it has been and continues to be grossly under-reported. (Breaking the Silence, A report based on the findings of the Women against Incest phone-in Survey, quoted in CSATF Report, 1985, p. 24).

The personal and institutional privitisation of child sexual assault is of fundamental significance in developing strategies to counter it. The sanctions provided by the criminal law have, for a number of reasons, failed to deter potential offenders from committing the crime or encourage child victims to report the crime. It is this failure which led the task force to examine the feasibility of an alternative approach.

THE CHILD VICTIM'S PERSPECTIVE

A typical response by a child victim to intra-familial sexual assault or assault from a person whom the the child knows and trusts, is to feel fear, shame and guilt. The offender usually swears the child to secrecy and heightens the child's guilt by conducting the encounter in a furtive and secretive way, by offering bribes, threats of violence (or by actually using violence), and by telling the child that they will both suffer severe punishment (gaol for the perpetrator and a child welfare institution for the child) if the offence is revealed. Given that societal structures require obedience from children and teach them to trust adults, particularly those in a position of direct responsibility for the child's physical and emotional needs, it is not difficult to appreciate that child victims are particularly reluctant to report the offence.

In the unlikely event that the child actualy does report the offence, they then often come under tremendous pressure to retract the accusation. Where a parent is the perpetrator, the non-offending parent may refuse to believe the accusations and ostracise or punish the child. Even where the non-offending adult knows the child is being truthful they may reject the child's accusations and the child, for fear of losing a breadwinner or partner whom they love and need.

Finally, if the welfare authorities become involved, the child will probably be removed from the home and all the accompanying familial supports. If the child is able to withstand this pressure and the case actually reaches court they must then endure the trauma of bearing the primary responsibility for convicting a close relative. Seen in that light, it is not really surprising that so few cases are reported and even fewer reach court where the child also faces peculiar legal hurdles.

EVIDENTIARY HURDLES IN THE COURTROOM

Even when a prosecution is launched the child victim is faced with a number of peculiar difficulties in establishing a case beyond reasonable doubt. The child's first hurdle is in having their evidence accepted into court. Under the law of N.S.W. a child's evidence may be received only after it has been established that they are capable of making an oath or affirmation or are able to satisfy the provisions of section 418 of the Crimes Act. The judge will only allow an oath to be administered if satisfied that thechild understands the meaning of 'divine retribution'. Many children, although not familiar with this theological concept and therefore unable to be sworn, nevertheless understand the difference between truth and lies, and the importance of telling the truth. Similarly, although section 418 allows for the reception of the unsworn evidence of a child, such evidence cannot be used to convict an accused unless it is corroborated by some other material evidence.

The fact that spouses are not compellable witnesses in cases of child sexual assault, is also a major impediment for the prosecution because, as stated above, most assaults takeplace within the home and it is often the spouse who is the best source of corroborating evidence.

These and other procedural problems are discussed in the CSATF Report. They should be redressed before the introduction of a pre-trial diversion scheme, because an accused person's willingness to enter a treatment program must be influenced by the real possibility of being convicted and sentenced toprison. If these legal anomalies remain, the incentive to avoid conviction and incarceration will be diminished.

HIGHER COURT STATISTICS FOR SEX OFFENCES AGAINST CHILDREN

What then is the likelihood of a conviction and a custodial sentence for those who commit sex offences against children?

Judy Cashmere and Marion Horsky of Macquarie Universtityare currently conducting a study of cases involving sex offences against children under the age of 18. Their study examines the outcome of all such cases resolved in 1982. Preliminaryfindings from their reseach, which includes cases commenced before and after the reforms to the sexual offence provisions of the NSW Crimes Act, provide a picture from which at least tentative conclusions can be drawn.

Of the 200 cases which were finalised in 1982, 197 reached court. Of those cases, 105 were committed for sentence, and 92 tried. Of the 105 committed for sentence, 32 offenders received custodial sentences, 72 were placed on good behaviour bonds, 3 people died before sentence and 1 failed to appear in court.

Of the 92 cases which went to trial, 17 were granted 'no bills', 34 received custodial sentences, 20 were placed on good behaviour bonds, and 19 were found not guilty.

In summary, therefore, of the 200 arrests, 66 offenders were incarcerated, and 91 placed on good behaviour bonds.

Unfortunately, these figures do not distinguish those cases which commenced before the abovementioned amendments to the Crimes Act which introduced categories of sexual assault offences.The findings, therefore, must be treated with some caution.

It is suggested, however, that the 1981 amendments did not reduce the likelihood of a non-custodial sentence, and there is accordingly no reason to believe that NSW courts are nowimposing a significantly higher proportion of custodial sentences. Good behaviour bonds, therefore, are now very popular sentencing options for criminal courts in these types of cases.

WHAT CAN PRE-TRIAL DIVERSION ACCOMPLISH?

From the foregoing discussion certain conclusions can be made.

> Firstly, current laws, by always providing penal sanctions (whether or not they are actually imposed) create powerful pressures, particularly from within the child's own family, not to report the offence.
>
> Secondly, children who do report the crime and give evidence, often suffer psychological trauma as a result of testifying against a family member. They may be ostracised and removed from the family home whether or not a prosecution ensures.
>
> Thirdly, the evidenciary hurdles placed before child victims and witnesses reduce the likelihood of a conviction.
>
> Finally, even when a conviction does result, the court often orders a good behaviour bond. This affords little or no ongoing protection to the child and family, and offers little or no treatment and counselling for the offender, who may soon re-join the family.

Pre-trial diversion schemes which appear to significantly reduce these problems associated with traditional forms of prosecution have been operating in the United States for several years. Although the schemes vary from jurisdiction to jurisdiction they all have the same basic features. If offenders meet certain eligibility guidelines they are diverted from the normal criminal justice system either before or after the filing of charges, but prior to conviction or entry of judgement. Criminal proceedings are suspended on the condition that the offender complies with certain orders usually including participation in counselling or treatment. The case is dismissed following successful compliance with the conditions of the court order (Bulkley, 1981, p. 9).

Such schemes are premised on the determination that punishment is not likely to deter offenders from re-committing certain crimes, whereas treatment or counselling may change behaviour patterns which would otherwise lead to recidivism. Co-operation in any treatment program is considered to be more effective as a condition of diversion than post-conviction probation or parole, because offenders are likely motivated to co-operate in a program in order to avoid prosecution, a criminal record, and incarceration. In its Report on 'Innovations in the Prosecution of Child Sexual Abuse Cases', in 1981, the American bar Association commented:

> It would seem that intra-family child sex offenders are ideal candidates for pre-trial diversion. It is well-recognised that treatment should be a fundamental part of disposition in criminal prosecutions for intra-family child sexual abuse. A pre-trial diversion program is particularly suited to providing treatment, since it offers offenders an incentive to avoid prosecution. Moreover, because of the stigma attached to a conviction for sexually molesting one's child and the fact that the majority of offenders otherwise lead generally law-abiding lives, pre-trial diversion appears to serve as a sufficient sanction for most incest offenders (Bulkley, 1981, p. 10).

For the child victim the trauma of reporting the offence is diminished because a non-custodial option is created; the evidentiary problems of the courtroom do not have to be faced; the offender has conditions which initially at least include no contact or at least supervised contact with the child and family; counselling is made available to all those affected by the offence; there is a real possibility of re-uniting the family; the child will usually be able to remain at home; and a principal breadwinner will not be lost to the family.

A PROPOSED PRE-TRIAL DIVERSION MODEL

A pre-trial diversion scheme could be adopted into the NSW criminal justice system, although it would be dependant on the passage of new legislation. It would also require the establishment of a special unit within the Attorney General's Department to determine which cases are suitable for pre-trial diversion, and a unit within another department, possibly Health, where offenders would receive treatment. Set out below is a possible model for such a scheme.

1. Following the arrest and charging of a person who has allegedly sexually assaulted a child, under the age of 18, the police will provide the alleged offender with information indicating the availability of the diversion program.

2. Immediately following the charge, the police will forward all relevant details of the alleged offence to the special unity within the Office of the Solicitor for Public Prosecutions, where unit personnel will consider whether the case should be prosecuted in the normal way or referred to the Health Department's treatment program for assessment as to suitability for pre-trail diversion. However, if the accused person makes it clear that there will be a plea of not guilty the case will proceed without further reference to the pre-trial diversion program. The decision by the

special unit will usually be completed within one to two weeks following the alleged offender's first appearance in court.

3. From the alleged offender's first appearance in the local court the prosecution will be conducted by the special unit personnel. The court will be advised that the accused's case is currently being assessed by the special unit, and the accused will not enter a plea. Depending on whether the accused is being held in custody, the matter will be adjourned for one to two weeks during which time the Solicitor for Public Prosecution's special unit will make its decision.

4. In making its decision the special unit will be guided by the following considerations:

   a) there should be no diversion for an accused charged with sexually assaulting an unknown child or a child outside the affinity system of the accused;

   b) the accused should have had no prior involvement in the treatment program;

   c) the accused should have no previous convictions for sexual assault;

   d) the evidence should not indicate that the assault was accompanied by violence amounting to grevious bodily harm or actual bodily harm, or threat of violence, or threatened use of weapons.

5. At the accused's second court appearance (mention) the Solicitor for Public Prosecutions will advise the court on the special unit's decision. If referral of the case to the treatment program is considered inappropriate, the normal prosecution process will take place. If the case is considered appropriate for referral to the treatment program for its consideration, and the accused agrees, the hearing will be adjourned to allow officers employed in the treatment program to interview the accused, and (where applicable) their family to determine they would be suitable for inclusion in the pre-trial diversion treatment program.

6. In determining whether to include the accused in the treatment program the treatment team will consider the alleged offender's potential to change the behaviour for which they have been charged in response to a pre-trial diversion treatment program.

7. The treatment team could be under the administration of the Department of Health.

8. After reaching its decision the treatment unit will notify the Solicitor for Public Prosecutions who will note the decision and at the next court appearance will, if the accused has been refused acceptance into the treatment program, advise the court of the decision and proceed with the prosecution in the normal way. If the accused is considered by the treatment team to be eligible for inclusion in the program, the Solicitor for Public Prosecutions will so advise the court whereupon the magistrate will refer the case to the District Court for the taking of a plea and the making of appropriate orders.

9. When the accused appears before the District Court he or she may elect to enter a plea of 'guilty', whereupon the court, instead of proceedings to sentence the offender, will require the following undertakings:

   a) that they report to the treatment program within 7 days;
   b) that they abide by the rules and requirements of the treatment program for a period of two years. Once the offender pleads before the District Court judge, that plea is then binding the offender.

Stages 8 and 9 will need to be laid down in legislation.

10. Following the District Court's order a record of the plea will be held by the police together with a record that the offender has been placed in the treatment program.

11. In the event of an offender breaching his or her undertakings, a discretion to give written notification to the special unit in the Office of the Solicitor for Public Prosecutions of the breach will reside with the treatment unit. The offender will thereupon be brought before the District Court to be sentenced for the original offence. In sentencing the offender the court will have open to it all the sentencing options it would have had if the offender had not entered the program.

The legislative base for this scheme will be a new Act which will:

   a) require the District Court to divert offenders into the treatment program once it receives notice from the Solicitor for Public Prosecutions of the offender's acceptance into the program;

   b) empower the District Court to receive the undertakings of offenders and make appropriate orders.

CONCLUSION

The introduction of a scheme for pre-trial diversion will undoubtedly receive mixed responses from various quarters. Many members of the legal profession will view such a scheme with scepticism deploring any departure from traditional criminal law procedure.

Advocates for victims of child sexual assault may perceive it as a 'soft option', as responses to the CSATF discussion paper reveal.

Pre-trial diversion schemes similar to that proposed in this paper have, in the United States, been successful in encouraging children to report intra-familial sexual assault and have minimised the trauma which always accompanies such offences. In the authors' view Australia is now ready to embark on a similar course.

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A PILOT SCHEME FOR THE AUSTRALIAN CAPITAL TERRITORY

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INTRODUCTION

Care should be taken in proceeding with a proposal for diversion in the A.C.T. It must be assured that the proposal will, in practicable terms, reap some benefit. There must be a positive and construtive proposal that can be put into practical effect.

Diversion can be defined as an attitude of restraint in the use of the criminal law; and as a procedural alternative to the processing of criminal cases through the judicial criminal justice system.

If the definition stopped here it would be clear that there are many diversion schemes in operation: prosecutor declining to prosecute; on-the-spot fines for traffic offences. It is only when the definition is taken further that it becomes apparent what diversion should be about, and how it can practicably be brought about in the A.C.T. Put simply, the kind of diversion system envisaged for the A.C.T. is one in which it would be practicable for a 'Crown or summary prosecutor: to suspend prosecution before trial, but after charge; to consult with some agency, be it in a community based or statutory form, in exchange for an undertaking by an offender that he or she will undertake an arranged program of counselling, instruction, acquisition of skills, or the payment of restitution or compensation to the victim; to make a final decision about prosecution upon the successful completion of the contract. Failure to complete the diversion arranged would result in prosecution of the original charge'.

The rationale of diversion is: to preserve scarce criminal justice resources; to avoid stigmatisation by the mark of the criminal justice system; and to intervene in the criminal justice system, and even prior to activating that system.

Diversion schemes do have difficulties.

- It is important that the public perceive and accept diversion.

- Politicians do not want to be seen as allowing law makers, law enforcers, judges, and magistrates to be lenient with certain types of offenders.

- Some members of the public could see diversion of particular classes of offenders as decriminalisation of that particular class of offence, for example, the reaction of NSW Premier Wran to the proposal by Mr Briese CSM for infringement notice penalites for cannabis possession.

How to measure the success of a diversion scheme also presents a difficulty. This requires close attention and is the most difficult question in the area of diversion. Mere statistics and arguments as to the prevention of recidivism are not the whole answer.

The most useful area of diversion is diversion in a therapeutic, helping, or rehabilitative context. This lends itself to the area of drug offences, in particular 'possession and use' offences as it could generally be accepted that the victim in such cases is also the offender thus eliminating the problem of what the reaction of the victim will be to a diversion scheme. In the area of drug offences there are already some existing schemes. The model adopted in South Australia in the Controlled Substances Act 1984 (SA) is a system to which the ACT should look to determine what has been achieved.

The South Australian scheme (which began only in May 1985) operates on drug offences (excluding cannabis) by inserting an extra step in the criminal justice system whereby it is required that a person is referred to an assessment panel and that panel makes a decision whether a person should be dealt with by the court. The whole system is predicated upon the offender admitting the offence. The assessment panel has power to call evidence and make an assessment. The idea is that the panel plan the possible treatment program with the offender.

Section 39 of the Controlled Substances Act 1984 (SA) allows the panel to authorise prosecution when:

a) the person fails to appear before the panel: s.39(2)(a); or

b) the person does not admit the allegation: s.39(2)(b); or

c) the person does not desire the panel to deal with the matter: s.39(2)(c); or

d) where the person hinders and does not co-operate with the assessment: s.39(2)(d); or

e) the person refuses to submit to examination for purposes of assessment: s.39(2)(e); or

f) the person refuses to and continues to refuse to comply with the undertakings: s.39(2)(f); or

g) where for some other reason in the opinion of the panel the matter should be dealt with by the court: s.39(2)(g).

As Mr Gallagher, the legal member of the South Australian scheme, commented during this conference, it is too early as yet to make any assessment of the efficiency of the scheme.

As a result of the recent drug summit, in the A.C.T. a policy proposal similar to that operating in South Australia was countenanced, which could lead to an eventual statutory diversion scheme in the A.C.T. Instructions have been given by the Department of Health to the Parliamentary Counsel.

The A.C.T. scheme would relate to all possessors and users of drugs without exception, including (unlike the South Australian scheme) cannabis users and possessors. This could create problems, as some groups in the community see cannabis use as no worse than drinking or smoking tobacco, and they would therefore argue that in a scheme of theraputic intervention there is no need to include cannabis users.

Obviously, only those possessors and users found with quantities of drugs less than the trafficable quantity would be included. A question as to the appropriateness of the inclusion of cannabis use below the trafficable quantity arises, as at present, in the ACT, the maximum penalty for possession of a quantity of cannabis below the trafficable quantity is $100.

The system proposed will operate pre-charge, when a police officer has reasonable cause to suspect the commission of the relevant offence. At that stage, the officer will be obliged, according to law, to advise the potential offender that they have the right to go to an assessment panel. The decision to divert will, in the A.C.T. confront the difficulty in Cleland v. R, s.24 of the Police Ordinance (A.C.T.) which requires that when an arrest without a warrant is made, the person must be brought before a magistrate as soon as possible. The problem of statutory non-compliance for failing to do so must be addressed.

One vital aspect of a diversion scheme is the necessity of the consent of the offender. It could be argued that given the rigours of the criminal justice system, expense, delays, possible stigma, and publicity, few will take that option when a less rigorous option is available. Is this really true consent?

The assessment panel would consist of a lawyer, a person with knowledge of the social, medical and psychological effect of drugs, and a person from the area of services to be offered. Upon making its assessment, the panel then makes a recommendation to the Director of Public Prosecutions (D.P.P.) the statutory discretion of the D.P.P. remains.

Should the person be acceptd by the panel, the panel then sets out a program of treatment or counselling, it may give guidance on lifestyle, and it may make directions. The period of operation of any recommendation would be a maximum of 12 months, and based on an undertaking from the offender. Should there be a failure to observe the recommendation by the offender the penalty is the reversion of the matter to the D.P.P. for consideration for prosecution. The A.C.T. model has the advantage over the South Australian model, therefore, of catering for those cases where the discretion not to prosecute should be exercised.

AREAS OF CONCERN FOR THE PROPOSED ACT SCHEME

- A diversion system such as the one proposed for the A.C.T. will only be as good as the services that can be provided for treatment. Government facilities and community volountary based services are already stretched, and the question is 'why impose more people on a system that cannot already cope with what it has?'

- The criminal justice system itself is having problems making services forthcoming for orders of disposal already made. The diversion model is outside that system and a question arises as to who will get priority of treatment.

- While participating treatment centres will need the approval of the authorities who set the goals and standards, there is no accreditation scheme as such. This could be a fault in the system particularly in relation to the volountary services and the question of funding.

- Public perception of diversion as a soft option in sentencing also creates problems in the political sphere. Governments do not want to be seen as going easy on drug offenders and drunk drivers. Thus education of the public is necessary to ensure that they understand the operation and necessity of the scheme as looking to the offenders as the victim rather than as the offender.

- Diversion interferes with the perceived role of specific and general deterrence that the court system has.

- A 'widening of the net' may occur: an impression gleaned from drug squad officers is that they are not at present really interested in catching users or possessors of drugs, rather they concentrate on those higher up the line. If a diversion system would encourage police to think about charging people who are possessors and users, and put them into the criminal justice system, the net does widen.

- To what extent should the system be enforced. In order to have an effective diversion scheme, it should not have too much enforcement attached to it. Should there really be two bites of the cherry, as it were, by being able to prosecute if an undertaking is not followed. The option of enforcement through future prosecution renders the scheme an aspect of the exercise of the D.P.P.'s discretion role of the panel or intervention of social workers on a regular basis.

- The practical effectiveness of the rationale behind the diversion scheme must be demonstrated to the community. If the therapeutic model is followed the availability of services must be assessed. To that end the scheme should not interfere with the ordinary discretion of police officers and investigation.

As a sentencing option, the court could divert from the criminal justice system, turning the matter over to a treatment situation.

Whichever form of scheme is adopted, it should be fully organised, and all concerned parties should be fully informed prior to its implementation.

To overcome the problems mentioned, an advisory committee should be established involving every agency, person, or aspect of government in the communty, who would be involved in the operation of the scheme. This will ensure the success of the scheme, through being assured of their support and encouragement for the model chosen.

The committee to advise on guidelines for a viable program should include representatives from the A.C.T. Health Authority, people with experience in criminal law, people with a knowledge and experience in diversion programs, representatives from the service providers, Australian Federal Police, DPP, Attorney General's Department (as they determine policy), Law Society, Bar Association, representatives from the Australian Institute of Criminology, and the A.L.R.C. could provide statistical, research support, and drafting personnel. Such a committee could make sure the A.C.T. has direction in the scheme it chooses. The composition of the committee will ensure that, by the active involvement of each participant, the scheme is demonstrated to them to have some value.

DISCUSSION

- Areas of operation of a diversion scheme: drug offences; domestic violence; shoplifting.

- Advantage of diversion scheme: The offender gets no criminal record or fine, and therefore, some incentive to

attend pursuant to the undertaking (community reaction to this could be a problem).

- The offender has access to services that otherwise may not be available to them. Thus if the diversion scheme is a sentencing/disposal option it will get people into the system of treatment (whether they take advantage of it is another question).

- Offenders who are addicts are not really responsible for their acts; too much emphasis can be laid on civil liberties particularly when considering that most drug addicts committ offences to support their habit. In such a situation there is also a victim involved apart from the addict, and thus community reaction will be strongest here.

- In relation to court diversion, the system already in operation in Victoria where magistrates have an option of not proceeding to conviction is a good one; magistrates can adjourn for 12 months. It is suggested that there should be two levels of diversion: court diversion with sanction, and an earlier pre-trial diversion that carries no condition.

- In order to facilitate community acceptance of the scheme, there should be a public relations/press officer involved.

- Early stages of schemes should be kept simple so as to ensure the scheme can work, at least at that level before moving onto more complex areas. Cases to be considered for diversion must be greatly limited, and gradually extend the system once it is shown that it can operate effectively and has community support. Public backlash must be dealt with. A possible metod of lessening this problem could be to have reasons for diversion given in each case.

- Some areas would attract more unfavourable public reactions than would others - such as compulsive gambling and mentally deficient persons - and perhaps they should not be included for that reason.

AUSTRALIAN INSTITUTE OF CRIMINOLOGY

PRE-TRIAL DIVERSION FOR ADULT OFFENDERS

20-22 August 1985

PROGRAM

TUESDAY 20 AUGUST

10.00-10.30	Morning Tea/Coffee	
10.30-10.45	Welcome and Opening Address Mr Terry Syddall Magistrate, Western Australia	
10.45-11.30	History of the Institute of Criminology's efforts in this area. Discussion	Mr Col Bevan Acting Director Australian Institute of Criminolgy
11.30-12.15	An International Review of Current Practices in Diversion. Discussion	Mr Ron Snashall Senior Programs Officer Australian Institute of Criminology
12.15- 1.30	Lunch	
1.30- 3.00	Legal Aspects of Pre-Trial Diversion Schemes. Discussion	Dr Des O'Connor Reader in Law Australian National University and Mr Bob Greenwood Deputy Director Office of Director of Public Prosecutions, Canberra
3.00- 3.45	Informal Justice Discussion	Ms Jenny David Lecturer in Law University of Sydney
3.45- 4.15	Afternoon Tea/Coffee	
4.15- 5.00	A Theoretical Critique of Diversion. Discussion	Dr Ken Polk Lecturer in Criminology University of Melbourne
5.00- 5.30	Review of the days activities and forward planning for Wednesday.	
5.30- 7.30	Reception and informal get-together. Venue: Australian Institute of Criminology Conference Room	

WEDNESDAY 21 AUGUST

9.30-10.15	The Management within the Criminal Justice System of Heroin-involved Offenders, Recommendations for New South Wales Based on the Treatment Alternatives to Street Crimes Programs; plus Proposal for a Compensation Orders Act. Discussion	Mr John Maher President, New South Wales Probation and Parole Officers Association
10.15-11.00	Pre-Trial Diversion of Adult Offenders - The Police Perspective. Discussion	Superintendent John Murray Prosecution Section South Australia Police Force
11.00-11.30	Morning Tea/Coffee	
11.30-12.15	The New Zealand Experience Discussion	His Honour Judge Pat Mahony Principal Family Court Judge New Zealand
12.15- 1.00	Diversion From Prosecution Discussion	Ms Marian Binnie Co-ordinator Community-Based Offender Program Western Australia
1.00- 2.30	Lunch	
2.30- 3.15	The Move from Penological Agnosticism to Correctional Understanding. Discussion	Mr Ross Lay Officer-in-Charge Probation and Parole Service Tamworth New South Wales
3.15- 4.00	Considerations for a Pre-Trial Diversion Program Discussion	Mr John Pyrke Probation Officer Glenorchy, Tasmania
4.00- 4.30	Afternoon Tea/Coffee	
4.30- 5.15	Diversion - An Interesting Diversion? Discussion	Mr Tony Hill Senior Probation and Parole Officer Brisbane Queensland
5.15- 5.30	Review of the days activities and forward planning for Thursday	

THURSDAY 22 AUGUST

9.00- 9.45	Child Sexual Abuse Treatment Program - the position in Western Australia Discussion	Dr Carol Dellar Sexual Assault Referral Centre Sir Charles Gairdner Hospital Perth Western Australia
9.45-10.30	Child Sexual Assault Pre-Trial Diversion Scheme. Discussion	Dr Sandra Egger Premiers Office New South Wales and Mr Bruce Hawker Department of Youth and Community Service New South Wales
10.30-11.00	Morning Tea/Coffee	
11.00-11.45	A Pilot Scheme for the Australian Capital Territory? Discussion	Mr Ron Cahill Chief Magistrate A.C.T.
11.45- 1.00	Review of the Conference planning for future action	
1.00- 2.00	Working Lunch	
2.00- 3.30	Final work on action plan.	
3.30- 4.00	Afternoon Tea/Coffee	
4.00	BUS TO THE AIRPORT.	

AUSTRALIAN INSTITUTE OF CRIMINOLOGY

PRE-TRIAL DIVERSION FOR ADULT OFFENDERS

20-22 August 1985

PARTICIPANTS

Mr Col Bevan	Assistant Director (Training) Australian Institute of Criminology P.O. Box 28 Woden ACT
Ms Marian Binnie	Co-ordinator Community Based Offender Program Department of Community Services 3 Walcott Street Mt Lawley WA
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Ms Roseanne Bonney	NSW Bureau of Crime Statistics and Research GPO Box 6 Sydney NSW
Mr Alan Brush	Regional Director Department of Corrective Services Probation and Parole Service P.O. Box 177 Blacktown NSW
Mr Ron Cahill	Chief Magistrate Chief Magistrates Chambers Law Courts of the A.C.T. Knowles Place Canberra ACT
Mr Jim Callahan	Secretary for Justice Department of Justice Private Bag Postal Centre Wellington New Zealand

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Mr R.F. Greenwood	Deputy Director Director of Public Prosecutions Office GPO Box 448 Canberra ACT
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His Hon. Judge Kevin Hammond	District Court Judge Judges Chambers, District Court 30 St George's Terrace Perth WA
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Mr Tony Hill	President Queensland Association of Probation and Parole Officers P.O. Box 405 North Quay Qld

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Mr Roderick Howie	Director Criminal Law Review Division Attorney-General's Department Level 19, Goodsell Building 8-12 Chifley Square Sydney NSW
Ms Megan Lathan	Legal Officer, Criminal Appeals Solicitor for Public Prosecutions Level 4, ADC House 99 Elizabeth Street Sydney NSW
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Mr John Maher	President Probation and Parole Officers Association P.O. Box 372 Fairfield NSW
His Hon. Judge Pat Mahony	Principal Family Court Judge Judges Chambers P.O. Box 10167 The Terrace Wellington New Zealand
Ms Sigrid Martyn	Acting Principal Legal Officer Attorney-General's Department Robert Garran Offices Barton ACT
Mr Kevin Mead	Officer in Charge Department of Corrective Services Level 3, McKell Building Rawson Place Sydney NSW

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Superintendent John Murray	Police Headquarters 1 Angas Street Adelaide SA
Mr Warren Nicholl	Stipendiary Magistrate Magistrates Chambers Law Courts of the ACT Knowles Place Canberra ACT
The Hon. Mr Justice Nicholson	Deputy Chairman Victorian Parole Board Supreme Court of Victoria William Street Melbourne Vic
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Mr John Pyrke	Probation Officer Tasmania Probation Service Murray Street Hobart Tas
Mr Don Robertson	Operations Manager - Juvenile Justice Department of Youth and Community Services 323 Castlereagh Street Sydney NSW

Mr Paul Rutledge	Legal Officer Constitution and Legislation Branch Solicitor-General's Office Comalco House George Street Brisbane Qld
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Mr Dennis Sweeney	Department of Health P.O. Box 100 Woden ACT

Mr Terry Syddall	Stipendiary Magistrate Court of Petty Sessions P.O. Box 282 Armadale WA
Mr Michael Tidball	Community Based Corrections Welfare Branch Department of Territories P.O. Box 158 Canberra ACT
Mr John Van Groningen	Professional Advisor to the Attorney-General Law Department of Victoria 221 Queen Street Melbourne Vic
Mr Justice R. Watson	Consultant to Commonwealth Government on Criminal Law GPO Box 9991 Canberra ACT
Mr Harold Weir	Justice Administration Course Co-ordinator Elton Mayo School of Management Institute of Technology North Terrace Adelaide SA

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