Harkness Henry Speech

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INTRODUCTION

About 18 months ago I retired to Greytown in the Wairarapa after 42 years in the law. I swapped suits for my gardening gear: cut off jeans, tee shirt and most importantly thick socks and red band gumboots. Rather unattractively gumboots do give you a band around your calf muscle from the top of your gumboots. It does look rather strange. The good thing is most other people in my town have the same calf muscle mark.

However Kate and I had shifted to the Wairarapa to ride horses, develop a large garden, play golf; all in good weather without Wellington's wind. We wanted to fit into the local community without the burden of our past, me as a Judge and Kate as Crown Counsel and so we avoided mentioning our immediate past jobs. When Sir Ivor Richardson died I went to his memorial service. On the way to Wellington I stopped at my local petrol station this time dressed not in my gardening gear but for once in my dark Judge's suit and tie. The petrol attendant, my mate Lance looked at me and said, "Off to Court?". Damn I thought our desire for anonymity hadn't worked, I'm sprung. Lance saw my irritation. He said, "Sorry it's just that pretty much all of the people who come in here wearing a suit are off to Court".

What Lance was really emphasising was that my criminal C.V was incomplete. I had been a criminal lawyer, a Judge who presided in criminal trials and criminal appeals, in the District Court, the High Court and Court of Appeal. I had been a witness in a criminal trial (indeed my evidence had been filmed for T.V) but and this is a big but I had never appeared in a criminal court as a defendant. Lance had identified this inadequacy.

This is not an academic paper. It is based on my practical knowledge and experience. And so in listening to what I have to say today I hope you will take into account this gap in my C.V.

My proposition today is that in a variety of ways the right to a fair trial is being undermined. And the public's right to a criminal justice system which is fairly and properly funded so that they can be confident in the system is also being compromised.

This vulnerability is through a variety of sources. Reduced legal aid for defence lawyers; reduced availability of money for expert witnesses for the defence; reduced funding for Crown Solicitors and Crown Law; the effect of the Sensible Sentencing Trust's lobbying and some recent legislative changes: including victim involvement in sentencing and the Three Strikes Law; the contribution of the media to public understanding or misunderstanding of Judicial decisions including sentencing; the Police diversion/warning system and the police/community justice system in Christchurch.

I want to talk about each of these topics and explain how each topic has in its way influenced the standard of trial or appellate hearing in New Zealand.

Legal Aid

I first want to discuss the changes to payments made to lawyers for criminal legal aid work as a result of the Legal Services Act 2011 and my view of the effect of these changes on the availability of legal services provided for those charged with crimes.

The cost of legal aid for those charged with criminal offending has long been the subject of Government concern. Obviously a system that simply funds lawyers for whatever work they do without limit is soon going to result in a cost explosion. And so some restraint on what can be charged is only reasonable. The balance in this equation arises really in two ways. First the equality of arms argument. Our system of criminal law only provides true justice if both prosecution and defence have similar relevant resources. This involves similar resources to fund their cases whether case preparation or for example expert witnesses. Of course equality of arms must take into account the prosecution burden of proof. Secondly the legal aid system must pay enough so that appropriately experienced and competent lawyers are prepared to do the work at the right level.

And so we can really only say that a defendant has had a fair trial if there are in the context of economic need, reasonable resources, as properly required, available to a defendant to instruct a lawyer, assess what evidence may be required and call such evidence; and a lawyer available and prepared to act who has the competence and skill required to meet the particular charge or charges a defendant faces.

I believe that the cost cutting inherent in the 2011 Legal Aid reforms in some cases may have put a fair trial in jeopardy. It is difficult to objectively assess this jeopardy. I rely upon my own knowledge and experience and anecdotal information from the concerns of others in the criminal justice system including lawyers in making this assessment.

First let's look at the 2011 legal aid reforms. As many of you know the basis for legal aid payments has varied over the years. Immediately before 2011 the payment system was on an hourly basis intended to reflect experience together with guideline hours for different types of work. The number of hours charged could not exceed the guidelines unless an amendment to the grant was sought and approved. My experience was that the guideline hours were reasonable although many applications to exceed the hours were made and granted.

In the early 2000s the eligibility for legal aid both financially and for types of offending was liberalised - hardly surprisingly the cost of legal aid exploded.

Dame Margaret Bazley undertook a review of legal aid. In summary she concluded that the then existing fee structure for legal aid - a fee for a particular service - was not efficient, and that it was open to and in fact was abused by some lawyers. She considered a bulk or fixed fee was the efficient system together with the development of the Public Defender Service. As I have mentioned legal aid expenditure had exploded. In 2004/2005 it was approximately $80 million, by 2006/2007 it was $101 million and by 2009/2010 it was $152 million.

The Government acted. It decided, rather than what had been an open budget with the Government funding whatever it cost in legal aid payments, that it would cap the legal aid budget. No more open budget. They decided the baseline for legal aid would be set at the 2007/2008 expenditure of $101 million. Importantly under the existing system the $101 million was forecast to increase from the $152 in 2009/2010 through to $207 million in 2014/2015. Doubling in 7 years.

Why these massive increases? Well we know it wasn't lawyer's hourly rates. They have been kept static or in most cases reduced. My impression is that these factors played a major role; there were more serious cases; the Government had increased eligibility for legal aid; criminal cases took much longer, jury trials on average were taking 50% or more longer than they were a decade before. Why was this? Two reasons - a huge increase in forensic evidence: DNA, blood

testing, video evidence of the scene of the crime - and defence lawyers heeding the constant attacks by appellate defendants in the Court of Appeal alleging trial counsel failure. Counsel understandably reacted by running every possible defence, challenging every point and calling every possible witness.

The Government therefore proposed to reduce legal aid payments from the actual $152 million in 2009/2010 back to a baseline of $101 million over the following 5 years to 2014/2015. $138 million was to be saved; ie legal aid payments were to drop by $138 million over the next five years to 2014/2015. How was it proposed to do this given the proposed massive reduction? Mostly by reducing legal aid payments to lawyers through a fixed fee regime and by the widening of the public defender service to cover up to 50% of cases in areas where they operated. And so the new regime came into being with the 2011 Act. There were challenges to the scheme in Courts - some in part successful. But in the end the Government had its way. Legal Aid paid a fixed fee for all criminal work with two exceptions, high cost cases and complex cases. These cases were estimated to be no more than 5% of the cases heard although as it has turned out they have constituted much less. And so for example the original fixed fee for a defended Judge alone trial (including sentencing) varied between $480 - $580. This fee was to; take instructions from a client, and a brief of evidence, interview any witness, review disclosure, all Court appearances, before trial research, identifying the legal issues, preparation for hearing, conducting hearing, appearing at sentencing etc. If the defended hearing was more than 1 1/2 hours then there would be an additional payment of $48 per 1/2 hour or $96 per hour.

Even for a simple Judge alone hearing this will often be hopelessly inadequate. At the $96 per hour rate this set fee gives the lawyer 3 1/2 hours for all attendances including likely 2 or 3 court appearances before the hearing. Even in the simplest of criminal Judge alone cases 3 1/2 hours will be inadequate.

At $96 per hour no lawyer is going to get rich. Assuming 1500 chargeable hours per annum and a 50% overhead the legal aid lawyer might be lucky to earn $70,000 per annum.

And so the question becomes which lawyers will act for these defendants at these rates? Will the lawyers be prepared to do all that is necessary to properly conduct a trial particularly if that means, over a year, hundreds of hours of unpaid work? The answer of course is the least experienced and, let's be brutally honest, the least competent lawyers all too often will take on this lower end work. This problem continues on through the more complex and serious criminal cases. The result - sometimes inexperienced and sometimes inadequate lawyers undertaking criminal cases well above their level of competence. Typically Judges will do what they can to level the trial playing field but it's not their job. Too much judicial intervention carries all sorts of hidden dangers for the Judges and for a fair trial. But I also want to acknowledge the many competent talented criminal lawyers who take on this work at a fraction of the hourly rates of their brothers and sisters doing commercial work. And recent analysis has confirmed what was known anecdotally – that significant numbers of lawyers are pulling out of legal aid work. These will often be the very experienced lawyers the system badly needs. Complaints of trial counsel inadequacy are common in the Court of Appeal but a poor effort by trial counsel is seldom enough to justify appellate intervention. And so a fair trial can be compromised.

Parallel with this problem is defence access to forensic evidence. Two problems in my experience have arisen here in part primarily driven by reduced funding. There have been regular problems for defence lawyers in getting approval from legal aid for forensic testing. This was a constant refrain from defence lawyers when I ran the High Court Criminal List in Wellington. Approval if given was slow and limited. Indeed I was reduced to personally ringing the legal aid approval officer and telling them I would have to announce in Court that this serious murder trial was going to be delayed because Legal Aid hadn't done its job. It got results but it was hardly ideal.

The second problem is reduced availability of experts. New Zealand has a very small pool of expert witnesses in many fields. Often overseas experts are the only available defense witnesses able to comment on the prosecution expert. Finding and funding such experts can become a major problem and an impediment to a fair trial.

I acknowledge that in the most recent budget legal aid payments were due to increase by $96M over a 4 year period. An average of $24M per year. Will this make any difference? I doubt it will address the problems I have identified.

In summary legal aid payments are now at rock bottom. Too often this means inexperienced lawyers with insufficient time are trying cases. This is typically at the lower level of criminal cases but it affects in turn all levels. So why does it matter? It matters because a fair trial matters. Justice systems rely upon confidence in the system. Each time we let a defendant down – one who leaves Court with a justified sense of grievance because he or she hasn't had a fair go at trial, confidence in the system is eroded just a little bit more.

CROWN – Crown Solicitors

About the time the 2011 legal aid changes came into being the basis for funding Crown Solicitors also changed. In many ways the existing payment systems for defence and prosecution, were similar - hourly rates but with some limit which could be exceeded. Although the Crown hourly rates were generally higher.

The new funding model was to bulk fund Crown Solicitors. They would be paid a lump sum to conduct the crown work in their area. Again exceptional trials could justify variations to the scheme. For some Crown Solicitors this was a significant funding cut. If you think about bulk funding what are the economic incentives? The complaint about open ended hourly rates was lack of incentive to limit the time taken. The economic incentive was to take as long as possible. The economic incentive of bulk funding is both to reduce trial time and if possible avoid a trial altogether. The fewer fully contested trials the more profitable for the Crown Solicitor. This inevitably raises plea discussions as a way of avoiding a trial. Indeed the 2013 Solicitor-General prosecution guidelines specifically acknowledge that "fiscal restraints" have meant fewer resources for Crown solicitors. They also specifically authorize plea discussions – the guidelines note such arrangements can save considerable costs for the Crown, the Courts and legal aid.

There is no doubt from my experience that since the introduction of bulk funding and the new Solicitor-General guidelines, the Crown have been far more willing to discuss and agree to lesser charges with a guilty plea. This isn't necessarily a bad thing but obviously these factors are relevant:

- Plea discussion should not be driven by cost.
- The charge pleaded to should reflect the true criminality of the act.
- The reasons for the acceptance of a plea to a lesser charge should always be made public. Failing to do so undermines confidence in the prosecution of crime and in the

judiciary. For some it looks like all those on the inside have got together to avoid the inconvenience of a trial.

All too often no reasons are given. This problem of a failure to give reasons for an acceptance of a plea to a lesser charge is illustrated in child death/murder cases. These are very difficult cases to try. Often it is difficult to establish when the fatal blow occurred and by whom. It is also difficult in such cases to establish the necessary mental ingredients of murder; an intent to kill or, recklessness and an appreciation what is being done may kill but proceeding anyway. In many cases there are terrible injuries to a young child. When the Crown agrees to accept a guilty plea to manslaughter and the murder count is discharged typically no explanation is given. The public are left confused. They don't understand what has been done nor why. Another drop in confidence results.

I accept that an explanation by the Crown might not satisfy all of the public. And all too often when an explanation is given subsequent media reports don't seem to reflect what has been said or the important points. But at least there is an explanation in the public domain.

The other point I want to make is this. Some of these difficult serious cases of child abuse and death may be better left to a jury to decide. Often the prosecution decision - whether there is enough evidence to establish who did what and whether the intent to murder is established - is on a fine line. I suggest it may be better to have 12 citizens bring their collective experience and sense to these decisions. A verdict by these 12 ordinary people is much more likely to be accepted by the wider public. We all hope however that the economic incentives or disincentives inherent in bulk funding play no part, even unconsciously, in these plea decisions.

CROWN LAW

My experience is that there are direct parallels with what is happening at some Crown Solicitors' offices that I have mentioned and the Criminal Section at Crown Law in Wellington. (disclaimer) I have already discussed the problems arising from bulk funding of Crown Solicitors. In particular, the best use of bulk funds if there is to be a hearing, is to have the most junior lawyer possible at the hearing. This is especially noticeable in appeals from the District Court to the High Court which are dealt with by local Crown Solicitors. When neither appellant counsel nor counsel for the respondent have much Court experience, the result can be rather superficial submissions. Some of these cases can be of considerable precedential importance in the District Court. I often required Counsel to go away and properly research important points. This illustrates again how important work is being pushed down to a lawyerly level far too junior for the work. And in my experience this is also what sometimes happens with Crown Law in appeals to the Court of Appeal. As most of you know Crown Law appear for the Crown on most appeals in the Court of Appeal.

These comments arise from my experience in two ways. First when Crown Law was restructured in about 2012 significant numbers of experienced lawyers left. Crown Law had been seen as one of the best places to practise law - despite the fact the pay was only so-so. It attracted the very best lawyers on a par with the top 2 or 3 law firms. The result of these changes was that a number of new inexperienced lawyers appeared for the Crown in Criminal Appeals in the Court of Appeal. There are some top class experienced lawyers at Crown Law but with hundreds of criminal appeals each year to the Court of Appeal the loss of experience was significant.

Why did this drop in experience really matter? Well to understand this you need to understand how practically the Criminal Appeal Division of the Court of Appeal works. I was a Judge of this Court for about 10 or 11 years. I sat on hundreds of criminal appeals. The vast majority were defence appeals. A few days sometimes up to a week or more before a hearing the Judges get

the appeal book. This has the relevant documents for the trial sometimes including the transcript, the final addresses and the summing up. There is a heck of a lot of reading required of a Judge. And so the standard of Counsel's submissions inevitably play a big part in helping the Judges' focus on the issues. Here Crown Law were the Kings or Queens of the Court of Appeal. The standard of their submissions identifying relevant parts of the evidence, and other parts of the case, and the relevant authorities had been of the highest standard. I'm afraid to say mostly but not always it was vastly better than defence counsels' efforts. While Crown law employed some very bright young lawyers after the revamp their lack of experience sometimes showed. The Crown Law standard sometimes dropped. And from time to time the Court was left in the position that counsel's submissions had not really dealt comprehensively with the issues the case raised. This could affect the quality of some appellate decisions. And in turn a fair appellate hearing, comprehensively assessing all of the trial process, could be compromised. While any deficit could be made up by the Judges, this is not how the system works best. Sure some money was saved from Crown Law's budget but what is the true cost to a criminal justice system where some cases might not get the full consideration and analysis that was their due.

Police Diversion/Warning Schemes

Any Constable has a discretion as to whether she or he charges someone they suspect of a crime. Those of us old enough remember the local constable who caught someone committing a minor crime, he and it mostly was a he, would take them home and talk to their parents. An informal punishment followed perhaps tidying up the local scout hall for a month. With more centralised policing the use of this discretion seemed to disappear. Then the focus changed to cost. What was the cost of prosecuting those who had been charged with low level crime?

A diversion scheme was developed by the police. The defendant was still charged, came to court, and if they admitted guilt to the police they would be "diverted" from the Criminal Justice system. They avoided a conviction if they paid some money or did some work for a charity. This system had great advantages. It avoided a criminal conviction for minor crime which could easily taint the life of a defendant. But there were serious hooks. What crimes were eligible for diversion were at the idiosyncratic discretion of the local diversion sergeant. Eligibility varied wildly from place to place. Donations were to be made to favoured charities. Those who believed they were not guilty were under pressure to accept guilt and avoid a conviction. Today, diversion is really out of favour, in part because of these problems, but primarily I believe because of the cost of the diversion scheme. It costs real money to run what is really a form of alternative justice - with a structure of diversion officers and the supervision of community work and other punishment. "Diverted" defendants in fact often appear many times in court sorting out whether they were to be diverted and what if any "punishment" they are to undertake before being released.

And so the diversion system has mostly been replaced by the police warning system. The warning system is run exclusively by police at a constable level with centrally developed guidelines. When the defendant is arrested and a decision made not to charge, he or she is warned about their behaviour and potential future consequences**.** This typically occurs at the police station**.** A record

of the warning is kept. The person does not appear in Court. This has resulted in significantly fewer defendants appearing in the District Court on minor criminal matters. About 2000 warnings are issued each month. It has resulted in significantly reduced police costs compared with diversion cases.

But there are similar concerns with the police warning system. It can be highly idiosyncratic. One constable's warning is another's arrest and prosecution. And so like offending may not be treated the same. What if the crime warned against caused damage to another's goods? Does the victim have an outlet? The potential for corruption arises in all these processes which ultimately are designed to avoid the Courts performing a public adjudicative function. A police constable who arrests someone will decide if that person avoids a conviction. It may be for a minor crime but a conviction can be the tipping point in, for example, a job application, or a visa for entry into a country. And so the stakes for a defendant may be high, and the future prospects of an arrested person might rely on the discretion of an individual constable. A discretion effectively exercised in private. And in this situation the seeds of corruption are present. I do not intend to suggest there has been corruption. But this is not an open public system like the Courts. And in that it invites speculation.

I do want to acknowledge the real advantages of these schemes. Thousands of New Zealanders have avoided convictions for minor crime to their considerable advantage. But the real concerns remain - pressure on the not guilty to accept guilt - uneven and unfair differences in decision making – a hidden process - and the potential for corruption.

Community Justice Panel – Christchurch

I want to now talk about Community Justice Panels in Christchurch.

I take the description of the Community Justice Panel in Christchurch from various NZ Police internet sites and from personal knowledge. While only operating in Christchurch, the police hope to expand to other centres. The Community Justice Panel is described as "one of three Alternative Resolutions, Policing Excellence initiatives which allow NZ Police more graduated responses to low - level offending without the need to rely upon the Courts." It is described as a "grass roots partnership" between Community Law and NZ Police. The Department of Justice provided start - up funding for the Community Justice Panel. The Community Justice Panel takes adults who are charged with a crime who admit guilt and agree to participate. After admitting guilt, the offenders appear before the Panel, rather than the Court. Forty percent of those who appeared before the panel had no previous convictions, and so 60% had previous convictions. Members of the Panel who make the decisions are described as "vetted and trained community representatives" who "hold offenders to account by setting restitution figures and repairing damage/harm caused by offending". The Community Justice Panel process is said to save half an hour in police time for each prosecution compared with a court hearing and three hours compared to diversion.

Each Community Justice Panel hearing lasts 30 - 45 minutes. The result can be reparation payments, community service or donations to charity. Some of the more serious offences actually referred were - burglary, unlawfully taking a motor vehicle - assaulting a child; common and domestic assault, cultivating supplying/selling cannabis, possession of an offensive weapon. For some offenders in the Courts this offending could result in imprisonment.

The focus is said to address the reasons for offending including, economic need, abuse of alcohol and drugs and mental health issues.

So what's wrong with all of this? Surely a commendable community/police initiative. The first point I want to make is that I'm all for those charged with minor crime avoiding a conviction where it may affect their future. But I have two concerns about this Christchurch process. The first is less serious than the second. A lot of resources are going into this process for those who commit minor crime. There seems to be only a modest effect on recidivism. Some of the resources used are voluntary but some, for example rehabilitation programmes, are not. The criminal justice system would be very glad of this effort by volunteers and these rehabilitation resources for those charged with much more serious crime. So the first concern is use of significant resources for minor criminal offending which doesn't really seem to significantly reduce reoffending.

The second concern is more fundamental. The Community Justice Panels are really an alternative justice system without the protections and without the trained participants. A bit like a hospital without medical professionals but with very well meaning citizens trying to do their best. The crimes dealt with include some where imprisonment is common. Thus equality of treatment suffers. None of the fundamental protections for those charged with a crime apply in the Community Justice Panel. They set their own process. Who vets and trains these community representatives – the police? If you don't want to participate as a defendant because something looks unfair then you're forced back to the Criminal Justice system and the possibility of a conviction. And so the pressure is on to accept whatever the Community Justice Panel say because the alternative may not be attractive. And what of the close involvement of the police in this process? Where is the proper separation of the investigative/prosecutorial/defense and Judicial functions so essential to a fair Criminal Justice system? In the Community Justice Panel the lines are dangerously blurred. In summary, well meaning but a dangerous undermining of the formal criminal justice system and the protections and balance in such a system.

Victims' Rights

Today in pretty much all common law jurisdictions there is a strong victims' rights movement. This is understandable. When I first began in criminal law 40 years ago victims were hardly mentioned. It was as if the system didn't want to hear how crime had affected those caught up in it. This significantly changed with the Victims of Offences Act in 1987 now the Victims' Rights Act 2002. At sentencing victims could file reports which detailed for the Judge the effect the crime had had on them, their families and friends. Impact reports could be read out in Court, often in dramatic and emotional ways which graphically told the defendant and the Judge the effect of their offending.

Some controversy arose however over some victim impact reports. The original Act made it clear the report was intended to describe the impact the crime had on the victim/victims. It was not intended to be an attack on the defendant, his/her personality or a critique of his family. It was the responsibility of the police and the Crown Prosecutor to edit these reports so that they complied with the Act. Sometimes this wasn't done and we had the very difficult problem of a Judge being forced to tell victims they couldn't read out parts of what they wanted to say. Unfair censorship was the cry. And so the Act was changed in 2015. The changes widened what could be included in victim impact reports. Now Judges are obliged to allow victims to read out victim impact statements. As long as the statements deal with the victims' views about the offending, they are acceptable. This is a very wide right and in many victims' minds entitles them to give their view of the defendant and often his or her family. While the Act allows a Judge to control abuse in a practical sense, this is very difficult to do.

In my view these changes were unwise and to some degree undermine the essence of a civilised criminal justice system.

When the victim resorts to directly telling a defendant what they think of him or her and their family, violence can easily erupt in the courtroom. What the victim thinks of the defendant or his/her

family surely cannot be part of a sentencing decision. The impact of the crime on the victim is an important part of a sentence. The fact the victim thinks the defendant is a scum bag isn't.

Finally and perhaps most importantly this tacit acceptance of such abuse wrongly encourages the personalisation of the criminal process. You will all know that we gave up personal response to crime by the intervention of the State through a structured Criminal Justice System. The State's role is to put a barrier between victim and defendant so that society isn't disrupted by personal revenge. The danger of the new liberal victims' rights laws is that they allow just a little of that personal revenge. Abuse is difficult to prevent. And at times the defendant's family in Court has responded aggressively to that abuse. This is the very situation a civilised criminal justice system is designed to avoid in the interests of social harmony.

Knowledge of victim impact is essential to a fair criminal justice system. Victim abuse of defendants undermines a fair criminal justice system.

Sensible Sentencing Trust

I want to briefly discuss the Sensible Sentencing Trust. It is a catchy name and to give the Trust their due they have consistently developed that theme over the years. They claim they have a sensible, common sense view of what Judges should do and how those before the Courts should be dealt with. The Sensible Sentencing Trust has had a significant effect on the position of victims within the justice system.

The persistent theme in the Sensible Sentencing Trust's publicity is they wish to make victims the centre of the justice system. Well victims are not the centre of the criminal justice system. Understanding and taking into account the effect of crime on victims is a very important part of any criminal justice system but it is not the centre. At the centre is fair and just process to determine whether those charged with criminal offences are guilty and if so what their punishment should be. Victims other than those who have relevant evidence about a charge are not involved in the determination of guilt or otherwise. They are involved in one aspect, an important one, at sentencing.

The Sensible Sentencing Trust's newsletters over the last few years relentlessly and often inaccurately criticises the justice system and defence lawyers. Appeals are often said to be an appalling waste of time. When an appeal by a defendant is dismissed it is "lucky" the Court of Appeal saw sense. When an appeal is dismissed, the newsletter suggests, the lawyer should be charged with wasting the Court's time. Lawyers are only in it for the money. New Zealand is described as a "paedophile heaven" and the justice system "endorses paedophilia".

The newsletter claims that, before the Sensible Sentencing Trust came into existence most New Zealanders "were scared to question the politically correct pervasive liberal lunatics knowing full well they would turn their wrath on you in an attempt to discredit and eliminate any and all opposition". Apparently without any irony the newsletter said of these "pervasive liberal lunatics",

“Their hatred - their venom and vengeance knew no bounds their mission was to destroy at all costs.”

A number of letters to the newsletter are highly critical of defence lawyers. Those who are trying to get acquittals of defendants whom a correspondent declares are guilty, are especially vilified (Teina Pora comes to mind). Judges are said to sanction child abuse if they suppress an offender’s name and have “abdicated their duty of care to New Zealand children”.

There is trenchant criticism of discounts for guilty pleas, for those who offer restorative justice and for those who get parole.

In one section the fact of a reduction in crime by 30% is recorded (due mostly to the Sensible Sentencing Trust’s work) and next a claim that there is a crime epidemic which pervades New Zealand.

I have spent some time describing some of the Sensible Sentencing Trust’s and their supporters’ views because many are in serious conflict with the right to a fair trial, a balanced sentencing and at least one appeal as of right. This constant refrain about how useless lawyers and the justice system are is dangerous and particularly dangerous because it is rarely, if ever, challenged.

The principles on which the justice system is based are fundamental to a democracy. Principles of the rule of law have been developed over centuries. They maintain a well-established balance between the defendant and the state. For a system designed by humans it works pretty damn well. If there is no counter to the Sensible Sentencing Trust’s approach on these issues they will undermine the rule of law piece by piece, bit by bit. Often the only voice in the media on criminal justice issues is the Sensible Sentencing Trust. What about senior lawyers and academics responding to the Trust’s view of the criminal justice system and putting some balance into the debate?

The Three Strikes Law

I don't want to discuss the detail of the Three Strikes Law. Most of you will be well familiar with it. Essentially it provides that the more crimes you commit of a particular type the longer you will serve in prison. And so at the second level you may have to serve the sentence you receive without parole and at the third level you may have to serve the maximum sentence for the particular offence.

This law significantly reduces judicial discretion at sentencing. A strike offense is defined not by the individual facts but by the offence itself, no matter how minor. Where a murder qualifies then there is no parole. The defendant will rot in prison until he/she dies with a narrow exception. This approach to sentencing is contrary to our history and good practice. Punishment should fit the facts of the crime. The temptation for Judges will be to stretch the narrow exceptions to the law to the greatest degree in an attempt to do justice in an individual case.

Where it applies this law does its best to prevent the Courts doing justice in each case. It sadly illustrates a deep distrust in the wisdom of Judges given it all but eliminates their function in these cases.

The Media

Having a well-informed media which puts the Courts under a microscope is a good thing in a democracy. No Judge can complain about criticism as long as it's informed and based on what the Judge has actually said.

Some of the metropolitan print media and a few in the electronic media are top class journalists. They accurately report what has gone on in the Courts. But all too often opinion pieces in the media are simply not based on the facts. All too often criticism is not based on actually reading what the Judge has said or understanding the legal constraints. And all too often what an interest group says about a judicial decision is simply reported. No effort is made to assess whether it's based on fact. A minor example - when I was Chief Judge there was a death driving case involving a tourist. The driver was imprisoned. The media reported that the public were outraged by the lenient sentence. A journalist rang me and asked me to comment on what she described as the lenient sentence. I told her perhaps she should read the Judge's sentencing remarks. The Judge had in fact imposed the maximum sentence available. That fact did not appear in the media report. And there is continuing frustration in the High Court with the reporting of murder sentencing where the sentence is described as the minimum non parole period not the fact life imprisonment has been imposed. I'm afraid the media, especially the electronic media very rarely make an effort to explain the reasons for the decision. Decisions of public interest are put up on the Court's Internet site within hours, sometimes minutes of being delivered. Some media will provide links to the full decision. But too often the main point of the Judge's reasoning is ignored and all the public are left with is another distraught family complaining 12 or 15 years is not enough for the life that is taken.

One other aspect of criticism of Judges' decisions. As I have said it's healthy in a democracy. But where it is based on misapprehended facts or is wrong in law who speaks for the Judges when the

Judges can't? It used to be the Attorney-General but that is now rare. So I suggest it falls to the lawyers and the legal academics. I challenge senior lawyers and academics to speak out when criticism of the Court and Judges is factually or legally wrong. My experience is that the media will be interested in putting the other side. Too often the interest groups have free rein. You can provide balance.

SUMMARY

Why do these problems in the Criminal Justice System really matter? After all most people who are guilty are found guilty most of those who aren't guilty are found not guilty. Who really cares that lawyers are now being paid less by the State? I don't recall seeing any protests in the streets of New Zealand over any of these issues that I have raised this evening. .

Each of these issues are at their essence about a fair trial - whether from the perspective of the lawyers involved, prosecution or defence, the trial process itself, and the public policy issues arising from poorly thought through legislation.

A fair trial is a fragile thing. It ultimately relies upon the faith ordinary citizens have in the trial process. Are the laws a citizen is tried under fair? Is there approximate equality of arms between the prosecution and defence? Is the Judge fair? Are the jury open minded? Are there any financial incentives that might skew the obligations of the prosecution or defence? Do narrow interest groups dominate the discourse on what is justice? Is the information the public receive about the courts accurate and balanced?

In each of these areas I have identified worrying trends. Many seem to be driven by the political law and order debate too often marked by political party policies which try and out do other political parties on the "get tough on crime" mantra. What many of these policies fail to recognise is that they chip away at the whole criminal justice system. Laws which protect ordinary citizen's rights are condemned as being soft on crime. If you're innocent why should you need these protections? And so the rights of citizens to fair representation and trial developed over centuries are eroded. Of course for most citizens day to day this doesn't matter. It doesn't matter until someone in their family is charged with a crime, or is the victim or a witness to a crime. Then it matters. Then whether you are dealt with fairly or not really matters. And if you are not? Well you might be

interviewed on TV if the case is very serious. And you will be asked something like - “What did you think of the sentence of 12 years for the life of your son/daughter?” And no-one cares to say well actually the sentence was life imprisonment, and sentencing isn’t trying and can’t put a value on a life. And certainly no-one says to a convicted defendant well do you think you got a fair trial given you had an inexperienced counsel and you couldn’t get the necessary forensic evidence and you now face life without parole under the Three Strikes Law.

And so my plea is for the legal community to raise a stink about changes which have the potential to undermine the criminal process, and the right to a fair trial. No-one else will.