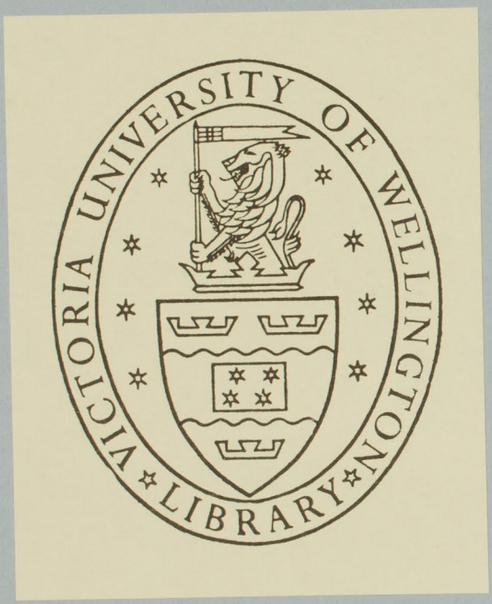
JAMES ARMSTRONG DOUGLAS

PRE-TRIAL DIVERSION AND THE WELLINGTON PROSECUTIONS DIVERSION SCHEME

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

1 September 1989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PART I
INTRODUCTION

'Diversion' has been a prominent term in the vocabulary of criminal justice since the late 1960's.[1] In fact it describes a process that is a permanent part of any criminal justice system - the exercise of a discretion by law enforcement agencies to withhold offenders from contact with some part of the formal system. 'Diversion' then can describe a broad and diverse range of practices. For example, when the police choose not to arrest, or to drop charges, perhaps on the basis that offenders atone for their conduct informally, that can be described as diversion. At the other end of the system, when a judge adjourns a case on the condition of good behaviour, or decides on some alternative to imprisonment, that can also be described as diversion.

A Specific Definition:

For the purposes of this paper, 'diversion' will mean 'pre-trial diversion'. This is the most common meaning of the term diversion, and as has been defined as:[2]

> ... formally acknowledged ... efforts to utilise alternatives to the justice system. To qualify as [pre-trial] diversion such efforts must be undertaken prior to adjudication and after a legally proscribed action has occurred ... [D]iversion implies halting or suspending formal criminal or juvenile justice proceedings ... in favour of processing through a non-criminal disposition.

Even within this definition there is considerable scope for variety, specifically as to what form the "non-criminal disposition" might take. What is important is that pre-trial diversion represents something more than a simple warning or dropping of a charge: it is rather the suspension of formal proceedings against a person "on the condition that he [or she] will do something in return."[3]

New Zealand:

In January of 1988 the Prosecutions Section of the Wellington police began running New Zealand's first police-initiated diversion scheme, on a trial basis.[4] To date it has been considered a success, and police in other centres have also organised schemes. As a result the police are currently formulating a national policy on diversion. The Law Commission has expressed support for the

concept,[5] and the Wellington scheme has received positive coverage in the press.[6]

The purpose of this paper is to evaluate diversion specifically in regard to the type of scheme running in Wellington, as this is likely to be the prototype for a national policy. Much of this evaluation is speculative in that as yet there is insufficient data on which to base a meaningful study of the achievements and effects of the scheme. However much assistance is derived from overseas studies and discussion of diversion.

The Wellington Scheme: its Nature and Mechanics:

The Wellington scheme, as is typical of diversion, is aimed at minor, and largely first, offenders. Unlike many overseas schemes of the past and present, it is not limited in its focus to juvenile offenders.

The police have stated their purpose in operating the scheme as:[7]

> ... to ensure that a first offender acknowledges full responsibility for the offence, compensates a victim in full and does not reoffend.

As an informal alternative to prosecution, the scheme aims to achieve these goals while protecting the offender from the stigma of a possible conviction. In this sense diversion is seen by the police as a second chance for the offender, which in turn shows the police to be a "fair organisation."[8]

Eligibility for diversion is decided on a number of criteria. These are described as follows:[9]

1. First offender.
2. Offence is not serious.
3. Offender admits guilt, shows remorse and is prepared to pay reparation.
4. Offender agrees to diversion.
5. Officer in charge of case (O/C case) agrees to diversion.
6. Victim agrees to diversion.

The final decision rests with the police Prosecutions Section, in the form of the officer in charge of diversion (O/C diversion).

Recommendations for diversion generally come from arresting officers, counsel or the Proecutions Section. In most cases the O/C diversion will make the decision to divert an offender

before the offender appears in court. In court - even diverted offenders must appear in court once - the police then ask for a remand of one to three months,[10] in which time the diversion can take place. The police also request that a second attendance in court by the offender be excused, in the event that the offender completes participation in diversion to the satisfaction of the police. If participation is not satisfactory, the police retain the power to resume prosecution.[11]

When an offender is diverted, he or she will be required to perform any or all of the following requirements at the discretion of the O/C diversion as to which:[12]

1. Offender to be severely warned and advised that any further offending will be dealt with by court action - as a general rule a person can only be eligible for diversion once.
2. Personal apology/letter of apology to victim(s).
3. Personal apology/letter of apology to O/C case.
4. Full reparation/compensation to victim(s) where applicable.
5. Professional counselling for alcohol/drugs/violence - generally involving a donation of around $100 to the agency doing the counselling. Weekly sessions are for a minimum of eight weeks.
6. Community work (preferably in the area of residence); often in place of a donation to charity.
7. Donation to a charity of the offender's choice, often roughly equivalent to the value of a fine and costs that would be paid in court for the offence.
8. Other conditions deemed appropriate.

When the relevant requirements are fulfilled, the police then withdraw the charge in court. Diversion however is not equivalent to an aquittal, and "fingerprints and photographs are retained."[13]

The Use of the Scheme to Date:

In practice the police have demonstrated flexibility in operating diversion, particularly in recent months as the scheme has become more widely accepted within the force in general.[14] Diversion has not been strictly limited to first offenders, and has been used to deal with some relatively serious offences.

As yet the police have only manual records of diversion cases, but are planning to have them on computer (which underlines the idea that diversion is not a complete acquittal). At 16/6/89, 17 months after the scheme commenced, 821 people had been diverted,

of which only seven had officially reoffended.[15] The following statistics represent a record of all those diverted between 22/5/89 and 27/6/89, a total of 82 people:

Age: the most common age of offenders was 18 to 21 (40%). 21% were under 18, while 17% were over 30 - several in their 50's.

Sex: male = 67%;
female = 33%.

Race: Caucasian = 71%;
Polynesian = 8.5%;
Maaori = 7.5%;
other = 11%.

Offences: shoplifting = 24%;
assault = 17%;
cannabis offences = 21%;
theft = 9%;
others = 29%.

Other offences included intentional damage, false pretences, insulting language, trespass, receiving, and credit by fraud.

In terms of the requirements performed, 73% made a donation, the average amount of which was $227. 27% did community work; some of whom also made a donation as above. 14% attended counselling.

15% of offenders paid reparation. However in many cases the donation to charity was in fact a payment, although not reparation, to the victim - generally retailers in shoplifting cases.

More recent figures suggest the percentage of female offenders in this period is unusually high, while the percentage of Maaori offenders is unusually low.[16]

PART II
THE RATIONALES FOR DIVERSION

Conflicting Origins - a Brief Historical Overview:

Diversion emerged as a popular alternative in criminal justice in the late 1960's, predominantly in the United States. At that time justice systems were in general oriented around rehabilitation of offenders as a philosophy of crime control, as they had been for the better part of the century.[17] It was still widely considered that crime or deviancy existed as the result of particular problems in individuals and communities that were for the justice system to identify and correct. Offenders were dealt with with the theoretical aim of reintegrating them, both physically and morally, into society as responsible citizens who "no longer saw the need to reoffend."[18]

Some of the earliest recommendations of diversion were part of rising criticism of the rehabilitative ethic, criticism which eventually led to its widespread abandonment in the 1970's in favour of an approach based on justifiable retribution. The assumption that deviancy could be positively defined in individuals, let alone treated, was questioned, and the real effects of a system which sought to do so examined.[19]

The development of labelling theory was central in the critique of rehabilitation.[20] It was contended that, despite its good intentions, an interventionist, welfare-based system regularly had a detrimental effect on those it processed. In their attempts to 'diagnose' and 'treat' agents of the system would stigmatise offenders by labelling them as delinquent, deviant or incorrigible. In turn offenders would "internalise these labels so that they [would] come to think of themselves in those terms."[21] Because it was then "very difficult to shed that new identity"[22] the system had in fact helped to create and maintain a delinquent or criminal career. Offenders - particularly juveniles who might otherwise simply mature out - are seen and see themselves in terms of their prior record, their future behaviour moulded by definitions and explanations of their past action imposed by the system. Labelling theorists argued such effects to be widespread if not uniform, and blamed a rehabilitative system which necessarily had to classify offenders before it could decide how it was to carry out its goal of treating them.

The emergence of diversion can partly be attributed to a response to the problems raised by labelling theory. It was advocated by some as a means of evading such consequences by dealing with offenders informally, out of the ambit of the stigmatising formal system. In its most extreme form, diversion was embraced by non-interventionists as a means of doing nothing at all with offenders.[23]

Clearly such thinking was unattractive to a system still officially infatuated with rehabilitation, which required intervention, and the wide measure of official support given to diversion resulted more from a recognition of other qualities inherent in the concept. Importantly it suggested a practical solution to the problem of an overloaded court system, burdened particularly by increasing prosecution and conviction of juveniles. It was also simply attractive as an alternative, flexible approach to crime control when it was generally accepted that the formal system was achieving little in deterring reoffending. Of course acceptance of diversion did not necessarily mean rejection of intervention and rehabilitation, and the majority of American schemes initiated in the late 1960's and early 1970's conformed to these ideas, involving the referral of offenders to counselling or employment programmes. Because of this those who had originally espoused diversion as a rejection of anything but "judicious intervention" by the state were able to complain that the "purposes of diversion [have] been perverted."[24]

The mid-1970's saw a shift in criminal justice philosophy, clearly visible in both the United States and Britain.[25] For several years rehabilitation had been criticised as not only too interventionist, but also sacrificial of due process, inconsistent and unfair on offenders, and in any case ineffective. It became superseded by a return to a system of punishment based primarily on retribution.

This by no means smothered the popularity of diversion, nor in fact its dominantly rehabilitative component. While serious crime was dealt with in terms of retribution, diversion still prospered in the area of minor and juvenile crime, which by nature invited paternalistic treatment more readily and less controversially. Diversion also still appealed to those critical of rehabilitation. In 1975 the Law Reform Commission of Canada recommended diversion away from the courts to more informal

resolution by mediation, particularly where the offence was less serious and there was an ongoing relationship between the offender and the victim.[26] A more settlement-oriented procedure was favoured over the adversary and formal nature of court proceedings as more likely to benefit both parties:[27]

> What the parties want is a solution that will harmonise their difficulties, not necessarily a judgement that will crystallise their discord.

In other instances also, such as the Groningen scheme in the Netherlands, diversion has been tried as a means of dealing with offenders in a more productive manner than is achieved by the courts, without being centrally rehabilitative in nature.[28]

The Wellington Scheme:

A number of different rationales and goals are discernible in the Wellington scheme:

- it seeks to reduce pressure on the system by removing cases from the courts;
- it recognises that there may be a more effective way to deal with some offenders than by trial and conviction;
- it is rehabilitative in part, in that it involves counselling as a requirement for certain offenders;
- it encourages settlement by informal reparation, and also by attempting to reconcile the parties (primarily by rehabilitative measures) in cases involving an ongoing relationship or domestic situation.

PART III
EVALUATING DIVERSION

A) THE AIMS OF DIVERSION - APPROPRIATE AND ACHIEVABLE?

Relieving Pressure on the System?

In introducing diversion in Wellington the police have explicitly recognised that the courts are at present burdened by a significant number of unnecessary cases being brought before them that could be as easily or better resolved out of court.[29] In theory diversion, as an informal alternative in processing offenders, can save the system time and money while dealing with cases in an effective as well as efficient manner. In practice however this can be questioned. Diversion is clearly likely to relieve pressure on the system if it provides an additional method of dealing with the same intake of offenders that the courts have previously had to process. This assumption is undermined by strong evidence that an effect of introducing diversion can be to increase the overall intake of the system. This phenomenon has been termed 'net-widening'.[30]

Wellington police have stated that diversion has the specific effect of "filling the grey-area between a warning and a prosecution."[31] Net-widening theory works on the logic that while diversion may be reducing the number of court prosecutions, it will also be reducing the number of warnings or "no action decisions."[32] Police who prior to diversion would not arrest because they were unwilling to see a minor offender convicted, might be quite willing to arrest where that offender will be diverted instead. Similarly victims who may not be willing to lay a complaint in normal circumstances may be more willing to do so if they are aware of the likelihood of diversion, which is not only a less formal and adversarial procedure, but also offers immediate compensation. Diversion has the superficial appearance of a soft option, a benevolent rehabilitating measure or an efficient settlement procedure, and by its nature encourages its own use. This may be positive in certain cases, however as the Law Reform Commission of Canada has stated:[33]

> ... it would be unfortunate if pre-trial diversion were used as a means whereby a larger and larger proportion of people in trouble were discouraged from handling their own problems and obliged to turn to state-run criminal justice programs.

It would also of course be more expensive for the state.

Overseas studies have been particularly critical of the net-widening side-effect of diversion with respect to juveniles. The attributes of young people in schemes especially in the United States have been found to be substantially different from those who are normally prosecuted where there is no diversion option:[34]

> ... the bulk of 'diversion cases' are young people who are normally counselled and released by the police, if indeed they have any dealings with the police.

The Wellington scheme is not directed specifically at juvenile offenders, but does deal with many people in the 15-19 year age group. There is a danger that young people who would otherwise be left alone may be drawn into the criminal justice system due to the presence of diversion.

In shoplifting cases the police have encountered the difficulty of 'victim' retailers who have a fixed policy of prosecuting all shoplifters. They have attempted to solve this problem by turning the donation to charity requirement of diversion into a payment by the offender to the store, providing an incentive to the retailer to consent to diversion.[35] The payment, like the donation, is generally equivalent to the fine and costs the offender could expect to pay from a trial, so in this sense the offender is not been duly disadvantaged. However again it is to be wondered whether the effect of the incentive may be to encourage stores to more readily involve the police with very minor offenders where they may have been willing to let the matter rest previously.

If the effect of diversion is to widen the net then the problem of numbers in the system is not clearly resolved; a busy diversion project may more than compensate for the limited reduction of pressure on the courts. It has in fact been suggested that diversion may even lead to an increase in formal prosecutions. Cohen has described the effect that diversion, as another 'level' of action within the system, can have in creating what is termed a "feedback loop:"[36]

> The disposition received by an offender arriving at a particular level [i.e. prosecution] is now affected by the knowledge that he [or she] was diverted at an earlier level. The most severe punishments go not just to the worst offenders in legalistic terms, but to those who foul up at their previous level.

This is relevant to the Wellington scheme in that the police have indicated that an offender who has been diverted will be judged

more harshly in court on reoffending, because they are seen as having failed already, or as having abused the benevolence of the system by not taking advantage of the 'reprieve' of the original diversion.[38] This suggests that once an offender is identified as having been processed already, their chances of being more firmly caught up by the system in future are increased. As Thorpe has put it, "putting more rungs in the middle of the ladder makes it that much easier to climb."[37] Given the tendency for diversion to widen the net, more prosecutions than normal can be generated. For example, an offender (O) may be diverted for an offence for which she need only have been warned. O then commits another offence. Normally she would only have been warned, but because she has previously been diverted she is in fact prosecuted. In such a case diversion is creating more work for the system rather than less.

The issue of net-widening aside, the capacity of diversion, as it is being operated currently in Wellington, to save time and money appears limited. Firstly, offenders still have to make one court appearance before they can be diverted. Secondly diversion itself can be a time-consuming business for the police in terms of organisation, meetings and follow-up, where the offender might otherwise be very briefly reprimanded in court and fined.

Counselling/Rehabilitation:

Under the Wellington scheme, those who have committed offences involving drugs, alcohol or violence are generally referred to counselling. Courses are provided by professional organisations and run for a minimum of eight weeks (if offenders fail to attend on a regular basis, counsellors contact the police). Educational courses may also be part of diversion's obligations - in one case of unlawful possession of a firearm, the offender was referred to a class on firearms' safety. In addition it is possible to consider the community work obligation as rehabilitative in nature, although this is perhaps secondary to its function as a substitute for the payment of a donation.

Referral to counselling, or therapy, has historically been a consistent but controversial aspect of diversion. Although rehabilitation lost popularity as a means by which to approach crime in the 1970's, its cause has more recently been reasserted,[39] and its presence in diversion has not faltered, particularly in the United States.[40]

Traditional doubts about the usefulness of rehabilitative measures as part of the criminal justice system focus on the element of coercion generally involved. The efficacy of compulsory treatment of offenders who are either unwilling or unsuitable subjects has been rightly questioned.[41] There is indeed little empirical evidence, or compelling logic, to suggest that involuntare rehabilitation measures of any sort are regularly successful in reforming offenders.[42] It has been specifically contended with respect to diversion that the effects of a correctional approach can be more negative than positive. Labelling theory, originally directed at the stigmatising effects of the formal system, applies just as easily to informal welfare-based alternatives such as diversion schemes with a counselling element; the damage being similar whether an offender is labelled a social deviant by a counsellor or a judge.

Another main criticism of rehabilitation is that it by nature leads to indeterminacy in dealing with offenders. Because the system aims to reform offenders, the amount of time that offenders spend in the system is not seen as important, as it clearly is in a retributive concept of punishment. This leads to inappropriate levels of intervention.[43] Frazier and Cochran have found in studying a large American diversion project that:[44]

> ... diverted youth are in the system longer than nondiverted youth regardless of whether the measure is total time in the justice system, the time involved in prosecution and subsequent processing, or the total time in the intake stage.

Such indeterminacy also fosters inconsistencies. Two offenders who have committed the same offence may be treated in radically different ways by the system depending on their respective abilities to "demonstrate their rehabilitation."[45] Therefore those people who are selected for diversion involving counselling may be those who can best demonstrate the likelihood that they will react positively to such treatment. Depending on the circumstances this might be pragmatic or it might be unfair.

These criticisms are directed at a brand of rehabilitation which focuses on 'curing' the offender and is tailored around that aim. This is the idealistic rehabilitation of the 1950's and 1960's.[46] More recently rehabilitation has been propounded in terms of a less ambitious agenda, with practical help rather than specifically correctional measures as its central tenet, and emphasis on voluntary rather than mandatory participation. This 'new rehabilitation' responds to the criticisms of the past; Weiler's comment in 1975 that "we cannot remake the human condition through the coercive operation of the criminal law process"[47] can be compared with Matthews' statement in 1987:[48]

> No one seriously believes we can 'eliminate' crime or 'remake' offenders, but there is nothing unrealistic about reducing crime or offering offenders a less damaging alternative to the traditional prison.

Consistent with this more pragmatic approach is the recognition that the success of rehabilitation, whether it be called treatment or help, will depend on a myriad of situational factors in every case.[49]

It would clearly be unfortunate if the Wellington scheme refers offenders to counselling who are unwilling or disinterested. The police recognise to some degree the dangers of involuntary rehabilitation and have stated that:[50]

> Counsellors have advised ... that persons referred to them under the diversion scheme have a more positive attitude to counselling than those sent by the court. Apparently offenders resent being ordered by the court but believe they have made the choice themselves under diversion.

It is however difficult to imagine that this would consistently be so. In agreeing to diversion offenders are more likely to be choosing to avoid prosecution than choosing to be counselled.

Some of the enthusiasm associated with attendance at counselling may be derived from a sense of relief that prosecution has not taken place. The feigning of attitudes can also not be discounted given that offenders may feel they are under pressure to perform in order to satisfy the police.

In respect of those counselled for drug abuse the police have stated that:[51]

> Results achieved from those dealt with for cannabis have been very good with only one person reoffending ... They have stated that they did not realise the effect that cannabis had on them until they stopped using it. They feel more alert, sleep better, are no longer moody, get on better with their families, friends and workmates and have a more positive outlook on life.

It is again somewhat difficult to believe that those counselled for cannabis offences are consistently demonstrating such a startling transformation in behaviour. That it may have happened in a few cases is possible, but it is blinkered to suggest that there is any sort of uniform effect which curtails reoffending. One person diverted for a cannabis offence has suggested that although he enjoyed counselling, the real effect of diversion was to lead him to be more covert in his use of the drug. There is also the possibility that the police have been selective in the diversion process, referring to counselling only those offenders who are both likely to be receptive to counsellors and unlikely to immediately reoffend. Again, there may be an element of pragmatism in this, but the merits of the counselling measure would be limited if it were only to deal with truly 'soft' cases who are least in need of help anyway.

There is clearly no harm in providing offenders with some degree of practical assistance or counselling, particularly where it is asked for by the offender, and so long as intervention is judicious. Yet there is a danger that counselling under diversion, which is in one sense compulsory,[52] may be used in respect of offenders who neither want it or even need it. In such cases the effects of counselling may be negative rather than positive. Again, it is important that the efficacy of counselling is not overestimated by the police as it appears to be at present.

The police must also be wary not to let the interests of counselling agencies override those of offenders. Clearly there is a professional and financial incentive for the independent agencies to encourage diversion to counselling and to repre-

sent its effectiveness. It would be unfortunate if diversion was to develop into a consistent source of clients for counsellors, as this would increase the likelihood of unnecessary treatment.[58]

Reparation:

Under the Wellington scheme "reparation or compensation has priority and must be paid."[53] This makes good sense; Hudson has stated:[54]

> ... if one of the functions of criminal justice is to affirm the values of society by saying which acts are beyond the moral bounds, this can as well be done by announcing that the victims of such acts deserve significant compensation as by saying that offenders merit significant punishment.

Furthermore to conduct reparation by the relatively informal procedure of diversion is to encourage a conciliatory process (assisted by the personal apology requirement), whereas the payment of court-ordered reparation may tend to involve some begrudging resentment on the part of the offender.

Reparation under diversion is generally paid immediately to the victim.[55] This is in contrast to court-ordered reparation which is often paid slowly or not at all. In this sense there is a clear incentive for victims to agree to diversion instead of prosecution. This is positive in that it encourages the use of a more personal process which is likely to better satisfy all parties concerned than the more adversarial court procedure. However, as has been suggested earlier in this paper, this may also have net-widening consequences. In addition victims, because of the reparation incentive, may put pressure on the police to divert cases that are unsustainable in court.

There is another danger that, because of its convenience, the police may be tempted to use diversion in cases where a trial would be more appropriate. It has been stated that some police (C.I.B. and fraud squad) "are now recommending diversion especially when reparation is being sought, sometimes involving several thousand dollars."[56] In one case $9000 was paid over under diversion. It is to be wondered whether cases as serious as this should not be treated with all due process in court.[57]

An Informal Alternative?

The police have made several claims about the ability of diversion to create positive attitudes in offenders. The change in diverted offenders has been described as "remarkable,"[59] particularly in terms of their feelings towards the police. There is apparently "no animosity or bitterness directed towards the police, victims or the court."[60]

Obviously the foundation for such purported results is the quality of diversion which distinguishes it from court process - its informality. It is in this sense a humanising of the justice process, which aims to avoid the intimidating and impersonal aspects of the formal system. It encourages facing up to responsibilities by direct and honest contact with police and victims in particular, and shows the police to be an organisation acting in the interests of offenders (and victims) rather than just attempting to secure as many convictions as possible.

There are clearly advantages in running an informal, less visible justice alternative. Some form of settlement or arbitration will often be more productive than an adversarial court battle as is recognised for example in the philosophy behind disputes tribunals and many aspects of family law proceedings, as well as general pre-trial settlements out of court. The Law Reform Commission of Canada specifically recognised the advantages of informal settlement when advocating diversion on this basis in 1975.[61]

However claims about the informality of diversion are necessarily limited. Like the courts, diversion has certain qualities of a system, and the police are as capable of being intimidating or alienating as any judge. The offender still has to face a judge once, and in addition may have to deal with a number of police, victims, counsellors and community work supervisors. While diversion is being run solely by one officer as at present, it is quite possible to imagine that there is a 'personal touch' involved, and clearly the police have developed very positive relationships with many offenders to date.[62] However if diversion is to expand at all, both in Wellington and nationally, there is the danger that it will lose some of its informal quality and become another recognised and regulated part of the system.

B) QUESTIONS OF PROCEDURE AND POLICY

Sacrificing Due Process:

It is a requirement of the Wellington scheme that the offender, in order to qualify, must admit responsibility for the offence. This is designed to safeguard processing of innocent persons. However clearly such an admission is not equivalent to a formal finding of guilt, and lacks the elements of due process that would normally contribute to a court ruling; judicial consideration of culpability according to the criminal standard and the rules of evidence. In many cases police, in exercising their discretion to divert, will know for certain that the offender is guilty and will have no chance in court, but there will be other cases that will not be so clear. For example situations are envisaged in which the offender:

- admits to the facts of an offence but may have a legal defence such as provocation or self-defence, or even absence of mens rea;
- admits to facts enough to strongly suggest an offence, but not clearly to the criminal standard;
- admits to facts that are untrue or unsubstantiated in order to secure a diversion and avoid prosecution. As Sanders has put it, this can be "like defendants who plea bargain when they are, or believe themselves to be, innocent."[63] It is unreasonable to expect that those who doubt their guilt will always be willing to test a court on the matter if there is an alternative.

In such cases an offender will be 'trading-off' a chance of an acquittal for the comparitive immediacy and certainty of diversion. It is true that:[64]

> ... realistically, it may be impossible to prevent persons consenting to [diversion] even though they may feel they have done no wrong.

The danger is that diversion will be used however to resolve too many cases that legally warrant an aquittal. Of course the right of the offender to refuse, and the presence of defence counsel, in theory should counteract this problem. In response to this Polk has pointed out in the American context that:[65]

> ... even the best informed defendant or legal counsel may not know that, in fact, the actual alternative to ... referral to diversion is no further action at all."

There will be "no further action" because the prosecution is in fact unsustainable.

Whether or not this will be a problem in any scheme depends to a large degree on how conscientious and restrained the police are in their use of diversion. The Wellington scheme seeks to guard against abuse by advising arresting officers that it is not sufficient that an offender is "just being smart" to recommend him or her for diversion.[66] However this is in contrast to another police statement that diversion can act as a solution for police where they have made too many unwarrantable arrests as the result of "arrest competitions" between stations, or for some other reason.[67] This suggests that the police consider that cases which otherwise they may have had no alternative but to drop (or be reprimanded by judges) can now be referred to diversion. This at least means some action rather than none, which confirms solidarity between the police Prosecutions Section and arresting officers, and removes the undesirable task of having to concede an unnecessary arrest. However this is clearly not an acceptable use of a scheme under which the penalties are by no means 'soft' and which constitutes a record, albeit not of conviction.

It is clear that the police are in the powerful position of being able to 'sell' diversion to not only offenders but also victims and counsel. This tends to be confirmed when it is considered that eight months into the scheme no offender had yet refused diversion.[68] It is important that the police do not exploit the fundamental attractiveness of diversion to offenders by using it to tempt those who have been arrested on flimsy grounds.

Comparative Fairness in the Requirements of Diversion:

It is important also in the interests of consistency that the weight of the sanctions imposed upon diverted offenders does not exceed that which the court would normally order. The observation has been made that:[69]

> any programme where discontinuance of involvement or refusal to cooperate may result in the deferred prosecution being reassumed possesses a considerable power to control and manipulate individuals, a power moreover that is not legally reviewable or alotted in proportion to the seriousness of the offence.

Under the Wellington scheme "any or all" of the conditions of diversion may apply to one offender.[70] In practice generally only one or two conditions are imposed upon each offender, the most common being the donation to charity which is very seldom more than the offender could expect to pay if convicted in court. However there have been several instances in which offenders have had to perform a relatively onerous combination of requirements, particularly where they are obliged to attend counselling on top of making a donation, paying reparation or doing community work. Counselling involves weekly sessions for a minimum of eight weeks, often a donation to the counselling agency to fund the exercise, and can be demanding also in emotional terms. There is clear scope for diversion to become unduly punitive, particularly if the scheme is expanded. As yet there are no clear police guidelines directed towards ensuring that the obligations imposed under the scheme are fair and relatively proportionate; such guidelines are important and should be formulated.

Scope for Inconsistency:

It is important in any justice system that there should be fairness and consistency in treatment of offenders. On the other hand the system must also show some degree of pragmatism, and recognise that offenders who have committed similar offences may need to be approached differently according to their varying personalities or circumstances. In allowing themselves a power of selection with diversion, the police must be careful not to sacrifice fairness too much in favour of personal factors. Some judicial concern has been expressed about convicting persons who it is felt may have been diverted if they had been able to present themselves better. Clearly it should not matter that in one case an offender was sullen towards the arresting or prosecuting officer while in another case the offender was appealing. Diversion realistically requires cooperation from offenders, but it should not be a reward for good behaviour.

The fact that the police have found diversion in Wellington to be so successful (limiting reoffending to less than 1% to date) is itself of some concern. This is a remarkable result which it is difficult to attribute to the not extraordinary mechanisms of

diversion alone. The possibility is that those offenders being selected for diversion are those who are in fact the most unlikely to reoffend anyway. This is understandable where the police want to demonstrate and maintain the apparent success of the scheme. However in reality it is not only unfair but undermines the credibility of diversion as a measure which seriously confronts the problem of recidivism.

Studies of overseas schemes have focused on the dangers of specifically sexual and racial discrimination in the police selection process.[71] Regarding certain American programmes, Alder finds evidence of a sexist bias in referrals, the proportion of females to males in diversion schemes being far greater than that being formally tried.[72] This may to some extent be indicative of the kinds of offences being committed by women, but Alder also finds, particularly in the juvenile area, that in identical circumstances females are commonly arrested and referred to diversion where males are simply warned or left alone entirely. Alder attributes this to a paternalistic impulse manifesting itself in police discretion; a desire to control the behaviour of women (or perhaps have women under one's control) according to sexual stereotypes.

The position of minority groups must also be considered. The danger is that ethnic or cultural groups that are traditionally associated with high crime or recidivism statistics may tend to be excluded from diversion in comparison to their majority counterparts.

At present it is really too early to speculate about any bias in the Wellington scheme of this nature. Although statistics from both Wellington and Canterbury[73] indicate lower proportions of Maaori and Polynesian offenders being diverted as against convicted, this must take into account the tendency for those being convicted in these groups to be repeat offenders.

Another factor which may create inconsistency is the element of victim discretion. Due to this provision in the scheme, two offenders in identical circumstances can be processed differently (one tried, one diverted) according to the sentiment of the respective victims. It is important that the police are not too willing to cater for the desire of the victim where the offence is minor. In Wellington this is in fact unlikely. The police have indicated that clear inconsistency is unlikely to be tolerated

with respect to the discretion of arresting officers,[74] and this policy should apply similarly to victims.

Finally there is the inevitable problem as to consistency between schemes in different regions. While diversion is still being developed in New Zealand, it is clear that police in some areas are conducting diversion with an emphasis and to a degree quite different from police in other areas.[75] It is to be hoped that a national police policy (probably modelled on the Wellington scheme) will emerge in the near future to lay down universal criteria which should minimise inconsistencies. However this will depend also on constant communication and comparison between areas. Overall, the point made by the Law Reform Commission of Canada is sensible in this respect:[76]

> ... equal justice is not an absolute to be pursued to the exclusion of all other values or considerations. If the resulting inequality is not gross it may be worthwhile to put up with it in order to secure other desirable objectives.

Diversion and Domestic Violence:

Wellington police have indicated that they have found diversion to be particularly successful in dealing with relatively minor cases of domestic violence, with no reoffending to date.[77] This is significant in that domestic violence has traditionally been a problem area for the police. Currently the police have a fixed national policy of arresting in all domestic situations where there is sufficient evidence of an offence, regardless of the circumstances. This is largely a response to criticisms made of the police in the past that they have tended to do little about such incidents. This might be attributed to an inherent bias among (generally male) officers in favour of the male in domestic situations, or just a natural unwillingness to intervene in complex, possibly family-related, disputes (therefore passively supporting male dominance). In adopting an arrest policy, police have paid heed to research which indicates that prosecuting domestic offenders is generally more satisfactory for all parties in terms of results than doing nothing.[78]

Diversion does have attractive qualities in this area. As a relatively low-key and informal method of processing it is far more likely to have the support of the victim than court action. It lacks the adversarial, formal and stigmatic elements of court

procedure that have traditionally made victims unwilling to cooperate in prosecuting their partners. Potentially diversion represents the sort of advantages as a settlement device as advocated by the Law Reform Commission of Canada; a more problem solving approach which takes into account the nature of the ongoing relationship between the parties.

Under the Wellington scheme the victim is advised to attend all counselling sessions that the offender must participate in as a result of diversion in domestic situations:[79]

> Better results are achieved this way. If only the offender attends counselling, there is less understanding or support by the victim who may in fact be the cause of the problems which result in the violence.

It is questionable whether this will be appropriate in all cases, or even the majority of cases. It makes sense to attempt to reconcile the parties' interests, but this obligation on the victim tends to remove the element of blame which in general should lie on the offender and classify the situation as one of mutual blame. It is not acceptable to suggest that victims are as responsible for domestic violence as offenders, and diversion should not in any way appear to be excusing the offender from the offence. Otherwise the police can be accused of supporting male dominance and acting in contradiction to the philosophy behind their arrest policy. Involvement of victims in counselling should be judicious and not as a matter of course. In some cases there may even be a need to discourage rather than protect the ongoing relationship.

A further difficulty is that diversion may provide an outlet to the traditional 'hands-off' approach that the arrest policy attempts to remedy. As a "grey area" or compromise option, diversion may attract cases that are serious enough to warrant a formal conviction. In general the police, and victims, are going to be loath to allow diversion in situations where the offence is perceived as more than minor, but domestic violence by nature may be an exception to this rule. Cases may be referred to diversion for which counselling is an innappropriate or ineffective response.[80] In essence diversion may provide the police with a more covert means of doing very little about domestic violence. This is probably not a present danger with the Wellington scheme;

as has been suggested it is probably the more 'soft' cases that are being dealt with by diversion at present, which again would help to explain the rather impressive reoffending statistics.

PART IV
CONCLUSION

Diversion as it is being run at present in Wellington clearly has its positive aspects. All parties can benefit from an alternative to the courts which provides for informal resolution of criminal behaviour, encourages real and meaningful interaction between those concerned (including the police) and saves offenders from the debilitating stigma of a conviction. Particularly in terms of facilitating compensation and settlement, diversion has the potential to provide satisfaction as an instrument of justice with minimal intervention from the state.

Diversion also has the capacity to give offenders friendly access to help with problems that they may have. However this is limited. Rehabilitation in any sense depends so much on the will and ability of the offender to want to learn or change; for this reason it is recommended that any counselling element in diversion be purely voluntary. Again, practical help is realistically rather more useful than therapy. In this sense diversion can be useful even if it fails to prevent another crime.

The usefulness of diversion in preventing reoffending should not be overestimated. What the statistics in fact suggest is the limited nature of the clientele that diversion is dealing with, and can in fact realistically deal with. Those being diverted are by and large the 'soft' cases who are generally going to behave themselves to a reasonable degree even without the assistance of diversion. Diversion may certainly improve their attitudes towards the police, which is good and reinforces a concept of community policing, but in few cases will it make a substantial difference to their future behaviour and there is no real reason why it should. The really hard cases will be left alone by diversion. These are cases where intervention by an official agency, no matter how informal, will generally be useless. The police can not be expected to succeed where the rest of society has otherwise failed for several years.

The police have the advantage of another option in diversion. As Sanders points out,[81] this can be useful where neither a conviction nor a 'let-off' is deemed appropriate. However is always the danger that the presence of a "grey area" will lead to abuse. Diversion should not act as an 'out' for police

in situations where prosecution is realised to be unjustifiable in legal terms but some action is desired on the grounds of internal politics and solidarity. Cases that should be dropped should be dropped. Diversion serves to complicate the prosecution process in this respect.

Overall diversion is attractive only where it retains its small scale and dominantly human element. The danger in recommendatins of a diversion 'scheme' - as opposed to just the age-old process - is that diversion as it expands will become more and more systemised and impersonal. This will lead to real problems of consistency, net-widening and arbitrariness as diversion becomes less of a pragmatic alternative and more an extension of the system, something taken for granted rather than a real alternative. Also, unless diversion remains small and relatively unambitious the ethical and practical problem of loss of due process may be overwhelming. Diversion is well-intentioned but must be realistic. It certainly does not represent a real advancement in crime control.

FOOTNOTES

1 The term diversion was probably first popularised by the U.S. President's Commission on Law Enforcement and Administration of Justice in its various reports of 1967. In Britain diversion was given official encouragement in the 1969 Children and Young Persons Act.

2 National Commission on Criminal Justice Standards and Goals, Corrections Task Force Report (Washington D.C. 1973), 50

3 National Commission on Criminal Justice Standards and Goals, Courts (Washigton D.C. 1973), 27

4 See "Wellington Prosecutions Diversion Scheme", an outline of the scheme produced largely for internal police purposes by J R McDonough (17/9/88).

5 Law Commission Report no. 7: The Structure of the Courts (March 1989)

6 The Evening Post Wellington, 10 June 1989, p28: "Putting it Right - Diversion".

7 Above n4, 1

8 Above n4, 4

9 Above n4, 1

10 The period of remand depends on the type of diversion that will be operated. One month is asked for usually; three months only where the offender is to attend counselling.

11 In practice the police have been reluctant to use this power. As long as offenders complete a substantial amount of their obligations under diversion, particularly in terms of counselling and community work, this has been considered sufficient.

12 Above n4, 2

13 Above n4, 5

14 Above n4, "Update to 16/6/89"

15 Idem

16 With only 70 or 80 persons being dealt with on a monthly basis, the variation between months tends to be quite great. Very few women were diverted in July and early August.

17 See B Hudson Justice through Punisment (1987), chapter one.

18 W Young "The Nature and Purposes of Sentencing and Penal Policy" (V.U.W.), 6

19 Above n17

20 See for example: E M Schur Radical Non-intervention (1973), 118-126

21 G T Reker et al "Juvenile Diversion: Conceptual Issues and Program Effectiveness" [1980] Canadian J Crim 36, 38

22 Above n20, 124

23 See C E Frazier and J K Cochran "Official Intervention, Diversion from the Juvenile Justice System, and Dynamics of Human Services Work: Effects of a Reform Goal Based on Labeling Theory" (1986) 32 Crime & Delinq 157, 159

24 E M Lemert "Diversion in Juvenile Justice: what hath been wrought?" [1981] J of Research into Crime & Delinq 34, 43

25 Above n17

26 Law Reform Commission of Canada, Studies on Diversion & Working Paper (1975)

27 Above, Studies, 26

28 M Andriessen "A Foreigner's View of American Diversion" (1980) 26 Crime & Delinq 70, 80 (on the Groningen Scheme).

29 Above n4, 1

30 For an excellent analysis of net-widening see S Cohen Visions of Social Control (1985), 50-56.

31 Above n4, 4

32 Above n17, 146

33 Above n26, Working Paper, 15

34 M W Klein "Deinstitutionalisation and diversion of juvenile offenders: a litany of impediments" in N Morris and M Tonry (eds) Crime and Justice (1979), 145, 165

35 This procedure also exists as a set policy in the Canterbury scheme.

36 Above n30, 55

37 D H Thorpe et al Out of Care: The Community Support of Juvenile Offenders (1980) 128

38 Above n4, 2

39 Above n17, chapter 6

40 See above n17, 148 for reference to "American-style 'new diversion'". See also above n23.

41 See Law Reform Commission of Canada Studies on Sentencing (1974) particularly P Weiler "The Reform of Punishment", 125. Also above n30, 169, and above n20, 29-71.

42 See above n17, 30; above n18, 7; above n41, Studies, 8.

43 Above n17, 23-30

44 Above n23, 165. In this scheme volunteer counsellors served as "adult role models" for young offenders (p 162).

45 Above n17, 26

46 Above n17, 175

47 Above n41, Studies, 125

48 Above n17, 175

49 Hudson points out however (p 176) that "rehabilitation, whether in its original or born-again form, still misdirects any help it has offer by concentrating on services to individual offenders, rather than attempting to change social conditions that give rise to criminal behaviour."

50 Above n4, 3

51 Above n4, "Update to 16/6/89"

52 Diversion in the total sense is voluntary by nature because the offender must consent to it. However the offender has no recognised choice as to the conditions that will apply once agreement has take place. Also it is questioned in this paper whether diversion is truly voluntary in reality; see "sacrificing due process".

53 Above n4, 2

54 Above n17, 179

55 Where the offender is impecunious a loan from the family or a bank is organised. This procedure is not available to the courts in ordering reparation.

56 Above n4, "Update to 16/6/89"

57 Particularly when one considers that disputes tribunals are only available to informally resolve civil cases involving less than $5000.

58 See M W Klein "Labelling Theory and Delinquency Policy" (1986) 13 Crim Just and Behaviour 47, 61 in referrence to the "oft-heard remark that the new diversion funds ... had begun to create a new, institutionalised diversion system or bureaucracy."

59 Above n4, "Update to 16/6/89"

60 Above n4, 5

61 Above n26

62 See for example above n6

63 A Sanders "The Limits to Diversion from Prosecution" (1988) 28 Brit J Criminol 513, 515

64 Above n26, Working Paper, 17

65 In Snashall R (ed) Pre-trial Diversion for Adult Offenders - Proceedings of Australian Institute of Criminology Seminar, (1986), 66

66 Above n4, 2

67 Above n4, 1

68 Above n4, 3

69 T F Marshall Alternatives to Criminal Courts (1985), 139

70 Above n4, 3

71 For example K Polk "Juvenile Diversion: a Look at the Record" (1984) 30 Crime & Delinq 648, 656

72 C Alder "Gender Bias in Juvenile Diversion" (1984) 30 Crime & Delinq 400

73 Canterbury statistics compiled by P Spiller, senior lecturer in law at the University of Canterbury.

74 Above n4, 5

75 For example at one stage diversion in Lower Hutt was not dealing with cannabis offences as diversion in Wellington was.

76 Above n26, Working paper, 10

77 Above n4, "Update to 16/6/89;" see also above n6.

78 G Ford Domestic Disputes (1985). This is a New Zealand paper based largely on an American study in Minneapolis which unfortunately has been undermined because of methodological flaws. See above n69, appendix one (p 202).

79 Above n4, "Update to 16/6/89"

80 Counselling may be of limited use in all cases - see "counselling/rehabilitation" earlier in this paper.

81 Above n63, 519

1 Folder Do

Douglas, James Armstrong
Pre-trial diversion and the Wellington Prosecutions Diversion Scheme