

MANAGERIALISM IN AUSTRALIAN CRIMINAL JUSTICE: RIP FOR KPIS?

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Over the last twenty-five years, managerialism, or new public management, has produced sweeping reforms in the criminal justice system. However, it has been relatively unremarked, probably because it has been embedded in a broader modernising process of government. This article examines the substantive effects that managerialism has had on the criminal justice system. Of particular concern is its influence on the concepts of justice and on the criminal justice system, viewed both as a system and in terms of its constituent arms and processes: law enforcement, the courts, sentencing and corrections. It argues that the influence of managerialism has been pervasive, powerful and in some cases, pernicious. On the other hand, where it has been allied with good management, it has brought efficiency, effectiveness, economy and clarity of purpose which was lacking from many parts of a system which was very far from perfect. Finally, it argues that a post-managerialist system can potentially take the best of reforms of the last few decades to create a hybrid combining good governance with humanity and justice.

I INTRODUCTION

If asked to identify the major trends and issues in criminology over the past three or four decades, most criminologists would readily identify matters such as gender and race, white-collar crime, drugs, sex offending, crime prevention, organised crime and corruption, restorative, actuarial and therapeutic justice, terrorism, privatisation and others which fill the learned journals, textbooks and edited collections. Yet curiously missing from this catalogue is what has arguably been the most powerful and influential impact on public administration generally, and criminal justice in particular: the theory and practice of managerialism or new public management. It is this agenda, rather than the more familiar issues above, that has produced 'the most sweeping reforms of the criminal justice system in over a century'.¹ Because it has been embedded in the modernising processes of government and has transcended party politics, managerialism has been relatively unremarked in the general Australian criminal justice literature, though not

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¹ Eugene McLaughlin and John Muncie, 'The Criminal Justice System: New Labour's New Partnerships' in John Clarke, Sharon Gewirtz, and Eugene McLaughlin (eds), *New Managerialism, New Welfare?* (2000) 171; Eugene McLaughlin, John Muncie and Gordon Hughes, 'The Permanent Revolution: New Labour, New Public Management and the Modernization of Criminal Justice' (2001) 1 *Criminal Justice* 301, 303; John W Raine and Michael J Willson 'Beyond Managerialism in Criminal Justice' (1997) 36 *Howard Journal* 80, 82.

completely unnoticed. In contrast, it has been vigorously debated by those involved in public administration.² In the United Kingdom, the implications of the 'new public management' have been widely canvassed.³

In his recent and widely discussed book *Death Sentence: The Decay of Public Language*,⁴ Don Watson bemoaned the insidious and deadening influence that managerialism has had on public discourse. His particular concerns are the clichés and formulae used to disguise or embellish truth and deaden the language. His major lament is the domination of managerial rhetoric and concepts over the substance of the activities they purport to manage. The purpose of this paper is not to examine the linguistic distortions that managerialism has wrought on the law, as on other areas of public administration, but rather to examine the substantive effects that managerialism has had on the criminal justice system. Of particular concern is its influence on the concepts of justice and on the criminal justice, viewed both as a system and in terms of its constituent arms and processes: law enforcement, the courts, sentencing and corrections. This paper argues that the influence of managerialism has been pervasive, powerful and in some cases, problematic. On the other hand, where it has been allied with good management, it has brought efficiency, effectiveness, economy and a clarity of purpose which was lacking from many parts of a system that was very far from perfect. Finally, it argues that a post-managerialist system can potentially take the best of reforms of the last few decades to create a hybrid combining good governance with humanity and justice.

II MANAGERIALISM

Management and managerialism are not the same concepts. Management has been defined as the task of directing flows of resources so as to achieve defined objectives.⁵ It can do this by setting clear objectives, communicating through the organisation, allocating resources to ensure their achievement, controlling costs, motivating staff, improving efficiency, and reporting up and down through the hierarchy.⁶ In contrast, managerialism, or corporate management, or new public management, or performance management refers to a combination of processes and values developed in the late 1970s and 1980s, drawn predominantly from private sector models, as a different approach to the provision of public services.

² See, eg. Mark Considine and Martin Painter (eds), *Managerialism: The Great Debate* (1997).

³ John W Raine and Michael J Willson, *Managing Criminal Justice* (1993); John W Raine and Michael J Willson, 'New Public Management and Criminal Justice' (1995) 15 *Public Money and Management* 35; John W Raine and Michael J Willson, 'From Performance Measurement to Performance Enhancement: An Information System Case-Study from the Administration of Criminal Justice' (1997) 17 *Public Money and Management* 19; Raine and Willson, 'Beyond Managerialism in Criminal Justice', above n 2; McLaughlin, Muncie and Hughes, above n 2, 303.

⁴ Don Watson, *Death Sentence: The Decay of Public Language* (2003).

⁵ Christopher Pollitt, *Managerialism and the Public Services: Cuts or Cultural Change in the 1990s?* (2nd ed, 1993) 5.

⁶ *Ibid.*

It has been contrasted with traditional forms of bureaucratic administration⁷ and is

best understood as a complex, often contradictory set of post-bureaucratic professional knowledges, practices and techniques drawn from a wide variety of sources (Re-inventing government, new public administration, new wave management, human resource management, postmodern organisational theory).⁸

Rather than being *defined*, it is probably best *described* through its constituent elements which are by now well known. It stresses *clarity of purpose* through corporate planning which involves the articulation and promulgation of mission statements, strategic and operational plans. These, in turn, require *accountability* through performance management by the use of key performance indicators (KPIs), bench-marking processes and data collection, analysis and, often, publication of comparative performance outcomes.⁹ The monitoring, supervision and evaluation of performance requires bodies, agencies or corporations to audit and inspect the relevant activities.

Managerialism seeks *efficiency* through eliminating duplication, waste, delay and uncertainty, disaggregating public sector units, separating purchaser and provider functions, and introducing or heightening competition or quasi-market mechanisms within, between or outside the public sector. *Effectiveness* is emphasised through a preference for output control and cost effective results rather than inputs, procedures or processes.¹⁰ *Economy* is sought through reductions in public expenditure, discipline and parsimony in the use of resources.¹¹ Inspiration is sought from the private sector such as activity-based costing, performance related pay, increased pay differentials, and directly by employing private providers within the organisation or through outsourcing services. *Consumer sovereignty* is elevated over citizenship, with those receiving public services, voluntarily or otherwise, redefined as clients, customers or stakeholders. The views of the consumer are expressed through choice and protected through service charters and similar documents. With an emphasis on outcomes, effectiveness and efficiency, it becomes less important whether the service is provided publicly or privately.¹²

⁷ John Clarke, Sharon Gewirtz and Eugene McLaughlin, 'Re-inventing the Welfare State' in John Clarke, Sharon Gewirtz and Eugene McLaughlin (eds), *New Managerialism, New Welfare?* (2000) 6.

⁸ Eugene McLaughlin and Karim Murji, 'Lost Connections and New Directions: Neo-Liberalism, New Public Management and the "Modernization" of the British Police' in Kevin Stenson and Robert R Sullivan (eds), *Crime, Risk and Justice* (2001) 109.

⁹ Raine and Willson, *Managing Criminal Justice*, above n 3, 68; Christopher Hood, 'A Public Management for all Seasons?' (1991) 69 *Public Administration* 3; Raine and Willson, 'Beyond Managerialism in Criminal Justice', above n 1, 81.

¹⁰ John Alford, 'Towards a New Management Model: Beyond "Managerialism" and its Critics' (1993) 52(2) *Australian Journal of Public Administration* 135.

¹¹ *Ibid.*

¹² Anthony Bottoms, 'Philosophy and Politics of Sentencing' in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform* (1995) 31-2.

Finally, management is professionalised so that the task of management is divorced from the underlying function. Content, or professional, knowledge is regarded as less important than the ability to manage the organisation that delivers the products or services. In its more virulent forms, managerialism becomes more than the set of practices just described, it becomes an ideology under which

an occupational group claims to be the possessor of a distinctive and valuable sort of expertise and uses that expertise as the basis for acquiring organisational and social power ... [It is a] normative system concerning what counts as valuable knowledge, who knows it and who is empowered to act in what ways as a consequence.¹³

Thus, while management is a set of organisational practices, managerialism is an ideologically driven process that employs management theories to introduce systemic change both to the delivery of publicly funded services and the underlying values of public provision.

While both governments and corporations have extensive histories, the profession of management only emerged in the early 20th century. The disciplines of business and public administration are of even more recent origin. In the second half of the 20th century, management theory developed ideas and concepts such as management by objectives, program budgeting, contracting out and performance-based budgeting. However, it was not until the 1980s that managerialism was recognised as a major intellectual or ideological force. This occurred for a number of reasons.¹⁴ At the political level, the grand social programs of the 1960s and 1970s were regarded as having failed to produce fairer and better societies. This was partially attributed to the limitations and constraints of central governments and the inefficiency and inefficacy of the public sector generally. Aspects of the welfare state in particular were regarded as stifling initiative, diminishing personal responsibility and encouraging sloth, waste and moral turpitude. The legitimacy of government itself, as a social or integrative agency, was brought into question. At the economic level, government was viewed as over-regulatory, over-taxing and an unsuitable mechanism for distributing and redistributing resources. Through its economic policies, it 'crowded out' private sector investment, thereby stifling economic growth. The solution to these ills, it was contended, lay in the liberation of the private sector. The intellectual underpinnings for these views were found in monetarism, public choice theory, libertarianism, deregulation, neo-liberalism, globalisation, privatisation and competition. The dominant discourse seized upon Osborn and Gaebler's dictum that governments should 'steer but not row',¹⁵ an idea originally

¹³ Clarke, Gewirtz and McLaughlin, above n 7, 8-9.

¹⁴ Pollitt, above n 5, 40; McLaughlin and Murji, above n 8, 107; Raine and Willson, *Managing Criminal Justice*, above n 3, 14; Julia Fionda, 'New Managerialism, Credibility and the Sanitisation of Criminal Justice' in Penny Green and Andrew Rutherford (eds), *Criminal Policy in Transition* (2000).

¹⁵ David Osborn and Ted Gaebler, *Re-inventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (1992).

coined by Savas in 1987.¹⁶ While the former was an appropriate task for government, the latter could be better carried out by the private sector. Thus government should be 're-invented'. The trend was away from an administrative system that concentrated on processes towards one that emphasised the delivery of results or outcomes.

In the United Kingdom, the development of what was known as 'New Public Management' can be traced back to the election of Margaret Thatcher as Prime Minister in 1979. Thatcherism transformed the civil service, and the criminal justice system was not exempted. Managerialism in Australia drew from this source but developed its own course.¹⁷ In the early 1980s, it was attractive to both major parties because it was seen as a way of ameliorating budget problems, improving services, introducing flexibility into the labour market, and increasing the responsiveness of the public service to government policy initiatives.¹⁸

The criminal justice system as a public service was not isolated from the reforms taking place in the broader institutional environment. In the United Kingdom, the managerialisation of the criminal justice system is well advanced and has flourished under Tony Blair's New Labor government. McLaughlin, Muncie and Hughes observe:

As with the rest of the public sector, the 'modernization' of criminal justice involves the establishment of a Public Service Agreement for the criminal justice system and separate PSAs for the Home Office, the Lord Chancellor's Department and the Crown Prosecution Service. Consequently, virtually every Home Office document stresses the need for consistent and mutually reinforcing aims and objectives; new funding mechanisms to direct resources strategically and effectively; the development of an evidence-based approach to embed a 'what works' professional culture; the realignment of organisational boundaries to remove obstacles to 'joint working' and development of a performance management culture to enhance productivity ... Criminal justice agencies now publish business plans with specified aims, objectives, performance measures, efficiency targets and clearly defined outcomes. Police forces have been set five year targets to reduce burglary and car crime and league tables on various aspects of police performance are commonplace. The Crown Prosecution Service has been instructed to overhaul both its relationship with the police and its management of cases and courts have been instructed to reduce the time taken between the prosecution and sentencing of offenders.¹⁹

In Victoria, managerialism reached its zenith with the election of the Liberal/National parties government under Premier Jeff Kennett in October 1992. Its adoption was conscious, systematic and relentless. All incoming Ministers

¹⁶ Emanuel S Savas, *Privatization: The Key to Better Government* (1987).

¹⁷ Considine and Painter, above n 2, 2.

¹⁸ *Ibid* 3.

¹⁹ McLaughlin, Muncie and Hughes, above n 1, 307.

received copies of Osborne and Gaebler's book. A Commission of Audit was established in 1993, which recommended significant restructuring of the public sector, new financial and asset management systems, and 'a new management approach to performance emphasising planning and accountability for outcomes and outputs of government rather than input and process controls'.²⁰ In the same year, the Government Management Improvement Initiative (MII) of Victoria was commenced.²¹

Launched in October 1993, the MII was designed to change the management systems and business processes within government 'to develop a management culture that is capable of delivering world "best practice" standards of policy and service delivery by a public sector'.²² The Department of Treasury and Finance took up the role of 'Central Commander of Managerialist Affairs'. It produced a Management Guidance Series, a compilation of publications designed to support the implementation of the Government's budget sector management reforms. These initiatives directed change within the Department of Justice as 'reducing the cost of justice services to the consumer and the community' became the new mantra of the Department.²³ As a supplement to the MII, the Continuous Management Improvement Program (CMIP) was launched in 1996. The CMIP focused on accountability, empowering consumers, minimising bureaucracy, and market mechanisms in preference to the provision of public services. Like the MII, the CMIP was coordinated from central agencies including the Department of Premier and Cabinet and the Department of Treasury and Finance.²⁴

In his foreword to the Department of Justice's 1994 Corporate Plan, the then Secretary, Warren McCann, echoed this approach:

The reforms sweeping through the Department of Justice [derive from]

... a new set of public sector management principles which confront old practices, which require a reappraisal of the role of the Department and its agencies and which force a questioning of the way in which services are delivered to the community.

Though 'business planning' and 'strategic planning' processes were widely used in the public sector in the mid to late 1980s and corporate plans had been employed for some time, they became the dominant management tools for 're-engineering' public administration. These required the development of Department-wide business and corporate plans (together with mission statements, visions and goals), budget estimates, program management plans, unit operational plans, sub-unit operational plans and individual management plans,

²⁰ Victoria, Department of Premier and Cabinet, *A Management Improvement Initiative for Victoria* (1993) 4.

²¹ Cindy Davids and Linda Hancock, 'Policing, Accountability and Citizenship in the Market State' (1998) 31 *Australian and New Zealand Journal of Criminology* 38, 42.

²² Victoria, above n 20, 3.

²³ Victoria, Department of Justice, *Annual Report* (1994-95) 7.

²⁴ Victoria, Department of Treasury and Finance, *Continuous Management Improvement Program: Benchmark* (1996) 1.

all of which included critical result areas, strategies, performance targets and measures. How this ideology and set of practices manifested themselves in the Victorian criminal justice system and elsewhere in Australia is now examined in more detail.

III MANAGERIALISM AND THE NATURE OF JUSTICE

The adversarial system is built upon the premise of judicial independence, which is, in turn, built on the theory of the separation of powers. Traditional adversarialism is reactive, relying on the parties to initiate and maintain proceedings. It is court focused, and in that forum, the judicial officer is required to be impartial and indifferent to the progress of the case. Matters of court resources and time, and those of the litigants, are of no, or secondary concern. Court management is recognised as an issue for departments of justice, though the judges have sought to gain control, successfully in many jurisdictions. Public sector control of court finances has always sat uncomfortably with the notion of judicial independence, which has been economically protected only to the extent of judicial remuneration and certainty of tenure.²⁵ Managerialism requires accountability for delivering results and efficient use of resources and while governments cannot influence the substantive outcomes of individual cases, the administrative arrangements of the courts can affect the way courts conduct their affairs.

Almost four decades ago, Herbert Packer suggested that the criminal justice system could be viewed either as an obstacle course or an assembly line.²⁶ The former is rights-oriented while the latter is utilitarian. Whereas justice theories emphasise rights, managerialism is instrumentalist.²⁷ The increasing number of cases coming before the courts has placed pressure on their processes, resulting in a move away from adjudicative to administrative justice.²⁸ More cases are dealt with at the pre-trial stage, through diversionary schemes, mediation and arbitration, and by administrative penalties such as on-the-spot fines. This emphasis on administrative and fiscal considerations can subordinate due process and rights to measures of throughput. The concomitant ideology of economic rationalism, as it became known and which underpinned the managerial ideology, shaped decision making, privileging economic factors over social considerations and altering the nature of the public discourse.²⁹

Due process and other human rights are expensive, inefficient and slow the operation of the system.³⁰ Institutions and ideas such as jury trials, the

²⁵ Raine and Willson, 'New Public Management and Criminal Justice', above n 3, 36.

²⁶ Herbert L Packer, *The Limits of the Criminal Sanction* (1968).

²⁷ Bottoms, above n 12, 38.

²⁸ Raine and Willson, *Managing Criminal Justice*, above n 3, 119.

²⁹ David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001) 188.

³⁰ Fionda, above n 14, 125; Raine and Willson, 'New Public Management and Criminal Justice' above n 3, 36.

presumption of innocence, the right to silence, legal aid and others, became increasingly difficult to justify on economic grounds. They are currently being further rationalised away on the grounds of public safety and in response to the threat of global terror.

IV SYSTEMIC MANAGERIALISM

The concept of a criminal justice system can be understood broadly as encompassing a ‘complex set of practices and institutions’ ranging from householder security, through to legislation, policing and corrections, in other words, the whole range of social responses to crime.³¹ More narrowly, it stands for the range of formal institutions responsible for the detection, adjudication and disposition of offenders by police, courts and correctional authorities, which is the sense in which it is used here. Traditionally these branches of government have been conceived of separately, partly because of the doctrine of separation of powers, and partly because they have had different historical foundations, philosophies, cultures, practices, and administrative and political lines of accountability.

In contrast, the managerialist philosophy stresses the interconnectedness of the various components of the organisation of justice, reinforcing the systemic aspect and attempting to give the notion operational force.³² It aims to develop a coherent government policy across agencies and improve their overall performance.³³ In the United Kingdom, this is most recently known by the term ‘joined up government’, which is regarded as a reaction against the narrow specificity of contracts and the excesses of competition. Australians prefer the term ‘whole of government’. The apotheosis of this approach in the United Kingdom was *‘Criminal Justice: The Way Ahead’*, published in 2001 which stated emphatically that ‘the CJS [criminal justice system] has to work as a coherent, joined up system, with all those involved adopting a common set of values to meet a common set of goals’.³⁴

In Victoria, ‘joining up’ has been attempted in many ways. Following the election of the Kennett Government in 1992, the Department of Justice was created from the separate ministries of Police and Emergency Services, Attorney-General, and Corrections, despite concerns about a perceived reduction in the separation of powers. There are now separate Ministers for the portfolios of Justice (the Attorney-General), Police and Emergency Services, and Corrections, but the overall mission or purpose of the Department is expressed in Departmental corporate and business plans. The centralisation of control of criminal justice

³¹ Garland, above n 29, vii.

³² Bottoms, above n 12, 24.

³³ McLaughlin, Muncie and Hughes, above n 1, 306.

³⁴ United Kingdom, Home Office, *Criminal Justice: The Way Ahead* (2001) 15. Albeit that in an appendix to the report outlining the core principles, criminal justice institutions were required to ‘respect each other’s independence and cooperate at every stage to achieve the aims of the system’ (Annex D: Criminal Justice System Core Principles, 121).

agencies and their link to fewer and common management and political structures, ultimately makes them easier to manage, if not control.

The linking of portfolios is intended to facilitate cooperation between agencies in order to meet overall systemic goals.³⁵ Achievement of overall goals is assessed by performance against departmental, portfolio, program and agency indicators. The relationships between agencies, and their place in the system, is further reinforced by the creation of common information systems, enhanced information sharing, and common identifiers to enable cross-system flows to be charted and monitored.³⁶ Recent attempts to develop a unique identifier system for offenders (under which every person brought into the system is given a unique and permanent numerical identifier) are emblematic of a systemic view of the criminal justice system. Such a mechanism enables authorities to track a person from arrest to release, not only for a single episode, but each time that person comes into contact with the law, as well as being able to evaluate the effectiveness of the system as a whole.³⁷

In 1996, the Victorian government commissioned the management consulting firm KPMG to undertake, for a fee of nearly \$1 million, Project Pathfinder,³⁸ whose primary aim was to improve the administrative practices and procedures of the criminal justice system. It aimed to 're-engineer' (a concept then very much in vogue) the criminal justice system to achieve substantial improvements in the delivery of criminal justice services, including police, courts, legal aid, Director of Public Prosecutions and correctional services. It is significant that it was management consultants, not lawyers, to whom the government turned for advice.

Project Pathfinder was imbued with the language of managerialism referring to 'business planning', 'performance indicators and measures', 'vision', 'mission', 'operating principles for the criminal justice system', 'efficient and effective criminal justice system', 'throughput', 'process time', 'elapsed time', 'resource utilisation', 'system integrity', 'continuous improvement' and so on. Pathfinder was approved by the Department of Justice in 1998 and resulted in the establishment of the Criminal Justice Enhancement Program (CJEP), with an initial budget of \$14.5 million,³⁹ whose aim was 'to introduce improved business processes, new technology and major cultural change into Victoria's criminal justice system'. The major benefits were expected to be increased efficiency, better quality and more sharing of information.

The importance of systemic monitoring of government performance under a

³⁵ Bottoms, above n 12.

³⁶ Raine and Willson, 'Beyond Managerialism in Criminal Justice', above n 1, 82.

³⁷ Anna Ferrante, 'Developing an Offender-Based Tracking System: The Western Australia INOIS Project' (1993) 26(3) *Australian and New Zealand Journal of Criminology* 232.

³⁸ Victoria, Department of Justice, *Project Pathfinder: Re-engineering the Criminal Justice System* (1997).

³⁹ Victoria, Department of Justice, *Criminal Justice Enhancement Program Case Study 2004*, <[www.justice.vic.gov.au/.../50ef502ec67bcbb2ca256c610018b626/\\$FILE/ATTL7XO9/CJEP_Project_Case_Study_v1.pdf](http://www.justice.vic.gov.au/.../50ef502ec67bcbb2ca256c610018b626/$FILE/ATTL7XO9/CJEP_Project_Case_Study_v1.pdf)> at 19 June 2004.

managerialist agenda became manifest in the early 1990s, when the Prime Minister, State Premiers and Territory Chief Ministers established a *Review of Commonwealth/State Service Provision* at the Premiers Conference in July 1993. The task of monitoring government performance in areas such as health, education, welfare and criminal justice was given to the Industry Commission (now the Productivity Commission), auspiced by the Council of Australian Governments (COAG). Annual reports are issued which articulate policy objectives for the criminal justice system (police, courts and correctional agencies) and report against a set of performance indicators. In relation to the sector as a whole, the selected performance indicators are perceptions of public safety, the incidence of crime, and recidivism. The cost effectiveness of each jurisdiction's service delivery is measured and compared.

Performance measures are not innocuous and passive tools. The United Kingdom experience, which is well in advance of Australia's, reveals some of the ramifications of rampant systemic managerialism. Measures are used to create competitive league tables of performance, for example, between police forces in different jurisdictions/regions. Measures are developed against budgets, which in turn are linked to agreements based on targets and performance. One of the problems in accounting for performance in a 'joined up' framework is that while the outcomes may be the responsibility of several agencies, none may have full control. However, all are required to cooperate to the same end.⁴⁰

Until the introduction of managerialism into criminal justice discourse, the 'system' saw little need to articulate its own objectives. Its functions were inferred or deduced by others (police, courts, corrections and commentators). Its core values developed over time through dialogue between participants, between the courts and legislatures, and in the operation and publications of the agencies that comprise it. Under a managerialist approach, the articulation of aims and purposes is the necessary first step in measuring outcomes. In the United Kingdom, the government defined three aims for the system: reducing crime and the fear of crime (and their social and economic costs); dispensing justice fairly and efficiently; and promoting confidence in the law.⁴¹

Similarly, the Australian Productivity Commission, which now has the task of reporting on government services, has ventured its own view of the aims of the criminal justice system. It states: 'The criminal justice system is broad and complex, and has many interrelated objectives. An overarching objective is to encourage community access to a fair system of justice that protects the rights of individuals and that is responsive to community needs'.⁴²

⁴⁰ Norman Flynn, 'The Government's Approach to Performance Management' (2000) 40 *Criminal Justice Matters* 6.

⁴¹ Lord Justice Auld, Department of Constitutional Affairs. *Review of the Criminal Courts of England and Wales* (2001) [7].

⁴² Commonwealth, Productivity Commission, *Report on Government Services* (2001) 319.

Though both the Productivity Commission and the United Kingdom government refer to justice values as well as effectiveness objectives, it is only against the latter that the system tends to be measured.

V MANAGERIALISM IN LAW ENFORCEMENT

The tensions that underlie the relationship between judicial officers and governments are also evident in the relationship between police and police command. At the individual level, police officers and judges must be autonomous in the exercise of their discretion. Organisationally, however, they can be directed where to work and the resources they are provided with are the prerogative of the police hierarchy, which in turn, is subject to government priorities. At a higher level, the accountability relationship between the Chief Commissioner and the government is problematic.⁴⁴ The position of Chief Commissioner of Police is not the same as any other Department head, as they have a large degree of operational independence. But their appointments are for fixed terms and they must report to Parliament through their Minister.

Managerialism came earlier to the police than it did to other criminal justice agencies, possibly because crime statistics were already available and partly because their paramilitary structures lent themselves more readily to top-down organisational imperatives.

Historically, performance indicators used by police were based on crime statistics and clearance rates, and were internally generated. The problems associated with this approach in terms of preventing the development of regionally and culturally appropriate policing methods, and the unreliability of statistics, has been extensively documented.⁴⁴ This approach was usurped by a 'value for money' approach, which prescribed performance indicators that were concretely linked to efficiency targets, as distinct from effectiveness.⁴⁵ This method reduced policing to easily calculable inputs and superseded a contextual evaluation of substantive police practices and their effectiveness.⁴⁶

In Victoria, the managerialist agenda in policing manifested itself through a number of strategies.⁴⁷ By the early 1980s, the police had adopted their first organisational philosophy, with KPIs being the absence of crime and the citizens' sense of security. The need for fiscal restraint was articulated at that time. The

⁴³ Philip Rogerson, 'Performance Measurement and Policing: Police Service or Law Enforcement Agency?' (1995) 15(4) *Public Money and Management* 25, 27; Jenny Fleming, 'Les Liaisons Dangereuses: Relations Between Police Commissioners and Their Political Masters' (2004) 63(3) *Australian Journal of Public Administration* 60.

⁴⁴ J Robinson, 'Police Effectiveness: Old Dilemma, New Directions' in Julia Vernon and Dorothy Bracey (eds), *Police Resources and Effectiveness* (1989) 22.

⁴⁵ Ibid. See also David Bradley, Neil Walker and Roy Wilkie, *Managing the Police* (1986) 145.

⁴⁶ Mary Ann Wycoff, 'Improving Police Performance Measurement: One More Voice' (1982) 4(1) *Urban Interest* 8.

⁴⁷ Davids and Hancock, above n 21, 46.

Neesham Report of 1985⁴⁸ stressed the need for more professionalised management at the higher levels, and by the mid 1980s, a ‘corporate philosophy’ was articulated, emphasising service, efficiency and care. The annual reports of the Force were organised according to the objectives and outcomes for each of the police departments. In 1987, the first corporate plan was developed.

The effects of the MII and the Productivity Commission’s work became apparent in the early 1990s. The former led to the creation of five ‘output’ classes for the police: public order; emergency management; crime prevention and control; road safety; and justice services. This was consistent with developments in other jurisdictions that had also introduced forms of ‘output-based management’.⁴⁹ This involved detailed identification, specification, measurement and quantitative reporting of the outputs produced by agencies, demonstrating the links between outputs and achievement of the outcomes and external reporting of output-based indicators. The Productivity Commission developed a performance indicator framework to evaluate police performance based on the two criteria of effectiveness and efficiency across the key activity areas. The framework identified over 20 indicators including reporting rates, satisfaction with services, perceptions of crime and police integrity, reported crime rates and crime victimisation, outcome of investigations, recovery rates of stolen property, cost per crime or per person, and proportions of operational staffing. Many of these are reported annually in the Commission’s reports.

In the mid 1990s, citizens became ‘customers’ and in 1994 a Customer Service Support and Coordination Unit was established as part of the ‘Customer Service Strategy’. Another management consulting firm, Coopers Lybrand, received over three quarters of a million dollars in 1996 for its advice on a customer service strategy. In the late 1990s, full output budgeting across the public sector became effective.

VI MANAGERIALISM IN THE COURTS

The judicial arm of government has never really considered itself as belonging to the ‘system’ in the sense that it has been required to work with the agencies in common cause, however that is defined.⁵⁰ The notion of the independence of the judiciary is fundamental to the doctrine of the separation of powers,⁵¹ but the governance and independence of the court system itself may be another matter.

Over the past three decades and even earlier, managerialist ideas and practices have influenced the ways that courts and judges are organised and operate.⁵² In

⁴⁸ Thomas A Neesham, Victoria Police Force, Ministry for Police and Emergency Services, *Report of the Committee of Inquiry* (1985).

⁴⁹ Steering Committee for the Review of Commonwealth / State Service Provision (SCRCSSP) *Report on Government Services 2002* (2002) vol 1, 260.

⁵⁰ Raine and Willson, *Managing Criminal Justice*, above n 3, 8.

⁵¹ Victoria, Department of Justice, *Courts Strategic Directions Project* (2004) 35.

⁵² Bottoms, above n 12, 29.

some respects, this is a positive step, as courts have not always been ideally organised.⁵³

This tension is well illustrated in the Attorney-General's Justice Statement released in May 2004. On the one hand, the statement confirms the need for an independent, diverse and skilled judiciary. On the other hand, it states that courts must be well managed, and a well-managed system involves three elements: coordination of resources and activities; agreed governance arrangements; and performance standards.⁵⁴ Of the relationship between the notion of an independent judiciary and the view that courts are part of the criminal justice system, the Statement observes:

... any new model must allow the courts to more effectively link with other parts of the justice system, especially criminal justice agencies. The courts are part of the criminal justice process, and the Government is anxious to ensure that the policies being pursued in all parts of the system are consistent with each other. In relation to the courts, this goal is tempered by the need for them to provide a fair process that balances the interests of law enforcement agencies with the rights of defendants.⁵⁵

Few Australian court systems have articulated their aims. The Productivity Commission's objectives for court administration are: to be open and accessible; to process matters in an expeditious and timely manner; to provide due process and equal protection before the law; and to be independent yet publicly accountable for performance.⁵⁶ In addition, all governments aim to provide court administration services in an efficient manner.

The Victorian Courts Strategic Directions Project sees the role of courts as being to provide high quality, equal and consistent justice for all in the community, to be independent, impartial and fair, to be accessible, efficient and adequately resourced, and to enjoy the confidence of the community.⁵⁷

For the courts, the Commission and its predecessor developed a performance indicator framework to cover three areas: quality; access and enforcement. Indicators include client satisfaction, appeal rates, case completion times, adjournment rates, enforcement of warrants and cost per case, though these quantitative indicators have not been universally accepted.⁵⁸

In Victoria, considerable tension between the government and the courts was generated in the early 1990s when a strategy of 'performance budgeting' was

⁵³ Raine and Willson, *Managing Criminal Justice*, above n 3, 8.

⁵⁴ Victoria, Attorney-General's Justice Statement, *New Directions for the Victorian Justice System 2004-2104* (2004) 42.

⁵⁵ *Ibid* 43.

⁵⁶ Commonwealth, Productivity Commission, *Report on Government Services* (2002) 474.

⁵⁷ Victoria, *Courts Strategic Directions Project*, above n 51, 9-10.

⁵⁸ Ronald Sackville, 'From Access to Justice to Managing Justice: The Transformation of the Judicial Role' (2002) 12 *Journal of Judicial Administration* 5, 17; Richard Mohr, Helen Gamble, Ted Wright and Brendan Condie 'Performance Management for Australian Courts' (1996) 6 *Journal of Judicial Administration* 156.

introduced. The government had proposed that better efficiency and less expensive delivery of services could be achieved by linking the amount of each court's budget with the number of cases disposed of by each Court. All three Courts (Supreme, County and Magistrates') rejected the proposal as being totally inappropriate and declined to participate in the process. Currently, a Courts and Tribunals Resources Model is being developed to better understand the workload and staffing costs of courts and tribunals, but it is not designed as a performance measurement device. However, the Courts are amenable to the development of a system designed to gather information and monitor their performance as part of the strategic planning process.⁵⁹

Pragmatic, economic imperatives have been evident in the court system for a very long time, but have been more prominent over the past three decades. Efficiency considerations have shaped the growth of the magistrates' jurisdiction. Magistrates do not sit with juries.⁶⁰ They are quicker and cheaper than the higher courts. They have expanded in both their civil and criminal jurisdictions. In the 1980s, the magistracy was professionalised⁶¹ as lay justices were phased out of the day-to-day business of the courts. In the United Kingdom, this process has been strongly resisted.⁶²

Simultaneously, a large amount of court business was routinised and bureaucratised and essentially removed from the court. In his book, *Criminal Justice on the Spot*,⁶³ Richard Fox traced this process in Australia and notes that in Victoria, over two and a half million cases a year are dealt with by on-the-spot fines and their use and scope is expanding. In contrast, the higher courts deal with about 1500 cases and the Magistrates' Court, about 100,000 cases.

Managerialism prefers predictability, speed and economy. Discretion is unpredictable and courts and trials are costly. Even hearing guilty pleas takes time. As well as introducing administrative penalties such as penalty notices and the like,⁶⁴ cautioning and diversion schemes have served to remove cases from the courts, though this was not necessarily their aim. Scotland has a system of procurator fines that allows the prosecution to impose a fine in lieu of court action.⁶⁵ In many jurisdictions, a number of functions have been delegated to clerks and registrars. In some Australian jurisdictions (for example, South Australia, ACT, New South Wales), Canada, New Zealand and the United States, trial by judge alone is permitted, which may reduce the time and cost of criminal

⁶⁰ Victoria, *Courts Strategic Directions Project*, above n 51, 17.

⁶¹ John Willis, 'Reflections on Achieving Fewer Jury Trials' (1995) 4 *Journal of Judicial Administration* 220.

⁶² Roger Douglas and Kathy Laster, *Reforming the People's Court: Victorian Magistrates' Reaction to Change* (1992).

⁶³ Peter Seago, Clive Walker and David Wall, 'The Development of the Professional Magistracy in England and Wales' [2000] *Criminal Law Review* 631.

⁶⁴ Richard Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (1995).

⁶⁵ Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties*, Discussion Paper No 65 (2002).

⁶⁶ Fionda, above n 14, 115.

trials.⁶⁶ This option is not possible for indictable offences under Commonwealth law. Both the Roskill Committee⁶⁷ and the Auld Review⁶⁸ in the United Kingdom recommended this for complex fraud trials, albeit that lay members could also sit with the judge.

It is considered desirable to reduce the number of contested trials. The growth of plea bargaining, the encouragement of guilty pleas through sentence discounts (eg *Sentencing Act 1991* (Vic) s 5(2)(e)) and the development of sentence indication schemes are primarily motivated by considerations of economy and inadequate judicial resources.⁶⁹ The public interest now demands that the considerations of public time and cost be taken into account in judicial administration.⁷⁰ They are also motivated by the desire to reduce delays.⁷¹ Delay in bringing cases before the courts is one of the endemic problems of court administration, but delay is a double-edged sword. Justice demands speedy trials (for example, Magna Carta, US Constitution, United Nations Convention on Civil and Political Rights). However, too speedy a trial can prevent defendants from properly preparing their cases.⁷² Speed must be tempered by justice.

Committal proceedings have also been regarded as yet another 'obstacle', in Packer's terms. Although forms of preliminary examination have existed for centuries, modern hearings date back to the early part of the 19th century (*Indictable Offences Act 1848* (UK)). Their use in Australia has decreased over the past 30 years with the introduction of hand up briefs. Committals have come to be regarded as expensive, time consuming and as producing delay.⁷³ They were abolished in Western Australia in 2002 following a recommendation of the Western Australia Law Reform Commission.⁷⁴

While accepting that the performance of individual judicial officers is not a matter for government (other than where it may relate to judicial misconduct), the identification and development of appropriate performance measures is strongly supported. Case and court management carry with them a host of indicators of case flow and outcomes: average cost per case; fine arrears; quality of service; case discontinuances; number and length of adjournments; conviction and acquittal rates; and elapsed times between events such as arrest, bail, committal,

⁶⁶ J Badgery-Parker, 'The Criminal Process in Transition: Balancing Principle and Pragmatism – Part II' 4 *Journal of Judicial Administration* (1995) 193 [30.1]; Sean Doran and John Jackson, 'The Case for Jury Waiver' (1997) 24 *Criminal Law Review* 155.

⁶⁷ Roskill Committee, House of Commons, *Fraud Trial Committee Report* (1986).

⁶⁸ Auld, above n 41, [173]-[206].

⁶⁹ See generally, Auld, above n 41.

⁷⁰ Australian Institute of Judicial Administration, Shorter Trials Committee, *Report on Criminal Trials* (1985); Arie Freiberg, 'Sentencing and Judicial Administration' (1993) 2 *Journal of Judicial Administration* 171.

⁷¹ Raine and Willson, *Managing Criminal Justice*, above n 3, 125; Robert Siefman and Arie Freiberg, 'Plea-bargaining in Victoria: The Role of Counsel' (2001) 25 *Criminal Law Journal* 64; Arie Freiberg and John Willis, 'Sentence Indication' (2003) 27 *Criminal Law Journal* 246.

⁷² Carol Jones, 'Auditing Criminal Justice' (1993) 33 *British Journal of Criminology* 187, 195.

⁷³ Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994) 416.

⁷⁴ Western Australia Law Reform Commission, *Review of the Criminal and Civil Justice System* (1999).

trial, sentence and appeal.⁷⁵ The Victorian Magistrates' Court has created a number of measures including timeliness, clearance ratios, quality of registry services and user satisfaction.⁷⁶ All of this is made possible by computerised systems such as CJEP, but the Justice Statement goes further in envisaging an Integrated Courts Management System to provide for an integrated electronic registry for all courts, online court information, electronic transactions, case management, and better data and statistics.⁷⁷

Possibly the most managerial of all of the initiatives which have affected the courts is that of case management. Case management generally refers to the processes used by judges or judicial officers to control the movement of cases through a court and involves the court managing the time and events involved in moving cases from commencement to disposition.⁷⁸ Chief Justice Spigelman of the New South Wales Supreme Court has observed that judges now 'intervene in proceedings to a degree which was unheard of two decades ago. Courts are no longer passive recipients of a caseload over which they exercise no control. All courts now engage in case management and caseload management'.⁷⁹

Case management is a product of many factors: financial constraints on courts and litigants; excessive delays; the growing complexity and volume of cases (particularly white collar, drug and organised crime trials); improvements in information technology; and the introduction of the culture of management into judicial administration.⁸⁰

Underlying this development is the argument that pure adversarialism, which is founded on plaintiff/prosecution and defence initiation, response and interaction, is ineffective in the speedy, economic, effective and efficient resolution of disputes. This can better be done by court supervision of cases, judicial management and leadership in managing lists and cases, monitoring of progress pre-trial, and more efficient management of cases once in court. 'Managerial judging', as the Australian Law Reform Commission termed it,⁸¹ significantly shifts the balance towards judicial control of litigation and a more inquisitorial system. Justice Sackville has argued that as well as the implicit rejection of the laissez faire model of adversarial litigation, the courts have accepted 'new and expanded notions of accountability, some of which are bound up with the principle of consumer orientation'.⁸²

The criminal law has been less amenable than civil litigation to case management,

⁷⁵ Raine and Willson, *Managing Criminal Justice*, above n 3, 20.

⁷⁶ Victoria, *New Directions for the Victorian Justice System*, above n 54, 44.

⁷⁷ *Ibid* 44-5.

⁷⁸ Access to Justice Advisory Committee, above n 73, 416; Australian Law Reform Commission *Managing Justice* (2000) [3.3]; Auld, above n 41, ch 10.

⁷⁹ Justice James Spigelman, 'The "New Public Management" and the Courts' (2001) 75 *Australian Law Journal* 748, 749.

⁸⁰ Nicola Lacey 'Government as Manager, Citizen as Consumer: The Case of the Criminal Justice Act 1991' (1994) 57 *Modern Law Review* 534

⁸¹ Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper No 20 (1997).

⁸² Sackville, above n 58, 6.

but the cost and length of major fraud trials in the mid-1980s led to a number of inquiries and reports which produced many new initiatives to obviate the need for, or speed up, trials.⁸³

The key elements of schemes to achieve these outcomes are: early identification of issues by prosecution and defence; pre-trial hearings to identify issues for trial; pre-trial disclosure of documents and statements; identification of early pleas, sanctions for non-cooperation and incentives for cooperation; better use of information technology to manage trials; judicial training in conduct of trials; continuity of judicial supervision; and better presentation of materials to juries.⁸⁴ Legislatively, these were sought to be achieved through the *Crimes (Criminal Trials) Act 1993* (Vic) and its successor, the *Crimes (Criminal Trials) Act 1999* (Vic). These Acts aimed to expedite the resolution of charges through a series of pre-trial disclosures, both voluntary and mandatory, and through a more active role for the judge in managing the pre-trial stages of the proceedings. The major obstacle to the full implementation of this system has not been administrative but cultural, namely the reluctance of defence lawyers to cooperate, having taken the view that such cooperation is likely to prejudice their client's case.⁸⁵ The compulsory disclosure of defence issues has been regarded as diminishing a defendant's right to a fair trial and as violating his or her right to silence, though there is some scepticism about the validity of this claim.⁸⁶

The relationship between case management and justice remains problematic. In the context of civil litigation, the High Court has stated:

Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim.⁸⁷

Criticisms of managerial justice have been numerous. Chief Justice Spigelman notes that the judiciary support the managerialist objective where it has minimised delay.⁸⁸ However, where the managerialist objective has simply entailed reduced budgets whilst maintaining similar workloads, criticism has been more scathing.

Managerial justice has increased the power of judges but it also has the potential to increase the charges of bias, diminish judicial accountability and, particularly

⁸³ Roskill Committee, above n 67; Australian Institute of Judicial Administration, above n 70.

⁸⁴ Australian Institute of Judicial Administration, above n 70; Auld, above n 41.

⁸⁵ John Willis, 'The Processing of Cases in the Criminal Justice System' in Duncan Chappell and Paul Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (2000) 150.

⁸⁶ Auld, above n 41, ch 10; Geoff Flatman and Mirko Bagaric, 'Accused Disclosure: Measured Response or Abrogation of the Presumption of Innocence?' (1999) 14 *Law Institute of Victoria Criminal Law Section Newsletter* 4.

⁸⁷ *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146, 154.

⁸⁸ Spigelman, above n 79.

in pre-trial processes, to privilege process over outcome.⁸⁹ Whatever the strength of these arguments, it appears that managerialism has significantly shaped the operation of the court system and is likely to continue to do so. In the broader context, the tensions between governments and courts will continue to be played out, particularly in relation to the unresolved issue, in Victoria at least, of courts governance, where the issues of control, management, finance, resources, accountability and political symbolism come together most sharply.⁹⁰

VII MANAGERIALISM IN CORRECTIONS

Correctional management is a science of long standing, but the management of correctional systems has evolved rapidly under the influence of managerialism. In Victoria, the correctional system evolved through the 1980s from the Department of Community Welfare Services to a separate Office of Corrections in the mid-1980s to its location in the mega Department of Justice from 1992. Among the early forms of modern management practices was the adoption of program budgeting approaches and corporate planning in the early 1980s. Through this period, issues of accountability, efficiency and effectiveness are constant themes in the annual reports. The engagement of outside management consultants to create a Corrections Master Plan in that period was significant for the type of expertise that was being sought.

Managerialism in its modern local form in Victoria became evident in 1989 with the preparation of a document, *The Way Ahead, Corporate Directions, 1990-1995*, which was intended to better clarify roles, goals and objectives. The Annual Report of the Office of Corrections for 1989 was the first to make mention of the development of a draft mission statement and principles, an annual planning process, and performance indicators. It also saw the introduction of a new performance appraisal system for senior staff.

A sample of the KPIs for Prison Operations and Community Based Corrections in 1995/1996 reveal the priorities in measuring performance. In Prison Operations, they refer to the number of escapes, prisoner deaths, average annual cost per prisoner, average annual operating cost per prisoner place and sentenced prisoners in employment. For Community Based Corrections, they are listed as: court orders managed; adult parole orders managed; community work hours; diversion from imprisonment, community orders completed; rate of offenders with up-to-date individual management plans and cost per offender per year.

Consistent with moves to separate management from professional knowledge or experience, private sector accounting firms were engaged to review programs and service delivery of corrections. In 1993, Arthur Anderson commenced a review

⁸⁹ Leigh Duthie, 'Case Management: The Case for Judicial Intervention' (2002) 76 *Law Institute Journal* 80, 82.

⁹⁰ Victoria, *Courts Strategic Directions Project*, above n 51, 67.

of management structures, staffing and resources in prison operations. KPMG was also involved in reviewing service delivery outcomes of correctional service providers and the Victorian Prison Drug Strategy in 1999.

Possibly the most prominent of the transformation of corrections involved the privatisation of correctional functions, particularly the operation of prisons. The commitment to a reduction in the role of the state in Victoria saw the contracting out of three correctional facilities which, at their peak, housed nearly half of Victoria's prisons. Attempts to contract out community correctional services were unsuccessful.

Contracting out required structural changes to government. Because some prisons remained under government control, it was thought proper and prudent to separate the purchasing function from the provider function. Accordingly corrections was split into two organisations: The Public Correctional Enterprise (CORE) was created to run government corrections, and the Office of the Correctional Services Commissioner was established to tender and monitor contracts, both with CORE and the private sector. This arrangement was conceptually flawed and proved unsustainable and was dismantled by the Labor government in 2003 when the two bodies were merged into one body, Corrections Victoria. In 2000, the Government resumed responsibility for the women's prison, though two prisons are still run by private providers.

Within the public service itself, the changes manifested themselves in the structure and functions of the organisations involved in corrections, in the expectations of staff, in the mechanisms of accountability and in the types of outcomes that were expected. The language of government changed. Statements of purpose, visions, goals and values appeared,⁹¹ sections or branches of government became 'business units', which had to strategically plan, and were audited, monitored and professionally managed.

For frontline staff, the environment and expectations were dramatically altered. The decline of the rehabilitative ideal and the argument that 'nothing worked' resulted in a move from a problem solving approach to one of performance management,⁹² from offender management to order management, from long term to short term objectives. Staff felt evaluated, not valued.⁹³ During the 1990s, when managerialism was in full flower, community corrections had to demonstrate their credibility through tough regimes of order enforcement, which led to increased breach rates and resulted in higher levels of incarceration. This, in turn produced judicial disillusionment with such orders. Short term performance indicators, coupled with the threat of outsourcing, led to a compliance rather than an outcome focus, high staff turnover, an increased use of contract staff and a decrease in morale amongst correctional officers.⁹⁴

⁹¹ Shane Bryans, 'The Managerialisation of Prisons: Efficiency without Purpose?' (2000) 40 *Criminal Justice Matters* 7.

⁹² Raine and Willson, *Managing Criminal Justice*, above n 3, 96.

⁹³ *Ibid.*

⁹⁴ David Daley, 'Re-invigorating Community Corrections: A View From Down Under' (2003) 65(1) *Corrections Today* 54.

Ironically, and perhaps paradoxically, during the period of the 1970s onwards, imprisonment rates rose steadily in most western jurisdictions. It is paradoxical because imprisonment is expensive and inefficient⁹⁵ and its privatisation only ameliorates the cost burden, but does not substantially reduce it. Part of the answer to the paradox lies in the fact that economic rationalism and managerialism were only two of the many influences shaping public policy. They were dominant, but not exclusive. In the latter part of the 20th century, an emotional, non-rational, expressive trend in law and society emerged in contradiction to the formal, rational, administrative and routinised forms of law that came to be termed 'technocratic justice'.⁹⁶ Some of the newer, or rediscovered sanctions such as public shaming and sexual offender notification have been termed 'emotive and ostentatious',⁹⁷ 'volatile and contradictory'⁹⁸ and 'unthinkable'.⁹⁹ However, in the realm of public policy, the 'affective' is regarded as important a dimension as the 'effective' in the formulation of penal policy¹⁰⁰ and sentencing is increasingly being recognised as having a carthartic as well as a utilitarian function.¹⁰¹ Though evidence-based practice has been the mantra for managerialist governments, the emergence of faith-based policies, at least in the United States may indicate that the peak of empiricism, economism and intellectualism may be past.

VIII MANAGERIALISM: PROS AND CONS

There are dangers in romanticising the days of old. Halcyon days are always remote but vaguely and fondly remembered. Historically the reality has been that courts were slow, inefficient, expensive and unresponsive to litigants. This may still be the case. Many prisons were squalid, badly run and ineffective. Police forces were and often still are corrupt. Modern management techniques have improved public administration in many ways. There is now much greater consciousness of costs and choices, and many public functions are run more efficiently.¹⁰² In some, or even many areas, the private sector may do things better and more cheaply, in which case, the only issue is that of accountability rather than the status of the service provider.¹⁰³ In the courts, delays have been reduced

⁹⁵ Fionda, above n 14, 118.

⁹⁶ Kathy Laster and Pat O'Malley, 'Sensitive New-age Laws: The Re-assertion of Emotionality in Law' (1996) 24 *International Journal of the Sociology of Law* 21; Garland, above n 29.

⁹⁷ John Pratt, 'Emotive and Ostentatious Punishment' (2000) 2(4) *Punishment and Society* 417.

⁹⁸ Pat O'Malley, 'Volatile and Contradictory Punishments' (1999) 3(2) *Theoretical Criminology* 175.

⁹⁹ Michael Tonry, 'Rethinking Unthinkable Punishment Policies in America' (1999) 46 *UCLA Law Review* 1751.

¹⁰⁰ Laster and O'Malley, above n 96; Arie Freiberg, 'Affective vs Effective Justice: Instrumentalism and Emotionalism in Criminal Justice' (2001) 3 *Punishment and Society* 265; Garland, above n 29.

¹⁰¹ John E Stannard, *The Cathartic Function of the Sentencing Process* (Paper presented at the Sentencing and Society 2nd International Conference, Strathclyde University, Glasgow, Scotland, 27-29 June 2002).

¹⁰² Pollitt, above n 5, 84.

¹⁰³ Arie Freiberg, 'Commercial Confidentiality and Public Accountability for the Provision of Correctional Services' (1999) 11(2) *Current Issues in Criminal Justice* 119.

and victims and witnesses have been better treated.¹⁰⁴ Overall, accountability has improved and processes are more transparent.

On the other hand, managerialism is open to a number of serious criticisms. As the High Court said of case management, it is not an end in itself: it should be there for a purpose. A process should be efficient, economic and effective, but only to achieve a further goal, for example a safe society. Courts must be efficient, but they must also be fair, equitable and impartial, must allow parties to be heard and represented, and must be able to produce a rational and defensible outcome.¹⁰⁵

The philosophy of economic rationalism, which partly underpinned managerialism, was itself found to be flawed. The 2002 Nobel prize winner in economics, Professor Daniel Kahneman, was a psychologist who concluded that people's economic behaviour was driven by psychological motives, including emotions and biases, as much as economic calculation, if not more. Motivation, particularly in the public service, was found to lie elsewhere than in financial reward, and management by objectives or targets proved to be a crude and ineffective instrument for running an organisation. The United Kingdom Parliament Select Committee on Public Administration's Fifth Report¹⁰⁶ concluded that '[t]argets can be good servants, but they are poor masters'.¹⁰⁷ They should not be substitutes for good strategy or effective management. A target regime, it concluded, can alienate and demoralise frontline staff if they are not involved in the setting of those targets or when they fail to deliver results. Furthermore, where targets are confused with outcomes, they can lead to conflict where targets are shared by more than one department and produce cheating or creative manipulation of figures.

The separation of management from professional knowledge or experience often resulted in a loss of direction, or worse, mission failure because content knowledge and skills were missing. Private sector models of employment including short-term and performance-based contracts are problematic in the public sector, which should be chiefly concerned with long-term and collective rather than short-term and individual outcomes. On the other hand, traditional public sector models of tenure sometimes resulted in unresponsive officers and the perpetuation of poor performance. Although managerialism does not necessarily entail a politicisation of the public service at the higher echelons, the coincidence of the two may be more than accidental. Indeed, to many of today's public servants, management accountability is simply the foundation for political compliance.¹⁰⁸

John Alford has argued that managerialism may be valid where there are

¹⁰⁴ Raine and Willson, 'Beyond Managerialism in Criminal Justice', above n 1, 86.

¹⁰⁵ Alford, above n 12, 139.

¹⁰⁶ United Kingdom, Select Committee on Public Administration, House of Commons, *Fifth Report* (2003).

¹⁰⁷ *Ibid* [33].

¹⁰⁸ I am grateful to Graeme Hodge for this insight.

internally consistent goals, specifiable outputs, simple and stable environments, and internally integrated production processes which are separable from other processes, but suggests that this does not usually apply in the public sector, and probably even less so in the criminal justice system.¹⁰⁹ It is doubtful that the criminal justice system has one goal, or even a number of consistent goals, and the notion of the separation of powers may institutionalise conflict between its various arms for good reason. Some of its values, such as ‘justice’ and ‘fairness’ may not be quantifiable, or perhaps even measurable.¹¹⁰

IX ALTERNATIVES TO MANAGERIALISM

I have argued that managerialism has been one of the most powerful transformative forces in Australian criminal justice because it has changed the language of criminal justice, its guiding values, institutions, relationships, day-to-day practices and personnel. It is now so embedded in public administration and in criminal justice as to be almost invisible. But the Australian model of managerialism was not inevitable nor is it immutable. It is powerful, but it is only one of a number of discourses that compete in the arena of public policy. The development of theories and practices of restorative justice¹¹¹ and therapeutic jurisprudence,¹¹² to name but two, show that the field is contestable. The strong undercurrents of emotive justice and populist punitiveness are evidence that modern rationality may only be a veneer.¹¹³

It is possible to build upon the virtues of good management but make explicit and apply those values that go beyond efficiency, effectiveness and economy. This need not necessarily be done in mission statements or strategic plans, but made manifest through the lived experience of the organisation. While most governments and organisations will readily agree on the objectives of government or management, namely control over spending, fiscal responsibility, improved transparency and accountability, and improved efficiency in service delivery, there are different ways in which these objectives can be achieved.¹¹⁴

First, the notion of a ‘purchaser/provider’ split can, and has been, rejected in favour of a partnership model which employs more collaborative language such as mutual respect, trust and capacity building. Policy is based on the idea that all parties are committed to the achievement of shared outcomes. This is a framework based on the idea of commonality of interests and cooperation between all parties rather than on a mechanistic and contractualist framework for the relationship between central and line agencies, or a government department

¹⁰⁹ Alford, above n 10, 142.

¹¹⁰ Western Australia Law Reform Commission, above n 74, [5.1].

¹¹¹ John Braithwaite, *Restorative Justice and Responsive Regulation* (2002).

¹¹² Bruce Winick and David Wexler, *Judging In A Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003).

¹¹³ Ian Brownlee, ‘New Labour – New Penology? Punitive Rhetoric and the Limits of Managerialism in Criminal Justice Policy’ (1998) 23 *Journal of Law and Society* 313, 334.

¹¹⁴ M Pfeffer, *The Management Reform Process – A Dissenting View* (unpublished paper, 2000).

and funded service providers. In contrast, 'purchaser/provider' is based on explicit commercial-style contracts, with accountability in only one direction. It tends to be adversarial in flavour and punitive in implementation.

Secondly, contractualist or market based models should be rejected in favour of one built on trust. As well as its ethical superiority, such a model is also more cost effective because it does not require the same ongoing mechanisms for specification, auditing and monitoring.¹¹⁵

Thirdly, a system is required which values flexibility and effectiveness. A major criticism of a planning based, output determined process is that it significantly inhibits the flexibility and effectiveness of the system. An obsession with outputs can lead to severe distortions of organisational effort. Instead of focusing on delivering a good outcome for end users, energy is diverted to constructing the right measures and ensuring that the targets are *seen to be* met, rather than being met. The danger is that these processes encourage meaningless reporting which bear no relationship either to transparency or quality. The demand for information now requires organisational resources to be devoted to keeping the higher levels of the organisation supplied with data which may or may not be useful or used. Nonetheless, both qualitative and quantitative performance measures and benchmarks can be useful, and if centrally imposed measures are to be rejected, it is incumbent on organisations to develop and justify their own measures.¹¹⁶

Fourthly, the appeal to, or reliance on, whole of government initiatives should be kept in perspective. Though integrated solutions and inter-departmental approaches are important and valuable when justified by the complex nature of the problem, in reality such approaches can ultimately inhibit productive action through over bureaucratisation, internecine squabbling, lack of leadership and ownership of problems, poor funding and fund management, and too much centralised or top-down control.¹¹⁷ Good work can and must be done at an agency level.

Fifthly, inappropriate rewards for managers and badly targeted sanctions for those who fail should be rejected. The use of short term performance contracts in the public sector is misconceived, not only because it fundamentally misunderstands the motivations for work and achievement, but concentrates the benefits on those who may only partially have contributed to the outcome, leaving those who were also responsible unrewarded, frustrated and possibly resentful.

Sixthly, purpose must be re-injected into process. The focus must return to the 'justice' rather than the 'system' element of the *criminal justice system*. This requires consideration of issues such as equity, consistency, fairness,

¹¹⁵ Valerie Braithwaite and Margaret Levi (eds), *Trust and Governance* (1998).

¹¹⁶ Sackville, above n 58, 19.

¹¹⁷ Wayne G Carson, 'Whole of Government and Crime Prevention for Victoria', (Paper presented at the Consultative Symposium on Crime Prevention for a Safer Victoria: Making It Work, Melbourne, 29-30 September 2003).

proportionality, accessibility and affordability.¹¹⁸ The recent Victorian Justice Statement¹¹⁹ reflects a welcome move away from the virulent forms of managerialism which have infected the United Kingdom and which were prominent in the 1990s, taking as its guiding principle the rule of law, and its guiding values in equality, fairness, accessibility and effectiveness, in that order.¹²⁰

More emphasis should be placed on the identification of problems and the development of solutions. In policing, the idea of problem-oriented policing was developed in the late 1970s.¹²¹ In the courts, the development of problem solving courts has taken an approach diametrically opposite to that of managerialism.¹²² Berman and Feinblatt define a problem solving court as one that seeks to use the authority of the courts to address the underlying problems of individual litigants, the structural problems of the justice system, and the social problems of communities.¹²³ Examples of these forms of specialised courts include drug courts, mental health courts, domestic violence courts, community courts and teen courts. A drug court was established in Victoria in 2002 and a domestic violence court will be established in 2005. Their emergence is a reaction against the modernising process, which, in some cases, has impersonalised the courts by emphasising outcomes over processes. They are, in part, a response to assembly line justice produced by case management, plea-bargaining and heavy caseloads or, what the Chief Judge of the New York State Court of Appeals has termed, 'McJustice'.¹²⁴ They are also part of a wider movement that has seen the growth of restorative justice, community justice, family group conferences, sentencing circles and other inclusive, participative, procedural justice oriented forms of dispute resolution, or what the Law Reform Commission of Canada has called participatory justice.¹²⁵ Participatory justice is built on a number of principles: early intervention; accessibility; voluntariness; careful preparation; opportunities for face to face dialogue; advocacy and support; confidentiality; fairness; relevant and realistic outcomes; efficiency; systemic impact; flexibility; and responsiveness. It is probably slow and expensive, but it might also provide the participants with a powerful sense of satisfaction.

The elements of a post-managerialist criminal justice system are already in place. It is all a question of balance. In their last work together on managerialism, Raine and Willson¹²⁶ identified what post-managerialist values could replace managerialist ones:

¹¹⁸ Editorial, *Criminal Law Review* (2001) 261.

¹¹⁹ Victoria, *New Directions for the Victorian Justice System*, above n 54.

¹²⁰ *Ibid* 22.

¹²¹ Herman Goldstein, 'Improving Policing: A Problem Oriented Approach' (1979) 25 *Crime and Delinquency* 244.

¹²² Arie Freiberg, 'Problem-oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8.

¹²³ Greg Berman and John Feinblatt, 'Problem Solving Courts: A Brief Primer' (2001) 23(2) *Law and Policy* 125, 126.

¹²⁴ Greg Berman, "'What is a Traditional Judge Anyway?': Problem Solving in the State Courts' (2000) 84(2) *Judicature* 78, 82.

¹²⁵ Law Commission of Canada, *Transforming Relationships Through Participatory Justice* (2003).

¹²⁶ Raine and Willson, 'Beyond Managerialism in Criminal Justice', above n 1, 93.

Managerialism	Post-managerialism
Crime control	Due process
Deterrence	Proportionality
Efficiency/economy	Fairness and security
Management standards	Professional standards
Consumerist	Community
Political leadership	Professional leadership
Short term	Long term
Experimentalist	Innovation plus stability
Centrally driven	Locally determined priorities
Central appointments	Locally selected
Standardisation	Diversity
Interdependence	Independence especially for the judiciary
Resource allocation as reward	Resources to need and regarding problems

If managerialism dies and leaves behind it a better managed public service and a better administered criminal justice system, its life of three score or so years will not have been in vain. Over the life of the system, that is a very brief interlude. KPIs have their place in public and private management, but as guides, not as destinations, as servants, not as masters. They are not dead, nor do they deserve to die. But it is the quality of justice that is of utmost importance, not its quantity. Ultimately, it may be an impossible task to measure and report on that quality. The criminal justice system is remarkable for its ability to absorb change, but yet retain its fundamental values. Its resilience is a testament to its strength and the appropriateness of its core values.