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PRECIS

PUBLIC ISSUES COMMITTEE

Police Diversion Scheme: Hidden Risks & A Call for Change

The Public Issues Committee of the Auckland District Law Society is calling for a legislative basis for the diversion scheme which has operated ad hoc since 1987. The Committee has identified a number of concerns including the mistaken view that the diversion scheme gives a person a completely clean slate, and discrimination that arises in certain contexts including employment and immigration as a result of a person's acceptance of guilt which underlies an acceptance of diversion. The Committee calls for it to be unlawful to discriminate against such persons in any decision or to make inferences arising from the fact that a person has participated in diversion. It also calls for there to be a clear legislative mandate that the law enforcement authorities are not to pass on information concerning past diversion to other parties.

POLICE DIVERSION SCHEME: HIDDEN RISKS & A CALL FOR CHANGE

1. The Public Issues Committee of the Auckland District Law Society calls for a review of the police operated diversion scheme. Under the scheme police withdraw cases from prosecution in return for the accused person agreeing with the Police to undertake certain actions.
2. These actions include an admission of guilt of the charge, an apology and usually the making of reparation to the victim and/or a donation to charity.
3. Diversion is generally used in cases where the charge would result in a first conviction for an offender and enables the person to avoid conviction. The scheme has positive aspects to it, in that it enables first time offenders to make reparation, enables them to be rehabilitated and is a good use of community resources for this process. The Committee however has identified the following problems:
 - (i) The act of accepting diversion includes an admission of guilt [which may not be made if there were to be a charge laid]. This admission can come up later in the person's life, in other contexts, and have serious unforeseen consequences. A person accepting diversion who might have otherwise obtained a discharge without conviction, may not be aware of such potential ramifications.
 - (ii) There are inconsistencies in the way in which diversion operates throughout the country and in different courts and centres. A person charged with the same offence may be offered diversion in one centre and refused in another.
4. The inherent dangers and unfairness in the Diversion scheme have been identified since its beginnings in 1987. A 1992 Justice Department Report pointed out the problematic nature of the scheme.
5. Another problem of the scheme is the way in which it is promoted to persons who have been accused of an offence. The Committee's view is that there are many individuals who accept diversion on the basis that in doing so there will be no ramifications to come against them later and absolutely no record kept of the misdemeanour. The problem here is that justice might not be done in many cases because there is a substantial risk that innocent persons also will opt for diversion if they think that there are going to be no ramifications, simply to avoid the inconvenience of taking time off work and coming back to court to defend their matter as well as the stress of ongoing court proceedings. The Committee is aware of instances where there is a reasonable explanation concerning a particular activity or event, that would amount to a defence in law, where such persons have accepted diversion for reasons of expediency.

6. The Committee is aware that the New Zealand Immigration Service for example is given information by the New Zealand Police that a particular person has had diversion in the past. To an intending immigrant this might affect their residence application or the extension of a visitor's permit, or a future visitor's visa, student visa or work visa application. In the employment context, since diversion requires admission of guilt, then this could seriously undermine a person's employment in certain areas.
7. The admission of guilt involved in accepting diversion might also affect a person's current insurance policies (if the admission concerns a crime of dishonesty). It may also affect the right of entry into other countries.
8. It is noted that the current Parliament has before it a private members bill, the "Clean Slate" Bill. Our view is that priority ought to be given to matters arising under the Diversion scheme before it enacts the Clean Slate Bill. In some instances the Clean Slate Bill will enable some quite serious offences to be wiped (six months of imprisonment or less or a fine of \$2,000 or less). Yet where minor offences leading to diversion are concerned, there are less protections.
9. If it is intended that where a person accepts diversion they have a clean slate, then there ought to be some clear legislative basis for this, e.g. a provision that it would be unlawful for there to be any form of discrimination against an individual for a matter covered by diversion, just as it is intended in the Clean Slate Bill (see clause 12) for persons to have a similar protection at law. In our view, the unlawful discrimination approach is a good one because although it does not allow a person to conceal the past, it effectively deals with the problems listed above where third parties are permitted to make decisions based on inferences arising from the Diversion process.
10. We believe also that it is important for our justice system to have internal integrity and it is of concern that the availability of Diversion (and the types of offence for which diversion will be offered) differs from city to city and from town to town in New Zealand. It is submitted that this ought to be clarified in any proposed legislation as well.
11. In summary, the Committee makes the following recommendations:
 - (i) That a legislative basis be given to the Diversion scheme.
 - (ii) The offences to which Diversion applies ought to be listed.
 - (iii) That parallel legislation be enacted that will make it unlawful for there to be any form of discrimination against persons who have participated in the Diversion scheme (and who have not re-offended).

- (iv) That there be tight restrictions upon disclosure of the fact a person has been charged and received Diversion and clarification that the police are not to pass on information concerning Diversion to other agencies.

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