

# Justice, Wellbeing and Social Capital

Author: Tim Hughes

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the Treasury

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## DISCLAIMER

This paper is part of a series of discussion papers on wellbeing in the Treasury's Living Standards Framework. The discussion papers are not the Treasury's position on measuring intergenerational wellbeing and its sustainability in New Zealand. Nor does this paper represent the position of the Ministry of Justice, NZ Police, Department of Corrections, or Oranga Tamariki.

Our intention is to encourage discussion on these topics. There are marked differences in perspective between the papers that reflect differences in the subject matter as well as differences in the state of knowledge. The Treasury very much welcomes comments on these papers to help inform our ongoing development of the Living Standards Framework.

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**AUTHOR**

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Tim Hughes  
Principal Advisor  
New Zealand Treasury

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**NZ TREASURY**

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New Zealand Treasury  
PO Box 3724  
Wellington 6008  
NEW ZEALAND

Email            [information@treasury.govt.nz](mailto:information@treasury.govt.nz)  
Telephone      64-4-472 2733  
Website         [www.treasury.govt.nz](http://www.treasury.govt.nz)

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# Executive Summary

## Purpose

Wellbeing and social capital are central concepts in the policy discourse of the new government. At the same time, inspired in part by the *Capabilities Approach* of Sen and Nussbaum, Treasury has been developing its living standards framework.

This discussion paper makes a first attempt at exploring these concepts from the perspective of the justice system. The aim is to support an ongoing conversation within the justice system, and between the justice system and wider stakeholders. The paper is in four parts, each of which I summarise here.

## Part 1: Definitions and conceptual framework

There are no universally agreed definitions of wellbeing and social capital, but this is not necessarily a problem. Each competing definition foregrounds certain issues and distinctions that support our ongoing dialogue about what government can and should do to support people's aspirations for their lives.

In this paper I discuss one understanding of social capital and wellbeing that is useful for exploring the role the justice system has in supporting people to live 'lives they have reason to value'.

The understanding I advance has many similarities to that presented by other authors in the LSF discussion paper series. Where there are differences, they arise primarily from taking Sen's (2009) invitation to (re)connect the study of politics and economics.

In many cases it is perfectly feasible to understand the value of the justice system in the language of economic theory. For example, we might say that the production function of justice agencies combines labour and capital to meet the demand for safety, which can in turn be understood (in certain contexts) as a public good. This approach can be used to estimate the cost-benefit ratio of investments in rehabilitation services, for example.

The language of social capital emerges from economic theory. The social capital literature notes that economically efficient outcomes often require cooperation and trust between multiple actors to overcome collective action problems. This trust in turn can result from, for example, people's internal preferences to be trustworthy, the reputational incentives from repeated interaction in social networks, and the deterrent effect of institutional enforcement of contract.

Economics builds a theory of social co-operation that is based on a certain view of freedom and agency that is inherent in the axioms of rational choice. In this paper I argue that if we expand our area of investigation to include political theory, we will find competing ideas of freedom that can enrich our understanding of social co-operation. For example, a libertarian takes a view of freedom as non-coercion of the individual. Advocates for *tino rangatiratanga* often define freedom as collective self-determination by Māori. Republican theories of democracy focus on freedom as non-domination. Sen and Nussbaum in the capabilities approach argue focus on 'substantive freedoms', such as education, to be and to do things that one values.

These competing definitions of freedom are important because of a paradox at the heart of freedom as a concept. As summarised by Popper (1945), the paradox of freedom is that:

*“...unlimited freedom leads to its opposite, since without its protection and restriction by law, freedom must lead to a tyranny of the strong over the weak. This paradox, vaguely restated by Rousseau, was solved by Kant, who demanded that the freedom of each man should be restricted, but not beyond what is necessary to safeguard an equal degree of freedom for all.”*

The paradox of freedom means that to safeguard any particular kind of freedom, it is necessary to restrict a corresponding freedom. For example, to safeguard the libertarian freedom from coercion, it is necessary to restrict the freedom to coerce. To safeguard the substantive freedom (capability) of education, it may be necessary to restrict freedom of expenditure through compulsory taxation sufficient to fund universal education.

Although we each have our own view of what freedom is, to live as a society we need to come to a compromise position about what freedoms we are going to restrict in order to safeguard an equal degree of freedom for all. Legal philosopher Jeremy Webber (2006) describes this as the:

*‘fundamental problem of law: how, despite our diversity, we can come to provisional working solutions, provisional norms, that allow us to live together despite our continuing disagreements. Those solutions may involve the imposition of a single outcome. They may involve the recognition of spheres of autonomy. They may produce a modus vivendi rather than a comprehensive body of principle. But they always aim to produce at least some settled order among the contending positions, allowing us to escape the brute interaction of those who are always “forçans ou forcés” (coercing or coerced)’ p170*

Whereas social capital in the economic literature focuses on regulatory networks, the same networks can be equally understood as ‘normative communities’. Society in general is the primary normative community to which we all belong. In this sense, a society is high in social capital to the extent that it has achieved a definition of freedom that achieves widespread agreement as morally correct, and widespread voluntary compliance with the restrictions on freedom that definition entails; compliance with taxation, with restrictions on pollution, with criminal and family law.

In these circumstances, the trust that people have in strangers is not what Eric Uslaner (2002) calls ‘strategic trust’, grounded in a purely rational, game theoretic calculation of the likelihood of compliance with contract. It is instead what Uslaner calls ‘moral trust’, a trust that is driven by a belief that we are members of a single moral community with shared beliefs about what our duties are to one another, including shared beliefs about how to resolve conflicts and disagreements.

This is a good starting point for consideration of the role of the state, and the justice system, in relation to social capital and wellbeing. The justice system embodies the paradox of freedom, as it is empowered like no other part of the state to arrest, imprison, punish, fine, seize property and otherwise restrict freedom. But it does so to guarantee our collective freedom. This is part of what James C. Scott (1998) means when he describes the state as ‘...the vexed institution that is the ground of both our freedoms and our unfreedoms’ p7.

In many respects the justice system has little ability to impose moral order upon society. As Uslaner has said:

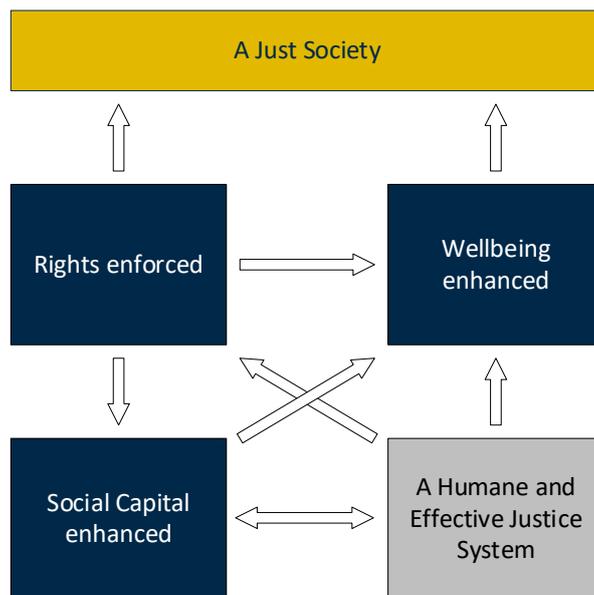
*“Courts can save us from rascals only if there are few rascals”* (Uslaner 2000, p143)

But that is to under-estimate the importance of a reliable, trustworthy backstop in the case of normative conflict. As stated in Rothstein and Teorell’s (2008) paper about the importance of impartial institutions:

*“...once in the cooperative equilibrium of contracts self-enforced by trust and norms of reciprocity, the state hardly needs to act as the third-party enforcer. Yet it is the fact that the state is expected to be an impartial arbiter in case of conflict that underpins people’s trust and reciprocity.”* p24

The role of the justice system under this view is to enforce where necessary our rights to the type of freedom that we have decided, via the political process, to guarantee each other. Depending on the view of freedom we decide to adopt, these rights may emphasise libertarian rights to personal property and personal safety, or may look to balance these against the social and economic rights of the egalitarian.

**Figure 1: Conceptual framework connecting justice, wellbeing and social capital**



Depending on the definition of freedom we choose as a society, enforcing rights may or may not lead to an increase in wellbeing, and may or may not directly create economic value. But as long as the rights that are enforced reflect society’s definition of freedom, and are enforced fairly, then enforcing them will enhance social capital in the sense of moral cohesion, and will serve the goal of a just society. Figure 1 illustrates the relationship between these concepts. This is the framework I use throughout this paper.

## Part 2: Creating wellbeing

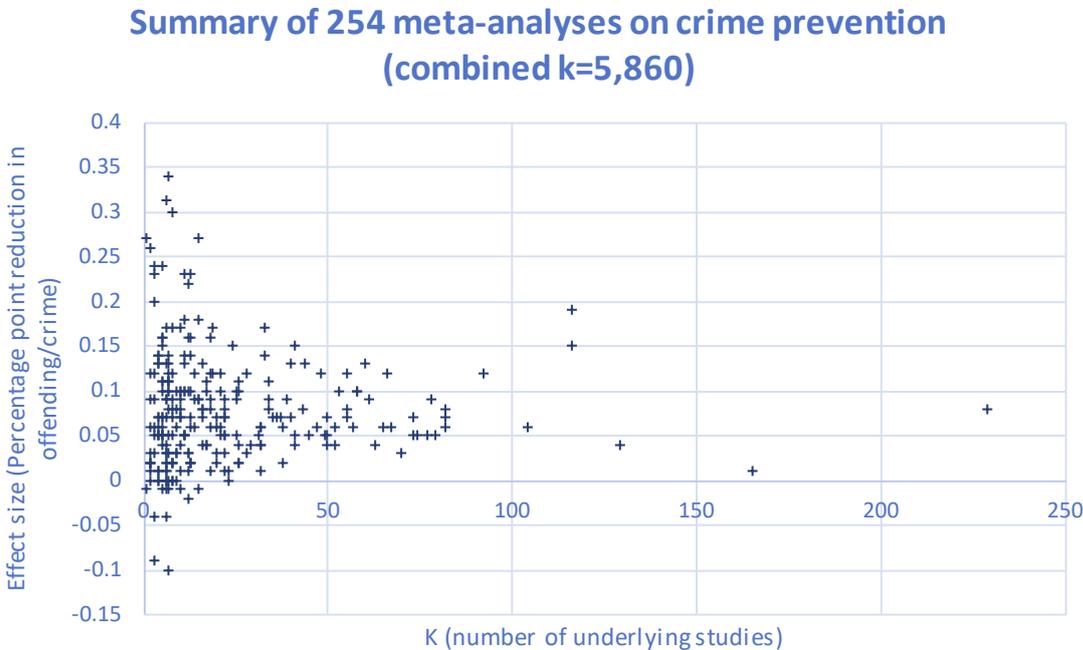
In part two of this paper I aim to substantiate the claim that social capital is a stronger determinant of justice-related wellbeing than the justice system itself. This claim is captured in Uslaner’s quip about courts’ inability to save us from more than a few rascals. But there is good evidence to substantiate it.

This evidence is strongest in relation to criminal justice. For example, Travis Pratt et al (2006) conducted a major meta-analysis of research into deterrence. Based on synthesis of 107 separate studies, the authors reported that:

- The severity of punishment has essentially no deterrent effect ( $r=0.03$ , NS)
- The certainty of apprehension has a small deterrent effect ( $r=0.101$ ,  $p<0.01$ )
- The deterrent effect from the certainty of apprehension is found most consistently in relation to white-collar offences such as fraud, tax violations, and non-compliance with regulatory laws.

Further evidence showing the relatively modest impact of the justice system on wellbeing comes from the very many studies into rehabilitation, various modes of policing, and other types of crime prevention such as CCTV. Over the past two decades, criminologists and organisations such as the Washington State Institute of Public Policy, and the Campbell Collaboration, have been working to organise this evidence base with a large set of meta-analyses.

Figure 2: Average effectiveness of various crime prevention approaches



The Ministry of Justice has taken advantage of this work by assembling the findings into a series of evidence briefs, available online.<sup>1</sup> In 31 evidence briefs, the Ministry summarises the findings from 254 meta-analyses of crime prevention approaches, which in turn cover 5,860 individual studies. This work shows that many types of crime prevention activity work on average. But it also shows that, particularly once approaches move beyond demonstration scale and are rolled out, the average effect is modest. This can be seen clearly in Figure 2.

At scale, very few approaches achieve more than a 5 or 10% reduction in crime, so it is unrealistic to expect any approach to directly reduce crime to have a substantial impact on wellbeing. When contrasted with the evidence for the impact of various elements of social capital, it becomes clear that the indirect route to wellbeing via internalised moral norms is more important.

For example, two of the best evidenced theories of crime are self-control theory and social learning theory. In two other studies, Travis Pratt, author of the meta-analysis on deterrence, worked with various co-authors to conduct similar meta-analytical reviews of these theories. On their own, each theory has a much stronger relationship with crime than does deterrence. For example, the association between the 'differential association' of people in anti-social networks has an average association with crime of  $r=0.232$  (Pratt et al 2010). When people lack internal normative regulation, the association is  $r=0.262$  (Pratt and Cullen 2000). But the strongest association is the combination of self-control and opportunity, with an association with crime of  $r=0.576$ . In other words, crime is most likely to occur when people who lack internal moral self-regulation associate with others like them, in contexts where there are unprotected opportunities for crime.

While less intensively researched than crime, the importance of social capital has also been emphasised by researchers of civil justice. For example, Ramseyer (2015) has shown that Japanese prefectures with higher levels of social capital experience fewer contract defaults, lower levels of litigation, and lower levels of bankruptcy procedures.

Given this evidence, I argue throughout this paper that the justice system should focus its attention on how to build social capital, how to contribute to the development and maintenance of a shared moral community.

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<sup>1</sup> <https://www.justice.govt.nz/justice-sector-policy/research-data/what-works/>

## Part 3: Building social capital

In part three I review how the justice system can help build social capital. The key concepts here are legitimacy and trust.

One way of conceptualising the legitimacy of justice institutions divides the concept into two elements: moral alignment and moral obligation (Hamm et al 2017). Under this approach, a legitimate justice system is one that reflects the morality of its society and generates a felt obligation in that society's members to obey the justice system as a result.

Legitimacy is intertwined with trust in institutions. One way of understanding trust is as a willingness to be vulnerable to another, in expectation that you will not be taken advantage of. Trust in an institution is more likely when it is seen as legitimately holding power, and is expected to wield that power appropriately.

The greatest challenge to creating legitimacy and trust is the fact that people hold different values. The justice system must reflect public morality. Yet the justice system also creates public morality by determining the appropriate compromise between competing normative orders, when that compromise can not be found in civil society. This is why the arrow between social capital and the justice system in Figure 1 is bidirectional.

This bidirectional arrow also reflects the fact that trust in justice institutions is closely associated with trust in strangers. It is important to remember that the legitimacy and trustworthiness of justice institutions in large part reflects the moral cohesion of society. A cohesive society will share a common set of moral values and see its justice institutions expressing this collective morality. A divided society is more likely to see its justice institutions as serving partisan interests.

In the justice system, this point is often made by quoting one of the most famous 'Peelian principles' penned by the founder of the Metropolitan Police, Robert Peel, in 1829. He said that:

*'The police are the public and the public are the police; the police being only members of the public who are paid to give full time and attention to duties which are incumbent on every citizen in the interests of community welfare and existence.'*

In part three I argue that the extent to which the police, alongside judges, corrections officers and all others working in the justice system, are seen as instruments of public morality depends on factors at the constitutional, organisational and professional levels.

At the constitutional level, I argue that the most important challenge for justice is that many Māori view the justice system as untrustworthy at best, illegitimate at worst. For these Māori, the justice system represents the imposition of the alien morality of an alien public, resulting in what political theorists would describe as either coercion or domination.

That a section of the community views the use of public power as illegitimate is corrosive to social capital and wellbeing both. As Moana Jackson noted, quoting the Waitangi Tribunal for effect:

*"When one section of the community burns with a sense of injustice, the rest of the community cannot safely pretend that there is no reason for their discontent. That is a recipe for social unrest ..."* Wai 11, p51, quoted in Jackson (1988). p284

This sense of injustice can be mitigated somewhat at the organisational and professional levels, particularly through a focus on procedural justice. But the deepest issues are constitutional. The majority prefers individualistic, centralised constitutional norms, as well as the majoritarian constitutional norms that enable them. These norms are in ongoing conflict with the communitarian, localised norms of the Māori minority.

Scholars focused on indigenous rights emphasise the need to create zones of ongoing intercultural dialogue in colonial societies. There are many examples from other sectors of constitutional arrangements to ensure this happens. For example, co-governance arrangements for natural resources such as the Waikato River explicitly devolve authority to a locally defined group comprising both Māori and tauīwi.

Other sectors seek to protect indigenous rights by placing explicit requirements in legislation for adherence to treaty principles. This allows for use of the Courts as a zone of intercultural dialogue. The Waitangi Tribunal can also play this role, most recently in its finding that Corrections was in breach of the principle of protection in its report *Tu Mai te Rangī!*. Scholars such as Matthew Palmer have proposed a Treaty of Waitangi Court to further strengthen and protect this function.

In part three, I also describe how the constitution needs to balance two conflicting aims. To effectively ‘safeguard the freedom’ of everyone, the justice system needs to be empowered to act decisively. But to prevent the justice system from becoming a source of unfreedom, it also needs to be constrained by norms such as the separation of powers.

These constraints, while necessary, can also inhibit the effectiveness of the justice system at creating a sense that the justice system works for all of us. For example, a separation of powers, particularly when combined with New Zealand’s highly centralised and fragmented governmental machinery, contributes to long-standing problems of service co-ordination for people with complex needs, and problems of customisation for people with atypical circumstances, particularly if resolving these issues would create political risk.

Dropping down to the organisational level, these problems have been extensively diagnosed as generic to government by the Productivity Commission (2015), Better Public Services Advisory Group (2011), Advisory Group on Review of the Centre (2001) and others. But they play out in the justice system perhaps more than elsewhere, given a number of important architectural features unique to it. For example:

- Compared to devolved models such as the health and education sectors, justice agencies are highly centralised.
- There is very little use of arms-length delivery agents such as NGOs or Crown Entities.
- With the exception of lawyers, the justice professions are regulated by their hiring organisations, which also exercise monopsonist power.
- For all these reasons, the justice system is more sensitive to national-level, majoritarian concerns than to local, minority preferences.
- The usual problems of inter-agency co-operation are magnified somewhat by the constitutional independence of the judiciary, the parole board, and the operational independence of the police.

These architectural features can stand in the way of the three main mechanisms that justice organisations can use to inspire trust and confidence: procedural justice, co-design, and preventing abuse of powers.

Of these three mechanisms, the best evidenced is procedural justice. Researchers have found that people are more likely to accept the outcome of a justice process as legitimate, regardless of the outcome, if the following four aspects are present in the encounter:

- **voice** – people want to have an opportunity to tell their story
- **neutrality** – people react to evidence that the authorities they are dealing with are neutral
- **respect** – people are sensitive to whether they are treated with dignity and respect, and to whether their rights as citizens are respected
- **intentions** – people react favourably to the judgement that the authorities are sincerely trying to do what is best for the people with whom they are dealing.

That procedural justice is central to creating a sense of our shared belonging in a single moral community is emphasised by something called the *Group Value Model*. This model builds on the idea that justice system staff are representatives of the social majority group and their actions reflect broader community outlooks (Brouwer et al 2018). As such, they play a key role in communicating messages of belonging and non-belonging. People react strongly to justice system actions they perceive as unfair because it challenges their feelings of belonging to the social group the justice system is seen to represent. Conversely, fair treatment strengthens group association (Bradford et al 2015).

Procedural justice can be encouraged within an organisation through mechanisms such as leadership and communication, performance management towards that end, and workforce strategies aimed at building a capability and culture that emphasises fair treatment above all else.

It can also be encouraged by external means, particularly the regulation of justice agencies by bodies such as the Independent Police Conduct Authority, Judicial Conduct Commission and Ombudsman. While these regulatory bodies focus primarily on investigating instances of very poor practice, with sufficient resourcing and mandate there is the potential for these kinds of authority to expand their efforts towards identifying, supporting, and promoting best practice. The example of the Health Quality Safety Commission is one model of this approach in action. The developing Adverse Incident Learning System, modelled partly on the work of HQSC, is another route to encourage good practice at a system level.

Perhaps the most important point though is that some forms of justice are more amenable to procedural justice considerations than others. Newer forms of justice such as the Matariki Court, Te Pae Oranga, and Restorative Justice, each in their own way create more space for people to bring their voice to proceedings than the formal environment of the Court. These models of justice also have the major advantage of being more consistent with traditional Māori forms, as noted by Khylee Quince among others. This suggests that one of the most productive ways in which the justice system could advance a wellbeing agenda would be to continue expanding the role of these justice mechanisms.

## Part 4: Implementing a wellbeing approach in the justice system

In the final section of this paper I summarise some of the potential implications of the wellbeing approach for justice.

I first cover the issue of measuring wellbeing, rights and social capital. I argue that a measurement framework ought ideally to include rights, dynamic and distributional considerations, and alternative sources of data such as behavioural experiments, direct feedback on procedural justice, and privately held data.

I then look at the related issue of monitoring mechanisms to understand change. I discuss the plethora of overlapping reporting mechanisms on various aspects of wellbeing and human rights, and the difficulty of interpreting movements in a performance monitoring sense without robust statistical analysis. I build on this to consider what an investment cycle focused on wellbeing might need to consider.

In closing, I summarise what I take to be the three most important answers to the question posed in relation to any paper penned by a public servant: so what? These answers can be found in the themes of reinforcing universal values, placing fairness alongside effectiveness, and in partnership and devolution.

### Reinforcing inclusive values

New Zealand's constitutional arrangements have a highly majoritarian skew. But the social harms that the justice system deals with are concentrated in a relatively small minority. Given these two factors, there is always the risk that the justice system is more sensitive to the interest of the majority in controlling that minority than it is to the requests by that minority to have their needs for justice met as citizens deserving of 'equal concern and respect'.

Nowhere is this risk more apparent than in relation to Māori, many of whom view the justice system not as the common foundation for our common freedom, but as the illegitimate source of their unfreedom. The longer this situation continues, the greater the threat to our moral cohesion as a society, and with it our wellbeing.

Taking rights seriously and creating normative arenas where we are forced to seriously consider our universal claims to dignity, in whatever cultural context they are expressed, are the main ways to demonstrate a commitment to universal rather than majoritarian justice. There are many ways to achieve this, from the greater use of restorative models through to legislative, regulatory and co-governance approaches.

### Fairness alongside effectiveness

Some aspects of the justice system can be feasibly understood in narrowly economic terms, as the cost-effective provision of services to deliver the public good of safety. But throughout this paper I highlight how this language risks mischaracterising and underestimating the value of the justice system. The justice system does not directly improve people's wellbeing in the way that the schooling system does. But it provides an essential function as the ultimate guarantor of our moral cohesion as a society, as the institutional backstop ensuring our moral trust in each other. This value is political and sociological as much as economic.

It is easy to take this trust for granted, but we would sorely miss it and find it hard to restore if it were to be lost. The fairness of our justice system is determined in many ways by our constitutional arrangements, and how effectively they enable the day-to-day balancing of demands from competing normative communities. But the fairness of our justice system is also determined in the very practical, day-to-day interaction of our ‘street level bureaucrats’ with the public. Alongside Māori, perhaps the greatest area for development in this sense is that of victims, particularly those who have experienced sexual or violent victimisation.

The policy implications include a focus on supporting our people through tools, leadership, culture and performance arrangements that emphasise fairness as much as effectiveness.

## **Partnership and devolution**

The final theme I want to emphasise is that of partnership and devolution. Justice is co-produced between government and civil society, and civil society does most of the hard work. A society high in social capital is largely self-regulating. It is Just, but without recourse to the justice system.

This is perhaps the strongest argument for partnership and devolution. Every time the justice system is asked to resolve a civil dispute, or administer a divorce, or investigate a crime, it is because the social fabric has failed. It has failed in two ways. It has failed because moral norms have been flouted, or can not be agreed, and because an appropriate resolution has not been found. Yet if the justice system tries to create justice unilaterally it will tend to fail. The justice system has neither the time nor the information to resolve every dispute in society.

Perhaps the best way to understand the value of the justice system is as a mirror, as a space for reflection. Like so many classic American books, plays and movies, such as *12 Angry Men* and *To Kill a Mockingbird*, in each case it is not only the defendant on trial. In a deeper sense in these works, America is on trial, or in our case Aotearoa. Each case invites reflection at multiple levels. Beyond the legal questions like culpability and remedy lie social questions, like what moral flaw is there in the individuals involved? In their relationship? In their broader micro-social context, their families, peer networks, employers? Why have these networks not created assent to pro-social norms? And at a higher level, particularly in relation to Māori offending, in what ways might our macro-level social, political and economic order be making it harder for individuals, families and whānau to build the capabilities they need to live lives of flourishing? In general, why has the social accord failed here?

These questions will never be answered to everyone’s agreement. They will continue to be posed anew time and again, in every age. But this matters little. In this paper I argue that our ongoing wellbeing as a society depends not on how well we answer these questions, but in how earnestly we all seek to, in the never-ending pursuit of a just society. Under this view, a well-functioning justice system creates space and tools for society to ask these questions, to help re-knit its moral fabric following moral failure.

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# Introduction

## Purpose

Wellbeing and social capital are central concepts in the policy discourse of the new government. This discussion paper makes a first attempt at exploring these concepts from the perspective of the justice system. The aim is to support an ongoing conversation within the justice system, and between the justice system and wider stakeholders, about:

- The main ways in which the justice system supports wellbeing.
- The main ways in which social capital supports the work of the justice system.
- How the justice system can build social capital.
- How performance monitoring, investment allocation and other business processes could be modified to ensure an ongoing focus on wellbeing.

## Context

### *Government priorities*

The concept of wellbeing is front and centre of the new Government's plans. As noted by Grant Robertson, Minister of Finance, in his IPANZ speech of 15 February 2018:

*"We will be a compassionate Government that measures itself by how well it improves the wellbeing of its people... This Government's programme is underpinned by an economic strategy focussed on improving the wellbeing and living standards of all New Zealanders through productive, sustainable and inclusive growth"*

This general focus on wellbeing can be seen throughout the Government's approach. For example:

- There is a children's wellbeing strategy.
- Social policy is being managed by a 'social wellbeing committee' of cabinet.
- Budget 2019 is being billed as a 'wellbeing budget'.
- Statistics New Zealand is leading the 'indicators New Zealand' project to improve our measurement of wellbeing.
- Various reform programmes across education, health, justice and elsewhere are directly or indirectly seeking to improve the wellbeing of New Zealanders.

### **Prior work on wellbeing and social capital in the public service**

Wellbeing and social capital are not new ideas in the New Zealand public service, even if their recent rise to the highest level of prominence is somewhat novel. A major step forward in the public service's thinking about these issues is the Treasury living standards framework (Gleisner et al 2011). This framework has recently been revisited with a more explicit wellbeing lens (King et al 2018, Smith 2018 etc). Both draw heavily on OECD-led work on measuring international wellbeing through the Better Lives Index (<http://www.oecdbetterlifeindex.org>).

Much of the substantive work on social capital and wellbeing in the NZ public service has focused on the difficult issue of measurement, including the recent Treasury papers. Statistics New Zealand has invested considerable effort over the years grappling with this issue, such as with their major 2008 publication, *Measuring New Zealand's Progress Using a Sustainable Development Approach*. Statistics NZ continue to grapple with this issue, most recently with the Indicators Aotearoa working group.

If equivalent effort has gone into considering how best to improve social capital, it is not always reflected in the same quantity of publication, with some notable exceptions such as the 1997 DIA report *Building Strong Communities: A Thinkpiece*.

### ***Work on wellbeing, social capital and justice in New Zealand***

The relevance of social capital for the operation of the justice system has seldom been explicitly considered in New Zealand. In 1997, Ministry of Justice staff member Richard Joblin contributed a chapter to one of a series of three books edited by David Robinson at the Institute of Policy Studies (Robinson 1997, 1999, 2002). Reflecting the focus in these volumes on voluntary associations as a key aspect of social capital, Joblin focused on the connection between social disorganisation theories of crime and Robert Putnam's definition of social capital.

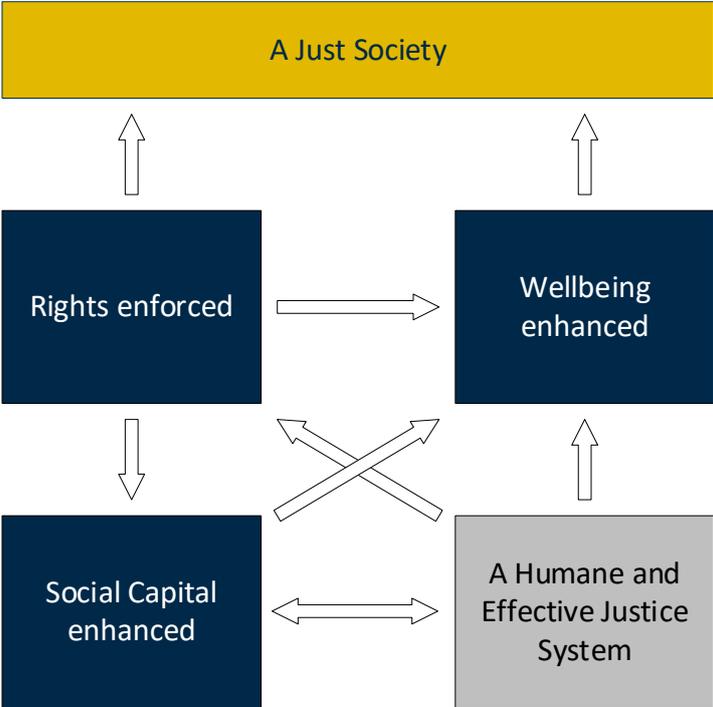
At the same time, many of the concepts within the broader idea of social capital, such as trust in institutions, have been central to the thinking of the justice system for many years.

This working paper aims to build on Joblin's initial application of social capital to the NZ Justice system, as well as numerous other NZ and international papers exploring related concepts. I apply a broader definition of social capital than Joblin, reflecting the broad definition in the recent living standards discussion paper (Frieling 2018). As well as considering social disorganisation, I will consider a range of other aspects of social capital and wellbeing, including institutional trust, norms, and anti-social networks.

### Approach to this paper

This paper is in four parts, organised around the conceptual framework illustrated in Figure 3.

Figure 3: Conceptual framework for wellbeing, social capital and the justice system



The first three parts explore the conceptual links between justice, social capital and wellbeing. The final part considers the practical implications. I de-emphasise measurement as a focus and concentrate on social capital and wellbeing as a policy framework. The purpose of this paper is to understand the links between the concepts, and the high level policy implications of these links.

In the first substantive part of this paper, I define the relevant concepts and highlight their philosophical underpinnings. I focus on both the instrumental and intrinsic value of protecting rights in the context of the justice system. Protecting rights can enhance wellbeing and contribute to building social capital, but the goal of a just society is served by enforcing rights even where doing so does not have an instrumental benefit in terms of wellbeing.

In part two I cover the variety of different ways in which social capital supports the wellbeing outcomes the justice system seeks to promote. I make the claim that social capital is a more important determinant of justice-related wellbeing than are the activities of the justice system.

This sets the scene for the longest and most important part of this paper, part three. In part three I consider the role that the justice system plays in building social capital, primarily through creating trusted institutions that fairly resolve conflict, as well as promoting pro-social norms and networks.

In part four, I apply the various concepts from the first three parts to develop a first approximation of a wellbeing agenda for the justice system, covering issues such as performance measurement, investment allocation and policy settings.

# Part one: Definitions and conceptual framework

Justice, social capital and wellbeing are enormous conceptual spaces that it is difficult to deal with in the whole. To help organise this paper, I work in this first section to define these areas and sketch their philosophical origins.

I start by defining the justice system broadly as covering a wide range of organisations as well as the law that shapes, empowers and constrains them. I define wellbeing in light of the capabilities approach, but note that more needs to be done to align this individualistic view of wellbeing with the view of wellbeing in te ao Māori. I interpret social capital in line with collective action theory, setting up a focus on regulatory mechanisms in the remainder of the paper.

I also raise the question of the appropriate role of the state in relation to both social capital and wellbeing. There is no one answer to this question. The reality of normative conflict emphasises the importance of creating fair institutions to help resolve these conflicts.

Having completed these definitions, I then sketch the way in which justice institutions contribute to wellbeing both directly, via control, and indirectly, by influencing norms and networks.

I complete part one by arguing that the value of the justice system can not be fully captured under the concept of wellbeing. I argue that much of the value of the justice system lies in the intrinsic value of enforcing rights. I argue that this is cause for concern because the latest iteration of the living standards framework does not include any mention of rights or offer any guidance as to how to resolve divergent views of value from the wellbeing and rights perspectives.

## Defining wellbeing, social capital and the justice system

Wellbeing and social capital are broad concepts with no universally accepted definition. For the purposes of this paper I will take as a starting point the living standards discussion papers on wellbeing (King et al 2018) and social capital (Frieling 2018).

The justice system is also a loose term that can be used to demarcate different groups of functions, agencies and behaviours, so for clarity I define my use of 'justice system' here. I also clarify some important concepts relating to wellbeing and social capital that we will draw on alongside the Treasury framework.

### Justice system

For the purpose of this paper I adopt a broad definition of the justice system. Functionally, this includes:

- The Crown-Māori Relations Roopū, including treaty settlements and post-settlement partnerships between crown and Māori

- Policing, including:
  - Crime prevention
  - Emergency first response
  - Investigation and prosecution, including youth aid
- Courts and Tribunals, including:
  - Civil justice, including the environment court, the disputes tribunal etc.
  - Family justice
  - Criminal justice, including the youth court, legal aid, the public defence service and collections
- Specialist justice sector agencies and officers, including:
  - Justice-funded NGOs such as Victim Support
  - Electoral Commission
  - Human Rights Commission
  - Independent Police Conduct Authority
  - Crown Law
  - Serious Fraud Office
  - Law Commission
  - The Coroner
  - The Ombudsman
- Corrections, including:
  - Prisons
  - Probation
  - Rehabilitation and Reintegration, including NGO-provided services
- Oranga Tamariki in its Youth Justice capacity

These functions and organisations are intertwined with legislation and common law, organisational culture, and the overall machinery of government, which are also in scope. It is also important to note the boundary between justice system institutions and other regulators such as the Commerce Commission and Financial Markets Authority is somewhat fluid. Much of what I cover in this paper can equally apply to these para-justice institutions.

Although the scope of this paper is very broad, I spend a disproportionate amount of time on criminal justice, reflecting my own area of relative expertise. And when it comes to criminal justice I focus in this paper primarily on the adult justice system (for crimes committed by those aged 18 or older), as the youth justice system falls within the children's wellbeing strategy being led by Oranga Tamariki and DPMC.

## **Wellbeing and ethical theory**

Following the OECD, Smith (2018) suggests that wellbeing is best understood as an individual-level state. Smith emphasises that this is not to deny the fact that individuals are nested in families, communities and other groupings, and are dependent on those groups for their individual wellbeing. It is just to emphasise that the state of being well is ultimately experienced and valued by individual people. Wellbeing is further defined as dynamic, measured at a point of time, but changing over time.

The focus on individuals reflects standard philosophical approaches to wellbeing. It is standard in ethics to distinguish between three main theories of well-being (Crisp 2017). Each type of theory concerns itself with defining what is ultimately good for an individual person, but defines the good in different ways. Hedonistic theories focus on the balance of pleasure over pain, and so focus on internal affective states. Desire theories focus on the external realisation of internal desires – wellbeing under this approach is the experience of fulfilling desires, or preferences. The final type of theory is known as the ‘objective list’ theory, lists a series of states or experiences that are good as ends in themselves, and not commensurable with other items on the list.

Wellbeing theories are evaluative, in that they specify grounds on which to evaluate whether someone’s life is good. But these competing theories of wellbeing have great relevance for moral theories as grounds for determining the rightness or wrongness of actions. Moral theories that emphasise wellbeing are generally known as welfarist theories.

Traditional economic theory is grounded in utilitarianism, a type of welfarist theory. Under this theory, economic arrangements are good to the extent that they contribute to the satisfaction of preferences or the creation of pleasure (utility). This reduces all good things to a single maximand, and so can be described as a monist approach.

Treasury (2018), largely following the OECD, define wellbeing as comprising 12 dimensions. In doing so, they have moved away from the hedonistic/desire fulfilment approaches in traditional economics, and aligned themselves with objective list theories of wellbeing. The 12 items on the list produced by the Treasury are:

- Income
- Jobs
- Health
- Housing
- Education
- Environment
- Cultural Identity
- Life Satisfaction
- Safety
- Work/Life
- Community
- Civic Engagement

Whereas traditional economic approaches are grounded in utilitarianism, the objective list approach is favoured by a competing approach to ethics, the capabilities approach.

The philosophy of capabilities was developed by Amartya Sen (eg, 2009), Martha Nussbaum (eg, 2011) and others. The capability approach defines a good life as one where one has the ‘substantive freedom’ to live the kind of life he or she has reason to value. Under this

approach the justification for the various items on the list is not that they produce utility, but that they are essential for creating meaningful choice about how to live.

If we are interested only in measurement, then as an empirical matter, Smith (2018) notes that it doesn't make much difference whether we favour a utilitarian or capabilities approach – what is good for substantive freedom tends to be good for utility as well.

But from a broader policy perspective the distinction between utility and capabilities is important. A focus on freedom rather than utility has major implications for the analysis in this paper, because of the fact that our freedoms can come in conflict with each other. Resolving conflict is at the heart of the justice system so this is a vital point that I will cover throughout this paper.

There are two other major issues with the Treasury approach to wellbeing that I will address in this paper. The first is the question of how to deal with moral imperatives driven from a concept of wellbeing that is not grounded in individual people. For example, Pacific and Asian New Zealanders often hold more collectivist views than pākehā (Thomsen 2018, Yong 2018, Superu 2016). And Māori approaches to wellbeing are often grounded in the interconnectedness of people and place (TPK and Treasury 2019, UC Aotahi 2019), rather than being located in any particular node of that relational nexus.

How to manage divergent views between Māori and non-Māori about the rightness or wrongness of actions is ultimately a constitutional issue grounded in the Treaty. I cover this point extensively in section 3.

The second challenge to the Treasury approach to wellbeing is the question of how to deal with competing normative claims from non-welfarist perspectives. Perhaps the most important example of this is of claims arising from a rights-based view of the world. I cover this point in detail further on in section 1.

## **Social capital and social theory**

In the Treasury framework, the level and distribution of individual wellbeing states is facilitated by the stocks of four types of capital – social, natural, human and physical/financial. This paper focuses on social capital as the key determinant of justice-related wellbeing and the main form of capital influenced by the justice system, although I also note links to the other capitals where relevant.

Treasury (2018) defines social capital as *“The social connections, attitudes, norms and formal rules or institutions that contribute to societal wellbeing by promoting the resolution of collective action problems among people and groups in society.”*

The importance of social capital in the Treasury framework stems from the fact that actions that result in wellbeing often require co-operation, and co-operation requires trust. For example, a modern economy can not function well unless people and organisations are able to enter into trusting relationships with suppliers, creditors, and customers with confidence that those relationships will be reciprocated. People both need to trust enough to enter into contracts, and to have that trust repaid.

As a form of social theory, social capital provides a framework for understanding how people can live more or less co-operatively in society with one another.

Problems of co-operation in economic contexts are often studied within the framework of *collective action problems*, or what Bo Rothstein calls ‘the problem with many names’ in the social sciences.

Collective action problems, most famously the prisoner’s dilemma, arise situations where co-operation is in everyone’s interests, but where an individual participant will be better off if they can convince the others to trust them, but then betray them. The Nash equilibrium in such a case is one where everyone betrays everyone else, thus making everyone worse off than if they all co-operate.

In the real world, the Nash equilibrium sometimes prevails, but often it does not. In a review of collective action research in relation to social capital, T.K. Ahn and Elinor Ostrom (2008) highlight three mechanisms that can make collective action more likely. These mechanisms are trustworthiness, networks and institutions.<sup>2</sup>

### ***Trustworthiness***

There are many different ways to define trust, and what it entails is debated extensively by philosophers (McLeod 2015). The position that Ahn and Ostrom take as economists is that trust involves a relationship between a trustor and a trustee. The trustor entrusts the trustee with an obligation to do some thing. For example, in a contract for service, the trustor entrusts the contractor as trustee to perform the agreed service. A person is trustworthy if, in their role as trustee, they prefer to do the right thing and fulfil their obligation. Trust is a choice to entrust someone, typically grounded in an assessment that a trustee will fulfil their obligation.

People are more likely to make an assessment that trust is appropriate in a population with people who are by and large trustworthy. In the language of economics, one way of understanding ‘trustworthiness’ is that of having a utility function where preferences for co-operation are weighted highly. Outside the realm of economics, we might more plainly say that people are trustworthy if they have a good moral sense, if they are prepared to fulfil their moral responsibilities, be they general (don’t steal) or specific (keep your word).

The link to morality is important here. Eric Uslaner (2002) has created a distinction between *strategic trust* and *moral trust*. Strategic trust is a purely intellectual assessment that someone is likely to fulfil their role as trustee. In contrast, moral trust is ‘...based upon a *fundamental ethical assumption: that other people share your fundamental values.*’

A sense of belonging to a shared moral community promotes trust, but is also important because it paves the way for altruism. Robert Putnam (2002) considered that ‘*altruism (and honesty...)* is an important diagnostic sign of social capital.’ To quote Putnam quoting Alexis de Tocqueville, altruism reflects ‘*self-interest properly understood*’, because short-term altruism supports long-term self-interest.

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<sup>2</sup> Ahn and Ostrom take these elements to actually *define* social capital, but this is just one of many competing definitions.

This is something of a departure from the general observation that self-interest co-ordinated through markets tends to maximise wellbeing, via the invisible hand. This insight is perhaps the most famous of Adam Smith's, but as Sen repeatedly stresses, he was fully aware of our moral character as well. Nearly twenty years before *The Wealth of Nations*, in *The Theory of Moral Sentiments*, he stated:

*“How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortunes of others, and render their happiness necessary to him, though he derives nothing from it, except the pleasure of seeing it.”*

The other aspects of social capital can be usefully understood as mechanisms to try and encourage the development of this moral trust that is at the core of social capital, this sense of being in a shared moral community, where we each 'render (each other's) happiness necessary to (us)'.

## **Networks**

The second mechanism promoting trust is the social network. Networks can facilitate co-operation even in the absence of the intrinsic (moral) motivation of a trustworthy person. This is because networks create an extrinsic (strategic) motivation to maintain a good reputation. Short-term cheating may have long-term negative consequences if it limits one's ability to enter in future agreements with those in your network(s).

The importance of reputations within networks goes a long way to explain historical patterns of commerce that were often restricted to within an ethnic, religious or familial network where reputational consequences could be enforced. For example, Maghribi Jews dominated long-distance trade in the medieval Mediterranean world because they shared a dense network of social ties making reputational consequences substantial (Greif 1993).

Dense social ties can reduce the need for formal legal remedies in modern societies too. For example, Ramseyer (2015) has shown that Japanese prefectures with higher levels of social capital experience fewer contract defaults, lower levels of litigation, and lower levels of bankruptcy procedures.

It is important to distinguish between tight networks of people who know each other directly, and loose networks of people in an 'imagined community' such as an ethnic group, nation, or region.

Tight networks can facilitate high levels of what is called in-group or particularised trust. People generally trust those that they know. If people are connected to many other people, or people who themselves are high in various kinds of capital, then this 'private' social capital is a capability held by an individual that they can help them live a life that they have reason to value, to use the language of the capabilities approach, or that more simply generates utility.

This type of micro-level social capital, the type that is held privately or in small groups or clubs, is called bonding social capital (Putnam 2002, Halpern 2005, Frieling 2018), or relational social capital (Esser 2008). The distribution of this type of social capital is important to understand the distribution of individual-level wellbeing. For example, loneliness harms wellbeing and can be understood as a lack of private social capital. It is also important to understand the externalities that may emerge from the distribution and nature of private

social capital. We will discuss this below in relation to what is sometimes called 'anti-social capital', such as that of a gang. We will also discuss this in relation to the distribution of power in society and what this means for institutional design.

At a macro-level, the most important type of social capital is called *bridging social capital* (Putnam 2002, Halpern 2005, Frieling 2018), or *system social capital* (Esser 2008). This type of social capital reflects weaker ties between individual groups or within a larger 'imagined community' (Bell 2016) or people who may never have met but nonetheless share an identity or value system such as a nation, political movement or ecumenical religious organisation.

This type of social capital is measured by *generalised trust*. A country is high in bridging social capital the extent to which people who don't know each other personally are prepared to trust each other.

Generalised trust is perhaps the central concept in social capital research because the level of generalised trust in a country is a strong predictor of the level of economic performance and wellbeing generally. Generalised trust is strongly correlated with other dimensions of social capital so is often used as a proxy measure or synecdoche for social capital overall.

Generalised trust is also known as *outgroup trust*. An example of how this is defined comes from Delhey and Welzel (2012) who define outgroup trust as the average trust in three outgroups (people one meets for the first time, people of a different nationality, people of a different religion).

Empirical work shows that outgroup trust and ingroup trust are distinct, though related. This finding has been produced using data from the World Values Survey (Delhey and Welzel 2012), German Socio-Economic Panel (Freitag and Traunmuller 2009), and United States (Uslaner 2002).

The World Values Survey data helps demonstrate cross-country variation in trust. For example, Delhey and Welzel (2012) find that ingroup trust is high in nearly all countries, with much greater variation in outgroup trust. In countries where outgroup is high ingroup trust is also high, but many countries with high ingroup trust do not have high outgroup trust. In other words, they find that ingroup trust is a necessary but not sufficient condition for outgroup trust. As will be discussed in the main body of this paper, much of social capital research is focused on the determinants of outgroup trust.

Because our modern societies are so large and complex, dense networks are no longer sufficient to facilitate trust. Because in a large society most people can't know each other by reputation (there are too many of us), strategic trust is unlikely to be sufficient. In creating his distinction between strategic trust and moral trust, Eric Uslaner (2002) notes that outgroup trust tends to be moral trust. This suggests that the challenge of generalised trust is about creating and sustaining a sense that everyone in society belongs to a single moral community with shared moral norms that have been internalised by its members.

In contrast to bonding social capital, bridging social capital is a public good: it is non-rival and non-excludable. Anyone can access it, and by accessing it one does not diminish it to a point where others can not also access it. Aspects of social capital such as generalised trust and a pro-social national identity clearly have these properties – they benefit everyone.

## *Institutions*

The final mechanism to facilitate trust under Ahn and Ostrom's framework is formal institutions. In Ahn and Ostrom's framework, institutions serve two purposes. One is punishment, to reduce the material incentive to cheat. For example, by making contracts enforceable, an effective court system can reduce the perceived benefits of breaching contract.

The second purpose is to supplement norms and networks by providing information about the past behaviour of people and organisations and make this reputational information available beyond the immediate networks of the people involved. A combination of experimental work and evolutionary modelling shows that improving information about people's prior trustworthiness exerts pressure to increase the proportion of people in the population who are trustworthy (Ahn 2005).

From the perspective of collective action theory, where the focus is on what might facilitate voluntary co-operation between actors for mutual benefit, these two functions may provide sufficient explanatory power. But from a wider perspective institutions, particularly those of government, are designed to do far more than this. They help pool risk and redistribute wealth. They help resolve conflict and regulate local social networks. They aim to correct for market failure. And the ways in which government does these things can all affect how people view each other, how much they trust each other, and the capabilities they each have to pursue their own vision of the good life.

So to fully appreciate the linkages between justice, wellbeing and social capital, we also need a theory of the state.

## Social capital, wellbeing and theories of the state

The Treasury living standards framework is relatively silent on the role of the state in relation to wellbeing. The LSF foregrounds the measurement of the stocks of capital and flows of wellbeing. To date there has been somewhat less focus on the appropriate role of Government versus other actors in society in relation to these stocks and flows. This work will be necessary to flesh out the LSF as a policy framework as well as a measurement framework.

This will require us to confront the ever-fascinating interface between economics and politics, encompassing as it does thinkers as diverse as Adam Smith, Karl Marx, Friedrich Hayek, J.S. Mill and Amartya Sen. This is only appropriate, given that social capital is a concept that has been developed and utilised by both economists (such as Stephen Knack) and political scientists (such as Robert Putnam).

Political science is the study of power. So it is not surprising that one of the critiques that those working at the intersection of politics and economics have made of social capital as conceived by economists is that it underplays the importance of power relationships in determining people's position in society and associated access to resources (eg, Fine 2010).

Power is absent from the discussion of social capital above, and in the Treasury papers (Frieling 2018). This is perhaps because economics focuses on individual choice, taking the reasonable view that an individual is best placed to know their own preferences. Ahn and Ostrom's conception of social capital is grounded in this methodology, by building up a view of society grounded in people's preferences and their voluntary choice to contract into certain mechanisms to facilitate co-operation that is mutually beneficial.

This allows for a minimal conception of institutional power based on the notion of voluntary consent to that power. For example, a court's enforcement of a contract is legitimate under this view because the two parties entered the contract willingly. For the same reason, the criminal justice system can legitimately punish and seek to deter violence as violence creates unconsented harm.

The picture I am describing of the state is that of the classical liberal or libertarian, focused on protecting freedom from interference. This picture implies a relatively small legitimate role for the state, as the circumstances in which all people are willing to consent to the authority of the state are likely to be very few. Under a classical liberal view, this is appropriate as the state is another source of (potentially very dangerous) source of interference in the freedom of the individual.

Under this view, the state should not seek to build wellbeing or social capital at all, unless everyone in society wishes it to. The appropriate role for the state under this conception would be limited to measurement and communication of trends.

The minimal state may be good for this definition of liberty, but it is not necessarily good for generalised trust or wellbeing. Those countries that do best on indices of social capital and wellbeing, such as the Nordic countries, tend to have implemented a much broader conception of the role of the state.

Broader conceptions of the state that do not rely on direct consent have to deal with the question of how to justify limiting people's freedom without their consent.

Answers to this question often start with one of the oldest problems with liberty, known as the paradox of freedom.

As summarised by Popper (1945), the paradox of freedom is that:

*“...unlimited freedom leads to its opposite, since without its protection and restriction by law, freedom must lead to a tyranny of the strong over the weak. This paradox, vaguely restated by Rousseau, was solved by Kant, who demanded that the freedom of each man should be restricted, but not beyond what is necessary to safeguard an equal degree of freedom for all.”*

In other words, the paradox is that ‘equal freedom’ can only be guaranteed by restricting freedom, by mitigating to some extent the power we can hold over each other. To work in the justice system is to live with this paradox every day. Classical liberalism resolves this paradox in a narrow way by focusing on what Isaiah Berlin (1969) called ‘negative liberty’, ie, *freedom from* coercion. A right to freedom from violence, for example, entails obligations to others not to do violence. A right to freedom of property entails obligations not to steal. A narrow conception of freedom means that an ‘equal degree of freedom’ can be guaranteed with a limited state.

Broader conceptions of the state look to expand the definition of freedom away from the simple freedom from coercion towards what Isaiah Berlin called positive liberty, ie, the *freedom to* flourish. Positive liberty is something of a two-edged sword: the further we expand the definition of the equal freedom we want to safeguard, the further we each need to accept restrictions on our own freedom. Indeed, Berlin argued that positive liberty, though important, can be misused rhetorically to subsume individual agency into a notion of the collective will of the nation or some other grouping, and so needs to be balanced with negative liberty.

Either way, if we think the state should have a role in building wellbeing then the debate can be usefully framed about how expansively we wish to define the freedom we are each entitled to have safeguarded against the power of others. The capabilities approach implicitly uses this framing, by suggesting that a just society is one in which we guarantee each other a reasonable level of capability, ie, substantive freedom, to live a life worth living. This underlies Sen’s concept of development as freedom, as economic development can be understood as expanding society’s stock of substantive freedoms.

Utilitarianism can also be used to by those that wish to argue for the state as a means to adjust access to resources, by trading off reductions in the welfare of some people if that results in greater benefit for others. Indeed, cost-benefit analysis can be seen as performing this function.

Under this conception of the state, the relevant role might be for the state to simply calculate the course of action that will maximise the capitals and societal wellbeing, and act accordingly. But some of the disadvantages of this conception of the state include that:

- The wellbeing impact of certain policies is often highly uncertain, or difficult to value using cost-benefit analysis.
- Utilitarianism is inconsistent with individual rights, so can support trading off the welfare of a minority in the interests of a majority.

- Utilitarianism is illiberal in the sense that it relieves individuals of much of their responsibility to identify and pursue their own version of the good life.

This is where the language of the capabilities approach, emphasising as it does freedom, comes in useful when using the LSF as a policy framework. Rather than seeing utility as the maximand for society, the capabilities approach implies that substantive freedom is the maximand for society, and individual utility as a responsibility of the individual to create with their freedom.

It is doubtful whether there is any one right answer to what freedoms we owe each other, and it would be of doubtful appropriateness for the public service to advocate for one view over another. But foregrounding these different conceptions of the role of the state highlights the reality of normative conflict in society. People have very different personal views about what their responsibilities are to each other and the extent to which these obligations should be enforced by the state, particularly when those people have different levels of economic or social power in relation to each other. For example, landlords are likely to have systematically different views about what ethical obligations they owe their tenants than those tenants do.

For this reason, universal consent is a very high bar for legitimising action by the state or any other institution. As jurist Jeremy Webber says in relation to lawmaking:

*‘all law is concerned with establishing a collective set of norms against a backdrop of normative disagreement, not agreement. It necessarily contains mechanisms for bringing contention to a provisional close, imposing a collective solution.’ p167*

Utilitarianism and the capabilities approach provide normative discourses that can be used to try and legitimate certain policies, to justify the collective solution that is imposed. Besides these two, there are many other philosophical perspectives on what makes power legitimate in a normative sense, based on grounds such as voluntary contract, public reasoning, participation rights, and so on (Peter 2017).

For this paper we can largely skirt around the significant complexity of normative theories of political legitimacy and focus on legitimacy as a descriptive concept. We can make this move because we are interested in legitimacy as a prerequisite to the generalised moral trust that constitutes social capital.

Descriptive accounts of political legitimacy, following Weber (1990[1918]; 1964) tend to focus on whether people accept authority and the need to obey its commands. Under this view, the ultimate test is whether the state’s authority to enact those policies is accepted as legitimate in practice by people who do not personally favour the policy. This legitimacy is essential for the maintenance of generalised trust, and wellbeing with it.

If power is exercised in a way that undermines the legitimacy of the authority, then the collective normative solutions imposed will be unlikely to be accepted or internalised by those who view the decision as legitimate. Furthermore, a lack of legitimacy can see a social division open up between those groups in society whose preferences are reflected in the imposed solution and others, reducing out-group trust between them.

Questions of political legitimacy are clearly of central importance to the justice system, as it holds power like no other part of the state to infringe people’s liberty. The justice system, and the government with it, can only legitimately enforce norms, be they in legislation or

elsewhere, if their authority to do so is viewed as legitimate by the public, irrespective of their impact on wellbeing. The specifics of this challenge for the justice system are detailed in part three of this paper.

For this introductory discussion, it is important merely to note how fundamental the issue of normative conflict is to the concept of social capital once it is understood as a concept in both political and economic theory. Jeremy Webber highlights that all collective norms must be imposed somehow, and represent 'peremptory closure' in that the collective solution will rarely be that one which each individual would have chosen if the choice was theirs alone. But a legitimate solution is one that people acquiesce to, even if they retain their right to continue advocating that different types of collective solutions be imposed in the future.

In the main discussion of this paper I highlight how each case that the justice system deals with is a zone of normative conflict, and the value created by the justice system is more about maintaining that acquiescence to the imposition of collective norms, and with it maintenance of a single moral community, than it is about the direct impact on wellbeing of each particular resolution.

For now I highlight that at a policy level, normative conflict about the extent to which the state should seek to advance wellbeing, and whose wellbeing it ought to advance, also needs to be managed. This is a general issue with the living standards framework that goes beyond the justice system. It is also one that affects the justice system, because although the justice system is involved in negotiating order in cases of normative conflict on the margin, its main role is enforcing the collective solutions that are decided upon by Government generally. If Government does not operate in a way that achieves legitimacy, the justice system will never be able to rebuild that legitimacy by itself.

At this highest level of decision making, one of the key tensions that has been debated by political theorists is between populist and liberal conceptions of democracy as a source of legitimisation (eg, Riker 1982).

The populist notion of democracy is usually traced to Rousseau and his idea of the general will. Populism has also been advanced by another thinker at the interface of politics and economics, Joseph Schumpeter, as the rule of the majority, as protected by fair competition for that power.

This view is perhaps closest to New Zealand's version of democracy, with its strong constitutional norms of parliamentary sovereignty and representative democracy, relatively unconstrained by international standards, with weak local government, no upper house, no supreme law and so on.

But the populist view of democracy creates risks of majority tyranny, whereby the preferences of a majority take no account of the interests of a minority who may suffer great harm from the majority if not protected by other democratic mechanisms (like non-derogable rights). In addition, populist models of democracy and the associated idea of elections determining the 'common good' tend to find little favour with political scientists working in the social choice tradition, who use mathematical models to demonstrate there are significant problems of coherence with any procedure for aggregating individual preferences (List 2013, Shapiro 2003, Riker 1982).

This may seem all very abstract, but is an important foundational issue for the living standards framework. If the living standards framework is to move beyond the relatively less contested area of measurement, and start to be applied as a policy tool, then it will need to confront the challenge of how to consider trade-offs in the wellbeing of some people over others, and how to balance different views of how to resolve those trade-offs.

The traditional answer to this question has been to measure and illuminate the trade-offs, and provide that information to the democratically elected Ministers responsible for taking the difficult decisions.

Does this approach generate legitimacy for the decisions Government takes about people's wellbeing in the face of competing normative claims in the population? Is this a legitimate approach to applying the living standards framework? To a large extent, yes, but under a majoritarian constitutional set-up there is always the risk that legitimacy will be created for a majority, but not all citizens.

Liberal notions of democracy like that advanced by James Madison focus on voting as just one of many mechanisms necessary to protect individuals from tyranny, both that of the state and of fellow citizens. The liberal view of democracy emphasises civil and political rights as a protection against majority tyranny. I will develop this point in a moment, and return to this topic in depth below in the section about the constitutional position of Māori.

But to finish this section, there is one additional idea that is worth introducing, that of contestability. This idea is central to modern concepts of republicanism. These ideas have been expressed in various forms over the centuries but re-developed in a contemporary context by ANU scholars Philip Pettit and John Braithwaite. Contemporary republican theory aims to find a middle ground between egalitarian and libertarian theories, by defining freedom as non-domination. Even if we can not define an unambiguous common good, then we can at least hope to agree to non-domination as an interest we all share in common.

Pettit (1999) describes the state of domination as:

*'Having to live at the mercy of another, having to live in a manner that leaves you vulnerable to some ill that the other is in a position arbitrarily to impose... It is the grievance expressed by the wife who finds herself in a position where her husband can beat her at will, and without any possibility of redress; by the employee who dare not raise a complaint against an employer, and who is vulnerable to any of a range of abuses, some petty, some serious, that the employer may choose to perpetrate; by the debtor who has to depend on the grace of the moneylender, or the bank official, for avoiding utter destitution and ruin; and by the welfare dependant who finds that they are vulnerable to the caprice of a counter clerk for whether or not their children will receive meal vouchers.'* p4

In these example, there is no active coercion or obstruction. But Pettit argues we should still view people in these situations as unfree, as lacking dignity and agency, as people we cannot stand eye to eye with and acknowledge as fellow citizens.

This view of democracy suggests that an appropriate role for the state is to protect each person's freedom from domination, and in doing this free them to pursue their own wellbeing. Pettit emphasises that the key test here is not consent, as not everyone might consent to being prevented from dominating another, but is instead contestability.

This is a crucial point when it comes to the design of justice institutions that can claim to be democratic. Crimes, civil disputes, family justice can all involve the subjection of one person or group to the arbitrary sway of another. But to be just, the solution imposed by the justice system needs itself to avoid becoming another source of domination. The axiom of contestability does not protect people against interference: the justice system could not work if it relied on consent to its directives. But contestability can be understood as the source of rights to be heard, to be fairly considered, to have one's dignity taken seriously.

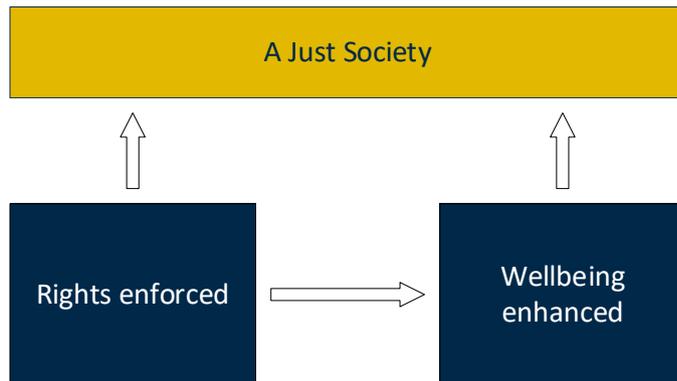
I will return to this point throughout this paper, particularly in section 3. For now, I highlight that the same point applies when it comes to the state's role generally in promoting wellbeing, as well as Treasury's and the rest of the civil service's role in advising on that aim. Advice on wellbeing and living standards is more likely to be seen as legitimate, and more likely to advance social capital, if developed in an open way where the advice is contestable by and sensitive to competing normative perspectives.

One perspective that it is particularly important to be sensitive to is that of human rights. Human rights are an essential mechanism for protecting against domination, and so can serve to generate moral trust. Social and economic rights can affect the distribution of wellbeing by creating moral duties to provide access to resources. And I argue that protecting rights is a necessary part of a just society, above and beyond wellbeing. We turn to these points now.

## A missing dimension: human rights

Implicit in the title of Amartya Sen's 2009 book on the topic, *The Idea of Justice*, the capabilities approach sees wellbeing as one component of a higher goal: making society more just. Under the capabilities approach, a just society is one in which people have a high standard of living, but also one in which rights, particularly the right to self-determination, are respected. As noted in Figure 4, I consider wellbeing alongside rights as joint determinants of societal justice.

Figure 4: scope of this section



This is important because much of the work of the justice sector is concerned as much with protecting rights as it is directly creating wellbeing. The protection of rights is fundamental to the work of the justice system.

In this section I argue that to fairly reflect the capabilities approach, to fairly reflect the value of the justice system, and be a fair framework to compare different investment and policy proposals, the Treasury needs to clarify how rights considerations should be considered alongside wellbeing considerations that are the focus of the living standards framework.

### What are rights?

There are many ways to define human rights. For the purposes of this paper I do not adopt the legal positivist's view of rights, namely the view that rights only exist if 'posited' in law. Rather I treat rights as ethical claims about our obligations to one another. I follow Sen (2009) in treating rights as entitlements that are critically important for individual freedom and that create a moral obligation for others to either refrain from certain actions, or to undertake certain actions. For example, to assert that my children have a right to life is to assert that others have an obligation not to take my life. To assert that my children have a right to free primary education, as the Education Act does, is to assert that society has an obligation to fund this education.

In other words, rights are a particularly strong type of moral claim that are necessary to resolve the paradox of freedom in relation to some entitlement that we see as an essential capability. By asserting the importance of rights in a policy framework alongside wellbeing, I am arguing that good policy advice needs to be sensitive both to arguments about duties as well as arguments about end states.

Rights claims are often in conflict. For example, treating free education as a right reduces people's right to do with their property as they wish, because funding free education entails

taxation. Or, as the old saw has it, 'our freedom to move our fists is constrained by the position of our neighbours' nose'.

As Dworkin (1977) notes, different political philosophies place different weight on different rights. Dworkin also notes that different political philosophies also differ on which moral goods to treat as 'rights' and which to treat as mere 'goals'. Goals, or interests, are objectives that would benefit an individual or individuals, but that do not create the same obligation on others. For example, an egalitarian might approve of treating primary education as a right and accept society's obligation to fund it, whereas a libertarian would likely treat primary education as a 'goal' that does not entail an obligation on others, because of the high weight libertarians place on property rights.

The capabilities approach goes further than most moral philosophies in advocating for a positive view of obligations, of treating capabilities as more than mere 'goals', but as entitlements that create a positive obligation on others to support.

As Vizard et al (2011) note in their review of the relationship between human rights and the capabilities approach, Martha Nussbaum goes further than Amartya Sen in defining capabilities explicitly as rights, in the sense of being non-negotiable entitlements rather than mere goals. In Nussbaum's words:

*"The idea that capabilities are not just optional needs to be hammered home in any way we can, since people are all too inclined to think that we may deny people this or that important thing in order to pursue aggregate wealth."* (Nussbaum 2011b)

Understanding capabilities as entitlements that create an obligation on others implies that many things can be considered 'rights' that may not explicitly be referred to as such. For example, eligibility rules for healthcare, welfare, legal aid, victim support can all be understood as implicitly defining 'rights' to a certain level of support in certain circumstances. And the level of taxation can be understood as representing society's level of accepted obligation to protect these rights over and above any protection that might be offered through family, friends or charitable networks in civil society.

In summary, the rights framework asks us to consider what the minimum level of freedom (capability) is that we have an obligation to provide each other, rather than seeking merely to increase some weighted or unweighted sum of freedoms (capabilities) in society.

### ***The hierarchy of rights***

Because rights are bound up in ethical judgements that differ between people, consensus on what to treat as a right and on the relative weight of different rights will always be a work in progress. To some extent all policy processes are exercises in balancing competing 'rights' and competing 'goals'. I do note, however, that in the international law context some effort has gone in to defining a 'hierarchy of rights' that attempts to codify the relative weight of certain commonly agreed rights.

The most basic rights are those accepted in most parts of the world as absolute, in that they can never be justifiably derogated. At the other end, reasonable people can and do take very different positions on how far our collective obligations are to advance social and economic 'goals' should go, ie, the extent to which we should treat these as 'rights' deserving of special protection and that create an obligation for us to protect.

The New Zealand legal framework reflects this. It is hard to imagine a situation in which New Zealand would endorse a breach of the right to freedom from slavery. But other rights, such as the right against discrimination under section 19 of the New Zealand Bill of Rights Act 1990, can be and are regularly ‘limited’ when to do so is necessary to advance a competing policy objective and when to do so can be ‘demonstrably justified in a free and democratic society’ as per section 5 of that Act.

Particularly in the social and economic sphere, the framework of rights is different to the framework of wellbeing economics because it allows for both consequentialist and non-consequentialist arguments about the type of society we want to live in generally, as it does for the particular merits of any given policy. For example, Sen (2009) notes a common ethical argument that the rich incur an obligation to help those less fortunate because power creates responsibility – this argument has weight regardless of the wellbeing implications of enforcing such an obligation.

Table 1: Hierarchy of Human Rights<sup>3</sup>

Level of Protection Required	Human Rights Contained in the Universal Declaration of Human Rights	Binding treaty
<b>No derogation is permitted even in national emergency</b>	Freedom from arbitrary deprivation of life	ICCPR
	Protection against torture or cruel, in human, or degrading punishment or treatment	ICCPR
	Freedom from slavery	ICCPR
	Right to recognition as a person in law	ICCPR
	Freedom of thought, conscience, and religion	ICCPR
<b>Can only be derogated from during public emergency which threatens life of nation</b>	Freedom from arbitrary arrest or detention	ICCPR
	Right to equal protection for all	ICCPR
	Right in criminal proceedings to a fair and public hearing, and to be presumed innocent	ICCPR
	Protection of personal and family privacy and integrity	ICCPR
	Right to internal movement and choice of residence	ICCPR
	Freedom to leave and return to one’s country	ICCPR
	Liberty of opinion, expression, assembly, and association	ICCPR
	Right to form and join trade unions	ICCPR
	Right to participate in government, access public employment without discrimination, and vote	ICCPR
<b>Take steps to offer in non-discriminatory way</b>	Right to work	ICESCR
	Entitlement to food, clothing, housing, medical care, social security and basic education	ICESCR
	Freedom to engage and benefit from cultural, scientific, literary, and artistic expression	ICESCR
<b>Aspirational only</b>	Right to own and be free from arbitrary deprivation of property	N/A
	Right to be protected against unemployment	N/A

<sup>3</sup> Source: [http://www.lawright.org.au/\\_dbase\\_upl/E\\_HumanRights.pdf](http://www.lawright.org.au/_dbase_upl/E_HumanRights.pdf)

## Do rights serve wellbeing or justice?

The Treasury living standards framework includes effective institutions of justice as an input into the end goal of higher living standards (wellbeing). Rights are implicitly treated as a subtype of institution that has primarily instrumental value, as subordinate to the master-goal of wellbeing.

Andrew Fagan (2012) characterises instrumental arguments for the normative basis of human rights as the ‘interest theory’ of rights. Under this argument, human rights derive their value as an institutional tool because they are necessary to protect people’s interests, in something like a rule utilitarian sense.<sup>4</sup> By instituting rights, societal wellbeing is higher than it would be otherwise.

In contrast, Fagan (2012) defines the ‘choice theory’ of rights as embedded in the importance of liberty. In this conception, rights can be understood as a mechanism to resolve the ‘paradox of freedom’ discussed earlier.

Only by making the exercise of liberty subject to the protection of individual rights can equal freedom be guaranteed. If we regard freedom as intrinsically important, and accept that rights are necessary to protect freedom, then rights have intrinsic value beyond their impact on our wellbeing. Sen is very clear that the capabilities approach, in treating freedom as the core value, denies that interests are sufficient in themselves to sustain a conception of the just society:

*“Sustaining living standards is not the same thing as sustaining people’s freedom and capability to have – and safeguard – what they value and have reason to attach importance to. Our reason for valuing particular opportunities need not always lie in their contribution to our living standards, or more generally to our own interests.”* (Sen 2009)

Under this view, justice is both an input to wellbeing and an end in itself. As Adam Smith put it in his *Theory of Moral Sentiments* (1759), justice ‘*is the main pillar that upholds the whole edifice [of society],*’ or to quote Rawls (1971), ‘*a conception of justice is to be the public basis of the terms of social co-operation*’.

Given its basis in the capabilities approach, I would suggest that the importance of rights be explicitly included in the living standards framework as an end in itself, or that the wellbeing framework be treated as subordinate to a higher-level framework that incorporates human rights. For this reason I place wellbeing and protection of rights in Figure 3 as intermediate outcomes that contribute to an ultimate outcome of a just society.

Placing rights alongside wellbeing reflects the view of the Fitoussi commission<sup>5</sup> that the protection of rights is important for both instrumental and intrinsic reasons (Stiglitz et al 2009). This also reflects the outcomes logic in the Ministry of Justice strategic intent that has ‘a safe and just New Zealand’ as the ultimate outcome our efforts seek to support (Ministry of Justice 2016).

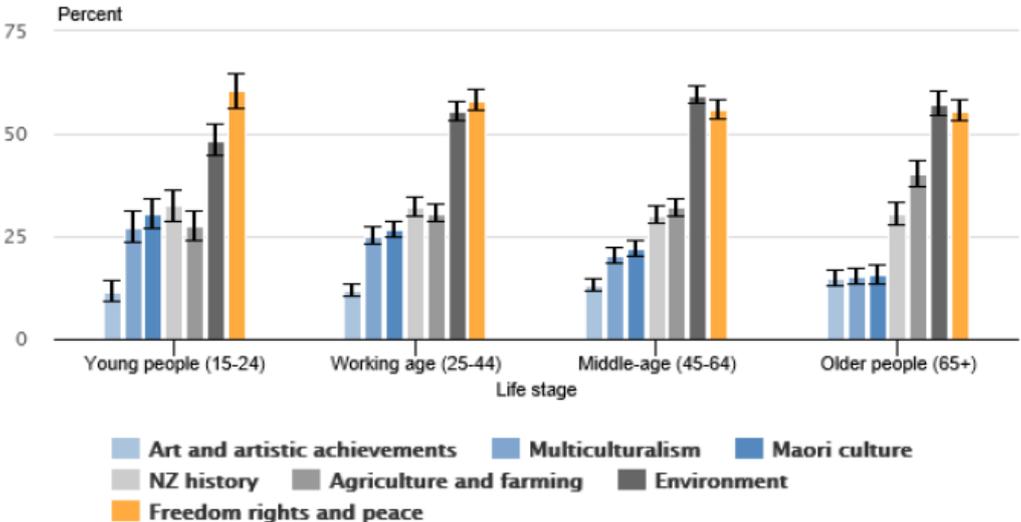
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<sup>4</sup> Although in contrast to utilitarianism with its focus on total (sum) utility, an instrumental argument for human rights is compatible with other distributional preferences, such as a Rawlsian max-min principle.

<sup>5</sup> The Fitoussi commission comprised Joseph Stiglitz, Jean-Paul Fitoussi and Amartya Sen, and was formed by Nicolas Sarkozy to provide advice on alternatives to GDP for measuring societal wellbeing. The work of the commission is often cited as seminal in the further development of the better lives index by the OECD, and related international examples including the NZ Treasury’s living standards framework.

The intrinsic importance of protecting rights can also be gauged by New Zealander’s belief in them. As shown in Figure 5, responses to the General Social Survey show that ‘freedom rights and peace’ are foremost in people’s minds when considering the definition of New Zealand.

**Figure 5: Proportion of New Zealanders stating each theme 'extremely important' in defining New Zealand, by life stage, 2016/17**



Source: Stats NZ

***When are rights not aligned with wellbeing?***

In many cases human rights are fully aligned with people’s wellbeing, ie, their value is completely instrumental. In these cases there is no pressing need to treat human rights separately in a wellbeing framework, as the difference is largely theoretical.

The practical rather than theoretical rationale for treating rights independently is that, if the living standards framework is to be used as a policy framework, it will need to deal with the fact that in many cases trade-offs do need to be made between different rights, or between rights and wellbeing, even where there is no instrumental benefit to doing so.

Particularly when rights conflict with wellbeing, it is important to consciously resolve these conflicts in order to maintain a sense that society and its institutions are just and legitimate.

Without providing a definitive list, some examples of where rights may clash with wellbeing in the justice system include:

- Where the right to due process for someone accused of sexual offending imposes harm on victim(s) subjected to cross-examination.
- Where a young person who has been charged with an offence has a right to legal representation but where an informal resolution may better meet their interests.
- Where a sentence of imprisonment is imposed against the wishes of the victim, reflecting a public right to punish wrongdoers.
- Where individual-level GPS tracking may improve public safety by reducing crime but conflict with the right to privacy.

Noting that rights and wellbeing are not always aligned does not necessarily privilege one over the other. It merely recognises that difficult trade-offs are often necessary in pursuit of a just society and suggests that a framework for a just society should acknowledge and illuminate these trade-offs.

## **Which rights ought the justice system protect?**

I have talked so far about rights in a very general sense, but much of the useful debate about rights is focused on which rights to protect and how. I cover these issues briefly now.

### ***Procedural and personal integrity rights***

Common law and legislation are full of examples of procedural protections intended to fairly treat all parties, particularly those accused of a crime. For example, the Criminal Procedure Act 2011 specifies such matters as what information must be included in a charging document, who is allowed to conduct proceedings against a defendant, the situations where a defendant may elect a jury trial, and so on.

Procedural fairness is important for both intrinsic and instrumental reasons. The instrumental reasons will be discussed in a later section focused on the link between procedural justice, legitimacy and institutional trust.

The intrinsic importance of procedural rights can be understood using a distinction drawn by Amartya Sen (2009) between comprehensive and culmination outcomes.

Culmination outcomes can be understood as simple 'end states', such as wellbeing. A utilitarian view of the world is interested only in end states of utility, for example. In contrast, comprehensive outcomes include *'the exact processes through which the eventual states of affairs emerge'*. Sen illustrates the distinction with a simple contrast between someone dying of starvation due to circumstances beyond anyone's control and someone being starved to death through the design of those wanting to bring about this outcome to illustrate the importance of procedural determinants of end states.

Economic research has demonstrated participation rights can improve wellbeing through 'procedural utility' (Frey and Stutzer 2005). But from a rights perspective, participation and procedural rights may be important to respect people's agency even if they provide no wellbeing benefit.

The difference between culmination and comprehensive outcomes has some similarities with the distinction in criminal law between 'wrongs' and 'harms'. A harm such as death is associated with different levels of culpability depending on the intent of the person who caused it. Someone who deliberately takes a life is responsible for a more serious 'wrong' than someone who takes a life through careless driving, even though the 'harm' is the same.

The importance of a procedurally just determination of end states is grounded again in the idea of freedom. If our concept of the good life is grounded in the idea of exercising our freedom, as it is in the capabilities approach, then it is not sufficient for justice that desirable states are arrived at without reference to how they are arrived at. The capabilities approach asserts that we must have a right to influence those end states through participation in the processes determining them.

The oldest procedural rights in the justice system, such as habeas corpus, focus on persons accused of crime. More recently, attention has been brought to bear on procedural rights of those who have been victimised, who have historically been treated as bit players in the main drama of the court. The Victims Rights Act 2002 was an important step forward in instituting procedural rights for those who have experience crime.

However, there is ongoing debate about whether the rights and interests of victims are adequately provided for by the justice system. The most serious concerns relate to children who have experienced crime, and people of any age who have experienced sexual victimisation. For example, the Law Commission (2015) made a set of 82 recommendations for change in the justice system to improve its response to victims of sexual violence.

The case of sexual violence provides one of the clearest examples of where rights not only conflict with interests, but where competing rights can make it difficult to provide equal justice for all.

Introducing the concept of rights changes the discussion about institutional design and institutional trust in relation to social capital, because different types of institution provide different ways of accommodating rights and interests. For example, Project Restore is a new form of institution that uses principles of restorative justice as a means to hold people to account who have committed sexual offences, as well as protecting victims' rights to voice and participation, outside of the court system.

This type of informal approach to dealing with offending is very different to the traditional legal process through the courts, but the Law Commission recommended that this sort of alternative to court-based justice be expanded in appropriate circumstances. The pros and cons of court-based justice vs informal justice can only be fully considered with reference to both rights and interests.

### ***Civil and political rights***

Human rights can be conceived in purely moral terms, for example based on a humanist (Caranti 2012) or teleological (Feser 2012) philosophy. Alternatively, they can be conceived as political in nature, as a way to institute a meaningful democracy as defined by a society's commitment to universal freedom rather than a more narrow commitment to certain electoral features (Goodhart 2012).

Civil and political rights, such as the freedom of assembly and the right to stand for office, are fundamental to this notion of human rights as democracy.

While New Zealand scores very well on international comparisons of civil and political rights, one area of weakness is the level of constitutional protection of these rights. These rights are protected in the Bill of Rights Act 1990, but this Act can be modified by a simple majority and is not enforceable in the Courts.

The constitutional advisory panel (2013) reported considerable support for entrenching elements of our constitution, including the Bill of Rights Act. So long as our norms and other aspects of social capital are working well we may not need this additional protection, as we will avoid electing leaders who may wish to undermine our democracy. But with recent international examples of erosion in democratic norms in both recent and established democracies, it may be timely to consider providing additional protection for these essential rights.

## ***Paper rights vs realised rights***

In international agreements and local legislation, many different rights are guaranteed. But merely stating that a right exists does not make it manifest. To realise a right often requires extensive activity. The justice system is responsible for ensuring rights are realised in at least four different ways.

First, the justice system delivers or funds many services that directly protect rights, such as victim support, legal aid and the public defence service. The level of funding provided to these services and quality of implementation determines the extent to which rights such as access to justice are realised.

Second, the justice system delivers many services that can be provided in a way that can be consistent or inconsistent with rights. For example, rights against inhumane treatment can only be realised with the active intent of police officers, corrections officers and others who are directly responsible for those in custody.

Third, the justice system includes a number of independent agencies that monitor the operational arms of the justice system, including the Ombudsman, Independent Police Conduct Authority, and the Human Rights Commission.

Fourth, the justice system leads New Zealand's programme of regular reporting on compliance with various international human rights agreements such as UNCROC and OPCAT.

## ***Distributional justice and rights to negative vs positive liberty***

As noted above, rights can be viewed as a mechanism to protect liberty. A view of which rights it is necessary to protect can be affected by one's view of liberty – in particular, whether one accepts a view of negative liberty or a more comprehensive view of positive liberty.

Rights in legislation such as the Bill of Rights Act 1990 often protect negative liberty – by granting a right to freedom *from* discrimination, for example. This right creates an obligation for people not to act in a discriminatory way. However, positive social and economic rights are also legislated for as well. For example, the Education Act 1989 provides a right *to* receive free primary and secondary education. Positive rights are more contentious than negative rights because they impose a duty on others to actively do something, and can come in conflict with negative rights (Scruton 2012). In this case, the negative right to retain the product of one's own labour is trumped by the obligation to provide resources (through tax) to realise the positive right to education.

Arguments for social and economic rights often reflect a positive conception of liberty such as that of the capabilities approach. Social and economic rights can be advanced as a mechanism to counteract asymmetries of economic power by creating an '*obligation of effective power to help advance the freedoms of all*' (Sen 2009). Creating rights and obligations are not the only mechanisms that can be used to achieve this goal – people could merely be encouraged to voluntarily advance the freedom of others, for example. But rights are often seen as a strong way to create obligations for one another.

Viewed in this way, social and economic rights are an important complement to the wellbeing framework for another reason: they implicitly capture distributional concerns. Although it introduces a multi-dimensional concept of value, the Treasury living standards framework is still a traditional economics framework in that it takes the total level of value/utility as the sole maximand, with distributional concerns as a secondary consideration.

Standard economic approaches only directly allows for a very limited concept of distributional justice, the concept of pareto efficiency.<sup>6</sup> The relative merits of other principles of distributional justice are treated as outside the normative framework of economics, and indeed are not discussed at all in the recent Treasury working papers.

This approach follows depression-era economist Lionel Robbins who asserted that the wellbeing (utility) of different individuals is non-comparable, thus placing issues of distributional justice beyond the reach of social science. But the implicitly utilitarian approach in economics and the living standards framework is not value free, a fact that modern welfare economics is increasingly recognising. It is no longer universally accepted in economics that wellbeing can or should be studied without reference to ethical values.

As Hilary Putnam (2004) writes:

*“if it is legitimate for some economists to defend utilitarian measures of well-being, it must be legitimate to consider the arguments against the adequacy of utilitarianism, both in terms of what it allows in its ‘information base’ and in terms of its procedures of evaluation”* p63

And one of the main criticisms of utilitarianism of course is that it does not include rights in its ‘information base’ or ‘procedures of evaluation’. To quote Sen (1999), who more than anyone has brought ethics back into the realm of economics<sup>7</sup>:

*“It is not to the credit of classical utilitarianism that it values only pleasure, without taking any direct interest in freedom, rights, creativity, or actual living conditions. To insist on the mechanical comfort of having just one homogenous “good thing” would be to deny our humanity as reasoning creatures.”* p77

The importance of distributional concerns should be central to any meaningful discussion about wellbeing in New Zealand because, in aggregate and on average, New Zealand is at or near the top of most metrics worldwide, suggesting our *level* of wellbeing is high on average, even though the *distribution* of wellbeing is such that there are a significant number of New Zealanders whose wellbeing and social capital is very low, very many of them being children.

Distributional concerns can be considered without any reference to human rights. But there are potential advantages to considering distributional questions within the framework of social and economic rights. The main advantage are that talk of positive rights automatically leads to discussion about obligations, because all rights entail obligations.

But human rights also provide a concrete perspective with which to assess different distributions. The rights perspective places a particular focus on the wellbeing of those at the bottom of the distribution, and those with less ability to advance their own wellbeing such as children and people with severe disabilities. Social and economic rights can be seen as specifying a de minimis conception of New Zealand under the ‘social unity’ dimension of social capital identified by Treasury. If, as the GSS shows, rights and freedom are central to our national identity, what is the minimum level of substantive freedom to wellbeing do we regard as the minimum for people living in this country?

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<sup>6</sup> A pareto efficient outcome is one where no one can be made better off without making anyone worse off. By this criterion, any form of income redistribution is inefficient.

<sup>7</sup> As repeatedly stressed by Sen, the two were originally tightly interwoven: Adam Smith did not write only *The Wealth of Nations*, but also *The Theory of Moral Sentiments*.

The answer to this question is important in the justice context because many of those people the justice system deals with, particularly in criminal justice, lack economic power and the ability to independently protect their own interests and rights. This lack of capability applies equally to those who commit crime and to those who experience it.

More prosaically, the value of much of the justice system's activity, from legal aid and public defence through to community law centres and the provision of health services to prisoners, goes directly to how we conceive of rights. Defining the extent to which we wish to protect rights such as access to justice influences our view of how well the justice system is performing. It also helps define the relative importance of funding these rights-protecting services, as compared with other demands on the public purse, from the perspective of building a just society.

Defining the relationship between rights and wellbeing is also important for the justice system because we have the policy lead on human rights and provide BORA vetting for all proposed legislation.

The extent to which aspects of positive liberty should be considered as rights protected by legislation, or advanced through other mechanisms depends ultimately on society's values and political choices, so this paper is not an appropriate mechanism to resolve this issue.

But having said that, it is important to note that those countries with the highest levels of wellbeing (ie, the Nordic countries) tend to be those who have instituted a more positive view of liberty in that they have higher levels of universal service provision and lower levels of income inequality (Rothstein 2011). This evidence suggests that classical liberal values and classical utilitarian values may be in conflict in that maximising negative liberty (eg, through low taxes) may not maximise wellbeing.

This conflict is further demonstrated by the finding that the income-wellbeing relationship is linear-log<sup>8</sup>, (Stevenson and Wolfers 2013). The diminishing marginal utility of income implies that income redistribution tends to increase wellbeing, all else equal<sup>9</sup>, an empirical reality that needs to be balanced against the desire to protect rights to private property.

The distribution of income and the choice between universal or targeted welfare state design is clearly beyond the scope of the justice system. But as the enforcement mechanism for the state, the justice system's ability to secure public legitimacy is not independent of the legitimacy of broader government institutions. Broader societal choices about how far to protect rights to negative and positive liberty are an important contextual factor in determining the role and effectiveness of the justice system at building social capital.

And although it is not the role of the public service to determine how best to balance rights and wellbeing, it is our role to highlight where there are tensions between them and to give free and frank advice about the trade offs.

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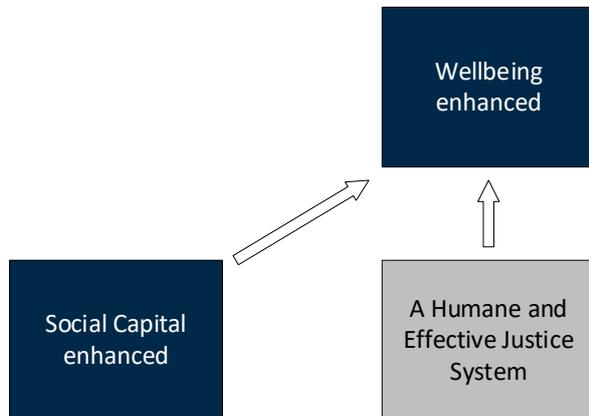
<sup>8</sup> ie, to achieve a 1 unit increase in wellbeing requires a % increase in income, so from 1 to 2 units of wellbeing might require a move from \$1000 to \$2000, from 2 to 3 units of wellbeing a move from \$2000 to \$4000 of income, from 3 to 4 units of wellbeing a move from \$4000 to \$8000 of income, and so on.

<sup>9</sup> This is not a new insight – it was first observed by Cecil Pigou in his 1920 book *Economics of Welfare*, though at that point the linear-log relationship between income and wellbeing had not yet been established empirically.

## Part two: Creating justice-related wellbeing

In this part of the paper I review the evidence for the relative importance of the justice system in comparison to social capital in producing wellbeing.

Figure 6: Focus of part two



My key claim in this section is that social capital is more consequential for wellbeing than is the justice system. This paves the way for the focus in part three on how social capital might be enhanced.

This claim builds from a simple insight: where society has a high level of social capital, the additional benefit of the justice system is comparatively modest. But where society has little social capital, the justice system will have far too much to deal with. In other words:

*“Courts can save us from rascals only if there are few rascals” (Uslaner 2000, p143)*

I start with a necessarily brief overview of what we know about the direct impact of the justice system on wellbeing.

I then discuss:

- The impact of the five social capital dimensions on personal safety
- The difference between pro-social and anti-social types of social capital
- Social capital and subjective wellbeing, particularly freedom from worry about crime
- The interplay between values and institutional legitimacy.

## Overview of wellbeing outcomes affected by the justice system

There are 12 dimensions of wellbeing/capability in the draft framework from Treasury (King et al 2018). The justice system directly contributes to all 12, as highlighted in Table 2. Considering the table, most of the contributions can be grouped under a general heading of regulatory enforcement. In the civil, criminal and family jurisdictions, the justice system is directly involved in enforcing regulations made by all parts of Government, affecting all individuals, families and businesses in New Zealand.

**Table 2: The justice system's direct contribution to wellbeing**

Wellbeing dimension from Treasury framework	Direct contributions from the Justice sector
Personal security	Crime prevention, incapacitation, probation Rehabilitation and reintegration Road safety Search and rescue Family court Police first response
Subjective wellbeing	Trust and confidence, fear of crime
Cultural identity	Treaty settlements Rangatahi court, iwi panels, Māori focus units, Matariki Court
Civic engagement and governance	Monitor electoral commission Prosecute corruption
Health status	Corrections health service AODT and CBT treatment Police mental health crisis response Resolving disputes under health law, eg, the Mental Health (Compulsory Assessment and Treatment) Act 1992 Administering Criminal Procedure (Mentally Impaired Persons) Act 2003
Income and wealth	Contract enforcement leading to business growth
Social connections	Adoption services aim to provide secure attachment for children Restorative justice helps rebuild positive social connections that have been harmed by crime
Jobs and earnings	Employment Relations Authority Post-release employment support
Education and skills	Prisoner education and employment
Environmental quality	Environment court
Work-life balance	Employment tribunal
Housing	Tenancy tribunal Housing support for people leaving prison Security improvements for people following victimisation

As can be seen, the justice system is involved in many types of regulation and service provision in both the social and economic domains. In this paper I emphasise the justice system's connection to the social system, but this list demonstrates the importance of the justice system in enforcing various types of economic regulation as well, across a wide range of markets including labour markets, markets for land and other natural resources, and rental markets.

### **How effectively do justice institutions directly regulate behaviour?**

It would take a whole paper of this one's length to fully cover the effectiveness of each of the justice system's functions. Rather than attempt that task, we can abstract out to a higher level and consider the two main mechanisms for compliance identified in collective action theory.

The first mechanism is direct. By punishing breaches of norms, institutions can directly reduce the expected benefits of wrongdoing and tip the scales in favour of co-operation. The effectiveness of the justice system at directly enforcing has been extensively studied in the deterrence literature, particularly in relation to criminal behaviour. A very useful summary is that of Daniel Nagin (2013). Without attempting to reprise that comprehensive review, a few of the most salient findings about deterrence, as also shown by the meta-analysis of Pratt et al (2006) are that:

- The severity of punishment has essentially no deterrent effect ( $r=0.03$ , NS)
- The certainty of apprehension has a small deterrent effect ( $r=0.101$ ,  $p<0.01$ )
- The deterrent effect from the certainty of apprehension is found most consistently in relation to white-collar offences such as fraud, tax violations, and non-compliance with regulatory laws.

The finding that fear of punishment is a relatively weak vehicle for compliance extends well beyond criminal justice. For example, research into 'tax morale' find that most people pay tax because they believe it is the right thing to do, and that far more people would evade tax if they were only worried about punishment (Torgler et al 2011).

This evidence suggests that to the extent that justice system institutions are effective, it is likely to be more because of the second, indirect, mechanism. This second mechanism is to strengthen informal norms and networks.

The Pratt et al (2006) meta-analysis provides the first piece of evidence for the greater relevance of the second mechanism. This study also examined the deterrent effect of social consequences of offending ( $r=0.143$ ,  $p<0.01$ ) and found these to be somewhat larger than the effects of formal punishment. This suggests that in general people fear being labelled with a conviction somewhat more than the sentence that follows.

This evidence suggests an interaction effect between networks, norms and institutions, with institutions being more somewhat more effective at facilitating compliance among networks, such as those white-collar offenders often belong to, with strong pro-social norms.

Further evidence to favour the second mechanism come from meta-analyses of phenomena other than punishment that show a stronger relationship with crime. For example, Pratt et al (2006) note that there is a relatively stronger association between crime and self-control (a criminological concept that relates to the concept of trustworthiness), as well as between crime and anti-social peers (a criminological analogue to the importance of networks in the collective action literature).

Political scientists also weigh in on this point. As stated in Rothstein and Teorell's (2008) paper about the importance of impartial political institutions:

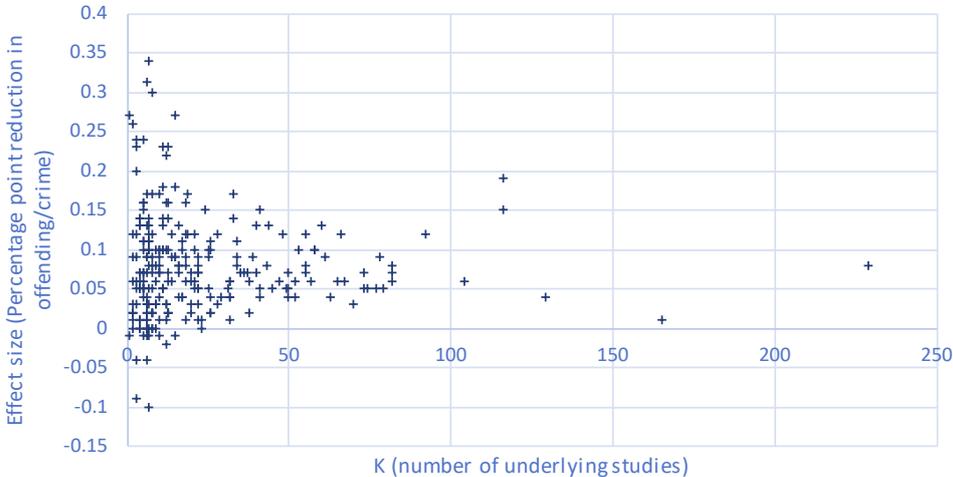
*“...once in the cooperative equilibrium of contracts self-enforced by trust and norms of reciprocity, the state hardly needs to act as the third-party enforcer. Yet it is the fact that the state is expected to be an impartial arbiter in case of conflict that underpins people’s trust and reciprocity.”* p24

In other words, the best punishment is one that never needs to be carried out. The ultimate goal of institutions may well be to support an internalisation of pro-social norms and values that facilitate compliance and co-operation in everyone’s interests. To adopt the language of Ahn and Ostrom, building the ‘trustworthiness’ of the population is the ideal way to ensure contractual and regulatory compliance, and prevent criminal behaviour.

Further evidence showing the relatively modest impact of the justice system on wellbeing comes from the very many studies into rehabilitation, various modes of policing, and other types of crime prevention such as CCTV. Over the past two decades, criminologists and organisations such as the Washington State Institute of Public Policy, and the Campbell Collaboration, have been working to organise this evidence base with a large set of meta-analyses. The Ministry of Justice has taken advantage of this work by assembling the findings into a series of evidence briefs, available online.<sup>10</sup> In 31 evidence briefs, we summarise the findings from 254 meta-analyses of crime prevention approaches, which in turn cover 5,860 individual studies. This work shows that many types of crime prevention activity work on average. But it also shows that, particularly once approaches move beyond demonstration scale and are rolled out, the average effect is modest. This can be seen clearly in Figure 7.

Very few meta-analyses show a negative average effect size. But at scale, very few approaches achieve more than a 5 or 10% reduction in crime, so it is unrealistic to expect any approach to directly reduce crime to have a substantial impact on the safety component of wellbeing. When contrasted with the evidence for the impact of various elements of social capital, it becomes clear that the indirect route via social cohesion is more important.

**Figure 7: Average effectiveness of various crime prevention approaches**  
**Summary of 254 meta-analyses on crime prevention**  
**(combined k=5,860)**



<sup>10</sup> <https://www.justice.govt.nz/justice-sector-policy/research-data/what-works/>

## Social capital and safety

I noted earlier that the role of deterrence in determining the level of crime in society is relatively weak. Instead, crime is caused by a range of factors that can fit readily within the framework of social capital:

*“Most people obey the law most of the time because it is the ‘right thing to do’ In this regard, genetics, socialisation, psychological development, moral reasoning, community context, social norms and networks may all help sustain the routine compliance that is ‘ingrained in everyday life’ (Jackson et al 2013, p30)*

For each of the dimensions of social capital defined by Treasury there are prominent theories of crime to match. I cover each of these briefly in turn:

- Pro-social norms, values and behaviours, including a sense of unity
- Social connections
- Trust in institutions

### **Pro-social norms, values and behaviours, including a sense of unity**

Pro-social norms and values relate to the psychology of criminal conduct at an individual level, developmental psychology at a meso level, and to theories such as institutional anomie at a macro level. I will cover each in turn.

#### ***Micro-level beliefs and behaviours of people who offend***

There are many different types of beliefs and norms that fall under the general heading of ‘pro-social’. The cognitive psychology of offending has been extensively studied over years. Without over-emphasising the importance of cognitions in comparison to social psychological explanations of crime, it is worth briefly considering what specific attitudes are more commonly associated with offending.

People who commit crime often hold distinctive beliefs or thinking patterns that drive their behaviour. For example, people who offend will often believe that they are different to others and deserving of special attention and favours, focused on asserting power and control over the social environment in an effort to ease feeling of powerlessness, or believe that one can indefinitely avoid the negative consequences of a criminal lifestyle (Walters 2012). People who commit white collar crime such as corporate fraud have been found to more commonly have values such as power/achievement and stimulation (Goosen et al 2016).

These beliefs are often reinforced by an impulsive, risk-seeking personality, and by differential association with peers who share the same thinking patterns and who reinforce them over time. These two factors, known as self-control and social learning in the literature, are among the best-evidenced drivers of crime (Pratt and Cullen 2000, Pratt et al 2010).

### *Meso-level beliefs and values of communities in which people who offend reside*

Social learning theory emphasises that offending behaviour and the beliefs that support it are developed through differential association with people who either negatively or positively reinforce those behaviours. This emphasises that the beliefs of the people who offend are not the only important factor – so too are the beliefs of those they are in contact with.

Differential association, ie, the pattern of social networks, is important both in the development of offending and in desistance.

### Developmental criminology and human capital

Developmental criminology focuses on how childhood experiences shape lifecourse patterns of offending and victimisation. There is no shortage of research emphasising how important these childhood experiences are, not only for crime but for values generally.

Both in the United States (Putnam 2002) and worldwide (Welzel 2013), there is evidence that population-level change in values over time is dominated by cohort rather than lifecycle effects. In other words, much more change comes from new generations having different values than comes from individual people changing their values over the course of their lifetime. Given that values appear relatively stable across the lifecourse, the best approach to building New Zealand's values may be to focus on the next generation. In a fairly literal sense, the values and beliefs of our children will be the values and belief of New Zealand in the future.

More specifically, crime will be more likely in future the more prevalent are anti-social beliefs and values in children and young people who are developing today. Families are clearly the most important source of values development, but others have influence too. Social learning theory may provide the explanation for the finding that mentoring for young offenders tends to reduce reoffending (Tolan et al 2013).

Schools are also a critical source of learning about values, particularly for children whose family environments are marked by high levels of stress, deprivation or other challenges. And the education system of course has a bigger role to play in building social capital. This paper is focused on social capital, but it is worth noting briefly that many of the sector's efforts to improve social capital and reduce reoffending may also modestly increase stocks of human capital. People who commit offences often lack for both human and (pro-) social capital.

There is clear evidence of a lack of human capital among people who offend. A recent study by the Department of Corrections found that 71 percent of people in prison could be characterised as having literacy 'below the level at which a person is able to cope with the demands of everyday life and work in a complex, advanced society', in comparison to 43% of a comparable, non-offender population. (Bowman 2014).

Building human capital is clearly part of the story about improving public safety. And as pointed out by one of the founders of social capital research, James Coleman (1990), investments in human capital often lead to improvements in social capital at the individual level, as increases in social status improve opportunities for connection.

## Supporting desistance

Once people have developed a criminal history, their ability to desist depends partly on the willingness of others to offer them chances to reform, by offering employment, housing, or personal relationships. Clearly their willingness to offer these opportunities will depend in turn on their personal values.

This lines up with Esser's (2008) emphasis on one aspect of social capital, building from collective action theory, as '*the readiness of actors to become trustfully involved in risky ventures with other actors*'. In the justice context, the willingness of community members to 'risk' trusting those with a criminal past, to extend opportunities to establish or re-establish bridging capital, goes a long way to determining how difficult the desistance process is, as discussed earlier.

### ***Macro-level values and a sense of unity***

Society-level values can influence individual behaviour in a number of ways. For example, the ecological theory of family and sexual violence emphasises that societal tolerance of low-level sexism reinforces a culture that makes sexual harassment or assault more likely to occur (eg, Casey and Lindhorst 2009). Many interventions in this area are focused on reducing the acceptability of low-level sexism.

At a national or state level, there is also a strong association between the levels of generalised trust and crime (Halpern 2005). Interestingly, this relationship appears to be mediated by the prevalence of self-interested values and inequality. Self-interested values are measured by questions about the perceived acceptability of behaviours such as keeping a lost wallet, for example.

Countries with higher average levels of self-interest also have higher levels of victimisation as measured by the International Crime Victimization Survey. Economic inequality is also associated with higher crime rates, but only in countries that also have high levels of self-interested values (Halpern 2001).

It is difficult to establish the nature of macro-level causation, so we do not know whether crime causes self-interest, or if self-interest causes crime, or some other factor causes both, or if a mixture of all three relationships are in play. But the association is clear. In criminology, this association is explored under institutional anomie theory, among others.

Institutional anomie theory was originally developed by Messner and Rosenfeld (1994), drawing upon earlier concepts from Emile Durkheim and Robert Merton. Messner and Rosenfeld argue that an institutional arrangement where the (market) economy is allowed to dominate without sufficient restraints from other institutional spheres, such as the family and the polity, will be particularly criminogenic.

The reason for this is that when the institutions of the market come to dominate, success is determined by material wealth, but market forces lead to unequal ability to achieve that success. This results in 'anomie', ie, 'the breakdown of social bonds between and individual and the community', and those denied access to legitimate paths to success will pursue 'legitimate ends through illegitimate ends'.

While there is a clear correlation between crime and structural factors such as inequality and non-economic institutions (Pratt and Cullen 2005), giving some credence to anomie theory,

macro-theories such as this are difficult to either prove or falsify as causal mechanisms. But to the extent which they ring true then from the perspective of social capital and wellbeing it makes sense to consider the role macro-level policies around income distribution, labour market regulation and access to education, for example, may affect justice outcomes.

## **Social connections**

In criminological research, the importance of social connections is explored using the language of 'informal social control'. I will now cover the implications of informal social control at an individual level for both offending and victimisation, and at a meso-level through schools and neighbourhoods.

### ***Micro-level social connections***

#### Micro-level social connection and offending

When someone misbehaves, local social networks respond immediately with sanction (or more rarely, praise). Misbehaviour can range from mere rudeness through to the most serious of crimes. Social sanctions range in seriousness too. Informal sanctions can be subtle, as little as an eyeroll or hostile glance. They can be direct, as with a verbal exchange, or indirect, as social opportunities are quietly closed off.

These informal sanctions are described in criminology as 'informal social control'. I have already noted that the deterrence literature shows people are more sensitive to these informal sanctions than to formal sanctions, on average. For non-criminal behaviour, social sanctions are the only type available. The same is also true for most criminal behaviour, since only about two-thirds of victimisation is reported to police (MOJ 2015), so in the majority of offences there is no possibility of formal sanction.

Most people who begin offending learn quickly not to keep doing so. Of those people born in 1970 to receive a conviction by the age of 43, half received only 1 or 2 convictions in total over that period (MOJ unpublished). This suggests that some combination of informal and formal sanction is sufficient to prevent most people from adopting an enduring criminal lifestyle.

But for those who do not desist quickly, continuing involvement in crime can take on its own momentum as informal sanctions become more entrenched. In their age-graded theory of informal social control, Sampson and Laub (1993) note how ongoing criminal activity leads to 'cumulative disadvantage' that makes stopping progressively more difficult. As informal sanctions mount, people who continue to offend find that their opportunities for positive social bonds have been 'knifed off', as jobs, relationships, and housing become more difficult to obtain.

As opportunities for pro-social connection are 'knifed off', anti-social connections may become strengthened. Beyond a certain point, informal and formal sanctions can make further offending more likely because anti-social peer connections are one of the strongest predictors of continued offending (Andrews and Bonta 1998).

Lifecourse processes of persistence and desistance in offending are analogous to lifecourse patterns of substance abuse and addiction. In the process of abusing substances, private social capital is often burnt, making it ever-more difficult to desist, and continued abuse ever-more attractive as a short-term escape from this depressing reality. Social networks become

configured around substance abuse, with substance users bonded together in common values and lifestyles. Indeed, it is no surprise that sustained criminal activity is typically accompanied by substance abuse or dependence. For example, 40% of people starting a community sentence in 2013 used addiction services from the health sector in the 12 months either side of the interaction, in comparison to only 2% of the general population (Horspool 2017).

What is surprising given all this is that nearly all people with a criminal history do manage to desist from crime at some point. Even those who do not manage to stop completely commit progressively fewer offences as they age (MOJ unpublished). Research into criminal desistance has shown that success in ending a criminal career comes from a combination of individual agency and the willingness of others to establish or re-establish social bonds (Laub and Sampson 2001). Desistance is often accompanied by marriage, childhood or a job that provides the opportunity for a new public identity and that increases someone's 'stakes in conformity'.

These connections provide the impetus for a 'fresh start', and can be a time when people are more receptive to change. The behavioural economics literature shows that people are more receptive at certain times of their life and that government intervention can be more effective at these times as a result (Dolan et al 2015).

That desistance from crime is typically accompanied by the development of new social connections shows that it is a two-sided affair that requires reconfiguration of the social fabric to detach someone from a primarily anti-social network and reattach them to a pro-social network or networks – to establish or re-establish positive sources of bonding and bridging social capital. This can not be achieved by anyone by themselves. To quote from Laub and Sampson (2001):

*“desistance is an outcome of a complex, interactional reciprocal process”* p30

This suggests that micro, meso and macro values influence the difficulty of forming pro-social connections for those with a history of offending or propensity to offend. Providing positive social capital to those with anti-social tendencies is dependent on the willingness of local, neighbourhood and national groups of people to offer a first, second, third or even fiftieth chance, as well as the willingness of the person to take the chance and ability to stick to that decision.

#### Micro-level social connections and victimisation

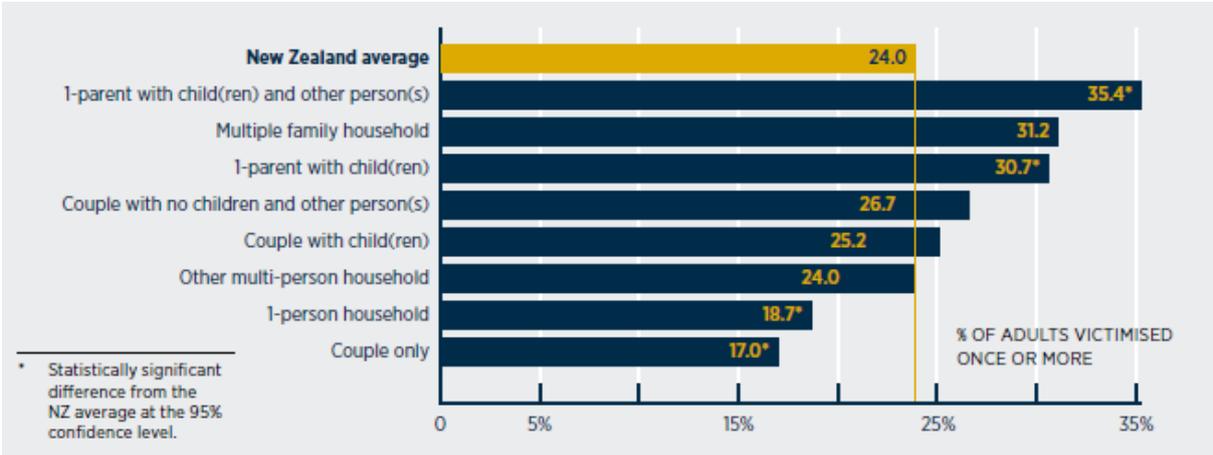
Social connections are also associated with victimisation and a sense of security. Results from the New Zealand Crime and Safety Survey have shown that married couples have the lowest rates of victimisation (MOJ 2015).

After controlling for age, 23% of people in married couples experienced victimisation during 2013, in comparison to 26-27% of people in de facto relationships or who are single. The British Crime Survey has similarly found that those who are separated or single are victimised at a higher rate than married couples (Halpern 2005). This may suggest that a strong intimate relationship is a protective factor.

The same pattern is also found in General Social Survey results for the self-reported wellbeing of different family types, with couples without children reporting the highest level of wellbeing, and sole parents reporting the lowest wellbeing (Stats NZ 2014).

Considering household composition, the highest rates of victimisation are for sole parent families, particularly if other adults who are not part of the nuclear family are also resident in the household. Clearly these aspects of social structure have a strong association with personal safety, as shown in Figure 8.

**Figure 8: Victimization of different household compositions against the NZ average – all offences (2013)**



The cross-sectional nature of the GSS and NZCASS prevents us from making any conclusions about the direction of causation between victimisation and wellbeing, but evidence from Australia’s HILDA survey allows us to be more definitive. Mahuteau and Zhu (2015) investigated the impact of victimisation on wellbeing and found that the impact of experiencing victimisation is well over that of being fired or made redundant (but smaller compared to experiencing the death of a spouse/child).

**Meso-level informal social control**

Informal social control can also apply at higher geographical levels such as the place, neighbourhood or community level. Situational crime prevention emphasises the characteristics of the concrete situation in which crime is or is not committed, and how these characteristics affect the perceived benefits and risks of the offence.

Research into situational crime prevention provides evidence for how urban design affects crime. Street lighting, clear sightlines, gating alleys and CCTV have all been shown to reduce crime, particularly property crime (Kokay 2016). But urban design and land use policy also influences the geographic concentration of disadvantage, affecting the difficulty of establishing pro-social ties within a community, and the likelihood of anti-social peer networks forming (especially among young people).<sup>11</sup>

Since crime peaks in the teenage years, schools are a particularly important source of meso-level informal social control. The way in which the school environment is managed affects not only student achievement, but has spillover benefits in terms of criminal behaviour. A meta-analysis of interventions designed to create a positive social environment within a school (positive values and networks, ie, social capital) found that these reduce offending

<sup>11</sup> On a personal note, when I worked as a social work assistant in a youth justice team early in my career, I worked with two 14-year old friends involved in petty crime who grew up together in nearby houses on Canal St in Avondale. They styled themselves the ‘Thugs of Canal’, branding this association as a gang with graffiti around the neighbourhood.

(Gottfredson et al 2002). Even without these interventions, schools naturally form a much stronger form of informal social control than any alternative of unstructured socialising, so merely keeping students in school for longer can improve safety. It is perhaps no surprise that stand downs and suspensions are strongly related to offending behaviour (MOJ 2016e).

## **Trust in institutions**

I will cover institutional trust in detail in part 3 because it is one of the most practical ways for the justice system to promote generalised trust. Institutional trust is strongly associated with many important outcomes because it is associated with self-regulation across society. Analysing data from 38 countries, Letki (2006) found that trust in institutions and their objective quality are among the strongest predictors of civic morality, including obedience to formal rules, and honest and responsible behaviour.

Boarini et al (2012) find that confidence in the judicial system has a significant positive association both with people's satisfaction with their own life and on their balance of positive and negative emotions, after controlling for a wide range of other potential drivers of wellbeing. With respect to the effect on life satisfaction, the magnitude of this impact is reported as 1.1 times the impact that a doubling of individual income would have.

Institutional trust is related to institutional legitimacy, which is a combination of moral alignment and felt obligation to obey. Legitimacy also has several wellbeing benefits. For example, when people view the justice system as legitimate, they are more likely to comply with laws, over and above the impact of personal morality. This finding has been replicated in the U.S. (Tyler 1990, U.K. (Jackson et al 2012) and Australia (Murphy et al 2009). People are also more likely to co-operate with the Police when they view them as legitimate, which can aid in police effectiveness (Bradford 2012, Tyler and Jackson 2013).

It is important to note that there may be an asymmetric relationship between institutional quality and generalised trust, whereby a drop in institutional quality has a stronger negative impact on generalised trust than an increase in institutional quality has on increasing generalised trust. For example, Rothstein and Stolle (2008) observe that between 1981 and 2000, Britain and South Korea both experienced strong declines in both trust in the police and generalised trust, whereas countries with a positive or stable trend in trust in the police did not experience as strong an increase in generalised trust.

Given that NZ is already near the top of most measures of institutional quality, this finding suggests that it is important to guard against deterioration in institutional trust, as such a deterioration could lead to a fall in generalised trust that is difficult to reverse.

## Anti-social capital and justice

One aspect of social capital theory has been particularly controversial. In *Bowling Alone*, Putnam describes social capital in a way that emphasises the importance of ‘dense’ community ties that are built and maintained through mechanisms such as social clubs.

It is the idea that dense social ties are an unmitigated good that is contentious, because some dense social ties impose negative externalities on society. For example, corrupt patronage networks, organised crime, sectarian violence and ethnic chauvinism are often characterised by high levels of in-group trust and network connectivity. Examples in the literature of ‘bad social capital’ harming societal wellbeing include the rise of cocaine manufacture in Columbia (Rubio 1997), in facilitating drug dealing networks in Chicago (Pattillo-McCoy 1999), corruption in Italy (Della Porta and Vannucci 1999) and the collapse of the Weimar Republic (Berman 1997).

Criminological research also highlights that social ties can harm wellbeing. There is solid evidence from social learning theory to show that anti-social peer associations facilitate crime above and beyond the fact that ‘birds of a feather flock together’ (Pratt 2010). Antisocial peer associations are also one of the strongest predictors of reoffending among people released from prison (Andrews and Bonta 1998)

Mark Warren (2008) has worked to distinguish good from bad social capital, or more precisely the circumstances in which social capital may result in negative externalities. These circumstances include:

- Where in-group trust is high but out-group trust is low – Woolcock (1998) defines this situation as ‘amoral familism’
- Where an in-group with high trust pursues interests that are not publicly justifiable (such as with a group of businesses formed to collude on price)
- Where society is highly unequal in its distribution of political or economic resources.

The key theme here is the importance of out-group trust. High levels of in-group trust and cohesion (ie, bonding social capital) are somewhat ambiguous from a wellbeing perspective – they may help, hinder, or make no difference to societal wellbeing depending very much on the context. But outgroup/generalised trust is far less ambiguous – more of it will nearly always be good for society.

Putnam’s focus on dense social networks arose because of his observed cross-sectional correlation between strong associational (civic) ties and generalised trust. Putnam theorised that associational ties build generalised trust, but this view has received little empirical support. Research based on panel data suggests that higher levels of trust among those involved in societies is largely a selection effect – people who are more trusting are more likely to join voluntary associations (Hooghe 2008, Rothstein 2011).

Because of this, the interest in tracking and promoting membership of civic associations has waned somewhat in social capital research. The focus now is much more on how to build generalised trust, which appears to have more to do with weak social ties (bridging social capital) than strong social ties (bonding social capital).

Criminological research has also shifted from a focus on strong interpersonal ties under the original formulation of social disorganisation theory, towards an interest in weak social ties under collective efficacy theory. Like social disorganisation, collective efficacy is measured at the neighbourhood level (Sampson 2006). But collective efficacy captures both the degree of social cohesion (bonding and/or bridging social capital) and shared expectations for social control (norms and values). By adding in shared expectations, collective efficacy captures 'weak ties' between residents who may be united in a shared willingness to act, even if their interpersonal ties are not strong.

Collective efficacy is measured by surveying residents about the likelihood that their neighbours could be counted on to take action if:

- Children were skipping school and hanging out on a street corner
- Children were spraypainting graffiti on a local building
- Children were showing disrespect to an adult
- A fight broke out in front of their house
- The fire station closest to home was threatened with budget cuts.

A meta-analysis of several macro-level/ecological theories of crime found that measures of collective efficacy appear to be at least as strongly associated with crime as traditional measures of social disorganisation (Pratt and Cullen 2005). Further, researchers have found that collective efficacy mediates social disorganisation (Sampson and Raudenbush 1999). In other words, areas with high levels of poverty, rental accommodation and resident turnover have lower crime rates than otherwise where they are nonetheless able to maintain a degree of collective efficacy.

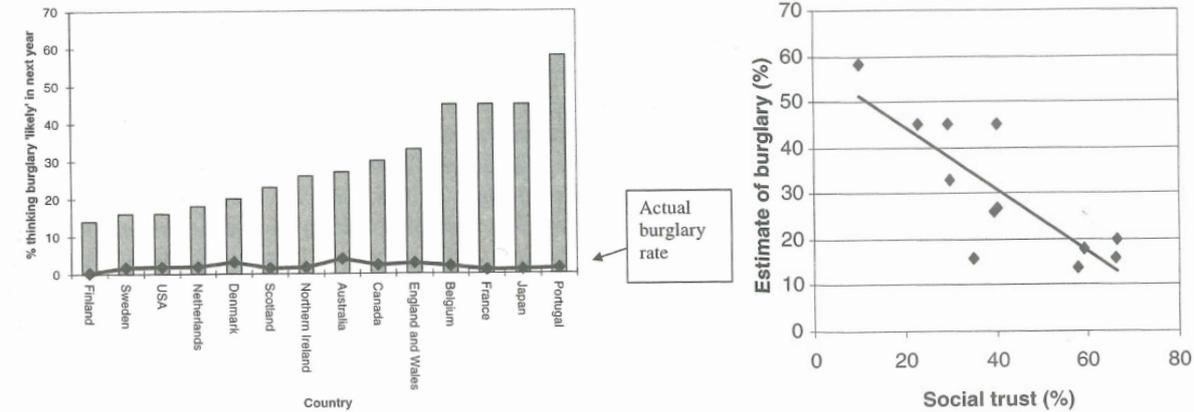
This research highlights that the link between social capital and various social ills, notably crime, is important but also nuanced. Depending on the type of social capital being considered, 'more' social capital is not always better. Where groups who share anti-social beliefs form strong networks and strong trust, the outcome for society will often be bad. In contrast, the more that individuals can be bonded to pro-social networks, well-bridged through weak ties to many other networks, and when these bridges are supported by generalised trust and strong norms about collective responsibility, the outcome for society will usually be good.

This is important for both measurement and policy, because we need to be careful about what kinds of social capital we are promoting.

# Social capital and fear of crime

There is good reason to think that social capital also helps insulate people from the fear of crime. Halpern (2005) combines data from the International Crime Victimization Survey and World Values Survey to suggest that social capital may be an important determinant of fear of crime. As shown in Figure 9, there is very little relationship between the actual and perceived risk of burglary when comparing across various countries in the rich world. There is through a strong association between perceived risk and levels of generalised trust.

Figure 9: Actual burglary, perceived burglary and social trust



Source: Halpern, D. (2005). *Social Capital*. Polity press.

This finding is reinforced by Britto (2011), who finds that fear of crime is related to economic insecurity and Jackson (2009) who finds a connection between vulnerability and fear of crime. Smolej and Kivivuori (2006) further finds that fear of crime is associated with greater consumption of media. This raises the question of how the media fits in to the living standards framework. Media are an institution that exists as part of the social fabric, so could be considered one aspect of social capital.

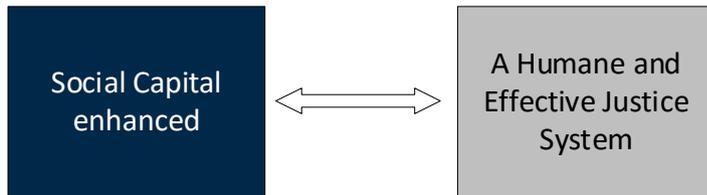
Regardless of the answer to this question, we do not have quite the right data to test the relationship between social capital and fear of crime in New Zealand. The main source for information about fear of crime is the NZ Police Citizen’s Satisfaction Survey. The last version of this survey to look at subgroup differences in fear was the 2015/16 survey (NZ Police 2016). This survey found that the proportion of people who feel unsafe or very unsafe in their local neighbourhood after dark is somewhat higher among women, those living in highly deprived areas, and those living in Auckland or Counties-Manukau.

The importance of neighbourhood characteristics is reinforced by a study from Brunton-Smith and Sturgis (2011), who find that fear of crime is higher in neighbourhoods with high residential mobility, ethnic diversity, and lower socioeconomic status. While these factors do not directly capture social capital, there is reason to think that they are related to it, given the link between these traditional ‘social disorganisation’ variables and direct measures of neighbourhood cohesion, ie, collective efficacy.

## Part three: Building social capital

Having sought to demonstrate that social capital has a greater direct impact on safety-related wellbeing than the justice system does, we now turn to the issue of how the actions of the justice system might influence social capital.

Figure 10: Scope of part three



As Figure 10 illustrates, the relationship is bidirectional. To be legitimate, the justice system needs to reflect the moral norms already in the population. Depending on the level of cohesion in society, people may favour a justice system that is more or less inclusive, that is more or less consistent with wellbeing.

We then consider the role the justice system plays in building:

- institutional trust and legitimacy, covering
  - constitutional design, most importantly in relation to Māori and the Treaty
  - organisational design, operation and regulation, particularly in relation to procedural justice
  - professional behaviour and regulation within the operation of organisations
- pro-social norms and networks:
  - at a micro-level with people who offend
  - at a meso level in communities, neighbourhoods and schools
  - at a societal level.

## What societal values should the justice system represent?

Although institutions influence moral norms, moral norms in a deeper sense exist prior to institutions. As New Zealand jurist Sir John Salmond stated in relation to the legal realm:

*“The constitution as a matter of fact is logically prior to the constitution as a matter of law. In other words constitutional practice is logically prior to constitutional law. There may be a state and a constitution without any law, but there can be no law without a state and a constitution.”* (Salmond 1902, p203, quoted in Palmer 2007)

Institutional economist Douglass North makes a similar point in relation to the economic realm:

*“Belief structures get transformed into societal and economic structures by institutions—both formal rules and informal norms of behavior. The relationship between mental models and institutions is an intimate one. Mental models are the internal representations that individual cognitive systems create to interpret the environment; institutions are the external (to the mind) mechanisms individuals create to structure and order the environment”* (North 1993)

The point here is that institutions do not have free reign to impose any set of values – they need to work within the existing set of moral norms in society and can legitimately impose new norms that are acceptably close to the pre-existing set. To maintain legitimacy, societal institutions can only diverge so far from society.

### Defining legitimacy

In the Treasury social capital framework, institutions need to be trusted. But to be trusted, justice institutions also need to be viewed as legitimate.

Legitimacy is conceptually distinct from trust (Tankebe 2013). As described earlier, trust reflects a prediction about the actions of another. Justice system institutions are ‘trusted’ to the extent that people believe they will act in good faith.

Legitimacy, on the other hand, is defined by researchers as comprising at least two elements (Jackson et al 2013, Hamm et al 2017). The first is moral alignment: the norms and values of the justice system should be aligned with that of the population in general terms. The second is the resulting felt obligation to obey – the authorisation of the justice system to take decisions on society’s behalf and acknowledging the moral duty to abide by specific rules and decisions regardless of your personal agreement with them.

*“Granting legitimacy to authorities such as the police and courts cedes them the right to define what constitutes proper behaviour. Holding the system of rules to be legitimate overrides specific questions concerning the morality of particular rules.”* (Jackson et al 2013, p30)

Defined in this way, a central role of justice system institutions is to demonstrate:

*“moral authority through procedural justice and defending and representing community values.... the police can embody in more general terms a shared sense of right and wrong and a commitment to the rule of law. This does not require them to be moralists, or to demonstrate moral superiority. But it does require them to negotiate order in a way that maximises consent.”* (Jackson et al 2013, p.34)

## What are New Zealand's moral values?

There are many different intellectual frameworks for studying and understanding morality. Leaving aside the many different normative theories of ethics, social and moral psychologists have developed frameworks to understand morality as a descriptive matter, including Moral Foundations Theory (Haidt 2013), and Social Dominance Theory (Sidanius and Pratto 1999).

Frameworks such as these, when attached to surveys, help provide insight into the distribution of views within and between countries. The main surveys of this kind in New Zealand are the NZ Attitudes and Values Survey and World Values Survey.

Sample size and response rates limit the extent to which we can rely on these data sources<sup>12</sup>. But for what it's worth, this data provides some provisional insights into the beliefs of New Zealanders. For example, one of the directors of the World Values Survey, Christian Welzel, has developed something he calls the 'emancipative values' index. This combines several correlated items, such as the acceptability of divorce, beliefs in male superiority, and the importance of protecting freedom of choice.

These are combined to provide a score between 0 and 1, where 0 represents the highest expectation of conformity to traditional deferential norms, and 1 represents the highest tolerance for diversity and personal choice. The societies that score lowest on this measure can be characterised as what Fukuyama (2011) called 'patrimonial', and include places such as Bangladesh and Saudi Arabia. The countries that score highest include the familiar names of Denmark, Sweden, and Norway.

This choice of index may seem obscure, but this index is a good predictor both the individual and societal level of many different aspects of social capital, wellbeing and democratic functioning. For example, in a book-length treatment of the subject, Welzel (2013) finds that the emancipative values are associated with various outcomes such as income, education, longevity, gender equality, rule of law, peace, security and democracy.

Most importantly, values of tolerance and personal choice are strongly associated with generalised trust, ie, social capital. For example, Delhey and Welzel (2012) use World Values Survey data to explore the determinants of outgroup trust. Using multi-level modelling to control for society-level and individual-level factors they find that at an individual level the strongest determinant of outgroup trust, after ingroup-trust, is the strength of 'emancipative values'.

The emancipative values index correlates strongly with similar scales measuring 'Tightness vs looseness', 'embeddedness vs autonomy' and 'collectivism vs individualism' (Welzel 2013). In a meta-analysis by Victoria University psychologists Ronald Fischer and Diana Boer (2011), greater individualism is consistently associated with more wellbeing. I hesitate to interpret the emancipative values index as 'individualism' though because this may imply a degree of selfishness.

While tolerance is associated with wellbeing, selfishness is not. This is obvious when we consider the countries where wellbeing is highest: the Nordic countries. These countries have some of the highest scores on both wellbeing (OECD 2017) and generalised trust (Bjornskov 2006).

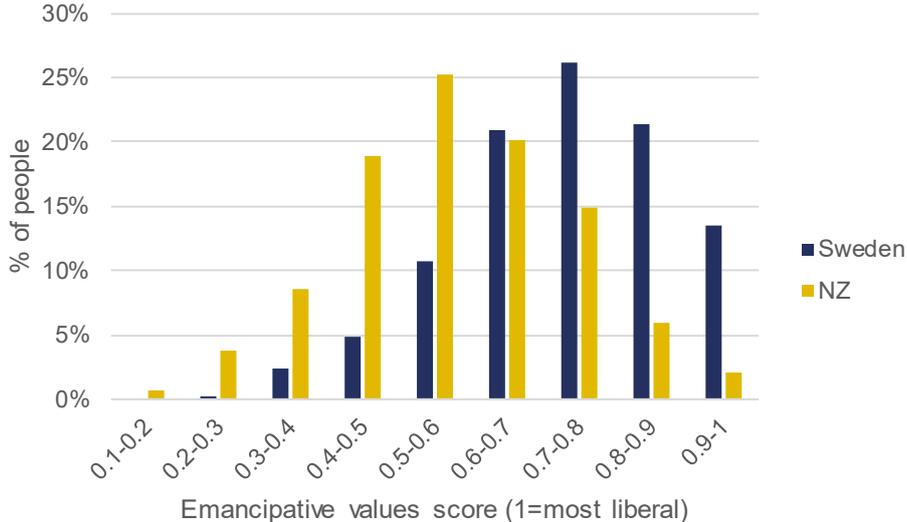
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<sup>12</sup> Conal Smith, personal communication

These countries are not conformist: they score very highly on the emancipative values index (Welzel 2013). But the Nordic countries, particularly Sweden and Norway, also have low scores for self-interested values in comparison to other countries (Halpern 2001).

As shown in Figure 11, New Zealanders, along with populations in the other anglo countries, hold values that are not as tolerant or inclusive as the populations of the Nordic countries. Not only are we less tolerant on average, there is a somewhat wider spread in values.

**Figure 11: World Values Survey data on emancipative values, NZ vs Sweden**



This reinforces the important role of the justice system, and government generally, in managing conflict between people and groups holding very different values.

It also demonstrates a potential tradeoff between legitimacy and wellbeing, depending on society’s values. The cross-country evidence suggests that ‘emancipative’ values are more consistent with wellbeing, but a justice system can not enforce these values on a society that does not to a sufficient degree already hold these values, without risking the public withdrawing its acquiescence to the system’s authority. With that in mind, we turn now to how the justice system can build trust in the face of conflicting values.

## Role of the justice system in building institutional trust and legitimacy

In the Treasury social capital framework, “*trust in institutions is the building block that underpins the other four social capital elements.*” (Frieling 2018).

This certainly rings true for justice. It is commonly observed that the justice system is inseparable from the society it serves. In the famous words of Robert Peele, founder of the Metropolitan Police:

*‘The police are the public and the public are the police; the police being only members of the public who are paid to give full time attention to duties which are incumbent on every citizen in the interests of community welfare and existence.’*

That these words from 1829 are still regularly quoted in 2019 speaks to their enduring power. In a democratic society, a justice system can only legitimately use public power with the consent of the people.

But for institutions as much as for people, trust is hard won and easily lost. Given the coercive powers and emotive context of justice, it is very easy for the occasional mis-step to undo plenty of other good work. So the design of the justice system reflects a careful balancing act between conflicting imperatives, such as:

- bringing swift and certain punishment to offenders, while avoiding wrongful conviction of the innocent
- empowering officials to act decisively, while preventing corruption or abuse of that power
- respecting both minority and majority values and interests, particularly in relation to Māori and non-Māori
- operating with efficiency and consistency, while also allowing for case-level and regional discretion.

In designing the justice system, our lawmakers have sought to balance these and other objectives through a range of different regulatory mechanisms. These mechanisms operate at three levels: constitutional, organisational, and professional. These levels are nested together, as indicated in Figure 12. For example, the way professionals act is influenced by their organisational environment, which is in turn influenced by the constitutional environment.

We use this framework to analyse where New Zealand is well-placed from the perspective of social capital, where areas of challenge lie, and what some of the general options that could be considered might be.

**Figure 12: Nested relationship between professionals, organisations and constitution**



### Constitutional level

Constitutional arrangements are about the legitimate use of public power. In this section I cover:

- The design of our electoral system
- The protection of fundamental rights
- The constitutional position of Māori
- Issues relating to the centralisation of public power
- Issues relating to the separation of powers

### Organisational level

There are many different organisations involved or connected to the justice system. In this section I cover the three main ways that these organisations can contribute to social capital:

- Preventing abuse and corruption
- Partnership and co-design
- Procedural justice

I then cover three structural issues that affect the use of these pathways:

- Organisational fragmentation and the challenge of service co-ordination
- Regulation of justice organisations
- The choice of commissioning models

## Professional level

At the next level down, individuals are authorised by their organisation or other mechanism to operate as professionals.

In this section I cover:

- Professional culture
- Professional capability
- Professional regulation

We turn now to a detailed discussion of each of the three levels of analysis.

## Constitutional issues

In his book *Seeing Like a State*, Yale-based political scientist James C. Scott (1998) describes the state as ‘...*the vexed institution that is the ground of both our freedoms and our unfreedoms*’ p7. This captures well the paradox at the heart of the justice system as an instrument of public power. The justice system is uniquely empowered to deprive individuals of their freedom. But we empower it to do so to protect our collective freedom.

It is not easy to resolve this paradox, to strike a fair balance between freedom and coercion. On the one hand, a toothless justice system will allow individuals to betray the moral code with impunity. On the other, it is easy for a justice system to tip over into excessive coercion, or to be used in a biased way to focus on restricting one group’s freedom to the benefit of another.

There is clearly no shortage of recent and historical examples of justice systems being used as or perceived as tools of oppression or unfair advantage. Contemporary policing in the United States provides ample examples, such as the 2014 unrest in Ferguson, Missouri and its precipitating circumstances. Closer to home, New Zealand’s justice system has been extensively used, particularly in the 19<sup>th</sup> century, to systematically seize land from and perpetrate other injustices upon Māori. More recent events such as Operation Eight and the Foreshore and Seabed legislation demonstrate how readily one group’s justice can be another group’s injustice.

The question that concerns us here is one of legitimacy. As I introduced in section 1, wellbeing, social capital and institutional legitimacy are deeply intertwined. In countries with the highest wellbeing, public power is a legitimate expression of the whole society’s morality, and the way that power is used strengthens rather than tears at the social fabric.

We now pick up the question of legitimacy again and explore it in more depth. What defines the legitimate use of public power is in its broadest sense a constitutional question. The nature of constitutions was considered in 2016 by Matike Mai Aotearoa – the independent working group on constitutional transformation that was commissioned by the Iwi Chairs Forum. The working group wrote that:

*“Government is the process that people choose to regulate their affairs and a constitution may be understood as the code they use to describe how government will function. A constitution is also the kaupapa or set of rules that a community sets about who can make the rules and how the people should abide by them and live amicably*

*together. They may be written or unwritten and they give expression not just to the ways of government in terms of structures and procedures but the values that a community think should underpin them.”*

Matthew Palmer (2007) defines a society's constitution in a similar way as '*...the set of factors that determines who exercises public power and how they exercise it.*' His analysis is grounded in the constitution as it currently stands, a constitution that is moulded very much on the British constitution.

Palmer takes a realist approach rather than a formalist approach, arguing that New Zealand's constitution is defined less by specific written rules and more by '*...the beliefs and behaviour of those who are involved in its operation (and) the beliefs and behaviour of those others whose opinions affect those involved in its operation.*' p565

This definition suggests that a constitution is a specific set of social norms held by those with power and those who accept that power – in other words, a constitution is part of our social capital.

He goes on to propose that the key beliefs and behaviours defining our constitutional culture are, in descending order of importance:

- representative democracy
- Parliamentary sovereignty
- the rule of law and judicial independence, and
- the constitution as an unwritten, evolving way of doing things.

These norms can help explain a number of features of New Zealand's governmental structure, including its high degree of centralisation, strong reliance on the electoral process as the main check on parliamentary and executive authority, and the profusion of departments and other agencies that have arisen organically as pragmatic solutions to particular problems.

From a wellbeing perspective, there are definite advantages to this constitutional culture and the way it is expressed through our electoral system. I cover the evidence for this point first.

However, these norms and features also create several important issues, which I then cover in turn. The issues relate to:

- The protection of fundamental rights
- The constitutional position of Māori
- Issues associated with centralisation
- Issues associated with the separation of powers

## ***Electoral system***

Using World Values Survey data, Rothstein and Stolle (2008) report there is no relationship between trust in political institutions with elected office and generalised trust at the aggregate level. They suggest this is because trust in solely political institutions with elected office (such as parliament) is mostly determined by party preference and political ideology. Citizens report greater confidence in appointed power holders (medical practitioners, police officers, judges) than elected power holders such as MPs (Rothstein 2011, IGPS 2016).

However, several structural features of electoral systems that determine the nature of representative democracy do contribute to generalised trust. Using World Values Survey data for 21 OECD countries from 1981 to 2008, Altman et al (2017) find that people report living more satisfying lives where they live in countries with a parliamentary executive, a proportional representation electoral system, and a unitary government structure.

They suggest that reasons for this finding might include that

*“first, a parliamentary (as opposed to a presidential) executive allows for a quicker and more flexible government response to changing national conditions because the fusion of the executive and legislative branches reduces the potential for political gridlock and allows for more effective governance. Second, [proportional representation] allows for greater democratic inclusion and better representation of diverse citizen opinions. Third, a unitary (as opposed to a federal) governmental structure allows for better policy coordination and, by extension, more effective public policy regimes.”*

Given this evidence, it is reassuring to know New Zealand already exhibits all these features.

Another important driver of institutional trust is free and fair elections. The World Bank includes this as one of their indicators of governance quality (Kaufmann et al 2004). Free and fair elections are an essential part of a modern democracy and any set of constitutional arrangements needs to ensure neutrality and independence in the running of elections.

In New Zealand, this independence is created by establishing the Electoral Commission as an independent crown entity that administers elections and the electoral roll under the Electoral Act 1993. The Ministry of Justice is the monitoring agency under section 27A of the Crown Entities Act 2004.

While this arrangement allows for a degree of independence, this independence could potentially be increased by providing a permanent legislative authority (PLA) for expenditure by the electoral commission. Many other independent actors in government are funded by PLA, including Judges' salaries<sup>13</sup>, the Inspector General,<sup>14</sup> the Coroner<sup>15</sup> and the Ombudsman.<sup>16</sup>

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<sup>13</sup> Under section 127 of the Senior Courts Act 2016, section 34 of the District Court Act 2016, section 206 of the Employment Relations Act 2000, section 13 of Te Ture Whenua Māori Land Act 1993

<sup>14</sup> Under the Intelligence and Security Act 2017, Schedule 3, clause 9(1)

<sup>15</sup> Under section 110 of the Coroners Act 2006

<sup>16</sup> Under sections 8 and 9 of the Ombudsman Act 1975

## ***Protection of fundamental rights***

Earlier in this paper I covered off the reasons why the protection of rights should be seen as intrinsically important, the right thing to do, regardless of any instrumental impact on social capital or wellbeing. This is not to say that protecting rights does not have instrumental value, however. Protection of rights is a fundamental constitutional principle, to prevent public power for being used to dominate the vulnerable, and as such helps build social capital.

In comparison to other countries, there is relatively little formal protection of human rights in New Zealand. The Bill of Rights Act 1990 and Human Rights Act 1993 are not entrenched, and as such can be overridden by a simple majority. They are also not superior law, in that the courts can not use it to strike down other legislation. These limitations are raised regularly by, for example, Sir Geoffrey Palmer, who favours enhancing the status of this legislation and introducing other protections such as requiring a supermajority of 75% majority to pass legislation.

However, even in the absence of formal protection by the courts, there is still much that can be done, and is done, to protect rights. Much of this activity can be understood as part of what John Keane (2007) has called *Monitory Democracy*. He describes monitory democracy as:

*“a ‘post-Westminster’ form of democracy in which power-monitoring and power-controlling devices have begun to extend sideways and downwards through the whole political order... These extra-parliamentary power-monitoring institutions include –to mention at random just a few –public integrity commissions, judicial activism, local courts, workplace tribunals, consensus conferences, parliaments for minorities, public interest litigation, citizens’ juries, citizens’ assemblies, independent public inquiries, think-tanks, experts’ reports, participatory budgeting, vigils, ‘blogging’ and other novel forms of media scrutiny.”* Loc 346

There are many different overlapping mechanism to identify, investigate and publicise situations where rights may be imperilled. The mechanisms include, for example:

- The Human Rights Commission
- The Human Rights Review Tribunal
- The Privacy Commissioner
- The Health and Disability Commissioner
- Bill of Rights Compliance reports, under section 7 of the Bill of Rights Act 1990
- The National Preventive Mechanism under the Crimes of Torture Act 1989

These domestic instruments are buttressed by international obligations under the various international human rights treaties, and the associated periodic reports. These mechanisms do not guarantee that all rights violations will be prevented, but they do ensure that violations or potential violations are made transparent and need to be justified in the public arena.

One of the newest areas of international human rights is the UN Declaration on the Rights of Indigenous Peoples, which was adopted in 2007 and supported by New Zealand in 2010. A declaration plan is being developed to drive and measure New Zealand’s progress towards

the aspirations embedded in this international agreement. A group of UN-appointed experts is currently reviewing New Zealand's progress.

This mechanism provides a new lens within which to consider the constitutional position of Māori within New Zealand society, alongside the more familiar frame of the Treaty. We turn to this issue now.

### ***Constitutional position of Māori***

Perhaps the ultimate test of a democratic constitution is whether it is accepted by the polity as legitimately authorising the use of public power. Under this test, the most significant constitutional issue in New Zealand is the fact that at least some Māori view the state and its institutions as untrustworthy at best, illegitimate at worst.<sup>17</sup>

For example, it is not infrequent for Māori who are convicted of criminal matters to appeal their conviction on the grounds that sovereignty was never ceded by Māori, and therefore criminal statutes do not have force against Māori defendants.<sup>18</sup> As a matter of law, the Courts have decisively rejected this line of reasoning. Yet the frequency of these appeals demonstrates that at least some Māori view the criminal justice system as illegitimate. That a section of the community views the use of public power as illegitimate corrodes both social capital and wellbeing. As Moana Jackson noted, quoting the Waitangi Tribunal for effect:

*"When one section of the community burns with a sense of injustice, the rest of the community cannot safely pretend that there is no reason for their discontent. That is a recipe for social unrest ..."* Wai 11, p51, quoted in Jackson (1988). p284

A challenge of legitimacy among indigenous citizens is unsurprisingly commonplace among countries with a colonial heritage, notably Canada, Australia and the United States. Each country has developed its own methods and frameworks for considering these issues, considering both international examples and the specific domestic context. Some of the most thoughtful work on this area has come out of Canada, providing a useful starting point before considering the New Zealand context. For example, Jeremy Webber (2006), working in the legal pluralist tradition<sup>19</sup>, encourages us to think about law in a broad sense as deriving not just from 'commands' of the sovereign, but arising from dialogue between and within multiple and overlapping 'normative communities' or 'legal orders' such as an indigenous group, a religious group or a profession. This conception of law has much in common with social capital, as this conception of law includes informal 'social norms' that are sometimes described as 'living law.'

He suggests that we:

*'focus squarely on the fundamental problem of law: how, despite our diversity, we can come to provisional working solutions, provisional norms, that allow us to live together despite our continuing disagreements. Those solutions may involve the imposition of a single outcome. They may involve the recognition of spheres of autonomy. They may produce a modus vivendi rather than a comprehensive body of principle. But they*

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<sup>17</sup> Eg, NZ Police (2016). 81% of Europeans have full/quite a lot of trust in confidence in Police, compared to only 67% for other ethnicities, including Māori.

<sup>18</sup> Eg, Hapi aka Morunga v NZ Police [2016] NZHC 1360, Phillips v R CA502/2013 [2013] NZCA 580, Martin v Police [2017] NZHC 1407

<sup>19</sup> A legal positivist views law as 'posited' by actions of the state, eg, statute or the decisions of the courts. By contrast, a legal pluralist views non-state sources of behavioural regulation as alternative sources of 'law'.

*always aim to produce at least some settled order among the contending positions, allowing us to escape the brute interaction of those who are always “forçans ou forcés” (coercing or coerced)’ p170*

His phrase ‘provisional norms’ emphasises their dynamic and contested nature. Legal and social norms are never fixed, but always subject to ongoing dialogue about their continued relevance. Indeed, he points out that if there were no disagreement about norms then we would have no need for law in the first place. Webber’s framework extends well beyond constitutional questions, but we can also apply in more limited fashion to those particular ‘provisional norms’ relating to the use of public power – that is, constitutional norms.

Like any other set of norms, constitutional norms are not fixed and are rightfully subject to ongoing debate and revision. Exercises such as the Constitutional Advisory Panel (2013), Matike Mai Aotearoa (2016) and the book by Palmer and Butler (2016) are important examples of this reflexivity in action.

A common theme among these exercises is the need for ongoing conversation and reflection among all New Zealanders about the foundations of our system of self-government. A wellbeing lens suggests the same conclusion. If this Government is interested in using the institutions of state to further the wellbeing of all New Zealanders, then ensuring those institutions are seen as truly reflecting our ‘strange multiplicity’ of cultures (Tully 1995) is surely a pre-requisite to any further activity. Regardless of how benevolently a policy might be crafted, if it is perceived as the product of an illegitimate public power, it is unlikely to achieve the intended results.

The risk is that if this constitutional dialogue is dominated by the majority culture, then even well-intentioned change will fail to improve perceived legitimacy among Māori. This risk is all the greater because the existing constitutional order is based on historical British and modern Pākehā values far more than tikanga Māori, and most scholars agree these constitutional norms were imposed without the full consent of Māori.<sup>20</sup> Given these existing norms are strongly majoritarian, there is a risk that Māori culture will be misinterpreted by the majority in a way that is acceptable to the majority on its terms alone.

Carwyn Jones (2016) picks up on this risk of selective majoritarian interpretation of minority culture to say that:

*“If the relationship between Indigenous peoples and the state is to be a treaty relationship rather than a colonial one, negotiations between the parties must be genuinely intercultural. In this way, dialogue takes place in an inter-cultural middle ground.” p60*

By inter-cultural dialogue, Jones means dialogue between Māori and non-Māori that involves an earnest attempt by those in each culture to understand the culture of the other. This builds on work by Jeremy Webber, who invites us to consider more fully how constitutional dialogue might better recognise and value the existence of diverse normative orders in New Zealand, notably those of Māori and Pākehā, but also those of other groups. It is not sufficient,

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<sup>20</sup> Scholars as diverse as Palmer (2008), Mutu (2010), Jackson (1992), Davies and Ewin (1992) and Kawharu (in Waitangi Tribunal 1984) agree that whatever those rangatira who signed the Treaty believed they were granting to the Crown, it falls far short of the strong version of sovereignty the Crown proclaimed for itself in May 1840 and elaborated on in subsequent statute. These views have been reinforced by the Waitangi Tribunal (2014), who issued a finding that those northern rangatira who signed the Treaty did not cede sovereignty.

Webber argues, merely to take the existing constitutional order as given and consider what concessions or alterations can be made to accommodate indigenous rights. Rather, if a constitution in a multicultural society is to be viewed as legitimate across all cultures, it needs to reflect each of those cultures on its own terms as much as possible.

What does 'inter-cultural' dialogue look like? Webber argues that in considering an unfamiliar normative tradition, we should enter with a presumption of respect, a presumption that the norms in question are adaptive to the social context they have been developed in:

*“There is good reason to believe, then, that norms that have been developed over time in relation to a particular field will take better account of its practices than norms developed in an entirely separate field with very different practices.... The insight might be framed in Burkean terms: normative traditions are repositories of knowledge and reflective judgments on the challenges of living in society-in actual, historically determined social milieux. One loses something when one treats those traditions with disregard.*

*What is more, those traditions often have great significance for their members' sense of moral responsibility and personal identity. Members have used the distinctive terms of those traditions to frame their commitments. They have mastered those terms, used them to guide their actions, and employed them to pose their deepest questions. It can be profoundly disabling to lose that framework.”* pp186-187

For non-Māori, particularly those non-Māori working as crown officials, this presumption implies a duty to consider deeply the development of Māori constitutionality in the context of the whole of te ao Māori. Because tikanga is and was adaptive to the social, economic, cultural and spiritual dimensions of life in te ao Māori, any genuine attempt to understand tikanga requires a genuine attempt to understand every other aspect of the 'social milieux' that produced and produces it. And because the reality of life as Māori has changed so significantly over the full course of their 800 or so years of living in these islands, as much before as after the arrival of Europeans, a proper understanding of tikanga needs to be dynamic, grounded in a strong historical awareness as well.

The Treaty and surrounding discourse are of course vitally important to any such genuine attempt at inter-cultural constitutional dialogue. But as Māmari Stephens (2013) points out, the Treaty by itself is insufficient for such a purpose. She states that:

*“any such inquiry (into Māori constitutionality) must not be restricted only to the role of the Treaty of Waitangi in Māori constitutional development. The Treaty discourse is critically important, but has, arguably, narrowed the view of Māori as a constitutional people; presuming that Māori constitutionality only began with the Treaty, and now may only be viewed through a Treaty lens...(and) such an inquiry should not presume that Māori constitutionality is automatically synonymous with notions such as self-determination, autonomy, nationhood and modern uses of the term 'rangatiratanga'.”*

In arguing for a presumptive respect, Jeremy Webber goes less far than some of his more radical colleagues in the legal pluralist tradition who argue that the moral force of any culture's norms can only be validated within that culture. The second step of inter-cultural dialogue, he argues, is a broader inquiry from that starting point of presumptive respect – there is no absolute requirement to affirm a different culture's norms.

Ideally, an honest dialogue will create significant levels of inter-cultural agreement as to certain norms, even if these are expressed somewhat differently in each cultural context and no perfect one-to-one translation is possible. Such agreement requires significant good faith on both sides. Given the ignominious history of settler mistreatment of Māori in this country, often aided fully by the Crown, and given current demographic and economic imbalances, such good faith is understandably a lot to expect from Māori.

But if such good faith can be found and nurtured, then Webber's framework invites Māori to offer the same presumptive respect to English and Pākeka constitutional norms that have proven adaptive in their context. Just as an understanding of tikanga depends on an understanding of Māori history, an understanding of New Zealand's current constitutional norms requires an understanding of European history. The rule of law and parliamentary sovereignty have been misused at times, certainly, but they have also helped prevent an English or New Zealand version of an overbearing sovereign such as a Franco or Stalin or Napoleon – just as these norms were designed to do.

Sovereignty itself is a constitutional norm that in its Westphalian version<sup>21</sup> helps prevent the recurrence of inter-state warfare that so plagued Europe up to and including the 17<sup>th</sup> century Wars of Religion; and in its Hobbesian version<sup>22</sup> helps prevent the internal strife that often accompanies a weak central authority, as we saw in English history with examples such as the War of the Roses, and in various phases of Scottish and Irish history.

And underpinning them all, number one on Matthew Palmer's list, is the norm of representative democracy. This norm is the one that has changed the most since 1840, and raises the question of what the 'Crown' is in the contemporary Māori-Crown relationship. In 1840 the Crown was the Queen of Britain, who was somewhat constrained by a parliament elected by a very small franchise – at this stage few men and no women had the vote, and certainly no Māori.

But over the course of the 19<sup>th</sup> century the Crown became the Queen of New Zealand, and increasingly the Queen-in-Parliament, such that the Queen now is merely a symbol of the sovereignty that lies with us through the parliament we elect. Thanks to the steady expansion of the electoral franchise, that representation is now universal, including provision for dedicated Māori seats. In a meaningful sense then the Crown is now us, all of us who live in New Zealand – Parliament is in the words of the current Prime Minister 'our place'. In the sense that Māori are eligible to vote, they too are now part of the Crown, and the 'Māori-Crown relationship' is in a very real sense primarily a relationship between Māori and non-Māori citizens.

I suspect most New Zealanders feel rightfully proud of the prevailing constitutional norms, even if they don't think of them as such, and intuit them in line with the empirical research as the foundation of our individual and collective wellbeing. This pride is justified, but a genuinely inter-cultural dialogue needs to be accompanied by an openness to learn from other cultures, and a corresponding openness to challenge. It is reasonable to hope that an inter-cultural dialogue will result in Māori finding some value in the prevailing norms, but the reverse applies too.

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<sup>21</sup> ie, the version articulated in the 1648 Treaty of Westphalia, acknowledging each state's right to govern within its borders, including most important the right to choose its own religion

<sup>22</sup> ie, placing all power in a strong central sovereign, a Leviathan

This openness also requires sensitivity to diversity within each normative order. Indeed, it is highly misleading to talk about a 'Māori normative order' if that implies a homogeneity of views, in the same way that the 'Pākeha normative order' includes libertarians and egalitarians, deep greens and gramscians. Within Māoridom, gang whānau will provide one view, the kingitanga another. Each iwi has its own norms, as does each urban authority, each kaupapa Māori NGO, each whānau and so on. On this point, Jeremy Webber says that:

*“(There is)... another judgment inherent in deference to another's order: when we defer, we are not merely recognizing another's norms; we are also deferring to the structure of authority by which conflict is settled in that order. Indeed on occasion we may be picking out one mechanism for settling conflict and preferring it to other competing mechanisms within that same order.” p197*

The Crown can not help but choose which voices to have dialogue with or not have, and which to weigh most highly in its decision-making. Perhaps the most difficult choice is about how to define 'Māori' in a contemporary setting, ie, what kind of grouping to privilege in the partnership between Māori and crown. Philosopher Andrew Sharp (2002) noted that there are at least three different kinds of Māori group. The first, such as hapū or iwi, is based on kin. The second, particularly relevant for urban Māori, is based on voluntary consent and association, such as to an urban Māori authority. The third is based on a pan-Māori basis of ethnic identification.

There are conflicts within Māoridom about the preferred mode of association, and the Crown can not help but favour some views over others merely in deciding who to treat with. This itself can be a source of frustration, particularly when the Crown, to meet its other fiduciary obligations, insists on forms of governance for the management of funds from treaty settlements, for example, that are not entirely grounded in traditional tikanga.

Any decision, whether to proceed with a course of action, or to not proceed, or to defer to another decision-maker, will of necessity mean heeding some voices more than others. In other words, the question of how those with public power should engage in inter-cultural constitutional dialogue is itself a constitutional question, itself subject to constitutional norms.

This is a useful point to turn to the Treaty itself. The growing acceptance of the Treaty as a constitutional instrument provides the framework within which inter-cultural dialogue tends to happen in New Zealand, and by which the Crown's participation in that dialogue is judged.

Suitably enough, dialogue within the inter-cultural space that the Treaty represents often focuses on the meaning of the Treaty itself. This meaning is far from settled – the Treaty is a highly uncertain and contested framework, as are the corresponding constitutional norms. There is extensive ongoing debate about what meaning the Treaty had in 1840, has now in 2019, and should have in the future. There are differences in opinion both between and within Māoridom and the Crown.

At one end of the spectrum of interpretations, Margaret Mutu (2010) analyses the Māori text of the Treaty<sup>23</sup> to suggest the rangatira who signed in 1840 understood the Treaty as guaranteeing their 'paramount authority'. She goes on to state that the power they granted to Hobson (the kāwana) was limited to controlling those English people resident, and in some

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<sup>23</sup> The differences between the Māori and English texts are infamous. Under international law, it is the version written in the indigenous language that is treated as the authoritative text.

cases permitting the lease (rather than sale) of land according to tikanga (payment/*hoko* under a use agreement/*tuku whenua*). This view of the Treaty suggests it grants strong constitutional rights to Māori and only very weak rights to non-Māori.

Ani Mikaere (2004) offers a related view, arguing that the constitutional rights of Pākehā today should be seen as constrained by their status as *manuhiri*, to be interpreted under tikanga by *tangata whenua*. Under these perspectives, it is for Māori to determine under tikanga what the constitutional future of New Zealand is, and for non-Māori to submit.

At the other end of the spectrum are those who, in the words of the Constitutional Advisory Panel (2013), “*reject the very basis of the Māori-Crown relationship and its history, and aspire to a system which pays no heed to a Treaty relationship or to indigenous rights.*” p32 This is tantamount to demanding Māori submit to the majority normative order, denying the need for any kind of inter-cultural dialogue.

Whatever the merits of the arguments at either end of this spectrum, the focus in the social capital literature on generalised trust suggests a need to find some middle ground where conflicting views might be reconciled. A view of New Zealand Government focused on the primacy of either a Māori or a Pākehā normative order is highly unlikely to be perceived as legitimate by everyone, so can be rejected by anyone who wishes to value the wellbeing of all New Zealanders.

Carwyn Jones (2016) offers a Māori perspective on what a more conciliatory approach might look like. Like Margaret Mutu, Ani Mikaere, Moana Jackson and others Jones supports the goal of Māori self-determination, and sees the Treaty as protecting Māori legal traditions. But Jones also builds on the work of Canadian scholars such as James Tully and Jeremy Webber in talking about the need for ‘reconciliation’ between Māori and colonists. As just discussed, he describes meaningful reconciliation as a high bar, one that can only be reached through an earnest intention to genuinely understand and value the indigenous culture on its own terms, not as translated inaccurately into the cultural and legal forms of the colonising culture.

Matthew Palmer (2008) offers a Crown-focused perspective on the ongoing ‘relationship’ between Crown, Māori and other New Zealanders. Palmer has analysed the differing meanings given to the Treaty by the various actors on the crown side, including the judiciary, Waitangi Tribunal, executive, and legislature, and at both international and New Zealand law. He notes that the meaning of the Treaty is contested even among these various instruments of the state, and that there is also a high degree of uncertainty about whose job it is to resolve the Treaty’s uncertain meaning. At the same time, Palmer suggested that a core interpretation shared by all Crown actors is that the Treaty ‘*represents an explicit commitment to the health of the relationships between the Crown, Māori and other New Zealanders.*’

This paper is written from the perspective of the public service, as one institution of the Crown. Public servants have a responsibility to be politically neutral, but also to give free and frank advice to the Government of the day. It would not be appropriate for the public service to try and resolve for itself the fundamental differences in interpretation of the Treaty, as this is a political question. But nor would it be appropriate to consider the Treaty solely from within the constraints of existing Crown interpretations of the Treaty.

So for this paper I explore what meaning a Government focused on wellbeing might *choose* to give to the Treaty (from its perspective) in pursuit of that objective, and particularly how it might apply that meaning in the design and operation of the justice system.

I split this discussion into two parts, drawing upon the framework of treaty principles commonly used by the Crown, but considered in light of the more general discussion above on the challenge of creating legitimacy in any state marred by a legacy of colonialism. I first consider the related treaty principles of active protection and equity.

I then consider the ‘exchange’ of rangatiratanga for kāwanatanga and the associated compact, and the implications of that exchange for an ongoing healthy relationship between Crown, Māori, and other New Zealanders in relation to justice matters.

In neither case do I assume the meaning of these terms is immutable or unchangeable, or that the answers can be found purely within them. But given that these terms have arisen from a rich Treaty discourse familiar to all thoughtful New Zealanders, they are a useful starting point for discussion.

### Active protection and equity

It is generally accepted that under the Treaty of Waitangi, the Crown has an obligation to actively protect Māori interests, and to do so equitably given the guarantee of full citizen rights in Article 3. In the Waitangi Tribunal’s (2017) inquiry into Māori reoffending rates, the Tribunal made a number of points in relation to these principles as they apply in the justice system, as preliminaries to their ultimate finding that the Department of Corrections is in breach of these principles.

The Tribunal stated that:

*“it is our view that the principle of active protection is heightened in circumstances of inequity between Māori and non-Māori.”* (p34)

In making this statement, they built on the earlier report into Offender Assessment Policies (Waitangi Tribunal 2005), where the Tribunal said that the significant proportion of men and women being disconnected from their communities could lead to:

*‘erosion in the basic structures of hapū and iwi...and a rejection of any pride in Māori identity.’* (p148)

They also referenced the report into Māori health (Waitangi Tribunal 2001), where the Tribunal found that the Crown was obliged to give:

*‘protection against the adverse effects of settlement, which ‘arises over and above considerations of equity... (and) ...calls for additional resources and effort to be deployed in favour of Māori whenever general programmes afford them insufficient protection.’* (p53)

In relation to the Department of Corrections, then, the Tribunal found that the ‘*urgent situation of grossly unequal reoffending rates*’, requires Corrections to demonstrate ‘*especially vigorous action*’, because ‘*Te ira tangata, the essence of life, is the ultimate taonga.*’ (Waitangi Tribunal 2017, p35-36)

The interpretation of equity relates to the discussion in part one of this paper about distributional justice and the protection of rights. People identifying as Māori make up 15% of the population, so a Government happy to go along with the preferences of the majority might be perfectly comfortable with a lower level of wellbeing and institutional trust among Māori if that meant a higher level of wellbeing and social capital for the 85% of non-Māori. This is perhaps a key reason why the Treaty provokes such controversy:

*“There are, of course, imperfections in particular systems of democracy. In particular, if you rely on majority rule to elect your rulers, how do you prevent abuse of minorities? This is the stuff of constitutional design. It explains the deep level of challenge that the Treaty of Waitangi poses to New Zealand constitutional culture in symbolising the accordance of a special constitutional status to Māori.”* (Palmer 2007, p581)

There is a rich tradition in liberal political theory focused on preventing the tyranny of the majority, particularly through instituting human rights and creating a separation of powers. This tradition can help explain the existence of constitutional norms such as judicial independence alongside representative democracy. Former Prime Minister Sir Geoffrey Palmer (2013) has noted this featured in his thinking when extending the jurisdiction of the Waitangi Tribunal back to 1840. As a result of this he argues that *‘Insulation from the ravages of extreme opinion has been achieved.’*

But we should also remember that there are important differences between western liberal and indigenous philosophies of justice. The language of rights, if understood only in the liberal tradition as political and legal rights, or even social and economic rights, does not appropriately capture the more holistic and spiritual concepts of justice in te ao Māori for example, and is resisted by some indigenous scholars (see discussion in Jones 2016).

Similarly, the argument goes that the question is not just one of distributional justice, it is also one of cultural justice. From this perspective, protecting the existence and value of tikanga as a taonga is essential regardless of any instrumental benefit to Māori in terms of their wellbeing, socioeconomic or otherwise. As Matthew Palmer (2008) notes, if Māori culture does not exist in New Zealand it doesn't exist anywhere, and this fact alone is reason enough to value and protect it.

This line of argument suggests that the principles of active protection and equity do not only mean that the justice system has a special duty to attend to offending, victimisation, and other harms such as family breakdown among Māori. The justice system does have this duty, but it also has a duty under the Treaty to protect tikanga in doing so. This has special relevance to the operation of initiatives such as Corrections' Māori Focus Units, the Rangatahi Courts and so on, to ensure tikanga used is genuinely tika. This is one reason why the principle of partnership can not be separated from the principle of protection; the Crown can not hold itself to be the arbiter of whether tikanga is tika without breaching the partnership principle.

The scope of *Tu Mai te Rangi!* was limited to the Department of Corrections, so the Tribunal did not explore the nature of active protection and equity in the context of the rest of the justice system. Unusually, there is also very little guidance to be had in legislation.

Most of the major sectors of New Zealand government have explicit provision in their empowering legislation for active protection of Māori. For example:

- Section 16(2) of the Education Act 1989 states that ‘In performing its functions and exercising its powers, a board [of trustees] must take all reasonable steps to act in a manner that is consistent with the principles of the Treaty of Waitangi.’
- Section 4 of the Public Health and Disability Act 2000 states that: ‘In order to recognise and respect the principles of the Treaty of Waitangi, and with a view to improving health outcomes for Māori, part 3 provides for mechanisms to enable Māori to contribute to decision-making on, and to participate in the delivery of, health and disability services.’
- Section 8 of the Resource Management Act states that ‘In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).’

These provisions have over time been interpreted in an ongoing constitutional dialogue that can help guide the application of the general principles of the Treaty in a specific context.

Clearly some parts of the Justice system, such as Te Kooti Whenua Māori and the Waitangi Tribunal, are also very actively involved in protecting Māori interests, and have mature systems for applying Treaty principles.

But notably few of the major pieces of legislation relating to the criminal justice system refers to the Treaty, special obligations to Māori, or any other form of explicit requirement for active protection and equity. The same is largely true of other parts of the justice system including the family court.<sup>24</sup> The major exceptions are perhaps the Resource Management Act 1991, the Children’s Act 2014 in relation to youth justice, and the provisions in the District Court rules and High Court rules about the right to speak Māori in court.

Legislation can be a blunt tool, and indeed the legislative framework for the justice system is flexible enough that a lot of important innovation to better protect Māori interests has been allowed to occur at the organisational level, such as the Matariki Court. I will discuss this in more detail below in the organisational section. But the point here is that at the constitutional level, there is comparatively little direct requirement set on justice institutions in their exercise of public power to ensure active protection and equity for Māori. This means in practice that much relies on the initiative of the individuals operating at an institutional level, be they judges, ministers, officials, or others.

In some cases this can be sufficient, but the fact that Waitangi Tribunal (2017) found the Department of Corrections to be in breach of the active protection principle suggests that organisational-level initiative is not always sufficient, or at least not always to the satisfaction of all. Increasing the constitutional requirement on justice agencies to protect Māori interests could be one important way to improve trust in institutions and social capital among Māori. Indeed one of the recommendations in *Tu Mai te Rangī!* was to amend the Corrections Act 2004 to state the Crown’s relevant Treaty obligations to Māori.

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<sup>24</sup> Including the Family Court Act 1980, Disputes Tribunal Act 1988, Policing Act 2008, District Court Act 2016, Senior Courts Act 2016, Criminal Procedure Act 2011, Crimes Act 1961, Summary Offences Act 1981, Sentencing Act 2002, Parole Act 2002, Corrections Act 2004, and Independent Police Conduct Authority Act 1988.

Matthew Palmer (2008) notes that after initial experiments in placing unelaborated references to the principles of the Treaty of Waitangi in legislation, lawmakers have preferred more recently to be more specific about the nature of the obligations in relation to a particular policy area. This suggests that a detailed policy process would be essential to consider exactly what Māori interests are most affected by the criminal justice system, and to articulate clearly the justice system's obligation to protect them. This paper is not the place for such an exercise, but as a starting point some of the main areas of interest are likely to include:

- access to and the exercise of tikanga during detention or management by the justice system
- opportunities and support to address related inequities, such as physical and mental health, and education
- maintaining meaningful whānau access, and support for broader whānau needs, particularly for the children and grandchildren of people under management
- involvement of hapū and iwi in the sentence management process as a way of preventing the erosion of rangatiratanga<sup>25</sup>
- mechanisms to protect the integrity of tikanga as applied in justice contexts.

Clearly the principles of partnership and participation are also relevant here, and Māori would need to be closely involved in identifying relevant interests if an objective of naming and protecting them in legislation were pursued.

Legislation is not the only mechanism to promote active protection and equity. At an organisational and professional level, structures of training, policy development, performance management and so on can all contribute. But at a constitutional level legislation is perhaps the strongest mechanism available. One key advantage of inserting provision into legislation is that it provides a means for ongoing inter-cultural dialogue between independent actors as to what the principle of active protection should mean in relation to specific concerns. The Waitangi Tribunal currently plays such a role, which is why reports such as *Tu Mai Te Rangī!* are such important sources of guidance for policy analysts.

However the Waitangi Tribunal, while independent, does not have the level of constitutional protection that a court does, and its findings are not binding either. As Palmer (2008) notes, for these reasons the Waitangi Tribunal is less influential a location of constitutional dialogue than it might otherwise be. He raises the possibility of creating a Treaty of Waitangi Court as a new court of first instance to interpret the meaning of the Treaty in a way that is binding. He suggests that this Court could be made up of both High Court Judges and Waitangi Tribunal members, as a partnership between the legal expertise of High Court Judges and their confidence among Pākehā, and the expertise in te ao Māori and confidence among (most) Māori of the Waitangi Tribunal members. This recommendation was noted with approval by the Human Rights Commission (2012) in their submission to the constitutional advisory panel.

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<sup>25</sup> Andrew Sharp (2002), citing the arguments made to the Waitangi Tribunal by the Waipareira Trust in a bid to be recognised as an iwi, describes one way of understanding rangatiratanga is as 'a quality of the relationship between leaders and people that is characteristic of good community relationships. In addition, it is a necessary basis for effective community action.'

Building and maintaining strong, healthy relationships between the Crown, Māori and other New Zealanders

In debating the meaning of the Treaty, perhaps more energy has been expended on the appropriate interpretation of three terms than on any other issue. These terms are *kāwanatanga*, *tino rangatiratanga*, and sovereignty.

One level of debate is at the historical level, focused on understanding the contemporary meaning given to the treaty by those who commissioned, drafted, translated, explained and signed it. The academic consensus on these questions has shifted significantly over the past 50 years, with the view that the Treaty is a simple treaty of peaceful cession being steadily overturned in response to the work of Ruth Ross (1972), Claudia Orange (1987) and many others (see Bell 2009 for a discussion).

The Waitangi Tribunal has also shifted its views over time. For example, in the 1988 Muriwhenua report the Tribunal stated that:

*“In our view the Māori chiefs were trying to preserve a form of autonomy that did not amount to complete sovereignty but a kind of local self-government in Māori districts... This sort of demand for independent Māori control over Māori resources and people runs right through subsequent history.*

*From the Treaty as a whole it is obvious that it does not purport to describe a continuing relationship between sovereign states. Its purpose and effect was the reverse, to provide for the relinquishment by Māori of their sovereign status and to guarantee their protection upon becoming subjects of the Crown.*

*In any event on reading the Māori text in the light of contemporary statements we are satisfied that sovereignty was ceded. Tino rangatiratanga therefore refers not to a separate sovereignty but to tribal self management on lines similar to what we understand by local government.”* p187

But in 2014, in a report addressing the first stage of an inquiry focusing on Northland claims, the Tribunal also stated that:

*“We think it likely that the rangatira viewed their agreement with Hobson at Waitangi as a kind of strategic alliance.”*

Based on a range of considerations the Tribunal went on to state that:

*“Our essential conclusion, therefore, is that the rangatira did not cede their sovereignty in February 1840; that is, they did not cede their authority to make and enforce law over their own people and within their territories. Rather, they agreed to share power and authority with the Governor. They and Hobson were to be equal, although of course they had different roles and different spheres of influence. The detail of how this relationship would work in practice, especially where the Māori and European populations intermingled, remained to be negotiated over time on a case-by-base basis.”* p430

Some degree of inconsistency is perhaps inevitable given the imprecision of the term ‘sovereignty’, which can have many different meanings. Political philosophers have involved themselves in this aspect of the debate. For example, Davies and Ewin (1992) support the

view that Māori could not have ceded sovereignty in an absolutist, Hobbesian sense, but could well have done so to the extent one accepts a weaker definition of sovereignty that permits for some sharing of authority.

Hugh Kawharu implicitly accepted this point in his submission to the Kaituna river inquiry, when he argued that the rangatira who signed the Treaty ceded some but not all of their authority:

*“what the Chiefs imagined they were ceding was that part of their mana and rangatiratanga that hitherto had enabled them to make war, exact retribution, consume and enslave their vanquished enemies and generally exercise power over life and death.”* p14

In taking this view, Kawharu goes less far than someone like Moana Jackson (1992), who argues that it is simply not possible that Māori ceded any sovereignty through the Treaty because:

*“Under Māori law, it was impossible for any iwi to declare its authority over another except through absolute military conquest. It was equally impossible for any iwi to give away its sovereignty to another. The sovereign mana or rangatiratanga of an iwi was handed down from the ancestors to be nurtured by the living for the generations yet to be. It could not be granted to the descendants of a different ancestor, nor subordinated to the will of another.”* pp6-7

This debate about the historical meaning of the Treaty is mirrored at the legal level. From the old view of the Treaty as a ‘simple nullity’, more recent legal scholarship takes a more nuanced view. Palmer (2008), while acknowledging that the Treaty is not directly enforceable as such at domestic law, emphasises that the growing use of references to the Treaty in statute, important precedents such as the *Lands* case, and the Treaty of Waitangi Act 1975 all mean the Treaty influences all domestic law. He also suggests that the Courts would find if asked that the Treaty is binding at international law, though as a treaty of protection rather than as a treaty of cession.

But regardless of the legal status of the treaty, the historical meaning of the Treaty is an important piece of context informing moral and policy debates about what meaning to give it now. Palmer (2008) notes that the Treaty is viewed as binding as a matter of ‘honour for the crown’. This is true, but given the Crown is in an important sense us as residents of this land, we could more straightforwardly say the Treaty creates a collective moral obligation on us all to honour the agreement by which we came to all be here together.

This agreement can be understood in the language of republican democracy, as guaranteeing a right to contestability, to be heard on matters that affect Māori, and specifically to be heard in an inter-cultural space as described by Jeremy Webber. This contestability is necessary to ensure Māori are not ‘dominated’ in the sense of being mercy to the arbitrary will of non-Māori.

Alternatively, from the perspective of wellbeing and social capital, we can at least acknowledge that the Treaty means that Māori have a legitimate expectation that the institutions of state will allow for a degree of autonomy, and it is unreasonable to expect Māori to view the institutions of state, particularly the coercive institutions of justice, as legitimate without allowing for that autonomy.

The meaning of autonomy has to be understood in relation to the promise to protect tino rangatiratanga. Tino rangatiratanga is an even richer term than sovereignty, with many shades of meaning depending on context. Jeremy Webber's advice here to consider any norm from a different culture in the context of its social and cultural environment is particularly apt – tino rangatiratanga, especially as exercised prior to 1840, or 1769, or 1642, can not be understood without understanding the social, economic and cultural realities of life at those times, particularly inter-related concepts such as mana, whakapapa, whanaungatanga and kaitiakitanga. Post 1840, tino rangatiratanga is closely linked with concepts such as kotahitanga and mana motuhake.

One of the limitations of the Treaty discourse is that interpretations of rangatiratanga tend to take on a legalistic mode, by forcing an understanding of rangatiratanga in relation to kāwanatanga, and as defined by the Crown.

This is perhaps one reason why the Crown more often talks in general terms about Treaty principles such as partnership, or what Matthew Palmer (2008) describes more generally as a relationship. This is a useful shortcut away from overly legalistic interpretations of the Treaty, but also leaves a risk of vagueness, particularly when these principles are considered in the abstract rather than in relation to specific matters. Hugh Kawharu's daughter, Merata Kawharu, invites us to get into these specifics:

*“The mixed bag of outcomes resulting from considering the Treaty and Treaty principles is perhaps not surprising when debate has been occurring at the level of generalities. Few policies specifically detail Crown and Māori responsibilities in protecting rangatiratanga.”* p109

This is a good starting point for a Crown official. How in practical terms might Crown and Māori protect rangatiratanga in relation to the justice system? What should rangatiratanga mean in relation to justice? Clearly this is a question that can only be rightfully answered in partnership with Māori, in the 'relational sphere' that Matike Mai Aotearoa (2016) identified between the rangatiratanga and kāwanatanga spheres, and that Carwyn Jones describes as the inter-cultural dialogue space.

But dialogue can be enhanced by careful forethought and self-reflection on all sides. On the rangatiratanga side, many Māori, such as Moana Jackson (1988), have developed arguments supporting a position that criminal harms between Māori should be dealt with primarily in the rangatiratanga sphere, and that Māori have a right to establish an independent justice system to address these harms within Māoridom.

This vision is not exactly without precedent. In the 1840s and 1850s rangatira held far greater latitude to manage criminal behaviour within their whānau and hapū under Governor Fitzroy's Native Exemption Ordinance of 1844, and Governor Grey's Resident Magistrates Ordinance of 1847 (Ward 1971). But that at a time when Māori still significantly outnumbered non-Māori, and the practical day-to-day authority of rangatira was much greater than today. What a genuine by-Māori, for-Māori justice system could look like given the social and political realities of New Zealand today is far from obvious. It is also a vision that can only appropriately be developed by Māori.

As a crown official I focus instead on the kāwanatanga side. What forethought might the Crown want to bring to such a dialogue? In particular, what kind of mechanisms could the Crown propose as means to enable this dialogue on an ongoing basis?

The first thing to note is that the process of adjudication is itself a zone of localised dialogue between conflicting normative orders. If everyone in the case agreed on the right way to resolve it, it wouldn't be brought for adjudication. Every case involves interpretation of general principles and rules in the light of locally specific facts. This interpretation goes both ways – we interpret facts in light of legal principles and rules, and interpret the ongoing suitability of these general principles and rules in light of the facts. This process of interpretation and reinterpretation is known as hermeneutics. Jeremy Webber (2006) notes that:

*“The hermeneutic character of normative argument means that law always has a measure of openness. The job of decision makers is to impose a collective resolution, but that resolution has to be made and remade.”* p192

This is all very familiar in terms of state law, but the legal pluralist framework invites us to consider the way social norms, or living law, is also made and remade through the process of adjudication.

An offence or other wrong is only brought to the justice system for resolution in circumstances where the local social order both failed to prevent that wrong, and failed to provide resolution. Every person, family, organisation and community affected by a case can't help but reflect in some way on what went wrong, and perhaps seek to revise some aspect of their 'living law' in response. This informal hermeneutic process happens in tandem with the formal hermeneutic process of the courtroom. The way the formal process is conducted can create more or less space for the informal process alongside it.

State law acknowledges this in a limited way insofar as it is interested in encouraging individual offenders to reflect on and revise their own internal normative world, through deterrence, rehabilitation, or to, in the words of s7(1)(b) of the Sentencing Act 2002, *'promot(ing) in the offender a sense of responsibility for, and an acknowledgement of, that harm (to the victim and community)'*.

But the existing framework for justice shows a more ad hoc interest in the social norms and broader social context of the wrongdoer, both generally and specifically in relation to Māori. The biggest contrast is between the youth and adult jurisdictions in criminal justice. Youth Justice centres around the Family Group Conference, which can be understood as a mechanism for the young person and their family to reflect on their own norms and develop a plan both to deliver justice to the victim and to prevent further harm. The involvement of Police and the Court is largely constrained to checking the plan for fairness and general acceptability from broader societal perspective, as represented by the parameters established in legislation. And for more serious matters where the Court plays a bigger role, the Rangatahi Court provides a more bicultural, relational approach for young Māori offenders.

As a form of inter-cultural dialogue between the Crown and whānau, the model for youth justice model is much further into the relational sphere than is the model for adult criminal justice, which generally speaking is firmly in the kāwanatanga sphere. The main exceptions to this are the Matariki Court, Te Pae Oranga and restorative justice conferences. In three quite different ways, these modes of justice provide much more space for broader dialogue from multiple normative perspectives, and greater opportunity for influence from those perspectives.

Expanding these modes of justice is therefore one way the justice system could look to better meet its treaty obligations. This type of location for inter-cultural dialogue is important because it is local and grounded in specific wrongs and a specific social context with specific

norms. This provides an important way to deal with the problem identified by Jeremy Webber about choosing which voices to engage with in a different normative order.

At a national level, a decision for example to engage in dialogue with a body such as the Iwi Chairs Forum, say, raises the question of the extent to which that body can be said to fairly represent all Māoridom. But localised dialogue focused on specific issues circumvents this issue, because it becomes possible for all those involved in the issue to participate in the dialogue. There are also other reasons to value these modes of justice, as discussed below in the section on building pro-social norms and networks.

Another set of options arises in relation to the governance of the justice system. At an organisational level, the language of *co-design* is often used to consider these issues. I discuss this in the organisational section below. But it is important to discuss power-sharing at the constitutional level first, where the language of *co-governance* is more appropriate.

It is important to cover the constitutional level first because the allocation of decision rights at this level affects the environment in which co-design takes place at lower levels. Given that the state agencies and Ministers currently hold so much power in comparison to Māori, efforts at partnership or co-design can easily result in one-sided outcomes that fail to build legitimacy or increase effectiveness.

There are at least three main ways that co-governance can be realised: directly, in an advisory capacity, or in a monitoring capacity.

#### *Formal allocation of decision rights*

The most direct route to co-governance is to formally allocate decision-making roles to Māori alongside agents of the Crown. There are many ways this can be achieved. For example, several distinctive governance bodies have been established in the natural resources sector, often following Treaty settlements, with dedicated roles for Māori, particularly Iwi Māori. These examples include the following (Kapea and Lenihan 2013):

- The *Waikato River Authority* is empowered by legislation to, among other things, act as sole trustee of the Waikato River Cleanup Trust, which is funded by Government. The Authority has five Iwi appointees on the Board and five Council appointees, one for each of the five river Iwi and five TLAs in the catchment.
- The *Te Oneroa a Tohe Statutory Board* provides governance and direction over the use, development and protection of Te Oneroa-a-Tohe (Ninety Mile Beach). The Board is comprised of 50% iwi members and 50% local authority members, with decisions being made by 70% majority.
- The *Crown Forestry Rental Trust* receives rents from licences that the Crown has granted to forestry companies to grow trees on crown land. This rental income is held and invested for the benefit of future Treaty claimants. There are six trustees – three are appointed by the Minister of Finance, and three are appointed by the New Zealand Māori Council and the Federation of Māori Authorities.
- The *Te Urewera Board* is comprised of 3 Crown and 6 Tūhoe members, and is responsible for the governance and management of Te Urewera.

There are all sorts of ways these kinds of examples could be adapted to the justice context. For example:

- The empowering legislation for existing crown entities such as the Independent Police Conduct Authority could allow for a minimum number of Māori-appointed members on their governing boards.
- New entities with mixed Crown and Māori membership could be established to perform functions such as contracting with rehabilitation providers.
- Māori could be given a formal role in reviewing proposed judicial appointments.

These are just some ideas to stimulate further discussion – their merits have not been analysed in a proper policy process. There are doubtless many other similar ideas that could be explored as well.

#### *Advisory bodies*

A second approach is to involve Māori in an advisory capacity. This creates a formal opportunity for influence over the decisions taken but can fall short of allowing full decision rights or partnership. There are also many examples of this kind of arrangement, including:

- A Māori Advisory Committee of the Intellectual Property Office of New Zealand.
- The Māori Advisory Board of the Department of Corrections.
- The *Whānau Ora Partnership Group* that was established in 2014 with six iwi appointees and six ministers, to discuss strategy for the initiative.
- The Māori Economic Development Forum, with a responsibility to advise NZQA on potential new qualifications that will bring improved economic benefits to Māori.
- A Māori advisory group, *Te Rōpū*, has been established for the Government's joint venture on family violence and sexual violence.

Bodies such as this could be established at the discretion of a Minister, department or other crown agent. Alternatively, they could also be given additional weight and durability if established via legislative instrument. Legislative instruments can also create stronger obligations for crown agents to engage meaningfully with these bodies. At the same time, though, merely providing avenues for advice in the *kāwanatanga* space falls a long way short of the promise of *rangatiratanga* and is likely to leave many of those with the strongest views unsatisfied.

### *Monitoring and auditing*

A third approach is less common across Government but is worth noting briefly. That is, to involve Māori in a monitoring or auditing capacity. This does not allow for decision rights, but requires decision-makers to directly answer to Māori for their decisions. A weaker version could involve monitoring by SSC or other central agency of Treaty compliance, as suggested by Transparency International (2013).

A monitoring role for Māori could take many forms. At the highest level for example, provision could be made for Māori appointments to the Office of the Auditor-General, with strengthened provision in the Public Audit Act for the examination of performance in relation to Māori. For an example at the opposite end of the scale, the Roper committee recommended that an official group of Kaumatua be appointed with full rights in legislation to access prisons, as a kind of second inspectorate as well as roving source of informal support and connection to whānau (Ministerial Committee 1989).

These two speculative options raise a general consideration across the three types of co-governance arrangement: the level of geographic aggregation that co-governance should operate at. For example, kaumatua-based monitoring at the prison level is a highly localised form of governance, in contrast to regional or national arrangements.

Governance at the local level will often be a better fit with both tikanga and rangatiratanga. As Eddie Durie (2005) points out, prior to colonisation:

*“Control from a centralised or super-ordinate authority was antithetical to the Māori system. Indeed, it is probably an understatement to say that Māori did not develop a central political agency, and more correct to assert that Māori ethic was averse to it.”*  
p449

Indeed, one reason why co-governance arrangements are more advanced in the natural resources sector may be that natural resources are commonly managed at a local or regional level, which aligns better with the decentralised nature of iwi and other Māori organisational structures. As Hohaia Collier (2008) noted,

*“Currently our Government prefers to deal with Māori at iwi or national level. An effect of this is that many hapū feel that they are being represented by others who may not be as closely aligned to them in terms of whakapapa, whanaungatanga and mana whenua as they would like”* pp317-318

So one reason why co-governance arrangements are less advanced in the justice system may be that the justice system is highly centralised. We turn now to the topic of centralisation as a more general issue standing in the way of trusted institutions, and not only among Māori.

### ***Problems arising from centralisation***

In general terms, New Zealand’s constitution represents a very centralised model of government in comparison to other countries:

*“Comparatively few functions are delegated to local or regional government; central government plays a far more dominant role in public administration in New Zealand than is the case in most other OECD countries”* (Productivity Commission 2014, p36)

The dominance of central government is especially true in the justice system. The Education and Health systems at least devolve a significant amount of practical authority to, respectively, Boards of Trustees and District Health Boards. But in the justice system, authority tends to flow unambiguously from the top down. For example, under the Policing Act 2008 significant powers are vested in the Commissioner of Police, and it is his<sup>26</sup> decision as to how far to delegate these. And unlike in many other countries, there is just one police force and one jurisdiction for the whole country.

Similarly, the Corrections Act 2004 grants significant powers to the Chief Executive of Corrections. Prior to 2016, courts were more decentralised, but the District Court Act 2016 unified all District Courts into a single jurisdiction. And although judges operate independently, the hierarchy of courts and doctrine of precedent ensure that individual discretion is constrained within reasonably tight bounds, and is regulated from above rather than below.

Centralisation has a number of advantages, including efficiency, but can also create problems in creating institutions that are sensitive to the needs of, and inspire trust in, specific locations, communities and sub-populations. I have already discussed Māori dissatisfaction with the constitutional distribution of power, and suggested that the level of centralisation may be a contributing factor to a lack of effective partnership and trust at the local level.

A frustration with centralisation is often voiced by broader community voices as well. A common theme is that centralised power creates perhaps undue sensitivity to the national political process. This reflects our constitutional structure of a strong executive at a national level. There are advantages to this sensitivity, as Ministers can change policies quickly where there is a clear public demand to do so. But this design also makes the system somewhat more sensitive to majority views at a national level than to local or minority views, contributes towards homogeneity, and can lead to undue risk aversion.

Concerns about the effect of the political process on government service delivery are not exactly novel. They have been identified repeatedly over the years as generic problems with the New Zealand state sector, not just the justice system. For example, the 2001 Advisory Group on the Review of the Centre (p15) identified “*risk aversion due to the political cost of failure*” as an impediment to better frontline services. The 2011 Better Public Services Advisory Group (p16) noted that “*There are inherent features of the state sector that discourage innovation (eg, high political cost if risky innovation fails)*”.

Most recently, these concerns were addressed exhaustively in relation to the broader social sector in a 2015 Productivity Commission report, *More Effective Social Services*. Many of the commission’s findings relate to the way organisations operate and will be dealt with below. But they also reflected the fact that many of the behaviours exhibited by agencies in the social system are adaptive given the constitutional and political environment that agencies work in. They noted that this adaptive behaviour can be particularly disempowering for NGOs and other community groups. They said that:

*“Ministers operate in a highly contested and adversarial environment. The New Zealand Treasury (2011) noted:*

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<sup>26</sup> Or perhaps ‘her’, one day

*‘The need to win elections leads politicians and their parties to develop a very good understanding of the factors that drive public opinion. Media exposure is “political oxygen”, mainstream media analyse the politics and not the policy of an issue, and the media require instant reactions and ready sound bites. Consequently, Ministers feel the pressure to:*

- *respond quickly and decisively to the latest risk, accident or misdeed;*
- *commit to concrete action, even without evidence that the action will address the problem, or that benefits are likely to exceed costs;*
- *stick to a political commitment once made; and*
- *deliver on the commitment as soon as possible.’ (p10)*

*Ministers can also have rivalries within the general envelope of collective responsibility.*

*In such an environment, government contracts are under persistent scrutiny by groups with an interest in discrediting government policies. The threat of opportunistic scrutiny provides a strong incentive for governments to use contracting approaches that minimise political risk – such as highly specific contracts and rigid performance reporting (Moszoro, Spiller & Stolorz, 2014). The threat of opportunistic scrutiny also prompts government agencies to offer contracts of short duration, and works against relational contracting.*

*Providers often interpret these phenomena as indicating that the agencies do not trust them.” pp88-89*

The Productivity Commission recommended greater devolution of social sector arrangements to deal with these problems. This is not a one-size-fits-all solution, certainly not in the justice system. Certain functions such as the power of arrest, judicial decision making, and imprisonment can’t feasibly be delegated too far without the state abrogating responsibility to protect human rights, as well as its Treaty obligations. The Commission noted that:

*‘...the Crown cannot devolve some responsibilities. These include international commitments on human rights, where New Zealand is party to an international agreement or treaty....decentralisation of power, through devolution or delegation of executive authority, does not reduce the direct responsibility of the Government to fulfil its human rights obligation.’ p109*

But other functions such as victim support, rehabilitation and reintegration services, and perhaps some forms of community sentence administration, could potentially be devolved further without risking a breach of fundamental rights. There is a potential intersection here with the review of local government and their role in supporting intergenerational wellbeing.

There are also more subtle ways of allowing for greater community-level or minority input into the decision-making process, short of full delegation or devolution. I outlined above three areas in which power could be shared with Māori, or Māori could otherwise have greater scope for influence at a local, regional or national level. These three areas were: direct involvement in decision-making; advice; and monitoring/audit. The same three areas could apply equally for communities or other interest groups.

These areas could be explored at either a constitutional level, particularly through the creation of formal rights in legislation, or at an institutional level, within the powers already delegated or granted to the various crown agents working in the justice system. We return to this topic at an organisational level below, particularly in relation to community policing. Either way, the fact that there appears to have been little progress in resolving this challenge across the state sector between the 2001 Review of the Centre and the 2015 Productivity Commission report suggests further consideration of the options is more than warranted to address problems of institutional trust among certain minority groups.

### ***Problems relating to the separation of powers***

It is somewhat ironic that New Zealand's system of government is both highly centralised and highly fragmented. We have focused so far in this discussion on the problems associated with centralisation. We turn now to fragmentation, as the central authority of the state is divided between many different actors. Compared to other countries, and especially given our small size, New Zealand has a very large number of agencies and Ministers (Advisory Group on the Review of the Centre 2001). I discuss this organisational fragmentation below. I focus here on the constitutional separation of powers between the judiciary, legislature and executive, which is also a form of (very deliberate) fragmentation.

This separation is designed to protect the rule of law, which Matthew Palmer (2007) suggests ranks third in our list of constitutional norms; we do not rank the rule of law as highly as in some other countries such as the United States but consider it very important nonetheless. He describes the rule of law in this way:

*“Law exists independently of the lawmaker once it takes on its own written expression. Yet if the lawmaker has the unilateral and untrammelled power to change the law, or to apply it in a particular case, then the law has no expression independent of the intention of the lawmaker. Law, in those circumstances, does not exist and cannot rule. The rule of law is only upheld when the lawmaker is not free to apply, and thereby determine the meaning of, the law in a particular case... In the unending struggle to clarify what sort of coercion we want government to impose in a society, lawmakers make laws, the words of which are interpreted by law-interpreters, the results of which can be scrutinised by lawmakers and changed if desired, to then be interpreted anew. Here lies the importance of the existence of different branches of government – and the dialogue between them over the meaning of law.”* Palmer 2007, p587

The challenges arising from the separation of powers need to be understood in this context, as the separation is a key form of protection against arbitrary rule, and a foundation of our democratic freedoms.

It is also important to remember that the rule of law is a characteristic of countries high in wellbeing and social capital.

Political scientists Berggren and Jordahl (2006) use the World Values Survey and Fraser Institute Economic Freedom Index to find a strong relationship between the rule of law (they call their index 'Legal system and property rights) and generalised trust.

In the 2015 version of this index, NZ is placed third in the world, behind only Finland and Norway.<sup>27</sup> Using the same data, Bjornskov et al 2010 find that property rights are also directly associated with wellbeing. Similar findings showing an association between the rule of law and generalised trust have been produced by, for example, Wang and Gordon (2011).

A slightly different measurement of the rule of law, by the world justice project, has New Zealand placed 8 out of 126 countries.

As the long list of items used by the Fraser Institute indicates, there are many separate aspects to the rule of law. The rule of law reflects choices made by each branch of government: the legislative (such as with the degree to which rights are protected by statute), the executive (such as with how much funding to grant the court system) and the judiciary (through their effective progress through cases).

So I would certainly not suggest anything that would diminish the rule of law. At the same time, it is important to carefully consider some of the unintended consequences of the separation of powers and how these might be addressed.

A separation of powers creates two related problems when it comes to designing institutions that inspire trust and facilitate wellbeing. The first is that a number of actors become institutionally separated who then need to co-operate to co-produce justice outcomes. For example, to complete a court case requires the co-operation of several different actors who are all funded and managed separately, including the judge, police prosecutor, defence lawyer and probation officer. The second, related problem is that these actors have different incentives, different cultures and different preferences, based on their place in the system.

When combined, these two factors are a recipe for inefficiency and insensitivity to individuals encountering the system. The accountability for system outcomes becomes fragmented and there is no guarantee that the local solution each actor pursues is consistent with a globally optimal outcome. To continue the example of court cases, undue delay has been repeatedly diagnosed and repeatedly targeted for reform over decades, with only modest success. For example, the Royal Commission on the Courts noted in 1978 that:

*“The commission has heard many complaints...about the length of time people are kept waiting...some litigants and witnesses are kept waiting for hours for their case to be heard. It is a system wasteful of time and money for counsel, litigants and witnesses.”*

Follow public consultation the Law Commission (2002) said that:

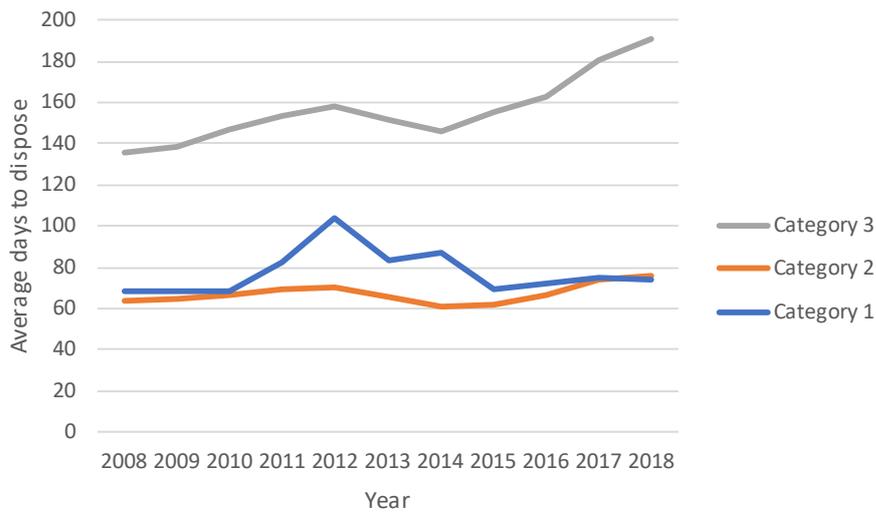
*“Almost everyone thinks the court system is unacceptably slow. This is very frustrating and can be traumatic for those involved.”* p21

It is difficult to pin down responsibility for court delays, as court outcomes are co-produced among so many independent actors. The Criminal Procedure Act 2011 was a major attempt to address this longstanding issue by providing tools to encourage co-operation. Unfortunately, it has not achieved the desired result, as can be seen in Figure 13. On average, court cases are taking longer to dispose now than ten years ago.

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<sup>27</sup> <https://www.fraserinstitute.org/economic-freedom/dataset?geozone=world&year=2015&page=dataset&min-year=2&max-year=0&filter=0&sort-field=legalSystemsPropertyRights&sort-reversed=1>

**Figure 13: Average time to dispose district court cases, by category<sup>28</sup>**

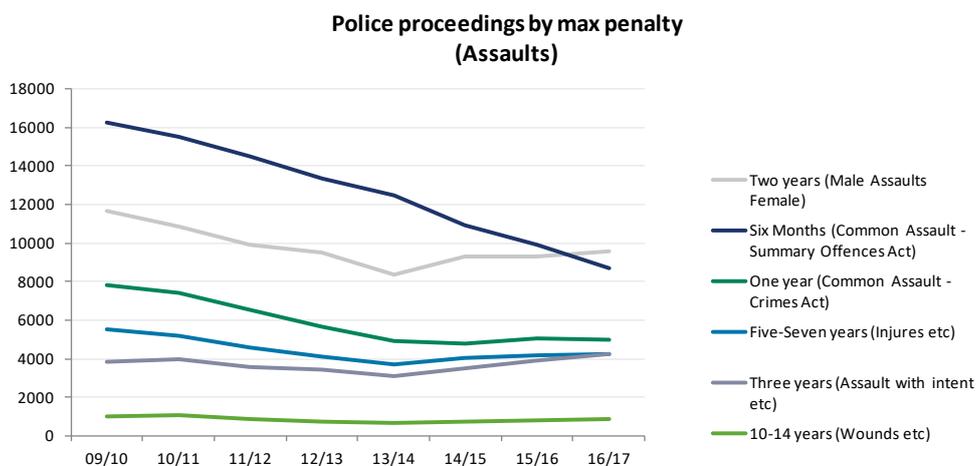


There are many potential explanations for court delay. One is as a natural outcome of a system where different actors have conflicting incentives.

Another example of where separation causes incentive problems is in relation to the prison population. The prison population is very sensitive to small changes in discretion elsewhere in the system, such as among parole board members, police prosecutors, and the judiciary.

There is evidence that patterns of discretion do change over time. For example, Figure 14 shows how Police began prosecuting assaults more aggressively between 2013 and 2017, using more serious charges than in previous years. This has a flow-on impact to the workload of the judiciary and the prison population, yet police do not incur any of this expenditure. In other words, there are significant externalities associated with many decision-points in the system, and these have not generally been internalised.

**Figure 14: Police charging practice for assaults**

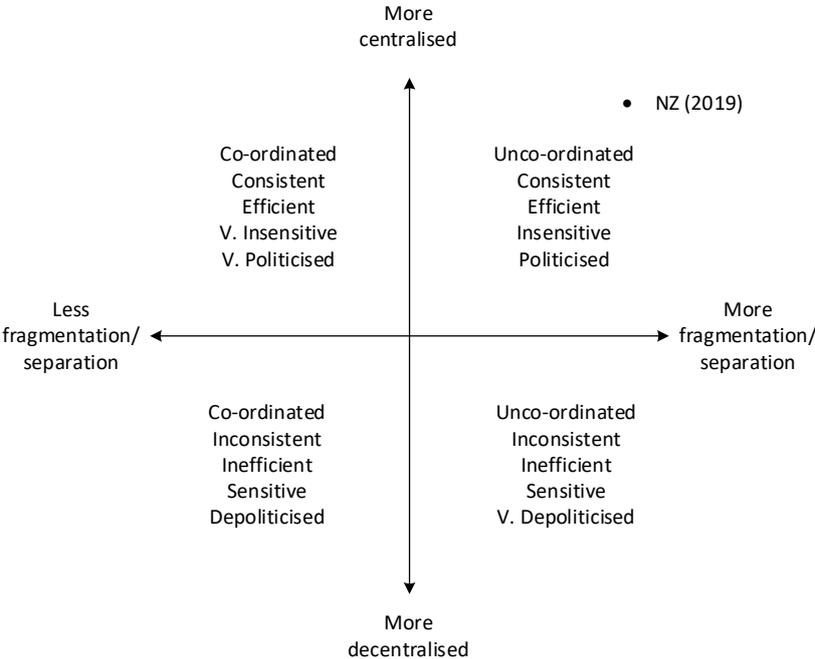


<sup>28</sup> Note that disposal time only includes active days, this means that time the case was on hold or disposed is excluded. Cases are on hold when a warrant to arrest was issued against the defendant for not showing up to court.

Both these examples suggest that the fragmented nature of the system may contribute to levels of punitivity and delay that could be somewhat higher than they might be otherwise. If in turn these contribute to an erosion in trust, particularly among victims in relation to delay, and Māori in relation to punitivity, they may run counter to a wellbeing and social capital agenda.

There is likely no simple solution to this issue. As already noted, the separation of powers is a fundamental check on abuse of power. Beyond this, a little thought suggests there is no optimum combination of centralisation/decentralisation and separation/unity that meets all relevant objectives. Figure 15 illustrates that there is a tension between the goals of co-ordination, consistency, efficiency, sensitivity to local context, and insensitivity to the vagaries of the political process.

**Figure 15: Stylised indication of tradeoffs in the centralisation/fragmentation space**



This framework can help understand the tradeoffs involved across the two dimensions of centralisation and fragmentation. For example, some other jurisdictions have responded to some of these challenges by reducing the level of discretion in the system, such as by issuing more prescriptive legislation or more detailed guidelines. This has the effect of strengthening the legislature in relation to the other branches of Government, moving up and to the left in the diagram.

However, the tradeoff of a move to greater specification is a reduction in the sensitivity to local conditions, a potentially a higher level of politicisation, and a greater risk of arbitrary outcomes. The example of mandatory minimum sentences in the United States is salutary in this regard.

Another option is to consider administrative vehicles to encourage or require greater co-operation. For example, the fact that justice is co-produced led the 1978 Royal Commission on the Courts to recommend establishing a new entity with both judicial and departmental representation, to take joint responsibility for the administration of the courts:

*'We consider it both necessary and desirable that the courts should be managed by a single authority, representative of those groups who have a prime interest in the administration of justice. This authority would exercise unified control over case-flow and the day-to-day administration of the courts...We would name this authority "the Judicial Commission".'* p197

This recommendation was not taken up by the Government of the day, and may not be relevant today – it merely demonstrates the kind of creative thinking that can be applied to manage some of the incentive problems created by constitutional separation. A more recent example is the joint venture focused on family and sexual violence.

### ***Constitutional issues: conclusion***

The coercive powers of the justice system to deprive people of their liberty go well beyond that of any other wielder of public power. Our constitutional norms place limits on how that power can be used. If the justice system is to build social capital and wellbeing, it is essential that constitutional arrangements serve to legitimise the justice system's power.

Perhaps the greatest issue of legitimacy concerns Māori and their constitutional role. The fact that the justice system is empowered by law that is enacted by elected representatives is not sufficient to secure legitimacy in the eyes of all Māori. There are at least three ways to strengthen the hand of Māori in the governance of the justice system, including shared decision-making, advice, and monitoring.

An important barrier to greater participation by Māori is the centralised nature of the justice system, which is compounded further by its fragmentation across multiple actors. These issues also create challenges in co-ordinating justice and making it sensitive to the needs of the minority of people who experience the large majority of the harm.

There are no perfect solutions, and every option to change will have its trade-offs. However, any constitutional system will place constraints on how effective various strategies at lower levels can be. We turn now to the next level down in our three-level framework: the organisational level.

## Organisational issues

We move on now to the various organisations within the justice system, how they are structured and how they are regulated (within the existing constitutional arrangements).

A range of organisational forms are used in the system reflecting different degrees of desired independence from the political process. The Ministry of Justice, Department of Corrections, Crown Law Office and Serious Fraud Office are the closest to the political process as they are public service departments, with direct obligations to their respective Ministers under the State Sector Act 1988.

These organisations also enter into contractual arrangements with non-governmental organisations in both the for-profit and not-for-profit sectors, and administer significant funding for lawyers under the legal aid scheme.

New Zealand Police is a non-public service department, reflecting a greater level of operational independence than other departments.

The primary accountability mechanism for each of these organisations is to parliament via their Minister under the Public Finance Act 1989 and the State Sector Act 1988. In addition, a parallel set of organisations and individuals are empowered to monitor and help regulate these organisations. The most notable are the Independent Police Conduct Authority, Ombudsman, and Judicial Conduct Commission, as well as the Auditor-General.

In addition, the Parole Board is an independent statutory body, operating in a quasi-judicial role at far remove from Ministers, although its administrative functions are provided by Corrections. Accountability for the Parole Board is provided primarily through rights of appeal to the judiciary.

The quality of government organisations is an enormous topic that can be approached in many different ways. For this section I take a pragmatic approach, building on the general definition of 'Quality of Government' offered by Rothstein and Teorell (2008):

*“the typical civil servant, policeman or judge... should be guided by the public interest instead of any personal interest... to use Ronald Dworkin’s phrase, (with) ‘equal concern and respect’ for all citizens.”*

I use this concept to animate the following discussion. I start with a discussion of three main pathways by which organisations can demonstrate 'equal concern and respect'. The first is by preventing corruption – that is, making sure power is not used for personal gain.

I then pick up the discussion earlier about partnership with Māori (and communities), this time using the lens of co-design rather than co-governance. The focus here is on how equal concern and respect might extend to the design, not just the delivery, of justice services.

I spend much more time discussing the third pathway – procedural justice. There is a large literature on procedural justice, focusing on the quality of interaction between organisations and individuals, with a focus on ensuring people encountering justice organisations can be made to feel concerned and respected as individuals, rather than as mere commodities on a production line.

I then consider three inter-connected structural considerations that influence the use of these three pathways. These are:

- organisational fragmentation and the need for co-operation between multiple organisations
- commissioning models for justice services
- regulation of justice institutions.

The following discussion takes for granted the fact that the way organisations act helps determine the extent to which they are trusted. But it is also important not to assume organisations are solely responsible for the level of trust they inspire.

A line of research suggests that trust in institutions may be only partly determined by their objective performance, with subjective assessment of disorder and the general condition of the social fabric dominating. This reflects a longstanding line of theoretical work in sociology and criminology that views the justice system, particularly the police, as ‘symbolic guardians’ whose role is to convey images of order, justice and stability, while also expressing the ‘spirit’ of the nation-state (Jackson and Bradford 2009). So when people express confidence in the police, they may really be expressing confidence in society generally:

*“Informal social controls regulate most deviance, and when these informal social controls are successful, the police may appear successful; when the informal social controls are seen to be weak – and when people are concerned about the long-term erosion of neighbourhood cohesion and social capital – the police may already have lost the confidence of the communities they serve.”* Jackson and Bradford 2009, p4

Bearing that in mind, we turn now to the three main pathways by which organisations can inspire greater trust.

### ***Pathways to organisational trust***

#### Pathway to trust 1: Preventing abuse and corruption

One of the quickest ways to corrode trust in justice institutions is to allow corruption or abuse of the significant powers they hold.

Thankfully, New Zealand scores very well on surveys of corruption. In the 2017 Transparency International Corruption Perceptions Index, New Zealand scored 89/100, which placed it first out of the 180 countries surveyed (Transparency International 2017). It is important to maintain this high ranking because the international context shows that where it exists, corruption is a common factor reducing trust in institutions (Rothstein and Teorell 2008). Low levels of corruption can not be taken for granted because corruption can and does emerge or re-emerge over time. For example, Australia has declined from an index score of 85/100 in 2012 to 77/100 in 2017.

In a recent review of the evidence, Dimant and Tosato (2017) point to a number of factors that have been shown to be associated with corruption. This evidence suggests that New Zealand will be more likely to maintain low levels of corruption if we:

- continue expanding the ability to transact with Government online

- maintain free trade
- maintain competitive internal markets
- minimise the amount of complex market regulation
- are careful about levels of migration from highly corrupt countries<sup>29</sup>.

There is an interesting parallel between this evidence and the evidence presented below in relation to universal vs targeted services and procedural justice. As will be noted, complex regulation and highly targeted services both require complex rules that create a degree of discretion in interpretation by street-level bureaucrats. This discretion can both reduce perceived fairness and increase corruption.

A comprehensive report by Transparency International (2013) assessed New Zealand's integrity systems for restraining the abuse of power, and ensuring that power is exercised appropriately. They described New Zealand's systems as 'fundamentally strong', but identified some areas of weakness, notably:

*“The interface between political party finances and public funding...(including) the transparency of political party financing... (and of) public funding of the parliamentary wings of the parties.”*

and

*“An erosion of the convention that public servants provide the government of the day with free and frank advice (and) an apparent weakening over the last decade of the quality of policy advice that public servants provide.”*

These two points interact somewhat, in that high quality, free and frank advice on the former issue may be important to help resolve this potential risk to our social capital.

## Pathway to trust 2: Partnership and co-design

It is increasingly common to hear voices advocating for greater citizen participation in the business of government, as a potential solution to the worldwide decline in trust in government (eg, OECD 2001, 2009, Edwards et al 2012, DPMC 2017). This participation is seen as a way to refresh democratic citizenship and reduce the distance between governors and the governed. There is reason to take these arguments seriously, but also need for caution, particularly in relation to justice matters.

This movement is sometimes known as participatory governance, borrowing from the closely related concepts of participatory and deliberative democracy. In an article on participatory governance, Osmani (2007:1), defines 'effective' participation as where:

*“all the relevant stakeholders take part in decision-making processes and are also able to influence the decisions in the sense that at the end of the decision-making process all parties feel that their views and interests have been given due consideration even if they are not always able to have their way.”*

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<sup>29</sup> The research suggests that in general any difference between migrants from highly corrupt countries and others seems to disappear after the first generation, but the first generation can still make a difference.

This represents a mid-spectrum view of public participation. Public participation can occur along a spectrum of intensity, a spectrum that has been divided into eight levels (Arnstein 1969), five levels (IAPP 2007, presented in Figure 16 below) or three levels (OECD 2001). But regardless of the framework used, the level of participation used in OECD countries tends to be at the lighter-touch end of the spectrum, more focused on the provision of information than on more active modes of participation (OECD 2009).

Figure 16: IAP2 spectrum of public participation

INCREASING IMPACT ON THE DECISION					
	INFORM	CONSULT	INVOLVE	COLLABORATE	EMPOWER
PUBLIC PARTICIPATION GOAL	To provide the public with balanced and objective information to assist them in understanding the problem, alternatives, opportunities and/or solutions.	To obtain public feedback on analysis, alternatives and/or decisions.	To work directly with the public throughout the process to ensure that public concerns and aspirations are consistently understood and considered.	To partner with the public in each aspect of the decision including the development of alternatives and the identification of the preferred solution.	To place final decision making in the hands of the public.
PROMISE TO THE PUBLIC	We will keep you informed.	We will keep you informed, listen to and acknowledge concerns and aspirations, and provide feedback on how public input influenced the decision.	We will work with you to ensure that your concerns and aspirations are directly reflected in the alternatives developed and provide feedback on how public input influenced the decision.	We will look to you for advice and innovation in formulating solutions and incorporate your advice and recommendations into the decisions to the maximum extent possible.	We will implement what you decide.

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This may be in part because the further down the spectrum one goes towards active participation, the more that participatory democracy comes into tension with representative democracy. This is particularly so for Westminster democracies with their emphasis on strong vertical accountability arrangements (Edwards et al 2012). Under the traditional representative model, authority is granted from the public to their representatives via the electoral process, and these representatives empower others through law and lawful instruction to take certain decisions. The accountability then flows back from decision-makers to representatives and from there to citizens, who hold the ultimate authority at the ballot box.

In contrast, the far end of the participation spectrum implies a devolution of power that changes this accountability relationship. At the ‘collaborate’/‘empower’ end of Figure 16, the participants themselves begin to wield the public power or direct how it is used. This means that, rather than power and accountability flowing ‘vertically’ from the electorate up to representatives and then down to organisations, the power and accountability flows ‘horizontally’ from participants directly to organisations (Edwards et al 2012).

This level of devolution raises important questions about the design of the participatory method, particularly in relation to the selection of participants and the extent to which they can legitimately be said to speak for ‘the public’, ie, to legitimately authorise the use of public power. These are clearly constitutional issues, which is why I discussed the topic of ‘co-governance’ in the preceding section.

For this section I limit the discussion to the ‘inform’, ‘consult’ and ‘involve’ parts of the spectrum, for which I use the term ‘co-design’. The question at this level is what the organisations of justice can do to improve trust by increasing opportunities for public participation, assuming that the ultimate authority to decide will continue to rest with those organisations and their political masters as it does under the existing constitutional arrangements.

A number of the challenges with co-governance also arise in relation to co-design, just in weaker form. Perhaps the most important is about the question of who participates, and who they can claim to speak for. Participation is costly to the participants. This gives reason to think that those who choose to participate in any given participatory process are more likely to be those with strongly held views and free time, two factors which may make them unlike most people in the general public. So the extent to which participants can be said to fairly represent public views may be in doubt.

This may be less of an issue when the purpose of participation is to seek more information to inform the decision. But if the aim is to improve the legitimacy of the decision and trust in the system, then relying on the views of a potentially unrepresentative group of participants may result in ‘minority tyranny’, undermining the system in the eyes of the majority. In a survey of member countries, the OECD (2009) found the second most common concern with participatory methods was the potential for hijacking by special interest groups.

This risk is moderated somewhat under lighter forms of public engagement, as the government retains the ultimate authority and can veto the proposals arising from a participatory process if they are unacceptable from a broader public interest test. This power of veto itself is a challenge though, as when used it can quickly destroy any trust that may have been built over the course of the engagement, undermining the purpose of undertaking it in the first place.

The risk is also moderated where the policy or decision primarily affects a specific group of people, such as landowners and residents in a planning context. In a justice context, the argument for participatory co-design is perhaps greatest in relation to specific cases, where the participants are clear. For example, restorative models of justice can be understood as co-design processes.

Similarly, where a minority group such as Māori, or refugees and migrants, or people with disabilities, is likely to have their preferences systematically under-emphasised under majoritarian policy processes, there is a strong argument for creating rights of participation in co-design.

The risks of participation are greater in regard to general policies or decisions that affect many people with diverse views. Special interest groups often hold conflicting views of the best way forward; this is certainly the case in relation to issues such as appropriate levels of punishment for criminal offending. There is an assumption in some of the literature on participatory and deliberative governance that sufficient discussion will reduce disagreement and help people who disagree better to converge on mutually acceptable policies. This assumption is challenged by democratic theorist Ian Shapiro (2003) as somewhat panglossian, given the existence of what he calls ‘moral fanatics’ as well as ‘moral sages’, and the risk that these ‘fanatics’ will seek to use participatory methods to advance their agenda rather than seek reasoned compromise with others. And even for those who are not fanatics, deliberation will not necessarily lead to moderation:

*“people with opposed interests are not always aware of just how opposed these interests actually are. Deliberation can bring differences to the surface, widening divisions rather than narrowing them.” p26*

There is empirical evidence from the social psychology literature to support this claim. Cass Sunstein (2002) summarises a range of important findings, including that:

- groups of like-minded people tend to adopt more extreme views following discussion
- people with pre-existing strong views are less likely to change them following discussion
- groups of people with conflicting views can moderate their views following discussion, but this is least likely to occur in relation to ‘highly visible public questions, eg, whether capital punishment is justified’
- polarization and depolarization are both sensitive to the confident delivery of persuasive facts in support of a particular direction
- polarization increases when the deliberating group is able to define itself by contrast to some other contrasting group
- polarization increases when individuals engage with each other somewhat anonymously, such as over the internet.

These findings suggest that the conditions in which deliberation is likely to result in a moderation of views and consensus on a direction are reasonably stringent, namely where:

- people with heterogeneous views meet face-to-face
- these people do not have strong or fixed prior beliefs, and are willing to be open-minded
- the group is provided with high quality, reliable information
- the group views itself as representing everyone, rather than a special interest.

Sunstein notes that these conditions have been successfully created in two types of deliberative method, the citizens’ jury and deliberative poll (see eg, Fishkin 1998). But both of these methods are intensive, requiring significant investment and design. In the absence of this care, there is the risk that well-intentioned participatory efforts, particularly internet-based, may actually create division and undermine trust and unity.

For all of these reasons, it makes sense to moderate expectations about the benefits of participation, both on the government and public sides. On the government side, it seems unrealistic to assume participation is a panacea that will resolve problems with trust, at least without significant effort and care. On the public side, expectations that participation will lead to significant influence may be inevitably frustrated when these views are in serious conflict with majority opinion.

At the same time, it would be premature to dismiss altogether the calls for greater direct participation. Indeed, given changing social norms away from hierarchical deference, to what Lawrence Friedman (1999) calls the horizontal society, and given that many or most contemporary policy problems resist solution by government on its own, ‘*more participatory or inclusive processes of governing appear to be inevitable*’ (Edwards et al 2012, p158).

The challenge is designing these processes so that they reward efforts at compromise, and encourage a sense that we all live in a single moral community, rather than reinforce in-group, special interest perspectives. In the words of Ian Shapiro:

*“Identities are fixed to some – usually unknown – degree, but they also adapt to circumstances, incentives, and institutional rules. The goal should be to reshape such constraints, where possible, so that at the margins identities evolve in ways that are more, rather than less, hospitable to democratic politics.”* p95

By ‘democratic politics’, Shapiro is not referring to electoral processes. Shapiro favours a definition of democracy in the republican tradition, as a collection of different mechanisms to prevent the domination of some individuals or groups by others. A personal identify ‘hospitable to democratic politics’ is one that accepts the principle of non-domination as a foundational value of society.

He uses this definition to propose that deliberation is most important when people have no ‘exit option’, ie, are vulnerable to domination, and when their ‘basic interests’ are at stake, by which he means something close to the basic capabilities defined by Sen and Nussbaum in the capabilities approach. He uses the example of the criminal jury to demonstrate the point – someone accused of a crime can’t voluntarily exit this situation, and their liberty is at stake, so there is a very strong case to insist on careful deliberation before establishing guilt, and to guarantee participation rights to the accused.

This a useful framework to think about what other contexts deliberation is important, and whose voices deliberation may seek to strengthen with a goal towards reducing domination.

I have already noted that any form of adjudication is a zone of normative dialogue, whether it be in relation to a criminal, civil or family matter, and in or out of a court. Each type of adjudication allows for different types and levels of participation by the various parties. I argued earlier that adjudication models such as Te Pae Oranga, Family Group Conference and Restorative Justice can all be seen as co-design fora in which all those with a ‘basic interest’ have a role in debating the appropriate means to remedy the situation, with the court playing back stop in case this process falls through.

Within the court system itself, various changes have been made over time to increase the rights of the victim to contribute to the dialogue, to acknowledge their basic interests in the outcome. The Matariki and Rangatahi Courts have also increased the role of whānau, hāpu and iwi in adjudication, acknowledging the basic interest that Māori have in ensuring the survival of Māori culture and institutions, as a basis for thriving as Māori.

These are all good examples of participation at the level of an individual case, and further expansion is generally desirable. There are also opportunities to consider greater participation at the next levels up, that of the neighbourhood, community and region.

There are fewer examples of direct participation at these levels. As discussed earlier, this may reflect the highly centralised nature of the justice system in this country. The main exception is in relation to community or neighbourhood level policing, which New Zealand has invested significantly in over the years. Although international evidence suggests that community policing does not tend to reduce crime, it does tend to increase trust in the police and perceptions of legitimacy (Gill et al 2014).

This suggests community policing is a useful supplement to other approaches to improving trust. However, it is important to note that the main concern with community policing is that participants tend to be unrepresentative of communities, usually from higher socio-economic areas, and with correspondingly unrepresentative priorities (Reisig 2010). If not carefully managed, this can lead to a form of domination at a local level, if police are overly sensitive to middle-class calls to focus on good order issues such as graffiti and pandhandling, rather than more harmful but less visible issues such as family violence being experienced by those with less voice.

Community policing may work best when combined with problem-oriented policing, which does tend to reduce crime (Weisburd et al 2008). Problem-oriented policing is a mode of policing that focused on identifying and analysing recurring problems at a local level, and working with local stakeholders to resolve them. This has the advantage of focusing participatory efforts on practical, tractable, local problems that the participants have some power to address. Although there is very little empirical evidence generally on the impact of participatory methods, there is some evidence that participation is more likely to increase trust where that participation leads to tangible, observable improvements in service quality (Wang and van Wart 2007).

Taken all together, this discussion of the evidence on public participation suggests caution, particularly if there are ambitions to move to the 'active participation' end of the public participation spectrum. At this end, a high level of investment is needed in large, carefully stage-managed pieces of national theatre that will always have some risk of backfiring.

Perhaps a safer route is to create and maintain mechanisms for regular low-cost communication at a local level, and empower local justice system actors to respond to these signals. Ideally these mechanisms would focus on the giving voice to the most vulnerable, be conducted face-to-face rather than online, and aim to establish an ongoing relationship rather than a single enduring 'solution'. The challenge is perhaps to create institutional sensitivity to localised voices that are easily drowned out and dominated by others, to encourage the organisations to adapt over time to local contexts and needs.

This idea can of course be found in Elinor Ostrom's focus on polycentric governance. In the words of Ralph Baumgartner (2010), in a review of her major work, *Governing the Commons*

*"Ostrom's findings ... (are) in sharp contrast with more commonplace ideas that institutions might be "designed," once and for all time. Institutional accretion might be a better phrase than institutional design... Single institutional fixes rarely work; norms cannot develop according to constitutional niceties but only on the basis of observed reciprocal behavior."* p576

### Pathway to trust 3: Procedural justice

The dominant theme in research about institutional trust is procedural justice. Procedural justice is distinct from the substantive outcome that we often think of as 'justice', such as whether someone is found guilty. Procedural justice, in contrast, refers to the justness of the process used to determine the outcome, regardless of what that outcome is.

In their paper 'An institutional theory of generalized trust', leading social capital scholars Bo Rothstein and Dietland Stolle (2008) draw upon available evidence to argue that '*trust thrives most in societies with effective, impartial and fair street-level bureaucracies.*'

Research into justice system institutions reinforces this general point about interactions with street-level bureaucrats (public servants), who in the justice system include police officers, judges, and court registrars. The relationship between fairness, effectiveness, trust and legitimacy has been extensively studied in the justice context, particularly in policing. Perhaps the most consistently supported driver of institutional trust and legitimacy is how fairly those institutions treat people.

Tyler (2013) defines four aspects to procedural justice:

- **voice** – people want to have an opportunity to tell their story
- **neutrality** – people react to evidence that the authorities they are dealing with are neutral
- **respect** – people are sensitive to whether they are treated with dignity and respect, and to whether their rights as citizens are respected
- **intentions** – people react favourably to the judgement that the authorities are sincerely trying to do what is best for the people with whom they are dealing.

When people who are in contact with justice institutions are treated fairly according to these criteria, the ultimate outcome will often not matter much to their opinion of the justice system and willingness to accept its decisions. People may not like being arrested for example, but they are more likely to accept that outcome as legitimate if treated fairly during the arrest.

The importance of procedural justice in relation to justice system institutions is hard to overstate given these institutions embody more than any other the power of the state, and are entrusted with the state's greatest powers to restrict individual's liberty. Even in interactions with no potential to result in arrest or imprisonment, the fact that justice system actors do have that power colours every interaction with the general public.

The *Group Value Model* of procedural justice theory is based on the idea that justice system staff are representatives of the social majority group and their actions reflect broader community outlooks (Brouwer et al 2018). As such, they play a key role in communicating messages of belonging and non-belonging, with serious membership implications for those who are deemed disrespectful and branded as outsiders. People react strongly to justice system actions they perceive as unfair because it challenges their feelings of belonging to the social group the justice system is seen to represent. Conversely, fair treatment strengthens group association (Bradford et al 2015).

Because procedural justice is so vital to the generation of institutional trust, I will now explore procedural justice from a number of perspectives, namely those of:

- people who have been victimised
- police
- courts
- corrections
- broader social services
- diverse ethnicities
- the general public.

### *Procedural Justice for people following victimisation*

In their review of the literature on the determinants of generalised trust, Dinesen and Bekkers (2016) report that there is a clear association between victimisation and lowered trust, but it is somewhat unclear what direction the causation flows. In other words, those who are victimised often have lower trust, but it is not entirely clear that this is necessarily caused by the victimisation.

But regardless of whether the experience of victimisation causes a loss of generalised trust, when someone who has been victimised comes to the justice system for help, that provides an opportunity to build their trust.

In the 2006 iteration of the New Zealand and Crime and Safety Survey, people who had been victimised were asked a series of questions to understand their needs and what would improve their experience of the justice system (Mayhew and Reilly 2006). Among those people who were dissatisfied with the way their case was dealt with, the most common reason was not being adequately informed, followed by a lack of haste in dealing with the matter, insufficient offers of support and impolite treatment by police.

This aligns with the international research. When researchers ask victims what they expect from the justice system, procedural fairness dominates the list of asks, with punishment being a minor goal for most victims. In a summary of this research Ivo Aaertsen (2012) notes that the main expectations from victims are that they receive:

- adequate information about the judicial procedure
- respectful treatment
- a settlement beyond the bureaucratic
- an involvement that is personal to a larger extent
- the ability to participate in the personal case
- access to financial or material compensation for the harm
- psychological redress through the attitude of the person who committed the offence.

The last point is perhaps the most crucial. People who have experienced victimisation want to see the person responsible held to account, but this will be more meaningful if the process elicits genuine remorse. Leading restorative justice scholar John Braithwaite (2006) refers to this as *active responsibility*, in contrast to the *passive responsibility* that the court imposes in sentencing.

More bluntly, empirical research has demonstrated that more punitive policies, such as the abolition of parole for serious offenders, do not enhance the legitimacy of the criminal justice system for victims, as their satisfaction with the sentence is driven primarily by the procedural justice aspects of the criminal justice system's response (Snacken 2013).

I will talk about restorative justice in more detail below, but it is important to note here that restorative processes, when run effectively, consistently produce better satisfaction for people who have been victimised than do court-based processes (Strang et al 2013, Ministry

of Justice 2016d), because these processes give more space for participation by victims and may be better at eliciting remorse than a more formal court setting.

Within the courts, the victim impact statement is one of the main vehicle for participation by people who have been victimised beyond giving evidence. The purpose of victim impact statements is to enable the victim to provide information to the Court about the effects of the offending; to assist the Court in understanding the victim's views about the offending; and to inform the offender about the impact of the offending from the victim's perspective.<sup>30</sup>

The international research base suggests that victim impact statements often increase victim satisfaction. However, the victim impact statement can also increase victim dissatisfaction if they expect to influence the sentence but are unable to (Roberts 2012).

In New Zealand, victims' preferences for sentencing are not able to be considered by the sentencing judge when determining the appropriate sentence. However, the information provided by the victim can indirectly affect the sentence if, for example, the victim reveals the harm caused by the offence is greater or lesser than expected, if a particular sentence would create further harm to the victim, or if others were also harmed by the offence.

International evidence suggests that victim impact statements generally do not affect sentence length, but that where they do they are as likely to lead to a reduction in sentence severity as an increase (Roberts 2012). A recent judgement on appeal to the High Court provides an example. In this case of sexual violation within a marriage, the victim expressed a preference for home detention rather than imprisonment, as the children would suffer from their father's unemployment if imprisoned. After considering this and a number of other relevant facts, the High Court quashed the original sentence of imprisonment and replaced it with a home detention sentence.<sup>31</sup>

### *Procedural Justice and Policing*

There is a substantial research base on procedural justice in policing. In a meta-analysis of 41 evaluations of procedural justice and legitimacy in policing for the Campbell Collaboration, Lorraine Mazerolle and colleagues (2013) found consistent evidence that when police apply a 'procedurally just dialogue' in their encounters with the public, there are benefits to satisfaction/confidence in the police, co-operation with the police, and perceived legitimacy. A 'procedurally just dialogue' is one where police adopt language that:

- treats citizens with dignity and respect
- conveys trustworthy motives
- allows citizens to speak up and express their views during encounters
- does not 'profile' people based on race, gender or any other characteristic.

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<sup>30</sup> R v Hill [2008] NZCA 41

<sup>31</sup> A v R [2018] NZHC 543

Tyler (2013) notes that it is relatively simple and inexpensive to improve procedural justice. A simple checklist might include:

- providing people with opportunities for explanation before decisions are made
- explaining how decisions are made
- allowing people mechanisms for complaint
- treating people with courtesy and respect.

There is evidence that procedural justice has an asymmetric relationship with trust. People expect the police to treat them fairly, so experiencing fair treatment only slightly increases trust. However, when people experience unfair treatment, the negative effect on trust can be substantial (Jackson et al 2013). This research emphasises the importance of ensuring all encounters with police are procedurally just, as even a small number of negative encounters could outweigh the impact of a majority of positive encounters.

### *Procedural Justice and Courts*

While most procedural justice research has focussed on the police, where the topic has been explored in a courts context similar findings have emerged:

*“Irrespective of why they are in court, people’s reactions are most strongly shaped by whether they think they have received a fair ‘day in court’, in the sense that their concerns have been addressed through a just process” Tyler 2013, p21*

The California Courts system has been a leader in efforts to improve procedural justice in courts (Centre for Court Innovation 2011). Their experience provides many practical examples of steps that can be taken to improve the culture of courts and their administration of justice.

California has focused its efforts on the high-volume areas of traffic violations, small claims cases, and family cases, given that these comprise a significant proportion of the public’s encounters with courts. California has also focused on court users who have limited English proficiency or who are representing themselves. Practical steps to improve procedural fairness include creating rules forbidding any jokes about litigants anywhere in the courthouse, particularly the courtroom, brown bag lunches inviting participants to reflect on the court experience from the perspective of a particular group, creation of commonly used documents in a variety of languages, and redesign of websites to make them simpler to navigate and use.

These recommendations apply equally to the civil, family and criminal jurisdictions. In the criminal justice system, there are many New Zealand examples of specialist courts that have been designed, among other things, to create more space for meaningful participation in the process from the accused and their support networks. For example, the Matariki Court in Kaikohe involves close involvement of the whānau and local iwi in creating a rehabilitation plan for the person appearing before the court. A similar model is used in the Rangatahi and Youth courts. For people in the mainstream court there is also the possibility of a restorative conference prior to sentencing. These sorts of initiatives are all aligned with the social capital and institutional trust literatures and their emphasis on fair treatment.

Another topic it is worth highlighting here is that of children, who can be involved directly in court processes as witnesses, or indirectly (such as in family court proceedings about custody or care and protection concerns). Given the vulnerability of children it is particularly important to treat them fairly, but the means to do so will often be different in comparison to adults. A recent report by Chief Victims Advisor, Kim McGregor (McGregor et al 2017), identified several options to improve the experience of children in the courtroom including:

- pre-recording children's entire evidence before trial, preceded by a ground rules hearing establishing the procedures to be used when gathering evidence
- recruiting communication assistants to help translate court language into a form easy for children to understand, with accompanying training for the judiciary and counsel
- introducing a system of accreditation for judges and lawyers who are to be involved in cases with children.

Another important aspect is the issue of physical accessibility, both in terms of facility design but also geographical location. Particularly for rural communities, the travel costs to a distant facility can be substantial.

#### *Procedural Justice and Corrections*

As at December 2017, Corrections was managing 10,400 people in prison and some 36,000 people under sentences or orders in the community. There are several reasons to care about procedural justice for these individuals under corrections management. The first is to protect their human rights. This is reflected in one of the principles in the Corrections Act 2004, which requires under 6(f) that:

- The corrections system must ensure the fair treatment of persons under control or supervision by:
  - providing those persons with information about the rules, obligations and entitlements that affect them; and
  - ensuring that decisions about those persons are taken in a fair and reasonable way and that those persons have access to an effective complaints procedure.

Procedural justice in corrections is also important instrumentally because, for example:

- many people will be under the management of corrections at some point in their life. For example, 115,000 people have been sentenced to imprisonment since 1980. Their experience will colour their perceptions of the legitimacy of the criminal justice system at that future point where they have desisted from crime
- it is in the interests of probation officers and correctional officers to work in a positive social environment
- legitimacy of the entire justice system in the eyes of the friends and family of people under corrections management will be coloured by their treatment
- for people with a criminal past to desist they must be welcomed back into the 'moral community' – they will have less reason to do so if they are not themselves being treated morally.

Turning first to those people under management in the community, there is clear evidence that procedural justice leads to better outcomes. For example, fair treatment by probation officers is associated with higher levels of payment for reparation orders (Gladfelter et al 2018). New Zealand evidence echoes this, finding the quality of the relationship between a probation officer and their charge is associated with lower reoffending (Polaschek 2016).

Fergus McNeill and Gwen Robinson (2013) have explored the drivers of procedural justice in probation using the concept of 'liquid legitimacy'. This concept captures the fact that people under supervision will tend to have a motivational posture of defiance, and will wish to keep themselves at a social distance from the authority. This social distance is a barrier to effective supervision and desistance.

The need to reduce social distance reflects the fact that deterrence and coercion are ineffective tools of behavioural influence (see discussion in an earlier section). The purpose of a community-based sentence or order involves a need or aspiration to control the behaviour of probationers. But the concepts of legitimacy and procedural justice reinforce that this will be best achieved if the probation officer can reframe the purpose of the sentence or order in a way that the person under management views the goals as their own. This emphasises the need for flexible procedures and a high quality workforce that is committed to procedural justice for people under community management.

The concept of liquid legitimacy emphasises that to achieve legitimacy and reduce social distance requires constant renegotiation between the probation officer and their charge. This renegotiation will be somewhat fluid, as will the degree of legitimacy achieved, depending on how the probation officer responds to challenges throughout the course of the sentence or order.

This same idea is captured in the Good Lives Model of rehabilitation (Ward and Maruna 2007). The Good Lives Model is a strengths-building approach that uses the social work maxim that treats the client as the ideal 'lead case worker'. The idea is that change will be most effectively achieved if the purpose of that change is to achieve the client's goals, rather than the professional's. The challenge is that of Kant: to treat people as ends, as deserving of dignity, rather than merely a means to the end of community safety, as a risk to be managed.

In prisons, leading penologist Alison Liebling at the University of Cambridge has extensively studied the importance of the prison environment both for the lives of people serving prison sentences and their prospects of reform. The key result from her research (Liebling 2011) is that interpersonal relationships between corrections officers and those serving sentences are central to how much distress people in prison feel, how likely they are to self-harm, and how likely order is to be maintained.

When corrections officers treat people in prison fairly, with respect, and minimise their use of coercion to achieve order, the best results are achieved. Writing from the perspective of the UK where very long sentences are increasingly common and there is greater use of maximum security than in the past, Liebling notes that fair treatment is even more essential to avoid people in prison losing all hope for the future.

### *Procedural Justice for broader social services*

Kumlin and Rothstein (2005) use Swedish survey data to show that at an individual level, and after controlling for observed confounders, contact with universal social services (such as hospitals) is associated with higher generalised trust, whereas contact with needs-testing social programmes (such as disability support) is associated with lower trust.

The researchers interpret this finding in line with the broader research on procedural justice, whereby citizens value being treated with “equal concern and respect” by government institutions. The more tightly a service is targeted/needs tested, the more complex the rules are likely to become, and the more difficult it is to fairly apply them without leading to frustration by the citizen. This interpretation is supported by the fact that those respondents who had been in contact with targeted services were less likely to agree that they had “received the help to which they are entitled”.

Relatedly, Lappi-Seppala (2008) undertakes comparative analysis of 16 Western European, five Eastern European and four Anglo countries to show that more welfare-oriented countries enjoy more public trust (both horizontally between citizens and vertically from citizens to institutions), less fear of crime and more legitimacy, and (perhaps as a result) are also less punitive.

While the debate about universal vs targeted services is generally used in a social service context, the justice system can also be operated in a more or less targeted way. The level of funding provided to entities such as the public defence service, disputes tribunal, employment tribunal, community law centres and legal aid determines the existence and extent of the ‘justice gap’ between rich and poor. The evidence presented above suggests that a system that is designed to provide universal access to justice is more likely to build social capital than a highly targeted system that requires an individual to meet their own justice needs unless manifestly unable to do so.

The social system also has a role to play in determining the degree of targeting or universalism in the justice system when considering services such as rehabilitation, health services for people in prison, and mental health services. The justice system provides many human services that are close to identical to their social system counterparts, such as alcohol and drug treatment. But by providing these services through the justice system they are necessarily targeted rather than universal. This affects their mode of delivery. Correctional rehabilitation services have a far greater emphasis on risk reduction than the strengths-building and client-led approach that is more common in the social system, although some scholars advocate for a similar approach in a correctional context (Ward and Maruna 2007).

The contrast between universalism and targeting can also be used to consider differences in penal policies. Among western countries, those countries such as the Nordic states that have the most universal welfare systems also tend to have small prison populations. In these countries, efforts to improve public safety are driven by provision of universal welfare state services, with less reliance on targeted crime control mechanisms such as imprisonment and electronic monitoring.

In contrast, countries with higher rates of imprisonment often have a more targeted welfare system, most notably the United States, and take a more majoritarian approach to justice. By majoritarian justice I mean situations where the crime-free majority focuses on insulating itself from the crime-committing minority through targeted use of incapacitation and other

mechanisms of control, rather than finding ways to reintegrate those who offend back into the social fabric. It is perhaps no coincidence that as generalised trust and social capital has been steadily eroding in the United States (Putnam 2002), it has been steadily increasing in the Nordic countries (Rothstein 2011).

#### *Procedural Justice for diverse ethnicities*

Procedural justice may be particularly important to build and maintain social capital in a context of growing ethnic diversity and population movement. There is some evidence that ethnic diversity is associated with lower levels of generalised trust (eg, Alesina and Ferrara 2002), but this may be true primarily in the United States and other countries with high income inequality (see Portes and Vickstrom 2011, van der Meer & Tolsma 2014 for reviews). In countries other than the United States, there is evidence that fair and effective institutions have successfully moderated the tendency for migration to reduce generalised trust.

For example, Nannestad et al (2014) investigated trust among migrants in Denmark from Pakistan, Turkey, Bosnia and the former Yugoslavia. These authors reported much higher levels of both institutional trust and generalised trust among migrants in comparison to their compatriots in their original country. They further reported a high level of person-level correlation between trust in institutions and their perceived even-handedness towards immigrants vs Danes. Similar findings were reported by Dineson (2012, 2013).

Applying a multi-level modelling approach to combined data from the World Values Survey and European Social Survey, You (2012) reported that ethnic homogeneity lost statistical significance in predicting generalised trust after controlling for various institutional factors including trust in institutions, corruption, political rights and skewness in the income distribution.

Bradford (2012) in a survey of 1,000 Londoners found that procedural fairness is particularly important in reinforcing social identity among non-whites, and that for this group co-operation with police is associated with how strongly they feel they 'belong' to Britain. This provides direct evidence for the role the justice system plays in demonstrating belonging to new migrants and reinforcing an inclusive social structure.

This is important because of the ongoing demographic change in New Zealand. Feedback from the Ministry for Primary Industries emphasised the impact of three longstanding trends, namely an ongoing drift of population from rural to urban locations, from southern to northern areas, and for education and social opportunities. This is on top of significant inward and outward international migration. This population change affects both source and destination and can make social cohesion more challenging to sustain.

When it comes to providing fair institutions for all ethnicities, Māori are of particular importance due to the special relationship between the crown and Māori embodied in the Treaty of Waitangi. I have already considered the general implications of the Treaty in terms of institutional trust. I will add here only that the over-representation of Māori in the criminal justice system places an additional burden on justice system institutions to give Māori reason to trust them.

For example, the relationship between fairness and institutional trust among Māori was examined in a 1997 NZ study (Department of Courts et al 1997). This study found that, among the third of Māori respondents who disagreed that courts treat people with respect, the most common explanation for this view was perceived racism, followed closely by 'staff

don't treat with respect', 'staff don't care', and 'don't understand/recognise culture. These results are too old to speak to the current performance of courts, but do show how a lack of perceived fairness can affect trust in institutions among Māori.

Treating Māori with 'equal concern and respect' can be difficult where unconscious bias exists. The Police Commissioner, Mike Bush, has been open about the existence of unconscious bias in the police force and has led efforts to address it. The challenge of bias is present across the entire justice system and needs to be deliberately addressed if justice system institutions are to gain and retain the trust of Māori.

### *Procedural Justice for the general public*

Procedural justice focuses on the experiences of those who contact the justice system, but most people in the general public have only minimal contact with the justice system. In the 2016 Public Perceptions Survey (MOJ 2016b), the most common form of contact by far was being in a vehicle stopped by Police, with 61% of respondents experiencing this. Far fewer had been involved with the court as a juror (7%), witness (6%), victim or defendant (2%). Only 1% had been arrested by Police.

This suggests that for most New Zealanders, their trust in the justice system will be driven less by their personal experience with it, and more by their perceptions of how others are treated. These perceptions may come through the media, friends and family, or through observing directly the treatment of others. To paraphrase Lord Hewart who, in 1923 (in *Rex v. Sussex Justices Ex parte McCarthy* [1923] All ER 233), famously said that justice '*should manifestly and undoubtedly be seen to be done*', it is not enough for justice to be fair – it must also be seen to be fair.

There are several ways in which the justice system can demonstrate its fairness to the general public. As the numbers above show, perhaps the most important is road policing, as the most common window into the justice system. Australian policing scholar Lorraine Mazerolle at the University of Queensland has conducted randomised controlled trials of road policing to better understand how police can improve perceived fairness when dealing with motorists. In Mazerolle and Terrill (2018) she draws upon this and similar work to identify effective approaches to building procedural justice. These include:

- for short encounters such as random breath testing, designing a basic procedurally just script and enforcing officer compliance with it
- focusing on supervisor's willingness to model and reinforce procedurally just behaviours
- increasing officers' ability to slow down and think during more complex encounters
- applying new approaches to full squads rather than individuals to reinforce a change in team culture as well as individual behaviours.

The community policing literature also provides guidance in improving trust and confidence. Although systematic reviews of the evidence find that community policing does not tend to reduce crime, there is clear evidence that community policing tends to improve confidence in and satisfaction with the police, as well as reduce disorder (Gill et al 2014). Among the various types of community policing tactics, the public appear to be particularly in favour of foot patrol (Karn 2013).

The impact on disorder is important to consider in relation to trust in the police, since communities are often more concerned about disorder (eg, graffiti, rubbish, homelessness) than they are with serious crime (Skogan 2006). There is a long-standing tension in policing between dedicating resource to the issues the majority are concerned about, such as disorder, car theft and burglary, vs dedicating resource to the more serious harms experienced by a minority, such as sexual assault. The literature on institutional trust suggests that both objectives are important to maintain social capital.

There are several other ways in which the public might contact the justice system, such as helping police with their inquiries, as witnesses, jurors, or through contact with customs officials at the border. In each of these areas, the general public might not only experience procedural fairness themselves, but also observe or hear about the treatment of others.

Another important window into the justice system is the media. Recent empirical work in the U.K. suggests the relationship between the media and public opinion is more complex than is often assumed, with people self-selecting sources of news depending on their pre-existing values, and only slowly changing their opinions in response to media coverage (Jackson et al 2013).

Nonetheless, it seems reasonable to assume that media portrayals of the justice system do in time make a difference to public opinion given that most people in New Zealand self-identify as having low levels of knowledge about the justice system (MOJ 2016b).

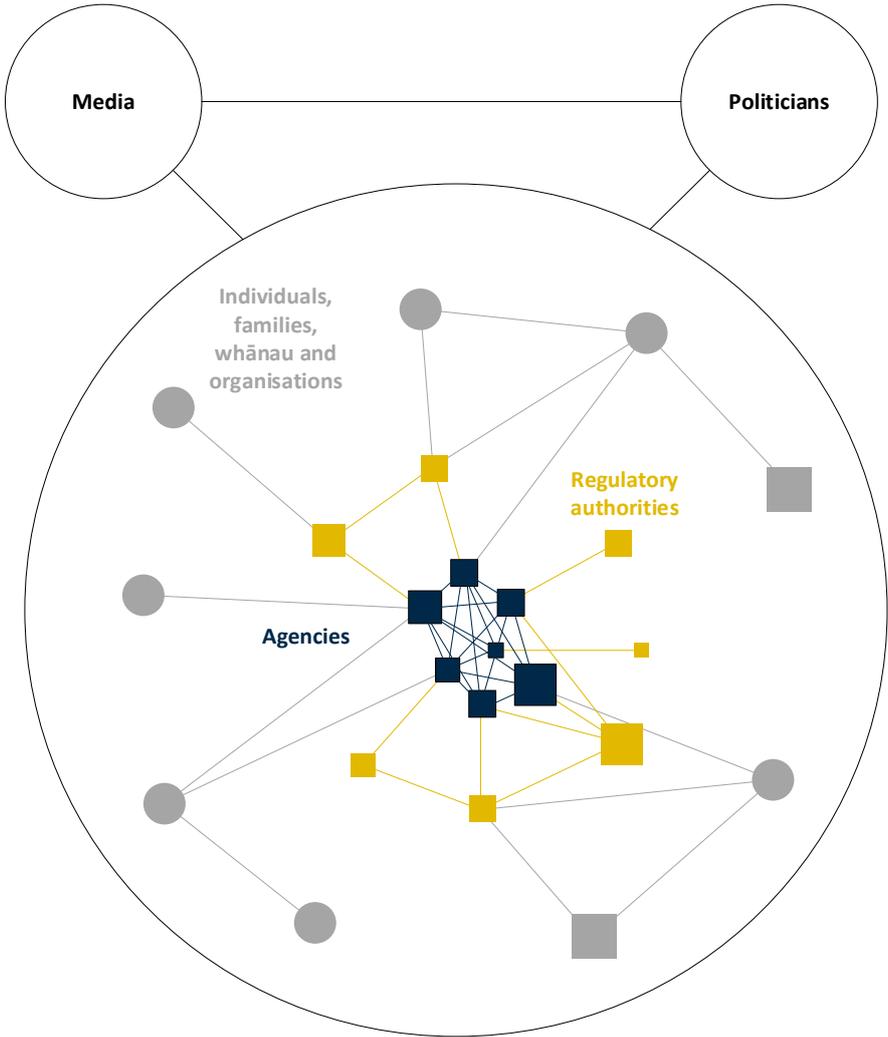
Police are highly visible in the media, commenting on individual cases, through shows such as Police 10-7, but also more indirectly through the branding opportunity presented by workforce recruitment drives. This may help explain why Police command the highest levels of trust and confidence of all justice system institutions, both in NZ (MOJ 2016b) and internationally (Hough and Roberts 2017).

When considering the media portrayal of the justice system, it is particularly important to reflect on how people who have experienced crime are reflected, as well as the justice system's response to them. This is because the public display low confidence that 'criminal court processes treat victims with respect', with only 25% of respondents agreeing to this statement in a recent survey of a nationally representative sample (MOJ 2016b).

### ***Structural issues affecting use of the non-corruption, co-design and procedural justice pathways to trust***

Few people will be surprised to hear that researchers have identified that preventing abuse of power, allowing participation and delivering procedural justice are the main ways to build institutional trust. But merely knowing this is the case isn't always sufficient to ensure these pathways are travelled. We now focus on three inter-connected structural issues that can make these pathways more or less likely to be used. The three issues are fragmentation of agencies, regulation of these agencies, and the service models used by these agencies.

Figure 17: Network governance



To see the connection between the three issues, it is useful to use the framework of network governance. Network governance is a prevailing analytical framework used to understand the challenges of public policy in the modern world (see eg, Klijn and Koppenjan 2016). A stylised diagram is presented in Figure 17 to illustrate the concepts. The basic insight of network governance is that service delivery and policy decisions are commonly owned by networks of individuals, agencies and others who exercise some influence over each other, rather than by a single monolithic entity, and that the dynamics of this network are important determinants the resulting policy and service outcomes. For example, in planning a new piece of infrastructure such as a road, the relevant network might include affected landowners, the local council, the funding body (NZTA), the environment court, Ministers, interest groups such as forest and bird, the local iwi, the construction company and so on. The outcome of the process will depend very much on the interplay of these actors within the network.

To support this discussion, I have separated these actors into agencies, regulatory authorities, and non-governmental actors. All are also nested within the broader imagined community that is produced in large part through the media, which also affects the decisions taken by politicians. Politicians in turn can be both actors within networks as well as those determining the constitutional and institutional arrangements that networks operate within.

## Agency fragmentation and inter-agency co-operation

We start at the middle of the diagram with the agencies of justice. There are many of these agencies and they often need to co-operate to produce justice outcomes. I gave the example of a court case earlier to illustrate a typical situation where some combination of Police, the Ministry of Justice, Corrections, the Judiciary, Crown Law and independent counsel need to co-ordinate their activities to achieve a result.

Further co-ordination may be needed with health, education and other social service agencies to meet wider needs. For some types of issue, such as money laundering and drug trafficking, co-ordination with international bodies may be needed as well.

This co-ordination happens between actors at a service delivery level every day. And because all of these actors may be affected by a policy change, they all will typically want to be involved in any policy process as well. This forms the core 'network' of interconnected agents in justice.

Even without adding any further layers of connectivity, the existence of this inner network of agencies raises several complications when it comes to institutional quality and trust, particularly in relation to procedural justice and co-design.

For example, it is common for victims to have to tell their story multiple times to different actors in the system, from police to victim support to lawyers, and for this to be experienced as retraumatising, particularly for victims of serious interpersonal crimes such as rape. Even if each individual agency treats the victim well, the overall effect may be a depersonalising one that limits the perceived procedural justice. This is an issue that can only be resolved by the network, not by any of its individual members. And from a co-design perspective, it is not immediately apparent how victims' groups might be included in that network to help work through a solution.

The existence of a network creates three main sources of complexity that need to be managed to produce an appropriate and enduring solution (Klijn and Koppenjan 2016). The first arises from the different perspectives of the actors. Each agency has different information, somewhat different values, and different analytical frameworks. This creates *substantive complexity* that needs to be worked through to produce a consensus view of the problem and appropriate solutions, to avoid a 'dialogue of the deaf'. This may be more difficult because of *strategic complexity* that can arise when different actors in the network seek to game the situation to favour their preferred solution. The third type of complexity, *institutional complexity*, relates to the rules, culture and norms that arise or are instituted in relation to the operation of the network.

The challenge of operating inter-agency networks well has been the focus of several reports over the years, such as that of the Better Public Services Advisory Group (2011). The approach recommended in that report, and that was implemented, was to strengthen the centre, in other words to transform the network of horizontal relationships into something closer to a hierarchy of vertical, or perhaps diagonal, relationships. For example, they recommended appointing a central lead for each major policy or functional network ('sector') and to empower them to support collective responsibility for the results in key result areas defined by Cabinet. Sector Group in the Ministry of Justice, where I am writing this paper, is one such example of sector leadership in action; Sector Group had the lead on developing the relevant BPS action plan and reporting against progress.

Network leadership is an important aspect of network management. In their survey of the field, Klijn and Koppenjan (2016) recommend that the leaders of governance networks focus on, among other things:

- avoiding premature selection of a problem definition or preferred option, to encourage exploration and avoid ‘*early substantive selection...* (which can) *encourage actor resistance*’
- creating opportunities for cross-frame reflection by creating spaces for actors to understand each other’s positions
- encouraging joint commissioning of research to avoid ‘report rain’ and competing experts
- attempt to achieve ‘goal intertwinement’ through options such as integrated design, package deals, and mitigating measures/compensations
- negotiating or otherwise establishing process rules about how the actors will behave, including conflict resolution mechanisms
- avoiding a hierarchical steering and project management approach
- inviting certain actors to participate in the network to ensure certain voices are represented.

These strategies are designed to encourage trust between actors in the network, willingness to co-operate and compromise, and work towards common ends. However, the authors note there is no simple or guaranteed route to network performance – there are many ways in which networks can fail, with vetoes, hostile dynamics, or conflicting priorities.

The Productivity Commission (2015), in its important report *More Effective Social Services*, identified that the social service system has repeatedly failed to address the needs of the most vulnerable. They identified the fragmentation of services as number one on their list of the top eight fundamental causes of under-performance in the current system:

*“Government commissioning of services happens in silos, with each silo evaluating the need for services through its own specialised lens. No agency has an understanding of (or accountability for) the holistic needs of clients, and users of the system must navigate their way through multiple administrative processes.”* p86

They note that the costs of this fragmentation fall disproportionately on those with the greatest need of support, and that previous initiatives such as Children’s Teams and Community Link have failed to resolve these problems:

*“Services for the most disadvantaged New Zealanders with multiple, complex problems... have been the target of many ad hoc integration initiatives. Such initiatives have largely failed to resolve the problems of service fragmentation. The initiatives have generally failed to devolve decision rights over an adequate budget to those working with clients. These problems have been compounded by multiple integration initiatives potentially targeted at the same clients.”* p248

Interestingly for our discussion on wellbeing, the Productivity Commission quoted Amartya Sen and his colleagues on the Fitoussi commission who had this to say about multiple disadvantage:

*The consequences for quality of life of having multiple disadvantages far exceed the sum of their individual effects.* (Stiglitz, Sen & Fitoussi, 2009, p. 15, quoted in Productivity Commission 2015, p256)

The issues of service fragmentation are a major impediment to providing genuine procedural justice for people coming through the justice system, regardless of whether their role is as offender, victim, plaintiff, defendant, family member or friend. When so many of these people have needs that go well beyond the presenting matter, it is hard to treat people with genuine 'dignity and respect' when these broader needs are treated by a succession of actors as someone else's problem.

As the quote from the Productivity Commission indicates, client-led budgets are one option they proposed to help resolve these issues. We come back to this suggestion below in the discussion on different service models.

Another suggestion the Productivity Commission made is to collate funding where possible around defined populations, and to have a single agency commission an integrated set of services to meet the needs of that population. They proposed two potential options to achieve this. One was to expand the scope of District Health Boards to cover social needs as well, forming District Health and Social Boards. The other, more revolutionary option was to form a Better Lives Agency to take overall responsibility for integrated services to the most disadvantaged New Zealanders, perhaps as an expanded version of Whānau Ora. This would be somewhat comparable to ACC, but covering a much wider range of needs.

It is clearly beyond the scope of this paper to comment fully on these proposals as they relate to the broader social system. But even within the justice system these concepts may have some merit in certain areas. For example, funding for victims is currently fragmented across many agencies including Police, the Ministry of Justice, ACC, Victim Support, MSD and Corrections. There may be merit in considering a consolidation of this funding under a single commissioning agency that can work with victims to identify the ideal mix of funding across various services. A similar argument could be made in relation to rehabilitation-oriented funding, which is spread between the Ministry of Justice, Corrections and various parts of the social sector.

However, there are limits to the degree of consolidation that is possible in Justice. As discussed earlier, there are constitutional reasons to keep police, courts and corrections separate, as a protection against the abuse of the state's coercive powers. This suggests that the delivery of justice will always have something of a network character and will need to be managed as such.

We have already talked about within-network self-management as a tool to improve the performance of networks. Another important tool is the addition of 'regulatory actors' into the network to provide external pressure to perform. This is the topic we turn to now, expanding our view outwards from the inner 'agency network' in Figure 17, to include the regulatory authorities.

## Regulation of justice organisations

Justice organisations exist to help regulate society, but it is important to remember that these regulatory organisations are themselves highly regulated. There are very many rules, principles, guidelines and so on to delimit the operation of these agencies, for example in the Corrections Regulations 2005, Solicitor-General's prosecution guidelines, and in general legislation such as the Public Finance Act 1989.

In turn, these rules, guidelines and principles are enforced or monitored by many different regulatory authorities, or these authorities hold specific powers of inquiry or rule-setting themselves. Many of these authorities exercise powers beyond the justice system, including:

- The Auditor-General
- Central agencies, such as in their role managing the performance of chief executives
- The Judiciary, in their judicial review and appeals functions<sup>32</sup>
- The Coroner
- The Ombudsman
- The Privacy Commissioner
- The Family Violence Death Review Committee
- The Human Rights Commission

Regulatory pressure of a sort is also applied by international bodies such as the United Nations, in their monitoring of compliance with international human rights instruments such as the Optional Protocol to the Convention against Torture.

There are also several regulatory authorities that are specific to the justice system, including:

- The Independent Police Conduct Authority
- The Judicial Conduct Commission
- The Law Society, in its role as regulator of the legal profession
- Ad hoc commissions or inquiries that are established from time to time, such as the 2007 Commission of Inquiry into Police Conduct.

Some of these regulatory authorities are in turn regulated by others in the sector. For example, the Ministry of Justice monitors, under the Crown Entities Act 2004, the various crown entities in the justice sector.<sup>33</sup>

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<sup>32</sup> The Judiciary can be seen as regulating itself through the hierarchy of appellate courts, and is also 'regulated' by the legislature in the ongoing dialogue between enactment and interpretation

<sup>33</sup> Namely the Human Rights Commission, Law Commission, Electoral Commission, Privacy Commissioner, Real Estate Authority and Independent Police Conduct Authority

From time to time new regulatory bodies are proposed or introduced as well. For example:

- The Chief Victims Advisor recently made calls for a formal Victims Commission to be created with a view to further strengthening the voice of victims in the network
- The current Government is developing policies to potentially introduce a Sentencing Council and Criminal Cases Review Commission
- The Roper Committee (1989) proposed introducing an independent Corrections Commission as a regulator of Corrections.

According to regulatory theorist Julia Black (2014), there are five elements or tasks relating to enforcing regulation. These are:

- **Detecting** undesirable or non-compliant behaviour
- Developing tools and strategies for **responding** to that behaviour
- **Enforcing** those tools and strategies on the ground
- **Assessing** their success or failure
- **Modifying** them accordingly

The regulatory authorities described certainly fulfil these functions. Most have been established with a particular view towards preventing abuse of powers. But there are also more indirect or subtle effects that these regulatory authorities have through their position in the network.

One is as a source of cultural pressure. The agencies of justice have to juggle multiple competing values and principles, and competing views of priorities. Given the dynamics of network interaction, it is easy for the network to slide in a particular direction, valuing one principle more than others. For example, the Chief Science Advisor, Peter Gluckman (2018), argued that drift towards ever-greater use of custodial remand in response to high profile media events is contrary to the evidence, which suggests this is likely to be increasing risk to the community.<sup>34</sup>

If we accept this argument, it suggests that the system has been overly sensitive to signals favouring short-term, politically motivated risk aversion. Regulatory bodies can provide a cultural check on these dynamics by bringing countervailing views and evidence to bear. Indeed, the network of science advisors can be seen as a regulatory mechanism in this light.

This cultural aspect of regulatory agencies is highlighted by policing academic Maria Ponomarenko (2019), who notes that in their absence the use of discretion can easily slide towards over- or under-enforcement of certain types of offence or offender. Ponomarenko states that:

*“Officers decide where to patrol and whom to stop. Whether to issue a warning for a broken taillight, or write a ticket. Whether to throw a joint in the gutter, issue a*

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<sup>34</sup> Because of the criminogenic effects of remand with the associated loss of housing, employment etc

*summons, or make an arrest. Commanders decide whether to prioritize the rash of commercial burglaries, or to try to do something about the dealers on the corner.*

*The problem, of course, is not so much with discretion itself—but with how that discretion is used. Too often, the failure to sufficiently cabin discretion has resulted in both over- and under-enforcement, typically at the expense of racial minorities and other marginalized groups...*

*Certain crimes—like loitering, or riding a bicycle on the sidewalk—are far more likely to be enforced in poor black neighborhoods than in affluent white ones. At the same time, residents in low-income, minority neighborhoods have complained for decades about unsolved homicides, permitted open-air drug markets, slow or nonexistent 911 response times, and tolerance of pervasive, low levels of violence. Often, it is the very same residents who report feeling both under-protected and over-policed.” p10*

Ponomarenko is writing in the American context, where the issues are arguably much greater than in New Zealand. But the general insight remains: even within the realm of permissible activity, regulatory bodies can help nudge an organisation to become appropriately sensitive to signals of different strengths and sources in the inevitably contested decision about what to focus on.

The American example helps to make salient a deep source of tension arising from the question of who the justice system is designed to serve. Over- and under-enforcement are subjective terms that different actors in a policy network are likely to interpret differently. Indeed, in the American context, the white majority may often be very happy with police focusing their efforts on the ‘over-enforcement’ of rules in minority neighbourhoods, if their major concern is to prevent spillovers of violence from minority into majority neighbourhoods.

This is a concrete example of majority tyranny in action, as discussed earlier in this paper. The creation of rights, in the corrections act for example, and associated authorities to investigate and adjudicate breaches of those rights, are important mechanisms to protect against that tyranny.

Under the views of democracy and wellbeing I highlight as consistent with the capabilities approach, then regulatory agencies, rather than reducing the legitimate democratic authority of representatives to do as they wish, strengthen democracy (and with it institutional trust and social capital), by helping protect minority interests from domination by the majority. The link to procedural justice and social capital is clear – for a system to provide justice to the minority of people who deal with it, the system needs to be sensitive to the needs of that minority. This arguments holds regardless of the impact on wellbeing.

**Figure 18: Minority vs majority experience of justice**



This is a particularly important issue in the justice system given the distribution of harms, particularly criminal harms. Both offending and victimisation are concentrated on a minority of the population, a minority that is disproportionately young, male, poor, and Māori.<sup>35</sup> I have argued elsewhere that it is useful to distinguish between ‘spectators’ and ‘participants’ in justice. For participants, crime or other harms (and the associated justice interactions) are a semi-regular occurrence for them or their friends and family. For this group, an effective justice system is one that operates in close co-operation with the social sector to help meet people’s needs and prevent future harms.

To some extent the majority of ‘spectators’ share these goals; surveys show that most people are in favour of rehabilitation for example, particularly for less serious offences (eg, Paulin et al 2003). But spectators can also have a very different view of the nature of the problem than participants do. This is because spectators derive their views not from personal experience, but more from images of justice provided through the media, images that often focus on the unrepresentative cases where the majority fall victim to largely random acts of violence committed by the minority. Researchers in ‘media logic’ have identified a tendency for the media to select and frame stories to emphasise threats to order, to personalise and dramatize issues, and present events out of context (see discuss in Klijn and Kuppenjan 2016).

For the majority, then, an effective justice system will often be one that offers to control the threat that crime poses to good order, a view that quickly slides into control of the minority itself with surveillance, incapacitation and other techniques of social control (see Garland 2001 for an extended discussion on what he calls the culture of control). Penal populism is a term coined to describe a situation when these majority preferences are enacted in relatively unconstrained form via representative politics (see Pratt 2006).

<sup>35</sup> For example, the 2016 NZCASS reported that about 75% of people experience no crime in a year. Of those who do, 3% of victims experience 53% of all victimisations. Offending is similarly concentrated. Of people born in 1970 who received a conviction before 2013, 5% accrued 47% of the total convictions (Hughes unpublished). Comparison of the two studies and the broader literature shows that the demographic correlates of offending are relatively similar to those for victimisation.

This brings us to the final and perhaps most important role of regulatory authorities, as an intermediary mechanism between the public and justice organisations. We need here to introduce the third layer of actors in the network illustrated in Figure 17, namely individuals, families, whānau and non-governmental organisations.

Regulatory organisations, particularly those with investigatory functions such as the IPCA, play an important role in hearing and adjudicating complaints about the treatment of people experiencing the justice system. This helps ensure procedural justice has a consistent 'voice' in the network, by revealing where it is lacking. It is a practical mechanism to ensure 'contestability' of decisions by those at risk of domination. Regulatory authorities also provide a means for managed partnership and co-design, by providing what network governance scholars call an 'arena' in which their concerns can be considered and deliberated.

However, significant complication is added from the final actors in the system as illustrated in Figure 17, namely the media and the politicians. Networks do not emerge spontaneously – they require effort from all parties to participate, and this effort is costly in terms of time at the very least. For some interest groups, politicians and the media may provide a lower cost means to advance their agenda than participation in the gritty business of negotiating with others to steadily remedy the system's flaws. The media is likely to be a particularly attractive avenue for those who wish to promote a stark black or white conception of crime and justice.

Regulatory organisations have a somewhat different role in relation to these dynamics, as key actors in the concept of *Monitory Democracy* introduced above.

Under this conception, regulatory authorities can be seen as a cost-effective way of ensuring certain interests or groups have voice in the network, to help prevent their domination, without necessarily requiring these individuals or groups to actively participate themselves or to make their case within the simplifying arena of the media.

For debates that do take place within the media part of the public sphere, regulatory authorities can affect how these debates take place, by acting as neutral providers of information to inform debate, and as neutral investigators who can be used by politicians to depoliticise complex issues.

There are at least three main observations to be made about the existing regulatory system for justice agencies. The first is that while there are many mechanisms to prevent the abuse of offender's rights, the system lacks emphasis on the interests of victims and Māori, and broader families. The calls for a Victims Commission and greater co-governance with Māori are evidence of this.

The second observation is that the regulatory system, like the agencies themselves, is fragmented, with multiple regulatory authorities each typically focused on a single agency.

The third observation is that the regulatory system is largely focused on receiving and investigating complaints, and spends comparatively less time investigating and publicly reporting on systematic issues or trends. Given the fragmentation of authorities, this observation is particularly true for issues that cut across multiple agencies.

A useful comparison is with the health system, where the regulatory system is comparatively more mature. A good example is the Health Quality and Safety Commission, which has a broad mandate and works extensively across multiple actors within the health system to

understand system issues, disseminate advice and guidance, and create transparency and trust among the public with extensive publication of data.

A key feature of this health system is an extensive use of adverse event learning, to monitor and understand recurring issues such as falls in hospitals, and work to pro-actively address these issues. This helps prevent knee-jerk policy reactions in response to crises that has characterised much of the justice system's evolution in recent decades.

A similar model is being piloted in justice, with the name Adverse Incident Learning System. This may provide the impetus to reconsider the overall regulatory arrangements for the justice system with a view to improving procedural justice, rooting out abuse and corruption.

With the planned introduction of a criminal cases review commission, sentencing council and potentially a victims commissioner, there may be an argument for uniting the disparate regulatory functions for justice into a single, system-focused regulator similar to the HQSC.

The argument for strengthened regulation becomes all the more important if one is also considering a greater level of devolution or decentralisation, as I argued earlier may be necessary to adequately meet the Crown's Treaty commitments. Indeed, the strength of regulatory authorities in the health sector partly reflects the devolved model applied in that sector, with DHBs (as crown entities) being the loci of authority.

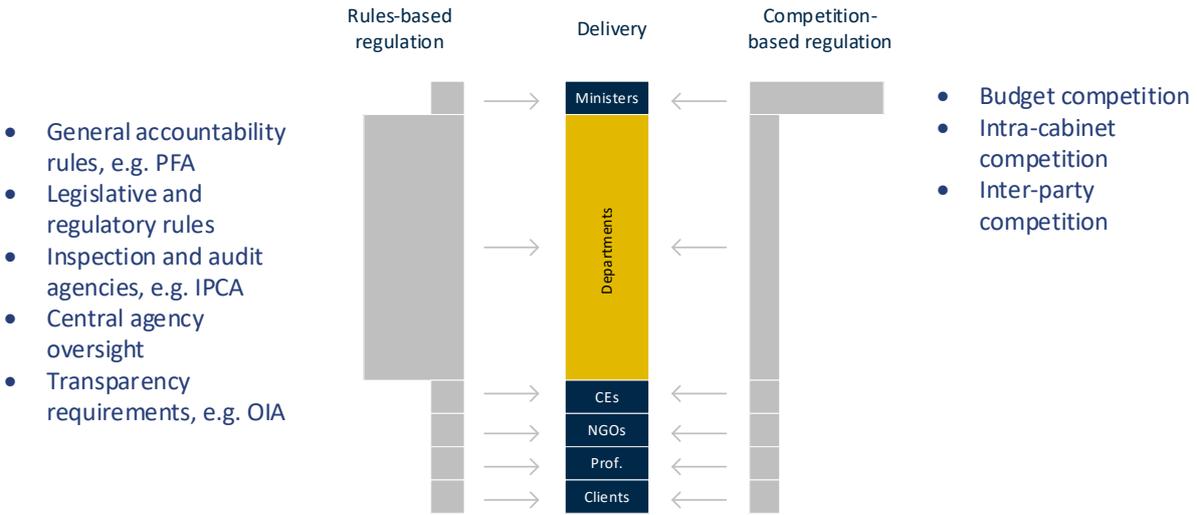
There is a more general point here, that the level and type of regulation depends on the general system architecture. There are many different types of 'service model' that can be used, and the choice of service model goes a long way to determining the nature of the network that governs it – what actors have influence, how strong that influence is, and the arena in which that influence is exerted. We turn to this area of discussion now.

### Service models

In its analysis of the factors driving social service effectiveness, the Productivity Commission (2015) emphasised the central importance of the 'service model' chosen by commissioning agencies for the delivery of social services. They traced many of the problems with the existing social services system to an over-reliance on two particular models, namely in-house provision and contracting out.

In-house provision is the prevailing service model in the justice system. Under this model, a department of state delivers services itself as a monopoly provider. Nearly all the functions of Police, Corrections, and the Ministry of Justice fit this description. Under this service model, each agency regulates itself, as discussed below at the professional level. There are also two main external types of regulation. We have just discussed the first type of regulation, namely that of rules and their enforcement or monitoring by regulatory authorities. The second type of regulation is political, via Cabinet, which is in turn subject to electoral competition. This is illustrated in Figure 19 below.

**Figure 19: In-house provision (Departmental)**



In comparison to the other service models, in-house provision is the most sensitive to dynamics arising from political competition for power. This is all the more so where regulatory authorities are weak. Depending on your view of democracy this could be seen as a strength (if a schumpeterian) or a weakness (if a republican). Either way, we could expect this model to be more sensitive to majority than minority interests and perspectives.

The Productivity Commission identified the key strengths of this model as the uniformity of provision, and efficient provision over short term horizons. However, it also identified the downsides of this model as being:

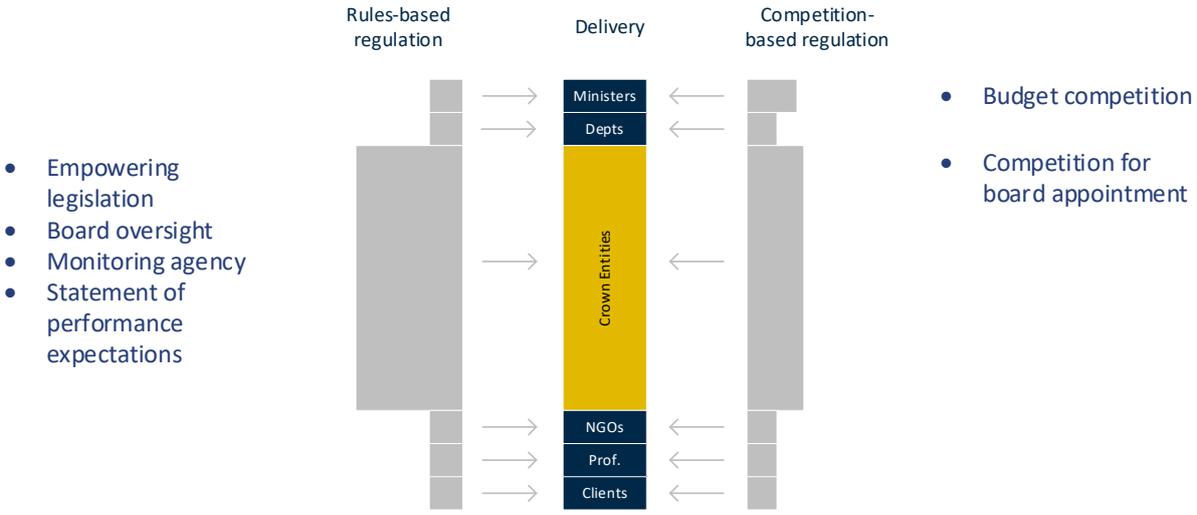
- A tendency to risk aversion
- A lack of innovation
- A lack of adaptation to client or local conditions.

Although these points were made generally to all social services within this model, the three points certainly ring true for the justice system.

A variant on this service model is that of in-house provision by a Crown Entity, such as a District Health Board. Crown Entities are still subject to political dynamics, particularly in the budget process, but the relationship is more distant and mediated by a governance board that will generally have more relevant expertise than a Minister. Crown Entities also tend to have more robust regulatory arrangements in place to monitor for problems and to guarantee robust accountability to parliament.

This kind of service model could be suitable if there were a desire to devolve some of the functions of justice, perhaps as part of an attempt to increase the degree of co-governance by Māori. The regional model for police forces in the United Kingdom provides an international example of where this kind of approach has been taken.

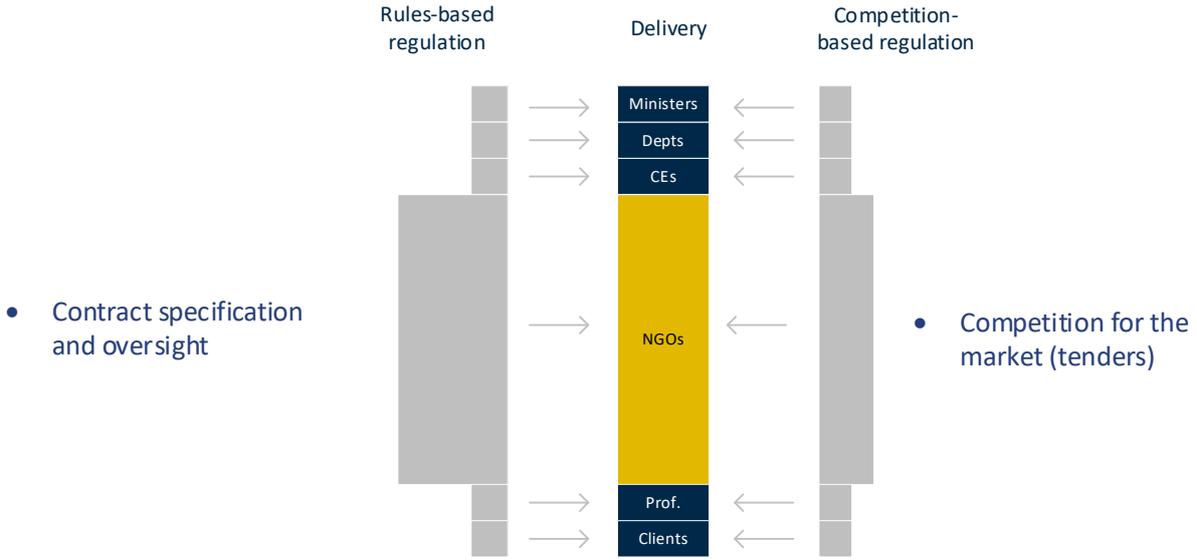
**Figure 20: In-house provision (Crown Entity)**



The next service model is contracting out, which is the most common form of arrangement where non-governmental organisations are involved. The main examples of this service model in the justice system are:

- Victim support
- Restorative Justice
- Stopping Violence programmes
- Some of Corrections rehabilitation and reintegration programmes.

**Figure 21: Contracted provision**



In this model, the contracting department plays the role of regulator through the specification and monitoring of contracts. Although contracting out plays a relatively minor direct role in the justice system, its indirect role is significant because of how many NGOs under contract

to social sector agencies are involved in the lives of offenders, victims and the families. The problems with the contracting out model are a longstanding and significant area of frustration for NGO providers, as the recent public engagement on criminal justice reform has re-emphasised. Many of the concerns raised by NGOs in this engagement had previously been raised during the Productivity Commission inquiry, and in its report the commission spent significant time commenting on these problems.

Whereas in the case of in-house provision Government is typically a monopoly provider, where Government contracts out it is typically a monopoly buyer, a monopsonist. Economic theory predicts that in such a situation, the sole purchaser will exploit their market situation to minimise price and quantity. The Productivity Commission had this in mind when they said that:

*“Government faces incentives to underfund contracts with non-government providers for the delivery of social services. Long-term underfunding has undesirable consequences. Payments for services where the Government controls service goals should be set at a level that allows an efficient provider to make sustainable return on resources deployed, encouraging investment by existing providers and entry of new providers.” p162*

There are other problems with the contracting out model, including:

- High transaction costs, particularly for smaller providers, in the context of multiple fragmented funding pools and winner-takes all tendering
- Excessive prescription of service outputs inhibiting innovation.

The innovation point is a major one. The commission stated that:

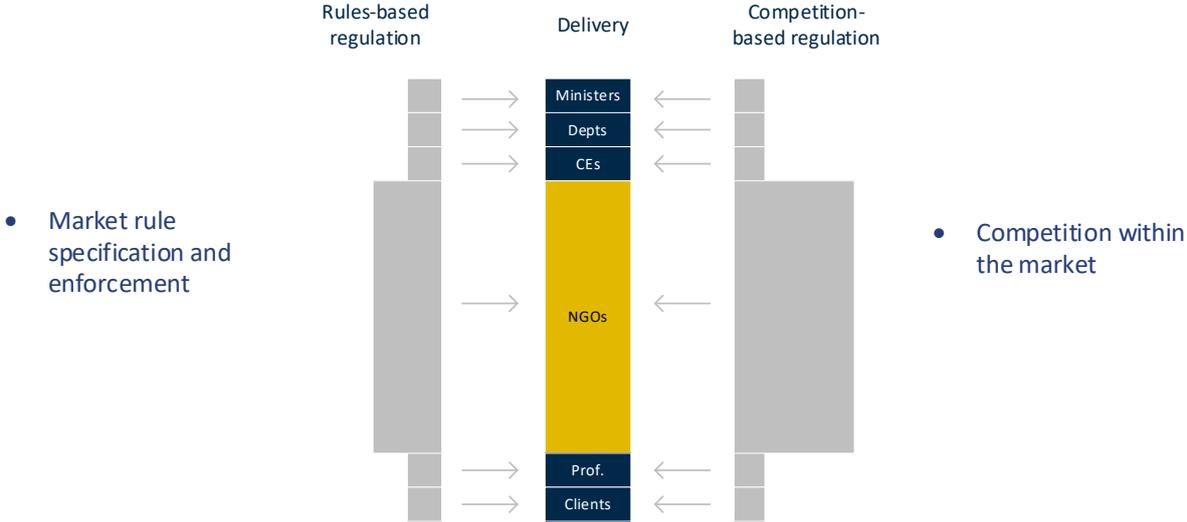
*“Despite these barriers, there are many examples of innovative approaches to the design and delivery of social services in New Zealand. Yet a single provider innovating in isolation has a limited impact on the overall effectiveness of the social services system. Unlike regular markets, where innovation spreads through successful innovators gaining market share or through imitation by other businesses, innovation in the social services system predominantly spreads through funders identifying promising innovations (possibly from overseas) and contracting providers to follow the new approach.*

*This centralised approach to spreading innovation has severe limitations. First, as discussed, the social services system fails to create and share information about which services and interventions work well and which do not. Second, funding agencies are cautious about trying out new approaches because of political risks and the need to manage costs. Third, once funders prescribe a new approach in contracts, providers again have little room to continue to innovate.” p58*

One alternative to contracting out that mitigates some of these problems is that of managed markets. These are uncommon in New Zealand, but are used for the employment services market in Australia. In that example, the performance of the various providers is assessed statistically each year and the market share of each adjusted to reward higher-performing providers. This allows for successful innovation to be rewarded with expanded market share. It also allows a higher level of competition than with winner-takes-all procurement, at lower cost to providers.

Such a model would only be suitable for some parts of the justice system – it would not be appropriate for policing, for example. But it would potentially be appropriate for services such as legal aid, restorative justice and reintegration services. The key challenge is, of course, selecting appropriate performance measures and capturing them accurately. Given the earlier discussion, focusing performance metrics on measures of victim satisfaction and procedural justice would be a good way to focus efforts on building social capital and wellbeing.

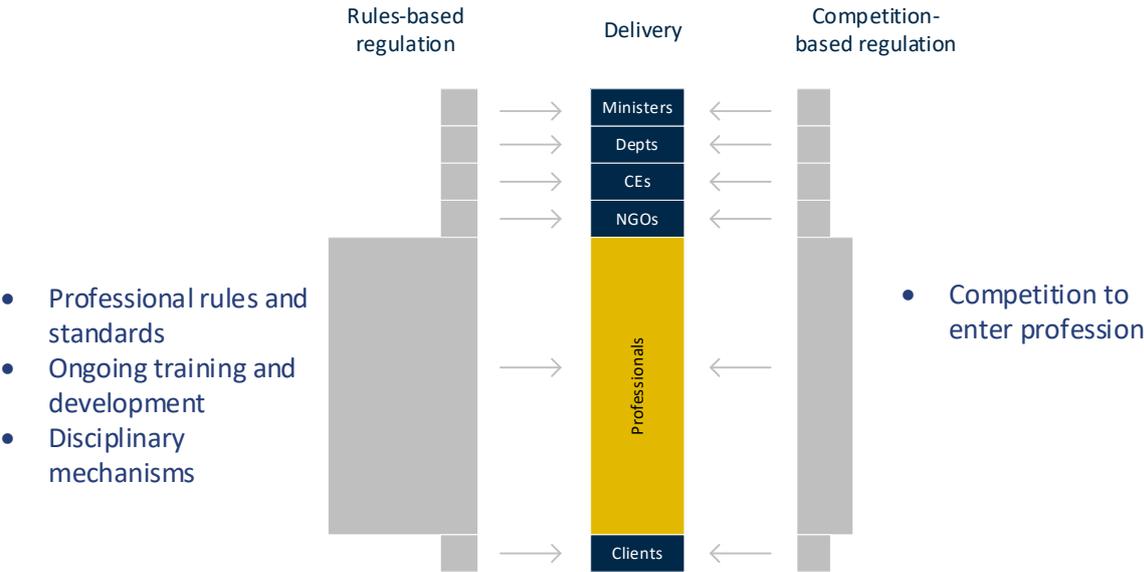
**Figure 22: Managed markets**



Another option is the trust model, such as General Practice in the health context, where service design and delivery is significantly delegated to professionals to manage themselves with a minimum of oversight and control by funders. The main example of this in the justice system is of legal aid, although the Judiciary can be understood within the same framework (acknowledging of course the constitutional role of the Judiciary, not just their service delivery role). A trust model relies strongly on the quality of professional oversight and regulation.

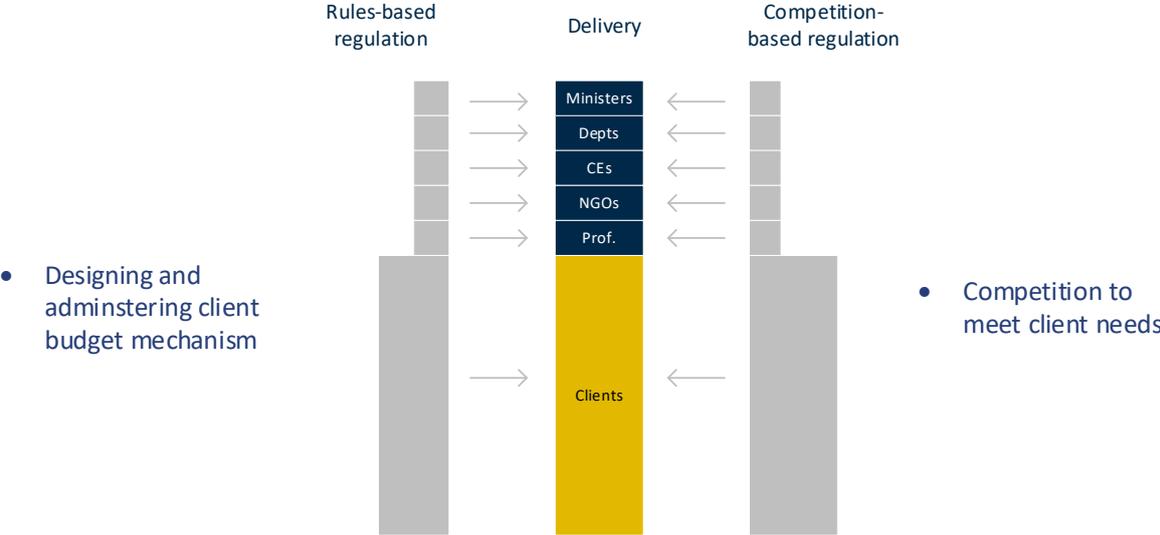
A trust model relies on the intrinsic motivation of the professionals to do a good job, and assumes that they are the best judge of quality. The Productivity Commission notes that this model can work well when the interests of providers and funders coincide, but that the weaknesses of this model are that it is difficult to measure performance, there is limited (top-down) accountability, and the level of trust can result in rent-seeking behaviour or inefficiency.

**Figure 23: Trust model**



The trust model devolves power very far from direct control of politicians, but one model goes even further, placing the decision-making directly in the hands of the service user. Two major examples in New Zealand are the Enabling Good Lives model for disability support, and the voucher system for ECE. In the first example, previously disparate funding pools have been combined, and clients have a significant amount of choice as to what mix of services they receive. This can be understood as a form of very granular ‘co-design’, in that each client ‘designs’ their own customised mix of services and providers.

**Figure 24: Client budgets/vouchers**



In the second example, ECE is subsidised behind the scenes by Government. This lowers the cost of ECE in an invisible way, maximising choice between providers. This allows for a wide variety of different ECE models to sit alongside one another in a competitive market and rewards innovation. In the justice system these models could potentially be appropriate for the provision of victim support, as victims have diverse needs and very different preferences. The challenge with this model is ensuring the providers are adequately compensated for the most difficult cases, to prevent them from ‘cream-skimming’, leaving those most in need

without adequate support. Those with the most complex needs may also not be very good advocates for themselves, or may not have all the information they need about what is going to work best for them, in which case an independent navigator service could also be appropriate.

### ***Organisational issues: conclusion***

In this section I have highlighted that the justice system can build institutional trust through preventing abuse of powers, making the design of services sensitive to the needs of those using them, through co-design or some other mechanism, and most importantly through procedural justice.

If the system does not do as well as it could at using these three pathways, it is in part because of the architecture of the system. A fragmentation of agencies, fragmented regulatory authorities, and a use of service models that create sensitivity to majority rather than minority interests and preferences, mean the system is slower than it could be at adapting itself over time to meet the diverse needs of the minority of people actually using the justice system.

There are different kinds of system architecture that would potentially reconfigure the network of influences and strengthen the 'voice' of service users in the system. There is no one correct or simple answer to the choice of service architecture, and it may never be appropriate to deploy some of these alternatives in relation to core services such as policing and prisons, where in-house provision minimises the risk of abuse. But for some of the more peripheral services, the models create viable alternatives. And even if they are not taken up, the discussion hopefully illustrates that different models need different types of regulation.

Given the lack of direct 'voice' for participants under the prevailing model of in-house provision, and lack of competition-based regulation outside majoritarian politics, a desire to build trust implies a need to strongly regulate justice agencies with that aim in mind. Existing regulatory authorities and rules have a strong focus on monitoring and preventing abuse, but with more support could potentially turn their focus as well on developing strengths across the system. The Health Quality and Safety Commission provides a good example of what this kind of authority might look like in Justice.

We turn now to the final set of nested issues in the discussion of institutional trust: professional issues.

## Professional-level issues

We turn now to the level at which individual people do their jobs. Despite all the complex rules and abstractions at the constitutional and organisational levels, people still make a big difference. But it would be unfair to look at these professionals in isolation. It makes sense to consider workforce issues in the context of institutional factors together because:

*“...to focus on individuals alone is to miss the significance of how their actions are governed by and interact with the broader organisational and institutional context in which they are situated.”* Black 2014

Some go further than this, emphasising how certain cultures are more adaptive than others given an external environment:

*“...culture formulation is neither a random event nor an action dependent solely on the personalities of founding leaders or current leaders, but it is, to a significant degree, an internal reaction to external imperatives”.* Gordon 1991, p404, quoted in Productivity Commission 2014

But regardless of the extent to which one favours structural or cultural explanations for phenomena, it is certainly indisputable that government institutions rely heavily on the quality of their workforce. In *The Open Society and its Enemies*, Karl Popper wrote that:

*“Not only does the construction of institutions involve important personal decisions, but the functioning of even the best institutions (such as democratic checks and balances) will always depend, to a considerable degree, on the persons involved. Institutions are like fortresses. They must be well designed and manned.”*

This insight has been given empirical standing in work showing that the degree of meritocracy in the civil service is associated with economic growth (Evans and Rauch 1999). The importance of a quality workforce is no surprise given the findings presented above about procedural justice. If civil servants are unmotivated or unskilled then it is unlikely the public will be satisfied with their encounters with those civil servants.

In comparison to the sections on constitutional and organisational issues, this section will be relatively short. This is because the justice system is relatively unique in the extent to which its professional and organisational structures overlap. For example, Police is the only organisation in New Zealand that hires police officers. Corrections is the only organisation that hires probation officers and corrections officers, and the Ministry of Justice is the only organisation that hires court registrars. A Judge can only be employed by the Judiciary. This monopsony power gives each organisation very significant scope to define the bounds of professional conduct.

With the primary exception of lawyers, who are regulated as professionals by the Law Society<sup>36</sup>, the institutional and professional structures within the justice system are more or less the same. Under this structure, the responsibility for ensuring a high-performing justice workforce lies very squarely with the agencies that employ them, as there is very little external pressure from market forces or independent professional bodies.

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<sup>36</sup> Leaving aside more minor exceptions, such as health staff working for corrections

This is one of the arguments in favour of the alternative service models described in the previous section, as means to provide stronger bottom-up influence, whether via empowering clients, professionals or non-governmental organisations.

But even under the assumption of no change, there is still much that can be done at the professional level. I talk first about leadership and culture, then about professional regulation.

### ***Leadership and culture***

Particularly for the departments within the justice system, namely Police, Corrections and the Ministry of Justice, the existing constitutional and organisational arrangements rely strongly on the quality of leadership at the top of those organisations, particularly in terms of creating a strong culture.

In its 2014 review of regulatory agencies, the Productivity Commission focused on the question of agency culture. They quoted Schein (2013), who stated that:

*“Culture is best thought of as what a group has learned throughout its own history in solving its problems of external survival in internal integration. ...It is best conceptualised at its core as **the shared, tacit assumptions that have come to be taken for granted and that determine the members’ daily behaviour.**” [Emphasis in original]*

Many decisions that are taken daily within the organisations of Police, Corrections and the Ministry, big and small, affect what tacit assumptions come to be taken for granted. These decisions start with who to hire, and who to promote. In this, there is an ongoing issue that the demographics of the justice workforce do not reflect the demographics of those using justice services. This can stand in the way of building procedural justice and trust.

This issue has been long recognised and relevant strategies are in place to address it. Diversity is gradually improving among the justice workforce. The Police workforce is now up to 12% Māori and 33% female according to the latest annual report. The Corrections workforce is at 21% Māori and 45% female. The Ministry of Justice workforce, by contrast, is 14% Māori and 69% female.

Another important role of leaders involves supporting their staff, providing pastoral care and supervision. Public-facing roles in the justice system in particular can be very trying, with exposure to people and material that is very confronting and emotionally draining. It is one thing to ask staff to conduct themselves professionally, providing procedural justice and treating everyone with equal concern and respect. But if these staff feel unsupported in the face of the secondary trauma they experience in dealing with the harm in our communities, asking for this generosity of spirit is going to be unrealistic at best.

Leadership also involves articulating and communicating a desired future, then tracking progress towards that goal. The straightforward implication of this point is that if the goal is to improve institutional trust, then repeatedly communicating that and measuring progress is a basic way to follow through. Police are the furthest progressed on this, with their publicly reported citizen satisfaction survey, conducted on an annual basis, and focus on a high performance culture alongside that. Other agencies in the justice system could usefully follow Police’s lead in this area.

Leadership also plays an important part in facilitating more effective cross-agency collaboration. This issue was focused on by the Better Public Service advisory group (2011). As noted earlier, meeting people's complex needs will often require the co-operation of multiple agencies, in ways that are not easily reduced to a rule-based formula. Leadership to empower staff to co-operate will often be a necessary step.

A more subtle issue here is that different agencies have different professional cultures with different ethics, different frameworks, and different priorities. Social work is a very different profession to law, for example, and both are different from psychology. Although inter-agency co-operation is often mentioned as necessary for effective social services, it is not as commonly observed that inter-professional co-operation is just as important.

This issue is also found in the health system, where different 'allied health professionals' often need to co-operate in multi-disciplinary teams to achieve an outcome, particularly for patients with more complex health needs. In the health system, there are direct structural levers to try and address this issue as multiple professions all report through to the DHB. There are also pan-professional regulators, like the HQSC and health and disability commissioner.

The challenge is perhaps greater in the justice system as the various professions are each aligned to a different organisation – police to Police, probation to corrections, social work to NGOs, and so on. In the presence of these structural barriers to effective multi-disciplinary operation, strong leadership becomes all the more important. Examples such as the Integrated Safety Response teams for family violence are a good model, although there is a risk that models such as this become dominated by the culture of the lead profession/organisation, in this case police.

Another aspect of multi-disciplinary work is the involvement of volunteers, particularly volunteers with lived experience. For example, it is not uncommon for people working in areas such as victim support and women's refuge to have a personal history of victimisation, a history which motivates them to support others going through the same experience. Similarly, as part of their journey to desistance, offenders are often motivated to give back as 'wounded healers'. The Māori philosophy of *tuakana teina* is relevant here, with former offenders motivated to act like mentors, big brothers, *tuakana*, to the junior *teina* still living the life.

The challenge for the justice system is how to harness this source of energy and integrate it safely and effectively into the broader justice workforce. Such a challenge will be easier to face the more there are strong systems in place to define and monitor standards of professional conduct. This goes to the issue of professional regulation, to which we turn now.

### ***Professional regulation***

Typically a 'profession' has rules defining membership and the expectations on members. Many professions, particularly public sector professions, are regulated under legislative settings. For example:

- health professionals are regulated under the Health Practitioners Competence Assurance Act 2003
- teachers are regulated under the Education Act 1989
- social workers are regulated under the Social Workers Registration Act 2003

These regulatory mechanisms tend to have, among other things:

- requirements on professionals, including a requirement for cultural competency
- restrictions on who can use the professional title
- bodies for accreditation that are independent from the employers
- bodies for investigation that are independent from the employers.

In the justice system, lawyers are regulated by the NZ Law Society under the Lawyers and Conveyancers Act 2006. This reflects the use of the trust-based service model for legal services, as discussed above. Psychologists are regulated under the Health Practitioners Competence Assurance Act 2003.

Other than that, professional regulation is restricted to the investigatory functions of the IPCA, Judicial Conduct Commission and Ombudsman. Although these bodies do investigate individual cases, their focus is on regulating the organisations rather than the individuals. Most professionals in the justice system are primarily regulated by their employer organisation as employees.

A choice of a different service model for justice services, as discussed above, would likely necessitate a need to strengthen the mechanisms for professional regulation. But even under the prevailing model of in-house provision, there exists the possibility of creating independent accreditation of justice professionals. This could serve as a potential counterweight to some of the downsides of in-house, monopoly provision with close political control, by creating a stronger voice for the needs of people caught up in the justice system.

### ***Professional issues: conclusion***

The system architecture for the justice system means that most justice professionals operate as employees, regulated by their organisations, rather than through any independent regulatory mechanism. This means that the main lever for increasing a focus on procedural justice and other means to improve social capital is via incentives on the organisations, and the quality of leadership provided within them. Comparison with other sectors such as health and education highlights that there is an option to strengthen the independence of professionals within the justice system. This would be necessary as part of a changed service model, but could also be considered in its own right.

## Using justice institutions to build pro-social norms and networks

We have now concluded our lengthy discussion on the justice system's role in building institutional trust. We now turn to the role the justice system might play in the other dimensions of social capital, namely pro-social norms and networks.

Values, behaviours and networks are closely linked. At an individual level, the cognitive-behavioural model emphasises the close connection between internal mental and emotional states and individuals' behaviour. At a meso- or macro-level, social psychology emphasises the way collective values shape behaviour in each behavioural setting. In this section, I examine the justice system's impact first on norms and networks at a micro, meso and macro level.

At a micro-level, the focus is on individual 'rehabilitation and reintegration' services, in addition to everything I have already said about procedural justice.

At a meso-level, the focus is on partnering with other regulatory centres such as schools, workplaces and Māori organisations.

At a macro-level, norms, networks and national identity merge because there are too many people in New Zealand for us to all know each other, small though our country is. At this level, values, social connections are indistinguishable from a sense of unity because the only way we are connected to everyone in New Zealand is through an 'imagined community' that we participate in via cultural symbols such as sporting events, cultural events and shared admiration for heroes who embody our values. Here the role of the justice system becomes more abstract, as a symbolic mirror that reflects a certain idea of New Zealand back to society.

### Building micro-level norms and networks

#### *Building or reforming individual values and behaviour*

The most obvious way the justice system affects individual values and behaviours is with services designed to do exactly that. These services are known as correctional rehabilitation and share many similarities with cognitive-behavioural and other psychological therapies used in mental health more generally. These services reflect the psychological model connecting thoughts (cognitions) with action (behaviour). By changing people's thinking patterns, including their values, behaviour can become more pro-social. There is good evidence that these services reduce reoffending, though the effect is relatively modest (Lipsey and Wilson 2007).

Rehabilitation is often provided alongside other services such as correctional education. It is unclear if correctional education improves generalised trust, but clear evidence that education generally does increase trust (Huang et al 2010), and correctional education tends to reduce reoffending (Davis et al 2013).

Efforts are also made to change individual behaviour in the non-criminal arenas. For example, Valerie Braithwaite (2013) has analysed tax compliance in Australia using the concepts of social distance and motivational posture. Most people adopt a posture of accommodation to the demands of the system because they believe its demands are legitimate. Others seek to distance themselves from the system through a posture of defiance.

This theory has broader application than just tax – the concept of motivational posturing has been used to similar effect in other regulatory fields such as child protection, occupational health and safety, peace building, nursing home regulation and agricultural reform (Braithwaite 2013).

In this theory, defiance has been demonstrated with factor analysis to take two forms. In the first, *resistance defiance*, defiance is an expression of dislike or hostility towards an authority, while accepting that the authority has legitimate power. For this type of defiance, the best route to improved compliance is likely to be procedural justice – using power appropriately and fairly.

The other form of defiance, dismissive defiance, is more problematic, because it credits neither the system nor the authority with soundness of purpose. For people with this posture, a good outcome would be for the regulatory system to be disbanded altogether. Procedural justice and effective operation of institutions is unlikely to be effective at shifting attitudes for this group. Rather, the solution is likely to be more directly targeted at the belief systems that deny the possibility of a legitimate authority altogether. In this context, political leadership becomes central to forge new belief systems and support for them across society at the meso- and macro-levels.

### ***Building micro-level social connections***

#### Criminal justice

As I covered in part two of this paper, micro-level social connections have a clear relationship with crime. Antisocial peer groups contribute to crime, and pro-social peer groups help prevent it. Crime can also affect social connections, both harming pro-social connections and strengthening antisocial connections. For example, some antisocial peer groups require a crime to be committed to create social trust and connectedness between them.

When a crime occurs, there are conflicting messages from deterrence and labelling theory about how the justice system should respond.

On the one hand, the justice system can increase reputational consequences and disincentive for crime (and regulatory non-compliance) by labelling people as ‘treacherous’ and increasing the flow of reputational information through the network. But labelling theory emphasises that stigmatising people with an offending history can also produce anti-social capital and make further non-compliance more likely.

One way to resolve this tension in criminal justice is the concept of ‘reintegrative shaming.’ The theory of reintegrative shaming’ was developed by Australian John Braithwaite in the 1990s. Both reintegrative shaming and stigmatisation can result in accountability following an offence, but the difference is in the way in which they use and affect social connections:

*“Stigmatisation is shaming which creates outcasts, where ‘criminal’ becomes a master status trait that drives out other identities, shaming where bonds of respect with the offender are not sustained. Reintegrative shaming, in contrast, is disapproval dispensed within an ongoing relationship with the offender based on respect, shaming which focuses on the evil of the deed rather than on the offender as an irremediably evil person, where degradation ceremonies are followed by ceremonies to decertify deviance, where forgiveness, apology, and repentance are culturally important.”*  
(Braithwaite 1993, p.1)

The theory of reintegrative shaming is closely associated with restorative justice. There are three main types of restorative justice in New Zealand:

- The family group conference for young people, where the person who committed the crime and their family meet to discuss how to formulate a plan to right the wrong, and where the person who experienced the crime participates too if they wish to.
- General victim-offender conferences, where if both the person who was victimised and person who committed the crime agree they meet to discuss how to make amends.
- Specialist sexual violence conferences, where the person who committed the crime meets with the person who was victimised to make amends.

Empirical tests of the effectiveness of restorative justice conferences provide the main basis for confirming the predictions of reintegrative shaming theory. After a number of promising early tests in Canberra, the Home Office in the UK commissioned several randomised controlled trials of restorative justice. A meta-analysis of the results of these studies by the Campbell Collaboration confirms that restorative justice reduces reoffending and improves victim satisfaction (Strang et al 2013).

New Zealand research confirms these findings, showing that restorative justice reduces reoffending (MOJ 2016) and improves victim satisfaction (MOJ 2011). This research shows that restorative models of justice are better aligned with a wellbeing and social capital agenda than traditional court-based justice.

Restorative approaches to justice also have the major advantage that they are somewhat closer to a tikanga-based approach to justice. For example, Khylee Quince (2007) has said:

*“A Māori system of punishment is largely forward-looking—aimed at repairing relationships, while accounting for past wrongs. In a worldview predicated upon a norm of balance and harmony, reparation was of far greater import than punishment. In such a system, the process of facilitating reparation, and mediating a settlement is as important as the outcome itself. The inclusion of the victim in this process is imperative in order to forge a binding and durable outcome. This is not to say that tikanga relating to justice was necessarily a soft option. The appropriate utu or payment for any given hara could include death, loss of group treasures or resources, and at the very least, involved public shame and humiliation. The emphasis on the future, however, prioritises a desire to reintegrate offenders into communities, heal victims, and maintain a balance between the acknowledgment of past behaviour and moving on.”*

Moana Jackson (1990) has also spoken of how Māori dispute resolution processes aimed to restore balance between wrongdoer, the wronged, and their communities:

*“The rights of individuals, or the hurts they may suffer when their rights were abused, were indivisible from the welfare of the whānau, the hapū, the iwi. Each had reciprocal obligations found in a shared genealogy, and a set of behavioural precedents established by common tipuna... They were based too on the specific belief that all people had an inherent tapu that must not be abused, and on the general perception that society could only function if all things, physical and spiritual, were held in balance.”* pp27-28

Reading these passages, it is perhaps not too much of a stretch to say that the tikanga Māori conception of criminal justice anticipates the pākehā language of social capital. Whereas from the pākehā perspective a criminal offence is interpreted somewhat more as an act of individual harm between an offender and a victim, or between an offender and the state, from a tikanga Māori perspective the harm is interpreted somewhat more as to the social fabric itself. And if the harm is to the social fabric, the resolution of the harm should be concerned with repairing that fabric.

The justice system also has an important role in supporting people serving community-based or prison sentences to create or re-create social connections as they reintegrate back into society. Housing support, release-to-work and other reintegration programmes such as Circles of Support and Accountability all offer promise as ways to connect people existing the criminal justice system to sources of pro-social capital. Many of these services, particularly those relating to employment, could not be provided if not for the civic-minded behaviour of businesses. This emphasises the interplay between pro-social values and pro-social connections discussed earlier.

Similarly, Halpern (2005) discusses mentoring programmes as a way to increase the social capital of those growing up in disadvantaged communities. Indeed, there is international evidence that mentoring tends to reduce reoffending when conducted by professionals (Tolan et al 2013).

### Family justice

There is ongoing debate about whether family connections count as social capital. Regardless of whether they are, there is no doubt that strong and healthy family attachments support wellbeing throughout the lifecourse.

The importance of family starts in utero. Foetal alcohol disorder and similar conditions can cause immediate and lasting harm to an individual's human capital. Early developmental conditions can both create and harm human capital. The link between early developmental circumstances and adult outcomes, including crime, is clear (see eg, the meta-analysis of Derzon 2010).

Family connections continue to support wellbeing throughout adulthood, as shown earlier with the evidence that married couples consistently have higher wellbeing than other household types.

The Family Court plays a vital role in helping resolve disputes about how best to create healthy family environments for children where other regulatory mechanisms have failed. The issues faced by the family court are complex and this paper is not the place to resolve them. Recent reports by the Ministry of Justice (2016f, 2017) go into much of the operational detail. For the purposes of this paper, it is sufficient to note that these problems are well worth grappling with to support wellbeing and social capital.

## Building meso-level norms and networks

Strengthening meso-level norms and networks is an area where police are particularly important for crime prevention and social capital. Police are very active in the community through neighbourhood policing, as well as providing support for community initiatives such as neighbourhood watch. Although the evidence is mixed when it comes to the effectiveness of neighbourhood watch at reducing crime (Telep and Weisburd 2011), it is clearly a source of bonding social capital for the participants.

Police can also build trust among residents by reducing fear of crime. For example, there is some evidence that foot patrol is more effective at reducing fear of crime than motorised patrol (Telep and Weisburd 2011). We also know that visible disorder tends to increase fear of crime (Brunton-Smith and Sturgis 2011), so 'order maintenance policing', also known as 'broken windows' policing, has a role to reassure local neighbourhoods they are safe, even if the direct impact of disorder such as graffiti on wellbeing is minimal. While the broken windows literature is very contentious, a meta-analysis of policing interventions designed to reduce disorder found a modest impact on crime (Braga et al 2015).

Police also actively partner with schools to provide services such as the Keeping Ourselves Safe programme and the road safety programme. These can potentially help create positive environments in school, which international research shows can help improve behaviour within school as well as reducing offending outside of school (Gottfredson et al 2002).

It is also important to note that the justice system is supported by many volunteers. Providing a vehicle for volunteering also provides a source of social capital for these participants.

## Building macro-level norms and networks

### *Crown-Māori relations*

The relationship between Crown and Māori is one of the most fundamental in New Zealand. This relationship is founded on the principles agreed to by the Crown in the Treaty of Waitangi, and by Māori in te Tiriti, in 1840. Since 1840 the Crown has committed a wide range of Treaty breaches like the loss of autonomy, control of and access to resources, and these breaches have harmed the social, cultural, environmental and economic development of Māori.

The Treaty settlement process has been working over the last 30 odd years to respond to Māori. As Justice Joe Williams notes in his covering letter to the Wai 262 report, we can now consider *"...the possibility of a treaty relationship after grievance. A normalised, fully functional relationship where conflict between the Crown and Māori is not a given."*

Justice Williams notes further that the partnership principle in the Treaty *'is the core of our national identity'*. This surely is correct. Until we can generate a shared 'imaginary community' for Aotearoa that fully captures its various cultural origins, our national identity and social capital will to some extent reflect conflict rather than co-operation.

With the creation of a Crown-Māori relations portfolio, the Government has signalled a clear intent to grapple with this challenge. A key aspect to this challenge is to expand the relationship beyond iwi to include opportunities for individual Māori, whānau, and hapū to participate in the relationship with the Crown.

The justice system has a major role to play in this relationship. Most directly, Te Arawhiti is hosted by the Ministry of Justice. Given the over-representation of Māori among victimisation statistics, offending statistics and the prison population, justice institutions have a particular responsibility to work with Māori to develop solutions.

Furthermore, several iwi have also received commitments to an ongoing relationship with the Ministry of Justice as part of their settlements. The Ministry has a responsibility to meet this obligation.

To meet our obligations, the justice system will need to invest substantially in building its capability for effective partnership. This will need to occur at all levels, from individual staff through to various business processes. This investment will have multiple benefits however, as there are ample opportunities to improve partnership with many other parts of civil society such as NGOs.

### ***Setting clear principles for criminal justice***

Macro-level social connections and a sense of unity are largely the same thing. No one individual can be ‘connected’ to everyone in NZ, but we are connected, more or less, through our membership of a single ‘imagined community’. One reason that generalised trust has come to dominate as an indicator of social capital generally is that it more than any other measure it captures the perceived strength of this imaginary link between us that is so necessary to a modern society.

The justice system reflects this collective self in its codes and practices. In a very real way the justice system helps define the nation and the national character. At this level of analysis, the distinction between values, institutions, and social connections starts to dissolve. There is no single place where the principles of the justice system are captured, but the closest is perhaps the Sentencing Act. The purposes of sentencing are defined as follows:

## **7 Purposes of sentencing or otherwise dealing with offenders**

*(1) The purposes for which a court may sentence or otherwise deal with an offender are—*

- (a) to hold the offender accountable for harm done to the victim and the community by the offending; or*
- (b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or*
- (c) to provide for the interests of the victim of the offence; or*
- (d) to provide reparation for harm done by the offending; or*
- (e) to denounce the conduct in which the offender was involved; or*
- (f) to deter the offender or other persons from committing the same or a similar offence; or*
- (g) to protect the community from the offender; or*
- (h) to assist in the offender’s rehabilitation and reintegration; or*
- (i) a combination of 2 or more of the purposes in paragraphs (a) to (h).*

In a sentencing context, these purposes are balanced against each other by the sentencing judge to determine the most appropriate sanction. In the system overall, the relative balance across these and other purposes is not explicitly determined, but rather emerges as the cumulative results of many specific policies and practices.

Over time, changes nudge the system in one direction or another. These changes in turn change the idea of New Zealand that the system reflects back to society. For example, policies such as a three strikes act, sex offender register and public protection orders speak to a certain definition of New Zealand and New Zealand values, and a certain closure of the group considered to be a New Zealander. Policies and practices such as restorative justice, warnings and diversions, the family group conference and the matariki court speak to another.

In this sense, the choice of principles for justice is a choice about the definition of New Zealand. In this, Nessa Lynch (2013) raises the question of why New Zealanders are happy to support both a relatively punitive system for adults who commit crime and a relatively restorative system for young people. This misalignment is unusual compared to international jurisdictions, where the youth and adult systems tend to be more closely aligned.

That New Zealanders are willing to support a restorative youth justice system suggests that the adult justice system may not be fully aligned with New Zealand values, and may be driving the New Zealand sense of self in a less inclusive direction.

In her paper, Nessa suggests that one explanation for the public's support for both restorative and punitive systems key aspect may be the way the adult and youth systems incorporate victims, with the youth system meeting victims' needs by involving them directly in family group conferences, and the adult system meeting victims' needs by offering punishment. To the extent this is true, it may suggest improving the way victims' needs are dealt with in the adult system is a necessary precondition to bringing that system in line with New Zealanders' values while retaining their confidence.

# Part four: A wellbeing agenda for the justice system

Having completed a cursory sketch of the enormous literatures sitting under the umbrella concepts of wellbeing and social capital, I now attempt to consider the practical implications of these concepts for the justice system. I consider briefly the issues of:

- Measurement
- Monitoring and reporting mechanisms
- Budgetary allocations and procedures
- Policy areas for focus

## Measuring wellbeing, rights and social capital

One important application of the wellbeing and social capital frameworks is to inform outcome measurement. Measurement of social capital and wellbeing at an aggregate level has already been extensively considered by Treasury, Statistics New Zealand and the Social Investment Agency. This issue continues to be considered under the project called *Indicators Aotearoa New Zealand*. As such, I will limit my comments in this paper to a few areas that are more pertinent to the justice system.

### Including measurement of rights

The first point is that to perform adequately as a policy framework, measurement of wellbeing must sit alongside monitoring of the fulfilment of rights. Rights as such can't be measured, but there are already several mechanisms for capturing and reporting on New Zealand's performance at meeting its human rights obligations, such as to UN Committee on the Rights of the Child, the Committee against Torture, and so on. I also note that Motu researcher Anne-Marie Brook is leading a global project to improve human rights measurement, a project known as the Human Rights Measurement Initiative.<sup>37</sup> This initiative promises to improve our ability to understand opportunities to improve the protection of rights among different groups in the population. I suggest that this work be incorporated into future efforts to measure New Zealand's wellbeing.

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<sup>37</sup> A beta version is available online, including NZ data, here:  
<https://humanrightsmmeasurement.org/data/#/Geography/cpr-pilot/all/NZL/>

## Distributional and dynamic considerations

As I highlighted in part one, the distribution of both wellbeing and social capital is potential as or more important than the sum total – it depends very much on the approach to aggregating the wellbeing of different people:

*“Policies that seek to use social capital, or are dependent upon its presence... must address imbalances in its distribution”* (Lowndes and Pratchett 2008).

This is true from the perspective of equity, but it also has practical relevance. As discussed in the section on ‘antisocial capital’, the ‘amount’ of social capital is less important to society than its type, and forms of social capital such as networks that are unevenly distributed are perhaps more likely to transform into ‘antisocial’ rather than ‘prosocial’ capital.

At a strategic level, understanding trends in the distribution of (private) social capital and wellbeing is essential to inform choices about which policy areas to focus effort on. At the policy level, understanding the distributional impacts of different options is equally important.

For micro-level analysis, the distribution of each measure of wellbeing can be analysed as needed as long as the measure is captured at an individual level.

But for aggregate measurement of wellbeing and social capital, I would suggest that we need high-level metrics that directly speak to distributional concerns. Familiar examples include the gini coefficient and proportion of people living below the income poverty line. A more comprehensive measure of inequality in material wellbeing has been developed by Motu (Grimes and Hyland 2015).

There is the possibility of creating similar metrics to measure, for example, the concentration of victimisation and offending in society. Evidence from successive crime and safety surveys suggests that the harm from crime is becoming increasingly concentrated on a shrinking proportion of the population, even as society becomes safer on average (MOJ 2015). Understanding the distribution of crime is particularly important when we consider findings that victimisation has a larger impact on wellbeing for people whose wellbeing was already low than on people whose wellbeing is high (Mahuteau and Zhu 2015).

The joint distribution and stability of the various dimensions of social capital and wellbeing is also important to capture and monitor at an individual level because multiple disadvantage is an area the Government has particular weaknesses in addressing (Productivity Commission 2015).

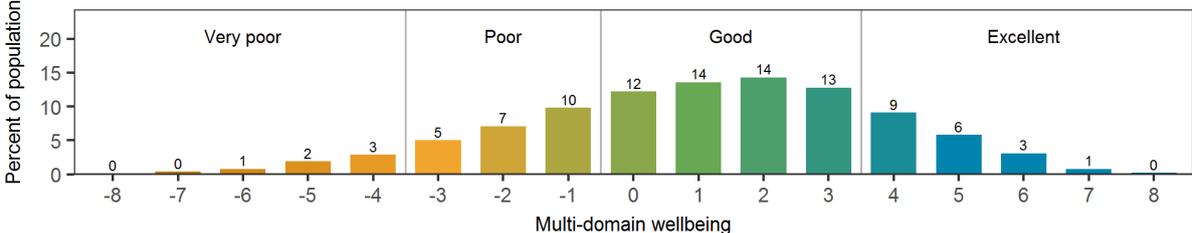
The *dynamic clustering* of wellbeing and social capital is also vitally important. In their book *Disadvantage*, Wolff and De-Shalit (2007) introduce the concepts of *corrosive capabilities* and *fertile functionings* in their contribution to the philosophy of capabilities introduced by Sen and Nussbaum. While they lack adequate data to fully test their reasoning, they argue for a focus on dynamic clustering of capabilities.

They reason that this will help us understand if certain capabilities or lacks thereof may be particularly important for wellbeing after considering their inter-relationship with other capabilities over time. For example, lack of adequate housing might be a corrosive capability if it leads over time to worsening health, a reduced ability to work, and thus lower income, lower quality food and so on.

Conversely, strong social connections might be considered a fertile functioning because they protect against risk and create opportunities for improved employment, housing and so on. To advance the policy potential of the capabilities/wellbeing approach it seems reasonable to argue that these more complex inter-relationships will need to be explored alongside trends in aggregate quantities.

While I'm not aware of any fully dynamic analysis of multi-dimensional wellbeing across the lifecycle in NZ, analysis of the latest GSS data from Treasury indicates that the cross-sectional clustering of disadvantage is heavily skewed with a long tail of people whose wellbeing is far lower than the average, as indicated in Figure 25 (McLeod 2018). This finding is echoed by Superu analysis of the 2014 GSS (Superu 2017).

**Figure 25: Treasury analysis of multi-dimensional wellbeing**



Source: New Zealand General Social Survey 2014/2016

**Additional measures of social capital and wellbeing**

The measures used to capture social capital and wellbeing tend to be chosen from pre-existing data collections that are readily accessible. I briefly note here a few ideas for alternative sources of data that could provide additional insight. I also note measures from the justice system that may provide an additional window into social capital, as well as commonly proposed measures that are problematic and should be used with caution, if at all.

**Alternative sources of data**

**Behavioural experiments**

Collective action theory suggests that trustworthy behaviour is a better predictor of future trustworthiness than are trusting attitudes. This suggests that surveys of perceived trustworthiness could be usefully combined with experimental evidence to test for changes and distributional differences in trustworthy behaviour. Various studies in experimental economics provide one avenue to estimate the trustworthiness of the population, as does the 'lost wallet' test. This test, originally conducted by reader's digest, involves distributing 'lost' wallets and seeing the proportion that are returned. It is perhaps no surprise that the highest proportion of returned wallets was in Helsinki. A recent replication of this test found that the proportion of wallets returned in Toronto was much higher than residents predicted when surveyed (Helliwell and Wang 2016), suggesting that experimental evidence of this type may provide a more accurate depiction of trustworthiness than do surveys of trust. Additional behavioural data has been captured by the Trustlab project led by the OECD, and used to triangulate survey-based data. Similar work in New Zealand could be valuable.

## Surveys

Values, beliefs and norms are multifaceted and important to understand to build social capital and wellbeing. Values are captured at a high level by the General Social Survey but for a detailed understanding of New Zealanders' values it may be necessary to look to other surveys such as the World Values Survey, New Zealand Attitudes and Values Survey, and New Zealand Election Study. Each of these surveys represent under-utilised resources to gain a richer understanding of the beliefs of New Zealanders and how these are evolving over time. The social capital framework emphasises that policy makers have much to gain from closer relationships with social psychologists.

As discussed in this paper, the question of what role the Government should play in shaping society's values is a very difficult one. But at least from a measurement perspective, it would seem desirable to monitor changing values to see if they are evolving in a way that is consistent with wellbeing. Monitoring change would seem to be particularly important given that values are a slow-moving train that evolve slowly but with great force and are difficult to turn around. Change in societal values is dominated by cohort effects, so an increase in values such as selfishness that make wellbeing harder to achieve, for example, may take a generation or more to reverse.

## Direct feedback

The literature review above emphasised that a key determinant of institutional trust is the quality of inter-personal treatment experienced by people in contact with the system. Surveys are one way to capture aggregate patterns of perceived treatment, but these would ideally be accompanied by more detailed investigation to capture the subtleties of interaction and determine opportunities for improvement. Taking the retail sector as a comparison, market researchers use methods such as the 'mystery shopper' and focus groups, as well as business processes such as the 'empathy engine' to avoid broad-brush generalisations when considering the needs of the customer.

These techniques are unfamiliar in the justice context but could be valuable. For example, Liebling (2011) talks about the need to measure the 'moral performance' of prisons by observing the quality of interactions between corrections officers and people serving sentences, and by seeking feedback directly from those people serving sentences as to the quality of their treatment.

## Privately owned data

The main sources for information about social capital tend to be administrative datasets and surveys. Both suffer from a number of limitations, including social desirability bias, selection bias, and an emphasis on individual-level variables. In the world of big data there are now several sources of privately held data that may help enrich our understanding of social capital.

For example, social network data and phone logs are a valuable source of information about people's connections with one another. These are already used extensively by intelligence agencies to help combat terrorism and organised crime. There is also the potential to use these sources of data in a more strategic manner to understand concentrations of pro-social or anti-social capital more generally and dynamics of group membership and exit.

In the area of values, anti-social beliefs such as racism or sexism are difficult to capture in surveys because people often provide answers they believe the interviewer wants to hear. A novel way around this problem made headlines recently as Seth Stephens-Davidowitz used google search data to demonstrate a strong relationship at the county level between Trump voting and the number of google searches for the phrase '*nigger jokes*'. He has subsequently used google search data to investigate a wide range of social phenomena such as homosexuality (Stephens-Davidowitz 2017), demonstrating the high potential of this new data source in the field of social research and policy.

### ***Justice system metrics that may provide additional perspective on wellbeing, social capital and rights***

#### Litigation volumes

One interesting insight from the social capital literature is that a decline in generalised trust is often accompanied by an increase in the volume of litigation through the courts and the number of lawyers. The amount of civil litigation may be a negative indicator of social capital if it indicates that fewer matters are being dealt with informally via social norms and networks. In Australia, a decline in generalised trust over the 1980s and 1990s was accompanied by an increase in litigation (Halpern 2005). Similarly, the decline in generalised trust in the United States between 1970 and 2000 was accompanied by a steady increase in the number of lawyers per capita (Putnam 2002).

#### Proportion of prison population unsentenced

One of the Sustainability Development Goal indicators is the proportion of the prison population that is unsentenced. This indicator is designed to capture one aspect of human rights, as a steadily increasing proportion of people being held before conviction speaks to a steady departure away from the presumption of innocence. And given the association reported in Lappi-Seppala (2008) between punitiveness and social capital, the prison population itself can be considered as a kind of proxy indicator for social capital.

#### HR data

Another source of information is human resources data from the justice system agencies. Corruption is generally measured using surveys of experts, but a useful complement to this could be measurement of the number of investigations into or supported allegations of corruption by police, corrections officers, registrars and so forth.

Similarly, recording any attempts at bribery offered to justice system officers could provide a window into any changing norms or expectations in the general public.

#### User surveys

A final source of information about social capital is surveys of people in contact with the justice system. NZ Police runs a Citizens' Satisfaction Survey and the Ministry of Justice runs a Court User Survey. The surveys are designed to understand the quality of services provide to the public, but given the line of reasoning emphasising the sociological determinants of institutional trust, these metrics may also provide a window into changes in the social fabric.

## ***Problematic measures***

### Membership in clubs and societies

As discussed in the section on ‘antisocial capital’, bonding social capital can be problematic in some circumstances, so simple measures of the density of association are an ambiguous indicator. Further, there is evidence that trust leads to association (Uslaner 2008), not the other way round, suggesting that clubs and societies are epiphenomena rather than a reliable indicator of the true concept in question.

### Crime reporting rates

Low reporting rates are often seen as an indication of justice system ineffectiveness, perhaps reflecting a belief that justice system institutions are unwilling or unable to provide the help people need after they have experienced victimisation. We might expect therefore that improving social capital would increase the level of reporting to the justice system.

While this may well be the case in many situations, there is emerging evidence that suggests the reverse may be true in other situations. Where social networks are strong and supportive, people may not want to involve the formal justice institutions. Kaarianinen and Siren (2011) use data from the 2006 Finnish Crime Victim Survey to explore the relationship between generalised trust, trust in police and reporting of violent crime committed by strangers. They find that reporting rates are actually higher for individuals with lower generalised trust, and lower trust in police. They go on to say that:

*“social capital as a resource may protect people from the negative effects of victimization. The immediate community, family and friends can offer practical and spiritual support to a victim of crime. Those who have the opportunity to talk to their family and friends about their victimization experience are more likely to get over the incident. Social networks and communities produce unofficial social control and support. The particular significance of social capital as a resource is that, when we have a wide enough and active social network around us, we may receive support and protection from the community when encountering various risks, including crime. It can therefore be assumed that a social community generates trust and a feeling of safety that reduces the victim’s need and wish to report the crime to the police”*

More research is required to understand if this phenomenon is unique to Finland. There are other reasons why reporting rates may be low, such as if a diversity of values mean that certain groups in NZ don’t report because they feel the system is misaligned with their personal values. Until we can resolve these difficult questions, we should view reporting rates as a somewhat ambiguous measure of institutional trust.

### Reoffending rates

Recidivism is commonly used as an indicator of justice system performance and societal safety. There are many ways to measure recidivism, depending on the original population (eg, released prisoners, convicted offenders, arrestees), outcome measure (re-arrest, re-conviction, re-imprisonment) and time period (12, 24, 36 months). Each will give a slightly different picture. But a fundamental problem with all of them is that changes in reoffending may just reflect compositional change in the population in question. For example, burglars reoffend at a higher rate than sex offenders, so if the proportion of burglars goes up so too will the reoffending rate, all else equal.

This makes reoffending rates a poor indicator of wellbeing and agency performance absent complex statistical adjustment.

#### Police-recorded victimisation

For a similar reason, police statistics are an ambiguous measure of wellbeing and social capital. The biggest problem with police statistics is that they are affected by reporting rates (for crimes such as burglary that tend to be reported to the police) and patterns of police deployment (for crimes that tend to be discovered by the police such as drug importation).

A new survey, the New Zealand Crime and Victimization Survey, has recently been introduced to provide a more reliable annual time series about personal safety. The first wave results are now online, and additional waves will be reported on annually (MOJ 2019).

## Monitoring change in outcomes

It is one thing to specify a set of metrics to capture wellbeing and social capital. But these metrics will only be influential if connected to appropriate reporting mechanisms that bring reliable and useful information to the right people at the right time.

### Aligning regular national and international reporting

There are many different mechanisms used to report on various aspects of social capital and wellbeing, including:

- Independent international reports:
  - The World Justice Project Rule of Law Index
  - Transparency International's Corruption Perceptions index
  - Freedom House's reports
  - The Human Rights Measurement Initiative
  - The Polity Project's reports
  - World Values Survey reports
  - The Gallup World Poll
  - The Bertelsmann Sustainable Governance Indicators
  - World Bank Institute governance indicators
- Formal inter-governmental reporting mechanisms:
  - Reporting on progress towards the Sustainable Development Goals
  - Regular reporting to the various United Nations committees on human rights
  - The OECD Better Lives Index
- Government-wide mechanisms:
  - Tier 1 statistics, managed by Statistics New Zealand
  - Indicators Aotearoa New Zealand
  - Child poverty and child wellbeing reporting
  - The Treasury living standards dashboard
  - The social wellbeing committee's indicator dashboards
  - The KiwiCounts survey
  - The now defunct Better Public Services measures
- Agency-level mechanisms:
  - Agency-driven surveys such as the NZ Police Citizens' Satisfaction Survey, NZ Crime and Victimisation Survey, and the now-defunct MOJ Public Perceptions Survey
  - The Statement of Intent, Annual Report and Four-Year Plan
- Non-governmental reporting mechanisms:
  - The Salvation Army's State of the Nation report

Given the focus of this paper is on the general implications of the wellbeing framework for policy in the justice system, I will not attempt to analyse the various approaches used by these diverse mechanisms or recommend an appropriate way forward. To adequately address this issue would require confronting many complex methodological issues relating to survey design

– for example, the OECD has found that the various rule of law measures are less reliable than measures of other forms of social capital such as trust (Gonzalez et al 2017).

I will note however that there is substantial opportunity to rationalise effort that goes into capturing and providing wellbeing and social capital information to these various channels, and that departments look to central agencies to provide leadership on this issue.

I will also note that the choice of who is responsible for capturing information is an important machinery of government question that speaks to the question of accountability – I will expand upon this point below in the subsection on governing for social capital.

## **Understanding change in social capital and wellbeing**

The various dimensions and levels of social capital and wellbeing change over time in ways that reflect the influence of many different factors. Decomposing the relative impact of these factors is a major statistical challenge that would reap large rewards. Ex ante, understanding causal linkages will help inform policy design to promote mechanisms that promote social capital and wellbeing, and reduce the strength of mechanisms that erode wellbeing and social capital.

Resolving the issue of attribution is also necessary if changes in social capital and wellbeing are to be used as ex post indicators of governmental performance. The challenge here is very similar to the challenge posed by the social investment paradigm, to hold agencies to account for improving long-term, complex social realities rather than short-term, narrowly defined outputs. I detailed some of the technical challenges to such an exercise in a 2016 working paper. Without repeating all of that reasoning here, I argued that meaningful attribution can not be conducted by analysing aggregate quantities, but instead requires well-designed experimental and quasi-experimental studies at a micro- or meso-level.

The same logic applies in this case, with the additional challenge that many wellbeing and social capital variables are not regularly captured at an individual level in administrative data collections. To build an information base for social capital and wellbeing-focused policy will require much more than assembling a sensible set of aggregate indicators. It will also require careful consideration of the best way to capture variables such as personal values, network structures and experiences with various government institutions, for a statistically meaningful proportion of the population. The current stock of population surveys such as the GSS are by and large not designed to support this kind of micro-level analysis, and may require expansion and/or more extensive redesign to support the policy agenda.

An important question to ask in this context is the place of longitudinal surveys in New Zealand's future collection of statistics for research purposes. Longitudinal designs are expensive but will often be the only practical option to understand within-person change over time. Part of the solution may be to consider academic-led surveys such as the World Values Survey, Growing Up in New Zealand, and the New Zealand Election Study as part of the information ecosystem for wellbeing policy, and for Government to be more closely involved in the funding and design of these surveys.

## Holding the justice system to account for changes in outcomes

The challenge of attribution needs to be overcome if one is to meaningfully define the limits of the justice system's responsibility in relation to other sources of regulation, and to identify the appropriate relationship between them. Having clarified the role of the justice system, another important question is how best to hold it to account for fulfilling its function. Accountability becomes particularly important if the ambition is to de-centralise and de-standardise the administration of justice, as the social capital literature would seem to suggest is desirable.

There are several checks and balances already in place to ensure the justice system is adequately protecting rights and due process.

For example, the Independent Police Conduct Authority and Ombudsman each have important investigatory roles in relation to Police and Corrections. Others, such as defence counsel, naturally have a role in ensuring adequate process is followed. Within the judicial system, multiple levels of appeal allow for testing the appropriateness of procedures used in individual cases.

Systems of checks and balances are less strong when it comes to some of the softer aspects of performance highlighted by procedural justice research, such as the quality of interpersonal treatment, or the effectiveness of relationships with other regulatory centres such as iwi or local councils. These aspects of performance are dealt with vertically through choices about what to focus on made by ministers, senior executives and so on down through each justice system organisation. There is a history of certain surveys and measures being discontinued if they are producing insights that are not politically useful, so reliance on vertical accountability has clear limitations to the pursuit of a wellbeing agenda. Supplementing vertical accountability with institutionalised arrangements for alternative sources of accountability can provide for multiple levels of protection and transparency.

There are examples from other sectors of arrangements to provide stronger horizontal accountability directly between the public and agencies, without having to rely solely on the intermediary mechanism of the political process. For example, the health sector has directly elected District Health Boards to monitor performance, as well as independent organisations such as the Health Quality and Safety Commission, and professional colleges to monitor and support practice improvements. In contrast to the health and education systems, justice system agencies are highly centralised and reliant on vertical accountability arrangements.

Another aspect of accountability relates to the difficult issue of attribution. While mechanisms such as the Independent Police Conduct Authority provide useful case-level accountability, they are not in a position to provide what might be called *statistical accountability* by conducting robust independent analysis of trends, to understand whether changes in outcomes such as institutional trust are produced by agency performance or some other mechanism. While this analysis can be conducted by agencies, it is reliant on ministerial appetite for analysis that may provide challenging results. Further, there is always a question of reliability when an agency is marking its own exam, especially given that complex statistical methods invariably require a degree of subjective judgement in their application.

Given this, there is a case to be made that statistical monitoring of performance be conducted by an independent agency such as Statistics NZ, perhaps as a supplement to their Tier 1 programme. Such a responsibility might extend to issuing requirements for data capture sufficient to monitor performance at a granular level, including requirements to capture 'soft' variables such as perceived treatment by agencies that are necessary for a full understanding of impacts on social capital.

## Wellbeing and social capital as an investment framework

The living standards framework will inevitably influence the design of future budgets, as well as to inform its fiscal analysis. I will offer a few reflections on this issue here.

### *Building on social investment*

Much useful work was undertaken under the social investment initiative in an attempt to grapple with complex issues such as intergenerational equity (Boston 2017) and the challenges inherent in early intervention (Hogan 2017). The wellbeing approach provides an opportunity to build on useful developments from social investment while also correcting for some of its flaws.

For example, Simon Chapple (2013, 2017) has been a strong critic of social investment's emphasis on measuring future liabilities without corresponding effort to measure future assets. The four capitals of the living standards framework fit naturally as a response to this criticism, as these capital stocks represent the 'future assets' that NZ is endowed with or that are created by private and public investment. At the same time, the living standards Framework as it is perhaps runs the risk of committing the opposite error, of calculating assets without also accounting for future liabilities in a complete balance sheet. It would be useful to see the living standards framework combined with the actuarial modelling to build a richer picture of how well Government policies and investments are both building assets and reducing liabilities for the benefit of both current and future generations.

The polycentric model of social capital also provides the opportunity to correct for another flaw in social investment, or at least a flaw in the actuarial models used to support it. These models all focus on individual behaviours and locate the explanation for those behaviours primarily in observed or unobserved latent 'traits' of the individuals themselves, absent any contextual information of the sort emphasised in the social capital literature, such as values and network structures at the micro, meso- and macro-levels.

The social capital literature challenges us to adopt a multi-level framework for understanding social phenomena whereby individual's future trajectories are a function of their traits as well as dynamic contextual changes that alter the future 'states' they inhabit. And from a fiscal perspective it is important to note that the future costs of these trajectories are in turn a function of policy choices that reflect public values.

For example, costs in the justice system have grown about three times faster than GDP since 1972, and about twice as fast as any other category of government expenditure. Although certain categories of serious crime have increased over that time, it would be wrong to attribute these costs solely to the individuals who committed the offences that were the proximal cause of the expenditure. At least as much of the growing fiscal burden of crime can be attributed to public values supporting ever-growing expenditure on police and prisons.

Another useful aspect of social investment was its focus on funding mechanisms as an important feature of institutional design determining the ease with which agencies can develop new practice methodologies and transfer funding to those areas producing the best results. Much thought has gone into the institutional barriers to creating an adaptive bureaucracy that does a better job of learning and evolving over time (eg, Wolf 2017) and it would be useful to see that work continue as part of the wellbeing framework.

## ***Redesigning the budget process to deal with multiple dimensions***

The track 1 process in Budget 2017 was a useful advancement on previous budget processes and did a good job of incorporating the worthy emphasis in social investment on evidence and long-term, multiple outcomes.

But the social wellbeing framework is more complex than the social investment framework, as it needs to be to include a broader set of values and concepts. To do justice to this richer framework the budget process will also need to evolve.

The key challenge to be addressed is the non-commensurability of outcomes in social wellbeing's multi-dimensional framing. As the centrepiece for Budget 2017, CBAX reflected what Wolff and De-Shalit (2009) refer to as a traditional 'monist' view of value by insisting all outcomes be reduced to a single dimension of (monetary) value. It is hard to see that the same approach in future budgets will be sufficient to fairly capture all the dimensions of wellbeing. Given the living standards framework owes its largest intellectual debt to Sen, it is worth referring to his words about an insistence on indexing all dimensions of value to a single metric:

*“any serious problem of social judgement can hardly escape accommodating pluralities of values ... the presence of non-commensurable results only indicates that the choice-decisions will not be trivial (reducible just to counting what is ‘more’ and what is ‘less’), but it does not at all indicate that it is impossible – or even that it must always be particularly difficult.... Reflective evaluation demands reasoning regarding relative importance, not just counting.” Sen 2009, p239-241*

This is not to say that CBAX is not a useful tool and indeed there are many aspects of value that can usefully be reduced to a monetary estimate. I would say about CBAX though, that it would be good to see its design reflect some of the voluminous literature on options to incorporate distributional weighting into the estimate of value (e.g. Adler 2016), reflecting my argument in part one of this paper.

Among additional dimensions of value, I have already made the case for the inclusion of rights as an important aspect of policy choice. Another important class of value is those outcomes such as procedural fairness that are clearly important but are virtually impossible to fairly reduce to a monetary value. And although our empirics aren't yet at a stage where we can fully appreciate the interplay between dimensions of wellbeing, the conceptual categories of corrosive capabilities and dynamic clustering of disadvantage introduced by Wolff and De-Shalit (2009) seem worthy of special consideration in a budget allocation framework, as certain categories of functioning or certain joint presentations of need may have what Wolff and De-Shalit, following Rawls, call 'lexical priority'. That is to say, there may be an ethical obligation to allocate effort to resolving some problems before others.

Without launching into an exploration of the various methodologies for dealing with multi-category choice situations, I will just observe that there is an exemplary model already in use in NZ – the Better Business Cases model for large-scale capital investment. The 'five cases' framework demonstrates that the economic rationale for an investment is a necessary but far from sufficient condition for sensible investment. It may be worth considering how a similar multi-dimensional framework could be applied to operational expenditure, both for central budgetary allocations made by Cabinet, as well as for budgetary allocations made within individual votes or allocations.

## Policy priorities

I will conclude this paper by summarising some of the clearest policy implications of the wellbeing framework for the justice system. I have placed this section last to avoid any temptation to look for simple policy ‘answers’ to the multi-faceted challenge of wellbeing. The wellbeing and social capital literatures emphasise that the amount of crime and justice in society is ultimately an emergent property of the social fabric. Good justice policy can contribute to the health of the social fabric, but inflated expectations of what policy can or should achieve risks doing more harm than good.

The social capital and wellbeing literatures further suggest that how the justice system operates is to some extent more important than what precisely it does. From a policy perspective, the social capital and wellbeing framework asks first that specific policy proposals consider the practice and workforce implications carefully, as well as the potential positive or negative impacts on the social fabric. But having said that, there are of course many specific policy areas that the social capital and wellbeing frameworks highlight as worth closer consideration.

While these policy areas have been touched on through the paper, I briefly reiterate them here for ease of reference, grouped under three of the most important themes from the literature: inclusive values, fairness, and partnership.

### Policy areas for focus

#### *Policies to encourage and reflect inclusive values in society*

The justice system both embodies and influences the values already in a society. Given the diversity of values in society, the justice system is faced with a choice about where in the spectrum of values to align itself. In doing so, it then encourages society through its actions to drift towards that point in the spectrum.

Depending on the choices made by the many actors in the justice system, from the constitutional and political down to the operational and professional, the justice system can embody and encourage values that are more likely to divide society or values that are more likely to bind society. Aggressive policing and racial targeting, such as that seen in many American police forces, encourages divisive values. Punitive sentencing has a similar effect, particularly if that punishment is disproportionately experienced by certain groups in society.

Many will argue that the justice system should rightfully adopt policies such as these, because through committing crimes offenders place themselves, by their own actions, outside our moral community. But for our purposes, we can note that this approach is inconsistent with a focus on wellbeing, because wellbeing is dependent on the moral cohesion represented by social capital, and divisive policies reduce moral cohesion. It is perhaps no coincidence that as the United States waged its war on crime from the 1970s till today, macro-level social capital, ie, generalised trust, steeply declined.

Inclusive values can be manifested in many ways, including through monitoring and enforcement by regulatory agencies, and through the creation of mechanisms for the contestability of decisions by minority groups.

Another way that the justice system contributes to this basic requirement of democratic society is by ensuring universal access to justice, primarily through legal aid, the public defence service and community law centres. Efforts to maintain access to justice should be seen as essential to maintaining social capital. In this light, a 2009 survey of a random sample of 1,800 New Zealanders should give cause for concern: over 70% of respondents disagreed that ‘the average New Zealander can afford to bring a case to court’ (Righarts and Henaghan 2010).

The justice system’s efforts to protect human rights are similarly vital to protect the dignity of all New Zealanders, including those it is most tempting to deny this protection to because of the tremendous harm they have inflicted on others. But only societies that take seriously their collective obligation to protect the rights of all their citizens have succeeded in achieving the highest levels of wellbeing and social capital.

### ***Policies to improve fair values***

Inclusive values are embodied more than any other way in the quality of inter-personal treatment received by New Zealanders in their interactions with their justice system. A famous essay by John Rawls (1985) goes so far as to claim that justice *is* fairness. Justice system institutions can do most to reinforce social capital by reinforcing inclusion in every interaction.

Much can be done in the realm of operational policy to improve the day-to-day experience of people interacting with justice institutions, such as by simplifying processes, reducing delays, and creating modern, internet-enabled service options.

But there is one group of New Zealanders who we have most reason to question the treatment of. It is hard to argue that the system does as good a job as it could to meet the needs of people who have been victimised, especially those who have experienced sexual or violent victimisation. Perhaps the greatest policy challenge for the justice system under a wellbeing agenda is to find new ways to hold offenders accountable in a way that protects their rights while also meeting victims’ needs for justice. New processes such as Project Restore represent an important start on this challenge, but these are currently very far from the default approach to meeting the needs of people who have suffered serious harm.

### ***Policies to improve partnership***

The final theme from the social capital literature invites a sense of humility about what the justice system can accomplish on its own, and the need to work effectively with alternative regulatory centres and normative communities in partnership. Partnership reflects the fact that New Zealand is a diverse country with many different values, and that a centralised model of a single monolithic system will likely always struggle to satisfy all New Zealanders.

Partnership starts with whānau, hapū and iwi. The challenge perhaps is to craft a new concept of Aotearoan justice that fairly reflects both tikanga Māori and tikanga Pākeha, focused on repairing and restoring the social fabric.

There are many other sources of regulation and normative dialogue in society, including schools, neighbourhoods, business associations, councils, and non-governmental organisation. The social capital framework invites us to consider whether it would be more effective to decentralise aspects of justice and empower these regulatory centres to take a greater obligation to manage behavioural problems in their sphere of influence.

Conversations about enhancing obligations through society could usefully focus on the challenge of supporting people with an offending past to desist. Desistance is not something the justice system can achieve by itself, nor is it something that people who have offended can achieve without support.

Decentralising justice may require new or expanded institutional mechanisms such as iwi panels, crime prevention councils and restorative justice pathways. Many individual policy initiatives can and have been advanced in this area, but more might be gained with a deliberate choice to advance strategically in this direction, perhaps following the example of the youth justice reforms of 1989.

This is just a small scattering of general ideas. This paper has not been designed to exhaustively cover the ground, merely to highlight possible avenues for further discussion, and hopefully to stimulate further conversation and debate. At a minimum, I hope I have made the case that the social capital and wellbeing frameworks have much to offer the justice system and are worth considering in much more depth than I have been able to manage in this exploratory paper.

# Epilogue: Implications for the Living Standards Framework

I wrote most of this paper in 2018, when I was employed by the Ministry of Justice. Since then I have moved to a position at the Treasury, which is co-publishing this paper with Justice as part of the LSF Discussion Paper series.

As part of this co-publishing process, I was asked to append some commentary to this paper on the general implications of the material for the living standards framework, beyond just its application to the justice system.

I would summarise the implications of this discussion for the living standards framework in three inter-related questions:

- How should the living standards framework be applied by different actors in the public service alongside complementary frameworks?
- How does the micro link to the macro in the framework?
- What is the relationship between wellbeing, capabilities and living standards in the framework?

I conclude by offering one potential approach to resolving these questions in future iterations of the framework.

## ***How should the framework be applied by different actors in the public service alongside complementary frameworks?***

The Treasury website states that:<sup>38</sup>

*“We’ve developed the Living Standards Framework to help us advise successive governments about the likely effects of their policy choices on New Zealander’s living standards over time. By adopting the (framework), we are aligning our stewardship of the public finance system with an intergenerational wellbeing approach.”*

This communication suggests that the framework is primarily conceived as guidance to Treasury staff. However as a central agency, Treasury affects all other parts of the public service. The Treasury has been increasingly incorporating the framework into the decision-making processes that it runs, such as through amendment to CBAX, the Better Business Cases process, and the design of Budget 19. This reflects a normative position being taken by the Treasury that agencies using or bidding for public resources should be viewing the value of these resources in terms of intergenerational wellbeing.

This is all well and good, and appropriate to the Treasury’s stewardship role. However, many policy questions grappled with by Government concern more than just wellbeing. In this paper I have emphasised the importance of rights-based perspectives on policy issues in the justice context. Rights-based thinking is also highly relevant in many other policy areas such as the health and disability, education and children’s policy areas. The Treasury has

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<sup>38</sup> <https://treasury.govt.nz/information-and-services/nz-economy/living-standards>

previously acknowledged the importance of rights considerations in relation to the living standards framework (Treasury 2011), but has yet to articulate in any detail how to deal with differences between welfarist analyses and analyses grounded in other moral perspectives.

Beyond rights, alternative moral perspectives include, inter alia, those in te ao Māori, Pacific and other cultures, concepts of marginalisation and associated forms of oppression (Young 1990) and from our obligations as international citizens, for example in relation to refugees. Without a clear way of dealing with these normative perspectives, there is a risk that the Treasury could consistently undervalue the importance of certain types of investment and performance in its understandable focus on wellbeing.

There is also a question of whether the living standards framework should be applied to other functions of the Treasury and Government. The emphasis so far in the development of the framework has been its relevance to the Treasury's advisory role to Government. That certainly makes sense, but I have highlighted throughout this paper how both wellbeing and social capital are highly dependent on the everyday performance of networks that span both government and civil society.

As a central agency the Treasury has an important role in stewarding the performance of this networked system, which can be seen in mechanisms such as its Investor Confidence Rating, Best Practice Regulation, and support for the Performance Improvement Framework led by SSC. There are pre-existing frameworks for these mechanisms, and it may be that the living standards framework is best seen as a complement to these mechanisms, but this is a question there is as yet little clarity on.

### ***How does the micro link to the macro in the framework?***

The living standards framework includes two very different levels of analysis. On one side there lies the country's aggregate stocks of four highly stylised types of capital, representing the country's entire accumulated wealth. On the other side, individual people experience a state of wellbeing. The two sides clearly have something to do with each other, as shown visually by connecting arrows. But the nature of this connection is not specified in the framework.

This would possibly not matter if the framework were intended only as a high-level outcomes monitoring tool. The OECD Better Lives Index does not specify the micro-macro connection either, for this very reason; the OECD index is intended to facilitate comparisons of outcome domains between countries and over time, nothing more. The process by which capitals are converted to wellbeing is produced is explored instead in the very many research reports produced by that organisation.

However, given that the living standards framework is intended to be used as a general policy tool, it makes sense for it to include some conception of the role actors such as firms, families and the state play in using the capital stocks to produce new value, reinvest value as capital for future periods, improve productivity, determine individual-level access to resources for consumption in this period, and so on.

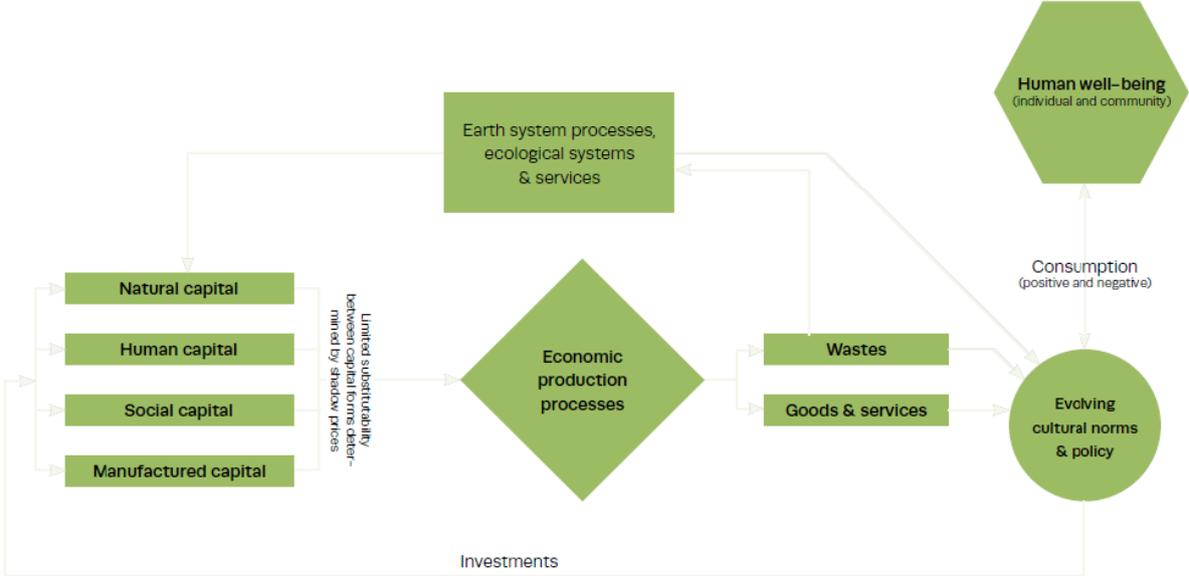
Consideration of these actors is necessary in many different types of policy issues of vital importance to the Treasury, such as productivity, fiscal sustainability, resilience to external shocks, and so on. Often this will include consideration of the roles and responsibilities of each sphere of social organisation in relation to wellbeing. In this paper I have highlighted the limits of the justice system as a direct producer of wellbeing, suggesting instead that justice-

related wellbeing is co-produced between state and non-state actors, with non-state actors carrying most of the load. I have also emphasised how the values of people in society constrain the role that the state can legitimately play in relation to people’s lives.

Similar debates about the appropriate role of state, family, individual, markets etc. play out in many different policy areas, both on consequentialist grounds focusing on wellbeing and other outcomes, and on deontological grounds focused on, for example, the moral duties of the individual or whānau or state.

More generally, inclusion of the processual links between stocks and flows is important to include consideration of Sen’s ‘comprehensive outcomes’, rather than just the ‘culmination outcomes’ observed in the resulting distribution of wellbeing. The appropriate policy response to the distribution of end outcomes will often depend on the relative roles of things like good and bad luck, fecklessness, and agency in the production of those outcomes, so need to be included somehow in a framework that aims towards global application to all manner of policy issues.

Figure 26: The inclusive wealth framework from UN:IDP & UNEP 2014



Detailing the connection between micro- and macro-level wellbeing may seem a daunting task, but it may provide some comfort to note that there is a pre-existing framework that begins to flesh out the links between the micro and macro aspects, arising out of developments in endogenous growth theory and applied, for example, in the UN’s inclusive wealth framework. In Conal Smith’s (2018) paper he reproduced Figure 26 from one of the UN’s reports to demonstrate how that framework includes both production processes and the policy factors. In many ways this diagram can be seen as a more relevant fore-runner to the living standards framework than the better lives index, given the framework’s ambition to be used as a policy tool.

Figure 26 does not perhaps go quite far enough for the purposes of the Treasury, but it provides a good starting point for further consideration of these important issues.

## ***What is the relationship between wellbeing, capabilities, functionings, utility, living standards and freedom in the framework?***

In a recent Policy Quarterly article, David Hall (2019) from AUT's policy observatory challenged the Treasury to consider the issue of how to interpret the 12 domains of wellbeing in the living standards framework. He had a particular focus on the data that has been collected to illuminate the domains of wellbeing, but his comments apply to the framework as a whole.

Hall noted that the living standards framework has diverse methodological inheritances, and as such '*incorporates the informational materials for a range of different philosophical perspectives*'. He views this interpretative pluralism as a virtue, given the framework will be used for different governments with different values and priorities.

Given this argument, it would perhaps be going too far to interpret the living standards framework in light of only one philosophical perspective. However, it also seems insufficient to provide no guidance at all about the potential normative interpretations of the components of the framework, and no guidance about how to resolve differences in normative interpretations. Hall argued that the capability approach is a useful interpretive approach that can be used alongside tikanga approaches, utilitarian approaches and so on:

*"this is the next frontier for the LSF: to bring greater clarity to how the LSF Dashboard might inform the political judgements of decision makers.... (tikanga concepts are one) way of making sense of the LSF indicators, of imbuing these with value and significance. Ideas like capability and utility operate at a similar level, as normative conceptions that instil the indicators with meaning. Greater clarity at this level will help the LSF to fulfil its promise in improving the practical judgements of policymakers."*

This challenge can be interpreted at least partly as a request for clarity on the language being used. For example, earlier versions of the framework more commonly used the language of *living standards* and *capabilities*, whereas the more recent version has more commonly used the language of *wellbeing* and *capitals*. It is not entirely clear what this shift in language means from the Treasury's perspective. For example, Hall notes that in Sen's philosophy, the term *living standards* refers to self-regarding achievements, or *functionings*, whereas the term *wellbeing* includes other-regarding achievements such as the care of children. Is this what Treasury means? Or when the Treasury uses the term *living standards* does it mean something closer to *capabilities*?

Similarly, focusing the Treasury's attention on *wellbeing* itself, rather than *capabilities* or *living standards* could imply that the Treasury itself is taking up the job of defining what a valuable life comprises, whereas the term *capability* implies the responsibility for defining the value of a life lies with the individual living it, as part of the *freedom* that is an intrinsic part of a life worth leading. Is this what the Treasury means by the shift in language?

It is not that the Treasury needs to take a position on the superiority of any one philosophical perspective. Each perspective has its strengths and weaknesses – for example, Hall notes that the capability perspective is less appropriate in cases such as children and people with severe disabilities, and for certain functionings such as personal safety.

But the general challenge remains, for the Treasury to confront the normativity that is inherent in all policy work. This normativity is particularly important when it comes to the relative responsibilities of different actors in society – it may be well for Government to be

interested in wellbeing and seek to enhance it, but how far should Government's responsibility for wellbeing itself, rather than the private and public capabilities that enable it, actually extend? These are constitutional questions as much or more than economic questions. This has been a major theme of this paper on the justice system, but is one that applies to the framework in all areas of application.

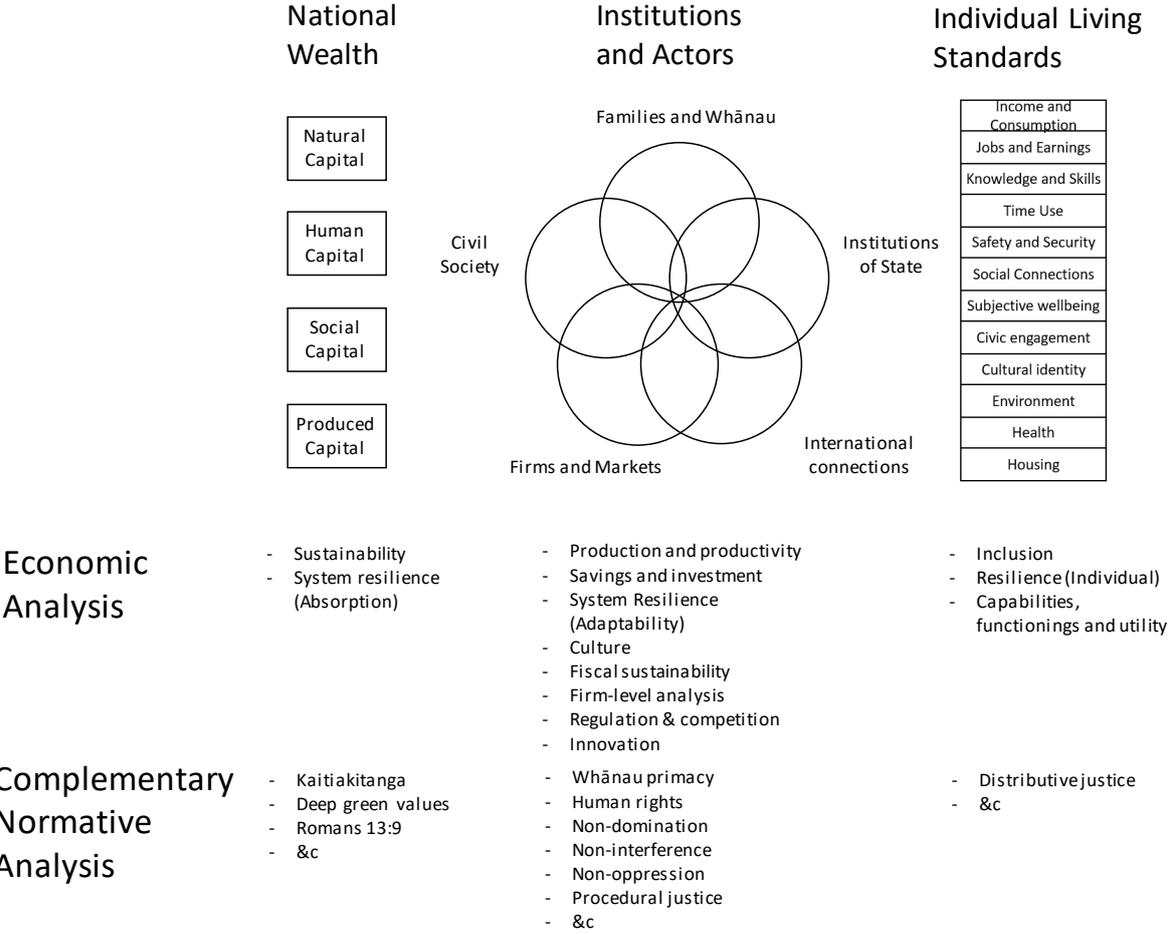
### ***A possible way forward***

The Treasury could take the living standards framework in many different directions. At one extreme the framework could be primarily thought of as an evolution of the national accounts, as a form of very high level measurement and monitoring. This approach has the advantage of simplicity.

But the more the framework is intended for application to policy advice, stewardship, regulation and the other functions of Treasury, the more important it becomes to find a place in the framework for the procedural concepts that animate those functions.

One potential approach to this is visualised in Figure 27 below, which builds on the process-based view of Figure 26 to highlight the different actors and institutional settings in which social and economic processes take place.

Figure 27: A potential future for the LSF



This potential approach is broadly an iteration of the framework rather than a complete redesign. However, there are a few definite changes it is worth highlighting for clarity.

The biggest change would be to add a third level to the framework to reflect that the relationship between national wealth and individual living standards is mediated in both directions by the accumulated decisions, behaviours, norms, and preferences of many actors in the interwoven spheres of the family, civil society, market, state and international arenas.

A second change would be to describe the ‘four capitals’ as the ‘national wealth’. This is for a couple of reasons. One is to allow for the fact that ‘capital’ can also be publicly or privately owned, by individuals, firms, charities, the crown and so on, and so ‘capitals’ can also be found in the other two levels of the framework. For example, an individual’s own education and skills represent their own ‘human capital’, so ‘human capital’ is both a micro-level concept that applies as part of someone’s living standards, and a macro-level concept that applies to the sum total of a nation’s human capital.

The second reason is that the language of ‘capital’ implies a certain normative view of how wealth should be applied, namely in a capitalist way, as an input into the economic production process. Alternative normative perspectives, particularly from te ao Māori, include moral imperatives to value certain stocks of wealth for their own sake, including the wealth in the natural world, in each of our abilities, and in our relationships with each other. The term ‘wealth’ is more neutral and inclusive than the term ‘capital’ in this sense.

The third, related, change would be to disaggregate the national wealth across the three levels. This helps locate the distribution of wealth at the appropriate levels in the framework – the balance sheets of government, firms, iwi etc would be located in the middle level of the framework, and the distribution of individual ‘capitals’, including private/bonding social capital, is most appropriately located at the individual level of the framework.

The fourth change would be to retire the description of the four capitals as ‘future wellbeing’ and the 12 wellbeing domains as ‘current wellbeing’. This has some merit as a first approximation, but ultimately muddies the waters. National wealth is indeed one of the determinants of future wellbeing, but so too are institutional designs, decisions and behaviours. National wealth also facilitates the current wellbeing of the nation. And similarly, many of the individual-level living standards such as knowledge and skills are enduring over time, so are best understood as capabilities that support both current and future wellbeing at an individual level.

The fifth change would be to return to the language of ‘living standards’ when talking about individuals, and being clear that ‘living standards’ can be interpreted in a number of ways, sometimes as utility, sometimes as capabilities, sometimes as functionings.

This is a smaller part of the sixth, largest change, which is to embrace normativity and adopt a pluralistic approach when analysing these issues. The final part of Figure 27 extends the idea of multiple normative perspectives and applies it to all three levels. There has been reference in recent living standards documents to distributional analysis, reflecting the traditional economic emphasis on endstates (‘culmination outcomes’ in Sen’s phrase). This is all very well, but this paper has highlighted that there are many other normative perspectives that emphasise procedural issues, or make deontological arguments for the primacy of certain institutional forms over others. A libertarian might favour the primacy of markets and individuals. A social democrat might favour the primacy of the state. Māori might favour the primacy of whānau. Many of these perspectives are about means as much as they are about ends.

It is not that the Treasury needs to develop complex and sophisticated positions from these various perspectives. The Treasury’s core business will always be applying the economic perspective to economic issues. The Treasury will always encourage others to apply the economic perspective to wider policy issues as well. The challenge is ensuring the frameworks that the Treasury use create space for non-economic perspectives on economic and other policy issues, without assuming a priori the moral superiority of any one perspective over the others. Embracing this pluralism would do more than anything else to make good on the debt the living standards framework owes to the work of Amartya Sen, and is surely going to be ever-more important as New Zealand continues to become more and more diverse.

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