

**An Analysis of the Power of New Zealand Courts to Judicially Review
Crown Prosecution Decisions Not to Prosecute with Reference to *Osborne v
WorkSafe New Zealand* (NZSC)**

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ABSTRACT

*Almost seven years after the tragedy at the Pike River mine, the Supreme Court of New Zealand declared that an unlawful bargain had been made to stifle the prosecution of the mine's CEO. This thesis analyses the issues that remain unresolved by the Osborne Supreme Court decision, and uses comparative jurisprudence to highlight the deficiencies of New Zealand law's position in relation to the judicial review of prosecutorial discretions. The conclusion to the analysis is the finding that some of the public law values that underlie judicial review, namely: the rule of law, the safeguarding of individual rights (including those of victims), accountability, consistency and certainty in the administration of the law are not sufficiently protected by the current New Zealand law. The contextual constraint of requiring 'exceptional circumstances' as a pre-condition to intervention, represents a judicial initiative to apply the intensity of review of prosecution discretions to the lower end on the reviewability spectrum, the lowest being non-justiciability. That prevailing approach is unstructured, meaning that the exercise of prosecution discretions may be anomalous or demonstrably wrong and yet insusceptible to judicial review. On the face of it, the 'exceptional circumstances' test requires an extremely high evidentiary threshold. A more principled approach is to modulate the appropriate intensity of review by using explicit calibrations or variable intensities on sliding scales depending on the nature of the issues engaged. This would enable courts on a more nuanced basis than the blunt instrument of the 'exceptional circumstances' test, to cautiously balance appropriate vigilance with appropriate restraint. The case law has in practice ring-fenced justiciability exclusively to the 'illegality' branch of review. The other orthodox grounds of review have been hypothesised by the courts as being available but have been very restrictively conditioned by potent dicta, so as to make them only likely to succeed in the very rarest of circumstances. That prevailing judicial ethos is critically examined for its compatibility with principle. The dissonance between New Zealand decisional law and the well-established approach in other jurisdictions, to markedly different effect, is identified. One crucial consequence is that victims are left without sufficient rights in the prosecution decision-making phase and have only limited access to justice. This thesis provides recommendations intended to offer some principled guidance post-*Osborne*: a renaissance of approach to this critically important (but generally overlooked) frontier of public law.*

List of Abbreviations

CEO	Chief Executive Officer
COPFS	Crown Office and Procurator Fiscal Service (Scotland)
CPS	Crown Prosecution Service (United Kingdom)
CPSI	Crown Prosecution Service Inspectorate (United Kingdom)
DA	Democratic Alliance (South Africa)
DoJ	Department of Justice (Hong Kong)
DPP	Director of Public Prosecutions
EU	European Union
HKSAR	Hong Kong Special Administrative Region
IPS	Inspectorate of Prosecution (Scotland)
LCRO	Legal Complaints Review Officer (New Zealand)
MI6	Secret Intelligence Service (United Kingdom)
NDPP	National Director of Public Prosecutions (South Africa)
NPA	National Prosecuting Authority (South Africa)
NZLC	New Zealand Law Commission
NZSC	Supreme Court of New Zealand
OSH	Occupational Health and Safety
PRC	Prosecutorial Review Commission (Japan)
PRCL	Pike River Coal Limited
RPC	Reasonable Prospect of Conviction
SAPS	South African Police Service
UN	United Nations

List of Legal Instruments: Abbreviations

ADJR Act	Administrative Decisions (Judicial Review) Act 1977 (Cth Australia)
AL Act	Administrative Law Act 1978 (Vic Australia)
BL	The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China
ECHR	European Convention on Human Rights 1953
Guidelines	Prosecution Guidelines 2013 (New Zealand)
HSEA	Health and Safety in Employment Act 2003 (New Zealand)
ICCPR	International Covenant on Civil and Political Rights
JR Act	Judicial Review Act 1991 (Qld Australia)
NZBORA	New Zealand Bill of Rights Act 1990
OIA	Official Information Act 1982 (New Zealand)
PAJA	Promotion of Administrative Justice Act 2000 (South Africa)
POA	Prosecution of Offences Act 1985 (United Kingdom)
VRA	Victims' Rights Act 2002 (New Zealand)
VRRS	Victims' Right to Review Scheme (United Kingdom)

CHAPTER 1

1 General Introduction

1.1 Background

New Zealand courts have seldom grappled with the issue of judicial reviewability of prosecution decisions not to prosecute.¹ Prosecution discretionary power was found either to be sourced in the prerogative or its use did not constitute an ‘exceptional circumstance’ where review would be appropriate.² These circumstances operated as institutional restraints. To date, there has been just one successful application for judicial review of a prosecution decision not to prosecute in New Zealand, the 2017 Supreme Court decision of *Osborne v WorkSafe New Zealand*.³ However, that decision left several major issues unconsidered or unresolved.⁴ Most significantly, the court only went as far as it was required on the issue of justiciability and did not offer its conclusions on a detailed overall analysis of the state of the current jurisprudence, nor did it stipulate a definitive test for judicial intervention.⁵ The current test for reviewability was set out by the High Court in *Polynesian Spa*, where justiciability is dependent upon proof of ‘exceptional circumstances.’⁶ The reviewability of prosecutorial discretions in New Zealand, has therefore been specially quarantined by that approach. It might be thought in itself, to be a remarkable statistic that there has only ever been in this country one successful judicial review of a decision not to prosecute (and then only after the High Court and Court of Appeal had in turn dismissed the proceedings), when the comparative success rate in other jurisdictions is

¹ Chapter 3 of this thesis identifies the key cases that have led to the current position regarding the justiciability of prosecution decisions in New Zealand.

² Prerogative power is power possessed by an official by virtue of their office, and was prior to the authoritative decision in *Burt v Governor-General* [1992] 3 NZLR 672 (CA) held to be unreviewable; GDS Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, Lexis Nexis, Wellington, 2014) at [2.25]. The current test for justiciability is the ‘exceptional circumstances’ test articulated by Randerson J in *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC) at [61]- [69].

³ See *Osborne v WorkSafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447, [2017] 15 NZELR 365.

⁴ Chapter 5 analyses this Supreme Court case and identifies some of the issues left unconsidered or unresolved by that decision.

⁵ See *Osborne v WorkSafe New Zealand* (SC), above n 3, at [1]; the court only went as far as it was required on the issue of justiciability. The court found that “It is contrary to the public interest and unlawful for an arrangement to be made that a prosecution will not be brought or maintained on the condition that a sum of money is paid.” See Chapter 5 for an analysis of this case.

⁶ It was held in *Polynesian Spa* that a challenge to a prosecution decision not to prosecute will succeed only in exceptional cases where the prosecuting authority has acted in bad faith or for a collateral purpose; *Polynesian Spa Ltd v Osborne*, above n 2, at [61]- [69] per Randerson J.

examined. In short, to date, only illegality has been acknowledged by the Supreme Court as a basis for judicial review of a prosecution discretion not to prosecute.

1.2 Purpose of the Research

The New Zealand courts are at risk of not doing proper justice by an approach to judicial review of such prosecutorial discretions that is both austere and obscure. This thesis, therefore seeks to answer why such a restrictive approach to judicial review of decisions not to prosecute has been adhered to by New Zealand courts, and how the *Osborne* case has impacted upon that position.⁷ The reason why only decisions *not to* prosecute have been selected for consideration is simply that when such a decision is made, the road for justice by victims effectively ends; whereas by a decision *to* prosecute, the road continues throughout the trial and beyond.⁸ Case law on decisions *to* prosecute has however been incidentally analysed to elucidate a number of specific features relevant to justiciability.

While there are both profound and compelling reasons for the existence of wide prosecutorial discretions,⁹ the purpose of this thesis is not to consider why broad prosecutorial discretion is intrinsically good, but to consider the dangers of inadequate checks and balances on the exercise of such broad prosecutorial power. The objectives of this thesis include the identification of areas in the law which presently fail to uphold some of the public law values that underlie judicial review: the rule of law, the safeguarding of individual rights (including

⁷ Chapters 6-9 consider some of the issues left unconsidered and unresolved by *Osborne v WorkSafe New Zealand* (SC), above n 3.

⁸ See *Osborne v WorkSafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513 at [35] – [37]. See also T Endicott *Administrative Law* (3rd ed, Oxford University Press, 2015) at 267; Endicott highlighted that a trial in itself is a safeguard against unlawful decisions to prosecute: “For a defendant against whom an unreasonable investigation is conducted or an unreasonable prosecution is pursued, the criminal justice process itself provides a hearing.” See also *R (on the application of F) v Director of Public Prosecutions* [2013] EWHC 945 (Admin) at [3]; Lord Judge CJ similarly emphasised that an individual facing trial has various mechanisms of accountability available to ensure that adequate prosecutions take place; See also *R (B) v DPP* [2009] EWHC 106 (Admin), [2009] 1 WLR 2072 at [52]; *R v Director of Public Prosecutions, ex parte Manning* [2001] QB 330 (DC) at [23] and *Marshall v Director of Public Prosecutions* [2007] UKPC 4, [2007] 4 LRC 557 at [18]. In *Belhaj and another v Director of Public Prosecutions* [2018] UKSC 33, 4 July 2018 at [32] Lord Mance stated that: “In the case of decisions to prosecute, a more appropriate forum for any challenge is usually the criminal process itself, in which the court has power to halt proceedings if they constitute an abuse.”

⁹ See *R v Beare* [1988] 2 SCR 387 at 410; Stephanos Bibas “The Need for Prosecutorial Discretion” (2010) 19 Temple Political and Civil Rights Law Review 369.

those of victims of crime), accountability, consistency and certainty in the administration of justice.¹⁰

1.3 Methodology and Issues Considered

In order to examine the potential inadequacies of New Zealand's current decisional law on judicial review of prosecutorial discretion, this thesis provides a consideration of the legal powers, concepts and history of New Zealand's approach to the judicial review of prosecutorial discretion.¹¹ Against this backdrop, a consideration of the same species of review is considered in selected jurisdictions in order to provide comparative points of reference.¹² This thesis then analyses the *Osborne* Supreme Court decision and isolates some of the issues that were left unresolved by that decision.¹³ Those issues provide the framework to illustrate the systemic failures and inadequacies of the current law of judicial review of prosecutorial discretion.

One of the unresolved issues flowing from the *Osborne* case relates to the current contextual decisional law test of requiring 'exceptional circumstances' for intervention.¹⁴ Various procedural and jurisprudential issues relating to this test and the principles that underlie it prevent justice from being properly served and the rule of law from being fully supported. The issue is whether what the Court of Appeal stated in *Wright v Bhosale*, namely that "...the courts are traditionally reluctant, for constitutional and policy reasons, to interfere in prosecutorial decision-making" remains justified or is a principled approach.¹⁵ Those policies may be sound in themselves, but whether they require such judicial abstinence is another matter altogether. The courts are not 'interfering' in prosecutorial decision-making, if they conclude such a decision was made under an error of law, was unreasonable or procedurally unfair. There the courts are vindicating a greater rule that denies the unaccountability of unlawful executive action.

Although the contextual difficulties and challenges of judicial review are well documented in jurisprudence, the impact of this context on the rights and interests of victims is much less

¹⁰ See Matthew Smith *New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters New Zealand Ltd, Wellington, 2016) at [2.0].

¹¹ See Chapters 2 and 3.

¹² See Chapter 4.

¹³ See Chapter 5.

¹⁴ See Chapter 6.

¹⁵ *Wright v Bhosale* [2016] NZCA 593, [2017] NZAR 203 at [26].

acknowledged. This is evidenced by the *Osborne* Supreme Court's decision not to consider victim-related issues which were raised in the Court of Appeal.¹⁶ More problematically, the current process of prosecutorial decision-making fails to adequately support the most basic of victims' needs and interests.¹⁷

As Justice Glazebrook explained, any reform of the criminal justice system must be to reduce the possibility of miscarriages of justice.¹⁸ Her Honour also made the point that miscarriages do not arise only through what happens in court.¹⁹ Victims are particularly vulnerable at the prosecution decision-making phase, of being exposed to unjust decision-making. While there is undeniable importance in convicting and punishing the guilty, this goal is arguably subordinate to ensuring that standards of fairness are observed in prosecutions. The right to fair trial is a non-derogable constitutional right. It is acute that to date in New Zealand, victims do not have a secured right to have prosecutorial decisions whether to prosecute, realistically subject to judicial oversight. Nor has there been any acknowledgment of victims' insufficient rights in the prosecution decision-making phase. Currently, the balance of the scales regarding process is unfairly tipped in favour of the prosecutor, wrongly relegating victims to a position of virtual irrelevancy.

This thesis also considers the appropriate boundaries of discretionary power for situations that were not resolved by the Supreme Court in *Osborne*.²⁰ The inherent limitations of private prosecution, as an alternative route to justice, is also considered.²¹

Recommendations regarding the reform of both the prosecution decision-making process and the reconceptualisation of judicial review in this particular context is addressed.²² The objective is to ensure that all New Zealanders fundamentally experience fair and proper administration of justice in this area of the law.

¹⁶ The Court of Appeal in *Osborne v WorkSafe New Zealand*, above n 8, at [84] – [89]; considered whether the applicants had a legitimate expectation that they would be consulted prior to the prosecutor making its decision.

¹⁷ See Chapter 7.

¹⁸ Susan Glazebrook, Justice of the Supreme Court of New Zealand “Keynote address to the Criminal Law Conference” (Criminal Law Conference 2012: Reforming the Criminal Justice System of Hong Kong, Hong Kong, 17 November 2012) at 2.

¹⁹ *Ibid.*

²⁰ See Chapter 8.

²¹ See Chapter 9.

²² See Chapter 10.

1.4 Structure

This thesis comprises ten Chapters.

Chapter 2 considers the Acts, Guidelines and prosecution powers that are engaged when prosecution decisions are made. Chapter 3 provides insight into the key cases that have defined the judicial development of judicial review of prosecution decisions in New Zealand.

The material dissonance between the current New Zealand position and that of other common law jurisdictions is noted in Chapter 4. Chapter 5 is an analysis of the *Osborne* Supreme Court decision, and identifies problematic areas of the law which remain unresolved by that decision to be considered in Chapters 6-9. Chapter 6 critically considers the organising principles by which the ‘exceptional circumstances’ position has been reached, and how judicial reluctance to review prosecutions decisions not to prosecute violates the rule of law. Chapter 7 considers the locus standi of victims in the prosecution process and the issues that impact victims when a decision not to prosecute is entered. Chapter 8 titled ‘Relief, Reconsideration, Resumption and Reneging,’ considers these concepts in the context of prosecution decisions. The issues related to the alternative remedy of private prosecution are examined in Chapter 9. The last Chapter makes a final conclusion and provides recommendations for the issues considered throughout the thesis.

1.5 Statement of Positionality

In 2016, I was asked by Nigel Hampton QC to be junior counsel for the Appellants in *Osborne v WorkSafe New Zealand* in the Court of Appeal.²³ My involvement in the case exposed me to the salient issue of justiciability of prosecutorial discretions, and the apparent inadequacies of the law at the time.

²³ *Osborne v WorkSafe New Zealand* (CA), above n 8.

CHAPTER 2

2 Prosecution Decision-Making, Power, Guidelines and Comity

This Chapter discusses the core powers, legislative instruments and principles that are engaged when a prosecution decision to prosecute is made or not, and considers a number of legal concepts relevant to the objectives of this thesis.

2.1 The Role of Crown Prosecutors

Prosecutors have a specialist role and have a duty to act in the wider public interest.¹ Deane J in *Whitehorn v R* made the following seminal statement on the role of prosecutors:²

Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of representing the cases against an accused, he will act with the fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure the accused's trial is a fair one.

The prosecutor therefore “strives to resist pressures from victims and from the police, to show respect for due process, to be fair and act as a ‘minister of justice.’”³ A prosecutor's experience and specialist knowledge is perhaps most crucial in determining the prosecution decision.⁴ This

¹ This is commonly misunderstood by many victims of crime who view prosecutors as their own legal representative and acting legal advisor. As a result, many victims tend to place high expectations on how the prosecutor should perform his or her functions. These expectations are usually unrealistic or unrelated to the prosecutor's role, often causing such victims to feel marginalised in the process.

² *Whitehorn v R* (1983) 152 CLR 657 at 663-664. The Victims of Crime-Guidance for Prosecutors 2014 at [9] states: “The prosecutor acts in the public interest when conducting a criminal prosecution and does not act for victims or the families of victims in the same way as other lawyers act for their clients. Prosecutors must nonetheless be mindful of the consequences for the victim, and take appropriate cognisance of views expressed by the victim or the victim's family, in relation to any significant decision relating to the proceedings.” At [10]: “Prosecutors should ensure that the victim has a clear understanding of the proper role of the prosecutor.” See also *R v Boucher* (1954) 110 CCC 263, [1955] SCR 16 (SCC) at 270 per Rand J: “It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence related to what is alleged to be a crime. Counsel have a duty to see all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings.”

³ David Jeremy QC “The Prosecutor's Rock and Hard Place” (2008) 12 Crim L Rev 925 at 926.

⁴ *R (on the application of B) v Director of Public Prosecutions* [2009] EWHC 106 (Admin), [2009] 1 WLR 2072 at [44], Lord Justice Toulson described this decision-making duty in the following terms: “The head of an independent, professional prosecuting service...entrusted by Parliament with the responsibility of deciding whether or not a person should be prosecuted at public expense.”

‘gatekeeping’⁵ task is essentially quasi-judicial in nature and discretion should be exercised independently of any improper external influence.⁶ Hong Kong’s former Director of Public Prosecutions (DPP) Ian Grenville Cross, commented that:⁷

The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender, and the community at large to ensure that the right decision is made. A wrong decision to prosecute, or, conversely, a wrong decision not to prosecute both tend to undermine the confidence of the community in the criminal justice system.

2.2 The Test for Prosecution in New Zealand

In New Zealand, the test for prosecution is outlined in the Solicitor-General’s Prosecution Guidelines 2013 (Guidelines). It engages a two-limbed test at paragraph 5 of the Guidelines,⁸ an Evidential Test and a Public Interest Test.⁹ The Guidelines also provide a non-exhaustive and illustrative list of public interest considerations to be taken into account when making a decision to prosecute or not.¹⁰

2.3 The Solicitor-General’s Prosecution Guidelines 2013

⁵ House of Commons Justice Committee *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System* (Ninth Report, HC 186, 2009) at 3.

⁶ The Solicitor-General’s Prosecution Guidelines 2013, paragraph 4.1 states: “The universally central tenet of a prosecution system under the rule of law in a democratic society is the independence of the prosecutor from persons or agencies that are not properly part of the prosecution decision-making process.” Further at paragraph 4.2: “In practice in New Zealand, the independence of the prosecutor refers to freedom from undue or improper pressure from any source, political or otherwise. All government agencies should ensure the necessary processes are in place to protect the independence of the initial prosecution decision.”

⁷ Ian Grenville Cross [Director of Public Prosecutions of Hong Kong 1997-2009] “To prosecute or not to prosecute? Duty and accountability” (Seminar on Constitutional Law Developments 1998, Hong Kong Bar Association and the Centre for Comparative and Public Law of the University of Hong Kong, 9 May 1998).

⁸ The Solicitor-General’s Prosecution Guidelines 2013, paragraph 5.1 states: “Prosecutions ought to be initiated or continued only where the prosecutor is satisfied that the Test for Prosecution is met. The Test for Prosecution is met if: 5.1.1: The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction- the Evidential Test; and 5.1.2: Prosecution is required in the public interest- the Public Interest Test. 5.2: Each aspect of the test must be separately considered and satisfied before a decision to prosecute can be taken. The Evidential Test must be satisfied before the Public Interest Test is considered. The prosecutor must analyse and evaluate all of the evidence and information in a thorough and critical manner.”

⁹ The prosecutor will evaluate matters such as the admissibility of evidence that may implicate the accused, the credibility and competence of witnesses and the influence they may have in court, factors relating to the prospect of conviction and any defences the accused may have.

¹⁰ The Solicitor-General’s Prosecution Guidelines 2013 at paragraph 5.8 provides a list of public interest considerations for prosecution and at paragraph 5.9 provides a list of public interest considerations against prosecution. As a general rule, the more serious the offence is, the more likely that the public interest will require that a prosecution be pursued.

Under New Zealand's constitutional structure, the Attorney General's role includes a responsibility through Parliament to the citizens of New Zealand for prosecutions carried out by or on behalf of the Crown. "However, this process is in practice, superintended by the Solicitor-General, who pursuant to s9A of the Constitution Act 1986, shares all the relevant powers vested in the office of the Attorney General."¹¹ The Solicitor-General's responsibility for public prosecutions has been codified in s185 of the Criminal Procedure Act 2011, giving these arrangements renewed force.¹²

The Guidelines apply to all Crown Solicitors, government agencies or instructed counsel¹³ and assist prosecuting agencies in determining whether criminal proceedings should be commenced,¹⁴ what charges should be filed¹⁵ and if commenced, whether criminal proceedings should be continued or discontinued.¹⁶ In executing all prosecution duties, the touchstone must be fairness to all of the parties that are engaged in the procedure and administration of the criminal legal processes involved.¹⁷

The primary check on prosecutorial discretion is whether decisions are made in compliance with the Guidelines.¹⁸ Unlike other common law jurisdictions, New Zealand has no centralised decision-making agency that deals solely with prosecutions.¹⁹ The absence of a stand-alone Crown Prosecution Service (CPS) and therefore a regulated decision-making process, highlights the importance of comprehensive Guidelines and adherence to core prosecution values.²⁰

¹¹ The Solicitor-General's Prosecution Guidelines 2013, at 1 "Attorney-General's Introduction."

¹² Ibid.

¹³ Ibid at paragraph 2.1 Most Crown prosecutions, are conducted by Crown Solicitors, who are private practitioners appointed to prosecute by the Governor-General by virtue of a warrant. Other prosecutions are conducted by the New Zealand Police and various enforcement agencies specialising in the enforcement of a particular regulatory area.

¹⁴ Ibid, at paragraph 1.2.1.

¹⁵ Ibid, at paragraph 1.2.2.

¹⁶ Ibid, at paragraph 1.2.3.

¹⁷ Ibid, at paragraph 19.1.

¹⁸ As a public document, the Solicitor-General's Prosecution Guidelines 2013, allow transparency to be achieved and encourages prosecutors to be consistent in their duties.

¹⁹ The United Kingdom has had a centralised decision-making agency called the Crown Prosecution Service (CPS) since 1986, headed by the Director of Public Prosecutions. See generally <www.cps.gov.uk>.

²⁰ The New Zealand Law Commission reached a preliminary view that a stand-alone Crown Prosecution Service was not a viable option due to reasons of efficiency and economy. Instead, the Commission proposed a number of improvements to the existing system. However, the Commission identified that a factor strongly in favour of a Crown Prosecution Service was the former lack of clear separation between investigation and prosecution functions within the police and prosecuting agencies generally; see New Zealand Law Commission *Criminal Prosecution* (NZLC R66, Wellington, 2000) at 13. See also The Solicitor-General's Prosecution Guidelines 2013 at paragraph 1.1 for the core prosecution values.

2.3.1 The Solicitor-General's Prosecution Guidelines 2013: Mandatory or Not?

The Guidelines were not designed to be “an instruction manual for prosecutors” and “do not purport to lay down any rule of law.”²¹ Although compliance with the Guidelines is expected by the Solicitor-General, there are no specified consequences for non-compliance. This raises questions about the Guideline's legal status.

The case *R v Barlow (No 2)* considered the legal status of the 1992 version of the Guidelines.²² The Court of Appeal upheld the reasoning of the High Court²³ finding that “the Guidelines do not and could not purport to control the exercise of the court's discretionary powers. Their only relevance for present purposes is to indicate the general practice which is adopted by the Solicitor-General.”²⁴

In contrast, the 2013 Guidelines were issued pursuant to s185 of the Criminal Procedure Act 2011. Sections 185 and 187 codified, for the first time, the Solicitor-General's oversight responsibility for Crown and public prosecutions. It was argued in the Court of Appeal in *Osborne v WorkSafe New Zealand* that this provided a clear statutory basis for the 2013 Guidelines, that was absent in the creation of the 1992 Guidelines.²⁵ However, the Court of Appeal confirmed that the Guidelines were not to be construed as a Code since they are aspirational in character and have a high discretionary content.²⁶

The lack of specified consequences for non-compliance with the Guidelines that largely removes the prospect of prosecutorial accountability, indicates the quasi-legal nature of the Guidelines. To this extent, the Guidelines may be identified as soft law: “Rules of conduct which, in principle, have no binding force but which nevertheless may have practical effects.”²⁷ The Guidelines are not rules of law that prosecutors are always bound to apply, but rules of

²¹ The Solicitor-General's Prosecution Guidelines 2013, paragraph 2.3.

²² *R v Barlow* [1996] 2 NZLR 116 (HC) 121.

²³ *Ibid*, at 121; Justices Gallen and Neazor held that the 1992 Guidelines were only an indication of the approach a prosecutor will follow, not binding and not enforceable by *mandamus*.

²⁴ *R v Barlow (No 2)* [1998] 2 NZLR 477 (CA) at 479.

²⁵ In the Court of Appeal; *Osborne v WorkSafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513.

²⁶ *Ibid*, at [74] per Kós P.

²⁷ Francis Synder *Soft Law and Institutional Practice in the European Community: Institutions, Processes, Tools and Techniques* (EUI Working Papers (Law), No 93/5, 1993).

practice. They form part of a broader normative framework for courts to consider when judging cases submitted to their jurisdiction. Although the Guidelines are not legally binding by definition, they still embody some hard law characteristics where for example, obligations are imposed.²⁸

2.4 Prerogative Powers

A prosecutor's decision to prosecute or not was traditionally believed to be an exercise of prerogative power.²⁹ Whilst even that orthodox approach rejected the idea of limitless power, and of limits which were immune from judicial administration, prosecution decisions were once held to be immune from judicial review simply because the power to make them was sourced in the prerogative.³⁰ The lack of an existing power of review was itself a determining feature of prerogative power.³¹ The distinction between public powers was based on their source, despite prerogative power being in most cases, conceptually and analytically identical to discretionary statutory power.³²

The initial development came with the English Court of Appeal decision in *Laker Airways Ltd v Department of Trade*.³³ Lord Denning MR rejected the notion that public powers were to be distinguished by their source and held that prerogative power "is a discretionary power to be exercised for the public good, [and] it follows that its exercise can be examined by the Courts just as any other power which is vested in the executive."³⁴ This empowered courts to interfere where prerogative power was exercised "improperly" or "mistakenly." The decision was endorsed in *Council of Civil Service Unions v Minister for the Civil Service (GCHQ)*.³⁵

²⁸ Obligations may be identified where the auxiliary verb "must" is used in the Guidelines. For example, at paragraph 5.2: the test for prosecution "must be separately considered and satisfied before a decision to prosecute can be taken."

²⁹ GDS Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, Lexis Nexis, Wellington, 2014) at [2.38].

³⁰ *Saywell v Attorney-General* [1982] 2 NZLR 97 (HC).

³¹ Philip A Joseph "False Dichotomies in Administrative Law: From There to Here" (2016) New Zealand Law Review 127 at 134 – 136.

³² *Ibid.*

³³ *Laker Airways Ltd v Department of Trade* [1977] QB 643 (CA). This position was foreshadowed in *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864 (DC) (Judicial review of the Compensation Board although created by prerogative powers.) See also Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at [18.6] (Judicial review of the prerogative).

³⁴ *Laker Airways Ltd v Department of Trade*, above n 33, at 705 per Lord Denning MR.

³⁵ *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 9, [1985] AC 374 [*GCHQ*]. See also *Burt v Governor-General* [1992] 3 NZLR 672 (CA). *Burt* was followed by *R v Secretary of State for the Housing Department, ex parte Bentley* [1994] QB 349 (CA) (judicial review of the prerogative of mercy). See also Joseph, n 33, at [18.6] (Judicial review of the prerogative).

Prerogative power was as amenable to judicial review as discretionary statutory power, and both powers are subject to considerations of justiciability on the same grounds.³⁶ Prosecution powers have now been converted to a total statutory footing in New Zealand, reinforcing the justiciability of prosecution decisions, albeit though only in ‘exceptional circumstances.’³⁷

2.5 Comity between Judiciary and Executive Re Prosecutorial Decisions

The New Zealand government,³⁸ acting through Parliament, may exert Parliament’s legislative supremacy over the courts by changing the law in response to any judicial decision.³⁹ Conversely, it is the function of the judicial arm to control the executive under the courts inherent jurisdiction to scrutinize executive action.⁴⁰ This is the self-referential responsibility of the judiciary. The principle of judicial independence was created to safeguard against abuses of power and empowers courts to judicially review prosecutors.⁴¹ Applications for judicial review⁴² of public decision-making may be made under the Judicial Review Procedure Act 2016⁴³ or by Part 30 of the High Court Rules 2016. Judicial review of the executive is an application of “checks and balances.”⁴⁴ Courts have the power and duty to constrain a prosecutor from exceeding his or her powers and to compel the lawful performance of their public duties.

³⁶ *R v Secretary of State for the Foreign Office, ex parte Everett* [1989] 1 QB 81; followed *GCHQ*, above n 35, Taylor LJ held that the grant or refusal of a passport is a matter of administrative decision affecting the right of individuals and their freedom of travel. It raises issues which are just as justiciable as the issues arising in immigration cases.

³⁷ *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC) at [69] per Randerson J.

³⁸ New Zealand’s government is known as “the Westminster model” after the British system at Westminster London and is based on the concept of the separation of powers. See Joseph, above n 33, at [8.0] (Separation of Powers).

³⁹ It was suggested in Dame Sian Elias “Administrative Law for “Living People” [2009] 68 CLJ 47 at 54 that the notion of parliamentary sovereignty is arguably a common law doctrine. However, there is suggestion that the deference shown by the courts to parliament is a political choice; See Jeffery Goldsworthy *The Sovereignty of Parliament, History and Philosophy* (Clarendon, 1999).

⁴⁰ See Joseph, above n 33, at [22.1] (Judicial Review) and [8.4.2] (Executive and judiciary).

⁴¹ See the Honourable Justice J M Priestly, “Chipping Away at the Judicial Arm?” (Harkness Henry Lecture, University of Waikato Law School, October 2009); “The independence of the judicial arm of government is secured not only by statute but also by convention and protective measures.”

⁴² The application for judicial review must raise an important issue, discrete from that of whether or not to prosecute in fact; see *Weist v Director of Public Prosecutions* (1988) 81 ALR 129 (FCA).

⁴³ The Judicature Review Procedure Act 2016 came into force on 1 March 2017 and re-enacts Part 1 of the Judicature Amendment Act 1972. Section 3(2) of the 2016 Act notes that the new Act is “not intended to alter the interpretation or effect” of the 1972 Act.

⁴⁴ Joseph, above n 33, at [8.4.2].

Judicial review has been regarded as an “institution of constitutional importance embracing the rule of law, the bureaucracy and government, and the independence of the judiciary.”⁴⁵ It also manifests a relationship between the judicial and executive branches that is distinctly different from that of the courts and Parliament.⁴⁶ A criminal justice system that is built on the rule of law, requires independent and impartial prosecutors who can perform unwaveringly, the task of investigating and deciding whether or not to prosecute alleged crimes. Professor Joseph states, “all legal systems must provide machinery for resolving claims and conflict between individuals and the State, according to law.”⁴⁷

Prosecutors and judges alike, have the indispensable function of protecting the rule of law ensuring the rights of individuals. Independence and impartiality are required to properly perform this role.⁴⁸ It is understood that without the fulfilment of these key roles of maintaining justice in society, there is an undeniable risk that “a culture of impunity will take root, thereby widening the gap between the population in general and the authorities.”⁴⁹ Therefore, if the public are unable to secure justice for themselves via the criminal justice system, they may be compelled to take the law into their own hands. This in turn would result in an uprising of crime, and further deterioration in the administration of justice. In this regard, comity between the judiciary and the executive is important in safeguarding confidence in the criminal justice system. The rights of the public are assured to the extent that the judiciary and the executive are protected from interference and unnecessary pressure.

Professor Philip Joseph contends that the inter-relationship of the judicial arm and the government arm can be considered to be a “collaborative enterprise.”⁵⁰ Professor Joseph cites favourably the dictum of Lord Bridge of Harwich in *X Ltd v Morgan-Grampian (Publishers) Ltd*.⁵¹

⁴⁵ Joseph, above n 33, at [22.1].

⁴⁶ Ibid.

⁴⁷ Philip A Joseph “Parliament, the Courts, and the Collaborative Enterprise” (2004) 15 KCLJ 321.

⁴⁸ Joseph, above n 33, at [8.1].

⁴⁹ *Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations, Professional Training Series No.9, 2003) at 116.

⁵⁰ Joseph, above n 47, at 323. The Honourable Justice J M Priestly, above n 41, at 14, footnote 38, noted that this “symbiotic analysis is largely similar to the concept advanced by Sir Stephen Sedley of bipolar sovereignty” See also C J S Knight “Bi-polar Sovereignty Restated” [2009] CLJ 361; Joseph, above n 33, at [21.2.2] (Collaborative enterprise).

⁵¹ *X Ltd v Morgan-Grampian (Publishers Ltd)* [1991] 1 AC 1 at 48. See *Arorangi Timberland Ltd. v Minister of the Cook Islands National Superannuation Fund* [2017] 1 WLR 99 (PC) at [31] per Lords Neuberger and Mance

The maintenance of the rule of law is in every way as important in a free society as a democratic franchise. In our society the rule of law rests upon twin foundations, the sovereignty of the Queen and Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law.

The appropriate limits to judicial review has been a perennial topic of debate, as courts seek to define their role as opposed to that of Parliament and the executive.⁵² While Cooke P has stated: "Some common law rights presumably lie so deep that even Parliament could not override them,"⁵³ Jeremy Waldron has suggested that: "Judicial review is politically illegitimate, so far as democratic values are concerned: by privileging majority voting among a small number of unelected judges and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality."⁵⁴ Perhaps the answer between these two positions is seen in the courts' cautious development of the boundaries of judicial review, whilst recognising that Parliament ultimately reserves the right to change the law. In Canada, this process has been described as a "constitutional dialogue between the courts and the legislature."⁵⁵

The next Chapter considers chronologically, the key cases that have led to New Zealand's current legal position.

in a joint judgment; "The Board would accept that, save perhaps in extreme circumstances, a statute should be presumed to be constitutional..."; (the author was junior counsel in the case).

⁵² Joseph, above n 33, at [22.5] (Constitutional and institutional limits to judicial review).

⁵³ *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398.

⁵⁴ Jeremy Waldron "The Core of the Case Against Judicial Review" (2006) 115 Yale LJ 1346 at 1353.

⁵⁵ Peter Hogg and Allison Bushell "The Charter Dialogue between Courts and Legislatures (or perhaps the Charter of Rights isn't such a bad thing after all)" (1997) 35 Osgoode Hall LJ 75. See also Joseph, above n 33, at [21.2.5] (Political-judicial dialogue); The Hon Justice Matthew Palmer "Constitutional Dialogue and the Rule of Law" (Key Note Address to Constitutional Dialogue Conference Faculty of Law, Hong Kong University, 9 December 2016).

CHAPTER 3

3 The Current Law Re the Justiciability of Prosecutorial Decisions in New Zealand

New Zealand courts have to date acknowledged only very limited power to judicially review prosecutorial discretions. The *Osborne v WorkSafe New Zealand* Supreme Court decision did not stipulate a precise test for the availability of judicial review in this context.¹ The current legal test is that judicial intervention is only appropriate in ‘exceptional circumstances.’ That test was articulated in *Polynesian Spa Ltd v Osborne*² which the Supreme Court did not consider, but took no issue with.³ This Chapter examines the transitions that have led from the initial austere position of the complete self-denial of jurisdiction to challenge any prosecutorial decision, to the present slightly ameliorated position that decisions not to prosecute are now amenable to judicial review, but under only almost unprovable threshold conditions.

3.1 Key Cases in New Zealand’s Legal History on the Justiciability of Prosecutorial Discretion

In the 1978 case *Kumar v Immigration Department*, Richardson J accepted that it would be appropriate for a court to intervene where the power to prosecute under immigration legislation was “exercised for collateral purposes, unrelated to the objectives of the statute or the prerogative in question.”⁴ A decision to prosecute based on a discriminatory reason was specifically stated to imperil the rule of law.⁵

In *Saywell v Attorney General*, the decision of a Crown Solicitor to present an indictment and the content of any indictment, were held to be matters immune from review by the High Court.⁶

¹ See *Osborne v WorkSafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447, [2017] 15 NZELR 365.

² *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC) at [61]- [69] per Randerson J.

³ See *Rewa v Attorney-General of New Zealand* [2018] NZHC 1005 at [46]; where Venning J held that the *Osborne* Supreme Court did not take issue with the Court of Appeal’s propositions in *Osborne v WorkSafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513 regarding restraint in the review of prosecutorial discretion, adopted from *Polynesian Spa*, above n 2, at [62].

⁴ *Kumar v Immigration Department* [1978] 2 NZLR 553, 558 (CA).

⁵ Followed in *Solicitor-General v Siemer* HC Wellington CIV 2010-404-8559, 9 May 2011 at [47] and [59] per Mallon J.

⁶ *Saywell v Attorney-General* [1982] 2 NZLR 97 (HC) at 105. See also *Newby v Moodie* (1987) 78 ALR 603 (FCA). In *Barton v R* (1980) 147 CLR 75, (1980) 32 ALR 449 it was held that the Solicitor-General acting as the alter ego of the Attorney-General making an original, or ex officio, decision to prosecute was also unreviewable.

The court's reasoning rehearsed the then orthodox view, that the exercise of prerogative power, being an extraordinary discretionary power that exceeds any other power possessed by an official by virtue of an office, was immune from judicial review. This was a judgment made during the apotheosis of unreviewable prerogative power. The *Council of Civil Service Unions v Minister for the Civil Service (GCHQ)* decision in the House of Lords, which held prerogative power to be as amenable to judicial review as discretionary statutory power, was still a few years away.⁷ In *Amery v Solicitor-General*, the Court of Appeal was faced with the issue of whether a decision of the Solicitor-General to stay private prosecution proceedings (by a *nolle prosequi*) was reviewable.⁸ The court observed: "Certainly this could be seen as the exercise of a statutory power and there is a good deal that can be said in favour of the conclusion that it is reviewable."⁹ However, apart from that tentative observation the Court of Appeal held that further consideration of the question was in the circumstances unnecessary, leaving the matter open. *GCHQ*, although not cited in argument, was to the same effect.

In the late eighties, the High Court in the two *Hallett* cases examined a non-prosecution decision.¹⁰ The first, involved the decision of a Department of Labour Inspector not to prosecute Mainzeal Corporation Ltd for alleged breaches of the Construction Act 1959 and Regulations. Again, the High Court found it was constitutionally inappropriate for the judiciary to review the relevant prosecution decision not to prosecute because it was a protected exercise of prerogative power. Nevertheless, Gallen J ventured, in an obiter statement, that the exercise of a statutory power would generally be open to review if it was "analogous to or identical with the power exercised by virtue of a prerogative."¹¹ The Court now took refuge in reasoning that where the decision and effect of the exercise of a prerogative power fell within the circumference of a statutory power then judicial review was potentially available. This reasoning depended on the apparent concentricity of the two sources of power. If a non-prerogative equivalent could be found, then the challenge to a prerogative power was avoided by the convenient displacement of the prerogative. The relevant Act imposed an obligation on the Inspector to make a prosecution decision. The court decided the power was statutory, not

⁷ *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 9, [1985] AC 374 [*GCHQ*]. For an overview of *GCHQ*, see Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at [18.6] (Judicial Review of the prerogative).

⁸ *Amery v Solicitor-General* [1987] 2 NZLR 292 (CA).

⁹ *Ibid*, at 293 per Cooke P.

¹⁰ *Hallett v Attorney-General* [1989] 2 NZLR 87 (HC) (Gallen J); *Hallett v Attorney-General (No 2)* [1989] 2 NZLR 96 (HC) (Henry J).

¹¹ *Hallett v Attorney-General*, above n 10, at 87 per Gallen J.

prerogative and was therefore reviewable. Gallen J held any ground of review could only determine not whether a prosecution should have been initiated, but the conceptually different and narrower issue of whether the question had been correctly addressed.

Hallett v Attorney General (No 2) was an application for judicial review of the Inspector's decision not to prosecute Mainzeal Corporation Ltd. Henry J held that as a matter of principle the court should not question whether or not a prosecution should have been initiated.¹² Since the Inspector had considered and decided against the question of prosecution, a discretion had been exercised. It was therefore not open for the court to review the decision or examine the various factors considered in the decision-making. This approach effectively eliminated any practical scope for an aggrieved person to successfully challenge a decision made for unreasonable or improper reasons. This decision represents the nadir of justiciability of prosecutorial decisions.

Polynesian Spa is the most oft-cited decision for the justiciability test on judicial review of prosecution decisions in New Zealand.¹³ Although judicial review was ultimately refused in a health and safety context, it was held that "all of the impugned steps taken by the Inspector involve the exercise of a statutory power or statutory power of decision and there is jurisdiction to review."¹⁴ However, Randerson J ruled that, for policy and constitutionality reasons, a challenge to a prosecution decision not to prosecute will succeed only in exceptional cases where the prosecuting authority has acted in bad faith or for a collateral purpose.¹⁵ This

¹² *Hallett v Attorney-General (No 2)*, above n 10, at 96.

¹³ *Polynesian Spa Ltd*, above n 2. Note, the Supreme Court in *Osborne v WorkSafe NZ*, above n 1, did not refer to *Polynesian Spa* in its judgment, but took no issue with the Court of Appeal's propositions in *Osborne v WorkSafe New Zealand*, above n 3, regarding the court's ability to interfere with prosecution decisions that it had adopted from *Polynesian Spa*. In *Snodgrass v Kapiti Coast District Council* [2014] NZHC 3153, [2014] NZAR 834 Mallon J noted *Polynesian Spa*, above n 2, at [91], as providing authority for the proposition that the court's jurisdiction to prevent an abuse of process, and appeal rights, provide a readily available alternative remedy, such that other than in rare cases, judicial review of decisions to prosecute will be unavailable. But this line of reasoning cannot apply to a challenge to a failure to prosecute. In *Potaka-Kiu v Police* [2016] NZHC 3063, HC Napier, 14 December 2016, Williams J at [28]; "Prosecutorial discretion should not be interfered with by the courts except in very rare circumstances. There may be scope for intervention if bad faith is established ..." citing *Polynesian Spa Ltd*, above n 2, at [61] – [62] and noting *Tui Saili v R* [2012] NZCA 149 at [23] that "deciding which charges to lay is a decision for prosecutors and not for the Court."

¹⁴ *Polynesian Spa Ltd*, above n 2, at [60] per Randerson J.

¹⁵ *Ibid*, at [68] per Randerson J. The court in *Mellon v Attorney-General* [2005] NZAR 432 at [25] found that a decision to prosecute could be subject to review and stayed in extreme cases where the circumstances precluded a fair trial or was made for reasons inconsistent with the purposes of criminal process such as grounds of bad faith, improper purpose, or a change of course that prejudiced the accused.

decision gave the apparent quietus to *Hallett (No2)*.¹⁶ But to permit a challenge on such limited grounds meant that unreasonableness (or its varietals) was denied as a legitimate basis to challenge a statutory decision refusing to prosecute a putative defendant. Unfairness was also excluded as grounds for review.

In *Young v Police*, Randerson J referred to “the extreme reluctance of the Courts to interfere with the [prosecutorial] discretion” and followed his judgment in *Polynesian Spa*.¹⁷ The Judge accepted that judicial review was available if there had been “a failure to exercise a discretion whether to prosecute.”¹⁸

In *Dewar v Waikato District Council*, Heath J was considering an appeal from a conviction under the Dog Control Act 1996. The appellant's argument was that the prosecution ought to have been stayed before the defended hearing had occurred. Heath J said:¹⁹

[36] The starting point for analysis is the purpose of the abuse of process ground for staying a prosecution. In my view, it is designed as a means to protect the integrity of the criminal justice system and the Court's processes against prosecutorial abuse. The jurisdiction must, however, be exercised in a manner that is consistent with the general deference that the Court gives to prosecutorial discretion: see, for example, *Polynesian Spa Ltd. v Osborne* [2005] NZAR 408 at 422-423, a decision of the Chief High Court Judge.

...

[37] By way of example, it is not uncommon for a person to be charged with indecent assault but to face a charge of sexual violation following committal at a preliminary hearing on the basis that the relevant Crown Solicitor has decided that the evidence is sufficient to prove the elements of the more serious offence. That example highlights why it is necessary to repose prosecutorial decisions in officers who have responsibility for making them. What may or may not have been said by subordinates leading up to the prosecutorial decision will rarely have any impact on the ability to charge.

In *Burgess v Field*, a Member of Parliament was prosecuted for corruption, an offence which required the prior consent of the Attorney General, which had been given.²⁰ A challenge to the Attorney General's consent failed. William Young P and Ellen France J in a joint judgment noted that there was only High Court authority for the proposition that a decision to prosecute may be challenged by judicial review, referring to *Hallett v Attorney General (No. 2)* and to

¹⁶ But in *Burgess v Field* [2007] NZCA 547, [2008] 1 NZLR 733, the Court appeared at [42] to resurrect *Hallett (No. 2)*, above n 10.

¹⁷ *Young v Police* HC Christchurch, CIV 2004-409-2406, 29 September 2006 at [17] - [18].

¹⁸ *Ibid.*

¹⁹ *Dewar v Waikato District Council* HC Hamilton, CRI 2006-419-101, 19 October 2006.

²⁰ *Burgess v Field*, above n 16.

Polynesian Spa.²¹ The joint judgment noted that “a number of constitutional and policy reasons for the courts' reluctance to interfere in relation to the prosecutorial discretion” exist.²² The Court of Appeal further emphasised “the traditional reluctance across the common law jurisdictions to interfere with decisions to initiate and continue prosecutions.”²³ It noted that Edwards discussed “compelling reasons for that reluctance.”²⁴ In the end, the Court assumed “without deciding” that the Attorney General's statutory decision to consent to a prosecution was reviewable, but rejected the claim that any “absurdity” had been established.²⁵

In *Greymouth Petroleum Ltd. v Solicitor-General*, Warwick Gendall J decided two unusual challenges.²⁶ Gendall J stated that whilst *Saywell*²⁷ “has been traditionally regarded as authority for the proposition that decisions of a Crown Solicitor to present an indictment, and the content of any indictment, are immune from judicial review,” that “it has become more generally accepted that the decisions are justiciable.”²⁸ The Judge noted that Pritchard J had been strongly influenced in *Saywell* by the concept that prosecutorial power was based upon historical prerogative, so that prosecutorial discretion was “a power of a special kind and not desirable for the Court to exercise a supervisory role in determining what “criminal prosecutions” should be heard.” Gendall J saw *Polynesian Spa* as adopting a more permissive approach and expressly followed that decision. He identified that in *Hallett (No. 2)*, Henry J had accepted that in principle, a court could intervene where there was a failure to exercise a discretion to prosecute at all.²⁹ But Gendall J rejected in principle that any discretion was amenable to review on the basis of weighing up the various factors relevant to such a decision. He found support in the Privy Council decision in *Sharma v Brown-Antoine* that although judicial review of a prosecutorial decision was available it is a highly exceptional remedy to be sparingly exercised

²¹ *Burgess v Field*, above n 16, at [42]; Chambers J did not discuss this point. See *Hallett v Attorney General (No. 2)*, above n 10; *Polynesian Spa*, above n 2.

²² *Burgess v Field*, above n 16, at [43] referring to *Polynesian Spa Ltd v Osborne*, above n 2, at [62].

²³ *Burgess v Field*, above n 16, at [43] referring to *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at [31].

²⁴ See *Burgess v Field*, above n 16, at [43] referring to John Llewelyn, Jones Edwards, “The Attorney-General, Politics and the Public Interest” (Sweet & Maxwell, London, 1984) at 29-32.

²⁵ *Burgess v Field*, above n 16, at [44].

²⁶ *Greymouth Petroleum Ltd. v Solicitor-General* [2010] NZHC 1381, [2010] 2 NZLR 567; a challenge to the filing of an indictment by the Solicitor-General under s345(2) of the Crimes Act 1961 and a challenge to the refusal by the Solicitor-General to grant dispensation under Reg 8 Crown Solicitors Regs 1994 to the Crown Solicitor at New Plymouth for him to accept instructions to appear at trial as defence counsel for Greymouth Petroleum Ltd, its employees and contractors, for breaches of the Resource Management Act 1991.

²⁷ *Saywell v Attorney-General*, above n 6.

²⁸ *Greymouth Petroleum Ltd. v Solicitor-General*, above n 26, at [37].

²⁹ *Ibid*, at [63] per Gendall J referring to *Hallett v Attorney General (No 2)*, above n 10, at 102.

and concluded that on the evidence no improper purpose was involved in the presentation of the indictment in the name of the Solicitor-General.³⁰

In *Young v Christchurch City Council*, French J stated: “It is well established that as a general rule a decision to prosecute is not reviewable, subject only to some very limited exceptions, none of which apply here: *Thompson v Attorney-General* [2000] NZAR 583; *Polynesian Spa Ltd. v Osborne* [2005] NZAR 408; *Wilson v Auckland City Council (No. 2)* [2007] NZAR 711.”³¹

In *R v Winn*, Ellis J, in a case where the defence claimed the wrong charges had been laid and that others were more appropriate (and involving lesser criminality), noted that judicial review can only lie where bad faith or improper motive has been alleged following *Greymouth Petroleum*.³² The Judge set out paragraph 1.4 of the Prosecution Guidelines dated 1 January 2010:³³

[7] In the rare case of poor decision-making, the Court seized of a particular prosecution may exercise its inherent remedial powers to prevent an abuse of its processes. The courts in New Zealand had declined to hear challenges to prosecution decision either in summary or indictable cases brought by way of judicial review. Principled decisions in accordance with these guidelines will help to ensure that the courts in New Zealand will see little reason to countenance a challenge to a prosecution decision.

The bad faith criterion was accepted as being the only basis for intervention in *Wilkins v Housing New Zealand Corporation* and the institutional limitations on fact-finding ability in judicial review has been offered as a reason for the Court's limited willingness to entertain challenges to prosecutorial decisions.³⁴ Entertaining challenges to decisions to prosecute outside the trial and appeal process was reasoned to be likely to seriously disrupt the criminal justice system.³⁵

³⁰ *Sharma v Brown-Antoine* [2006] UKPC 57, [2007] 1 WLR 781 (PC Trinidad and Tobago) at [14].

³¹ *Young v Christchurch City Council* HC Christchurch CIV 2008-409-003095, 9 April 2009 at [25].

³² *R v Winn* HC Auckland, CRI-2009-090-12003, 13 September 2010 at [7].

³³ *Ibid*, citing The Solicitor-General's Prosecution Guidelines 2010 at paragraph 1.4.

³⁴ *Wilkins v Housing New Zealand Corporation* HC Auckland [2014] NZHC 507, 19 March 2014 at [21] per Andrews J (prosecution for using a document to gain pecuniary advantage). See also *Jefferies v Wellington Regional Council* [2014] NZHC 916, 9 May 2014 at [17] per Collins J; in *Li v Hamilton District Court* [2015] NZHC 1605, [2015] NZAR 1280 at footnote 37; Duffy J noted “the procedural limitations of judicial review in terms of the restrictions on fact finding ability” as an additional reason for the limited right to challenge prosecutorial decisions.

³⁵ *Taikato v Tauranga District Court* [2012] NZHC 560, [2012] NZAR 471 at [46] per Wylie J

The judgment of Brown J in *Osborne v WorkSafe New Zealand*³⁶ closely examined the jurisprudential issues, which unlike any other New Zealand case, was not about whether a decision to prosecute should have been made but rather whether the decision by the prosecution to offer no evidence (as part of a wider plea-bargain outcome) was amenable to judicial review. WorkSafe pleaded that its decision was not amenable, "...because it was a decision made after taking into account specific factors in the exercise of its prosecutorial discretion. Such factors included the weighing of policy and public interest factors with which it is inappropriate for the Courts to interfere."³⁷ Brown J recognised and adopted the approach that under English law (and supported by English and Privy Council authority), the threshold for judicial review will be *lower* in the context of decisions *not to prosecute*.³⁸

WorkSafe invoked four constitutional and policy reasons to defend the judicial review:

- (a) The discretion to prosecute is part of the function of the executive, not the courts;
- (b) it is inappropriate for the court to interfere in prosecutorial decisions given its own function of responsibility for the conduct of criminal trials;
- (c) prosecutorial decisions involve a high content of judgment and discretion;
- (d) there is political accountability for prosecutorial decisions.

The High Court did not peremptorily reject the argument that judicial review is available if the prosecutor has failed to have regard to a relevant consideration or has had regard to an irrelevant consideration.³⁹ Instead the court adopted the approach that such a claim is "unlikely to be vindicated" because of the width of considerations that the decision-maker could properly take into account and because of the "high level of restraint" that "will be observed by the Court in recognition of the policy and constitutional decision of such a decision."⁴⁰

Subsequently, in *Waiapu v R* Lang J stated:⁴¹

[21] In New Zealand, the position has always been that the courts have been reluctant to intervene or become involved with the exercise of prosecutorial discretion. The reasons for this were succinctly summarised by Randerson J in *Polynesian Spa Ltd. v Osborne* [2005] NZAR 408 (HC) at [61]. In essence, the discretion to prosecute on behalf of the state is a function of

³⁶ *Osborne v WorkSafe New Zealand* [2015] NZHC 2991, [2016] 2 NZLR 485, (2015) 13 NZELR 485.

³⁷ *Ibid*, at [31].

³⁸ See *R v Director of Public Prosecutions ex parte Manning* [2001] QB 330 at [23], *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20, [2006] 1 WLR 3343 at [18]; *Marshall v Director of Public Prosecutions* [2007] UKPC 4, [2007] 4 LRC 557 (Jamaica) at [14].

³⁹ *Osborne v WorkSafe New Zealand* (HC), above n 36, at [38], adopting *Matalulu v Director of Public Prosecutions* (Fiji) [2004] NZAR 193 (SC Fiji) at 216.

⁴⁰ *Osborne v WorkSafe New Zealand* (HC), above n 36, at [40].

⁴¹ *Waiapu v R* [2016] NZHC 2491, [2016] NZAR 1561.

Executive government rather than the courts. The role of the courts has traditionally been to ensure the proper and fair conduct of trials. This is an important principle, because the prosecutor will almost always have a far greater understanding than the Court of issues that may render the laying of a particular charge appropriate or inappropriate.

In *Wright v Bhosale*, Whata J, giving the judgment of the Court, repeated the constitutional and policy reasons for the Courts' reluctance to interfere in prosecutorial decision-making, but added: "Despite these constraints, there are two remedies available to a person who considers he or she has been wrongly charged. The first and most effective remedy is to defend the charge and, if necessary, to apply to have it dismissed. The second is the availability of judicial review, though we accept there may be substantial hurdles to relief in this context."⁴²

In 2017, the *Osborne* Court of Appeal held that "the exercise of prosecutorial discretion is justiciable," but that "intervention"⁴³ is likely only to be in 'exceptional circumstances.'⁴⁴ The court held that there were good reasons for the exercise of judicial restraint in the review of prosecutorial discretion and was particularly influenced by the *Polynesian Spa* judgment and other overseas authorities.⁴⁵ The court also found that a stronger case for restraint existed where the prosecutorial decision was *to* prosecute, due to the risk of collateral interference with the criminal justice system being greater.⁴⁶ The appeal failed as the Court found there was nothing improper with the conditional reparation undertaking as there was no agreement that it was to be paid in substitution for a prosecution.

New Zealand's most recent and highest authority on judicial review of prosecutorial discretion is the 2017 decision of *Osborne* in the Supreme Court.⁴⁷ The court found that an unlawful bargain to stifle a prosecution had been made by WorkSafe, and granted the applicants a declaration to this effect.⁴⁸ The court's decision affirmed the justiciability of prosecution decisions, but it did not attempt to create a precise test on the availability of judicial review of prosecution decisions. The Court did not take issue with the propositions of the Court of Appeal

⁴² *Wright v Bhosale* [2016] NZCA 593, [2017] NZAR 203 at [26]; expressly noting *Polynesian Spa Ltd*, above n 2, at [68].

⁴³ In Randerson J's terms from *Polynesian Spa*, above n 2, at [63], [69] and [100].

⁴⁴ *Osborne v WorkSafe New Zealand* (CA), above n 3, at [35].

⁴⁵ *Ibid*, at [34]. See generally *Polynesian Spa Ltd v Osborne*, above n 2, at [62]; *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756 at [31]; *Fox v Attorney-General*, above n 23, at [28] – [31]; and *Matalulu v Director of Public Prosecutions (Fiji)*, above n 39, at 215.

⁴⁶ *Ibid*, at [34], [35] and [36].

⁴⁷ *Osborne v WorkSafe New Zealand* (SC), above n 1.

⁴⁸ *Ibid*, at [101].

on this point, and to this extent, the current test is that which was articulated by Randerson J in *Polynesian Spa*.⁴⁹

The overall outcome then is that since 1978 in *Kumar*, when Richardson J first ventilated the possibility of judicial review of a prosecutorial decision,⁵⁰ until the 2017 Supreme Court decision in *Osborne*, only a single challenge to a prosecutorial discretion to refuse to initiate a prosecution has been successful. The immediate post-*Kumar* decisions were dominated by reasoning that prosecution decisions were protected as being unreviewable prerogative decisions. That line of judicial reasoning slipped away, but was replaced by reasoning that the general orthodox grounds for judicial review were simply unavailable and that only either bad faith or a proven collateral purpose could ever be the basis for a successful challenge. Rather than explicitly reaffirming that all grounds for judicial review were available and insisting on the production of cogent evidence, (together with the fact that because of the polycentric nature of the decision-making, this necessarily required a very substantial deference to the decision-maker for constitutional and policy reasons,) the New Zealand courts opted instead for the view that only the two nominated grounds for review were available.⁵¹ Challenges based on unreasonableness, or error of law, or the failure to take into account relevant considerations (or its converse taking into account irrelevant considerations) are simply not open. In *Osborne* Brown J acknowledged for the first time in a New Zealand court, that the full array of judicial review grounds are potentially available, but concurrently emphasised that the intrinsic nature of the decision-making will mean that the prospect of a successful outcome under this widened vista still remains very low indeed.⁵² The Supreme Court decision in *Osborne* confined reviewability to the ‘illegality’ branch of review and made no further comment regarding expansion of the grounds. The other branches remain impervious to judicial review.

From the above cases, it is demonstrated that the courts have taken a hesitant but incremental approach towards reviewability of prosecution powers. It is accepted now that where a statute regulates an area where a prerogative power operates, the statute prevails and ousts the prerogative, subject to the statute expressly or impliedly, preserving the prerogative power

⁴⁹ See *Osborne v WorkSafe New Zealand* (CA), above n 3, at [34]; *Polynesian Spa Ltd v Osborne*, above n 2, at [62]. See also the Venning J’s comment in *Rewa v Attorney-General of New Zealand*, above n 3, at [45] and [46].

⁵⁰ *Kumar v Immigration Department*, above n 4, at 558 noting that a discriminatory exercise of a prosecutorial discretion would erode “an essential pillar of the rule of law.”

⁵¹ These grounds both fall under the ‘illegality’ branch of review.

⁵² *Osborne v WorkSafe New Zealand* (HC), above n 36, at [38]- [40].

intact.⁵³ The *Polynesian Spa* decision opened non-prosecutions to review in any ‘exceptional circumstances’ but limited that opening to exclude unfair or unreasonable decisions.⁵⁴

3.2 Judicial Review of Police Operational Decisions: A Parallel

A useful parallel is to consider the current New Zealand law regarding the justiciability of police operational decisions. The Courts have reasoned that challenges to the failures of the Police to investigate: allegations of criminality or their failures to prioritise types of investigations or in the prioritisations of Police resource allocations, is a complete ‘no-fly zone’ for judicial review.⁵⁵ Attempts to have the New Zealand Police held accountable for such decision-making uniformly have failed. The success of Mr. Blackburn before Lord Denning MR in *R v Commissioner of Police of the Metropolis, ex parte Blackburn*⁵⁶ has not been replicated in New Zealand. In *Evers v Attorney-General*, Chambers J held that operational decisions of the police were unreviewable, except in ‘exceptional circumstances.’⁵⁷ That is exactly the same narrow approach articulated in *Polynesian Spa* as applying in the context of prosecutorial decisions. The test exhibits perfect symmetry.

In *Sathyan v Police Commissioner of Wellington*⁵⁸ Clark J held in judicial review proceedings that the non-investigation of a complaint or series of complaints from the public was not justiciable. The Court of Appeal dismissed Ms Sathyan’s application for leave to appeal out of time from that decision. Winkelmann J for the Court stating:⁵⁹ “It is well established that the

⁵³ Joseph, above n 7, at [27.5.3]; GDS Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, Lexis Nexis, Wellington, 2014) at [2.38].

⁵⁴ In *R (on the application of Corner House Research) v Director of the Serious Fraud Office*, above n 45, at [30]; the House of Lords found that the decision whether or not to prosecute was only review in ‘highly exceptional circumstances.’

⁵⁵ The New Zealand position is contrasted by that taken in the United Kingdom on this point. See *Belhaj and another v Director of Public Prosecutions and another* [2018] UKSC 33, 4 July 2018 at [16]; where the Supreme Court of the United Kingdom stated: “The High Court’s review jurisdiction extends to principles to the exercise of any official’s functions in relation to the criminal process. These include police decisions to investigate or charge (*R v Comr of Police of the Metropolis, ex parte Blackburn* [1968] 2 QB 118) or to administer cautions (*R (Aru) v Chief Constable of Merseyside Police* [2004] 1 WLR 1697).”

⁵⁶ *R v Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 QB 118, [1968] 1 All ER 763 (CA); (a directive by the Commissioner of Police to his officers to take no proceedings against clubs for breach of gaming laws quashed as unlawful.)

⁵⁷ *Evers v Attorney-General* [2000] NZAR 372 (HC) at [11]; (an unsuccessful private action to compel the Commissioner of Police to stop youths persistently causing nuisance outside a motel and resulting in business loss.)

⁵⁸ *Sathyan v Police Commissioner of Wellington* [2016] NZAR 175 (HC); (Ms Sathyan believed she was a victim of cyber-bullying from various governmental agencies).

⁵⁹ *Sathyan v Police Commissioner of Wellington* [2017] NZAR 186 (CA) at [11].

courts will not compel the police to commence an investigation into a particular incident or incidents.” In *LP v Attorney General*,⁶⁰ Nation J reached a similar conclusion, but accepted that intervention was possible at least in police policy matters, where a perverse decision had been made.

By contrast to the New Zealand position, in *DB v Chief Constable of Police Service of Northern Ireland* the United Kingdom Supreme Court invalidated as unlawful a police operational decision made as part of a police strategy to manage associated public disorder arising from an illegal parade, which involved the flying of flags provocative to certain sectors of the Belfast population.⁶¹ The argument that the operational decision of the Police were immune from challenge by judicial review received short shrift. Lord Kerr approved the approach of the English Court of Appeal in an earlier case:⁶²

As Lord Dyson MR said in *H v Commissioner of the Metropolis v ZH* [2013] 1 WLR 3021 at para 90: ...operational discretion is important to the police...It has been recognised by the European court: see [(2012)] *Austin v United Kingdom* 55 EHRR 359, para 56. And I have kept it well in mind in writing this judgment. But operational discretion is not sacrosanct. It cannot be invoked by the police in order to give them immunity from liability for everything they do.

Under the present state of the law in New Zealand, the courts have repeatedly disavowed jurisdiction to judicially review the operational decisions of the Police. This wide-horizon exception makes, as Lord Dyson MR noted in England, all operational decisions “sacrosanct.” The present position in relation to police operational decisions resonates with the similar reluctance of the Courts here to assume a more robust approach to the accountability of prosecutors (including the police). Just as with the core issue of judicial reviewability of prosecutorial decision and discretions the Court have recognised that an entire and major aspect of policing is firmly within a modern Alsatia.

3.3 Judicial Review of Prosecutorial Decisions in Disciplinary Contexts: A Parallel

⁶⁰ *LP v Attorney General* [2016] NZAR 511 (HC); (LP a paranoid schizophrenic thought he had been the victim of a sexual assault because upon awakening he suffered from soreness in the spine and anal region).

⁶¹ *DB v Chief Constable of Police Service of Northern Ireland* [2017] UKSC 7, 1 February 2017.

⁶² *Ibid*, at [6] and [71] per Lord Kerr (with whom Lord Neuberger, Lord Reed, Lord Hughes and Lord Dyson agreed). At [76] Lord Kerr stated: “A definite area of discretionary judgment must be allowed the police. And a judgment on what is proportionate should not be informed by hindsight. Difficulties in making policing decisions should not be underestimated, especially since these frequently require to be made in fraught circumstances. Beyond these generalities, I do not consider it useful to go.”

A further parallel, like the judicial review of police operational decisions, is the judicial review of decisions to institute or terminate disciplinary decisions. This subject too provides an informed comparative basis for analysis.

In *Z v Complaints Assessment Committee* a dentist had been acquitted in a trial of indecently assaulting patients. Disciplinary proceedings were instituted against Z who sought judicial review of the decision to initiate the disciplinary proceedings, on a range of contentions including double jeopardy⁶³ and delay.⁶⁴ In denying judicial review Fogarty J emphasised the reluctance of a Court “to interfere with the exercise of discretion by any prosecutor whether to prosecute or not.”⁶⁵

Panckhurst J in *M v Wellington Standards Committee (No. 2)* had, in judicial review proceedings, to decide whether the decision of the Committee warranted the laying of misconduct charges before the New Zealand Lawyers and Conveyances Disciplinary Tribunal.⁶⁶ By this time, the Supreme Court decision in *Z v Dental Complaints Assessment Committee* was available, substantially affirming the judgment of Fogarty J and that of the Court of Appeal.⁶⁷ McGrath J in the Supreme Court stated:⁶⁸

[139] Where the lawfulness of the exercise of a statutory power turns on expert judgment, and there is no question of breach of natural justice, bad faith, material error in the application of the law, or exercise of the power in a way which cannot rationally be regarded as coming within the statutory purpose, the courts are unlikely to intervene.

Applying this approach Panckhurst J reasoned although “a conventional exercise of a prosecutorial discretion is subject to this Court's supervisory jurisdiction...the same rationales that have founded the traditional reluctance [in criminal prosecutorial decision-makers] to intervene remain at play [in the analogous disciplinary context].”⁶⁹ Once the decision has left the prosecution and been entrusted to another body the rights to challenge the prosecution's decision had been superseded by the rights now available before the trial forum.⁷⁰

⁶³ Relying on *Re a Medical Practitioner* [1959] NZLR 784 (CA).

⁶⁴ *Z v Complaints Assessment Committee* HC Christchurch, CIV 2005-409-000458, 12 October 2005 (Fogarty J).

⁶⁵ *Ibid*, at [47], citing *Polynesian Spa Ltd*, above n 2.

⁶⁶ *M v Wellington Standards Committee (No. 2)* HC Wellington, [2013] NZHC 1037, 9 May 2013.

⁶⁷ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1.

⁶⁸ *Ibid*.

⁶⁹ *M v Wellington Standards Committee (No. 2)*, above n 62, at [10] – [11].

⁷⁰ See to the same effect; *Orlov v New Zealand Law Society* [2013] NZCA 230, [2013] 1 NZLR 562 at [50].

The New Zealand Legal Complaints Review Officer (LRCO), in a series of decisions has decided that the successful intervention point by an aggrieved practitioner to challenge a disciplinary decision to prosecute will include situations in which the decision to prosecute was:⁷¹

- (a) Significantly influenced by irrelevant considerations,
- (b) exercised for collateral purposes unrelated to the objectives of the statute in question (and therefore an abuse of process),
- (c) exercised in a discriminating manner, or
- (d) exercised capriciously in bad faith, or with malice.

Recently, the New Zealand LRCO confirmed that this approach (which as to (a) and (b) is much wider than that of *Polynesian Spa*) remained appropriate.⁷² However, this approach of an inferior tribunal has limited value, especially as the High Court has not adopted its liberality.

The Court of Appeal has emphasised that disciplinary proceedings are a facet of consumer protection legislation and to achieve the statutory aims, complaints against professionals must be dealt with expeditiously. Therefore, to ensure that statutory objective, the High Court is directed not to entertain an application for judicial review before the disciplinary process is complete, unless the complaint is one that cannot be cured by the disciplinary Tribunal. The prospect of successful judicial review of a decision to initiate disciplinary proceedings is now remote.⁷³ But this emphasis on the disruptive effect of judicial review on a disciplinary process is irrelevant in a decision not to prosecute at all in a disciplinary context.

Over the last few decades, New Zealand courts have significantly expanded the criteria of who may be subject to review. This now includes prosecutors. But to date only the *Osborne* Supreme Court has successfully reviewed a prosecution decision.⁷⁴ The outcomes in other

⁷¹ *Poole v Yorkshire* [2009] LRCO 133/09, 11 November 2009 at [21]; *CN v Auckland Standards Committee 1* [2010] 106/2010, 23 September 2010; *TE v Wellington Standards Committee 2* [2013] LCRO 100/2010, 92/2011, 153/2012, 1 February 2013.

⁷² *DL v [Area] Standards Committee* LRCO 164/2016, 26 October 2016 at [15]. See also *FF v Wellington Standards Committee 2* LCRO 23/2011, 27 September 2011 at [50] - [51].

⁷³ *Deliu v New Zealand Law Society* [2015] NZCA 12, [2016] NZAR 1062 per Wild J at [22] and especially footnote 20.

⁷⁴ For other cases on judicial review of prosecutorial discretion, see Matthew Smith *New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters New Zealand Ltd, Wellington, 2016) at [3.4.5]; see *Hayes v Logan* [2005] NZAR 150 (HC) at [52]; *Lin v Police* HC Auckland CRI- 2010-404-312, 4 October 2010 at [9]; *Orlov v New Zealand law Society (No. 8)* [2012] NZHC 2154, [2013] 1 NZLR 390 at [62]; *Jefferies v Wellington Regional Council* [2014] NZHC 916 at [18].

common law jurisdictions is, by contrast, considerably different. This is considered in the next Chapter.

CHAPTER 4

4 Judicial Review of Prosecution Decisions in Select Foreign Jurisdictions: A Comparative Analysis

This Chapter compares and contrasts comparators that share New Zealand's Anglo-Commonwealth characteristics and common law background. There is also a comparative section focusing on South Africa with its Roman-Dutch legal heritage overlaid by English Common Law and modern constitutional law jurisprudence. Decisions from its Constitutional Court have been often cited and applied in the New Zealand higher courts. This Chapter also includes a consideration of *Armani Da Silva v United Kingdom* decided in the European Court of Human Rights in order to examine the human rights response to the issue and to provide insight regarding the availability of judicial review of prosecutorial decisions (or some functional equivalent) in civil law countries.¹

Australia holds the most reactionary position as prosecution decisions are held to be non-justiciable. Hong Kong, Canada, South Africa and the United Kingdom have each approached the justiciability issue quite differently, and all have evolved beyond New Zealand's current position. The United Kingdom has the most extensive body of jurisprudence, and the courts in Canada have established an exclusive standard of review unshared by any other jurisdiction. Development in Hong Kong and the hybrid jurisdiction of South Africa appears to have been catalysed by the differing demands of each jurisdiction's own unique disposition.

While New Zealand's position is more developed than the absolutism of Australia, the judiciary has by adopting the contextual position of only allowing intervention in 'exceptional circumstances,' pre-set a very demanding entry-point in this area of review.

4.1 Australia

In Australia, prosecutorial decisions are made by the Office of the DPP which applies the Australian Prosecution Policy. "The first criterion of this policy is that of evidential

¹ *Armani Da Silva v United Kingdom* [2016] ECHR 314, (2016) 63 EHRR 12.

sufficiency...A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the alleged offender. The existence of a bare prima facie case is not sufficient to justify prosecution. Once it is established that there is a bare prima facie case, it is then necessary to give consideration to the prospects of conviction. A prosecution should not proceed if there is no reasonable prospect of a conviction being secured.”²

4.1.1 Non-justiciability of Prosecutorial Decisions

The prosecution discretion in Australia is a statutory power.³ However, the courts there have reasoned that since prosecutorial discretion was originally sourced in the prerogative, the shift from prerogative to statute did not remove immunity even where the statute completely supplants the prerogative.⁴ This quarantining from judicial review has been rationalised by Australian courts, on the basis that the independence and impartiality of the judicial process would be jeopardised if they were to be seen in any way as affiliated with who is to be prosecuted and for what.⁵ In *Maxwell v R*, Dawson and McHugh JJ made the point that:⁶

[15] The decision whether to charge a lesser offence, or to accept a plea of guilty to a lesser offence than that charged, is for the prosecution and does not require the approval of the Court. Indeed, the Court would seldom have the knowledge of the strength and weaknesses of the case on each side which is necessary for the proper exercise of such a function. The role of the prosecution in this respect, as in many others, is such that it cannot be shared with the trial judge without placing in jeopardy the essential independence of that office in the adversary system.” The justices later stated in relation to a decision in *R v Brown*:⁷ “The Court rightly observed that the most important sanctions governing the proper performance of a prosecuting authority’s functions are likely to be political rather than legal.

The Australian legal system operates under the written Australian Constitution, which sets out a federal system of government that sharply divides power between the federal government and the States and territories, each of which maintain separate jurisdictions with their own system of courts and parliaments.⁸ Therefore, decisions that involve the prosecution process

² *Armani Da Silva v United Kingdom*, above n 1, at [182].

³ Mark Aronson, Bruce Dyer and Matthew Groves *Judicial Review of Administrative Action* (3rd ed, Lawbook Co, Sydney, 2004) at 95, footnote 49.

⁴ *Ibid*, at 95.

⁵ *Likiardopoulos v R* (2012) CLR 265 at [37], 86 ALJR 1168 (Gummow, Hayne, Crennan, Kiefel and Bell JJ), see also at [2] - [3] (French CJ).

⁶ *Brain William Maxwell v R* [1996] HCA 46, 184 CLR 501, 60 SASR 7, 135 ALR 1, 67 A Crim R 11.

⁷ *R v Brown* (1989) 17 NSWLR 472.

⁸ J Carvan *Understanding the Australian legal system* (5th ed, Lawbook Co, Sydney, 2005) at 59.

may be capable of judicial review by virtue of different statutory schemes for judicial review than are available in some jurisdictions or under the common law.⁹ The jurisdictions that appear to support judicial review in this context via statute will be discussed in turn.

In the Commonwealth jurisdiction, section 3 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("ADJR Act") states that all decisions of an 'administrative character' made under the Act are capable of judicial review. In *Newby v Moddie*, the Full Federal Court held that prosecution decisions to prosecute that have been made under the Director of Public Prosecutions Act 1983 (Cth) fall within the interpretation of section 3 ADJR Act and may therefore be capable of judicial review.¹⁰ Davies J in *Smiles v Federal Commissioner of Taxation* was prompted by the earlier High Court decision, *Australian Broadcasting Tribunal v Bond*,¹¹ to suggest that decisions to prosecute might be classified as a "procedural determination" rather than a "decision".¹² The Full Federal Court dismissed the appeal from Davies J and declined to make any comment on this issue.¹³

In the jurisdiction of Victoria, ss 2 and 3 of the Administrative Law Act 1978 (Vic) ("AL Act") states that: "any person whose rights are affected by a decision of a [person] who is required to observe natural justice has a right to apply to the Supreme Court of Victoria for judicial review of the decision." Although the provision could empower review of prosecutorial process, there has been no such case that has been the subject of authority. In discussing this point, Flynn commented that "Many decisions of prosecutors undoubtedly affect the rights of a person. However, it is uncertain whether a prosecutor is required to observe natural justice... The existence of the right to review under the AL Act is in addition to any right to review that may exist at common law: s 11 AL Act. However, the Public Prosecutions Act 1994 (Vic) ousts the jurisdiction of the Supreme Court to review defined "special decisions" and decisions related to laying of contempt charges by the Attorney-General: s 47 ff."¹⁴

⁹ Martin Flynn "Human rights, prosecutorial discretion and judicial review- the emergence of missing links?" (paper presented to the Australian Institute of Criminology, Prosecuting Justice conference, Melbourne, 18-19 April 1996) at 5.

¹⁰ *Newby v Moddie* (1988) 83 ALR 523 at 526-527.

¹¹ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 335-9.

¹² *Smiles v Federal Commissioner of Taxation* (1992) 107 ALR 439 at 442.

¹³ s39B(1) of the Judiciary Act 1903 (Cth) enabled the Federal Court to exercise power to review the decision: *Smiles v Federal Commissioner of Taxation*, above n 12, at 456. The provision states that "the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth."

¹⁴ Flynn, above n 9, at 5.

Lastly, in the Queensland jurisdiction, section 4 of the Judicial Review Act 1991 (Qld) ("JR Act") allows for all decisions of an administrative character that have been made under a Queensland enactment to be capable of being judicially reviewed. In analysing this statutory provision, Flynn commented that:¹⁵

The similarity of the wording of this provision with the wording of the ADJR Act suggests that, subject to the observations of Davies J. in *Smiles v FCT* (1992) 107 ALR 439 at 442... a decision to prosecute made under the Director of Public Prosecutions Act 1984 (Qld) is reviewable. It should be noted that while the decision to initiate a prosecution is a decision of an "administrative character" (*Newby v Moddie* (1988) 83 ALR 523 at 526-527), it has been held that the decision of a prosecutor on whether to exercise a right of reply during the course of a criminal trial is not a decision of an administrative character: *Bellino v Clair* (1992) 63 A Crim R 346 at 347. The statute also empowers the court to decline to review a decision on the basis that the review would disrupt proceedings of a court: s 14 JR Act.

While the above statutory provisions appear to suggest that some prosecution process decisions may be potentially reviewable in a few Australian jurisdictions where statutory prosecution power is exercised, the courts at common law and legal commentators have frequently suggested that a Crown prosecutor's decision to prosecute is insusceptible to review.¹⁶

In *Maxwell*, the court held that "the integrity of the judicial process particularly, its independence and impartiality and the public perception thereof would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what."¹⁷

The passage in *Maxwell* was cited with approval¹⁸ in *Likiardopoulos v R*. The Court confirmed that:¹⁹ "Sanctions available to enforce well established standards of prosecutorial fairness are to be found mainly in the powers of a trial judge and are not directly enforceable at the suit of the accused or anyone else by prerogative writ, judicial order or an action for damages."

¹⁵ Flynn, above n 9, at 6.

¹⁶ For cases see *Smiles v Federal Commissioner of Taxation*, above n 12, at 445 Davis J; *Jarrett v Seymour* (1993) 119 ALR 46 at 34-36. For Legal commentators see Fiona Wheeler "Judicial Review of Prerogative Power in Australia: Issues and Prospects" (1992) 14 Sydney LR 432-473.

¹⁷ *Brain William Maxwell v R*, above n 6 at [26].

¹⁸ In the joint judgment of Justices Gummow, Hayne, Crennan, Kiefel and Bell in *Likiardopoulos v R*, above n 5.

¹⁹ *Ibid*, at [4] (French CJ reserved his position on whether there may be limited scope for review under Constitution, s75 (v)).

4.1.2 The Exceptional Nature of the Jurisdiction

In *Jarret v Seymour* the Full Federal Court stated that, exceptionally, a decision of a prosecutor to institute proceedings may be subject of judicial review:²⁰ “Moreover, this case is concerned with a particular area of criminal process, that is, the discretion to institute criminal proceedings, where collateral intervention, as was sought here, should be allowed only in very special situations. There a cogent, and obvious, policy considerations underlying the reluctance of the civil courts to interfere collaterally with the initiation of a criminal prosecution (see, for example, *Barton v R*²¹).”

Gaudron J in *Elliot v Seymour* dismissed an appeal from the Full Federal Court, and stressed the exceptional nature of the jurisdiction. “It is by no means clear that civil proceedings will lie to prevent the laying of criminal charges. But, if they do, it will only be because it would be an affront to justice if the proceedings were to be instituted or, and this may be an aspect of the same thing, because the safeguards available in criminal proceedings are clearly inadequate to protect against the injustice involved.”²²

In *Smiles*, Davies J considered a line of authorities that contemplated the grounds for judicial review of the decision to prosecute. In his judgment, he concluded that “the Court will not interfere by way of judicial review in the ordinary process of a prosecution. It may be appropriate for the Court to make an order of review affecting a prosecution where, for example, the decision or conduct sought to be reviewed was beyond jurisdiction or an abuse of process, or the conduct sought to be reviewed was contrary to that provided by statute, or there is a discrete point of law the early determination of which may conclude or assist the resolution of the prosecution proceedings.”²³

The High Court of Australia in *Island Maritime Ltd v Filipowski*, similarly held that there may be room in the modern age to reconsider the court’s reluctance to intervene in prosecutorial decision-making, but also warned that intervention should only be exercised in ‘exceptional circumstances.’²⁴

²⁰ *Jarret v Seymour*, above n 16, at 56.

²¹ *Barton v R* [1980] HCA 48, 147 CLR 75, 32 ALR 449.

²² *Elliot v Seymour* (1993) 119 ALR 1 at 7.

²³ *Smiles v Federal Commissioner of Taxation*, above n 12, at 442.

²⁴ *Island Maritime Ltd v Filipowski* (2006) 226 CLR 328 (HCA) at [81] – [82].

In *Elias v R*, the court articulated the scope of external review as limited. “In the unlikely event that the discretion to prosecute a particular charge (or at all) was exercised for some improper purpose, the court has the power to relieve against the resulting abuse of its process. The time for debate as to any claimed abuse arising out of the selection of the charge is before the entry of a plea.”²⁵

The current common law position in Australia is that decisions to prosecute or not are not justiciable, except where an abuse of process has been found, but even then, there are strict time requirements to bring such claims.²⁶ The Australian courts have allowed review however, where a specific statutory consent was required to commence proceedings out of time. The Federal Court in *Buffier v Bowen*, held that the Attorney-General has statutory power to consent to the institution of criminal proceedings out of time.²⁷ However, his decision to consent was unlawful as he had inadequate material before him.

Flynn contends that “the abrogation by statute in each jurisdiction of common law prerogatives in relation to the criminal process removes “prerogative” as a reason to deny judicial review.”²⁸ On this view, prosecutorial decision-making would no longer retain “prerogative” status and must be open to review. The Australian courts are yet to adopt this reasoning or to reach this conclusion. The courts have made *obiter* comments suggesting when intervention ‘may be appropriate’ under grounds of review relating to illegality, but this is also yet to be affirmed.²⁹

In a recent Royal Commission Roundtable Discussion on DPP Complaints and Oversight Mechanisms, former DPP of New South Wales, Nicholas Cowdery QC stated that “The High Court of Australia has plainly ruled out judicial review of prosecution decisions other than in cases of abuse of process of the court or where unfairness would arise that could not be overcome in the trial process; so to introduce it would require legislation (presumably in all jurisdictions to be so affected). Courts retain the right to stay proceedings for good cause in

²⁵ *Elias v R* (2013) 248 CLR 483, 87 ALJR 895 at [35], (French CJ, Hayne, Kiefel, Bell and Keane JJ)

²⁶ i.e. procedures required by law to be observed in connection with the making of the decision were not observed (e.g. consent of a particular office holder to the prosecution: *Bacon v Rose* [1972] 2 NSWLR 793); (the decision involved an error of law: *Sankey v Whitlam* (1978) 142 CLR 1).

²⁷ *Buffier v Bowen* (1987) 72 ALR 256; [1988] 32 A Crim R 222 (FCA) per Neaves J.

²⁸ Flynn, above n 9, at 6.

²⁹ *Smiles v Federal Commissioner of Taxation*, above n 12, at 442.

individual cases, temporarily or permanently.”³⁰ Cowdery expressed in his view that “no need for judicial review in Australia has been demonstrated.”³¹ Cowdery continued to explained that: “A real issue of the separation of powers arises here. A DPP is regarded as a part of the executive branch of government, albeit with some quasi-judicial functions and characteristics. If the judiciary is to be supplanted in that position (and putting to one side the practical difficulties that would arise), that is a clear breach of the separation that we regard as essential to the proper functioning of government.”³²

4.2 Hong Kong

The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (BL) which came into effect on 1 July 1997, serves as the constitutional document of Hong Kong. Article 63 of the BL provides that: “The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference.”³³ The Department headed by the Secretary of Justice, has full independence in deciding whether a prosecution should be initiated, pursued or terminated.³⁴

³⁰ Nicholas Cowdery AM QC, former DPP of NSW *Royal Commission Roundtable Discussion on DPP Complaints and Oversight Mechanisms* (29 April 2016) at 3.

³¹ *Ibid*, at 3.

³² *Ibid*, at 4.

³³ In *Re C (A Bankrupt)* [2006] 4 HKC 582 at [18] per Stock JA, “The prosecutorial independence is a linchpin of the rule of law. He is in the discharge of that duty to be ‘actuated by no respect of persons whatsoever’ (Sir Robert Finlay, 1903, Parl. Debates Vol. 118, cols. 349-390) and ‘the decision whether any citizen should be prosecuted or whether any prosecution should be discontinued should be a matter for the prosecuting authorities to decide on the merits of the case without political or other pressure...any practice savouring of political pressure, either by the executive of Parliament, being brought to bear upon the Law officers when engaged in reaching a decision in any particular case, is unconstitutional and is to be avoided at all costs.’” Ian Grenville Cross “Focus on Discretion to Prosecute: The DPP and Exercise of Prosecutorial Discretion” (1998) 28 Hong Kong LJ 400; in reference to Art 63 “I consider it reassuring that this principle, long recognised in colonial times, now for the first time enjoys an entrenched status by virtue of its placement in the mini-constitution. See also Sino-Joint Declaration Part III, Annex I, (“A prosecuting authority of the Hong Kong Special Administrative Region shall control criminal prosecutions free from any interference.”)

³⁴ Bokhary GBM, NPJ, Michael Ramsden and Stuart Hargreaves *Hong Kong Basic Law Handbook* (Sweet & Maxwell, Hong Kong, 2015) at 266; “Article 63 is directed not only at protecting the Director of Public Prosecution from objectionable political interference in his decision to institute, take over and discontinue criminal proceedings. The protection also extends to preclude judicial interference, subject only to issues of abuse of the court’s process, and judicial review in exceptional circumstances: *Ma Pui Tung v Department of Justice* CACV 64/2008, [2008] HKEC 1590 at [10] per Rogers VP; “It is no doubt, in extremely rare cases and only where the evidence points unquestionably to a decision of the prosecuting authority not to prosecute. There are instances where an application for judicial review in respect of a refusal to prosecute has been allowed... It is, perhaps, all the more important that a court should exercise extreme caution if consideration is given to questioning a decision not to prosecute.”) However, this comment was made without a full review of all relevant authorities and on appeal the CA was of the view that there was no ground to question the decision not to prosecute.

Prosecutors in Hong Kong make their decisions in accordance with the Prosecution Code 2013. The Code in practice, is used as a set of guidelines similar to the ones set out in New Zealand and are based on the guidelines previously formulated for the Attorney-General in the United Kingdom. The Department of Justice holds that “the golden thread that runs through the fabric of the Prosecution Code is the importance of upholding the just rule of law by just application of just laws.”³⁵

There are two means of redress available to a person who feels aggrieved by inertia or partiality, caused by a prosecutor.³⁶ Firstly, any private individual has the right to institute a private prosecution, as recognised by the common law.³⁷ Secondly, a prosecutor may be held accountable for a prosecution decision via judicial review. Former Hong Kong DPP Grenville Cross SC stated that the decision whether to prosecute or not is dependent upon a broad view of the interests of justice,³⁸ and that a wrong decision not to prosecute will “undermine the confidence of the community in the criminal justice system.”³⁹

4.2.1 Judicial Reviewability of Prosecution Decisions Pre-Handover

In the case *Keung Siu-wah v Attorney-General* decided in 1990, the Court of Appeal refused to interfere with the Attorney-General’s decision to prosecute.⁴⁰ The court found that “any prerogative remedies, or injunctions and declarations, were not applicable in regards to a decision whether to initiate a prosecution; the content of an indictment; the preferment of a voluntary bill, the compounding of an offence; or the timing and conduct of prosecutions.”⁴¹ In his leading judgment, Fuad VP made the following statement:⁴² “In my judgment it is a

³⁵ Department of Justice Hong Kong Special Administrative Region, Prosecution Code 2013 at 3.

³⁶ As in New Zealand, the prosecution decision in Hong Kong is based on the available evidence and the public interest.

³⁷ Magistrates Ordinance Cap 227, s14. The case *Ma Pui Tung v Department of Justice*, above n 34, involved a decision not to prosecute where the aggrieved person brought a private prosecution.

³⁸ Grenville Cross, Director of Public Prosecutions of Hong Kong “To prosecute or not to prosecute” *South China Morning Post* (Hong Kong, 19 December 2000).

³⁹ Grenville Cross, Director of Public Prosecutions of Hong Kong “To prosecute or not to prosecute? Duty and accountability” (Seminar on Constitutional Law Developments 1998, Hong Kong Bar Association and the Centre for Comparative and Public Law of the University of Hong Kong, 9 May 1998) at 2.

⁴⁰ *Keung Siu-wah v Attorney-General* [1990] 2 HKLR 238 (CA), expressly disapproved in *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20, [2006] 1 WLR 3343 at [16] - [17].

⁴¹ Ian Dobinson “The decision not to prosecute” (speaking at the International Conference of the International Society for the Reform of Criminal Law papers, 26 August 2001) referring to *Keung Siu-wah v Attorney-General*, above n 40.

⁴² *Keung Siu-wah v Attorney-General*, above n 40, at [54].

constitutional imperative that the Courts do not attempt to interfere with the Attorney General's discretion to prosecute, but once the charge or indictment comes before a Court for hearing, it can consider whether the prosecution should be allowed to continue if grounds amounting to an abuse of process are raised." Penlington JA agreed with Fuad VP and noted that:⁴³ "There is no doubt that any court may refuse to hear proceedings which it regards as an abuse of process...but the authorities are overwhelmingly that the decision of the Attorney General whether or not to prosecute in any particular case is not subject to judicial review." The Court of Appeal in *Keung Siu-wah* took an extremely strict stance where Penlington JA considered the authorities to be "overwhelming that the decision of the Attorney General whether or not to prosecute in any particular case is not subject to judicial review."⁴⁴

In 1991, the Court of Appeal in *R v Harris*, stated that: "[Any] involvement by the courts in the prosecution process is liable to compromise and to be perceived to compromise their impartiality."⁴⁵ In that case the Attorney-General had resiled from his earlier decision not to prosecute a former expatriate Senior Crown Counsel for inciting sexual offences. The Court considered "the twin problems of an absence of objectively ascertainable standards and the relative unfamiliarity of the courts with the weighing of all the considerations which may bear on the exercise of prosecutorial responsibility."⁴⁶ The issue of the non-justiciability was raised by Silke VP who held that the Attorney-General was permitted to change his mind and by reversing his earlier decision not to prosecute, the Attorney-General was not found to have manipulated or misused the rules or procedure.⁴⁷ Fuad VP noted that he would be indisposed to intervene unless "the court processes are being employed for ulterior purposes or in such a way (for example, through multiple or successive proceedings) as to cause improper vexation and oppression"⁴⁸

These pre-handover decisions have since been disproved and it has been the view of post-handover judgments that decisions not to prosecute under the new constitutional order are susceptible to judicial review in exceptional cases.⁴⁹

⁴³ *Keung Siu-wah v Attorney-General*, above n 40, at [58].

⁴⁴ *Ibid.*

⁴⁵ *R v Harris* [1991] 1 HKLR 389 (CA) at 406.

⁴⁶ *Ibid.*, at 403 citing *Connolly v Director of Public Prosecutions* [1964] AC 1254 (HL).

⁴⁷ *Ibid.*, at 397-398 and 401.

⁴⁸ *R v Harris*, above n 45, at 402.

⁴⁹ *RV v Director of Immigration* [2008] 4 HKLRD 529 at 545; Hartmann J, "The prosecutorial independence of the Secretary is the linchpin of the rule of law. That is the way it has been prior to the Basic Law and the way it now remains. The exceptional circumstances of which I speak must be truly exceptional and must demonstrate

4.2.2 Post-Handover

In 2005, Hartmann J, the Judge in charge of the Constitutional and Administrative Law List, in *Kwan Pearl Sun Chu v Department of Justice*,⁵⁰ repeated the long-held view that the courts would be slow to interfere with the DPP's decision not to prosecute. In reviewing the allegations advanced by the applicant, he almost made the suggestion that such decisions were not capable of judicial review at all, by stating:⁵¹

[13] In any event, it seems to me that the law, as it presently stands, prevents the applicant from obtaining leave. The relevant Hong Kong law is contained in a judgment of our Court of Appeal in *Keung Siu-wah v Attorney General* [1990] 2 HKLR 238. I quote from the headnote: 'It was a constitutional imperative that the court would not interfere with the Attorney General's discretion to prosecute. However, the court retained an inherent jurisdiction to prevent abuse of process.'

Hartmann J, albeit conscious of being *prima facie* bound by *Keung Siu-wah* then however, qualified the above statement by referring to developments in judicial review in the United Kingdom, which highlighted that decisions not to prosecute were in fact amenable to judicial review where dishonesty, bad faith or other exceptional circumstance where it could be found.⁵²

In *Re C (A Bankrupt)*, Stock JA in the Court of Appeal noted that Article 63 of the BL enshrines the independence of the Secretary for Justice but added nevertheless that "dishonesty, bad faith or some other exceptional circumstances" might provide a basis for challenge in the courts of the exercise in a particular case of a prosecutorial prerogative (following *R v Director of Public Prosecutions ex parte Kebilene & Others* [2000] 2 AC 326).⁵³

In *RV v Director of Immigration*, Hartmann J found that the Secretary for Justice had not acted unconstitutionally by failing to follow published prosecution policy and held that the courts have no power to inquire into the rationality of the policy.⁵⁴ The supervisory jurisdiction of

that the Secretary has acted outside of his very broad powers, powers that...he exercises free of direction by his ministerial colleagues and free also of the control and supervision of the courts."

⁵⁰ *Kwan Pearl Sun Cha v Department of Justice* [2005] 3 HKC 441.

⁵¹ *Ibid.*

⁵² *Ibid.*, at [17].

⁵³ *Re C (A Bankrupt)*, above n 33.

⁵⁴ *RV v Director of Immigration*, above n 49, at 544 per Hartmann J, "Clearly, the secretary would act outside of his powers if it could be demonstrated that he has done so not on an independent assessment of the merits but in

judicial review extended to conduct an examination whether the Secretary of Justice had acted beyond his power by making decisions that were “not an independent assessment of the merits but in obedience to a political instruction,”⁵⁵ “institut[ing] a prosecution in return for payment of a bribe,”⁵⁶ or “refus[ing] to prosecute a specific class of offences detailed in a statute lawfully brought into law.”⁵⁷ The *RV* case also considered the reviewability of the Department of Justice’s decision to prosecute. The court followed the Privy Council judgments in *Mohit v Director of Public Prosecutions of Mauritius*⁵⁸ and *Sharma v Brown-Antoine*⁵⁹ and concluded that the policy considerations in a decision not to prosecute were different from those engaged in a decision to prosecute.⁶⁰

Zervos J’s⁶¹ decision in the Court of First Instance in *D v Director of Public Prosecutions* is Hong Kong’s most significant development regarding judicial review of prosecution decisions.⁶² The case involved an application for leave to judicially review the decision of the DPP not to prosecute an alleged case of indecent assault. The alleged incidents of indecent assault involved a domestic helper’s (‘D’s’) male employer Mr Shek exposing his genitals and covertly masturbating himself behind her, which she had captured on her mobile phone. The DPP refused to prosecute Mr Shek on the ground that the totality of the evidence was equivocal as to whether he was reckless in acting as he did. Counsel for ‘D’ contended that the DPP had failed to evaluate the evidence properly and misunderstood or misapplied the legal test for recklessness.

In making his decision, Zervos J was persuaded by the decision in *RV*.⁶³ Hartmann J concluded, the source and nature of the power is therefore different from the source and nature of the prerogative power that had been exercised when *Keung Siu-wah* was decided.⁶⁴ It is essential

obedience to a political instruction. Article 63 specifically forbids such interference with the exercise of his powers.”

⁵⁵ *RV v Director of Immigration*, above n 49, at [71].

⁵⁶ *Ibid.*, at [72].

⁵⁷ *Ibid.*, at [73].

⁵⁸ *Mohit v Director of Public Prosecutions of Mauritius*, above n 40, which had expressly disapproved *Keung Siu-wah v Attorney General*, above n 40.

⁵⁹ *Sharma v Brown-Antoine* [2006] UKPC 57, [2007] 1 WLR 781 (PC) (Trinidad and Tobago)

⁶⁰ See also *Iqbal Shahid & Others v Secretary for Justice* [2010] 5 HKC 51, where the court determined that a prosecution decision that ran contrary to a prosecution policy in a particular area could also be judicially reviewed, but the application failed on the facts.

⁶¹ Himself, the former Director of Public Prosecutions in Hong Kong from 2011-2013.

⁶² *D v Director of Public Prosecutions* [2015] 4 HKLRD 62.

⁶³ *RV v Director of Immigration*, above n 49.

⁶⁴ *Keung Siu-wah v Attorney-General*, above n 40.

that power only be exercised within constitutional limits, or remain within them. This assessment is for the courts, and the determination is judicial review. “To come to this conclusion is not a defiance of binding precedent, it is recognition of a new constitutional order and the duties of our courts in respect of that new order.”⁶⁵ In *Re C*, Stock JA made the observation that “dishonesty, bad faith or some other exceptional circumstances might found a basis for challenge in the courts of the exercise in a particular case of a prosecutorial prerogative.”⁶⁶

Zervos J in *D v DPP* held that it was reasonably arguable that the Director in deciding not to prosecute had erred in his understanding of the application of law, and that such a misapplication fell within the ‘exceptional circumstances’ as observed by Stock JA in *Re C* or the DPP had exceeded the constitutional limits as held by Hartmann J in *RV*.⁶⁷

The DPP then took the advice of Mr David Perry QC⁶⁸ from the English Bar who gave very clear advice that the original decision of the DPP not to prosecute was unsustainable in law and that in the forth-coming substantive judicial review the applicant would inevitably succeed.⁶⁹ In the result, the DPP agreed to prosecute. The defendant Mr Shek was found guilty and was sentenced to jail for four months. The indecent assault had clearly been caught on a mobile phone video. His appeal against conviction was dismissed.⁷⁰

The current law in Hong Kong is that any decision made under the public interest aspect, automatically makes the decision potentially amenable to review. Any decision not to prosecute is susceptible to judicial review, however in *Po Fun Chan v Winnie Cheung* it was held that any ground to obtain leave for judicial review must be reasonably arguable.⁷¹ The institution of an action will only have a chance of success if a court is satisfied that:⁷²

- (a) the decision was the result of an unlawful prosecution policy;⁷³
- (b) the decision ignored established policy; or

⁶⁵ *RV v Director of Immigration*, above n 49, at [68].

⁶⁶ Stock JA in *Re C (A Bankrupt)*, above n 33, also cited in *RV v Director of Immigration*, above n 49 at [64].

⁶⁷ *D v Director of Public Prosecutions*, above n 62 at [26]. The Director had provided reasons for not prosecuting.

⁶⁸ Ex relatione Ms Emma Tsang, junior counsel for D.

⁶⁹ In Hong Kong, every application for judicial review requires leave to apply for judicial review: The Rules of the High Court Cap. 4A, O 53.

⁷⁰ *HKSAR v Shek Kwok Ngai* [2017] 2 HKLRD 629.

⁷¹ *Po Fun Chan v Winnie Cheung* (2007) 10 HKCFAR 676.

⁷² A Bruce SC *Criminal Procedure: Trial on Indictment* (Butterworths Asia, 1998) at [553].

⁷³ Prosecution policy relates to the guidelines set out in Hong Kong’s Prosecution Code.

- (c) the decision was perverse⁷⁴
- (d) the decision was based on a material error of law⁷⁵
- (e) the decision was made in bad faith⁷⁶
- (f) the decision was made in obedience to political instruction⁷⁷

Some of these criteria obviously may overlap. Prosecutors can be held to account for improper decisions to prosecute. It is noted in *Bruce on Criminal Procedure* that a failure to institute criminal proceedings may now be open to challenge as a result of *R v Inland Revenue Commissioners, Ex parte Allen*⁷⁸ where the court held that the decision to prosecute was amenable to judicial review if an unjustified departure from normal prosecution practice could be established or “even if, without reference to wider policies or practice, it is insofar as it amounts to a breach of contract or representation.”⁷⁹

4.2.3 Limitations of Judicial Review in Hong Kong

Since *D v DPP*, the Hong Kong courts have moved away from the “exaggerated sense of deference to ‘constitutionally guaranteed’ independent prosecutorial discretion.”⁸⁰ However, the courts still “labour under a self-imposed unwillingness to review, expressed through reliance upon the strict test of unreasonableness.”⁸¹

Another limitation standing against effective judicial review was described by McConville as “the recourse by courts to grounds for review of an essentially subjective character.”⁸² He commented that “there is, of course, a tension of another kind at work which must be recognised: courts are fully aware that the wider the interpretation given to unreasonableness the greater the risk the courts will slip into reviewing the merits of the decision as opposed to the decision-making process itself.”⁸³ The courts in Hong Kong have nevertheless embraced a

⁷⁴ See *Re Leung Lai Fun* [2018] 1 HKLRD 523 (CA) at [14]; the Court noted that the party seeking judicial review of a decision not to prosecute did “not have all the information in the control of the DPP, including the statements and explanations of the persons concerned.”

⁷⁵ *D v Director of Public Prosecutions*, above n 62.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *R v Inland Revenue Commissioners, ex parte Allen* [1997] STC 1141.

⁷⁹ Bruce, above n 72; CPS “Appeals: Judicial Review of Prosecutorial Decisions” <www.CPS.gov.uk>.

⁸⁰ Michael James McConville “Politicians and Prosecutorial Accountability in Hong Kong” 36 *Common Law World Review* 355 at 375. See *D v Director of Public Prosecutions*, above n 62.

⁸¹ McConville, above n 80, at 375. See *Re Leung Lai Fun*, above n 73. See also *Ng Shek Wai v Independent Commission Against Corruption* [2018] HKCFI 720 at [34] (a decision not to further investigate a possible offence).

⁸² McConville, above n 80, at 367.

⁸³ *Ibid.*, at 367.

strict view of the unreasonableness standard. The difficulties for an applicant to prove that the prosecution decision was made dishonestly or in bad faith is an onerous task and one that is unlikely to occur in practice. However, where a prosecutor provides reasons for his or her decision not to prosecute they may disclose as in *D v DPP* a clear error of law. Fok JA (now Fok PJ) identified the relevant duty to give reasons in *Lister Assets Ltd v Chief Executive in Council*.⁸⁴

4.2.4 Comparison with New Zealand

While the HKSAR courts labour under a strict but a self-imposed approach to review of prosecution decisions, the HKSAR courts have made significant constitutional developments to the concept of ‘reviewability.’

D v DPP is an important case to contrast with the High Court decision of *Osborne v WorkSafe New Zealand* to illustrate the differences in judicial attitudes towards reviewability in each jurisdiction. Counsel for both Anna Osborne in *Osborne* and the domestic maid “D” in *D v DPP* relied on *Matalulu v Director of Public Prosecutions (Fiji)* as authority for the position that prosecution decisions are amenable to judicial review.⁸⁵ Zervos J found in *D v DPP* that *Matalulu* disapproved *Keung Siu-wah*,⁸⁶ by deciding that judicial review of prosecutorial discretion can be exercised sparingly. One of the strong comments that came from the *Matalulu* decision was that established principles of judicial review are applicable when prosecution power is reviewed. Zervos J’s judgment alluded to this by holding that the prosecution decision was amenable to judicial review as a matter of principle. Contrastingly, Brown J’s decision in *Osborne* took a very conservative view of the *Matalulu* decision and focused on an extremely closed element of the decision which has since been overridden. Brown J was persuaded by *Matalulu*’s stance on irrelevant considerations as not open to review, yet strayed from the main

⁸⁴ *Lister Assets Ltd v Chief Executive in Council* CACV 172/2012, 25 April 2013 at [20] “Moreover, there is no general duty at Common law to give reasons for an administrative decision. Instead, the duty may arise as a matter of fairness in the particular circumstances of the decision. The general position is stated in *R v Home Secretary ex p Doody* [1994] 1 AC 531 at p 564E and *R (Hansan) v Secretary of State for Trade and Industry* [2009] 3 All ER 539 at 19.” At [21] “There are two situations in which, by way of exception to the general rule, reasons may be required for an administrative decision. The first is where the decision appears aberrant, so that the reasons for reaching that decision should be made known to the recipient so that he may know whether the aberration is a legal one (and so challengeable) or apparent. The second is where the decision engages an interest such as personal liberty that is so highly regarded by the law that fairness requires that reason to be given as a right. See *R v Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 WLR 242 at 263.”

⁸⁵ *Matalulu v Director of Public Prosecutions (Fiji)* [2004] NZAR 193 (SC Fiji).

⁸⁶ *Keung Siu-wah v Attorney-General*, above n 40.

and widely approved point that when review is properly engaged, it would accord with principles for judicial review to be granted. Zervos J's decision in *D v DPP* took a modern approach, in line with recent authority that has overlooked the austere parts of *Matalulu*.⁸⁷

One reason why the application for judicial review succeeded in *D v DPP* was that the court was persuaded by the English approach to judicial review of declined prosecutions. The case *Mohit* was decided by the Privy Council and was considered in *D v DPP* and not considered in the High Court in *Osborne*.⁸⁸ The central issue in *Mohit* was whether the decision of the DPP to discontinue a private prosecution was subject to judicial review. The Privy Council, with Lord Bingham delivering the judgment held that the threshold for a successful challenge of a prosecutor's decision is high, however "it is one thing to conclude that the courts must be sparing in their grant of relief to those seeking to challenge the DPP's decisions not to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any review at all." The court in *Mohit* actually endorsed the view that prosecution decisions are poly-centric in nature as stated in *Matalulu*, but made it firmly clear that it does not prevent decisions from being reviewable at all.⁸⁹ Brown J's judgment in *Osborne* did not refer to the *Mohit* decision. If *Mohit* had been given consideration, it would have provided valuable insight into the more recent English approach and may have reduced the persuasiveness of the rigid *Matalulu* decision heavily relied on.

4.3 Canada

In Canada, the Public Prosecution Service of Canada Deskbook contains the test for prosecution.⁹⁰ Prosecutors first consider "the evidential test, which requires that there be more than a bare prima facie case; however, it does not require a probability of conviction (that is,

⁸⁷ It must be noted that *Matalulu v Director of Public Prosecutions*, above n 85, was decided by Von Doussa and French JJ of the Federal Court of Australia (the latter later Chief Justice of Australia) and Keith J of the Court of Appeal, later of the Supreme Court of New Zealand and the International Court of Justice. The presiding judges in *Matalulu* came from countries where judicial review of discontinued prosecutions had never succeeded. This leaves little speculation as to why the *Matalulu* decision itself was so restrictive. *Matalulu* must be read as constrained by this factor, and it should now be compared against more recent cases that have widened the scope for review. See now *R v Director of Public Prosecutions ex parte Jones (Timothy)* [2000] IRLR 373, [2000] Crim LR 858; and *Webster v Crown Prosecution Service* [2014] EWHC 2516. These cases have widened the scope for judicial review since *Matalulu*.

⁸⁸ See *Mohit v Director of Public Prosecutions of Mauritius*, above n 40.

⁸⁹ Also approved in *R v Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 QB 118, [1968] 1 All ER 763 (CA) and in *R v Director of Public Prosecutions ex parte Chaudhary* [1995] 1 Cr App R 136.

⁹⁰ Public Prosecution Service of Canada Deskbook at part 2.3 referring to the Guideline of the Director Issued under Section 3(3)(c) of the Director of Public Prosecutions Act, S.C. 2006, c.9, s. 121.

that a conviction is more likely than not).”⁹¹ Prosecutors then consider whether a prosecution would best serve the public interest.

4.3.1 Judicial Reviewability of Prosecutions Decisions

The Canadian courts have repeatedly affirmed that prosecutorial discretion is necessary for the proper functioning of the criminal justice system in light of *R v Cook*.⁹² In *Miazga v Kvello Estate* prosecutorial discretion was considered fundamentally important “not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their *quasi*-judicial role as ‘ministers of justice.’”⁹³ In *Sriskandarajah v United States of America*, the Supreme Court of Canada held that: “Not only does prosecutorial discretion accord with the principles of fundamental justice — it constitutes an indispensable device for the effective enforcement of the criminal law.”⁹⁴

In *R v Anderson*, the court held that all Crown decision-making is reviewable, but made the distinction that “decisions of Crown prosecutors are either exercises of prosecutorial discretion or tactics and conduct before the court.”⁹⁵ Subsequent to the Supreme Court’s decision in *Krieger v Law Society of Alberta*,⁹⁶ the law had been clouded as a result of confusion over the meaning of “prosecutorial discretion,” so the *Anderson* court took the opportunity to clarify this point. The court found that “prosecutorial discretion” is an expansive term covering all “decisions regarding the nature and extent of the prosecution and the Attorney General’s participation in it.”⁹⁷

The courts in Canada afford a high level of deference to prosecutors making their prosecution decisions. In *Anderson*, the court observed that:⁹⁸ “The many decisions that Crown prosecutors

⁹¹ *Armani Da Silva v The United Kingdom*, above n 1 at [184].

⁹² *R v Cook* [1997] 1 SCR 1113, at [19]. See also *R v Beare* [1988] 2 SCR 387 at 410; *R v T (V)* [1992] 1 SCR 749 at 758-762.

⁹³ *Miazga v Kvello Estate* 2009 SCC 51, [2009] 3 SCR 339 at [47].

⁹⁴ *Sriskandarajah v United States of America* 2012 SCC 70, [2012] 3 SCR 609 at [27].

⁹⁵ *R v Anderson* 2014 SCC 41 [2014] 2 SCR 167 at [36].

⁹⁶ *Krieger v Law Society of Alberta* 2002 SCC 65, [2002] 3 SCR 372.

⁹⁷ *R v Anderson*, above n 95, at [44], citing *Krieger v Law Society of Alberta*, above n 96 at [47].

⁹⁸ *Ibid*, at [46].

are called upon to make in the exercise of their prosecutorial discretion must not be subjected to routine second-guessing by the courts. The courts have long recognized that decisions involving prosecutorial discretion are unlike other decisions made by the executive: see M Code, “Judicial Review of Prosecutorial Decisions: A Short History of Costs and Benefits, in Response to Justice Rosenberg” (2009) 34 *Queen’s LJ* 863, at 867.” On the same footing, the court in *Power* commented that judicial reluctance to interfere in prosecutorial decisions is a “matter of principle based on the doctrine of separation of powers as well as a matter of policy founded on the efficiency of the system of criminal justice” which also recognizes that prosecutorial discretion is “especially ill-suited to judicial review.”⁹⁹

The *Anderson* court affirmed that “manifestly, prosecutorial discretion is entitled to considerable deference. It is not, however, immune from all judicial oversight.”¹⁰⁰ The court in *R v Jewitt* reversed a long line of authority, and effectively established judicial review of prosecutorial misconduct at common law.¹⁰¹ The Supreme Court of Canada has affirmed on several occasions that prosecutorial discretion is also reviewable for abuse of process.¹⁰²

4.3.2 The Highest Legal Test for Review

Canada currently maintains the highest threshold for review of non-prosecutions in all of the selected jurisdictions. The legal test is one of ‘flagrant impropriety.’¹⁰³ The courts only take into account the prosecutor’s decision-making process and exclude any consideration of factors that the prosecutor may have paid regard to in reaching his final decision. In *Kostuch v Alberta (Attorney General)* the court used Miller ACJ’s definition¹⁰⁴ of ‘flagrant impropriety’ that it “can only be established by proof of misconduct bordering on corruption, violation of the law, bias against or for a particular individual or offence.”¹⁰⁵ The court in *Nixon v R* held that the abuse of process doctrine comes into play where there is evidence that the Crown’s decision

⁹⁹ *R v Power* [1994] 1 SCR 601 at 623.

¹⁰⁰ *R v Anderson*, above n 95, at [48].

¹⁰¹ *R v Jewitt* [1985] 2 SCR 128 (SCC).

¹⁰² *Krieger v Law society of Alberta*, above n 96, at [32]; *Nixon v R* [1984] 2 SCR 197 at [31]; *Miazga v Kvello Estate*, above n 93, at [46].

¹⁰³ *Gentles v Ontario (Attorney-General)* (1996), 39 CRR (2d) 319, 1996 CarswellOnt 4247 (QL) at [55]; *Perks v Ontario (Attorney General)* 1998 CarswellOnt 416, [1998] OJ no. 421; *Krieger v Law society of Alberta*, above n 96, at [49], *Kostuch v Attorney General* (1995), 174 AR 109 (CA) at [33].

¹⁰⁴ *Kostuch v Alberta* (1991), 121 AR 219, 66 CCC (3rd) 201 (QB) at 206 per Miller ACJ.

¹⁰⁵ *Kostuch v Alberta (Attorney-General)*, above n 103, at [34].

“undermines the integrity of the judicial process” or “results in trial unfairness.”¹⁰⁶ The Court also referred to “improper motive[s]” and “bad faith”¹⁰⁷ in its discussion. Courts in more recent cases generally use the precise term of ‘flagrant impropriety’ and have added to the definition of it, ‘improper motive,’¹⁰⁸ ‘bad faith’ or ‘so wrong as to violate the conscience of the community.’¹⁰⁹

There have been recent attempts to expand the meaning of ‘flagrant impropriety’ but the courts have to date, been unaccepting of further expansion. In both the cases of *Kostuch v Attorney General* and *Gentles v Ontario (Attorney-General)*, the argument that violations of the Canadian Charter of Rights and Freedoms should be grounds to review the charging decisions of prosecutors was raised.¹¹⁰ In both cases the argument was rejected, finding that violations of s7 of the Charter does not amount to ‘flagrant impropriety,’ preventing the courts from intervention. The argument was also tested in *McHale v Ontario (Attorney-General)* regarding a violation of section 15 of the Charter involving prosecutorial bias towards police.¹¹¹ The argument did not stand in that case either. The courts have also dismissed arguments to expand the definition of ‘flagrant impropriety’ to include a simple “error of law”¹¹² and where allegations of Aboriginal rights being violated, were unfounded.¹¹³ However, it appears that true violations of Aboriginal rights may be accepted as ‘flagrant impropriety’ in light of the statement made by Moldaver J in *R v Anderson*, at least where Aboriginals have been subject to prosecutorial discrimination: “Crown decisions motivated by prejudice against Aboriginal persons would certainly meet this standard.”¹¹⁴

The Canadian legal system has its roots in the common law legal tradition, except for the Province of Québec which has its own unique legal system.¹¹⁵ The courts in Québec have adopted a wider definition of ‘flagrant impropriety,’ that extends to decisions of the Crown

¹⁰⁶ *Nixon v R*, above n 102, at [64]

¹⁰⁷ *Ibid*, at [68].

¹⁰⁸ *Perks v Ontario (Attorney General)*, above n 103 at [8].

¹⁰⁹ *Gentles v Ontario (Attorney-General)*, above n 103, at [54].

¹¹⁰ *Kostuch v Attorney General*, above n 103; *Gentles v Ontario (Attorney-General)*, above n 103.

¹¹¹ *McHale v Ontario (Attorney-General)* 2011 CarswellOnt 5984, 239 CRR (2d) 73.

¹¹² *Zhang v Canada (Attorney-General)* (2007) 61 Admin LR (4th) 99 at [14].

¹¹³ *Labrador Metis Nation v Canada (Attorney General)* 267 FTR 219, [2005] 4 CNLR 212, 35 Admin LR (4th) 239.

¹¹⁴ *R v Anderson*, above n 95, at [50].

¹¹⁵ Québec is the only province in Canada which regulates civil matters by French-heritage civil law. Other areas of the law such as; public law, criminal law and other federal law operate in accordance to Canadian common law.

prosecutor that are “patently unreasonable.”¹¹⁶ Although the standard in Québec is lower than the ‘flagrant impropriety’ standard used in the rest of Canada, the permissible grounds of review paired with the burdensome standards of evidential proof, have made the ‘patently unreasonable’ standard similarly burdensome for claimants to satisfy.

The burden of proof required for the ‘flagrant impropriety’ standard lies on the accused to establish on the balance of probabilities the proper evidentiary foundation to proceed with an abuse of process claim.¹¹⁷ However it was recognised by the court in *Nixon* that since the Crown will almost always be the only party who knows why a particular decision was made, the Crown may be required to give their reasons for making the decision in order to justify the decision taken when the claimant has satisfied the evidentiary foundation.¹¹⁸ Moldaver J in *Anderson* noted that:¹¹⁹ “Requiring the claimant to establish a proper evidentiary foundation before embarking on an inquiry into the reasons behind the exercise of prosecutorial discretion¹²⁰ respects the presumption that prosecutorial discretion is exercised in good faith...It also accords with this Court’s statement in *Sriskandarajah*, that ‘prosecutorial authorities are not bound to provide reasons for their decisions, absent evidence of bad faith or improper motives.’”¹²¹

In *R v Power*, it was held that the court should be presented with “overwhelming evidence that the proceedings under scrutiny are unfair.”¹²² In *R v Roach* the court concluded that it is not always necessary for cases under review to require an evidential foundation of affidavits or viva voce testimony.¹²³

¹¹⁶ *Bérubé c Québec (Procureur général)* 1996 CarswellQue 1183, [1997] RJQ 86. See also, *Law Society of New Brunswick v Ryan* [2003] 1 SCR 247 at [52] per Justice Iacobucci; “A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.”

¹¹⁷ *R v Anderson*, above n 95, at 52 per Moldaver J; *R v Cook*, above n 91, at [62]; *R v O’Connor*, [1995] 4 SCR 411 at [69] per L’Heureux-Dubé J; *R v Jolivet* [2000] 1 SCR 751 at [19].

¹¹⁸ *Nixon v R*, above n 102, at [60].

¹¹⁹ *R v Anderson*, above n 95, at [55].

¹²⁰ *Application under s83.28 of the Criminal Code (Re)* 2004 SCC 42, [2004] 2 SCR 248 at [95].

¹²¹ *Sriskandarajah v United States of America*, above n 94, at [27].

¹²² *R v Power*, above n 99, at [17] per L’Heureux-Dubé J.

¹²³ *R v Roach* 2013 ABQB 472 at [36].

Despite the ‘flagrant impropriety’ being the automatic standard used to review prosecutorial discretion in Canada, claimants may also bring review for “malicious prosecution.”¹²⁴ To establish malicious prosecution the plaintiff must prove the following:¹²⁵

1. Initiated by the defendant;
2. Terminated in favour of the plaintiff;
3. Undertaking without reasonable and probable cause; and
4. Motivated by malice or a primary purpose other than carrying the law into effect.

Canadian claimants have experienced greater success for challenges that have been brought on the grounds of “malicious prosecution” or “abuse of process” for the simple reason that the courts have more power to intervene and a greater evidential matrix during a trial. In fact, claimants are nowadays attempting to rely on the abuse of process doctrine instead of claiming alleged ‘flagrant impropriety’ in order to seek a *certiorari* order against Crown prosecutors that have stopped private prosecutions, on the sheer basis that the courts are more likely to intervene.¹²⁶ However, none of these attempts to date have been successful. In the case *Ahmadoun v Ontario* the court had grave doubts whether the applicant had standing to seek to quash the Crown’s decision entering a stay in criminal proceedings against a defendant.¹²⁷

4.3.3 Comparison with New Zealand

In Canada, the Crown prosecutor’s discretionary power to prosecute or not derives from prerogative power.¹²⁸ Although the courts have accepted that such decisions are justiciable, the fact that the power is still sourced in the prerogative might indicate why the courts in recognition of common law tradition, have afforded a high level of deference to prosecutors that is unmatched across other jurisdictions and have set the exacting standard of ‘flagrant impropriety.’ The New Zealand position is different in that the courts willingness to intervene is not conditioned by the source of the discretionary power. Rather, it is only whether the exercise of that power is lawful that remains critical.

¹²⁴ *Krieger v Law Society of Alberta*, above n 96, at [46], [47] and [49]; the Supreme Court of Canada held that courts may interfere in circumstances of ‘flagrant impropriety’ or ‘malicious prosecution.’

¹²⁵ *Miazga v Kvello Estate*, above n 93 at [3]; *Nelles v Ontario* [1989] 2 SCR 170 at 193; *Proulx v The Attorney General of Quebec* [2001] 3 SCR 9 at [123].

¹²⁶ *Ahmadoun v Ontario (Attorney General)* 281 CCC (3d) 270, [2012] OJ No 639 (QL).

¹²⁷ *Ibid*, at [6].

¹²⁸ The scope and exercise of the prerogative power of the Crown prosecutor to decide whether to prosecute is sourced from common law practice that has not been codified in Canada.

The most explicit difference between the two jurisdictions are the tests used by their respective courts and the standards of proof required to meet evidentiary thresholds. Comparatively, the Canadian ‘flagrant impropriety’ standard is far more stringent than New Zealand’s ‘exceptional circumstances’ approach.¹²⁹ In the Canadian case *R v Durette* Finlayson JA observed that it was the burden of the applicant to give sufficient and clear evidence to support his allegation against the Crown Prosecutor and that this must be done before the court will scrutinise the prosecutor’s exercise of discretionary power.¹³⁰ If the burden is not met, it is assumed by the courts that there are no issues relating to the exercise of power by the Crown prosecutor. It was noted in *R v Laforme* that mere conjecture or speculation is insufficient to meet the ‘flagrant impropriety’ threshold.¹³¹

Crown prosecutors in both jurisdictions are not obliged to provide reasons for their charging decisions. When reasons are not given in a decision not to prosecute, it becomes extremely difficult for victims to obtain evidence concerning the decision-making process that would go towards satisfying the evidential threshold.

4.4 United Kingdom

4.4.1 Different Approaches to Judicial Review of Decisions *to* and *not to* Prosecute

Of all the jurisdictions selected for consideration, the law in the United Kingdom will have the most weight in terms of judicial direction for New Zealand. The New Zealand legal system is heavily based on English law, and by virtue of the common heritage, remains similar in many respects. Both jurisdictions do not have a single document written constitution, therefore the confines of judicial review cannot be delineated by any words in a constitution.¹³² Furthermore, both jurisdictions do not define the appropriate scope of judicial review by any statute. The

¹²⁹ Although the ‘exceptional circumstances’ approach only allows for review if it can be established that “the prosecuting authority acted in bad faith or brought the prosecution for collateral purposes”; *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC) at [64] this is still a less limited form of review than that requiring ‘flagrant impropriety’. But see Dean R Knight “A Murky Methodology: Standards of Review in Administrative Law” (2006) 6 NZJPIL 117 at 145-146; who made the reference that judicial review of prosecutorial discretion in New Zealand would fall under the ‘flagrant impropriety’ standard of review when applying his own framework for the basis of judicial intervention.

¹³⁰ *R v Durette* (1992) 72 CCC (3d) 421 at 437 – 439.

¹³¹ *R v Laforme* (2003), 57 WCB (2d) 40, [2003] OJ no 845 (Ont SCJ) at [8].

¹³² For discussion of New Zealand’s constitutional structure and the foundations of judicial review see Joseph, Philip A Constitutional and Administrative Law in New Zealand (4th ed, Brookers, Wellington, 2014) at [8.0] and [22.0].

legislation¹³³ that relates to the review in this context is procedural only, and therefore it is the full responsibility of the courts in both jurisdictions to set the limits or boundaries to the grounds of review as a function of the supervisory jurisdiction under the Rule of Law.¹³⁴

Judicial review of prosecution decisions to prosecute or not is a situation that is treated with special restraint in the United Kingdom, but it is accepted that such decisions are amenable to review.¹³⁵ The United Kingdom's Supreme Court in *Belhaj and another v Director of Public Prosecutions* gave a short summary of the position:¹³⁶ "The High Court's review jurisdiction extends in principle to the exercise of any official's functions in relation to the criminal process. These include...decisions of prosecutors whether or not to prosecute (*R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE Intervening)* [2009] 1 AC 756, para 30), or of the Director of Public Prosecutions to consent to a prosecution (*R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326); and decisions of the Attorney General whether to take over a prosecution or enter a nolle prosequi (*Mohit v Director of Public Prosecutions of Mauritius* [2006] 1 WLR 3343)."

In *R (on the application of Gujra) v Crown Prosecution Service* it was held that "The general approach of the courts is to disturb a decision of an independent prosecutor only in highly exceptional cases."¹³⁷ The Court in *Sharma* made a similar observation stating "judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy."¹³⁸

¹³³ Formerly the Judicature Amendment Act 1972 and now the Judicial Review Procedure Act 2016 [NZ].

¹³⁴ As noted in GDS Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, Lexis Nexis, Wellington, 2014) at [5.02], the legislative history surrounding the Judicature Amendment Act 1972 indicates that the legislation was intended merely to renovate the procedure for judicial review. See now the Judicial Review Procedure Act 2016.

¹³⁵ In certain circumstances the courts in the United Kingdom have also been willing to judicially review prosecutorial decisions relating to youths. See *R v Chief Constable of Kent, ex parte L; R v Director of Public Prosecutions, ex parte B* (1991) 93 Cr App R 416; the Divisional Court held that prosecutorial discretion to prosecute a youth or not is not amenable to judicial review. The court decided however that judicial review is only able to only succeed where evidence could be shown that the decision was made regardless of, or clearly contrary to, a settled policy of the DPP evolved in the public interest (for example, the policy of cautioning juveniles). In *R (on the application of F) v Crown Prosecution Service and Chief Constable of Merseyside Police* [2003] EWHC 3266 (Admin); the court decided a judicial review application involving a decision to pursue a prosecution against a youth. The claimant argued that his case should be dealt with by way of a final warning. That application failed as the Divisional Court held that all relevant matters had been considered and that the prosecutor had given proper regard to the Code for Crown Prosecutors, and that the prosecutor's decision was rational. The court made the observation that it was inappropriate for it to retake decisions that Parliament had entrusted to the CPS except in exceptional circumstances.

¹³⁶ *Belhaj and another v Director of Public Prosecutions* [2018] EWHC 3056, 4 July 2018 at [16].

¹³⁷ *R (on the application of Gujra) v Crown Prosecution Service* [2012] UKSC 52, [2013] 1 AC 484 (UKSC) at [41].

¹³⁸ *Sharma v Brown-Antoine*, above 59, at [14(5)].

Likewise, in *R (Birmingham) v Director of the Serious Fraud Office* the court found that judicial review of the prosecutor's decision whether to launch a prosecution is to be exercised sparingly.¹³⁹ The court in *Mohit* also commented that the prosecutorial decisions of English Directors of Public Prosecutions are in principle amenable to judicial review.¹⁴⁰

The administrative courts of England and Wales take different approaches to review depending on whether the decision was *to* prosecute or whether it was *not to* prosecute. The Supreme Court in *Belhaj* explained that:¹⁴¹ “Judicial review proceedings challenging decisions whether or not to prosecute are not common. In the case of decisions not to prosecute, a more appropriate forum for any challenge is usually the criminal process itself, in which the court has power to halt proceedings if they constitute an abuse. Nevertheless, challenges by potential defendants by way of judicial review to decisions to prosecute are probably more familiar than challenges by victims, interest groups or others by way of judicial review to decisions not to prosecute.”

4.4.2 Judicial Review of the Decision *to* Prosecute

In *R v (Pepushi) v Crown Prosecution Service* the court observed “save in wholly exceptional circumstances, applications in respect of pending prosecutions that seek to challenge the decision to prosecute should not be made in this court. The proper course to follow...is to take the point in accordance with procedures of the Criminal courts.”¹⁴² In *R v Panel on Takeovers and Mergers*, Steyn LJ in the Court of Appeal noted *obiter* that “in the absence of evidence of fraud, corruption or *mala fides*, judicial review will not be allowed to probe a decision to charge individuals in criminal proceedings.”¹⁴³ The court in *Kebilene* made a similar observation and held that where there is a remedy within the criminal process and there is no finding of dishonesty, bad faith or other exceptional circumstance, the DPP's decision is not amenable to judicial review.¹⁴⁴

¹³⁹ *R (Birmingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2007] QB 727 at [63].

¹⁴⁰ *Mohit v Director of Public Prosecutions of Mauritius*, above n 40, at [18].

¹⁴¹ *Belhaj and another v Director of Public Prosecutions*, above n 136 at [32].

¹⁴² *R v (Pepushi) v Crown Prosecution Service* [2004] EWHC 789 (Admin) at [49].

¹⁴³ *R v Panel on Take-overs and Mergers, ex parte Fayed* [1992] BCC 524 at 536C-D per Steyn LJ.

¹⁴⁴ *R v Director of Public Prosecutions, ex parte Kebilene and Others* [1999] UKHL 43, [2000] 2 AC 326, [1999] 3 WLR 972 at 337. See to the same effect, in the context of a decision to prosecute, the terse rejection of a challenge to a prosecution by Simon France J in *Rowell v District Court of Wellington* [2017] NZHC 2706;

In *R v Panel of Take-overs and Mergers, ex parte Datafin plc* the Court of Appeal held that the amenability of judicial review often requires an examination of the nature of the power under challenge including its source:¹⁴⁵

In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction [of judicial review], but it is a fatal error to regard the presence of all those factors as essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction.

In *Allen*, the High Court Queen's Bench Division found that decisions to prosecute are judicially reviewable if evidence can establish that there was an unjustified departure from settled prosecution practice.¹⁴⁶ Review may also be available if there is no reference to any wider policy or practice, where the actions are so unfair that it amounts to a breach of contract or representation. The courts in *Allen* emphasised that judicial review of decisions to prosecute will though very rarely succeed.

The Divisional Court in *R v Liverpool City JJ and the CPS, ex parte Price* held that the circumstances for a review of a decision to prosecute would have to be exceptional where there is perversity, or if the decision is contrary to the Code for Crown Prosecutors.¹⁴⁷ However, in practice, the courts are reluctant to intervene in the expanded grounds of acting perversely or contrary to the Code for Crown Prosecutors.

In *Kebilene*, the House of Lords stated "absent dishonesty or *mala fides* or an exceptional circumstance, the decision of the Director to consent to the prosecution of the [claimants] is not amenable to judicial review."¹⁴⁸ The court then quashed the Divisional Court's declaration that the continuing decision of the DPP to proceed with the prosecution was unlawful.

There are numerous policy reasons that underlie the court's reluctance to review a prosecutor's decision to prosecute without first demonstrating fraud, corruption, or *mala fides* in the

[2017] NZAR 1717 pointing out the full powers of the Criminal Procedure Act 2011 to deal with such issues at trial by conventional procedures.

¹⁴⁵ *R v Panel of Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815, [1986] 2 All ER 257 per Lord Donaldson MR.

¹⁴⁶ *R v Inland Revenue Commissioners, ex parte Allen*, above n 78.

¹⁴⁷ *R v Liverpool City JJ and the Crown Prosecution Service, ex parte Price* (1998) 162 JP 766.

¹⁴⁸ *R v Director of Public Prosecutions, ex parte Kebilene and Others*, above n 144, at 369H-371G.

decision-making process. The case *Sharma* highlights the critical reason that the accused has alternative options other than judicial review, such as subsequent criminal trials or the ability to file a motion to stay a prosecution where there has been an abuse of process.¹⁴⁹

In *Sharma*, judicial review was sought as to a decision to begin disciplinary proceedings against the Chief Justice of Trinidad and Tobago who was charged with attempting to pervert the course of justice. The Privy Council held that although decisions *to* prosecute are susceptible to review, interference with the prosecutor's decision would be rare and the court must be satisfied that such a claim would have a realistic prospect of success and could not be addressed through the normal criminal process. The request was rejected by the court as it saw that the matter could be resolved through the criminal process and held that it was the correct forum to deal with the issue at hand.¹⁵⁰

The court in *R (Barons Pub Company) v Staines Magistrates Court* considered whether public law principles that limit the scope of judicial review should be imported into criminal litigation.¹⁵¹ The defendant company was charged with contraventions of the Food Hygiene (England) Regulations 2006 and the local council decided to prosecute. The defendant company applied to stay the proceedings as an abuse of process as it contended that the decision to prosecute was perverse because it was in breach of the council's enforcement policy. The company proposed that the magistrates to review the prosecutorial decision via "mini judicial review." The Administrative Court dismissed the claim and found that a challenge relating to such a decision should not be made outside of the criminal proceedings. It may only be challenged as an abuse of process application which, by definition, could only be determined by the criminal trial court.

The authorities regarding judicial review of the decision *to* prosecute demonstrate that review in this context is almost insurmountable. There appears to be only one modern example where such a judicial review in the United Kingdom has succeeded. In the case *E and others v DPP*

¹⁴⁹ *Sharma v Brown-Antoine*, above n 59.

¹⁵⁰ *Ibid*, at [31] per Baroness Hale, Lord Carswell and Lord Mance. They went on to state at [32]; "In our opinion, the same responsibility extends to the oversight of executive action in the form of a police or other prosecutorial decision to prosecute. The power to stay for abuse of process can and should be understood widely enough to embrace an application challenging a decision to prosecute on the ground that it was arrived at under political pressure or influence or was motivated politically rather than by an objective review of proper prosecutorial considerations (such as, in England, those set out in the Code for Crown Prosecutors issued under the Prosecution of Offences Act 1985)."

¹⁵¹ *R (on the application of Barons Pub Company Ltd) v Staines Magistrates' Court* [2013] EWHC 898 (Admin).

judicial review was sought of a decision by the respondent to prosecute a 14-year-old child for her alleged sexual abuse of her two younger sisters aged five and six.¹⁵² The case succeeded in review on the point that the prosecution policy had not “as a matter of irrefutable substance” been correctly applied.¹⁵³ The prosecutor’s explanations for the decision were quite radically deficient and were such that it was “impossible to know” how the prosecutor had reconciled or dealt with the powerful countervailing considerations involving the welfare of all the children.

4.4.3 Judicial Review of Decisions *Not to Prosecute*

Prosecutorial decisions *not to prosecute* in the United Kingdom are amenable to review, however the courts have emphasized that intervention should be sparingly exercised.¹⁵⁴ Judicial review of decisions *not to prosecute* share the same grounds of “fraud, corruption, and *mala fides*” for review as decisions *to prosecute*, however the courts are comparatively more receptive of variegated forms of intensity of review and structured forms of deference.¹⁵⁵ As a result, applications for review of non-prosecutions has achieved some success in the United Kingdom.¹⁵⁶ In *Manning*, Lord Bingham CJ gave a comprehensive reason explaining that if the standard of review were ‘too exacting’ victims will have no effective remedies to deal with flawed decisions as decisions not to prosecute do not proceed to trial, nor do they go through other proceedings where the legitimacy of such decisions may be checked.¹⁵⁷ His Lordship’s reasoning and principle was adopted in subsequent cases.¹⁵⁸

¹⁵² *E and others v Director of Public Prosecutions* [2011] EWHC 1465 (Admin), [2012] 1 Cr App R 6, [2012] Crim LR 39.

¹⁵³ *Ibid*, at [55] per Munby LJ (McCombe J concurring).

¹⁵⁴ *R v Director of Public Prosecutions, ex parte Chaudhary*, above n 89.

¹⁵⁵ See Dean R Knight “Modulating the Depth of Scrutiny in Judicial Review” [2016] New Zealand Law Review at 78. See *R v Director of Public Prosecutions v ex parte Manning* [2001] QB 330, where the court examined the reasonableness of the prosecutor’s application the evidential sufficiency test.

A counter-example is found, however in the case *R (on the application of F) v Director of Public Prosecutions* [2013] EWHC 945 (Admin), [2014] 2 WLR 190; while the judge’s rhetoric clearly advocates for a ‘reasonableness’ standard, the reasoning in his judgment arguably applies a standard of ‘correctness.’

¹⁵⁶ *R v Director of Public Prosecutions, ex parte Chaudhary*, above n 89; *R v Director of Public Prosecutions ex parte Jones (Timothy)*, above n 86; *R v Director of Public Prosecutions, ex parte Treadaway* [1997] EWHC Admin 741, *The Times*, 31-October-1997; *R v Director of Public Prosecutions v ex parte Manning*, above n 155; *R (On the application of Joseph) v Director of Public Prosecutions* [2001] Crim LR 489; *R (on the application of Peter Dennis) v Director of Public Prosecutions* [2006] EWHC 3211.

¹⁵⁷ *R v Director of Public Prosecutions v ex parte Manning*, above n 155.

¹⁵⁸ See *R (on the application of D) v Director of Public Prosecutions* [2017] EWHC 1768 (Admin), [2017] Crim LR 907; *Socha v Czech Republic* [2016] EWHC 139 (Admin) DC.

In *R v DPP Ex parte Chaudhary* Kennedy LJ noted: “It has been common ground before us in the light of the authorities that this Court does have power to review a decision of the Director of Public Prosecutions not to prosecute, but the authorities also show that the power is one to be sparingly exercised.”¹⁵⁹ His Lordship continued stating: “From all those decisions it seems to me that in the context of the present case this court can be persuaded to act if and only if it is demonstrated to us that the Director of Public Prosecutions...arrived at the decisions not to prosecute...”¹⁶⁰ Whereupon he proceeded to set out the basic principles that ought to be considered in determining whether a decision not to prosecute should be overturned, and established three possible grounds of review. It was held that judicial review is permissible only if it can be demonstrated that the DPP acting through the CPS arrived at the decision *not to prosecute*.¹⁶¹

- 1) Because of some unlawful policy...
- 2) Because the Director of Public Prosecutions failed to act in accordance with his or her own settled policy as set out in the Code; or
- 3) Because the decision was perverse. It was a decision at which no reasonable prosecutor could have arrived.

Of all the grounds founded by Kennedy LJ, perversity has the highest threshold. His Lordship held that perversity included illegality as well as unreasonableness, and is similar to how Lord Greene MR interpreted ‘unreasonableness’ in the (in)famous *Wednesbury* decision, to refer to both illegality and to irrationality.¹⁶² Only the first ground of unlawful policy matches the New Zealand decision in *Polynesian Spa*. The other two grounds; failure to act in accordance with the Code and perversity of the decision were not considered. The *Polynesian Spa* decision made the scope for judicial review of prosecution decisions not to prosecute very limited. Only where there is bad faith, a collateral purpose or an unlawful policy, can the decision be reviewed.¹⁶³ However, other grounds of review such as abuse of a discretionary power and material error of law or fact, may produce the same outcome where the Guidelines are not

¹⁵⁹ *R v Director of Public Prosecutions, ex parte Chaudhary*, above n 89, at 139G-140A.

¹⁶⁰ *Ibid*, at 141B-C.

¹⁶¹ The following narrow grounds were also accepted as challenges to a CPS decision by Sir John Thomas P and Simon J in *L v DPP* [2013] EWHC 1752 (Admin). These propositions were applied in *R v Director of Public Prosecutions, ex parte Chaudhary*, above n 89. To these ‘narrow grounds’ must be added the broader grounds of impropriety or abuse of power mentioned by Lord Judge LCJ in *R (on the application of F) v Director of Public Prosecutions*, above n 155.

¹⁶² *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, [1948] 1KB 223 (CA). See Palmer J’s criticism of its circularity in *Hu and Ors v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [27].

¹⁶³ *Polynesian Spa Ltd v Osborne*, above n 129, at [64].

followed. The New Zealand courts have never articulated outright if perversity is a ground for review.

The United Kingdom has a great body of jurisprudence regarding judicial review of the decision not to prosecute. Some cases which have experienced success under the grounds founded in *Chaudhary* are considered below.¹⁶⁴

4.4.4 Error in Law

The facts of *Chaudhary* related to the issue of whether the prosecutor approached his decision in accordance with the Code.¹⁶⁵ The court observed that the CPS had confused or conflated consensual buggery and non-consensual buggery, which are two separate and distinct offences in the evidentiary sufficiency test. The court held that since the prosecutor had looked to convict on a less serious offence and failed to consider the question of whether the evidential sufficiency criteria had been met in relation to the more serious offence, the prosecutor had therefore made an error of law, making his decision to discontinue ultimately irrational.

In *R v Director of Public Prosecutions, ex parte Jones (Timothy)*, the Divisional Court found that the DPP's decision not to prosecute a company or its managing director for the manslaughter of the claimant's brother in a workplace accident had been irrationally concluded.¹⁶⁶ The court held that the DPP had correctly identified the objective test for gross negligence manslaughter, but then had permitted a lack of subjective recklessness to intrude so as to be able to decide not to prosecute. The DPP also failed to address other factors which, in the absence of subjective recklessness would usually go against the prospects of a successful conviction. The court decided that the DPP's conclusion that the danger had not been sufficiently obvious was irrational.

4.4.5 Evidential Insufficiency

In *R v Director of Public Prosecutions, ex parte Manning*, the court examined the reasonableness of the prosecutor applying the evidential sufficiency test.¹⁶⁷ It was found by the court that the prosecutor had not properly taken into account certain critical evidential matters

¹⁶⁴ *R v Director of Public Prosecutions, ex parte Chaudhary*, above n 89.

¹⁶⁵ *Ibid.*

¹⁶⁶ *R v Director of Public Prosecutions, ex parte Jones (Timothy)*, above n 87.

¹⁶⁷ *R v Director of Public Prosecutions, ex parte Manning*, above n 155.

and had applied a test that was higher than required by the Code in determining the prospect of success. It was not required by the Code that if a prosecution was brought, that it would more likely than not result in a conviction. Also, the CPS was not required to establish the equivalent standard of proof as that required of a jury or magistrates court after trial, in assessing whether to initiate a conviction or not.

R (on the application of B) v Director of Public Prosecutions was a case involving a serious assault where “B” the victim, had his ear bitten off.¹⁶⁸ The victim identified “HR” as the ear biter. B had a history of psychotic illness which lead him to hold paranoid beliefs about some people, and he also experienced hallucinations. There was no evidence of this in relation to HR however. A medical report describing B’s mental condition concluded that it might affect B’s perception and recollection of events. On this basis, the prosecutor decided without further investigation that this precluded him from putting B before the jury as a reliable witness in the absence of any other evidence to confirm that HR was the ear biter. The prosecutor offered no evidence. The court held that the prosecutor misapplied the Code by deciding not to prosecute on the basis of B’s mental health. The decision was held to be both irrational and also constituted a violation of the victim’s right under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

4.4.6 Procedural Unfairness

In certain circumstances, the English courts have allowed judicial review of decisions not to prosecute under the ground of procedural unfairness. The court in *Manning* made the point that the prosecutor had not given reasons behind his decision not to prosecute in the unlawful killing of a man in custody, which violated Article 2 of the European Convention of Human Rights (ECHR).¹⁶⁹ In following the reasoning of the *Manning* court, the High Court of England and Wales decided in *R (Peter Dennis) v DPP*, that judicial review is available “where an inquest jury has found unlawful killing, the reasons why a prosecution did not follow have not been clearly expressed.”¹⁷⁰ The court also took consideration of the case *Jones (Timothy)* and found

¹⁶⁸ *R (on the application of B) v Director of Public Prosecutions* [2009] EWHC 106 (Admin), [2009] 1 WLR 2072.

¹⁶⁹ *R v Director of Public Prosecutions ex parte Manning*, above n 155.

¹⁷⁰ *R (on the application of Peter Dennis) v Director of Public Prosecutions* [2006] EWHC 3211

that if it can be shown that the evidence used by the prosecutor in making his decision is irrational, then that may also be grounds for review.¹⁷¹

Although the grounds for review in the United Kingdom have developed to be significantly more expansive than the available grounds in New Zealand, the chance of ultimate success for judicial review in England and Wales still remains slim. The following cases illustrate the various ways the courts have refused to intervene in a decision *not to* prosecute.

The case *Patrick John Lewin v Crown Prosecution Service*, involved a CPS decision not to prosecute for manslaughter by gross negligence. An application for judicial review was made but dismissed by the Divisional Court.¹⁷² There was evidence contained in a letter written by the CPS which outlined the reasons for the decision. The court held that the prosecutor's reasoning and conclusions regarding causation could not be faulted. It was found that there was no possibility of proving beyond reasonable doubt that a reasonable person in the position of the potential accused would have foreseen the risk of death. The prosecutor had adhered to the prosecution Code and the decision not to prosecute could not be found to be premature nor tainted by an earlier decision not to prosecute.

In *R (Da Silva) v Director of Public Prosecutions* the Divisional Court dismissed a judicial review application of the prosecutor's decision not to prosecute any police officers for the murder or gross negligence manslaughter of the claimant's cousin in a fatal shooting.¹⁷³ The court found that the decision in *Manning* remained good law following the introduction of the European Convention on Human Rights into domestic law, and thus continued to provide the relevant test concerning the lawfulness of decisions of prosecutors not to bring prosecutions.¹⁷⁴ The court noted that the decision had been made by a highly-experienced Crown prosecutor which was then reviewed by the DPP and a leading counsel both of whom had special expertise of serious criminal trials. The Court also observed that the decision-making process was careful and thorough and that the Crown Prosecutor had given proper regard to the Code and applied the evidential test properly relating to each of the individuals.

¹⁷¹ *R v Director of Public Prosecutions ex parte Jones (Timothy)*, above n 87.

¹⁷² *Patrick John Lewin v Crown Prosecution Service* [2002] EWHC 1049.

¹⁷³ *R (on the application of Da Silva) v Director of Public Prosecutions* [2006] EWHC 3204.

¹⁷⁴ *R v Director of Public Prosecutions ex parte Manning*, above n 155.

In *Marshall v Director of Public Prosecutions*, the appellant sought judicial review of a decision not to prosecute that involved police officers shooting the appellant's son.¹⁷⁵ The decision was made on the basis that there was on insufficient evidence to bring a charge. It was argued by the appellant that the DPP's reasoning was insufficient making the court's task to consider that decision futile. The Privy Council disagreed and held that the DPP was under no obligation to provide further reasoning since it appeared that the prosecutor had not misapprehended or failed to include any important piece of evidence in his consideration. The decision was also not found to be inexplicable nor aberrant. The main issue in the case was whether the DPP could have made his decision sensibly on the evidence, which the Privy Council found that he could, and thus the appeal was unsuccessful.

4.4.7 Recent Developments

On the 4th of July 2018, the United Kingdom Supreme Court handed down its decision in *Belhaj*. The appellants sought judicial review of the failure to prosecute Sir Mark Allen (a former MI6 officer). The application was brought on three grounds: misdirection of law, procedural unfairness and inconsistency with the evidence. The Supreme Court held that only the last of these grounds was relevant to the issue before them and allowed the appeal on the basis that "decision not to prosecute was irrational because...the material in the public domain alone [was] enough to make good the elements of the relevant offences."¹⁷⁶

In June 2013, the CPS in England and Wales launched the Victims' Right to Review Scheme (VRRS) which gave effect to the principles laid down in the case of *R v Christopher Killick* and Article 11 of the European Union (EU) Directive establishing minimum standards on the rights, support and protection of victims of crime.¹⁷⁷ The scheme was designed to make review of CPS decisions not to prosecute easier for victims of crime.¹⁷⁸ The court in *Killick* held that victims have a right to seek review in circumstances where a decision not to prosecute has been made and that victims should not have to seek recourse to judicial review.¹⁷⁹ The court

¹⁷⁵ *Marshall v The Director of Public Prosecutions (Jamaica)* [2007] UKPC 4, [2007] 4 LRC 557.

¹⁷⁶ *Belhaj and another v Director of Public Prosecutions*, above n 136, at [3].

¹⁷⁷ *R v Christopher Killick* [2011] EWCA Crim 1608.

¹⁷⁸ See CPS "Victims' Right to Review Scheme" <www.cps.gov.uk>Judicial review proceedings should not be brought until after the CPS has had an opportunity to review the decision under the VRRS procedure. See also Richard Wilson QC "Judicial Review: An Introduction to Key Principles" in Piers Von Berg *Criminal Judicial Review A Practitioner's Guide to Judicial Review in the Criminal Justice System and Related Areas* (Hart, Oxford, 2014) at 15.

¹⁷⁹ *R v Christopher Killick*, above n 177.

recognised that prosecutors can make errors and therefore an administrative review process must be made available to ensure accountability and redress. The court also stated that the right to review should be made the subject of a clearer procedure and guidance with time limits.

The VRRS mechanism is co-extensive with the right of a victim to seek judicial review of decisions not to prosecute. When a request for review has been made, the CPS arranges for an immediate review of the case by a prosecutor who has had no previous dealings with the case to determine whether the matter can be resolved quickly. If the issue cannot be solved at this stage, the matter proceeds to an independent review carried out by the Appeals and Review Unit or a Chief Crown Prosecutor to determine whether the decision was right or wrong.¹⁸⁰ The standard of review of the VRRS is correctness.¹⁸¹ It allows reviews “even in the case of mere error-extending the role of victims as agents of accountability.”¹⁸² This standard is lower and more easily proved than the standard of reasonableness generally applied in judicial reviews taken in the United Kingdom.¹⁸³

Dr Marie Manikis argues however, that the VRRS includes numerous limitations to accountability. “First, some have argued that it presents severe objectivity issues since these reviews are typically made internally by the CPS. Second, review is limited under this mechanism to decisions not to prosecute.”¹⁸⁴ Dr Manikis highlighted that victims also have an interest in ensuring that decisions to prosecute and decisions to enter into plea discussions are “justified and not tainted with defects, and that a trial might not always be possible or present a sufficient safeguard against these flaws.”¹⁸⁵

Even though the administrative review must be exhausted before victims can proceed to judicial review and the VRRS may bear other limitations, the United Kingdom is the first of

¹⁸⁰ Between 1 April 2014 and 31 March 2015, the CPS reviewed 1,674 cases. In 1,464 of those cases (87%) the prosecutor’s decision was found to be correct, while 210 decisions (13%) were overturned for errors made by the prosecutor.

¹⁸¹ CPS guidance suggests that the local resolution examines whether the decision made was wrong and the independent review considers the case afresh to determine whether the original decision was right or wrong; CPS “Victims’ Right to Review Scheme” <www.cpsgov.uk>. In *R v Christopher Killick*, above n 177, it was made clear that although the original decision not to prosecute was not unreasonable, it was wrong, and that there was a realistic prospect of a conviction that was in the public interest.

¹⁸² Marie Manikis “Expanding participation: victims as agents of accountability in the criminal justice process” (2017) 1 PL 63-80.

¹⁸³ See in *R (on the application of F) v Director of Public Prosecutions*, above n 155, where the court used the review standard of correctness instead of reasonableness.

¹⁸⁴ Manikis, above n 182 at 63-80.

¹⁸⁵ *Ibid.*

all common law jurisdictions to give victims a more accessible process to have prosecution decisions not to prosecute reviewed, including a lower standard to contest those decisions. To this extent, the United Kingdom is leading the way in giving victims better procedural rights and a participation framework based on accountability, “the CPS decision-making in the first instance is an important milestone for victims in their integration into a system of justice that otherwise ill affords victims’ rights that can be enforced against the state.”¹⁸⁶

4.4.8 Comparison with New Zealand

New Zealand’s stance on judicial review of decisions *not to* prosecute is similar to the United Kingdom’s position on review of decision *to* prosecute. The scope for review of decisions *not to* prosecute is considerably more expansive in the United Kingdom since more grounds for review are available.

The jurisprudence of the United Kingdom indicates two significant judicial trends. Firstly, the courts have taken a much more “nuanced and variegated”¹⁸⁷ stance to justiciability of prosecution decisions. Secondly, where the rights of individuals are concerned, the courts are more willing to require prosecutors to be accountable for the process of their decision-making by asking them to provide “reference to the policy basis on which decisions have been taken, and justification in the form of either archival reasons or explanation to the court on judicial review.”¹⁸⁸ The introduction of the VRRS scheme is also indicative of an effort to improve confidence in the justice system. There is a greater level of accountability where prosecutorial discretionary power is concerned in the United Kingdom, and the extensive body of jurisprudence will continue to be a useful comparative source for the courts in New Zealand.¹⁸⁹

¹⁸⁶ Tyrone Kirchengast “Victims’ Rights and the Rights to Review: A Corollary of the Victim’s Pre-trial Rights to Justice” (2016) 5(4) International Journal for Crime, Justice and Social Democracy 103 at 112.

¹⁸⁷ David Mullan “Judicial Review of the Executive- Principled Exasperation” (2010) 8 NZJPIL 145 at 162.

¹⁸⁸ Ibid.

¹⁸⁹ Other cases in the United Kingdom involving judicial review of prosecutorial decisions include: *R (Guest) v Director of Public Prosecutions* [2009] EWHC 594 (Admin); (quashing decision not to prosecute, and quashing conditional caution, because fundamentally flawed); *R (C) v Chief Constable of A* [2006] EWHC 2352 (Admin) at [32]; (judicial review of ongoing police investigations only in the “most exceptional cases”); *R v HM Commissioners of Inland Revenue, ex parte Dhesi* The Independent 13th November 1995 (decision to apply for voluntary bill of indictment reviewable on limited grounds); *R v Attorney-General, ex parte Rockall* [2000] 1 WLR 882; (refusal to revoke consent to prosecution); *R v Attorney-General, ex parte Ferrante* [1995] COD 18; (refusal to authorise proceedings); *R (Pullen) v Health and Safety Executive* [2003] EWHC 2934 (Admin); (whether error of law or unreasonableness in HSE’s decision not to prosecute); *R v Inland Revenue Commissioners, ex parte Mead* [1993] 1 All ER 772; (Revenue decision to prosecute); *R v Director of Public Prosecutions, ex parte Camelot Group Plc* (1998) 10 Admin LR 93; (refusing judicial review of decision not to prosecute private prosecution being effective and convenient alternative remedy); *R (Compassion in World Farming) v Secretary of State for the Environment Food and Rural Affairs* [2004] EWCA Civ 1009 at [47]; (rare

4.5 South Africa

4.5.1 Prosecution Decision Trends in South Africa

South Africa has a 'hybrid' or 'mixed' legal system, which was formed by combining several distinct legal traditions; the civil law system inherited from the Dutch, the common law from the United Kingdom and the customary law of indigenous Africans. The different legal traditions have a complex inter-relationship, however the English influence is most prominent in the procedural aspects of the legal system. As a general rule, the law in South Africa for criminal and civil procedure follows the common law tradition, thus making the jurisdiction a worthwhile comparator for judicial review.

In South Africa, all prosecutors work for the National Prosecuting Authority (NPA) which was established as a result of South Africa's transition to democracy.¹⁹⁰ Under South African law, the Constitution empowers the NPA to institute criminal proceedings on behalf of the state.¹⁹¹ The test for the institution of a prosecution is set out in commentary on the Criminal Procedure Act:¹⁹²

A prosecutor has a duty to prosecute if there is a prima facie case and if there is no compelling reason for a refusal to prosecute. In this context 'prima facie case' would mean the following: The allegations, as supported by statements and real and documentary evidence available to the prosecution, are of such a nature that if proved in a court of law by the prosecution on the basis of admissible evidence, the court should convict. Sometimes it is asked: Are there reasonable prospects of success? The prosecution, it has been held, does not have to ascertain whether there is a defence, but whether there is a reasonable and probable cause for prosecution – see generally *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (AD) at 137 and *S v Lubaxa* 2001 (2) SACR 703 (SCA).

The South African Constitutional Court has recognised post 1994, that “the constitutional obligation upon the state to prosecute those offences which threaten or infringe the rights of citizens is of central importance in our constitutional framework.”¹⁹³ The NPA is an institution that is indispensable to the rule of law, and therefore must act consistently to constitutional

if ever for Court to make mandatory order requiring public authority to prosecute); *R (Charlson) v Guildford Magistrates Court* [2006] EWHC 2318 (Admin) [2006] 1 WLR 3494; (judicial review granted of refusal to issue summons for private prosecution).

¹⁹⁰ Jean Redpath *Failing to prosecute? Assessing the state of the National Prosecuting Authority in South Africa* (ISS monograph Number 186, Pretoria: Institute for Security Studies, 2012) at 3.

¹⁹¹ Constitution of the Republic South Africa, 1996, s179(2).

¹⁹² E Du Toit et al. *Commentary on the Criminal Procedure Act* (looseleaf ed, Juta) at 1-4M.

¹⁹³ *S v Basson* [2004] (6) BCLR 620 (CC) at 32.

prescripts and within its powers.¹⁹⁴ However, performance data of the NPA suggests that the NPA's policy that grants prosecutors a broad discretion in the decision not to prosecute, "has been broadly interpreted, making a decision to prosecute the exception rather than the rule."¹⁹⁵ Essentially, this has marred the NPA's repute with controversy, leading the public to question the decisions of NDPPs where there is no clear legal basis. It has additionally caused an unfavourable ripple effect in the criminal justice system. For example, in *S v Macrae* the Supreme Court of Appeal held that the prosecutor had failed to exercise his discretion sensibly and the decision not to prosecute "had led a matter without merit to be pursued to that court [causing unnecessary] expenditure of time and effort and placed [extra] costs [on] the public purse."¹⁹⁶

As a result of this prosecuting trend, withdrawals have become the most common result in cases that are enrolled in court.¹⁹⁷ In the *Zuma* review case the then acting NDPP Mpshe discussed the extent of withdrawals in his answering affidavit, in an attempt to justify his claim that NDPPs have an unfettered discretion and that decisions not to prosecute are not susceptible to judicial review. Mpshe stated: "Of the 1,5 million criminal matters, 300 000 to 400 000 cases are withdrawn per year."¹⁹⁸ In an audit conducted during September 2007 it was established that about 25% of the criminal matters were withdrawn at the request of the complainant. About 21% were withdrawn because, in the assessment of the prosecutor, there was no prima facie case. In about 5% of the matters the withdrawal was because the magistrate refused a postponement and 4% because a witness statement was outstanding."¹⁹⁹ Mpshe failed to outline the circumstances of the remaining 45% of cases. It is suggested by Jean Redpath that "In the absence of further information, it must be that in such cases the prosecutor must have exercised his/her discretion and decided not to prosecute."²⁰⁰

4.5.2 Judicial Reviewability of Prosecution Decisions

¹⁹⁴ *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 3 SA 486 (SCA) at [45].

¹⁹⁵ Redpath, above n 190, at 41.

¹⁹⁶ PG du Toit and GM Ferreira "Reasons for Prosecutorial Decisions" 2015 18(5) PER/PELJ 1507 at 1507. See *S v Macrae* 2014 2 SACR 15 (SCA) at [1] & [30].

¹⁹⁷ Redpath, above n 190, at 38.

¹⁹⁸ *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1, 2009 (2) SA 277 (SCA).

¹⁹⁹ Answering affidavit of Mokothedi Mpshe in the *Zuma* review application (20 October 2009).

²⁰⁰ Redpath, above n 190, at 39.

The issue of whether prosecution decisions are reviewable in relation to the Promotion of Administrative Justice Act 2000 has been a question that has burdened the courts in South Africa for some time. The Act itself specifically excludes decisions to prosecute from review, however it does not state the same for decisions not to prosecute outright.²⁰¹ In 2011 the Democratic Alliance (DA) made an application to review, correct and set aside Mpshe's decision not to prosecute Jacob Zuma the President of South Africa on corruption charges in the North Gauteng High Court.²⁰² In his answering affidavit, Mpshe on behalf of the NPA contested that prosecution decisions to prosecute are able to be distinguished from decisions not to prosecute, maintaining that the Promotion of Administrative Justice Act does not apply to the decision *not to* prosecute.²⁰³

Mpshe argued that prosecution decisions are only reviewable on very narrow grounds such as bad faith, (and does not include broader constitutional and administrative law grounds such as rationality). The former NDPP also claimed without reference to any authority that 'this is the approach that our courts have always adopted in relation to prosecutorial decisions, and it is the approach adopted in other jurisdictions.'²⁰⁴ Mpshe's statement rings true somewhat for the years preceding 1994 in South Africa, discretionary powers of prosecutors were then considered to be non-justiciable.²⁰⁵ In South Africa's current constitutional arrangements, the legal position regarding amenability in this context has changed. Hoexter states that "the idea of uncontrolled or unguided discretion is hopelessly at odds with modern constitutionalism."²⁰⁶ The Supreme Court of Canada in *Roncarelli v Duplessis* similarly stated that "there is no such thing as absolute untrammelled discretion."²⁰⁷ These changes started to progress in the 1980s where the normal standards of review were applied to both prosecutors and Attorney Generals.²⁰⁸

In 2009, the Supreme Court of Appeal noted *obiter* that decisions *to* prosecute under the PAJA are not subject to review, but also made the following footnote:²⁰⁹ "The review of a decision

²⁰¹ Promotion of Administrative Justice Act 3 of 2000, Section 1(ff).

²⁰² *Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2011] ZAGPPHC 57, 22 February 2011.

²⁰³ Answering affidavit of Mokothedi Mpshe in the *Zuma* review application (20 October 2009) at [18].

²⁰⁴ *Ibid*, at [59].

²⁰⁵ See L Baxter *Administrative law* (Juta, Kenwyn, 1994) at 333 footnote 184.

²⁰⁶ C Hoexter *Administrative Law* (2nd ed, Juta, Cape Town, 2012) at 47.

²⁰⁷ *Roncarelli v Duplessis* 1959 SCR 121.

²⁰⁸ Redpath, above n 190, at 42.

²⁰⁹ *National director of Public Prosecutions v Zuma*, above n 198, at [35].

not to prosecute is not excluded by PAJA and although the Constitutional Court in *Kaunda v President of the RSA* (2) 2005 (4) SA 235 (CC) para 84 left the question open, the court below held that it could be reviewed (para 58). As to a decision not to prosecute in the UK: *Corner House Research v The Serious Fraud Office* [2008] UKHL 60 (30 July 2008).”²¹⁰ It is self-evident that the court appended this footnote to suggest that decisions *to* prosecute are distinguishable from decisions *not to* prosecute and perhaps that it may even entertain review of decisions *not to* prosecute.

The reviewability issue under the PAJA arose again in the 2014 case *Freedom Under Law v National Director of Public Prosecutions*.²¹¹ Murphy J in his reasoning disassociated decisions *to* prosecute from decisions *not to* prosecute and held that under a “purely textual interpretation of the definition of administrative action thus confirms that prosecutorial decisions in general do indeed constitute administrative action and are subject to review under PAJA.”²¹² The Judge also commented on an argument calling for deference of prosecutorial discretion that was advanced in the case *Democratic Alliance v President of the Republic of South Africa and Others* ²¹³as being “misplaced.”²¹⁴

However, in 2014 the Supreme Court of Appeal heard the case *National Director of Public Prosecutions v Freedom Under Law* and settled the question of reviewability under the PAJA. The court held that decisions *to* prosecute and *not to* prosecute are of the same genus and that “although on a purely textual interpretation the exclusion in s 1(ff) of PAJA is limited to the former, it must be understood to incorporate the latter as well.”²¹⁵

In the judgment of Harms DP in *National Director of Public Prosecutions v Zuma*, a series of cases from the United Kingdom were cited for their explanation of the policy considerations that provide the basis of non-justiciability of prosecution decision *to* prosecute.²¹⁶ The court stated that the same considerations apply to the exclusion of decisions *to* prosecute under the

²¹⁰ *National director of Public Prosecutions v Zuma*, above n 198, at [35], footnote 33.

²¹¹ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP).

²¹² *Ibid*, at [132].

²¹³ *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC).

²¹⁴ *Freedom Under Law v National Director of Public Prosecutions*, above n 211, at [138].

²¹⁵ *National Director of Public Prosecutions v Freedom Under Law* 2014 4 SA 298 (SCA) at [27].

²¹⁶ *National Director of Public Prosecutions v Zuma*, above n 198, at [35], footnote 31; referring to *Re Smalley* [1985] AC 622, [1985] 2 WLR 538 (HL) at 642-643; *Re Ashton* [1994] 1 AC 9 at [17]; *Sharma v Brown-Antonie*, above n 58, at [14]; *Marshall v Director of Public Prosecutions (Jamaica)*, above n 175, at [17].

PAJA.²¹⁷ The principle created by the English courts meant that judicial intervention should only be reserved for ‘exceptional circumstances.’

Brand JA held later in the Supreme Court of Appeal that the parameters of judicial review do not extend to include review under the basis of the PAJA, but is “limited to grounds of legality and rationality.”²¹⁸ The Judge continued that “the legality principle has by now become well-established in our law as an alternative pathway to judicial review where PAJA finds no application.”²¹⁹ Brand JA noted that the legality principle acts “as a safety net to give the court some degree of control over action that does not qualify as administrative under PAJA, but nonetheless involves the exercise of public power. Currently it provides a more limited basis of review than PAJA. Why I say currently is because it is accepted that ‘[l]egality is an evolving concept in our jurisprudence, whose full creative potential will be developed in a context-driven and incremental manner’ (see *Minister of Health NO v New Clicks SA (Pty) Ltd & others* 2006 (2) SA 311 (CC) para 614; Cora Hoexter op cit at 124 and the cases there cited). But for present purposes it can be accepted with confidence that it includes review on grounds of irrationality and on the basis that the decision-maker did not act in accordance with the empowering statute (see *DA & others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA) paras 28-30).”²²⁰

Essentially, the courts in South Africa have constructed a parallel legal process that involves the development of judge-made law in order to review prosecution decisions of the NPA. When it is overtly clear to the courts that the exercise of prosecutorial discretion must be justifiably restrained, the courts may expand the law by creating new factors that can be attributed to the rationality enquiry. The Constitutional Court construed the rationality principle in the following way.²²¹

It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the power for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does

²¹⁷ *National Director of Public Prosecutions v Zuma*, above n 198, at [35].

²¹⁸ *National Director of Public Prosecutions and Others v Freedom Under Law* (67/20140 [2014] ZASCA 58; 2014 (4) SA 298 (SCA) at [27].

²¹⁹ *Ibid*, at [28].

²²⁰ *National Director of Public Prosecutions and Others v Freedom Under Law*, above n 218, at [29].

²²¹ *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the RSA* 2000 2 SA 674 (CC) at [85] - [86].

not, it falls short of the standards demanded by our Constitution for such action. The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.

The judicial stance and precedent regarding the judicial review of prosecution decisions in South Africa is that a court will not interfere with a bona fide decision,²²² nor will it compel a decision on whether to prosecute within a specified time period.²²³ Courts can however, review the exercise of discretion of the DPP on the basis of ordinary administrative law grounds of review.²²⁴ In *Freedom Under Law v National Director of Public Prosecutions* the court made reference to the fact that judicial review of prosecutorial discretion in South Africa is based on breaches of the principle of legality, and courts may intervene when the discretion is improperly exercised (illegal and irrational), where there is evidence of *mala fides* or of decisions based on ulterior purposes.²²⁵

In 2016, the Gauteng Division of the High Court in Pretoria heard the review involving the prosecution decision by former acting NDPP Mokotedi Mpshe to drop on the 6 April 2009, 783 corruption charges against the South African President Jacob Zuma.²²⁶ The High Court rejected Jacob Zuma's attempt to appeal. The Court held that the case was 'inexplicable' and the prosecution decision was "irrational and should be reviewed" and that "Mr Zuma should face the charges as outlined in the indictment."²²⁷ Ledwabe J held that Mpshe's decision to disclose his decision to prosecutors only after it was discussed in a news conference was irrational behaviour and thinking. Ledwabe J stated "considering the situation in which he found himself, Mr Mpshe ignored the importance of his oath of office which commanded him to act independently and without fear and favour."²²⁸ Accordingly the court also found that

²²² See *Gillingham v Attorney-General* [1909] TS 572.

²²³ See *Wronsky v Prokureur-General* [1971] (3) SA 292 (SWA).

²²⁴ See *Mitchell v Attorney-General, Natal* [1992] (2) SACR 68 (N); *Highstead Entertainment (Pty Ltd t/a 'The Club' v Minister of Law and Order* 1994 1 SA 387 (C); *Wilson v Director of Public Prosecutions* [2002] 1 All SA 73 (NC); *S v Dubayi* 1976 3 SA 110 (Tk).

²²⁵ *Freedom Under Law v National Director of Public Prosecutions*, above n 211, at [124].

²²⁶ *Democratic Alliance v Acting National Director of Public Prosecutions & Others* 2016 (2) SACR 1(GP). Mpshe's speech was heavily criticised as it appeared that he had plagiarised the Judgment of Seagroatt J in the criminal case of *HKSAR v Lee Ming Tee*, Hong Kong High Court, December 13 2002 and for his reliance on dubious international legal authority.

²²⁷ *Democratic Alliance v Acting National Director of Public Prosecutions & Others*, above n 223, at [92] - [94].

²²⁸ *Ibid.*

Mpshe had failed to treat the respondents equally before the law. President Zuma applied for leave to appeal but the Supreme Court of Appeal dismissed the appeal.²²⁹

4.5.3 Comparison with New Zealand

The NPA in South Africa has played the role of protagonist in the increased dilution of the duty to prosecute.²³⁰ The NPA's apparent erosion of independence, has blighted its reputation, however it maintains that its decisions are immune from review. The NPA recently published a code of conduct which stated that the discretion *not to* prosecute should be exercised free even of 'judicial interference'.²³¹ This might appear to be a petulant example of the NPA fighting against the judiciary. Furthermore, there has been no clear example of Crown Prosecutors acting in a manner that is suggestive of bureaucratic influence. The closest example of a prosecution decision to not to prosecute wielded on 'politically' sensitive and weak grounds is the prosecutorial decision taken in *Osborne*.²³²

South African law accepts irrationality to be a valid ground in reviewing a prosecution decision. Irrationality however, was not a confirmed ground for review in *Polynesian Spa*. The position in South Africa, although bears its own limitations (i.e. reviewability is only really available as a result of the legality principle and not the PAJA), has allowed a very wide and far-reaching ground of review to be available. Considering the unstable political climate and the doubtful independence and diminished credibility of the NPA, this ground of review is likely to be the basis for most review cases in South Africa, and is likely to provide adequate protection for the proper functioning of South Africa's newly-founded democracy. In this sense, judicial review in South Africa has developed to respond most effectively to the dangers present in its own unique circumstances.

4.6 The European Court of Human Rights

²²⁹ *Zuma v Democratic Alliance* (1170/2016) [2017] ZASCA 146 13 October 2017 per Navasa ADP (Cachalia, Bosielo, Leach and Tshiqi JJA concurring).

²³⁰ Redpath, above n 190, at 54.

²³¹ *Ibid*, at 55.

²³² Where the prosecutor made an arrangement that a prosecution will not be brought or maintained on the condition that the sum of \$3.41 million was to be paid to the victim's dependents.

The European Court of Human Rights recently decided the case *Armani Da Silva v The United Kingdom*.²³³ The applicant, Da Silva, is the cousin of Jean Charles de Menezes, a Brazilian national who was shot dead by two special firearms officers after he was mistakenly identified as a suicide bomber. Ms Da Silva complained that after the investigation had ensued, the State failed its duty to ensure the accountability of its agents for her cousin's death since none of the police officers implicated in the killing had been prosecuted for a serious criminal offence.

The Court's Grand Chamber held that the United Kingdom did not fail to uphold its procedural obligations under the right to life (Art. 2 ECHR) since it conducted an effective investigation into the shooting of Mr de Menezes which was capable of identifying and if appropriate, capable of punishing those responsible.²³⁴ The decision not to prosecute any individual police officer was not due to the "failings in the investigation or the State's tolerance of or collusion in unlawful acts; rather, it was due to the fact that, following a thorough investigation, a prosecutor had considered all the facts of the case and concluded that there was insufficient evidence against any individual officer" to allow for a decision to prosecute.²³⁵

The court regarded the *Manning* case to be authority for judicial review of prosecutorial decisions.²³⁶ and stated that "a decision not to prosecute is susceptible to judicial review in England and Wales but the power of review is to be sparingly exercised; the courts can only interfere if a prosecutorial decision is wrong in law."²³⁷

The Court also commented on the availability of judicial review of prosecutorial decisions in European Contracting States by referring to information made available to it.²³⁸

²³³ *Armani Da Silva v The United Kingdom*, above n 1.

²³⁴ *Ibid*, at [282].

²³⁵ *Ibid*, at [284].

²³⁶ *Ibid*, at [165]. See *R v Director of Public Prosecutions, ex parte Manning*, above n 155, at [23].

²³⁷ *Armani Da Silva v The United Kingdom*, above n 1, at [277].

²³⁸ *Ibid*, at [279]. See at [181] the considered relevant comparative law regarding the susceptibility of the decision not to prosecute to judicial review: "The decision not to prosecute is susceptible of some form of judicial review or appeal to a court of law in at least eighteen Contracting States, namely Albania, Armenia, Austria, Azerbaijan, Belgium, France (albeit in limited circumstances), Ireland, Italy, Luxembourg, Malta, Monaco, Poland, Portugal, Russia, Spain, Switzerland, Turkey and Ukraine. In at least seven Contracting States, the decision of the prosecutor is normally contested before a hierarchical superior in the prosecution service with the final decision being susceptible of judicial review. These States include Bulgaria, Estonia, Germany, Lithuania, Moldova, Romania and Slovakia. Finally, in at least twelve Contracting States there is no possibility of judicially reviewing the decision not to prosecute, although in some cases the decision may be contested to a hierarchical superior in the prosecution service. The States which do not permit judicial review include Cyprus, Czech Republic, Finland, Georgia, Hungary, Iceland, Latvia, "The Former Yugoslav Republic of Macedonia", Montenegro, Serbia, Slovenia and Sweden."

...the decision not to prosecute is susceptible to some form of judicial review or appeal to a court of law in at least twenty-five Contracting States and in these countries the standard of review varies considerably. In seven of these countries the decision must first be contested before a hierarchical superior in the prosecution service. In twelve countries, the decision of the prosecutor may only be contested before such a hierarchal superior. Consequently, it cannot be said that there is any uniform approach among Member States with regard either to the availability of review or, if available, the scope of that review.

4.7 Concluding Comments

Judicial review of prosecutorial decisions in New Zealand is less developed in comparison with the majority of other common law jurisdictions. The position in Australia remains the most extreme in maintaining non-justiciability. The overall New Zealand position does not allow this facet of the criminal justice process to be held sufficiently accountable as prosecutorial discretions are effectively unchecked, since judicial review is rarely accessible. Bingham LCJ's comment in *Manning* is therefore deserving of extra emphasis: "If the standard of review is set too high, and if the test were to be too exacting, an effective remedy would be denied."²³⁹ The Canadian 'flagrant impropriety' standard is an exemplar of a high threshold test, which Bingham LCJ warned against. The Privy Council in *Mohit*²⁴⁰ has endorsed both the width and the supreme importance of the supervisory jurisdiction over prosecutorial discretions not to prosecute. The courts in the United Kingdom have allowed review where the DPP had: failed to act in accordance with his or her own settled policy as set out in the Code, arrived at a decision on the basis of an unlawful policy or reached a decision that reflected an error of law or was perverse. The courts in South Africa have allowed irrational decisions to be reviewable. The experience in Hong Kong indicates that judicial review is a fundamental supervisory duty and that such law must be generative and transformational if it is to enhance the rights of victims of crime as significant stakeholders in the criminal justice system. New Zealand decisional law has, by contrast, moved only very cautiously and incrementally. There does not yet exist a comprehensive and definitive statement by our highest courts of their acceptance of the developed positions already reached by the Privy Council and the courts in other common law and comparative jurisdictions.

²³⁹ *R v Director of Public Prosecutions, ex parte Manning*, above n 155, at [23].

²⁴⁰ *Mohit v The Director of Public Prosecutions of Mauritius*, above n 40.

An analysis of the *Osborne* Supreme Court decision²⁴¹ and the problems and issues that remain unresolved by that decision are made in the next Chapter.

²⁴¹ *Osborne v WorkSafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447, [2017] 15 NZELR 365.

CHAPTER 5

5 Analysis of the *Osborne* Supreme Court Decision

In 2010, an underground explosion at the Pike River mine killed twenty-nine men and injured another two. The company Pike River Coal Limited (PRLC) was found guilty of various breaches of the Health and Safety in Employment Act 1992 (HSEA), and was sentenced to pay a fine of \$760,000 and \$3.41 million in reparations to the victims' dependents. The company subsequently fell into receivership and given its economic state, was unlikely to make the payments. The mine's CEO Peter Whittal, was also charged with offences under the Act and pleaded not guilty to all charges. Whittal, who had directors' and officers' liability insurance, used the money to fund the defence of the charges and reparation payments. Through his counsel, Whittal undertook to make a voluntary payment of \$3.41 million in reparation on the condition that the prosecution would offer no evidence against him. WorkSafe considered this offer and made the decision not to prosecute. It explained that while there was sufficient evidence to justify a prosecution, the likelihood of success was low. No evidence was offered and the charges were dismissed.¹

The applicants; a widow and a mother of two men who had perished in the mine, sought judicial review of WorkSafe's decision to offer no evidence, on the basis that an unlawful bargain had been made to stifle the prosecution in exchange for payment. Brown J in the High Court dismissed the application finding that no grounds of review had been established. He held that the offer of reparation was voluntary and that WorkSafe was entitled to consider this as a factor in deciding whether to prosecute.² The applicants appealed to the Court of Appeal. The bench comprising of Kós P, Randerson and French JJ considered several issues including:³

1. Is the prosecutor's decision on 4 December 2013 to offer no evidence in support of the charges against Mr Whittal on the basis that it was not in the public interest to do so ("Prosecution Decision") amenable to judicial review?
2. Did the prosecutor enter into an agreement with Mr Whittal that in return for the payment of \$3.41 million to the victims it would offer no evidence in support of the charges against Mr Whittal?
3. In deciding not to proceed with the prosecution against Mr Whittal, did the prosecutor:

¹ See for a more explicit summary of the facts see *Osborne v WorkSafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447, [2017] 15 NZELR 365 at [2]- [13].

² *Osborne v WorkSafe New Zealand* [2015] NZHC 2991, [2016] 2 NZLR 485 at [37] – [42].

³ *Osborne v WorkSafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513 at [26].

- 3.1 fail to comply with the Solicitor-General's Prosecution Guidelines; or
- 3.2 fail to have regard to s5(g) of the Health and Safety in Employment Act 1992?

- 4. Did the applicants have a legitimate expectation that they would be consulted prior to the prosecutor making its decision?

The Court of Appeal held that while it was prepared to review executive action of that nature,⁴ it could not be shown that there had been a meeting of minds and therefore a striking of an unlawful arrangement to stifle the prosecution.⁵ The applicants appealed to the Supreme Court.

New Zealand's landmark case on judicial review of prosecutorial discretion is the unanimous Supreme Court decision *Osborne v WorkSafe New Zealand*.⁶ The presiding judges were Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ. The Court considered whether the Court of Appeal was correct to dismiss the appellants' appeal to that Court, namely, "whether WorkSafe New Zealand acted to give effect to an unlawful agreement of this nature when it offered no evidence on charges against Peter Whittal" for breaches of the HSEA.⁷

Adopting the test in *Jones v Merionethshire Permanent Benefit Building Society*, the Supreme Court held that an unlawful bargain arises when there is an understanding or promise, express or implied, that a public offence⁸ would not be prosecuted on the condition of the receipt of money or other valuable consideration.⁹ It was not material that the prosecutor had been independent or been fair or honest, or that a judge gave express approval to the withdrawal of the charges.¹⁰

The Supreme Court adopted *Bhowanipur Banking Corp Ltd v Dasi* noting that agreements to stifle prosecutions were seldom set out on paper. The conduct of the parties must be inferred from a survey of the whole circumstances.¹¹ The way in which the parties described their affairs

⁴ *Osborne v WorkSafe New Zealand* (CA), above n 3, at [34] – [36].

⁵ *Ibid*, at [55], [56] and [59].

⁶ *Osborne v WorkSafe New Zealand* (SC), above n 1.

⁷ *Ibid*, at [25].

⁸ Opposed to a civil wrong.

⁹ *Jones v Merionethshire Permanent Benefit Building Society* [1892] 1 Ch 173 (CA).

¹⁰ See *Osborne v WorkSafe New Zealand* (SC), above n 1, at [70], [71], [74], [75], [76], [77], [78] and [104].

¹¹ *Bhowanipur Banking Corp Ltd v Dasi* (1941) 74 Calcutta LJ 408, [1942] BOMLR 1 (PC); the author of this thesis was junior counsel in *Osborne v WorkSafe New Zealand* (CA), above n 3, and had located and brought this extremely obscure but definitive judgment of the Privy Council to the court's attention. The judgment, given at the time of World War Two, was never reported except in two discontinued Indian series of law reports.

was not determinative. Neither was the fact that one party's reasons or motives behind entering into the arrangement might have included considerations other than the conditional payment.¹²

The Supreme Court allowed the appeal, finding that on the evidence, the arrangement was an unlawful bargain to stifle a prosecution. The decision that the charges were not to be proceeded with as they no longer fulfilled the public interest test was an acceptance of an offer of payment in exchange for not proceeding with any of the charges against Mr Whittall. The withdrawal of the charges had been conditional on a payment to be used for reparations being made. Even though WorkSafe had made various considerations of legitimate significance, these did not alter the substantive object and effect of the arrangement made with Mr Whittall.¹³

The observation made by all of the judges, except for Ellen France J, was that it was unnecessary to express a view on whether, in the absence of an unlawful bargain, the decision not to offer any evidence would have been lawful in any event, and that “[w]e should not be taken to agree with the High Court or Court of Appeal that the justifications put forward for the decision were adequate to pass the supervisory jurisdiction of the court.”¹⁴

The *Osborne* Supreme Court decision has significance by its very uniqueness, literally New Zealand's only ever successful judicial review of a prosecutorial decision. It affirms that prosecution decisions not to prosecute are justiciable. Specifically, the Court held that an arrangement to stifle a prosecution on condition that a sum of money is paid is unlawful. “Chequebook justice” will not be tolerated in New Zealand.¹⁵ The Court's decision clarifies the approach that the prosecutor should have adopted. The decision has also contextually improved the health and safety landscape in New Zealand.

However, the contours of judicial review of prosecutorial discretions still remains quite unclear. The court eschewed from articulating more fully what are, and what are not, good reasons for judicial review of prosecutorial decisions. In *Rewa*, Venning J, the Chief High Court Judge, noted that the Supreme Court in *Osborne* did not take issue with the *Osborne* Court of Appeal's propositions regarding the limited extent of the Court's powers of review of

¹² *Osborne v WorkSafe New Zealand* (SC), above n 1, at [81], [82], [83] and [104].

¹³ *Ibid*, at [92], [93], [94], [95], [101], [103] and [104].

¹⁴ *Ibid*, at [97] – [98].

¹⁵ The voluntary payment of reparation was often termed “chequebook justice” by counsel for the appellants throughout the appeals in their written and oral submissions, coauthored by the writer of this thesis.

prosecutorial discretion, which were in turn adopted from *Polynesian Spa Ltd v Osborne*.¹⁶ On that analysis, the grounds for judicial review of prosecution decisions still remain confined under the *Polynesian Spa* approach, to only the illegality branch of orthodox justiciability. The standard of review similarly remains as the quasi-standard (or pseudo-standard) of ‘exceptional circumstances.’ In comparison with other jurisdictions, such as the United Kingdom and Hong Kong, the development of judicial review in the context of prosecution decisions is still at an incipient stage in New Zealand. While the door to judicial review has finally been unlocked, the gap created is narrow. The Supreme Court left several significant issues unresolved, contenting itself with reaching the disturbing conclusion that a Crown Prosecutor had acted under an illegal arrangement.

Firstly, although the Supreme Court appears to have agreed with the Court of Appeal’s assessment of both New Zealand and overseas authorities, and the various principles for review of prosecution decisions, the Court did not give its own view on the ‘exceptional circumstances’ position posited by Randerson J in *Polynesian Spa*.¹⁷ To this extent, no legal test that considers the availability of judicial review of prosecutorial decision-making has yet been articulated by our highest court. As the next Chapter illustrates, there are constitutional and practical rationales for the basis of the ‘exceptional circumstances’ test. However, when the test is confined to matters of illegality, and the applicable intensity of review is not transparent, the risk to the balance between vigilance and restraint is self-evident. Wider rule of law implications are engaged.¹⁸ While the court made it clear that the agreement to stifle the prosecution was one that violated the rule of law,¹⁹ the Supreme Court reasoning is concise and precise. It plainly decided not to determine any more than it had to do. The proven illegality

¹⁶ *Rewa v Attorney-General of New Zealand* [2018] NZHC 1005 at [45] and [46]; See *Osborne v WorkSafe New Zealand*, above n 3, at [34]; See generally *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC) at [62]; *R (on the application of Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756 at [31]; *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at [28]–[31]; *Matalulu v Director of Public Prosecutions (Fiji)* [2004] NZAR 193 (Fiji SC) at 215.

¹⁷ *Polynesian Spa Ltd v Osborne*, above n 16, at [61]–[69] per Randerson J.

¹⁸ See Michael Fordham QC *Judicial Review Handbook* (5th ed, Hart, Portland, 2008) at [12.1]; “Judicial review is the Courts’ way of enforcing the rule of law: ensuring that public authorities’ functions are undertaken according to law and that they are accountable to law. In other words, ensuring that public bodies are not “above the law.”

¹⁹ It emphasised that “prosecutions taken on behalf of the public are in vindication of law and to protect rule-of-law values such as in equality of treatment”; *Osborne v WorkSafe New Zealand* (SC), above n 1, at [73]; “[t]he rule of law is undermined if accountability and punishment for public wrongs turns on the means of the defendant.” See also at [73] “If obtaining reparation in return for a promise to abandon criminal proceedings is “a serious abuse of the right of private prosecution”, it is at least as much an abuse of the obligations of public prosecution. Such prosecution is undertaken by public officials. It is undertaken on behalf of the community in vindication of law and to protect rule of law values such as in equality of treatment.”

clearly contaminated the prosecutorial decision-making process and the resultant decision not to prosecute.

Secondly, the *Osborne* Court of Appeal considered the issue of whether the victims' families had a legitimate expectation that they would be consulted prior to the prosecutor making its decision. The Court of Appeal concluded that the Victims' Rights Act 2012 (VRA), the Guidelines and the Victims of Crime- Guidance for Prosecutor Guidelines of 2012 do not singly or cumulatively create a legitimate expectation of consultation.²⁰ The Supreme Court did not touch on this matter. While it may be accepted that those Acts and Guidelines do not create a legitimate expectation of consultation, the pressing and outstanding issue left unresolved is whether victims or their dependents should be denied any involvement in the prosecution decision-making phase at all. This and related issues that victims experience in the prosecution process, and in judicial review of prosecution decisions, is considered in Chapter 7.

Thirdly, in relation to relief, the Supreme Court could only grant a declaration that the decision of WorkSafe New Zealand to offer no evidence in the prosecution of Peter Whittall was unlawful.²¹ The reasons for this were considered by the Court of Appeal.²² Chapter 8 considers other appropriate remedies that were not available in *Osborne* but may be available to other successful claimants, by an examination of comparative law. The concepts of reconsideration, resumption and reneging are also considered to illustrate the appropriate boundaries of the Court's power, should these circumstances occur in future cases.

Finally, although the dependents in *Osborne* were granted a declaration, in many ways their victory may be pyrrhic considering the numerous lives of loved ones lost. Judicial review was the only route for justice, since the appellants were statutorily barred from instituting a private prosecution.²³ To this end, Chapter 9 analyses the various limitations on private prosecutions and the viability of this alternative.

²⁰ *Osborne v WorkSafe New Zealand* (CA), above n 3, at [85] - [89].

²¹ *Osborne v WorkSafe New Zealand* (SC), above n 1, at [101] per Elias CJ, William Young, Glazebrook and O'Regan JJ and at [102] per Ellen France J.

²² See *Osborne v WorkSafe New Zealand* (CA), above n 3, at [24] "even if there was illegality in the decision, no relief other than declaration should be granted because any error was immaterial and did not affect the outcome of its decision – and because third parties (the insurer and the families who had received payment of the reparation sum) had altered their positions in reliance on the decision."

²³ Section 54A(2) of the Health and Safety in Employment Act 1992 precludes private prosecution if WorkSafe has taken enforcement action.

CHAPTER 6

6 The Systemic Failures of the Current Law Re Justiciability and the Rule of Law

This Chapter sets out the key procedural and jurisprudential issues arising from the current regime of judicial review of prosecutorial decisions not to prosecute. After the Supreme Court's narrow but enlightened decision in *Osborne v WorkSafe New Zealand*,¹ a number of systemic failures remain that continue to militate against justiciability and the objectives of the rule of law. The prevailing judicial approach of only intervening in 'exceptional circumstances' is critically examined for its compatibility with principle.²

6.1 Difficulties of Accessing Judicial Review

It is of significant constitutional importance that access to justice is ensured. However, access³ to judicial review of prosecutorial discretions is not absolute. The following sections consider the ways in which access to the courts in this context may be denied.

6.1.1 Intensity of Review

Courts use standards of review to guide the latitude or degree of deference that they are prepared to cede to the initial decision-making body,⁴ i.e. the "calibration of the depth of scrutiny as a preliminary step in the supervisory process."⁵ Two issues concerning the standard of review of prosecution decisions post-*Osborne* are raised:

¹ *Osborne v WorkSafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447, [2017] 15 NZELR 365.

² The 'exceptional circumstances' position as articulated in *Polynesian Spa* [2005] NZAR 408 (HC) at [61]- [69] per Randerson J. See Chapter 6 at section 6.1.3 for a consideration of the organising principles underlying the 'exceptional circumstances' position and the restrictions to access to justice.

³ See GDS Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, lexis Nexis, Wellington, 2015) at [3.07]. See also Edite Ligere "Locus Standi and the Public Interest: a Hotchpotch of Legal Principles" (2005) *Journal of Planning & Environment Law* 292-297.

⁴ Michael Taggart "Proportionality, Deference, Wednesbury" [2008] *New Zealand Law Review* 423. The courts do not review the merits of the decision, but consider only the process to which the prosecution decision was made. This position was affirmed in *Matalulu v Director of Public Prosecutions (Fiji)* [2003] 2 HKC 457 at 735 (Fiji SC); "the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits."

⁵ Dean R Knight "Modulating the Depth of Scrutiny in Judicial Review: Scope, Grounds, Intensity, Context" (2016) *New Zealand Law Review* 63 at 77.

1. The inconsistency and uncertainty of the current approach to intensity of review.
2. The high standard of review that the ‘exceptional circumstances’ approach dictates and its implications of access for judicial review.⁶

Currently, the Supreme Court of New Zealand has declined to embrace terminology that describes different variabilities of intensity.⁷ Instead, the courts adopt an appropriate intensity of review of discretionary prosecution decisions by contextually analysing the impugned decision.⁸ But the courts’ dependency on the ‘exceptional circumstances’ approach, rather than acceptance of an explicit doctrinal form of the variable intensity of review, leaves judicial review of prosecution decisions susceptible to inconsistency and vulnerable to unpredictability of outcome. The current test for reviewability masks any principled analysis by employing the opaque reasoning that the supervisory jurisdiction is only engaged in cases demonstrating ‘exceptional circumstances.’⁹ This is policy-driven rather than principled analysis and it does not elucidate at all.

As Professor Michael Taggart warned, “unless we commit to [a] sort of mapping project [i.e. a schematic for the intensity of review] the law will continue to be rather chaotic, unprincipled and result-orientated.”¹⁰ Dr Dean Knight explained that “the strong commitment of New Zealand courts to contextualism means techniques which involve different degrees of scrutiny are inevitable. But, except for some limited exceptions, the courts are generally quite coy about explicitly embracing the notion of variability or providing any firm scaffolding for its deployment.”¹¹

⁶ The ‘exceptional circumstances’ position as articulated in *Polynesian Spa*, above n 2, at [61]- [69] per Randerson J.

⁷ See Dean R Knight “Mapping the Rainbow of Review: Recognising Variable Intensity” [2010] New Zealand Law Review 393 at 399- 408. See for example, *Ye v Minister of Immigration* [2009] NZSC76, [2010] 1 NZLR 104 (NZSC, transcript, 21-23 April 2009, SC 53/2008) at 179-182; The Chief Justice said that the word ‘deference’ is “dreadful” and that there was “so much dancing around on the heads of pins” in relation to different degrees of reasonableness.

⁸ See the comment of Chief Justice Sian Elias in *Ye v Minister of Immigration*, above n 7; “It’s got to be contextual. What is reasonable takes its colour from the context.”

⁹ *Polynesian Spa*, above n 2, at [61]- [69] per Randerson J; *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at 69-72 per McGrath J for the court; *Gill v Attorney-General* [2010] NZCA 468, [2011] 1 NZLR 433 at [19] per Stevens J for the Court; but *Gill* and *Fox* were decisions challenging the refusal of a trial Court to grant a discretionary stay of a criminal prosecution. The assimilation of the abuse of process doctrine and trial decision-making with pre-trial prosecutorial decision-making, is reasoning consistently found in New Zealand decisions. But that approach can have no logical impact or peremptory value in relation to decisions not to prosecute at all. See also Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at [22.6.1].

¹⁰ Taggart, above n 4, at 453.

¹¹ Knight, above n 7, at 399.

In an exchange with counsel on the question of intensity of review, Elias CJ in *Ye v Minister of Immigration* stated:¹² “I don’t know that degrees of reasonableness help...It’s got to be contextual. What is reasonable takes its colour from the context.” Contrastingly, the High Court has endorsed the concept of explicit standards of review and some Court of Appeal judges have flirted with the concept.¹³ Local scholars have largely embraced the concept of variability of review.¹⁴ However, Professor Joseph criticised it as “a terminological overload [which] can only result in distracting formalism,”¹⁵ but noted that the sliding threshold of review- or “selective raising and lowering of the review threshold” is now part of the judicial review process in New Zealand.¹⁶

Dr Knight contends that the method of capturing the “key schemata employed throughout New Zealand and the Anglo-Commonwealth to organize the modulation of the depth of scrutiny,” is to turn to *De Smith’s Judicial Review* textbook.¹⁷ With regard to the intensity of review, the text notes that intensity may be understood by a continuum of methods.¹⁸ “In the last decade the New Zealand courts, following UK developments, overtly have adopted a variable approach to the intensity of review: that is, the graver the impact of the decision upon the individual affected by it, the more substantial the justification that will be required to assure the court of its legality. The emphasis on justification is all-important, and it is not coincidental that the common law is increasingly requiring reasons and putting greater

¹² *Ye v Minister of Immigration*, above n 7 at (NZSC, transcript, 21- 23 April 2009, SC 53/2008) at 179 – 182. Note, in Knight, above n 5, at 64; Knight noted that the variation of the depth of scrutiny may be deeply embedded in jurisprudence and judicial methodologies. Perhaps this is one reason why the Supreme Court objects to the language of variability of intensity. This does not however help provide transparency in finding the balance between vigilance and restraint.

¹³ *Ibid*, at 79 – 80. See *Wolf v Minister of Immigration* [2004] NZAR 414 (HC) at [43] where Wild J endorsed the intermediate standard of simple reasonableness (or simple unreasonableness), with the adoption of the appropriate form depending on context. See also *Pharmaceutical management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA) at 66 which endorsed the “hard look” intensity of review; *Pring v Wanganui District Council* [1999] NZRMA 519 (CA); *Huang Xiao Qiong v Minister of Immigration* [2007] NZAR 136 (HC); *Wright v Attorney-General* [2006] NZAR 66 (HC); *S v Chief Executive of the Department of Labour* [2006] NZAR 234 (HC); *Dunne v CanWest TVWorks Ltd* [2005] NZAR 577 (HC).

¹⁴ See Taylor above n 3, at [3.11].

¹⁵ See Joseph, above n 9, at [22.8.4].

¹⁶ Philip A Joseph “The Demise of Ultra Vires- Judicial Review in the New Zealand Courts” [2001] PL 354 at 936.

¹⁷ See Harry Woolf, Jeffery L Jowell, Catherine M Donnelly, *De Smith’s Judicial Review* (8th ed, Sweet and Maxwell, London, 2018).

¹⁸ *Ibid*, at 11-086; this ranges from “full intensity review” to “non-justiciable”, with “variable intensity unreasonableness review” in the middle. Note that Dean R Knight “A Murky Methodology: Standards of Review in Administrative Law (2008) 6 NZJPIIL 117 was referenced in *De Smith’s Judicial Review* at 11-140 in relation to New Zealand’s intensity of review profile.

emphasis on transparency. It is now generally recognised that judicial review of discretionary decision-making involves a sliding scale, with non-justiciability at one end and close scrutiny at the other.”

The variation of the intensity of scrutiny in the context of the broader Anglo-Commonwealth “is ubiquitous but the manner in which the balance between vigilance and restraint is struck varies across time and across jurisdictions.”¹⁹ For example, standards of review in Canada are organized by a clear framework of explicit standards,²⁰ whereas in the English- style judicial review, the method taken by courts regarding intensity of review “tends to be seen in particular grounds or doctrines for substantive review, rather than providing a grand schematic. In particular, it arises from...variegated forms of unreasonableness and structured forms of deference; all these doctrines exhibit the transparent mediation of the balance between vigilance and restraint, based on various constitutional, institutional and functional factors.”²¹

The variable intensity approach espoused by Dr Knight and cited in *De Smith’s Judicial Review*, reflects the curial technique taken by the English courts.²² When properly understood, variable intensity turns on the nature, the importance and the context of the impugned decision. This is actually in harmony with the concept of contextualism, “but the courts remain reticent to translate this contextualism into an explicit adoption of variable intensity or deference. This is a contradictory, not principled, position. As Professor Taggart recorded, you cannot have

¹⁹ Knight, above n 5, at 64.

²⁰ See *Dunsmuir v New Brunswick* 2008 SCC 9, [2008] 1 SCR 190. See generally Harry Woolf, Jeffery L Jowell, Catherine M Donnelly, above n 17, at 11-112 – 11. 130. Paul Daly “The Struggle for Deference in Canada” in Hanna Wilberg and Mark Elliot (eds) *The Scope and Intensity of Substantive Review* (Hart, Oxford, 2015) at 297; Paul Daly “Dunsmuir’s Flaws Exposed: Recent Decisions on Standard of Review” (2012) 58 McGill LJ 483; David J Mullan “Dunsmuir v New Brunswick, Standard of Review and Procedural Fairness for Public Servants: Let’s Try Again!” (2008) 21 CJALP 117; Gerald P Heckman “Substantive Review in Appellate Courts Since Dunsmuir” (2009) 47 Osgoode Hall LJ 751; Andrew Green “Can There Be Too Much Context in Administrative Law? Setting the Standards in Canadian Administrative Law” (2014) 47 UBC L Rev 443.

²¹ Knight, above n 5, at 78-79. See *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514 at 531 (HL); *R v Ministry of Defence, ex parte Smith* [1996] QB 517 (CA); *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696; *R v Lord Saville of Newdigate, ex parte A* [2001] EW Civ 2048, [2001] WLR 2855; *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 at 1130; *R (Mahmood v Secretary of State for the Home Department)* [2000] EWCA Civ 315, [2001] 1 WLR 840 at 849; *A (Asif Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789, [2002] QB 129 at [49]; *Sheffield City Council v Smart* [2002] EWCA Civ 4 at [42]; *Kennedy v Charity Commission* [2014] UKSC 20, [2014] 2 WLR 808. See generally Tom Hickman *Public Law After the Human Rights Act* (Hart Publishing, Oxford, 2010) at 18 and 105; Harry Woolf, Jeffery L Jowell, Catherine M Donnelly, above n 17, at 11-087 – 11-1-03.

²² The Chief Justice in Sian Elias “Administrative law for ‘Living People’” (2009) 68 CLJ 47 at 66 recognised that the simplistic approach taken in New Zealand could be ridiculed for being an “anti-intellectual strand.”

one without the other.”²³ He also argued that “we must get beyond simply talking about context and actually contextualize in a way that can generate generalizable conclusions. In short, we need a map of the rainbow of review that is reliable and helpful, and we need willing cartographers.”²⁴

Surprisingly, the Supreme Court in *Osborne v WorkSafe New Zealand* did not articulate any standard of review required for prosecution decisions.²⁵ Randerson J’s ‘exceptional circumstances’ threshold however, operates as a quasi-standard of review. Only where ‘exceptional circumstances’ can be found, will an applicant succeed in judicial review.²⁶ The approach is contextual, but on the face of it, sets an extremely high threshold and corresponding intensity of review. It imposes a heavy burden to adduce ‘exceptional’ evidence on applicants seeking to challenge prosecutorial decisions. In short, it disincentivises recourse to judicial review by the imposition of an artificial and almost unsustainable standard for challenges to one critically important sub-species of decision-making.

Dr Knight considered the ‘murky methodology’ of standards of review of administrative law in New Zealand, and questioned what “appropriate standard of review that courts should adopt when reviewing the decisions of public bodies and officials.”²⁷ He proposed a framework which refined the basis of intervention on the following continuum or sliding-scale of categories:²⁸

- (a) Non-justiciability;
- (b) Flagrant impropriety;
- (c) Manifest unreasonableness;²⁹
- (d) Simple reasonableness; and
- (e) Incorrectness.

²³ Knight, n 7, at 429.

²⁴ Taggart, n 4, at 454.

²⁵ Nor did the Court of Appeal in *Osborne v WorkSafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513. The court there used the ‘exceptional circumstances’ approach adopted from *Polynesian Spa*, above n 2. Note the Supreme Court in *Osborne v WorkSafe New Zealand* (SC), above n 1, took no issue with the Court of Appeal using this test; see *Rewa v Attorney-General* [2018] NZHC 1005 at [45] – [46] per Venning J, Chief High Court Judge.

²⁶ *Polynesian Spa Ltd v Osborne*, above n 2, at [61] - [69].

²⁷ Knight, above n 5, at 118.

²⁸ *Ibid*, at 143.

²⁹ *Ibid* at 146; Knight noted that this standard is equivalent to the traditional *Wednesbury* reasonableness standard; See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1KB 223 (CA). *Attorney-General’s Reference (No 3 of 1999)* [2001] 2 AC 91

Dr Knight noted that the standard of ‘flagrant impropriety’ is closely aligned with non-justiciability and that judicial intervention is only allowed under ‘exceptional circumstances.’ That standard was used by the Privy Council in *Mercury Energy Ltd v Electricity Corporation of New Zealand*, where intervention was restricted to fraud, corruption or bad faith.³⁰ Dr Knight then made the comparison that this limited form of review is noted in other areas “to soften the effect of otherwise non-justiciable matters,” and gave the example of reviewing prosecutorial discretion.³¹ He proposed that the ‘flagrant impropriety’ standard “provides a workable methodology in that intervention is reserved for the most exceptional cases, that is bad faith, corruption and fraud.”³² Dr Knight’s article essentially suggests that the standard of review currently adopted by the courts under the ‘exceptional circumstances’ approach might be one of ‘flagrant impropriety,’ the same standard used in Canadian jurisprudence for this type of review.³³

English courts that have considered judicial review of prosecutorial decision-making, have adopted a similar ‘exceptional circumstances’ approach, but importantly, the intensity of judicial review has been in those cases, decided using variegated intensities. For example, if the intensity of review were to be captured by an explicit standard under the unreasonableness ground, it has in most cases resembled the much lower ‘reasonableness’ standard, (or simple reasonableness based on Dr Knight’s Framework).³⁴

Professor Keith’s comment on the adoption of an appropriate standard of review, must be noted:³⁵ “...there is no single precise answer to the extent of appellate review of the exercise of discretion. Moreover, there can clearly be approaches falling between the two possibilities

³⁰ Knight, above n 5, at 145. The case *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) considered whether commercial decisions of a state-owned enterprise were reviewable. Lord Templeman at 391 stated “It does not seem likely that a decision by a state-owned enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith.” See also Janet McLean “New Public Management New Zealand Style” in Paul Craig and Adam Tomkins (eds) *The Executive and the Public Law* (Oxford University Press, Oxford, 2006) at 124.

³¹ Knight, above n 5, at 145.

³² Ibid, at 146.

³³ See chapter 4 at section 4.3.2 for a discussion on the standard of ‘flagrant impropriety’ used in Canada.

³⁴ See Chapter 4 at section 4.4.3; see *R v Director of Public Prosecutions v ex parte Manning* [2001] QB 330 where Lord Bingham CJ examined the reasonableness of the prosecutor’s decisions by applying the evidential sufficiency test. See also Knight, above n 18, at 150 for a discussion on the ‘simple reasonableness’ standard. See generally Taylor, above n 3, at [11.01]. It should also be noted that the ‘exceptional circumstances’ approach in the United Kingdom covers matters that fall under all three branches of review, namely; illegality, unfairness and irrationality/unreasonableness.

³⁵ KJ Keith “Appeals from Administrative Tribunals – the Existing Judicial Experience” (1969) 5 VUWLR 123 at 151.

stated at the outset- “wrong principles” and complete substitution....More precise articulation of the line will normally have to come from the courts...”

The New Zealand Supreme Court has never articulated a “unified and principled” approach of variegated intensities of review for prosecutorial discretion.³⁶ But it may be deduced from the works of scholars and the organising principles that underlie the ‘exceptional circumstances’ approach that the standard applied in New Zealand is high.³⁷ This means that aggrieved victims may be precluded under that demanding standard from having their cases successfully judicially reviewed.

6.1.2 The Limited Grounds of Review for Prosecution Decisions in New Zealand

The grounds for challenge under judicial review generally in New Zealand are not prescribed by statute but are analytically divided into:³⁸

- 1) illegality (acting outside the scope of the power; getting the law wrong)
- 2) unfairness or impropriety (both procedural and substantive or actual), and
- 3) irrationality or unreasonableness.³⁹

These are not hermetically sealed categories-they overlap and converge. Their Lordships in *CCSU* cautioned that these grounds are neither exhaustive nor mutually exclusive and there is room for new grounds to evolve on a case to case basis.⁴⁰ Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* noted that grounds of review are not discrete categories but often merge and overlap.⁴¹ In terms of public law, impropriety and illegality shade into each other and there is no clear demarcation line. A strict categorisation

³⁶ See Benjamin Snow “Reviewing Crown Discretion: The Need for a Unified, Principled Approach that Mandates Transparency” (2013) 98(6) Criminal Report 143.

³⁷ See Chapter 6 at section 6.1.4 for the principles that underlie the ‘exceptional circumstances’ position.

³⁸ *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 9, [1985] AC 374 at 410-411 [GCHQ] per Lord Diplock.

³⁹ Taylor, above n 3, at [11.01]; “The inconsistency in the use of “unreasonableness”, “*Wednesbury* unreasonableness” and “irrationality” as being restricted to the meaning of what no reasonable authority could do and being used in a wider sense as including the other grounds relating to the deliberative process...has still not been settled. In fact, the concept of varying intensity of unreasonableness review stated by Baragwanath J in *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72 has been gaining acceptance.”

⁴⁰ See also *Wheeler v Leicester City Council* [1985] AC 1054 (HL) at 1078 per Lord Roskill. Lord Roskill arrived at a similar classification as Lord Diplock.

⁴¹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, above n 29. There is often tendency for plaintiffs to claim under every possible ground. Helen Aikman QC stated that in her experience, it is usually better to focus on one or two major grounds, even if there is some overlap; see Helen Aikman QC “Grounds of challenge” in *Judicial Review Intensive* (September, 2007).

approach only leads to the blanket exclusion of certain grounds of review, evidenced in *Polynesian Spa Ltd v Osborne* and *Matalulu v Director of Public Prosecutions (Fiji)*.⁴²

The ordained tripartite expression of the grounds of review has been repeatedly endorsed in New Zealand administrative law.⁴³ Lord Cooke advanced the following statement on the grounds of review: “The substantive principles of judicial review are simply that the decision-maker must act in accordance with law, fairly and reasonably.”⁴⁴ However, the orthodoxy has never prevailed in judicial review of prosecution decisions. By only deciding as far as it was required, the Supreme Court in *Osborne* approved justiciability on a slender basis- without endorsing the approach of the Court of Appeal on other aspects of its reasoning. Any position that finally eliminated the branches of unfairness and unreasonableness from review, would be unprincipled. The courts would have failed to find an appropriate balance between vigilance and restraint.⁴⁵

As a matter of judicial policy, Randerson J in *Polynesian Spa*, narrowly circumscribed justiciability to extend only to the illegality branch of review. Only where there is bad faith,⁴⁶ a collateral purpose or where there is an abdication of discretion via the adoption of a fixed policy⁴⁷ could a decision be reviewed.⁴⁸ For a decision not to prosecute, “judicial review is only likely to be obtained in such a case where there has been a failure to exercise discretion, such as by the adoption of a general policy in certain classes of cases, prosecutions will not be

⁴² *Polynesian Spa Ltd v Osborne*, above n 2; *Matalulu v Director of Public Prosecutions (Fiji)*, above n 4.

⁴³ See *Peters v Davison* [1999] 2 NZLR 164 (CA) at 208; *BNZ Investments Ltd v Commissioner of Inland Revenue* [2007] NZCA 356, [2008] 1 NZLR 598 at [15]; *Osbourne v Chief Executive of the Ministry of Social Development* [2010] 1 NZLR 559 (HC) at [54]. See also Knight, above n 5, at 71 – 72.

⁴⁴ Robin Cooke “The Struggle for Simplicity in Administrative Law” in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s- Problems and Prospects* (Oxford University Press, Auckland, 1986) 1 at 5.

⁴⁵ See Knight, above n 5, at 74.

⁴⁶ Joseph, above n 9, at [23.2.1]; “The courts will admonish public administration where there is malice, or fraudulent or dishonest intent”; See for example, *Huffman v Black (No 2)* [1990] DCR 152; *Roncarelli v Duplessis* [1959] SCR 121; *Beaton v Institute of Chartered Accountants of New Zealand HC Auckland CIV-2005-404-2642*, 17 November 2005 at [84]. “A person exercising public powers must use them for the public good and not for ulterior, fraudulent or capricious purposes”; *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2001] UKHL 16. See also *Webster v Auckland Harbour Board* [1983] NZLR 646 (CA) at 650; *Webster v Chetnik Developments Ltd* [1988] 1 AC 858 (HL) at 873, footnote 20; “These decisions judicially approved a passage from Sir William Wade and CF Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) at 355, where the concept of the public good was used to distinguish public from private action.”

⁴⁷ Joseph, above n 9, at [23.3.2]; “A decision maker entrusted with a discretion must not allow a fixed rule of policy to displace personal judgment. “The general rule” said Lord Reid, “is that anyone who has to exercise a statutory discretion must not ‘shut his ears to an application.’”; *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 (HL) at 624, referring to *R v Port of London Authority, ex parte Kynoch Ltd* [1919] 1 KB 176 (CA) at 183, and applied in *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 (CA) at 171.

⁴⁸ *Polynesian Spa Ltd v Osborne*, above n 2, at [64].

brought. There may be other grounds but it is likely only to be in exceptional cases that a court would intervene where a decision has been taken not to prosecute in a specific case not affected by factors such as the adoption of a general policy.”⁴⁹

In *Osborne* (HC),⁵⁰ Brown J noted there is conflicting High Court authority on whether prosecutorial decisions may be reviewed on the basis of relevant or irrelevant considerations.⁵¹ He applied dicta in *Matalulu*:⁵² “Contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings.” Brown J noted that restraint is particularly necessary where the prosecution discretion is broad and does not expressly or impliedly identify relevant or extraneous matters, drawing from Duffy J’s analysis in *Cooke v Valuers Registration Board*.⁵³ But, Brown J did not consider *R v Director of Public Prosecutions, ex parte Chaudhary*, where Kennedy LJ found the decision not to prosecute “unreasonable in that it failed to have regard to a material consideration.”⁵⁴

Subscribing to the strict view in *Matalulu*, Brown J held that a challenge based on not taking into account relevant considerations cannot succeed, unless the statutory power in question either expressly or impliedly identifies what is extraneous. This parallels *Polynesian Spa* in limiting the grounds of review for prosecutorial discretion. A deep-seated sense of judicial restraint is evident by this exclusionary approach.

⁴⁹ *Polynesian Spa Ltd v Osborne*, above n 2, at [69].

⁵⁰ *Osborne v WorkSafe New Zealand* [2015] NZHC 2991, [2016] 2 NZLR 485 at [38] - [42].

⁵¹ *Matalulu v Director of Public Prosecution (Fiji)*, above n 4, at 216.

⁵² *Ibid*, at 753-756. That passage was approved by the Privy Council in *Mohit v The Director of Public Prosecutions of Mauritius* [2006] UKPC 20, [2006] 1 WLR 3343 at [17]. Both *Mohit* and *Matalulu*, above n 4, were approved generally by the House of Lords in *R (on the application of Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756.

⁵³ *Cooke v Valuers Registration Board* [2014] NZHC 323; When dealing with a broad discretionary statutory power, it is necessary to distinguish considerations that the decision-maker has treated as relevant to the exercise of the power from those that are made mandatory by statute. The distinction is made clear in *CREEDNZ Inc Governor-General* [1981] 1 NZLR 172 (CA) at 183 per Cooke J: What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the Court holds a decision invalid on... [that ground]. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the Court itself, would have taken into account if they had to make the decision. See per Mander J in *Vogel v Commission of Crown Lands* [2018] NZHC 953 at [82] – [84].

⁵⁴ *R v Director of Public Prosecutions, ex parte Chaudhary* [1995] 1 Cr App R 136 at 144.

The Court of Appeal in *Osborne* stated that “a decision not to prosecute because of an unlawful general policy which is in effect, an abdication of discretion is both reviewable and likely to result in relief being ordered (usually in the form of an order to reconsider).”⁵⁵ The Court of Appeal cautioned that:⁵⁶

...the reality remains, however, that it will be difficult to make out grounds of review such as having regard to irrelevant considerations or failing to have regard to relevant considerations because of the width of the considerations to which the prosecutor may properly have regard, as well as the limited scope of considerations that are truly mandatory rather than merely permissive. That is one reason why it is said courts will only intervene in exceptional cases.

The Court of Appeal also found that: “A material error of law in the exercise of prosecutorial discretion will be reviewable.”⁵⁷ In considering *Chaudhary* it also held that failure to accord to the applicable code for the conduct of prosecutions was a legitimate ground for review and that such failure “may logically be cast as either an error of law or a failure to consider a relevant consideration.”⁵⁸ The *Osborne* Court of Appeal considered certain contexts where review would be available, it did not articulate the precise grounds that may be available for judicial review of prosecution decisions.

The *Osborne* Supreme Court decision did not go as far as the Court of Appeal in its analysis of the appropriate circumstances for intervention, but held that “it is contrary to the public interest and unlawful for an arrangement to be made that a prosecutor will not be brought or maintained on the condition that a sum of money is paid.”⁵⁹ To this extent, the Supreme Court’s decision was confined to the ‘illegality’ branch of review, and made no further comments regarding any expansion from this branch.

Instead of applying the array of general judicial review standards, principles and tests that applies in every other judicial review,⁶⁰ but insisting on proof commensurate to the seriousness of the allegation, the courts have significantly minimised the area for challenge, thereby putting a whole class of important executive activity beyond the reach of review. This same outcome

⁵⁵ *Osborne v WorkSafe New Zealand* (CA), above n 25, at [39].

⁵⁶ *Ibid*, at [45].

⁵⁷ *Ibid*, at [48].

⁵⁸ *Ibid*, at [49].

⁵⁹ *Osborne v WorkSafe New Zealand* (SC), above n 1, at [1].

⁶⁰ Except for commercial decisions of quasi-public bodies; see *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*, above n 30, at 391 (only reviewable for “fraud, corruption or bad faith”). See also *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 (CA); *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZCA 259, [2009] 3 NZLR 713; Knight, above n 5 at 77.

would occur, but on a sound principled basis, if the general orthodoxy prevailed, as the realities of being able to prove, by cogent evidence, bad faith or collateral purpose are so slim in any event. To quarantine two whole branches from review because they have possible potential of involving questions that conflict with the separation of powers or require strenuous balancing exercises, “is to ignore the fact that the court is already required to enter a similar exercise in relation to legislation whenever proportionality is in issue.”⁶¹

In a recent decision by the New Zealand LCRO, a challenge was made by a lawyer “DL” to review the prosecutorial discretion to charge him with disciplinary offences.⁶² It was found that the relevant principles that might apply to decisions being reversed by Review Officers were discussed in *FF v Wellington Standards Committee 2* and include situations where a decision to prosecute was:⁶³

- (a) Significantly influenced by irrelevant considerations
- (b) Exercised for collateral purposes unrelated to the objectives of the statute in question (and therefore an abuse of process).
- (c) Exercised in a discriminatory manner.
- (d) Exercised capriciously, in bad faith or with malice.

The Officer noted that the principles while not necessarily exhaustive, provide guidance on the approach a LCRO can be expected to adopt when proceeding with a review of a decision to prosecute. It can be seen that the LRCO has adopted a more comprehensive position than that yet achieved by our courts.

6.1.3 The Organising Principles underlying the ‘Exceptional Circumstances’ Position: Restrictions to Access to Justice

As previously noted, the Supreme Court in *Osborne* did not provide a comprehensive analysis. It decided the case on a narrow basis and left many important issues unanswered.⁶⁴ The ‘exceptional circumstances’ approach is limited by the organising principles that underlie it.⁶⁵ The *Polynesian Spa* restrictions demonstrate judicial caution towards interfering with

⁶¹ Anna Poole “Recent legislative competence challenges” (2011) 19 SLT 127-134.

⁶² *DL v [Area] Standards Committee* LRCO 164/2016, 26 October 2016.

⁶³ *FF v Wellington Standards Committee 2* LCRO 23/2011, 27 September 2011 at [49] – [51].

⁶⁴ The Supreme Court in *Osborne v WorkSafe New Zealand*, above n 1, only went as far as it was required on the justiciability issue. See Chapter 5.

⁶⁵ The ‘exceptional circumstances’ position as articulated in *Polynesian Spa*, above n 2, at [61] – [69] per Randerson J.

prosecutorial independence. The question that arises however, is whether the rationales employed by the courts to justify the current restraint are defensible? This section considers these principles concludes that the Courts have overly limited their own scope of review, significantly reducing the opportunity of aggrieved victims to have prosecution decisions reviewed.

6.1.3.1 The Concept of Judicial Reluctance to Interfere

The common law courts give respect to the “constitutional and institutional differences between the branches of government and defer over decisions involving: the national interest, polycentric issues, macro-economic policy, the allocation of public resources, the mediation of sectional interests and moral preferences.”⁶⁶ In *Sharma v Brown-Antoine*,⁶⁷ Lord Bingham explained that the courts have provided numerous reasons for their extreme reluctance to disturb prosecution decisions via judicial review. Firstly, the powers in question are entrusted to the specific officers and no other person, and no other authority is allowed to exercise such powers or make any judgment on which such exercise must depend. Secondly, courts have long-recognised the polycentric nature of such decisions, which necessarily includes policy and public interest considerations that are not susceptible to judicial review. Thirdly, the powers are conferred in very broad and non-prescriptive terms.⁶⁸

In *Wayte v United States*,⁶⁹ Powell J commented on why courts are reluctant to circumscribe prosecutorial discretion; “This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.”⁷⁰ The same factors similarly apply to a decision not to prosecute.

⁶⁶ Joseph, above n 9, at [22.5.1]. See for example, *R v Director of Public Prosecutions, ex parte Kebilene and Others* [1999] UKHL 43, [2000] 2 AC 326, [1999] 3 WLR 972 at 381; *R v Lichniak* [2002] UKHL 47, [2003] 1 AC 903 at [14]. Compare *A v Secretary of State for the Home Department* [2002] EWCA Civ 1502, [2004] QB 335; *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 (judicial deference to ministerial assessments of the national interest involving terrorist threats but not so as to exclude judicial scrutiny where Convention rights are in issue under the Human Rights Act 1998 UK). See generally, Harry Woolf, Jeffery L. Jowell, Catherine M Donnelly, above n 15, at 1-034 – 1-044.

⁶⁷ *Sharma v Brown-Antoine* [2006] UKPC 57, [2007] 1 WLR 781 (PC), at 788.

⁶⁸ *Ibid*, at 788 E-H.

⁶⁹ *Wayte v United States* 470 US 598 (1985).

⁷⁰ *Ibid*, at 607-608 per Powell J.

In *R v Director of Public Prosecutions ex parte Manning*, Lord Bingham CJ, explained why differential approaches are taken for decisions to and not to prosecute:⁷¹

[23] In most cases the decision will not turn on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting an effective remedy would be denied.

In *R (on the application of F) v Director of Public Prosecutions* Lord Judge CJ made the point that in contrast to an inappropriate decision to prosecute, where the individual facing trial has various alternative remedies in the Crown court or Magistrates' court, by its definition, a decision not to prosecute that constitutes a miscarriage of justice only has judicial review as a remedy.⁷² His Lordship emphasised that:⁷³

[5]...the court examining the decision not to prosecute is not vested with a broad jurisdiction to exercise its own judgment, and second guess the Director's decision, and direct reconsideration of the decision simply because the court itself would have reached a different conclusion. The remedy is carefully circumscribed. In the decided cases different epithets have been applied to highlight how sparingly this jurisdiction should be exercised. The remedy is 'highly exceptional,' rare in the extreme,' and 'very rare indeed.

Prosecutorial decision-making has been described as being cloaked with a presumption of validity, making a prosecutor's charging decision "essentially unreviewable."⁷⁴ This discretion is further cloaked in a "presumption of regularity [that] supports...prosecutorial decisions and 'in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties.'"⁷⁵ Some commentators have described the prosecutorial discretion as being "treated as gospel, resulting in a doctrine that prevails and

⁷¹ *R v Director of Public Prosecutions, ex parte Manning*, above n 34.

⁷² *R (on the application of F) v Director of Public Prosecutions* [2013] EWHC 945 (Admin), [2014] 2 WLR 190 at [3].

⁷³ *Ibid.*

⁷⁴ James Vorenberg "Decent Restraint of Prosecutorial Power" (1981) 94 Harv L Rev 1521 at 1522. Professor Vorenberg notes that while prosecutorial discretion remains broad, other actors' discretionary powers in the criminal justice system have been limited. He cites the limitations on the powers of magistrates to set bail, judges to set sentences, and correctional offices to control inmates.

⁷⁵ *United States v Armstrong* 116 S. Ct. 1480 (1996) (quoting *United States v Chemical Found Inc* 272 U.S.1, 14-15 (1926)).

prosper through inertia rather than through sound policy.”⁷⁶ The judicial deference generally afforded to prosecutors is most evident with respect to the decision-making function.⁷⁷

6.1.3.2 The Principle of Deference

Judicial review of prosecutorial decisions is anchored to the judicial deference principle, limiting the role of the courts with respect to judicial review.⁷⁸ Within this paradigm, the judiciary has absolute power to interpret the law, while prosecutors perform their function within a sphere of discretionary administrative power bounded at the margins of law circumscribed by Parliament. The deference principle presupposes judicial power to review, but constrains the appropriateness to review based on the premise that administrative decision makers are entitled leeway and concession to make their discretionary decisions, and that the courts will respect this. Justiciability as a concept imports the deference principle as a means of recognising the constitutional and institutional limits of judicial review.⁷⁹ Accordingly, deference is considered to be the “invisible hand” guiding the exercise of the judicial discretion to review or not.⁸⁰

The adoption of judicial deference is still a highly controversial proposition and has mixed support amongst judges.⁸¹ For example, Laws LJ endorsed the doctrine of deference in *International Transport Roth GmbH v Secretary of State for the Home Department*, and even went as far as creating criteria to aid judges in implementing the principle on a case-by case

⁷⁶ Robert Heller “Selective Prosecution and the Federalization of Criminal Law: The need for meaningful Judicial Review of Prosecutorial Discretion” (1997) 145 University of Pennsylvania Law Review 1309 at 1327. Heller observed at 1327 footnote 79 referring to Kenneth Culp Davis *Discretionary justice: A Preliminary Inquiry* (Louisiana State University Press, Baton Rouge, 1969) at 191 that: “Professor Davis is especially critical of the inability of courts, and even many commentators to question the soundness of bestowing upon...prosecutors almost unlimited discretion: ‘[T]he habit of assuming that of courts the prosecutor’s discretion must be uncontrolled is so deeply embedded that the usual implied response to questions as to whether the prosecuting power can be confined or structured or checked is that the questioner must be totally without understanding. Inability of those who are responsible for administering the system to answer the most elementary questions as to the reasons behind the system is itself a reason to re-examine.’”

⁷⁷ Bennett L Gershman “A Moral Standard for the Prosecutor’s Exercise of the Charging Discretion” (1993) 20 Fordham Urban Law Journal 513-530.

⁷⁸ The principle of deference is closely linked to the concept of variable intensity of review as discussed in Chapter 6 section 6.1.2. See Taylor, above n 3, at [3.13]; “The reasons for deference relate to subjective justiciability and focus on institutional capacity and special expertise. Deference is therefore variable.”

⁷⁹ Joseph, above n 9, at [22.5.1].

⁸⁰ Ibid.

⁸¹ See Taylor, above n 3, at [13.3]; See Steyn “Deference a tangled story” [2005] PL 346; Lord Steyn stated he is “reluctant to enter into an argument about labels”, but that his “inclination is not to abandon altogether the phrase deference, which is sanctioned by wide usage in the United Kingdom and abroad, and has virtue of concision.”

basis.⁸² Other judges deplore the principle, for example Lord Hoffmann balked at the notion of deference in *R (Prolife Alliance) v British Broadcasting Corporation* and considered that the submissive overtones of the word “deference”, denoting “servility or perhaps gracious concession” is not appropriate to describe what is happening.”⁸³ However, as Professor Joseph cogently reasoned, the “enterprise of judicial review would collapse without the concept of justiciability, and this concept implies ex hypothesi a principle of judicial restraint.”⁸⁴

The House of Lords in *R v Director of Public Prosecutions, ex parte Kebilene*, upheld the DPP’s decision to prosecute three individuals under section 16A of the Prevention of Terrorism (Temporary Provisions) Act 1989.⁸⁵ Lord Steyn, in his majority opinion explained that the DPP’s decision should be upheld on the basis that “absent dishonesty or mala fides or an exceptional circumstance, the decision of the DPP to consent to the prosecution of the Respondents is not amenable to judicial review.”⁸⁶ Lord Hope concurred, indicating that the Court should adopt the judicial deference principle:⁸⁷

...in this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic ground, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention. This point is well made at p.74 para 3.21 of Human Rights Law and Practice (Butterworths, 1999), of which Lord Lester of Herne Hill QC and Mr David Pannick QC are the General Editors, where the area in which these choices may arise is conveniently and appropriately described as the ‘discretionary area of judgment.’

Lord Hope’s reasoning has since been echoed in obiter passages of later cases, which suggest that judges should recognise a ‘discretionary area of judgment’⁸⁸ or allow administrative officials some ‘degree or margin of deference.’⁸⁹

⁸² *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 (CA) at [83]- [87]. In his opinion, Laws LJ asserts: “(1) that Acts of Parliament merit greater judicial deference than executive decisions or subordinate measures, (2) that greater judicial deference is owed in cases where the Convention contemplates a balance between individual rights and policy interests, (3) that greater judicial deference is owed where the subject matter falls within the traditional constitutional responsibility of Parliament or the executive, and (4) that greater judicial deference is owed where the subject matter implicates the actual or potential expertise of Parliament or the executive.”

⁸³ *R (Prolife Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185 at [75] (HL).

⁸⁴ Joseph, above n 9, at [22.5.1].

⁸⁵ *R v Director of Public Prosecutions, ex parte Kebilene and Others*, above n 66.

⁸⁶ *Ibid*, at 371.

⁸⁷ *Ibid*, at 381.

⁸⁸ *R v Secretary of State for the Home Department, ex parte Mahmood* [2001] 1 WLR 840 (CA) at [38] (CA); *Brown v Stott* [2003] 1 AC 681 at 703 (PC).

⁸⁹ *International Transport Roth GmbH v Secretary of State for the Home Department*, above n 82, at 761 (CA). See also *Popular Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 at [69] (CA).

The deference principle has been described by North American commentators as the “passive virtue.”⁹⁰ The courts there have fervently developed how the principle may be understood. In *Baker v Canada*⁹¹ the court recognised the deference principle as meaning ‘respect.’ Dyzenhaus writes that “deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision.”⁹²

In order to understand the deference principle, it is important to identify that justiciability and jurisdiction are distinct concepts. Professor Joseph states that “jurisdiction identifies the court’s *power* to intervene in judicial review, while justiciability identifies the *appropriateness* to intervene in judicial review.”⁹³ Justiciability has been described as a concept “whose purpose is to confine the courts to the exercise of judicial power in relation to issues not properly assignable to other branches of government under the separation of powers doctrine and otherwise ‘within the institutional competence’ of the courts.”⁹⁴ Conversely, non-justiciability is a term that “may conveniently be used to denote decisions where the court is of the view that ‘the decision-making function lies within the province of the executive and that it is inappropriate that the courts should trespass into that preserve.’”⁹⁵ While courts in New Zealand have jurisdiction to review prosecutorial discretion, it appears that the courts have largely ring-fenced the discretionary area occupied by the prosecutor as “non-justiciable,” predominantly placing them outside the limits of court challenges.⁹⁶ Deference in this regard, has evolved beyond giving “respectful attention”⁹⁷ to prosecutors, rather, courts reviewing prosecutorial discretion in New Zealand are, as some judges feared, “graciously conceding.”⁹⁸

⁹⁰ Alexander M Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill, Indianapolis, 1962) at ch 4 entitled “The Passive Virtues.” See Joseph, above n 9, at [22.5.1].

⁹¹ *Baker v Canada* [1999] 2 SCR 817 at 859 per L’Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie JJ.

⁹² D Dyzenhaus “The Politics of Deference: Judicial Review and Democracy” in M Taggart (ed) *The Province of Administrative Law* (Hart, Oxford, 1997) 279 at 286.

⁹³ Joseph, above n 9, at [22.5.1]. Approved in *Trident Trust Co (NZ) Ltd v Bozo* [2018] NZHC 947 at [18] per Downs J.

⁹⁴ Administrative Review Council *The Scope of Judicial Review Discussion Paper* (2003) at 28. See also Anthony Mason AC KBE “The High Court as Gatekeeper” (2000) 24(2) *Melbourne University Law Review* 784 at 788 and “The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights” (1994) 1(1) *Australian Journal of Human Rights* 3 at 8.

⁹⁵ Administrative Review Council, above n 94 at 28. See also Anthony Mason AC KBE “The Importance of Judicial Review Of Administrative Action as a Safeguard of Individual Rights” (address made to the Australian Bar Association Fifth Biennial Conference, 4 July 1994) at 14.

⁹⁶ An observation made by Professor Philip Joseph in Joseph, above n 9, at [22.5.1].

⁹⁷ D Dyzenhaus “The Politics of Deference: Judicial Review and Democracy” in M Taggart (ed) *The Province of Administrative Law* (Hart, Oxford, 1997) 279 at 286.

⁹⁸ *R (Prolife Alliance) v British Broadcasting Corporation*, above n 83, at [75].

6.1.3.3 Rationales for Judicial Reluctance

There are various reasons for judicial reluctance to review prosecutorial discretion apposite to the deference principle. Some of the arguments include; the impossibility of total enforcement of the laws,⁹⁹ the need for leniency in particular cases,¹⁰⁰ and the prosecutor's expertise, as opposed to the judge's.¹⁰¹ Robert Heller identified four main rationales stipulated in *United States v Armstrong*¹⁰² for judicial reluctance to interfere with the prosecutorial discretion.¹⁰³ The rationales are used as justifications by the courts to "adopt the virtually irrebuttable presumption that a prosecutor is acting within constitutional limits."¹⁰⁴ But each rationale has an equally convincing counter-argument.

1. *The Separation of Powers Doctrine*

The separation of powers doctrine is committed to the principle of limited government. The doctrine lies at the heart of a prosecution decision. Since decisions involve a high content of judgment, prosecutors require full independence in the fundamental exercise of any discretion.¹⁰⁵

Proponents of this view advocate that the constitutionally-enshrined separation of powers doctrine generally prevents the judiciary from interfering with a prosecutor's broad discretion

⁹⁹ Givelber "The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law" [1973] U ILL LF 88 at 100-101; it can of course be argued that if total enforcement of the laws is impossible, perhaps the laws should be revised in a more enforceable manner, (i.e. fewer laws, with more resources allocated to the enforcement of those laws.)

¹⁰⁰ Ibid, at 100-102. However, a persuasive argument can be made against this rationale. One scholar argues that the result of discretionary leniency in enforcement is, in fact, injustice or discrimination towards those who are not treated leniently; see Davis, above n 76.

¹⁰¹ Givelber, above n 99, at 192.

¹⁰² *United States v Armstrong*, above n 75. See Heller, above n 76, at 1314; "The *Armstrong* court reversed a district court's discovery order that would have compelled the [United States] Attorney's Office for the Central District of California to disclose its criteria for bringing a drug prosecution federally. The Court found that such charging decisions fall within recognised prosecutorial discretion and that only a high threshold of evidence that suggests a constitutional violation based on selective prosecution would permit such discovery."

¹⁰³ Heller, above n 76, at 1327-1341. Micheal O'Higgins "Reviewing Prosecution Decisions" (paper presented to 9th Annual National Prosecutors' Conference, Dublin Castle Conference Centre, May 2008) at 7.

¹⁰⁴ Heller, above 76, at 1326.

¹⁰⁵ *Polynesian Spa Ltd*, above n 2, at [62] per Randerson J; *Fox v Attorney- General*, above n 9, at [30] – [31]; *R (Corner House Research) v Director of The Serious Fraud Office*, above n 52, at [31] per Lord Bingham; *Marshall v DPP* [2007] UKPC 4 (Jamaica) at [17] per Lord Carswell. For a commentary on the separation of powers doctrine see Joseph, above 9, at [8.0].

to decide whether to prosecute or not and conduct criminal prosecutions.¹⁰⁶ The reasons for the courts' reluctance to judicially review appears to lie in the intersection of the componentry of government under the separation of powers doctrine. The Courts have taken a self-constraining approach as a result of these principles, which has created an institutional disinclination to interfere in this species of decision-making. But the absolute deference to prerogative power is now replaced by the considerable deference to the polycentric decision-making of prosecutors for and on behalf of the executive.

The argument bluntly contends that the judiciary cannot interfere with the prosecutorial role of the executive. In the Canadian case *R v Bladerstone et al*,¹⁰⁷ Monin CJM concisely summarised the argument as thus,¹⁰⁸

The judicial and executive must not mix. These are two separate and distinct functions. The accusatorial officers lay informations or in some cases prefer indictments. Courts or the curia listen to cases brought to their attention and decide them on their merits or on meritorious preliminary matters. If a judge should attempt to review the actions or conduct of the Attorney General...he could be falling into a field which is not his and interfering with the administrative and accusatorial function of the Attorney General and his officers. That a judge must not do.

In *Krieger v Law Society of Alberta*, the Supreme Court of Canada considered whether the separation of powers doctrine formed the basis for judicial deference to prosecutorial discretion.¹⁰⁹ “In our theory of government, it is the sovereign who holds the power to prosecute his or her subjects. A decision of the Attorney General, or of his or her agents, within the authority delegated to him or her by the sovereign is not subject to interference by other arms or government. An exercise of prosecutorial discretion will, therefore be treated with deference by the courts and by other members of the executive.” The court also commented on issues at a practical level regarding regular review of prosecutorial discretion observing that:¹¹⁰ “The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision

¹⁰⁶ Heller, above n 76, at 1338. See also Robert J Frater *Prosecutorial Misconduct* (Canada law Book Ltd, Aurora (ON), 2009) at 45. This issue was discussed in *Greymouth Petroleum Ltd v Solicitor General* [2010] 2 NZLR 567 (HC) which followed *Polynesian Spa Ltd v Osborne*, above n 2. Those decisions agree there is jurisdiction to entertain a review, but that this would only be in ‘exceptional circumstances’; *Greymouth Petroleum Ltd v Solicitor-General* at [39]. This is in contrast to the orthodox view espoused in *Saywell v Attorney General* [1982] 2 NZLR 97 (HC) that review is not possible. *Tindal v Muldoon* HC Auckland A 383/83, 7 November 1983 is more liberal.

¹⁰⁷ *R v Balderstone et al* (1983), 8 CCC (3d) 532; [1983] MJ no 207 (Man CA).

¹⁰⁸ *Ibid*, at [28].

¹⁰⁹ *Krieger v Law Society of Alberta* 2002 SCC 65, [2002] 3 SCR 372 at [45].

¹¹⁰ *Ibid*, at [32].

to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution.”

Ramsay further explained the rationale stating:¹¹¹ “It is fundamental to our system of justice that criminal proceedings be conducted in public before an independent and impartial tribunal. If the court is to review the prosecutor’s exercise of his discretion the court becomes a supervising prosecutor. It ceases to be an independent tribunal.” In *Director of Public Prosecutions v Humphrys*, Viscount Dilhorne made advisory comments regarding the rationale:¹¹² “A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has a power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.” Various commentators and many courts including the *Armstrong* Court have articulated that prosecutors are comparatively more competent than the judiciary in making such decisions due to their expertise and experience in confronting these types of issues regularly.¹¹³

Although it is now well established in New Zealand that courts have jurisdiction (albeit restricted) to judicially review prosecutorial discretion, the rationale that the courts should not interfere by virtue of the separation of powers argument is unconvincing. The more compelling and converse argument is that prosecutors should retain broad discretion in their decision-making process, since they have specialised judgment and acuity to make such decisions compared to the courts.¹¹⁴ However, the validity of this argument is lost when the courts are called upon to review an allegedly flawed decision. Reviewing executive action is a primary discipline of the judiciary and they regularly review policy decisions of other state actors.¹¹⁵

¹¹¹ J A Ramsay “Prosecutorial Discretion: A Reply to David Vanek” (1987-88) 30 Crim LQ 378-380.

¹¹² *Director of Public Prosecutions v Humphrys* [1976] 2 All ER 497 (HL) at 511.

¹¹³ See for example, *United States v Armstrong*, above n 75, at 1486; “Judicial deference to the decisions of [federal prosecutors] rests in part on an assessment of the relative competence of prosecutors and courts.”; *Wayte v United States*, above n 69; describing common factors considered in making charging decisions as “not readily susceptible to the kind of analysis the courts are competent to undertake”; Steven Alan Reiss “Prosecutorial Intent in Constitutional Criminal Procedure (1987) 135 U Pa L Rev 1365 at 1368-1369; describing the prosecutor-as-expert argument for judicial deference to prosecutorial discretion. But see Vorenberg, above, n 74, at 1545-48; describing and criticizing this expertise argument for unfettered prosecutorial discretion.

¹¹⁴ *Heller*, above n 76, at 1341.

¹¹⁵ For example, government ministers. See Chapter 6, section 6.1.4.3. See for example *R v Secretary of State for Social Security, ex parte Council for the Welfare of Immigrants*.

This begs the question why prosecutorial discretion, a power exercised by the executive, exists as an anomaly in this regard.

Heller argues: “To cloak prosecutorial discretionary decision-making in a presumption of regularity based on the fact that enforcement of the nation’s criminal laws is the “special province of the Executive Branch, however, ignores the proper role of the judicial branch within the constitutional system of checks and balances.”¹¹⁶ These checks and balances do not only safeguard against gross abuse, but also guard against the dangers that are endemic in any discretion based decision-making. For example, when a prosecutor becomes too close to a case and loses perspective. Even the most capable prosecutors may overlook important public interest considerations, or make a material error of law.

The independence of a prosecutor can only materialise under certain conditions and without trespassory interference by the exercise of judicial power. But the judicial duty necessarily intersects with prosecutorial discretions. Any demarcation dispute needs to be resolved by a highly principled and transparent praxis with the authority of the Court of Appeal and of the Supreme Court.

2. The Limit of Court Resources

This argument purports that “prosecutorial and judicial resources will be stretched beyond acceptable limits if frequent judicial reviews of charging decisions are allowed.”¹¹⁷ Given New Zealand’s already over-burdened criminal justice system, this argument asserts that the “prosecutorial discretion is necessary to curb the ever-increasing strain” on the courts.¹¹⁸ The strain on resources and on the courts and prosecutors may be felt in two ways. First, criminal statutes often prescribe criminal conduct in broad terms. If a reviewing court finds the impugned decision not to prosecute to be flawed, then following from the experience of the English courts, prosecutors will need to reconsider their decisions and upon reconsideration, may decide to proceed. By this process, more cases will advance through the criminal justice system. Secondly, it is held that any collateral civil litigation to challenge decisions to prosecute will burden the criminal justice system’s resources and cause long-winded delays in criminal

¹¹⁶ O’Higgins, above n 103, at 7; Heller, above n 76, at 1340.

¹¹⁷ Heller, above n 76, at 1328.

¹¹⁸ Ibid.

proceedings. The Courts are concerned that allowing more judicial review challenges against prosecution decisions will “open up the ‘floodgates of litigation’ inviting a deluge of spurious claims.”¹¹⁹

Admittedly, the preservation of prosecutorial and judicial economy and preventing delay in criminal proceedings are legitimate concerns. These concerns are especially highlighted when there are possible avenues for frivolous and collateral litigation. The courts must find the correct balance between accounting for these legitimate concerns without disregarding claims that may be meritorious. Such a balance would require consideration of the legitimate goal of preventing frivolous claims against a victims’ right to review. The proper means of finding this balance is for the New Zealand courts to use variable intensities of review that consider the nature, importance and context of the decision, in order to minimise the risk of meritorious claims being turned away. The current ‘exceptional circumstances’ approach taken in review, is arguably too exacting and obfuscates the process of adopting an appropriate intensity of review.

3. The Facilitation of Legal Enforcement

The third policy argument that militates against judicial interference has been termed by American commentators as the “chilling of legal enforcement” justification.¹²⁰ The argument maintains that prosecutors may second-guess their decisions to prosecute or not if they perceive that they will be subject to constant scrutiny by the courts.

However, the courts using the ‘chilling of law enforcement’ argument as a justification for judicial resistance to intervene in prosecutorial discretion, means that the courts have improperly balanced a legitimate policy concern with a constitutional right. It is the prosecutor’s role to ardently enforce their discretion, as it is the courts to ensure that the prosecution discretion is not left unchecked. The lack of an institutional framework of checks and balances within which prosecutorial discretion is exercised encourages abuses of the rights of individuals.

¹¹⁹ Amy G Applegate “Prosecutorial Discretion and Discrimination in the Decision to Charge” (1982) 55 Temple LQ 35 at 37.

¹²⁰ Heller, above n 76, at 1331.

4. *Unnecessary Disclosure of Law Enforcement Strategies*

The fourth policy objection relates to the courts' concern that if the judiciary scrutinises prosecutorial decision making too closely, it has the potential to undermine effective crime control. Vorenberg states that: "Charging unpredictability can be seen, in this view, as a way of retaining some 'unearned' deterrence that would be lost if penalties were known and predictable."¹²¹ It is considered that the interest in protecting prosecutorial strategies from the public justifies the need for prosecutors to have broad discretion, and limited intervention from courts.

However, there are two reasons that discredit that justification for broad prosecutorial discretion. Firstly, the argument presupposes that all criminals rationally pre-determine criminal acts before committing them. This is an unsupported assumption since many crimes are conducted on the spur of the moment. Additionally, even if some criminals structure their crimes in accordance with prosecution strategies, this is not necessarily undesirable. In fact, it may actually serve as useful tool for deterrence. If an offender is aware of the aggravating factors that might lead to a more serious charge or charges being laid, and a potentially harsher sentence, then the offender might choose to commit the crime in a more benign manner. For example, an offender choosing to commit a robbery instead of a more severe aggravated robbery (with a deadly weapon). Secondly, the strategies prosecutors have for law enforcement may be protected from exposure through judicial safeguards. The perception that court intervention of prosecutorial discretion would harm criminal enforcement efforts is "simply too weak an argument to support a policy that injects into the criminal justice system an avenue for misuse of governmental powers."¹²²

One other rationale for judicial reluctance to challenge decisions not to prosecute exists that was not identified in *Armstrong*. The argument purports that taking a less restrictive approach to judicial review will lead to uncertainty for defendants. Under the principle of finality, it may be understood that to prevent defendants from being unfairly oppressed, defendants should be able to rely upon a prosecution decision not to prosecute, rather than having to live in a

¹²¹ Vorenberg, above n 74, at 1549- 1550.

¹²² Heller, above n 76, at 1338.

purgatory-like state, where the decision could change at any time.¹²³ However, this argument fails to recognise that a decision not to prosecute does not necessarily mean that the defendant is acquitted. If new evidence comes to light, it is still possible that the individual may be re-charged with the offence.

The issue has also been considered in various cases where the objection has been surmounted. For example, in *Chaudhary Kennedy LJ*¹²⁴ found that the time that had elapsed since the offence may be a relevant consideration in the charging decision. If a defendant is prejudiced as a result of delays in the bringing of charges, then this should be a factor against prosecution. If the prosecutor had made an undertaking that the defendant would not be prosecuted, rather than making a representation that the case is closed, then this should likewise indicate against prosecution. However, if the offence is one of a more serious nature, for example sexual crimes or murder, then a greater delay in bringing charges may be acceptable.

While the various rationales indicate why the courts are exercising restraint in judicial review of prosecutorial discretion, each rationale has an equally persuasive counter-argument against it. Despite this, courts are still showing a uniform approach towards judicial restraint and prosecutorial power remains essentially untrammelled. Prosecution decisions being polycentric in nature, combined with the concepts of deference and justiciability are factors that all limit the scope of judicial review. In the United Kingdom case, *Sharma*,¹²⁵ the Privy Council extensively considered common law cases focusing on judicial review of prosecution decisions and concluded that the language used in the cases showed a consistent approach: “Rare in the extreme, “Sparingly exercised,” “very hesitant” and “very rare indeed.” The Privy Council approved of Lord Steyn’s dicta in *Kebilene*:¹²⁶

“My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review.”

¹²³ See *R v Smith* [2003] 3 NZLR 617 (CA) at [46] per Elias CJ; “Unless a judgment of a Court is set aside on further appeal or otherwise set aside or amended according to law, it is conclusive as to the legal consequences it decides.”; Starmer, Keir QC “Finality in criminal justice: when should the CPS reopen a case?” [2012] Crim LR 526-534. See also paragraph 7.1 of the Solicitor-General’s Prosecution Guidelines 2013.

¹²⁴ *R v Director of Public Prosecutions ex parte Chaudhary*, above n 54.

¹²⁵ *Sharma v Brown-Antoine*, above n 67.

¹²⁶ *R v Director of Public Prosecutions, ex parte Kebilene and Others*, above n 66, at 371.

The language used in these United Kingdom cases is echoed in many of the pronouncements of the courts in New Zealand. In numerous cases, the courts here have articulated their own underlying rationales as the basis of their reticence.

6.1.3.4 Judicial Restraint: The New Zealand Context

The New Zealand courts have adopted a very cautious approach, since their slow but eventual emancipation from the prerogative non-justiciability approach.¹²⁷ Brown J in *Osborne* (HC) reasoned that rather than set down principles, a case by case approach was required until the highest New Zealand courts consider the issue.

In view of the extensive arguments and authorities cited to the *Osborne* Supreme Court, it had an opportunity to fully lay down the law in this regard. Instead, it decided the case on a very narrow basis. It did not comment on the decisional law test of ‘exceptional circumstances’ in *Polynesian Spa* (an authority cited to it at some length by all parties) nor did it approve or disapprove of the principles behind the exercise of judicial restraint in the review of prosecutorial discretion articulated by the Court of Appeal. This engenders an undesirable uncertainty as to the true state of the law. To this end, it is appropriate to work backwards from the Court of Appeal’s findings in reaching their conclusion. The Court of Appeal was particularly influenced by *Polynesian Spa*.

In *Polynesian Spa*, Randerson J found six reasons to support the ‘exceptional circumstances’ approach as the test for reviewability, and why the ambit of review should not be extended further.¹²⁸ Although His Honour made clear that the justifications applied to both decisions to prosecute and not to prosecute, only two of the six reasons can legitimately apply to decisions not to prosecute. The remaining four rationales¹²⁹ essentially argued that matters should be

¹²⁷ Prerogative powers are reviewable in New Zealand, but some arcane restrictions still remain see Taylor, above n 3, at [2.25] – [2.29]. Even the prerogative of awarding honours is justiciable: *Black v Chrétien* (2001) 199 DLR (4th) 228 Ont: CA. But the Crown has the “exclusive power over the making of war and deployment of armed forces”; Rosara Joseph, *The War Prerogative: History, Reform and Constitutional Design* (Oxford University Press, 2013) at 110.

¹²⁸ *Polynesian Spa Ltd v Osborne*, above n 2, at [62].

¹²⁹ The other four of Randerson J’s reasons at that only apply to a prosecution decision to prosecute are (at [62]): “(c) Decisions to initiate and continue prosecutions generally involve a high content of judgment and discretion in the decisions reached. (d) Where a prosecution ensues, the courts possess an inherent power to stay or dismiss a prosecution for abuse of process. (e) The conclusion on behalf of a prosecuting authority that an offence has been committed is merely an expression of opinion which is capable of being challenged in Court. (f) If factual errors are made in an investigation by a prosecuting authority or if there is further or other material which a

considered at trial, which cannot apply to decisions not to prosecute, where the prosecution process comes to an end and no trial takes place. Only the first two reasons are useful in this context. The first reason contended that;¹³⁰

a) It is important that the proper constitutional boundaries be observed. The discretion to prosecute on behalf of the state is a function of Executive government rather than the courts whose function is to ensure the proper and fair conduct of trial [...]

Randerson J's reason resonates with Lord Bingham's explanation as to why courts do not disturb a decision of an independent prosecutor save in highly 'exceptional circumstances' in *Sharma v Brown-Antoine*.¹³¹ Lord Bingham made similar opine in *R (Corner House Research and another) v Director of the Serious Fraud Office*.¹³² "Only in highly exceptional circumstances will the court disturb the decisions of an independent prosecutor and investigator... The reasons why the courts are very slow to intervene are well understood. They are, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgements on which such exercise must depend." Randerson J¹³³ noted a "marked reluctance" to intervene with the discretion since prosecution decision-making is a function of executive government and not of the courts.¹³⁴ It would be inappropriate for the courts to interfere in prosecutorial decisions given its own function of responsibility for the conduct of criminal trials.¹³⁵

defendant considers ought to have been weighed by the prosecuting authority, there is an opportunity to explore and test such issues at trial and to bring such further evidence as the defendant sees fit."

¹³⁰ Ibid, at [62] per Randerson J.

¹³¹ Lord Bingham stated: "That the powers in question are entrusted to the officers identified and to no one else, no other authority may exercise the powers or make the judgments on which such exercise must depend." For other cited reasons see; *Sharma v Brown-Antoine*, above n 67, at 788 E-H.

¹³² *R (on the application of Corner House Research) v Director of the Serious Fraud Office*, above n 52, at [31] per Lord Bingham.

¹³³ *Polynesian Spa Ltd*, above n 2, at [61] per Randerson J.

¹³⁴ Ibid, at [62] per Randerson J; *Fox v Attorney- General*, above n 104 at [28]; *Sharma v Brown-Antoine*, above n 67, at 789 per Lords Bingham and Walker; *Krieger v Law Society of Alberta*, above n 108, at [45] per Iacobucci and Major JJ for the court. It is generally inappropriate for a judicial officer to decide the merits of prosecution; *Police v Hall* [1976] 2 NZLR 678, 683 (CA) at 683 per Woodhouse J "it must normally be regarded as inappropriate for a judicial officer, whether Judge or Magistrate, to control executive officers in their decisions as to the initiations of prosecutions".

¹³⁵ *Fox v Attorney- General*, above n 9, at [31]; *R v Anderson* 2014 SCC 41, [2014] 2 SCR 167 at [32] per Moldaver J for the court, citing the Supreme Court of Canada's earlier decision in *R v Power* [1994] 1 SCR 601 at 627. In *R v Director of Public Prosecutions, ex parte Kebilene*, above n 66, at 370 D the court held that there is a "strong presumption against the Divisional Court entertaining a judicial review application where the complaint can be raised within the criminal trial and appeal process." In *Attorney General v Tsang Yuk Kiu* [1996] HKC 38, the court noted that it is "the trial judge who has the responsibility for ensuring that the criminal process is not abused by the prosecution, and it is not for the Court of First Instance by judicial review to substitute an opinion of its own." In *Ng Pak Min v HKSAR* High Court of Hong Kong, 27 July 1999 HCAL 70/1999 at [11] per Stock J, the court commented that the principle of judicial review is an avenue of last resort, that requires scrupulous adherence as "it will only be in the most exceptional circumstances that a court will stop criminal proceedings *in limine*."

Randerson J's reasoning is made on the basis that a demarcation between responsibilities exists. However, judicial reluctance to intervene on the basis that the decision-making is some aspect of executive function, is an unsatisfactory answer. The Courts' core function is to ensure government acts under and in accordance with the law. By emphasising that the source of the decision-making is in the executive, to justify non-interference, is only a covert revival of the discredited prerogative non-reviewability position. The Judges in *Matalulu*¹³⁶ in the Supreme Court of Fiji recognised the "polycentric character of official decision making," and considerations including policy and the public interest are areas that courts will not supervise via judicial review because "it is within neither the constitutional function nor the practical competence of the courts to assess their merits." Respect for the kindred concepts of separation of powers and the rule of law prevents the courts from encroaching into the territory occupied by the prosecutor. But again, the Courts are not lacking in "practical competence" to decide the issues. It is always a matter of evidence. Despite assertions to the contrary, the Courts are institutionally equipped to decide all issues involving the power of the State, as criminal law is only a subset of public law itself.

While it is true that the executive and judiciary perform distinct constitutional roles, the functions of each can only properly be carried out if the judicial and executive arms work as a "collaborative enterprise."¹³⁷ It is the function of the judicial arm to scrutinize executive action and use judicial review as a safeguard against abuses of executive power.

Randerson J's second reason for the 'exceptional circumstances' approach was:¹³⁸

b) Decisions to initiate and continue prosecutions generally involve a high content of judgment and discretion in the decisions reached.

Randerson J's sentiment was similarly observed in the courts of *Matalulu*¹³⁹ and *Hallett v Attorney-General (No 2)*.¹⁴⁰ While there is no denying that prosecutors require broad discretion

¹³⁶ *Matalulu v Director of Public Prosecutions (Fiji)*, above n 4, (the Court comprising French, Keith and von Doussa JJ, respectively, Chief Justice of Australia, a Justice of the New Zealand Court of Appeal and a Justice of the Federal Court of Australia); *Matalulu* has been approved by the Privy Council on appeal from: Mauritius, Trinidad and Tobago and Jamaica in; *Mohit v DPP of Mauritius*, above n 52; *Sharma v Brown-Antoine*, above n 67; *Marshall v DPP*, above n 105.

¹³⁷ Philip A Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 321.

¹³⁸ *Polynesian Spa Ltd v Osborne*, above n 2, at [62] per Randerson J.

¹³⁹ *Matalulu v Director of Public Prosecution (Fiji)*, above n 4.

¹⁴⁰ *Hallett v Attorney-General (No 2)* [1989] 2 NZLR 96 (HC) (Henry J).

to make specialised decisions of a “polycentric nature,” this does not mean that such decisions should be left virtually unbridled. Some commentators object to the courts’ habitual rubber stamping of prosecutorial decisions. It is feared that the culture of judicial reticence has the “potential for, and the reality of abuse, charging that discretionary enforcement detracts from the legitimacy of the criminal justice system, violates the principle of fair notice, and frustrates the will of the people.”¹⁴¹ It is the court’s mandate to provide checks on discretion.

An interesting point of comparison is the willingness of the courts to regularly and freely review other types of administrative decisions that similarly require a high content of judgment and discretion, “while the prosecutor’s discretion is left relatively unhampered.”¹⁴² The purpose in making this distinction is to call attention to the fact that decisions of courts on which abuse of discretionary powers are based, are more often than the courts have admitted, judgments about what is thought to be the right approach for Parliament to take.¹⁴³ An overt example of this is the English Court of Appeal case; *R v Secretary of State for Social Security, ex parte Council for the Welfare of Immigrants*.¹⁴⁴ The majority found it inconceivable that Parliament could have “intended to authorise the removal of all social security entitlements from asylum seekers who failed to claim asylum upon entry into the United Kingdom.”¹⁴⁵ The Courts saw it fit to quash the regulations giving such effect. Parliament plainly disagreed and passed new legislation that re-authorised the regulations in the same terms. Lord Sumption suggests there are two ways in which the court’s decision can be interpreted:¹⁴⁶

Some might say that this was a vindication of the proper role of the Courts. They were not prepared to allow a harsh policy to be followed by the executive on such an issue until Parliament had authorised it in unmistakable terms. But another possible conclusion is that the Court of Appeal’s view that Parliament could not have intended such a thing always was unrealistic. It ignored the political background to the legislation and underrated the level of Parliamentary concern about the effect of the UK’s relatively generous level of social provision

¹⁴¹ Applegate, above n 119, at 40. For references to abuse caused by unbridled discretion see Robert H Jackson “The Federal Prosecutor” (1940) 24 J Am Jud Soc’y 18 at 19 noted the prosecutor’s extreme power and its possibility for abuse. See also Kenneth Culp Davis *Administrative Law Treatise* (2d ed, K.C Davis Pub. Co, San Diego, 1979) at 209-210; James Vorenberg “Narrowing the Discretion of Criminal Justice Officials” (1976) Duke LJ 651 at 652-653; For reference that discretionary enforcement detracts from the legitimacy of the criminal justice system see Givelber, above n 99, at 100. For reference concerning violation of principle of fair notice see Givelber, above n 99, at 98. For reference concerning the frustrated will of the people see: Givelber, above n 99, at 96.

¹⁴² See Applegate, above n 119, at 40. See also Davis, above n 141.

¹⁴³ Jonathan Sumption QC “Judicial and Political Decision-Making: The Uncertain Boundary” (the F A Mann Lecture, 2011) at 4.

¹⁴⁴ *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants*, [1997] 1 WLR 275, [1996] 4 All re 385, [1996] EWCA Civ 1293.

¹⁴⁵ Sumption, above n 143, at 4.

¹⁴⁶ Ibid.

in drawing asylum-seekers across Europe to our shores. Differences like these at one point became so intense that an attempt was made, which was ultimately abandoned, to oust by statute the courts' powers of judicial review over certain categories of asylum decisions.

Judgments of this nature are undeniably political, for the simple reason that they deal “with matters (namely the merits of policy decisions) which in a democracy are the proper function of Parliament and of ministers answerable to Parliament and the electorate.”¹⁴⁷ The courts have blurred the line between policy and law in such decisions.¹⁴⁸ This begs the question why polycentric prosecution decisions, that are reviewed in light of process and not merit, are comparatively non-justiciable? There is inconsistency and contradiction in the courts' approach. Policy decisions are purported to be rarely justiciable matters, yet the courts are prepared to intervene in such decisions if they were made via other types of administrative discretion and not prosecutorial. The lack of consistency in the courts' approach creates an injustice. It places the power of prosecutors not only beyond the law, but also beyond other discretionary decision-making powers of the executive.

Another consideration as to why courts may exhibit institutional inertia, is the impact and disruption caused by collateral challenges to the criminal justice system. The point was considered in *Polynesian Spa*¹⁴⁹ having regard to *Kebilene*¹⁵⁰ about decisions to prosecute. Nevertheless, the same concerns can be raised for prosecution decisions not to prosecute. However, the ‘exceptional circumstances’ standard¹⁵¹ for review stipulated in *Polynesian Spa* then practically closes the scope for review. Perhaps the dominating latent reasoning, the inarticulate premise of the New Zealand courts', is the floodgates anxiety. As Brewer J noted, adopting a line from the movie *Field of Dreams*, in relation to judicial review of the decisions of the Judicial Conduct Commissioner when that first became available it was thought there

¹⁴⁷ Sumption, above n 143, at 4.

¹⁴⁸ Ibid, at 2; Jonathan Sumption QC referred to the judgment of Laws LJ in *R v Department of Education and Employment ex parte Begbie* [1999] EWCA Civ 2100, [2000] 1 WLR 1115 since it confronted the issue of whether judicial decisions on questions of policy implicated democratic legitimacy and that commented that Laws LJ “distinguished between cases which raised, directly or indirectly, ‘questions of general policy affecting the public at large or a significant section of it’, and cases affecting only the individuals concerned by some particular application of policy. The difference was that in the former category, to quash the decision on the grounds other than irrationality would require the judges to ‘don the garb of the policy-maker, which they cannot wear’; while the latter can be resolved judicially with ‘no offence to the claims of democratic power.’”

¹⁴⁹ *Polynesian Spa Ltd v Osborne*, above n 2, at [62] per Randerson J.

¹⁵⁰ *R v Director of Public Prosecutions, ex parte Kebilene and others*, above n 66.

¹⁵¹ *Polynesian Spa Ltd v Osborne*, above n 2, at [69] per Randerson J. *R (Corner House Research) v Director of The Serious Fraud Office*, above n 52, at [31] per Lord Bingham, held that only in highly exceptional cases will the Court disturb the decision of an independent prosecutor. Lord Bingham's judgment was supported by Lord Hoffman at [49], Lord Rodger at [50] and Lord Brown at [58]. Baroness Hale agreed with Lord Bingham on the ultimate outcome, but did not discuss justiciability at [52] - [57].

would be very few cases, rather than the hundreds that ensued: “However – if you build it [they] will come.”¹⁵²

The Court of Appeal in *Osborne* also commented on judicial restraint in the review of prosecutorial discretion, making the similar points¹⁵³ noting that “the exercise of restraint—which relates to the scope and standard (or intensity) of review, and to the availability and scope of relief — is not to be confused with the issue of justiciability. The latter concerns whether the Courts are prepared to intervene at all in the exercise of their constitutional responsibility to review aspects of Executive action.”¹⁵⁴ The Court reiterated that the exercise of prosecutorial discretion is justiciable and that Courts are prepared to review executive action of that nature, “but the intensity of review, and availability of relief, will be constrained...”¹⁵⁵

Rewa involved an application for judicial review of the decision by the Attorney-General to lift a stay of proceedings against the applicant in relation to a charge of murder.¹⁵⁶ It was held that the crown was not in a position to argue the merits of the application.¹⁵⁷ The court noted its own jurisdiction to stay or dismiss a prosecution for an abuse of the process but that different considerations apply to the exercise of the Attorney-General’s prerogative power.¹⁵⁸ The court cited *Moenvao v Department of Labour*¹⁵⁹ where Richardson J “emphasized the importance of the distinction between the decision to prosecute, which was a matter of administrative law, and the abuse of process doctrine as a matter of criminal procedure.”¹⁶⁰ The court followed the Court of Appeal’s reasoning in *Osborne*¹⁶¹ regarding the need for judicial restraint in the review of prosecutorial discretion.¹⁶²

¹⁵² *Deliu v Office of the Judicial Conduct Commissioner* [2012] NZHC 356, [2012] NZAR 80 at [28].

¹⁵³ *Osborne v WorkSafe New Zealand* (CA), above n 25, at [34]; “(a) the importance of observing constitutional boundaries, including the Executive’s role in deciding whether to prosecute, and the Courts’ role in ensuring the proper and fair conduct of trials; (b) the high content of judgment and discretion in prosecutorial decisions; (c) the undesirability of collateral challenges to criminal proceedings which may disrupt due process; (d) the High Court’s inherent power to stay or dismiss a prosecution for abuse of process; (e) the opportunity to challenge a prosecutor’s opinion that an offence has been committed — either summarily, by applying for a discharge under s 147 of the Criminal Procedure Act 2011, or at trial; and (f) the existence of other mechanisms for accountability of prosecutorial decisions, such as the responsibility of the relevant minister to Parliament.”

¹⁵⁴ *Ibid*, at [35].

¹⁵⁵ *Ibid*.

¹⁵⁶ *Rewa v Attorney-General of New Zealand*, above n 25, at [1].

¹⁵⁷ *Ibid*, at [13].

¹⁵⁸ *Ibid*, at [41].

¹⁵⁹ *Moenvao v Department of Labour* [1980] 1 NZLR 464 (CA).

¹⁶⁰ *Rewa v Attorney-General of New Zealand*, above n 25, at [42].

¹⁶¹ *Osborne v WorkSafe New Zealand* (CA), above n 25.

¹⁶² *Rewa v Attorney-General of New Zealand*, above n 25, at [45].

The margins that the courts have set for themselves regarding justiciability are so narrow, that in practice, judicial review of prosecution decisions has arguably become synonymous with non-justiciability. In New Zealand it is very common in non-serious crimes that courts will interfere in a prosecution decision by dismissing a charge at trial under s147 of the Criminal Procedure Act 2011.¹⁶³ This can happen for various reasons, including when a judge believes for some reason the case should not have been brought by the prosecutor, or where there has been an abuse of process. Essentially, similar matters are put before a judge on judicial review, yet it appears that the courts are unprepared to interfere with prosecution decisions in this context. If the Judiciary chooses to forgo these checks and balances, this means that the executive has in this regard a virtually unfettered discretion, which is wrong in principle.

The New Zealand Law Commission (NZLC) reported¹⁶⁴ on a discussion paper¹⁶⁵ which critiqued New Zealand's prosecution system. It concluded that the issue relating to the judicial reviewability of prosecutorial decisions, garnered the most adverse comments out of all the proposals made in the Discussion paper. "There were fears expressed that it would become a routine tactic in criminal cases, placing obstacles in the path of prosecutions."¹⁶⁶ The Law Commission found that "the Department of Labour believed that any move to open up legal avenues for external review should be resisted. The police were of a similar view."¹⁶⁷ The NZLC proposed that there should be no "general legislative intervention to encourage judicial review of prosecution decisions, stating it was a matter best left for the courts to develop."¹⁶⁸ The discussion paper also considered whether prosecutions decisions should in principle, be amenable to judicial review. "If so, it proposed that all prosecuting agencies should be amenable to judicial review on the same footing."¹⁶⁹

¹⁶³ See the clear remarks of Simon France J in *DGN v Auckland District Court* [2015] NZHC 3338, [2018] NZAR 137 at [28]; 'compelling reasons' are required not to use s147 applications as at [30] an 'abuse...sourced in delay or misconduct fits within the s147 rubric. See also *Rowell v District Court at Wellington* [2017] NZHC 2706, [2017] NZAR 1717 at [3] that s147 Criminal Procedure Act is wide enough to encompass all argument of law and jurisdiction- including, it would appear most challenges to police or prosecutorial impropriety such as in *Torres-Calderson v Police* [2018] NZHC 722 [54], [2018] NZAR 665.

¹⁶⁴ New Zealand Law Commission Criminal Prosecution (NZLC R66, Wellington, 2000)

¹⁶⁵ New Zealand Law Commission Criminal Prosecution (NZLC PP28, Wellington, 1997)

¹⁶⁶ New Zealand Law Commission Criminal Prosecution, above n 164, at 27

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid; "In particular, it proposed at [220] that section 20 of the Serious Fraud Office Act 1990, which exempts the prosecution decisions of the SFO from judicial review, be reviewed in light of the *C v Wellington District Court* [1996] 2 NZLR (CA) and *R v Bedwellty Justices, ex parte Williams* [1997] 1 AC 225 cases." The Commission decided that the section does not need to be repealed as the section allows for decisions of the Director not to prosecute to be reviewed.

Three conclusions can be made from the Commission's report. Firstly, issues concerning the justiciability of prosecution decisions should stay within the realm of the courts, and is not an issue that can be solved by legislative intervention. Secondly, the Commission did not discourage the courts to develop the law regarding judicial review of prosecutorial discretion. This may suggest that the Commission believes this area of the law is insufficiently developed in New Zealand.¹⁷⁰ Lastly, by questioning the amenability of all prosecuting agencies' decisions, the Commission indicates its interest in the widening of the scope of review in this regard.

The separation of powers doctrine and the polycentric nature of prosecution decisions appear to have restrained the courts from widening the scope for reviewability beyond the 'exceptional circumstances' end-point. The very high threshold for review in New Zealand gives prosecutors what O'Higgins calls "partial immunity."¹⁷¹ However, the 'exceptional circumstances' quasi-standard has rule of law implications as there are no checks on prosecutorial discretion when a prosecution is discontinued as judicial review is notionally available, but realistically unavailable. The lack of checks goes against the separation of powers doctrine and means that justice is not served in those circumstances. For the judiciary, by self-abnegation, to have erected a virtually insurmountable hurdle to succeed in judicial review of these decisions, is to place such decisions almost beyond the law. For prosecutors, such an ecosystem is ideal for breeding aberrant and perverse decisions, with virtual impunity.

Judicial reluctance and inertia to change from traditional practice, means that the prosecutorial discretion remains largely unfettered. Although there are legitimate reasons to reject a check on the prosecutorial discretion, there are clearly identifiable implications with the current system. These issues relate largely to the rule of law.

¹⁷⁰ See Ian Dobinson's comment on the need for effective judicial review of decisions not to prosecute; "The decision not to prosecute is different. It is very unlikely...that an accused would seek to overturn a decision not to prosecute... It is therefore left to the victim or those close to the victim to seek redress. One avenue is through a private prosecution, but this is problematic and costly. Similarly, a civil action for damages could be brought but this also has inherent problems...every legal system has a vested interest in ensuring that all such decisions are seen to be fair and just. Unfair and unjust decisions not to prosecute, as stated above, have significant potential to bring a justice system into disrepute and it is accordingly the responsibility of both the government and the courts to safeguard against this."; Ian Dobinson "The decision not to prosecute" (speaking at the International Conference of the International Society for the Reform of Criminal Law papers, 26 August 2001).

¹⁷¹ O'Higgins, above n 103 at 2.

6.2 Rule of Law implications

Judicial review has been described as “the rule of law in action,”¹⁷² judicial resistance to review prosecutorial discretion therefore raises concerns for the rule of law.¹⁷³ The question that must be asked is: can the rule of law be supported given that prosecutors in New Zealand exercise broad discretion while the judiciary has self-imposed austere limitations to judicial review of prosecution decisions?¹⁷⁴ Justice Beazley and Pulsford considered whether compliance of the rule of law is more fiction than reality, using an analogy from Hans Christian Andersen’s fairy tale; “is the cloth woven with gold, or do we fool ourselves, as did the emperor in his new clothes...”¹⁷⁵ This analysis examines whether the rule of law is being upheld in the exercise of prosecutorial discretion in New Zealand. On examination, it would appear that the cloth here, is far from lustrous.

The working definition of the rule of law is greatly contested by theorists, however, there are two main views that dominate the multitude of definitions. The positivist view is that the principle is simply procedural, eschewing any prescriptive content.¹⁷⁶ The substantive, normative or natural law orientation contends that the rule of law necessitates certain requirements as to the content of the law. Since the substantive view is encapsulated within the working definition advocated by positivists, the positivist approach will be used and in this sense, both views will be considered. On a positivist view, the rule of law is broken down into three meanings;

- a) Public action must be authorized by law,
- b) The law applies to all equally, and
- c) The law must be accessible.

¹⁷² Ministry of Justice (United Kingdom) *Judicial Review: Proposals for Further Reform Consultation Paper* (2013) at [21] cited in Amy Street *Judicial Review and the Rule of Law: Who is in Control?* (online looseleaf, The Constitution Society, 2013) at 12; “Judicial review...can be characterised as the rule of law in action...”

¹⁷³ See Matthew Smith *New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters New Zealand Ltd, Wellington, 2016) at [2.0]; “Judicial review upholds the rule of law, requiring and incentivising good decision-making and preventing abuses of public power.”

¹⁷⁴ Michael Code “Judicial Review of Prosecutorial Decisions: A Short History of Costs and Benefits, in Response to Justice Rosenberg” (2009) 34 *Queen’s LJ* 863 at 873; “The concept of prosecutorial independence, when properly understood, protects Crown counsel’s decisions from certain forms of improper interference and influence, but judicial oversight is not one of them.”

¹⁷⁵ Justice M J Beazley AO and Myles Pulsford “Discretion and the rule of law in the criminal justice system” (2015) 89 *ALJ* 158 at 158.

¹⁷⁶ Joseph, above n 9, at [7.2.3]; “On this view the rule of law means government in accordance with formally authenticated laws and is not to be confused with institutional values, such as democracy, justice, equality, human rights or respect for human dignity.”

The following sections consider whether the rule of law is protected by the current regime of judicial review of prosecutorial discretion by considering the three meanings of the rule of law in this context.

6.2.1 Public Action Must Be Authorised by Law

Dicey, explained in 1885, that the rule of law had three meanings.¹⁷⁷ Dicey described the first as meaning “[t]he absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government...; a man may with us be punished for a breach of law, but he can be punished for nothing else.”¹⁷⁸ Therefore, any public authority who imposes a detriment or penalty must be able to supply the rule or statute or common law that authorizes the action. Accordingly, the exercise of prosecutorial discretion is linked to the potential for arbitrariness. Under Dicey’s first meaning of the rule of law, “arbitrariness, prerogative, or discretionary executive power entailed the rule of lawless government.”¹⁷⁹ This meaning however, has been criticized for treating “arbitrary power” and “wide discretionary authority” as indistinguishable, both being a violation of the rule of law.¹⁸⁰

Lord Bingham likewise commented on the relationship between the rule of law and discretion, cautioning that questions of legal right and liability should be determined by applications of the law instead of relying on the exercise of discretion.¹⁸¹ Academic commentators have however, criticized the assertion that discretionary powers are inherently undesirable.¹⁸² The focus of Dicey’s first meaning has changed in modern times from the removal of discretions, to controlling their ambit and application.¹⁸³ Discretion does not itself violate the rule of law, so long as the essential aspects of the rule of law are satisfied.¹⁸⁴ The criminal justice system

¹⁷⁷ A V Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan & Co, London, 1959). See RA Cosgrove *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (Macmillan, London, 1980); see also Joseph, above n 9, at [7.5.1].

¹⁷⁸ Dicey, above n 177, at 202.

¹⁷⁹ Joseph, above n 9, at [7.5.1].

¹⁸⁰ Ibid, at [7.5.2(2)(a)].

¹⁸¹ T Bingham “The Rule of Law” (2007) 66 Camb LJ 67 at 72.

¹⁸² Joseph, above n 9, at [7.5.2 (2)(a)]. See, for example, RVF Heuston *Essays in Constitutional Law* (2nd ed, Stevens, London, 1964) at 42.

¹⁸³ Joseph, above n 9, at [7.5.2 (2)(a)].

¹⁸⁴ Beazley and Pulsford, above n 175, at 2.

today cannot function without discretion, and it may even be considered unwise to have a system based entirely on fixed rules.¹⁸⁵

Former England and Wales DPP Keir Starmer stated that: “Properly exercised the discretion whether to prosecute or not delivers justice and is consistent with the rule of law.”¹⁸⁶ One academic pointed out that “Prosecutorial discretion and the rule of law exist optimally in a system where there is a measured balance of suspicion and trust in Government; where there is an accepted trade-off by the citizenry between collective interests and individual rights. The Public Prosecutor is the lynchpin in maintaining this delicate balance in the criminal justice system, and in a functioning democracy, is answerable to the collective will of the people, expressed through Parliament.”¹⁸⁷ The guard against wrongful use of discretionary power and the protection of the rule of law, therefore first lies in the hands of the prosecutor. Thereafter, the responsibility to check for inconsistencies is placed on the courts.

The need for effective review of prosecutorial discretion is important for many reasons. In *Wong v R*, Gleeson CJ commented that “all discretionary decision-making has the potential to cause some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice.”¹⁸⁸ Lord Bingham explained that “the broader and more loosely textured a discretion is, whether conferred on an official or a judge, the greater scope for subjectivity and hence for arbitrariness.”¹⁸⁹ The rule of law requires that public action must be authorized by law,¹⁹⁰ and that no public power is unfettered or “at large.”¹⁹¹ The normal course for public action to be scrutinized is through judicial review. Judicial review operates as a disincentive for decision-makers to act arbitrarily¹⁹², however the courts have constrained their powers to review prosecution decisions by only allowing the two nominated grounds for review stipulated in *Polynesian Spa*¹⁹³ to be available. Therefore, any unrestrained or abusive use of prosecutorial discretion that falls outside of bad faith or a collateral purpose is effectively

¹⁸⁵ Jeffries JC “Legality, Vagueness, and the Construction of Penal Statutes” (1985) 71 Virginia L Rev 189 at 213.

¹⁸⁶ Keir Starmer QC “The rule of law and prosecutions: to prosecute or not to prosecute” (2011) 24 Advocate 40 at 42.

¹⁸⁷ Kumaralingam Amirthalingam “Prosecutors and the Rule of Law- The Role of Legal Education and Training” (speech given to the IAP 18th Annual Conference, Moscow, 9 September 2013) at [20].

¹⁸⁸ *Wong v R* (2001) 207 CLR 584; 76 ALJR 79 at [6].

¹⁸⁹ Bingham, above n 181, at 73.

¹⁹⁰ *Entick v Carrington* (1765) 19 St Tr 1029; Bingham, above n 181, at 73.

¹⁹¹ Joseph, above n 9, at [7.5.2(2)(a)]. See *Padfield v Minster of Agriculture, Fisheries and Food* [1968] AC 997 (HL) at 1060; *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 545.

¹⁹² Joseph, above n 9, at [7.5.2(2)(c)].

¹⁹³ *Polynesian Spa Ltd v Osborne*, above n 2, at [64] per Randerson J.

left unchecked. The courts have rationalized on a separation of powers argument to adopt a strict approach, this in practice however neglects the rule of law.

Justice Palmer argues for greater justiciability of public power explaining that:¹⁹⁴

If a public body purports to exercise public power in a specific instance those concerned with that exercise must be able to ask an independent body- the courts- whether the exercise of public power accorded with the law. If it did, no harm is done by testing the question and, indeed, public confidence in law and government is enhanced. If an exercise of public power were not made according to law then the rule of law requires that be addressed, as it is when any other decision-maker acts inconsistently with the law. To leave the decision to the executive branch, untested, is to leave the effective determination of the law- a judicial function- to the executive.

Former Justice Sir John McGrath shared a similar sentiment about the court's role. His Honour on behalf of Chief Justice Elias and himself, in the Supreme Court stated, although the focus of his comments related to statutes limiting recourse to judicial review, arguably the same concerns are applicable to the exercise of discretionary power:¹⁹⁵

[3] Judicial review is the common law means by which the courts hold such officials to account. It provides the public with assurance that public officials are acting within the law in exercising their powers, and are accountable if they depart from doing so. Statutes limiting recourse to judicial review to challenge statutory decisions accordingly raises issues of constitutional concern. This concern is reflected in the presumption of the courts, when interpreting such legislation, that it was not Parliament's purpose to allow decision makers power conclusively to determine any question of law. Legislation which does not on its terms prohibit judicial review, but restricts its availability, can nevertheless interfere with full supervision by the courts of the conformity of activities of government with the rule of law. The courts are reluctant to read legislation in a manner that impairs their ability to hold public officials to account in this way.

Justice Brennan contends that “judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by the law and the interests of the individual are protected accordingly.”¹⁹⁶ The rule of law requires that there is no such thing as an unchecked discretion, yet the courts have through self-abnegation chosen to restrict the availability for review of prosecutorial discretion, this ultimately interferes with the rule of law. De Smith defined one aspect of the rule of law as meaning; “the law should conform to

¹⁹⁴ The Honourable Justice Matthew Palmer, Judge of the High Court of New Zealand “The Rule of Law, Judicial Independence and Judicial Discretion” (Speech given as the Kwa Geok Choo Distinguished Visitor 2016, National University of Singapore, 20 January 2016).

¹⁹⁵ *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.

¹⁹⁶ *Church of Scientology v Woodward* (1982) 154 CLR 25 at 71 per Brennan J (Australia).

minimum standards of justice, both substantive and procedural.”¹⁹⁷ As will be discussed in the next Chapter, there is currently no procedural justice mechanism in place to protect victims’ interests at the prosecution decision-making stage. Substantive justice also cannot be achieved if judicial review is so restricted that deserving claimants are excluded from any opportunity for redress. If a flawed prosecution decision is left unchecked, it simply cannot be reasoned that minimum standards of justice are functioning as they should.

6.2.2 The Law Applies To All Equally

Dicey’s second meaning of the rule of law was described in this way: “Equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; the ‘rule of law’ in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of ordinary tribunals.”¹⁹⁸ This definition has also been criticized for the fact that not all are subject to the same laws, for example where different legal rules apply to different statuses recognized by law.¹⁹⁹ The principle of equality therefore operates if the laws applying to each status are capable of applying to all equally.²⁰⁰ Lord Bingham later stated that the rule of law requires that the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.²⁰¹ The court in the Australian case *Wong v R* reiterated the principle of equality stating; “Equal justice requires identity of outcome in cases that are relevantly identical. It requires different outcomes in cases that are different in some relevant respect. Equality before the law requires consistent treatment.”²⁰² The test for equality before the law, will be whether a prosecutor has taken into account relevant/irrelevant considerations. The test will reveal whether the prosecutor has acted arbitrarily or not.²⁰³

¹⁹⁷ Joseph, above n 9, at [7.2.1]; SA De Smith and R Brazier *Constitutional and Administrative Law* (8th ed, Penguin Books, London, 1998) at 17.

¹⁹⁸ Dicey, above n 177, at 202-203.

¹⁹⁹ Different legal rules apply with every status recognized by law, for example; welfare beneficiaries (Social Security Act 1964), infants and adults (Minor’s Contracts Act 1969); Joseph, above n 9, at [7.5.2(3)(a)].

²⁰⁰ Ibid, at [7.5.2(3)(a)].

²⁰¹ Grenville Cross, Director of Public Prosecutions of Hong Kong “To prosecute or not to prosecute” *South China Morning Post* (Hong Kong, 19 December 2000); “No two cases are alike. Factors may arise in one case which have no relevance in another. That does not mean that the taking into account of such factors somehow contravenes the principle of equality before the law. If that were right, it would never be proper to decide not to prosecute a suspect because he was very young, or very old, or seriously ill, or badly stressed, since that would involve the giving of preferential treatment to that person over others. Equality before the law does not require that every case be treated in exactly the same way, irrespective of the personal situation of the suspect, or the circumstances of the case, or the merits of the prosecution.”

²⁰² Joseph, above n 9, at [7.5.1].

²⁰³ Beazley and Pulsford, above n 175, at 2.

The difficulty with testing for arbitrariness of prosecutors in terms of equality before the law in the New Zealand context again, relates to the availability of grounds of review. In *Osborne*, the High Court did not reject the argument that judicial review is available if the prosecutor has failed to have regard to a relevant consideration or has had regard to an irrelevant consideration, but held that such an approach is “unlikely to be vindicated” on account of the breadth of considerations that the prosecutor could properly take into account, resulting from the “high level of restraint” observed by the courts for decisions regarding policy.²⁰⁴ This means that although the courts may test for equality before the law by construing the relevant/irrelevant considerations test that the prosecutor conducts, the court’s scrutiny has little or no practical affect even if the prosecutor was found to be arbitrary in the decision-making process. Clear violations of the rule of law are slipping through cracks in the review system.

Another aspect of equality before the law was argued by Robert Heller. Heller contends that the rationales for judicial reluctance to review a prosecutorial decision, “although admittedly based upon legitimate governmental interests, fail to justify the decree of discretion granted to prosecutors because they fail to balance these legitimate interests against the important guarantee²⁰⁵ of equal protection of the laws.”²⁰⁶ The context of Heller’s argument was based on race-based selective prosecution claims.²⁰⁷ “nowhere is a careful re-examination of the prosecutorial discretion more warranted than in the context of race based selective prosecution claims.” However, the same concerns apply to judicial review of prosecutorial discretion, since the same rationales apply. Despite equality before the law being an essential attribute of the rule of law,²⁰⁸ prosecutors are practically placed beyond the law in regards to judicial review of their decisions. There is an unfair balance of rights between prosecutors and judicial review complainants.

²⁰⁴ *Osborne v WorkSafe New Zealand* (HC), above n 50, at [38].

²⁰⁵ Heller commented that the constitutional principle of selective prosecution was embodied in the Fourteenth Amendment’s Equal Protection Clause (America).

²⁰⁶ Heller, above n 76, at 1343. New Zealand’s constitutional structure is based on the rule of law. One of the requirements of the rule of law is for the law to apply to all equally.

²⁰⁷ *Ibid*, at 1327.

²⁰⁸ Dicey, above n 177, at 202-203.

Equality of the law requires consistent treatment.²⁰⁹ Bias, whether implicit or not conflicts with the rule of law. The law must apply to everyone equally. Different application of the law effectively means that different people are being subject to different laws. As Piwowarski aptly posits:²¹⁰ “At a meta-level [...] the ability to treat seemingly-like cases differently may diminish judicial participants’ perceptions of the evenhandedness of the judicial process.” This appositely exposes how this facet of the rule of law is weakened.

6.2.3 The Law Must Be Accessible

The prosecutorial discretion being largely unfettered fails to protect another aspect of the rule of law, that being certainty.²¹¹ Lord Bingham has explained that under the rule of law, “the law must be accessible and so far as possible intelligible, clear and predictable.”²¹² Raz, on the same footing identified that one principle of the rule of law is that all laws should be prospective, open and clear,²¹³ as it aids the function of the law in guiding the behaviour of its subjects.²¹⁴ Hayek, also included the need for certainty in his definition of the rule of law; “that government in all its actions is bound by rules fixed and announced beforehand- rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.”²¹⁵ A rule of law implication that flows from the prevailing New Zealand decisional law of judicial review of prosecutorial discretion, is the absence of a clear entry point for judicial intervention. This hinders applicants for civil legal aid for such judicial reviews, as they need to demonstrate factual and legal merit.²¹⁶ The prevailing uncertainty in this regard will act, or may act, as an institutional inhibition to being able to successfully obtain legal aid as the case law obscures any confident foreseeability of success in this area.

²⁰⁹ See for example, *Matadeen v Pointu* [1999] 1 AC 98 (PC) at 109, and *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] NZLR 1056 at [95] *Pora v Attorney General* [2017] NZHC 2081, [2017] 3 NZLR 683 at [121]. See also Joseph, above n 9, at [7.5.1].

²¹⁰ Nathan Piwowarski *Discretion and the Rule of Law: Is it Time for a Little Formalism? (Or, Mr. Prosecutor: How Formalists Learned to Stop Worrying and Love Discretion)* (speaking at the King Scholar Senior Seminar Paper, Michigan State University College of Law, 2007) at 34.

²¹¹ Beazley and Pulsford, above n 175, at 2.

²¹² Bingham, above n 181, at 69.

²¹³ J Raz “The Rule of Law and its Virtue” (1977) 93 LQR 195 at 198.

²¹⁴ *Ibid.*

²¹⁵ Raz, above n 213, at 195, quoting Friedrich A Hayek *The Road to Serfdom* (Routledge Press, United Kingdom, 1944) at 54.

²¹⁶ See the Legal Services Act 2011, s10(4)(d)(i) which prohibits the grant of civil legal aid where “the applicant’s prospect of success are not sufficient.”

One of the fundamental elements of the rule of law is certainty and predictability.²¹⁷ This is especially important for criminal law since the loss of liberty is at stake in any case.²¹⁸

However, a consequence of decisions being made by prosecutorial discretion is the ability for prosecutors to effectively re-write the law by requiring certain elements that are not already expressed in governing statutes. *Chaudhary*, illustrates this point.²¹⁹ The main issue in the case involved the act of buggery. Buggery under section 21(1) of the sexual offences Act 1956 stated: “It is a felony for a person to commit buggery with another person or with an animal.” Consent was not a defence to buggery.²²⁰ As a result of the offence being discriminatory in nature, in the 1990s, the CPS created two divisions of buggery under s12(1): consensual buggery and non-consensual buggery.²²¹ Prosecution for consensual buggery required special circumstances, otherwise it would not generally call for prosecution; if for example the act was made in a place restricted from public access.²²² Those who had engaged in non-consensual buggery would more likely be prosecuted.

Chaudhary is an example of where the prosecutorial discretion goes beyond the decision whether to prosecute or not, but effectively enables a prosecutor to use their power to re-write the law. The CPS developed two categories of buggery, to aid decision-making, yet through practice, it has become new law that has not gone through the appropriate Parliamentary process. Furthermore, this newly created law is inaccessible since it is only available to those who have access to the offices of prosecution authorities and Crown Solicitors. In this regard, the prosecutor has stepped outside the bounds of his duty, and made the law inaccessible to the public. Such actions demonstrate complete neglect of the rule of law. Justice Cooper in *New Zealand Motor Caravan Association Inc v Thames-Coromandel District Council* explained the importance of accessible laws:²²³ “Citizens are entitled to regulate their affairs in accordance with the law, and should not be dependent on enforcement policies able to be changed without the formality and publicity attendant on the actual law making process.”

²¹⁷ See Joseph, above n 9, at [7.2.3] for a commentary on the substantive concept of the rule of law.

²¹⁸ *Ibid.*

²¹⁹ *R v Director for Public Prosecutions, ex parte Chaudhary*, above n 54.

²²⁰ *Ibid.*, at 139.

²²¹ *Ibid.*, at 146.

²²² *Ibid.*, at 136.

²²³ *New Zealand Motor Caravan Association Inc v Thames-Coromandel District Council* [2014] NZAR 1217 at [62].

6.2.4 Concluding Comments

The current strict approach to review of prosecutorial discretion distinctly contrasts the rule of law in every aspect of the working definition advocated by positivists. Palmer doubts whether the rule of law is properly recognised or has durability in New Zealand. He expressed that the rule of law is in peril:²²⁴

In my view the rule of law, supported by the principle of judicial independence, is and should be a corner stone of New Zealand's constitutional instrument by which the coercive powers of the state can be contained, but I sound a word of warning to the legal establishment. I am not confident that New Zealanders currently understand the rule of law or, in a crunch, would necessarily stand by it as a fundamental constitutional norm... The rule of law is not reinforced by New Zealand cultural value. Neither is this surprising given its lack of academic and legal articulation. Without academic and judicial clarification of the meaning and importance of the concept of the rule of law and judicial independence, and some concrete event or debate that generates public appreciation and regard for it. I believe the rule of law is a vulnerable constitutional norm in New Zealand.

Palmer's admonition may be overstated. However, to the extent that the judicial reviewability of prosecutorial discretions is ring-fenced by the exacting test of 'exceptional circumstances,' his statement, in this context, has some resonance.

6.3 Problematic Prosecutorial Decision-Making

Having considered how the current approach to judicial review leaves the rule of law unprotected by each of its meanings, this section considers examples of its violations caused by unprincipled decision-making in New Zealand and other jurisdictions. Interdisciplinary research concerning the patterns of decision-making of public prosecutors will also provide a better understanding of the inherent dangers of discretionary power. The deficiency of the *Osborne* decision is the opportunity that was wasted to adequately protect aggrieved victims from prosecutorial misconduct.

6.3.1 Bias in Prosecutorial Discretion

In describing the prosecutors' discretion to make decisions, Gershman observed that "various legal, political, experiential and ethical considerations inform and guide the charging

²²⁴ Sir Geoffery Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 564 at 588-589.

decision.”²²⁵ However, an adverse side-effect of exercising discretion, although unprincipled, is the ability of prosecutors to inject their personal preferences in decision-making. Hence, the prosecutor has “virtually unfettered power to make momentous choices that can destroy a person’s reputation, liberty and even life itself.”²²⁶ Prosecutors may be influenced in their decision-making by a vast range of influences. For example, prosecutors have been found to adopt unconscious heuristics that have resulted in unequal treatment.²²⁷ Numerous studies undertaken in the field of psychology have acknowledged that “prosecutors and police investigators alike are vulnerable to: confirmation or expectancy bias, coherence bias, attribution bias, including gender and race attribution; and commitment bias.”²²⁸ Piwowarski in his analysis of interdisciplinary research on the topic found that prosecutors may decide to prosecute on the basis of:²²⁹ “non-legal institutional pressures, including public²³⁰ and political

²²⁵ Gershman, above n 77, at 513.

²²⁶ Bennett L Gershman “The New Prosecutors” (1992) 53 U Pitt L Rev 393 at 405. See also the cautionary comment made by former United States Solicitor-General and Supreme Court Justice, Robert H Jackson; “The prosecutor has more control over life, liberty and reputation than any other person...His discretion is tremendous...If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants...it is this realm- in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecutorial power lies. It is here the law enforcement becomes personal.”; Robert H Jackson “The Federal Prosecutor”, above n 141, at 18, quoted in Davis, above n 76, at 190.

²²⁷ Piwowarski, above n 210, at 28, referring to Timothy D. Wilson & Nancy Brekke “Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations (1994) 116 Psychol Bull 117 at 119-130; explaining that that one cannot eliminate an unwanted mental process unless they are aware of it; Chris Guthrie, et al. “Inside the Judicial Mind” (2001) 86 Cornell L Rev 777 at 820; applying concept to judges specifically; Dan Simon “A Psychological Model of Judicial Decision Making” (1998) 30 Rutgers LJ 1 at 36-37; “[Judges’] opinions do not include all the reasons which actually influenced the judge’s decision. Naturally, judges leave out reasons of which they are not consciously aware . . .”.

²²⁸ It has been illustrated through research that the reasoning process of humans is able to be distorted by prejudices, for example, via confirmation or hindsight bias. See Glazebrook, Susan Justice of the Supreme Court of New Zealand “Keynote address to the Criminal Law Conference” (Criminal Law Conference 2012: Reforming the Criminal Justice System of Hong Kong, Hong Kong, 17 November 2012) at 3 footnote 10 citing Keith A Findley and Michael S Scott “The Multiple Dimensions of Tunnel Vision in Criminal Cases” (2006) Wis L Rev 291 at 292; “Confirmation bias is the tendency to seek or interpret evidence in ways that support existing beliefs, expectations, or hypotheses. When testing a conclusion, police officers, convinced for example by an early (but plainly flawed) eyewitness identification, may seek evidence that will confirm the guilt of a particular individual, not disconfirm it. As a result, they may overlook viable alternative perpetrators, and downplay inconsistencies and inaccuracies in other evidence suggesting that the person they focused on may not have been the actual perpetrator.” See Glazebrook, above n 228, at 3 footnote 11 citing Findley and Scott, above n 228 at 316.; “Hindsight bias is the tendency for people to think that an eventual outcome was inevitable. Their knowledge of certain outcomes, such as a charge being laid, affects their recollection of what actually happened. For example, once police and prosecutors conclude that a particular person is guilty, not only might they overestimate the degree to which that suspect appeared guilty from the beginning, but they will likely best remember those facts that are incriminating.”

²²⁹ Piwowarski, above n 210, at 29.

²³⁰ James Eisenstein & Herbert Jacob *Felony Justice: An Organizational Analysis of Criminal Courts* (Little-Brown, Boston, 1977) at 47; “Individual prosecutors’ effective performance is generally measured by the number of trials (with violent crimes most highly valued, the percentage of convictions (including pleas), and the length of sentence for repeat and violent offenders.”; William F McDonald *Plea Bargaining: Critical Issues and Common Practice* (Department of Justice, 1985).

pressure²³¹ for guilty verdicts pleas;²³² the exigencies of the adversarial trial system²³³ and high caseloads.²³⁴

It has been long-established that prosecutors might be to some extent responsible for propagating inequality in the criminal justice system.²³⁵ Smith and Levinson argued that implicit racial attitudes and stereotypes have the ability to skew prosecutorial decisions in various ways in terms of racial bias.²³⁶ Implicit racial bias is a term that researchers use to describe the cognitive processes where regardless of even the best intentions, individuals can automatically classify information in racially biased ways.²³⁷

The English case *Manning*,²³⁸ is said to have raised broader issues relating to racism in the criminal justice system and pertaining particularly to prosecutorial decisions that involve police. The applicants sought judicial review of the decision not to prosecute after the death of their relative, who was a black man that died in custody. Burton argues that “the facts of Mr Manning’s case certainly do nothing to dispel the belief of some black families that they have to fight hard for justice in a system that discriminates against ethnic minorities. If, as in the

²³¹ Sara Sun Beale “The News Media’s Influence on Criminal Justice Policy: How Market Driven News Promotes Punitiveness” (2006) 48 Wm. & Mary L Rev 397.

²³² Ronald F Wright “Trial Distortion and the End of Innocence in Federal Criminal Justice” (2005) 154 U Pa L Rev 79 at 90; F Andrew Hessick III & Reshma M. Saujani “Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge” (2002) 16 Byu J Pub L 189 at 211.

²³³ See George T Felkenes “The Prosecutor: A Look at Reality” (1975) 7 Sw U L Rev 98 at 99 & 114; Franklin Strier “Making Jury Trials More Truthful” (1996) 30 UC Davis L Rev 95 at 142-51; Darryl K. Brown “The Decline of Counsel and the Rise of Accuracy in Criminal Adjudication” (2005) 93 Cal L Rev 1585; Bruce A Green “Why Should Prosecutors ‘Seek Justice’?” (1999) 26 Fordham Urb LJ 607 at 609.

²³⁴ See, e.g. Andrew D Leipold “How the Pretrial Process Contributes to Wrongful Convictions” (2005) 42 Am Crim L Rev 1123 at 1159.

²³⁵ See Scott W Howe “The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination” (2004) 45 WM & Mary L Rev 2083 at 2094–106; considering the extreme deference given to prosecutors; Rory K. Little “What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh” (2004) 53 Depaul L Rev 1591 at 1599–600; addressing “unconscious race empathy” that white prosecutors may have with white defendants or white victims; Jeffrey J Pokorak “Probing the Capital Prosecutor’s Perspective: Race of the Discretionary Actors” (1998) 83 Cornell L Rev 1811 at 1819; alluding to unconscious biases produced due to similarities between prosecutors and victims; Yoav Sapir “Neither Intent nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal” (2003) 19 Harv Blackletter LJ 127 at 140–41 proposing that it “[i]s likely that unconscious racism influences a prosecutor even more than it affects others”.

²³⁶ Robert J Smith & Justin D Levinson “The impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion” (2012) 35 Seattle University Law review 795.

²³⁷ Ibid at 797.

²³⁸ *R v Director of Public Prosecutions, ex parte Manning*, above n 34.

Manning case, a prosecution does not follow the inquest verdict of unlawful killing suspicions of racism are bound to remain.”²³⁹

The existence of any discrimination or unprincipled use of discretionary power in the prosecution decision directly violates the rule of law and neglects the values of the Prosecution Guidelines. Although allegations of discriminatory prosecution are very difficult to prove and such decisions are invariably protected by the cloak of discretion, the fact that discretionary decision-making is susceptible to such risks, means that the courts should be more open and cautious to scrutinising prosecution decisions.²⁴⁰

6.3.2 Questioning Decisions Not to Prosecute: The Political Arena

Another area of major concern involves wrongful non-prosecution of Government actors. South Africa’s National Prosecuting Authority is headed by the National Director. Inappropriate exercise of prosecutorial discretion to not prosecute is most evident in cases involving the National Director exercising his constitutionally sanctioned power of veto over decisions of prosecutors beneath him. In the Institute for Security Studies monograph by Jean Redpath, it was found that the national director’s power to veto has been exercised (or not exercised) in a way that has left researchers questioning the independence and impartiality of the NPA.²⁴¹ The statistics are as follows; “in 2005-2006 the NPA received 517 101 new dockets from the police, but prosecutions were instituted in only 74 059 (14%) of cases and declined

²³⁹ Mandy Burton “Reviewing Crown Prosecution Service decisions not to prosecute” (2001) 5 Crim LR 374-384. In the New Zealand context, the most apparent bias in the criminal justice system is racial. Cabinet papers relating to the “effective Interventions” package, that have been behind recent reforms in the criminal justice sector, suggests that over-representation of Māori may be attributed to bias or other unintended consequences of discretion; Department of Corrections *Over-representation of Māori in the criminal justice system: An exploratory report* (2007); suggests that “when a range of measures of social and economic disadvantages are taken into account, Māori ethnicity recedes as an explanation for over-representation. The level of Māori over-representation in the criminal justice system is very much what could be predicted given the combination of individuals’ life experiences and circumstances, regardless of ethnicity. In this sense, Māori over-representation is not a “Māori” problem at all.” But see Khylee Quince “Māori and the Criminal Justice System” in J Tolmie W Brookbanks *Criminal Justice in New Zealand* (Wellington, Lexis Nexis, 2007); a New Zealand Professor of Law with special interest in Māori and the criminal justice system, commented on the presence of discrimination stating that; “what is happening to Māori within the justice system is not just happening to them because of class, and because of the seriousness and prevalence of their offending, at a deeper level it is happening to them because they are Māori.”

²⁴⁰ See Keir Starmer QC [Director of public prosecutions of England and Wales] “The rule of law and prosecutions: to prosecute or not to prosecute” (paper delivered at the Middle Temple and SA Conference, Advocate, December 2011) at 41.

²⁴¹ Jean Redpath *Failing to prosecute? Assessing the state of the National Prosecuting Authority in South Africa* (ISS monograph Number 186, Pretoria: Institute for Security Studies, 2012) at vi.

in 307 362 (60%), while 136 589 (26%) were referred for further investigation.²⁴² While the NPA would tend to blame withdrawals on poor docket preparation by the police and this may indeed be the case of withdrawal in many cases, the NPA's own audit of 2007 withdrawals does not give a proper account for the reason for 55% of the withdrawals.²⁴³

The researchers concluded that the statistics indicate a general tendency to decide not to prosecute.²⁴⁴ This included decisions not to prosecute in particular, high-level NPA officials, even when South Africa's Special Investigating Unit had considered the cases and recommended prosecution. A trend of the NPA terminating prosecutions and forfeitures against the high-profile and politically connected was also found. The facts suggest that the NPA is exercising the discretion not to prosecute inappropriately and without due regard to the South Africa's constitutional duty to prosecute. The secondary-effect being the depletion of "internal morale and external public confidence."²⁴⁵

What this section ultimately highlights is that the appearance of prosecutorial independence is equally as important as actual independence. The Honourable Mr Justice Coldrey whilst acting as DPP in Victoria Australia wrote:²⁴⁶ "It is not suggested that an Attorney-General would seek to act other than honourably in making a prosecutorial determination. However, given the potency of these pressures, the process of evaluation central to decision making may well be affected by considerations (albeit subconscious) extending beyond those appropriate to a specific case." He continued to reveal the crux of the issue:²⁴⁷ "On a more tangible level, a major problem exists when the prosecutorial discretion must be exercised in a controversial or politically sensitive circumstances. There is a real potential that such decisions will become subject to distortion or misconstruction if they are drawn into the ambit of party political debate or alternatively, will be perceived as having been motivated by political partisanship. It is not to the point that such assertions and perceptions may be factually groundless. The damage that

²⁴² *Ex parte Attorney-General. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1998 NR 282 (SC) (1); [1995] (8) BCLR 1070 (NmSC).

²⁴³ Redpath, above n 241, at 41.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ John Coldrey "The Office of the Director of Public Prosecutions: Independence Professionalism and Accountability" (1990) as cited in Geoffrey Flatman "Independence of the Prosecutor" (Paper presented at the Australian Institute of Criminology Conference: Prosecuting Justice, Independence of the Prosecutor, Melbourne, 18-19 April 1996).

²⁴⁷ Coldrey, above n 246, as cited in Flatman, above 246.

is created is that the necessary public confidence in the administration of the criminal law will be eroded.”

Another aspect of the rule of law deserving of attention is that of accountability. There are two forms of accountability. The first is where prosecutors must be accountable to the ‘interested parties,’ and the second is accountability in the sense of curial sanction.²⁴⁸ It is under the second meaning that prosecutors enjoy greater immunity from being held to account compared to their professional counterparts.

6.4 Lack of Prosecutorial Accountability

When Crown Prosecutors are found to have caused a miscarriage of justice through prosecutorial misconduct by the Supreme Court or the Court of Appeal, this in practice does not call for further investigation nor sanctions against them. Certainly, all lawyers are susceptible to disciplinary proceedings by the New Zealand Law Society Standards Committee or the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.²⁴⁹ Complainants may also exhaust civil law avenues for conduct amounting to malicious prosecution or claim actions in tort.²⁵⁰ However, regardless of these disciplinary routes, “Crown prosecutors are rarely held to account, certainly externally, even with a clear appellate court determination of prosecutorial misconduct causing a miscarriage of justice.”²⁵¹ The WorkSafe prosecutor in *Osborne* for example, was not sanctioned even after the finding of the Supreme Court for his misconduct.

To some extent, accountability is realised as the courts maintain the final decision over the determination of a prosecution. This accountability mechanism however, does not reach decisions not to prosecute as such matters never proceed to trial. It also fails to give relief to individuals who have been exposed to the stresses of lengthy trials which should have never proceeded.²⁵² Independence without accountability presents a major threat to the public interest

²⁴⁸ Accountability in its first sense will be discussed in Chapter VII; that prosecutors must give proper regard to victims’ interests.

²⁴⁹ Ministry of Justice “New Zealand Lawyers and Conveyancers Disciplinary Tribunal” <www.justice.govt.nz>.

²⁵⁰ Frater, above n 106, at 257; “Civil actions for malicious prosecution or other torts...and even in rare circumstances, prosecution”; *Nelles v Ontario* [1989] 2 SCR 170 is Canadian authority for the position that prosecutors have civil liability for malicious prosecutions

²⁵¹ Nigel Stone “Production of Reports Following Finding of Miscarriage of Justice in Certain cases” (2013) 21 Waikato Law Review 49 at 49.

²⁵² Flatman, above n 246.

which requires administration of the criminal justice system to be fair and just.²⁵³ Coldrey J whilst acting as DPP stated: “Whilst it is argued that prosecutorial independence is an essential element in the proper administration of criminal justice it must be equally recognised that inherent in an independence without accountability is the potential for making arbitrary, capricious, and unjust decisions.”²⁵⁴ New Zealand lacks a workable accountability mechanism for abuses of prosecutorial power.

The principle of accountability is central to the concept of democratic governance based on the rule of law. Lord Bingham states that under the rule of law, ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such.²⁵⁵ If public decision-makers are able to avoid being held to account for misconduct, “government has the potential to become arbitrary and self-serving.”²⁵⁶ Limiting bureaucratic discretion by ensuring compliance with specially designed rules and regulations keeps the government accountable and achieves three means: “The proper use of public funds, the fair treatment of citizens and the achievement of policy objectives as determined through the democratic process.”²⁵⁷

Three elements comprise and ensure the accountability of public decision-making. The first element is answerability, this means that public officials must be able to justify and explain how his or her powers are exercised. Secondly, accountability is dependent on responsiveness, which requires the public to participate in the decision-making process. Finally, accountability mechanisms must be enforceable, whereby the decision-maker is subject to some form of sanction when they are unable to answer for the exercise of their powers or failed to respond to public expectations and needs.

Former Crown Prosecutor, Nigel Stone examined this issue and contrasted a prosecutor’s accountability to the way judges may be held to account by the Judicial Conduct Commissioner, police officers by the Independent Police Conduct Authority or doctors, nurses

²⁵³ Flatman, above n 246.

²⁵⁴ Coldrey, above n 246, as cited in Flatman, above n 246.

²⁵⁵ Lord Bingham of Cornhill “The Rule of Law” (lecture given to the sixth Sir David Williams Lecture, Centre for Public Law, University of Cambridge, November 2006).

²⁵⁶ Martin Schönteich *Strengthening prosecutorial accountability in South Africa* (Institute for Security Studies Paper 255, April 2014) at 2.

²⁵⁷ Ibid; Robert D Behn *Rethinking democratic accountability* (Brookings Institution Press, Washington DC, 2001) at 9.

and others in the medical profession by the Health and Disability Commissioner.²⁵⁸ While judges, police officers and medical professionals may be scrutinised by independent bodies, the actions of prosecutors are not subject to the same supervisory processes.²⁵⁹ The lack of consistency in the processes is simply bewildering and difficult to rationalise. Furthermore, in 2006, the Supreme Court of New Zealand in *Chamberlains v Lai*²⁶⁰ lifted “barristerial immunity” for defence counsel which had been a feature of the system since the 1970’s. Despite a burgeoning trend for accountability, prosecutors have managed to slip through the cracks unlike their learned counterparts thus far.

The main reason why prosecutors have been protected from accountability unlike other professionals is due to their special role of acting in the public interest and not on behalf of the public.²⁶¹ Prosecutors do not advocate for victims of crime, since they are not truly their ‘lawyer’. Contrastingly, judges, police officers and medical professionals act exclusively on behalf of society’s interests at large. Therefore, it may be concluded “that no individual ought to be able to make a complaint against them.”²⁶²

Despite this, Stone argues that there needs to be another method, aside from bringing issues to the New Zealand Law Society to which certain classes or persons are able to submit their concerns relating to prosecutorial actions. “Victims should have the power to make a complaint about the conduct of a Crown Prosecutor insofar as they were directly affected by that decision. This would not extend, of course, to a complaint made on the basis that an accused was acquitted.”²⁶³ Prosecutorial independence and accountability can operatively co-exist; “provided an appropriate balance between them is found, both principles can be protected.”²⁶⁴ In fact, the expectation that a prosecutor acts impartially denotes the need for scrutiny to ensure such impartiality.²⁶⁵

²⁵⁸ Stone, above n 251, at 49-53.

²⁵⁹ Ibid.

²⁶⁰ *Chamberlains v Lai* [2006] NZSC 70, [2007] 2 NZLR 7.

²⁶¹ Stone, above n 251, at 54.

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ Schönteich, above n 256, at 2.

²⁶⁵ Timothy Waters *Overview: Design and Reform of Public Prosecution Services in Promoting Prosecutorial Accountability, Independence and Effectiveness: Comparative Research* (Sofia, Open Society Institute, 2008) at 22.

Currently in New Zealand and in jurisdictions overseas, there is a developing trend of greater public accountability and transparency within criminal justice systems.²⁶⁶ The oversight, review and inspection mechanisms have been termed the ‘fourth arm of governance.’²⁶⁷ Accountability of the executive is also part of the victims’ rights movement which advocates for increasing accountability and participation of victims.²⁶⁸ It is argued that since Crown prosecutors maintain a significant role in acting in the public interest, “a greater level of accountability and transparency in regard to their decision-making should accompany this responsibility.”²⁶⁹ A system that holds prosecutors to account when it is warranted, empowers the public. It gives recognition to the fact that the Prosecution Office derives its power from the state, which in turn has derived its power from the public.

The rule of law in relation to judicial review of prosecutorial discretion has become a truism without content. Without sufficient protection, there is doubt as to whether the cloth will ever “indeed be golden.”²⁷⁰

The next Chapter considers the impact of the current law on those most directly affected by a decision not to prosecute; the victims.

²⁶⁶ Stone, above n 251, at 53.

²⁶⁷ F Contini and R Mohr “Reconciling independence and accountability in judicial systems” (2007) 3(2) Utrecht Law Review 31.

²⁶⁸ See Jonathan Doak “Victims’ Rights in Criminal Trials: Prospects for Participation,” (2005) 32 Journal of Law and Society 294-316; Tyrone Kirchengast “Victims’ Rights and the Rights to Review: A Corollary of the Victim’s Pre-trial Rights to Justice,” (2016) 5(4) International Journal for Crime, Justice and Social Democracy 103 at 115.

²⁶⁹ Stone, above n 251, at 53.

²⁷⁰ Beazley & Myles, above n 175, at 174.

CHAPTER 7

7 The Insufficient Protection of Victims' Rights and Interests

The Supreme Court in *Osborne v WorkSafe New Zealand* highlighted the unprincipled outcome of the prosecution decision¹ but did not consider the issue of consultation raised in the Court of Appeal.² This Chapter does not consider the issue of whether victims have a 'legitimate expectation' of consultation, but questions why consultation is not already a procedural right for victims in the prosecution decision-making phase, when one of the public law values that underlie judicial review is the safeguarding of individual rights.³ De Smith, in defining the rule of law, recognised that "the law should conform to minimum standards of justice, both substantive and procedural."⁴ The lack of minimum standards of justice for victims during the prosecution process and other victim-related issues in judicial review are considered.

7.1 Definition of Victims Under the Victims' Rights Act 2002

The Victims' Rights Act 2002 (VRA) was enacted to give victims of criminal offences, statutory recognition in New Zealand's criminal justice system.⁵ It has converted some directives concerning the proper treatment of victims into enforceable rights.

However, the VRA's definition of "victim" under s4 as "a person against whom an offence is committed by another person" appears to limit the rights of victims in a pre-conviction phase.⁶

¹ *Osborne v WorkSafe New Zealand* [2017] NZSC 175, [2017] 15 NZELR 365 at [1].

² One of the issues before the Court of Appeal in *Osborne v WorkSafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513 at [85] – [89]; was "Did the applicants have a legitimate expectation that they would be consulted prior to the prosecutor making its decision?"

³ See Matthew Smith *New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters New Zealand Ltd, Wellington, 2016) at [2.0].

⁴ SA de Smith and R Brazier *Constitutional and Administrative Law* (8th ed, Penguin Books, London, 1998) at 17.

⁵ The new Act replaced and further developed the principles in the Victims of Offences Act 1987 by establishing specific obligations on certain agencies to provide information and assistance to victims of crime. Interest in replacing the old Victims of Offences Act 1987 sparked from a citizen-initiated referendum that took place in 1999, which found that victim participation in the criminal justice process being at the discretion of the judge was insufficient. See Ann Ballin *Toward equality in criminal justice: final report of the Victims Task Force* (Wellington, 1993); which also strongly disapproved of the principles contained in the Victims of Offences Act 1987. The new Act gave effect to New Zealand's commitment to the United Nations Declaration on the Rights of Victims of 1985.

⁶ Victims' Rights Act 2002, s4(a)(i).

“Offence committed” suggests proven guilt and therefore does not include those aggrieved by an accused where guilt has not yet been proved. Conversely, the UN Declaration states that a person may be deemed a “victim” in the course of the prosecution charging process when guilt of an accused is yet to be proved or not.⁷ The Declaration states: “A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and victim.”⁸ Although the VRA may in practice, allow victims to exercise their rights regardless of whether anyone is, charged, arrested or convicted of the offence(s) in question, the definition of “victim” in the VRA does not currently reflect this understanding.

7.1.1 Locus Standi of Victims

Victims in New Zealand are not considered parties to criminal proceedings and therefore have no legal standing.⁹ Victims are only relevant in the prosecution process for reporting the crime, and thereafter, for supplying information to investigators and when required by prosecutors, to give evidence in court. This exclusion of victims from any formal role in the system leaves them fully dependent on prosecutors to represent their interests in the proceedings.¹⁰ Victims have been described as “passengers in a system which was being driven by other people,” and often experience feelings of disempowerment and irrelevancy.¹¹

Although the Guidelines, UN Declaration and the VRA aim to protect victims in the prosecution process, Garkawe argues that “little real change has occurred as far as the role of

⁷ The Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) at [4] - [7]. Geoffrey Flatman and Mirko Bagaric “The Victim and the Prosecutor: The Relevance of Victims in Prosecution Decision Making” (2001) 6(2) Deakin Law Review 238 at 238 noted that the Declaration: “sets out basic standards for the treatment for victims, including, the standard that victims should be treated with both compassion and respect for their dignity. It also provides that the criminal justice system should allow the views of victims to be ‘presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.’”

⁸ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res 40/34 UNGAOR, 40th sess, Supp No 49, UN Doc A/Res/40/34, (1985), annex A, art 2.

⁹ The adversarial legal system places decision-making power in the hands of the parties to the proceedings, who decide how the case should be presented and what evidence will be led.

¹⁰ Sam Garkawe “The Role of the Victim During Criminal Court Proceedings” (1994) 17(2) University of New South Wales Law Journal 595 at 598. It should be noted that the only exception to this is for the victim to take their own private prosecution.

¹¹ House of Commons Justice Committee *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System* (Ninth Report, HC 186, 2009) at 37.

victims is concerned.”¹² These legal instruments only promote victims’ rights in a ‘symbolic’ way and remain mostly ‘ineffectual’ for five reasons.¹³

Firstly, victims are only one of the numerous factors that prosecutors take into consideration under the Guidelines. If a victim does not agree with a decision, prosecutors can easily justify their actions on the basis of other considerations.¹⁴ Secondly, the ‘rights’ embodied in the Declarations and Acts are only effective if victims are aware of them and take initiative to request that the right be granted. Neither the police nor Crown Solicitors are obliged to inform victims of these rights. Garkawe argues that “consequently, many victims remain ignorant of these rights, and even if aware, often have difficulty knowing how to exercise them.”¹⁵

The third reason concerns the time constraints on prosecutors. The prosecutor’s role is an onerous one, consideration of victims may simply be overlooked, despite the fact that prosecutors should do so.¹⁶ The fourth reason is that where there has been a breach of rights, the legislation does not provide for a guaranteed judicial or administrative remedy or an adverse consequence in case of breach.¹⁷ In this sense, victims are placed in an even more vulnerable position, as prosecutor’s face no accountability for non-compliance.

The final reason is “the presence of the largely hidden factor of bureaucratic resistance to change, particularly changes that add to the burden of a Department.”¹⁸ Andrew Karmen crisply summarises this point: ¹⁹ “Criminal justice professionals have little incentive to act in accordance with the wishes and needs of victims, since they are not directly accountable to them, either legally or organizationally. Official priorities are to achieve high level of productivity and to maintain smooth coordination with other components of the system. Victims are viewed as a resource to be drawn on, as needed in the pursuit of organizational

¹² Garkawe, above n 10, at 599. Garkawe’s arguments were based on the DPP Guidelines and various Declarations and Charters of Victims’ Rights in New South Wales Australia. The same arguments are applicable to the New Zealand’s context.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid, at 600.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Andrew Karmen *Crime Victims - An Introduction to Victimology* (2nd ed, Brooks/Coles Pub. Co, Calif, 1990) at 212.

objectives that are usually only incidental to the satisfaction of the interests of the individual victims.”

7.2 Insufficient Rights for Victims

The rights of victims under the VRA²⁰ are only protected insofar as the role victims play in the criminal justice system; as witnesses and information receivers.²¹ As vulnerable players in the system, victims are not always comfortable asking for information regarding their case, and some simply do not know how. Information is one of the most important needs of victims participating in the prosecution process.²² In this regard, the VRA only goes halfway in protecting victims’ right to information at the prosecution decision-making stage. Section 12(1) states:

A victim must, as soon as practicable, be given information by investigating authorities or, as the case requires, by members of court staff, or the prosecutor, about the following matters...

The legislation provides a clear framework, where the onus is on the corresponding agent to provide the information automatically to the victim at a *practicable* time. The statutory obligation on prosecutors is reinforced in the Prosecution Guidelines 2013, where information must be provided to victims to ensure they “understand the process and know what is happening

²⁰ The purpose of the Act is to improve provisions for the treatment and rights of victims of offences; see Victims’ Rights Act 2002, s3, see also s7. In Ontario Canada, any rights in the Victims’ Bill of Rights, 1995, S.O. 1995, c.6 are actually considered principles and not enforceable statutory rights. In *Vanscoy v Ontario*, [1999] OJ 1661, 99 OTC 70 (Ont SCJ) at [20] - [22]; it was held that the Act “is a statement of principle and social policy, beguilingly clothed in the language of legislation. It does not establish any statutory rights for victims of crime”

²¹ A summary of the Victims’ Rights Act 2002 is provided by the Ministry of Justice “A Guide for Agencies dealing with Victims of Offences” <www.justice.org.nz>: The Victims’ Rights Act 2002 “(1) expands the range of persons who are defined as victims for the purposes of the Act by including parents and guardians of child victims and close family members of those murdered or rendered incapable. (2) provides that persons not strictly under the Act may have input into proceedings involving the accused/offender (3) mandates the provision of assistance and information to victims (4) encourages the holding of meetings between victims and offenders, in accordance with principles of restorative justice (5) prohibits the disclosure in court of victim’s address except in particular circumstances (6) requires that in all cases a victim impact statement is sought, for the information of the sentencing judge (7) requires that victims’ views on any application for order prohibiting the publication of the accused/offender’s name are sought (8) provides comprehensive rights of notification, to victims of certain offences, of the occurrence of specified (including forthcoming) events relating to the accused/ offender (9) provides that victims of certain offences may participate in the decision-making processes, such as processes for the offender’s release from prison under the Parole Act 2002 or for the deportation of the offender under the Immigration Act 1987.”

²² Angela Jane Lee *Victims’ Needs: an Issues Paper* (prepared for the Department of Justice Policy and Research Division, 1993).

at each stage.”²³ The provision to this extent, has been drafted carefully and is realistically enforceable.²⁴

Conversely, a victim’s right to information in the context of the charging decision at subsection (b) is insufficient. Section 12(1)(b) of the VRA stipulates that a victim must:

as soon as practicable be given information for the charges laid or reasons for not laying charges, and all changes to the charges laid.

On this basis, any prosecutor who merely informs a victim that discontinuation resulted from public interest concerns, has fulfilled the obligation under s12(1)(b). The insufficiency in such an answer lies in the detail not provided. Lay victims are unlikely to understand what falls into the public interest without proper consultation. The provision fails to specify how comprehensive and detailed prosecution reasoning should be for the benefit of victims. As it stands, s12(1)(b) ironically protects prosecutors by allowing them to ‘check-off’ matters which require mere compliance, whilst insufficiently providing for victims’ needs.

In *Osborne*, the Court of Appeal commented on the limits to victims’ right to information at the prosecution decision-making stage. The Court stated that the VRA is “concerned with duties of courtesy, compassion and the provision, as soon as possible, of *information* about various prosecution-related matters (including the final outcome). These obligations are altogether at a remove from a statutory requirement of consultation *before* prosecutorial discretion is exercised.”²⁵ The Court also commented on the Victims of Crime- Guidance for Prosecutor Guidelines of 2012,²⁶ stating: “These too only refer to the need to give

²³ Solicitor-General’s Prosecution Guidelines 2013, paragraph 29.2.

²⁴ Victims’ rights in Canada are comparatively passive and vague. The Victims’ Bill of Rights states; “victims should have access to information about the charges laid with respect to the crime and, if no charges are laid, the reasons why no charges are laid.”; Victims’ Bill of Rights, 1995, SO 1995, C.6, Principle 2 (v). There is no indication of who is to give information and the inclusion of the word “should” diminishes the enforceability of the right.

²⁵ *Osborne v WorkSafe New Zealand (CA)*, above n 2, at [88].

²⁶ See Victims of Crime- Guidance for Prosecutors 2012, paragraph 16: “Prosecutors will on request meet the family of someone killed as a result of a crime and explain a decision on prosecution. In any case involving a death the prosecutor has a role to play in minimising the additional distress criminal proceedings are likely to cause to a victim’s family and friends. The bereaved family are likely to be acutely concerned about any major decision taken in the case, e.g. to change the charge or accept a plea to an alternative or lesser charge, or to terminate the proceedings.” Note, paragraph 17 of the Victims of Crime- Guidance for Prosecutors 2014 is identical to paragraph 16 of the 2012 Guidelines except for the first sentence which reads: “Prosecutors *should* on request meet the family of someone killed as a result of a crime and explain a decision on a prosecution.” (emphasis added) The use of the word ‘should’ in the revised 2014 version of the Guidelines downplays the need for prosecutors to perform this responsibility compared to the 2012 version where the word ‘will’ was used instead. Victims’ interests are afforded even less protection as newer versions of the Guidelines are made.

information to victims. They do not create a legitimate expectation of consultation.”²⁷ In contrast, the Divisional Court in *R v Director of Public Prosecutions, ex parte Manning* held that although the DPP was not required as part of his general duty to give reasons for a decision not to prosecute, it was reasonable to do so where no compelling grounds suggested otherwise.²⁸ In that case, an individual had died in custody and a properly directed inquest had reached a verdict of unlawful killing. The English courts are more willing to take victims’ interests into account where a death has occurred.²⁹ The court found that reasons should have been given for a decision not to prosecute.³⁰

[33] In the absence of compelling grounds for not giving reasons, we would expect the Director to give reasons in such a case: to meet the reasonable expectation of interested parties that either a prosecution would follow or a reasonable explanation for not prosecuting be given, to vindicate the Director's decision by showing that solid grounds exist for what might otherwise appear to be a surprising or even inexplicable decision and to meet the European Court's expectation that if a prosecution is not to follow a plausible explanation will be given. We would be very surprised if such a general practice were not welcome to Members of Parliament whose constituents have died in such circumstances. We readily accept that such reasons would have to be drawn with care and skill so as to respect third party and public interests and avoid undue prejudice to those who would have no opportunity to defend themselves... In any event it would seem to be wrong in principle to require the citizen to make a complaint of unlawfulness against the Director in order to obtain a response which good administrative practice would in the ordinary course require.

Another aspect of the charging decision that affects the sufficiency of victims’ rights is the prospect of delay. In other jurisdictions, it is emphasised that in order to treat victims with due respect, decisions not to prosecute must be communicated to victims without undue delay.³¹

²⁷ *Osborne v Worksafe New Zealand* (CA), above n 2, at [89]. See also *Osborne v Worksafe New Zealand* [2015] NZHC 2991, [2016] 2 NZLR 485, (2015) 13 NZELR 485 at [86] where Brown J reflected on the applicant’s written submissions on the issue of whether the applicants had a legitimate expectation that they would be consulted prior to the prosecutor making its decision; “The tenor of the argument is reflected in the following paragraphs: ... There was a secret arrangement in which the prosecutor assumed a role almost as a kind of unauthorised agent for the victims, which even extended to “trading” the dismissals of charges (and dismissals “on the merits”) for the payment of the reparations owed to the victims by PRC. In truth, the [Worksafe] placed itself in a highly compromised position. It purported to act for the victims and to negotiate with Mr Whittal about the reparation owed to the victims, but excluded them from any input into the terms of the “unfortunate bargain” that it made.” Brown J decided at [88], [89] and [94] that none of the provisions referred to, or cases cited, could support the conclusion that the victims’ dependents had a legitimate expectation of prior consultation.

²⁸ *R v Director of Public Prosecutions, ex parte Manning* [2001] QB 330.

²⁹ *Ibid.*, at [33]; “It is not contended that the Director is subject to an obligation to give reasons in every case in which he decides not to prosecute... But the right to life is the most fundamental of all human rights.”

³⁰ *Ibid.*

³¹ The EU Directive states: “Member States shall ensure that victims are notified without unnecessary delay of their right to receive the following information about the criminal proceedings instituted as a result of the complaint with regard to a criminal offence suffered by the victim and that, upon request, they receive such information: (a) any decision not to proceed with or to end an investigation or not to prosecute the offender...” EU, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing *Council Framework Decision* 2001/220/JHA, [2012] OJ, L 315/57 at 67. See also section 14, The Victims’ Bill of Rights, C.C.S.M.

Although it is general practice in New Zealand to do so,³² the obligation under s12(1)(b) is only for a prosecutor to communicate the decision to victims “as soon as practicable.”³³ Almost invariably, that will be *after* it has been communicated to the defendant.³⁴ To inform victims of the decision only when it is practicable, encourages delay and the inefficiency of the victims’ real opportunity to make a difference.

Other issues relating to word-choice in the VRA, also prevent the legislation from fully realising its intended purpose.³⁵ The use of the curious word “should”³⁶ in introducing a number of victims’ rights was “criticized in Parliamentary debates as it was considered to downplay the enforceability of the rights included in the Act.”³⁷

Victims or their dependents currently do not have a legitimate expectation for consultation prior to a prosecution decision being made, not even where deaths have occurred. They only have a right to information, but even this right is more symbolic than effectual. When a victim is fully informed about the prosecution decision, two positive outcomes are produced. Firstly, a victim who understands why their case is to be discontinued is better able to move on from the criminal experience. Secondly, being properly informed also prevents victims from perceiving that the justice system has failed to serve them properly. The discipline of providing reasons especially to the dissatisfied party or parties in litigation, is an indispensable part of

c. V55 (Manitoba); “At the victim's request, the Director of Prosecutions must ensure that the victim is consulted on the following, if reasonably possible to do so without unreasonably delaying or prejudicing an investigation or prosecution: a. decision on whether to lay a charge.”

³² The Solicitor-General’s Prosecution Guidelines 2013, paragraph 19.1 states that: “The overarching duty of a prosecutor is to act in a manner that is fundamentally fair. Prosecutors should perform their obligations in a detached and objective manner, impartially and without delay.” The Solicitor-General’s Prosecution Guidelines 2013 have no binding force, but must be considered by prosecutors. The Court of Appeal in its judgment of *Osborne v WorkSafe New Zealand* (CA), above n 2, held that under s12 of the Victims’ Rights Act 2002 the provision of information to victims must be done “as soon as possible” at [88].

³³ Victims’ Rights Act 2002, s12(1).

³⁴ Arguably, a delay in receiving information regarding the prosecution decision, paired with insufficient reasoning would cause emotional distress and confusion for victims, leaving them feeling like “peripheral players” in the process; Elisabeth McDonald “The views of complainants and the provision of information, support and legal advice: How much should a prosecutor do?” (2011) 17 Canterbury Law Review 66. A victim’s participation in this state-controlled process has the potential to cause “secondary victimization”, leaving victims worse off than if they had not reported the offence at all; E Corns “Criminal Proceedings: An Obligation or Choice for Crime Victims” (1994) 13 Univ Tas LR 358.

³⁵ An example is however, found in s7 (emphasis added) which states: “Any person who deals with a victim (for example, a judicial officer, lawyer, member of court staff, Police employee, probation officer, or member of the New Zealand Parole Board) *should*—(a) treat the victim with courtesy and compassion; and (b) respect the victim’s dignity and privacy.”

³⁶ In a statutory formulation, this is an unparalleled example of a weak future indicative tense grammatical form.

³⁷ Susan Glazebrook, Justice of the Supreme Court of New Zealand “Streamlining New Zealand’s Criminal Justice System” (Criminal Law Conference 2012: Reforming the Criminal Justice System of Hong Kong, Hong Kong, 17 November 2012) at 26. See Honourable Phil Goff, Second Reading (5 Oct 1999).

the fundamental judicial obligation.³⁸ While no direct analogy with prosecutors can be made, essentially the same imperatives and obligations ought to apply in view of the victims' role. The critical question is, why a right to consultation has not already been incorporated as a procedural right for victims in the prosecution decision-making phase?

The consideration that follows, of victims' interests and needs illustrates the necessity of such a right. The law has not conformed to minimum standards of justice for victims during the prosecution decision-making phase.

7.2.1 Victims' Interests Unsecured

Paying regard to victims' interests may be understood as "the taking into consideration of the views and concerns of victims in the course of the judicial process."³⁹ As victims are directly affected by the crime, they have a natural interest in the proceedings against defendants. How these interests are to be considered, depends on the procedural rules that allow victims to share their views and concerns, and more substantially, how they are considered by decision-makers in the process.⁴⁰

Consideration of victims' interests in the prosecution process can be divided into two dimensions of the justice integer, these either being procedural or substantive.⁴¹ Procedural justice is concerned with fairness of treatment in processes. Procedural justice can be achieved by allowing victim involvement in the proceedings, their input on decisions and their ability to help shape outcomes.⁴² Allowing victims to participate in proceedings fosters the victim-perception of being respected, which can improve satisfaction with the criminal justice system. Substantive justice is achieved through the outcomes of judicial mechanisms, this includes

³⁸ See *Singh v Chief Executive Officer, Department of Labour* [1999] NZAR 258 (CA) where Keith J identified five rationales.

³⁹ Separate Opinion of Judge Pikis in *Prosecutor v Lubanga*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007 ICC-01/04-01/06-925, 13 June 2007 at [14].

⁴⁰ Luke Moffett "Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court" (2015) 26(2) Criminal Law Forum 255-289.

⁴¹ See Marie Manikis "Expanding participation: victims as agents of accountability in the criminal justice process" (2017) 1 PL 63-80; Luke Moffett *Justice for Victims before the International Criminal Court* (Routledge, Abingdon, Oxon, 2014).

⁴² Jo-Anne Wemmers *Victims in the Criminal Justice System* (Kugler, Amsterdam, 1996); and Yael Danieli "Massive Trauma and the Healing Role of Reparative Justice" in R Letschert, R Haveman, A M de Brouwer, and A Pemberton (eds.) *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011) at 235-261.

redressing the harm caused to victims and the causes of victimisation, which give rise to three main rights in relation to outcomes: truth; justice and reparations.⁴³ The two types of justice work cohesively to provide for an effective remedy.

Victims currently have no opportunity to be actively involved or participate at the decision-making stage. Not even a consultative right.⁴⁴ This issue is not specific to New Zealand, but continues to be problematic in other jurisdictions.⁴⁵ Rt Hon Lord Goldsmith QC has commented that “the prosecutor plays a vital role in achieving this objective [of putting the victim at the heart of the criminal justice system] by communicating with and supporting victims of crime. They are also champions of victims’ rights and protect their interests.”⁴⁶ However, this means is simply unachievable at the prosecution decision-making phase, without a procedural justice mechanism in place. Protecting victims’ interests has been historically, of low priority in the criminal justice system,⁴⁷ and this important objective is still yet to be prioritised.

It has been suggested by the Victims’ Task force that “a new understanding of the nature of the relationship between the victim and the State is necessary”⁴⁸ if any improvement from the

⁴³ Based on the right to an effective remedy under Article 8 Universal Declaration of Human Rights (UDHR), 217 A (III), 10 December 1948.

⁴⁴ It is perhaps for this reason, that prosecutors are often targeted by victims as failing to address or protect their interests properly.

⁴⁵ McDonald, above n 34. For example, global studies on the experiences of female victims of sexual assault, have indicated that the majority of prosecuting counsel are considered by such victims to aggravate their difficulties in the trial process, as opposed to alleviating them; See Amanda Konradi *Taking the Stand: Rape Survivors and the Prosecution of Rapists* (Praeger, London, 2007); Joseph R Gillis and others “Systemic Obstacles to Battered Women’s Participation in the Judicial System: When Will the Status Quo Change?” (2006) 12 *Violence Against Women* 1150; Lisa Frohmann “Constituting Power in Sexual Assault Cases: Prosecutorial Strategies for Victim Management” (1998) 45 *Social Problems* 393; Sara Payne *Rape: The Victim Experience Review* (Home Office, 2009) at 22; Mark R Kebbell, Caitriona M E O’Kelly and Elizabeth L Gilchrist “Rape victims’ experiences of giving evidence in English courts: a survey” (2007) 14 *Psychiatry, Psychology and Law* 111; ACT Government *A Rollercoaster Ride: Victims of Sexual Assault: Their experiences and views about the Criminal Justice process in the ACT* (ACT Government, 2009) at 20. Other research shows that participants in the criminal justice system find it to be “an artificial, alienating and disempowering process that does not produce an outcome in which they have confidence.”; See Ministry of Women’s Affairs *Restoring Soul: Effective Interventions for Adult Victim/Survivors of Sexual Violence* (2009) at 37.

⁴⁶ Statement by Rt Hon Lord Goldsmith QC [the United Kingdom’s former Attorney General] *The Prosecutors’ Pledge* (2006).

⁴⁷ The New Zealand Law Commission *Criminal Prosecution* (NZLC PP28 1997) at 12; “Traditionally, the criminal law has been viewed as being concerned with the State’s interests in the preservation of peace and order, and civil law as being concerned with providing redress and compensation to individual victims. In the past the criminal justice system has marginalised victims of offences.”

⁴⁸ *Ibid*, at 79.

current position is to be achieved.⁴⁹ Sir Ken Macdonald QC, noted that “it is possible to find a balance which improves the respect with which victims and witnesses are treated, while at the same time upholding defendant rights and fair trial principles.”⁵⁰ To this extent, any expansion of the role of victims in the criminal justice system must not unduly compromise the existing rights of the accused or impact society’s interest in seeing justice be served.

7.2.2 The Relevance of Victims’ Interests

The Social Contract Theory has been utilised by scholars to illustrate that victims enjoy the State’s protection.⁵¹ The theory purports that citizens surrender their natural liberties in exchange for the enjoyment of order and safety of the organised state. Locke contended that individuals are not forced, but through consent, volunteer their natural rights to a trustful and neutral authority in exchange for neutral and equal protection.⁵² When the authority fails to protect the individuals who conferred power to it, then the authority’s exercise of that power is illegitimate.⁵³

The above reasoning is transferable to the context of improper prosecution decisions not to prosecute. In state-controlled prosecutions, the state displaces the victim’s right to exact private vengeance, requiring the victim to instead channel any desires of retaliation through the criminal

⁴⁹ Ballin, above n 5, at 35; “To the victim, the offence is a personal matter requiring restitution of harm suffered, while to the state it is a violation of criminal law requiring a consistent, predictable and equitable response under the law.”

⁵⁰ Sir Ken Macdonald QC [the former Director of Public Prosecutions in England and Wales 2003-2008] (speech given to the Institute of Human Rights, 18 January 2008); “Balancing the Rights of Victims and Defendants: prosecutors and due process” The Ministry of Justice also held similar views: “We believe that it is possible to find a balance between improving the involvement of victims in the criminal court process and upholding the principled, professional operation of the system including the rights of the defendant”; Ministry of Justice *A Focus on Victims of Crime: A Review of Victims’ Rights – Public Consultation Document* (2009) at 25. This would be the social contract theory in practical operation.

⁵¹ See John Locke *Two Treatises of Government* by Peter Laslett (student ed, Cambridge University Press, New York, 1988); Philip A Joseph *Constitutional and Administrative Law* (4th ed, Brookers, Wellington, 2014) at [7.2.1]. See also Wayne A Logan “A Proposed Check on the Charging Discretion of Wisconsin Prosecutors” (1990) 1990 Wis L Rev 1695 at 1720; Steven J Heyman, “The First Duty of Government: Protection, Liberty and the Fourteenth Amendment” (1991) 41 (3) Duke LJ 507 at 514; Kenneth L Wainstein “Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction” (1988) 76 (3) Cal L Rev 727 at 730; Richard L Aynes, “Constitutional Considerations: Government Responsibility and the Right Not to be a Victim” (1984) 11 Pepp L Rev 5 (1984) 63 at 75-77; Paul S Hudson, “Crime Victim and the Criminal Justice System: Time for a Change, The Symposium: Victims’ Rights” (1983-1984) 11 (5) Pepp L Rev 23 at 32.

⁵² Locke, above n 51, at 130 and 135.

⁵³ Ibid.

justice system.⁵⁴ Therefore, the criminal law can be seen as establishing a social contract between the state and the victim. If a prosecutor decides not to prosecute without a legitimate reason, this is equivalent to the state's failure to protect victims from crime and is a complete disregard of victims' retributive interests. Kenneth Wainstein asserts that when this situation occurs, the state loses its exclusive right to determine whether or not to prosecute and victims should therefore be allowed to invoke judicial power to reverse the decision not to prosecute, in order to defend for their interests.⁵⁵ Views shared by other academics also include the fact that victims of crime should not have to experience re-victimisation caused by the state's own wrongful inaction.⁵⁶

The inclusion of victims' interests in the prosecution process is relevant for two other reasons.⁵⁷ Firstly, victims are critical in proving the occurrence of such crimes by testifying and providing evidence to aid investigators and prosecutors. This can be achieved by affording sufficient protection of victims' rights and interests, in order to build trust between victims and the criminal justice system, and would facilitate co-operative behaviour. Secondly, the criminal law's purpose is to prosecute and punish perpetrators of the law, on a moral basis it is deemed unjust to allow the needs and interests of those most affected by crimes to be ignored in the process of seeking justice.⁵⁸ It has been accepted that "criminal law and criminal procedure could never really lead to justice being administered unless and until the system pays respect to the interests of victims of crime."⁵⁹

7.2.3 What do Victims Need?

⁵⁴ Josephine Gittler "Expanding the Role of Victim in a Criminal Action: An Overview of Issues and Problems" (1984) 11 (5) *Pepp L Rev* 117 at 142.

⁵⁵ Wainstein, above n 51, at 730.

⁵⁶ Gittler, above n 54, at 117; Richard L Aynes, 'Constitutional Considerations: Government Responsibility and the Right Not to be a Victim' (1984) 11 *Pepp L Rev* 5 at 63. On this note, an analogy has been used by one academic to compare victims that are unreasonably blocked from accessing the criminal justice system, as analogous to those who have been denied the benefits of insurance, for which premiums have been paid; Li Tian "Victims' Opportunities to Review a Decision not to Prosecute made by the Crown Prosecutor" (LLM Thesis, The University of Western Ontario, 2013).

⁵⁷ Moffett, above n 40.

⁵⁸ William Tallack *Reparation to the Injured and the Right of the Victims of Crime to Compensation* (London 1900); Margaret Fry "Justice for Victims" (1959) 8 *Journal of Public Law* 191-194.

⁵⁹ Marc Groenhuijsen "Conflicts of Victims' Interests and Offenders' Rights in the Criminal Justice System a European Perspective" (1996) in C. Sumner et al. (eds) *International Victimology: Selected Papers from the 8th International Symposium: Proceedings of a Symposium, 21-26 August 1994* (Australian Institute of Criminology, Canberra, 1994) at 163-176.

In 1993, New Zealand's Department of Justice researched victims' needs to assess the effect of changes made by the Victims of Offences Act 1987.⁶⁰ It recognised five categories of need, that may restore victims' sense of self-worth and enable victims to move on from criminal experiences if these needs were supported:⁶¹

- Information
- Involvement and participation
- Protection and privacy,
- Support, and
- Reparation and/ or compensation

The NZLC contends that “of all the needs expressed by victims, the need for case-related information and assistance” is most commonly sought.⁶² Section 12(1) of the VRA does not protect this need sufficiently. When a prosecution decision is made, most victims want to know what the charging decision is, what charges are laid, the reasons for the decision, and whether to offer diversion or seek reparation. Only a right to consultation can adequately support and fulfil victims' needs at the pre-trial stage. Giving victims greater participatory rights allows abstract justice to take on a more personal dimension by providing reparation in the form of satisfaction, since their suffering has been recognised. This in turn, promotes an individual's healing process and gives victims the sense of empowerment, agency and closure. Furthermore, such rights help lay the foundation for reconciliation for those affected.

7.2.4 Concluding Comments

⁶⁰ Now the Victims' Rights Act 2002. See Lee, above n 22, at 9 -10. See also New Zealand Law Commission, above n 47, at 84. These needs are still relevant to victims today. Victims' justice needs are intricate and individualised. The emotional effects of crime on victims are likewise specific to the individual, See Wallace *Victim Impact Statements: A Monograph* (Department of Justice, Wellington, 1989) at 16; even if an offence is minor in nature, it cannot be assumed that the impact on the victim is also minor, likewise for serious offences, it cannot be assumed that the impact on the victim will be serious. See also The New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at 128; without the support of these complex needs in the criminal justice system, victims can inadvertently experience trauma, distress, and secondary victimisation. See also Judith Herman “Justice From the Victim's Perspective” (2005) 11 *Violence Against Women* 571 at 574; “if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law.” At 575 Herman writes that the “wishes and needs of victims are often diametrically opposed to the requirements of legal proceedings” and that “the victims vision of justice is nowhere represented in the conventional legal system”.

⁶¹ New Zealand Law Commission, above n 47, at 84.

⁶² Ibid. See Lee, above n 22, at 29; Church, Lang, Leigh, Young, Gray and Edgar *Victims' Court Assistance: An Evaluation of the Pilot Scheme* (prepared for the Department of Justice Policy and Research Division, 1995). The provision of information enables victims to make their own choices throughout their experience of the prosecution process. These choices are fundamental to victims' recovery; See Lee, above n 22, at 29.

Currently, victims' needs and interests are inadequately protected. As Locke's Social Contract recognises, civil society is dependent on national governance and coercive force to preserve individual rights.⁶³ Victims currently only have participatory opportunities at the end stage of the trial process,⁶⁴ but are merely information receivers at the pre-trial prosecution stage.⁶⁵ The current statutory law is an imbalance. It does not create an entitlement to be consulted prior to a decision having been made not to prosecute. It only engenders a subsequent hope to find out why a prosecution has already been decided not to be justified. But even that provision of information, is of flimsy value, as it occurs retrospectively to the decision. As the previous sections have illustrated, minimum standards of justice for victims, as stakeholders in the criminal justice system, are ignored. This undermines the rule of law by disincentivising victims from having any role in the decision to prosecute or not which manifestly affects them and their right to dignity and intrinsic worth.⁶⁶

7.3 Discretionary Relief: Limitations and Uncertainty

As a consequence of the limited procedural rights in the prosecution process,⁶⁷ victims have limited power to redress the wrongs caused by unjust prosecution decisions. Even when an impugned decision is decidedly flawed, the court may under judicial review, still refuse to grant a remedy or be incapable of granting the most appropriate remedy.⁶⁸

⁶³ See Locke, above n 51; Philip A Joseph *Constitutional and Administrative Law* (4th ed, Brookers, Wellington, 2014) at [7.2.1].

⁶⁴ The New Zealand Law Commission, above n 47. A particularly important participatory right is the ability for victims to present an impact statement to the sentencing judge. The statement has a visceral role and it opens an opportunity for new facts that may not have been revealed in the course of the trial to be heard; Ann Ballin Report on the Progress of the Victims Task Force (Wellington, 1989) at 4.

⁶⁵ Section 12(1) Victims' Rights Act 2002; Prosecution Guidelines 2013, paragraph 29.2.

⁶⁶ SA de Smith and R Brazier *Constitutional and Administrative Law* (8th ed, Penguin Books, London, 1998) at 17; "the law should conform to minimum standards of justice, both substantive and procedural."

⁶⁷ See Andrew Ashworth and Mike Redmayne *The Criminal Process* (4th ed Oxford University Press, Oxford, 2010) at 52. See also Marie Manikis "Imagining the Future of Victims' Rights in Canada: A Comparative Perspective" (2015) 13(1) *Ohio State Journal of Criminal Law* 163 at 164; Andrew Ashworth classifies victims' rights as "service and procedural rights. Service rights are defined as initiatives that aim to provide victims with better treatment and experiences in the criminal justice system. They include for example, rights to information/notification....Procedural rights, on the other hand, are more controversial within the adversarial context, since they provide victims with a more participative role in the decision-making process." These rights include opportunities for victims to provide information and at times, their views and opinions to criminal justice agencies, as well as victim personal statements at sentencing.

⁶⁸ Jonathan Auburn, Jonathan Moffett and Andrew Sharland *Judicial Review Principles and Procedure* (Oxford University Press, United Kingdom, 2013) at 795; "Where on a claim for judicial review, the court concludes that a particular decision or action is or was unlawful, it has a discretion as to whether to grant or refuse a final remedy and, if it does grant a final remedy, what remedy should be grant: a successful claimant has not entitlement to a final remedy. However, in practice a court will not refuse a final remedy unless there is a good reason to do so." See: *Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd* [1982] AC 617 (HL) at 656 per Lord Roskill; *R (Edwards) v Environment Agency* [2008] UKHL 22, [2008] 1 WLR 1587, at

The courts' discretion is influenced by many factors, but generally, the established discretionary grounds have a broad tripartite classification.⁶⁹ The first category concerns issues related to the applicant, for example a court may choose not to grant relief based on an applicant's behaviour.⁷⁰ The second category involves considerations that relate to the circumstances of the case, these include whether the same decision would be reached by a decision-maker if there was to be a reconsideration,⁷¹ or if the flaws are not of a serious nature,⁷² or if it would result in undue prejudice to third parties.⁷³ The last category involves matters that relate to the wider public interest, such as whether the granting of a remedy would be futile or whether disproportionately adverse administrative consequences would flow from granting a remedy.⁷⁴

The *Osborne* Court of Appeal did note however that "a decision not to prosecute because of an

[63] per Lord Hoffman; *Berkeley v Secretary of State for the Environment (No 1)* [2001] 2 AC 603 (HL) at 616 per Lord Hoffman and at 608 per Lord Bingham; *R v Governors of Small Heath School, ex parte Birmingham City Council* (1989) 2 Admin LR 154 (CA) at 167 per Glidewell LJ; *R v General Medical Council, ex parte Toth* [2001] 1 WLR 2209 (QB) at [6] per Lightman J. See also T Bingham "Should Public Law Remedies be Discretionary?" [1991] PL 64.

For example, when a person has been acquitted, only declaratory relief may be available. See *Osborne v WorkSafe New Zealand* (SC), above n 1.

⁶⁹ Jonathan Auburn, Jonathan Moffett and Andrew Sharland, above n 68 at 796; "When deciding whether to refuse a particular final remedy, the court will take into account all the circumstances of the case. Accordingly, the exercise can be an acutely fact-sensitive one and, therefore, care should be taken when seeking to apply the approach taken in one case to another case."

⁷⁰ For example, if complainants brought delayed applications for review, commenced proceedings too soon, failed to exhaust other available alternate remedies, clearly waived any procedural irregularity or were found to have brought proceedings for strategic reasons or for reprehensible behaviour. See *Van der Plaats v District Court* [2005] NZAR 344 where proceedings were described as 'continued harassment' and *Northcote Mainstreet Inc v North Shore City Council* [2006] NZRMA 157 at [281] where it could not be concluded that the plaintiffs had brought proceedings 'as an altruistic act or as self-appointed guardians of the public quest,' but were trade competitors whose challenge would in any event be futile.

⁷¹ For example, where there is only a moderate procedural defect in process and where the result does not depend on evidence and argument yet to be heard and upon which opinions may differ. See *Phillips v Wairarapa Kennel Association Inc* [2005] NZAR 460 at 470. If a decision on reconsideration is inevitably to be the same, this is a basis for granting only declaratory relief or no relief at all.

⁷² See *Forbes v Coxhead* 29/8/05, Mackenzie J, HC Wellington, CIV 2005-485-624.

⁷³ See *Ngati Maru v Thames Coromandel District Council* 27/8/04, Laurenson J, HC Hamilton, CIV 2004-485-330.

⁷⁴ See *Percival v Attorney-General* [2006] NZAR 215. Unless the court is persuaded by such factors and is precluded from granting a remedy, there are various remedies available generally on judicial review, see Judicial Review Procedure Act 2016, s16; Paul Radich "Achieving outcomes in public law disputes" in *Judicial Review Intensive* (September 2007); "A declaration about the effect of flaws in a process. Declarations can be seen to emanate from the consideration of an application for review, they would often be an integral part of conclusions drawn by a court; Mandamus; an order compelling a decision-maker to perform the power or public duty under review; Injunction; to prevent a breach, continuation of a breach or a further breach of duty; Prohibition; to prevent a decision-maker from exercising a power or jurisdiction that it is not lawfully empowered to exercise; Certiorari to quash or vary a decision on the review and usually accompanied by a direction requiring the decision maker to make its decision again."

unlawful general policy -in effect an abdication of discretion — is both reviewable and likely to result in relief being ordered (usually in the form of an order to reconsider).”⁷⁵ In order to gain insight on the impact the discretion may have on judicial review cases involving prosecution decisions, it is important to consider as a parallel, the issues that judicial discretion presents for other types of judicial review involving administrative decision-making.

Cooke J in the late 1970s espoused that administrative law needs to develop as an effective and realistic branch of government. He cautioned that progress should not be equated with giving judgment to the plaintiffs,⁷⁶ nor should the discretionary remedies be granted “lightly.”⁷⁷ Cooke J’s admonishing dicta revealed that whilst there were significant advancements in administrative law, the strong culture of remedial restraint in New Zealand courts should persist. The rationale for restrained remedial discretion ensured that decision making in the public interest by the administrative and judicial branches could be assured and recognised and “any incipient tendencies for judicial aggrandisement could be seen to be thwarted.”⁷⁸ Professor Joseph contends that the significance of remedial discretion consequently became an “indispensable adjunct” to the perceived judicial function.⁷⁹

However, the restrictive approach to remedial discretion volte-faced in the early 1990s. Courts being more liberal with the granting of remedies caused one analyst to query whether an “undesirable gap”⁸⁰ was forming in New Zealand’s case law between public law rights and vindication of those rights. Even more recently, Professor Janet McLean asserted that the “existence of a potentially opaque and incoherent remedial discretion was becoming increasingly difficult to justify.”⁸¹

The concerns of academics regarding the liberal use of remedial discretion have not however, been echoed in judicial decisions in more recent times. *Air Nelson Ltd v Minister of Transport*⁸²

⁷⁵ *Osborne v WorkSafe New Zealand* (CA), above n 2, at [39].

⁷⁶ *Stininto v Auckland Boxing Association (Inc)* [1978] 1 NZLR 1 at 29.

⁷⁷ *Ibid.*

⁷⁸ John Caldwell “Judicial Review: The Fading of Remedial Discretion” (2009) 23 NZULR 489 at 490.

⁷⁹ See the comment of Philip A Joseph *Constitutional and Administrative Law* (4th ed, Brookers, Wellington, 2014) at [27.4.1]. More generally on the remedial discretion, see Greg Kelly, Jessica Gorman, Jason McHerron, John Wild, Nicholas Wood and Andrew Beck *McGechan on Procedure* (Looseleaf ed, Thomson Reuters, New Zealand) at JA4.03.

⁸⁰ J Beatson “The Discretionary Nature of Public Law Remedies” [1991] NZ Recent Law Review 81.

⁸¹ J McLean “Roadblocks, Restraint and Remedies: The idea of Progress in Administrative Law” in G Huscroft and M Taggart (eds), *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (2006) 211 at 213 and 233.

⁸² *Air Nelson Ltd v Minister of Transport* [2008] NZAR 139 (CA)

is a useful example. O'Regan J held "there must be extremely strong reasons to decline to grant relief."⁸³ *Berkeley v Secretary of State for the Environment* from the House of Lords, was cited with approval in *Air Nelson*, where the discretion to refuse relief was considered to be "very narrow" and "exceptional."⁸⁴ O'Regan J held that "the starting point is that where a claimant demonstrates that a public decision-maker has erred in the exercise of its power, the claimant is entitled to relief."⁸⁵ He had also advocated similar views in his dissenting judgment in *Unison Networks Ltd v Commerce Commission*.⁸⁶ The majority in that case strongly cautioned against using the discretion to refuse to set aside an unlawful decision.⁸⁷ It was found that "even if [the plaintiff was] unscrupulous and had behaved badly, the decision-making process would still be flawed and the public would still be entitled to have it done properly. I do not consider that such circumstances would be a reason to refuse relief."⁸⁸ Asher J went on to say, "I consider that a relevant factor in considering whether to grant relief is whether the seriousness of the error identified in the successful judicial review application is proportionate to the consequences of relief being granted. Weight should be given to the gravity of the error and all the circumstances of the case."⁸⁹ Fogarty J attractively set out the true principles animating the inherently discretionary nature of judicial review in *Barker v Queenstown Lakes District Council*.⁹⁰

The judgments of the Court of Appeal⁹¹ in both cases indicate that New Zealand has now firmly subscribed to the view that discretionary remedies should rarely be refused. This greatly contrasts with the approach advocated in Cooke J's earlier dicta.⁹² Arguments for withholding relief in discretion have considerably lost persuasive power in the courts of New Zealand and

⁸³ Ibid, at [60].

⁸⁴ *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 at 608 (HL) per Lord Bingham, and at 616 per Lord Hoffman, respectively.

⁸⁵ *Air Nelson Ltd v Minister of Transport*, above n 82, at [61].

⁸⁶ *Unison Networks Ltd v Commerce Commission* CA284/05, 19 December 2006 at [94].

⁸⁷ Ibid, at [81], with reference to authorities cited by Michael Fordham *Judicial Review Handbook* (4th ed, Hart, Oxford, 2004) at [24.3.4]. On appeal, the Supreme Court held that the respondent had acted lawfully, and accordingly did not address the question of relief: *Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 42.

⁸⁸ *Unison Networks Ltd v Commerce Commission*, above n 86, at [367].

⁸⁹ Ibid, at [375].

⁹⁰ *Barker v Queenstown Lakes District Council* [2006] NZAR 716 [54] – [56] emphasising an evaluation of the gravity of error and its two dimensions.

⁹¹ *Air Nelson Ltd v Minister of Transport*, above n 82; *Unison Networks Ltd v Commerce Commission*, above n 86.

⁹² *Stininato v Auckland Boxing Association (Inc)*, above n 76, at 29.

the United Kingdom. The same strong legislative presumption in favour of grant of relief is also to be found in section 19 of the Crown Entities Act 2004.⁹³

Despite the current judicial trend of exercising remedial discretion more liberally, until *Osborne* in the Supreme Court, there had been no successful judicial review of prosecutorial discretion in New Zealand.⁹⁴ The lack of certainty of obtaining practical or worthwhile relief in this regard, places victims in a vulnerable position for two reasons. Firstly, even in a successful review, remedies are not guaranteed. The second reason concerns the lack of jurisprudence in New Zealand as to what remedies are available for review of prosecution decisions not to prosecute. The lack of clarity and unpredictability in the exercise of remedial discretion may leave victims feeling discouraged from initiating judicial review. It also a rule of law implication⁹⁵ that affects victims' ability to obtain legal aid.⁹⁶ Professor Herman, argues that more victims might be willing to participate in legal proceedings if they believed there were outcomes that could potentially make the ordeal worthwhile. However, she notes that "even a successful legal outcome does not promise much satisfaction, because [victims'] goals are not congruent with the sanctions that the system imposes."⁹⁷ As in *Osborne* in the Supreme Court, the only relief available was a Declaration- a pronouncement of proven illegality and failures by the prosecutor- as the defendant had been wrongfully but irreversibly acquitted.

The next Chapter addresses the boundaries of discretionary power in relation to relief and the inter-play between the concepts of reconsideration, reneging and resumption.

⁹³ A point made by Joseph, above n 79, at [27.4.1]. Section 19(1) and (2) of the Crown Entities Act 2004 suggests that unless the error in question is "minor or technical" relief should be granted.

⁹⁴ But see now *Osborne v WorkSafe New Zealand* (SC), above n 1.

⁹⁵ See Friedrich A Hayek *The Road to Serfdom* (Routledge Press, United Kingdom, 1944) at 54.

⁹⁶ See Chapter 6 at section 6.2.3.

⁹⁷ Herman, above n 60, at 575.

CHAPTER 8

8 Relief, Reconsideration, Resumption and Reneging

In *Hallett v Attorney-General (No 2)* Henry J pointed out that the question of jurisdiction to review must not be confused with the power to give discretionary relief.¹ This Chapter considers the court orders that could not be considered in *Osborne v WorkSafe New Zealand* and the limits of court power in this context.² In some cases, the prosecutor themselves may decide to reverse their original decision. Although the power to reverse serves as a constitutional safeguard, it also has far-reaching consequences. The boundaries of discretionary power must be well-understood to maintain consistency and certainty in the law.

8.1 Discretionary Court Orders: The Orthodox Approach

8.1.1 New Zealand

Although the *Osborne* appeal was dismissed in the Court of Appeal, the court still broached the question of relief. The court held that “a decision not to prosecute because of an unlawful general policy — in effect an abdication of discretion — is both reviewable and likely to result in relief being ordered (usually in the form of an order to reconsider).”³

The court also stated: “We add that even if the Prosecution Decision or District Court Decision had been shown to be unlawful, we would not have quashed them. It is impossible to restore the circumstances pertaining at the time of those decisions, because the \$3.41 million has been irretrievably transferred to the families. That is a sufficiently strong reason to decline substantive relief.”⁴ The Supreme Court affirmed the Court of Appeal’s point on relief by granting the dependents a declaration that the conditional payment was an unlawful bargain.

Given the particular circumstances of the *Osborne* case, quashing the prosecutor’s decision would not have been appropriate. However, it is clear that a quashing order and an order for

¹ *Hallett v Attorney-General (No 2)* [1989] 2 NZLR 96 (HC) at 102.

² *Osborne v WorkSafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447, [2017] 15 NZELR 365.

³ *Osborne v WorkSafe New Zealand* [2017] NZCA 11 at [39] per Kós P.

⁴ *Ibid*, at [101] per Kós P.

reconsideration is the most common method used by courts to deal with impugned decisions in appropriate cases.⁵ If a reconsideration order is made, the court will not be able to substitute its own view of the matter for that of the prosecutor. Nor does it have the power to require the prosecutor to change the original view. The court may express its opinion on the matter which could have the effect of assisting the prosecutor's next decision, however the court's power is confined to this limit.

8.1.2 United Kingdom

In the United Kingdom, the common method for courts to deal with incorrect or irrational decisions not to prosecute is to quash the decision and simultaneously order a reconsideration from the DPP or CPS.⁶ The Court has jurisdiction and is more specialised than a prosecutor in interpreting the law, therefore it is accepted that a direction for reconsideration is not an inappropriate transgression from the courts. Full discretion remains with the prosecutor and they may choose to maintain their original decision. The courts have highlighted however, that there would not be a reconsideration of the prosecutorial discretion simply because the court itself would have reached a different decision.⁷

In *R v Director of Public Prosecutions, ex parte Treadaway*, the applicant had been released from prison after serving a sentence for robbery.⁸ After his release, he was awarded damages by the High Court in respect of an assault he had suffered at the hands of five police officers. The DPP decided not to prosecute any of them. The Divisional Court allowed the application, finding that even though the civil court's decision did not bind the DPP, the High Court judge had made substantial conclusions and findings. The DPP ought to have examined these findings closely before the decision not to prosecute was entered. The court held that the DPP did not give the High Court's decision the analysis it deserved and consequently the DPP failed to notice that evidence was missing. Accordingly, the Divisional Court directed the CPS to reconsider its decision not to prosecute.

⁵ The same approach is taken in the United Kingdom, see *R v Director of Public Prosecutions, ex parte Kebilene and Others* [1999] UKHL 43, [2000] 2 AC 326, [1999] 3 WLR 972. The Hong Kong courts also take this approach; Eric Wing Hong Chui and T Wing Lo *Understanding Criminal Justice in Hong Kong* (2nd ed, Routledge, New York, 2016).

⁶ *R v Director of Public Prosecutions, ex parte Manning* [2001] QB 330. Lord Justice Goldring in *R (on the application of Guest) v Director of Public Prosecutions* [2009] EWHC 594 (Admin) [2009] 2 Cr App R 26 at [50] held that a court should not make a quashing order if it were to be merely academic.

⁷ *R (on the application of F) v Director of Public Prosecutions* [2013] EWHC 945 (Admin), [2014] 2 WLR 190 at [5] citing Lord Bingham CJ in *R v Director of Public Prosecutions, ex parte Manning*, above n 6.

⁸ *R v Director of Public Prosecutions, ex parte Treadaway*, The Times October 31 1997.

In *R (on the application of Joseph) v Director of Public Prosecutions* a decision not to prosecute was made by the CPS on the basis the evidence was insufficient to defeat a probable defence of self-defence.⁹ The Divisional Court used its remedial discretionary powers to direct the CPS to reconsider its decision not to prosecute. The court held that the case required reconsideration since it could be demonstrated on an objective appraisal that there was serious evidence supporting a prosecution that had not been carefully considered, in particular that pertaining to the issue of self-defence.

In *R (on the application of Peter Dennis) v Director of Public Prosecutions*, the DPP decided not to prosecute an employer for gross negligence manslaughter resulting from an employee falling to his death through a skylight in the course of work.¹⁰ The DPP refused to prosecute on the basis that the case did not satisfy the Code for Crown Prosecutors. The Administrative Court found that the prosecutor failed to deal with the core issues of the case that might have been brought against the employer. It was found that the prosecutor also failed to provide clear reasoning relating to the verdict of inquest and why it should not have led to a prosecution. It was the opinion of the court that had those matters been considered, a different decision might be made. The court referred the matter back to the CPS, emphasizing that the final decision would still be for the prosecuting authority and not the court. In making his decision, Lord Justice Waller set out the approach for applications where reconsideration of the decision not to prosecute may be appropriate:¹¹

- (i) If it can be demonstrated on an objective appraisal of the case that a serious point or serious points supporting a prosecution have not been considered;
- (ii) If it can be demonstrated that a conclusion in a significant area about the nature of the evidence supporting a prosecution, is irrational;
- (iii) Where the points are such to make it seriously arguable that the decision would otherwise be different; or
- (iv) Where an inquest jury has found unlawful killing, the reasons why a prosecution did not follow have not been clearly expressed.

In *R (on the application of Guest) v Director of Public Prosecutions* the claimant was a victim of an alleged assault who challenged the failure of the respondent to quash a conditional caution

⁹ *R (on the application of Joseph) v Director of Public Prosecutions* [2001] Crim LR 489.

¹⁰ *R (on the application of Peter Dennis) v Director of Public Prosecutions* [2006] EWHC 3211.

¹¹ *Ibid*, at [29] – [30].

given to the assailant.¹² The Divisional court held that the offence failed to meet the criteria of the Code for Crown prosecutors for a caution, since the offence was particularly serious in nature, involving violence and injury. The decision to give a conditional caution is therefore able to be judicially reviewed if it may be demonstrated that it was unlawful as a result of improper procedure or if it has been issued for an offence that falls outside of the Director's Guidance or it is unreasonable on *Wednesbury* principles.¹³ In such circumstances the decision to authorise and then administer a conditional caution may be quashed and then caution set aside.

The cases above establish when the courts are likely to quash a prosecutor's original decision and order a reconsideration. The question of how far court orders can go in this context is considered next.

8.2 The Limits of Court Power

8.2.1 The Court's Power to Compel or Reinstate a Prosecution

An area of disparity among common law jurisdictions regarding the limits of court power is whether the judiciary has power to compel a prosecutor to prosecute after a judicial review application. The Canadian courts appear to be prepared to exercise such power as necessary, while the courts in the United Kingdom and South Africa see the exercise of such power as an affront to the separation of powers doctrine. While the New Zealand courts have not directly tackled this question, the statement made in the Court of Appeal that abuse of prosecutorial discretion would "likely to result in relief being ordered (usually in the form of an order to reconsider),"¹⁴ accords more with the South African and United Kingdom's position.

In *National Director of Public Prosecutions and Others v Freedom Under the Law* the South African Supreme Court of Appeal considered whether courts have power to reinstate a prosecution decision.¹⁵ The court below was held to be correct in setting aside the impugned decisions however, ordering the NDPP to reinstate the charges against the respondent to be

¹² *R (on the application of Guest) v Director of Public Prosecutions*, above n 6.

¹³ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

¹⁴ *Osborne v WorkSafe New Zealand (CA)*, above n 3, at [39] per Kós P.

¹⁵ *National Director of Public Prosecutions and Others v Freedom Under Law* (67/2014) [2014] ZASCA 58.

enrolled and pursued without delay was an inappropriate transgression of the separation of powers doctrine.¹⁶ Brand JA explained:¹⁷

That doctrine precludes the courts from impermissibly assuming the functions that fall within the domain of the executive. In terms of the Constitution the NDPP is the authority mandated to prosecute crime, while the Commissioner of Police is the authority mandated to manage and control the SAPS. As I see it, the court will only be allowed to interfere with this constitutional scheme on rare occasions and for compelling reasons. Suffice it to say that in my view this is not one of those rare occasions and I can find no compelling reason why the executive authorities should not be given the opportunity to perform their constitutional mandates in a proper way. The setting aside of the withdrawal of the criminal charges and the disciplinary proceedings have the effect that the charges and the proceedings are automatically reinstated and it is for the executive authorities to deal with them. The court below went too far.

The United Kingdom case, *R v Director of Public Prosecutions, ex parte Kebilene* considered the discretion of the DPP to prosecute during an interim period between the enactment of the Human Rights Act and the bringing into force of the provisions.¹⁸ The House of Lords held that the DPP's decision to consent to a prosecution would not be amenable to judicial review proceedings in the absence of dishonesty, bad faith or an exceptional circumstance. The House quashed the declaration from the Divisional Court that the DPP's continuing decision to proceed with the prosecution was and unlawful act. The House concluded that as soon as the Human Rights Act came into force, the argument that domestic legislation is incompatible with the Convention should be brought at trial or appeal process. The additional remedy of judicial review should not be open to the defendants. Lord Hope added that "the process of judicial review could do no more than require the Director to reconsider his decision. It could not require him to change his view. It would fall short of providing a remedy which is as effective as that which could be provided by the trial judge during the trial process or on appeal."¹⁹ Lord Hope's statement emphasises that the court's powers cannot go beyond an order for reconsideration.

Conversely, in Canada, applications have been made seeking court orders in the nature of a *mandamus* to compel prosecutions. In *Meyer v British Columbia (Attorney General)*, the petitioner applied to the Supreme Court of British Columbia for an order of *mandamus* compelling that the Attorney General of British Columbia prosecute a member of the Canadian Pacific Railway Police for an alleged assault. The Court stated that "the *mandamus* application

¹⁶ *National Director of Public Prosecutions and Others v Freedom Under Law*, above n 15, at [51].

¹⁷ *Ibid.*

¹⁸ *R v Director of Public Prosecutions, ex parte Kebilene and Others*, above n 5.

¹⁹ *Ibid.*, per Lord Hope.

focuses upon the ability of this Court to review the Attorney General's discretion."²⁰ The court concluded that "the ability of a judge to interfere with prosecutorial discretion is limited to cases of 'flagrant impropriety'"²¹ and that in the current case there was no evidence of 'flagrant impropriety' and therefore dismissed the application for *mandamus*.

In *Gervasoni v Canada (Justice)*, the applicant sought a *mandamus*, to compel the Minister of Justice to seek formal written assurances from the requesting state that the death penalty would not be sought in the case.²² The Court of Appeal for British Columbia dismissed the application and held that "the Minister was acting within the parameters of his discretion" and that "the requesting state having advised the Minister of its final decision that the death penalty will not be sought or imposed in this case, the maximum sentence which the applicant is facing, if convicted, is life imprisonment."²³ The Minister is entitled in these circumstances to issue the warrant of surrender without further consideration of death penalty assurances, and in so doing has not committed reviewable error."²⁴

While the power to compel a prosecution has never actually been exercised by the Canadian courts, there has been no dialogue that suggests that such power is inappropriate. To this extent, it would appear that the Canadian courts would be willing to compel a prosecution where an abuse of discretion is found in *mandamus* applications.

The question of whether New Zealand courts should allow *mandamus* to compel a prosecution makes for an interesting hypothetical exercise.

The argument that New Zealand courts should follow the Canadian position by allowing courts to compel prosecutions in 'exceptional circumstances' is made on the basis of two reasons. Firstly, the power to direct a reconsideration is essentially a court power that asks of a prosecutor to perform a specific action. On this basis, the concept of compelling is no different. Admittedly, compelling is a greater intrusion on the prosecutor's discretion, than directing a reconsideration. However, when a court has already concluded that a decision is wrong in law, the intrusion on discretion is arguably justified. When a court quashes a decision and directs

²⁰ *Meyer v British Columbia (Attorney General)* 2002 BCSC 257 at [10].

²¹ *Ibid*, at [16].

²² *Gervasoni v Canada (Minister of Justice)* (1996) 72 BCAC 141 (CA)

²³ *Ibid*, at [26].

²⁴ *Ibid*, at [29].

the prosecutor to reconsider, yet the original decision is maintained, the court's quashing of the decision is rendered meaningless and the applicant for judicial review has essentially, 'won the battle, but lost the war.' The preserving of original decisions, may also encourage applicants who are unaffected by judicial review costs to repeat applications, in the hopes for a more desirable outcome. Judicial review in this sense can become endless, and burdensome for the criminal justice system.

Secondly, the power to compel may also protect against reconsiderations that are made in bad faith or conducted improperly. Although such situations are likely to be extremely rare, allowing the courts to compel a prosecution completely eliminates the risk of this happening. There is no way of detecting whether a prosecutor that has been directed to reconsider their decision has properly made a second decision not to prosecute, or whether they have stubbornly insisted on not prosecuting. Even when a proper second decision not to prosecute is reached, it does not eliminate the wrong-doing that was found by the courts in judicial review.

If the New Zealand courts followed the South African and United Kingdom's position, it would be on the basis that allowing courts to compel a prosecution would be to usurp the function of the prosecutor, which is a plain violation of the separation of powers doctrine.

While there are merits to both positions, considering the New Zealand Court of Appeal's statement regarding discretionary orders, it is likely that our judiciary would consider the power to compel prosecutions to be overstepping its function.²⁵ The Canadian courts have set the high standard of 'flagrant impropriety' for review, and it is arguable that extraordinary remedies are warranted when review is able to meet such a high test. The threshold for review in South Africa, the United Kingdom and in New Zealand is much lower, and any orders that may flow from a successful review do not need to be 'extraordinary' in nature. Furthermore, the New Zealand version of judicial review of prosecution decisions has generally followed the precedents set by the United Kingdom and development of this species of review appears to accord more with the United Kingdom position compared to judicial review in Canada.

²⁵ *Osborne v WorkSafe New Zealand (CA)*, above n 3, at [39] per Kós P; "a decision not to prosecute because of an unlawful general policy — in effect an abdication of discretion — is both reviewable and likely to result in relief being ordered (usually in the form of an order to reconsider)."

While compelling or reinstating prosecution decisions may be inappropriate, the position in New Zealand on reinstatements of judicial decisions is different.

8.2.2 Power to Direct Inferior Court to Resume Terminated Proceedings: A Parallel

Reinstatements in New Zealand have been ordered, where a judge from an inferior court prematurely or unjustifiably discontinues a case by wrongly acceding to a recusal submission, or through self-abnegation. A superior court can through judicial review, order the judge to return to the seat of adjudication.²⁶

In *Hosking v Tauranga District Court*, it was found that the Judge had no basis to terminate the trial as he did. It was appropriate not to dismiss the prosecution but for the original trial judge to resume the hearing.²⁷

On a similar footing, is the power of the executive to reverse its own decisions.

8.3 The Prosecutor's Power to Reverse

8.3.1 Reversals vs the Principle of Finality

In New Zealand, a prosecutor has discretionary power to reopen a prosecution decision not to prosecute and reverse the decision provided there are justifiable reasons to do so.²⁸ This power safeguards the proper functioning and quality of discretionary decision-making. The

²⁶ Gerard McCoy "Judicial recusal in New Zealand," in H P Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, United Kingdom, 2011) at 327-328.

²⁷ *Hosking v Tauranga District Court* [2009] NZAR 712; see also *Police v Wanganui District Court* [2009] NZAR 97; Although the District Court Judge was wrong in concluding that it was "impracticable" to continue and wrong to reach that decision in breach of natural justice, neither mandamus or a declaration was granted; *Nattrass v Attorney General* [1996] 1 HKC 480; where a prosecution application in Hong Kong had wrongly succeeded; *Re Politics, ex parte Hoytes Commission Pty Ltd* (1991) 65 ALJR 445, HCA; an Australian case where the commissioner ejected too soon.

²⁸ See the reasons identified at paragraph 7.3 of the Prosecution Guidelines 2013: "7.3.1 Rare cases where a reassessment of the original decision shows that it was wrong and should not be allowed to stand; 7.3.2 Cases which are stopped so that more evidence which is likely to become available in the near future can be collateral and prepared. In these cases, the prosecutor will tell the defendant that the prosecution may well start again; and 7.3.3 Cases which are stopped because of a lack of evidence but where more significant evidence is discovered later."

consequences of reversals are however, somewhat extensive. Most apparent is that the power essentially rebuts the finality principle.

Keir Starmer QC commented on the commonness of reversals in the United Kingdom before the VRRS was introduced: “The decisions of prosecutors were rarely reversed because it was considered vital that decisions, even when later shown to be questionable, were final and could be relied upon.”²⁹ The principle of finality also encourages police and prosecutors to reach the correct decision the first time. Starmer stated that “this approach was intended to inspire confidence, but in reality it had the opposite effect. Refusing to admit mistakes can seriously undermine public trust in the criminal justice system.”³⁰ Following Starmer’s argument, it may be understood that the prosecutor’s right to reverse a decision is important in the interests of justice and that victims’ rights should outweigh the accused’s right to certainty.

The case *R v Christopher Killick* involved two sufferers of cerebral palsy who complained to the police of being anally raped and sexually assaulted. A third complainant was identified and said he had been non-consensually buggered.³¹ The appellant, who also suffered from cerebral palsy, denied any form of sexual activity with the two complainants and maintained that the anal intercourse was consensual. The CPS decided not to prosecute and the appellant was informed of the decision via email.

A complaint was made about the prosecution decision which resulted in a review. The review concurred, however three and a half years later a “third tier” review resulted in a reversal of the decision not to prosecute. Alison Levitt QC who effected the reversal concluded that while the original decision not to prosecute was not unreasonable, it was wrong in that there was a realistic prospect of a conviction and it was in the public interest that there should be a prosecution.

Throughout the reviews the appellant was told on numerous occasions that he would not be prosecuted which he relied on to his detriment. The appellant submitted that the CPS’s reversal of the decision not to prosecute was an abuse of process. His honour Judge Rook QC dismissed

²⁹ Owen Bowcott “Crime victims allowed to challenge prosecutors” *The Guardian* (United Kingdom, 5 June 2013). Sir Keir Starmer QC was the DPP of England and Wales.

³⁰ *Ibid.*

³¹ *R v Christopher Killick* [2011] EWCA Crim 1608.

the application and held that the CPS had the right to review and reverse its decision and commence proceedings. The court reiterated that the complainants had the right to seek review of the prosecution decision “that right under the law and procedure of England and Wales is in essence the same right expressed in Article 10 of the Draft EU Directive on establishing minimum standards on the rights, support and protection of victims of crime dated 18 May 2011 which provides: ‘Member States shall ensure that victims have the right to have any decision not to prosecute reviewed.’”³² The court found no abuse of process in the case:³³

[55] Although no excuse was or could have been put forward for the delay, we do not consider that in itself it amounted to an abuse of process or caused prejudice or detriment. We accept the evidence that there was clear strain, but it did not amount to prejudice or detriment. Nor was the delay in disclosure until 2010... prejudicial; even if the appellant had been prosecuted immediately, he would not have seen the note until after he had made his prepared statement. Nor could it possibly be said, to accept the statement of Lord Steyn in *Latiff* [1996] 1 WLR 104, that the continued prosecution was “an affront to public conscience.

The court continued to explain that the communications to the appellant that he would not be prosecuted could not be considered legally binding:³⁴

[56] Thus even on the assumption, contrary to our decision, a representation was made, there was good reason why the prosecution had to review the matter; the delay arising out of the review caused no prejudice. There was no abuse of process. In all the circumstances, the judge was right to dismiss the application on this basis. We would simply observe, given the circumstances of this case, that it must be for the Director to consider whether the way in which the right of a victim to seek a review cannot be made the subject of a clearer procedure and guidance with time limits. As we have explained, the right of a complainant to a review is nothing to do with complaints about the conduct of a level of service provided by the CPS; it is an integral part of the exercise of a prosecutorial discretion and the use of the term complaint has the danger to which we have referred.

In holding this view, the Court of Appeal endorsed the victim’s “right” to have a decision not to prosecute reviewed and the test on review is understood to be “unreasonableness” not in the traditional *Wednesbury* sense,³⁵ but where the original decision was “wrong.”

The view held by the *Killick* court essentially recognises that adjustments to the principle of finality are justified in that victims are not just witnesses in the criminal justice process, but real participants that have needs, interests and rights that must be protected. Starmer explained that “Neither the *Killick* judgment nor the draft EU Directive referred to in it, qualify that

³² *R v Christopher Killick*, above n 31, at [49].

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, above n 13.

“right” and so, presumably, it is available to all victims and not just in special or ‘exceptional circumstances’ and, equally importantly, presumably the “right” to a review can only have practical effect if it carries with it a right to have reversed any decision which, on review, is found to be wrong.”³⁶ On judicial review of prosecution decisions, the court assumes that the prosecutor would have considered all relevant factors in reaching their decision, accordingly it would “be disproportionate for a public authority not to have a system of review without recourse to court proceedings.”³⁷ The *Killick* decision is a prime but extraordinary example of when the original prosecution decision failed to be fully informed and was ultimately wrong. In rare cases like *Killick*, it would appear that the principle of finality must yield in order to ensure that correct decisions are made, whether in light of victims’ rights or from a more traditional public law view.

It should be noted that the reversal in *Killick* occurred without the introduction of any fresh evidence. The appropriateness to reverse a decision without new evidence is closely tied to the finality principle and common law jurisdictions have approached the issue in different ways.

8.3.2 Reversals Without New Evidence

While the power to reverse acts as a constitutional safeguard, it should only be exercised where strong and compelling reasons exist. Most reversals occur when new evidence is introduced, or when evidence will become available in the near future. In New Zealand, it is rare that a reversal can take place without a crown prosecutor referring to fresh evidence.³⁸ The appropriateness of reversing a decision not to prosecute in the absence of fresh evidence is therefore an important issue to consider. The courts in the United Kingdom, Hong Kong and Ireland have set out legal principles in case law to guide the appropriate use of reversals when no new evidence can be produced.

8.3.2.1 United Kingdom

³⁶ Keir Starmer QC “Finality in criminal justice: when should the CPS reopen a case?” [2012] Crim LR 526-534.

³⁷ *R v Christopher Killick*, above n 31, at [48].

³⁸ See though *Rewa v Attorney General* [2018] NZHC 1005 where a stay entered by the Solicitor-General was uplifted as a result of the outcome and implications in *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277.

In *R v Director of Public Prosecutions, ex parte Burke*, the Crown discontinued proceedings and made an agreement not to reinstate them in the absence of fresh evidence.³⁹ The case involved an alleged sexual assault that was dropped on the basis of insufficient evidence. The Crown reneged on that promise however when the victims' mother made an informal complaint to the DPP who then recommended that proceedings should be commenced against the claimant in the absence of fresh evidence. The DPP formed the view that the original decision to discontinue was wrong. The court refused the judicial review application on the basis that the DPP retains a discretion to reinstate a prosecution without needing to demonstrate special circumstances in support of that decision.⁴⁰

The *Killick* case is another example of a rare occasion where the prosecutor was justified in reversing the original decision not to prosecute, even after the accused had been informed that a prosecution would not be instituted.⁴¹ The Court of Appeal concluded that “as a decision not to prosecute is in reality a final decision for a victim, there must be a right to seek a review of such a decision”⁴² and that the reversal of the original decision did not amount to an abuse of process.

8.3.2.2 Hong Kong

In *R v Harris*,⁴³ the appellant argued that because the Attorney General had previously assured him that he would not be charged he should have been granted a stay at trial as he had sought. The evidence as it stood for the initial decision not to prosecute was precisely the same as it was on the date of the decision to prosecute. On behalf of the Attorney General, it was argued that the prosecution was not an abuse of process because the assurance of non-prosecution had been based on incorrect legal advice, and the prosecution was launched only when the error came to light.

³⁹ *R v Director of Public Prosecutions, ex parte Burke* [1997] COD 169.

⁴⁰ The Divisional Court was prepared however, to accept that a complaint could be brought on grounds that the CPS has raised a legitimate expectation on the part of the defendant that he would not be prosecuted. Such considerations may go to issues of abuse of process. Philips LJ said: ‘I consider that if a letter is written which creates an expectation that there will be no further prosecution, this can be a material factor in deciding what the public interest requires.’ This was relied on and considered in *R (SA) v Director of Private Prosecutions* [2002] EWHC 2983 (Admin) at [34]. Another example is *R (O) v Director of Public Prosecutions* [2010] EWHC 804 (Admin).

⁴¹ *R v Christopher Killick*, above n 31.

⁴² *Ibid*, at [48].

⁴³ *R v Harris* [1991] 1 HKLR 389 (CA).

The Court of Appeal held it had no power to interfere with the Attorney General's discretion to prosecute, however once the charge was put before the court it could at that point consider whether the prosecution should be allowed to continue if abuse of process grounds had been raised. The court found that there was nothing unlawful in the change of mind of the Attorney General, who had not manipulated or misused the rules or the procedure.

8.2.3.3 Ireland

In *Eviston v Director of Public Prosecutions*, the DPP reversed a decision not to prosecute but made the reversal without any new evidence.⁴⁴ The Supreme Court held that the DPP was entitled to review his original decision in the absence of fresh evidence and make a new decision without needing to provide reasons.⁴⁵ But it held in this particular case however, the DPP had failed to follow fair procedures and on that basis the prosecution required intervention to be stopped. McGuinness J stated "on these facts it seems to me that once the DPP had unequivocally and without any caveat informed the Applicant that no prosecution would issue against her in connection with this road traffic accident, it was a breach of her right to fair procedures for him to reverse his decision and to initiate a prosecution by the issuing of the summons on the 23rd of December 1998."⁴⁶ Keane CJ stated as "there was no new evidence before him when the decision was received, the applicant was not afforded the fair procedures to which in all the circumstances, she was entitled."⁴⁷

*Carlin v Director of Public Prosecutions*⁴⁸ was decided on a similar basis to *Eviston*. The case involved the applicant (Mr Carlin) being arrested with assault causing harm in July 2001. The DPP had decided and informed Mr Carlin that no prosecution would be brought, but following an internal review the DPP directed that a prosecution be brought. Mr Carlin took judicial review proceedings to prohibit prosecution.

⁴⁴ *Eviston v Director of Public Prosecutions* [2002] IESC 62, [2003] 3 IR 260. Denham J stated: "The decision-making power to bring a prosecution on indictment lies with the Office of the Director of Public Prosecutions, which is an independent office, established by statute. The decision to bring a prosecution depends on all the circumstances of a case. In some situations, it may not be appropriate to bring a prosecution in the first instance, or for a second time, for good reasons. It requires an exercise of discretion on the matrix of facts. The circumstances will be different in every case."

⁴⁵ See for commentary, Sean E Quinn *Criminal Law in Ireland* (4th ed, Irish Law Publishing, Ireland, 2009) at 221.

⁴⁶ *Eviston v Director of Public Prosecutions*, above n 44, at 230.

⁴⁷ *Ibid*, at 299 per Keane CJ.

⁴⁸ *Carlin v Director of Public Prosecutions* [2010] IESC 14, [2010] 3 IR 547.

The Supreme Court dismissed Mr Carlin's appeal and accepted the DPP's right to review a decision not to prosecute. Fennelly J found that the DPP was entitled to review decisions even with representations by the alleged victim and their dependents. The decision to prosecute and the right to review prosecution decisions were held to be exercises of executive power immune from review, absent mala fides.⁴⁹

8.2.3.4 Concluding Comments

All three jurisdictions affirm that the DPP has the right to review and reverse an original decision even in the absence of new evidence. In the United Kingdom, failure to inform an accused of the possibility of a reversal does not amount to the reversal being invalidated. There the courts have taken a more victims'-rights approach towards any adjustments to the principle of finality, and see that this shift in paradigm increases public confidence in the administration of justice. The same pertains in Hong Kong.

In Ireland however, the courts are more protective of the accused's right of certainty. But no specific test was articulated in *Eviston* for intervention.

Denham J's approach in *Carlin*, does not concern the factual accuracy of the decision, but rather the process by which it was reached. *Carlin* has been described as inhabiting "a space beyond traditional concerns about process and or the public's interest in prosecution. It points to a need to articulate and explore the reflexive relationship between fair trial rights and the public community interest in criminal justice. Denham J invokes the public's confidence in the justice system in order to convey the message that there are values intrinsic to the criminal justice system that cannot be simply labelled as defendant's rights or public interest in a prosecution. Instead, broader, fundamental interests relating to the legitimacy of verdicts (and by extension the authenticity of complainant's suffering) are at stake."⁵⁰

While all three jurisdictions maintain different approaches towards the rights of victims and those who are suspects, the overarching concern for legitimacy in the DPP's decision-making process and the interest of preserving public confidence has been at the core of those decisions.

⁴⁹ A position very close to *Matalulu v Director of Public Prosecutions* [2004] NZAR 193 (SC Fiji).

⁵⁰ Sinead Ring "Carlin v DPP: Prosecutorial Discretion and the Decision (Not) to Prosecute" (2010) Human Rights in Ireland <www.humanrights.ie>.

While finality in decision-making is a critical feature of the rule of law, in the context of justified reversals, the rule of law ideal is better served when finality is trumped to avoid injustice.⁵¹

The next Chapter considers the alternative route to justice; private prosecution.

⁵¹ As Lord Atkin said in *Ras Behari Lal v King-Emperor* (1933) 50 TLR 1, 2 (PC) at 2 “Finality is a good thing, but justice is better.”

CHAPTER 9

9 Private Prosecution

One alternative remedy to judicial review long-held to be one of the bastions of the common law, is the right of an aggrieved person to bring a private prosecution.¹ In *Osborne v WorkSafe New Zealand* the appellants were barred from instituting this right.² This Chapter evaluates the viability and efficiency of the private prosecution alternative for those who seek to challenge a decision not to prosecute, in particular, the restrictions placed on initiating private prosecutions. It also considers issues involved with interventions to, *inter alia* prevent their abuse in New Zealand, the United Kingdom and Hong Kong. These jurisdictions approach the right in similar ways, but have different restrictions when legislation and case law are considered. It is argued that since access to justice via private prosecution is so onerous, the test for judicial review of prosecution decision-making must be recountoured to give deserving applicants greater opportunities to achieve justice.

9.1 New Zealand

The right to privately prosecute in New Zealand is now preserved by s26 Criminal Procedure Act 2011.³ The NZLC critically analysed the need for private prosecutions and concluded that: “The important constitutional and theoretical place of private prosecutions within our system warrants their retention.”⁴ While prosecuting criminal offenders is a central function of the state,⁵ the ability for private entities and individuals to alternatively commence a private prosecution acts as “a safeguard against the misuse [of this] public power.”⁶ Private prosecutions also play a role in satisfying state deficiencies “existing not through negligence

¹ *R v Gratanelli* (1849) St Tr (NS) 979; *Gouriet v Union of Post Office Worker* [1977] 3 All ER 70, [1978] AC 435; *Jiang Enzhu v Lau Wai-hing* [2000] 1 HKLRD 121, [1999] 3 HKC 8. Whether privately prosecuting is a ‘right’ was questioned in *Jones v Whalley* [2007] 1 AC 63, [2007] 1 Cr App R 2.

² Section 54A(2) of the Health and Safety in Employment Act 1992 precludes private prosecution if WorkSafe has taken enforcement action.

³ Summary Proceedings Act 1957, s13 “Except where it is expressly otherwise provided by an Act, any person may lay an information for an offence” was repealed by s7(2) Summary Proceedings Amendment Act (No 2) 2011, from 1 July 2013.

⁴ New Zealand Law Commission *Criminal Prosecution* (NZLC R66, 2000) at 92.

⁵ New Zealand Law Commission *Criminal Prosecution* (NZLC PP28, 1997) at 137.

⁶ *Ibid* at 136.

or abuse but rather through economic limitations.”⁷ Most relevantly, the right to privately prosecute provides victims with an alternative avenue to protect their interests if public prosecutors decline to prosecute.⁸

Despite the significant constitutional function of private prosecution, there are substantial inroads to exercising the right. Deterrents to privately prosecuting include the cost, inconvenience, the legal skill required to present a case in court, the stringent burden of proof required for a conviction and the risk of an adverse costs award. The Criminal Disclosure Act 2008 also applies. These factors, combined with the general lack of awareness of the existence of this prosecutorial right, make private prosecutions in New Zealand uncommon. The subservience of the victim in law is further underpinned by the fact that a private prosecution may be taken over by the Solicitor-General or crown prosecutor at any time.

Section 26 of the Criminal Procedure Act 2011 provides that:⁹ “the Registrar may accept [a] charging document for filing; or refer the matter to a District Court Judge for a direction that the person proposing to commence the proceeding file formal statements, and the exhibits referred to in those statements, that form the evidence that the person proposes to call at trial or such part of that evidence that the person considers is sufficient to justify a trial.”

Section 26(2) states that: “The Registrar must refer formal statements and exhibits that are filed in accordance with subsection (1)(b) to a District Court Judge,¹⁰ who must determine whether the charging document should be accepted for filing. A Judge may issue a direction that a charging document must not be accepted for filing if he or she considers that—

⁷ New Zealand Law Commission, above n 4, at 94. In *Edwards v District Court at Lower Hutt* [2018] NZHC 1266 at [19], Cooke J noting the cases *Taka v District Court at Auckland* [2015] NZHC 972, [2016] NZAR 1459 at [12] – [17] and *Mitchell v Porirua District Court & Ors* [2017] NZHC 1331 at [73] stated “I accept that the right involves an important safeguard arising from the state’s otherwise complete control of prosecutions. But I also accept Mr Robinson’s submission that there is an equally important check to prevent the power of private prosecution being used inappropriately.”

⁸ New Zealand Law Commission, above n 5, at 137. See Bill Hodge, “Private Prosecutions: Access to Justice” (1998) 4 NZLJ 145-148; “private prosecution is not a medieval anachronism but is rather a useful weapon for the pursuit of justice. Justice must not only be seen to be done, it must be done, and if by no one else, then by the victims themselves. Private prosecutions have the constitutional high ground, therapeutic value for the victims, and genuine practical significance. Access to justice is a good thing, and the few participatory windows of access should be opened wider, not closed down. Just as war is too important to be left to the generals, so justice is too important to be monopolized by the crown.”

⁹ Criminal Procedure Act 2011, s26 (1)(a) and (b).

¹⁰ *Prescott v District Court at Northshore* [2017] NZHC 2828, [2018] NZAR 307 at [46] (“prescriptive”).

- (a) the evidence provided by the proposed private prosecutor in accordance with subsection (1)(b) is insufficient to justify a trial; or
- (b) the proposed prosecution is otherwise an abuse of process.”

In *Taka v Auckland District Court*,¹¹ Brewer J held that in evaluating the evidential merit of a proposed private prosecution, the private prosecutor was required to file formal statements (and exhibits referred to in them) in order that a Judge could evaluate the sufficiency of the evidence. Brewer held whether the putative defendants had the right to be heard before a Judge determines that the prosecution be accepted for filing, depends on a contextual assessment involving the statutory framework, the nature of the decision and the effect on the individual.¹² Where a private prosecutor has an evident personal motive the putative defendant should be heard.¹³

Another limitation is the additional requirement of consent from the Attorney-General for prosecution of a motley assortment of offences or where only certain organisations or parties may commence proceedings. The justifications are alleged to be to secure consistency.¹⁴

The Prosecution Guidelines state that “the Solicitor-General has a limited role or authority in relation to private prosecutions, for example when the power to stay a prosecution is exercised or there is a statutory requirement that a prosecutor obtains the Solicitor-General’s consent.”¹⁵ The requirement of consent by the Attorney General can also be exercised by the Solicitor General.¹⁶

¹¹ *Taka v Auckland District Court*, above n 7.

¹² See *Durayappah v Fernando* [1967] 2 AC 337 (PC) and *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA).

¹³ Brewer J applied *Wang v North Shore District Court (No 2)* [2014] NZHC 2756, [2014] NZAR 1428.

¹⁴ An example of this was the introduction of the Crimes (Indecency) Amendment Act 2015. It created a barrier to private prosecutions specifically against crimes against morality and decency via section 4 of the Act. Section 4 replaced section 124(5) of the Crimes Act 1961 with: No private prosecution (as defined in section 5 of the Criminal Procedure Act 2011) for an offence against this section can be commenced without the Attorney General’s consent. The offence in section 124 Crimes Act 1961 relates to the distribution or exhibition of indecent matter.

¹⁵ Solicitor-General’s Prosecution Guidelines 2013, paragraph 2.5.

¹⁶ Section 9A of the Constitution Act 1986 states: “The Solicitor-General may perform a function or duty imposed, or exercised a power conferred, on the Attorney-General.” It is likely that the Solicitor-General will exercise the power conferred on the Attorney-General when the issue concerns legal matters, such as the consent for private prosecutions. See *Gibbs v New Plymouth District Council* [2009] NZAR 344 at 350-351 (HC).

Private prosecutors are also limited in the right to appeal sentences. In *Gibbs v New Plymouth District Council*, Harrison J ruled that the Council as prosecutor was debarred as a matter of jurisdiction from pursuing an appeal against sentence in the absence of consent from the Solicitor-General, necessitated by the mandatory requirement in s115A(2) Summary Proceedings Act 1957 (now s246(2) Criminal Procedure Act 2011).¹⁷ By contrast, an appeal against acquittal can be brought as of right by an aggrieved private prosecutor: s248(1) Criminal Procedure Act 2011.

Access to justice via private prosecution is limited by costs. Legal aid is not available in New Zealand to fund private prosecutions.¹⁸ Hence, legal process and costs will present a huge barrier.¹⁹ In cases involving alleged breaches of the HSEA 1992, it is likely that an employer will have access to greater resources (including insurance funding) than an employee, and those who are faced with corporate defendants are likely to be at a financial disadvantage.²⁰ A poorly prepared prosecution may also result in significant cost orders being made under the Costs in Criminal Cases Act 1967.²¹

The NZLC has emphasised the importance of private prosecutions within our justice system but has also highlighted the dangers of the current system. “To a large extent, those dangers arise out of a lack of independent review or supervision of a private prosecution once commenced, and the consequent absence of protections for a defendant.”²² Paragraph 2.5 of the Prosecution Guidelines states that: “The Solicitor-General expects law practitioners conducting a private prosecution to adhere to the Law Society’s general rules of professional conduct and to all relevant principles in [the] Guidelines.”²³ Courts also have supervisory jurisdiction over private prosecutions.²⁴

¹⁷ *Gibbs v New Plymouth District Council*, above n 16.

¹⁸ See Part 2, Legal Services Act 1991.

¹⁹ Natalie K Fraser “Smoke and Mirrors: The Introduction of Private Prosecutions under s54A of the Health and Safety in Employment Act 2002” (2003) 9 *Te Mata Koi: Auckland University Law Review* 1230-1266.

²⁰ However, it is likely that many small businesses will have few resources than a union.

²¹ Costs will not be awarded however just because the accused is acquitted. There must be more justification than just losing.

²² New Zealand Law Commission, above n 4, at 92.

²³ The Solicitor-General’s Prosecution Guidelines 2013, at paragraph 2.5.

²⁴ In the case *Teo v Attorney-General* [2002] NZAR 793, the Court of Appeal of Samoa held that the decision of the Attorney-General to discontinue a private prosecution is reviewable by the Court but only on the ground of “flagrant impropriety in the exercise of discretion,” the same standard applied in the Canadian case *Kostuch v Attorney General* (1995), 174 AR 109 (CA).

In *Mitchell v Tyson*,²⁵ Clark J held that section 26(3) Criminal Prosecutions Act 2011 provides the statutory basis for balancing the rights of a private prosecutor to prosecute those who offend against the criminal law with the rights of individuals not to be subject to a prosecution that is without merit.²⁶ The appellant had no right of appeal under s296 Criminal Procedure Act 2011 as it only provided appellate jurisdiction to the High Court where a person had been “charged with an offence.” A decision to refuse to allow the filing of a charging document, as here, could not constitute the jurisdictional fact that the intended defendant had been charged.²⁷ “The appellant’s remedy lay in judicial review. The Court of Appeal recognized in *R v Anderson* that the availability of judicial review was relevant in construing the scope of s296.”²⁸

Wang v North Shore District Council involved an application for judicial review of whether a Judge had an obligation to provide reasons to authorize a summons at the behest of a private prosecutor to commence a prosecution.²⁹ It was decided that in the context of private prosecutions, the judicial discretion as to whether or not a summons should be issued provides a valuable safeguard to prevent any abuse of process in commencing such prosecutions and requires a closer scrutiny of the basis upon which such a private prosecution application was made, than in public prosecutions.³⁰ It was held that since judicial review is the only remedy available where there has been a refusal to exercise a discretion in favour of granting or refusing a summons, judicial review proceedings are entirely appropriate.³¹

In *Prescott v District Court at North Shore*,³² the applicant’s proposed private prosecution charging documents were not accepted by the Registrar on directions from the District Court

²⁵ *Mitchell v Tyson* [2016] NZAR 1545.

²⁶ Following *Taka v Auckland District Court*, above n 7.

²⁷ Clark J applied *Anderson v R* [2015] NZCA 518, [2016] 2 NZLR 321.

²⁸ *Mitchell v Tyson*, above n 25, at [39]; *R v Anderson*, above n 25, at [46].

²⁹ *Wang v North Shore District Court* [2013] NZHC 3126, [2014] NZAR 101. On 6 November 2014, the plaintiffs were successful again in their application for judicial review of a decision of the District Court to accept charging documents issued by a private prosecutor, the second defendant, against the plaintiffs: *Wang v North Shore District Court (No 2)*, above n 13. According to the NZAR headnote by Kim J McCoy for *Wang v North Shore District Court (No 3)* [2015] NZHC 1611, [2015] NZAR 1678 at 1678; “the plaintiffs sought costs against both the District Court and the private prosecutor, contending that costs were justified because it was the second time within a year that judicial review proceedings had been successfully brought against the court in relation to the same essential matter, (2) the District Court had on any view made too many errors of fact and law and (3) successful parties required to take judicial review of proceedings against an inferior court should be entitled to the remedy of a compensatory costs order.” The court dismissed the application, finding that “costs will not be awarded against a Court for having made an error of law. Costs would only be awarded against a Court upon proof that a judicial officer had acted perversely, oppressively or in bad faith.”

³⁰ *Burchell v Auckland District Court* [2012] NZHC 3413, [2013] NZAR 219 was considered.

³¹ *C v Wellington District Court* [1996] 2 NZLR (CA) distinguished.

³² *Prescott v District Court at North Shore*, above n 10.

Judge. In following *Taka* and applying *Mitchell*, the court held that the provisions of s26 are prescriptive. The court held that the District Court Judge made errors of law by failing to direct the private prosecutor to file formal documents and by making a decision regarding the sufficiency of evidence presented by the applicant on the basis of an inadmissible opinion reached by another judge in earlier separate proceedings.³³

Prescott emphasized that the reasons and conclusions of the decision maker may disclose an error of law upon which the challenge to the decision is founded, but the court will focus only on the impugned decision itself in judicial review.³⁴ Only in ‘exceptional circumstances’ will a reviewing court determine that it is appropriate to order the removal of a specific finding from a decision, as opposed to quashing the decision.³⁵

Private prosecutions were introduced to the HSEA in 2003. Reporting before that amendment, the Transport and Industrial Relations Select Committee stated:³⁶

There are a number of reasons for removing the Crown’s monopoly on prosecutions. These include enhancing the deterrent effect of enabling a greater range of persons to enforce the Act; providing an alternative means of seeking justice for aggrieved parties where a case is not prosecuted by OSH; and providing a safeguard against potential inertia, incompetence or biased reasoning.” Concern had been expressed to the Select Committee that the right to prosecute might be used by trade unions as an industrial weapon. The Select Committee noted that private prosecutions could be taken only if the Department of Labour elected not to act; “[t]he Department of Labour advises that the safeguards surrounding private prosecution are robust and protect against inappropriate private litigation. Meanwhile, the provisions of the Sentencing Act reduce incentives to take private prosecutions for financial gain because victims can no longer be awarded part of a fine.

Parliament also decided that the ordinary time-bar to initiate such prosecutions should be more flexible because of: long latency occupational illness, latent defects, and a failure by the employer to notify serious harm. In the case of private prosecutions, the July- October 2001 Cabinet paper that recommended flexible, limitation periods stated that:³⁷ “In the private prosecution context, a private party may choose to begin their investigation only after OSH has decided not to prosecute...This may not provide enough time for another party to prepare a

³³ *Dorbu v The Lawyers and Conveyancers Disciplinary Tribunal* HC Auckland CIV-2009-404-7381, 11 May 2011 was followed.

³⁴ *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55, [2008] 1 NZLR 13.

³⁵ *Y v Director of Proceedings* [2016] NZHC 2054 considered.

³⁶ *McVicar v District Court at Wellington* HC Wellington CIV-2010-485-1834, 3 February 2011 at [19] cited by Miller J.

³⁷ *Ibid*, at [25] cited by Miller J; *Summit Wool Spinners Ltd v Department of Labour* [2007] NZHC 1852; [2008] NZAR 19 per Asher J at [25] – [29] re s54D.

prosecution within the six-month period and the Court would consider whether further time is warranted in that situation. Section 54B sets out the six-month time limit by which an inspector must file a charging document.”

Section 27 of the HSEA 2002 provided for the substitution of new sections 53 and 54 of the Act. As a consequence, by the new s54A(2)(a) of the Act a private prosecution can be instituted if an inspector (defined in s2) or another person has “not taken enforcement action against any possible defendant in respect of the same matter.” A specific extension of time for laying a private prosecution information is given as long as there is compliance with s54C(3) which requires any application to extend time is made with one month after receiving a notice from the Secretary under s54c(1)(b).

Since the amendment, very few private prosecutions have been successful.³⁸ This is likely to be a direct result of the practical difficulties involved but also the high case-load taken on by WorkSafe. The most obvious restraint on private prosecutors trying to claim under the HSEA is obtaining sufficient evidentiary material to make their case. WorkSafe has statutory powers to investigate into such cases which are unavailable to laymen. Victims may however, be able to obtain evidence from WorkSafe by using the Official Information Act 1982 (OIA). If WorkSafe has not already previously investigated the case, victims will have a difficult task of conducting their own investigation. Reflecting on the private prosecution HSEA amendment, the Court in the successfully prosecuted case of *Creeggan v New Zealand Defence Force* stated: “You are proof that one person can make a difference. By dint of your tenacity and resolve, you have managed to create a silver lining from an unimaginable tragedy that has seared itself into the nation’s psyche. You have demonstrated what the amendment legislation permitting private prosecutions set out to achieve.”³⁹

While private prosecutors have experienced some degree of success in cases involving a previous decision not to prosecute, there remain significant statutory brakes and inherent

³⁸ See *New Zealand Meat Workers Union v South Pacific Meats Limited* [2012] DCR 877 (HC) where a conviction was upheld on appeal and *Creeggan v New Zealand Defence Force* DC Wellington CIV-2012-085-543, 22 October 2013.

³⁹ *Creeggan v New Zealand Defence Force*, above n 38, at [48]. In another HSEA case, *Kelly v M & A Cross Ltd* DC Rotorua CRI-2014-063-000784, 21 May 2014, WorkSafe NZ made the decision not to prosecute against forestry company M&A Cross, when a falling log struck and killed a worker. After WorkSafe made its decision, the Council of Trade Unions launched a private prosecution. M&A Cross Ltd pleaded guilty. See also *McCoy v Downer and Company Ltd* (1981) 1 DCR 327. (Wellington City Council refused to enforce its noise bylaw-successful private prosecution).

restrictions. If a private prosecution fails, the risk of facing malicious prosecution proceedings in tort exists.⁴⁰

9.2 United Kingdom

The right to bring private prosecutions in the United Kingdom is preserved by statute.⁴¹ It has been described there as “a valuable constitutional safeguard against inertia or partiality on the part of authority”⁴² and “against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law.”⁴³ In certain cases, an intending prosecutor must obtain the consent of the Attorney General or the DPP before the commencement of proceedings.⁴⁴ A private prosecution is commenced by issue of a summons from a magistrate. The discretion of the magistrate to issue a summons engaged: “(i) whether the allegation is of an offence known to the law and if so whether the essential ingredients of the offence are prima facie present; (ii) that the offence alleged is not ‘out of time’; (iii) that the court has jurisdiction; (iv) whether the informant has the necessary authority to prosecute.”⁴⁵ A summons will not be granted where there is impropriety or where an abuse of process is involved.⁴⁶

⁴⁰ See *Commercial Union Assurance Co of New Zealand v Lamont* [1989] 3 NZLR 187. For other cases on judicial review of private prosecutions, see Matthew Smith *New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters New Zealand Ltd, Wellington, 2016) at [3.4.4]; see *Kern v District Court at North Shore* [2014] NZHC 896, [2014] NZAR 699; *Ericson v District Court at Wellington* [2013] NZHC 516; *Burchell v Auckland District Court*, above n 28.

⁴¹ Prosecution of Offences Act 1985, s6(1): “Subject to subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director’s duty to take over the conduct of proceedings does not apply.”

⁴² *Gouriet v Union of Post Office Workers*, above n1, at 477 per Lord Wilberforce.

⁴³ *Ibid*, at 498 per Lord Diplock.

⁴⁴ Examples include the institution of prosecutions under section 2(4) of the Suicide Act 1961, which relates to the assistance of another’s suicide, or the institution of war crime prosecutions under the Geneva Conventions Act 1957, s1A and International Criminal Court Act 2001, s53(3).

⁴⁵ *R v West London Justices, ex parte Klahn* [1979] 2 All ER 221.

⁴⁶ *R (on the application of the Mayor and Burgesses of the London Borough of Newham) v Stratford Magistrates’ Court* [2004] EWHC 2506 (Admin). An example of an abuse of process would be where the private prosecutor encouraged the crime or was in some way involved in the mischief he has complained of: *R (on the application of Dacre) v Westminster Magistrates’ Court* [2008] EWHC 1667 (Admin).

By s6(2) of the Prosecution of Offences Act 1985, the DPP may take over the private proceedings at any stage.⁴⁷ A private prosecutor is under no obligation to inform the CPS that a private prosecution has commenced.⁴⁸

In the United Kingdom prior to 23 June 2009,⁴⁹ the best exposition of the DPP's policy was encapsulated in a letter written on behalf of the Director and quoted by Laws LJ in *R v Director of Public Prosecutions, ex parte Duckenfield*:⁵⁰

...where we have been asked...to take over the prosecution in order to discontinue it, we would do so if one (or more) of the following circumstances applies: there is clearly no case to answer. A private prosecution commenced in these circumstances would be unfounded, and would therefore be an abuse of the right to bring a prosecution; the public interest factors tending against prosecution clearly outweigh those factors tending in favour; the prosecution is clearly likely to damage the interests of justice. The CPS would then regard itself as having to act in accordance with our policy...It has been considered that to apply the Code tests to private prosecutions would unfairly limit the right of individuals to bring their own cases.

Duckenfield involved private prosecutions that had been brought by a representative of the victims' families against two retired police officers in relation to the Hillsborough disaster for manslaughter and wilful neglect of duty.⁵¹ The two officers requested that the DPP take over and discontinue the prosecutions. This request was rejected by the DPP and the officers were unsuccessful in their application for judicial review. The Divisional Court rejected the challenge to the lawfulness of the DPP's policy; he was completely within his powers to refuse to take over the private prosecution and to discontinue it and that the criteria are not the same as for the Code of Crown Prosecutors. Laws LJ stated:⁵²

⁴⁷ Prosecution of Offences Act 1985, s6(2): "Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage."

⁴⁸ See CPS "Private Prosecutions: Legal Guidance" <www.cps.gov.uk>. The CPS may therefore find out about a private prosecution in one of the following ways: "where the private prosecutor, or a representative of the private prosecutor, asks the CPS to take over the prosecution; where the defendant, or representative of the defendant, asks the CPS to take over the prosecution; where extradition is required and the Home Office (directly or indirectly) refers the private prosecutor or representative of the private prosecutor, to the CPS; where a justices' clerk refers a private prosecution to the CPS under section 7(4) of the Prosecution of Offences Act 1985, because the prosecution has been withdrawn or unduly delayed and there does not appear to be any good reason for the withdrawal or delay; where a judge sends a report to the CPS; where the CPS learns of the private prosecution in another way, for example from a press report."

⁴⁹ See *R (on the application of Gujra) v Crown Prosecution Service* [2012] UKSC 52, [2013] 1 AC 484 (UKSC) at [24].

⁵⁰ *R v Director of Public Prosecutions, ex parte Duckenfield* [2000] 1 WLR 55 at 63.

⁵¹ Ibid. On 29 June 2018 at Preston Crown Court Oppenshaw J lifted the stay imposed by CPS in 2000 halting private prosecutions for manslaughter by gross negligence, see Danny Boyle "Hillsborough match commander David Duckenfield will face trial, as judge lifts ban on prosecution" *The Telegraph* (United Kingdom, 29 June 2018); The former Commander of Police David Duckenfield at the 1989 FA Cup semi-final.

⁵² *R v Director of Public Prosecutions, ex parte Duckenfield*, above n 50, at 68 per Laws LJ.

...in truth, however, it could not be right for the DPP to apply across the board the same tests, in particular the ‘reasonable prospect of conviction’ test referred to in the correspondence, in considering whether to take over and discontinue a private prosecution as the Code enjoins Crown Prosecutors to follow in deciding whether to institute or proceed with a prosecution themselves; the consequence would be that the DPP would stop a private prosecution merely on the ground that the case is not one which he would himself proceed with. But that, in my judgment, would amount to an emasculating of section 6(1) and itself be an unlawful policy.

This policy relating to the evidential criterion of “clearly no case to answer” was changed after 23 June 2009⁵³ and the “reasonable prospect test” was used instead. The very policy that was previously held to be unfairly limiting the rights of private prosecutors was introduced. It has since been the DPP’s policy to take over and discontinue private prosecutions unless the prosecution was more likely than not to result in a conviction.

In *R (on the application of Gujra) v Crown Prosecution Service*, the appellant had instituted two private prosecutions which were subsequently taken over and discontinued by the DPP.⁵⁴ The Supreme Court agreed on the important and practical constitutional role that private prosecutions played in the United Kingdom and that the right has a distinguished pedigree, however their Lordships differed on the extent of the right. Lord Wilson for the majority affirmed that while the right to initiate private prosecutions remained intact, it could not have been the intention of Parliament that the DPP should decline to exercise his discretion so as to intervene and discontinue a prosecution even in circumstances that lack a reasonable prospect of success.⁵⁵ It was held that testing for the likelihood of conviction was a comparatively more relevant question than the old “no case to answer” test. Lord Wilson disagreed with *Duckenfield*.

Lord Neuberger in agreement with Lord Wilson observed that factors such as the unfairness to a defendant, costs, use of court time and confidence in the justice system justify the Reasonable prospect of conviction (RPC) test in public prosecutions be applicable to private prosecutions.⁵⁶ The Attorney General has always retained the prerogative power by entering a nolle prosequi in private prosecutions.⁵⁷ His Lordship concluded that although the new policy might restrict the right to privately prosecute, it is not unacceptable as a matter of law.⁵⁸

⁵³ See *R (on the application of Gujra) v Crown Prosecution Service*, above n 49, at [25].

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, at [39].

⁵⁶ *Ibid.*, at [57].

⁵⁷ *Ibid.*, at [64].

⁵⁸ *Ibid.*, at [71].

Lady Hale and Lord Mance for the minority adopted a wider, rights-based approach to the question and held strong views on the constitutional basis for private prosecutions and the importance of the individuals' right of access to the courts. No unjustified intrusion by the executive into an individual's right of access to the courts should be countenanced.⁵⁹ Lady Hale added that the possibility of judicial review is "not a good safeguard" and the test may raise issues involving the violation of arts.3 and 8 of the European Convention of Human rights.⁶⁰

The strict legal analysis of the majority is persuasive, however in recognising that there is a right to initiate a private prosecution but no right to continue, save for circumstances where the conditions are the same as those applicable to a continuance of a public prosecution, essentially weakens the right to initiate private prosecutions in the first place. Lord Mance and Lady Hale's approach recognised this, however even the minority's position raises several practical challenges. Amirthalingam explained that:⁶¹

In particular, a difficulty with the minority's approach is that in theory, whenever the Director exercises his discretion not to prosecute on the basis that the evidential sufficiency test has not been satisfied, the dissatisfied victim or kin might then seek to launch a private prosecution on the ground that there is no case to answer...In *Jones v Whalley* the House of Lords upheld a magistrate's decision to stay the proceedings when a private prosecution was brought against an individual who had been cautioned by the police and told that he would not be prosecuted. Lord Bingham of Cornhill noted that, similarly, a decision by the Director not to prosecute should also stand and any attempt to bring a private prosecution could be reviewed as an abuse of process (at [15]).

The split decision in *Gujra* is indicative of the difficulties of finding the balance between well-considered theory and practical justice in areas involving prosecutorial discretion and legitimate expectation. What the *Gujra* decision does not change, is the fact that some prosecutions will never come to the attention of the CPS. Stark made the observation that "In the absence of a particular need for CPS involvement, they will then continue without the assistance of the state's prosecution service. But if both the evidential and public interest tests

⁵⁹ *R (on the application of Gujra) v Crown Prosecution Service*, above n 49, at [103] - [105].

⁶⁰ *Ibid*, at [132] Per Lady Hale dissenting. Article 3 is prohibition of torture. Article 8 is right to respect for private and family life. Under both articles, the state has a positive obligation to provide an effective deterrent, in the shape of the criminal law. Lady Hale cited *X and Y v Netherlands* (1985) 8 EHRR 235 as an example. Lady Hale at [133] in *Gujra*: The court held "that the obligation is not fulfilled if a private prosecution, which a reasonable prosecutor could consider more likely than not to succeed before a reasonable court, can be prevented because another prosecutor takes a different view."

⁶¹ Kumaralingam Amirthalingam "Private prosecutors and the public prosecutor's discretion" (2013) 129 LQR 325-328. See also *Jones v Whalley*, above n 1.

are satisfied, is the DPP not recognising, in essence, that the state ought to be prosecuting the defendant? If so, one might wonder why the pursuit of these cases should depend on the action of private prosecutors.”⁶²

An onerous feature of private prosecution is obtaining evidentiary material. In *R v Director of Public Prosecutions, ex parte Hallas* it was held that both private prosecutors and defendants in the United Kingdom are prevented from obtaining access to statements, photographs, reports or other documents held by the CPS.⁶³ In *Taylor and Another v Director of Serious Fraud Office and Others* the court held that there is no right to obtain documents from the CPS since the evidentiary material is held under confidentiality for those who provided the materials, and is not open to the public domain.⁶⁴ However, victims of crime in the United Kingdom, unlike in New Zealand are entitled to know why the DPP declined to prosecute the alleged offender.⁶⁵

9.3 Hong Kong

Hong Kong’s 2013 Prosecution Code states that: “Under the common law a person has the right to commence a criminal prosecution in the public interest.”⁶⁶ Both the courts and scholars have emphasised the right of private prosecution.⁶⁷ Apart from the deterrent of cost, there are two barriers to the initial institution of a private prosecution.⁶⁸ Firstly, a private prosecutor must persuade a magistrate to issue a summons. Thereafter, in order to retain control of the case, a

⁶² Findlay Stark “The Demise of the Private Prosecution” [2013] The Cambridge law Journal 8 at 10.

⁶³ *R v DPP ex parte Hallas* [1988] 87 Cr App R 340

⁶⁴ *Taylor and Another v Director of Serious Fraud Office and Others* [1992] 2 AC 177.

⁶⁵ For detailed and recent discussion of this issue in the United Kingdom, see *Armani Da Silva v The United Kingdom* [2016] ECHR 314, (2016) 63 EHRR 12.

⁶⁶ Department of Justice Hong Kong Special Administrative Region, Prosecution Code 2013 at paragraph 7.1.

⁶⁷ See for scholars, Simon N M Young ‘Prosecutions Division of the Department of Justice’ in Mark S Gaylord, Danny Gittings, and Harold Traver (eds) *Introduction to Crime, Law and Justice in Hong Kong* (Hong Kong University Press, 2009) at 111-130; Gary N Heilbronn, *Criminal Procedure in Hong Kong* (Longman Group 1990) at 62. In *Re Ng Chi Keung* CACV 32/2013, 19 May 2014, the Court held that ‘[t]here can be no doubt that an individual has a right to institute a private prosecution.’ As in the United Kingdom and New Zealand, the right to bring a private prosecution in Hong Kong is not absolute and is restricted by certain limitations. The court in *Ma Pui Tung v Department of Justice* CACV 64/2008 acknowledged that citizens who have been aggrieved by a prosecutor not to bring a prosecution, have the right to privately prosecute.

⁶⁸ The government does not provide legal assistance for conducting a private prosecution: *D v Director of Public Prosecutions* [2015] HKCFI 1151, [2015] 4 HKLRD 62 at [14]. It was argued that ‘the burden of bearing the costs of such a [private] prosecution, including the legal fees of the defendant if the prosecution fails, generally serves to deter private prosecutions: Simon N.M Young ‘Prosecutions Division of the Department of Justice’ in Mark S Gaylord, Danny Gittings, and Harold Traver (eds) *Introduction to Crime, Law and Justice in Hong Kong* (Hong Kong University Press, 2009) at 111-130.

private prosecutor must persuade the Department of Justice (DoJ) not to take it over, even though the Secretary of Justice may do so.⁶⁹

The magistrate's exercise of discretion on whether to issue a summons for private prosecutions is based on the prima facie evidence test.⁷⁰ The application will be dismissed if there is 'insufficient evidence to support the complaints made by the applicant.'⁷¹ In applications where there is a 'lack of particulars and substance to the draft charges,'⁷² or if the application discloses 'no criminal offence' and does 'not even show a prima facie case on the facts,'⁷³ the magistrate will refuse to issue summons to initiate the prosecution.⁷⁴ This screening process by the magistrate is to ensure that intending prosecutors do not institute frivolous claims against others. It has also been argued that once a private prosecution satisfies the prima facie evidence test, the expense of time and money is on the private prosecutor to defend himself and the court's time and resources will be used to hear the case, therefore it is not unreasonable to require such a level of evidence to be made out before institution.⁷⁵

The requirement of prima facie evidence for the institution of private prosecutions is arguably more restrictive than the test imposed in New Zealand, which only requires that summons be issued when a private prosecutor has proven that the case against the accused is not frivolous or unfounded.⁷⁶ The court in *HKSAR v Wong Kun Cheong* even went as far as requiring 'direct and admissible evidence' to support a complaint before a magistrate would issue summons.⁷⁷ That "the requirement for 'direct' evidence is too strict as it is not possible in all cases for the

⁶⁹ Magistrates Ordinance (Cap 227), s14 "Private Prosecution and Intervention by the Secretary for Justice."

⁷⁰ Which considers if there is prima facie evidence adduced by the applicant against the accused. See *HKSAR v Cheung Kin Chung* [2015] HKCFI 890, [2015] 3 HKLRD 310 at [37]. See also *HKSAR v Cheung Kin Chung* [2015] HKCFI 2064 at [15]. See also *Tsui Koon Wah v Principal Magistrate of Kowloon City Magistrates' Courts* (unrep., HCAL 81/2006, [2006] HKEC 1721.)

⁷¹ *Re Robert James Stairmand* [2010] HKCA 138, CACV 283/2009 (13 May 2010) at [7].

⁷² *HKSAR v Cheung Kin Chung* [2014] HKCFI 1814, HCMA 490/2014 (25 September 2014) at [10].

⁷³ *HKSAR v Cheung Kin Chung* [2015] HKCFI 2115, HCMA 411/2015 (5 November 2015) at [36].

⁷⁴ The High Court in *HKSAR v Cheung Kin Chung* [2014] HKCFI 1394, HCMA 335/2014 (1 August 2014) at [32] stated "[a]n applicant for issuing of a summons to start a private prosecution must understand that he is starting a solemn criminal proceeding by making a serious allegation against another person. Once a summons is issued, the person to whom the summons is issued is burdened with a criminal prosecution. The applicant therefore cannot assume that a Magistrate will grant him the application and issue the summons if the only thing he provides is an Information containing a Statement of Offence and Particulars of Offence."

⁷⁵ Jamil Ddamulira Mujuzi "Private Prosecutions in Hong Kong: The Role of the Magistrates and State Intervention to Prevent Abuse" (2016) 4 The Chinese Journal of Comparative Law 253 at 258.

⁷⁶ *Attorney-General v Slavich* [2013] NZHC 627 (27 March 2013).

⁷⁷ *HKSAR v Wong Kun Cheong* [2002] HKCFI 101, HCMA 242/2002 (9 April 2002) at [2].

prosecutor to adduce direct evidence. Therefore, magistrates should not raise the threshold too high as this would indirectly undermine the right to institute a private prosecution.”⁷⁸

McConville further explained that “In order to adduce sufficient evidence to sustain a prosecution, the private prosecutor needs to get relevant evidence to support a legal challenge.”⁷⁹ Private prosecutors would therefore need to obtain from the DPP, the reasons for making the decision not to prosecute. However, in Hong Kong’s Prosecution Code, the DPP is not required to provide reasons behind his decisions and will only do so in ‘exceptional circumstances.’⁸⁰ McConville commented that “it is arguable that these guidelines no longer comport with modern expectations relating to the rights of victims and their families, at least in certain classes of cases. The best example would be the death of a citizen whilst in the custody of state officials where doubts are raised as to the adequacy of the police investigation or of the related prosecutorial review.”⁸¹ Although McConville was referring an earlier version of Hong Kong’s Prosecution Code, the current 2013 version contains similar deficiencies. The victims and families in such cases are still left without a proper forum to adduce sufficient evidence to bring a private prosecution and are often left without proper explanations and information regarding the decision not to prosecute. Hong Kong’s position is the same as New Zealand, both being behind the United Kingdom.

Hong Kong’s Prosecution Code does not expressly require that a person who wishes to institute must be a victim of crime.⁸² While victims of crime have certainly brought private prosecutions ‘in the public interest’ the Prosecution Code does not specifically provide the right of private prosecution to victims. This may be contrasted by the position taken by Lord Mance in *Gujra* who explained the rationale behind empowering victims of crime to take private prosecutions.⁸³

⁷⁸ Mujuzi, above n 75, at 259.

⁷⁹ Michael James McConville “Politicians and Prosecutorial Accountability in Hong Kong” (2007) 36 Common Law World Review 355 at 360.

⁸⁰ See Hong Kong Special Administrative Region Prosecution Code 2013, paragraph 23.

⁸¹ McConville, above n 79, at 361.

⁸² Paragraph 7.1 of the Code provides that “[u]nder the common law a person has the right to commence a criminal prosecution in the public interest.”

⁸³ *R (on the application of Gujra) v Crown Prosecution Service*, above n 49, at [116] per Lord Mance dissenting: “Private prosecutions is, and I think always has been, a safeguard against the feelings of injustice that can arise when, in the eyes of the public, public authorities do not pursue criminal investigations and proceedings in a manner which leads to culprits being brought before a criminal court. The impunity which offenders appear to enjoy can be socially detrimental. That is...particularly so in those cases where a victim actually knows that the offence has been committed but finds that a [public] prosecutor does not think on a balance of likelihood that his evidence, if given orally in court, will be accepted. The feeling of injustice will be particularly acute, if...the [public] prosecutor’s decision was a fine one, and the alleged victims or another prosecutor might equally reasonably have concluded that the case was one in which the evidential test was satisfied.”

One of the less restrictive features of instituting private prosecutions in Hong Kong as against other states however, is that the 2013 Prosecution Code provides that there is no prerequisite that the DPP should have declined to prosecute before instituting a private prosecution. In the United Kingdom, private prosecutions may only be instituted after the public prosecutor has declined to prosecute.

Intervention by the Secretary for Justice may occur after a summons have been issued. This is because Article 63 of the BL vests the ultimate control of prosecutions in the Department of Justice⁸⁴ in accordance with the Prosecution Code.⁸⁵

Hong Kong's former DPP commented that: "The procedure is open to the intrusion of improper personal or other motives. It may be used to bring groundless, oppressive or frivolous prosecutions... There may be a duplication of proceedings. The prosecution may be contrary to the public interest, included in which is a consideration of the likelihood of conviction, and of the appropriateness of conviction."⁸⁶ Where the right of private prosecution has been abused and the Secretary of Justice has intervened, Berry Hsu has termed this exercise of power the 'prerogative power of *nolle prosequi*.'⁸⁷

In *Ng Chi Keung v Secretary for Justice* an application for judicial review of two decisions taken by the DPP was made.⁸⁸ The first decision by the DPP was to intervene and assume

⁸⁴ Paragraph 1.1 of The Statement Prosecution Policy and Practice states: "The Department of Justice is responsible for the conduct of criminal proceedings in Hong Kong. In the discharge of that function the Department enjoys an independence which is constitutionally guaranteed. Article 63 of the Basic Law of Hong Kong stipulates that the Department 'shall control criminal prosecutions, free from any interference'. That the notion of prosecutorial independence enjoys an entrenched status enables prosecutors to discharge their duties to the public within secure parameters. Prosecutors act independently without fear of political interference or improper or undue influence. At the same time, the Secretary for Justice is accountable for their decisions and actions."

⁸⁵ At paragraph 7.3 "[t]he Secretary for Justice is entitled to intervene in a private prosecution and to assume its conduct, becoming a party to the proceedings at that time and displacing the original prosecutor. The Secretary for Justice may continue proceedings privately begun or may prevent them from continuing by declining to sign the charge sheet or indictment" see sections 74 and 75 of the District Court Ordinance, Cap. 336 and section 17 of the Criminal Procedure Ordinance, Cap. 221. A decision on the future course of the prosecution will be made in accordance with the Prosecution Code before a decision is made whether or not to intervene.

⁸⁶ Ian Grenville Cross "Instituting Private Prosecutions" *Hong Kong Lawyer* (Hong Kong, March 2001).

⁸⁷ Berry Fong-Chung Hsu "Legal Facets of Hong Kong SAR Economic Development: Colonial Legacy and Constitutional Constraint" in Ming K. Chan and Alvin Y. So (eds) *Crisis and Transformation in China's Hong Kong* (Hong Kong University press, Hong Kong, 2002) at 220-225. Section 15 Magistrates Ord 227 (HK) has the chapeau: "Secretary for Justice may withdraw case by entering *nolle prosequi*."

⁸⁸ *Ng Chi Keung v Secretary for Justice* [2016] 2 HKLRD 1330 (CFI).

control of three private prosecutions initiated by the applicant.⁸⁹ The second decision was that taken by the DPP to discontinue those private prosecutions on the basis that there was no reasonable prospect of conviction. The court held, dismissing the application on the basis that the view that there was insufficient evidence was unimpeachable.

One important distinction between Hong Kong's Prosecution Policy compared to that in the United Kingdom was highlighted in this case. Patrick Li J stated that "Under Pt. 11 of the policy, the right to bring a private prosecution is recognized and the power to intervene by the SJ is emphasized."⁹⁰ The Judge added "[a]ccording to code 11.6(c), the DPP would only apply the reasonable prospect test when considering taking over with a view to terminate the private prosecution...the DPP would leave them to the magistrates to ensure that there would be at least prima facie evidence before issuing summonses."⁹¹

It was noted by the respondents in *Ng Chi Keung* that "From 1996-2000, there were 30 applications for private prosecutions allowed by the magistrates, about 65 summonses were issued. From 2001 to 7 September 2013, there were 21 applications for private prosecutions allowed by the magistrates. There were 24 applications refused or withdrawn. A total of 41 summonses were issued."⁹² Throughout these years, the DPP took over and discontinued only two private prosecutions." The statistics failed to reveal whether the bulk of "other private prosecutions" satisfied the prima facie evidence or reasonable prospect of conviction test.⁹³ The court made the comment that "One fact is clear- intervention by the DPP was extremely rare. There is no evidence that the DPP adopted the RPC across the board to restrict private prosecutions."⁹⁴

Pursuing a private prosecution in order to challenge a prosecution decision not to prosecute in Hong Kong has been described as "inefficient, haphazard and ineffective."⁹⁵ While individual

⁸⁹ The applicant alleged that the interested parties had conspired to pervert the course of justice by making a false report to the Commercial Crime Bureau.

⁹⁰ *Ng Chi Keung v Secretary for Justice*, above n 88, at [81].

⁹¹ *Ibid*, at [82].

⁹² New Zealand does not carry statistics for private prosecutions on a national basis. The number of interventions by the Solicitor-General has not been stated.

⁹³ *Ng Chi Keung v Secretary for Justice*, above n 89, at [83].

⁹⁴ *Ibid*, at [84].

⁹⁵ *McConville*, above n 79, at 375.

citizens of Hong Kong retain the right to institute private prosecutions, “this rarely acts as a safeguard in practice because of the many obstacles that need to be overcome.”⁹⁶

9.4 Concluding Comments

The experience from the three jurisdictions demonstrates that the ability to privately prosecute fulfils an important constitutional purpose by safeguarding against inertia and partiality of public authorities. However, all three jurisdictions have placed restrictions on the right. It is important to briefly consider the rationale behind these limitations. In any public prosecution, it is assumed that the prosecutor will carry out his or her role “moderately, albeit firmly. He must not strive unfairly to obtain a conviction; he must not press his case beyond the limits which the evidence permits; he must not invite the jury to convict on evidence which in his own judgment no longer sustains the charge laid in the indictment.”⁹⁷ These propositions are axiomatic in the criminal law process of all three jurisdictions, however they do not apply to a private prosecutor. A private prosecutor will almost undoubtedly have a personal interest in the outcome of their case and uses the “criminal courts as an extension of a personal dispute.”⁹⁸ As a corollary of exercising the right to privately prosecute, the liberty of the accused is put at risk since prosecutions “can be conducted by people who are not, and may not understand the implications of being Ministers of Justice.”⁹⁹

The courts have grappled with the difficult task of “ensuring that the victim’s right to institute a private prosecution is not eroded, while the accused’s right not to be harassed in the name of private prosecutions is protected.”¹⁰⁰ Overall, it is concluded that private prosecution is still a mostly ineffective alternative dispute mechanism. Numerous legal barriers must be surmounted. Essentially, “the type of case which presents the greatest difficulty is where a private prosecution has been brought because the CPS have decided not to prosecute. The private prosecution in such a case represents an attempt to overrule the decision of a Crown Prosecutor.”¹⁰¹

⁹⁶ McConville, above n 79, at 360.

⁹⁷ The Report of the Farquharson Committee “The Role of Prosecution Counsel” (1986).

⁹⁸ Richard Buxton “The private prosecutor as a minister of justice” (2009) 6 Crim LR 427-432.

⁹⁹ Ibid.

¹⁰⁰ Mujuzi, above n 75 at 259.

¹⁰¹ Peter Hungerford-Welch “R (on the application of Gujra) v Crown Prosecution Service: prosecution - private prosecution - policy of Director of Public Prosecutions” (2013) 4 Crim LR 337-341.

Private prosecution is “not likely to be allowed to be used as a vehicle by those who merely have an axe to grind. It is, rather, used on the one hand to ensure the enforcement of laws which official bodies appear not to have the will or the resources to enforce. On the other hand, it has utility as a means of redress for victims where the authorities may be reluctant either to enforce the law or enforce it with adequate rigour.”¹⁰² There is a need then, to assess the ways in which the right to private prosecution could be strengthened, and the three jurisdictions considered have done so in various ways.

Firstly, New Zealand’s approach to the institution of private prosecutions places minimal restriction on intending prosecutors by requiring only that the case against the defendant be not frivolous or unfounded to justify a trial. In comparison, Hong Kong requires a *prima facie* case or direct evidence against the defendant before institution is allowed. In the United Kingdom, victims are afforded greater rights to access to the reasons behind a public prosecutor’s decision-making where a decision not to prosecute has been made. This allows victims to experience a greater chance of success in private prosecutions and less chance of intervention, since evidentiary thresholds are more likely to be met. This right is unavailable in Hong Kong and New Zealand. As one academic cogently put, “there would seem to be little justification for a justice system which left so much in the hands of victims and their families who will often be without legal skills and financial resources.”¹⁰³ Thirdly, one of the procedural aspects of private prosecution peculiar to Hong Kong is that there is no prerequisite that the DPP should have declined to prosecute before instituting a private prosecution.¹⁰⁴ Vexatious claims, are most likely be filtered out before they can be initiated, and the courts may stay these cases for abuse of process.

In all three jurisdictions, there is no requirement for the informant’s consent to be sought before the DPP takes over the private prosecution. In such cases the interests of justice overrides the views of any of the informant or victim. One academic has argued that requiring consent from the victim “ensures that a victim participates actively in a decision that will affect his private prosecution. The challenge, though, is that there is a danger that the victim may refuse to give

¹⁰² L H Leigh “Private prosecutions and diversionary justice” (2007) 4 Crim LR 289-295.

¹⁰³ McConville, above n 79, at 362.

¹⁰⁴ It must be noted that one author in Hong Kong holds the view that private prosecutions can only be instituted after the DPP has declined to prosecute. See Stephen D Mau *Hong Kong Legal Principles: Important Topics for Students and Professionals* (2nd ed, Hong Kong University Press 2013) at 132.

his consent, although the DPP is of the view that there it is not in the interests of the public to continue with the private prosecution.”¹⁰⁵

When the state decides not to prosecute and further prevents a private prosecution, what access to justice do such victims have left? In her dissent, Lady Hale in *Gujra* emphasised the importance of protecting and defending the interests of those who are typically vulnerable to not being listened to by public prosecution authorities.¹⁰⁶ This is a strong argument in favour of public prosecutors taking greater initiative to consult with victims. It is not persuasive however, to broaden the right to privately prosecute.¹⁰⁷ Private prosecution is not an answer to the finding herein, that the current self-abnegation by the New Zealand judiciary of its full constitutional role to supervise prosecutorial decisions and process by judicial review, is indefensible.

¹⁰⁵ Mujuzi, above n 75 at 268.

¹⁰⁶ *R (on the application of Gujra) v Crown Prosecution Service*, above n 49, at [124] - [126], [130].

¹⁰⁷ *Ibid*, at [64] per Lord Neuberger; *Jones v Whalley*, above n 1, at [9] per Lord Bingham.

CHAPTER 10

10 Conclusion

Osborne v WorkSafe New Zealand dealt with illegality- an extremely rare circumstance.¹ Judicial checks and balances exist in the trial scenario by the role and authority of the trial judge. However, that scrutiny is simply unavailable where a decision not to prosecute is made. The only scrutiny is under judicial review, which has been uniformly unsuccessful, save for the result in *Osborne*, which did not disturb the long-standing very narrow scope for such review espoused in *Polynesian Spa*. There is wide scope for a decision not to prosecute to be abused. The Supreme Court's decision is significant for affirming jurisdiction to judicially review prosecution decision-making, albeit confining its decision to only the head of illegality. It left undecided the wider justiciability issues. From a comparative law viewpoint as noted in Chapter 4, that avoidance sets New Zealand's law on judicial review of prosecutorial discretion back from almost all of the selected comparators. As Chapters 6-7 illustrated, the current attenuated decisional law is too restrictive, and does not fulfil the rule of law imperative nor the wider expectations of society. Chapter 8 offered a conceptual lens through which could be seen the need for appropriate boundaries to be established in the exercise of discretionary power. The structural and practical limitations impinging on private prosecution, as discussed in Chapter 9, reinforce the need for a recontouring of the current law on judicial review of prosecutorial decision-making.

To curb those juridical risks exposed by the arguments in this thesis, the Supreme Court should take the earliest opportunity to bring judicial review of prosecutorial discretion into alignment with the modern developments in other common law jurisdictions. New Zealand is an uncomfortable outlier. Continuation of the current reluctant approach only serves to weaken the general bulwark of administrative law and therefore public accountability under the law. While the courts in New Zealand have zealously striven to protect and uphold the rule of law in this area, their self-imposed restrictions create deleterious conditions, engendering in prosecutors a belief of invulnerability from focused judicial scrutiny in decisions not to

¹ *Osborne v WorkSafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447, [2017] 15 NZELR 365 at [1]; *Polynesian Spa Ltd*, [2005] NZAR 408 (HC) at [64].

prosecute. That apparent untouchability, corroborated statistically, is an Alsatia that public law cannot countenance.

Legislative reform is overdue to protect victims' rights and ensure that the engagement of those rights within the criminal justice system is accessible, transparent and robust. These fundamental qualities need to be implemented to ensure that key players in the prosecution system are seen to be accountable for their actions. If these changes in the law will enhance the protection of the fundamental rights of individuals and affirm the rule of law in action, then they must be accomplished.

The following recommendations intend to provide guidance for developments post-*Osborne*.²

10.1 Recommendations

The recommendations resulting from the considered issues are divided into five sections. The first, recommends a recontouring of judicial review to potentiate access to supervisory access for victims, without compromising the tenets of the separation of powers. The second, recommends ways in which the prosecutorial decision-making process may be realigned to promote the lawful exercise of prosecutorial powers. The third section provides recommendations to enhance victims' rights in the prosecution process. The fourth provides recommendations in relation to private prosecutions and the approach to relief. The final section addresses issues specific to the Supreme Court's decision in *Osborne* and makes recommendations in light of that watershed development.³

10.2 Widening the Scope for Review in New Zealand

Some of the public law values that underlie judicial review are the rule of law, the safeguarding of individual rights, accountability, consistency and certainty in the administration of legislation.⁴ This thesis demonstrates the current status of judicial review ability of prosecutorial decisions not to prosecute in New Zealand is so austere that these values are

² *Osborne v WorkSafe New Zealand* (SC), above n 1.

³ Ibid.

⁴ See Matthew Smith *New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters New Zealand Ltd, Wellington, 2016) at [2.0].

failing to be protected. The President of the United Kingdom Supreme Court, Lord Neuberger, observed in a public lecture, “the courts have no more important function than protecting citizens from the abuses and excesses of the executive.”⁵ But the current judicial review regime of prosecution decisions in New Zealand fails to administer justice according to that function. Prosecutorial action is essentially insulated from judicial scrutiny, thus weakening the rule of law.

The issues covered in Chapter 6 highlighted the prevailing problems that prevent judicial review from being an effective remedy for claimants. The courts are extremely reluctant to review a discretionary decision not to prosecute by a Crown prosecutor, but a “prosecutor’s discretion to make a decision in the public interest carries with it the need to make that decision reviewable.”⁶ The available grounds to challenge such decisions in New Zealand have been wrongly held to be narrow in scope, and wrongly confined to breaches that can be made under the ‘illegality’ branch.

In *Polynesian Spa Ltd v Osborne*, it was held that a “generally strict approach to judicial review of prosecutorial discretion is maintained,” and that review was only available for ‘exceptional circumstances.’⁷ The New Zealand jurisprudence to date is patchy and opaque. It requires a strict approach but does not condescend to identification of a precise test. We lack in New Zealand, endorsement of an articulated and principled basis identifying the intensity of supervisory intervention. *Polynesian Spa* is only a first instance decision and although it has been considered by the Court of Appeal in a number of cases, there is no definitive approval of its strict test.⁸

In reviewing polycentric decision-making,⁹ of which prosecutorial discretions is a prime example, the *Polynesian Spa* court could have created the same level of restraint by adopting

⁵ Lord Neuberger, President of the Supreme Court of the United Kingdom “Justice in an Age of Austerity” (Justice Tom Sargent Memorial Lecture 2013, 15 October 2013).

⁶ Ian Grenville Cross “Focus on Discretion to Prosecute: The DPP and Exercise of Prosecutorial Discretion” (1998) 28 Hong Kong LJ 400.

⁷ *Polynesian Spa Ltd*, above n 1, at [66].

⁸ See *Osborne v WorkSafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513; *Wright v Bhosale* [2016] NZCA 593, [2017] NZAR 203; *Burgess v Field* [2007] NZCA 547, [2008] 1 NZLR 733.

⁹ See *Matalulu v Director of Public Prosecutions (Fiji)* [2004] NZAR 193 (SC Fiji) at 735-736; “The polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits.” However, in New Zealand, it is now accepted that prosecution decisions are susceptible to review. See Joseph, above n 9, at [22.5.5] (Constitutional and institutional limits to

a textured intensity of review, instead of narrowing the grounds for judicial review. The variegated intensity of review would have provided the optimum principled solution and not the virtual exemption approach imposed by requiring ‘exceptional circumstances.’ The only basis of intensity of review of prosecutorial discretion in *Polynesian Spa* was to use the contextual quasi-standard of ‘exceptional circumstances.’ On this basis, it is unsurprising that the *Polynesian Spa* court reacted against liberalisation of grounds of review, as it was a simpler solution to narrow the grounds of judicial review as a means of limiting intensity (at the High Court level anyway)¹⁰ than to modulate a variegated basis of intensities of review, with little to no guidance from the superior courts. The ‘exceptional circumstances’ approach continues to be the quasi-standard adopted by New Zealand courts for judicial review of prosecution decisions. This quasi-standard paired with the narrow ground confined to ‘illegality,’ diminishes the rule of law that judicial review is meant to instantiate.

The New Zealand position is the antithesis of the United Kingdom position, where judicial review of prosecution decisions in ‘exceptional circumstances’ is available under all three branches of the broader grounds of review. The English courts determine the intensity of review using variegated forms of intensity and structured forms of deference.¹¹ O’Higgins commented on the current ‘exceptional circumstances’ approach in the United Kingdom stating that “it may be fairly said that, while ‘exceptional circumstances’ have to be found before a prosecution decision can be challenged, the category of cases in which a review can be brought in the UK and Ireland is not closed.”¹²

10.2.1 Recontouring the Grounds for Review

judicial review). See also Piers Von Berg *Criminal Judicial Review A Practitioner’s Guide to Judicial Review in the Criminal Justice System and Related Areas* (Hart, Oxford, 2014) at 243.

¹⁰ See GDS Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, Lexis Nexis, Wellington, 2014) at [3.15] for a commentary on limiting available grounds as a means of limiting intensity.

¹¹ See Knight, “Modulating the Depth of Scrutiny in Judicial Review: Scope, Grounds, Intensity, Context” [2016] New Zealand Law Review 63 at 79. See *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514 at 531 (HL); *R v Ministry of Defence, ex parte Smith* [1996] QB 517 (CA); *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696; *R v Lord Saville of Newdigate, ex parte A* [2001] EW Civ 2048, [2001] WLR 2855; *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 at 1130; *R (Mahmood v Secretary of State for the Home Department)* [2000] EWCA Civ 315, [2001] 1 WLR 840 at 849; *A (Asif Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789, [2002] QB 129 at [49]; *Sheffield City Council v Smart* [2002] EWCA Civ 4 at [42]; *Kennedy v Charity Commission* [2014] UKSC 20, [2014] 2 WLR 808. See generally Tom Hickman *Public Law After the Human Rights Act* (Hart Publishing, Oxford, 2010) at 18 and 105.

¹² Micheal O’Higgins “Reviewing Prosecution Decisions” (paper presented to 9th Annual National Prosecutors’ Conference, Dublin Castle Conference Centre, May 2008) at 34.

By the generality of judicial review, executive acts can be challenged at common law on the grounds of illegality, irrationality or procedural fairness, although the grounds of review are not closed.¹³ As a result of the *Polynesian Spa* decision, prosecution decisions in New Zealand are only judicially reviewable to the extent that they were made in bad faith, for a collateral purpose or made in accordance with an unlawful policy. The High Court decision confined judicial review only to matters that fall within the ‘illegality’ branch of review as opposed to allowing the other orthodox common law grounds of unreasonableness and unfairness to apply.¹⁴

Judicial review must be recontoured by discarding *Polynesian Spa* so that all the traditional grounds of review at common law of illegality, irrationality and procedural impropriety become available for judicial review of prosecution decisions. It must be emphasised that these branches of review are not hermetically sealed nor mutually exclusive.¹⁵ The most logical and practical way of implementing this reform is to adopt the current model of judicial review in England and Wales. In England and Wales, it has been the mantra of judicial review that administrative acts of the prosecutor are challengeable by the three branches of review, namely for illegality, irrationality and procedural unfairness. That approach is partly seen in *R v Director of Public Prosecutions Ex parte Chaudhary*, which held:¹⁶

[Judicial review can occur] if and only if it is demonstrated to us that the Director of Public Prosecution acting through the Crown Prosecution Service arrived at the decision not to prosecute:

- 1) Because of some unlawful policy...
- 2) Because the Director of Public Prosecutions failed to act in accordance with his or her own settled policy as set out in the Code; or
- 3) Because the decision was perverse. It was a decision at which no reasonable prosecutor could have arrived.

Chaudhary promotes the interests of aggrieved victims who have been denied a trial, by a decision not to prosecute. The grounds of review that are available in England and Wales have the effect of substantially broadening reviewability. The real question in judicial review is:

¹³ *Council of Civil Service Unions v Minister for the Civil Service [CCSU]* [1985] AC 374, [1984] 3 WLR 1174, [1984] 3 All ER 935 (HL).

¹⁴ *Ibid*, at 410-411. Lord Diplock classified the grounds for judicial review into three categories: illegality, irrationality and procedural impropriety.

¹⁵ Michael Fordham *Judicial Review Handbook* (6th ed, Hart Publishing, Oxford 2012) at 487.

¹⁶ *R v Director of Public Prosecutions, ex parte Chaudhary* [1995] 1 Cr App 136. The analysis here is still too limited. The full exposition of the grounds for reviewability of prosecutorial decisions is correctly found in *DL v [Area] Standards Committee* LRCO 164/2016, 26 October 2016.

‘Has something in public law terms gone wrong?’¹⁷ The same legal error can fall within one or more of the grounds available, having a different threshold.

The expansive reform of the grounds of judicial review in New Zealand will be counterbalanced by other principles which can be used to keep challenges within their proper limits, such as adopting an appropriate standard of review. This would mean that all the traditional grounds of review are available, but will be restricted by the intensity with which they are applied depending on the facts of each individual case. This recontouring of the grounds of review will not only provide aggrieved victims with greater opportunities to have their cases heard, but when paired with an appropriate standard of intensity of review, will allow the courts to fulfil their oversight function without overstepping the boundaries occupied by the executive. This reform brings a categorical approach for the courts to find the balance between vigilance and restraint, and allow the focus of judicial review to be on matters that are deserving of true judicial concern.

10.2.2 Variable Intensities of Judicial Review

The Supreme Court in New Zealand has not yet clearly embraced the language of variable intensities of review. That would promote consistency and certainty in judicial review of prosecution decisions. While there is suggestion that the variation of intensities of review may be “deeply embedded in the jurisprudence and... numerous judicial methodologies... covertly recognise this modulation process,”¹⁸ the use of terminologies reflecting intensities help “exhibit the transparent mediation of the balance between vigilance and restraint.”¹⁹ A clear modulating process of variable intensities will also ensure that the standard of review applied to a particular decision is appropriate, since review is based on a sliding scale.

However, the question of ‘what standard of review should be in place?’ is not a simple one. Any solution would need to balance the importance of accountability with the principles of independence of prosecutors in making their decisions, as well as the separation of powers between prosecutors and judges. The difficulty is that “[c]reating a framework for judicial oversight of Crown discretion appears inconsistent with the simultaneous affirmation of

¹⁷ *Pora v Attorney General* [2017] NZHC 2081, [2017] 3 NZLR 683 at [138] per Ellis J

¹⁸ Knight, above n 11, at 64.

¹⁹ Ibid, at 79.

prosecutorial independence from political and judicial interference as a constitutional principle. Interestingly though, they are each enlisted for the common purpose of eliciting adherence to the Crown's traditional virtues of impartiality and fairness. The important distinction between them resides in the particular corruption each is focused on addressing."²⁰ Prosecutorial independence safeguards against the potential for external corruption, "[i]t seeks to maintain the purity of an institution's commitment to its mandate, shielding it from outside influence. This is best achieved through decision-making autonomy and immunity from reprisal from outside sources."²¹

On the other hand, judicial oversight ensures that there is accountability where there is internal corruption. "Accountability seeks to ensure an institution is truly adhering to its public commitments and is not misusing its authority or concealing an ulterior agenda. It is best achieved through careful oversight of the institution's use of discretion by an outside source."²² The challenge in adopting an appropriate standard of judicial review is finding a balance between the respective goals of each branch of government. Dr Knight describes the court's role in this regard as finding the balance between vigilance and restraint.²³

In assessing what standard of review should be employed in reviewing administrative decisions, the Supreme Court of Canada held that the reviewing court must go through a "pragmatic and functional analysis" consisting of four steps.²⁴ The court must consider who the original decision-maker was and who the body reviewing the decision will be, whether there is a privative clause or right of appeal, the general purpose of the legislation authorizing the decision as well as the nature of the decision.²⁵ The weighing of these factors using a pragmatic and functional approach "inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law."²⁶ The Supreme Court of Canada also indicated that "the standard of review is a question of law, and agreement between

²⁰ Benjamin Snow "Reviewing Crown Discretion: The Need for a Unified, Principled Approach that Mandates Transparency" (2013) 98(6) Criminal Report 143.

²¹ Ibid.

²² Ibid.

²³ Knight, above n 11, at 64.

²⁴ *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 at [28] per Bastarache J.

²⁵ Ibid, at [26] per Bastarache J. See also *Keddy v New Brunswick (Workplace Health, Safety & Compensation Commission)* 2002 NBCA 24, 42 Admin LR (3d) 161 (NBCA) at [28] - [29]; Marie Manikis "Expanding participation: victims as agents of accountability in the criminal justice process" (2017) 1 PL 63-80.

²⁶ *Dr Q v College of Physicians and Surgeons of British Columbia* [2003] 1 SCR 226, 2003 SCC 19 at [21].

the parties cannot be determinative of the matter.”²⁷ Therefore, it is the duty of the court to decide the appropriate level of deference it should grant in reviewing decisions based on its evaluation of the four factors. Dr Knight described the modulation of the depth of scrutiny in very practical terms: “Intensity is depicted in terms of a complete continuum of methods.”

In New Zealand, intensity of review has mostly been developed as formulations of the reasonableness ground.²⁸ Where an impugned decision is found to be unreasonable, under the modulating process of intensity of review, the courts are likely to assess the decision against a sliding scale of ‘reasonableness’.²⁹ The Canadian Supreme Court in *Dunsmuir* defined the intermediate reasonableness standard as follows: “In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”³⁰ The Court in *Ryan* made the following analysis:³¹ “Applying the standard of reasonableness gives effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process and for its own reasons. The standard of

²⁷ *Monsanto Canada Inc. v Ontario (Superintendent of Financial Services)* 2004 SCC 54 at [6] per Deschamps J.

²⁸ See Philip A Joseph *Constitutional and Administrative Law* (4th ed, Brookers, Wellington, 2014) at [24.4]. See *Kaur v Minister of Immigration* [2018] NZHC 1049 at [20] – [27] where the applicants argued that an immigration officer’s decisions (under s61 of the Immigration Act 2009) should be reviewed against a lower threshold for review than *Wednesbury* unreasonableness. Jagose J at [24] held that “[a]t the policy level, s61 remains a functional backstop for the executive branch to consider, in its absolute discretion, policy factors emerging in the final analysis,” and that he was bound by appellate authority that such decisions would be reviewed against the *Wednesbury* standard. See also *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR [508] at [28] – [29] where Palmer J postulated an alternative to the circular *Wednesbury* formulation namely: where a decision is so unsupportable or untenable that proper application of the law requires a different answer, it is unlawful because it is unreasonable. (Applying *Bryson v Three Foot Six Ltd* [2005] NZSC 24, [2005] 3 NZLR 721.)

²⁹ See in particular *Wolf v Minister of Immigration* [2004] NZAR 414 (HC) at [43]. See *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [2]; discussed in MB Rodriguez Ferre “Redefining reasonableness” [2017] NZLJ 67; The approach of Palmer J is commended: “Where a decision is so insupportable or untenable that proper application of the law requires a different answer, it is unlawful because it is unreasonable. That may involve the adequacy of the evidential foundation of a decision or the chain of logical reasoning in the application of the law to the facts.”

³⁰ *Dunsmuir v New Brunswick* 2008 SCC 9, [2008] 1 SCR at [44] and [47]; This standard was created as an intermediate standard in response to “the perceived all-or-nothing approach to deference, and in order to create a more finely calibrated system of judicial review.” See also L Sossin and C M Flood “The Contextual Turn: Iacobucci’s Legacy and the Standard of Review in Administrative Law” (2007) 57 UTLJ 581.

³¹ *Law Society (New Brunswick) v Ryan* [2003] 1 SCR 247 at [50] per Iacobucci J. See also Manikis, above n 25, at 63-80; “Applying the standard of reasonableness gives effect to the legislative effect. The ‘reasonableness’ standard ensures that “the independence and expertise of prosecutors is not trivialised and replaced by penal populism and unfounded complaints arising solely from victim and public dissatisfaction with the prosecutorial decision. To protect prosecutorial independence, it would be imperative, in the event of a difficult and controversial decision, to maintain prosecutorial decisions and thus adopt a more rigid standard than one of correctness.” See also Dean R Knight “A Murky Methodology: Standards of Review in Administrative Law” (2006) 6 NZJPIL at 150 - 158.

reasonableness does not imply that a decision maker is merely afforded a “margin of error” around what the court believes is the correct result.”

Despite the flexibility shown by the court in *R (on the application of F) v Director of Public Prosecutions*³² where the ‘correctness’ standard of review was applied, the courts of England and Wales have generally adopted a deferential approach to judicial review by using the standard of ‘reasonableness’ of both unreasonable decisions to and not to prosecute.³³ The level of deference to the original decision should depend on the nature in dispute. If the issue is a matter of fact, such as re-evaluating existing evidence or re-identifying public interests in the case, the court should not consider whether the institution of the prosecution could be more reasonable, but whether the non-prosecution falls into the acceptable range of reasonableness. If the issue is about legal considerations, such as the interpretation of the applicable law or legality of a policy concerning public interests, the court can make a conclusion based on its own judgment and analysis without deferring to the original decision. These should not be a one-size-fits-all approach to the reviewability of prosecutorial discretions. It will depend on the nature of the challenge.

Reviewability based on the contextual ‘exceptional circumstances’ approach has on face-value, a high threshold, and is uncertain. It was concluded in Chapter VI that while the ‘exceptional circumstances’ approach may operate as a standard of review, it nevertheless is a muddled and subtle variation of a standard that has crept into jurisprudence. The ‘exceptional circumstances’ approach is not only of austere scope but also ambiguous in application. What is required in New Zealand is a transparent and distinct modulating process of intensity of review, that facilitates consistency and certainty across all judicial review cases, involving that of prosecutorial discretion.

It has been suggested by Dr Manikis that the standard of review for judicial review cases of prosecutorial decisions in England and Wales should change depending on the nature of the decision i.e. whether it is substantive or procedural.³⁴ Dr Manikis explained that “due to the

³² *R (on the application of F) v Director of Public Prosecutions* [2013] EWHC 945 (Admin); (an anomalous decision.)

³³ But note Knight, above n 11, at 78-79 “In English-style judicial review, this judicial method [of scrutiny of review] tends to be seen in particular grounds or doctrines for substantive review, rather than providing grand schematic.” The explicit standard of ‘reasonableness’ based on cases that have considered judicial review prosecutorial discretion best resembles the depth of scrutiny applied in England and Wales.

³⁴ Manikis, above n 25, at 63-80.

specific nature of substantive prosecutorial decisions, a deferential standard such as reasonableness would be required if the body reviewing the decision is not within the prosecutorial office” and when the decision made by prosecutors “is procedural in nature, regardless of the reviewer, a lower standard of correctness would be considered appropriate since these decisions are more about respecting a fair process and the rule of law than weighing numerous factors. In this respect, the independence and separation of powers is less of a concern, since it does not affect the core of the prosecutor’s decision.”³⁵

While the above framework aims to balance accountability with prosecutorial independence and the separation of powers between judges and prosecutors, with respect, the substantive/procedural dichotomy is a most tenuous basis for creating split standards of applicable deference. So often procedural and substantive issues are inter-dependent, if not actually fused. That proposal may be paralleled with the approach taken in *Krieger v Law Society (Alberta)*, where the Supreme Court of Canada distinguished between “core” and “non-core” discretions, in order to preserve traditional areas of Crown discretion.³⁶ Prosecution powers categorized as “core” included the decision whether to prosecute or not. The Court held that the threshold for review of these cases would be tested against the high ‘flagrant impropriety’ standard.³⁷ The category of “non-core” powers included decisions that related to prosecution “tactics or conduct before the court.”³⁸ The Court in *Krieger* did not place any constraints on cases involving “non-core” discretions for judicial review. Essentially, the *Krieger* court sought to restrict judicial review depending on the nature of prosecutorial decisions by adopting two applicable standards of review.

The problem with this approach however, is that it creates unnecessary complication for the judicial review process. In criminal law, errors of procedure can be fatal to the safety of the substantive process or verdict. Prosecution decisions by their very nature are often both substantive and procedural in nature. The courts would in many cases, need to force certain decisions to fit into one of the categories and exercises of labelling would be created. Form would triumph over substance. This would be a reversion to the discredited over-refined ultra vires approach. It would also create rigid and logically inconsistent outcomes. Furthermore,

³⁵ Manikis, above n 25, at 63-80.

³⁶ *Krieger v Law Society of Alberta* 2002 SCC 65, [2002] 3 SCR 372, 4 CR (6th) 255 (SCC) at [47].

³⁷ *Ibid*, at [49].

³⁸ *Ibid*, at [47].

the strained efforts of the courts may be questioned on appeal if it could be established that the court made an error in categorising the nature of the decision and therefore applied the wrong standard of review. Many prosecution decisions cannot be isolated into the substantive/procedural dichotomy but overlap and are inseparable in nature.

The viability of the two-levels of deference crafted in the *Krieger* decision was heavily criticized,³⁹ and one author explained that the approach “diverts the law’s focus from the true purpose of the analysis-achieving a measure of judicial oversight that respects independence while ensuring accountability.”⁴⁰ Cases since *Krieger* illustrate how the strained dichotomy categorization process has caused judicial disparity and difficulties for the courts. For example, Justice Hill in the Québec Court of Appeal in *Camiré* decided that the discretion to repudiate a plea agreement was not a “core” power.⁴¹ The Supreme Court of Canada however, rejected this view and held that the power “fell squarely within the core elements of prosecutorial discretion.”⁴² The *R v Nixon* court conflated the two standards of review by taking a less deferential approach to “core” powers compared to earlier cases that had categorised powers as “non-core.”⁴³ Categorisation is as the Canadian approach amply demonstrates, hazardous and not necessarily intuitive.

What should be adopted instead, is a “unified and principled” approach using variable intensities of review that allows for effective judicial oversight, without compromising the independence of the prosecutor.⁴⁴ The standard of ‘reasonableness’ for example operates on a sliding scale so that even where decisions are of a substantive or procedural nature, the courts have the ability to adjust levels of deference within the ‘reasonableness’ standard.⁴⁵ As Lord

³⁹ See Michael Code “The Attorney General in the 21st Century: A Tribute to Ian Scott: Judicial Review of Prosecutorial Decisions: A Short History of Costs and Benefits, in Repsonse to Justice Rosenberg” (2009) 34 Queen’s LJ 863 at [48] - [51].

⁴⁰ Snow, above n 20.

⁴¹ *Camiré c. R.*, 2010 QCCA 615 (Qué CA) at [31] - [34].

⁴² *R v Nixon* 2011 SCC 34, [2001] 2 SCR 566, 85 CR (6th) 1 (SCC) at [30].

⁴³ See Ibid. See also Snow, above n 20.

⁴⁴ Snow, above n 20.

⁴⁵ See *Wolf v Minister of Immigration*, above n 29, where Wild J endorsed the intermediate standard of reasonableness (or unreasonableness) based on a sliding scale at [47]; “Whether a reviewing Court considers a decision reasonable and therefore lawful, or unreasonable and therefore unlawful and invalid, depends on the nature of the decision: upon who made it; by what process; what the decision involves (ie its subject matter and the level of policy content in it) and the importance of the decision to those affected by it, in terms of its potential impact upon, or consequences for, them.” John M Evans “Standards of Review in Administrative Law” (2013) 26 Can J Admin L & Prac 67; “In judicial review proceedings, whether a decision is reasonable depends on the statutory scope of the decision-maker’s range of choice. The narrower the range, the easier it will be to prove that the decision fell outside the range of possible decisions; conversely, the broader the range of choice, the more difficult it will be to prove unreasonableness.”

Steyn emphasised in the oft repeated dictum, “In law context is everything.”⁴⁶ The curial technique of variable intensities of review ensures that the contextual character of the decision is the focus of judicial review rather than its formal nature. It allows for an appropriate amount of transparency of the prosecutor’s decision, while maintaining a high level of recognition towards prosecutorial independence. Code commented that “a deferential standard of review in relation to prosecutorial decisions is justified by the need to prevent constant second-guessing of the many small choice or “judgment calls” that the Crown must make during the conduct of a case.”⁴⁷ If the New Zealand Supreme Court adopts the language of variable intensities of review, greater transparency will be achieved, public confidence in the administration of justice will be advanced, prosecutorial independence will be preserved and judicial review will be able to tenaciously fulfil its fundamental rule of law function.

10.2.3 Concluding Comments

The effect of this reform is that it creates a system where judicial review is available for genuine claims, which provides aggrieved victims with access to judicial review when it is needed. It is the crucial role of the courts to delineate the boundaries of judicial review. With these recommendations for reform, the courts can expand the scope of judicial review of prosecutorial decisions not to prosecute but also afford an appropriate amount of deference to the prosecutor. In addition, victim’s interests will be subject to greater consideration, the rule of law is better protected and judicial review in the context of prosecutorial discretion fulfills its constitutional role. Finally, the widening of reviewability may also attract deserving victims to pursue their cases and achieve justice where it is warranted.

10.3 Reforms to Help Reduce Miscarriages of Justice

One of the findings of this thesis is the danger of wide prosecutorial discretion paired with a judicial reluctance to review prosecution decisions. What must be emphasised however, is that broad prosecutorial discretion is not inherently dangerous, it only becomes troubling when use of discretion becomes “idiosyncratic, unaccountable or opaque.”⁴⁸ Broad discretion is in fact

⁴⁶ *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 1 AC 532, [2001] 2 WLR 1622, [2001] 3 All ER 433 at [28] per Lord Steyn.

⁴⁷ Code, above n 39.

⁴⁸ Stephanos Bibas “The Need for Prosecutorial Discretion” (2010) 19 Temple Political and Civil Rights Law Review 369 at 372.

essential in doing justice: “Justice not only requires rules but also fine-grained moral evaluations and distinctions.”⁴⁹

In *R v Beare*, Justice La Forest commented that “discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid.”⁵⁰ Along similar lines, Bibas argued that “discretion per se is neither bad nor antithetical to the rule of law. We often equate the rule of law with rigid rules, emphasising the need to treat like cases alike. But the flip side of rigid rules is discretion in applying them where they do not quite fit. The flip side of treating like cases alike is treating unlike cases unlike. By their nature, rules cannot capture every subtlety, which is why various actors need discretion to tailor their application of the law.”⁵¹ He continued to note that: “Discretion is far from lawless or arbitrary. When used judiciously, it can deliver consistent and tailored results. What we need to watch out for in practice then, are the forces that push prosecutorial discretion in the wrong direction, away from the public’s sense of justice.”⁵² The problem with prosecutorial discretion is “not that it places discretionary power in the hands of individuals. What is troubling is that it is very often ad hoc, hidden and insulated from public scrutiny and criticism. Many discretionary decisions require no reasoned justification.”⁵³ The existing risk is that prosecution decisions may be inconsistent or subconsciously biased.

There are two approaches that may be taken to reduce miscarriages of justice in the prosecution decision-making process and therefore reduce the quantum of victims seeking judicial review.⁵⁴ One way is to narrow the prosecutor’s discretion by codifying limitations on their power. An example of this would be to codify the Prosecutorial Guidelines. Sze Ping Fat’s comment on the future of Hong Kong’s Prosecution Guidelines accords with this first approach. He argued that:⁵⁵

If the prosecution policy is to serve a useful purpose in the administration of justice, it is only fair and reasonable that the relevant principles and guidelines be refined and handed down as a statutory code (with sanctions for non-compliance). This will not only ensure that a consistent and judicious approach is always applied by both the police and the DoJ in reaching their

⁴⁹ Bibas, above n 48, at 370.

⁵⁰ *R v Beare* [1988] 2 SCR 387 at 410.

⁵¹ Bibas, above n 48, at 370.

⁵² *Ibid*, at 374.

⁵³ *Ibid*, at 373.

⁵⁴ The term “miscarriage of justice” is nowhere defined in New Zealand legislation.

⁵⁵ Sze Ping Fat “Prosecution Policies: Hong Kong” (2017) 181 JPN 310.

decisions but also assist the court with objectively ascertainable standards against any misuse or abuse of the prosecutorial power accorded by art.63 of the Basic Law.

The problem with restricting prosecutorial discretion however, is that it limits the prosecutor's "capacity to provide for individual or unanticipated circumstances. This kind of approach also minimises the ambit for grounds such as [...] unreasonableness. The more prescriptive [...] laws are, the more scope there tends to be to argue about their correct meaning."⁵⁶ Douglass explained that:⁵⁷

It is not unwarranted for society to demand that ethical standards be applied to prosecutors. The public has invested prosecutors with almost total discretion in the performance of their duties. Although there has been considerable discussion in recent years to limit prosecutorial discretion, society, the legislatures and the courts generally recognize that an attempt to provide guidelines, standards or limitations on prosecutorial discretion is a difficult, if not impossible task. Legislatures and courts have consistently backed away from attempts to codify any limitation on the prosecutor's discretion, recognising that the most effective limitation on the exercise of discretion is a professionally responsible prosecutor.

In a report to the Attorney-General, the Australian Administrative Review Council similarly contended that:⁵⁸

Although it is clear that Parliament has the power to exclude or define the procedural requirements imposed on decision makers, it is difficult for any code to cover all circumstances that might be thrown up. For example, it is one thing to define the ambit of a decision maker's duty to disclose material. It is more difficult to deal exhaustively with circumstances in which a decision maker has misled a person affected by a decision and deprived them of an opportunity to present a case fairly. It is equally difficult to deal with a situation in which the decision maker proposes to make adverse findings about a person without giving them an opportunity to respond. Although the effect of such a provision may be to reduce judicial review, it is doubtful, in practice, that review could be eliminated entirely.

The recommendations in this section do not subscribe to the restrictive approach, but instead introduce educative tools and mechanisms of prosecutorial accountability and that may be included into the existing prosecuting framework. In order to reduce the potential for judicial intervention, the practical reforms are based on the guiding principles of respect for autonomy, the need for high quality decision-making and the importance of making prosecution decisions more legitimate in the eyes of the public.

⁵⁶ Administrative Review Council (Australia) *The Scope of Judicial Review* (Report No 47, 2006) at 24.

⁵⁷ John Jay Douglass, *Ethical Issues in Prosecution* (Houston: U. of Houston Law Center, 1988) at 2.

⁵⁸ Administrative Review Council (Australia), above n 56.

10.3.1 Rule of Law Training

Procedures must be set in place that guarantee the careful selection of prosecutors and which safeguard against their arbitrary dismissal, as a means of protecting prosecutorial independence.

One academic contends that prosecutors should undergo rule of law training, where the nature and role of prosecutorial discretion is thoroughly addressed:⁵⁹

The strategy for effective education and training should be informed by three criteria: (i) holistic – it should involve the various stages of legal education and involve different perspectives; (ii) vertical – it should build and reinforce rule of law values at different points and in different contexts; (iii) reflective – it should ensure prosecutors understand that adherence to the rule of law is not achieved merely by following rules but by making the rights decisions. Just as the rule of law flourishes when it is part of a supportive ecosystem so too the education and training effort must be part of an ecosystem that reinforces the values at all stages from university education, through vocational and professional training and reflection throughout one's career.

If public prosecutors are fully trained and understand the implications of arbitrary decision-making to the rule of law, the risk of inconsistent decisions is likely to be reduced, and prosecutors are more likely to be conscious of unequal treatment of offenders when exercising their powers.⁶⁰ The Prosecution Guidelines together with rule of law training will provide a much stronger safeguard to ensuring that decisions have not been injected with the personal preferences of the prosecutor but are the product of careful decision-making by the evidential and public interest tests.

10.3.2 Greater Prosecutorial Accountability

Currently, victims of crime aggrieved by prosecutorial misconduct in New Zealand have no real way (let alone a dedicated process) of having their complaints investigated. Various jurisdictions overseas have incorporated mechanisms to promote prosecutorial accountability.

⁵⁹ Amirthalingam, Kumaralingam “Prosecutors and the Rule of Law- The Role of Legal Education and Training” (speech given to the IAP 18th Annual Conference, Moscow, 9 September 2013) at [44].

⁶⁰ This type of rule of law training may be similar to the ‘continuing professional development’ requirement of all lawyers in New Zealand who provide regulated services. All lawyers must complete 10 hours of ‘CPD’ activities and declarations and verifications are made to show compliance. See NZ Law Society “CPD requirements” <www.lawsociety.org.nz>.

In the United Kingdom, the CPS established a quality assurance unit that operated within the CPS itself in 1995. In 2000, the unit became an independent statutory body, the Crown Prosecution Service Inspectorate (CPSI).⁶¹ The CPSI's mission is to enhance the quality of justice by independently inspecting and assessing prosecutions handled by CPS. The CPSI serves to improve the CPS's effectiveness and efficiency, in order to promote public confidence in the service. The CPSI annually reviews "a sample of case files from across all geographic regions where CPS's operate, for the quality of prosecutorial decisions (e.g. ensuring that the Code for Crown Prosecutors is applied correctly), case preparation and progress, victims' and witnesses' experiences of the criminal justice system, and prosecutors' adherence to custody time limits for detained accused persons."⁶² The annual investigations enables the CPSI comprehensively review of the casework quality of the CPS. The CPSI places pressure on the CPS conducting follow-up inspections to see if recommendations from the review have been adopted. Furthermore, the CPS may feel pressure to address CPSI recommendations since the reports suggesting improvements to CPS operations are publicly available.

Similarly, in Scotland, an Inspectorate of Prosecution (IPS) inspects the operations of the Crown Office and Procurator Fiscal Service (COPFS), the authority responsible for prosecutions in Scotland. The IPS makes recommendations in relation to improvements in service delivery, which as a result makes the COPFS more accountable whilst enhancing public confidence.⁶³

In Victoria Australia, the accountability issue has been approached in a different way, through the Public Prosecutions Act 1994. The statute requires the DPP to consult with the Chief Crown Prosecutor and either counsel involved in the trial or the next most senior Crown Prosecutor regarding "special decisions" before the DPP may conclude his decision.⁶⁴ Although the final decision belongs to the DPP, if his decision happens to fall into the minority then he is required to furnish the Attorney with details regarding the reasons for his decision which are tabled in Parliament.⁶⁵ The tabling of the information is suspended however where it may prejudice the

⁶¹ Crown Prosecution Service Inspectorate Act 2000.

⁶² Martin Schönteich *Strengthening prosecutorial accountability in South Africa* (Institute for Security Studies Paper 255, April 2014) at 7. In 2012/2013 CPSI inspectors examined over 2,800 case files as part of the CPSI's Annual Casework Examination Programme.

⁶³ Scottish Government "Inspectorate of Prosecution in Scotland (IPS leaflet)" <www.scotland.gov.uk>.

⁶⁴ See s45C of the Public Prosecutions Act 1994. See also Geoffrey Flatman QC, Director of Public Prosecutions (Victoria), "Independence of the Prosecutor" (paper presented to Australian Institute of Criminology: Prosecuting Justice, Melbourne 18 and 19 April 1996.)

⁶⁵ Ibid.

proceedings. What this process does well is that it separates the prosecutorial decision making function from the administration of the office or resource which implement the decisions.

In considering this accountability mechanism Geoffrey Flatman while he was DPP stated:⁶⁶ “I think this division of function is appropriate in principle and effective in action. It puts the Director and Crown Prosecutors in the position of being able to make prosecution decisions without the distraction of concerns about the resource implications of those decisions and the many matters of administration which come up in a large and busy office. In doing so, they are ultimately accountable to the Attorney. At the same time, the Office of Public Prosecutions has a dual accountability: it is responsible to the Director as his or her solicitor and it is responsible to the Minister for the manner in which it carries out the business of the Director and handles the budget allocated to it.”⁶⁷

Japan has a prosecutorial accountability mechanism that specifically reviews prosecutorial decisions not to prosecute; the Japanese Prosecutorial Review Commission system (PRC). When the prosecutorial discretion not to prosecute is exercised for matters of a political nature, the PRC will consider the independence of such decision-making. The PRC begins the reviewing process in one of two ways. The first is where a victim or his/her representative applies for a commission hearing to investigate the application. The second is when the commission itself, via a majority vote, decides to carry out an investigation. Japan has at least one commission in every district court area, comprising of 11 members who are chosen at random from public voting lists for six month terms.⁶⁸ After investigations, the PRC submits “one of three recommendations: non-prosecution is proper, non-prosecution is improper, or prosecution is proper.”⁶⁹ The recommendations are of an advisory nature and do not bind the prosecutor. Since the conception of the PRC in 1949 till 1989, Japan’s PRCs undertook and disposed of an average of 1930 cases a year. “When viewed as a proportion of decisions not to prosecute, PRCs held hearing on an average of 34.5 suspects for every 10,000 (or 0.35 percent) not prosecuted.”⁷⁰ Over this 40-year period PRCS recommended prosecution in about 7 per cent

⁶⁶ Flatman, above n 64.

⁶⁷ Ibid.

⁶⁸ See Schönteich, above n 62, at 10; “Meetings are held quarterly or on special call of the chairperson of the commission, who is elected by its members. Politicians, elected officials, and those who perform vital political and criminal justice functions are disqualified from participating in PRCs. PRCs are assisted by secretaries who are appointed by the Supreme Court.”

⁶⁹ Ibid, at 11.

⁷⁰ M D West “Prosecution review commissions: Japan’s answer to the problem of prosecutorial discretion” Columbia Law Review 92 (1992) at 698.

of all cases heard. Of these, 20 percent resulted in prosecutors reversing their initial decision not to prosecute.”⁷¹

New Zealand has no centralised prosecuting agency, therefore accountability mechanisms that base their operations on the existence of such agencies, namely prosecution service inspectorates and complaints assessors, are not roles that can be easily replicated in New Zealand’s criminal justice system. Furthermore, these roles do not act as a panacea for holding prosecution services to account and improving their performance. Inspectorates for example only create their reports annually, and from a sample of casework. While the role of complaints assessors is dependent on members of the public to make complaints in the first place.

In contrast, the Japanese accountability mechanism of a prosecutorial review commission, casts a much wider net in scrutinising prosecutorial action, especially for decisions not to prosecute which are evidently much more susceptible of being left unchecked. The ability to register complaints also “ensures a level of victims’ rights; and the system encourages citizen participation in the democratic process.”⁷² However Japan has recently re-developed the power of PRCs, allowing them to overrule the prosecutor’s decision not to prosecute and compel a prosecution through a specially court-appointed prosecutor. This change was a dangerous one. It removes the prosecutor’s “final control over the charging decision, ‘replacing it with the unbridled discretion of lay persons whose focus may be unduly skewed by the notoriety of the event or potential accused.’ The risk is undermining individuals’ right not to be prosecuted arbitrarily and, when prosecuted, strictly according to the prosecution service’s written guidelines.”⁷³ The transferability of such a mechanism to New Zealand is inappropriate, as it dangerously places specialised power in the hands of people who do not understand it, and fails to properly protect prosecutorial discretion. Judicious discretion can actually promote justice, and necessarily tailors application of the law.⁷⁴

⁷¹ West, above n 70, at 702. See also Schönteich, above n 62, at 11.

⁷² Schönteich, above n 62, at 14. Since their inception in 1948, more than half a million Japanese citizens have participated in PRCs.

⁷³ Ibid.

⁷⁴ Bibas, above n 48, at 370.

One of the difficulties of creating a complaints system for prosecutorial misconduct is that Crown prosecutors act exclusively in the public interest.⁷⁵ Consequently, it has been unconvincingly argued that no one should be able to file a complaint against them.⁷⁶ On such reasoning, a claim to act in the public interest would always provide total immunity and simultaneously deny accountability regardless of its perversity.

Stone's proposal aims to bridge the gap by creating a reporting system headed by the Solicitor-General, who has complete discretion to determine whether a prosecutor's conduct should be investigated or not. He contends that despite prosecutors acting for society's interests at large, certain classes of person should be able to make a complaint against them.⁷⁷ The basis of the Solicitor-General's decision is determined by:⁷⁸

1. a finding by an appellate court of prosecutorial misconduct resulting in a miscarriage of justice; or
2. a complaint made by a person falling within a defined category.

Those who fall within the defined category would importantly include victims of crime. When the investigation is completed, a report would be written by a lawyer with the appropriate qualifications, similar to reports written by the Commissioner of Health and Disability for the medical field.⁷⁹ The report would then be published online and distributed to Crown prosecutors throughout New Zealand, outlining the reasons for the miscarriage of justice in the overall contextual setting.⁸⁰ An accompanying education programme based on each report would also be distributed.⁸¹ The reports act as both a mechanism of accountability and an important educative tool for crown prosecutors.⁸² While disciplinary proceedings would be separate from the reporting system, the disciplining body could consider the "well informed" opinion of the Crown Law Office investigation.⁸³

⁷⁵ Crown prosecutors are accountable to their respective Crown solicitor and to the firms they have been employed by. Crown solicitors are accountable to the Solicitor-General. See Nigel Stone "Production of Reports Following Finding of Miscarriage of Justice in Certain cases" (2013) 21 Waikato Law Review 49 at 54.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid at 55.

⁸⁰ Ibid.

⁸¹ Ibid at 56.

⁸² Ibid at 58.

⁸³ Ibid.

One of the issues reported by victims of crime concerning the Victims Right to Review Scheme (VRRS) in the United Kingdom, is the perceived lack of objectivity within the scheme, as essentially prosecutors are reviewing their peers.⁸⁴ Stone's proposal faces the same dilemma, as the expertise required to investigate into prosecutorial misconduct "would, in practical terms, need to be found within the Crown Law Office."⁸⁵ In order to mitigate the issues concerning objectivity, Stone suggests that the method used by the Health and Disability Commissioner could be adopted "To ameliorate the potential issues of objectivity, the Health and Disability Commissioner requires any expert engaged in the commission of a report to declare any conflicts of interest that he or she might have, relying on professional integrity to remain objective. From time to time experts from Australia are asked for their assistance, although this seems unfeasible in the context of prosecutorial investigations owing to the difference between New Zealand and Australian law. Whenever possible, these practices should be adopted in the production of the reports concerning prosecutors."⁸⁶

Stone also contends that the reporting system would be more favourable than establishing a "Prosecution Review Authority" as the creation of such an authority would incur additional costs and because of the "lack of evidence to suggest the problem of prosecutorial accountability justifies the significant step of establishing an entirely separate agency to oversee prosecutors."⁸⁷

In considering ways to keep prosecutors from abusing their discretion, Bibas commented that "the best way to keep discretion from being idiosyncratic is to encourage prosecutors to develop patterns and habits and then justify deviations from those habits."⁸⁸ Stone's proposal encourages prosecutors to develop good habits through the continuation of quality improvement. The reports are written with the intent to educate prosecutors of mistakes to avoid and therefore improve decision-making. As a result, both the possibility for miscarriages of justice and the quantum of judicial review cases will be reduced. The focus on education rather than discipline accords well with the principle of accountability which requires that

⁸⁴Mary Lliadis, Asher Flynn "Providing a Check on Prosecutorial Decision-making: An Analysis of the Victims' Right to Review Reform (2017) 58 *The British Journal of Criminology* 550-568; D. Shaw "Victims' Right of Review Scheme Sees 146 Charged" *BBC News* (United Kingdom, 19 July 2014).

⁸⁵Stone, above n 75, at 55.

⁸⁶*Ibid.*

⁸⁷*Ibid.*

⁸⁸Bibas, above n 48, at 374.

prosecutors retain “judgment and courage to make the necessary decisions inherent in every prosecution.”⁸⁹

Stone’s reporting system offers a new mechanism of accountability that fosters “robustness, openness and transparency” without compromising the prosecutor’s broad discretion. The system also accords with the Victims’ Rights movement by providing aggrieved victims with a forum to have their complaints heard.⁹⁰

10.3.3 Internal Re-review of Decisions Not to Prosecute

Following on from Bibas’s recommendation that prosecutors should develop patterns and habits for the proper exercise of discretion, one of these habits should be to re-review decisions not to prosecute when they are likely to be challenged on judicial review.⁹¹

If the right to pre-charge consultation is incorporated into the existing system, prosecutors will have a reasonable idea of whether the decision not to prosecute is likely to be challenged via judicial review, as the victim is likely to make this known in the consultation.⁹² It is recommended that such decisions should be re-reviewed by the prosecutor. This habit would ensure that the best interests of the victim are protected and would also serve the prosecutor’s interests as the re-review serves as a check for high-quality decision making.

If an original decision on re-review is found to be wrong, the prosecutor must take the necessary steps to rectify the decision if possible. The effect of the recommendation is to allow quicker resolution of improper or wrong decision-making and to decrease the need for judicial review.

10.3.4 Concluding Comments

To reduce the quantum of judicial review cases, it is important to look at the root of the problem, that being miscarriages of justice resulting from poor prosecution decision-making. The following recommendations place the victim at the fore and focus on improving the quality

⁸⁹ *R v Tkachuk*, 2001 ABCA 243 at [27], 293 AR 171.

⁹⁰ Stone, above n 75, at 58.

⁹¹ Bibas, above n 48, at 374.

⁹² See Chapter 10 at sections 10.4-10.4.5.

of decision-making and the development of good habits to ensure the proper exercise of prosecutorial discretion.

10.4 Improving Victims' Rights in the Prosecution Decision-Making Process

Over the last three decades, common law jurisdictions⁹³ have engaged in a movement geared towards changing the way victims' rights are both viewed and incorporated into the criminal justice process.⁹⁴ This shift in attitude and the sea-change of victims' rights rose from growing concerns about the role and treatment of victims, who have traditionally been denied participatory rights on the basis that this threatens the objective and public nature of the criminal justice system.⁹⁵ It may also be argued that since victims have an opportunity to seek damages in civil actions, procedural rights for victims are neither relevant nor justified. Doak justified this lack of victims' rights in the pre-trial phase of criminal proceedings:⁹⁶

The concept of victim involvement here is fraught with numerous difficulties on account of the myriad of competing aims of criminal justice, which include the objective of adjudication of guilt, the desirability of truth-finding, the preservation of public interests, and the need to preserve fair trial rights for the accused. It is additionally complicated by the fact that his or her status as a 'victim' is somewhat uncertain prior to the determination of the accused's guilt.

But, "victim-oriented reforms [have] been regarded as crucial towards acknowledging the victim's interest, alongside those of the accused and the state: a perspective Lord Steyn describes as *a triangulation of interests*."⁹⁷ Brien and Hoegen have reasoned that the presumption of being a 'non-victim' until the trier of fact has been determined essentially

⁹³ Including New Zealand, the common law states of England and Wales, Canada and Australia have a limited historical record of granting rights to victims; Tyrone Kirchengast "Victims' Rights and the Rights to Review: A Corollary of the Victim's Pre-trial Rights to Justice," (2016) 5(4) International Journal for Crime, Justice and Social Democracy 103 at 105.

⁹⁴ Jonathan Doak "Victims' Rights in Criminal Trials: Prospects for Participation," (2005) 32 Journal of Law and Society 294-316; Kirchengast, above n 93, at 115.

⁹⁵ Doak, above n 94, at 294. See also Asher Flynn "Plea-negotiations, Prosecutors and Discretion: An Argument for Legal Reform" (2016) 49 Australian and New Zealand Journal of Criminology 564-582; "Changes include compensation schemes, improved access to information, Victim Personal Statements (VPS) and other protective measures for victims, for example restrictions on questions that can be asked of victims when testifying in sexual offence trials, and the use of video testimony and devices to block the offender from the victim's view."

⁹⁶ Doak, above n 94, at 296. Doak's conclusion that victims are difficult to incorporate into the criminal justice system was also based on structural barriers of the criminal justice system, normative barriers, the merging of public and private interests and the limitations of the victim/prosecutor relationship.

⁹⁷ Lliadis and Flynn, above n 84, citing Lord Steyn in *Attorney-General's Reference (No 3 of 1999)* [2001] 2 AC 91 at [118] (cited with approval by the House of Lords in *R v H* [2004] 2 AC 134 at 145-146).

precludes some of the substantive rights and interests from protection during the pre-trial and trial stages.⁹⁸

This section recommends the promulgation of victims' rights and interests through reforms that increase the inclusion and consideration of victims in the pre-trial phase. Currently, victims are excluded from the existing adversarial framework until sentencing or in the diversion process. Although decisions not to prosecute in New Zealand are justiciable, victim-focussed reform should be prioritised at this stage because the prosecution decision-making process itself, is shrouded by a veil of legal privileges and expansive confidentiality claims. Victims' rights are and only acknowledged and regulated by the Prosecution Guidelines, which are 'soft law' in nature.⁹⁹ Prosecution decisions are therefore made in a process of "low visibility" towards victims.¹⁰⁰ As one author observed, "maintaining accountability requires a consistent- and potentially uncomfortable-measure of sunlight."¹⁰¹ A reform of the prosecution decision-making process would advance the trend evidenced in international literature, of providing victims with enforceable rights.¹⁰² These recommendations ensure that victims are not left in the dark and play a more prominent role in improving the transparency, accessibility and accountability of prosecution decisions.

10.4.1 Improving the Existing Victims' Rights

The definition of 'victim' under the VRA should include both "offence committed" and "alleged offence," which would harmonise with the UN's definition.¹⁰³

If a defendant has the right to be tried without undue delay, then as a matter of the fair balancing of rights, victims should also have the right to receive information regarding a prosecution decision without delay and when they can still influence the final dispositive decision.¹⁰⁴ That

⁹⁸ Marion Brien and Ernestine Hoegen, *Victims of Crime in 22 European Justice Systems* (Willem-Jan der Wolf, The Netherlands, 2000) at 30.

⁹⁹ See also the Victims of Crime- Guidance for Prosecutors Guidelines 2014.

¹⁰⁰ John Li J Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984) at 403.

¹⁰¹ Mark Phillips "The Public Interest Criterion in Prosecutorial Discretion: A Lingering Source of Flexibility in the Canadian Criminal Process?" (2015) 36 Windsor Review of Legal and Social Issues 43. In a well-known quotation, Justice Brandeis described sunlight as the "best of disinfectants", Louis D Brandeis "What Publicity Can Do" Harper's Weekly (New York, 20 December 1913) at 10.

¹⁰² Doak, above n 94, at 294.

¹⁰³ See Chapter 7 at section 7.1.

¹⁰⁴ New Zealand Bill of Rights Act 1990, s25(b).

prosecution decision is apex within the prosecution process where victims' interests are at stake, so time must be prioritized in performing this obligation. The phrase "as soon as practicable in s12(1)(b) of the VRA 2002 should be replaced with "without delay" in order to enhance victims' confidence in the legal system.

Replacement of the curious word "should," with "must," in relation to various rights within the VRA 2002 will also guarantee their enforceability and afford better treatment of victims. The current statute is intentionally aspirational – it is a 'feel good' response that actually creates little in the way of textured rights.

10.4.2 Why Victims' Interests Should be Given Weight at the Prosecution Decision-Making Stage

The Prosecution Guidelines and VRA 2002, requires prosecutors to provide information to victims about the charging decisions.¹⁰⁵ But this is an inadequate safeguard. Resistance towards victim participation is evident in the prosecution decision-making phase.¹⁰⁶ This resistance, likely to be a product of institutional inertia, is sometimes justified as a limit on *defendants'* existing rights, which would introduce prosecution-orientated changes in the system.¹⁰⁷

For many victims, participation and involvement in the prosecution process is highly prioritised, but it is ultimately the State's role to control how such decision-making should be conducted. It is argued that the State should not place expectations or further burdens on victims by involving them in the prosecution decision, regardless of their individual preferences.¹⁰⁸ Some criminal legal theorists assert that the State should retain full responsibility for this role to "ensure that there is order and law-abidance" and must bear the "burden" on behalf of citizens to see that justice is served.¹⁰⁹ Doak in critiquing that view, explained that:¹¹⁰ "Conceptually, victims have no role to play in the modern criminal justice

¹⁰⁵ Victims' Rights Act 2002, s12(1); Prosecution Guidelines 2013 paragraph 29.2.

¹⁰⁶ Sarah Welling "Victims in the Criminal Process: A Utilitarian Analysis of Victim Participation in the Charging Decision" (1988) 30 *Ariz L Rev* 85 at 85.

¹⁰⁷ *Ibid*, at 86; See Lynne N Henderson "The Wrongs of Victim's Rights" (1985) 37 *Stan L Rev* 937.

¹⁰⁸ Andrew Ashworth "Victims' Rights, Defendants' Rights and Criminal Procedure" in Adam Crawford and Jo Goodey (eds) *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate, Dartmouth, 2000) at 198.

¹⁰⁹ Andrew Ashworth "Responsibilities, Rights and Restorative Justice" [2002] *British Journal of Criminology* 578 at 579; Doak, above n 94.

¹¹⁰ Jonathan Doak *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, Oxford, 2008) at 35-36.

system other than to act as “evidentiary cannon fodder”... Therefore, although many victims feel as though they are “owed” a right to exercise a voice in decision-making process, such as prosecution...the criminal justice system places such rights or interests in a firmly subservient position to the collective interest of society in prosecuting the crime and imposing a denunciatory punishment.” It is also contended that State management of prosecution decision-making results in better consistency and predictability of treatment- which is very important when considering the impact of variable outcomes on a defendant.¹¹¹

Other commentators have cautioned against participatory rights, fearing that “victims may seek to pursue a prosecution for reasons unrelated to the likelihood of obtaining a conviction, such as for therapeutic reasons.”¹¹² However, evidence about whether participating in a criminal trial has therapeutic benefits for victims is inconclusive.¹¹³ Other studies considering victim involvement at other stages of the prosecution process, suggests that involvement in the form of giving evidence and being cross-examined, causes distress to victims and can lead to secondary victimisation.¹¹⁴

The most repeated and possibly leading argument against victim participation is that it will limit the existing rights of defendants. The protection of the rights of suspects and defendants is a legitimate objective of the prosecution system. New Zealand has obligations under the ICCPR, and NZBORA to protect the rights of suspects and defendants.¹¹⁵ It is argued that according victims’ views with more weight will significantly increase both costs and the

¹¹¹ Elisabeth McDonald “The views of complainants and the provision of information, support and legal advice: How much should a prosecutor do?” (2011) 17 Canterbury Law Review 66 at 67.

¹¹² Victorian Law Reform Commission *The Role of Victims of Crime in the Criminal Trial Process: Consultation Paper* (July 2015) at 54. See Geoffrey Flatman and Mirko Bagaric “The Victim and the Prosecutor: The Relevance of Victims in Prosecution Decision Making” (2001) 6(2) Deakin Law Review 238 at 251.

¹¹³ Jo-Anne Wemmers “Victims’ Experiences in the Criminal Justice System and Their Recovery from Crime” (2013)19(3) International Review of Victimology 221 at 222; Jim Parsons and Tiffany Bergin “The impact of Criminal Justice Involvement on Victims’ Mental Health” (2010) 23(2) Journal of Traumatic Stress 182 at 183.

¹¹⁴ Victorian Law Reform Commission “The role of victims in the decision to prosecute” <www.lawreform.vic.gov.au>.

¹¹⁵ Section 25 of the Act provides: “Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights: (a) The right to a fair and public hearing by an independent and impartial court; (b) The right to be tried without undue delay; (c) The right to be presumed innocent until proven guilty according to law; (d) The right not to be compelled to be a witness or confess guilt; (e) The right to be present at trial and to present a defence. Sections 23-23 and 26-27 also provide rights for suspects and defendants in the investigation and prosecution process. Note that the corresponding provisions of the International Covenant on Civil and Political Rights are not entirely synonymous with those in New Zealand Bill of Rights Act 1990. Compare for example article 9(2) and 9(3) of the Covenant with s23(2) and 23(3) of the New Zealand Bill of Rights Act 1990.”

volume of trials that may not result in convictions. A further consideration is the victims' ability to pressurise prosecutors to file aggravated charges.

Advocates for increased victim participation assert there is an imbalance between defendants' rights and victims' rights. However, Macdonald contends that arguments to justify an expansion of victims' participatory rights on the basis of fair balancing are problematic.¹¹⁶ Firstly, exactly what is being balanced are incommensurables. Secondly, it is difficult to determine the weight to be accorded to such potentially competing interests. Edwards states:¹¹⁷ "We cannot justify granting participation rights to victims simply because they are rights enjoyed by defendants; the justification for granting certain rights to defendants is crucial to ensure that he receives a fair trial, and is not subject to unrestrained power and resources of the state. However, legal representation for a victim cannot be justified on these grounds, as the victim is not in a position of inequality vis-à-vis the state."

Edward's proposition that victims are not in a position of inequality in relation to the State lacks plausibility, in the context of an improper prosecution decision not to prosecute. The position illustrated by the social contract theory is exactly on point.¹¹⁸

Welling asserts that the introduction of participatory rights for victims will not affect the existing rights of defendants or create implications for the prosecution process. A defendant's right to challenge a prosecution decision can only be affected by the power of the prosecutor, since they have exclusive power over the decision, and it does not require that victims' views dominate the prosecutor's decision.¹¹⁹

Welling explained that the prosecutor's main interest in regarding the process of reaching the charging decision, is to do so by the simplest process to achieve the quickest decision.¹²⁰ In this regard, the interest of the prosecutor and victim diverge. For the prosecutor, "the amount of additional time consumed by victim participation would depend on the type of participation right defined, but there will inevitably be some impact...From the prosecutor's perspective,

¹¹⁶ McDonald, above n 111, at 67.

¹¹⁷ Ian Edwards "An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making" (2004) 44 *Brit J Criminal* 967 at 972.

¹¹⁸ See Chapter 7 at section 7.3.2.

¹¹⁹ Welling, above n 106, at 88.

¹²⁰ *Ibid*, at 90-91.

victim participation would be benign as to the substance of the charging decision, but would entail some costs for the process of making the decision.”¹²¹ The prosecutor is always free to allow the victim to participate if the prosecutor decides it would be appropriate. Therefore, the only circumstance “where victims’ participation rights would have any practical impact is where a prosecutor wants to make the prosecution decision without consulting the victim.”¹²² Consequently, the only situations that are changed by allowing participatory rights are those circumstances where a “prosecutor is resistant to victim participation, otherwise the victim would already have been consulted.”¹²³

Crimes against the individual victim are also acts against society as a whole; “victims are not owed convictions; rather it is the larger society, if anyone that has the right to pursue convictions.”¹²⁴ The interests of victims will require balancing against the objectives of the criminal prosecution system.¹²⁵ The decision to prosecute still lies exclusively with the prosecutor. Victims’ interests can and should be considered and protected yet maintaining the criminal law’s objective of holding those responsible to account under fair processes.

On balance, allowing participatory rights to victims will in fact have little if any impact on the rights of the accused or the prosecution process generally. It is important then, to consider what kind of participation is appropriate or desirable for victims. In presenting this debate, Edwards distinguishes between dispositive and non-dispositive participation.¹²⁶ Dispositive participation affords control to the victim over certain aspects of the process, for example the prosecutor may be under an obligation to ascertain a victim’s preference and act in accordance with it, however it will be for the victim to provide this preference. Non-dispositive participation includes consultation; the provision of information; and, expression. In these types of participation, the victim is not the decision-maker but they are given a position where they could potentially influence the particular decision. This is distinct from the victim’s current position in the system as an ‘information receiver,’ where the role is a passive one that entails no interactive input into the decision-making itself.¹²⁷

¹²¹ Welling, above n 106, at 91.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Larry May, *Crimes against Humanity: A Normative Account* (Cambridge University Press, Cambridge, 2005) at 220.

¹²⁵ The New Zealand Law Commission *Criminal Prosecution* (NZLC PP28 1997) at 12.

¹²⁶ Edwards, above n 117, at 974.

¹²⁷ Ibid, at 976-977.

10.4.3 Need for Pre-Charge Consultation

A pre-charge consultation between the prosecutor and victim should be introduced into the prosecution decision-making process, in order to support victims' procedural justice needs.¹²⁸ This means that victims should be afforded non-dispositive participation rights. A right to consultation. Currently, victims have a superficial right to information by the VRA 2002, which comes into force only after the prosecutor has made the prosecution decision.¹²⁹ Giving victims a participatory right, will expand their role from being an instrument that enables the prosecutor to procure convictions, to a tool which can be used in the interests of justice.

There are specific benefits to victims who are able to participate in the prosecution system. Bacik et al. conducted research on rape victims and observed that those victims who were offered some type of formal role at trial were reported to have a greater understanding of their role at trial, appeared to exhibit better levels of confidence and articulateness when testifying, received less hostility from the accused's legal representative and felt greater satisfaction with their treatment in the legal process.¹³⁰ Doak concluded that "offering victims some form of acknowledged and formal role at trial should enhance their sense of powerlessness that many have reported during criminal proceedings."¹³¹ In turn, more victims might be encouraged to report crimes and cooperate with the police and prosecution authorities."¹³²

A pre-charge consultation gives victims the opportunity to have their views heard, a factor that the prosecutor might take into consideration. It may also encourage the prosecutor to decide to prosecute and file the most serious charges that can be justified. This in turn, would gratify the victim's interest in the substance of the charging decision. It is important to note that ultimately, the decision-making power still lies with the prosecutor. Despite whether the final decision is

¹²⁸ Ian Grenville Cross "Focus on Discretion to Prosecute" (1998) 28 Hong Kong Law Journal 400; Cross says there is a difference between informing and consulting in practice. They can be distinguished where there is legitimate public interest. "Sir Thomas Hetherington, when asked for examples of cases where he initiated consultation with the Attorney-General, gave this reply: 'Some of the City Fraud cases-involving Lloyds and Johnson Matthey Bankers- because there is so much legitimate public interest in what is going to happen. Cases involving public figures such as Derek Hatton, the Deputy Leader of Liverpool Council, where we decided not to prosecute: that was one where we kept the Attorney informed rather than asking him to take a decision.'"

¹²⁹ Victims' Rights Act 2002, s12(1).

¹³⁰ I Bacik, C Maunsell and S. Grogan "The Legal Process and Victims of Rape" (Dublin Rape Crisis Centre and School of Law, Trinity College, 1998).

¹³¹ Doak, above n 94, at 312.

¹³² Ibid.

favourable to the victim or not, allowing for victim participation in the decision-making process will make victims feel less alienated and irrelevant in the prosecution process. Enabling a right to participate by consultation will also mean that the process accords with the New Zealand Ministry of Justice's goal to be more "responsive" to victims.¹³³

Recently, the International Criminal Court has responded to societal outcry that victims are unfairly ignored by the criminal justice system, by allowing victims for the first time in the history of international criminal justice, the possibility to share their views and concerns in the proceedings, represented by a lawyer.¹³⁴ To give victims in New Zealand participatory rights at the charging decision develops the criminal law in terms of international standards and would also be in accord with the global victims' movement, which advocates for "greater victim input into the central decisions affecting the outcome of the prosecution."¹³⁵ Victims in New Zealand have already been given the right to participate in post-conviction phases, therefore conceptually, allowing a right to participate in the charging decision is logical. "Granting victims' a right to participation at the charging stage would be consistent with the current structure and would contribute to a coherent system."¹³⁶

A right to non-dispositive victim participation provides greater access to justice and can be easily incorporated into the existing adversarial framework. As Doak pointed out, "[i]t is ironic that the person whose complaint was instrumental in bringing the case to court is denied the right to participate as a separate player in proceedings, but must instead play an extremely limited role...the injection of the victim's perspective could lend additional transparency to the

¹³³ Ministry of Justice *A Focus on Victims of Crime: A review of Victims' Rights- Public Consultation Document* (2009) at 4. In a 2009 Public Discussion Document, the Ministry proposed to improve victims' role by providing more communication between victims and prosecutors to ensure victims have the opportunity to be more involved in the case; Ministry of Justice *A Focus on Victims of Crime: A review of Victims' Rights- Public Consultation Document* (2009) at 5. The Ministry stated that victim involvement should be implemented from when the crime occurs to the final stage of proceedings when a sentence is given. This of course would include the prosecution, decision-making phase. The Ministry asserted that the benefits of victim participation in the whole criminal justice process are two-fold. Firstly, a greater focus on victims will assist in reducing the cost and impact of crime and improved responsiveness to victims. Secondly it "will enhance the effectiveness of, and public confidence in, the criminal justice system, such confidence is necessary for those victimised by the crime and for the whole community and is seen as essential to ensuring that victims report crimes"; Ministry of Justice *A Focus on Victims of Crime: A review of Victims' Rights- Public Consultation Document* (2009) at 4.

¹³⁴ Elisabeth Baumgartner "Aspects of victim participation in the proceedings of the International Criminal Court" (2008) 90 *International Review of the Red Cross* 409 at 410.

¹³⁵ Flatman and Bagaric, above n 112; Peggy Tobolowsky "Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime" (1999) 25 *Criminal and Civil Confinement* 21 at 58.

¹³⁶ Sarah Welling, above n 106, at 117.

outcome of the case.”¹³⁷ Incorporation of a pre-charge consultation therefore elevates the victims’ role from what is currently a position of virtual irrelevancy to an ‘agent of accountability’.¹³⁸ In this sense, victims who participate in a consultation have the opportunity to scrutinise prosecution powers for themselves and query whether they have been treated fairly in the process.

Consultation also benefits the criminal justice system generally by promoting the value of truth-finding and transparency in the decision-making process. Telford and Walker expanded on this notion by explaining how victim participation in the criminal justice process is able to bolster the systems overall legitimacy:¹³⁹

...Similarly, participation in the criminal process also serves to legitimise the system by engaging interested, and often aggrieved parties in resolving a dispute, or as a form of external audit to help ensure equitable procedures...

Lliadis and Flynn considered a wide range of literature that considered victims’ procedural justice needs,¹⁴⁰ which included:¹⁴¹

- (1) information- to be kept informed at all stages of the case’s progression before decisions are made;
- (2) validation- including validation of victimisation experiences, feeling as though they are believed and being treated with respect and dignity;
- (3) voice- providing victims with the opportunity to narrate their story to a supportive and receptive audience, and to have this story acknowledged and;
- (4) control- being given some sense of control in their case, particularly regarding the decisions made.

A pre-charge consultation is able to satisfy all of these needs. Firstly, victims who consult with the prosecutor have access to clear information about how and why a prosecution decision will be made. This in turn allows victims to understand their role in the decision-making process

¹³⁷ Doak, above n 94, at 312.

¹³⁸ Manikis, above n 25, at 63-80.

¹³⁹ N Walker and M Telford *Designing Criminal Justice: The System in Comparative Perspective* (Report 14, Review of the Criminal Justice System in Northern Ireland, HMSO, Belfast, 2000) at 10.

¹⁴⁰ H Zehr “Retributive Justice, Restorative Justice” in Gerry Johnstone, ed. *A Restorative Justice Reader: Text, Sources, Context* (Willan Publishing, 2003); Judith L Herman “Justice from the Victim’s Perspective” (2005) 11 *Violence Against Women* 571-602; K. Burke and S. Leben “Rape of Older People in the United Kingdom: Challenging the ‘Real Rape’ Stereotype” (2007) 57 *British Journal of Criminology* 1-17; T. Tyler “Procedural Justice and the Courts” (2007) 44 *Court Review: The Journal of the American Judges Association* 25-31; Haley Clark “What is the Justice System Willing to Offer? Understanding Sexual Assault Victim/Survivors Criminal Justice Needs” (2010) 85 *Family Matters* 28-37.

¹⁴¹ Lliadis and Flynn, above n 84.

and any potential implications for them. Clark found that victims who had received information “expressed relief, as it provided them with forewarning about the system, and they were able to adjust and manage their expectations accordingly.”¹⁴² Where a decision not to prosecute is taken, it allows victims to make informed decisions about whether to engage in judicial review, and to prepare themselves for such a step if it is needed. Victims may also experience a sense of closure that they would otherwise not receive when a prosecution does not follow. Access to information enables victims to understand their own rights, the system’s purpose and can help them feel less frustrated with ‘seemingly futile decisions.’¹⁴³

Flynn noted that: “Notwithstanding that often immense differences between individual victims and their victimisation experienced, a common need consistently identified by victims of crime is the desire to be kept informed at all stages of the case’s progression through the criminal justice process...when such information is provided, it has been recognised that victims feel an increased level of satisfaction.”¹⁴⁴

Validation for victims may be understood as the expression of belief by system officials to victim allegations.¹⁴⁵ Judith Herman observed that giving victims validation through official acknowledgement of the crime can be difficult to achieve in the criminal justice system as a result of constitutional limitations of the law that protect the accused against the powers of the state.¹⁴⁶ The pre-charge consultation overcomes this difficulty by ensuring that victims’ narratives are heard and considered by the prosecutor without hindering the rights of the accused or prosecution powers.

While on face value, it may appear that a consultation right conflicts victims’ interests against the rights of defendants and the prosecutor’s duties, Welling explained that victim participation at the charging decision cannot violate defendants’ rights “because only the prosecutor, as the exclusive source of charging, has the power to violate the rights of the defendant with regard to charging.”¹⁴⁷ Victim participation also does not determinatively affect the prosecution

¹⁴² Clark, above n 140.

¹⁴³ Ibid.

¹⁴⁴ Asher Flynn “Bargaining with Justice: Victims, Plea Bargaining and the Victims’ Charter Act 2006 (Vic)” (2012) 37 Monash University Law Review 73 at 79.

¹⁴⁵ Clark, above n 140, at 28-37.

¹⁴⁶ Herman, above n 140, at 572.

¹⁴⁷ Sarah Welling, above n 106 at 88; See also at 88; “Defendants have few rights in the charging decision. They have the right to challenge the charging decision as unsupported by sufficient evidence, as unconstitutional if

decision, and therefore does not conflict with the prosecutor's right to decide whether to prosecute or not.¹⁴⁸ Van Ness has argued that "it is inevitable that the interests, rights and needs of victims will conflict at some point with those of the state. The question, then, is not how to *avoid* conflicts between competing interests, but how to *manage* them effectively, so that as many of the competing interests as possible are accommodated in a principled manner."¹⁴⁹ Pre-consultation is the answer. It allows victims' interests to be taken into account without usurping the state's right to prosecute or not as both rights are equally enforceable. To this extent, the main function of the criminal justice system of punishing the guilty and acquitting the innocent is not impeded by incorporating a pre-consultation right.¹⁵⁰

As Tyler acknowledged, "[h]aving an opportunity to voice their perspective has a positive effect upon people's experience with the legal system irrespective of the outcome, as long as they feel that the authority sincerely considered their arguments before making their decision."¹⁵¹ By this understanding, a participation via consultation can improve victims' satisfaction with the justness of the prosecution process. As 'agents of accountability' a pre-charge consultation also offers victims a sense of control even if participation does not fully affect the final outcome of the decision.

Canvassing the right to pre-charge consultation in light of the existing framework of the Victims' Right to Review Reform Scheme (VRRS) in the United Kingdom, demonstrates that a right to pre-charge consultation is better at fully supporting victims' procedural justice needs compared to a right to request an internal review, which only really enhances victims' rights in an adversarial context.¹⁵² It is for this reason why the pre-charge consultation has been recommended over schemes like the VRRS.

retaliatory or discriminatory, and, as some cases suggest, as unethical if not made in good faith or not based upon appropriate charging considerations."

¹⁴⁸ Also, the consultation being limited to the expression of the victim's views prevents the consultation from being time-consuming and prevents interference with a prosecutor's interest of time; Sarah Welling, above n 105 at 114.

¹⁴⁹ D Van Ness "A Reply to Andrew Ashworth" (1993) 4 Crim Law Forum 301 at 304.

¹⁵⁰ A Sanders and R Young, *Criminal Justice* (Oxford University Press, London, 2007) at 9. See generally Julia Tolmie and Warren Brookbanks *Criminal Justice in New Zealand* (Lexis Nexis NZ Limited, Wellington, 2007).

¹⁵¹ T Tyler "Procedural Justice and the Courts" (2007) 44 Court Review: The Journal of the American Judges Association 25-31.

¹⁵² Lliadis and Flynn, above n 84.

The primary aim of the newly introduced VRRS in the United Kingdom seeks to promote transparency, accessibility and accountability by allowing victims to request a review of a prosecutor's decision not to prosecute. Essentially, the scheme seeks to achieve the same outcomes for victims as the pre-charge consultation does. While in a successful review under the VRRS, the prosecutor may choose to reverse his or her decision, the effect of a pre-charge consultation, while not being wholly determinative also has the effect of 'review' in the sense that victims provide a check on the exercise of prosecution powers and their views may have some weight in the final decision made by the prosecutor. These similarities make the VRRS an attractive comparator.

In a socio-legal study analysing the VRRS, Lliadis and Flynn concluded that "while the theoretical underpinnings of the VRR present major benefits for victims, our data suggests that the potential shortcomings may limit the viability of victims' procedural justice needs being met." These findings were based on the fact that the VRRS relies upon the CPS themselves to conduct reviews, "the very organisation the victim is questioning."¹⁵³ The perceived level of accountability therefore is diminished in the eyes of victims which in turn "reduces the VRRS's effectiveness in meeting victims' procedural justice needs."¹⁵⁴ In comparison, the level of accountability surrounding pre-charge consultation remains high, because prosecutors would be under the duty to provide both the reasons for their decision and how the decision itself was reached. A pre-charge consultation facilitates transparency, something the VRRS lacks.

These findings suggest that victim's procedural justice needs are not met by simply giving victims more opportunities to have prosecution decisions reviewed. What is needed is a mechanism like a pre-charge consultation which makes victims key players in the decision-making process. A flow-on effect of increased transparency of decision-making is that victims in judicial review cases of decisions not to prosecute, will have the evidentiary material needed to support their case. Such victims would have already been consulted in the process, and therefore would have been given reasons behind the decision not to prosecute by the prosecutor. Generally, legal opinions written by Crown-Solicitors providing reasons for prosecution decisions are legally privileged and unobtainable.¹⁵⁵ Crown Solicitors do not fall

¹⁵³ Lliadis and Flynn, above n 84.

¹⁵⁴ Ibid.

¹⁵⁵ See *Case Note 95812* [2007] NZ PrivCmr 11.

under the Official Information Act 1982, which makes obtaining non-privileged information itself an arduous task. Both factors diminish the transparency and predictability of how prosecution decisions are made.¹⁵⁶ A pre-charge consultation is therefore integral in providing victims access to these reasons, whilst also improving transparency and accountability of prosecution decisions.

Despite the current right to information under s12(1)(b) of the VRA 2002 regarding the charging decision, the provision of reasons behind a prosecution decision is still rarely practised. Professor Michael Taggart explained:¹⁵⁷

Despite the rhetoric of administrative law's commitment to transparency, in the long historical view neither the common law in general nor administrative law in particular was committed to reason giving as an essential prerequisite to the validity of decision-making... but it seems only a matter of time before the exceptions swallow the hoary general rule that reasons not be given.

In recognising the need for transparency in the prosecution process, Snow argued that:¹⁵⁸

The best way to facilitate judicial review in a manner that respects prosecutorial independence, while ensuring accountability, is by requiring transparency. This would place a legal obligation on the Crown to provide an explanation for their discretionary decisions... Mandated transparency should not be characterised as judicial supervision or interference. It is the law and the public interest, not the judiciary, which require explanation. This obligation would achieve a balance between accountability and independence that effectively promotes adherence to the Crown's high traditional virtues. It can only serve to enhance public confidence in the administration of justice, at the expense of secrecy, which is "simply no longer acceptable to the public." Justice Rosenberg predicted that transparency would become necessary "not solely because courts may demand [it]... but because the Attorney General will recognize that providing reasons is in the public interest.

Transparency must not be an aspirational ideal, it must become a mandatory duty. A right to pre-charge consultation will allow transparency of prosecution decision-making and "reduce

¹⁵⁶ Before the High Court decision in *Osborne v WorkSafe New Zealand* [2015] NZHC 2991, [2016] 2 NZLR 485, (2015) 13 NZELR 485 was released, the appellants had judicially reviewed the decision to offer no evidence in February 2015. The application was for discovery of the correspondence between prosecuting and defence counsel and the files notes that were exchanged on a without prejudice basis. Dobson J held that in a plea bargain to resolve criminal charges, counsel to counsel communications are protected by s69 Evidence Act 2006, due to its public interest and by the creation of an overriding discretion that protects confidential information. Dobson J followed *Reid v Crown Law Office* [2009] NZHC 446 and held that if a file note was potentially disclosable, any part of it that reflected or alluded to work done or the priorities in the preparation of the litigant's case would remain confidential. Even though the correspondence and file notes were relevant they were not discoverable for being privileged and confidential. In Hong Kong, there is extremely limited capacity for discovery in judicial review.

¹⁵⁷ Michael Taggart "Proportionality, Deference, Wednesbury" (2008) NZ L Rev 423 at 462.

¹⁵⁸ Snow, above n 20.

the likelihood that people will perceive a gulf between their expectations of the criminal justice system and the reality.”¹⁵⁹

10.4.4 Incorporation of Pre-Charge Consultation

It is recommended that the most practical and effective way of incorporating the right to a pre-charge consultation is to amend the existing s12(1)(b) of the VRA 2002. Currently, the right states that “A victim must, as soon as practicable, be given information by investigating authorities or, as the case requires, by members of court staff, or the prosecutor,” regarding the charging decision.

In order to fulfil victims’ procedural justice needs, the current right should be amended so that s12(1)(b) is isolated from the general ‘information of proceedings’ categories under s12 and instead make a stand-alone provision which states that victims must, without delay be consulted by the prosecutor, about the charges laid or reasons for not laying charges, and all changes to the charges laid. To ensure that victims are provided with sufficient information, it is recommended that the revised s2(1)(b) should provide a non-exhaustive list of categories of information that a victim should receive when a prosecutor provides the reasoning for their decision. For example, in a consultation, the prosecutor must explain to victims in layman’s terms what the decision is, why it was reached and what a decision not to prosecute actually means (e.g. a decision not to prosecute is not equivalent to an acquittal.)

In *Manning*, Lord Bingham suggested there should be a policy of pro-active disclosure.¹⁶⁰ Pro-active disclosure would provide a clear interpretation of how policies were applied, and checks for inconsistency. It would act as a fillip to judicial review when reasons for a decision are transparent and can be understood. The amendment of section 12(1)(b) would mean ‘pro-active disclosure’ becomes a right.

Consultation should be conducted either orally or in written form, and is limited to the victim sharing their views and concerns, giving them no right to determine the substance of the

¹⁵⁹ K Gelb *Myths and Misconceptions: Public Opinion Versus Public Judgment about Sentencing* (Sentencing Advisory Council, Victoria, 2006) at 23.

¹⁶⁰ *R v Director of Public Prosecutions, ex parte Manning* [2001] QB 330 at [33].

prosecution decision.¹⁶¹ This is because the main benefits of victim participation are derived from the participation process, and not the impact the participation has on the substance of the decision.¹⁶² The consultation should be expeditious and should not absorb undue amounts of time, but should be thorough enough so that victims leaving the consultation have the information that they need. A new guideline in the Victims of Crime-Guidelines for Prosecutors should be created to guide prosecutors on the depth of consultation required. This should reflect the proportionality and seriousness of the offence. For example, where someone has been killed as a result of a crime, the prosecutor must on request, meet the family to explain a decision on a prosecution.¹⁶³ The standard requirements for consultation are set out in *Wellington International Airport v Air New Zealand* and include the requirement that consultation must be genuine and approached with an open mind, and allow sufficient time and information for those consulted to make a meaningful point.¹⁶⁴ Redefining the right to information as a participation right of consultation necessitates a remedy where the right is denied.

Moffett recognised that “victim’s rights are meant to ensure justice mechanisms are responsive to their needs and consider their input into proceedings so as to remedy their harm.”¹⁶⁵ Giving victims of crime the right to a pre-charge consultation creates no risk of infringing upon any legal or moral right, since the substance of the prosecution decision is the product of power of the prosecutor. Furthermore, “the victim’s right to participate in the charging decision does not cater to society’s baser instincts, nor is it a masquerade to limit defendant’s rights under the guise of concern for victims. Rather, it has social utility.”¹⁶⁶ New Zealand’s criminal law must give victims a right to participate in the prosecution decision-making to see that procedural justice is secured.¹⁶⁷ Any denial risks the credibility and efficacy of the system. It would also relegate victims to the position of ‘objects’ meaning that “justice is done on the basis of their

¹⁶¹ Welling, above n 106, at 116.

¹⁶² Ibid at 116.

¹⁶³ The Victims of Crime- Guidance for Prosecutors 2014, paragraph 17 states: “Prosecutors should on request meet the family of someone killed as a result of a crime and explain a decision on a prosecution.” The use of the weak future-indicative word ‘should’ currently gives prosecutors a choice of whether to fulfil this duty or not. This should no longer be acceptable. The word ‘should’ needs to be replaced with the word ‘will.’

¹⁶⁴ *Wellington International Airport v Air New Zealand* [1993] 1 NZLR 671 at 675. See also *Aorangi School Board of Trustees v Ministry of Education* [2010] NZAR 132 at [31] - [36] per French J.

¹⁶⁵ Luke Moffett “Meaningful and Effective? Considering Victims’ Interests Through Participation at the International Criminal Court” (2015) 26(2) Criminal Law Forum 255 at 259.

¹⁶⁶ Welling, above n 106, at 117.

¹⁶⁷ See The New Zealand Law Commission *Criminal Prosecution* (NZLC PP28 1997) at 85; “Today, public opinion is shifting...with victims’ issues receiving attention and support across a broad political spectrum.”

suffering, without recognising them as [human beings that have] needs and interests in determining the substantive outcomes.”¹⁶⁸

10.4.5 Concluding Comments

Under Lord Steyn’s triangulation of interests, the result may be a narrow isosceles triangle- the hypotenuse between the state and the defendant may be longer than the side reflecting victims’ interests. But there must be three clear sides- at present there are not-the current law provides for only a straight line between the state and the defendant. As Kirchengast argued, “boundaries which once separated the victim from substantive participation in adversarial systems of justice are now being eroded and dismantled in favour of rights and powers that can be enforced against the state or the accused, albeit in an unconventional, fragmented and at times controversial way.”¹⁶⁹ Victims must be given better procedural rights during the prosecution decision-making phase. To attain this balance does not require the sacrifice of public justice nor initiation of private justice. As Michael O’Connell, the Commissioner for Victims’ Rights in South Australia stated, “It does require us, however, to acknowledge victims as real people with real need and real rights – and, if we get it all right, we will attain a better justice.”¹⁷⁰

10.5 Recommendations for Discretionary Relief and Private Prosecutions

10.5.1 Discretionary Relief: The Appropriate Boundaries

The New Zealand courts should follow jurisprudence from the United Kingdom and allow flawed decisions in judicial review cases to be quashed and then direct the prosecutor to reconsider the decision. A consideration of whether or not the extraordinary remedy of *mandamus* should be made available in New Zealand was made in Chapter VIII section 8.2.1. It is recommended that such power should not be made available, to compel an actual specific decision, rather reflecting the separation of powers, an order to reconsider or a Declaration would be appropriate.

¹⁶⁸ Moffett, above n 165, at 260; Claude Jorda and Jérôme de Hemptinne “The Status and Role of the Victim” in A Cassese, P Gaeta, and R W Jones (eds.) *The Rome Statute of the International Criminal Court: A Commentary*, (Oxford University Press, 2002) 1387-1419 at 1389.

¹⁶⁹ Kirchengast, above n 93, at 104.

¹⁷⁰ Michael O’Connell *Victims’ Rights: Integrating Victims in Criminal Proceedings* (Commission for Victims’ Rights, Government of South Australia, 2012).

A *mandamus* to compel essentially require the court to step outside of its constitutional bounds and to exercise the powers vested in the prosecutor. The judiciary must decide cases in light of law, but do not have the authority to decide to prosecute- that would create a fundamental incompatibility with the adjudicative role. Only the executive has the exclusive power of direct action, but it has no lawful authority to act outside of the provisions of the laws or the specific judgments of the judiciary. The separate functions and independence of both branches is the core of the separation of powers doctrine. To allow *mandamus* to compel a prosecution as a form of relief would be asking the courts to usurp powers beyond their authority, or as Justice Iacobucci put it, the courts “should not use the open door of jurisdiction to enter rooms in which they did not belong.”¹⁷¹ For this reason, relief should be limited to quashing and directing reconsideration by a prosecutor or giving a focussed Declaration as relief.

10.5.2 Strengthening the Right to Private Prosecution

Where a prosecution decision not to prosecute has been made in New Zealand, victims may choose instead of judicial review to exercise the right to private prosecution. This right however is subject to numerous limitations, as illustrated in Chapter IX. Many of these limitations are procedural statutory requirements that private prosecutors must fulfil. Some of these limitations can be overcome, but there are ways in which the right to institute a private prosecution may be strengthened.

It was noted that one of the deterrents of private prosecution is costs. In New Zealand, a successful private prosecutor’s costs may be awarded on the “just and reasonable” basis provided for in s4(1) of the Costs in Criminal Cases Act 1967, so the court may order the offender to reimburse the private prosecutor the costs incurred in the prosecution. A similar approach¹⁷² is taken in the United Kingdom¹⁷³ and other countries such as South Africa,¹⁷⁴ Zimbabwe¹⁷⁵ and Namibia.¹⁷⁶ One recommendation which would assist indigent private

¹⁷¹ Frank Iacobucci “Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis” (2002) 27 Queen’s LJ 859.

¹⁷² See Jamil Ddamulira Mujuzi “Private Prosecutions in Hong Kong: The Role of the Magistrates and State Intervention to Prevent Abuse” (2016) 4 The Chinese Journal of Comparative Law 253 at 253-273.

¹⁷³ See Murtaza Ali Shah “Private Prosecution of Altaf Hussain if CPS Does Not Act: Barrister Gulraiz” *The News* (31 August 2016).

¹⁷⁴ Criminal Procedure Act, No 51(1977) s15.

¹⁷⁵ Mary Taruvinga “Kereke Ordered to Pay Legal Costs” *News Day* (Zimbabwe, 20 August 2016).

¹⁷⁶ Criminal Procedure Act, No 51(1977) s15. This South African Act is also in force in Namibia.

prosecutors to exercise their rights would be for the New Zealand government to provide legal aid to private prosecutors who were able to satisfy the requirements under s26 of the Criminal Procedure Act 2011. The jurisdictions of Scotland¹⁷⁷, Azerbaijan,¹⁷⁸ Spain and Poland¹⁷⁹ have adopted this approach.

Currently, a private prosecution may be taken over by the Solicitor-General or Crown prosecutor at any time. This intervention does not require consent from the private prosecutor or the court. In recommending ways to strengthen the right to private prosecution in Hong Kong, Mujuzi suggested that the executive's decision to take over a private prosecution should be subject to judicial scrutiny.¹⁸⁰ Mujuzi argued that "ensuring that the court has the final say on whether the DPP should take over a private prosecution guarantees that such prosecutions are not discontinued under questionable circumstances."¹⁸¹ Uganda¹⁸² and Gambia¹⁸³ are two common law countries that have adopted this approach.

Mujuzi's proposal makes the trial court's consent to a take-over final. If a similar procedure were to be adopted by New Zealand courts it is recommended that the trial court's view cannot be the final say and instead should be put to the public prosecutor to reconsider his or her decision if the court's view differs from that of the public prosecutor. This would ensure that the separation of powers is maintained while also providing an added measure of protection of the right to privately prosecute from being unfairly discontinued. If the trial court is not a superior court, then its decision will remain amenable to judicial review, regardless of the public prosecution position.

¹⁷⁷ See Libby Brooks "Glasgow Bin Lorry Crash: Legal Aid Granted for Private Prosecution" *The Guardian* (United Kingdom, 9 March 2016).

¹⁷⁸ Jamil Ddamulira Mujuzi 'The Right to Institute a Private Prosecution: A Comparative Analysis' (2015) 4 *International Human Rights Law Review* at 242-243.

¹⁷⁹ Jamil Ddamulira Mujuzi 'Victim Participation in the Criminal Justice System in the European Union through Private Prosecutions: Issues Emerging from the Jurisprudence of the European Court of Human Rights' (2016) 24 *EUR J Crime, Crim L & Crim J* 107 at 119-120.

¹⁸⁰ Mujuzi, above n 172, at 273.

¹⁸¹ *Ibid.*

¹⁸² Article 120(3)(d) of the Constitution of Uganda provides that 'the Director of Public Prosecutions shall not discontinue any proceedings commenced by another person or authority except with the consent of the court.' See Mujuzi, above n 172, at 273.

¹⁸³ Section 84 of the Constitution of Gambia (1997) confers the DPP with power to conduct prosecutions. Section 84(4) states that the DPP "shall not: (i) take over and continue any private prosecution without the consent of the private prosecutor and the court; or (ii) discontinue any private prosecution without the consent of the private prosecutor." See Mujuzi, above n 172 at 273.

10.6 Recommendations Specific to the *Osborne* Case

Our highest Court has already spoken in *Osborne*, however this section aims to provide recommendations for future Courts grappling with similar issues.

10.6.1 Recommendation for Compounding of Offences in New Zealand

The Supreme Court Decision in *Osborne v WorkSafe NZ* stated that “it is contrary to the public interest and unlawful for an arrangement to be made that a prosecution will not be brought or maintained on the condition that a sum of money is paid.”¹⁸⁴ In other jurisdictions, this is known as ‘compounding of an offence,’ and “consists of a prosecutor or victim of an offence accepting anything of value under an agreement not to prosecute, or to hamper a prosecution.”¹⁸⁵ While the Supreme Court has clearly held that such action is unlawful, New Zealand seems to have no statutory provision regarding compounding of offences.

Compounding of a felony was once a common law offence but has been abolished in England and Wales,¹⁸⁶ Northern Ireland,¹⁸⁷ the Republic of Ireland¹⁸⁸ and in New South Wales.¹⁸⁹ The common law has been replaced by statute in these jurisdictions. Only a few small countries in the Caribbean and South Pacific now allow compounding of offences, and even then, exclusively for fishing-related offences.¹⁹⁰

Compounding of offences is available in India¹⁹¹ and Singapore,¹⁹² but under very strict terms. The use of administrative penalties and the process of compounding of offences involves an exercise of judicial powers, “therefore, constitutional and administrative law implications for such options need to be comprehensively examined before using the compounding of offences as an option in enforcement.”¹⁹³ In Singapore, usually only the alleged victim may compound

¹⁸⁴ *Osborne v WorkSafe New Zealand* (SC), above n 1.

¹⁸⁵ Corker Binning “Compounding a felony and settling criminal offences” <www.lexology.com>.

¹⁸⁶ The Criminal Law Act 1967 (UK) c 58, s5(5).

¹⁸⁷ The Criminal Law Act 1967 (Northern Ireland) c 18 (N.I.), s5(5).

¹⁸⁸ The Criminal Law Act 1997 (No.14), s8(3).

¹⁸⁹ The Crimes Act 1900, s341 [1].

¹⁹⁰ Food and Agricultural Organization of the United Nations *Report of and papers presented at the expert consultation on illegal, unreported and unregulated Fishing*, (Sydney, Australia, 15-19 May 2000).

¹⁹¹ Code of Criminal Procedure 1972, s320.

¹⁹² Criminal Procedure Code 2010, ss241-243.

¹⁹³ Food and Agricultural Organization of the United Nations, above n 190.

an offence.¹⁹⁴ The victims in *Osborne* were not informed about the reparation agreement prior to the prosecution decision, which emphasises the illegitimacy of the compounding.

Section 320(9) of the Indian Penal Code holds that no offence shall be compounded, except as provided by the section. The Supreme Court in India laid down the principle that “if a person is charged with an offence, then unless there is some provision for composition of it the law must take its course and the charge enquired into resulting in conviction or acquittal. If composition of an offence is permissible under the law the effect of such composition would depend on what the law provided for.”¹⁹⁵ The question of compoundability arose in *KV Antony v Sherafuddin*, in the Kerala High Court. It was held that “in a case where a special enactment provides for compounding of offence it can certainly be done. If not, it cannot be done.”¹⁹⁶ The Indian precedent is clear that compounding is only available when it is provided for in a statute.

In *Kamini Kumar Basu Thakur v Birendra Nath Basu Thakur*,¹⁹⁷ the Privy Council considered the issue of compounding a non-compoundable offence. It was held that if an *ekrarnamah* (agreement)¹⁹⁸ is executed to give effect to the arbitrator’s award that a complaint of a non-compoundable offence will not be further proceeded with, then the consideration of the *ekrarnamah* is unlawful and the award is invalid. This is irrespective of whether any prosecution in law had been started. It was also acknowledged that “it is unlikely that an *ekrarnamah* will expressly state that a part of the consideration for it is an agreement to settle a criminal prosecution. It is enough in such cases if evidence is given from which the inference necessarily arises that part of the consideration is unlawful.”¹⁹⁹

In an important judgment of the Supreme Court of India, *V Narashimha Raju v Gurumurthy Raju* the appellant had filed an application under certain provisions of the Arbitration Act 1940, for setting aside the award on grounds that the consideration for the arbitration agreement was unlawful, “as it was the promise by the first respondent not to prosecute his complaint which involved a non-compoundable offence and, therefore, the agreement was invalid under s23 of

¹⁹⁴ Criminal Procedure Code 2010, Fourth Schedule.

¹⁹⁵ *Biswabahan Das v Gopen Chanra Hazarika* AIR 1967 SC 895 (India SC).

¹⁹⁶ *KV Antony v Sherafuddin* 1996 CriLJ 135.

¹⁹⁷ *Kamini Kumar Basu Thakur v Birendra Nath Basu Thakur* [1930] UKPC 4, (1930) 2 MLJ 82 per Sir Binod Mitter.

¹⁹⁸ A deed of settlement or arrangement in Indian Law.

¹⁹⁹ *Kamini Kumar Basu Thakur v Birendra Nath Basu Thakur*, above n 197, at [14].

the Indian Contract Act 1872.²⁰⁰ It was invalid because its consideration was opposed to public policy.” The court held the award could not be enforced. Similarly, in *Shripad v Sanikatta Co-Operative Salt Sale*, the court held “where an offence is non-compoundable, an agreement the purpose of which is to compound that offence, is illegal as opposed to public policy, but that where an offence is compoundable, an agreement aimed at compounding is not invalid as it is not opposed to public policy.”²⁰¹

In *Ouseph Poulo And Three Ors v Catholic Union Bank Ltd. And Ors*, the Supreme Court of India agreed with Lord Akin in *Bowhanipur*²⁰² and held that if “agreements made between the parties based solely on the consideration of stifling criminal prosecutions are sustained, the basic purpose of criminal law will be defeated; such agreements may enable the guilty persons to escape punishment and in some others they may conceivably impose an unconscionable burden on an innocent party under the coercive process of a threat of the criminal prosecution.”²⁰³ Essentially, when such an agreement is made, the complainant has chosen the fate of the complaint filed in criminal court and that strictly goes against public policy. The power to compound is extremely rare in Hong Kong and is strictly exercised to encourage compliance for very minor offences, such as filing obligations for companies²⁰⁴ or failure to declare dutiable goods.²⁰⁵

The stifling of the prosecution by the prosecution in *Osborne* was unprincipled and was a thinly disguised attempt to buy off a prosecution, by paying the dependents of victims- who neither knew about or wanted this payment.

10.6.2 Third Threshold to Review: When Prosecutions Are Commenced and Subsequently ‘Reversed’

²⁰⁰ *V Narashimha Raju v Gurumurthy Raju And Others* 1963 AIR 107, 1963 SCR (3) 687.

²⁰¹ *Shripad v Sanikatta Co-Operative Salt Sale* (1944) 46 BOMLR 745.

²⁰² *Bhowanipur Banking Corporation Ltd v Shreemate Durgesh Nadini Dasi* [1941] UKPC 24, (1942) BOMLR 1 (PC). Discussed in *Osborne*, above n 1.

²⁰³ *Ouseph Poulo And Three Ors v Catholic Union Bank Ltd. And Ors* AIR 1965 SC 166, 1964 (o) KLT 398 SC, 1964 7 SCR 745.

²⁰⁴ *The New Companies Ordinance (Cap.622)-Compounding of Specified Offences*, Companies Registry External Circular No.12/2014, CR HQ/1-50/15 Pt. 4 (16 May 2014).

²⁰⁵ Hong Kong Dutiable Commodities Ordinance, Chapter 109, Laws of Hong Kong.

There is room to suggest that, following the decision in *Manning*, if there is a lower threshold for a complainant or a victim's family to review a decision *not to* prosecute, as contrasted with a defendant trying to review a decision *to* prosecute, then in circumstances where a prosecution is commenced but then 'reversed' and not proceeded with (as in the *Osborne* case) the bar to enable judicial review by a complainant or a victim's family should be set lower.²⁰⁶

A lower standard should exist because if the formal parties to a case, e.g. WorkSafe New Zealand and Mr Whittal, for improper or unlawful reasons do not want to proceed then the complainants and victims must be entitled to have standing to challenge as otherwise the parties have a hermetically sealed system that provides no scope for the other affected persons to challenge an unlawful outcome that the parties find comfortable, which fails in terms of basic principles, being the purchase of an exit from a prosecution.

²⁰⁶ *R v Director of Public Prosecutions ex parte Manning*, above n 160.

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