PROSECUTION ACCOUNTABILITY AND JUDICIAL REVIEW

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This article examines the various ways that prosecution decisions can be challenged and, in particular, the extent to which prosecution decisions might be susceptible to judicial review. The focus is on the decision to commence or not to commence a prosecution. First considered is the extent to which that decision can be challenged pursuant to conventional criminal procedures. The availability of tort-based civil proceedings and the extent to which prosecution decisions are susceptible to judicial review are then considered. It is argued that providing adequate avenues to challenge prosecution decisions needs to be seen in the broader context of (a) the need to balance prosecutorial independence and prosecutorial accountability and (b) the separation of powers doctrine.

I INTRODUCTION

Public prosecutors possess and exercise some of the most important decision-making powers in the criminal justice system. Prosecutors decide, for example, whether to commence a criminal prosecution, whether to stay a prosecution, what the charge shall be if criminal proceedings are to be commenced, whether to call contentious evidence, whether to grant an indemnity from prosecution to a witness, and whether to commence an appeal against an acquittal or sentence. These decisions can have enormous implications for the various parties involved and for the limited resources of the courts. Often, the real-life implications of these decisions are hidden or at least underestimated. These types of prosecution decisions can be made by the Attorney-General, the Solicitor-General, a Crown solicitor, a Crown prosecutor or the police.

All these prosecutorial decisions are made within the context of two fundamental principles. First is the principle of prosecutorial independence. Prosecutorial independence is a multilayered concept. Independence can be a normative principle relating to how prosecutors ought to act. This requires, for example, that when making any decisions (pre-trial, at trial and post-trial) and appearing in court, the

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prosecutor must act in an independent and impartial manner. This responsibility is reflected in the applicable rules of professional conduct, statutory provisions, and common law principles.[1] The primary duty of the prosecutor is to ensure that the accused has a fair trial. A key aspect of prosecutorial independence is the concept of prosecutorial discretion. Prosecutorial discretion requires that a prosecution decision be made on the basis of the individual judgement of the prosecutor, taking into account all relevant considerations.[2]

Prosecutorial independence also refers to the institutional separateness of the prosecution sector from other parts of government, particularly the judicial arm. It is generally accepted, for example, that the courts do not determine which cases are to be prosecuted and which are not; that is a matter for the prosecution authorities.

In *Fox v Attorney-General* McGrath J stated:[3]

> In our system of government, the discretion to prosecute on behalf of the state and to determine the particular charges a defendant is to face is part of the function of the Executive Government rather than the Courts. That allocation of the function recognises the governmental interest in seeing that justice is done and community expectations that criminal offenders are brought to justice are met.

Institutional prosecutorial independence is an integral part of the overall constitutional arrangement in New Zealand. An aspect of this institutional independence is the exercise of powers of the Crown law officers, particularly the exercise of prerogative powers of the Attorney-General,

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1 The requirement of prosecutorial independence is recognised, for example, in Crown Law *Solicitor-General's Prosecution Guidelines* (1 July 2013) at 6; Criminal Procedure Act 2011 [CPA], ss 185(3) and 193; and Crown Law *Crown Solicitors: Terms of Office* (May 2017) at 4 ("Crown Solicitors must be independent and free from compromising influences or loyalties when providing services as Crown Solicitor"). It is also recognised in the plethora of cases relating to the duty of the trial prosecutor to act in a manner fair to the accused. See for example *R v Roulston* [1976] 2 NZLR 644 (CA); *R v Cook* [1997] 1 SCR 1113; *R v Stewart (Eric)* [2009] NZSC 53, [2009] 3 NZLR 425; *Porter v R* [2015] NZCA 448 at [11]; *Garaway v R* [2015] NZCA 611 at [32]; *R v E* [2008] NZCA 404, [2008] 3 NZLR 145; and *Fa'avae v R* [2012] NZCA 528, [2013] 1 NZLR 311.

2 The distinction between a discretionary decision and a non-discretionary decision was discussed in *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 at [49]–[53] and in *R v Taipeti* [2018] NZCA 56, [2018] 3 NZLR 308 at [49].

3 *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at [28].

free from judicial oversight.[4] Prosecutorial independence (in all its meanings) is a core element of the rule of law.[5]

The second fundamental principle underpinning all public prosecutions is that, because of the enormity of prosecution powers, prosecutors and the prosecution system in general should be held to account for the exercise of those powers.[6] As part of the executive government, prosecution authorities (individuals and organisations) do not possess any immunity from scrutiny or review. Prosecutorial accountability is also a key component of the rule of law.[7] It is a multilayered concept and can be analysed in both individual and organisational terms.[8]

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4 For example, at common law the Attorney-General can stay a criminal prosecution by entering a "nolle prosequi" upon the record of the court without the need to obtain the leave of the court: *Daemar v Gilliand* [1979] 2 NZLR 7 (SC), discussed in *Rewa v Attorney-General of New Zealand* [2018] NZHC 1005, [2018] 3 NZLR 233 at [18]–[19] per Venning J. "Nolle prosequi" (or "nolle") is Latin for "not willing to proceed". At common law the Attorney-General has a prerogative power to enter a nolle which has the effect of staying the criminal proceedings. No reasons have to be provided. However, the entering of a nolle is not equivalent to an acquittal and the proceedings can be recommenced at a later time: *R v Swingler* [1996] 1 VR 257 (CA) at 265. This power is recognised in the CPA, s 176.

5 Prosecutorial independence requires that, at an institutional or organisational level, the prosecution sector is able to operate in an independent manner. Specific examples include that prosecution decisions are not influenced by government policies or ministerial pressure, that the prosecution system has adequate resources to perform its role, and that prosecutions operate separately from the police or other investigative agencies.

6 Section 27(1) of the New Zealand Bill of Rights Act 1990 recognises the right of all persons "to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law". Section 27(2) then recognises the right of such a person to apply for "judicial review" of that determination. "Review" is used here in contradistinction to the right to "appeal" in s 25(h), which is limited to circumstances where the appellant has been convicted of an offence. The right to apply for judicial review is thus a human right.

7 See Lord Bingham "The Rule of Law" (2007) 66 CLJ 67 at 81–82.

8 Individual accountability refers to the different ways that a prosecutor can be held to account for improper conduct. For example, the prosecutor is subject to professional rules of conduct set out in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, especially r 13.12. The trial judge can give directions to the jury and, in exceptional cases, can order a stay of proceedings. An appellate court can also quash a conviction on the basis of improper prosecutorial conduct. Organisational accountability refers to the various ways a prosecution agency can be held to account for the exercise of its powers and its general administration. For example, the Attorney-General is responsible to Parliament for the overall prosecution system in New Zealand. "Performance indicators" could also be used to evaluate the effectiveness and efficiency of prosecution authorities (see Christopher Corns *Public Prosecutions in Australia: Law, Policy and Practice* (Thomson Reuters, Sydney, 2013) at [15.110]–[15.260]), although such research is rare in common law jurisdictions.

In general, prosecutorial independence and prosecutorial accountability coexist comfortably. There is no necessary conflict between the two principles. However, in some circumstances a tension can arise between the two.

Against this background, the purpose of this article is to examine the various ways that prosecution decisions can be challenged and, in particular, the extent to which prosecution decisions might be susceptible to judicial review. The focus of the article is on the decision whether or not to commence a prosecution. This category of prosecution decision-making is not only the most common but has also been the subject of the bulk of the cases discussed in this article.[9] The article examines Crown prosecutions rather than prosecutions conducted by the New Zealand Police.[10]

The article examines this topic in three parts. Part II considers the extent to which the decision whether or not to commence a criminal prosecution can be challenged pursuant to conventional criminal procedures. Part III considers the availability of tort-based civil proceedings, and Part IV outlines the extent to which these prosecution decisions are susceptible to judicial review.

It will be seen that that in New Zealand, whilst the criminal and civil courts exercise judicial restraint in interfering with prosecutorial decisions, in appropriate cases the courts do not hesitate to quash a prosecution decision or provide appropriate remedies in judicial review.

II CHALLENGING PROSECUTION DECISIONS: CRIMINAL PROCEDURE AVENUES

In *Fox v Attorney-General* the Court of Appeal stated:[11]

> The Courts traditionally have been reluctant to interfere with decisions to initiate and continue prosecutions. In part this is because of the high content of judgment and discretion in the decisions that must be reached. But perhaps even more so it also reflects constitutional sensitivities in light of the Court's own function of responsibility for conduct of criminal trials. This reluctance to interfere on the ground that the prosecution is thought to be inappropriate is widely apparent in all common law jurisdictions …

The "constitutional sensitivities" referred to in this dictum are a reference to what is commonly referred to as the separation of powers doctrine, discussed further below. Under the separation of powers doctrine, the criminal courts have no business with prosecutorial decision-making because prosecutorial decision-making is part of the executive government.

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9 The prosecution can also be held to account through various discretions of the trial judge to exclude evidence, particularly pursuant to s 30 of the Evidence Act 2006. That discretion is beyond the scope of this article.

10 The accountability of police prosecutions raises its own set of issues, particularly as the police (as an organisation) are also the criminal investigators. These issues are beyond the scope of this article.

11 *Fox v Attorney-General*, above n 3, at [31] per McGrath J. The Court also noted (at [28]–[29]) that accountability mechanisms, other than the courts, include ministerial responsibility to Parliament.

There is, however, one qualification to this general rule: a criminal court will intervene in a current prosecution where the continuation of the prosecution would constitute an abuse of the court's own processes, or the trial would otherwise be unfair to the defendant. A criminal court hearing the case has a number of powers and procedures available which, in effect, can act as a check on or review of a prosecution case. These powers and procedures can be pursuant to a statutory power or within the inherent jurisdiction of the court. The purpose of these judicial powers is not to regulate or control the prosecution, but rather to prevent the processes of the court from being abused and to ensure that the trial of the accused is fair or, more accurately, not unfair.

If charges have been filed and the case proceeds to trial, the court is seized of the matter. The trial judge has no power to refuse to hear the case just because he or she thinks the case should not have been prosecuted. If a defendant wishes to argue that the prosecution should not continue, the onus is on the defendant to establish the grounds whereby a court could terminate the proceedings. There are a number of ways in which a court can order the discontinuance of the proceedings.

A Discharge of Accused

Under s 147 of the Criminal Procedure Act 2011 (CPA) the court can dismiss a charge. Section 147 provides:

> (1) The court may dismiss a charge at any time before or during the trial, but before the defendant is found guilty or not guilty, or enters a plea of guilty.
> (2) The court may dismiss the charge on its own motion or on the application of the prosecutor or the defendant.
> (3) A decision to dismiss a charge may be made on the basis of any formal statements, any oral evidence taken in accordance with an order made under section 92, and any other evidence or information that is provided by the prosecutor or the defendant.
> (4) Without limiting subsection (1), the court may dismiss a charge if—
> (a) the prosecutor has not offered any evidence at trial; or
> (b) in relation to a charge for which the trial procedure is the Judge-alone procedure, the court is satisfied that there is no case to answer;[12] or

12 The predecessor to s 147 of the CPA was s 347 of the Crimes Act 1961. The leading cases on the scope of s 347 were *R v Flyger* [2001] 2 NZLR 721 (CA) and *Parris v Attorney-General* [2004] 1 NZLR 519 (CA). The test under s 147(4)(b) of the CPA is essentially the same as the previous "no-case" submission. If there is no evidence that the offence was committed by the defendant, the case should be dismissed. If the evidence is tenuous, then if the judge concludes that, taken at its highest, a jury properly directed could not convict on the evidence of the prosecution, the case should be dismissed. Where the strength of the evidence depends upon the jury's assessment of a witness or other matters, then the case should proceed: *R v Flyger*, above n 12, at [17].

(c) in relation to a charge to be tried, or being tried, by a jury, the Judge is satisfied that, as a matter of law, a properly directed jury could not reasonably convict the defendant.[13]

(5) A decision to dismiss a charge must be given in open court.

(6) If a charge is to be dismissed under this section the defendant is deemed to be acquitted on that charge.

(7) Nothing in this section affects the power of the court to convict and discharge any person.

Despite the general principle that courts do not determine what matters are brought by the prosecution, s 147(4)(b) and (c) of the CPA clearly give a court significant power, in effect, to veto the decision of a prosecutor to commence or continue a criminal prosecution. The purpose of this power is not to control the prosecution but rather to ensure that the trial processes of the court are not abused by cases which have no hope of resulting in a conviction. To proceed with a case that is "doomed to fail" is not only unfair to the defendant but also a waste of court resources. Section 147(4)(b) and (c) are thus designed to prevent a miscarriage of justice.

It is particularly significant that a dismissal is deemed to be an acquittal because an acquittal means the prosecution cannot subsequently file new charges in relation to the same matter because of double jeopardy principles.[14] This is a protection from prosecutorial abuse.

It is clear from s 147(4)(b) and (c) that the basis of the discharge is the insufficiency of the prosecution's evidence, as distinct from any conduct of the prosecution. A dismissal under s 147 is a clear alternative to an application for judicial review. Indeed, if there are reasonable grounds to make an application under s 147, judicial review should be out of the question.

B Stay of Proceedings

At common law, an accused person can make an application to the trial judge for a permanent stay of proceedings on the basis that the prosecution is an abuse of the processes of the court or, for

13 Compare CPA, s 232(2)(a), whereby a conviction can be quashed if "the jury's verdict was unreasonable". Section 232(2) is a retrospective evaluation of the strength of the prosecution's evidence whilst s 147(4)(c) is a prospective evaluation of the strength of the prosecution's evidence.

14 The prosecution has a right to appeal (as a question of law) a decision to dismiss a charge under s 147 of the CPA: see s 196(2). If the prosecutor "withdraws" all the charges under s 189 of the CPA, this is not equivalent to an acquittal and the prosecution can subsequently file fresh charges in relation to the same matter: see s 192(5); and *Attorney-General v New Plymouth District Court* [2002] 1 NZLR 414 (HC). A withdrawal of a charge is a procedural step. Similarly, if the Attorney-General directs a stay, that decision can be reversed without leave of the court.

some other reason, the trial would be unfair.[15] The basis of the stay is the need to protect the integrity of the judicial process itself, although any unfairness to the defendant can be a relevant consideration.

The power to order a stay is part of the inherent jurisdiction of a court and is far broader in scope than s 147. The basis of the stay is not necessarily the inadequacy of the prosecution case but rather the circumstances surrounding the investigation of the case and the filing of the charges.

In *Moevao v Department of Labour*, the Court of Appeal stated, referring to the rationale for a stay application:[16]

> The concern is with conduct on the part of a litigant in relation to the case which unchecked would strike at the public confidence in the Court's processes and so diminish the Court's ability to fulfil its functions as a Court of law.

The Court stated that a stay can be granted where either the court's processes are employed for an ulterior purpose, or the prosecution is improperly vexatious and oppressive; the focus is on misuse of the court's processes.[17] The Court expressed the general test for a stay as "whether the continuation of the prosecution is inconsistent with the recognized purposes of the administration of criminal justice and so constitutes an abuse of the process of the court".[18]

Along similar lines, in *Fox v Attorney-General* the Court stated:[19]

> Conduct amounting to abuse of process is not confined to that which will preclude a fair trial. Outside of that category it will, however, be of a kind that is so inconsistent with the purposes of criminal justice that for a Court to proceed with the prosecution on its merits would tarnish the Court's own integrity or offend the Court's sense of justice and propriety. The power of stay is not available for disciplinary purposes nor to reflect a Court's view that a prosecution should not have been brought. The hallmarks of official conduct that warrant a stay will often be bad faith or some improper motive for initiating or continuing to bring a prosecution but may also be simply a change of course by the prosecution having a prejudicial impact on an accused. Finally, to stay a prosecution, and thereby preclude the determination of the charge on its merits, is an extreme step which is to be taken only in the clearest of cases.

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15 *Fox v Attorney-General,* above n 3, at [32]. In *Fox*, the Court stated (at [72]) that a stay could be granted on the basis of a bad faith, improper motive for bringing the prosecution, or prejudicial conduct on the part of State actors. See generally David M Paciocco "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept" (1991) 15 Crim L J 315; and Don Mathias "The Duty to Prevent an Abuse of Process by Staying Criminal Proceedings" in J Bruce Robertson (ed) *Essays on Criminal Law: A Tribute to Professor Gerald Orchard* (Brookers, Wellington, 2004) 133.

16 *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA) at 482 per Richardson J.

17 These criteria for a stay are similar to the grounds for the tort of malicious prosecution. See discussion below.

18 At 482. This dictum was adopted by the High Court of Australia in *Williams v Spautz* (1992) 174 CLR 509 at 520.

19 *Fox v Attorney-General,* above n 3, at [37].

However, in both *Moevao* and *Fox*, the Court of Appeal held that the circumstances in question did not justify a stay being granted.[20] In *Fox v Attorney-General*, the Court held it was not an abuse of process for the prosecution to re-lay a number of charges which had been withdrawn by the police as part of plea negotiations. The key factor was that the accused had not been prejudiced by the re-laying of the charges.

Cases where a stay was granted include *Turipa v R*.[21] In *Turipa*, the High Court granted a stay on the basis that the laying of the charges was an abuse of the processes of the court. The accused was charged with murder and manslaughter. The jury returned verdicts of not guilty to both charges. The prosecution subsequently filed charges of wounding with intent to injure, based on the same facts as at the first trial.

A collateral attack on a criminal conviction by the initiation of civil proceedings can also constitute an abuse of process.[22]

There is some authority for the proposition that an abuse of process application can be made to the trial court where it is alleged that the decision to prosecute was based on improper political influence.[23]

An application for a stay is also a clear (and preferable) alternative to an application for judicial review.

C Decision Not to Commence a Prosecution

If the police or other prosecution authority decide not to prosecute a particular matter, there is no application that can be made by an aggrieved person to a criminal court since there are no criminal proceedings afoot. It appears there are only two possible avenues which an aggrieved person might pursue. First, the person could request a review of the decision by the relevant prosecution authority. Second, the person could consider a private prosecution. However, there is no statutory right for a

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20 Other cases where a stay was refused include *R v Chase* [2013] NZHC 1963 at [58]–[60]; *R v Antonievic* [2013] NZCA 483, [2013] 3 NZLR 806; *R v The Queen* [1996] 2 NZLR 111 (HC) at [112]; *Wilson v R* [2015] NZSC 71 (application for leave); and *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705 at [93].

21 *Turipa v R* [2004] 2 NZLR 706 (HC). Undue delay could be a basis for granting a stay: see *R v The Queen*, above n 20.

22 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL) at 541 per Lord Diplock. An example is where a question determined in a criminal proceeding is raised again as the ground of a civil action.

23 See *Sharma v Brown-Antoine* [2006] UKPC 57, [2007] 1 WLR 780, where the Privy Council dismissed an appeal by the former Chief Justice of Trinidad and Tobago against the decision of the Court of Appeal of Trinidad and Tobago to set aside a grant of judicial review. The Deputy Director of Public Prosecutions of Trinidad and Tobago had charged the appellant with attempting to influence the outcome of a trial. The Privy Council held that the appropriate forum was the trial court.

complainant or other person to seek a review, or formal obligation on any prosecution authority to conduct a review, of a decision not to commence a prosecution.

However, in sexual violence cases, if the police have responsibility for the matter, the police must advise the complainant that they may seek a review of the decision not to prosecute and how long they may take to consider this option.[24] If a Crown solicitor has responsibility for the matter and decides not to prosecute, the complainant must be told that they may seek a review of the decision not to prosecute and how long they may take to consider this option.[25] It is up to the police or Crown solicitor respectively as to how the review is to be conducted.[26] This review right is important, but it is not enshrined in statute.

The victim has a right to be advised of the reasons why a prosecution was not commenced, but even that information can be withheld on the ground that release of the information could harm the investigation or the criminal proceedings.[27]

An aggrieved complainant could also lodge a complaint with the Independent Police Complaints Authority if the police refuse to explain the reasons for a refusal to prosecute or to review the decision.

By comparison, in the United Kingdom, a Victims' Right to Review Scheme (VRRS) was introduced in 2013. Under this scheme the complainant has a right to have the decision not to commence a prosecution reviewed within the Crown Prosecution Service (CPS). Further, judicial review is not available until a review under the VRRS is completed.[28]

D Private Prosecution

If the police or a Crown prosecutor refuse to prosecute a matter, then any person has a right to commence a criminal proceeding.[29] A criminal proceeding is commenced by the filing of a charge in the District Court.[30] In respect of a private prosecution, a criminal proceeding can only be conducted against a defendant by (a) the person who commenced the proceeding or (b) a lawyer representing the

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24 Crown Law *Solicitor-General's Prosecution Guidelines*, above n 1, at [4.2.2].

25 At [4.4.2]. If a charge is to be amended or reduced, there is no requirement on the police or the Crown solicitor to advise the complainant of the reasons; this is a matter for the discretion of the police or Crown solicitor: at [4.8].

26 At [4.5]. The complainant must also be advised of the process to be adopted and the likely timeframe.

27 Ministry of Justice *Victims Code* (September 2016) at pt 2 ("Right 2").

28 See discussion in *L v DPP* [2013] EWHC 1752 (Admin). The Court stated that judicial review should not be conducted until the Crown Prosecution Service [CPS] had completed its review under the Victims' Right to Review Scheme, and if a CPS review had been completed, then the scope for a successful judicial review would be very small indeed.

29 CPA, s 15.

30 Section 14(1).

person who commenced the proceeding.[31] However, where a jury trial is to be conducted, the prosecution must be conducted by a lawyer.[32]

The right to commence and conduct a private prosecution is an important constitutional right, but there is always the danger that the right may be abused by a vexatious litigant who seeks vengeance rather than justice. The issue of controlling or holding the private prosecutor to account therefore arises. This is achieved primarily by the proposed prosecutor having to satisfy the court of statutory prerequisites (prior to filing a charge) which do not apply to public prosecutors. These statutory prerequisites mean that the aggrieved person does not have a right to prosecute but rather has a right to apply to the court for leave to prosecute.

Thus, if a person who is proposing to commence a private prosecution seeks to file a charging document, the registrar may: (a) accept the document for filing; or (b) refer the matter to a District Court judge for a direction that the person file formal statements and any exhibits referred to in the statements which would constitute the evidence in the case.[33]

If the judge gives a direction under s 26(1)(b) of the CPA, and the applicant files formal statements and exhibits, then the registrar must forward those to a judge who then decides whether or not to permit filing of the charging document.[34] The judge will refuse leave to file the charge if he or she considers the evidence is "insufficient to justify a trial" or the proposed prosecution is "otherwise an abuse of process".[35] Significantly, the judge can direct that the proposed prosecution is an abuse of process without any application for such a direction.

The effect of the above statutory provisions is that the so-called right to private prosecution is heavily qualified by the statutory prerequisites in s 26 for all private prosecutions and, in respect of jury trials, the requirement that only a lawyer can conduct the prosecution. Further restrictions can be found in the Crown Prosecution Regulations 2013. For example, if the defendant elects to have a jury

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31 Section 10(1)(a) and (b).

32 Section 10(3). This rule applies to a category 3 offence when the case has been adjourned to a trial callover and to category 4 offences when the proceeding has been transferred to the High Court under s 36: see s 10(3).

33 Section 26(1).

34 Section 26(2).

35 Section 26(3). The criteria for deciding whether to grant leave to prosecute is more liberal than the test set out in the *Solicitor-General's Prosecution Guidelines*, which requires that the prosecution also be "in the public interest": see Crown Law *Solicitor-General's Prosecution Guidelines*, above n 1, at [5.5]. This is perhaps the quintessential difference between public and private prosecutions. Private prosecutions do not concern the public interest, except to the extent the prosecution is an abuse of process. The registrar then notifies the applicant and retains a copy of the proposed charging document.

trial, the matter is transferred to the High Court, or if the Solicitor-General directs that the matter become a Crown prosecution, then the matter must become a Crown prosecution.[36]

Assuming the matter does not become a Crown prosecution, then if the private prosecutor cannot afford to engage the services of a (competent) private prosecutor, the right to prosecute is only symbolic.[37]

Nevertheless, if the private prosecution succeeds, this could be described as holding the Crown prosecution authorities to account for their refusal to prosecute.

III TORT-BASED PROCEEDINGS

The available tort-based proceedings are premised on a prosecution having commenced or being completed. The first possibility is the tort of malicious prosecution.

A Malicious Prosecution

Malicious prosecution is a well established tort in all common law jurisdictions.[38] To succeed, the plaintiff must establish five elements:

(a) that the prosecution of the plaintiff was initiated by the defendant;[39]

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36 Crown Prosecution Regulations 2013, reg 4(1)(c) and (e).

37 Under s 176(1) of the CPA, the Attorney-General has the power to stay any proceedings where a charge has been filed.

38 For a detailed overview of the tort of malicious prosecution see Stephen Todd and others *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at ch 18.2.

39 *Commercial Union Assurance v Lamont* [1989] 3 NZLR 187 (CA) at 196; *A v State of New South Wales* [2007] HCA 10, (2007) 230 CLR 500; *Amin v Bannerjee* [1947] AC 322 (PC) at 330; John G Fleming *The Law of Torts* (9th ed, Law Book Co, Sydney, 1998) at 673; and *Skrijel v Mengler* [2003] VSC 270. This element has been described as the defendant "procur[ing]" the investigation (*Commercial Union Assurance v Lamont* at 196), "instigat[ing]" the investigation (*Fanzelow v Kerr* (1896) 14 NZLR 660 (CA) at 664 per Prendergast CJ), "setting the law in motion" or being "actively instrumental" in "setting the law in motion" (*Danby v Beardsley* (1880) 43 LT 603 (Comm Pleas); and *Mutton v Baker* [2014] VSCA 43). It is insufficient that the defendant merely provided information to the police: *Stanizzo v Fregnan* [2021] NSWCA 195 at [224]–[225]. A distinction is made between the person formally filing the charge (for example, a police officer) and the person responsible for the decision of the police to file a charge: *Commercial Union Assurance v Lamont* at 193; and *Stanizzo v Fregnan* at [224]–[225]. A criminal prosecution can commence bona fides but if, during the proceedings, the prosecutor becomes aware of the innocence of the defendant, but nevertheless continues with the prosecution, the tort may be committed: *Fitzjohn v Mackinder* (1861) 9 CB (NS) 505 (Comm Pleas) at 530. If the defendant made a false statement to the police, then it is easier to infer malice and lack of probable cause.

(b) that the defendant was motivated by malice in bringing or maintaining the prosecution;[40]
(c) that the prosecution was brought without reasonable and probable cause;[41]
(d) that the prosecution was terminated in a way that did not incriminate the plaintiff;[42] and
(e) that the plaintiff suffered some form of damage.[43]

These elements of the tort are cumulative and thus the plaintiff must establish all of them. Each of these five elements can raise difficult questions of law and fact. To succeed, the plaintiff is not required to prove his or her innocence.[44]

The basis of the tort of malicious prosecution is the need to protect the processes of the courts from abuse by people wrongfully "setting the law in motion".[45] In deciding if the tort is made out, the court must balance the need to protect citizens from being harassed by unjustifiable litigation with the need to encourage citizens to aid in the investigation and enforcement of the criminal law.[46]

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40 *Castrique v Behrens* (1861) 3 El & El 709, 121 ER 608; and *Commercial Union Assurance v Lamont* above n 39, at 192. Where a jury is used, the question of malice is a question of fact and in a judge-alone trial the question of malice is a question of law: *Little v Law Institute of Victoria (No 3)* [1990] VR 257 (SC) at 265; and compare *Mitchell v Jenkins* (1833) 5 B & Ad 588, 110 ER 908 (KB). "To constitute malice the dominant purpose must be a purpose other than the proper invocation of the criminal law": *A v State of New South Wales*, above n 39, at [91]. The defendant must have had an improper motive such as ill-will or spite.

41 *Commercial Union Assurance v Lamont*, above n 39, at 189; and *Herniman v Smith* [1938] AC 305 (HL). An objective and subjective test is involved: *A v New South Wales*, above n 39, at [58].

42 *Van Heeran v Cooper* [1999] 1 NZLR 731 (CA). In other common law jurisdictions this element is described as the proceedings terminating in favour of the plaintiff. See for example *A v New South Wales*, above n 39, at 502–503; *Beckett v New South Wales* [2013] HCA 17, (2013) 248 CLR 432 at [4]; *Stanizzo v Fregnan* above n 39, at [163]; and *Davis v Gell* (1924) 35 CLR 275 at 282. The usual manner of proceedings terminating in favour of the plaintiff is an acquittal or dismissal of the charge, but other ways include the entry of a nolle prosequi or the refusal of a magistrate to commit the accused for trial. The quashing of a conviction by an appeal court is clearly sufficient: *Mellor v Baddeley* (1834) 2 CR & M 675, 149 ER 932 (Exch); and *Herniman v Smith*, above n 41.

43 *Slaveski v State of Victoria* [2010] VSC 441. If the plaintiff was imprisoned, then it is unnecessary to prove damages: *Berry v British Transport Commission* [1961] 1 QB 149 (QB) at 161. Damages can relate to injury to reputation, loss of liberty and pecuniary loss in defending the matter: *Savile v Roberts* (1698) 1 Ld Raym 374, 91 ER 1147 (KB); and *Kearns v Milner* [2014] NZHC 2752, [2014] NZAR 1494.

44 *Van Heeran v Cooper* above n 42, at 736–737; *Herniman* v *Smith*, above n 41; and *Beckett v New South Wales* above n 42, at 437.

45 *Amin v Bannerjee*, above n 39; and *Commercial Union Assurance v Lamont*, above n 39, at 192. See Gilbert Kodilinye "Setting in Motion Malicious Prosecution: The Commonwealth Experience" (1987) 36 ICLQ 157.

46 John G Fleming *The Law of Torts* (7th ed, Law Book Co, Sydney, 1987) at 579.

Malicious prosecution is available in respect of an unjustified criminal prosecution but also in respect of civil proceedings.[47] The tort may be available where the accused person has been acquitted or found not guilty, or where the proceedings have otherwise been discontinued.

The defendant will be the person who was responsible for the criminal prosecution. This could be the principal investigator, a Crown prosecutor or other public prosecutor, or, in the case of a private prosecution, the individual who filed the charge.[48] The defendant could also be a complainant who makes a false statement to the police and gives false evidence at trial. The tort of malicious prosecution cannot succeed unless the plaintiff can show that the defendant was motivated by malice and there were no reasonable grounds for the criminal prosecution. As a consequence of these very stringent requirements, an action in malicious prosecution will rarely be commenced and even more rarely succeed. Nevertheless, it remains a potential prosecutorial accountability mechanism.

B Misfeasance in Public Office

The tort of misfeasance in public office is based on a public officer or official abusing their power in an intentional or reckless manner.[49] In summary, the elements of the tort are:

(a) the plaintiff must have standing to sue;
(b) the defendant must be a public officer;[50]
(c) the defendant must have acted (or omitted to act) in purported exercise of their public power unlawfully either:
    (i) intentionally; or
    (ii) recklessly;[51] and
(d) the defendant must have so acted either:

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47 For example, malicious bankruptcy and liquidation proceedings, malicious arrest, abuse of process of the court, malicious execution against property, and malicious civil proceedings. The tort of malicious prosecution is available for a natural person and artificial persons: *Chapel Road Pty Ltd v Australian Securities and Investment Commission* [2007] NSWSC 975, (2007) Aust Torts Reports 81-912 at [18].

48 Criminal proceedings must have been commenced. This is normally satisfied by the filing of a criminal charge. The mere fact of arrest is insufficient.

49 For a detailed overview of the tort of misfeasance in public office see Todd, above n 38, at ch 19.2.

50 This includes a police officer: *Garrett v Attorney-General* [1997] 2 NZLR 332 (CA); and *Niao v Attorney-General* (1998) 5 HRNZ 269 (HC). A public prosecution agency is also included: *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335 (CA) at 347. An independent barrister briefed to prosecute an accused is not included: *Cannon v Tahche* [2002] VSCA 84, (2002) 5 VR 317. It seems clear that a Crown prosecutor may also be included: *Currie v Clayton* [2014] NZCA 511, [2015] 2 NZLR 195 at [40]. In *Currie v Clayton*, the Court of Appeal held that the High Court was in error to strike out the plaintiff's claim of misfeasance in public office against a Crown prosecutor based on the alleged failure of the prosecutor to properly disclose information to the defendant.

51 *Calveley v Chief Constable of Merseyside Police* [1989] AC 1228 (HC) at 1240.

(i) with malice towards the plaintiff (targeted malice); or
(ii) knowing his or her conduct was likely to harm the plaintiff; or
(iii) with reckless indifference as to whether the plaintiff would be harmed;[52] and

(e) the plaintiff must have suffered loss caused by the actions of the defendant.

Given the strictness of the elements of this tort, it will be exceedingly rare for a plaintiff to succeed with a claim of misfeasance in public office against a public prosecutor.

C Negligent Prosecution

There is some authority for the proposition that, in New Zealand, a civil action in negligence might, in appropriate circumstances, lie against those responsible for the prosecution. In *King v Attorney-General*, Associate Judge Smith was not prepared to strike out an action in negligence brought against the New Zealand Police for alleged incompetent investigation/prosecution of the plaintiff, at least from the point in time when charges had been filed.[53] King had been charged with the murder of his neighbour, X. The crucial evidence against King was that of a co-worker. Following a mistrial, and after the commencement of a second trial, the Crown did not object to King being discharged. The Crown had by then considered the evidence of the co-worker to be unreliable. It subsequently emerged that the Crown had also failed to advise King that DNA tests had shown there was no DNA of his to connect him with the murder.

King unsuccessfully sought compensation from the State and commenced a civil action in negligence against the police.[54] Associate Judge Smith made a crucial distinction between liability for events up to the filing of charges, and events after the filing of charges. His Honour held an action in negligence was not recognised in respect of events up to the filing of charges.[55] However, there was no basis to strike out the claim for the period after charges had been filed and the Court was seized of the matter.[56] Associate Judge Smith did not decide that negligence had been established; that was

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52 *Currie v Clayton*, above n 50, at [40]. Todd describes this element as requiring that the police officer have been aware that his or her actions were unlawful and likely to injure the plaintiff. This can be established by showing either (a) that the officer intended to injure the plaintiff or (b) that the officer knew he or she had no power to do what was done and that the action was likely to injure the plaintiff: Todd, above n 38, at ch 19.2.03.

53 *King v Attorney-General* [2017] NZHC 1696, [2017] 3 NZLR 556.

54 The basis of the claim was that the police decided to prosecute King when there was insufficient evidence. Further, the prosecution had failed to advise King of the exculpatory DNA evidence. The distinction between negligent investigation and negligent prosecution becomes blurred, although clearly the prosecution had a basic duty to review all the available evidence before continuing with the prosecution. The claim for compensation failed because King had not been convicted or imprisoned for the offence.

55 To recognise such an action would undermine the tort of misfeasance in public office because the plaintiff would not have to establish malice. This would be against public policy: at [87] and [90].

56 At [136]–[137].

a matter for the trial where all relevant evidence could be adduced. Associate Judge Smith held there were no public policy reasons why negligence should not be recognised as a possible cause of action in the circumstances of this case.

IV JUDICIAL REVIEW

A What is Judicial Review?

Judicial review is a civil proceeding in the High Court to determine the legality or lawfulness of a decision made by an inferior court or public authority.[57] The prerequisites and procedure for judicial review are set out in the Judicial Review Procedure Act 2016 (JRPA) and the High Court Rules 2016.[58]

The right to apply for judicial review is found in the JRPA and the common law. Section 27(2) of the New Zealand Bill of Rights Act 1990 recognises the right to apply for judicial review but does not create an independent right of review.[59]

Judicial review is not an appeal. Rather, the court is exercising original jurisdiction as distinct from appellate jurisdiction.[60] Judicial review is essentially the exercise of a supervisory jurisdiction by the High Court over inferior courts and public administrative bodies, including public prosecution bodies. The purpose of judicial review is to ensure that courts and public bodies exercising public functions are acting lawfully and within their powers. Whereas a criminal appeal is concerned with the merits or substance of the decision under challenge (for example, a conviction), judicial review is concerned with the legality or lawfulness of a decision and the procedures that were followed in arriving at that decision.[61] The focus is on determining whether there was an improper use of public powers and duties.

Judicial review is based upon principles of administrative law and, in theory, all of the grounds for challenging a decision under administrative law principles are open.[62] In practice, the chief grounds are: (a) error of law; (b) misdirection on applicable law; (c) taking into account an irrelevant

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57 For a general overview of judicial review see Matthew Smith *The New Zealand Judicial Review Handbook* (Thomson Reuters, Wellington, 2016); and Chris Corns and Douglas Ewen *Criminal Appeals and Reviews in New Zealand* (Thomson Reuters, Wellington, 2019) at ch 9 and 10.

58 The Judicature Amendment Act 1972 previously governed applications for judicial review.

59 *Young v Police* [2007] 2 NZLR 382 (HC) at [34] and [38]. Section 27(2) of the New Zealand Bill of Rights Act would not enable review of decisions of the High Court or the Court of Appeal: at [35].

60 The person applying for judicial review is the applicant and the person or body subject to the application is the respondent: Judicial Review Procedure Act 2016 [JRPA], s 8.

61 In this sense, judicial review is similar to a criminal appeal of a discretionary decision.

62 These are often referred to as "Wednesbury" unreasonableness, referring to *Associated Provincial Picture Houses Ltd v Wednesbury* [1948] 1 KB 223 (CA).

consideration and failing to take into account a relevant consideration; (d) errors in the deliberative process (for example, breach of natural justice); (e) acting unreasonably so that no reasonable person or body in the position of the defendant could have arrived at the decision; and (f) bias.[63] The remedies available are: (a) an order in the nature of the traditional writ of mandamus, prohibition or certiorari; or (b) a declaration or an injunction.[64] It is also not unusual for the court to refer the matter back to the original decision-maker for the matter to be reconsidered in accordance with the correct law.

Judicial review can be utilised by the defence and by the prosecution. In general, judicial review will only be available in respect of decisions which cannot be the subject of applications to the criminal court or appeals from that court. The *Solicitor-General's Prosecution Guidelines* regarding when a criminal appeal should be commenced will guide the decision as to when a judicial review should be commenced.[65] An application for judicial review by the prosecution requires the consent of the Solicitor-General.[66]

B Public Prosecution Decisions Are Susceptible to Judicial Review

In New Zealand, public prosecution decisions are susceptible to judicial review because such decisions involve the exercise of a "statutory power". Under s 5(1) of the JRPA, a statutory power means a power or right to do anything that is specified in s 5(2) and that is conferred by or under any Act or the constitution of any body corporate. Section 5(2) includes "exercis[ing] a statutory power of decision". A statutory power of decision is a power or right conferred by or under any Act, or under the constitution of any body corporate, deciding, prescribing or affecting the rights, powers, privileges, duties or liabilities of any person.[67] Decisions made by public prosecution authorities satisfy these criteria.

In comparison, the general approach taken in Australia is that prosecution decisions are not susceptible to judicial review. In several key cases, the High Court of Australia has declared that prosecution decisions are not susceptible to judicial review. In *Maxwell v The Queen* the High Court stated:[68]

> It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute, to enter a nolle prosequi, to proceed ex officio, whether or not to present evidence and, which is usually an aspect

63 Corns and Ewen, above n 57, at ch 9.

64 JRPA, s 16. Remedies are largely a matter for the court's discretion.

65 Crown Law *Solicitor-General's Prosecution Guidelines*, above n 1, at [26.16].

66 At [26.14].

67 JRPA, s 4.

68 *Maxwell v The Queen* (1986) 184 CLR 501 at 534. See also *Barton v The Queen* (1980) 147 CLR 75 at 95–96; and *Maya v Director of Public Prosecutions* [2019] VSCA 117 at [44].

of one or other of those decisions, decisions as to the particular charges to be laid or prosecuted. 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.

C Judicial Restraint

Whilst prosecution decisions are in general justiciable, the circumstances in which such a review will be available are limited, and in all common law jurisdictions, it will only be in exceptional cases that judicial review of a prosecution decision will be allowed, regardless of the type of decision involved.[69] It was seen from the above discussion that the criminal courts are reluctant to interfere or intervene in prosecution decisions and the same judicial restraint is found in civil courts, although for slightly different reasons.

In *Osborne v Worksafe New Zealand*, the Court of Appeal set out the following specific reasons for judicial restraint in judicial review of prosecution decisions:[70]

(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.

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69 Early cases such as *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC) at [64] and [69] suggested that prosecution decisions were not susceptible to judicial review except if the applicant could show bad faith, collateral purpose or overriding policy. In *Polynesian Spa Ltd v Osborne,* Randerson J set out the following reasons why the courts are extremely reluctant to interfere with prosecution decisions: (a) constitutional boundaries; (b) criminal proceedings should not be subject to collateral challenge; (c) high content of judgement and discretion; (d) power of courts to stay proceedings as abuse of process; (e) the conclusion of a prosecution authority is simply an opinion and capable of being challenged; and (f) further material can be disclosed by the prosecution at trial: at [61]–[62]. In New Zealand such a limited approach has now been rejected but the general principle remains that judicial review will only be available in respect of prosecution decisions in rare and exceptional cases. In the United Kingdom a similar judicial restraint exists. See for example *R (on the application of Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin) at [49]; *Sharma v Browne-Antoine*, above n 23, at [14(5)]; and *R (Bermingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2007] QB 727 at [63].

70 *Osborne v Worksafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513 at [34]. These reasons have been identified by appellate courts in most common law jurisdictions.

In *Osborne v Worksafe New Zealand*, the Court of Appeal also stated:[71]

> As will become apparent in the discussion that follows, the exercise of prosecutorial discretion is justiciable. The Courts are prepared to review Executive action of that nature. But the intensity of review, and availability of relief, will be constrained for the reasons set out in the preceding paragraph.

There are also evidentiary limitations with judicial review compared to challenging a prosecution decision at trial, pre-trial or post-trial.[72]

Because of the significance of the six reasons for judicial restraint set out in *Osborne v Worksafe New Zealand*, it is useful to briefly explore those reasons a little further.

1 Constitutional boundaries

It is a fundamental feature of all common law jurisdictions that, as a general principle, there exists a clear separation between the executive, judicial and legislative branches of government, otherwise known as the separation of powers doctrine. The judiciary, for example, should not intrude into executive or legislative functions and the executive should not intrude into judicial functions.[73] A useful example is the distinction between the power of the Attorney-General to direct that a criminal prosecution be stayed[74] and the power of a judge to order a stay of proceedings.[75] The former power is purely a matter for the Attorney-General (as prosecutor) and the latter is a matter purely for the trial judge to decide.

2 High content of judgement

In most, if not all, prosecution decisions, the prosecutor is exercising an individual discretion and is required to take into account a large number of different, and often competing, considerations. Those considerations can include broad policy factors. An example is the apparently simple decision of whether or not to commence a prosecution. Part 5 of the *Solicitor-General's Prosecution Guidelines*

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71 At [35]. In the earlier decision of *Greymouth Petroleum Ltd v Solicitor-General* [2010] 2 NZLR 567 (HC), the High Court stated (at [37] and [64] per Gendall J) that a decision to present an indictment is reviewable but only in exceptional circumstances such as bad faith, collateral purpose or political motivation.

72 Because judicial review is not a merits-based review but rather a review of the legality of the proceedings under challenge, evidence is usually by way of affidavit, although the court can hear viva voce evidence.

73 The separation of powers doctrine is manifested in formal rules and principles, and in informal ways such as the unwritten convention that judges should not engage in political attacks on executive government policies (at least in their judicial capacity) and that government ministers ought not attack particular judicial decisions.

74 The power of the Attorney-General to direct a stay of proceedings is recognised in s 176(1) of the CPA. Section 176 does not create the power; the source of the power is the prerogative powers of the Attorney-General at common law: *Rewa v Attorney-General of New Zealand*, above n 4, at [20]. The power to enter a stay includes the power to "lift" the stay and recommence the criminal proceedings: at [25] and [31].

75 A judge can order a stay of proceedings as part of the inherent jurisdiction of a court: *Moevao v Department of Labou*r, above n 16; and *Fox v Attorney-General*, above n 3, at 72.

sets out a plethora of factors which must be considered, including the "public interest test". Douglas Ewen refers to the "institutional special knowledge of the subject matter",[76] a description which is apt for prosecutorial decision-makers. Courts do not like to interfere in such broad discretionary decision-making unless clear legal error can be shown. It is not the role of the courts to second guess the discretionary decisions of prosecutors.

In criminal appeals, a distinction is made between an appeal from the exercise of a discretion by the original decision-maker and an appeal from a decision not based on the exercise of a discretion but rather based on the application of a specific legal principle or test (an "evaluative decision"). A different approach is taken by the appellate court depending upon the nature of the decision under appeal. An appeal of a discretionary decision is a limited type of review – not merits-based and not a rehearing. The appellant must be able to point to a specific legal error.[77] On an appeal from an evaluative decision, the appeal court can engage in a broader review of the merits and can rehear the matter. The appeal court can form its own view on the issues.[78] In *Taipeti v R*, the Court of Appeal decided that bail decisions are not discretionary in nature and hence an appeal from a bail decision engages the approach set out in *Austin, Nichols & Co Inc v Stichting Lodestar.*[79]

3 Undesirability of collateral attack

There is a very strong line of authority for the view that challenges to the filing of a charge and the commencement of proceedings should be made to the trial court, not to the civil courts by way of judicial review.[80] Even if those challenges (pre-trial or at trial) fail, and the defendant is convicted, it is also possible to appeal the conviction on the basis of an error of law. It would only be in very exceptional circumstances that judicial review would be the appropriate avenue where criminal proceedings have been commenced (for example, if the court lacked jurisdiction to hear the matter). Judicial review prolongs criminal proceedings and is disruptive for all parties.[81] In Australia, legislation has been passed prohibiting any judicial review of a decision by the Commonwealth Director of Public Prosecutions to prosecute a person, and prohibiting judicial review of any "related criminal justice decision".[82]

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76 Corns and Ewen, above n 57, at 717.

77 *May v May* (1982) 1 NZFLR 165 (CA) at 169–170; and *Taipeti v R*, above n 2, at [64].

78 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5]; and *Taipeti v R*, above n 2, at [41].

79 *Taipeti v R*, above n 2, at [64]; and *Austin, Nichols & Co Inc v Stichting Lodestar*, above n 78, at [5].

80 *Polynesian Spa Ltd v Osborne*, above n 69, at [68].

81 *DGN v Auckland District Court* [2015] NZHC 3338, [2018] NZAR 137 at [33].

82 Administrative Decisions (Judicial Review) Act 1977 (Cth), s 9A(1) and sch 1 para (xa).

4 Other accountability mechanisms

In *Osborne v Worksafe New Zealand*, the Court of Appeal referred to "other mechanisms" for prosecution accountability.[83] This is a broad category, but the Court gave the example of the "responsible minister" in Parliament.[84] Because of the importance of the role of the Crown law officers in the overall system of public prosecutions, this sub-topic requires a little more discussion.

The two law officers of the Crown are the Attorney-General and the Solicitor-General. Together, the Attorney-General and the Solicitor-General are at the apex of the constitutional arrangement for the administration of criminal justice, including criminal prosecutions. The Attorney-General is the first, or principal, legal officer of the Crown in New Zealand.[85] The Attorney-General is responsible to Parliament for the government's administration of the law (in conjunction with the Solicitor-General), including criminal prosecutions. This involves providing advice to government and appearing in the courts on behalf of the Crown.[86] The Attorney-General is empowered to stay a prosecution by entering a nolle prosequi and to determine a claim for public interest immunity.[87] The consent of the Attorney-General is also required for some prosecutions.[88]

The Solicitor-General is the second law officer of the Crown.[89] The Solicitor-General is a government official (as distinct from a Minister) and is the Chief Executive of the Crown Law Office.[90] In practice, the Solicitor-General is the government's chief legal advisor and advocate in courts. The Solicitor-General appears as senior counsel for the most important litigation and appeals. The Solicitor-General is directly responsible for the Crown's conduct of criminal prosecutions, including responsibility for jury trials and representing the Crown on appeals and reviews.[91] This means the Solicitor-General will be directly engaged with criminal prosecution practices. The

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83 *Osborne v Worksafe New Zealand*, above n 70, at [34].

84 At [34].

85 The Attorney-General is appointed under warrant by the Governor-General.

86 The Crown is often the defendant in judicial review applications involving criminal matters. The Attorney-General is the appropriate defendant in an action based on breach of the New Zealand Bill of Rights Act: *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.

87 Other responsibilities of the Attorney-General include advising Parliament if a Bill appears to be inconsistent with the New Zealand Bill of Rights Act: New Zealand Bill of Rights Act, s 7.

88 See Crown Law *Statutory Offences Requiring the Consent of the Attorney-General* (1 July 2013).

89 The Solicitor-General is appointed under warrant by the Governor-General pursuant to the royal prerogative.

90 For prosecutions by government agencies to which the Cabinet Office Circular "Cabinet Directions for the Conduct of Crown Legal Business 2016" (30 March 2016) CO 16(2) applies, the Solicitor-General retains responsibility and may direct the manner in which those services are provided.

91 See John McGrath "Principles for Sharing Law Officer Power: The Role of the New Zealand Solicitor-General" (1998) 18 NZULR 197.

Solicitor-General can exercise virtually all the powers of the Attorney-General. Section 9A of the Constitution Act 1986 states, "The Solicitor-General may perform a function or duty imposed, or exercise a power conferred, on the Attorney-General."[92]

The CPA devotes sub-pt 2 of pt 5 (ss 185–193) to setting out the Solicitor-General's responsibility for oversight and conduct of criminal prosecutions. Section 185(1) of the CPA provides, "The Solicitor-General is responsible for maintaining general oversight of the conduct of public prosecutions."[93] In performing this role the Solicitor-General may:[94]

(a) maintain guidelines for the conduct of public prosecutions; and
(b) provide general advice and guidance to agencies that conduct public prosecutions on the conduct of those prosecutions.

D The Decision to Prosecute

Because of the available avenues to challenge prosecution decisions in the criminal trial process, it will only be in very limited circumstances that a prosecution decision to commence a prosecution might be susceptible to judicial review. However, it is possible.[95] The applicant would have to demonstrate that the decision to prosecute was in some way unlawful or an abuse of power.[96] Dishonesty or male fides would qualify.

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92 The Governor-General can appoint a barrister or solicitor of at least seven years' practice to act in place of the Solicitor-General if the Solicitor-General is absent through incapacitation or otherwise: Constitution Act 1986, s 9B. The Solicitor-General can delegate any of the functions of the Attorney-General to a Deputy Solicitor-General, with the consent of the Attorney-General: s 9C.

93 One example of how the Solicitor-General oversees the prosecution system is the requirement in s 246(2) of the CPA that the consent of the Solicitor-General be obtained for all prosecution appeals against sentences imposed under pt 6, sub-pt 4 of the CPA. This enables the Solicitor-General to keep track of the general approach taken in respect of prosecution appeals. The consent of the Solicitor-General is also required for the police to commence an appeal or a judicial review: Cabinet Office Circular, above n 90, at [29]; and New Zealand Police Prosecution Service *Statement of Policy and Practice* (February 2017) at 19. The Solicitor-General can also refer a question of law to an appeal court: CPA, s 313. The Solicitor-General can also apply for the retrial (that is, re-prosecution) of a person acquitted: ss 151–156. Applications for the retrial of an acquitted person raise their own set of issues and practices for police and prosecutors. These are beyond the scope of this article.

94 Section 185(2).

95 *Osborne v Worksafe New Zealand*, above n 70, at [36]. The Court stated that "a stronger case for restraint exists where the prosecutorial decision is *to* prosecute". The Court also stated that there is no jurisdictional distinction between a decision to prosecute and a decision not to prosecute: at [38]. This suggests that there must be circumstances where a decision to prosecute is susceptible to judicial review. In the United Kingdom, judicial review will be extremely rare where a criminal prosecution has commenced, and even rarer in Australia.

96 *A v R* [2012] EWCA Crim 434; and *Regina v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326 (HL) at [371]–[372], [376] and [390].

In *Rewa v Attorney-General of New Zealand*, Venning J in the High Court had to determine whether the decision of the Attorney-General to "reverse" or "lift" a stay of proceedings was susceptible to judicial review.[97] The lifting of the stay amounted to the "recommencement" of a charge of murder. Venning J found that the power of the Attorney-General is an exercise of the Attorney-General's prerogative powers. Whilst s 176(1) of the CPA recognises the power of the Attorney-General to stay proceedings, s 176 is not the source of the power. The source of the power is the common law.[98] At common law, the power to stay proceedings includes a power to lift the stay without any need to obtain the leave of the court.[99] Section 176 is silent on this issue, but Venning J held that there is no law which requires the Attorney-General to obtain the leave of the court to lift a stay.[100]

The next issue was whether the decision to lift a stay was susceptible to judicial review. Venning J noted that there were conflicting authorities on whether the power to stay proceedings was justiciable and stated:[101]

> There is a good argument that if, as seems accepted, the Attorney-General's power to grant a stay is reviewable, the decision to lift a stay should be reviewable as well. In any event, for present purposes the Crown accepts the decision is justiciable and reviewable.

Venning J then considered the reasons given by the Attorney-General to lift the stay[102] and concluded:[103] (a) there was no evidence of bad faith on the part of the Attorney-General; (b) there

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97 *Rewa v Attorney-General of New Zealand*, above n 4. In 1996, Rewa was charged with the murder of SB. The key Crown evidence was DNA evidence linking Rewa to the body of the deceased. In 1998, the jury failed to reach a verdict on the murder charge. Later in 1998, a second jury failed to reach a verdict on the same charge. In late 1998, the Solicitor-General entered a stay in respect of the murder charge. Teina Pora was convicted of the murder of SB in 2000 but, following an appeal to the Privy Council, that conviction was quashed by the Privy Council in 2015 without an order for a retrial: see *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277. In 2017, the police wrote to Rewa advising that an application was to be made to the High Court seeking to retry Rewa on the charge of murder of SB. Later in 2017, the Solicitor-General directed that the original stay be reversed. A trial date was set and the matter was called before the High Court for timetabling. At this point Rewa commenced a judicial review of the decision to reverse the stay.

98 *Rewa v Attorney-General of New Zealand*, above n 4, at [20]. In the United Kingdom, the power of the Attorney-General to stay proceedings remains a common law power: at [21].

99 At [25].

100 At [31]. The effect of a stay is simply to terminate the existing proceedings without any adjudication of guilt or innocence. This does not preclude the prosecution from recommencing with the original charges.

101 At [39]. At common law the decision to stay may not be reviewable, but it is significant that in *R v Barlow* [1996] 2 NZLR 116 (HC) the Court referred (at [507]) to s 27 of the New Zealand Bill of Rights Act as a relevant consideration.

102 *Rewa v Attorney-General of New Zealand*, above n 4, at [47].

103 At [48]–[53].

was no evidence of unfairness to Rewa;[104] and (c) the decision to lift the stay was not inconsistent with the letter sent by the police to Rewa.[105] Venning J held that the application for judicial review could not succeed.[106] The decision to recommence the prosecution was beyond challenge.

In *R v Crown Prosecution Service*, a Crown prosecutor decided not to prosecute the defendant for rape.[107] On review, a second Crown prosecutor decided to overrule the first decision and decided a prosecution was justified.[108] The defendant then commenced an application for judicial review of the decision to prosecute him.[109] The argument of the defendant was that he was denied natural justice in not being able to make submissions to the reviewing prosecutor, and that the decision to prosecute was unreasonable.[110] The Divisional Court dismissed the application on the basis that the reviewing prosecutor had no duty to consider any submissions of the defendant and the decision to prosecute was reasonable because there was sufficient evidence to justify placing the defendant on trial.[111]

E The Decision Not to Prosecute

The bulk of the cases dealing with judicial review of prosecution decisions involves a decision not to prosecute rather than a decision to prosecute. The leading authority for the proposition that a refusal to prosecute, or the discontinuance of a prosecution, can be subject to judicial review is *Osborne v Worksafe New Zealand.*[112] There are several grounds on which a decision not to prosecute can be challenged. In *Wallace v Attorney-General*, Ellis J (referring to the review carried out by the Court of Appeal in *Osborne v Worksafe New Zealand)* stated:[113]

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104 Third trials are rare but not unheard of and there were compelling reasons to try Rewa.

105 At [52]. The letter was simply a courtesy note. The Deputy Solicitor-General had delegated the power to issue the direction pursuant to ss 9A and 9C of the Constitution Act: at [50].

106 At [54].

107 *R v Crown Prosecution Service* [2015] EWHC 2868 (Admin), [2016] 1 WLR 804.

108 At [7].

109 At [10].

110 At [12].

111 At [17] and [32].

112 *Osborne v Worksafe New Zealand*, above n 70. In an appeal from the decision of the Court of Appeal, the Supreme Court confirmed the availability of judicial review for such decisions but upheld the appeal on other grounds: see *Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447. See also *Wallace v Attorney-General* [2021] NZHC 1963, where Ellis J stated (at [582]), "Although the authorities make it clear that the decision not to prosecute may be the subject of judicial review, I do not regard such decisions as engaging s 8 [of the New Zealand Bill of Rights Act]". The Crown accepted that the decision not to prosecute was reviewable: at [583].

113 *Wallace v Attorney-General*, above n 112, at [587].

> The review essentially confirmed that, in appropriate circumstances, all the standard bases for review (abdication of discretion, failure to follow established guidelines, taking into account irrelevant considerations, failure to take into account relevant ones, unlawfulness and unreasonableness) might be available.

The following can be grounds for judicial review of a decision not to prosecute.

1 Unlawful decision

If it is not permissible for the prosecution to make a particular decision, then that decision is beyond the power of the prosecutor and thus susceptible to judicial review. For example, it is impermissible for a public prosecutor to enter into a bargain to stifle the prosecution. That is, it is unlawful for the prosecution authorities to enter into a financial bargain with the proposed defendants whereby the charges are withdrawn in return for the defendant paying a substantial amount of compensation to the victims of the criminal offence. This is what occurred in *Osborne v Worksafe New Zealand*.[114] The Supreme Court made a declaration that the decision was unlawful.

Where the prosecution decision is based on the application of an unlawful fixed policy, the decision is reviewable. The application of a rigid universal policy means the decision-maker has failed to exercise his or her discretion and the decision is unlawful.[115]

2 Failure to give reasons

The prosecution has no statutory legal duty to provide reasons for its decisions.[116] However, in limited circumstances, it could be a breach of prosecutorial duties for the prosecution to fail to provide proper reasons. One such circumstance is where a person has been killed as the result of action or inaction by a state official (such as a police officer or prison guard).[117] These circumstances can engage the "right to life" recognised in s 8 of the New Zealand Bill of Rights Act.

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114 *Osborne v Worksafe New Zealand*, above n 112. The Supreme Court held that the High Court and the Court of Appeal both erred in concluding there was no bargain to stifle the prosecution.

115 *Osborne v Worksafe New Zealand*, above n 70, at [39]. An example is *Regina v Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 QB 118 (CA).

116 The absence of duty to provide reasons is an aspect of prosecutorial independence. In cases of "significant public interest", a Crown solicitor has the discretion to provide a public statement giving broad reasons why a decision was made to prosecute or not to prosecute: Crown Law *Solicitor-General's Prosecution Guidelines*, above n 1, at [6.1]. This may also apply in cases of a stay, application to dismiss a charge, or to offer no evidence: at [6.1]. There is no specific duty to provide reasons to a crime victim or to a defendant.

117 *Regina v Director of Public Prosecutions*, *ex parte Manning* [2001] QB 330 (QB). In *Manning*, the Court held that where a person had died in the custody of the State and a coronial inquiry had reached a verdict of unlawful killing, it was incumbent on the Director of Public Prosecutions to provide reasons for the decision not to prosecute.

In *Wallace*, Ellis J held that the failure of the Solicitor-General in 2002 to provide adequate reasons for refusing to commence a prosecution against the relevant police officer for murder was unacceptable. The application for judicial review was upheld. As part of the remedies awarded, Ellis J provided a declaration:[118]

> The Solicitor-General should have given reasons for declining to prosecute Constable Abbot in relation to Steven Wallace's death, following release of the Chief Justice's judgment in June 2002.

If reasons are not provided, it is very difficult to know if there has been some sort of error in the decision-making process.[119]

If a decision not to prosecute was based on identifiable reasons, but those reasons were based on a misunderstanding of the relevant law by the prosecutor making the decision, or there was an improper application of the law to the facts, judicial review may be available.[120]

3 Failure to consider relevant factors or considering irrelevant factors

In *Osborne v Worksafe New Zealand*, the Court of Appeal considered in some detail whether a prosecution decision could be reviewed on the ground that the decision failed to consider a relevant factor or considered irrelevant factors. The Court concluded that this ground was available in its own right and possibly also as an error of law or a failure to comply with the prosecution guidelines.[121] However, the Court of Appeal emphasised that it will be difficult to succeed with this ground 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".[122] Further,

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118 *Wallace v Attorney*-General, above n 112, at [647]. Ellis J also held there had been a breach of s 8 of the New Zealand Bill of Rights Act in that there had not been an adequate investigation into the death of the deceased: at [646].

119 The lack of reasons made it difficult to determine if the prosecution had taken into account irrelevant factors or failed to take into account relevant factors. The courts have, however, made it clear that the prosecution is not required to provide reasons in all cases. The distinguishing feature in *Wallace*, above n 112, and in *Manning*, above n 117, was that an ordinary citizen had been killed by the actions of a state official (a police officer). This then placed the case in the "right to life" category in the context of human rights in general and s 8 of the New Zealand Bill of Rights Act in particular.

120 *Osborne v Worksafe New Zealand*, above n 70, at [48]. The Court referred to *Regina (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] AC 756 at [32] and stated, "We agree with those observations. A material error of law in the exercise of prosecutorial discretion will be reviewable": at [48]. For United Kingdom cases see *R v Director of Public Prosecutions, ex parte Jones* [2000] Crim LR 858 (QB) (regarding mens rea for negligent manslaughter); and *R (on the application of Torpey) v Director of Public Prosecutions* [2019] EWHC 1804 (Admin), [2019] Crim LR 985 (regarding causation in homicide). In *R v Director of Public Prosecutions, ex parte Jones*, the Court held that the decision of the CPS not to prosecute was irrational.

121 *Osborne v Worksafe New Zealand*, above n 70, at [40] and [49].

122 At [45].

to succeed on this ground the applicant must show that the particular factor was "material". That is, that the factor concerned would have had a bearing on the final decision.

A number of decisions in the United Kingdom have succeeded on this ground.[123] For example, in *R v Director of Public Prosecutions, ex parte C*, a Crown prosecutor decided not to prosecute the defendant for buggery of his wife, an offence under s 12 of the Sexual Offences Act 1956.[124] On review, the Divisional Court held that the decision not to prosecute was unreasonable because the prosecutor had failed to take into account the possibility that a defence might be that sexual intercourse had not taken place at all. The Court upheld the review and remitted the case to be reconsidered. In *R (on the application of Torpey) v Director of Public Prosecutions*, the Divisional Court upheld an application for judicial review on the ground that the CPS had failed to consider relevant facts and had considered irrelevant facts.[125]

4 Failure to comply with prosecution code or prosecution policy

Although the New Zealand *Solicitor-General's Prosecution Guidelines* are not binding,[126] if an applicant could demonstrate that the prosecutor failed to comply with the guidelines in a material respect, such a failure might constitute grounds for judicial review.[127]

In *R v Director of Public Prosecutions, ex parte Manning*, the Court held that in deciding whether to prosecute, the prosecutor had applied a test higher than that set out in the CPS Code.[128] In *Manning*, the CPS decided not to prosecute for homicide even though there was clear evidence to establish the offence. The prosecution also failed to provide adequate reasons to the family of the deceased for the refusal to prosecute.

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123 See for example *R (on the application of Torpey) v Director of Public Prosecutions*, above n 120, at [52]; *R v Director of Public Prosecutions, ex parte Jones*, above n 120; and *R (on the application of Dennis) v Director of Public Prosecutions* [2006] EWHC 3211 (Admin), [2007] NLJR 143.

124 *R v Director of Public Prosecutions, ex parte C* [1995] 1 Cr App Rep 136 (QB).

125 See *R (on the application of Torpey) v Director of Public Prosecutions*, above n 120. See also *R (on the application of Dennis) v Direction of Public Prosecutions*, above n 123. In *Regina v Director of Public Prosecutions, ex parte Kebilene*, above n 96, the Court held the Director of Public Prosecutions had not erred in deciding to prosecute even though there was uncertainty regarding the applicable law (in particular, the law pertaining to the reverse onus of proof). The Court held that in the absence of dishonesty, bad faith or other exceptional circumstances, the decision of the Director of Public Prosecutions to consent to a prosecution was not susceptible to judicial review: at [371], [372], [376] and [390].

126 See Crown Law *Solicitor-General's Prosecution Guidelines*, above n 1.

127 *Osborne v Worksafe New Zealand*, above n 70, at [49]. See also *R v Director of Public Prosecutions, ex parte C*, above n 124.

128 *Regina v Director of Public Prosecutions, ex parte Manning*, above n 117, at [32]. See CPS "Code for Crown Prosecutors" (26 October 2018) <www.cps.gov.uk>.

If the plaintiff could establish that in making the decision the prosecutor had failed to exercise his or her discretion and had simply applied a pre-determined or blanket policy, there would be grounds for review.[129]

V CONCLUSION

Decisions made by prosecution authorities can have significant implications for all the parties involved and for the judicial system as a whole. The integrity of prosecutorial decision-making is central to public confidence in the court system. For these reasons, it is essential that prosecution decisions are made in an independent manner. At the same time, it is also essential that prosecutors be held to account for the exercise of their powers.

In New Zealand, three general categories of "remedies" exist to challenge the most common prosecution decisions. The first category includes various applications that can be made to a court where a criminal prosecution has commenced. These include an application to dismiss charges and an application for a stay of proceedings. Where a decision has been made not to commence a prosecution, an aggrieved party can commence a private prosecution or, in limited cases (ie sexual violence), a complainant can seek a review of that decision. The second category of remedies consists of tort-based actions such as malicious prosecution and misfeasance in public office. The third category is judicial review of matters which cannot be conveniently dealt with by the first two categories of remedies.

In their approach to quashing prosecution decisions, courts in New Zealand have demonstrated judicial restraint. A permanent stay of criminal proceedings will be granted only in exceptional circumstances (such as abuse of process or trial unfairness). An action against a prosecution authority using the tort of malicious prosecution is difficult to sustain and the courts are only prepared to judicially review prosecution decisions in exceptional circumstances. In respect of judicial review of prosecution decisions, the position taken in New Zealand can be described as "midway" between the approach in Australia (of virtually absolute restraint) and the approach in the United Kingdom (of limited judicial restraint).

At the heart of judicial restraint in New Zealand is a recognition of the separation of powers as a fundamental constitutional principle. The "constitutional boundaries" referred to in *Osborne v Worksafe New Zealand*[130] prevent the courts from interfering with prosecution decisions such as the decision to commence a prosecution, file particular charges or not to commence a prosecution.

However, constitutional boundaries are not inconsistent with the responsibility of judges to protect court processes from abuse or to protect accused persons from unfair trials. These are the rationales for granting a stay in criminal proceedings or an action in malicious prosecution in civil proceedings.

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129 *Polynesian Spa Ltd v Osborne*, above n 69, at [63] and [64], confirmed in *Young v Police*, above n 59, at [18].

130 *Osborne v Worksafe New Zealand*, above n 70, at [34].

Conventional grounds for judicial review may also be available in appropriate circumstances. That said, the rarity of judicial review of prosecution decisions in New Zealand may also be an indicator of the quality of prosecutorial decision-making, particularly internal checks and balances within prosecution authorities.[131]

With all these mechanisms, a balance is achieved between the requirements of prosecutorial independence and prosecutorial accountability. The current balance in New Zealand between judicial restraint and the need for prosecutorial accountability may alter some time in the future if the current *Solicitor-General's Prosecution Guidelines* are reformulated as a prosecution "code", or if complainants are accorded legal rights to have prosecution decisions internally reviewed. At present there is little evidence of momentum for either reform.

131 Criminal appeals against conviction and sentence, based on prosecutorial error, are another matter. In many cases the Court of Appeal and the Supreme Court have quashed a conviction on the basis of prosecutorial error. See for example *R v Stewart (Eric)*, above n 1; *Porter v R*, above n 1, at [11]; *Fa'avae v R*, above n 1; *McNaughton v R* [2013] NZCA 657, [2014] 2 NZLR 467; *Smith v R* [2013] NZCA 362, [2014] 2 NZLR 421 at [42]; *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705; and *Hughes v Police* [1995] 3 NZLR 443 (HC). Criminal appeals, however, perform different functions from judicial review.