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**CHARTING THE TRAJECTORY OF INTENSITY
OF REVIEW FOLLOWING *OSBORNE V
WORKSAFE NEW ZEALAND***

Submitted for the LLB (Honours) Degree

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2018

Abstract

The courts have used the concepts of justiciability and intensity of review to restrict access to judicial review where it seemed inappropriate to intervene in executive decision-making. The courts have used these concepts to limit judicial review of prosecution discretion. More recently, there has been a trend in favour of widening availability of review, resulting in a shift away from non-justiciability towards intensity of review. This paper examines the trajectory of judicial review away from non-justiciability and towards intensity of review, and considers whether the *Osborne v Worksafe New Zealand* litigation disrupts or endorses this trajectory. Overall, it argues that the Court of Appeal endorsed the shift to intensity of review. While the Supreme Court appears to disapprove of intensity of review, particularly low intensity of review, it did not overturn the Court of Appeal's position. In the context of judicial review of prosecution decisions, lower courts will apply the Court of Appeal's precedent, and use a varying intensity approach.

Key terms: 'intensity of review', 'judicial review', 'justiciability', '*Osborne v Worksafe New Zealand*', 'prosecution discretion'

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I Introduction

The availability of judicial review of prosecution decisions is restricted. Historically, this stemmed from the conception that the courts had no jurisdiction to review actions that stemmed from a prerogative power, and could only review powers conferred by statute.¹ Prosecution decisions were considered prerogative powers, and thus outside the courts' jurisdiction.

Over time, this strict position has softened in many jurisdictions. Case law accepted that courts were able to review *some* prerogative powers.² This led to courts accepting jurisdiction to review prosecutorial decisions,³ but the law is unsettled as to the appropriateness of intervention in some contexts. The availability of judicial review for prosecution decisions is not settled, and the case law is somewhat contradictory.

The *Osborne v Worksafe New Zealand* (“*Osborne*”) litigation addressed the law relating to judicial review of prosecution discretion in New Zealand. The cases shed some light on New Zealand's position on the justiciability of review of prosecutorial discretion and examine the intensity of review that is available. The different outcomes at each stage of the litigation shows how unsettled this area of law is.

This essay will consider whether the Supreme Court decision in *Osborne v Worksafe* rejects the trend in judicial review to move away from justiciability and towards intensity of review.⁴ Part II will track the developments in judicial review in the United Kingdom and New Zealand to show that there is a trend of rejecting non-justiciability in favour of intensity of review in both jurisdictions. Part III will examine the *Osborne v Worksafe* litigation. It will show that the Court of Appeal endorsed the trend towards intensity of review,⁵ while the Supreme Court expressed concerns with the concept of intensity. It will conclude by explaining why the approach taken by the Supreme Court is regrettable and leaves the law in an unsettled state.

1 Fiona Wheeler “Judicial Review of Prerogative Power in Australia: Issues and Prospects” (1992) 14 Syd LR 432 at 433.

2 *Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

3 *R v Metropolitan Police Commissioner, ex parte Blackburn* [1968] 2 QB 118.

4 *Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447.

5 *Osborne v Worksafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513.

II *The Shift from Justiciability to Intensity of Review*

There are three ways the law has commonly restricted the availability of judicial review of prerogative powers such as prosecutorial discretion. First, and most restrictively, prerogative powers were considered to fall outside the jurisdiction of the court. The Court had no ability to decide how the monarch should exercise their absolute power.⁶ Prerogative powers were therefore immune from judicial review.

As the following sections will show, this strict position was softened in favour of non-justiciability. Justiciability determines whether it is appropriate for a court to determine a particular issue.⁷ It may be inappropriate for the Court to consider an issue due to constitutional concerns or a lack of institutional capacity to determine the issue.⁸ A decision could be unreasonable and be decided based on irrelevant factors, but if it is not justiciable, the courts cannot review the decision.⁹ The decision “survives to perpetuate unfairness”.¹⁰

The third concept used to restrict judicial review is intensity of review. Intensity of review refers to the extent to which courts will scrutinise the decision and how much deference or latitude they will show to the decision-maker.¹¹ This may manifest in a requirement of exceptional circumstances before judicial review can succeed.¹²

Intensity of review is used where the nature of a decision means it may be unsuitable for it to be closely scrutinised by the courts, and judges ought to defer to the decision-

6 Fiona Wheeler, above n 1, at 433.

7 Philip A Joseph “Constitutional and Administrative Law in New Zealand” (4th ed, Brookers Ltd, Wellington, 2014) at [25.5.1].

8 Dean Knight *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, New York, 2018) at 153.

9 B V Harris “Judicial Review, Justiciability and the Prerogative of Mercy” (2003) 62 CLJ 631 at 633.

10 At 633.

11 At 645; and Knight “Modulating the Depths of Scrutiny in Judicial Review: Scope, Grounds, Intensity, Context” [2016] 63 at 78.

12 *Sharma v Antoine* [2006] UKPC 57, [2007] 1 WLR 780 at [14].

maker. Alternatively, other types of decisions (where human rights are involved, for instance)¹³ should be closely reviewed by the courts.¹⁴

Intensity of review is apparent in the differing approach to the three main grounds of review – illegality, procedural impropriety and unreasonableness.¹⁵ In regards to the first two, the courts tend to expect a high degree of compliance with the law and natural justice.¹⁶ This is analogous to a high intensity of review. When it comes to unreasonableness, however, the standard for successful review is much higher.¹⁷ This is a lower intensity of review.

Justiciability and intensity of review can manifest in a multitude of ways. At the most stringent end, a finding of non-justiciability will result in a court refusing to review a particular decision. This is known as primary justiciability. The concept of secondary justiciability is also increasingly used in academic writing, which refers to a situation where a decision can be judicially reviewed, but only on certain grounds.¹⁸ Restricting review to instances of bad faith or fraud is an instance of secondary justiciability.¹⁹

This section will examine the emerging trend in judicial review of prosecution discretion to expand the types of decisions that are justiciable while simultaneously restricting judicial review by limiting the intensity of review available.²⁰ It will look at how this trend has emerged in the United Kingdom, and then examine whether New Zealand has accepted the United Kingdom's approach.

13 Michael Taggart “Proportionality, Deference, Wednesbury” [2008] NZ L Rev 423 at 434; and Knight, above n 8 at 166.

14 Taggart, above n 13, at 434 and 450–451.

15 Knight “Mapping the Rainbow of Review: Recognising Variable Intensity” [2010] NZ L Rev 393 at 414–415.

16 At 414.

17 At 415.

18 Harris, above n 9, at 644.

19 See for example *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) at 391 and *Lab Tests Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776.

20 Harris, above n 9, at 631; Robert S French “The Rise and Rise of Judicial Review” (1993) 23 UWAL Rev 120; Wheeler, above n 1.

A *Intensity of Review in the United Kingdom*

Courts were initially unwilling to judicially review prerogative powers. Over time, however, courts have become more willing to find that decisions involving prerogative powers are justiciable, and appropriate to review.²¹ This shift is most notable in *Council of Civil Service Unions v Minister of Civil Service*, where the exercise of the prerogative power to regulate the home civil service was not immune to judicial review.²² This widening of justiciability took place in the context where courts were also more willing to review ministerial statutory discretion, following cases such as *Padfield v Minister of Agriculture, Fisheries and Food*.²³ Courts were increasingly willing to intervene in executive decision-making where decisions were made poorly.

A prosecutor was considered to act under a prerogative power. In cases of judicial review of prosecution discretion, the United Kingdom moved away from finding such cases non-justiciable, and instead applied a very low intensity of review. The law is somewhat murky, however. As the following section will show, some cases prefer a secondary justiciability approach, where judicial review for prosecution discretion is only allowed on certain grounds such as bad faith and abdication of discretion.²⁴ Other cases suggest a preference for intensity of review, where more grounds apply, but the courts will not intensely scrutinise the decision.²⁵

The shift away from justiciability began in 1968 in *ex parte Blackburn*. The plaintiff challenged the decision of the police to not prosecute certain low-level gambling offences. Despite the previous position that prosecution decisions were not susceptible to review, the court held that where there had been a total abdication of discretion and duty, as had occurred, judicial review was not only available, but would succeed.²⁶ This is the first clear shift away from primary justiciability towards secondary justiciability.

21 Wheeler, above n 1, at 433.

22 *Council of Civil Service Unions v Minister of Civil Service*, above n 2.

23 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL).

24 See for example *R v Metropolitan Police Commissioner; ex parte Blackburn*, above n 3; and *Matalulu v Director of Public Prosecutions (Fiji)* [2003] 4 LRC 712 (Fiji SC).

25 See for example *R v Director of Public Prosecutions, ex parte C* [1995] 1 Cr App R 136 (QB); and *R v Director of Public Prosecutions, ex parte Manning* [2001] QB 330 at 41–42.

26 *R v Metropolitan Police Commissioner; ex parte Blackburn*, above n 3, at 770.

The approach in the case law between 1968 and today contains elements of both secondary justiciability and intensity of review. Soon after *Blackburn*, another two cases resulted in successful judicial reviews of prosecution discretion, both of which appear to widen the situations where judicial review could be used to challenge the prosecution. In *ex parte C*, prosecution decisions were considered reviewable where the decision was wholly unreasonable or where it did not accord with the guidelines for prosecutors.²⁷

In *ex parte Manning*, the Court held the prosecutor had failed to consider certain evidential factors, which was held to amount to a failure to consider relevant considerations.²⁸ Both of those cases widened the grounds where judicial review would be available.

On the other hand, cases such as *Matalulu v Director of Public Prosecutions* retained the idea that a very high standard must be met before review would succeed and maintained there were certain grounds where judicial review of a prosecution decision would not be available.²⁹ The Court outlined five scenarios where a review of a prosecution decision would succeed: 1) where the DPP acted in excess of its constitutional or statutory power; 2) when the prosecutor had acted under the direction or control of another person; 3) in bad faith or dishonesty, i.e. for a bribe; 4) an abuse of the process of the Court and 5) where the prosecutor had fettered their discretion by rigid policy (as in *Blackburn*).³⁰

Matalulu did accept that the Court could review prosecution decisions on other grounds, including relevancy, as in *ex parte C* and *ex parte Manning*, but this ability was limited. The Court stated review based on relevant or irrelevant considerations was unlikely to succeed because of the “width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings”.³¹ It also held that an error of law would not be reviewable.³²

27 *R v Director of Public Prosecutions, ex parte C*, above n 25.

28 *R v Director of Public Prosecutions, ex parte Manning*, above n 25.

29 *Matalulu v Director of Public Prosecutions (Fiji)*, above n 24.

30 At 735–736.

31 At 736.

32 At 736.

The approach set out in *Matalulu* therefore contains elements of both secondary justiciability and intensity of review. Some grounds of review are not available, and a light intensity of review would be applied to the available grounds due to the discretion available to the prosecutor. Since then, other cases have endorsed or quoted *Matalulu*, particularly the concerns cited by the judges against widening judicial review in the context of prosecution decisions.³³ Since *Matalulu* held there are some grounds of review that are not appropriate to consider in a review of prosecutorial discretion, such as error of law, the case embraces secondary justiciability. Within potential grounds of review, such as relevancy, courts would afford the decision-maker a high degree of discretion, suggesting a lower intensity of review.

The law is complicated somewhat by the judgment of *R (F) v Director of Public Prosecutions* where error of law was held to be reviewable.³⁴ This more recent case suggests the current trend in the context of prosecution discretion is moving towards broadening the allowed grounds of review, but it is not clear which path future cases will take.

The United Kingdom primarily uses secondary justiciability to restrict the availability of judicial review for prosecution discretion. More recent law suggests this position is softening, and the courts may soon accept more grounds of review are available, and use intensity of review more frequently following *R (F)*.

B Intensity of Review in New Zealand

In the context of prosecution discretion, there is evidence of New Zealand following the United Kingdom's path, and moving towards secondary justiciability and intensity of review. This trend is also seen in broader administrative law, which provides further evidence of a trend against non-justiciability in favour of intensity of review.

1 Intensity of review in judicial review of prosecution discretion

One of the first major cases regarding judicial review of prosecution discretion is found in *Hallett v Attorney-General*. At the strike-out stage, Gallen J was opposed to

33 See for example *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20, [2006] 1 WLR 3343 at [17]; *Sharma v Antoine*, above n 12, at [17] and *Marshall v Director of Public Prosecutions* [2007] UKPC 4, [2007] All ER 202 at [17].

34 *R (F) v Director of Public Prosecutions* [2013] EWHC 945 (Admin); [2014] 2 WLR 190.

reviewing a prerogative power.³⁵ On the facts of the case, however, no prerogative power issue arose because the case involved a power to prosecute arising directly from a statute.³⁶

Hallett and Hallett (No 2) do, however, still disclose an unwillingness to review actions of a prosecutor. At both the strike-out and trial stage, the judges endorsed *ex parte Blackburn*, and thus approved of secondary justiciability over non-justiciability as the correct approach to review of prosecution discretion.³⁷ They declined, however, to expand the available grounds of review beyond what was enunciated in *Blackburn*. The key question both judges thought needed to be answered was whether discretion had been exercised at all.³⁸ If the prosecutor made a decision within their discretion, there could be no successful review. Gallen J did suggest that a failure to consider relevant considerations could be an indication that discretion was never exercised.³⁹ Accordingly, by the 1990s, New Zealand law was slightly widening the justiciability of judicial review of prosecution decisions by endorsing *Blackburn* and adopting secondary justiciability.

*Thompson v Attorney-General*⁴⁰ further evidences the New Zealand preference for secondary justiciability over intensity of review. In the case, the judge followed *Blackburn* as discussed in *Hallett (No 2)* and held prosecution decisions are not reviewable unless there has been an abdication of discretion.⁴¹ Mr Thompson was refused a diversion for a burglary offence and applied for judicial review of the decision. Panckhurst J acknowledged judicial review would succeed if it were available.⁴² The decision was “simply inadequate” when compared to the standards expected according to the Manual for Best Practice.⁴³ The judge held the decision was made “on inadequate, if not misleading, information”⁴⁴, and he was “left with the

35 *Hallett v Attorney-General* [1989] 2 NZLR 87 (HC) at 91.

36 At 91–92.

37 At 94; *Hallett v Attorney-General (No 2)* [1989] 2 NZLR 96 (HC) at 102.

38 *Hallett v Attorney-General*, above n 35, at 94; *Hallett v Attorney-General (No 2)*, above n 37, at 102.

39 *Hallett v Attorney-General*, above n 35, at 94.

40 [2000] NZAR 583 (HC).

41 At [28]–[29].

42 At [16].

43 At [15].

44 At [15].

impression that the coordinator by then had a closed mind”.⁴⁵ The judge thought it likely the value of the stolen property was overstated, and the plaintiff was a secondary offender, not the primary.⁴⁶ Due to the strict application of *ex parte Blackburn*, the case failed despite the obvious issues with the decision, which may very well have succeeded under a “highly exceptional circumstances” standard.⁴⁷ This suggests the courts would strictly adhere to the limited grounds of review available for decisions involving prosecution discretion.

An approach that began to accept intensity of review was taken in *Polynesian Spa v Osborne*.⁴⁸ The Court held that prosecution decisions were reviewable, but it would be rare for such a challenge to be successful.⁴⁹ Randerson J stated:⁵⁰

... the Courts show considerable constraint in interfering with the exercise of prosecutorial discretion. *Hallett* is authority for the proposition that judicial review is only likely to be obtained in such a case where there has been a failure to exercise discretion ... There may be other grounds but it is likely only to be in exceptional cases that a Court would intervene ...

Randerson J’s legal reasoning did not use the term “intensity of review”, but still disclosed elements of a variable intensity approach. The exceptional circumstances requirement quoted above equates to a low intensity of review threshold. He held that failure to comply with residual fairness obligations would be unlikely to result in a successful judicial review application given the alternative mechanisms of resolution, such as the trial process.⁵¹ When considering relevancy, he limited the ability to intervene to situations where there had been a failure to exercise discretion, as in *Blackburn*.⁵² This reasoning suggests the judge considered the decision warranted low-level scrutiny under the circumstances. Finally, when considering unreasonableness, he cast doubt that the ground would be available for such a decision,⁵³ which retains the notion of secondary justiciability.

45 At [15].

46 At [16].

47 *Sharma v Antoine*, above n 12, at [14].

48 [2005] NZAR 408 (HC).

49 At [68].

50 At [69].

51 At [91].

52 At [100].

53 At [102].

Thus, New Zealand case law contains elements of secondary justiciability and intensity of review. *Polynesian Spa* maintained that there could be some grounds of review not available when reviewing a prosecutor. The case further indicates that a very low level of intensity will be used against prosecutorial discretion. Breaches of natural justice and failure to consider relevant factors may not result in a successful judicial review.

These series of cases show the trajectory of non-justiciability to intensity of review in cases regarding prosecution discretion in New Zealand prior to the *Osborne* litigation. Closely following *ex parte Blackburn*, there was an initial shift to secondary justiciability. *Polynesian Spa* utilised secondary justiciability and also engaged in a low intensity of review. This is consistent with the approach from the United Kingdom, and, as the following section will explore, aligns with the trend in administrative law outside of the prosecution discretion context.⁵⁴

2 *Intensity of review in administrative law generally*

There are only a few cases in New Zealand that address judicial review of prosecution discretion. It is therefore useful to consider how intensity of review is discussed in judicial review cases in other contexts, to see evidence of a trajectory away from non-justiciability and towards intensity of review in administrative law more broadly. This section will examine the shift from non-justiciability to secondary justiciability and intensity of review outside the context of prosecution discretion.

Similar to the United Kingdom, New Zealand courts began moving away from the strict concept of non-justiciability.⁵⁵ Following *Curtis v Minister of Defence*,⁵⁶ non-justiciability has been described as a “narrowing concept”.⁵⁷

Lower courts have been willing to embrace both intensity of review and secondary justiciability to replace non-justiciability.⁵⁸ In the Court of Appeal’s decision of *Ye v Minister of Immigration*, Glazebrook J expressly discussed the correct intensity of review to apply to the case (although ultimately decided on other grounds).⁵⁹ Since the

54 Knight, above n 15.

55 Rayner Thwaites “The Changing Landscape of Non-Justiciability” [2016] NZ L Rev 31 at 48.

56 *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA).

57 *Mihos v Attorney General* [2008] NZAR 177 (HC) at [59].

58 Knight, above n 15, at 405–406.

59 *Ye v Minister of Immigration* [2008] NZCA 291, [2009] 2 NZLR 596.

case involved the human rights of children, she stated the court should apply an “anxious scrutiny” standard.⁶⁰ She further endorsed Professor Taggart’s idea of full proportionality in judicial review involving human rights.⁶¹

In *Huang v Minister of Immigration*,⁶² William Young P embraced the language of intensity, and explicitly used the term ‘intensity of review’.⁶³ Similarly, in *Lab Tests Ltd v Auckland District Health Board*, Arnold and Ellen France JJ explicitly considered the correct standard of review to apply in the case.⁶⁴

More recently, *Taylor v Chief Executive of the Department of Corrections* held that the intensity of review depended on the subject-matter.⁶⁵ Furthermore, the Court suggested the greater the interference with rights, the greater ability the Court would have to interfere.⁶⁶ However, the Court considered it would be “exceptional” to substitute the Court’s decision for the decision-maker’s.⁶⁷

Secondary justiciability can be seen in the commercial context, where the courts have restricted the availability of judicial review.⁶⁸ Accordingly, in *Air New Zealand Ltd v Wellington International Airport Ltd*, irrationality and relevant considerations were not grounds of review available to the plaintiffs.⁶⁹ This aligned with the Privy Council decision of *Mercury Energy Ltd v Electricity Corporation of New Zealand*, where it was doubted that review would succeed in the absence of fraud, corruption or bad faith.⁷⁰

60 At [303].

61 At [304].

62 [2008] NZCA 377, [2009] 2 NZLR 700 (CA) at [62]–[67].

63 At [62].

64 *Lab Tests Ltd v Auckland District Health Board*, above n 19.

65 *Taylor v Chief Executive of the Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648 at [88].

66 At [90].

67 At [89] and [109].

68 Knight, above n 15, at 407.

69 *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZCA 259, [2009] 3 NZLR 713 at [76].

70 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*, above n 19 at 391, referred to in *Air New Zealand Ltd v Wellington International Airport Ltd*, above n 69.

These cases evidence a trend in favour of intensity of review over non-justiciability, although the law is far from settled.⁷¹ While it is clear that there are some types of decisions where secondary justiciability will apply, and others where a low or high intensity of review may apply, it is not always clear how the judges have come to their decisions and how they may determine the intensity of review in a new context.

The trend towards intensity of review is only seen in the High Court and Court of Appeal. Supreme Court judges seemed to have critiqued the trend towards intensity of review.⁷²

In *Ye v Minister of Immigration*, during submissions by counsel, Elias CJ and Tipping and McGrath JJ seemed hesitant to adopt the notion of intensity of review.⁷³ When it was suggested to Elias CJ that the courts ought to show deference to the decision-maker in certain situations, Her Honour remarked “That’s a dreadful word.”⁷⁴ This aligns with academic concerns that deference and non-justiciability result in injustices.⁷⁵ Similarly, Tipping J seemed hesitant to adopt the idea that the Court should vary its standard of intensity, preferring the idea that the Court will always take a hard look.⁷⁶

Similar critiques were made extra-judicially by Elias CJ. Her Honour has expressed concerns with notions of proportionality and deference, at least in a human rights context.⁷⁷ She noted “Institutional deference to the political branches risks not only vindication of rights (and therefore their efficacy) but also the vindication of official conduct that is substantively compliant with human rights by a disinterested and independent judiciary.”⁷⁸

71 Knight, above n 15, at 411.

72 At 411.

73 *Ye v Minister of Immigration* (NZSC, transcript, 21-23 April 2009, SC 53/2008) at 179–182.

74 At 181.

75 See for example Chris Finn “The Justiciability of Administrative Decisions: A Redundant Concept” (2002) 30 FL Rev 239 and TRS Allan *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford, 2001).

76 *Ye v Minister of Immigration* (NZSC, transcript, 21-23 April 2009, SC 53/2008) at 180.

77 Sian Elias “Righting Administrative Law” in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, Oxford, 2009) 55.

78 At 66.

Despite these hesitations from the Supreme Court, the Court has not formally disavowed the notion of intensity of review. This has left the law in a slightly odd position – the lower Courts (and numerous academics) seem prepared to accept that the concept of intensity of review should be utilised, while the highest court in New Zealand is loath to accept this position, but has not condemned it.⁷⁹

3 *The trajectory of non-justiciability to intensity pre-*Osborne**

Pre-*Osborne*, the general trend regarding the standard of review of prosecution decisions was against non-justiciability. Courts became more inclined to allow decisions to be justiciable, if only on limited grounds. The lower courts continued the trajectory to secondary justiciability and intensity of review. This shift is evident in cases involving reviews of prosecution discretion, and supported by the similar trend in administrative law more broadly.

The move away from non-justiciability continued despite the Supreme Court's potential dislike of intensity of review. The statements given by Elias CJ and Tipping J do not suggest a desire to return to a refusal to review, but a desire to be afforded more judicial discretion to intervene where appropriate. Arguably, this approach results in a shift from one end of the spectrum of review (non-justiciability) to the other end (review to ensure the correct, or perhaps even preferable, decision is made based on fact and law).⁸⁰

Such a shift, however, has not been articulated in any Supreme Court judgment. The Supreme Court may not agree with notions of intensity and deference, but in the absence of higher precedent, the Court of Appeal rulings set out the law regarding judicial review and intensity of review in New Zealand. Accordingly, before *Osborne*, in both administrative law generally and in the context of prosecution discretion, secondary justiciability and intensity of review were accepted concepts.

III *Osborne v Worksafe: What Changes?*

The *Osborne* litigation provided the opportunity for the courts to explore the correct intensity of review in the context of prosecution discretion, and to comment on the concept of intensity more broadly.

79 Knight, above n 15, at 411.

80 Taggart, above n 13, at 451.

The following section will consider whether the *Osborne v Worksafe* litigation alters or supports the previous trajectory towards intensity of review favoured by the lower courts. It will show that the Court of Appeal's approach does continue on this trajectory, and endorses low intensity of review for prosecution discretion. The Supreme Court does not sufficiently engage with the issue to disturb the Court of Appeal's precedent.

A Decision of the High Court

The factual background leading to the proceedings is well-known in New Zealand. In 2010, there was an explosion in the Pike River Mine, which killed 29 miners and injured two others.⁸¹ Prosecutions were brought against the responsible companies, including Pike River Coal Ltd.⁸² Worksafe also considered bringing an individual prosecution against Mr Whittall, the CEO of Pike River Coal Ltd. Worksafe eventually decided not to pursue a prosecution and offered no evidence against him.⁸³ A range of considerations factored into their determination. One of those considerations was that Mr Whittall offered to pay \$3.41 million in reparation to the victims' families.⁸⁴ Two of the families challenged the decision to offer no evidence in judicial review proceedings, initially heard in the High Court.

The High Court endorsed a secondary justiciability approach. The shift away from non-justiciability is seen by the fact Worksafe did not contend judicial review of prosecutorial discretion is never permitted, but rather that review is restricted.⁸⁵ Worksafe contended this high burden was necessary due to (1) the fact the discretion to prosecute is part of the function of the executive, not the courts; (2) it is inappropriate for courts to interfere in prosecutorial decisions given their own responsibility for the conduct of criminal trials; and (3) prosecutorial decisions involve a high content of discretion.⁸⁶

Ultimately, the Court held that given this case did not involve the adoption of a blanket policy (as in *Blackburn*) and instead involved relevancy considerations, it did not reach

81 *Osborne v Worksafe New Zealand*, above n 4, at [2].

82 At [5].

83 At [12].

84 At [13].

85 *Osborne v Worksafe New Zealand* [2015] NZHC 2991, [2016] 2 NZLR 485 (HC) at [34].

86 At [35].

the high threshold to allow judicial review to succeed.⁸⁷ Judicial review was therefore not permitted. This reasonably restrictive view appears substantially similar to *Hallett, Thompson and Polynesian Spa*.

The judge further considered the outcome of the case if review had been available. The argument for the plaintiff appears to have been framed as a failure by Worksafe to consider relevant considerations, or that irrelevant considerations were used in the decision-making. The Court referred to authority from *Matalulu v Director of Public Prosecutions* which indicated such a claim is unlikely to succeed due to the width of discretion afforded to the prosecutor.⁸⁸ Such an approach shows the Court would have adopted a low intensity of review had review been available.

The intensity of review can further be seen in the treatment of the Prosecution Guidelines. The Court held the Guidelines could not form an expectation as to how the prosecutor was to conduct a case. The Guidelines were considered to be only an indication of the approach a prosecutor will follow, not enforceable law.⁸⁹ Moreover, the judge was content that Worksafe had only considered relevant factors, and had not failed to properly consider the purpose of s 5(g) of the Health and Safety in Employment Act. The judge did not require explicit reference to be made to s 5(g), and held reference to the standard was implicit throughout.⁹⁰ Allowing a decision-maker to fulfil their obligations implicitly and without clear evidence that the relevant factors had been considered would be more acceptable under a low intensity of review.

The Court further found there was no evidence of an unlawful bargain.⁹¹ It is interesting that Brown J did not consider that a finding of an unlawful bargain would have made review available. Unlawful bargain was only considered in the alternative that judicial review was allowed. This shows that a very low intensity of review was adopted.

Brown J also acknowledged that United Kingdom case law considered the threshold for review to be lower where the decision was not to prosecute.⁹² This further aligns with

87 At [42].

88 At [37].

89 At [46].

90 At [82].

91 At [59].

92 At [33].

the notion of intensity of review – the courts will carefully consider the surrounding circumstances to arrive at the correct intensity.

In short, the High Court’s approach showed acceptance of the notions of secondary justiciability and intensity of review, and indicated that the appropriate level of intensity for judicial review of prosecutorial discretion is low.

B Decision of the Court of Appeal

The Court of Appeal was asked to address many of the same questions as the High Court: the issue of justiciability, whether there was an unlawful bargain between Worksafe and Mr Whittall, and whether Worksafe had failed to consider relevant factors by not following the Prosecution Guidelines and not referring to s 5(g) of the Act.

1 Justiciability

The Court of Appeal noted a variety of strong reasons for judicial restraint in the review of prosecutorial discretion. These included observing constitutional boundaries, the high content of discretion involved in such decisions, the undesirability of collateral challenges to criminal proceedings, the other avenues to challenge a prosecutor’s view that an offence has been committed, for instance at trial, and the existence of other mechanisms for accountability of prosecutorial decisions.⁹³

Nonetheless, the Court of Appeal ultimately held that prosecutorial decisions are reviewable. The Court explicitly endorsed the notion of intensity of review and moved away from secondary justiciability.⁹⁴ The Court noted:⁹⁵

Absent abdication of discretion, relief ... is likely on review only in exceptional cases. But a prosecutorial decision will generally be justiciable, albeit the intensity of review and remedial response may be restricted.

This is a clear statement in support of intensity of review. The use of the phrase “intensity of review” explicitly recognises and endorses the approach.

93 *Osborne v Worksafe New Zealand*, above n 5, at [34].

94 At [35].

95 At [35].

It is notable that despite the “very good reasons for the exercise of judicial restraint” identified by the Court, non-justiciability was still rejected.⁹⁶ The policy reasons identified were not good enough to amount to justification for the court to “summarily refuse to consider [review of prosecution decisions]”.⁹⁷ This suggests Kos P preferred to move away from non-justiciability, while his references to exceptional circumstances show acceptance of intensity of review.

The fact the Court considered judicial review to be more appropriate where the decision was *not* to prosecute further indicates use of intensity of review.⁹⁸ Where the decision is not to prosecute, there is no possibility of interfering with an ongoing criminal trial, and there would be fewer alternative avenues for a complainant to use.⁹⁹ This shows the Court considering all the relevant circumstances and policy issues in judicial review, and using them to determine how intensely to scrutinise the relevant issue.

The Court suggested a preference to move away from secondary justiciability by expanding the grounds of review available. It held judicial review of a prosecution decision may be advanced on grounds other than abdication of discretion, including relevancy,¹⁰⁰ although accepted this ground would rarely succeed.¹⁰¹

The rejection of secondary justiciability can also be seen in the acceptance that error of law could be a ground of review of prosecutorial discretion. Kos P expressly considered whether error of law could be an available ground of review, and considered the competing United Kingdom cases of *Matalulu* and *R (F) v DPP*, both discussed above.¹⁰² He ruled error of law ought to be available, and should not be completely excluded,¹⁰³ thus suggesting a preference for intensity of review over secondary justiciability.

96 At [34]–[35].

97 At [51].

98 At [36]–[37].

99 At [36]–[37].

100 At [40].

101 At [45].

102 At [46]–[47].

103 At [47].

2 *Unlawful Bargain*

The Court's discussion regarding unlawful bargain is relevant to intensity of review. It gives insight into just how much deference a court will provide to the decision-maker. In the case, the Court found that no unlawful bargain was made out on the facts.¹⁰⁴ Later, however, the Court said it "would have considered granting declaratory relief had unlawfulness been established".¹⁰⁵

That is an intriguing comment for intensity of review. It suggests that the Court would have held back from granting relief *even if* unlawful bargain had succeeded. Arguably, this shows a very high standard of deference. It would be very serious for a court to find that a prosecutor had entered into a bargain to stifle prosecution. Yet even in this circumstance, the Court was not willing to definitively state that judicial review would succeed under a low intensity of review.

It would be wrong, however, to read too much into the Court of Appeal's statement. While it is possible that the statement endorses an extremely low intensity of review, it is also possible the Court merely did not wish to make strong, absolute statements in an obiter discussion.

The position of the law following the Court of Appeal's decision in *Osborne* continues the trajectory from non-justiciability to intensity. It rejects secondary justiciability by accepting there are numerous grounds upon which judicial review can be based, but the Court will rely on the context of the decision to determine the intensity of review. The possibility the Court would not have allowed a declaration suggests that intensity may be particularly high, but strong conclusions cannot be drawn from their statement. The Court of Appeal is therefore consistent with the trend in earlier cases on judicial review of prosecution discretion, and with similar cases in the United Kingdom.

C *Decision of the Supreme Court*

The Supreme Court was not asked to consider whether judicial reviews of prosecution discretion were justiciable. Both parties accepted the Court of Appeal's ruling on this issue.¹⁰⁶ Worksafe further accepted that an agreement to stifle prosecution in return for

104 At [72].

105 At [101].

106 *Osborne v Worksafe New Zealand*, above n 4, at [24].

payment would reach a level of illegality that would justify judicial review. Accordingly, the appeal turned on whether the arrangement between Worksafe and Mr Whittall was an agreement to stifle prosecution or merely an offer of voluntary payment that could be considered by Worksafe when deciding whether to prosecute.

The Supreme Court found for the appellants, and held an unlawful bargain could be made out on the facts. Mr Whittall had suggested “a voluntary payment of a realistic reparation payment, *conditional upon* the informant electing not to proceed with any of the charges against Mr Whittall” (my emphasis).¹⁰⁷ The Supreme Court held this was an offer to form an agreement to stifle prosecution. The agreement did not change in substance when Worksafe decided to offer no evidence against Mr Whittall, which was an acceptance of the above offer.¹⁰⁸ Moreover, it was immaterial that Worksafe had other reasons not to offer evidence.¹⁰⁹

At first glance, the case appears to have bypassed discussing justiciability and intensity of review altogether. This was to be expected given the Court was not asked to determine the issue. The reasoning of the Court focused on determining whether there had in fact been an unlawful bargain to stifle prosecution between Worksafe and Mr Whittall. Moreover, no explicit reference was made to the intensity standard in judicial review cases, and the judges did not explicitly endorse or critique the current approach to intensity of review.

A closer reading, however, suggests the Supreme Court cast doubt on intensity of review more subtly in its judgment. At the end of Elias CJ’s judgment, writing for William Young, Glazebrook and O’Reagan JJ, she noted that even if the Supreme Court had found there was no unlawful bargain, it may still have allowed the judicial review to succeed.¹¹⁰ Her Honour expressed doubt as to whether Mr Whittall could properly be said to be a secondary offender while Pike River Coal was the principal offender; whether individual responsibility had been properly considered; and whether it was appropriate to not explicitly focus on s 5(g) of the Act.¹¹¹

107 At [42].

108 At [88].

109 At [93].

110 At [97].

111 At [97]–[98].

Her Honour did not provide much detail as to how such factors could lead to a successful claim for judicial review. The lack of detail in the discussion makes the Court's meaning unclear. To shed some light on the possible meaning of this obiter discussion, the following section will analyse under what circumstances the factors mentioned by the Chief Justice could give rise to a successful review of prosecution discretion. It will conclude that a very high intensity of review would need to be applied for judicial review to succeed, which suggests the Supreme Court disapproves of low intensity of review in the context of prosecutorial discretion. The disapproval expressed in those comments, however, is not enough to disrupt the overall trajectory in favour of intensity.

1 Error of law

Her Honour suggested there was an arguable case that Worksafe erred in their decision-making by concluding Mr Whittall was only a secondary offender, which would alter his likely sentence, and thus reduce the benefit of prosecuting him.¹¹² This would amount to reviewing a decision on an error of law.

The Court of Appeal in *Osborne* was clear that a material error of law in the exercise of prosecutorial discretion will be reviewable.¹¹³ At first glance, this first factor does not alter the Court of Appeal's approach on intensity of review.

On the other hand, the particular error of law referenced by Her Honour is reasonably minor. Worksafe considered numerous factors when deciding not to prosecute, and this was only one of them.¹¹⁴ It is difficult to conceive of this error as "material" given the range of other appropriate reasons to not prosecute given by Worksafe. Even if Mr Whittall were considered a primary offender, there is no reason to believe this would have changed the outcome of Worksafe's decision against prosecution. Accordingly, it is not an error of law which affected the decision itself.¹¹⁵ To consider that this error would lead to a successful review against a prosecutor requires a much more intensive review than has previously been allowed for prosecution decisions. In fact, it seems to require highly intensive scrutiny.

112 At [97].

113 *Osborne v Worksafe New Zealand*, above n 5, at [48].

114 *Osborne v Worksafe New Zealand*, above n 4, at [56].

115 *Peters v Davison* [1999] 2 NZLR 164 (CA) at 201–202.

The judgment does not take a firm position that this particular error of law would have led to a successful review, but at least suggests a fairly low standard before the Court will interfere with a decision. While this does not openly reject intensity of review, it does not seem reconcilable with the use of a low intensity standard in this context.

2 *Mistake of fact*

The mischaracterisation of Mr Whittall as a secondary offender instead of a primary offender could also be an error of fact, as could the belief that the Royal Commission report was sufficient response to individual responsibility.

Error of fact is an emerging ground of judicial review, and judges have been hesitant to endorse it.¹¹⁶ It is possibly becoming more accepted today. Most recently, the Court of Appeal in *Taylor v Chief Executive of the Department of Corrections* allowed an appeal for judicial review on four grounds, one of which was mistake of fact.¹¹⁷ Nonetheless, the law is unsettled and there is no case law on the amenability of error of fact to a judicial review of prosecutorial discretion.

Given that error of fact is an emerging ground of review, it seems inconsistent with a low intensity of review approach to apply it successfully in a case such as this. It has been suggested that one of the ways in which the depth of scrutiny is modulated is by the evolution of new grounds of review.¹¹⁸ New grounds of review tend to allow a higher level of scrutiny. If mistake of fact is not a ground of review, it would be considered a question as to the merits of the decision, and the stringent unreasonableness standard would apply. The development of material error of law as a sub-ground of review therefore offers an additional way to apply varying intensities of review, depending on the case. The Chief Justice did not suggest which grounds of review may be applicable, so it is not clear if she would endorse using mistake of fact in such a circumstance. Given mistake of fact is rarely successful, her comments were likely intended to suggest review on error of law, not fact.

116 This hesitancy was recognised in *Taylor v Chief Executive of the Department of Corrections*, above n 65, at [94]; see also Dean Knight, above n 11, at 75–76.

117 At [94]–[100].

118 Knight, above n 11, at 75.

3 *Relevant considerations*

The Chief Justice suggested that Worksafe's failure to consider the purposes of the Act as outlined in s 5(g) amounted to a failure to consider a relevant consideration. Previous cases considered relevancy was an available ground of review, but expressed doubts that it could succeed given the large discretion afforded to the prosecutor.¹¹⁹ A higher intensity of review would need to be accepted for this factor to contribute to a successful review.

To succeed in a claim on relevancy grounds, it is necessary to show that it was *mandatory* to consider a particular factor.¹²⁰ Section 5(g) of the Act does not make it mandatory for a prosecutor to consider the seriousness of the offence. It is merely one of the objects of the Act. The Prosecution Guidelines may say the objects of the Act are relevant, but the Court of Appeal was clear that the guidelines were expressly aspirational and not legally binding.¹²¹ It is difficult to see how this factor could result in a successful review. Case law suggests departure from voluntarily adopted guidelines could be a reviewable error of law.¹²² Such law may not be applicable where the guidelines are "expressly aspirational". It is unclear if Elias CJ was suggesting the guidelines are enforceable. Reasons for why they may be binding were not advanced in her judgment.

It is also worth noting that the High Court thought Worksafe had implicitly considered s 5(g) in their decision, but Elias CJ suggested that unless the Act had been explicitly considered, judicial review might succeed on relevancy grounds. Such an approach indicates a high intensity of review, which further points to the Supreme Court's dissatisfaction with varying intensity of review. All of these factors, therefore, indicate a rejection of low intensity of review. The question then becomes whether this expression of dissatisfaction alters the trajectory away from intensity of review.

119 *Matalulu v Director of Public Prosecutions*, above n 24.

120 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 183.

121 *Osborne v Worksafe New Zealand*, above n 5, at [74].

122 *Chiu v Minister of Immigration* [1994] 2 NZLR 541 (CA) at 550.

4 *Trajectory of intensity of review post-Osborne*

The Court did not make any firm finding that, in the absence of the unlawful bargain, the factors raised would have resulted in a successful review. Elias CJ said:¹²³

We express no views on how they would be assessed if it had been necessary to deal with the other grounds of judicial review. Nor is it necessary for us to consider the extent to which it might be appropriate to consider such matters in judicial review of a prosecutorial discretion.

The Court seems aware that judicial review would be widened beyond what is currently accepted should those factors lead to a successful review of prosecution discretion. Nonetheless, the Court is unlikely to have made those comments if it did not consider there was a reasonably strong argument that such grounds of review were available and could potentially succeed on the facts of the case.

The obiter discussion lacks clarity, however. As the above discussion shows, it is not clear precisely how the factors considered by the Chief Justice would result in a successful judicial review. The Court was clear that it expressed no view on whether the factors would allow a ground of review to be made out, or even whether the potential grounds could be considered in the context of prosecution discretion. This makes it difficult to draw many conclusions from the discussion.

At best, the non-committal comments from the Supreme Court constitute a subtle obiter critique of intensity of review. This, however, is not enough to alter the previous existing trajectory towards intensity. Particularly, the clear endorsement of intensity from the Court of Appeal in *Osborne*¹²⁴ and the approach in cases such as *Ye*¹²⁵ and *Huang*¹²⁶ create legal precedent that endorses intensity of review. If the Supreme Court wished to disturb that position, it needed to do so much more explicitly. The Supreme Court has not created precedent which changes the intensity approach to judicial review, either generally or in the context of prosecution discretion. Its previous comments extra-judicially or with counsel in cases such as *Ye* suggest it does not like intensity, but has not set precedent on it.

123 *Osborne v Worksafe New Zealand*, above n 4, at [100].

124 *Osborne v Worksafe New Zealand*, above n 5, at [35].

125 *Ye v Minister of Immigration*, above n 59.

126 *Huang v Minister of Immigration*, above n 62, at [62]–[67].

The Supreme Court does not want to return to non-justiciability – on the contrary, the judges want to reject the notion of deference and be free to take a hard look whenever they feel it is appropriate. However, the Court gave little indication of what it thought could replace intensity.

One possibility is that the Court viewed the situation through the lens of secondary justiciability. The obiter discussion arguably focused on the available *grounds* of review, which would be consistent with a secondary justiciability approach. The focus of the discussion, however, was to list a range of *factors* that may satisfy a ground of review.¹²⁷ The focus was on the factors, not the grounds of review, which is not consistent with secondary justiciability.

The Supreme Court was also not willing to state with certainty that all grounds of review would be available in a review of prosecution discretion.¹²⁸ Thus, the Court *recognised* secondary justiciability, but the discussion did not *endorse* the concept. Given the Supreme Court’s previous critiques of low intensity of review previously outlined in this essay, it seems unlikely it would condone secondary justiciability, which shows even more deference to the decision-maker than a low intensity standard.

It is possible the Supreme Court prefers contextualism, where judges determine judicial review by considering all the circumstances holistically without “doctrinal scaffolding” to determine the intensity of scrutiny.¹²⁹ Lord Cooke promoted contextualism by advancing a model of judicial review without technicalities, which allows judges to intervene where they see injustice.¹³⁰ This is arguably the position preferred by the Supreme Court. Tipping J’s comment in *Ye* that “you interfere if you think you should” aligns with a contextual approach.¹³¹ Elias CJ has made comments that endorse Lord Cooke’s simplicity project.¹³²

Alternatively, the Supreme Court may merely be expressing concern at the very low intensity of scrutiny that lower courts tend to apply. Elias CJ in particular seems concerned at the idea the courts should be highly deferential to the decision-maker. If

127 *Osborne v Worksafe New Zealand*, above n 4, at [96]–[100].

128 At [100].

129 *Knight*, above n 11, at 81.

130 At 83.

131 *Ye v Minister of Immigration* (NZSC, transcript, 21-23 April 2009, SC 53/2008) at 180.

132 *Knight*, above n 15, at 403.

so, the Supreme Court may not be completely opposed to the notion that sometimes a higher level of scrutiny will be applied than other times, but that in no circumstances should a very low intensity apply. This would still accept some variation of intensity of review.

Ultimately, the Supreme Court judges have made obiter and non-judicial comments that suggest they do not like intensity of review. They have not, however, released a formal judgment contradicting the lower courts' approach to intensity. Accordingly, the trajectory of non-justiciability to intensity is not altered by the Supreme Court in *Osborne*. The most recent precedent regarding intensity of review for prosecution discretion is therefore the Court of Appeal in *Osborne*, which moved away from secondary justiciability in favour of intensity, as stated above. In a judicial review of prosecution discretion, judges will adopt a low intensity of review.

5 *Lack of clarity in the law*

The Supreme Court's approach is regrettable for its lack of clarity. The position on intensity of review is currently confusing due to an apparent split between judges of the lower courts and judges of the Supreme Court. On the one hand, the Court of Appeal has explicitly endorsed the concept of intensity of review. The Court of Appeal in *Osborne* is a prime example of this. On the other hand, the Supreme Court appears to have critiqued this approach.

The lack of clear direction from the Supreme Court creates a highly confusing situation for decision-makers and their lawyers. If a prosecution decision is judicially reviewed, the outcome of the case may change if appealed all the way to the Supreme Court. In this environment, it is hard for decision-makers to know if they are making decisions that will withstand judicial review.

This is particularly true given the changing composition of the Supreme Court. Lower court judges who have previously been willing to use varying standards of intensity are now on the Supreme Court. In *Ye v Minister of Immigration*, Glazebrook J analysed the correct intensity to apply to review in the circumstances of the case. She is now on the Supreme Court, and was a judge in *Osborne v Worksafe* (SC), where intensity was seemingly criticised. This makes it harder to state the Supreme Court's position on the issue of intensity with any certainty.

Moreover, New Zealand only has binding precedent on this unsettled area of law at the Court of Appeal level, despite the Supreme Court considering the issue on multiple occasions. The Supreme Court ought to clarify the law on intensity of review.¹³³ Taggart argued the law regarding deference is currently “chaotic, unprincipled and results-oriented”.¹³⁴ It is crucial that courts apply the correct standard of intensity to best uphold the standard of governance citizens deserve, which requires higher courts to enunciate reasoning for when to intervene. Development of intensity of review can only occur where:¹³⁵

... a deliberate and concerted effort is made to explain all the factors that influence the judges in characterising a case as of a particular sort and positioning it appropriately on the rainbow of review.

This is particularly important given a finding of low intensity may allow an unjust result to remain and perpetuate harm.¹³⁶ The courts require a robust approach to intensity, to ensure they are not merely rubber-stamping executive decisions.¹³⁷

The Supreme Court should therefore have taken the opportunity to provide guidance on when a lower or higher level of intensity ought to apply. Currently, courts are aware of a need to consider the surrounding context, including the nature of the decision being made and the nature of the body making the decision.¹³⁸ A clear example is the discussion from the Court of Appeal in *Osborne* on the reasons courts should be hesitant to interfere with prosecutorial discretion. While this is a reasonable approach, the courts only appear to have rather vague guidelines about considering context, without agreed understanding on what circumstances would lead to a high or low intensity. The Supreme Court ought to have provided guidance on this, particularly since it appears to disagree with the low intensity applied by the lower courts. The extra-judicial and obiter comments from *Osborne* suggest a dislike of deference and low intensity, yet the Court has not provided guidance to ensure the lower courts adopt an appropriate level of review.

133 Taggart, above n 13, at 460.

134 At 453.

135 At 454.

136 Harris, above n 9, at 633.

137 Matthew Groves “Habeas Corpus, Justiciability and Foreign Affairs” (2013) 11 NZJPIL 587 at 596.

138 *Lab Tests Ltd v Auckland District Health Board*, above n 19, at [58].

The Supreme Court's approach in *Osborne v Worksafe* was regrettable since it has left the law on intensity of review in an uncertain state, and failed to ensure lower courts apply the appropriate standard of intensity.

IV Conclusion

The discrepancy in views between the lower courts and the Supreme Courts makes it hard to chart New Zealand's progress towards embracing intensity of review. While the lower courts have begun to embrace intensity of review, the Supreme Court remains wary.

The *Osborne* litigation was an opportunity for the Supreme Court to clarify their views on intensity, and provide guidance to lower courts on the correct level of scrutiny to apply. Instead, the Supreme Court did not properly engage in discussion on intensity, and merely made passing obiter comments that suggest dislike for low intensity of review. The law therefore remains murky, with minimal guidance for lawyers, lower court judges or decision-makers.

In the absence of more explicit dissatisfaction with intensity from the Supreme Court, the position adopted by the Court of Appeal is the law in New Zealand. Accordingly, lower courts will use the concept of intensity of review in judicial review cases involving prosecution decisions. This continues the trajectory evidenced in broader administrative law away from non-justiciability and in favour of secondary justiciability and intensity.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises exactly 7,983 words.

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