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**PRIVATE PROSECUTIONS IN NEW ZEALAND  
– A PUBLIC CONCERN?**

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***Abstract***

*This essay evaluates whether private prosecutions remain a safe and useful mechanism in the modern New Zealand criminal justice system. It argues that private prosecutions are an important constitutional safeguard against state inertia, incompetence and bias, and that recent legislative reforms have strengthened the judiciary's ability to ensure this mechanism is not misused. Despite this, concerns still remain. This essay begins by providing an overview of private prosecutions and a justification for their continued existence. It then outlines the current procedure for private prosecutions in New Zealand, highlighting, in particular, the impact of the Criminal Procedure Act 2011. Finally, this essay explores remaining concerns with this mechanism. Ultimately, while still in favour of retaining private prosecutions, this essay advocates for a greater alignment of the purposes of private prosecutions in theory and their application in practice. It cautions against further normalisation and commercialisation of private prosecutions and questions their effectiveness as a "safeguard" given the considerable financial and investigative burdens faced by applicants.*

*Private prosecutions – criminal law – Criminal Procedure Act 2011*

***The text of this essay (excluding the cover page, table of contents, keywords, abstract, footnotes and bibliography) consists of exactly 7979 words.***

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## *I Introduction*

It is undeniable that New Zealand’s criminal justice system is dramatically different from its early Anglo-Saxon roots.<sup>1</sup> One similarity that remains, however, is the ability of a private person to bring criminal proceedings against another. This mechanism is often conceived as an “important safeguard” for New Zealand citizens,<sup>2</sup> with several high-profile cases in recent years.<sup>3</sup> Private prosecutions are rare in the modern criminal environment and consequently, little academic attention has been paid to them. Where the use of private prosecutions has been considered, however, concerns have been raised.<sup>4</sup>

Now, nearly 20 years after the last comprehensive review of private prosecutions in New Zealand,<sup>5</sup> this essay returns to the subject and evaluates whether private prosecutions remain a safe and useful addition to the law in light of recent legislative changes. This essay firstly provides a descriptive overview of these proceedings, with a definition, brief history, and justification for their continued existence. Secondly, this essay outlines the current procedure for private prosecutions, including their scope, how private proceedings may be commenced, and applicable safeguards. In doing so, it describes how the Criminal Procedure Act 2011 brought greater oversight to private prosecutions. Finally, this essay highlights remaining concerns with this mechanism. It cautions against further commercialisation and normalisation of private prosecutions and questions the effectiveness of this mechanism as a “safeguard” given the considerable financial and investigative burdens faced by applicants.

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1 Philip Stenning *The Modern Prosecution Process in New Zealand* (Victoria University Press, Wellington, 2008) at 25.

2 Law Commission, *Criminal Prosecution: A Discussion Paper* (NZLC PP28, 1997) at [436].

3 For example *Taylor v Witness C* [2017] NZHC 2610.

4 See for example Bill Hodge, “Private Prosecutions: Access to Justice” [1998] NZLJ 145 and Law Commission *Criminal Prosecution* (NZLC R66, 2000).

5 Law Commission, above n 4.

## *II Private Prosecutions in the Criminal Law*

### *A Definition*

Private prosecutions are prosecutions commenced and managed by individuals or entities other than the state. This essay adopts the Criminal Procedure Act 2011 (“CPA”) definition of a private prosecution:<sup>6</sup>

“a proceeding against a defendant in respect of an offence that is not -  
(a) a public prosecution; or  
(b) a proceeding in respect of an offence commenced by or on behalf of a local authority, or other statutory public body or board.”

Public prosecutions, by contrast, are proceedings commenced by or on behalf of the Crown, including Crown entities.<sup>7</sup> Despite this distinction, private prosecutors may still be public in nature or functions. Private prosecutors include local government agencies and public boards and bodies. Other classes of private prosecutors include private agencies recognised to or established as enforcing particular enactments, organisations interested in enforcing particular statutes, individuals or commercial enterprises acting for their own cause, and commercial businesses that undertake private prosecutions on behalf of others.<sup>8</sup>

### *B History*

The history of private prosecutions in the criminal law is defined not by its emergence, but rather its decline. The criminal justice system in medieval England was founded upon the assumption that the responsibility for preserving peace and bringing offenders to justice was one which belonged to every member of the community. Initially, there was no formal machinery for the prosecution of criminal offences - rather the system relied heavily on the

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6 Criminal Procedure Act 2011, s 5.

7 Criminal Procedure Act 2011, above n 6, s 5. See Crown Entities Act 2004, s 7 for what constitutes a Crown Entity.

8 For more information on classes of private prosecutors see Law Commission, above n 4, at 92-93 and G L Turkington and J M E Garrow *Garrow and Turkington’s Criminal Law in New Zealand* (online ed, LexisNexis NZ, May 2018) at CPA5.1.

initiative of private citizens.<sup>9</sup> Grand juries made of ordinary citizens investigated serious crimes and initiated proceedings. These juries were expected to know and in truth disclose all circumstances of the crime with the presentation of an accused person to a justice of the King’s Bench.<sup>10</sup> By the end of the sixteenth century, the role of the grand jury had gradually evolved from being “self-informed and active” to “static, passive[,] ignorant” and reliant on victims and aggrieved citizens to bring evidence to them. This movement was also paralleled by the development of rules of evidence, proof of facts and the professionalisation of people involved in these processes.<sup>11</sup> A disciplined professional police force was established in 1829 and, in part due to the serious decline in the standards of private prosecutions, police gradually acquired the roles of investigator and prosecutor.<sup>12</sup> Friedman describes a gradual “master-trend” in the history of criminal justice “from private to public, and from lay to professional”.<sup>13</sup>

New Zealand adopted many of the key features of the British criminal justice system during the country’s colonisation in the early 1840s.<sup>14</sup> Grand juries were introduced in 1858, however, most of their role was quickly taken over by Justices of Peace.<sup>15</sup> Police acted as prosecutors in firstly summary cases, and by 1864, for the beginnings of indictable cases.<sup>16</sup> Crown solicitors and prosecutors would prosecute where the party bound over the prosecution did not want to. By 1864 this was usually a police officer.<sup>17</sup> As public prosecution roles continued to grow in dominance and intensified in expertise, private prosecutors, in turn, became less common.<sup>18</sup> Nowadays most prosecutions in New Zealand are public in nature, instigated by Crown Solicitors, police and relevant Ministries and

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9 Stenning, above n 1, at 39.

10 Law Commission, above n 2, at [38]–[39].

11 Law Commission, above n 2, at [22]; and Hodge, above n 4, at 145.

12 Law Commission, above n 2, at [44].

13 Lawrence Meir Friedman *Crime and Punishment in American History* (Perseus Books Group, 1993) at 174.

14 See Stenning, above n 1, at 60 – 61 for a description of the key features of the British criminal justice system adopted by New Zealand.

15 Law Commission, above n 2, at [47]–[49].

16 At [50].

17 At [53]–[54].

18 For a more complete overview of the beginnings of New Zealand’s prosecutorial system see Stenning, above n 1, 23 - 99 and Law Commission, above n 2, at [37]–[55].

Crown agencies,<sup>19</sup> such as Worksafe who enforce the Health and Safety at Work Act 2015 (HASAW).<sup>20</sup> Private prosecutions, by contrast, are rare in comparison.

### C Purposes

Private prosecutions fulfil several important purposes in the modern era. Prosecuting criminal offenders is a central function of the State. Private prosecutions play a fundamental constitutional role in protecting against misuse, or more commonly omitted use, of this state power. By allowing private individuals to bring their own criminal proceedings, the public is safeguarded against inertia, incompetence or biased decision making by the state.<sup>21</sup> Given this role, it is therefore unsurprising that private prosecutions often concern political or public figures.<sup>22</sup> Providing the public with this opportunity to be heard, in turn, protects the integrity and community trust of the judicial system and Crown.<sup>23</sup>

Further, it is well-known that the abilities of the state to investigate and prosecute are not limitless. Financial restraints heavily confine and dictate the state's prosecutorial decisions and interpretation of policies and principles.<sup>24</sup> Consequently, low-level offences are often downgraded and deprioritised.<sup>25</sup> Private prosecutions, therefore, supplement state prosecutorial deficiencies that exist through negligence and abuse, and also those that exist as a result of economic limitations.<sup>26</sup>

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19 Julia Tolmie and Warren Brookbanks *Criminal Justice in New Zealand* (LexisNexis NZ, Wellington, 2007) at 8.3.1.

20 See Crown Entities Act 2004, sch 1 and Health and Safety at Work Act 2015 for more information.

21 Law Commission, above n 2, at [436], cited also in *Taka v District Court at Auckland* [2015] NZHC 972 at [12]. See also the original dicta of Lord Wilberforce in *Gouriet v Union of Post Office Workers* [1977] UKHL 5; [1978] AC 435 at 498.

22 For example see *Bright v Key* [2009] NZHC 532, [2009] NZAR 532 and “Mallard pleads guilty to fighting, says sorry to consultant” *New Zealand Herald* (online ed, 18 December 2007).

23 *Creegan v New Zealand Defence Force* DC Wellington CRI 2014-085-007231, 18 July 2014 at [48].

24 Crown Law Office *Solicitor General's Guidelines* (1 July 2013) at [5.7].

25 Hodge, above n 4, at 147.

26 Private Prosecutions Ltd submission in New Zealand Law Commission, above n 4, at [260].

In consequentialist theory, prosecution and punishment operate as a form of behaviour modification by deterring citizens from engaging in harmful activities.<sup>27</sup> Selective prosecuting by the state reduces the risk of being prosecuted, creating a disincentive for complying with the law. Offences that do not result in harm, such as criminal nuisance where there is no injury and inchoate offences, are often not prosecuted.<sup>28</sup> Submissions in favour of lifting the state monopoly to prosecute offences under the Health and Safety at Work Amendment Act 2002 implied it was common knowledge that Occupational Health and Safety Management Service responded to only with the worst cases: “employers know that unless they kill their workers, their prosecution risk is minimal”.<sup>29</sup> Low-level and inchoate offences play an important role in allowing agencies to step in and stop dangerous conduct before harm occurs. As Dabee emphasises “the use of private prosecutions to prosecute minor violations may prevent the normalisation of ignoring safety regulations, and prevent a more serious accident from happening.”<sup>30</sup>

Private prosecutions further deter criminal behaviour and fulfil the state’s economic limitations by enabling more people to prosecute. Competitors have the greatest interest in ensuring competing businesses do not get unfair price advantages by not adhering to legal standards. They are therefore are willing to use the full extent of their commercial resources to ensure that any deviation from legal obligations is prosecuted.<sup>31</sup> Private prosecutions further enable groups with specific interests, such as unions and organisations to bring proceedings. These groups may have a greater awareness of offences being committed through both their interest and as vulnerable people, such as new migrants, may be more willing to report violations to them rather than regulators or the police.<sup>32</sup>

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27 A P Simester and W J Brookbanks *Principles of Criminal Law* (4th ed, Brookers, Wellington, 2012) at 17.

28 Fran Wright “Criminal Nuisance: Getting Back to Basics” (2005) 21 NZULR 665. See *Parkin v Tararua District Council* [2004] DCR 882 for an example of successful private prosecution of the offence of criminal nuisance.

29 Robyn Houlain “Submission on Health and Safety in Employment Act Amendment Bill to the Transport and Industrial Relations Select Committee 2002” at 2.

30 Nadia Dabee, “Private prosecutions and workplace health and safety” [2015] NZLJ 371 at 372.

31 Richard Johnstone and Michael Tooma *Work Health and Safety Regulation in Australia: The Model Act*, (Federation Press, Australia, 2012) at 193 and Ministry of Labour *Discussion Paper on Review of the Health and Safety in Employment Act 1992* (December 2001) at 20.

32 Dabee, above n 30, at 372.

The importance of this safeguard can be evidenced by the impact lifting the Crown’s monopoly on health and safety offences in the workplace had.<sup>33</sup> In 2002 Private prosecutions were introduced to the regime in part due to suspicions that worthy cases were not being prosecuted.<sup>34</sup> The New Zealand Council of Trade Union submission on the relevant Bill criticised the regime as being unable to prevent workplace accidents.<sup>35</sup>

Enforcement of the Act by the Department of Labour had been ‘soft’, providing further encouragement to employers who decide to ‘take the risk’ that they won’t be prosecuted for breaches of the Act, even in fatal cases where prosecution would appear to be warranted.

Similarly, statistics released by the Minister of Labour in 2001 found an average of only one in one thousand non-compliant workplace behaviours were being prosecuted.<sup>36</sup> Since lifting the monopoly, numerous private prosecutions have been successful. In 2015 two private prosecutions were brought by the Council of Trade Unions against forestry companies for the death of workers, Charles Finlay and Eramiha Pairama. In both cases, WorkSafe had investigated the incidents and decided not to prosecute. Despite this, both private prosecutions were won “with incredible ease”.<sup>37</sup> Further in 2014 the New Zealand Defence Force pleaded guilty to failing to take practical steps to ensure the safety of its employees following a helicopter crash that killed four crew members. Justice Hastings finished his judgment by emphasising to Sergeant Creeggan, the private prosecutor and sole survivor of the crash:<sup>38</sup>

You are proof that one person can make a difference. By dint of your tenacity and resolve, you have managed to create a silver lining from an unimaginable tragedy that has seared itself into the nation’s psyche. You have demonstrated what the amendment legislation permitting private prosecutions set out to achieve. The New Zealand Defence Force is a better employer and the honour of the Crown has gone some way to being restored as a result of your actions.

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33 Health and Safety in Employment Amendment Act 2002.

34 Hazel Armstrong and Robert Brier, “Enforcing the HSE Act” [2003] NZLJ 259.

35 New Zealand Council of Trade Unions “Submission to the Transport and Industrial Relations Select Committee on Health and Safety on the Employment Act Amendment Bill 2002”.

36 *Discussion Paper on Review on the Health and Safety in Employment Act 1992*, above n 31, at 17.

37 Iain Lees-Galloway MP (25 August 2015) 708 NZPD 6089. For further information see WorkSafe declines, private prosecution wins” (3 August 2015) Radio New Zealand <[www.radio.nz.co.nz](http://www.radio.nz.co.nz)> and Mike Mather “Puketi Logging sentenced over death of Eramiha Pairama” *Stuff* (1 October 2015).

38 *Creeggan*, above n 23, at [48].

Hodge additionally argues that private prosecutions importantly provide a “pragmatic window of opportunity for the public to participate in a fundamental state service.”<sup>39</sup> Jurors aside, New Zealanders are provided with little democratic opportunity to participate in, or occasionally even know, the operations of the criminal justice system. Appointments for key figures, such as the judiciary and the Crown Solicitor, are neither transparent nor well-known.<sup>40</sup> Being able to involve the public and show justice and due process operating in this opaque sector helps restore faith and confidence in the criminal justice system.<sup>41</sup> Private prosecutions, arguably even where unsuccessful, allow for public accountability and independent scrutiny of the Crown.<sup>42</sup>

Finally, private prosecutions are often argued as having particular importance for victims of crime. The ability to instigate prosecutions allows those impacted to express their interests and liberty into the law and implement the administration of justice.<sup>43</sup> As Hodge expressed, in reflecting on his personal experiences with legal redress:<sup>44</sup>

the opportunity of private prosecution, and the availability in theory of that opportunity, itself enabled a therapeutic consideration of the issues. Had that window been shut, then bitterness and frustration would have intensified, and emotional closure not been possible.

It also provides aggrieved citizens with “recognition of their right to be heard and the observance of the principles of natural justice as confirmed by s 27 of the New Zealand Bill of Rights Act 1990.”<sup>45</sup> Private prosecutions can have a cathartic effect for victims even where unsuccessful. Victims are provided with the security of knowing that their story and concerns were properly and unbiasedly reviewed.<sup>46</sup> This cathartic or intended cathartic effect has been played out in New Zealand media for several high profile private

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39 Hodge, above n 4, at 146.

40 See Crown Law Office, *Judicial Protocol* (April 2013) and Crown Law Office, *Crown Solicitors: Terms of Office* (May 2017) at [6] for more information on these appointment processes.

41 Hodge, above n 4, at 146.

42 *Creegan v New Zealand Defence Force* [2014] NZDC 244 at [27].

43 Tyrone Kirchengast *The Victim in Criminal Law and Justice* (Palgrave Macmillan, New York, 2006) at 192.

44 Hodge, above n 4, at 147.

45 *Prescott v District Court at North Shore* [2017] NZHC 2828 at [48].

46 See Hannah Bartlett “Driver found ‘not guilty’ in ex-cop’s private prosecution” *Stuff* (online ed, 25 May 2018).

prosecutions in recent years.<sup>47</sup> This purpose could be said to be especially important in modern New Zealand given the statutory bar to civil personal injury claims.

It should not be argued, however, that private prosecutions have a purpose of providing individual justice for victims. Rather, any cathartic effect for victims and families should be perceived as a bonus. In modern criminal theory, offences are conceptualised as inflicting harm upon society as a whole rather than individual victims.<sup>48</sup> This is translated into state policy by commencing prosecutions only where the public interest requires.<sup>49</sup> The impersonal nature of the modern criminal justice system is designed “to ensure that the punishment [judges] impose in the name of the community is itself a civilised reaction, determined not on impulse or emotion but in terms of justice and deliberation.”<sup>50</sup> It lessens the fire for private vendettas and vengeance, and removes the “personal, often emotional, involvement of individual victims” from the criminal justice system which can “generate very particularised interests in the outcome of cases; and these individual interests may have little to do with the public interest.”<sup>51</sup> Recently, however, victims have been granted a greater role and emphasis in the criminal law. This “repersonalising” of the criminal justice system risks turning back the clock to early systems once overtaken by historical evolution.<sup>52</sup> Justifying private prosecutions as providing individual justice, therefore, undermines the intentions of the criminal justice system. Further, it is questionable whether the involvement of the victim in the criminal justice process does actually help recovery or whether victims are instead revictimised through the process.<sup>53</sup> It has been suggested direct assistance may be more beneficial for victims than a sense of ownership of the criminal justice process.<sup>54</sup>

In overseas jurisdictions, arguments have been advanced as to whether private prosecutions remain a valuable right in light of other safeguards and mechanisms.<sup>55</sup> In New Zealand, the

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47 For example *Parker v Rangitonga* [2017] NZDC 7581 in Tony Wall “Man who attacked Tauranga woman jailed after private prosecution” *Stuff* (online ed, 10 April 2017).

48 Tolmie and Brookbanks, above n 19, at 8.2.1.

49 See “The Public Interest Test” in *Solicitor General’s Guidelines*, above n 24, at 8–10.

50 *R v Puru* [1984] NZCA 248; [1984] 1 NZLR 248 at 249.

51 Tolmie and Brookbanks, above n 19, at 8.2.1 and J Hagan *Victims Before the Law* (Butterworths, Toronto, 1983) at 3.

52 Sian Elias, “Blameless Babes” (2009) 40(3) VUWLR 581 at 584.

53 Elias, above n 52.

54 Elias, above n 52.

55 See for example *Jones v Whalley* [2006] UKHL 41; [2007] 1 AC 63 at [9] and [16].

executive's decisions not to prosecute are susceptible to judicial review. To ensure, however, that the judiciary does not overstep constitutional boundaries and engage in high-content, discretionary questions,<sup>56</sup> the intensity of the review and the availability of relief is constrained. It is likely to be obtained only where there has been a failure to exercise discretion, such as by the adoption of a general policy not to bring prosecutions for certain offences or in "exceptional cases".<sup>57</sup> Other safeguards include the responsibility of relevant ministers to parliament or the ability for a commission of inquiry to be commenced. Arguably however, as these safeguards do not usually result in convictions, they do not provide the same deterrent effect, accountability and public assurance that such offences will not be repeated as private prosecutions do.<sup>58</sup> Further, New Zealand can be distinguished from other jurisdictions. England and Wales have the Crown Prosecution Service, an independent prosecuting authority that prosecutes cases following investigations by the police and other organisations.<sup>59</sup>

### *III Current Procedure*

#### *A Scope*

The modern authority for private prosecutions is contained in sections 15 and 10 of the CPA. These sections respectively allow "any person" to commence and then conduct a prosecution.<sup>60</sup> Such proceedings can be commenced for any criminal offence unless specified otherwise. Under HASAW private prosecutions may be commenced only where the regulator has not taken and does not intend to take enforcement and prosecution action in respect of the circumstances in question,<sup>61</sup> or where the prosecutor gains the leave of the court through the CPA.<sup>62</sup> In both situations, the person must have received a notification from the regulator that enforcement or prosecution has not and will not be taken.<sup>63</sup> Some

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56 *Osborne v Worksafe New Zealand* [2017] NZCA 11; 2 NZLR 513 at [34].

57 *Osbourne*, above n 56, at [35]. For more information on judicial review of decisions not prosecute see Graham Taylor *Judicial Review A New Zealand Perspective* (4th ed, LexisNexis NZ, Wellington, 2018) at 2.36.

58 *Creegan*, above n 42, at [31].

59 "About us" (2017) The Crown Prosecution Service <[www.cps.gov.uk](http://www.cps.gov.uk)>.

60 Where the matters proceeds to a jury trial however only a lawyer may conduct the case as provided by the Criminal Procedure Act 2011, s 10(3).

61 Health and Safety at Work Act 2015, s 144(1).

62 At s 144(3)(a).

63 At s 144(1)(c) and (3)(b).

criminal offences explicitly exclude the ability to bring a private prosecution without the consent of the Attorney-General or, as often occurs, the Solicitor-General.<sup>64</sup> Other offences sometimes require the Attorney General's consent or leave of the court prior to commencing any criminal proceeding more generally.<sup>65</sup>

The ability to commence a private prosecution is also time restricted. Section 25 of the CPA specifies time periods for when category 1, 2 and 3 offences may be brought. Charging documents in respect of category 4 offences can be brought at any time.<sup>66</sup> Section 148 of the HASAW similarly sets out limitation periods for offences under that Act.<sup>67</sup>

### *B Commencing private prosecutions*

The process for commencing a private prosecution is outlined in section 26 of the CPA. It provides -

- (1) If a person who is proposing to commence a private prosecution seeks to file a charging document, the Registrar may—
  - (a) accept the charging document for filing; or
  - (b) refer the matter to a District Court Judge for a direction that the person proposing to commence the proceeding file formal statements, and the exhibits referred to in those statements, that form the evidence that the person proposes to call at trial or such part of that evidence that the person considers is sufficient to justify a trial.
- (2) The Registrar must refer formal statements and exhibits that are filed in accordance with subsection (1)(b) to a District Court Judge, who must determine whether the charging document should be accepted for filing.
- (3) A Judge may issue a direction that a charging document must not be accepted for filing if he or she considers that—
  - (a) the evidence provided by the proposed private prosecutor in accordance with subsection (1)(b) is insufficient to justify a trial; or
  - (b) the proposed prosecution is otherwise an abuse of process.

64 By virtue of Constitution Act 1986, s 9A. Offences include Crimes Act 1961, s 124(5) and s 124A(5), and Films, Videos and Publications Classification Act 1993, s 144.

65 For a list of these offences see Crown Law Office *Statutory offences requiring the consent of the Attorney-General* (1 July 2013).

66 Criminal Procedure Act 2011, s 25(1).

67 Health and Safety at Work Act 2015, s 148. See also s 149 for exceptions to this limitation period.

While there is no guidance as to when registrars should refer files to judges, commentary anticipates registrars routinely direct files involving lay litigants to judges but accept documents from local authorities or public boards and bodies without referral.<sup>68</sup> Evidence must also be filed that supports the charge(s). This evidence solely informs the judge's decision.<sup>69</sup> Decisions made by either the judge or registrar under section 26 are susceptible to judicial review but not appeal.<sup>70</sup> Where the charging documents are accepted, summons are issued on behalf of the prosecutor by either the judge or registrar.<sup>71</sup>

Subsection three outlines the two grounds on which the charging document may not be accepted. Precedent regarding section 147 of the CPA, which gives judges discretionary power to terminate proceedings, and its previous equivalent, section 347 of the Crimes Act, assist in interpreting the threshold for these grounds.<sup>72</sup> Insufficiency considers whether there is evidence that if accepted by the factfinder would be sufficient in law to prove the essential elements of the charge beyond reasonable doubt, whether any useful purpose would be served in continuing the trial, and whether the alleged offence would receive only nominal punishment.<sup>73</sup> "Insufficient to justify a trial" is exercised in the interests of justice with respect to the relative roles of judge and jury,<sup>74</sup> and the need to ensure access to courts.<sup>75</sup> Insufficient evidence can only be found where "where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it".<sup>76</sup>

Abuse of process concerns situations that would preclude a fair trial or "tarnish the Court's own integrity or offend the Court's sense of justice and propriety."<sup>77</sup> This includes where

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68 Turkington and Garrow, above n 8, at 26.1.

69 *Taka*, above n 21, at [25] and Ian Murray *A Practical Guide to Criminal Procedure in New Zealand* (2nd ed, LexisNexis NZ, Wellington, 2016) at 3.19.2.

70 *Mitchell v Tyson* [2016] NZHC 2210; [2016] NZAR 1545 at [37-39] and *Mitchell v Porirua District Court* [2017] NZHC 1331; [2017] NZAR 1077 at [22]. See also Taylor, above n 57, at 2.42.

71 Criminal Procedure Act 2011, s 33.

72 *Walters v Chow* DC Wellington CRI-2013-085-009988, 31 October 2013 at [9] and *Dixon-McIver v Weston* DC Lower Hutt BC201366990, 19 November 2013 at [11].

73 *Walters*, above n 72, at [14].

74 *R v Kim* [2010] NZCA 106 at [5].

75 *Spratt v Savea* DC CRI-2014-009-001492, 29 April 2014 at [21].

76 *R v Galbraith* [1981] 1 WLR 1039 at 1041, cited in *Parris v AG and others* [2004] 1 NZLR 519 at [8].

77 *Fox v Attorney-General* [2002] NZCA 62; 3 NZLR 62 at [37].

no useful purpose would be served by the continuation of the proceedings, where the holding of a trial would be unreasonably burdensome on the defendant, or where the prosecution has acted in bad faith or from improper motives in carrying on the prosecution improperly or by altering its conduct in a way which has a prejudicial impact on the defendant.<sup>78</sup> Courts cannot, therefore, dismiss proceedings merely as a method of disciplining the prosecution or because, in the Court’s opinion, the proceedings should not have been brought.<sup>79</sup> Where the prosecution is sought by leave of the court under HASAW, the Judge must also take into account consistency with the purpose of the Act and whether it is in the public interest.<sup>80</sup>

The judicial oversight given by section 26 for commencing private prosecutions is new. Prior to the CPA’s enactment, private prosecutions could be instigated merely by laying information for a summary offence,<sup>81</sup> or by filing an indictment form for an indictable offence.<sup>82</sup> Leave from the court was not required, however, District Court judges, justices, community magistrates and registrars had discretion not to issue summons and warrants of arrest.<sup>83</sup>

Section 26 was a welcomed response to calls for greater judicial oversight of private prosecutions.<sup>84</sup> It is well acknowledged that the availability of private prosecutions in any criminal justice system risks improper and malicious prosecutions at the peril of a person’s liberty.<sup>85</sup> In the past numerous private prosecutions have been commenced in New Zealand that sought to abuse this mechanism.<sup>86</sup> Section 26 was introduced as “a sifting process designed to protect the proposed defendant from an unnecessary or wrong prosecution”<sup>87</sup> and as bringing a “necessary degree of judicial oversight”.<sup>88</sup>

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78 *Spratt*, above n 75, at [18].

79 At [18].

80 Health and Safety at Work Act 2015, s 144(5)(b).

81 Summary Proceedings Act 1957, s 13.

82 Crimes Act 1961, s 345(2).

83 Summary Proceedings Act 1957, s 19 as discussed in *Burchell v Auckland District Court* [2012] NZHC 3413; [2013] NZAR 219 at [22-24].

84 Law Commission, above n 2, at [445] and New Zealand Police Association “Criminal Procedure (Reform and Modernisation) Bill” at [6].

85 Law Commission, above n 2, at [439].

86 For example *R v Holden* HC Auckland T981504 (4 September 1998).

87 *R v Lakau* DC Auckland CRI-2013-004-013119, 13 March 2014 at [4].

88 *R v Rasmussen* [2015] NZHC 52 at [12].

While section 26 is silent on the hearing rights of prospective defendants, courts have taken a discretionary approach. Woolford J suggested that “the Court undoubtedly has a residual discretion to hear a proposed defendant if it is felt necessary for the purpose of reaching a decision”.<sup>89</sup> Similarly, Brewer J held that there was no obligation as such to seek the views of the proposed defendant but rather it came down to the proper exercise of judicial discretion.<sup>90</sup> Discretion would be best exercised where the private prosecutor has a personal interest in the prosecution and the “subjective nature of his approach to the case is evident on the materials...filed.”<sup>91</sup> This discretionary approach has been supported by other judges,<sup>92</sup> and, for reasons that will be discussed later, is supported by this essay.

### *C Obligations on private prosecutors*

In the past commentators raised concerns that public and private prosecutors were subject to different obligations. For example, in the Law Commission’s report, it was pointed out that private prosecutors were not obliged to disclose relevant information and the Official Information Act 1982 and Privacy Act 2003 did not necessarily apply.<sup>93</sup> Disclosure obligations are now uniform across all prosecutors with the enactment of the Criminal Disclosure Act 2008 which explicitly identifies private prosecutors as bound.<sup>94</sup> Other relevant statutes regarding criminal procedure similarly apply to both types of prosecutors, such as the Crimes Act<sup>95</sup> and Costs in Criminal Cases Act 1967.<sup>96</sup> Private prosecutors must also abide by the New Zealand Bill of Rights Act 1990.<sup>97</sup>

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89 *Wang v District Court at North Shore* [2015] NZHC 2756 at [57].

90 *Taka*, above n 21, at [44]–[45].

91 At [46].

92 Chief Judge Jan-Marie Doogue, “Five Topics Relevant to Criminal Procedure” *At the Bar* (December 2015) at 9.

93 Law Commission, above n 4, at [258].

94 See definition of “prosecutor” in Criminal Disclosure Act 2008, s 6(1).

95 Crimes Act 1961, s 2.

96 Acknowledged in Law Commission, above n 2, at [440].

97 By virtue of New Zealand Bill of Rights 1990, s 3(b). For example, see *Taylor v Sand* HC, T 28/93, 18 December 1995 at 9.

## D Safeguards

Private prosecutions are also subject to a number of inherent safeguards to prevent abusive court behaviour. As discussed above, section 147 of the CPA gives judges discretionary power to terminate proceedings before or during the trial in favour of the defendant.<sup>98</sup> Grounds for dismissal include where no evidence is offered, there is no case to answer, where as a matter of law a properly directed jury could not reasonably convict the defendant, delay, and abuse of process.<sup>99</sup> The CPA further grants the Attorney General the ability to intervene in the process and stay a prosecution, recognising the office’s ultimate constitutional responsibility for prosecutions.<sup>100</sup> In addition, the District and High Court have jurisdiction to stay criminal proceedings.<sup>101</sup> Where private prosecutions have been improperly commenced, defendants can seek remedies through the tort of malicious prosecution, though this threshold is not easily met.<sup>102</sup> Commentators also point to the cost of investigating, preparing and bringing proceedings as a significant deterrent to misusing private prosecutions.<sup>103</sup> As will be discussed later in this essay, however, the impact of costs is a concern to the availability of private prosecutions.

These safeguards are very similar to those which existed prior to the CPA. Under the Crimes Act, courts similarly retained discretionary powers to quash counts and stay proceedings either before or during trial for want of evidence or where an injustice has been or is likely to be done to the accused.<sup>104</sup> The Attorney General again also possessed jurisdiction to stay proceedings.<sup>105</sup> From 2006 - 2011, the Solicitor General issued 57 stays of proceedings for improperly pursued private prosecutions by individuals.<sup>106</sup>

98 Criminal Procedure Act 2011, s 147(1). For example see *Rensen v A (Ruling)* DC Hamilton CRI-2014-068-000138, 18 November 2014.

99 Section 147(4)(a).

100 Section 176.

101 For High Court, see High Court Rules 2016, r15.1 and Christopher Corry, *Sim’s Court Practice (NZ)* (online looseleaf ed, LexisNexis NZ, January 2018) at HCR 15.1 For District Court, see *Moenvao v Department of Labour* [1980] 1 NZLR 464. See also *Ratima v Tauranga District Court* [2012] NZHC 1306 for judicial review of a District Court stay in relation to a private prosecution.

102 Stephen Todd (ed) and others *The law of torts in New Zealand* (7th ed, Thomas Reuters, Wellington, 2016) at 1036. See chapter 18.2, “Malicious Prosecution” for more information.

103 Law Commission, above n 2, at [440] and Hodge, above n 4, at 147–148.

104 Crimes Act 1961, s 345(5) and s 345(6).

105 Summary Proceedings Act 1957, s 77A and s 159. For further information see summary of “Existing controls on private prosecutions” in Law Commission, above n 2, at [440].

106 John Spencer, *Review of Public Prosecution Service* (Crown Law Office, September 2011) at 71.

It is argued that the effect of section 26 has been to reduce the reliance on safeguards to remove improper and inappropriate private prosecutions. It instead allows for earlier dismissals of such proceedings. This creates a more streamlined approach and reduces the burden on defendants as they are less likely to need to apply for a stay or dismissal of the prosecution.

#### *IV Areas of concern*

While recent legislative reforms have helped ensure that private prosecutions are not vexatious or unmeritorious, concerns as to their use in New Zealand do remain. Firstly, the mere availability of private prosecution is being used as a vehicle for harm. This essay also finds that the recent case of *Rangitonga v Parker* arguably breaches the principle of double jeopardy and uses a private prosecution in a manner outside of their intended purposes. Thirdly, this essay finds that even with the recent reforms, distinctions between private and public prosecutors remain. Such distinctions make further normalisation and commercialisation of private prosecutions a continuing worry. Further this essay emphasises that for this mechanism to operate as an effective safeguard, victims and aggrieved citizens must have the practical capabilities to instigate proceedings. Significant investigative and financial burdens continue to place this mechanism outside of the reach of those in need.

##### *A Harmful Use*

While section 26 allows the refusal of charging documents, cases show that the mere availability of private prosecutions is being used as a vehicle for harm.

The ability of ordinary citizens to instigate criminal proceedings can be used to coerce, intimidate or threaten others. For example in *Thompson v R*, Chisholm J refused to allow leave to commence a private prosecution partially as the question of whether charges should be laid had become “inextricably interwoven” with a proposal for payment for substantial amounts of money to avoid the prosecution.<sup>107</sup> Similarly, Spencer QC records a concerning story of a student in England who, after losing her train ticket, was threatened with a private prosecution unless she paid an “administrative settlement” of £103.90p,

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<sup>107</sup> *Thompson v R (Private Prosecution)* [2007] NZAR 722 at [24].

which included both the “unpaid fare” and a “contribution towards the administrative costs incurred.”<sup>108</sup> As Spencer emphasises such behaviour is unethical and borders on blackmail.<sup>109</sup>

Further, the knowledge that a person is attempting to commence a private prosecution against another can also be damaging in and of itself. Convictions are a designed to be a “public, condemnatory statement about the defendant”,<sup>110</sup> and consequently prosecutions carry negative connotations. Private prosecutions have been attempted alongside media campaigns intended to bring individuals’ reputations into disrepute. As McNaughton J summarized one case:<sup>111</sup>

This private prosecution has been brought for an ulterior motive by the complainant, that is primarily to destroy his career and reputation and collaterally damage Kristin school and at the same to obtain an advantage in pressing the relationship property claim.

Defamation proceedings have also been attempted against individuals who have publicly revealed that private prosecutions were being instigated.<sup>112</sup>

At particular risk of vexatious proceedings are those who work in the criminal justice sector. In many cases, private prosecutors have sought to bring proceedings against people involved in their criminal charges, including police officers and judges, after their appeal rights amounted to no avail.<sup>113</sup> Private prosecutors often instigate proceedings as collateral challenges to negative verdicts against them,<sup>114</sup> or to express their frustration and disapproval towards the criminal justice system.<sup>115</sup> The 2017 New Zealand Police policy document highlighted the risk individual officers continue to face.<sup>116</sup> The impact of these

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108 J R Spencer QC “Professional private prosecutors and trouble on the trains” (2018) 2 Archbold Review 4 at 4–6.

109 At 4–6.

110 Simester and Brookbanks, above n 27, at 5.

111 *Denham v Clague* [2015] NZDC 12703 at [59].

112 See *Duval v Bennison* [2015] NZHC 1371.

113 See for example *Burchell*, above n 83 and *Slavich v Heath* DC Auckland BC201462470 (14 March 2014), *Spratt v Savea* CRI-2014-009-001492, 29 April 2014.

114 For example *Slavich*, above n 113, at [38].

115 New Zealand Police Association, *Police and Law & Order Policies: Towards a safer New Zealand 2017* at 24.

116 At 24.

cases is substantial to both the emotional and financial well-being of these officers and their loved ones.<sup>117</sup> As the New Zealand Police Association emphasised in their submission on the Criminal Procedure Bill:<sup>118</sup>

It is widely known that the costs of initiating such a case by filing documents are practically nil, and that the simple act of so filling itself achieves the objective of ‘getting back’ at Police. There has even been a website devoted to encouraging individuals to do so.

Also at risk are the victims of crime. Private prosecutions can be brought in New Zealand without victim consent,<sup>119</sup> and consequently may be commenced in a manner that causes, whether intended or not, harm to victims. Such a concern was noted in *New Zealand Private Prosecution Service Ltd v Key*, where the Human Rights Tribunal found that the proceedings “undoubtedly added to hurt and embarrassment” of the victim and were brought with “apparent indifference” of this impact.<sup>120</sup> Concerningly, private prosecutions have also been commenced by offenders against their past victims out of vengeance.<sup>121</sup>

Finally, private prosecutions provide just another court mechanism for vexatious litigants to achieve their purpose. When undeserving matters are brought to Court, it creates inefficiency, clogs the system with unnecessary cases, wastes public money and jeopardises the repute of the overall process. In the past, several vexatious litigants have brought unsuccessful private prosecutions amongst an array of other judicial applications.<sup>122</sup> Slavich, for example, commenced 35 private prosecutions in an attempt to impugn the conduct of those who had been involved in his prosecution at trial.<sup>123</sup> He was later declared vexatious by the High Court.<sup>124</sup>

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117 New Zealand Police Association, above n 115, at 24. For example see the impact of *Wallace v Abbott* [2003] NZHC 42; (2002) 19 CRNZ 585 as highlighted by Hon Dr Paul Hutchinson (National - Port Waikato) (23 June 2004) 618 NZPD 13880.

118 New Zealand Police Association, above 115, at 3. For information on fees see Courts and High Courts (Criminal Fees) Regulations 2013, sch 1.

119 Criminal Procedure Act 2011, s 15 allows “any person” to commence a proceeding.

120 *New Zealand Private Prosecution Service Ltd v Key* [2015] NZHRRT 48 at [104].

121 For example see *van der Platt v District Court at Invercargill* [2005] DCR 443; [2005] NZAR 344.

122 See for example, *Attorney-General v Reid* [2012] 3 NZLR 630.

123 *Attorney-General v Slavich* [2013] NZHC 627.

124 At [172].

These harms are evidently not solvable by the new oversight that section 26 provides, rather, the harm is achieved even before a decision not to accept the charging documents is made. This, however, should not be a reason to forgo the availability of private prosecutions entirely. The discretionary approach under section 26 means that not all defendants will need to be involved in dismissing charging documents. This helps limit the burden that merely attempting to file charging documents has. Further, some concerning behaviour may be remedied by other parts of the law, such as the offence of blackmail, defamation proceedings and the ability of the courts to declare litigants vexatious. The threshold for these, however, will often not be met. Evidently more needs to be done to protect citizens from the misuse of private prosecutions, particularly those working in the criminal justice sector.

### *B Double jeopardy*

Given that private prosecutions operate alongside the public prosecution system, the availability of this mechanism creates potential double jeopardy concerns. Double jeopardy is a “fundamental and pervasive” legal principle that requires that no person is tried for the same offence twice.<sup>125</sup> It recognises the need for finality in criminal proceedings and the power imbalance that exists between the individual and the state.<sup>126</sup> The principle protects the defendant from continued embarrassment, anxiety and financial burdens in facing multiple prosecutions. Further, by allowing only one attempt at prosecution, it has been theorised to reduce the likelihood of wrong convictions.<sup>127</sup>

Defendants of private prosecutions are safeguarded from breaches of double jeopardy in multiple ways. Charging documents can be rejected at the judges’ discretion under section 26 for abuse of process, and prosecutions, as discussed, can be stayed by the Attorney General or courts.<sup>128</sup> Further, defendants can enter a special plea of previous conviction or previous acquittal which prevents defendants from being acquitted or convicted of the same offence or any other offence “arising from the same facts”.<sup>129</sup> The New Zealand Bill of

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125 Martin L Friedman *Double Jeopardy* (Clarendon Press, Oxford, 1969) at 3.

126 Friedman, above n 125, at 3–5, and *Green v United States* 355 US 184 (SC 1957) at 187-188 per Black J. See also *Rangitonga v Parker* [2015] NZHC 1772 at [39].

127 Friedman, above n 125, at 3–5, and *Green v United States*, above n 126, at 187-188 per Black J. See also *Rangitonga v Parker*, above n 126, at [39].

128 See Part III, G “Safeguards” for more information.

129 Criminal Procedure Act 2011, s46 and 47.

Rights Act 1990 additionally recognises the defendant’s right not to be tried or punished twice.<sup>130</sup>

In the recent case of *Rangitonga v Parker*, the Court of Appeal considered whether a private prosecution for a rape charge was barred by double jeopardy.<sup>131</sup> Ms T alleged that Mr Rangitonga violently assaulted her and then raped her after she lost consciousness. Rangitonga initially faced two charges: wounding with intent to cause grievous bodily harm and sexual violation by rape. Prior to trial, the Crown withdrew the wounding charge with the intention it would enable the jury to focus on the rape charge. At trial, however, Rangitonga was acquitted of rape.<sup>132</sup> Consequently, T then sought to commence a private prosecution in relation to the wounding charges. The Court of Appeal allowed the prosecution, interpreting the relevant special pleas to apply where there was a “common punishable act/omission central to both the previous and new charge”.<sup>133</sup> In this case, the central punishing act for both charges was held to be distinct; namely sexual connection without consent for the rape charge and punching and attempted strangulation for the wounding charge.<sup>134</sup>

In his defence, Rangitonga argued the prosecution should be discontinued due to abuse of process. He alleged that his evidence at trial was given in light of his understanding that the wounding charge had been withdrawn. The Court of Appeal dismissed his argument. Rangitonga had no real option but to give evidence at the first trial as T undoubtedly had injuries that needed to be accounted for.<sup>135</sup> While this is true, the issue still remains that Rangitonga believed he was no longer in jeopardy for the wounding conviction. The Court of Appeal expressed this concern in their judgment stating:<sup>136</sup>

Notwithstanding our finding that the special plea is not available to Mr Rangitonga, we have some concerns about the propriety of a private prosecution now proceeding in circumstances where the Crown deliberately withdrew the wounding charge prior to his trial for rape. It has not been suggested there was any indication this charge or any similar charge would or might be re-laid. In these circumstances, Mr Rangitonga

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130 New Zealand Bill of Rights 1990, s 26.

131 *Rangitonga v Parker* [2016] NZCA 166; [2016] NZAR 768.

132 See [7]–[11].

133 At [41].

134 At [42].

135 *Rangitonga v Parker (No 2)* [2017] NZCA 47; [2017] NZAR 460 at [8].

136 *Rangitonga v Parker*, above n 131, at [51].

may have had grounds to believe he was no longer in jeopardy on any charge related to his assault on the complainant.

While not criticising the outcome of this case, it is argued that the use of private prosecution in this case did not align to the intended purpose of this mechanism and raises concerns about Rangitonga’s right to be free from double jeopardy. The lack of conviction following the public prosecution was not due to inertia, incompetence or biased reasoning by the Crown, but rather the unfortunate result that the Crown’s strategic trial decisions did not conclude in their favour. The private prosecutor here had the unfair advantage of learning from the public prosecution. While Rangitonga may not have been at peril of being charged for the wounding, he had grounds for believing he would not face further prosecution for the incident. Under this perspective, *Rangitonga v Parker* creates a concerning precedent for the use of private prosecutions. Given, however, the unique circumstances of this case and the court’s wide discretion to remove cases for abuse of process, this essay is hopeful that it is unlikely private prosecutions will be permitted to be used in this manner again.

### C *Impartiality and Neutrality*

Private prosecutors are often criticised as being different from public prosecutors as they lack neutrality and impartiality. Private prosecutors may choose to instigate proceedings, not as a consequence of state inertia or bias, but rather for their own purpose and benefits, both consciously and subconsciously.

The “Philips principle” advocates for the separation of investigation and prosecution roles. It is widely acknowledged that to ensure prosecutorial decisions are decided independently and free from prejudice and improper motives, the investigation of an offence and the following prosecutorial decision should be separated.<sup>137</sup> As Sir Philip expressed:<sup>138</sup>

[a] police officer who carries out an investigation, inevitably and properly, forms a view as to the guilt of the suspect. Having done so, without any kind of improper motive, [that officer] may be inclined to shut his [or her] mind to other evidence telling against the guilt of the suspect or to overestimate the strength of the evidence... assembled.”

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137 Law Commission, above n 2, at [325].

138 Cyril Philips (chair) *United Kingdom Royal Commission on Criminal Procedure* (Cmnd 8092, 1981) at 83.

Private prosecutors, however, are not required to separate investigation and prosecution roles. On some occasions, they may play many or most of the roles involved in the process, including investigator, case-manager, witness and advocate.<sup>139</sup>

Further, personal motives may make it hard for a private prosecutor to behave as neutrally as a public prosecutor would.<sup>140</sup> Almost by definition, private prosecutors have a personal interest in the outcome of the case.<sup>141</sup> Private prosecutors remain, to the dismay of some practitioners,<sup>142</sup> only expected rather than bound to adhere to the Solicitor General's Guidelines ("Guidelines").<sup>143</sup> These Guidelines require prosecutions to be commenced only where there is sufficient evidence to provide a reasonable prospect of conviction and the prosecution is required in the public interest.<sup>144</sup> Private prosecutors may also be financially motivated. Judges may impose a sentence of reparation if the offence(s) caused a person to suffer loss of or damage to property, emotional harm, or loss or damage consequential on any emotional or physical harm or loss of, or damage to, property. The already limited availability of this reparation, however, is further subject to several restrictions.<sup>145</sup>

Further, media reports show private prosecutors routinely instigate proceedings as part of their self-given role of "New Zealand's private prosecutor".<sup>146</sup> Such "serial litigants" regularly initiate private prosecutions on behalf of others or for the "social justice" of the community as a business, despite lacking formal legal education or being professionally admitted to deliver legal services.<sup>147</sup> In several situations prosecutions commenced by such

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139 Richard Buxton "The private prosecutor as a minister of justice" (2009) 6 Crim LR 427 at 429 and Hannah Laming and Annabel Kerley "Private prosecutions: A question of ethics" *The Law Society Gazette* (23 October 2017).

140 Buxton, above n 139, at 427.

141 Buxton, above n 139, at 427.

142 Working group representing the Independent Criminal Bar at Hamilton "Submission on the Criminal Procedure (Reform and Modernisation) Bill" at 6-7.

143 *Solicitor General's Guidelines*, above n 24, at [2.5].

144 See the "Evidential Test" and "Public Interest Test" in *Solicitor General's Guidelines*, above n 24, at 6-10.

145 See Sentencing Act 2002, s 35, s 32(3) and (5).

146 "McCready sets sights on PM over Banks case" *New Zealand Herald* (online ed, 17 June 2014).

147 See discussion on New Zealand Private Prosecutions Limited in Law Commission, above n 4, at [261] and the following example news articles, Leith Huffadine "Serial litigant threatens to prosecute Meka Whaitiri if police don't" *Stuff* (online ed, 1 September 2018), Henry Cooke "Private

litigants have been found to be brought purely with the intention of promoting the interests of the private prosecutor.<sup>148</sup>

Some commentators have argued impartiality and proper behaviour can be ensured by the instruction of private counsel.<sup>149</sup> This is true to an extent. Counsel are bound by the Guidelines.<sup>150</sup> Indeed, the Ministry of Justice in their departmental report on the Criminal Procedure (Reform and Modernisation) Bill did not recommend binding private prosecutors to the Guidelines in part as they would already be bound when represented by counsel.<sup>151</sup>

At the same time, however, concerns have been raised overseas where counsel are able to act as both prosecutors and private practitioners.<sup>152</sup> There is an inherent tension in this duality. The practitioner is obliged to act in their clients' interests, while simultaneously acting as a minister of justice. Such obligations will not always marry.<sup>153</sup> In Britain for example, private prosecutions are increasingly being advocated as a strategy to protect corporate brands from intellectual property offences.<sup>154</sup> Due to economic factors, few fraud cases are actually prosecuted by the police.<sup>155</sup> Consequently, "the era of the corporate Private Prosecution is firmly established" and "an all-encompassing brand protection strategy is required in many industries."<sup>156</sup> Commercial law firms endorse the use of private prosecutions as they can protect brands in a more timely and cost-effective manner than

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prosecution of Todd Barclay and Bill English suggested" *Stuff* (online ed, 26 June 2017) and Hamish Rutherford "Private prosecution seeks emails' disclosure" *Waikato Times* (Waikato, 25 June 2013).

148 For example see *New Zealand Private Prosecution Service Ltd*, above 120, at [105].

149 Buxton, above n 139, at 428. See also Tamlyn Edmonds "Private prosecutions: a valuable safeguard" *The Law Society Gazette* (19 October 2015).

150 *Solicitor General's Guidelines*, above n 24, at [2.5].

151 Crime Prevention and Criminal Justice Unit, Ministry of Justice *Departmental Report for the Justice and Electoral Committee: Criminal Procedure (Reform and Modernisation) Bill* (16 May 2011) at 88–89.

152 Roger A Fairfax Jr, "Delegation of the Criminal Prosecution Function to Private Actors" (2009) 43 *University of California* 411 at 436.

153 Laming and Kerley, above n 139.

154 *R (Virgin Media Ltd) v Zinga* [2014] 1 WLR 2228 at [57]. For example, see Matt Bosworth, "Time to adopt a private prosecution policy?" (2018) 168 *New Law Journal* 14.

155 See Button et al "Evaluating the Case for Greater Use of Private Prosecutions in England and Wales for fraud offences" *Centre for Counter Fraud Studies at the University of Portsmouth for the Midlands Fraud Forum, Eversheds and PKF* (2012) and William Boyce QC, Rachna Gokani "Private Prosecutions" *The Law Society Gazette* (15 September 2014).

156 Bosworth, above n 154, at 14.

the civil system, and send a strong deterrent message.<sup>157</sup> The factors influencing decisions to prosecute in such cases are evidently very different from those that determine public prosecutions.

Further, allowing private practitioners to commence prosecutions for their own commercial benefit inevitably brings economic considerations into prosecutorial decisions. Private firms may be tempted to commence unjustified prosecutions to maintain high conviction rates for commercial reasons or to use the threat of criminal prosecution to influence matters in their private practice, such as the hinting of a prosecution against a civil litigation opponent to encourage settlement.<sup>158</sup> Commercial pressures may also discourage compliance with disclosure and ethical obligations. The risk of being improperly motivated is especially high where companies are dependent on prosecutions for their revenue. In Britain, some companies have delegated prosecutorial functions to specialist companies who prosecute for profit.<sup>159</sup> Similarly, in New Zealand, there has even been a dedicated private prosecution company formed.<sup>160</sup>

While section 26 brings greater judicial oversight to private prosecutions, it does not, however, equip courts with a general ability to ensure that private prosecutions are only being used as a safeguard. The thresholds for the Guidelines and section 26 are distinct. The “Evidential Test” in the Guidelines is met where there is a “reasonable prospect of conviction”.<sup>161</sup> By contrast, charging documents may only be dismissed where evidence is insufficient to prove the elements of the charge, where there is no useful purpose or only nominal punishment would be granted.<sup>162</sup> Similarly, the “Public Interest Test” is met where “prosecution is required in the public interest”.<sup>163</sup> By contrast, judges can dismiss charging documents only where it amounts to an abuse of process.<sup>164</sup> In the United Kingdom there is a greater ability to remove such cases. While courts only disturb decisions of independent prosecutors in “highly exceptional cases”,<sup>165</sup> the CPS is able to intervene and discontinue

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157 At 14–15.

158 Fairfax Jr, above n 152 at 439-440 and Spencer, above n 108, at 4–6.

159 Spencer, above n 108, at 4–6.

160 Law Commission, above n 4, at [261].

161 For more information see *Solicitor General’s Guidelines*, above n 24, at [5.3]–[5.4].

162 See discussion of s 26(3)(a) at Part III, E “Commencing a private prosecution”.

163 For more information see *Solicitor General’s Guidelines*, above n 24, at [5.5]–[5.11].

164 See discussion of s 26(3)(b) at Part III, E “Commencing a private prosecution”.

165 *R (Corner House Research) v Serious Fraud Office* [2009] 1 AC 756 at [30].

prosecutions where the Code for Crown Prosecutors, the Guidelines equivalent, is not met.<sup>166</sup>

The consequence of these disparities is that private prosecutions may be commenced even where the state would not have instigated them had it behaved free from inertia, bias or incompetence. This makes the decision-making processes surrounding prosecutions inconsistent and allows financially motivated prosecutions to occur. Commercial biases will not always amount to abuse of process. For the purposes of fairness, there should not be arbitrary differences in how people are treated by the criminal law. As the Law Commission rightly stated:<sup>167</sup>

the making of prosecution decisions is not an area where the economic principle of competition should predominate. Public interest factors rather than cost ought to be paramount; there is a need for consistency of decision-making.

Private prosecutions need to be instigated for reasons only provided by their intended purposes. Normalising and commercialising private prosecutions undermines many of the reasons why prosecution became a state function in the first place. Concerns have been raised in England as to the increased frequency and reliance on private prosecutions as a consequence of economic retrenchment by the state.<sup>168</sup> As reported in 2014, one firm alone was handling 75 private prosecutions.<sup>169</sup> By contrast, in Scotland only one private prosecution has been brought in the last century.<sup>170</sup> Some endorse this narrow application,<sup>171</sup> whilst others have advocated for greater ability in Scotland to bring private prosecutions.<sup>172</sup> A balance between these two approaches evidently must be met.

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166 See discussion on this higher threshold in *(R on the application of Gujra) v Crown Prosecution Service* [2011] EWHC 472.

167 Law Commission, above n 2, at [334].

168 Paul Peachey, “Two-tier justice: Private Prosecution revolution” *The Independent* (August 2014).

169 Peachey, above n 168.

170 Findlay Stark “The demise of the private prosecution?” (2013) 72(1) CLJ 7 at 10.

171 At 10–11.

172 Petition PE 1633 as discussed in Scottish Government Justice Committee “*Petition PE 1633: Private Criminal Prosecution in Scotland* (23 February 2018).

## D *An effective safeguard?*

This essay has emphasised the important role private prosecutions play as a safeguard against the misuse of state power. For private prosecutions to operate as an effective safeguard however the ability to commence proceedings must be accessible to all aggrieved citizens. Currently, costs, investigative burdens and a lack of public awareness seriously limit citizens' ability to commence private prosecutions in their time of need.

### 1 *Investigative abilities*

Private prosecutors are expected to investigate and manage their own cases.<sup>173</sup> Despite this, private prosecutors and, where employed, private investigators do not have the same investigative powers and abilities as the state. In special cases, some private prosecutors do enjoy powers. For example, SPCA inspectors have special powers, such as inspection without a warrant,<sup>174</sup> and appointed inspectors under HASAW enjoy powers of entry and inspection among others.<sup>175</sup> This, however, is not the case for most private prosecutors even though such powers can often be crucial in obtaining sufficient evidence.

In some situations, private prosecutors may have the benefit of an investigation already being concluded by a public body. While there is no general duty of disclosure of investigative findings, private prosecutors may be able to gain evidence through the Official Information Act 1982 or Privacy Act 1993.<sup>176</sup> Disclosures under these Acts, however, are subject to numerous restrictions.<sup>177</sup> Further, as the decision to commence a private prosecution tends to follow, or in the case of HASAW must follow, a decision not to publicly prosecute, this waiting period may make private prosecutors almost completely reliant on disclosures by enforcement bodies. Scene and other evidence may no longer be available by the time the private prosecutor begins their investigation.

Not having investigative powers or the information of enforcement bodies significantly limits the ability of the private prosecutors to prepare their case. Worthwhile cases may be unable to be prosecuted not for want of evidence, but for the inability to access and find such

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173 As emphasised by Judge D J Sharp in *Butcher v Auckland District Court & Clark* [2017] NZHC 2338 at [15].

174 See Animal Welfare Act 1999.

175 See Health and Safety at Work Act 2015, s 163.

176 Tim Mackenzie, "Legal viewpoint - Going private" *Safeguard Magazine* (online ed, 2014).

177 For more information see Official Information Act 1982 and Privacy Act 1993.

evidence. Due to the principle of double jeopardy, it is crucial that all prosecutions, whether public or private, are brought in their strongest form possible. Evidently, simple solutions such as expanding powers and capabilities to obtain evidence are not valid. Investigative powers and evidence are constrained to certain roles and processes for good reason. Greater information sharing and further granting of investigative powers to relevant unions and reputable organisations could be a step in the right direction. Ultimately however the potential for stronger relationships between public and private prosecutors is dependent upon the frequency of private prosecutions. As John Macaulay reflected on his involvement in the successful Scottish private prosecution, *Sweeney v X* 1982 JC 70:<sup>178</sup>

It is important to state that we received complete cooperation from the Crown [and the Justiciary Office] at every stage... – after all, private prosecutions did not come along every day of the week.

## 2 Costs

The most serious obstacle to private prosecutions operating as an effective safeguard is the financial burden of bringing such proceedings. The costs of commencing private prosecution lie with the prosecuting party. In addition, private prosecutions may also need to hire a legal representation to help navigate through the law or for jury trials,<sup>179</sup> and a private investigator. Further, both successful and unsuccessful private prosecutors risk having to pay all or part of the defendant’s costs.<sup>180</sup> The Costs in Criminal Case Act 1967 gives judges’ discretion to grant defendant’s costs where “just and reasonable”.<sup>181</sup> In doing so the court shall have regard to such factors as whether the prosecution was brought in good faith, whether there was sufficient evidence, investigation and prosecution behaviour and whether the defendant was found not to be guilty.<sup>182</sup> Legal aid is not available to private prosecutors as they have not been charged with or convicted of an offence.<sup>183</sup>

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178 John Macaulay, “Private Prosecution: the Glasgow Rape Case revisited” *The Journal of the Law Society of Scotland* (16 January 2017).

179 Criminal Procedure Act 2011, s 10(3).

180 Costs in Criminal Cases Act 1967, s 7(1)(b).

181 Section 5.

182 Section 5(2).

183 Legal Services Act 2011, s 8(1)(a).

The financial burden faced by applicants dramatically diminishes the ability of private prosecutions to operate as an effective safeguard. Costs place private prosecutions “beyond the reach of most concerned citizens”<sup>184</sup> and create a “two-tier system of justice”.<sup>185</sup> Consequently, victims and other aggrieved citizens are often reliant on public generosity to support their case. They may be forced to self-represent or reliant on pro-bono advice or support from legal charities.<sup>186</sup> Further, areas of the law where private prosecutions could have a substantial impact due to official reluctance to investigate, such as human trafficking,<sup>187</sup> may be unable to benefit from this safeguard as the expense is beyond the financial capabilities of concerned non-governmental organisations and individuals.

Even where the potential prosecution party may possess the financial capabilities to commence a worthy private prosecution, costs remain a significant deterrent from doing so. Victims and other aggrieved citizens are ultimately forced to answer the uncomfortable question of the price they are willing to pay for their own justice. As Fraser stated in discussing costs for private prosecutions under HASAW, it is “difficult to understand why someone would engage in a private prosecution, with all the expense, both emotional and financial, when all access to financial compensation via the courts is barred”.<sup>188</sup>

This issue of costs is also concerning when private prosecutions are heavily relied on by the state. For example, the Society for the Prevention of Cruelty to Animals (SPCA) is largely responsible for the investigation and prosecution of offences under the Animal Welfare Act 1999.<sup>189</sup> While the most serious cases are handed to the police, the SPCA still commences many important prosecutions. In 2016 the charity brought 47 animal welfare prosecutions.<sup>190</sup> Having a private charity charged with the enforcement of a criminal statute at its own costs and discretion raises concerns. Insufficient funds and resources mean that

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184 *Osborne*, above n 56, at [37].

185 Term taken from Peachey, above n 168.

186 For example Trainor’s appeal in Rangitonga in Tony Wall, above n 47 and the private prosecution of Eramiha Pairama’s death in New Zealand Council of Trade Unions “CTU wins second forestry private prosecution” (online ed, August 12 2015).

187 Thomas Harré “Is there a problem in New Zealand waters? Human trafficking prosecution” [2015] NZLJ 382.

188 Natalie K Fraser “Smoke and Mirrors: The Introduction of Private Prosecutions under s 54A of Health and Safety Employment Amendment Act 2002 (2003) 9(4) AULR 1230 at 1266.

189 Animal Welfare Act 1999, ss 121–124.

190 Society for the Prevention of Cruelty to Animals *Annual Report 2016* at 8.

many potential prosecutions are not commenced, or where they are, these prosecutions are reliant on public generosity and pro bono support.<sup>191</sup>

Ensuring equal access to private prosecutions may not be easy to solve. Indeed the issue is not individual to private prosecutions at all – concerns have continuously been raised as to equitable access for the entire justice sector.<sup>192</sup> In any event, as Boyce QC and Gokani rightly argue this concern of “justice for sale”, while in need of address, should not be a reason to abolish the right to private prosecutions entirely for:<sup>193</sup>

if ‘economic retrenchment’ is inevitable, should not private prosecutions be seen as an essential safeguard – an opportunity for some victims of criminal conduct to seek justice even when the state has neither the current political will nor the resources to do so for them?”

### 3 *Knowledge of the safeguard*

Finally, it must be added that for private prosecutions to act as an effective safeguard, citizens must know about this mechanism. While lawyers can inform people, not all potential prosecutors will be able to afford legal advice nor may they think to engage with lawyers without knowing such a possibility exists. Case law shows private prosecutors missing limitation periods in part due to their “understandable” ignorance of the law.<sup>194</sup> Public prosecutors currently do not have a duty to inform victims or complaints of their ability to commence proceedings privately following decisions not to prosecute. Whether such a duty should be created needs to be balanced with the threat of further normalisation and attempted misuse of private prosecutions.

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191 See for example “SPCA appeals for cash to fund animal cruelty prosecutions” *Stuff* (online ed, 31 July 2009) and “Top lawyers to work for SPCA for free” *The New Zealand Herald* (online ed, 9 April 2009). For more information on specific concerns regarding SPCA prosecutions, see Danielle Duffield “Instant Fines for Animal Abuse? The Enforcement of Animal Welfare Offences and the Viability of an Infringement Regime as a Strategy for Reform” (LLB(Hons), Dissertation, University of Otago, 2012).

192 See for example concerns raised in Helen Winkelmann, Chief High Court Judge “Access to Justice – Who Needs Lawyers?” (Ethel Benjamin Address, 7 November 2014).

193 Boyce and Gokani, above n 155.

194 See for example *McVicar v Department of Corrections* [2012] DCR 479 at [53].

## V *Conclusion*

The Law Commission, while acknowledging several issues with this mechanism, concluded that the “important constitutional and theoretical place of private prosecutions within our system warrants their retention”.<sup>195</sup> This essay does not change that view. The purposes that justify retaining private prosecutions, however, must be reflected in their use. While recent legislative reforms have made substantial improvements to this area, concerns still remain. To be a safeguard, private prosecutions must never be normalised, or even more concerning, commercialised. At the same time, however, private prosecutions need to be an available and accessible option for those who require them. While finding a balance between English and Scottish approaches is no easy feat, it is evidently a task worthwhile of further attention.

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195 Law Commission, above n 4, at [255].

***Word count***

The text of this essay (excluding table of contents, footnotes, and bibliography) comprises approximately 7,979 words.

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