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**THE ROLE OF ALTERNATIVE
PROCESSES IN ACCOUNTING FOR THE
INTERESTS OF VICTIMS**

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The 2017 New Zealand Supreme Court decision in Osborne v Worksafe New Zealand illustrates that there may be an inherent lack of fit between the adversarial system and the place of victims. Given the rise of the victims' status in domestic and international law, it is important that the interests of victims are accounted for. Although the victims in Osborne wanted prosecution, they also did not have their needs or interests met in any alternative way once the prosecution was dropped. This paper considers how victims' interests in similar cases might be met by the use of alternatives to trial. Additional benefits of alternative processes, as well as potential challenges, are also examined. It is proposed that the availability of alternative processes should change in two ways. Firstly, there should be increased availability of alternative processes within the criminal justice system. Secondly, alternative processes should be available outside the criminal justice system when there is a decision not to prosecute or where the victim does not want to go through the formal system. These changes will ensure victims' interests, including the right to information, participation and having accountability from the offender, can still be met in some cases.

Key Words: Criminal Justice System; Victims' Interests; Alternatives to Trial; Alternative Processes

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I Introduction

The 2017 New Zealand Supreme Court decision in *Osborne v Worksafe New Zealand*¹ is an example of the criminal justice system failing to meet the interests of victims. Although the victims in *Osborne* wanted prosecution, they also did not have their needs or interests met in any alternative way once the prosecution was dropped. The case illustrates that there may be an inherent lack of fit between the adversarial system and the place of victims. Given the increasing recognition of victims in domestic and international law,² the interests of victims should be accounted for. This paper considers how the interests of victims such as those in *Osborne* are met in the criminal justice system and how they may be better met through alternative processes.

Part II summarises *Osborne* and the issues it raises. Part III addresses the preliminary issues of who victims are and whether victims have a legitimate interest, before considering some of the interests' victims have in the trial and how the criminal justice system meets these. Part IV considers how we might address these interests using an alternative process and what additional benefits an alternative process may provide. Potential limitations of alternative processes are considered in Part V. Part VI then sets out two recommendations for changing the availability of alternative processes to better account for the interests of victims.

II Osborne v Worksafe New Zealand

The Pike River Coal Mine explosion in 2010 killed twenty-nine people. Two others survived with injuries.³ Following the explosion, prosecutions were commenced by the Department of Labour under the Health and Safety in Employment Act 1992. The mine owner, Pike River Coal Ltd (PRCL), faced nine charges which were not defended. PRCL was fined \$760,000 and ordered to pay \$3.41 million in reparation to the families of those killed and to the survivors.⁴ PRCL was in receivership so the chances of any payments were doubtful.

Twelve charges were brought against the Chief Executive of PRCL, Mr Whittall, who pleaded not guilty. Mr Whittall offered to make a voluntary payment of \$3.41 million in exchange for the prosecution offering no evidence against him.⁵ Discussions commenced between counsel for Mr Whittall and the Crown Solicitor. Worksafe decided to offer no

¹ *Osborne v Worksafe New Zealand* [2017] NZSC 175 [Osborne].

² Yvonne Marie Daly "Victim Participation in Criminal Process" [2011] NZLJ 247 at 247.

³ *Osborne v Worksafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513 at [1].

⁴ At [2].

⁵ At [3].

evidence against Mr Whittall and the District Court dismissed the charges. Mr Whittall was ordered to pay the \$3.41 million to the families of those killed and to the survivors.⁶

The appellants in *Osborne*, Ms Osborne and Ms Rockhouse, were family members of people killed in the explosion. They applied for judicial review of the prosecutor's decision not to offer evidence. They argued that the transaction the prosecution had entered into with Mr Whittall was a bargain to stifle prosecution.⁷ Their claims were dismissed in the High Court.⁸

An appeal to the Court of Appeal was dismissed.⁹ The Court considered that the agreement was not a bargain to stifle prosecution.¹⁰ In a joint judgment delivered by Kós P the Court said that reparation was only one of the factors that was considered in the decision not to prosecute.¹¹ Kós P said reparation could be a relevant consideration in deciding whether to prosecute.¹² Although reparation may be a more significant consideration where the victims accepted reparation as rectifying the loss, it “did not mean that reparation was to be disregarded altogether where it could not rectify the loss caused, or where a victim considered it would not do so”.¹³ In deciding whether to proceed with charges the prosecutor was exercising an independent discretion, and the wishes of the victim were not relevant.¹⁴

The Supreme Court reversed the decision of the Court of Appeal, ruling that Worksafe's decision to offer no evidence was unlawful.¹⁵ The Court said the agreement to accept the conditional payment was a bargain to stifle prosecution.¹⁶ Public prosecutors were subject to legal duties and obligations when deciding whether to prosecute. Their decisions could be challenged using public law controls.¹⁷ The Court said a public wrong could not be fully settled by settling the private injury.¹⁸ Public prosecutions were brought on behalf of the community and therefore required equal treatment in order to uphold the rule of law.¹⁹

A Issues

Osborne raises a number of important issues including victim input into prosecutorial decisions, the right of victims to challenge prosecutorial decisions and victims' interests in

⁶ *Osborne v Worksafe New Zealand*, above n 3, at [4].

⁷ At [5].

⁸ At [6].

⁹ At [102].

¹⁰ At [72].

¹¹ At [100].

¹² At [56].

¹³ At [77].

¹⁴ At [87].

¹⁵ *Osborne*, above n 1, at [97].

¹⁶ At [101].

¹⁷ At [72].

¹⁸ At [70].

¹⁹ At [73].

the criminal justice system. This paper will focus on how the adversarial system accounts for victims' interests. The victims in *Osborne* were aggrieved by the decision not to prosecute. They had no involvement in, or consultation about, the decision. The victims received reparation, but this was not the outcome they wanted. It also did not address other interests the victims may have had in prosecution.

Although the decision not to prosecute was declared unlawful by the Supreme Court, monetary compensation was the only consequence Mr Whittall faced. It is also unclear where the boundary lies following *Osborne*. If the payment had been voluntary, rather than conditional on the prosecution offering no evidence, it seems possible the arrangement could have established grounds for a decision not to prosecute. This can be seen in the Supreme Court decision where the judges carefully limit their analysis to the particular case. The majority said it was not necessary to express a view on whether the decision would have been unlawful in the absence of the unlawful bargain.²⁰ Similarly, Elias CJ concluded by saying the approach may not be as clear cut in other cases and she "would not want to foreclose for consideration when it arises the place of reparation in prosecution decisions".²¹ The Court seems open to the possibility that reparation may contribute to a decision not to prosecute in future cases.

This paper considers how the interests of victims may be accounted for when there is a decision not to prosecute or where victims do not want to go through the formal system. As the victims in *Osborne* wanted the prosecution to proceed, it is important to consider what interests' victims have in the criminal trial. I will then consider how alternative processes may be able to meet these interests. Where there is a decision not to prosecute, can some interests of victims be met through the availability of alternative processes? Do alternative processes better account for victims' interests in some cases? Should they be available more often in the criminal justice system? Additional interests of victims, beyond those met by trial, that an alternative process may provide for will also be considered. The preliminary issues are who constitutes a victim and whether victims have a legitimate interest.

III Victims' Interests

According to the United Nations, victims are people who:²²

individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws.

²⁰ *Osborne*, above n 1, at [97].

²¹ At [106].

²² United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, art 1.

Under the United Nations definition, “victim” includes “immediate family or dependants of the direct victim” where that is appropriate.²³ The Sentencing Act 2002 and Victims’ Rights Act 2002 adopt similar definitions.²⁴ It is clear “victims” is not limited to those who suffer immediate harm and may extend to the families of those who suffered harm. Applying this definition, the families of those in the explosion in *Osborne* are victims. The question is therefore whether victims have a legitimate interest in the process.

There is debate as to whether victims have a legitimate interest in the criminal justice system.²⁵ Some writers do not believe it is the function of the criminal justice system to account for victims.²⁶ Others view victims as key actors, raising the possibility that victims should have legal representation.²⁷ In New Zealand, the Victims’ Rights Act 2002, introduction of reparation and victim impact statements, and the Victims Code all address the place of victims in the criminal justice system. Internationally, concern for the place of victims can be seen from the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985. Given the increasing recognition of victims’ interests in domestic and international law, the starting point in this paper is an assumption that victims do have a legitimate interest in the criminal justice system. Proceeding on that assumption, I now consider some of the interests’ victims have and how the adversarial trial meets, or fails to meet, these interests.

A Victims’ Interests in the Trial

Although there is dissatisfaction among victims with how the current criminal justice system operates,²⁸ there are mechanisms within the system that are intended to meet the interests of victims.²⁹ The ways the adversarial trial accounts for victims means some victims, such as those in *Osborne*, may want the prosecution to proceed. This may depend on what the victim is seeking. Some victims may want a trial and the retribution this provides. Other victims may seek the denunciation or accountability which an alternative process may be able to provide. Research also suggests victims’ views may change over time as they gain information, so that they originally want retribution but as the trial proceeds their interests

²³ United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, art 2.

²⁴ Sentencing Act 2002, s 4; Victims’ Rights Act 2002, s 4.

²⁵ Andrew Ashworth “Responsibilities, Rights and Restorative Justice” (2002) 42 *Brit J Criminol* 578; Ian Edwards “An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making” (2004) 44 *Brit J Criminol* 967.

²⁶ Ashworth, at 585.

²⁷ Jonathan Doak “Victims’ Rights in Criminal Trials: Prospects for Participation” (2005) 32(2) *Journal of Law and Society* 294 at 307.

²⁸ Andrew Ashworth “Restorative Justice and Victims’ Rights” [2000] *NZLJ* 84 at 88.

²⁹ At 86.

become less punitive.³⁰ It is important to consider what interests victims have in the adversarial trial and how the criminal justice system meets these.

1 Right to information

Research suggests the need for information is the most important need victims have.³¹ The right to information includes being informed about how the system works and being provided information about developments in their case.³² Victims are generally not familiar with the criminal justice system. They rely on public authorities to inform them how the process will work and what role they will have.³³

The criminal justice system in New Zealand recognises victims' rights to information. Under s 11 of the Victims' Rights Act 2002 victims have the right to information about services, programmes and remedies. Section 12 sets out victims' rights to information about the proceedings.³⁴ Section 13 imposes limits on the rights in ss 11 and 12: The information does not need to be disclosed if a good reason for withholding it would exist under the Official Information Act 1982.³⁵ The Victims' Code affirms these rights.³⁶

Despite these rights, in practice victims are rarely informed of developments in their case.³⁷ In *Osborne* the victims were given very little information about any developments. Victims have no standing in the criminal trial which makes their right to information and any other rights difficult to enforce.³⁸ Whether the right to information operates as a rule or merely a guideline is therefore debatable.

2 Victim participation

There is research which suggests many victims do not feel adequately involved in the criminal justice system and want more involvement.³⁹ For victims who want involvement, participation is a key interest. Victims have little participation in the criminal justice system despite the fact they suffer the majority of harm caused by an offence. This can be seen in *Osborne* where the victims were not consulted before the decision to offer no evidence was

³⁰ Julian Roberts "Public Opinion, Crime, and Criminal Justice" (1992) 16 Crime and Justice 99 at 126.

³¹ Jo-Anne Wemmers "Restorative Justice for Victims of Crime: A Victim-Oriented Approach to Restorative Justice" (2002) 9 IRV 43 at 44; Edwards, above n 25, at 977.

³² Wemmers, at 44.

³³ At 44.

³⁴ Victims' Rights Act 2002, s 12.

³⁵ Section 13.

³⁶ Ministry of Justice *Victims Code* (September 2016).

³⁷ Wemmers, above n 31, at 47.

³⁸ Yahya Duro Uthman Hambali "Finding Voice for Victims of Crime in the Adversarial Criminal Justice System" (2015) 4(2) GSTF JLSS 21 at 25.

³⁹ Wemmers, above n 31, at 50.

made.⁴⁰ Victims are not parties to the proceedings and instead act as witnesses to a crime against the state.⁴¹ Victims have no autonomy when they act as a witness. They become a tool for the prosecution or the defence.⁴² This can make the process unsettling and result in re-victimisation.

If an offender is found guilty, the appropriate sentence is determined by a judge. Victims have limited input in sentencing. The introduction of victim impact statements (VISs) was an attempt to increase the role of victims. While these are a promising attempt to include victims, they fall well short of meeting expectations. VISs only offer victims' input at the end of the criminal justice process whereas victims want a role from the early stages.⁴³ A judicial officer can also limit which parts of the statement are considered.⁴⁴

3 *Offender accountability*

Victims have an interest in the offender taking responsibility and being accountable. An offender has limited direct involvement in the criminal justice system so less opportunity to be accountable.⁴⁵ The criminal justice system is a remote mechanism. Prosecution is undertaken by the state and the offender is only accountable to an independent judge or jury.⁴⁶ This removes the offence from the victim and community it has affected. Such an approach may desensitise the offender from appreciating the harm they have caused. The win-lose nature of the criminal justice system and the harsh consequences that can be imposed are also disincentives to accountability. Offenders may be more willing to accept responsibility in an alternative forum.⁴⁷

The criminal justice system may provide wide offender accountability because criminal trials are open to the public.⁴⁸ It also means the media is largely unrestricted when reporting details of the trial,⁴⁹ although there are guidelines the media must follow.⁵⁰ If an offender is given permanent name suppression this will severely limit the accountability that the criminal justice system provides.⁵¹ However, the number of permanent name suppressions

⁴⁰ *Osborne*, above n 1, at [58].

⁴¹ Jo-Anne Wemmers "Where do They Belong? Giving Victims a Place in the Criminal Justice Process" (2009) 20 *Crim L F* 395 at 398.

⁴² At 398.

⁴³ At 399.

⁴⁴ Victims' Rights Act 2002, s 27.

⁴⁵ Elisabeth McDonald and Yvette Tinsley *From "Real Rape" to Real Justice* (Victoria University Press, Wellington, 2011) at 416.

⁴⁶ At 416.

⁴⁷ At 414.

⁴⁸ Doak, above n 27, at 314.

⁴⁹ Criminal Procedure Act 2011, s 198(1).

⁵⁰ Ministry of Justice *Media Guide for Reporting the Courts and Tribunals: Edition 3.1* (August 2017).

⁵¹ Law Commission *Suppressing Names and Evidence* (NZLC IP13, 2008) at 18.

is relatively low: The criteria for permanent name suppression were tightened in the Criminal Procedure Act 2011.⁵²

When there is a decision not to prosecute, victims lose the opportunity for any accountability. This was the situation in *Osborne* where Mr Whittall paid reparation but was not accountable to the victims or the public. Similarly, victims who do not report offences because they do not want to go through the traditional system will have no accountability from the offender.

IV Meeting Victims' Interests through Alternative Processes

It is clear from the previous section that the trial does not always meet some of the interests' victims have. Where there is a decision not to prosecute or where the case is not reported to police, the criminal justice system does not account for any of these interests. This raises important questions about how to address the interests of victims in these situations. Where there is no prosecution, can some interests of victims still be met through the use of alternative processes? Can an alternative process better account for the interests of victims than the adversarial trial in some cases so that they should be available more often? Examples of alternative processes, how they address the interests of victims, and additional benefits of these processes are now considered.

A Examples of Alternative Processes

A number of different initiatives come under the umbrella term "alternative processes": The term is intended to encompass any alternatives to the defended trial. This allows a broad range of responses that can be tailored to different communities and offence types. Some alternatives may require the defendant to admit responsibility, while others may take a more adjudicative or investigative approach. Given the flexibility of alternative processes there is scope for creative solutions that can encompass a range of outcomes such as education, community service, disciplinary action, reparation, censure and apology. This ensures the solution will be suitable to the particular circumstances of the case: the particular offence, victim, offender and the circumstances.

Given the flexibility of adapting alternative processes to the particular circumstances, there is a promising opportunity for the development of new alternatives. Each alternative process need to undergo rigorous assessment to ensure procedural rights and the safety of the participants are protected. There are a number of alternative processes already available in

⁵² New Zealand Law Society "Permanent Name Suppression in High and District Courts 2011 to 2015 (26 May 2016) <www.lawsociety.org.nz>; Criminal Procedure Act 2011, s 200.

New Zealand, most operating within the criminal justice system. Below are brief descriptions of some alternative processes that have already had some success. These will be alluded to further when considering how alternative processes can meet the interests of victims.

Victim-offender mediation is often used in civil cases in New Zealand but there is the potential for more use in the criminal context. Victim-offender mediation involves direct dialogue between the victim and the offender facilitated by an independent third party.⁵³ After considering their needs, interests and anything else relevant to the case, the parties can reach an agreement on how the offence should be dealt with.⁵⁴

Restorative justice is defined as “a process whereby parties with a stake in a specified offence collectively resolve how to deal with the aftermath of the offence and its implications for the future”.⁵⁵ The underlying goal of restorative processes is to manage disputes in a way which restores the victim, offender and the community.⁵⁶ The restorative conference is therefore flexible and can take a number of different forms depending on what is needed in the particular circumstances. Restorative justice usually involves a meeting between the victim, the offender, a facilitator and others authorised to attend such as support persons and community representatives.⁵⁷ The conference considers what has happened before reaching an agreement on how to put things right and prevent something similar occurring in the future.⁵⁸

Iwi-led and community justice panels are currently available as an alternative to prosecution for low-level offences. These operate as a pre-charge alternative for police who can refer cases to the panels.⁵⁹ Iwi-led panels are community-based Māori indigenous panels, underpinned by Māori principles.⁶⁰ Restoring connections and teaching the offender about their whakapapa/ancestry is an important part of the process.⁶¹ These panels include a member of police who is in charge of the referral and other community members.⁶² Community members may include local kaumātua, social workers, church leaders, sports

⁵³ Yvette Tinsley and Elisabeth McDonald “Is There Any Other Way? Possible Alternatives to the Current Criminal Justice Process” (2011) 17 *Canta LR* 192 at 205.

⁵⁴ At 205.

⁵⁵ Tony Marshall *Restorative Justice: An Overview* (Home Office Research, London, 1999), as cited in Ashworth, above n 25, at 578.

⁵⁶ Tinsley and McDonald, above n 53, at 193.

⁵⁷ Ministry of Justice *Restorative Justice Victim Satisfaction Survey* (September 2016) at 7.

⁵⁸ At 7.

⁵⁹ Yvette Tinsley and Warren Young “Overuse in the Criminal Justice System in New Zealand” (24 September 2016) Social Science Research Network <www.ssrn.com> at 16.

⁶⁰ New Zealand Law Society “Justice Panels: Innovative way to achieve justice” (11 February 2016) <www.lawsociety.org.nz>.

⁶¹ New Zealand Law Society, above n 60.

⁶² Tinsley and Young, above n 59, at 16.

coaches and school teachers.⁶³ The process involves a hearing in which panel members reach an agreement on conditions the offender needs to meet.⁶⁴ The focus of the outcomes is accountability, restitution and education.⁶⁵ To achieve these objectives a range of conditions may be imposed including “apologies, community service, financial reparation, donations, essays and referrals to treatment or support services”.⁶⁶ There will be no formal prosecution if an offender satisfies the conditions set by the panel.⁶⁷

B How Alternative Processes Meet the Interests of Victims

Part III identified some of the interests’ victims have in the trial and the shortcomings of the criminal justice system in providing for these. Building on the examples I have given of alternative processes that may be used, I now consider how alternatives to trial may be able to account for the interests’ victims have in the adversarial trial and any additional benefits.

1 Victims’ interests in the adversarial trial

The need for information is a key interest victims have. Alternative processes may be more effective in providing victims information. In a victim-offender mediation the offender and the victim are the key participants so they will be supplied the information they need to participate. There may be cases where the victim has an interest in their family or whānau being informed. In these situations, iwi-led panels or community justice panels allow wider community involvement, so that both the victim and their family or whānau can be informed about the case. Research also suggests alternative processes are better at providing victims’ information: The ability of restorative justice to provide more information to victims is one reason victims choose to participate.⁶⁸

Alternative processes provide victims more participation than the criminal justice system. Victims and offenders have an active role in alternative processes.⁶⁹ It is common for the victim, offender and other interested parties to reach an agreement on how the offence should be dealt with.⁷⁰ This means the victim’s interests are taken into account in any decision as to the appropriate outcome. In restorative justice the parties determine what is needed to repair the harm caused and restore the position of the parties.⁷¹ The victim is given a chance to be heard and their input is essential. Giving victims an opportunity for input

⁶³ New Zealand Law Society, above n 60.

⁶⁴ Tinsley and Young, above n 59, at 16.

⁶⁵ At 16.

⁶⁶ At 16.

⁶⁷ At 16.

⁶⁸ Wemmers, above n 31, at 47.

⁶⁹ New Zealand Police *Community Justice Panel in Christchurch: An Evaluation* (November 2012) at 36.

⁷⁰ At 36.

⁷¹ Wemmers, above n 41, at 400.

does not necessarily mean they will receive the outcome they wanted. A study on restorative justice found 95% of victims were satisfied with the process when only 83% were satisfied with the outcome.⁷² This suggests it is the value of having input, not deciding the outcome, that is the important factor. This is supported by findings that participants in the criminal justice system place as much importance on procedure, or procedural justice, as they do on outcome.⁷³

Given that research suggests not all victims want an active role, there is a risk victims will feel pressured into participating in alternative processes when they do not want to.⁷⁴ To ensure the process is voluntary and prevent any re-victimisation there need to be safeguards that ensure an alternative process is only used when that is what the parties want. Where the parties want direct involvement, the alternative can be tailored to the individual circumstances of the case. In a case where there is a risk of power imbalance, victim-offender mediation could be used. The use of an independent mediator helps to protect the interests of all parties.

Alternative processes give victims more accountability from the offender. In an alternative process the offender is directly accountable to the victim and the community.⁷⁵ The offender must address the victim face to face and be directly accountable to the person they have harmed.⁷⁶ The offender is given the opportunity to accept responsibility for their actions and the impact they have had.⁷⁷ Alternative processes will often include an apology as part of the agreement reached.⁷⁸ This gives the victim recognition of what has happened to them and can be empowering. Alternative processes also create a forum that promotes accountability because the fear of harsh consequences is reduced.⁷⁹

Where the victim's main interest is direct accountability from the offender, victim-offender mediation might be used. Some victims want to confront the offender but do not want the wider publicity that a trial or other alternatives provide. It is common for only the victim, the offender and an independent facilitator to be present in victim-offender mediation making it particularly suitable in certain cases. Where the victim wants wider accountability or there is a public interest, use of restorative justice or community justice panels involves

⁷² Judy Paulin, Venezia Kingi, Tautari Huirama and Barb Lash *The Rotorua Second Chance Community-Managed Restorative Justice Programme: An Evaluation* (Ministry of Justice, New Zealand, 2005) at 45-48.

⁷³ Richard Moorhead, Mark Sefton and Lesley Scanlan *Just Satisfaction? What Drives Public and Participant Satisfaction with Courts and Tribunals* (Ministry of Justice, London, March 2008) at 60.

⁷⁴ At 50.

⁷⁵ McDonald and Tinsley, above n 45, at 416.

⁷⁶ At 416.

⁷⁷ Ministry of Justice, above n 57, at 7.

⁷⁸ Tinsley and Young, above n 59, at 16.

⁷⁹ McDonald and Tinsley, above n 45, at 414.

the community. The offender is therefore accountable to the victim and the wider community.

2 *Additional benefits of alternative processes*

There may be some additional benefits of alternative processes that the criminal justice system cannot provide. Alternative processes may be more suitable when the victim has an interest in restoring the relationship with the offender. Restorative justice shifts the focus from retribution and punishment of the offender to restoration of the victim, offender and community.⁸⁰ This is not to say punishment cannot be part of the outcome, but just that it is not the priority. This aspect of the process may be important in small communities or where there is an ongoing relationship.⁸¹

Alternative processes may be useful where the offender commits the offence on someone they know,⁸² for example in employment or domestic violence situations. This is supported by research which found victims were more satisfied with restorative processes in family violence cases than in non-family violence cases.⁸³ The formal adversarial approach of the criminal justice system together with the inherent need for a “winner” and a “loser” is not suitable for parties who desire an ongoing relationship.

The focus on restoring relationships could lead to higher victim reporting rates. This is a significant consideration given the major under-reporting in some areas. An example is sexual violence where statistics estimate only 9% of incidents in New Zealand are reported to police.⁸⁴ In situations where the victim knows the offender they may not want them to be convicted or imprisoned, but still desire accountability from the offender.⁸⁵ Alternative processes allow this accountability without necessarily subjecting the offender to conviction or imprisonment when that is not what the victim wants. It is acknowledged that conviction or imprisonment could not be avoided in every case, as the public interest still needs to be accounted for.

Alternative processes may be more effective at prioritising victims. Victims have been referred to as the “forgotten party” in the criminal justice system.⁸⁶ The criminal justice

⁸⁰ Tinsley and McDonald, above n 53, at 193.

⁸¹ Sinclair Dinnen *‘Traditional’ Justice Systems in the Pacific, Indonesia and Timor-Leste* (UNICEF, 2009) at 5.

⁸² At 5.

⁸³ Ministry of Justice, above n 57, at 11.

⁸⁴ Ministry of Women’s Affairs *Restoring Soul: Effective Interventions for Adult Victims/Survivors of Sexual Violence* (2009) at 2.

⁸⁵ McDonald and Tinsley, above n 45, at 414.

⁸⁶ Wemmers, above n 41, at 395.

system views crime as a breach of normative values.⁸⁷ The aim is therefore redress to society or the “public interest”.⁸⁸ These aims require the criminal justice system to focus on community protection and punishing offenders for past conduct.⁸⁹ Even with increasing recognition of victims’ interests, these will always be secondary under such a system. Failing to prioritise victims can have a significant impact in other areas. Research has linked victims’ negative experience with the criminal justice system to mental health issues such as post-traumatic stress disorder.⁹⁰

An alternative process focuses on restoration, re-integration and repairing the harm caused by an offence.⁹¹ This is a future oriented approach which shifts the focus to understanding what the victim has lost and what is needed to repair that harm. The majority of victims who participated in community justice panels or restorative justice were satisfied with the process.⁹² Prioritising the victim is not just important for victims but also for public perception of the criminal justice system. In the 2016 survey into public perceptions, the most common way respondents said their confidence in the criminal justice system could be increased was by “putting the interests of victims at the heart of the system”.⁹³

An alternative process may also be better in terms of efficiency and providing victims a remedy. One problem with the criminal justice system is that it makes providing a remedy for victims highly selective.⁹⁴ The offender must be identified, charges must be laid, and the charges must be successful for an offender to be sentenced. Prosecutors exercise discretion when deciding whether to proceed with charges.⁹⁵ If the case has a weak evidential foundation, limiting its chances of success, or if prosecution does not meet the public interest test, charges may not follow.⁹⁶ This results in many victims not receiving any remedy.⁹⁷ Even where offences are prosecuted, the sentence will not necessarily be what the victim desires. Victims’ have limited input into the appropriate sentence. As can be seen from *Osborne*, an outcome may account for the victim but not be what the victim wanted. Alternative processes give victims direct input which means they are much more likely to be satisfied with the outcome.

⁸⁷ Hambali, above n 38, at 21.

⁸⁸ At 21.

⁸⁹ Tinsley and McDonald, above n 53, at 193.

⁹⁰ Christine Englebrecht, Derek Mason and Margaret Adams “The Experiences of Homicide Victims’ Families with the Criminal Justice System: An Exploratory Study” (2014) 29(3) *Violence and Victims* 407 at 409.

⁹¹ Tinsley and McDonald, above n 53, at 193.

⁹² New Zealand Police, above n 69, at 36; Ministry of Justice, above n 57, at 4.

⁹³ Ministry of Justice *Public Perceptions of Crime 2016 – Survey Report* (November 2016) at 10.

⁹⁴ Paul Gordon and Alan Woodfield “Fines, reparations and legal design issues in New Zealand’s health and safety in employment legislation” [2006] ELB 160.

⁹⁵ Crown Law *Solicitor-General’s Prosecution Guidelines* (2013), Part 5.

⁹⁶ Part 5.

⁹⁷ Gordon and Woodfield, above n 94.

Making alternative processes available outside the criminal justice system where there is a decision not to prosecute or where the victim does not want to go through the traditional system would be a significant change. In 2014 the New Zealand Crime and Safety Survey (NZCASS) results indicated that only 30.9% of crime is reported to police.⁹⁸ Not all crime that is reported results in prosecution of the offender.⁹⁹ Having alternative processes available outside the criminal justice system would provide victims recognition in situations where there is currently nothing available to address their interests. Although the victims in *Osborne* received reparation, there will be cases where a decision not to prosecute leaves a victim with no resolution.

Court proceedings are also expensive. Even if the cost is borne by the state, proceedings are usually long and drawn out.¹⁰⁰ This can be emotional for victims and families who have to relive the event. There is also no guarantee of success. Using reparation in an alternative process to the criminal justice system would give victims security of receiving a remedy. Research on restorative justice found that victims who received reparation received it sooner than in the criminal justice process.¹⁰¹ Restitution is a key aim of community justice panels so it is common for agreements to include reparation and a plan of how the reparation will be paid.¹⁰²

Alternative processes may be more consistent with Māori tikanga than the adversarial trial. Some academics view indigenous dispute resolution as the roots of restorative justice.¹⁰³ If this is so, restorative justice should be more consistent with Māori tikanga. There is still limited research on whether these processes are in fact consistent with Māori and other indigenous groups' conceptions of justice.¹⁰⁴ Although restorative justice or iwi-led panels require community or tribal accountability, the focus is still on the Western conception of individual responsibility and punishment. This is very different to the traditional Māori approach of collective responsibility to offending.¹⁰⁵ These processes do provide community involvement and restorative justice has been compared to the māori concept of a whānau hui.¹⁰⁶ As these processes can be tailored to the particular circumstances, they may be more easily adapted to different cultures. Where victims have an interest in incorporating Māori principles, the bi-cultural nature of community justice panels may make them particularly appropriate.

⁹⁸ Ministry of Justice *New Zealand Crime and Safety Survey* (2014) at 105.

⁹⁹ James Dignan *Understanding Victims and Restorative Justice* (Open University Press, Maidenhead, 2005) at 62.

¹⁰⁰ Dinnen, above n 81, at 6.

¹⁰¹ New Zealand Police, above n 69, at 36.

¹⁰² At 2.

¹⁰³ Jim Consedine *Restorative Justice: Healing the Effects of Crime* (Ploughshare Publications, Lyttleton, 1995), cited in McDonald and Tinsley, above n 45, at 395.

¹⁰⁴ McDonald and Tinsley, above n 45, at 429.

¹⁰⁵ At 428.

¹⁰⁶ Paulin, Kingi, Huirama and Lash, above n 72, at 20.

Research into restorative justice may support that alternative processes are more consistent with Māori tikanga. A study by the Ministry of Justice found that 91% of Māori victims were satisfied with the restorative justice conference.¹⁰⁷ In terms of victims' overall satisfaction with the process, satisfaction for Māori was 89% whereas satisfaction for NZ Europeans was 77%.¹⁰⁸ There are a number of factors that could have led to the increased satisfaction for Māori. It is possible that the consistency of restorative processes with Māori tikanga was one factor.

It has been 30 years since Moana Jackson's seminal report which recommended a parallel justice system for Māori.¹⁰⁹ Despite this, Māori are still constrained to the parameters of the traditional system. Although alternative processes do not provide a completely parallel system, they may be a step towards an approach more consistent with Māori values. More research should be conducted to determine whether alternative processes are more consistent with Māori tikanga. Finding approaches that are consistent with Māori tikanga is important for victims, offenders and the community. Given the over-representation of Māori as victims of crime and as offenders in every stage of the criminal justice process,¹¹⁰ it is important to consider alternatives that are responsive to Māori perspectives. This is particularly so given that Māori consistently report feeling alienated and shut out of the criminal justice system.¹¹¹

C Availability of Alternative Processes

An alternative process will not always be appropriate and there are a number of factors which can prevent the availability of alternative processes in the criminal justice system. Participation in alternative processes is voluntary.¹¹² Both the offender and the victim must agree to participate.¹¹³ These processes requires an admission of guilt by the defendant.¹¹⁴ Alternative processes would require a decision by police to issue a diversion or a pre-trial warning instead of prosecuting. This would be in cases where the evidential test was met but prosecution was not in the public interest. The decision not to prosecute is often conditional on the offender meeting the requirements imposed in the alternative process.¹¹⁵ Currently, alternative processes within the criminal justice system are available only for low

¹⁰⁷ Ministry of Justice, above n 57, at 11.

¹⁰⁸ At 14.

¹⁰⁹ Moana Jackson *The Maori and the Criminal Justice System: He Whaipaanga Hou - A New Perspective*, Part 2 (Department of Justice, Wellington, 1988).

¹¹⁰ Department of Corrections *Over-representation of Māori in the Criminal Justice System: an exploratory report* (September 2007) at 6.

¹¹¹ At 6.

¹¹² Ministry of Justice, above n 57, at 7.

¹¹³ Tinsley and McDonald, above n 53, at 194.

¹¹⁴ Ministry of Justice, above n 57, at 7.

¹¹⁵ Tinsley and Young, above n 59, at 16.

level offences. This paper argues that more alternative processes should be developed, and that alternative processes should be available for more serious offending.

Alternative processes outside the criminal justice system have not been formally recognised in New Zealand. Establishing alternative processes outside the criminal justice system would require a new framework to establish how they would operate. It is recommended that alternative processes outside the criminal justice system should be available in two situations. Firstly, if there is a decision not to prosecute such as in *Osborne*. Secondly, a victim should have the option of going directly to an alternative process provider if they do not want to go through the traditional system.

This may require some legislative change authorising providers to handle these cases. Alternatively, the Ministry of Justice could issue guidelines for providers setting out the function of, and eligibility for, alternative processes. There may need to be some acceptance of responsibility for these processes to operate effectively and to prevent re-victimisation. Whether there are victims' interests that could be met by alternative processes should also be considered. The establishment of alternative processes outside the criminal justice system would require public funding.

V Limitations of Alternative Processes

Although this paper claims alternative processes may in some cases better account for victims' interests, it is important to acknowledge the complexities associated with their availability. There are a number of determinations that would need to be made as to how alternative processes would operate including eligibility, confidentiality, privilege and whether participation would bar proceedings for the same offence.¹¹⁶ In cases where there is no prosecution, it may be difficult to get potential offenders to participate and some incentive or assurance may be required. There are also concerns that alternative processes fail to uphold some of the principles and protections that are central to the adversarial trial.¹¹⁷ Some of the main concerns are now considered.

A Proportionality and Consistency

Academic writers have suggested that alternative processes have the potential to lose the objectivity, consistency and overall legitimacy of the criminal justice system.¹¹⁸ The flexibility provided by an alternative process creates significant concerns with upholding principles of proportionality and consistency. The criminal justice system applies the just

¹¹⁶ Law Commission *The Justice Response to Victims of Sexual Violence* (NZLC R136, 2015) at 16.

¹¹⁷ Doak, above n 27, at 300.

¹¹⁸ At 300.

deserts principle which aims to ensure any punishment is proportionate to the harm caused.¹¹⁹ In contrast, an alternative process considers the individual victim and offender and what they require to repair the harm.¹²⁰ Tailoring the remedy to individual parties has the potential to result in an outcome that is too lenient or too harsh, depending on the views of the individual victim involved.¹²¹ It can also lead to similar offences having different outcomes depending on the views of the victim. If a punishment depends partially on the wishes of the victim this means offenders will not necessarily receive a punishment that is proportionate to the offence they committed. The desire for consistency has traditionally lead to a reluctance to expose people to variable sentences influenced by the views of victims.¹²²

This legitimate concern is somewhat addressed by the fact participation in alternative processes is voluntary. The main difficulty is unfairness on defendants who wish to take part in an alternative process but are not able to. An example would be where the victim does not agree to participate. Although this is a valid concern, the benefits to victims, offenders and the community from the availability of an alternative process outweigh this concern. Further, given that victims desire more involvement in the system and research shows the majority are satisfied with restorative processes,¹²³ the number of victims who do not want to participate should be low.

It is important that alternative processes remain voluntary for victims and offenders. Victims should not feel pressured into participating because of efficiency reasons or because it is in the defendant's interests.¹²⁴ There should be clear guidelines to police and prosecutors. Where alternative processes are available in the criminal justice system, the options need to be clearly and impartially laid out to the victim. The victim should be able to then decide whether they want the prosecution to proceed or would like an alternative process to take place. It is also important that victims are informed about the criminal justice process so that they understand their options and can make an informed decision on how they want to proceed.

B By-pass for Wealthy

Use of an alternative process creates a potential route for wealthy people to bi-pass the criminal justice system. Offenders who are wealthy may be able to reach an agreement

¹¹⁹ Ian Edwards "Victim Participation in Sentencing: The Problems of Incoherence" (2001) 40(1) The Howard Journal 39 at 41.

¹²⁰ Doak, above n 27, at 300.

¹²¹ Ashworth, above n 25, at 586.

¹²² At 586.

¹²³ Paulin, Kingi, Huirama and Lash, above n 72, at 45.

¹²⁴ Law Commission, above n 116, at 224.

whereby payment of monetary compensation is the only consequence they face. This was one concern of the victims in *Osborne* who referred to the agreement between Mr Whittall and the prosecutor as “chequebook justice”.¹²⁵ The rule of law dictates that all are equal under the law and should therefore be subject to the same procedure and response.¹²⁶ Differential treatment of similar offenders depending on their means is clearly inconsistent with the rule of law.

This argument loses strength when outcomes in the criminal justice system are considered. Reparation is usually imposed in sentencing and does take account of the defendant’s ability to pay reparation.¹²⁷ Further, *Osborne* illustrates that the criminal justice system can create a result where someone has bought their way out of the system. Although the decision not to prosecute was deemed unlawful in *Osborne*, there remains the possibility that voluntary reparation could potentially establish grounds for a decision not to prosecute. Whether a person should be able to buy their way out of the system also depends on whose interests are prioritised. If the victim’s interests are prioritised, and the outcome they want is monetary reparation, maybe this should be a viable option. However, reparation would not address any public interest concerns that needed to be met.

C Objective Decision Maker

The use of judges in the criminal justice system provides an objective and neutral decision maker. This avoids the risk of any unequal power dynamics or bargaining positions between the parties having an impact on the decision.¹²⁸ In a situation where a power imbalance was not controlled, victims’ interests may not be accounted for even with a direct role in decision making such as in alternative processes. In this respect, the criminal justice system protects victims’ interests. The use of lawyers remedies any power imbalance and the state should ensure the interests of the victim are protected and accounted for.¹²⁹ However, the fact victims have no legal representation or standing in the criminal justice system limits the protection provided to them by an objective decision maker. Victims often feel unaccounted for which suggests their views are not adequately conveyed in the trial.

Given their personal involvement in the situation it may be hard for victims to separate their emotions from any decision or agreement. This could cloud their judgment and stop them pursuing the outcome that is best for them. It may be best for victims if an independent person decides how the situation should be rectified, or at least which option should be

¹²⁵ TVNZ “‘Chequebook justice’ not OK in NZ, says Pike River lawyer” (24 November 2017) <www.tvnz.co.nz>.

¹²⁶ Ashworth, above n 25, at 582.

¹²⁷ Sentencing Act 2002, s 12.

¹²⁸ Dinnen, above n 81, at 5.

¹²⁹ Wemmers, above n 41, at 412.

pursued. Alternative processes provide this protection to some extent. Although the parties take over some of the decision making power, most alternative processes use an independent party, such as a restorative justice co-ordinator or mediation facilitator. Having a number of alternative processes available also means the appropriate process could be chosen relative to the risk of power imbalance and other factors.

D Public Interest

The criminal justice system is designed to accommodate the competing interests of the victim, offender, community and state. There is concern that the focus of alternative processes on the needs of the victim and offender can fail to account for the public interest, in particular protection of the community.¹³⁰ Although this is a valid concern, there are cases where alternative processes can protect the public interest. When operating within the criminal justice system, alternative processes would be available only where they could account for the public interest. When there is a decision not to prosecute, or where the victim does not want to go through the formal process, the public interest is currently unaccounted for. The availability of alternative processes outside the criminal justice system would in some way address the public interest.

Part of the concern with alternative processes is public perception rather than reality. Alternative processes are often seen to be “soft on crime”.¹³¹ This can lead to concerns that alternative processes do not protect community safety, which is one of the main interests the public has in prosecution.¹³² However, some familiar with restorative processes view the outcomes as being harsher than the traditional system.¹³³ Research by the Ministry of Justice also found that offenders who participated in restorative justice were less likely to reoffend.¹³⁴ Early indications also suggest community justice panels lead to a reduction in offending.¹³⁵ If alternative processes lead to a reduction in offending there is potential for them to be more effective in protecting the community than the criminal justice system.

Community representatives are usually able to attend alternative processes and can ensure community interests are accounted for. Alternative processes are also flexible and can be adapted to the particular circumstances of the case. In a case of high public interest an approach which allows sufficient input from the community can be used. An example is the use of community justice panels which are community led and set in the offender’s own

¹³⁰ McDonald and Tinsley, above n 45, at 421.

¹³¹ At 422.

¹³² Just Speak *The Case Against Prisons* (April 2018), at 14.

¹³³ McDonald and Tinsley, above n 45, at 414.

¹³⁴ Ministry of Justice “Reoffending Analysis for Restorative Justice Cases 2008-2013: Summary Results” (2014).

¹³⁵ New Zealand Police, above n 69, at 35.

community.¹³⁶ This allows a response adapted to the particular individual and community. Community safety and rehabilitation of the offender are main outcomes desired by the community.¹³⁷ As the victim is part of the community they represent the interests of the community as well as themselves.

The concern for the public interest can also be discounted by the reality that the criminal justice system often fails to account for the public interest. In *Osborne*, the decision of the prosecutor meant Mr Whittall was only required to pay the \$3.41 million reparation. Although the decision was found to be unlawful, cases that follow the correct process can result in a defendant only being required to pay reparation. This would do nothing to protect the public and the community has no involvement, other than a right to attend the public trial. Alternative processes allow the community direct involvement which means community interests are heard and can be accounted for in the outcome.

VI Recommendations

The increasing recognition of the importance of victims has fuelled academic debate on how victims should be incorporated into the criminal justice system. Like many cases, the interests of the victims in *Osborne* were not adequately accounted for in either the procedure followed or the outcome. *Osborne* may illustrate an inherent lack of fit between the criminal justice system and the place of victims. This paper argues alternative processes may in some cases be more effective in meeting the interests of victims. Two recommendations for how the availability of alternative processes should change to better account for the interests of victims are set out below.

A Increased Availability of Alternative Processes within the Criminal Justice System

There should be increased availability of alternative processes that operate within the criminal justice system as a form of diversion. The New Zealand Police diversion policy and pre-charge warnings indicate an acceptance that alternatives to the criminal justice process may be appropriate for some low-level offences.¹³⁸ Given the positive indications from research on alternative processes, their availability should extend to more serious offences. The extended availability could be offered on a trial basis allowing research to be carried out to determine whether the positive indications continued with more serious offences. The changes could also be phased in so that initially availability was only to slightly more serious offences. If the results were positive, the availability could then increase.

¹³⁶ New Zealand Law Society, above n 60.

¹³⁷ Just Speak, above n 132, at 14.

¹³⁸ New Zealand Police *Adult Diversion Scheme Policy* (January 2016); Justice O'Reilly *New Zealand Police Pre-Charge Warnings Alternative Resolutions – Evaluation Report* (New Zealand Police, December 2010).

An assessment of eligibility for alternative processes could be made by police. Where there was a public interest concern that could not be met by alternative processes, the offence would not meet the criteria for an alternative process. There are cases where the public interest can be protected by alternative processes. In cases such as *Osborne* the criminal justice system fails to provide for, or protect, the public interest at all. In *Osborne* an alternative process would have accounted for the public interest by allowing community representatives to attend and give input into the outcome.

There may be some objections to police making these kinds of decisions for more serious offences. This may be particularly so given the various issues with police discretion that research has identified.¹³⁹ This would require clear guidelines on the availability of alternative processes in order to inform the discretion of police. It is also acknowledged that there would need to be a line drawn as to when alternatives were not an option. This could be informed by research on the success of the increased availability or could be set at a certain level such as offences punishable by less than 2 years imprisonment.

Increasing the availability of alternative processes will better meet the interests of victims in some cases. Alternative processes give victims more information about their case and put them at the centre of the process. For victims who want to participate, an alternative process could give them the opportunity for involvement and input into how the offence should be resolved. Where an alternative process is appropriate, offenders can be directly accountable to the victim.

The criminal justice system should develop new alternative processes so that a range of options are available. Given the number of variables that go into an offence, the more a process caters to the particular circumstances of the case, the more effective it is likely to be. Increased availability of alternative processes is consistent with evidence-based practice. Although increasing the availability will increase short term cost, the initiative could reduce cost long-term. Restorative processes are effective at reducing re-offending.¹⁴⁰ Re-offending is more likely to lead to incarceration which is a huge cost to the criminal justice system.¹⁴¹ Increasing availability of alternative processes would also help reduce the burden on District Courts by diverting more cases outside of court. This would increase efficiency and reduce cost.

¹³⁹ Judge Sir David Carruthers *Review of Pre-Charge Warnings* (Independent Police Conduct Authority, September 2016) at 11.

¹⁴⁰ Ministry of Justice, above n 134.

¹⁴¹ Department of Corrections “Prison Facts and Statistics – June 2010” <www.corrections.govt.nz>.

B Availability of Alternative Processes outside the Criminal Justice System

Alternative processes should be available outside and independent of the criminal justice system where there is a decision not to prosecute or where the victim does not report to police because they do not want to go through the traditional system. This will ensure that victims' interests can still be met in such cases.

Where there is a decision not to prosecute, the criminal justice system often fails to account for any interests of the victim. Even in a situation such as *Osborne* where the victims received reparation, any other interests the victims had are completely disregarded. An alternative process would account for some of the interests' victims have in a trial which would otherwise be unaccounted for where there is no prosecution.

The availability of alternative processes for victims who do not want to go through the criminal justice system would reduce the large number of cases which are currently unreported. Although these would not be reported to police, they would be reported to an authority who could deal with them through an alternative process. Where victims know the offender, they may not want them to suffer harsh consequences. An alternative process could provide for the interests of victims in having their relationship with the offender restored. It would also allow the victim to participate and give input into the resolution of the offence. The offender would be accountable for the offence in a forum that removes the fear of harsh consequences and therefore promotes accountability. If parliament wants to recognise the importance of victims, it needs to acknowledge the number of victims who are currently unaccounted for because they do not want to go through the criminal justice system. The latest NZCASS survey suggests 69% of crime is not reported to police.¹⁴² The system cannot be said to account for victims' interests if over two-thirds of victims are missing out on any recognition.

It is argued that, though the availability of alternative processes outside the criminal justice system may appear to be inefficient, their availability could indirectly increase efficiency. Research suggests there are high rates of victim satisfaction in alternative processes. Having a system which can meet the needs of more victims may reduce the burden of victimisation in other areas such as the health system. Despite any concerns about efficiency, the availability of alternative processes outside the criminal justice system should be adopted on a principled basis. There have been a number of changes domestically and internationally that recognise the importance of victims and their interests. An approach that better meets the interests of victims should therefore be adopted.

¹⁴² Ministry of Justice, above n 98, at 105.

VII Conclusion

The Supreme Court decision in *Osborne* highlights the inadequacies of the criminal justice system in accounting for the interests of victims. The mechanisms within the criminal justice system designed to meet the interests of victims mean some victims want prosecution to proceed. However, as has been considered, the criminal justice system often fails to adequately meet these interests. An alternative process may better provide for the interests' victims have in a trial and there are additional benefits from an alternative process. Although there are challenges to implementing alternative processes, some of these can be discounted by the practical reality of how the criminal justice system operates. There are two recommendations for changing the availability of alternative processes to better meet the interests of victims: There should be increased availability of alternative processes within the criminal justice system, and alternative processes should be available outside the criminal justice system where there is a decision not to prosecute or where the victim does not want to go through the traditional system. These changes will reduce the number of cases where the interests of the victim are not being accounted for.

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