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"Anti-smacking" law and judicial review

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believes the law of unintended consequences will strike

The debate about the amendment to s 59 of the Crimes Act 1961 produced enough heat to contribute to global warming. The compromise agreed between National and Labour prior to the passing of the Amendment Bill introduced a new clause which has ramifications beyond the mere removal of the previous defence to assault on a child. In particular, the insertion of s 59(4) of the Crimes Act 1961 raises new issues around the exercise of police discretion. That subsection says:

> To avoid doubt it is affirmed that the Police have the discretion not to prosecute complaints against a parent of a child or person in the place of a parent of a child in relation to an offence involving the use of force against a child where the offence is considered to be so inconsequential that there is no public interest in proceeding with the prosecution.

This article considers the question of the extent to which this section may change the law relating to the judicial review of police discretion to prosecute. It is contended that this section in fact, will broaden the circumstances in which judicial review of police discretion may occur.

POLICE DISCRETION TO PROSECUTE

It has been argued that "Police discretion is a corollary of the law itself" (S Kay *Organisational Discretionary Decision Making in the Police*, 1996, Thesis, Victoria University of Wellington, p 119). The very structure of our law allows police their discretion. For example, an incident which led to bodily injury could attract charges of either wounding with intent or assault with intent to injure, the former entailing a far higher penalty. Further, the structure of the policing and judicial systems means that decisions to prosecute are always initiated by police. Police can be regarded as "gatekeepers to the criminal justice system … occupying a quasi judicial role, selecting potential offenders, deciding on guilt and imposing punishment" (S Poyser "The Role of Police 'Discretion' in Britain and an Analysis of Proposals For Reform" (2004) 77 *Police Journal* 5, 6).

There is no statutory basis for this quasi judicial role which police assume. Neither the Police Act 1958 nor the Policing Act 2008 make specific provision for police to have a discretion in deciding whether or not to prosecute. Instead, the discretion appears to have originated from the early days of policing, and is based on simple practicalities. If every act which could be considered a crime had to be taken further by police, then our judicial system would grind to a halt. However, the result of this is that in many ways police are case managers for the courts.

New Zealand has somewhat formalised the existence of police discretion through the creation of the Diversion Scheme for minor crimes. However, the legal basis of the discretion is still obscure. It arises both from the common law doctrine of the independence of the constable, and the concept of constitutional independence, by which police are not subject to ministerial control, but are only responsible and accountable to the law. It has been suggested that "by concealing the exercise of discretion behind a screen of legality, the political, organisational and industrial determinance of discretion are not recognised, articulated or regulated" (S Egger and M Findlay "The Politics of Police Discretion" in Findlay and Hogg (eds) *Understanding Crime and Criminal Justice*, 1988, p 211).

That raises difficulties with the exercise of police discretion. There is the potential for that discretion to be abused, and it is unclear exactly who can supervise its exercise. Accordingly, judicial review appears to be one of the only remedies that people have available to them when police make decisions otherwise than in good faith.

The Solicitor-General has published guidelines for prosecution which are available from the Crown Law website. Those guidelines emphasise that the original decision rests with police and it is the role of Crown Law and the Solicitor-General to advise only. When it comes to the decision to prosecute, there is a necessity to balance the evidential sufficiency with the public interest. Matters of the public interest include:

- seriousness and triviality;
- mitigating and aggravating circumstances;
- staleness of the offence;
- obsolescence or obscurity of the law;
- whether alternatives are available.

It is necessary for the Police to balance all interests under these guidelines, and it is clear that there are matters which are not to be considered which include:

- the colour, race, ethnic or national origins, sex, marital status, religious ethical or political beliefs of the accused;
- the prosecutor's views of an accused or a victim;
- political advantage or disadvantage to the government arising from prosecution;
- effect on the personal or professional reputation or the prospects of those prosecuting.

Section 59 of the Crimes Act 1961 arguably enshrines in statute law one of the considerations mentioned above, which is the seriousness of the offence, and whether it is, in the

words of the statute, "inconsequential". At this point the question must be what remedies are available to those who feel that police have made decisions which do not follow their own proposed guidelines?

JUDICIAL REVIEW OF POLICE DISCRETION

It appears to be accepted that police discretion is reviewable. In *Kumar v Immigration Department* [1978] 2 NZLR 553 at 558, Richardson J for the Court of Appeal said:

> It scarcely needs to be said that discretions reposed in the Executive and in particular the discretion to prosecute, must be exercised on proper grounds and for proper purposes. If the exercise of a discretionary power has been influenced by irrelevant considerations, that is, considerations that cannot properly be taken into account, a court will normally quash the decision. And clearly the courts may and will intervene where a power has been exercised for collateral purposes, unrelated to the objectives of the statute or the prerogative in question. A discriminatory exercise of discretion without authority infringes the fundamental principle of equal treatment under the law and the equal protection of the laws for every person which has long been recognised as an essential pillar of the rule of law.

Such words reinforce why it is that judicial review should be available. Decisions on whether or not to prosecute give police enormous power. That power arises whether or not police use an overt discretion, for example, deciding not to prosecute, or a covert discretion, deciding which charge to lay.

This latter type of discretion and the impact it can have was illustrated by Steven Kay in his thesis for Victoria University, in comparing *R v Tua* (HC, Auckland T 131/85, 6 November 1985, Vautier J) and *R v Spring* (CA 107/85, 31 October 1985). In the former case a Samoan who cut an arresting officer's hand with a knife and wounded him so that the arm required five stitches, was charged with wounding to intent which then carried a penalty of 14 years' imprisonment. In the latter case, Robert Spring, a 23-year-old Pakeha, inflicted a cut on a man in a bar that required 17 stitches and put the victim in danger of losing sight in one of his eyes. He was charged with assault with intent to injure, an offence which then carried a maximum penalty of three years. Provided that the two offenders have similar offending histories, this example highlights the great power the Police have when exercising a discretion on whether or not to prosecute.

Polynesian Spa Ltd v Osborne [2005] NZAR 408 involved the exercise of discretion in favour of prosecution by an Occupational Safety and Health Inspector under the Health and Safety in Employment Act 1992, following the death of a woman at a Rotorua hot pools complex. An application was made to review the decision to prosecute. The prosecution occurred after a report was issued by an inspector, a draft of the report having already been provided to the applicant. The draft report and the report noted that the applicant did not take all practicable steps to ensure that the hazards at the work place did not harm the deceased. The review was taken on the basis that:

- there was no adequate opportunity for the applicant to comment on the steps that could have been taken;
- the report did not properly analyse all the practicable steps; and
- alternatives to prosecution were not considered.

At p 422 Randerson J, Chief High Court Judge, considered some of the reasons for the courts' reluctance to interfere with the exercise of a discretion to prosecute. He noted:

- an issue of proper constitutional boundaries;
- criminal proceedings should not generally be subject to collateral challenge;
- decisions to initiate and continue prosecutions generally involve a high content of judgment and discretion in the decisions reached;
- if there is a prosecution the court can dismiss a prosecution for abuse of process;
- the conclusion by a prosecuting authority that an offence has been committed is just an expression of opinion capable of challenge in court;
- if factual errors are made in investigation or there is further or other material which ought to have been weighed by the prosecution authority, the trial presents an opportunity for such issues to be explored and tested.

Of particular importance to those who wish to challenge a decision to prosecute them on the basis of an inappropriate exercise of the discretion is the simple fact that the trial itself presents that opportunity. Allowing for defendants to challenge the decision to prosecute before the trial has commenced opens criminal proceedings up to collateral challenge as noted. This would seriously disrupt the criminal justice system, as was noted by Lord Steyn in *R v Director of Public Prosecutions ex p Kebilene* [1999] 4 All ER 801 at 834. The fact that the court can stay a proceeding or dismiss it due to an abuse of process means that there is already a remedy available.

It is questionable that judicial review of the decision to prosecute really involves questions of proper constitutional boundaries being observed. It is suggested in *Fox v Attorney-General* [2002] 3 NZLR 62 at para [31] that the courts do not interfere with decisions to initiate and continue prosecutions because it "reflects constitutional sensitivities in light of the court's own function and responsibility for conduct of criminal trials". It is true that the court does have a role in conducting criminal trials, and ensuring that they are conducted fairly. However, the focus should not be on the courts' role in ensuring fair trials but rather their role in ensuring that executive power is exercised in an appropriate manner. Accordingly, the rationale that there is already a remedy available through the role of the courts in deciding whether a prosecution is an abuse of process during the case, is a sounder basis for a reluctance to judicially review exercise of police discretion, than saying it is not the role of the courts.

That deals with situations where a prosecution has been launched, however, what about where police have investigated but decided not to prosecute? A classic example of this would be from six years ago and the "Paintergate" saga involving Helen Clark's famous piece of art, that was not actually painted by her. In such a case, what are the chances of having a decision reviewed?

The cases in which judicial review has been successful are decisions in which prosecutions have not taken place. *R v Commissioner of Police of Metropolis, ex p Blackburn* [1968] 1 All ER 763 is a good example of this. A review of the decision not to prosecute is normally not entertained for

reasons similar to those already listed above. A further consideration is the role that the courts have as either the arbitrator of guilt and innocence, or the facilitator of a finding of guilt and innocence. If the courts were to consider a decision not to prosecute and to order that the decision be made to prosecute, that arguably undermines the potential defendant's right to a fair trial. It would seem as if the court had predetermined his or her guilt.

That is a very sound reason why the courts should be reluctant to allow for judicial review of police decisions not to prosecute. However, there are still grounds for review. For example, in *R v Director of Public Prosecutions, ex p C* [1995] 1 Cr App R 136, the English High Court considered judicial review of the decision not to prosecute. It stated there that the grounds for review were on the basis that there was either:

- an unlawful policy;
- a failure to act in accordance with policy;
- the decision made was perverse.

Support for failure to exercise a discretion by imposing a blanket policy against prosecuting certain offences, is clearly reviewable as was noted by Henry J in *Hallett v Attorney-General (No 2)* [1989] 2 NZLR 96 and in *Blackburn*. Of course, there is a further factor which is the ability for citizens to bring private prosecutions. It was held in *Blackburn* that the fact that private prosecution could be brought disentitled the applicant to an order for mandamus on the ground that there was available another effective and convenient remedy. Accordingly, in practical terms it seems doubtful that an application for judicial review of a decision not to prosecute could actually be taken. After all, there are alternatives and in particular private prosecution. Therefore, what is the remedy?

SECTION 59

That leaves the question of whether or not the amendment to s 59 of the Crimes Act alters the position regarding judicial review of police discretion to prosecute. The significance of the amendment is that it embodies in statute, quite clearly, the discretion of police not just in relation to this particular offence but in a more general way. The words of the section which affirm police have the discretion not to prosecute complaints, suggests that the discretion goes far beyond this particular offence. This is consistent with the general discretion above.

The statute also recognises a particular criterion which police must consider when deciding whether or not to prosecute, that criteria being whether or not the assault is inconsequential. Given the wording of the section, recognising a pre-existing discretion with a set criterion, the potential effect of the section is to broaden the ability of individuals to judicially review police for a decision whether to prosecute.

Although a review of a decision not to prosecute will probably be blocked by the lack of an adequate remedy and the availability of private prosecutions, a decision to prosecute might be more open to judicial review. In particular, an allegation that a decision that a certain assault was inconsequential and so there was no public interest in prosecution, is very different from an allegation that a prosecution has been brought in bad faith and is therefore an abuse of process. This raises an interesting question as to how the courts will practically approach this particular issue. Will the courts allow a defence to a charge of assault on a child on the basis that the person committing the alleged assault was a parent or in the position of a parent, and that the assault was inconsequential? Is this to be dealt with at trial or will it be subject to separate proceedings by way of judicial review?

This section also raises some interesting issues for the way in which police deal with this situation. In particular, police are going to have to consider carefully whether or not an assault on a child is inconsequential. Given the grounds of judicial review, it will be absolutely necessary that police prove that in making the decision to prosecute they have considered this statutorily mandated criterion. Failure to do so would no doubt be grounds for a review of the decision.

However, when it comes to a question of exactly what is and is not consequential the courts are unlikely to intervene too much. Unless it can be shown that the decision made was based on an irrational view of what is and is not inconsequential, the courts are unlikely to impose on police their own definition of what is inconsequential. To do so would be to go against the principles of judicial review which the courts have previously enunciated. In particular, it would undermine the role of the courts in ensuring that a trial is fair, and would lead to collateral challenges to criminal proceedings.

CONCLUSION

The discretion to prosecute which police have is important. It is important not only for the consequences that it can have for those who are prosecuted or not prosecuted, or for those who have certain charges laid against them which attract higher sentences or lower sentences, but because it is essential to the running of our justice system. Police discretion may not have any real statutory basis to it, apart from the affirmation in s 59 of the Crimes Act (and certain provisions in the Electoral Act 1993), but it is an important part of our legal system.

The question is how we balance that important part of our legal system with the need to ensure executive actions are properly reviewed. Given the consequences that come about from a decision to prosecute or not, it is important that the courts do not take a limited role in this. Instead it is the role of the courts to supervise the way in which decisions to prosecute or not are being made.

Of course, the point is that the way the justice system works, the courts are already performing a supervisory role because in the trial process decisions to prosecute are essentially being reviewed. Further, when it comes to decisions not to prosecute the ability to bring a private prosecution, although costly, essentially gives a remedy.

Section 59 of the Crimes Act now introduces an interesting dynamic in police decisions to prosecute. In particular, it embodies in statute not only police discretion but also a factor that is taken into account in relation to this particular section, namely the question of inconsequentiality. It is submitted that this will inevitably impact on the law relating to judicial review. The question of whether courts will specifically consider inconsequentiality will be an important one. There is also a question of the extent to which the courts will impose a standard of inconsequentiality which police will be expected to follow.

Accordingly an area of the law which appeared well settled may develop as prosecutions under the anti-smacking legislation start coming before the courts. ❐