

PROSECUTORS – SHOULD WE TRUST THEM? A CROSS-JURISDICTIONAL ANALYSIS OF THE EFFECTIVENESS AND TRANSPARENCY OF LIMITS ON PROSECUTORIAL DISCRETION DURING PLEA BARGAINING

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I. INTRODUCTION

In 2016, the story of “Baby Moko”¹ captured the country’s attention as we witnessed his killers come before the courts and enter guilty pleas to manslaughter and ill-treatment charges. The story of the beatings Baby Moko suffered at the hands of his caregivers is not easily forgotten.² But the other story to emerge from that case was the plea bargain negotiated between the Crown and defence lawyers which saw charges of murder downgraded to manslaughter and guilty pleas entered.³ Fierce public outcry and media scrutiny resulted, and nationwide protests were staged on the day of the caregivers’ sentencing. Suddenly, the exercise of prosecutorial discretion became the subject of national debate, with the Attorney-General even taking the rare step of publicly defending the plea deal.⁴

Whether that plea deal was justified is ultimately a matter of conjecture, but the case finally brought an important topic into the public domain – plea bargaining. The plea negotiations in the Baby Moko case are symptomatic of most similar arrangements in common law criminal jurisdictions; they involve prosecutors and defence lawyers negotiating behind closed doors, beyond the purview of the public. And New Zealand is not alone when it comes to controversial plea bargains.⁵ How then can we be confident that those entrusted with prosecuting crimes are conducting themselves within the bounds of their mandate? What checks exist to prevent potential abuses of prosecutorial discretion in plea bargaining so that the community can be assured that the decision to downgrade the charge in the Baby Moko case, and others like it, is robust and defensible?

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¹ Moko Rangitoheriri.

² See generally Benn Bathgate and Matt Shand “Moko Rangitoheriri’s Killers David Haerewa and Tania Shailer Sentenced to 17 Years’ Prison” *Stuff* (online ed, 27 June 2016).

³ See generally *R v Shailer* [2016] NZHC 1414.

⁴ See for example Sam Sachdeva “Attorney General Christopher Finlayson defends manslaughter charge for Moko’s killers” *Stuff* (online ed, 9 June 2016).

⁵ See for example Terry Kirby “CPS to Review Decision to Drop Charges Against Bahar Mustafa Over #killallwhitemen Controversy” *East London Lines* (online ed, London, 3 November 2015); Michael Rellahan, “I’m Not Angry’ Says Woman in Case, ‘It Makes Me Sad’” *Daily Local News* (online ed, West Chester, 12 September 2016); and Aleks Devic and Paul Toohey “Widespread Outrage as Matthew Newton’s Latest Violent Assault Charges Are Dropped” *Perth Now* (online ed, Perth, 15 November 2012).

This article surveys a number of jurisdictions (New Zealand, the United States' federal system, England and Wales, and to a lesser extent Victoria and New South Wales in Australia, and British Columbia and Ontario in Canada) with a view to identifying the principal features of their respective plea bargaining frameworks, in order to determine the extent to which those features restrain prosecutors' plea bargaining discretion. This survey will not involve a line-by-line analysis of each and every aspect of the plea bargaining frameworks, instead focusing on three broad categories of features: internal checks, third party influences and judicial oversight.

Having considered the effectiveness of these features in Parts III-V, I will then discuss the importance of a transparent plea bargaining process and argue that there is a systemic disconnect between the transparency and effectiveness of the three features examined. That is, while some of these features provide a meaningful check on prosecutorial discretion, they lack the transparency required to ensure that public confidence in the plea bargaining system is achieved, and vice versa. Finally, I will argue that it is the convergence of transparency and effective checks on prosecutorial discretion that ought to be the starting point for any reform of plea bargaining processes.

II. PLEA BARGAINING GENERALLY

A. Defining Plea Bargaining

Before turning to the substance of this article, it is important to outline precisely what "plea bargaining" means. Though different jurisdictions use the phrase in various ways,⁶ I use it to denote any negotiations and/or agreements reached between prosecutors and defence lawyers that are directed toward resolving a criminal proceeding without the need for a trial. It does not necessarily entail a case where guilty pleas are entered (although they will be the most common) and includes all cases where a prosecutor elects to withdraw charges and discontinue proceedings against a criminal defendant. Furthermore, it does not necessarily relate to agreements about the charges to which a defendant pleads guilty, but can also relate to any agreement between the parties as to sentence, or the factual basis for sentencing, practices which are particularly prominent in the United States.

Further, although at the outset of this article I cited an example of a plea bargain that attracted negative publicity because of perceived under-charging, the public's interest in plea bargaining is not so limited. The wider public's interest naturally includes ensuring that defendants' interests are adequately protected in the plea bargaining process. However, I acknowledge that many of the concerns affecting defendants in the plea bargaining process are able to be appropriately safeguarded by their legal representatives.⁷ That is not to suggest that the plea bargaining process is a completely level playing field, but it recognises that public confidence in the plea

⁶ See generally Carol Brook and others "A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States" (2016) 57 *William & Mary L Rev* 1147.

⁷ See Daniel McConkie "Judges as Framers of Plea Bargaining" (2015) 26 *Stanford L & Pol'y Rev* 61 at 80–81.

bargaining system may demand that more attention be placed on protecting the rights and interests of those who do not have a seat at the plea bargaining table (for example, victims and investigators).

B. The "Schizophrenic" Prosecutor

The reader will have been alerted to the importance placed on the "public interest" in this article. While such an amorphous phrase is difficult to define precisely, it is important to set out the specific lens through which the public interest is to be considered here.

Prosecutors are commonly described as "ministers of justice", and advocates who act on behalf of the community, whose duties are not to convict, but to do justice.⁸ However, they are also advocates, and it is this dual role as both ministers of justice and advocates that leads some commentators to describe prosecutors as suffering from an "ongoing schizophrenia".⁹ Not only that, but prosecutors also face other pressures, with the presence of fiscal and political constraints influencing the way they carry out their role. This article takes all those factors as a given; they are a reality. Instead, the article focuses on how prosecutors' power is harnessed to ensure that they are upholding their duties as advocates on behalf of the community, consistently with the community's expectations of them.

III. INTERNAL CHECKS

In this section, I explore the basic frameworks that govern the exercise of prosecutorial discretion, first through the tests that prosecutors must employ to decide whether to prosecute, and then the specific rules of engagement for plea bargaining. I then turn to consider what internal processes, if any, exist for peer review of prosecutors' charging and plea bargaining decisions.

A. Prosecution Tests

The first and most obvious check on a prosecutor's discretion in plea bargaining is the prosecution test – the test for determining whether to charge (or continue a proceeding against) a defendant. By and large, the tests across the jurisdictions have two core components: an evidential and public interest component. As will be shown below, the tests in each jurisdiction grant significant latitude for prosecutors to manipulate the outcome.

⁸ See for example Office of the Director of Public Prosecutions (NSW) *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales* (1 June 2007) at 5; Michael Cassidy "Character and Context: What Virtue Theory Can Teach Us about a Prosecutor's Ethical Duty to 'Seek Justice'" (2006) 82 *Notre Dame L Rev* 635 at 636–637.

⁹ Daniel Medwed *Prosecution Complex: America's Race to Convict, and its Impact on the Innocent* (NYU Press, New York, 2012) at 3.

1. *The evidential component*

Common to all of the jurisdictions surveyed is the evidential test for proceeding against a defendant.¹⁰ Most jurisdictions employ a “reasonable” or “realistic prospect of conviction” test which is applied on the basis of available and admissible evidence.¹¹ But even as between these jurisdictions, the test is not applied in a uniform way. England and Wales stipulate that the test will be satisfied on a “more likely than not” standard (that is, 51 per cent),¹² whereas the New Zealand test avoids employing any “mathematical science”.¹³ The United States’ test requires a belief “that the admissible evidence will probably be sufficient to obtain and sustain a conviction”.¹⁴ The use of “probable” suggests a test at least as onerous as the “more likely than not” threshold in England and Wales.

British Columbia, on the other hand, sets out a tiered test depending on the type of case. The ordinary evidential test requires a “substantial likelihood of conviction”,¹⁵ with a special test to be applied in “exceptional circumstances”, which the applicable guidelines note “will most often arise in the cases of high risk violent or dangerous offenders or where public safety concerns are of paramount consideration”.¹⁶ In those cases, a “reasonable prospect of conviction” test will apply (implicitly, a lower standard than “substantial likelihood of conviction”). For the general run of cases, therefore, British Columbia imposes a more stringent standard on prosecutors than the test most commonly found in the other surveyed jurisdictions.

There is no particular magic in these evidential tests. They align with what one might expect; that a significant part of the decision to prosecute rests on the likelihood of conviction. And while the tests across the jurisdictions might place different standards on prosecutors in terms of the likelihood of conviction required to proceed with a prosecution, the application of the tests is uniformly subjective – prosecutors make their own judgment about whether the various objective tests are met.

¹⁰ United States Department of Justice *United States Attorneys’ Manual* (1 January 2017) at [9-27.220]; Crown Prosecution Service (England and Wales) *The Code for Crown Prosecutors* (January 2013) at [4.4] [Crown Prosecution Service (Eng)]; Crown Law Office (New Zealand) *Solicitor-General’s Prosecution Guidelines* (1 July 2013) at [5.5.1] [Crown Law Office (NZ)]; Ministry of Justice (British Columbia) *Crown Counsel Policy Manual: Charge Assessment Guidelines* (2 October 2009); Ministry of Attorney-General (Ontario) *Crown Policy Manual: Charge Screening* (21 May 2005) [Ministry of Attorney-General (Ont)]; Office of the Director of Public Prosecutions (NSW), above n 8, at [4]; and Office of the Director of Public Prosecutions (Vic) *Director’s Policy: Prosecutorial Discretion* (24 November 2014) at [2].

¹¹ Crown Prosecution Service (Eng), above n 10, at [4.4]; Crown Law Office (NZ), above n 10, at [5.5.1]; Ministry of Attorney-General (Ont), above n 10; Office of the Director of Public Prosecutions (NSW), above n 8, at [4]; and Office of the Director of Public Prosecutions (Vic), above n 10, at [2].

¹² Crown Prosecution Service (Eng), above n 10, at [4.5].

¹³ Crown Law Office (NZ), above n 10, at [5.4].

¹⁴ US Department of Justice, above n 10, at [9-27.220].

¹⁵ Ministry of Justice (BC), above n 10, at 1.

¹⁶ At 1.

2. *The public interest component*

Once the evidential threshold has been crossed, prosecutors turn to weigh wider considerations for and against prosecution, commonly referred to as the public interest test.¹⁷ This gives prosecutors the power to elect not to proceed with charges despite the evidential test being met. This is also where prosecutors have the most discretion, with reference to a myriad of factors that can be weighed as the individual prosecutor sees fit. For example, New Zealand's Prosecution Guidelines set out 31 separate non-exhaustive factors both for and against prosecution that "may be relevant and require consideration by a prosecutor when determining where the public interest lies in any particular case".¹⁸ These encompass matters such as the seriousness of the offence, the defendant's history, the victim's views, and the cost of prosecution.¹⁹ British Columbia, New South Wales, and Victoria employ very similar tests.²⁰

In the United States, the test is couched slightly differently, but is similar in effect. That test requires a consideration of whether "a substantial federal interest would be served by prosecution".²¹ That language is driven principally by the complex interplay between State and Federal prosecution systems which often sees both State and Federal prosecutors potentially responsible for conducting a prosecution. But once the "responsibility" considerations are stripped away, the test operates similarly to the New Zealand test, requiring a focus on all relevant considerations such as law enforcement priorities, the nature and seriousness of the offence, the deterrence that could be achieved by a prosecution, the offender's culpability and history, the offender's willingness to cooperate, and the probable sentence.²² And although only eight separate factors are set out, the list is "not intended to be all inclusive".²³

A more structured approach to the public interest test is utilised in England and Wales, with prosecutors first being required to address eight questions to assess whether prosecution is in the public interest.²⁴ Those questions do not address any novel considerations and cover broadly similar ground to the New Zealand and United States' tests.²⁵ Again, they are not exhaustive, and prosecutors can then turn to other (unspecified) considerations that affect the public interest.²⁶ The more structured

¹⁷ See Crown Law Office (NZ), above n 10, at [5.5.2]; Crown Prosecution Service (Eng), above n 10, at [4.1]; and US Department of Justice, above n 10, at [9-27.220].

¹⁸ At [5.9].

¹⁹ At [5.5]–[5.9].

²⁰ Ministry of Justice (BC), above n 10, at 4-5; Office of the Director of Public Prosecutions (NSW), above n 8, at [3]; and Office of the Director of Public Prosecutions (Vic), above n 10, at [6]–[11].

²¹ US Department of Justice, above n 10, at [9-27.220].

²² At [9-27.230].

²³ At [9-27.230].

²⁴ Crown Prosecution Service (Eng), above n 10, at [4.5].

²⁵ The questions are as follows: (a) How serious is the offence committed? (b) What is the level of culpability of the suspect? (c) What are the circumstances of and the harm caused to the victim? (d) Was the suspect under the age of 18 at the time of the offence? (e) What is the impact on the community? (f) Is prosecution a proportionate response? (g) Do sources of information require protecting?

²⁶ Crown Prosecution Service (Eng), above n 10, at [4.5].

approach thus seems unlikely to lead to different outcomes when compared with the tests used in the other jurisdictions canvassed.

The above discussion illustrates how much discretion is involved in the public interest test, regardless of jurisdiction. The significance of discretionary factors rests not so much in what the different jurisdictions stipulate as part of the public interest enquiry, but in the fact that so many considerations are potentially available to the prosecutor, whether they are explicitly stated or not. This is in stark contrast to the principle of legality in civil law jurisdictions, which operates to limit the prosecution test to an evidential threshold test.²⁷ Common law prosecutors, therefore, have the opportunity to reverse engineer plea bargain outcomes, first negotiating an outcome, then working back to fill in the public interest test to justify the result.

B. Plea Bargaining: the Rules of Engagement

As Brown and Bunnell have noted, “[a]ny way you slice it, plea bargaining is a defining, if not the defining, feature of the present [United States] federal criminal justice system”.²⁸ That statement is borne out empirically by the high proportion of Federal cases determined by guilty pleas, in excess of 90 per cent.²⁹ The percentage of cases where plea bargaining takes place is likely even higher, given that some sort of plea bargaining is probably attempted in cases that do go to trial. And although plea bargaining data is difficult to obtain in jurisdictions outside of the United States,³⁰ it is uncontroversial to suggest that plea bargaining plays a significant role in New Zealand and in other comparable jurisdictions, even if not to the same extent as the United States.

Given the prevalence of guilty pleas and, by natural extension, plea bargaining, it should come as no surprise that the various prosecutors’ manuals of the jurisdictions reviewed in this article provide not just for a prosecution test, but also specific rules of engagement when it comes to resolving a case by way of plea bargaining.

The most detailed and prescriptive approach to plea bargaining is set out in the United States Attorneys’ Manual. Federal prosecutors can enter three types of plea agreements: charge agreements, where a defendant enters a plea to a charged offence or lesser related offence, possibly in exchange for dismissal of other charges; sentence agreements, where the prosecutor agrees to take a particular position on sentence; and mixed agreements, involving a combination of charge and sentence

²⁷ See Philip Stenning “Prosecutions, Politics and the Public Interest: Some Recent Developments in the United Kingdom, Canada and Elsewhere” (2009) 55 Crim LQ 449 at 454.

²⁸ Mary Brown and Stevan Bunnell “Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia” (2006) 43 Am Crim L Rev 1063.

²⁹ Mark A. Motivans “Federal Justice Statistics, 2012 – Statistical Tables (2012)” (4 February 2016) Bureau of Justice Statistics <<https://www.bjs.gov/index.cfm>> at 17.

³⁰ See generally Equal Justice Project “Plea Bargaining in our Justice System” (paper prepared for Equal Justice Project symposium, Auckland, 4 October 2016) at [5.4.1]; and Fair Trials “The Disappearing Trial Report” (report, London, 27 April 2017) at [49].

agreements.³¹ Again, as with the prosecution test, prosecutors have wide discretion to “weigh all relevant considerations” to determine the appropriateness of a plea bargain.³² However, one important rider on the prosecutor’s discretion is that plea agreements must ensure that the defendant pleads to a charge or charges “that is the most serious readily provable charge consistent with the nature and extent of his/her conduct”.³³ This seriousness requirement places a restriction on the prosecutor’s discretion to plea bargain, and the ability to facilitate plea bargaining generally. It means both parties to the negotiation appreciate that there is a certain offence “floor”, below which the prosecutor’s ability to bargain to extract a guilty plea is exhausted. There is, however, a small safety valve in that prosecutors are required to make an individualised assessment of the circumstances of the conduct, which includes a determination of whether the potential sentence would be proportional to the conduct.³⁴

The tiered plea agreement structure with the overarching seriousness requirement is more formal than the protocol for any of the other jurisdictions canvassed. In New Zealand, the primary consideration is what is in “the interests of justice”;³⁵ the selected charges having to “adequately reflect the essential criminality of the conduct”.³⁶ Further, prosecutors are specifically prohibited from reaching sentence agreements.³⁷ Plea discussions do, however, ordinarily involve reaching agreement on the factual basis for sentencing, which inevitably encompasses heavy negotiation over the relevant aggravating and mitigating features of the offence.³⁸ The New Zealand model more closely resembles the position in England and Wales, and the Australian and Canadian jurisdictions. The focus in those jurisdictions is on ensuring that the charges agreed upon appropriately reflect the seriousness of the offending and that the Court is left with the ability to impose a sentence that adequately reflects the offender’s culpability.³⁹

Finally, one important restriction, common to all of these jurisdictions, is that prosecutors are prohibited from overcharging in order to extract a plea, whether this is by the implicit effect of the evidential test, or explicitly stated.⁴⁰ Critics of plea bargaining generally make the argument that it provides innocent defendants with an incentive to plead guilty, or to avoid the litigation risk of receiving a higher sentence

³¹ US Department of Justice, above n 10, at [9-27.400]. “Pre-charge plea agreements” have been put aside for the purposes of this discussion.

³² At [9-27.420].

³³ At [9-27.430].

³⁴ At [9-27.300].

³⁵ Crown Law Office (NZ), above n 10, at [18.6].

³⁶ At [18.6.1].

³⁷ At [18.7.3].

³⁸ At [18.8].

³⁹ See Crown Prosecution Service (Eng), above n 10, at [9.1]-[9.2]; Ministry of Attorney-General (Ontario) *Crown Policy Manual: Resolution Discussions* (21 March 2005) at 1–2; Office of the Director of Public Prosecutions (NSW), above n 8, at [4]; Office of the Director of Public Prosecutions (Vic) *Director’s Policy: Resolution* (24 November 2014) at 3–4.

⁴⁰ See for example Crown Law Office (NZ), above n 10, at [18.7.1]; Crown Prosecution Service (Eng), above n 10, at [6.3].

if they are found guilty at trial.⁴¹ This argument will be examined further below when considering the prosecutors' leverage during charge selection.⁴² But while the prohibition on overcharging by no means immunises against temptation, it certainly operates as a constraint by ensuring, at least in theory, that prosecutors' charging decisions are made with reference to the evidential threshold they have to satisfy, and not by some crude free market of criminal justice where charges are bartered down from unrealistic starting points. However, in general, the problem identified under the public interest test discussed above⁴³ – that prosecutors have the ability to manipulate the governing test to reverse engineer an outcome – remains true when considering the specific rules that govern plea bargaining.

C. Internal Approval

Supervision and review of prosecutors' decisions by more senior prosecutors is one way to limit abuses of discretion in individual cases. That is likely to eliminate the presence of rogue prosecutors, whose approach to plea bargaining fails to uphold the governing rules. However, it is less likely to identify systemic problems, given that those doing the supervising may be the root cause of those problems. It is also unlikely that prosecutors' decisions will be reviewed *de novo*, with deference paid to the first instance decision maker.

The US Attorneys' Manual is the only governing document to require a system of approval to be established. The Manual requires each office to establish a system for approval of plea bargains by a supervisor.⁴⁴ This provides an important back-stop to ensure that the overarching prosecution tests are being complied with. However, as will be discussed below in relation to victims, some systems provide a layer of internal appeal or review when investigators or victims do not accept a plea agreement that has been finalised.⁴⁵ New Zealand, on the other hand, does not require any formal approval of plea agreements or provide for a layer of approval in the applicable prosecution guidelines.⁴⁶ That is not to say, however, that individual Crown Solicitors' offices do not have their own internal review processes established – many do. Rather, it is to point out that we lack insight into their existence and/or efficacy.

⁴¹ Daniel Medwed, above n 9, at 52–53.

⁴² See Part V.C.1.

⁴³ See Part III.A.2.

⁴⁴ US Department of Justice, above n 10, at [9-27.450].

⁴⁵ See Part IV.B.

⁴⁶ Although there is an exception for plea agreements in relation to murder charges: Crown Law Office (NZ), above n 10, at [18.9].

D. Conclusion on Internal Checks

As shown above, there is extensive uniformity between the different jurisdictions in the governing prosecution tests, and the rules of engagement for plea bargaining. Critically, we have seen that the tests provide prosecutors the opportunity to use them in ways which achieve a desired outcome, based on the way that the enumerated factors are weighed, with only basic checks acting to narrow the prosecutor's discretion.

While internal review systems are likely to mitigate those concerns, particularly in relation to rogue prosecutors, such checks are unlikely to resolve systemic issues, and these checks are also likely to suffer from problems with deference and implicit bias. In sum, the internal checks identified across the different jurisdictions are useful in providing a structure and framework for prosecutors when engaging in plea negotiations, but such checks may represent more of a theoretical – as opposed to an actualised – check on prosecutorial discretion.

IV. THIRD PARTY INFLUENCES

In this section, I consider the role that third parties (aside from the judiciary) play in fettering prosecutorial discretion. In particular, I focus on the role of victims, and to a lesser extent, investigators. Their roles are important because although they form part of the public on whose behalf the prosecutor is acting, they are more directly impacted by the decisions of prosecutors. And while on the surface prosecutors might be seen to represent their interests, the prosecutor's own interests might not always align with those of victims and investigators. In respect of victims, an obvious example is when a victim wants a defendant prosecuted to the fullest extent of the law, but the prosecutor would prefer to plead the case out early with reduced charges. Investigators, who often play the middleman between prosecutors and victims also have their own interests to protect, which may not align with those of prosecutors; particularly where investigators see a wider law enforcement objective in having a particular case prosecuted that is not commensurate with a quick plea deal (for example, prosecuting lead conspirators in drug offending cases).

A. Victims' and Investigators' Views During Negotiations

The role of victims in the criminal justice process necessitates striking an awkward balance between ensuring that a defendant's right to a fair trial and due process is secured, while also making the process sufficiently palatable for victims to want to participate. Part of that involvement extends to their role in the plea bargaining process, and the influence of victims is one of the important checks on the exercise of prosecutorial discretion.

Victims' views can be influential in a number of ways. First, if a victim is not willing to go through the Court process then, in many cases, that will be determinative of the prosecutor's decision on whether to proceed with a prosecution, particularly in sexual

offending and domestic violence cases.⁴⁷ Second, a victim may express a view on whether a negotiated plea bargain reflects the seriousness of the crime committed against them.⁴⁸ Third, they may provide opposition for a prosecutor who wants to drop a case.⁴⁹

All of the jurisdictions canvassed provide for consultation with the victim and investigator to some degree. Starting with New Zealand, which has a very detailed scheme for protecting victims' interests, victims have a right to be informed of the progress of a criminal proceeding at all material stages, and to be provided with an explanation for many of the decisions made by prosecutors during the course of a proceeding, most notably charging and plea bargaining decisions.⁵⁰ Victims must also be given an opportunity to make their position on any proposed plea agreement known to the prosecutor where practical and appropriate.⁵¹ Importantly, however, victims' views can never bind prosecutors, and final decisions must be made by the prosecutor based on "the broader public interest and the interests of justice".⁵² That makes sense; victims are not parties to plea bargaining agreements, and the prosecutor is entrusted with the decision-making power on behalf of the Executive. Investigators, of course, play the important intermediary role of informing the victim on behalf of the prosecutor, but investigators also have the right to be consulted and have their views taken into account in respect of any plea arrangements or other significant matters.⁵³ New South Wales operates a similarly detailed scheme for both victims and investigators.⁵⁴

The United States too operates a similar model for victims and investigators, through the Crimes Victims' Rights Act and the US Attorneys' Manual, but also includes a right for victims to be heard by the Court at any hearing involving pleas by the defendant.⁵⁵

In England and Wales, as with the other jurisdictions canvassed, prosecutors are required to consult with the victim and investigator, although there is less of an emphasis on ongoing consultation in respect of victims.⁵⁶ While in New Zealand victims are required to be informed of the progress of a case at all material stages, the victim's right to be informed and consulted in England and Wales only accrues when guilty pleas are being considered during an existing prosecution.⁵⁷

⁴⁷ See Yvette Tinsley "Investigation and the Decision to Prosecute in Sexual Violence Cases: Navigating the Competing Demands of Process and Outcome" [2011] 17 *Canta LR* 17 at 33-34: the discussion in respect of sexual violence cases. Also published in Elisabeth McDonald and Yvette Tinsley (ed) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (VUP, Wellington, 2011). See also Louise Ellison "Prosecuting Domestic Violence without Victim Participation" (2002) 65 *Modern LR* 834.

⁴⁸ Yvette Tinsley, above n 47, at 37-38.

⁴⁹ At 35-36.

⁵⁰ See generally Victim Rights Act 2002, s 12; Crown Law Office (NZ), above n 10, at [18.5]; Crown Law Office (New Zealand) *Victims of Crime – Guidance for Prosecutors* (6 December 2014).

⁵¹ Crown Law Office (NZ), above n 10, at [18.5].

⁵² At [18.5].

⁵³ At [28.2].

⁵⁴ Office of the Director of Public Prosecutions (NSW), above n 8, at [19]-[20].

⁵⁵ Crimes Victims' Rights Act 18 USC § 3771. See also US Department of Justice, above n 10, at [9-27.420].

⁵⁶ Crown Prosecution Service (Eng), above n 10, at [9.3] and [9.5].

⁵⁷ At [9.3].

There is nothing startling about these rules. We would expect to see victims and investigators informed and consulted throughout the plea bargaining process. And while this does provide an important theoretical check on prosecutorial discretion, its effectiveness can only really be measured when we consider what avenues exist for victims and investigators when they disagree with a prosecutor's decision, which I consider next.

B. Appeals and Reviews

What happens when a prosecutor has negotiated a plea bargain, or decided to drop charges and an affected party other than the defendant is dissatisfied with the decision? In some jurisdictions, the responsible prosecutor's decision is not always binding and final, and dissatisfied parties are able to seek a review of the decision.

The first step for any review is to ensure that any negotiated plea agreements, and the basis for them, are accurately recorded in writing, a requirement common across the jurisdictions reviewed, albeit with differing levels and methods of review.⁵⁸ As discussed above, the United States requires prior approval of plea bargains by a supervising prosecutor.⁵⁹ Other jurisdictions, however, have implemented methods to respond to cases where the victim or investigator objects to a prosecutor's proposed plea bargain. In New South Wales, any such objections must be referred to a senior prosecutor for consideration.⁶⁰

The most developed appeal system is the Victims' Right to Review Scheme operating in England and Wales.⁶¹ This scheme was developed following the Court of Appeal decision in *R v Killick*, which concluded that victims ought to have a right of review of prosecutorial decisions, within clearly prescribed limits, and not be required to resort to judicial review.⁶² Any person who has suffered harm as a result of criminal conduct falls within the eligibility criteria of the scheme⁶³ and can apply for reviews of qualifying decisions, which essentially encompass decisions not to prosecute or proceed against a defendant.⁶⁴ It does not extend to cases where guilty pleas have been entered to a set of negotiated charges.⁶⁵ The process for review once a complaint is laid by a victim commences with an internal review, known as "local resolution" – where the decision

⁵⁸ See for example US Department of Justice, above n 10, at [9-27.450]; Attorney General's Office (England, Northern Ireland and Wales) *Attorney General's Guidelines on Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise* (30 November 2012) at [C3]; Crown Law Office (NZ), above n 10, at [18.4]; Ministry of Justice (BC), above n 10, at 5; Office of the Director of Public Prosecutions (NSW), above n 8, at [20]; Office of the Director of Public Prosecutions (Vic), above n 39, at [15].

⁵⁹ See Part III.C.

⁶⁰ Office of the Director of Public Prosecutions (NSW), above n 10, at [20].

⁶¹ Crown Prosecution Service (England and Wales) "Victims' Right to Review Guidance" (July 2016) <http://www.cps.gov.uk/publications/docs/vrr_guidance_2016.pdf> [Crown Prosecution Service (Eng)].

⁶² *R v Killick* [2011] EWCA Crim 1608.

⁶³ Crown Prosecution Service (Eng), above n 61, at [14].

⁶⁴ At [9].

⁶⁵ At [11].

is referred back to the office where the original decision was made.⁶⁶ Under local resolution, a new prosecutor will be assigned to review the original decision. The victim then has the opportunity to have the matter considered by an independent appeals unit if they are dissatisfied with the outcome from local resolution.⁶⁷

It is clear that this system of review provides a transparent platform for prosecutorial discretion to be reviewed. It has also proven to be a useful check on those decisions. Between April 2014 and March 2015, 1,674 appeals were lodged, with 210 being upheld (12.5 per cent).⁶⁸

The English and Welsh system is admirable for its ability to ensure that the hardest decisions – the decisions not to prosecute – have a meaningful check placed on them. Those are likely to be the cases that involve the most scrutiny by victims and the public. A widely publicised recent example is the overturning of the Crown Prosecution Service’s decision not to prosecute Lord Greville Janner, a former member of the House of Lords, who was accused of historical sexual abuse of children. An original decision by the Crown Prosecution Service not to prosecute owing to Lord Janner’s ill health was overturned following a review under the scheme.⁶⁹ However, in cases where the victim is dissatisfied with a negotiated plea bargain, victims cannot have recourse to the scheme.

I identified above the concern that internal approval systems may fail to address systemic issues within prosecutors’ offices, and suffer from an implicit bias through deference.⁷⁰ Those concerns also apply to internal appeals/reviews, though with less force. With internal appeals, the presence of a third party driving the appeal (whether it be the victim or investigator) is likely to engender a more robust approach to reviewing exercises of discretion by creating an additional layer of accountability – as against internal approval alone where prosecutors take a negotiated plea bargain to a supervisor for approval. Internal appeals are therefore likely to provide a more meaningful check on prosecutorial discretion than simple internal approval policies.

C. Conclusion on Third Party Influences

The influence of third parties, predominantly victims but also investigating agencies, provides a relatively robust check on prosecutorial discretion, at least so far as those parties’ interests are concerned. In different jurisdictions we see those views carrying more institutional weight than others in the way that the frameworks for decision making are established. While it must be remembered that victims and investigators

⁶⁶ At [22]–[29].

⁶⁷ At [30].

⁶⁸ Crown Prosecution Service “Victims’ Right to Review Data” (June 2017) <http://www.cps.gov.uk/victims_witnesses/victims_right_to_review/vrr_data/index.html>.

⁶⁹ Rajeev Syal “Lord Janner Found Unfit to Stand Trial for Alleged Sex Offences” *The Guardian* (online ed, 7 December 2015).

⁷⁰ See Part III.C.

are not parties to criminal litigation, their involvement in the process requires that their views be taken into account.

V. JUDICIAL SUPERVISION

One third party, not yet discussed, has potentially significant influence over the plea bargaining process: judges. Given their significance in the criminal justice system, they are deserving of separate treatment. The focus on the judiciary in this section will consider three aspects of their role. The first two, closely related, will address the scope of judicial power to influence and ultimately reject plea bargains, and then to grant judicial review in subsequent challenges to plea bargains. Finally, this section will address the Executive and Judicial separation of powers in the sentencing process, and the extent to which judges can check prosecutorial discretion when offenders are sentenced.

A. Approval of Plea Bargains

Simply put, if a judge has the ability to reject a negotiated plea bargain, this power has the potential to significantly curtail prosecutorial discretion. And in a perfect world, a judge would have sufficient time and resources to assess and weigh the evidence against a defendant, and determine whether the proposed resolution is in the public interest. This, of course, represents a counsel of perfection which criminal justice systems around the world are prepared to compromise to achieve an efficient disposition of criminal cases. And even if judges did have such resources, their assessments would likely be imperfect by not having the ability to assess witness credibility. So instead the system places a large amount of trust in the hands of the parties to criminal litigation, both (ordinarily) represented by legally qualified counsel, to strike a deal which appropriately meets the interests of both parties, as we would expect to see in a civil settlement. Criminal justice systems, therefore, need to find an appropriate balance between judicial oversight and enabling the parties to get on with the job. And across the jurisdictions we see varying degrees of judicial involvement in the plea bargaining process.

At one end of the spectrum sits the United States which prohibits judicial involvement in plea agreement discussions.⁷¹ That significantly impinges on the Court's ability to provide a robust check on plea negotiations. For one, it means judges are unlikely to have much more information than what is contained in the indictment.⁷² And given that lack of first-hand knowledge, by the time plea deals are finalised, there is a real benefit to expediting the process. In a practical sense judges are incentivised to effectively rubber stamp plea deals.⁷³

Canada, on the other hand, has a system which encourages judicial intervention as part of the plea bargaining process. The Canadian Criminal Code mandates that pre-trial discussions occur between the Crown, defence, and the Judge, to determine the

⁷¹ Federal Rules of Criminal Procedure (US), s 11(c)(1).

⁷² Daniel McConkie, above n 7, at 63.

⁷³ At 63.

likely length of trial and the scope of the issues to be resolved.⁷⁴ It envisages that judges intervene to express their views on the merits of particular issues, and many judges do in fact engage in discussions regarding resolution.⁷⁵

New Zealand too uses a structured pre-trial criminal process where discussions between counsel and the Judge about the direction of the case and likelihood of trial are encouraged.⁷⁶ This emerged from the significant overhaul in criminal procedure implemented through the Criminal Procedure Act 2011, which aimed to streamline court procedures and improve efficiency.⁷⁷ Following the reforms, criminal cases are broken into three stages: Initial appearances, the case management phase, and trial. At the initial appearances, pleas are entered and (if eligible) an election is made by the defendant as to whether to pursue a trial by jury or judge-alone.⁷⁸ At the case management stage, parties are required to engage in discussions about the direction of the case, and whether a trial is necessary or if resolution can be reached in another way, such as through a sentence indication.⁷⁹ Further, judges are able to make any particular case management directions necessary to “facilitate resolution of the proceeding”.⁸⁰ If required, the case then moves to the trial stage. Each of the preliminary stages also has an associated time frame.⁸¹ It is notable, therefore, that while the New Zealand reforms place a large emphasis on simplification and efficiency improvements in the criminal justice system, that has not been to the exclusion of judicial intervention.⁸² And although the level of judicial intervention will differ from case to case, the Canadian and New Zealand frameworks at least demonstrate a willingness to facilitate that intervention.

In Australia, the courts have recognised the limited ability of judges to interfere with the exercise of discretion by prosecutors to reduce charges as part of a negotiated plea deal, except to protect an abuse of process.⁸³ Instead, judges are only likely to be able to influence the process through expressing opinions on plea deals, which will no doubt be factored in by the prosecution.⁸⁴ The effect and extent of such opinions, however, is unknown (anecdotal accounts aside).

Judges in England and Wales too have no formal role in rejecting a prosecutor’s decision to reduce charges as part of a negotiated guilty plea, although their views are obviously persuasive.⁸⁵ Perhaps the most publicised example was the plea deal agreed between the Crown and defence lawyers acting for Peter Sutcliffe, better known as the “Yorkshire Ripper”. Prosecutors agreed to accept guilty pleas to

⁷⁴ Criminal Code RSC 1985 c C-46, s 625.1.

⁷⁵ Carol Brook and others, above n 6, at 1157–1158.

⁷⁶ Criminal Procedure Act, ss 56–57.

⁷⁷ See generally the discussion led by Judge David Harvey in Carol Brook and others, above n 6.

⁷⁸ Criminal Procedure Act, ss 37–44 and ss 50–53.

⁷⁹ See generally Criminal Procedure Act, ss 55–56.

⁸⁰ Criminal Procedure Act, s 58.

⁸¹ See Carol Brook and others, above n 6, at 1162–1163 for a detailed breakdown of those timeframes.

⁸² Criminal Procedure (Reform and Modernisation) Bill (243–1) (explanatory note).

⁸³ *Maxwell v R* [1996] HCA 46, (1996) 184 CLR 501 at [25]–[26], citing *R v Brown* (1989) 17 NSWLR 472 (CA).

⁸⁴ *R v Brown*, above n 83.

⁸⁵ *R v Coward* (1980) 70 Cr App R 70 (CA) at 76.

manslaughter for the deaths of thirteen women on the basis of diminished responsibility. The trial Judge refused to accept that plea deal and, after the Director of Public Prosecutions was consulted, the prosecution proceeded with murder charges, ultimately resulting in convictions.⁸⁶

There is, however, an exception for cases of serious or complex fraud in England and Wales.⁸⁷ For those cases, the Attorney General has published prescriptive guidelines for the plea bargaining process, which includes provision for the Judge to conduct a merits review of the plea bargain and determine whether it is in the interests of justice.⁸⁸ This model, while useful, must be seen in the context of the cases for which it is designed: complex and serious fraud. It is doubtful whether there is any enthusiasm to extend this approach to the general run of cases, when one considers the relative simplicity of the majority of criminal cases, the resources required to implement such a system, and criminal justice policies which, as seen above, tend to place great weight on the efficient disposition of cases. However, as the New Zealand experience demonstrates, efficiency and increased judicial intervention are not wholly inconsistent goals.

For the most part, the above discussion has shown that judicial approval of plea bargains is something of a foregone conclusion with little merits review undertaken by judges either for assessing the benefit for the defendant or the wider public interest. The Canadian and New Zealand approaches (and the specific complex fraud example in England and Wales) provide a more judicially active model in which judges involve themselves at a relatively early stage to shape a plea bargain (if appropriate). This proactive involvement does alleviate some of the concerns stemming from plea bargaining occurring behind closed doors, but it is unlikely even in these jurisdictions that judges are able to immerse themselves in the case sufficiently to rise to the level of a third party arbitrator, who can provide a more rigorous check on the prosecutor's discretion. Judges are also limited by only examining the strength of the evidence on paper.

B. Judicial Review of Prosecutorial Discretion

The prospect of an aggrieved victim or affected party succeeding in a review of a prosecutor's charging decision in the courts is grim, let alone the practical difficulties associated with bringing a claim. The New Zealand Court of Appeal recognised this recently in *Osborne v Worksafe New Zealand* when considering an appeal against the High Court's refusal to grant judicial review of Worksafe's decision to drop charges against former Pike River Coal Ltd Chief Executive, Peter Whittall.⁸⁹

[45] The reality remains, however, that it will be difficult to make out grounds of review such as having regard to irrelevant considerations or failing to have regard to relevant considerations because of the width of the considerations to which the prosecutor may properly have regard,

⁸⁶ Gary Slapper and David Kelly *The English Legal System* (10th ed, Routledge, 2009) at 504.

⁸⁷ Attorney General's Office (England and Wales) *Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud* (29 November 2012).

⁸⁸ At [E4].

⁸⁹ *Osborne v Worksafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513.

as well as the limited scope of considerations that are truly mandatory rather than merely permissive. That is one reason why it is said *courts will only intervene in exceptional cases* (Emphasis added).

Intervention is even more difficult in the United States where prosecutors are generally considered to be immune from judicial review,⁹⁰ their decisions being a “special province of the Executive branch”.⁹¹ This rule is not absolute, and the law has carved out exceptions, such as when there has been a “retaliatory use” of prosecutorial power,⁹² or when a prosecutor has selectively prosecuted a defendant on the basis of “race, religion, or other arbitrary classification,”⁹³ or where a prosecutor induces a guilty plea through plea bargaining, only to later renege on part of the deal.⁹⁴

Canada too proceeds on the basis that the exercise of prosecutorial discretion is not “subjected to routine second-guessing by the courts”, based principally on the theory that “it is the sovereign who holds the power to prosecute his or her subjects”.⁹⁵ Exercises of prosecutorial discretion are only reviewable for abuses of process.⁹⁶ The Australian jurisdictions have similarly set the abuse of process standard.⁹⁷ While an abuse of process test potentially encompasses wider conduct than the narrowly drawn rule in the United States, it is doubtful whether in practice there is any difference between these tests. The reality is that very few cases will succeed in these jurisdictions.

On the other hand, England and Wales have historically provided more fertile ground for reviews of decisions not to prosecute, and the New Zealand Court of Appeal in *Osborne* indicated a preparedness to adopt a similar approach. However, that position will soon be reviewed by the Supreme Court, which has granted leave to appeal the Court of Appeal’s decision.⁹⁸ English and Welsh courts will entertain review where a decision not to prosecute was based on some unlawful policy, or failure to act in accordance with the Code for Prosecutors, or was a decision that no reasonable prosecutor could have made.⁹⁹ Courts have allowed judicial review in cases where a prosecutor failed to consider the evidential sufficiency of a more serious charge,¹⁰⁰ incorrectly assessed the test for recklessness for manslaughter when determining not to charge a company,¹⁰¹ and failed to properly consider the factual findings from a court in a related civil case bearing on the prosecution.¹⁰² Reviews of decisions to

⁹⁰ Ronald Cass and others *Administrative Law: Cases and Materials* (7th ed, Aspen Publishing, 2016) at 284.

⁹¹ See *Heckler v Chaney* 470 US 821 (1985) at 832.

⁹² See for example *Thigpen v Roberts* 468 US 27 (1984) at 31.

⁹³ *United States v Armstrong* 116 S Ct 1480 (1996) at 1486.

⁹⁴ *Santobello v New York* 404 US 257 (1971).

⁹⁵ *R v Anderson* [2014] 2 SCR 167 at [46] citing *Krieger v Law Society of Alberta* [2002] 3 SCR 372 at [45].

⁹⁶ *R v Anderson*, above n 95, at [51].

⁹⁷ See for example *Maxwell v The Queen* (1996) 184 CLR 501 (HCA) at 534; *Likiardopoulos v The Queen* (2012) 86 ALJR 1168 (HCA) at [37]; and *Elias v The Queen* (2013) 248 CLR 483 (HCA) at [34].

⁹⁸ *Osborne v Worksafe New Zealand* [2017] NZSC 90.

⁹⁹ *R v Director of Public Prosecutions, ex parte C* [1995] 1 Cr App R 136 (QB) at 141.

¹⁰⁰ At 141.

¹⁰¹ *R v Director of Public Prosecutions, ex parte Jones (Timothy)* [2000] Crim LR 858 (QB).

¹⁰² *R v Director of Public Prosecutions, ex parte Treadaway* (Unreported) 31 July 1997 (QB).

prosecute, on the other hand, have a higher standard of review, requiring “dishonesty or mala fides or some other wholly exceptional circumstance...”.¹⁰³ However, the availability of review in England and Wales must be seen against the review scheme available for victims in that jurisdiction, discussed above.¹⁰⁴ That scheme was specifically designed to prevent victims needing to have recourse to judicial review to challenge prosecutors’ decisions. It is unlikely, therefore, that the relatively lower standard of judicial review provides an additional check on the exercise of discretion.

Two things emerge from this summary. First, those who are dissatisfied with a prosecutor’s decision to prosecute or not to prosecute have very little recourse through judicial review. Second, even if a person did have such recourse, the need to seek relief through judicial review is a cumbersome (and expensive) tool, and unlikely to be taken up by an aggrieved party. The threat of judicial review is therefore unlikely to have any material influence on a prosecutor exercising their discretion negotiating over a plea bargain.

C. Sentencing

While plea bargaining, as the domain of the prosecutor, is principally a function of the Executive, sentencing remains the role of the judiciary. The ability of judges to fashion sentences which appropriately fit the culpability of defendants is one way through which prosecutorial discretion can be limited. In this section, I consider whether the division of roles between prosecutors and judges as to process (i.e., charges) and outcomes (i.e., sentences) holds true. I note at the outset that prosecutors already bind judges to a certain extent through the selection of charges and the agreed factual basis for sentencing. However, the analysis that follows focuses on what additional powers prosecutors have to fetter judicial discretion. I will also address what is known as the “trial penalty” problem in the United States, where defendants are faced with severely inflated post-trial penalties during the plea negotiation process in order to encourage them to plead guilty.

As will be outlined below, sentencing has a major role in driving plea bargaining, in particular the way that prosecutors choose to exercise their discretion. This should come as no surprise; after all, the criminal justice system is a results-driven business. In the overwhelming majority of cases, it is uncontroversial to suggest defendants are not so much concerned with the scale of the offence they are charged with, but with the length or type of a potential sentence.

1. Binding the judiciary

The prosecutor’s power to influence sentencing outcomes through plea bargains is most evident in the United States. As outlined at the start of this paper, three types of plea bargains exist in the United States: charge agreements, sentence agreements, and agreements involving a mixture of both.¹⁰⁵ The United States Attorneys’ Manual

¹⁰³ *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326 (HL) at 371.

¹⁰⁴ See Part IV.B.

¹⁰⁵ See Part III.B.

goes to great lengths to emphasise, however, that plea agreements should not unduly impinge on the Court's sentencing options.¹⁰⁶ While laudable, practice appears to indicate that Federal prosecutors effectively control the sentencing process, for institutional and deferential reasons.

Institutionally, the impact of mandatory minimums, sentencing enhancements and guideline sentences substantially curtail the court's sentencing power.¹⁰⁷ Mandatory minimums, most often seen for Federal drug offending,¹⁰⁸ empower prosecutors to select between various crimes, each with different mandatory minimums, to narrow the judicial discretion in sentencing.¹⁰⁹ A special case of mandatory minimums is the use of three-strikes laws which require the imposition of a life sentence upon conviction for a third qualifying serious violent felony.¹¹⁰ New Zealand has its own version of this legislation,¹¹¹ although recent decisions of the High Court and Court of Appeal indicate a liberal judicial attitude being taken to how mandatory the minimum sentences are for those offenders on their second and third strikes.¹¹²

Judicial discretion is further curtailed by sentencing enhancements. Enhancements are factors which prosecutors have discretion to charge, such as a "prior felony" enhancement in drug offence cases or for three-strikes offences,¹¹³ or the carriage of weapons during a drug offence,¹¹⁴ which dramatically increase the mandatory minimum sentence available.¹¹⁵ Finally, the much maligned Federal Sentencing Guidelines,¹¹⁶ despite having been rendered "advisory" by the Supreme Court in *United States v Booker*,¹¹⁷ still assume significant influence over the sentencing process, particularly since the Supreme Court subsequently mandated in *Gall v United States*¹¹⁸ that the first step in the sentencing process is for judges to determine the appropriate Guideline sentence, before turning to determine the appropriate sentence in the particular case. The institutional role that prosecutors play in selecting charges therefore presents a large impediment to judges, providing the necessary check at sentencing through the leverage prosecutors possess from the sentence-based charging tools used during the plea bargaining process.

¹⁰⁶ U.S. Department of Justice, above n 10, at [9-27.430].

¹⁰⁷ See for example Michael Simons "Prosecutors as Punishment Theorists: Seeking Sentencing Justice" (2008) 16 Geo Mason L. Rev 303.

¹⁰⁸ Jamie Fellner "An Offer You Can't Refuse: How U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty" (2014) 26 Fed. Sent'g Rep'r 276 at 277: "In fiscal year 2012, 60 per cent of convicted federal drug defendants were convicted of offences carrying mandatory minimum sentences".

¹⁰⁹ Michael Simons, above n 107, at 324.

¹¹⁰ Violent Crime Control and Law Enforcement Act 1994 (US).

¹¹¹ Sentencing and Parole Reform Act 2010.

¹¹² *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602; *R v Campbell* [2016] NZHC 2817.

¹¹³ Michael Simons, above n 107, at 329.

¹¹⁴ Jamie Fellner, above n 108, at 277–278.

¹¹⁵ At 277–278.

¹¹⁶ Introduced by the Sentencing Reform Act 1984, the Federal Sentencing Guidelines set prescriptive sentence ranges that were (until *Booker*) mandatory for Federal Judges to follow. A Guidelines range is primarily determined by using a notional offence level and the defendant's history which are computed into a sentencing grid.

¹¹⁷ *United States v Booker* 543 US 220 (2005).

¹¹⁸ *Gall v United States* 552 US 38 (2007).

The institutional control in the United States is reinforced by the judicial deference paid to prosecutorial discretion. As discussed above,¹¹⁹ where judges are presented with a plea agreement, there is generally very little incentive for them to reject such deals, driven principally by their lack of involvement and oversight of the plea bargaining process. In turn, sentence agreements are effectively rubber-stamped by the courts.

The Canadian jurisdictions also place a heavy emphasis on deference to the plea bargain when it comes to joint positions on sentence. While agreements on sentence are not binding on judges,¹²⁰ courts are obliged to accept agreed sentences except when it would bring the administration of justice into disrepute.¹²¹

In the remaining jurisdictions,¹²² courts place a heavy emphasis on the retention of judicial power in the sentencing process. In the prescribed model for complex fraud cases in England and Wales discussed above,¹²³ plea agreements must contain a joint submission on sentencing, including reference to relevant guidelines or authorities, but there is a specific prohibition on agreeing end penalties,¹²⁴ and judges retain complete discretion to sentence as they see fit.¹²⁵

New Zealand goes a step further to specifically prohibit negotiating a plea agreement on the basis that the prosecutor will support a specific sentence.¹²⁶ And Australia goes further again by even prohibiting prosecutors from making submissions to the Court as to the appropriate sentence.¹²⁷

Evidently, there is a spectrum of prosecutorial influence in the sentencing process across the jurisdictions. In the United States and Canada, negotiated pleas have the ability to completely dictate the sentencing outcome. England and Wales, Australia, and New Zealand, on the other hand, focus on retention of the Court's discretion to sentence according to the true culpability of the offender. Of course, judicial discretion will always be curtailed by the selection of charges and the negotiation over a statement of facts,¹²⁸ but stopping short of binding judges to outcomes is a crucial step in maintaining the transparency of the criminal justice system (a theme I will return to later) and providing a check on prosecutorial discretion.¹²⁹ At a fundamental level, it represents a demarcation between the Executive and Judicial branches of government. Absent this demarcation, an important layer of scrutiny is lost, and it is easy to appreciate how negative perceptions of the criminal justice system fester.

¹¹⁹ See Part V.A.

¹²⁰ *R v Cerasuolo* (2001) 151 CCC (3d) 445 (ONCA).

¹²¹ *R v Dorsey* (1999) 43 WCB (2d) 273 (ONCA).

¹²² England and Wales, New Zealand, and the Australian jurisdictions canvassed in the paper.

¹²³ See Part V.A.

¹²⁴ Criminal Procedure Rules: Part IV: Further Practice Directions Applying in the Crown Court (Eng), r 45.24.

¹²⁵ At [E5].

¹²⁶ Crown Law Office, above n 10, at [18.7.3].

¹²⁷ *Barbaro v The Queen* (2014) 253 CLR 58 at 76.

¹²⁸ See for example US Department of Justice, above n 10, at [9-27.430]; Crown Law Office (NZ), above n 10, at [18.8]; Office of the Director of Public Prosecutions (Vic), above n 39, at [15].

¹²⁹ See Part VI.

2. The "trial penalty" problem

With the prevalence of plea bargaining emerges the trial penalty problem, which manifests itself in different ways across the jurisdictions. Starting with the United States, the use of sentencing enhancements was discussed in the previous section as a way in which prosecutors are able to narrow judicial discretion when it comes to sentencing offenders. Enhancements are also an important bargaining tool used by Federal prosecutors as a way of imposing a "trial penalty" on defendants.¹³⁰ The prototypical example of a trial penalty is the use of prior drug convictions. A mandatory sentence will double upon one prior conviction, and will become life imprisonment where a defendant has two prior convictions.¹³¹ Prosecutorial conduct which exerts pressure with these types of bargains has been declared constitutional.¹³² Rational actors, faced with such a staggering increase in the potential penalty when a prosecutor threatens to charge enhancements, have a strong incentive to take a plea deal that does not charge the enhancement and not gamble with their life at trial. The effects of this are acute in the case of innocent defendants who plead guilty to avoid significantly longer periods of incarceration, or even death, if they are convicted at trial.

The overlay of the mandatory minimums in the United States creates a complex set of prosecutorial incentives, largely not seen in other jurisdictions – while they remain present, the trial penalty problem will likely continue to exist. However, these tools are simply an amplification of the problem seen in other jurisdictions, where defendants receive generous sentence discounts in exchange for their guilty pleas.

In New Zealand, the trial penalty problem is most evident in the sentence indication procedure that was formalised in the Criminal Procedure Act 2011. The use of sentence indications as part of the resolution of cases has become commonplace. Under this framework defendants can request a sentence indication from a judge which, if accepted and guilty pleas are entered, would be binding.¹³³ A similar procedure operates in Victoria.¹³⁴

The attraction of a sentence indication is obvious. It first provides a defendant with relative certainty of what their sentence will be. If a defendant declines a sentence indication given by a judge and is ultimately convicted at trial, the sentence indication at least provides a benchmark for what their sentence will be (absent any credit for a guilty plea). Second, a sentence indication has a strategic advantage that can be used effectively by defence counsel. Sentence indications take the power out of the prosecutor's hands and put it in the hands of the judge. Inevitably busy trial judges are incentivised to give more lenient sentence indications to encourage guilty pleas.¹³⁵

¹³⁰ Michael Simons, above n 107, at 351.

¹³¹ Jamie Fellner, above n 108, at 277–278.

¹³² See for example *Bordenkircher v Hayes* 434 US 357 (1978).

¹³³ Criminal Procedure Act, ss 60-65.

¹³⁴ Criminal Procedure Act 2009 (Vic), ss 60-61.

¹³⁵ Law Commission *Criminal Pre-Trial Processes: Justice Through Efficiency* (NZLC R89, 2005) at 94; and see generally Tim Conder "Sentence Indications – Some Practical Challenges" [2017] NZCLR 100.

Sentence indications therefore perpetuate the trial penalty problem through a different route. Informed defendants know they will not just receive credit for their guilty pleas, but also sentences which, in general, sit on the lower end of the range compared with a sentence imposed post-trial. Not only does this adversely affect defendants, but also likely affects victims who are unlikely to welcome more lenient sentences.¹³⁶ These concerns are by no measure purely academic – as was shown by the New South Wales sentence indication pilot scheme being abandoned in the 1990s amid widespread dissatisfaction about the impact that the proposals might have on both defendants and victims.¹³⁷

A way to avoid at least part of the ill effects of the trial penalty problem lies in the system used by the English and Welsh courts. These courts are not constrained by the same institutional concerns with mandatory minimums and sentencing enhancements as the United States, but they also have a very passive sentence indication procedure. The English and Welsh Courts forbid sentence indications as a general rule, citing the potential undue pressure on an accused as the chief grievance.¹³⁸ Instead, judges are only permitted to state, “whether the accused pleads guilty or not, the sentence will or will not take a particular form, e.g. a probation order or a fine, or a custodial sentence”.¹³⁹

The potential solutions do not end there, and this topic has received great attention in legal scholarship.¹⁴⁰ While an exacting analysis of potential solutions is beyond the scope of this article, it is evident that no one proposal is obviously right, with each potential solution presenting new challenges and difficulties. For example, if legislators were to do away with mandatory minimums and sentencing enhancements, prosecutors’ ability to offer relatively certain outcomes to defendants dissipates, which adversely affects risk-averse defendants.¹⁴¹ Similar effects would likely be felt with the abolition of sentence indications.

D. Summary on Judicial Supervision

Regrettably, the above discussion has illuminated that the tools judges have to provide a check on prosecutorial discretion are somewhat benign. We have seen that in four respects: (1) an inability to scrutinise plea bargains before they are accepted; (2) an unattractive, and largely unattainable, remedy to override prosecutorial discretion

¹³⁶ Although under s 61(3)(c) of the Criminal Procedure Act, judges are required to have a victim impact statement (where applicable) prior to passing any sentence indication.

¹³⁷ Asher Flynn “Sentence Indications for Indictable Offences: Increasing Court Efficiency at the Expense of Justice? A Response to the Victorian Legislation” (2009) 42 Aust & NZ J Criminology 244 at 256, citing Don Weatherburn and Bronwyn Lind “The Impact of the New South Wales Sentence Indication Scheme on Plea Rates and Case Delay” (1995) 18 UNSW LJ 211.

¹³⁸ See for example *R v Turner* [1970] 2 QB 321.

¹³⁹ See *R v Turner*, above n 138.

¹⁴⁰ See for example Candace McCoy “Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform” (2005) 50 Crim LQ 67; and Frank H. Easterbrook “Plea Bargaining as Compromise” (1992) 101 Yale LJ 1969.

¹⁴¹ See generally Robert Scott and William Stuntz “Plea Bargaining as Contract” (1992) 101 Yale LJ 1909.

through judicial review; (3) in the United States and Canada, a chokehold being placed on judicial discretion in sentencing; and (4) a trial penalty problem which judges are either powerless to control (as in the United States) or, ironically its chief perpetrators (as in other jurisdictions reviewed such as New Zealand). These concerns manifest themselves to varying degrees in the different jurisdictions canvassed, but each of them represents an erosion of judicial influence on prosecutors conducting plea negotiations.

VI. THE OVERLAY OF TRANSPARENCY

I now return to consider the overriding question of this article: how can the public have confidence in prosecutors to make decisions in the public interest when engaging in plea bargaining?

In Parts III, IV, and V, I considered the scope of the checks which overlay the prosecutor's decision-making power when engaging in plea bargaining. Assessed individually, we have seen that those checks have vastly different capabilities to materially restrain prosecutorial discretion.

A quite separate issue from checks on discretion is transparency. That is, to what extent can the public see what is happening during the plea bargaining process? If a check on discretion exists, yet that check is not transparent, it is unlikely to instil in the public confidence that prosecutors are discharging their obligations. Put another way, public confidence in the plea bargaining system is a function not just of the effectiveness of the check, but also the degree to which the public is able to perceive it operating in action.¹⁴²

I argue that the only way the public can have confidence in plea bargaining processes is where effective checks on discretion are coupled with transparency. Having surveyed the effectiveness of those checks, I can now consider how transparent those checks are. And as will be discussed below, there is a marked inter and intra-jurisdictional divergence between the effectiveness of the checks and how transparent they are to the public.

Having already identified the relevant checks, it is a relatively simple exercise to identify their transparency. The analysis that follows can therefore be set out in short order.

A. Transparency of Internal Checks

In Part III, I surveyed the prosecution tests in each of the jurisdictions, as well as the additional rules for plea bargaining and the provision for internal approval of plea bargains.

¹⁴² See also Asher Flynn "Plea Negotiations, Prosecutors and Discretion: An Argument for Legal Reform" (2015) 49 Aust & NZ J Criminology 564 at 566.

Largely, the prosecution tests and plea bargaining rules are transparent, at least facially. The tests are found in publicly available documents, and the requirement for plea agreements to be recorded in writing provides an added layer of transparency by recording how the agreement was reached. But as I concluded above, the malleability of these tests in being able to reverse engineer results provides a limited check on prosecutorial discretion. While to some extent this is narrowed by prohibitions on overcharging, this does little to change the perception that prosecutors operate on an honesty policy. We therefore see a divergence between the effectiveness of the check and transparency.

With respect to internal approvals, to the extent that these provide a check in the United States (as being the only jurisdiction that mandates internal approval of plea bargains), there is a lack of transparency in the procedure used as the public cannot see how the approval process is conducted. But the remaining jurisdictions canvassed do not even mandate internal approval systems. Undoubtedly such internal approval systems will exist in many of the prosecutors' offices within these jurisdictions, but the public lacks any insight into the framework and processes of any systems. The public also has no way of knowing which offices do not have such processes put in place.

B. Transparency of Third Party Influences

When looking at third party influences, we saw far more robust mechanisms for checking prosecutorial discretion, through the input of victims and investigators, as well as providing varying degrees of review. The advantage of third party influences is that they inject additional parties to the discussion and, to a certain extent, lift the veil on the secrecy surrounding plea negotiations, thereby introducing greater transparency to the process. Although prosecutors are the ultimate decision makers, the views of victims and investigators are clearly influential.

England and Wales have been particularly successful at achieving a degree of convergence between transparency through the input of third parties and the effectiveness of the applicable checks, particularly in relation to victims. The victims' review scheme is a robust mechanism for reviewing decisions not to prosecute, and it is readily observable by victims who are provided full reasons for the outcomes of the decisions.¹⁴³ If a victim disagrees with an outcome, that victim can at least see how that outcome was reached.

New Zealand too places a large emphasis on the involvement of third parties, particularly victims, with extensive obligations on prosecutors to keep victims (and indeed investigators) informed on the progression of cases.¹⁴⁴ Yet there is a lack of transparency with respect to how victims' and investigators' views are taken into account, and no right of review or appeal against prosecutors' decisions (excluding judicial review),¹⁴⁵ which brings us a step back from the convergence achieved in the English and Welsh model. A step closer to that model is the approach in New South

¹⁴³ Crown Prosecution Service (Eng), above n 61, at [40]–[48].

¹⁴⁴ See Part IV.A.

¹⁴⁵ See also the discussion in Part III.C.

Wales where objections to plea bargains by victims and investigators are considered internally by a senior prosecutor.¹⁴⁶ But again, due to the internal nature of such reviews, we lack insight into how those reviews are conducted.

Therefore, the divergence between effectiveness and transparency persists to a degree, even in relation to third parties.

C. Transparency of Judicial Supervision

Finally, we have judicial checks, which focus on the influence over and approval of plea bargains, the process of judicial review, the connection between plea bargaining and sentencing, and the trial penalty problem. We saw that across many of the jurisdictions, judicial checks and reviews on the plea bargaining process are relatively benign; principally a function of the late involvement of judges within the process. This differs in New Zealand and Canada, where criminal procedure rules encourage early judicial intervention and oversight in the resolution of cases.¹⁴⁷

Judicial checks have the obvious benefit of transparency. They inject an independent party into the process who is able to bring plea bargaining out from behind closed doors and into the purview of a public courtroom. We, therefore, see some convergence between the effectiveness of judicial checks and transparency in relation to judicial oversight of plea bargains in New Zealand and Canada.

But in the remaining jurisdictions, there is marked divergence between the transparency and the effectiveness of judicial supervision as a check on prosecutorial discretion, founded principally on the ineffectiveness of those checks. Improving the effectiveness of those checks to narrow the divergence should, therefore, be the starting point for any reform of plea bargaining processes which seeks to improve public confidence in the system.

VII. IS TRANSPARENCY A REALISTIC GOAL?

Measuring public confidence in the prosecution and plea bargaining system is undoubtedly difficult to quantify. In fact, a criticism of my argument could be that it is simply not realistic to expect that the wider public pays attention to the construction of plea bargains or the exercise of prosecutorial discretion unless there is a particular catalyst, such as the Baby Moko case, to bring issues to light. But I argue that the success of transparency does not depend on the proportion of the public that actually scrutinises plea deals. Almost any measure would be deemed to fail if its success was judged by how many people paid attention to it. Instead, I argue that transparency across all the various checks on plea bargaining that exist accumulate to improve public confidence.

I will use a few examples from above to demonstrate my point. First, take the principle of open justice. I advocated above that plea bargains which are more actively

¹⁴⁶ See Part IV.B.

¹⁴⁷ See Part V.A.

scrutinised in open court are likely to instil greater public confidence in the process. That occurs not because more parties necessarily actively review the plea deal, but I would argue principally due to the implicit threat that the deal could be reviewed because part of the process is conducted in an open forum.

Another example is through the influence of victims' views. While victims' views are required to be taken into account in all jurisdictions, only England and Wales, through the victims' review system, provide a transparent system by which those views are taken into account. Again, the number of cases scrutinised through that system is small, but it creates another possibility through which an external party can look behind plea bargaining agreements.

While the number of individual cases that receive scrutiny from external parties and the public is slim, the accumulation of transparency across these different checks itself provides a check on the exercise of discretion, because it incentivises prosecutors to consider the potential ramifications and scrutiny by others of any plea deal. It is the growth in the collective transparency of the checks on prosecutorial discretion that is likely to build public confidence in the system, irrespective of the proportion of the population actually scrutinising plea bargains.

VIII. CONCLUSION

I have argued that public confidence in a system so heavily centred on plea bargaining depends not just on the effectiveness of the checks on prosecutors' decision making, but on the transparency of that decision making. One without the other will either lead to unbridled prosecutorial power or a robust system of checks which the public does not understand. In the Baby Moko case, it is naturally a matter of conjecture as to whether the decision to negotiate that plea bargain was the correct decision. But there was certainly a sufficient factual basis to raise a query, which illustrates the importance of a process which is not simply robust but is also transparent. This is not because as lawyers and legal policymakers we expect members of the public to regularly scrutinise negotiated plea bargains, but because a series of checks which are transparent create the right incentives for prosecutors to exercise their discretion in a way which is consistent with their overriding duty as an advocate for the wider public.

The survey of the jurisdictions in this paper has demonstrated that in some small pockets, such as third party influences, there is a degree of convergence between the effectiveness of the checks on prosecutorial discretion and the level of transparency of the process. However, in the majority of cases, there is marked divergence between the two, principally demonstrating the "one without the other" problem I have just described. I have sought to highlight this gap to demonstrate that any future reform of the plea bargaining process premised on building confidence in the overall efficacy of the plea bargaining system should have the convergence of these two primary features as its focal point.