

**The James Spigelman Oration 2016**  
**Judicial Legitimacy and the limits of Review**

**Virginia Bell AC**

It is a privilege to be invited to give the 2016 Spigelman Oration. Jim Spigelman's contribution to the development of Australian public law is formidable. Not the least of it is found in the many scholarly lectures that he delivered during his tenure as Chief Justice of New South Wales. One lecture, less scholarly than the rest, he must have given around 50 times: his remarks on the admission of legal practitioners. At admission ceremonies, when I was one of the judges constituting the Court, sitting out on the left wing, I never tired of hearing it. Spigelman CJ's theme, with which many in this audience will be familiar, was that in the basic mechanisms of governance, the rule of law and parliamentary democracy, ours is an old country.

It seemed to me that this emphasis was likely to be the product of having grown up in the Australia of the 1950s with parents who had lived through the tyranny and disruption of central Europe in the first half of the last Century. Whatever its origin, a focus of Jim Spigelman's contribution to public debate has been to make a generation of lawyers more conscious of the stability of our institutions of government and, perhaps, to reflect on the

mechanisms which foster and maintain that stability. This was the subject of the lecture on what he characterised as "the Integrity Branch of Government"<sup>1</sup>, notwithstanding he commenced it with something approaching Trumpian praise for the sumptuary rules of the Chinese Imperial civil service.

The evident contribution of the judicial branch to maintaining the integrity of government is through judicial review. Recognising its constitutional significance, Jim Spigelman's concern has been to caution against overreach. He suggested that courts were apt to find *Wednesbury* unreasonableness too readily, evidencing a slippage from examination of the integrity of the process to mere matters of good administration. He proposed the "Integrity Branch" as a conception in which the case law on judicial review might develop without compromising judicial legitimacy<sup>2</sup>.

Against this background, it is with a degree of hesitation that I refer to the reformulation of *Wednesbury* unreasonableness in *Minister for Immigration and Citizenship v Li*<sup>3</sup>, a decision which Associate Professor McDonald points out is the first occasion on which the Court has invalidated an administrative decision on the

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<sup>1</sup> JJ Spigelman, "The Integrity Branch of Government" (2004) 78 *Australian Law Journal* 724.

<sup>2</sup> JJ Spigelman, "The Integrity Branch of Government" (2004) 78 *Australian Law Journal* 724 at 736-737.

<sup>3</sup> (2013) 249 CLR 332.

ground of unreasonableness for many years<sup>4</sup>. Unsurprisingly, it has attracted a good deal of commentary including, most recently, Beazley P's analysis in the context of her comprehensive review of the development of the unreasonableness ground in the Whitmore Lecture<sup>5</sup>.

As that review amply demonstrates, the requirement of reasonableness in the exercise of a statutory discretion formed part of the law long before the decision in *Association Provincial Picture Houses Ltd v Wednesbury Corporation*<sup>6</sup>. The majority's abandonment in *Li* of Lord Greene MR's circular formulation<sup>7</sup> in favour of the standard of reasonableness indicated by the construction of the statute, will not, I trust, be seen as ushering in an inevitable slide into merits review. Nor should disavowal that the standard of reasonableness is limited to the "irrational" or "bizarre" be so seen. *Li* may be thought to illustrate the point: the Migration Review Tribunal's decision not to adjourn the proceedings because in its estimate Ms Li had had a sufficient opportunity to present her case may not qualify for either epithet. Nonetheless, with the

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<sup>4</sup> McDonald, "Rethinking Unreasonableness Review" (2014) 25 *Public Law Review* 117.

<sup>5</sup> Beazley, "Judicial Review & The Shifting Sands of Legal Unreasonableness", (12 October 2016).

<sup>6</sup> [1948] 1 KB 223 and see *Minister for Immigration v Li* (2013) 249 CLR 332 at 348-351 [23]-[29] per French CJ; 362-366 [64]-[73] per Hayne, Kiefel and Bell JJ.

<sup>7</sup> *Minister for Immigration v Li* (2013) 249 CLR 332 at 364 [68].

exception of Collier J, who upheld the challenge on a view that the Tribunal had failed to properly consider Ms Li's adjournment application, at each level of the hierarchy, each judicial officer seized with the matter found the Tribunal's exercise of its discretion to be legally unreasonable. The conclusion may have been arrived at more readily because the discretion was one with which, as Gageler J applying the *Wednesbury* test observed, courts are familiar<sup>8</sup>.

The application of the reasonableness standard to the review of reasons for attaining a state of satisfaction on which jurisdiction is conditioned may present greater difficulty. The majority in *Minister for Immigration and Citizenship v SZMDS* were agreed on the requirement of logically probative material to support the decision-maker's conclusion but were divided on the application of the test<sup>9</sup>. Heydon J applying formal logic found it unnecessary to address the question<sup>10</sup>. The challenge was to the Refugee Review Tribunal's rejection of the applicant's claim to fear persecution in Pakistan on the ground of his sexuality in circumstances in which he had admitted to having voluntarily returned to Pakistan for a holiday. The want of logic on which the applicant relied was the Tribunal's failure to explain how his sexuality might have come to be known in the course of a short holiday. The entry point in Heydon J's analysis

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<sup>8</sup> *Minister for Immigration v Li* (2013) 249 CLR 332 at 377 [112].

<sup>9</sup> (2010) 240 CLR 611.

<sup>10</sup> (2010) 240 CLR 611 at 628[57]-[58].

was that it was the applicant's case that his sexuality would come to be known at some time following his return to Pakistan. While it may be less likely that it would come to be known in a short period, Heydon J reasoned that it could not be said to be illogical for the Tribunal to accept the postulate for the applicant's case. It may be that vitiating illogicality is a concept somewhat more expansive than the rules of formal logic would allow, but as the differing views of Hill J at first instance and Whitlam J, in dissent, in the Full Court of the Federal Court in *Eshetu* underscore so pointedly<sup>11</sup>, illogicality will not uncommonly be a matter of opinion.

Earlier this year, French CJ, speaking of the reasonableness standard in administrative law, drew an analogy with Heisenberg's uncertainty principle in mathematics. Up to then my only acquaintance with Heisenberg was through "Breaking Bad", but as I grasped the gist of his Honour's analogy, it was to warn that the shades of meaning of reasonableness "can tempt courts applying it in judicial review to stray beyond their proper constitutional functions"<sup>12</sup>. The same concern led Spigelman CJ to remind his

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<sup>11</sup> *Eshetu v Minister for Immigration and Multicultural Affairs* (1997) 71 FCR 300.

<sup>12</sup> R French, "Rationality and Reasonableness", (27 April 2016, ANU Canberra).

Integrity Branch audience that judicial legitimacy is the core of the scope and content of judicial review<sup>13</sup>.

In the field of the criminal law Australian courts have resisted the Imperial march of administrative law for reasons which reflect another aspect of our conception of judicial legitimacy. Decisions that come within the umbrella of "prosecutorial discretion": finding a bill of indictment whether ex officio or after committal for trial; offering no evidence; the entry of a nolle prosequi and the election not to call a witness are treated as insusceptible of judicial review. By contrast, for more than twenty years courts in England have reviewed decisions of the Crown Prosecution Service ("the CPS") to prosecute and not to prosecute.

In one respect the difference may be surprising since the power to prosecute on indictment in the Australian jurisdictions has been sourced in statute almost since the earliest days of the colony. Section 5 of the *Australian Courts Act* 1828 conferred power on the Attorney-General and other officers appointed for the purpose to prosecute all crimes cognisable in the courts. It was a power which was described by Stephen CJ as vested in the Attorney-General without supervision, limitation or control<sup>14</sup>. This was conformable

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<sup>13</sup> JJ Spigelman, "The Integrity Branch of Government" (2004) 78 *Australian Law Journal* 724 at 737.

<sup>14</sup> *R v Macdermott* (1844) 1 Legge 236 at 237; and see *R v McKaye* (1885) 6 LR (NSW) 123.

with the view taken of the English Attorney-General's prerogative power to enter a *nolle prosequi* or to present an *ex officio* information<sup>15</sup>.

This orthodoxy was challenged by Alexander and Thomas Barton following the Attorney-General's decision to file an *ex officio* indictments against them before the conclusion of their committal hearing<sup>16</sup>. The determination was made under the power conferred by s 5 before the establishment of the Director of Public Prosecutions. The Bartons argued that the power, being statutory, must be subject to review. Their alternative argument, which anticipated the decision of the House of Lords in the *GCHQ Case*<sup>17</sup>, contended that the equivalent prerogative power was itself reviewable.

Each contention received short shrift in the High Court. The purpose of s 5 was said to be to confer power of the same kind as exercised by the Attorney-General in England. These powers with respect to the institution and maintenance of proceedings on

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<sup>15</sup> *R v Allen* (1862) 1 B & S 850 [121 ER 929]; *R (on the Prosecution of Tomlinson) v Comptroller-General of Patents, Designs and Trademarks* [1899] 1 QB 909 at 914 per AL Smith LJ.

<sup>16</sup> *Barton v The Queen* (1980) 147 CLR 75.

<sup>17</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

indictment were explained by Viscount Dilhorne in *Gouriet v Union of Post Office Workers*<sup>18</sup>:

"[The Attorney General] may stop any prosecution on indictment by entering a nolle prosequi. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers he is not subject to direction by his ministerial colleagues or to the control and supervision of the courts."

Gibbs A-CJ and Mason J in their joint reasons in *Barton* considered that it had not been the Parliament's intention to make the New South Wales' Attorney-General's decision to file an information subject to review. Importantly, their Honours pointed out that it was considered undesirable for the court whose function it is to determine guilt or innocence to become too closely involved in the determination of whether a prosecution should be brought<sup>19</sup>.

The foundations for the modern English approach are sourced in decisions which predate the GCHQ Case, starting with *R v Commissioner of Police of the Metropolis; Ex parte Blackburn*<sup>20</sup>. In the mid-1960s there was a question as to whether roulette and

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<sup>18</sup> [1978] AC 435 at 487.

<sup>19</sup> (1980) 147 CLR 75 at 94-95.

<sup>20</sup> [1968] 2 QB 118.



other games in which the bank had an advantage were made unlawful under the English gaming legislation. Pending the determination of this question in the *Kursaal Casino* case, the Commissioner of the Metropolitan Police issued a directive that police were to cease routine policing of gaming clubs<sup>21</sup>.

Mr Blackburn, a private citizen, moved in the Divisional Court for mandamus to compel the Commissioner to enforce the gaming laws. The motion was dismissed and Mr Blackburn appealed to the Court of Appeal. By the time the appeal came on, the unlawfulness of roulette had been confirmed by the House of Lords<sup>22</sup> and the Commissioner had made clear that it was the intention of the Metropolitan Police to enforce the law in accordance with the decision. Mr Blackburn's appeal was dismissed but not without the Court addressing its power to compel the Executive to enforce the law.

Lord Denning MR observed that there were many areas of the Commissioner's discretionary powers with which the courts would not interfere. However, he allowed an exception in the case of a policy decision not to enforce the law in some particular respect<sup>23</sup>.

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<sup>21</sup> *Crickitt v Kursaal Casino Ltd* [1968] 1 WLR 53.

<sup>22</sup> *Crickitt v Kursaal Casino Ltd* [1968] 1 WLR 53.

<sup>23</sup> *R v Commissioner of Police of the Metropolis; Ex parte Blackburn* [1968] 2 QB 118 at 136-137.

To similar effect, Edmund-Davies LJ said that English law was not powerless against those appointed to enforce it who "merely cocked a snook at it"<sup>24</sup>. Salmon LJ, in less colourful terms, expressed the same view<sup>25</sup>.

The statements in *Blackburn* and two decisions in which judicial review went to supervise the exercise of discretionary powers by bodies having prosecutorial functions, the Race Relations Board and the General Counsel of the Bar<sup>26</sup>, were relied upon by the Divisional Court in holding it had the power to review the decision of the CPS to prosecute two juveniles: *R v Chief Constable of the Kent County Constabulary; Ex parte L*<sup>27</sup>. The decisions were sought to be impugned on *Wednesbury* grounds. Watkins LJ doubted the availability of judicial review of the decision of the CPS to prosecute an adult: the danger of opening the door too wide to the review of prosecutorial discretion was manifest in such cases. This was by way of contrast with the "special position" of juveniles. The legal, as distinct from policy, basis for the distinction was not explored. In

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<sup>24</sup> *R v Commissioner of Police of the Metropolis; Ex parte Blackburn* [1968] 2 QB 118 at 148.

<sup>25</sup> *R v Commissioner of Police of the Metropolis; Ex parte Blackburn* [1968] 2 QB 118 at 138-139.

<sup>26</sup> *R v Race Relations Board; Ex parte Selvarajan* [1975] 1 WLR 1686; *R v General Council of the Bar; Ex parte Percival* [1991] 1 QB 212.

<sup>27</sup> *R v Chief Constable of the Kent County Constabulary; Ex parte L (a minor)* [1993] 1 All ER 756.

particular, there was no consideration of the compatibility of review with the separation of judicial and executive functions.

Within four years of the decision in *L*, the Divisional Court in *R v Director of Public Prosecutions; Ex parte C*<sup>28</sup> entertained an application for judicial review to quash the decision not to prosecute an adult for the offence of buggery. The proceeding came before Kennedy LJ and appears to have been argued upon common ground that the Court had power to review the decision, albeit the power was to be "sparingly exercised"<sup>29</sup>. The Director of Public Prosecutions was required, under his statute, to issue a Code for Crown Prosecutors giving guidance on the general principles to be applied to the decision to institute proceedings. Kennedy LJ held that it would be appropriate for the court to intervene where the Director made the decision not to prosecute applying an unlawful policy, or failing to correctly apply the policy in the Code or if the decision was perverse.

The Code required prosecutors to consider the sufficiency of the evidence to support a prosecution. Kennedy LJ found the prosecutor's decision in *C* was flawed because he had failed to properly assess the sufficiency of the prosecution proofs and

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<sup>28</sup> [1995] 1 CR App 136.

<sup>29</sup> [1995] 1 CR App 136 at 140.

available lines of defence<sup>30</sup>. The decision was set aside and the matter was remitted to the Director of Public Prosecutions for reconsideration.

The issue was touched on here in *Jago v District Court (NSW)*<sup>31</sup> by Gaudron J. Her Honour observed that the unreviewability of the prosecutor's discretion had been seen initially as an aspect of the prerogative power but that more recently it had come to be seen as deriving from the nature of the subject matter and the incompatibility of judicial review with the ultimate function of the court in a criminal trial<sup>32</sup>. The analysis was developed in her joint reasons with Gummow J in *Maxwell v the Queen*<sup>33</sup>. There the sentencing judge rejected the accused's plea of guilty to a lesser offence which had been accepted by the prosecution in satisfaction of the indictment. In question was the Court's power to do so. In the Court of Criminal Appeal, Gleeson CJ (as he then was) characterised the issue as at the margin between executive and judicial power<sup>34</sup>. His Honour considered it fell on the judicial side of that divide.

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<sup>30</sup> [1995] 1 CR App 136 at 144-145.

<sup>31</sup> (1989) 168 CLR 23.

<sup>32</sup> (1989) 168 CLR 23 at 77.

<sup>33</sup> (1996) 184 CLR 501.

<sup>34</sup> *R v Maxwell* (1994) 34 NSWLR 606 at 608.

Mr Maxwell appealed successfully to the High Court. Gaudron and Gummow JJ pointed out that there could be no doubt as to the Director of Public Prosecution's power to enter a nolle prosequi or to refuse to offer evidence<sup>35</sup>. The existence of either power denied that the court could require that the accused be tried on a more serious charge than the charge on which a plea had been accepted. Their Honours went on to say<sup>36</sup>:

"It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute, to enter a nolle prosequi, to proceed ex officio, whether or not to present evidence and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted. The integrity of the judicial process – particularly, its independence and impartiality and the public perception thereof – would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what."

This statement of principle was endorsed by five members of the High Court in *Likiardopoulos v The Queen*<sup>37</sup>.

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<sup>35</sup> *Director of Public Prosecutions Act 1986 (NSW)*, s 7(2)(b).

<sup>36</sup> *Maxwell v The Queen* (1996) 184 CLR 501 at 534.

<sup>37</sup> (2012) 247 CLR 265 at 280 [37] per Gummow, Hayne, Crennan, Kiefel and Bell JJ; and, see *Elias v The Queen* (2013) 248 CLR 483 at 497 [34]; *Magaming v The Queen* (2013) 252 CLR 381 at 390 [20].

In separate reasons, French CJ allowed that the existence of the jurisdiction conferred on the High Court by s 75(v) of the Constitution and the constitutionally protected supervisory role of the Supreme Courts of the States raises a question of whether there is any statutory power or discretion which, as a matter of principle, can be said to be insusceptible of judicial review<sup>38</sup>. Nonetheless, his Honour described the general unreviewability of prosecutorial decisions as resting on the impartiality of the judicial process and the separation of judicial and executive powers<sup>39</sup>.

French CJ had considered the review of prosecutorial discretion in the context of the powers conferred on the Director of Public Prosecutions under the Constitution of Fiji when he sat as a member of the Supreme Court of Fiji in *Matalulu v Director of Public Prosecutions*<sup>40</sup>. The claimant sought judicial review of the decision of the Director of Public Prosecutions to enter a nolle prosequi bringing to an end a private prosecution that the Director had taken over. The court said that the Director of Public Prosecutions' powers, sourced in the Constitution, were not to be treated as a modern formulation of ancient prerogative authority and were subject to established principles of judicial review.

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<sup>38</sup> (2012) 247 CLR 265 at 269-274 [4].

<sup>39</sup> (2012) 247 CLR 265 at 269 [2].

<sup>40</sup> [2003] 4 LRC 712.

The Privy Council approved the reasoning of the Court in *Matalulu* in dealing with a like challenge to the exercise of the discretionary powers of the Director of Public Prosecutions of Mauritius<sup>41</sup>. Lord Bingham gave the reasons of the Privy Council, distinguishing *Gouriet* as a case concerned with a non-statutory power deriving from the royal prerogative<sup>42</sup>. His Lordship observed that the Mauritian Director of Public Prosecutions' position was more closely aligned with that of the Director of Public Prosecutions in England whose decisions had been held not to be immune from review<sup>43</sup>. The reference was to Kennedy LJ's judgment in *Ex parte C* and the decisions following it.

The Canadian courts share the Australian concern with the incompatibility of judicial review of the exercise of prosecutorial discretion<sup>44</sup>. Recently, in *R v Anderson*, the Supreme Court of Canada, affirming its earlier statement in *Power*, said<sup>45</sup>:

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<sup>41</sup> *Mohit v Director of Public Prosecutions of Mauritius* [2006] 1 WLR 3343 at 3348 [11].

<sup>42</sup> *Mohit v Director of Public Prosecutions of Mauritius* [2006] 1 WLR 3343 at 3350 [14].

<sup>43</sup> *Mohit v Director of Public Prosecutions of Mauritius* [2006] 1 WLR 3343 at 3351 [14].

<sup>44</sup> *Kostuch (Informant) v Attorney General of Alberta* (1995) 128 DLR (4th) 440 at 449; *R v Power* (1994) 1 SCR 601 at 622-623.

<sup>45</sup> *R v Anderson* (2014) 2 SCR 167 at 184 [32] citing *R v Power* (1994) 1 SCR 601 at 627.

"The Crown cannot function as a prosecutor before the court while also serving under its general supervision. The court, in turn, cannot both supervise the exercise of prosecutorial discretion and act as an impartial arbitrator of the case presented to it."

The English courts have tended not to analyse the question in terms of the separation of powers. Underlying the English approach is a concern that immunising prosecutorial discretion from judicial review may deny the victim any means of redress. This explains why a different test of lesser stringency is applied to the review of decisions *not* to prosecute<sup>46</sup>.

The approach is exemplified by the decision in *R v Director of Public Prosecutions, Ex parte Manning*<sup>47</sup>. A prisoner died of asphyxia while being carried by prison officers following an incident. The Coroner's jury returned a verdict of "unlawful killing". The Director of Public Prosecutions considered that there was insufficient evidence against any individual to justify a prosecution for manslaughter. The Director briefed senior Treasury counsel to review his decision. Counsel provided a detailed advice agreeing with the Director's conclusion. In the result the Director determined not to prosecute any person.

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<sup>46</sup> *Ex parte Kebiline* [2000] 2 AC 326; *R (Corner House Research & Another) v Director of Serious Fraud Office* [2009] 1 AC 756; *R (E) v Director of Public Prosecutions* [2012] 1 Crim App R 6 at [50].

<sup>47</sup> [2001] QB 330.



The sisters of the deceased brought an application for judicial review. In the Divisional Court Lord Bingham observed that it will often be impossible to stigmatise a judgment whether to prosecute or not as wrong even if one disagrees with it<sup>48</sup>. Nonetheless, his Lordship cautioned that the standard of review should not be set too high, since it is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied<sup>49</sup>. His Lordship approached the application on a view that the death of a person in custody must always raise concern and where following an inquest the jury returns a verdict of unlawful killing the "ordinary expectation would naturally be that a prosecution would follow"<sup>50</sup>.

A number of flaws in the reasoning of counsel who conducted the review were identified in *Manning*. These were matters that should have been taken into account in assessing the prospects of a successful prosecution and the failure to do so vitiated the Director's decision. The decision was quashed and the matter remitted to the Director of Public Prosecutions for reconsideration.

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<sup>48</sup> *R v Director of Public Prosecutions; Ex parte Manning* [2001] QB 330 at 344 [23].

<sup>49</sup> *R v Director of Public Prosecutions; Ex parte Manning* [2001] QB 330 at 344 [23]; and, see *R (Corner House Research & Anor) v Director of Serious Fraud Office* [2009] 1 AC 756.

<sup>50</sup> *R v Director of Public Prosecutions; Ex parte Manning* [2001] QB 330 at 347 [33].

*Manning* is not the only occasion on which the Court has directed the Director of Public Prosecutions to reconsider a decision not to prosecute in a case in which a Coroner's jury has returned a verdict of unlawful killing<sup>51</sup>. So, too, the Court has directed reconsideration of a decision not to prosecute where the victim of an assault has been awarded damages in a civil action. The Divisional Court held that "very careful analysis" was required if the Director of Public Prosecutions was to determine not to institute a criminal prosecution in light of the detailed findings made by the judge in the civil action<sup>52</sup>.

Analysis of the sufficiency of evidence to support a successful prosecution may strike an Australian audience as in tension with maintenance of the court's impartiality, a perspective informed by the strict separation of powers for which our Constitution provides. Equally, to an Australian audience, the concept of the victim's "right" to seek redress against a decision of the Director of Public Prosecutions not to prosecute may seem in tension with the assumptions on which our system of adversarial criminal justice proceeds.

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<sup>51</sup> *R v Director of Public Prosecutions, Ex parte Jones (Timothy)* [2000] Crim LR 858.

<sup>52</sup> *R v Director of Public Prosecutions, Ex parte Treadaway* (unreported, 31 July 1997, DC).

The English approach at least in some respects reflects wider European influences. In 1985, the Committee of Ministers of the Member States of Europe adopted a recommendation that victims should have the right to seek a review of a decision not to prosecute. Such a right was incorporated as proposed Article 10 in a draft Directive of the European Parliament<sup>53</sup>.

The draft Directive was adopted by the European Parliament in October 2012<sup>54</sup>. The Directive formally establishes minimum standards on the rights, support and protection of victims of crime. Article 11 requires Member States to ensure that victims have the right to a review of a decision not to prosecute.

The existence of a right of this kind was recognised by the Court of Appeal (Criminal Division) in *R v Killick*<sup>55</sup>. In February 2006, two complainants, who each suffered from cerebral palsy, reported to the police that Mr Killick had sexually assaulted them. In April 2006, Mr Killick was arrested and interviewed by the police. He

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<sup>53</sup> European Commission, Brussels, 18 May 2011, *Proposal for a Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime*, COM(2011) 275 final at 8.

<sup>54</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 2012 OJ L315/57.

<sup>55</sup> *R v Killick* [2012] 1 Crim App R 10.

denied the allegations. In June 2007, the CPS advised Mr Killick of its determination not to prosecute him.

Following that determination, the complainants' solicitors wrote to the CPS asserting that the decision was unreasonable, in breach of the Code of Practice for Victims of Crime and contrary to provisions of the disability discrimination legislation<sup>56</sup>. The CPS instituted an internal review which appears to have been rather elaborate. It took two years. Independent senior counsel was briefed to advise whether all relevant considerations had been taken into account and whether the decision was legally reasonable. In July 2009, the reviewing officer found that the decision was the correct decision<sup>57</sup>.

Following this determination, the complainants' solicitors advised the CPS of their clients' intention to commence judicial review proceedings. This advice prompted a further review. Ultimately, the Director of Public Prosecutions accepted advice that his earlier decision was wrong although not legally unreasonable. It was determined that it was in the public interest to prosecute Mr Killick. The complainants were informed of the decision in December 2009. Mr Killick was not informed of the new decision until February 2010, when he was summoned to appear before the

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<sup>56</sup> *R v Killick* [2012] 1 Crim App R 10 at [27].

<sup>57</sup> *R v Killick* [2012] 1 Crim App R 10 at [28], [34].

Magistrates Court. He applied unsuccessfully for a stay of proceedings on the ground that their continuance amounted to an abuse of process.

In December 2010, Mr Killick was convicted by majority verdict of a number of counts. He was granted leave to appeal against his convictions on a ground which challenged the refusal to stay the proceedings. In dismissing his appeal, the Court of Appeal characterised the Director of Public Prosecutions' initial decision as in reality "a final decision for the victim"<sup>58</sup>. Their Lordships said that English law recognised the right of the victim to a review of a decision not to prosecute consistently with the right declared in the draft Directive. In the result, although the delay in the conduct of the review had been lamentable, it had not amounted to an abuse of process.

The focus on the rights of the victim is prominent in the analysis of Toulson LJ in *R (B) v Director Public Prosecutions*<sup>59</sup> upholding an application for review of the Director's decision to discontinue a prosecution. The decision reflected the prosecutor's view that the victim could not be put before the Court as a reliable witness. The view was informed by a psychiatric report which set out the victim's history of psychotic illness which included that he

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<sup>58</sup> *R v Killick* [2012] 1 Crim App R 10 at [48].

<sup>59</sup> [2009] 1 WLR 2072.

had at times held paranoid beliefs about certain people. In the psychiatrist's opinion, the victim was suffering from a mental condition which might affect his perception and recollection of events so as to make his account unreliable.

Judicial review was sought on the ground that the decision to discontinue the prosecution was irrational, failed to have regard to the need to promote equality of opportunity and violated the victim's rights under the European Convention on Human Rights (ECHR). Toulson LJ observed that the victim had given a coherent, and on its face credible, account of the events at a time when they were fresh in his memory. There was no evidence that he entertained hostility towards the defendant or that he had held paranoid beliefs about the defendant. His Lordship noted that the CPS had not attempted to discuss the psychiatrist's report with the victim or his solicitors. His Lordship was troubled by the logical implication of the reasons for discontinuing the prosecution: any person suffering from a mental illness might be assaulted with impunity absent independent evidence.

Toulson LJ concluded that the prosecutor's reasoning was irrational<sup>60</sup> and that the decision to terminate the prosecution had been unlawful. It had occasioned humiliation in violation of the

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<sup>60</sup> *R (on the application of B) v Director of Public Prosecutions* [2009] 1 WLR 2072 at 2088 [55].

claimant's rights under the ECHR. While it could not be assumed that the trial would have resulted in the conviction of the defendant, the complainant was entitled to be compensated for deprivation of the opportunity of having the proceedings run their proper course. He was awarded damages for the injury to his self-respect occasioned by being made to feel that he had been beyond the effective protection of the law.

As Keir Starmer QC, the English Director of Public Prosecutions has noted, the "right" recognised in *Killick* to have a decision not to prosecute reviewed does not turn on unreasonableness in the *Wednesbury* sense but on the less demanding test of whether the original decision was "wrong"<sup>61</sup>. He points to the far-reaching consequences of the right. Prosecutors had been reluctant to reopen a decision not to prosecute once the decision had been communicated to the prospective defendant. Mr Starmer observes<sup>62</sup>:

"[As] *Killick* recognises, once the interests of the victim are factored in, finality for the suspect has somehow to be adjusted to accommodate the 'right' of the victim to 'seek a review' of a decision not to prosecute. Neither the *Killick* judgment, nor the draft EU Directive referred to in it, qualify that 'right' and so, presumably, it is available to all victims and not just in special or exceptional

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<sup>61</sup> Starmer QC, "Finality in Criminal Justice: When Should the CPS Reopen a Case?", [2012] *Criminal Law Review* 526 at 527.

<sup>62</sup> Starmer QC, "Finality in Criminal Justice: When Should the CPS Reopen a Case?", [2012] *Criminal Law Review* 526 at 528.

circumstances and, equally importantly, presumably the 'right' to a review can only have practical effect if it carries with it a right to have reserved any decision which, on review, is found to be wrong."

This change in approach to the finality of his decisions is said by Mr Starmer to be in line with other adjustments to criminal trial process in recent years of which the most far-reaching was the amendment to the law of double jeopardy<sup>63</sup>.

In light of *Killick*, the CPS has established the Victims' Right to Review Scheme (VRR). The victim is given a right to request a review of a decision not to prosecute or to terminate criminal proceedings. The right is limited to "qualifying decisions" which cover all those decisions that result in no prosecution of any person for any offence arising out of an incident. The Administrative Division has distinguished these qualifying decisions from "operational prosecutorial decisions"<sup>64</sup>. The latter, being decisions which affect the scope of the prosecution, including the selection of the charge and the number of suspects to be charged. Operational decisions are not susceptible of review. The Administrative Division has said that the prosecutor's independent judgment should be safeguarded rather than subjected to a generalised right of review

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<sup>63</sup> Starmer QC, "Finality in Criminal Justice: When Should the CPS Reopen a Case?" [2012] *Criminal Law Review* 526 at 530-531.

<sup>64</sup> *R (On the application of Abida Chaudhry) v Director of Public Prosecutions* [2016] EWHC 2447 (Admin) at [46](iv).



and to the defensive considerations which could so easily result<sup>65</sup>. A right to review all cases where charges were brought against some, but not all, suspects would significantly undermine operational prosecutorial discretion and have potentially serious resource implications for the CPS. Gross LJ considered that removal of the limitation of "qualifying decisions" under the VRR would risk disturbing the balance between what he identified as the three interests in the prosecution: the State, the defendant and the victim<sup>66</sup>.

The characterisation of the victim as having a distinct "interest" in the prosecution is notable. It is in line with the European Parliament's Directive and perhaps with changes in international criminal law under which victims are classed as participants in proceedings before the International Criminal Court and the Special Tribunal for Lebanon<sup>67</sup>.

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<sup>65</sup> *R (On the application of Abida Chaudhry) v Director of Public Prosecutions* [2016] EWHC 2447 (Admin) at [46](i).

<sup>66</sup> *R (On the application of Abida Chaudhry) v Director of Public Prosecutions* [2016] EWHC 2447 (Admin) at [46](iv).

<sup>67</sup> *Rome Statute of the International Criminal Court*, 2187 UNTS 90, art 68(3); *Statute of the Special Tribunal for Lebanon*, S/RES/1757, art 17. Victims may apply to become civil parties before the Extraordinary Chambers in the Courts of Cambodia; McAsey, "Victim Participation at the International Criminal Court and its Impact on Procedural Fairness" (2011) 18 *Australian International Law Journal* 105 at 105-106.

The criminal law has long been conceived of as vindicating the interests of society generally and the prosecutor as representing those interests, as distinct from the interests of the investigating police or the victim<sup>68</sup>. It is the distinction that Blackstone drew between private and public wrongs, with the latter violating the rights and duties that are due to the whole community "in its social aggregate capacity"<sup>69</sup>. The conception of the victim as having a discrete "interest" in the prosecution under our adversarial criminal trial process is controversial. Even more so, is the idea mooted on occasions here, as in England, that the victim should be separately represented at the criminal trial<sup>70</sup>. Among other things, it is an idea that is apt to wrongly give rise to a perception of the criminal trial as a contest between victim and the accused. Under a system of

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<sup>68</sup> Beccaria, *An Essay on Crimes and Punishments*, New edition (1872) at 16; Ashworth, *The Criminal Process: an evaluative study* (1994) at 34-37; Cowdery, *Challenges to Prosecutorial Discretion* (2013) 39(1) Commonwealth Law Bulletin 17 at 19.

<sup>69</sup> Blackstone, *Commentaries on the Laws of England*, 1st ed, Vol 4 at 5.

<sup>70</sup> Ashworth, "Punishment and Compensation: Victims, Offenders and the State", (1986) 6(1) *Oxford Journal of Legal Studies* 86 at 120; Braiden, "The Case for Separate Legal Representation for Rape Victims", (1999) 93(1) *Law Society Gazette* 5; Currie and Kift, "Add Victims and Stir? Or Change the Recipe? Achieving Justice for Victims of Crime in Queensland" (1999) 6 *James Cook University Law Review* 78 at 107; Kirchengast, "The Integration of Victim Lawyers Into the Adversarial Criminal Trial", paper delivered at the Australian and New Zealand Critical Criminology Conference at the University of Sydney, 1-2 July 2010; Braun, "Legal Representation for Sexual Assault Victims – Possibilities for Law Reform" (2014) 25 *Current Issues in Criminal Justice* 819.

criminal justice which requires proof beyond reasonable doubt, that is a perception which hardly does a service to the victim.

The English courts have expressed concern about the impact of judicial review on delays in the Crown court<sup>71</sup>. One recent instance involved an application to review the decision to prosecute, which followed the complainant's successful application to review the earlier decision not to prosecute<sup>72</sup>. Notably, when the New Zealand Law Commission considered the matter in referral on criminal procedure, it reported that judicial review of prosecutorial discretion attracted more adverse comment than any other proposals<sup>73</sup>. Concerns about delay and fragmentation of the criminal process<sup>74</sup> have evident force but the justification for the Australian reticence lies in considerations of judicial legitimacy and the incongruity of the court supervising the decisions of one party to prospective litigation before it.

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<sup>71</sup> *R v A(RJ)* [2012] 2 Crim App R 8 at [80].

<sup>72</sup> *R (S) v Director of Public Prosecutions* [2016] 1 WLR 804 at 813 [31].

<sup>73</sup> Law Commission (NZ), *Criminal Prosecution*, Report 66, October 2000 at 27 [64].

<sup>74</sup> *R (Corner House Research & Anor) v Director of the Serious Fraud Office* [2009] 1 AC 756; *R (E) v Director of Public Prosecutions* [2012] 1 Crim App R 6 at [50]; *R v Director of Public Prosecutions; Ex parte Kebiline* [2000] 2 AC 326 at 371 per Lord Steyn, 372 per Lord Cooke of Thorndon; *R v Panel on Takeovers and Mergers; Ex parte Fayed* [1992] BCC 524; *R v Inland Revenue Commissioners; Ex parte Allen* [1997] STC 1141.