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Continuing Legal Education for Criminal Lawyers

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RECENT DEVELOPMENTS IN PROSECUTOR'S DUTIES

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NOTE: THE VIEWS EXPRESSED IN THIS PAPER ARE THE AUTHOR'S ALONE. THEY DO NOT REPRESENT THE VIEWS OF THE NSW LAW SOCIETY, NSW YOUNG LAWYERS, OR THE NSW ODPP.

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Introduction

1. In a recent decision of the NSW Court of Criminal Appeal, Hamill J was moved to note that "Overwhelmingly, prosecutors conduct themselves within the ethical boundaries and with appropriate deference to their role and duties", although it should be noted that this was in the context of his Honour having immediately bemoaned the

> *… unfortunate number of appeals brought to this court in which the conduct of Crown prosecutors, in adducing evidence, cross examining and in their addresses to juries are said to give rise to miscarriages of justice.*[2]

2. His Honour was presumably speaking only about NSW – but there is no reason to think that things are much different in other states.
3. In some ways, criminal law is an unsavoury and perhaps unfulfilling jurisdiction; nobody wishes to be either a victim of crime or a defendant. Prosecutors are also burdened in that they must participate as advocates for a side, but owe the other side very many duties and are not allowed to regard a conviction as a "win".[3] Their conduct is carefully scrutinised, and as we will see in this paper the duties they owe are not always straightforward.
4. In this paper, focusing on "recent" developments (generally the last 12 months or so) around the country, I have attempted to draw together a miscellany of duties of prosecutors in what is hopefully a useful way, both for those who represent defendants and for those who are prosecuting. Though the paper focuses on recent developments, it will be necessary for completeness to attend to some far older principles first.

The starting point

5. The most obvious starting point for any discussion of prosecutors' duties is the obligation to act fairly; on one view, this might be seen as the obligation from which all others arise. One often-cited exploration of this is the exposition by Murphy J in the (wonderfully titled) case of *King v The Queen*:

> *The duty of a prosecutor is to present the case against the accused fairly and honestly; not to use any tactical manoeuvre legally available in order to secure a conviction. In this regard, I adopt the words of Maxwell J in* Bathgate *(1946) 46 SR (NSW) 281 at 284-285:*

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[2] *Hassan Ibrahim v R* [2014] NSWCCA 160, at [77] to [79]. His Honour went on to cite as examples *R v Kennedy* [2000] NSWCCA 487; *R v Rugari* [2001] NSWCCA 64; *R v Teasdale* [2004] NSWCCA 91; *R v Attallah* [2005] NSWCCA 277; *KNP v R* (2006) 67 NSWLR 227; *Livermore v R* (2006) 67 NSWLR 659; *Causevic v R* [2008] NSWCCA 238; *Anderson v R* [2010] NSWCCA 130; *Armstrong v R* [2013] NSWCCA 113; *Lyndon v R* [2014] NSWCCA 112.

[3] Rand J in the Supreme Court of Canada in *Boucher v The Queen* (1954) 110 CCC 263 at p 270 said (rather dramatically) that "The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility."

> *"It cannot be too strongly impressed that the obligations of the Crown prosecutor arise not merely by reference to the attitude adopted by the defence. 'Counsel for the prosecution … are to regard themselves as ministers of justice, and not to struggle for a conviction, as in a case at nisi prius — nor to be betrayed by feelings of professional rivalry — to regard the question at issue as one of professional superiority, and a contest for skill and pre-eminence': Puddick (1865) 4 F & F 497; 176 ER 662 at 663. 'But it must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issue. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed': Maxwell v DPP [1935] AC 309 at 323 and Sugarman case (1935) 25 Cr App R 109 at 115."*[4]

6. Prosecutors are required to act with fairness and detachment, and with the objective of establishing the whole truth.[5] They must be, "detached"[6], as well as "fair", "temperate" and "restrained"[7], avoid "zealotry"[8] yet also be "firm" and "fearless".[9]

7. In spite of all these restraints, it is said (perhaps with some optimism, in light of some of the foregoing adjectives) that there is not a duty to be "bland, colourless and lacking in the advocate's flourish" in addresses.[10]

8. A useful summary of the role of the Crown Prosecutor and the limits of trial advocacy is to be found in *Livermore v R* [2006] NSWCCA 334 at [24] to [52], in which the court actually had the heading "The Role of the Crown Prosecutor and the Limits of Trial Advocacy" and proceeded to extract some of the better-known principles. In the event that *Livermore* was too long, recent developments have come to the rescue to summarise them for you, Dear Reader. In the recent (June 2014) case of *Lyndon,* Basten JA distilled those principles from *Livermore* under two headings:

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[4] *King v The Queen* (1986) 161 CLR 423 at 426 (per Murphy J).

[5] *Whitehorn v The Queen* (1983) 152 CLR 657, 663.

[6] *Whitehorn v The Queen* (1983) 152 CLR 657, at [7].

[7] *R v Liristis* (2004) 146 A Crim R 547, 564; citing *McCullough v The Queen* (1982) 6 A Crim R 274 at 285.

[8] *Kennedy v R* (1997) 94 A Crim R 341 at 353 (per Hunt CJ at CL).

[9] *Hassan Ibrahim v R* [2014] NSWCCA 160, at [82] (per Hamill J).

[10] *R v Smith* (2007) 179 A Crim R 453 (Qld CA), 463-4 (McMurdo P, Keane JA and Daubney J agreeing).

As an aside, perhaps care must be taken with those flourishes in light of the following real-world example:

> *An eloquent counsel, who proclaimed in a murder case: 'Justice demands that the defendants be held accountable for her inch-by-inch death, until a merciful God gave her peace', was quite deflated when he read in the transcript that he had said: '… until a merciful God finally gave herpes'.* (Beverley Tait, *Court in the Act* (1993), p92.)

(a) although the prosecution case should be presented in the best light, with appropriate firmness, that should be done with fairness and professional detachment, eschewing intemperate or inflammatory language;

(b) the case to be presented is that revealed by the evidence, with respect to which the personal opinions of the prosecutor are irrelevant and potentially distracting.[11]

9. Thus there has been for some time a particular duty upon a prosecutor not to convey their own opinions:

> *To my mind there is no question but that the Crown Prosecutor's address was inappropriate and breached the obligations which fell upon him. The introduction of his own personal thoughts were a gross breach of his duty to present the Crown case in an impartial and fair manner.* ***By imposing his own view on the jury there was a risk that they might believe that they were required to decide whether the prosecutor was correct in his personal views rather than assessing for themselves whether the evidence proved the Crown case.***[12]
>
> [**Emphasis** added]

10. In *Lyndon*, in conduct of a kind which will come up more than once in this paper, the prosecutor during his closing address had referred to his own experience with children giving evidence. For example, he commented that

> *"A great many people would have difficulty accepting a child's word over an adult saying that they are wrong. No[w] there is no evidence in the trial and as far as the Crown knows, no evidence at all that children are any more or less likely to tell lies on their oath in a court. [SG] and [TG] are nine. Some people would say well, kids fantasise. The Crown says to you that you know, you know, from your own childhood from your children or grandchildren, that kids know the difference between their fantasies and what happened to them in real life."*[13]

11. No objection was made by defence counsel to any part of the prosecutor's address. The applicant sought leave to appeal against his convictions on grounds that, *inter alia*, the closing address had improperly suggested an expertise in the Crown in determining the credibility of children.

12. The majority found that the prosecutor's opinions (and his attempt to call in aid his own experiences and the office of Crown Prosecutor) were an "irrelevant distraction",[14] though they were an "inept, unnecessary and inappropriate" attempt to make a submission which might otherwise have been ok.[15] Other comments in the closing were said to be an "irrelevant flourish and an example of ill-discipline".[16]

13. Notwithstanding those comments, the majority (Basten JA and Button J) found that there was no realistic possibility of prejudice arising from the prosecutor's closing address read

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[11] *Lyndon v R* [2014] NSWCCA 112 at [24].

[12] *R v KNP* (2006) 67 NSWLR 227, at [53].

[13] Ibid, at [40].

[14] Ibid, at [43].

[15] Ibid, at [44].

[16] Ibid, at [47].

as a whole and in the context of the trial.[17] RS Hulme AJ, on the other hand, called the conduct "grossly improper" and disagreed that there was no "realistic possibility" of prejudice – but agreed, in the context of the trial, that there was not *actual* prejudice.

14. This duty of objectivity continues outside the courtroom, such that a prosecutor may not make public comment about a trial. In the well-known gang rape case of *MG*, the NSW CCA made the following comments about the (equally well-known) prosecutor, who had made public comments about the widely-reported trial:[18]

> *[53] …* ***Her obligations were clear. She was to refrain from publishing material concerning the appellant's trial, appeal or retrial.*** *The Court of Criminal Appeal had reminded her that she was not to comment to the media on any trial. Notwithstanding that reminder she spoke out on an occasion when she must have realised that there was a real possibility that she would be reported.*
>
> *[54] The Bar Rules and Prosecution Guidelines embody the obligations of a prosecutor which have evolved over time. Although given statutory force they have been developed from practices sanctioned by the courts and have been designed to ensure that an accused person receives a fair trial. The overriding principle is that a prosecutor has a duty to act fairly.* ***Any breach of the Rules or Guidelines by a prosecutor, particularly when the trial process is not complete, may bring into question the integrity of a trial prosecuted by that prosecutor.***[19]
>
> [**Emphasis** added]

15. Most recently (or in an upcoming development, or a *potential* development, depending on the State or Territory you are in), this requirement is now enshrined in a professional conduct and practice rule. As part of the Legal Profession Uniform Law (sometimes known as the nationalisation of the legal profession). NSW and Victoria are currently the only two jurisdictions participating in the so-called "national" scheme, but I understand Queensland have adopted the conduct rules. In NSW at least, the formalising of this concept into a rule (which means that a breach could amount to unsatisfactory professional conduct) is a new development:

> *A solicitor must not publish or take steps towards the publication of any material concerning current proceedings which may prejudice a fair trial or the administration of justice.*[20]

16. Following *MG*, it seems unlikely that many people employed by the Crown in its many forms (and jurisdictions) have been making comment to the media in a prejudicial way, in NSW or anywhere else in the country. But it is interesting to muse on the relevance of comments made by police, typically in the very initial stages of an investigation. For a solicitor it is now considered to be a matter of professional ethics – a duty to one's own profession – not to harm a prosecution by making comment. There are of course other

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[17] Ibid, at [51].

[18] The actual text of the offending speech can be read at http://www.smh.com.au/news/national/margaret-cunneens-lecture/2005/09/23/1126982234942.html (as at 15 March 2015).

[19] *R v MG* (2007) 69 NSWLR 20.

[20] New South Wales Professional Conduct and Practice Rules 2013 (Solicitors' Rules), Rule 28.1; Legal Profession (Australian Solicitors Conduct Rules) Notice 2012 (Qld) Rule 28.1. This rule is part of the *Australian Solicitors' Conduct Rules* (2011) and will presumably be adopted in due course by Victoria.

rules which govern unfairly prejudicial publicity around a trial, but it is a cute example of the difference between a profession, properly so-called, and other vocations.

Disclosure

17. Disclosure would seem to be the most well-known of all the duties of the Crown. It receives attention in appellate jurisdictions (and in CPD papers) with monotonous regularity. Taking only NSW as an example recent cases where it was raised, in one form or another, include:

    R v Gittany (No 3) [2013] NSWSC 1670 (McCallum J)

    Wood v R [2012] NSWCCA 21

    Gilham v R [2012] NSWCCA 13

    Regina v Richard Lipton [2011] NSWCCA 247

18. It is also (theoretically, at least) chronologically the first obligation which falls upon a prosecutor, before any questions about witnesses or inappropriate closings or cross examinations can arise.

19. Before we turn to recent developments, the jumping-off point for much of the recent authority tends to be the West Australian decision of *Mallard v The Queen*[21] – particularly at [17], where it adopts *Grey v R* (2001) 184 ALR 593.

20. Andrew Mallard was convicted of murder, following at trial at which an apparent confession had formed the central basis of the prosecution case. After eight years in prison and several unsuccessful appeals against conviction, a petition for mercy was referred to the Western Australian Court of Criminal Appeal. It rejected the petition, which decision was appealed to the High Court. In the HCA, it was determined that the CCA erred in the way it set the bounds of its jurisdiction when determining the reference, but rather than referring the matter back to the court below, the HCA dealt with the petition itself. In the course of determining the reference, a large body of evidence which had not been disclosed came to light, including:

    - The results of an experiment where the wrench that the accused "confessed" to using was taken to the head of a pig (presumably dead – the judgment doesn't say), with results that indicated it could not have been the weapon;
    - Another experiment, deleted from an expert report at the request of police, which tended to show that the accused's clothes had not been immersed in salt-water, despite his "confession" to washing the blood off his clothing in a river.
    - A statement which tended to indicate he couldn't have been wearing a cap he had "confessed" to wearing at the time;
    - Sketches of the offender by a witness in which the offender had no moustache (the accused had a "large and clearly visible" moustache – evidence of the value of prominent facial hair), and the fact that references to these sketches were deleted from the illustrator's statement;
    - Words attributed to the accused in a police statement which were unlikely to have ever been used by him, but then deleted in later versions in order to avoid the discrepancy coming to light; and

[21] (2005) 224 CLR 125.

- An account of a better potential suspect for the crime who was seen at a time when the accused was detained in a lockup.

21. It was, in short, not a minor case of a police officer forgetting to serve a statement, and can be better put into the category of wholesale police misconduct.

22. *Grey*, which as indicated above was adopted in *Mallard*, involved similarly-significant misconduct, and there the plurality there said

> *It is one thing to say that the defence knew or could have found out about various aspects of unsavoury behaviour on the part of Mr Reynolds but an altogether different thing to say that it knew of the special relationship between Mr Reynolds and the police. And although it might also be possible to say that a lucky (if extremely risky) question of him might have elicited an answer which revealed the existence of the letter of comfort and perhaps even its contents,* ***there was no reason why the defence in a criminal trial should be obliged to fossick for information of this kind and to which it was entitled.*** *Nor can we accept, in any event, as the Court of Criminal Appeal held, that reasonable diligence before or during the trial would have unearthed the letter.*[22] [**Emphasis** added]

23. Finally before turning the recent developments, one helpful summary, adopted regularly in Australia,[23] appears in *R v Keane* (1994) 2 All ER 478, where the Court of Appeal of England and Wales (Criminal Division) held that, subject to the question of public interest, the prosecution must disclose documents which are material in the sense that they could be seen, on a sensible appraisal by the prosecution:

> *a) To be relevant or possibly relevant to an issue in the case;*
>
> *b) To raise or possibly raise a new issue the existence of which is not apparent from the prosecution case; or*
>
> *c) To hold out a real (as opposed to a fanciful) prospect of providing a lead on evidence going to either (a) or (b). This category is not limited to admissible evidence: R v Brown (Winston)[1998] AC 367 at 376–7.*

24. One very recent (March 2015) Victorian Court of Appeal decision considered the content of the duty to disclose. In *Kev v The Queen*, the Commonwealth DPP (appearing in Victoria) was said to have failed to disclose information about an apparently-unrelated offender whose conduct was said to have been "strikingly similar" to Kev's alleged conduct. The "connection" (if it be that) arose because, coincidentally, the same judge had considered both matters and so thought that the case of the earlier unrelated offender – involving as it did, very similar behaviour by *this* offender – might be a useful comparator on sentence. The allegation levelled against the CDPP was, in essence, that they should have seen the relationship between the two matters and so disclosed it so that the offender might have pointed to the earlier offender as having committed or been related to this offence. They did not – though that was "understandable", because it was

> *… sheer coincidence that the same judge presided over both trials, and it is significant that his Honour saw no connection between the two cases, save for using Ong [the earlier offender] as a comparator for sentencing purposes.*

25. The court, whilst finding that it might have been prudent, in a perfect world, to have drawn the earlier matter to this accused's attention, nevertheless rejected the ultimate

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[22] *Grey v R* (2001) 184 ALR 593, at [23] (per Gleeson CJ, Gummow and Callinan JJ).

[23] See eg *Regina v Richard Lipton* [2011] NSWCCA 247 at [77].

submission because "Any such material must be relevant, capable of giving rise to legally admissible evidence, and legitimately able to be invoked as exculpatory material."[24]

26. One might expect that, in an era where the funding of public services in the area of crime (other than the police) is under threat, the increasing workloads for individual prosecutors will lead to a situation where it is more likely that things that should "ideally" be disclosed will not be – not for any nefarious reason, but purely because the prosecutor has so much work that they did not turn their mind to it.

27. Potentially, other recent developments might indirectly assist. One example is the institution of "pre-trial disclosure" in some jurisdictions[25], which (theoretically, at least) requires the parties to turn their minds to the real issues in dispute. It seems at least possible that the legislation may assist the parties to identify the most significant of any such oversights – though it may be accepted that these amendments are not without their own problems, both practically and in terms of erosion of traditional rights.

28. One other complicating feature which has received recent (May 2014) attention of the HCA, and which straddles the issue of disclosure and duty of fairness to the accused, is evidence which is obtained via the various commissions (whether they be crime commissions, corruption commissions or others).

29. In *Lee v The Queen* [2014] HCA 20 the appellants (both with the surname Lee) submitted that their joint trial on various drug and firearms offences miscarried as a result of the DPP's possession and possible use of evidence given by one of them under compulsion before the NSW Crime Commission. The legislation required that a non-publication order be made where publication might prejudice the fair trial of a person who may be charged with an offence, and that order was made. In spite of that non-publication order and the abrogation of the accused's right to self-incrimination (and without complaint from the appellants during the trial), the transcript was disclosed to the police, and then provided to the DPP.

30. The HCA unanimously held that the "… trial was altered in a fundamental respect by the prosecution having the appellants' evidence before the Commission in its possession."[26] Relevantly for present purposes, they went on to hold that

> *The prosecution has a specific role in our system of criminal justice, one which entails particular responsibilities. It is not to the point that the defence lawyers did not object or seek a stay of the proceedings. No forensic advantage could have been sought by the failure to do so. It is the prosecution which has the responsibility of ensuring its case is presented properly and with fairness to the accused. It is therefore more to the point that the prosecution's possession of the appellants' evidence before the Commission put at risk the prospect of a fair trial, which s13(9) sought to protect.* ***The prosecution should have enquired as to the circumstances in which the evidence came into its possession and alerted the trial judge to the situation, so that steps could be taken to ensure that the trial was not***

[24] *Kev v The Queen* [2015] VSCA 36, at [82] (per Weinberg and Santamaria JJA).

[25] Eg. In Victoria: *Criminal Procedure Act 2009* (Vic) Part 5.5 (Div 2), In NSW: *Criminal Procedure Act 1986* (NSW) Part 3 (Div 3).

[26] *Lee v The Queen* [2014] HCA 20, at [43] (per French CJ, Crennan, Kiefel, Bell and Keane JJ).

affected. *The trial judge could have ordered a temporary stay, while another prosecutor and other DPP personnel, not privy to the evidence, were engaged.*[27]

[**Emphasis added**, internal citations omitted]

31. There have been a number of legislative amendments in NSW which deal with aspects of this decision (and I understand further amendments are in train), but the fundamental point, for present purposes, is that it is not always perfectly straightforward for the "Crown", taken holistically (i.e. including the police, the DPP, and any commissions or inquiries), to seek and obtain all relevant information. As the last sentence from the above extract from *Lee* makes clear, the consequence of the fact that certain personnel had read the transcript was that they were required to cease acting in the matter, new staff had to be briefed, and it was necessary to hermetically seal those staff off from the evidence and people who had previously had the matter. But before they could know that they were indelibly prejudiced by the material, they first had to read it.

32. From a defence lawyer's perspective, it would presumably be apparent from instructions whether the accused has previously appeared and given compulsory evidence. What will be less clear is who from the prosecution has seen the information – bearing in mind that thorough and appropriate screening of the material may mean that some people have to look at the material in order to make the decision about its relevance. Sometimes it may be necessary to have a frank discussion with the Crown about who has seen the material and in what circumstances, and in some (hopefully rare) circumstances it may be necessary to involve the court in the question of whether any information has "leaked" to those ultimately with carriage of the substantive hearing or trial.

[27] Ibid, at [44] (per French CJ, Crennan, Kiefel, Bell and Keane JJ).

At hearings / trials

The calling of witnesses

33. Like rules around disclosure, the rules around the calling of witnesses are ostensibly well-settled but come up regularly in appellate decisions – sufficiently so that there have been recent developments worthy of a brief diversion here.

34. The most well-known exposition of the rules about which witnesses the Crown must call appears in *R v Apostilides*, in which the court (with some poetic licence) said that the duty is "…not only a lonely responsibility but also a heavy one", and set out a number of principles so pithy it would be a tragedy not to recite them in full:

> *1. The Crown Prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown.*
>
> *2. The trial judge may but is not obliged to question the prosecutor in order to discover the reasons which lead the prosecutor to decline to call a particular person. He is not called upon to adjudicate the sufficiency of those reasons.*
>
> *3. Whilst at the close of the Crown case the trial judge may properly invite the prosecutor to reconsider such a decision and to have regard to the implications as then appear to the judge at that stage of the proceedings, he cannot direct the prosecutor to call a particular witness.*
>
> *4. When charging the jury, the trial judge may make such comment as he then thinks to be appropriate with respect to the effect which the failure of the prosecutor to call a particular person as a witness would appear to have had on the course of the trial. No doubt that comment, if any, will be affected by such information as to the prosecutor's reasons for his decision as the prosecutor thinks it proper to divulge.*
>
> *5. Save in the most exceptional circumstances, the trial judge should not himself call a person to give evidence.*
>
> *6. A decision of the prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice.*[28]

35. In *Gilham*, the NSWCCA was faced with a scenario in which an initial Crown Prosecutor had determined that an expert witness was "plainly unreliable" in a first trial, and a subsequent prosecutor "uncritically adopted the approach of the first prosecutor" in a retrial.[29] The court there observed that

> ***The* Apostilides *principles are not the rules of a game. They are rules designed as a protection against unfairness or the abuse of prosecutorial power*** *(see* R v Gibson

[28] *R v Apostilides* (1984) 154 CLR 563, 575 (per Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ). It should be observed that it would have been more pleasing, given the name of the case, if there had been 12 principles.

[29] *Gilham v R* [2012] NSWCCA 131, [394].

[2002] NSWCCA 401 (Sully J at [49], Wood CJ and Howie J agreeing)), quoting Randall v The Queen *[2002] 1 WLR 2237 at 2243).*[30]

[**Emphasis** added]

36. The court in *Gilham* went on to observe that, at least in Uniform Evidence Act jurisdictions (with apologies to those from other States), cross examination of an unfavourable witness is not limited to circumstances where the unfavourable evidence is unexpected – in other words, the Crown may call a witness with the expectation that they will apply under s38 of the *Evidence Act 1995* to cross examine them.[31]

37. One recent (July 2014) case from Western Australia seems to suggest that it will be sufficient reason for the prosecution to decline to call a witness – notwithstanding there is a suggestion that witness might be criminally involved – if the witness has not provided a statement and has not co-operated with the prosecution.[32] But, as *Apostilides* made clear, the question must be seen in light of the particular trial, taken as a whole.

38. One question which is central is the relevance of the evidence which the witness could give, and what effect it would have on the case for each side. In *Mahmood v Western Australia*, Hayne J seemed to extend the duty for a prosecutor to call witnesses so far as to include the duty to lead evidence of all the inculpatory (sic) admissions an accused might have made:

> *In general, the prosecution should call "[a]ll available witnesses ... whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based". **If an accused has made inculpatory statements that are admissible in evidence, the prosecution should ordinarily lead evidence of all of those statements.** It is necessary, of course, to take account of statutory provisions governing admissibility of out‑of‑court admissions that are not recorded. But subject to that important consideration, it is not open to the prosecution to pick and choose between those statements, whether according to what is forensically convenient or on some other basis. And in leading evidence of out‑of‑court assertions which the prosecution alleges are inculpatory, the prosecution must take the out‑of‑court assertion as a whole; the prosecution "cannot select a fragment and say it bears out their case, and reject all the rest that makes against their case".*[33]
>
> [**Emphasis** added; Internal citations omitted]

39. But on this point, a recent (June 2014) Victorian case suggests a slightly different direction. In *Rich v The Queen* [2014] VSCA 126 is a lengthy decision of the Victorian Court of Appeal, but it bears particular interest because one of the members of the bench now finds himself on the High Court.

40. The court first considered the orthodox question of whether, in the context of the particular trial, the failure to call a particular witness had caused a miscarriage of justice.

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[30] Ibid, [404].

[31] Ibid, [406]-[409].

[32] *Wittensleger v The State of Western Australia* [2014] WASCA 20 at [95] to [99] (per Hall J, McLure P and Mazza JA agreeing).

[33] *Mahmood v Western Australia* (2008) 232 CLR 397.

It was, perhaps, wishful thinking on behalf of the appellant to suggest that the prosecutor was under a "duty" to call the witness, given that "the prosecutor did not merely have a suspicion that [the witness] might be unreliable. [The witness] had perjured himself in the same proceedings."[34]

41. But the decision is interesting for what the court considered next, which seems to suggest that, in spite of what is said above in *Mahmood*, it was relevant that the evidence might have actually *harmed* the accused's case:

> *… in reality the applicant was to some extent advantaged by the failure to call Dickson. In* Diehm v Director of Public Prosecutions (Nauru)*[164] where the prosecutor had not called a witness whom the High Court described as material, because he was drunk at the time he had been intended to give evidence, it was held that there had been no miscarriage of justice. In reaching that conclusion the High Court took account of aspects of his earlier statement that would have strengthened the prosecution case. In this case, if Dickson had been called as a witness he was likely to have testified about the conversation between the applicant and Ryan. If the jury had accepted that evidence it would very probably have reinforced their conclusion as to the applicant's involvement in the armed robbery.*[35]

42. One final observation should be made by way of recent development in the area of which witnesses the Crown must call. As part of the move towards so-called "National" professional conduct and practice rules, in NSW both the solicitor's rules and the barrister's rules were amended (the position in some other States accords with the below solicitors' rule). One of the amendments related to the calling of witnesses, although the wording is slightly different in each case:

BARRISTERS' RULES

> *88. A prosecutor must call as part of the prosecution's case all witnesses:*
>
> *(a) whose testimony is admissible and necessary for the presentation of all of the relevant circumstances; or*
>
> *(b) whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;*
>
> *(c) unless:*
>
> > *(i) the opponent consents to the prosecutor not calling a particular witness;*
> >
> > *(ii) the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused;*
> >
> > *(iii) the only matter with respect to which the particular witness can give admissible evidence goes to establishing a particular point already adequately established by another witness or other witnesses;*
> >
> > *(iv) the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable; or*
> >
> > ***(v) the prosecutor, having the responsibility of ensuring that the prosecution case is presented properly and presented with fairness to the accused, believes on reasonable grounds that the interests of justice would be harmed if the witness was called as part of the prosecution case.***

[34] *Rich v The Queen* [2014] VSCA 126, at [350] (per Nettle, Neave, and Osborn JJA).

[35] Ibid, at [351]. The internal citation is to *Diehm v Director of Public Prosecutions (Nauru)* (2013) 303 ALR 42.

88A. The prosecutor must inform the opponent as soon as practicable of the identity of any witness whom the prosecutor intends not to call on any ground within rule 88(c) (ii), (iii), (iv) or (v), together with the grounds on which the prosecutor has reached that decision, unless the interests of justice would be harmed if such grounds were revealed to the opponent.[36]

*(additions from pre-existing rules in **bold text**)*

SOLICITORS' RULES

29.7 A prosecutor must call as part of the prosecution's case all witnesses:

29.7.1 whose testimony is admissible and necessary for the presentation of all of the relevant circumstance;

29.7.2 whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;

UNLESS:

(i) the opponent consents to the prosecutor not calling a particular witness;

(ii) the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused;

(iii) the only matter with respect to which the particular witness can give admissible evidence goes to establishing a particular point already adequately established by another witness or other witnesses; or

(iv) the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable, provided that the prosecutor must inform the opponent as soon as practicable of the identity of any witness whom the prosecutor intends not to call on any ground within (ii), (iii) or (iv) together with the grounds on which the prosecutor has reached that decision.

43. The solicitor's rule as extracted above is the standard format which is adopted in Queensland and will, I understand, be adopted in Victoria. But the particular formulation in the NSW *Barristers' Rules* does not, to my knowledge, appear anywhere else. Whether the differences between those two formulations (which were, previously, identical between the solicitors' and barristers' rules) are significant is a matter of opinion, but on one view the absence of any reference to the "interests of justice" in the solicitors' rule makes it less stringent.

Closing addresses

44. The closing address is said to be particularly prone to conduct inconsistent with the duties of a prosecutor.[37] Whether the frequent appearance in appeal decisions is because of the particular frailties of juries, or because everybody is just worn down by the end of a trial and didn't notice at the time that the prosecutor had said outrageous

[36] *New South Wales Barristers' Rules.*

[37] *Hassan Ibrahim v R* [2014] NSWCCA 160 at [78].

things is a matter of opinion. One recent (August 2014) NSW case gives as examples the following comments in closing which have been held to be improper or inappropriate:

> *(i) Comments inserting the personal opinions of the prosecutor into the proceedings.*
>
> *(ii) Intemperate or inflammatory comments tending to arouse prejudice and emotion.*
>
> *(iii) Submissions based upon material not established by the evidence.*
>
> *(iv) Comments which belittle or ridicule the defence case.*
>
> *(v) Attempts to impugn a witness in circumstances where the witness was not afforded the opportunity of responding to an attack upon their credit.*
>
> *(vi) Comments which have a tendency to invert the onus of proof or water down the standard of proof.*
>
> *The first five of those categories were referred to in the judgment of the Court (McClellan CJ at CL, Johnson and Latham JJ) in Livermore v R at [31]. The sixth was discussed in Wood v R and is the kind of inappropriate comment that was made in this case. Inappropriate comments are not limited to those six categories.*[38]

45. Some examples of misconduct are more straightforward than others. *Wood v R* [2012] NSWCCA 21 was a bracing example of a close examination by an appellate court of the conduct of a particular Crown Prosecutor – indeed an entire ground of appeal (which was upheld), and some 82 paragraphs of the judgment, were dedicated to the conduct of the (Senior) Crown Prosecutor in that case. Amongst other things, close focus was placed on the fact that the Crown prosecutor had posed 50 questions which, essentially, he said the accused had to answer (or at least were of particular relevance to the jury's consideration).[39] This, plainly, had a tendency to invert the onus of proof.

46. But the context of the overall trial is very important. A recent (September 2014) Victorian case dealt with language which was said (albeit by a judge in the minority on this point) to have been "intemperate and inappropriate for a prosecutor", as well as "florid, in the sense that it was replete with extravagant language" and "… calculated to be inflammatory and emotive. It was designed to arouse a strong emotional response in the jury which was highly prejudicial to the appellant."[40] In closing to the jury in relation to the alleged sexual assault of a 13 year old by the accused, her father, the prosecutor had said asked (presumably rhetorically):

> *What sort of a monster, what sort of a monster is [the complainant] that she could make up these sort of things about her own father? You've got to be joking. That's no lie.*
>
> And
>
> *Remember, this is her own father. What sort of person could have the sophistication and the malevolence to make that up? It happened, as sure as you're sitting there. And she underlines it – if this is all a lie, she underlines it with her Christian beliefs – remember that?*[41]

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[38] Ibid, at [80].

[39] The 50 questions are enumerated at *Wood v R* [2012] NSWCCA 21, [607].

[40] *Woods (a Pseudonym) v The Queen* [2014] VSCA 233, at [97] (per Priest JA).

[41] Ibid, at [58] to [59].

47. In some respects, these comments from the prosecutor needed to be viewed in the context of what had occurred in that trial. The Crown Prosecutor had gleaned from the cross examination of the complainant what was to be in the closing for the accused. One judge (in the majority) observed that:

> *… in the reality of life, what defence counsel put to the complainant and urged before the jury as a view they should accept, was blunt and harsh to a 13 year old undergoing the painful experience of recounting prolonged sexual abuse by her father. Counsel did not say that she was a monster or malevolent or malicious but the effect was the same, and implicit. It cannot be said otherwise. Furthermore, to say that no criticism was made of the complainant as a person, and yet to ask the jury to accept that the allegations were a lie made up for the purpose of getting out of the house, was disingenuous. For the submission — that is, the defence — went to inherent character.*[42]

48. In the conclusion, Weinberg JA and Hansen JA each formed the view that the conduct of the prosecutor was saved by the repeated references by the Crown Prosecutor and the trial judge to the fact that the onus was on the Crown. However, all judges had a concern with comments by the prosecutor to following effect:

> *… Now, despite what [defence counsel] might say to you about the unlikelihood of these offences having occurred in this particular environment, I'll say to you, there's nothing particularly unusual about these circumstances. If you came to these courts time and time again, you would see cases just like this one.*
>
> *And*
>
> *I'm harping on about this, but it's not unusual for sex crimes to be committed in private and in close quarters to others, particularly when the parties are known to each other and when there is a true power imbalance, such as there is here. Such as a father or a stepfather and a young girl. It's just not uncommon at all, and your common sense will tell you that.*[43]

49. This, all three judges held in separate judgments, amounted to the prosecutor giving evidence from the bar table – though the majority held that it did not cause a miscarriage of justice. It would appear that, as well as a number of directions by the trial judge, the trial advocate's failure to make application for a discharge of the jury was important to the Court of Appeal's decision.[44] Indeed, this is not the only recent decision which draws attention to the fact that it might be necessary to raise a prosecutor's conduct during the course of the trial – and that at the very least, a failure to do so might be taken as an indication that the conduct did not loom large in the course of the trial, and so tell against the granting of an appeal.[45]

50. As has become apparent above, alleged breaches of duties often require a party to raise the question of the (mis)conduct during the trial. How one raises it is of course a matter of personal style for the individual advocate, and the particular circumstances. It should be said, however, that inflammatory personal attacks on the prosecutor's conduct are not, at least in my view, likely to achieve the desired result (meaning a cessation of the

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[42] Ibid, at [69] (per Hansen JA).

[43] Ibid, at [74].

[44] Ibid, at [84] (per Hansen JA), and at [8] (per Weinberg JA).

[45] Eg *Lyndon v R* [2014] NSWCCA 112 at [75]-[77] per RS Hulme AJ.

offending conduct). As we have seen above, allegations relating to some aspects of a prosecutor's conduct may amount to allegations of professional misconduct (or unsatisfactory professional conduct), and professional collegiality suggests that one should be slow to make such an allegation without solid foundation.

On sentence

51. A prosecutor's duties are no less during sentencing, though they can (mercifully) be more pithily summarised.

52. Helpfully, as recently as March 2015 the High Court has done just that:

> … ***the prosecutor is under a duty to assist the court to avoid appealable error.*** *Where the sentencing judge indicates the form of proposed sentencing order and the prosecutor considers that such a penalty would be manifestly inadequate, the prosecutor discharges his or her duty to the court by so submitting. The failure to do so is a material consideration in the exercise by the Court of Criminal Appeal of the residual discretion. The weight of that consideration will depend upon all of the circumstances. A prosecution concession that a non-custodial sentence is an available disposition is a powerful consideration weighing against intervening to impose a sentence of imprisonment on appeal.* [46]
>
> [**Emphasis** added; Internal citations omitted]

53. The comments about the consequences of a Crown concession should be placed in context. CMB was sentenced for a series of sexual offences against his daughter and sent to a treatment program (since terminated) called Cedar Cottage at which he was encouraged to make further disclosures to demonstrate a commitment to change. He made admissions to other offending which his daughter didn't remember, was charged for the further offences, and pleaded guilty to them. The District Court deferred imposing a sentence on the new matters so that CMB could finish at Cedar Cottage; the Crown's representative in these later proceedings did not object to that course.[47]

54. The DPP publicly announced that he wouldn't appeal given the "unique history" of the matter, but for possibly the first time since the creation of the Office of the DPP in 1986 the NSW Attorney General separately announced that he would exercise his own right of appeal – and the CCA agreed with him.

55. In *Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2 the High Court took the axe to a Victorian practice on sentence. That practice had arisen out of earlier Victorian authority[48] and led to prosecutors in Victoria submitting about "ranges" of penalties (I am not aware of the prevalence of the practice in other States, other than that in NSW it was never common and would probably have been considered prohibited).

56. In striking down the practice, the HCA said:

> *The prosecution's statement of what are the bounds of the available range of sentences is a statement of opinion. Its expression advances no proposition of law or fact which a sentencing judge may properly take into account in finding the relevant facts, deciding the applicable principles of law or applying those principles to the facts to yield the sentence to be*

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[46] *CMB v Attorney General for New South Wales* [2015] HCA 9, [64] (per Kiefel, Bell and Keane JJ).

[47] *R v CMB* [2014] NSWCCA 5, [78] – note that this was the decision which was successfully appealed in *CMB v Attorney General for New South Wales* [2015] HCA 9.

[48] *R v MacNeil-Brown* (2008) 20 VR 677.

imposed. That being so, the prosecution is not required, and should not be permitted, to make such a statement of bounds to a sentencing judge.[49]

57. Later the plurality said

> *… unless the sentencing judge gives some preliminary indication of the sentence which he or she intends to impose, there can be no occasion for the prosecution to anticipate possible error and make some correcting submission. Even in a case where the judge does give some preliminary indication of the proposed sentence,* ***the role and duty of the prosecution remains the duty … to draw to the attention of the judge what are submitted to be the facts that should be found, the relevant principles that should be applied and what has been done in other (more or less) comparable cases. It is neither the role nor the duty of the prosecution to proffer some statement of the specific result which counsel then appearing for the prosecution (or the Director of Public Prosecutions or the Office of Public Prosecutions) considers should be reached or a statement of the bounds within which that result should fall****.*[50]
>
> [**Emphasis** added; Internal citations omitted]

58. In *R v Loveridge*, the NSWCCA considered *Barbaro* and said that it "narrow[ed] the long-standing ethical rule which permitted a prosecutor to inform the court of an appropriate range of penalty, including a period of imprisonment, by reference to relevant decisions".[51]

59. One observation that needs to be made, however, is that *CMB* and *Barbaro*, despite being only one year apart, highlight a tension for the role of the prosecutor on sentence. On the one hand the HCA says in *CMB* that the prosecutor is under a duty to submit that a particular sentence indicated by a sentencing court is manifestly inadequate (i.e. to prevent falling into appealable error), and in *Barbaro* it says it is not the prosecutor's role to set forth a particular result.

60. It is true that these two positions are reconcilable, but that is not necessarily easily so. Take a common example in NSW. For a suspended sentence to be available to the court, the sentence of imprisonment to be imposed must be two years or less.[52] If a judicial officer asks a prosecutor whether a suspended sentence would be an appealable error, by necessity any submission that a suspended sentence would be an appealable error amounts to a submission that a sentence of a particular magnitude (more than two years) ought to be imposed.

61. It might be said – perhaps controversially – that the above approaches are indicative of a High Court which has not recently done an outstanding job in the area of criminal law. This says nothing about the correctness of the outcomes, but there has been a tendency to make monumental changes whilst providing only limited guidance about the consequences – with a particular example being the decision relevant to sentencing in NSW of *Muldrock v R* (2011) 244 CLR 120. This has meant that intermediate appellate

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[49] *Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2, [7] (per French CJ, Hayne, Kiefel And Bell JJ).

[50] Ibid, [39].

[51] *R v Loveridge* [2014] NSWCCA 120, [223] (per Bathurst CJ, Johnson and RA Hulme JJ).

[52] *Crimes (Sentencing Procedure) Act 1999* (NSW) s12(1).

courts have been forced to interpret vague decisions, leading to uncertainty, often for years. To wit: *CMB* has been remitted for the NSWCCA to interpret the consequences of the quite short pair of judgments.

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