The Prosecutor's Duty and the Prosecutor's Conscience

The Hon Justice Robert Beech-Jones*

It's been a good month for prosecutors. One of you became Prime Minister of the United Kingdom[1] and another of you became the Democratic Party's presumptive nominee for President of the United States.[2] I suppose it's just another reason to be nice to you.

In 1994, New South Wales became the second last Australian jurisdiction to abolish the right of an accused to make a statement to the jury from the dock without being subject to cross examination.[3] The Australian Capital Territory became the last jurisdiction to abolish that right the following year. The origins of that practice are a story in and of itself. Until 1702 in the United Kingdom, neither the accused nor any defence witness could give evidence on oath. After that time, defence witnesses could testify on oath, but the accused was still disqualified from doing so lest they imperil their immortal soul by committing perjury in their own defence. So instead of testifying on oath, they spoke unsworn.[4]

The restrictions on the accused testifying on oath were removed in the United Kingdom in 1898.[5] Like in sport, we were ahead of the english.[6] In New South Wales the result

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* Justice of the High Court of Australia. This is an edited version of a speech delivered to the Australian Association of Crown Prosecutors Conference 2024 on 8 August 2024.

[1] The Hon Sir Keir Starmer KCB KC MP.

[2] Vice President Kamala Harris.

[3] See *Crimes Legislation (Unsworn Evidence) Amendment Act 1994* (NSW). The right of an accused to make an unsworn statement was abolished in Queensland by s 27 of *The Criminal Code and the Justices Act Amendment Act 1975* (Qld); in Western Australia by s 2 of the *Evidence Act Amendment Act (No 2)1976* (WA); in the Northern Territory by s 360 of the *Criminal Code Act 1983* (NT); in South Australia by s 3 of the *Evidence Act Amendment Act 1985* (SA); in Tasmania by the *Evidence Amendment (Unsworn Statements) Act 1993* (Tas); in Victoria by the *Evidence (Unsworn Evidence) Act 1993* (Vic)*;* and in the Australian Capital Territory with the adoption of the *Evidence Act 1995* (Cth).

[4] John Langbein, *The Origins of Adversary Criminal Trial* (2005) at 52.

[5] *Criminal Evidence Act 1898* (UK), 61 & 62 Vict, c 36; John Langbein, *The Origins of Adversary Criminal Trial* (2005) at 52.

[6] The restrictions were removed in South Australia and the Northern Territory by s 1 of the *The Accused Persons Evidence Act 1882* (SA) which applied in the Northern Territory until the *Evidence Ordinance 1939* (NT); in Tasmania by 52 Vic No 7 (1888) (Tas) (for summary offences) and s 85(1) *Evidence Act 1910* (Tas) (for all offences); in New South Wales by s 6 of the *Criminal Law and Evidence Amendment Act 1891* (NSW) (for indictable offences), which applied in the ACT until the *Evidence Ordinance 1971* (ACT), s 66(1) and by s 407 of the *Crimes Act 1900* (NSW) (for all offences)*;* in Victoria by s 34 of the *Crimes Act 1891* (Vic); in Queensland by s 2 of the *Criminal Law Amendment Act 1892* (Qld) (for summary offences) and by s 8 of the *Evidence Act 1977* (Qld) (for all offences); and in Western Australia by the *Criminal Evidence Act* 1896 (WA).

was that the accused was left with the options of giving evidence, making a statement from the dock, sometimes doing both,[7] or staying silent.

The right to make a dock statement was wrongly denied to a future premier of New South Wales who later secured the passage of the *Criminal Appeal Act 1912* (NSW).[8] That right was famously exercised by a sitting High Court Justice, as well as countless accused persons whose identity has been lost over time. The exercise of the right to make a "dockie" by one of those accused persons was the source of one of the best legal anecdotes I have ever heard. It was masterfully delivered to a Bench and Bar dinner by the Honourable Justice Michael McHugh KC AC. With his permission and using my very unreliable memory, I will attempt to do the anecdote justice.

By the 1960s New South Wales was vying for the title of the verballing capital of the common law world. The practice had found its way to Newcastle, which was the domain of one Richard Seeley - a very experienced and accomplished breaker, enterer and criminal defendant.

In various trials before Judge Cross and a jury in the District Court in Newcastle, Seeley used his right to make a dock statement to craft what became known as the "reverse verbal".[9] Two or more detectives invariably gave evidence that Seeley had spontaneously confessed. In his dock statement, Seeley responded by telling the jury that he attended the police station to give his version of events, but they weren't interested in hearing from him.

Seeley then told the jury that when he went to the police station, he said to the detectives "don't you want to hear what I have to say", but they said "no … we don't care about your version of events, we are going to verbal you". Seeley said he asked the detectives "what's a verbal?". According to Seeley, the detectives then replied "well, a verbal is where we lie to the jury and say you confessed". "That's terrible" Seeley supposedly replied, "won't the court protect me?". "No" the detectives said, "we have Judge Cross in our pocket … but your best chance is with the jury, they're always

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[7] *R v Smith* (1896) 17 NSWR 104.
[8] William Arthur Holman; *R v Smith* (1896) 17 NSWR 104; H V Evatt, *Australian Labour Leader: The Story of W A Holman and the Labour Movement*, 3rd ed (1945); The Hon Justice Peter McClellan, 'A Matter of Fact: The Origins of the Court of Criminal Appeal' (Centenary of the Court of Criminal Appeal Dinner, 3 December 2012).
[9] Another version of Seeley's reverse verbal is set out in New South Wales Bar Association, *Bar News* (Spring 1986) at 10.

independent and sometimes they see through us despite what Judge Cross tries to do".

By now, Judge Cross was about to explode and the detectives were biting their lips. As I recall Justice McHugh telling it, Seeley used the reverse verbal to pull off a series of acquittals in Newcastle before chancing his arm in Sydney. However, once he got there, he ran into the armed hold up squad who were a lot tougher than the Newcastle detectives and Seeley's luck ran out.

The story is a good one in its own right, but it also illustrates that persistent abuses of power in the law will provoke a response. Seeley eventually wandered off the stage but of course Justice McHugh did not. He often quoted Oliver Wendell Holmes in his judgments, especially Holmes' most famous saying that "the life of the law has not been logic: it has been experience".[10] To paraphrase that quote, by the late 1980s, the experience of the law, which was later put beyond any doubt by the Wood Royal Commission[11], was that the practice of verballing was widespread and was eating away at the foundations of the criminal justice system. In *McKinney v The Queen*,[12] Justice McHugh joined with Chief Justice Mason, Justices Deane and Gaudron to hold that where police confessions are not reliably corroborated, the trial judge should warn the jury of the danger of convicting on the basis of that evidence alone.

McKinney was one of a series of developments, the others being various legislative changes, inquiries and royal commissions, which minimised the role, if any, played by uncorroborated police admissions in most criminal trials.

Society, especially the police force, are the better off for those changes. As many of you will remember, there was a time when the evidence of the investigating detective was the most important and the most contentious in many criminal trials. At least in my experience, these days the investigating detective has largely moved from being an actor on centre stage at the trial to more of a floor manager; arranging witnesses and exhibits, and providing a convenient means of adducing largely uncontested evidence.

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[10] Oliver Wendel Holmes Jnr, *The Common Law* (1881) at 5. See *Peters v Attorney-General (NSW)* (1988) 16 NSWLR 24 at 39; *Secretary, Department of Health & Community Services v JWB and SMB* (1992) 175 CLR 218 at 319; *CSR Ltd v Eddy* (2005) 226 CLR 1 at 39 [91].

[11] The Royal Commission into the New South Wales Police Service

[12] (1990) 171 CLR 468.

Well, what does this have to do with you?

If we can queue the violin, in *The Queen v Apostilides*, the High Court described your role as a "lonely" one.[13] You all don't look lonely or for that matter sad but that description is nevertheless accurate in many ways.

I don't need to tell you that your primary function is not to win and its certainly not to win at all costs. The duties of fairness that govern the prosecuting function are onerous and they cut across the competitive instincts that attract so many of us into becoming barristers or advocates. Equally, and no matter how often you might be gratuitously reminded of those duties by your opponents, it is not a prosecutor's duty to simply give up because a hard case just got harder.

Much of the prosecutor's work takes place in public and as such is subject to scrutiny. We can all recognise a case that has been put in court firmly and fairly and we can readily compare it with one that does not answer either description. But the "lonely" component of the prosecutor's role spoken of in *Apostilides* is the tough decisions that are made in private and which are necessary to maintain the fairness of a prosecution. No tabloid newspaper will celebrate you for those decisions and you won't get silk for making them. Prosecutors often have to choose secret honour over public adulation or professional recognition.

However, to pick up what happened with verbals and Oliver Wendell Holmes, the logic of leaving many of the requirements of a fair trial solely to a prosecutor's conscience has, in some areas, given way because of the experience of what happens when that approach has been found wanting. On some topics, the legislature and the courts have had their say. To illustrate the varying states of play on the different aspects of a prosecutor's function and the extent to which they are left to the prosecutor to exercise their own conscience, I will touch upon three aspects of the prosecutor's functions and duties: the duty of disclosure; the exercise of the prosecutor's power to make pre-emptory challenges to jurors; and decisions to prosecute.

The duty of disclosure

[13] (1984) 154 CLR 563 at 575.

The topic of the prosecutor's or the prosecution's duty of disclosure is a large one and I will touch on it only lightly. The duty has been recognised by the High Court.[14] With reference to various cases, Justices Edelman and Steward in *Edwards v The Queen* described the scope of the duty as requiring "disclosure of all material that, on a sensible appraisal by the prosecution: (i) is relevant or possibly relevant to an issue in the case; (ii) raises or possibly raises a new issue that was not apparent from the prosecution case; or (iii) holds out a real (as opposed to fanciful) prospect of providing a lead in relation to evidence concerning (i) or (ii)".[15] As the facts and outcome in *Edwards* illustrate, there is scope for debate about what the duty, or its statutory analogue, requires in a particular context.

However, subject to one very big proviso, the common law or ethical "duty" of disclosure has not been treated as an enforceable duty owed to the accused or anyone else to provide material. Instead, similar to the duty of the Crown Prosecutor to call all material witnesses,[16] the performance of the duty has been considered a matter for the prosecution[17] and the court will not review or enforce the duty outside the powers the court exercises to control its own processes, such as by granting a stay or setting aside a conviction if a miscarriage of justice results from a failure to comply with the duty.[18]

The very big proviso is the intervention of statute. In *Edwards*, my colleagues Justices Edelman and Steward described the position concerning the prosecution's duty of disclosure in New South Wales prior to 2001 as being "governed by a patchwork of common law obligations, prosecution guidelines, and statutory and ethical rules".[19] The significance of 2001 is that this was when legislation was passed giving effect to disclosure requirements on the prosecution,[20] the impacts of which are still being worked through.[21] There were later legislative changes to extend that obligation to the

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[14] *Grey v The Queen* (2001) 75 ALJR 1708 at 1712 [18] per Gleeson CJ, Gummow and Callinan JJ, 1718 [50], 1721 [63] per Kirby J; 184 ALR 593 at 598, 607, 611; *Mallard v The Queen* (2005) 224 CLR 125 at 133 [17] per Gummow, Hayne, Callinan and Heydon JJ, 150-151 [64]–[67] per Kirby J.
[15] (2021) 273 CLR 585 at 600 [48], citing *R v Keane* [1994] 1 WLR 746 at 752; [1994] 2 All ER 478 at 484; *R v Brown (Winston)* [1998] AC 367 at 376-377; see also *R v Reardon [No 2] (*2004) 60 NSWLR 454 at 468 [48]; *R v Spiteri* (2004) 61 NSWLR 369 at 373-374 [17]-[20]; *R v Livingstone* (2004) 150 A Crim R 117 at 126-127 [44]-[45]; *R v Lipton* (2011) 82 NSWLR 123 at 145-147 [77].
[16] See *The Queen v Apostilides* (1984) 154 CLR 563.
[17] See *Marwan v Director of Public Prosecutions* (2019) 278 A Crim R 592 at 597 [27]; *R v Petroulias (No 22)* (2007) 176 A Crim R 309 at 325 [64]; *Mallard v The Queen* (2005) 224 CLR 125 at 155-156 [81]-[84] per Kirby J.
[18] *Edwards v The Queen* (2021) 273 CLR 585 at 594 [24].
[19] *Edwards*(2021) 273 CLR 585 at 600-601 [48].
[20] *Criminal Procedure Act 1986* (NSW), s 141, 142.
[21] See *Edwards* (2021) 273 CLR 585; see also *R v Dickson; R v Issakidis (No 12)* [2014] NSWSC 1595.

police.[22] Similar legislative developments have occurred in most other Australian jurisdictions.[23]

These statutory provisions involve a recognition by the legislatures that it was not good enough to leave performance of the duty of disclosure solely in the hands of the prosecution and to try and deal with concerns about non-compliance with the duty only by a motion seeking a stay or an appeal in the event of a conviction. The terrible circumstances of *Mallard v The Queen*[24] highlight the difficulty with that approach.

However, one area where the prosecutor's judgment and their conscience still has a large role to play is in the maintenance of claims of legal professional privilege and the like over material that might otherwise satisfy the test for disclosure. In my previous position I joined in a decision of the New South Wales Court of Criminal Appeal that held that a waiver of privilege does not arise per se from the continuation of a prosecution without the production to the defence of privileged material that is caught by the duty of disclosure.[25] On that approach, if privilege is maintained and upheld then the question of whether or not a stay should be granted would arise but must be decided without direct evidence of the contents of the privileged communication.

The most common practical example of the interaction between the duty of disclosure and the existence of privilege that I have seen is where a witness makes a material disclosure to the Crown Prosecutor or a solicitor in conference in preparation for or during the trial. In the trials I presided over, invariably the Crown voluntarily waived privilege and handed over notes of the conference. However, that was all dependent on an assessment by the prosecutor that what had been disclosed was material and that privilege should be waived. If that had not happened the accused and the court may have not been any the wiser about what had occurred.

However, these issues are not confined to circumstances where there is a potential claim for legal professional privilege. It can also include a claim of public interest immunity. In *JB v The Queen*[26] it was conceded that a conviction of a juvenile for murder could not stand in circumstances where it was not disclosed that the support

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[22] *Director of Public Prosecutions Act 1986* (NSW), s 15A.
[23] See, eg, *Criminal Procedure Act 1921* (SA), ss 123, 125; *Director of Public Prosecutions Act 1991* (SA), s 10A; *Director of Public Prosecutions Act 1984* (Qld), s 24C; *Criminal Procedure Act 2004* (WA), ss 61, 95; *Criminal Procedure Act 2009* (Vic), Pts 3.2, 4.4; *Legal Profession (Solicitors' Conduct) Rules 2020* (Tas), r 34 .
[24] (2005) 224 CLR 125.
[25] *Director of Public Prosecutions (Cth) v Kinghorn* (2020) 102 NSWLR 72 at 116 [172].
[26] [2015] NSWCCA 182 at [3].

person who encouraged the underage accused to make admissions was in fact a police informant.

Most issues of disclosure are resolved by erring in favour of providing the relevant material. However, whether to make and maintain a claim for legal professional privilege (or a claim for public interest immunity) over material that might meet the requirement for disclosure is a potent test for the prosecutor's conscience.

Pre-emptory challenges in jury selection

Each of the States and Territories has enacted legislation conferring rights of pre-emptory challenge on the accused and the Crown.[27] In Tasmania and Victoria the relevant statute refers to the Crown having the power to make a juror stand aside.[28] However I am reliably informed that those powers are not legally constrained.

Rights of pre-emptory challenge are unfettered and closely guarded. In *Johns v The Queen*[29] Chief Justice Barwick referred to the right of challenge especially pre-emptory challenge as: lying at the "very root of the jury system"; not requiring any justification by the accused for its exercise; and capable of being based on the accused's instinctive reaction. This was endorsed in *Katsuno v The Queen*.[30]

And it is not just a **denial** of the right of pre-emptive challenge that is protected. A mere **attempt** by a judge to influence the right of pre-emptory challenge may invalidate a conviction.[31] In *R v Peter*[32] multiple accused were charged with rape and during the empanelment process pre-emptory challenges were made by the accused, which resulted in the gender mix of the first six jurors being five males and one female. At that point the trial judge reminded the prosecution and Counsel for the accused that she had the power to discharge all the persons selected to serve as jurors if the challenges resulted in a jury composition that would appear to be unfair[33] and that her Honour "*would* consider a jury entirely comprised of men or almost entirely comprised of men to be a jury of a composition that may cause the trial to appear to be unfair".[34]

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[27] *Juries Act 1927* (SA), s 61(1); *Juries Act 1962* (NT), s 44(1); *Juries Act 1967* (ACT), s 34; *Jury Act 1977* (NSW), s 42(1); *Jury Act 1995* (Qld), s 42(3); *Criminal Procedure Act 2004* (WA), ss 104(3)-(4); Justice Kirby recounts the history of the Crown's right to challenge jurors in *Katsuno v The Queen* (1999) 199 CLR 40 at 75-77 [82]-[86].
[28] *Juries Act 2000* (Vic), ss 38-39; *Juries Act 2003* (Tas), ss 33-34.
[29] (1979) 141 CLR 409 at 418.
[30] (1999) 199 CLR 40 at 58 [28].
[31] *R v Cherry* (2005) 12 VR 122 at 125-126 [10].
[32] (2020) 6 QR 333.
[33] *Jury Act 1995* (Qld), s 48.
[34] *R v Peter* (2020) 6 QR 333 at 340 [4].

The accused were convicted but the convictions were set aside on appeal. The Court of Appeal of the Supreme Court of Queensland held that the trial judge's comments were capable of influencing the exercise of the accuseds' right of pre-emptory challenge[35] and that rendered the trial unfair,[36] resulting in a miscarriage of justice that was incapable of being saved by the proviso.[37] The Court of Appeal left open the question of whether the trial judge did have the power to discharge the whole jury as described, but expressly rejected the assumption that "a jury comprised of men or almost entirely comprised of men to be a jury of a composition that may cause the trial to appear to be unfair".[38]

Subject to statutory modification, the unfettered scope of the right of pre-emptory challenge that I have described applies equally to the Crown.[39] In *Katsuno* the sheriff provided the Chief Commissioner of the Victorian Police with a copy of the names of persons on the jury panel. This practice was held to be contrary to s 21 of the *Juries Act 1967* (Vic).[40] The Chief Commissioner used that information to ascertain whether any member of the jury panel had prior criminal convictions, albeit not convictions that would disqualify them from jury service. This information was in turn provided to the prosecutor who used it to exercise a pre-emptory challenge to one potential juror. The accused was convicted and challenged his conviction on the basis of this practice. However, as it was accepted that, like the accused, the Crown can make a pre-emptory challenge for any reason, whether good or bad, a majority of the High Court held that, despite the unlawful disclosure of the identity of the jury panel, what had occurred was not a defect in the criminal trial and upheld the conviction.[41]

Most jurisdictions in the United States also allow prosecutors pre-emptory challenges. Although I think we can all ask the question, how long does it take them to empanel a jury over there? Nevertheless, there are constitutional restraints on a prosecutor's right of pre-emptory challenge.

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[35] *R v Peter* (2020) 6 QR 333 at 345 [25].
[36] *R v Peter* (2020) 6 QR 333 at 346 [26].
[37] *R v Peter* (2020) 6 QR 333 at 346 [27].
[38] *R v Peter* (2020) 6 QR 333 at 344 [19].
[39] *Katsuno v The Queen* (1999) 199 CLR 40 at 58 [29].
[40] *Katsuno* (1999) 199 CLR 40 at 50 [2], 57 [25], 65 [54], 85 [104].
[41] *Katsuno* (1999) 199 CLR 40) at 50 [2] per Gleeson CJ, 63 [45] per Gaudron, Gummow and Callinan JJ, contra 68-69 [62]-[64] per McHugh J, 97 [136] per Kirby J.

Mr Batson was an African American man who stood trial for burglary in Kentucky. The prosecutor used his right to make pre-emptory challenges to remove four African Americans individuals from the jury. This case reached the Supreme Court of the United States in *Batson v Kentucky* which held that the right of pre-emptory challenge was subject to the equal protection clause in the Fourteenth Amendment so as to preclude such challenges based solely on account of a juror's race.[42] However, proof of a violation is not so easy with the accused having to first establish that: the accused is a member of a cognisable racial group; the prosecutor used pre-emptory challenges to remove jurors who are also members of that racial group;[43] and there is an available inference that the prosecutor did so on account of the juror's race. If that burden is discharged, the evidential burden shifts to the prosecution to provide a neutral explanation for their challenges. The prosecution cannot justify a decision to exclude a juror on the basis the juror would be partial to the accused because of their shared race. If the prosecution provides a justifiable explanation, the trial judge must then resolve the issue.[44] From what I can tell I think this process often involves the prosecutor having to give evidence before the trial judge who may rule on their credibility. I don't envy any trial judge in that position.

Batson v Kentucky was subsequently extended to prohibit prosecution challenges exclusively based on gender[45] and has been applied to civil cases heard by a jury[46] and to the conduct of the accused's lawyers.[47] However, concerns about the ability to prove a *Baston* type challenge have continue to simmer.[48] These concerns led to Washington State adopting its own rules with a lower threshold for a *Baston* type challenge.[49] In 2022, Arizona adopted its own solution by abolishing all pre-emptory challenges. This did not come about from a legislative change but a change to the

[42] *Batson v Kentucky* (1986) 476 US 79.
[43] It was later decided that the accused did not need to be of the same racial group as the excluded jurors: see *Powers v Ohio* (1991) 499 US 400 at 415.
[44] *Batson v Kentucky* (1986) 476 US 79 at 98-99.
[45] *JEB v Alabama ex rel TB* (1994) 511 US 127 at 129.
[46] *Edmonson v Leesville Concrete Co Inc* (1991) 500 US 614 at 616.
[47] *Georgia v McCollum* (1992) 505 US 42 at 59.
[48] See, eg, "Judging the Prosecution: Why Abolishing Peremptory Challenges Limits the Dangers of Prosecutorial Discretion" (2006) 119(7) *Harvard Law Review* 2121.
[49] "Arizona Supreme Court Abolishes Peremptory Strikes in Jury Selection - Order Amendment Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure" (2022) 135(8) *Harvard Law Review* 2243 at 2245.

rules of criminal procedure made by the Arizona Supreme Court following a petition by two appeal judges.[50]

I have presided over criminal trials where one could discern some strategy behind the accused's pre-emptive challenges and, in at least some of those was, there was clearly some stereotypical thinking being applied. Some of the young graduates who work for me and witnessed this were genuinely affronted by what they saw.

The various prosecution guidelines contain clear prohibitions on prosecutor's using pre-emptory challenges to alter the representative composition of juries.[51] For my part I have never seen anything in the trials I presided over to suggest that the Crown used its challenges for any reason other to address concerns or suspicions about the juror's competence and in some cases to attempt to retain the representative composition of the jury by responding to the approach adopted by the accused.

In this country, the fair exercise of the Crown's power to make pre-emptory challenges is a matter solely for the prosecutor's conscience. I dare say it's an area where all competitive instincts must be firmly put aside.

Decision to prosecute

This brings me to the decision to prosecute.

In Australia, regardless of whether decisions to prosecute crimes are made under prerogative or statute, they are insusceptible to judicial review.[52] This proposition rests on constitutional or quasi constitutional considerations; curial intervention in decisions about who is to be prosecuted and for what offences are seen as potentially compromising the independence and impartiality of the judicial process.[53]

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[50] "Arizona Supreme Court Abolishes Peremptory Strikes in Jury Selection - Order Amendment Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure" (2022) 135(8) *Harvard Law Review* 2243 at 2244-2245.

[51] See, eg, Northern Territory, Office of the Director of Public Prosecutions, *Guidelines of the Direction of Public Prosecutions* (2016) at [13.1]; South Australia, Office of the Director of Public Prosecutions, *Statement of Prosecution Policy & Guidelines* (2014) at 18; New South Wales, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2021) at 35 [9.2]; Australian Capital Territory, Office of the Director of Public Prosecutions, *The Prosecution Policy of the Australian Capital Territory* (2021) at 15 [3.16]; Queensland, Office of Director of Public Prosecutions, *Director's Guidelines* (2022) at 45 [32]; Western Australia, Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines* (2022) at [91]; Victoria, Office of the Director of Public Prosecutions, *Policy of the Director of Public Prosecutions* (2023) at 20 [52]; Tasmania, Office of the Director of Public Prosecutions, *Prosecution Policy and Guidelines* (2024) at 12.

[52] *Maxwell v The Queen* (1996) 184 CLR 501 at 534; *Likiardopoulos v The Queen* (2012) 247 CLR 265 at 280 [37].

[53] *Maxwell v The Queen* (1996) 184 CLR 501 at 534; *Likiardopoulos v The Queen* (2012) 247 CLR 265 at 280 [37].

In the United States, the decision to prosecute is seen as the "special province" of the executive government which has a broad discretion to enforce the nation's criminal laws.[54] However, like the power to make pre-emptory challenges, the exercise of that power is subject to constitutional constraints including the equal protection components of the Fifth[55] and Fourteenth Amendments.[56] Claims of selective prosecutions based on race have succeeded,[57] but the threshold is high and requires proof of discriminatory intent and effect.[58] As a consequence, such claims have proved difficult to mount.[59]

The position in the United Kingdom is different again. In the United Kingdom, the capacity to seek judicial review of decisions to prosecute and decisions not to prosecute is well established.[60] Judicial review of decisions to prosecute is relatively exceptional because the accused also has other remedies, such as seeking a stay or appealing a conviction.[61] With decisions not to prosecute, in *R v Killick*[62] the Court of Appeal of the United Kingdom referred to the "right" of a victim of crime to seek judicial review of the decision.[63] While there are many statements emphasising the need for restraint before interfering with a prosecutorial decision,[64] it has also been said that "the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute".[65] The grounds of review appear to largely correspond with the well-known grounds of judicial review, including the application of an unlawful policy,[66] the failure to act in

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[54] *Heckler, Secretary of Health and Human Services v Chaney* (1985) 470 US 821 at 832; *Wayte v United States* (1985) 470 US 598 at 607.
[55] So far as federal prosecutions are concerned.
[56] So far as state prosecutions are concerned.
[57] See, eg, *Yick Wo v Hopkins, Sheriff* (1886) 188 US 356 at 374.
[58] See *United States v Armstrong* (1996) 517 US 456.
[59] See Anne Bowen Poulin, "Prosecutorial Discretion and Selective Prosecution: Enforcing Protection after *United States v Armstrong*" (1997) 34(3) *American Criminal Law Review* 1071.
[60] See, eg, *R v Race Relations Board, Ex parte Selvarajan* [1975] 1 WLR 1686 at 1697; [1976] 1 All ER 12 at 21; *R v Chief Constable of Kent, Ex parte L* (1991) 93 Cr APP R 416; The Honourable Justice Virginia Bell AC, "Judicial Legitimacy and the limits of Review" (The James Spigelman Oration 2016, 22 November 2016).
[61] *R (B) v Director of Public Prosecutions* (2009) 1 WLR 2072 at 2087 [52].
[62] [2012] 1 Cr App R 10.
[63] *R v Killick* [2012] 1 Cr App R 10 at 133 [49].
[64] See, eg, *R v Director of Public Prosecutions; Ex parte Manning* [2001] QB 330 at 343-344 [23].
[65] *R v Director of Public Prosecutions; Ex parte Manning* [2001] QB 330 at 343-344 [23].
[66] *R v Director of Public Prosecutions, Ex parte C* [1995] 1 Cr App R 136 at 140 [5]; *R v General Council of the Bar, Ex parte Percival* [1991] 1 QB 212 at 234.

accordance with the Director of Public Prosecutions' Guidelines or the Code for Crown Prosecutors,[67] error of law[68] and unreasonableness.[69]

In the United Kingdom, assessments by prosecutors of the credibility of the victim upon whom the success of the prosecution depends are not immune from judicial review. In *R (B) v Director of Public Prosecutions*[70] an application for judicial review was upheld in circumstances where the prosecutor had determined not to proceed with an assault charge because a psychiatrist's report raised concerns about the victim's mental health and the reliability of their evidence. The prosecutor's decision was held to be irrational as it was based on either a misreading of the psychiatrist's report or unfounded stereotyping of the victim.[71] One of the Court's criticisms of the prosecutor was that there was no attempt by the prosecutor to discuss the report with the psychiatrist, the victim, or the victim's solicitor.[72] I would add that, in the various UK cases that I have read, the full reasons for the prosecutor's decision to prosecute or not prosecute were made available.[73]

As I have said, there is no scope in this country to obtain judicial review of decisions to prosecute and not to prosecute.[74] However, aspects of the decision making process in relation to bringing prosecutions are often reflected upon by courts, at least indirectly in applications for stays, conviction appeals and, in New South Wales, in applications for costs in criminal cases following an acquittal, discharge, direction that no further proceedings be taken, or successful appeal against conviction.[75] Under the New South Wales legislation, before a certificate for costs can be issued, there has to be a finding that, "if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings".[76] Of necessity a consideration of that test may involve a reflection on the decision to prosecute. Although there are costs provisions in other

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[67] *R v Director of Public Prosecutions, Ex parte C* [1995] 1 Cr App R 136 at 140 [5]; *R v General Council of the Bar, Ex parte Percival* [1991] 1 QB 212 at 234; *R (on the application of Guest) v Director of Public Prosecutions* [2009] Cr App R 26.
[68] *R v Director of Public Prosecutions. Ex parte Jones (Timothy)* [2000] Crim LR 858.
[69] *R v Director of Public Prosecutions, Ex parte C* [1995] 1 Cr App R 136 at 140 [5].
[70] [2009] 1 WLR 2072.
[71] *R (B) v Director of Public Prosecutions* [2009] 1 WLR 2072 at 2088 [55]
[72] *R (B) v Director of Public Prosecutions* [2009] 1 WLR 2072 at 2084 [40]
[73] See, eg, *R (B) v Director of Public Prosecutions* [2009] 1 WLR 2072 at 2082-2083 [35]-[38].
[74] Leaving aside the possibility of a statutory right expressed in the clearest of terms.
[75] *Costs in Criminal Cases Act 1967* (NSW).
[76] *Costs in Criminal Cases Act 1967* (NSW), s 3(1)(a).

States,[77] on my reading none of them come so close to second guessing the decision to prosecute as the New South Wales legislation does. Some of you can breathe easy now that I am not discussing that legislation or any recent decisions concerning it further.

Instead, I want to compare two cases which I think highlight the difficult issues that can arise regarding decisions to prosecute.

In *Nguyen v The Queen,*[78] the appellant was convicted of raping a woman in a carpark after they went on a date. The issue at the trial was consent. Numerous text messages which had passed between the appellant and the victim after the rape were tendered. The victim did not expressly mention being raped in the text messages. Under cross examination the victim agreed that one of the text messages involved her telling the appellant that she did not want to have sex with him until they had a more meaningful relationship.[79] The trial judge was a very experienced former Crown Prosecutor. In the absence of the jury, her Honour expressed doubts about the victim's credibility and the strength of the Crown case.[80]

Still, the appellant was convicted. On appeal he contended that his conviction was unreasonable and could not be supported having regard to the evidence. Justices Adamson, R A Hulme and I dismissed the appeal. You are all familiar with the principles governing such appeals, including the role of the jury in assessing a witness' credibility.[81] The point raised on the appeal concerned the supposed damage to the victim's credibility from the apparent inconsistency between her text messages and her evidence that she was raped. However, we held that this contention ignored what the victim said under cross examination when she was confronted with the text messages. The victim explained that, although her text messages suggested she was willing to see the appellant again, she did not want to. She said that she only sent the text messages to find out from the appellant whether he ever had any interest in her or feelings towards her other than a desire for sex.[82] She was seeking an explanation

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[77] See, eg, *Official Prosecutions (Accused's Costs) Act 1973* (WA); *Costs in Criminal Cases Act 1976* (Tas); *Criminal Procedure Act 2009* (Vic), s 404.
[78] [2022] NSWCCA 126.
[79] *Nguyen v The Queen* [2022] NSWCCA 126 at [29]-[30].
[80] *Nguyen v The Queen* [2022] NSWCCA 126 at [62].
[81] See *Pell v The Queen* (2020) 268 CLR 123.
[82] *Nguyen v The Queen* [2022] NSWCCA 126 at [25], [27], [30].

for what had happened to her; to put it bluntly did the man who raped her ever have an interest in her as a person and not just for sex?

My colleagues and I considered that was a plausible explanation. Of course, whether it was to be accepted was a matter for the jury.[83] The appeal was dismissed.

Nguyen is just another example of an unreasonable verdict case that turns on its facts. However, it came to mind when I read a judgment of Chief Justice Bell, President Ward and Justice Sweeney in what I will refer to as *Decision Restricted*.[84] *Decision Restricted* was an appeal from the refusal of a trial judge to grant a stay because of concerns that in conference the prosecutor had inadvertently but recklessly coached the complainant to revise her evidence in order to overcome a perceived weakness in the Crown case. After the conference the prosecutor requested the police obtain a further statement from the complainant. The statement the police obtained was materially different to the complainant's first statement. The accused sought a stay of the proceedings and eventually obtained a full copy of the notes of the complainant's conference with the prosecutor that had led to the second statement being obtained. It was conceded that the notes of the conference revealed that the prosecutor had improperly suggested answers to the complainant, but a stay was refused at first instance and on appeal because, armed with the notes and various Crown concessions, a fair trial was still possible[85] and the prosecution would not bring the administration of justice into disrepute.[86] Consistent with what I said earlier, if a claim for privilege over the notes of the conference had been made and upheld then that would have presumably bolstered the case for a stay, although any decision on that topic would have been decided in the absence of what the notes revealed.

The present significance of *Decision Restricted* is its discussion of the competing obligations that were imposed on the prosecutor. The prosecutor was subject to the ethical obligations imposed on all legal practitioners not to coach witnesses, specifically not to expressly or impliedly suggest the evidence or answer a witness should give.[87] However, there was also a statutory obligation on the prosecutor to

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[83] *Nguyen v The Queen* [2022] NSWCCA 126 at [57]- [61].
[84] [2023] NSWCCA 233.
[85] *Decision Restricted* [2023] NSWCCA 233 at [115]- [121].
[86] *Decision Restricted* [2023] NSWCCA 233 at [122]-[129].
[87] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW), r 24;; *Legal Profession Uniform Conduct (Barrister) Rules 2015* (NSW), r 69; *Decision Restricted* [2023] NSWCCA 233 at [33]. See also Raymond Gibson, *Prosecuting*, 2nd ed (2022) at [3.30].

consult with a victim of sexual violence before a decision was made to modify or not proceed with charges against an accused.[88] In addition, the prosecution guidelines provided that "in advising a victim of a possible discontinuance of all charges, a summary of the reasons why discontinuance is being considered should be provided".[89] The conference with the prosecutor which led to the complainant revising her evidence was at least partly undertaken to consult about the possible withdrawal or modification of the charges.

The Court of Criminal Appeal summarised the position of the prosecutor as follows:[90]

> "... the context of the [conference with the prosecutor] was one that required the [prosecutor], as a matter of statutory obligation, to explain to the complainant why he might not be able to certify the charges. That necessarily involved a discussion of her evidence and placed him in a difficult situation in which great care was required to be taken."

So, lets return to the position of the prosecutor in *Nguyen* that I referred to earlier. In advance of the trial does the prosecutor raise the contents of those text messages with the victim in conference? Is that coaching? Does the prosecutor need to raise the messages with the victim to form a view about whether the proceedings should continue? What happens if the prosecutor does not raise the text messages with the victim and decides to carry on and the prosecution goes pear shaped? Do they incur a costs order for either not inquiring about the text messages or running a case on the possibility that the victim may have a good explanation as ultimately occurred in *Nguyen*? What if the prosecutor does not raise the text messages with the victim, determines that they undermine her credit, and then consults with the victim about withdrawing the charges as they are obliged to? How far do they go in explaining to the victim that their credibility is the problem? Put yourself in the victim's shoes and your being told the case is dropped because of a significant concern about your credit. Wouldn't you press for detail? How much detail should the prosecutor provide? Provide too much and be accused of coaching. Provide too little and be savaged publicly. There is a strong public expectation these days that decisions of public officials will be justified. If all of this transpired in the United Kingdom the victim could

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[88] *Victim Rights and Support Act 2013* (NSW).
[89] See ODPP (NSW) Prosecution Guidelines at [5.6]; *Decision Restricted* [2023] NSWCCA 233 at [48].
[90] *Decision Restricted* [2023] NSWCCA 233 at [127(3)].

seek judicial review of any decision to not proceed with the charges and one way or another through that process they would be apprised of any concern about the text messages.

When will I stop asking questions in this speech? More importantly, do I have any answers to these questions? I don't, but even if I did, I wouldn't tell you. However, I bet you do have views on these topics and the great opportunity you have at this conference is to share them and get the views of others. One point of this speech is that we are now moving to the core of the area of the prosecutor's conscience and outside the domain of judges or courts. The courts may look at these issues when a stay is sought, when a costs application is made, or when a conviction appeal is heard. But courts and judges are only boundary riders; we call balls and strikes or, to be more Australian, we call no balls and head high deliveries. However, we are not, on the current and firmly established state of the law, in the business of telling prosecutors what stump to bowl at, what length to pitch at or whether it should be off spin or leg spin. As the story I told at the beginning of this speech is meant to illustrate, if a change in the law like that was to come about, it would most likely only be the result of persistent misuses of power. To paraphrase your closing addresses, this is all entirely a matter for you.

Have a great conference.