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OBLIGATIONS TO TENDER MIXED STATEMENTS: UPHOLDING THE RIGHT TO A FAIR TRIAL OR AN UNDUE EROSION OF PROSECUTORIAL DISCRETION? *NGUYEN V THE QUEEN* (2020) 380 ALR 193

I Introduction

Mixed statements are statements that contain both inculpatory statements, which are against a person's interests, and exculpatory statements, which are self-serving. Inculpatory statements are a well-established exception to the hearsay rule,[1] which generally provides that out-of-court statements cannot be used in evidence to prove the truth of their contents.[2] However, no such exception exists for exculpatory statements.[3] It has been unclear for some time whether prosecutors are obliged to tender mixed statements if they are not being relied upon in the prosecution's case. At first blush, the majority judgment delivered by Kiefel CJ, Bell, Gageler, Keane and Gordon JJ in *Nguyen v The Queen* (2020) 380 ALR 193 ('*Nguyen*') appears to resolve the divergence of opinion as to whether the prosecution has a standing obligation to tender mixed statements, in a rational and uncontroversial fashion.[4] The plurality placed great emphasis on the obligation of Crown prosecutors to put their case fully and fairly before the jury. We agree — as did Nettle J and Edelman J — that, on this basis, the evidence in question ought to have been tendered. The joint judgment went further, however, clarifying that the Crown's obligation of fairness requires 'the presentation of all available, cogent and admissible evidence'.[5] This appears to have recognised the existence of a prima facie rule that the prosecution must tender all records of interview containing mixed statements, unless there is a good reason not to do so. In its reasoning, the High Court reaffirmed the fundamental prosecutorial duties of fairness and the accused's right to remain silent. However, the Court left some questions unanswered as to the exercise

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1 *Cleland v The Queen* (1982) 151 CLR 1, 23 (Deane J); *Pollitt v The Queen* (1992) 174 CLR 558, 578 (Brennan J); *Evidence Act 1995* (Cth) s 81.

2 *Walton v The Queen* (1989) 166 CLR 283, 288 (Mason CJ); *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, 970 (Lord Radcliffe).

3 John Goldring, 'Can Exculpatory Statements be Admissions?' (2004) 25(1) *Australian Bar Review* 14, 15, 26.

4 *Nguyen v The Queen* (2020) 380 ALR 193, 200 [32] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ, Nettle J agreeing at 204 [48], Edelman J agreeing at 205 [52]) ('*Nguyen*').

5 Ibid 201 [36].

of this prosecutorial duty in practice. In this case note, we discuss the responsibilities inherent in the role of the prosecutor and consider how these duties may be fulfilled in light of the erosion of prosecutorial discretion that the joint judgment in *Nguyen* appears to allow. However, overall, whether or not this interpretation of prosecutorial obligations is a necessary or preferable development in the law remains to be seen.

II Background

A *Facts*

The appellant, Van Dung Nguyen, was charged with one count of unlawfully causing harm to another ('count one') and one count of aggravated assault caused by the use of an offensive weapon ('count two') under ss 188(1) and (2)(m) of the *Criminal Code Act 1983* (NT).[6] According to witnesses, the appellant and the first victim had been playing a singing game at a house party before an argument started about the rules of that game.[7] It was alleged by the first victim that after the game the appellant followed him outside, 'approached him with something in his hand and hit him on the top of his head'.[8] A witness said that they saw the appellant hit the victim with a bottle.[9]

Prior to being charged, Nguyen had been interviewed by police about the relevant events, and this interview had been recorded electronically.[10] Before the interview, the appellant was cautioned in accordance with the '*Anunga* rules'.[11] With the assistance of an interpreter, the appellant was asked to explain the caution in his own words, to which he said: 'Whatever you ask and whatever I answer will be taken as evidence in the court.'[12] During this interview, Nguyen provided a version of events that could be categorised as a mixed statement,[13] as it involved both inculpatory and exculpatory material which was capable of forming a basis for a claim to self-defence.

The appellant admitted in the interview to throwing the bottles, however, he explained that this was only done to defend himself from what he had perceived to have been an imminent attack.[14] Nguyen explained that the first victim had become angry with him because of his behaviour during the singing game. When the appellant and the

6 Ibid 195 [6].

7 Ibid 195 [7].

8 Ibid.

9 Ibid 195 [8].

10 Ibid 194 [1].

11 Ibid 213–14 [76]. The *Anunga* rules are a set of guidelines for questioning Indigenous suspects that were formulated by Forster J in *R v Anunga* (1976) 11 ALR 412: at 414–15.

12 *Nguyen* (n 4) 195 [9], 213–14 [76].

13 Ibid 195 [10].

14 Ibid.

victims went outside to smoke, three of the victims displayed anger towards Nguyen, which led him to believe that they intended to hit him.[15] He explained that two of the other parties obstructed the door to the house, at which point the appellant wielded two beer bottles and threatened to strike the other parties if they hit him.[16] When the first victim moved forward, the appellant 'said he had no choice but to throw the bottle of beer at him for otherwise he would have been hit'.[17] This formed the basis of count one.[18] After throwing the bottle, the appellant then ran from the house to the road. Nguyen stated that it was only after the other parties followed him that he threw the second bottle as a warning.[19] This bottle was alleged to have been thrown at the second victim,[20] which formed the basis of count two.[21] As such, in his record of interview, the appellant gave a mixed statement which contained both inculpatory and exculpatory statements as he admitted to throwing bottles at the victims, but only in self-defence.[22]

B *Procedural History*

The appellant's charges proceeded twice to trial in the Supreme Court of the Northern Territory. On both occasions the appellant exercised his right not to give evidence.[23] At the first trial, the prosecution played the recorded interview as part of its case.[24] However, the jury was unable to reach a verdict.[25] Prior to the commencement of the second trial, the prosecution elected not to present the record of interview, and advised the Court of this intention. The trial judge inquired whether this decision was made because removing the record of interview — the only basis for self-defence — would create 'a better chance of winning'.[26] The prosecutor responded: 'To be blunt, your Honour, yes it's a tactical decision.'[27] The prosecution referred to the fact that the self-serving statements could not be tested in cross-examination, and that the defence was capable of providing evidence about the matters discussed in the record of interview.[28] Counsel for the appellant applied to stay the trial on the basis that the

15 Ibid.
16 Ibid.
17 Ibid.
18 Ibid 195 [6].
19 Ibid 195 [10].
20 Ibid 195 [8].
21 Ibid 195 [6].
22 Ibid 194 [2].
23 Ibid 194 [4].
24 Ibid 195–6 [11].
25 Ibid.
26 Ibid.
27 Ibid.
28 Ibid.

record of interview was admissible as a mixed statement, and that the prosecution's obligation of fairness required the evidence to be tendered.[29]

The prosecutor disputed that the interview was a mixed statement and stated that the prosecution had an absolute discretion as to whether or not to adduce it. The trial judge referred the following questions to the Full Court of the Supreme Court of the Northern Territory under s 21(1) of the *Supreme Court Act 1979* (NT):

> 'Question 1: Is the recorded interview … admissible in the Crown case?
>
> Question 2: Is the Crown obliged to tender the recorded interview?'[30]

C *Full Court Decision*

The majority of the Full Court (Kelly and Barr JJ, Blokland J dissenting) in deciding these questions applied the Court's decision in *Singh v The Queen* ('*Singh*').[31] In *Singh*, the majority of the Court of Criminal Appeal of the Supreme Court (Kelly J and Barr J, Blokland J dissenting) held that it is a matter for the prosecution to decide whether to adduce evidence of admissions.[32] The majority considered that there was no general principle requiring a prosecutor to tender an accused's exculpatory or mixed out-of-court statement as a matter of fairness.[33] Thus, the majority held that the prosecution was not required to tender the recorded interview in *Nguyen*'s case. Justice Blokland, in dissent, suggested that the prosecutor should reconsider tendering the recorded interview, as Nguyen had understood at the interview that what he said would be put before a jury.[34] Thus, her Honour questioned whether the trial could be fair if such evidence was withheld.[35] The Full Court's decision was appealed to the High Court.

D *Issues and Applicable Law*

The legal issues before the High Court were whether the recorded interview was admissible in the Crown case ('Question 1') and whether the Crown was obliged to tender the recorded interview ('Question 2').

To answer Question 1, the Court considered s 81 of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('*Uniform Evidence Act*'), which provides that the hearsay rule does not apply to evidence of admissions and statements concurrently made

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29 Ibid 196 [12].

30 Ibid.

31 (2019) 344 FLR 137 ('*Singh*'). See *R v Nguyen* (2019) 345 FLR 40 ('*Nguyen (NTSC)*').

32 *Singh* (n 31) 166 [68] (Kelly J, Barr J agreeing at 182 [123]); *Nguyen* (n 4) 196 [14], 197 [18].

33 *Singh* (n 31) 165–6 [66] (Kelly J); *Nguyen* (n 4) 196–7 [15].

34 *Nguyen (NTSC)* (n 31) 52 [46], 54 [53]; *Nguyen* (n 4) 197 [17].

35 *Nguyen (NTSC)* (n 31) 54 [54].

with such admissions.[36] In answering Question 2, the Court looked to the common law and the 'principles or rules which are regarded as fundamental to the conduct of a criminal trial'.[37]

It was Question 2 that formed the principal issue to be decided. While it was not contentious to find that the Crown has an obligation to present a full and fair case before the jury,[38] what was less clear was whether there was a positive duty to present certain evidence, or whether — as a matter of prosecutorial discretion — the Crown was at liberty to present its case however it saw fit.

III High Court Decision

A *Plurality*

The plurality of the Court (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ) found that the recorded interview was admissible in the Crown case. Their Honours reasoned that exculpatory statements in a record of interview which also contains admissions will usually satisfy the rules of admissibility at both common law and s 81 of the *Uniform Evidence Act*.[39] However, importantly, such statements are only admissible when connected with an admission that is being relied upon as part of the Crown's case.[40] Where there is any doubt about the connection between the exculpatory statement and an admission, the plurality held that questions of credibility and reliability are 'squarely within the province of the jury' to determine.[41] Their Honours held that where mixed statements are admitted, they must be accompanied by a direction to the jury 'that they may give less weight to exculpatory assertions than to admissions and that it is for them to decide what weight is to be given to a particular statement'.[42] The plurality agreed with the Full Court's affirmative answer to Question 1.

The key question for the plurality then became whether the Full Court had erred in deciding that the prosecution was not obligated to tender the record of interview. Their Honours held that this was an error, identifying the prosecution's obligation to present its case fully and fairly as the fundamental principle that determined this issue.[43] Their Honours found that the prosecution's decision not to tender the mixed

36 *Nguyen* (n 4) 197 [20].

37 Ibid 198–9 [26].

38 Ibid. See, eg, *R v Soma* (2003) 212 CLR 299, 308–9 [28] (Gleeson CJ, Gummow, Kirby and Hayne JJ) ('*Soma*').

39 *Nguyen* (n 4) 198 [22], [25].

40 Ibid 198 [25].

41 Ibid 198 [22].

42 Ibid 198 [24], citing *Mule v The Queen* (2005) 221 ALR 85, 94 [25] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

43 *Nguyen* (n 4) 200 [32].

statement did not accord with this obligation, and disadvantaged the appellant.[44] The factors that led to this conclusion were that: Nguyen's account remained consistent and was not demonstrably false; Nguyen believed that the record of interview was going to be used in court; and the decision not to adduce it was admittedly a tactical one, to favour the prosecution's case.[45]

Their Honours noted that in regards to mixed statements, it is well accepted that if the prosecution wishes to rely on the admissions favourable to its case, the prosecution must tender the whole of the statement and 'take the good with the bad'.[46] The joint judgment noted that there has been a divergence of opinion in Australian courts as to whether there is a prosecutorial obligation to adduce mixed statements where the prosecution is not seeking to rely on *any* part of the statement as part of their case.[47] The plurality proceeded to explore this issue and resolve the uncertainty. Their Honours noted that any discussion of the role of the prosecutor begins with the acknowledgement of prosecutorial discretion, and that it is for the prosecutor to decide how their case shall be presented.[48] However, the concept of 'discretion' was qualified as being a process by which a prosecutor determines the course 'which will ensure a proper presentation of the Crown case conformably with the dictates of fairness to the accused'.[49]

It is a fundamental rule that the prosecution must put its case both fully and fairly before a jury.[50] There is a non-reviewable prosecutorial discretion to decide which witnesses are called and what evidence is necessary for the proper presentation of its case.[51] The existence of this discretion was not questioned and instead was considered 'fundamental' by the plurality.[52] In the previous cases of *Ziems v Prothonotary of the Supreme Court of New South Wales*,[53] *Richardson v The Queen*,[54] and *Whitehorn v The Queen*,[55] the High Court held that the prosecution is bound to call all material witnesses before the court in order to present a complete account to the jury of the events upon which the prosecution's case is based.[56] The plurality in *Nguyen* reasoned by analogy that mixed statements are subject to the same consideration and

44 Ibid 204 [46].

45 Ibid.

46 Ibid 202 [38], quoting *Soma* (n 38) 309–10 [31].

47 *Nguyen* (n 4) 199 [28].

48 Ibid 200 [33].

49 Ibid 200 [34], quoting *Richardson v The Queen* (1974) 131 CLR 116, 119 (Barwick CJ, McTiernan and Mason JJ) ('*Richardson*').

50 *Nguyen* (n 4) 198–9 [26].

51 Ibid 198–9 [26], 201 [35].

52 Ibid 198–9 [26], 200 [33].

53 (1957) 97 CLR 279 ('*Ziems*').

54 *Richardson* (n 49).

55 (1983) 152 CLR 657 ('*Whitehorn*').

56 Ibid 674–5 (Dawson J). See *Ziems* (n 53) 294 (Fullagar J); *Richardson* (n 49) 119.

that all evidence 'which may properly and fairly inform the jury about the guilt or otherwise of the accused' must be tendered.[57]

Their Honours also contemplated the risks associated with prosecutorial discretion, namely, that the discretion is not subject to review and that a judge cannot compel the Crown to adduce certain evidence.[58] Their Honours suggested that the use of discretion can deprive the accused of a fair trial and that, while the concept of a 'fair trial' cannot be comprehensively defined, 'there can be no doubt that fairness encompasses the presentation of all available, cogent and admissible evidence'.[59] The plurality considered that in some circumstances it will be unfair to an accused to tender a record of interview.[60] Their Honours considered that 'the omission of that evidence is justified' in circumstances where the reliability or credibility of the evidence is clearly lacking.[61] However, the plurality noted that such circumstances 'may be expected to be rare'.[62] As such, their Honours identified a prima facie rule for the tendering mixed records of interviews:

> [W]here an accused provides both inculpatory and exculpatory statements to investigating police officers, it is to be expected that the prosecutor will tender that evidence in the Crown case, unless there is good reason not to do so, if the prosecutorial duty is to be met.[63]

In response to the prosecutor's tactical decision in *Nguyen*, the plurality held that the prosecutorial discretion should not be discharged tactically in a way that will 'advance the Crown case and disadvantage the accused'.[64] The fundamental notions of fairness require the prosecution to refrain from tactical considerations when deciding to tender a mixed statement.[65] On this basis, the plurality held that the Crown was obliged to tender the recorded interview.[66]

B *Justice Nettle and Edelman J*

In separate judgments, both Nettle J and Edelman J agreed with the plurality that the appeal should be allowed. However, their Honours were not convinced with the assertion in the joint judgment that the Crown must present all available, cogent and admissible evidence to the jury to meet its obligations of fairness.[67] Justice Nettle

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57 *Nguyen* (n 4) 201 [37].

58 Ibid 201 [35].

59 Ibid 201 [36].

60 Ibid 202 [41].

61 Ibid 202 [41], 203 [44].

62 Ibid 203 [44].

63 Ibid 202 [41].

64 Ibid 203–4 [45].

65 Ibid.

66 Ibid 204 [47].

67 Ibid 204–5 [48]–[49] (Nettle J), 206 [54], 208–9 [62] (Edelman J).

noted that, as a matter of professional practice, it has been recognised that the failure of a prosecutor to adduce relevant evidence can present the accused with an unfair choice between providing evidence or 'risking adverse speculation by the jury'.[68] However, when considering that risk to the accused, his Honour was not persuaded that the Crown was required to present all available evidence.[69] In particular, Nettle J noted that the Anglo-Australian system of criminal justice is accusatorial and adversarial, and thus there may be many instances where the prosecution is 'perfectly entitled' not to adduce certain evidence with no resulting unfairness to the accused.[70] For Nettle J, whether a prosecutor's decision not to tender certain evidence was unfair and amounted to a miscarriage of justice could only be determined on appeal.[71]

Justice Edelman provided three reasons why the duty of the prosecution to tender a record of interview or to call a witness should not be elevated to a 'free-standing' obligation.[72] First, his Honour stated that such an obligation would require numerous exceptions and qualifications to 'prevent the obligation from being stated in anything other than vague, contingent terms'.[73] Justice Edelman gave many examples of such exceptions, including where the evidence was considered immaterial or unnecessary, and where tendering the evidence would cause unfairness to the accused.[74] Second, Edelman J considered it 'curious, even bizarre' that such an obligation could exist in circumstances where a trial judge would be incapable of enforcing it.[75] Third, his Honour asserted that if such a rule existed, the question on appeal would be whether the failure to adduce evidence resulted in a miscarriage of justice 'when viewed against the conduct of the trial taken as a whole'.[76] This assessment could only be conducted on appeal.[77] In light of these considerations, Edelman J viewed the prosecution's duty to tender the recorded interview as 'a "prima facie rule of practice", a general guide to the ethical practice which informs the prosecutor's duty of fairness',[78] a departure from which at trial, without good reason, could constitute a miscarriage of justice.[79]

Justice Edelman explained that the prosecutor's duty to act fairly is not derived from some rule of law, rather it describes one of the functions of the Crown prosecutor,

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68 Ibid 204 [48] (Nettle J).

69 Ibid 204–5 [49].

70 Ibid.

71 Ibid 205 [50].

72 Ibid 208–9 [62].

73 Ibid 209 [63].

74 Ibid 209 [63]–[65].

75 Ibid 209–10 [66], citing *R v Apostilides* (1984) 154 CLR 563, 576 (Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ) ('*Apostilides*').

76 *Nguyen* (n 1) 210 [67], quoting *Apostilides* (n 75) 575.

77 *Nguyen* (n 1) 210 [67].

78 Ibid 212 [72] (citation omitted).

79 Ibid. See also at 212–13 [74]–[75], citing *Mahmood v Western Australia* (2008) 232 CLR 397, 409 [41] (Hayne J).

which has been derived from rules of practice.[80] Both Edelman J and Nettle J highlighted that prosecutorial obligations impose no rigid requirements — such as the tendering of specific evidence — but rather guide the Crown to uphold overall fairness according to the facts and circumstances of the particular case.[81]

IV Comment

A *The Role of the Crown Prosecutor*

Inherent in the position of Crown prosecutor are two competing roles of equal importance. The first is that of the impartial minister of justice, and the second is that of the active advocate tasked with robustly representing one side in an adversarial system.[82] The role of the impartial minister recognises that the right of the accused to a fair trial is a fundamental principle of our criminal justice system.[83] Prosecuting counsel represents the state, and in discharging this function it is expected that the 'whole truth' shall be established at trial.[84] While it is perfectly legitimate for the prevailing concern of defence counsel to be to secure a result for their client, no prosecutor should 'ever feel pride or satisfaction in the mere fact of success'.[85] However, the role of the active advocate acknowledges that a vigorous presentation of the prosecution's case may satisfy the prosecution's obligation to present its case fully and fairly.[86] The adversarial nature of our criminal justice system is premised on the belief that 'it is the open conflict between two opponents of equal force, the defence and the prosecution, that best leads to the ascertainment of truth and the rendering of justice'.[87]

The question then becomes how, in practice, can a prosecutor responsibly fulfil both duties when there is an inherent conflict? It is unclear what lengths the prosecution

80 *Nguyen* (n 1) 210–11 [70].

81 Ibid 205 [50] (Nettle J), 206 [54], 209 [65] (Edelman J).

82 David Plater, 'The Changing Role of the Modern Prosecutor: Has the Notion of the "Minister of Justice" Outlived Its Usefulness?' (PhD Thesis, University of Tasmania, 2011) 151.

83 See, eg, *Wilde v The Queen* (1988) 164 CLR 365, 375 (Deane J); *Jago v District Court (NSW)* (1989) 168 CLR 23, 29 (Mason CJ); *Dietrich v The Queen* (1992) 177 CLR 292, 299 (Mason CJ and McHugh J), 326–7 (Deane J), 353 (Toohey J), 362–4 (Gaudron J).

84 *Whitehorn* (n 55) 663–4 (Deane J).

85 Christmas Humphreys, 'The Roles and Responsibilities of Prosecuting Counsel' (1955) (1) *Criminal Law Review* 739, 740.

86 See, eg, *R v Rugari* (2001) 122 A Crim R 1, 10 [52] (Carruthers AJ) (Court of Criminal Appeal of New South Wales).

87 Plater (n 82) 6, citing Barry Grosman, 'The Role of the Prosecutor: New Adaptations in the Adversarial Concept of Criminal Justice' (1968) 11(1) *Canadian Bar Journal* 580, 580.

must go to in order to ensure that the accused is empowered at trial.[88] A further question is whether or not this obligation of fairness is bolstered when the defendant is subject to a special vulnerability — such as in *Nguyen*, where the appellant had cultural and linguistic disadvantages.[89]

B *The Importance of Prosecuting Fairly*

It is a fundamental human right to have access to a fair trial.[90] Throughout the judgment in *Nguyen*, the High Court reiterated and reaffirmed the fundamental responsibility of the Crown to prosecute fairly and in line with this right. The plurality held that to do so, the prosecution must tender all available, cogent and admissible evidence, including mixed statements, to present a full account of its case to the jury and avoid any potential prejudice towards the accused.

In *Nguyen*, the prosecution demonstrated an overtly tactical approach in the discharge of its duties, despite well-established Australian authorities stating that the prosecution should exclude any notion of winning or losing in the exercise of its functions.[91] As the prosecution acts in the public interest, it is inappropriate and at odds with its role for it to be employing tactics to incriminate an accused. Obtaining justice is at the heart of the prosecutor's role,[92] and seeking a conviction rather than justice for the accused is antithetical to the prosecution's core duties as discussed above.

The accused has the right to remain silent in criminal trials.[93] However, in *Nguyen*, by choosing not to tender the record of interview in circumstances where the appellant intended to exercise his right to silence, the prosecution was, in essence, forcing the appellant to give evidence in order to allege self-defence. The employment of such tactics is arguably at odds with other protections of the accused's right to silence that the High Court has ensured.[94] Thus, by denouncing the use of such tactics by the prosecution in *Nguyen*, the High Court upheld and ensured compliance with the accused's right to remain silent.

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88 Martin Hinton, 'Unused Material and the Prosecutor's Duty of Disclosure' (2001) 25(3) *Criminal Law Journal* 121, 124.

89 *Nguyen* (n 1) 213–14 [76]–[77]. See generally, Diana Eades, 'The Social Consequences of Language Ideologies in Courtroom Cross-Examination' (2012) 41(4) *Language in Society* 471.

90 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.

91 *Whitehorn* (n 55) 664 (Deane J); *Libke v The Queen* (2007) 230 CLR 559, 586 [71] (Hayne J), quoting *Boucher v The Queen* [1955] SCR 16, 23–4 (Rand J).

92 See, eg, David Plater, 'The Development of the Prosecutor's Role in England and Australia with Respect to Its Duty of Disclosure: Partisan Advocate or Minister of Justice?' (2006) 25(2) *University of Tasmania Law Review* 111, 111–12.

93 See, eg, *Azzopardi v The Queen* (2001) 205 CLR 50, 73 [61] (Gaudron, Gummow, Kirby and Hayne JJ).

94 See, eg, ibid.

C *The Erosion of Discretion*

The plurality decision to impose a positive obligation to adduce mixed statements, from one perspective, upholds the prosecutorial duty to present a full and fair case, as relevant inculpatory and exculpatory evidence must be presented to the jury. Within this standing obligation remains an element of discretion, as such evidence is required to be tendered 'unless there is good reason not to do so'.[95]

There are, of course, other standing responsibilities of the prosecution, such as the duty to disclose evidence to the defence, even where such material is exculpatory and does not form part of the prosecution case.[96] This is justified as the accused is opposed by the might of the state, which controls the investigatory process.[97] However, once the prosecution has discharged its duty of equipping the defence with the requisite tools to present a proper case, arguably the Crown's role as the minister for justice has been fulfilled. It is certainly not an obligation of the prosecutor to present the defence case on the defendant's behalf. From this perspective, it is questionable whether it is truly desirable that a prima facie rule exists that relies on the existence of 'good reasons' not to present particular evidence. Certainly, there will be some scenarios — as demonstrated by the facts in *Nguyen* — where the interests of fairness will necessitate the production of certain evidence by the Crown. As such, there is little question that the decision in *Nguyen*, as it pertained to its facts, was the correct one. Yet, as Nettle J observed, it is not difficult to imagine 'unexceptional cases' in which a prosecutor could refrain from presenting all 'cogent and admissible evidence'.[98]

The plurality expressly stated that 'a decision by a prosecutor to refuse to tender a mixed statement so that the accused is forced to give evidence' violates the obligation of fairness.[99] This may be an indication that the prosecutor would not have been entitled to omit the record of interview purely on the basis that it would be fairer to both parties to have the evidence tested in cross-examination. Such justification by the prosecutor would unlikely constitute a 'good reason' not to tender the evidence, as required by the plurality. The inference of this is that some other positive characteristic of unreliability will need to be established. If this is the correct interpretation of the standing obligation, the prospects of the 'whole truth' being established at trial may be undermined.[100] There is potential for an accused person to allege a version of events during a record of interview that is self-serving in nature and must be presented before the court; despite this evidence having neither been sworn nor affirmed, and not subjected to the testing involved in cross-examination.

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95 *Nguyen* (n 4) 202 [41].

96 Hinton (n 88) 124.

97 Ibid 122.

98 *Nguyen* (n 4) 204–5 [49].

99 Ibid 203–4 [45].

100 *Whitehorn* (n 55) 663–4 (Deane J).

The undesirability of this scenario is precisely the reason why the right to provide an unsworn statement has been abolished in every Australian jurisdiction,[101] subject to some exceptions.[102] Prior to their abolition, unsworn statements were a useful mechanism, particularly for vulnerable defendants, to avoid the decision between staying silent or 'being bamboozled by a skilful Crown prosecutor'.[103] However, ultimately it was accepted that if a statement goes before a jury, the jury then ought to have the tools to assess its veracity, which can only be achieved through cross-examination.[104] The ability to avoid this testing was said to tip the scales of justice against the victim and the community in favour of the accused.[105] Yet, it appears that the High Court's recognition of the prima facie rule in *Nguyen* may have created a 'back door' for unsworn statements to make their way into the courtroom. If this is what becomes of the duty to tender mixed statements, it shall be contrary to the operation of the adversarial system which reveals the truth through 'argument and counter argument, examination and cross-examination'.[106] Consequently, the erosion of the ability of the prosecutor to decide whether or not the admission of certain evidence contributes to the overall fairness of the case has the potential to tip the scales of justice back towards the accused.

D *The Future of Mixed Statements*

While the plurality of the High Court in *Nguyen* clarified the prosecution's duty surrounding the tendering of mixed statements, it will be interesting to see the development of this duty moving forward. Both Nettle J and Edelman J had reservations about the plurality's finding that the prosecution must tender *all* available, cogent and admissible evidence to discharge its duties unless there is 'good reason

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101 See *Evidence Act 1995* (Cth) s 21; *Evidence Act 2011* (ACT) s 21; *Evidence Act 1995* (NSW) s 21; *Criminal Procedure Act* 1986 (NSW) s 31; *Criminal Code Act 1983* (NT) s 360(1); *Evidence (National Uniform Legislation) Act 2011* (NT) s 21; *Criminal Code Act 1899* (Qld) s 618; *Evidence Act 1929* (SA) s 18A; *Evidence Act 2001* (Tas) ss 21, 30A; *Evidence Act 2008* (Vic) s 21; *Evidence Act 1906* (WA) s 97(2). However, it appears that unsworn statements may not have been abolished in Norfolk Island: see *R v McNeill [No 1]* (2007) 209 FLR 124, 132 [37] (Weinberg CJ) (Supreme Court of Norfolk Island).

102 For example, in South Australia, the abolition of sworn statements does not extend to circumstances captured in s 9 of the *Evidence Act 1929* (SA) where the court determines that a person does not have sufficient understanding of the obligation to be truthful entailed in giving sworn evidence.

103 David Brown, 'Silencing in Court: The Abolition of the Dock Statement in New South Wales' (1994) 6(1) *Current Issues in Criminal Justice* 158, 162.

104 See, eg, New South Wales, *Parliamentary Debates*, Legislative Council, 20 April 1994, 1425–6 (John Hannaford).

105 Ibid 1426.

106 Howard Shapray, 'The Prosecutor as a Minister of Justice: A Critical Appraisal' (1969) 15(1) *McGill Law Journal* 124, 126.

not to do so'.[107] Though the plurality predicted exceptions to be 'rare',[108] exceptions *will* arise. Some examples given by members of the Court included where the evidence is clearly doctored or false,[109] immaterial,[110] unnecessary,[111] or unfair to the accused.[112] It is unclear, however, what will alert prosecutors to false evidence and constitute a good reason to exclude evidence. In their Honours' reasons, the plurality did not consider the appellant's evidence to be demonstrably false, as it remained consistent despite being 'challenged a number of times by the interviewing police officer'.[113] However, what would have made the appellant's evidence demonstrably false was not explored by the Court and remains to be seen. Until further authority builds, it is largely for the prosecution to determine whether a good reason exists for not tendering mixed statements.

Importantly, as stated by both Nettle J and Edelman J, determining whether such an exception exists is only appropriate on appeal, when evaluating retrospectively whether there has been a miscarriage of justice in the exercise of the prosecution's discretion.[114] As such, if an accused does not appeal, any unfairness in the exercise of the prosecution's discretion is unlikely to be uncovered. Relying on appeals to determine whether there has been a miscarriage of justice, though necessary, adds to the existing strain on the courts and to the legal costs borne by both the state, in prosecuting the case, and the accused, in defending the charges.

The High Court's divergence in its consideration of the prosecution's duty to tender mixed statements as either an 'obligation' or a 'prima facie rule of practice' is an interesting one. While Edelman J's qualifications tending towards the duty being a rule of practice rather than an obligation are compelling, it is argued that either characterisation will likely result in the same prosecutorial conduct. Moving forward, whether as a duty or general practice, prosecutors will tender mixed statements unless there is a sound reason not to.[115]

V Conclusion

The High Court's decision in *Nguyen* sought to clarify the prosecution's duty regarding the tendering of mixed statements. In doing so, it upheld the overriding duty of the Crown to exercise its prosecutorial functions fairly and to uphold the right

107 Nguyen (n 4) 202 [41].

108 Ibid 203 [44].

109 Ibid 203 [44] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ), 209 [64] (Edelman J).

110 Ibid 209 [63] (Edelman J).

111 Ibid.

112 Ibid 209 [65] (Edelman J).

113 Ibid 204 [46].

114 Ibid 205 [50] (Nettle J), 210–11 [68]–[69] (Edelman J).

115 See, eg, Supreme Court of South Australia, *South Australian Criminal Trials Bench Book*, September 2020, 97–8.

of the accused to remain silent. Ultimately, the plurality of the High Court held that the prosecution must tender 'all available, cogent and admissible evidence', unless good reason exists, in order to discharge its obligation of fairness to the accused.

While the plurality showed great concern for ensuring that Crown prosecutors have no misgivings about their obligation to present a full and fair case, we are unconvinced — as were Nettle J and Edelman J — that a prima facie rule of tendering all 'available, cogent and admissible evidence' is the best mechanism to achieve this. Mandating the inclusion of mixed statements may erode the role of the prosecutor as an adversarial advocate, but could also impede the ability of the prosecutor to act as a minister for justice, if in particular circumstances the inclusion of such evidence is not necessary for a proper presentation of the Crown case.

Though the High Court attempted to clarify the obligations surrounding the tendering of mixed statements in *Nguyen*, ultimately the Court left many questions unanswered. It is clear that more case law is required to shed light on the plurality's finding that the prosecution must tender all available, cogent and admissible evidence unless there is good reason not to do so. As such, moving forward, it will be interesting to see how the authorities develop.

The divergence in the High Court as to whether the prosecution's duty to tender mixed statements is properly classified as an 'obligation' or 'general rule of practice' was also particularly fascinating in *Nguyen*. It remains to be seen whether this divergence in opinion will again be considered by the Court. However, for now, it is clear that whether by obligation or practice, unless good reason exists, admissible mixed statements must be tendered by the prosecution to discharge its duty of fairness.