Has the 'Silver Thread' of the Criminal Law Lost its Lustre? The Modern Prosecutor as a Minister of Justice

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Abstract

The notion of the prosecuting lawyer as the impartial non-partisan 'minister of justice' is entrenched in both England and Australia as the 'silver thread' of the criminal law. However, this article suggests that this acceptance overlooks a number of fundamental questions as to the continued application of the minister of justice role. Sir Patrick Devlin in 1956 warned that a too literal application of this role risked undermining the rationale and operation of the adversarial criminal trial. Devlin's concern remains pertinent today. The adversarial criminal trial remains the method by which common law criminal justice systems 'do justice'. The rationale of the adversarial criminal trial is that both prosecution and defence should discharge their respective roles with vigour and to the best of their ability to ensure that a trial has the greatest chance of being fair for all parties and that justice is done. The original rationale for the minister of justice role in the early 19th century was to compensate for the unequal playing field that typically existed between prosecution and defence in this period. However, the role, born from necessity and good intention, has in latter times not only lost relevance but has, in some respects, overly constrained the prosecutor and risks undermining the modern adversarial criminal trial. The role, created to promote justice, may actually serve to deny justice by rendering prosecutors unable to effectively discharge their functions. Devlin was correct in his analysis of the flaws in the minister of justice role and literal application of this role may prevent the modern prosecutor from acting as an active advocate within an adversarial system. It is contended that ultimately there is an irreconcilable tension between the notion of the prosecution as both zealous advocate and minister of justice and that more than a glib slogan is necessary to define the modern prosecutorial role.

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I INTRODUCTION

> Finally there is, or has been, a tendency for counsel for the prosecution not to prosecute firmly enough. The last half-century has seen a welcome transition in the role of prosecuting counsel from a prosecuting advocate into a 'minister of justice'. But in some places the pendulum has swung too far, and the ministry has moved so close to the opposition, that the prosecutor's case is not adequately presented, and counsel, frightened of being accused of an excess of fervour, tend to do little except talk of reasonable doubt and leave the final speech on the facts to the judge. In England the administration of justice depends as much on the presentation of two opposing cases as government in England depends on the two party system. The result of that deficiency is that the duty of seeing that the prosecution's case is effectively put is sometimes transferred to the judge and thus the balance of the trial is upset.[1]

These were the concerns first expressed in 1956 by Sir Patrick Devlin, the eminent English judge, that too literal application of the prosecutorial role as a minister of justice risked undermining the whole premise and operation of the adversarial criminal trial. It is contended that the concerns expressed by Devlin over half a century ago remain equally, if not even more, pertinent today. The broad support that still exists for the lofty notion of the prosecuting lawyer as the non-partisan and impartial 'minister of justice' who performs his or her functions without any concern as to whether the case is won or lost is striking. 'It has long been established that a prosecution must be conducted with fairness towards the accused and with a single view to determining and establishing the truth.'[2] Indeed, this role is so deeply entrenched that it has been described as the 'silver thread' of the criminal law.[3] However, it is suggested that such statements obscure major questions as to the continued application of the minister of justice role. This article argues that the minister of justice model is flawed in several crucial respects. It is timely to re-evaluate at least some aspects of the modern prosecutorial role to accommodate a more robust and active role that accords with the reality of the prosecutor's position as an active advocate within a modern adversarial criminal process.

This article examines the utility of applying the minister of justice concept to the modern prosecutorial role. Though the term 'prosecutor' is capable of differing meanings,[4] the focus of this article is upon the role of

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[1] Sir Patrick Devlin, *Trial by Jury* (University Paperback, 2nd Ed, 1966) 122-123.
[2] *R v Lucas* [1973] VR 693, 696-697 (Smith ACJ).
[3] *R v Pearson* (1957) 21 WWR (NS) 337, 348.
[4] The term 'prosecutor' extends beyond the prosecuting lawyer at the higher courts to others such as prosecuting lawyers in the Magistrates' Courts (see Christmas Humphreys, 'The Roles and Responsibilities of Prosecuting Counsel' [1955] *Criminal Law Review* 739); the police prosecutor in the Magistrates' Courts: see Chris Corns, 'Police Summary

the prosecuting lawyers (whether directly employed by the Director of Public Prosecutions or not) in the higher courts. The procedures associated with trial on indictment at the higher courts, notably before a jury,[5] are widely perceived to represent the 'gold standard'[6] of criminal justice to be applied regardless of the level of the criminal court.[7] This is reflected and reinforced in the comprehensive guidelines[8] issued by the Directors of Public Prosecution that exist in both Australia and England, which set the benchmark for proper prosecutorial practice in the higher courts. The summary courts, despite their undoubted importance in the administration of criminal justice,[9] do not readily lend themselves to a study of the prosecutorial role given the nature of their work (much of it still relates to relatively trivial offences, and the mass processing of guilty pleas),[10] the relative obscurity of much of their work and their inaccessibility to academic scrutiny.[11] Consequently, this article examines some of the problems with the minister of justice role through a focus on the prosecutorial role at the higher courts.

Prosecutions in Australia and New Zealand: Some Comparisons' (2000) 19 *University of Tasmania Law Review* 280; and officers appearing in the summary courts to prosecute in various specialist areas such as breach of community based orders such as probation or parole and the plethora of modern regulatory offences summarily prosecuted by staff from the relevant Government agency: see Andrew Sanders and Richard Young, *Criminal Justice* (Butterworths, 2nd ed, 2000) 364-380.

5 Trial by jury is a 'venerated institution' (Paul Fitzpatrick, 'The British Jury' [2010] *Cambridge Student Law Review* 1) that is often asserted to be 'rightly heralded as the most appropriate organ for determining guilt': Ibid 15; whether such faith is justified is beyond the scope of this article.

6 Andrew Sanders, 'Core Values, the Magistracy and the Auld Report' (2002) 29 *Journal of Law and Society* 324, 339.

7 See *R v Stipendiary Magistrate for Norfolk, Ex parte Taylor* [1998] Crim LR 276, 277; Penny Darbyshire, 'An Essay on the Importance and Neglect of the Magistracy' [1997] *Criminal Law Review* 627, 634-636.

8 See *Code for Crown Prosecutors 2010* (EK); *Guidelines for Prosecutors* (ACT); *Prosecution Policy of the Commonwealth*; *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*; *Prosecution Guidelines 2005* (NT); *Director's Guidelines 2010* (Qld); *Statement of Prosecution Policy and Guidelines* (SA); *Director's Guidelines* (Qld); *Prosecution Policy and Guidelines 2010* (Vic); *Statement of Prosecution Policy and Guidelines 2005* (WA), *Prosecution Guidelines* (Tas).

8 *R v Randall* [2002] 1 WLR 2237, 2241.

9 See, for example, Jill Hunter and Kathryn Cronin, *Evidence, Advocacy and Ethical Practice* (Butterworths, 1995) 98. The bulk of criminal offences are dealt with in the summary courts as opposed to the higher courts. Figures consistently show that over 95% of all criminal cases are death with summarily in both England: see Sanders and Young, above n 4, 485; and Australia: see, for example, Martin King et al, *Non-Adversarial Justice* (Federation Press, 2009) 9.

10 See, for example, Tony Krone, 'Heading Upstream: Prosecution Intervention in the Investigative Process', Paper Presented at the Criminal Investigations Workshop, ARC Centre of Excellence in Policing and Security, Australian National University, Canberra, 10-11 December 2009, <http://ceps.anu.edu.au> 27; Sanders and Young, above n 4, 487-488.

11 See, for example, Darbyshire, above n 7, 636-637; Krone, above n 10, 11.

The prosecutorial role as a minister of justice is entrenched in both England and Australia, yet its continuing relevance is questionable. The law that prescribes the modern prosecutorial role developed in the first half of the 19th century. The circumstances that necessitated the development of the minister of justice role have changed, and the original rationale for the role is diminished. The modern defendant is not in the same disadvantaged position that he or she was in the early 1800s. Despite the fundamental changes to the Australian and English criminal process, the concept of the prosecutor as a minister of justice, as originally formulated in England and later embraced in Australia, has survived largely unchallenged and its inconsistencies have been for the most part unremarked on in both jurisdictions.[12]

The minister of justice role is open to question. The term has been criticised as 'nebulous'[13] and as offering no more than 'general platitudes'.[14] As Medwed observes, 'The reliance on "justice" as a governing principle of prosecutorial behaviour is problematic because of the term's inherent vagueness.'[15] There is also the fundamental question of how prosecutors are to properly discharge the minister of justice role while simultaneously striving for a conviction, which is also accepted as a proper and necessary objective for prosecutors in an adversarial criminal process. This tension is ultimately irreconcilable and assertions to the contrary are misplaced.

The modern application of the minister of justice role sets the bar too high for prosecutors, hampering their ability to be effective advocates in the modern adversarial criminal process. The risk identified by Devlin of submissive prosecutors who may be constrained from either effectively advancing the prosecution case or testing the defence case is real. The prosecutor's role, or at least aspects of it, should be reformulated to accommodate more active and vigorous advocacy, especially at trial. Such a reformulation would support the rationale of an adversarial system of criminal justice. It is acknowledged that in some circumstances such as the disclosure of relevant material in the prosecution's possession, the minister of justice role remains valid. However, in other circumstances

[12] Though not in other jurisdictions such as the United States (see, for example, Jerome Frank and Barbara Frank, *Not Guilty* (Doubleday and Company Ltd, 1957)) 231-242; Canada (see, for example, Howard Shapray 'The Prosecutor as a Minister of Justice: a Critical Appraisal' (1969) 15 *McGill Law Journal* 124, 127).

[13] Janet Hoeffel, 'Prosecutorial Discretion at the Core: the Good Prosecutor meets *Brady*' (2005) 109 *Pennsylvania State Law Review* 1133, 1137.

[14] Deborah MacNair, 'Crown Prosecutors and Conflict of Interest: a Canadian Perspective' (2002) 7 *Canadian Criminal Law Review* 257, 258.

[15] Daniel Medwed, 'The Prosecutor as a Minister of Justice: Preaching to the Converted from the Post-Conviction Pulpit' (2009) 84 *Washington Law Review* 35, 43.

such as in the conduct of the trial when the defendant is legally represented, the prosecutor should be free, as Farrell suggests, to:

> put on the hat of the zealous advocate for justice', and assume an active role similar to that of defence counsel.[16] Every defendant clearly has the vital right to a fair trial but 'the State too is entitled to a fair trial.[17]

II THE NATURE AND RATIONALE OF THE MINISTER OF JUSTICE ROLE

'It is trite to observe', as Mitchell comments, 'that 'Crown counsel's role within the criminal justice system is unique.'[18] The prosecutor plays a fundamental, though often overlooked and misunderstood role in the criminal process. The question of how the prosecutor should discharge his or her many functions and powers within a demanding modern adversarial criminal process is neither simple nor straightforward. There is no single document which sets out the role of the prosecuting lawyer.[19] 'It is a role circumscribed by statute, case law, professional conduct, history, custom and practice.'[20]

The constraints imposed on prosecutors by the minister of justice role are considerable. The role impacts all stages of the prosecutor's conduct from pre-trial to sentencing.[21] This minister of justice duty applies equally to those who prepare as those who conduct the prosecution case at trial.[22] The responsibility applies in all cases ranging from the trial of the gravest case such as murder in full public view through to the most minor charge outside the public eye.[23]

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[16] Rebecca Farrell, 'Advocacy, Justice and Prosecutorial Misconduct: the Death of the Prosecutor's Reasonable Inference on Credibility Issues' (2002) 41 *Washburn Law Journal* 299, 300.

[17] *R v Karaibrahimovic* (2002) 164 CCC (3d) 431, 449.

[18] Graeme Mitchell, 'No Joy in This for Anyone': Reflections on the Exercise of Prosecutorial Discretion in *R v Latimer*' (2001) 64 *Saskatchewan Law Review* 491, 495, quoting *R v Henderson* (1999) 44 OR (3d) 628, 638.

[19] MacNair, above n 14, 287.

[20] Ibid.

[21] The minister of justice role was understood traditionally to preclude the prosecutor from playing any role at sentence; Humphreys, above n 4, 747. This is no longer the case: *R v MacNeil-Brown* (2008) 20 VR 667. This increased role is supported by prosecutorial guidelines in both England and Australia. The explanation for this increased prosecutorial role in sentence lies with the advent of prosecution appeals against sentence and the prosecution's duty to avoid the court falling into appealable error as well as the increasing complexity of modern sentencing law and options: *R v MacNeil-Brown* (2008) 20 VR 667, [21].

[22] *R v Lucas* [1973] VR 693, 705.

[23] TG Bowen-Colthurst, 'Some Observations on the Duties of a Prosecutor' (1968-1969) 11 *Criminal Law Quarterly* 377, 379.

However, the minister of justice role goes further than the various specific demands and duties and translates into a general if somewhat nebulous overriding duty that the prosecutor's purpose is to assist the court in arriving at the truth and justice of the case in dispute. The prosecutor's role excludes any notion of winning or losing.[24] As Rand J explained,

> [i]t cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime.[25]

The English Court of Appeal similarly explained in *R v Sugarman*[26] that it could not too often be made plain that the business of prosecution counsel was fairly and impartially to exhibit all the relevant facts to the jury. The prosecution had no interest in procuring a conviction, the court declared, 'it's only interest is that the right person should be convicted, that the truth should be known, and that justice should be done.'[27] Humphreys, a famous English prosecutor, explained that it was not the prosecutor's duty to secure a conviction and no prosecutor should ever feel pride or satisfaction in the mere fact of success. Still less should the prosecutor ever boast of the percentage of convictions secured over a period. Rather the prosecutor's duty in Humphreys' opinion was to present to the court a precisely formulated case against the accused, and to call evidence in support of it and to cross examine with perfect fairness any defence witness. It was no rebuff to the prosecutor's prestige if the court was left unconvinced of guilt. The prosecutor's attitude should be so objective that he or she was, so far as was humanely possible, indifferent to the result. Indeed, Humphreys considered that the prosecutor's duty extended to assisting the defence in every way.[28]

Such lofty conceptions of the prosecutorial role continue to command strong support. The reiteration offered by Deane J in *R v Whitehorn*[29] is typical:

> Prosecuting counsel in a criminal trial represents the state. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the

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[24] Ibid 377; Claude Savage, 'The Duties and Conduct of Crown and Defence Counsel in a Criminal Trial' (1958) 1 *Criminal Law Quarterly* 164, 164-165.
[25] *R v Boucher* [1955] SCR 16, 23-24.
[26] (1936) 25 Cr App R 109.
[27] Ibid 114-115.
[28] Humphreys, above n 4, 748.
[29] (1983) 152 CLR 657.

> law requires to be observed and of helping to ensure that the accused's trial is a fair one.[30]

Dal Pont identifies two main reasons for the minister of justice role. The first is that, unlike other lawyers, there is theoretically no conflict between the prosecutor's duty as a minister of justice to the court and the duty to the 'client' – the state. Dal Pont asserts, '[t]he proper administration of justice serves the interests of both.'[31] The purpose of the adversarial criminal trial is 'an unending, uncompromising search for the truth; its purpose being as much the acquittal of the innocent as it is the conviction of the guilty.'[32] The prosecutor is a servant of justice rather than of the state.[33] The notion of the prosecutor as a minister of justice means that the state 'wins' whenever justice is accorded in its courts, whatever the outcome.[34]

The second reason identified by Dal Pont for the minister of justice role is that 'in the eyes of the jury, the prosecutor's status as the state may give her or his words a stamp of integrity and fairness.'[35] Unlike defence counsel 'a prosecutor is likely to be seen by the jury as an authority figure whose opinion carries considerable weight.'[36] Prosecution counsel represents 'the guardian of law and order' and as such he or she is perceived to have a greater potential to influence the jury than counsel for the defence.[37]

A third rationale that has been offered for the minister of justice role is that prosecution counsel represents not just the state but also the considerable powers of the state. It is argued that in order to ensure the position of the accused is protected, the state's powers and position are tempered by the restraints of the minister of justice role.[38] The prosecutor is seen to stand between the state and the individual.

However, in perhaps its simplest terms, the rationale of the minister of justice role is straightforward. It is perceived as part of the fundamental right of all accused to a fair trial. 'The right to a fair trial,' as Grossman

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[30] Ibid 663-664.
[31] Gino Dal Pont, Lawyers' *Professional Responsibility in Australia and New Zealand* (Lawbook Co, 4th ed, 2009) 18.2, [18.14].
[32] Shapray, above n 12, 126.
[33] William Gourlie, 'Role of the Prosecutor: Fair Minister of Justice with Firm Convictions' (1982) 16 *University of British Columbia Law Review* 295, 300.
[34] *Brady v Maryland* (1963) 373 US 83, 87-88.
[35] Dal Pont, above n 31, [18.3], [18.14]. See also *R v Alister* (1984) 154 CLR 404, 429–430.
[36] *State v Bujnowski* (1987) 130 NH 1, 4.
[37] *R v B (RB)* (2001) 152 CCC (3d) 437, 443 (Donald JA). See also *R v GDD* [2010] NSWCCA, [55].
[38] Carol Corrigan, 'On Prosecutorial Ethics' (1986) 13 *Hastings Constitutional Law Quarterly* 537; *R v Regan* (2002) 161 CCC 3d 97, 157-158.

notes, 'is the single most sacred ideal in our criminal justice system, yet it remains largely amorphous and ill defined.'[39] Nevertheless, despite this fact, the prosecutor's duty to act as a minister of justice and not as a partisan advocate, as extra-curially noted by Spigelman CJ, 'lies at the heart of what is required' for a fair trial.[40]

These rationales for the minister of justice role are not entirely untenable. In particular the notion that the minister of justice role is a necessary part of a defendant's right to a fair trial should not be lightly dismissed. 'The right of an accused to receive a fair trial according to law is a fundamental element of our criminal justice system.'[41] However, in the modern criminal justice system the importance of the minister of justice concept in securing a fair trial can be overstated. The modern accused enjoys a comprehensive range of protections that are designed to ensure a fair trial. It is difficult to see how the minister of justice role is such a prerequisite to a fair trial. Indeed, the minister of justice role if too strictly applied might have an adverse effect on the legitimate interests of the community and any victim (remembering that the interests of fairness in the content of a fair trial extend beyond those of the accused to also society and the victim).[42] An overly strict application of the role may also undermine the prosecution and trial of serious offences.

III THE 19TH CENTURY ADVERSARIAL TRIAL SYSTEM – A FOCUS ON FAIRNESS

The typical criminal trial of the 1600s and 1700s bore little similarity to the modern trial. Not only was the defendant at a disadvantaged position when compared with his or her modern counterpart in terms of the rights that they did (or rather did not) enjoy, but the typical trial of the 1600s and 1700s betrayed few of the adversarial trademarks that distinguish the modern common law criminal trial. The presiding judge dominated the trial and dictated both the course of proceedings and the examination of the witnesses, and lawyers rarely appeared.[43] As McHugh J noted in 2001 in *R v Azzopardi*,[44] trials were relatively short, informal affairs[45] that

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[39] Barry Grossman, 'Disclosure by the Prosecution: Reconciling Duty and Discretion' (1988) 30 *Criminal Law Quarterly* 346.

[40] Chief Justice James Spigelman, 'Public Confidence in the Administration of Criminal Justice', Opening Address, The Australian Association of Crown Prosecutors Conference, Sydney, 5 July 2007, (2007) 19 *Current Issues in Criminal Justice*, 219, 221. See also *R v Randall* [2002] 1 WLR 2237, 2241.

[41] *R v Dietrich* (1992) 177 CLR 292, 335 (Deane J). See also *Jago v District Court (NSW)* (1989) 168 CLR 23, 29 (Mason CJ), 56 (Deane J), 72 (Toohey J) and 75 (Gaudron J).

[42] See, for example, *Attorney-General's Reference* (No 3 of 1999) [2001] 2 AC 91, 118.

[43] John Langbein, 'The Criminal Trial before the Lawyers' (1978) 45 *University of Chicago Law Review* 263, 314-315.

[44] (2001) 205 CLR 50.

'were effectively dialogues between judges, witnesses and accused persons.'[46] McHugh J, drawing on Langbein's work,[47] observed that until the regular appearance of counsel in the late 18th century, the common law system, at least as it concerned felonies, was in substance an inquisitorial system.[48]

The civil or inquisitorial shape of the criminal trial underwent a gradual but fundamental shift in the later part of the 18th century and the first part of the 19th century.[49] The consequences of this development were ultimately to prove profound. There was a gradual but fundamental transformation of the nature of the criminal trial from an inquisitorial and lawyer-free 'accused speaks' proceeding to an adversarial and lawyer-dominated 'testing the prosecution case' contest that would be instantly recognisable to the modern criminal lawyer in either England or Australia.[50] This development may have been unforeseen and unintended,[51] but by the mid 1800s the transformation was complete. Cairns asserts that such leading criminal trials of the period as *R v Courvoisier* in 1840[52] and *R v Palmer* in 1855[53] demonstrate the ascendancy of the adversarial system of criminal justice.[54] Hostettler

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[45] McHugh J notes that the average trial at the Old Bailey was a mere half an hour.
[46] *R v Azzopardi* (2001) 205 CLR 50, 97-98 ('*Azzopardi*').
[47] See Langbein (1978), above n 43; John Langbein, 'Shaping the Eighteenth Century Criminal Trial: A View from the Ryder Sources' (1983) 50 *University of Chicago Law Review* 1; John Langbein, 'The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors' (1999) 58 *Cambridge Law Journal* 314; John Langbein, *The Origins of Adversarial Criminal Trial* (Oxford University Press, 2003). See also John Beattie, 'Scales of Justice: Defence Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries' (1991) 9 *Law and History Review* 221; Stephan Landsman, 'The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England' (1990) 75 *Cornell Law Review* 497.
[48] *Azzopardi*, 97-98. The trial described by McHugh J is more akin to the inquisitorial process of civil law jurisdictions than the modern adversarial criminal trial.
[49] *Azzopardi*, 99: that a simple measure of this trend is that from 2% in the 1770s the rate of defendants represented by counsel in felony trials at the Old Bailey had increased to 36% by 1795. See further Beattie, above n 47, 227.
[50] John Hostettler, *The Politics of Criminal Law Reform in the 19th Century* (Barry Rose Law Publishing, 1992), 43.
[51] Landsman, above n 47, 502.
[52] See James Atlay, *Famous Trials of the Century* (Grant Richards, 1899) 44-63.
[53] See Central Criminal Court, *Illustrated and Unabridged Edition of the Times Report of the Trial of William Palmer for Poisoning John Parsons Cook at Rugeley: From the Shorthand Notes taken in the Central Criminal Court from Day to Day* (Ward & Lock, 1856).
[54] See David Cairns, *Advocacy and the Making of the Adversarial Criminal Trial: 1800-1865* (Clarendon Press, 1998), 163. See also Allyson May, *The Bar and the Old Bailey, 1750-1850* (University of North Carolina Press, 2003) 6, 200.

agrees: '[b]y 1845 the lawyers had captured the courtroom and made the trial accusatorial.'[55]

The modern adversarial system provided an effective means of striking a fairer balance between the positions of prosecution and accused. As a consequence of the adversarial system's focus on fairness, the ascendance to a fairer system was also the catalyst for the widespread acceptance that the prosecutorial role must be one of a minister of justice.

IV MINISTER OF JUSTICE CONCEPT BORN FROM THE MODERN ADVERSARIAL SYSTEM

The transformation of the criminal trial to an adversarial system exposed the underlying inequalities in the positions of the prosecutor and the defendant. The adversarial context could not serve as a mechanism for exposing the truth, unless some degree of equality existed between the contestants. The development of the minister of justice concept in England in the early 1800s is explicable by the particular social and historical climate in which it emerged. In the newly adversarial criminal process of the early part of the 19th century,[56] there was an increasing awareness of the uneven playing field that typically existed between the defendant and the state.

> A criminal trial in those days was not unlike a race between the King and the prisoner, in which the King had a long start and the prisoner was heavily weighted.[57]

The inequality of the legal system in this period is striking. As Bentley notes, '[r]ights regarded today as lying at the heart of the fair trial were denied to the accused as either unnecessary or actually obstructive of justice.'[58] The notion of the prosecutor as a minister of justice who owed a wider interest than simply seeking the defendant's conviction was to alleviate the defendant's position in this unfair process. The minister of justice role was just one of a number of legal measures that developed during this period in attempt to level the unequal positions of the

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[55] John Hostettler, *Fighting for Justice: The History and Origin of Adversary Trial* (Waterside Press, 2006) 58.

[56] See further Beattie, above n 47, 251; Langbein (1978), above n 43.

[57] James Stephen, *A History of the Criminal Law of England* (Vol 1) (Macmillan and Co, 1883) 397. Though this analogy was offered by Stephen to describe the typical criminal trial of the late 1600s, his assessment remains equally apposite to describe the criminal process through until the various major reforms at the end of the 19th century. See further David Bentley, *English Criminal Justice in the Nineteenth Century* (Hambledon Press, 1998) 297-301; May, above n 54, 200.

[58] Bentley, above n 57, 297.

prosecution and defence by improving the defendant's situation.[59] As Landsman notes,

> [a]ll these developments suggest that the legal community of the day saw its task not simply as convicting the guilty, but as satisfying a profound social desire for fair play.[60]

The minister of justice role was to particularly compensate for the restrictions placed on the ability of defence counsel in cases of felony (unlike prosecution counsel) to fully represent the defendant at trial and to address the jury[61] and to offset the potentially partisan and tainted agenda of the private prosecutors who, rather than any public agency, were responsible for the institution and conduct of most criminal proceedings.[62]

The traditional negative perception (which was often justified from practice)[63] of the prosecutorial role as the zealous and partisan advocate solely bent upon securing the conviction of the defendant at all costs was discarded. The notion of the prosecutor as the restrained minister of justice was firmly established in England by the 1820s.[64] By this period, as Cairns notes, '[t]he existence of such a duty of restraint was not

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[59] See Landsman, above n 47, 603-604. Though Landsman does not refer to the prosecutorial role as a minister of justice he does include such developments to assist the defendant as the curbs on the use of out of court confessions, the introduction and increasing use of defence counsel and the rigour with which the evidence of accomplices and so-called 'thief catchers' (private prosecutors motivated by the generous rewards that were offered for the successful prosecution of certain offences) was viewed at trial.

[60] Ibid 604.

[61] See the comments in 1824 of the Attorney-General in *R v Flauntleroy* (see the transcript of the trial in Horace Bleackley (ed), *The Trial of Henry Flauntleroy and Other Famous Trials for Forgery* (William Hodge and Co, 1924) 74-75; Langbein (2003), above n 47, 287-288; Cairns, above n 54, 4 and 54. It was not until the *Prisoners Counsel Act 1836* that the defendant gained the right to be fully represented by counsel at both the committal proceedings and at trial and to sight pre-trial of the depositions of the prosecution witnesses.

[62] See *R v Brice* (1819) 2 B & Ald 606; *R v George Maxwell Ltd* [1980] 2 All ER 99; John Spencer, 'Response to Consultation' quoted by Lord Peter Goldsmith, *Pre-Trial Witness Interviews by Prosecutors Report* (Office of the Attorney-General, 2004) 6. The vindictive and corrupt nature of many private prosecutions in the first half of the 1800s were a topic of regular comment and complaint. See, for example, John Phillimore QC quoted by John Hostettler, above n 50, 166. See further John Edwards, *The Law Officers of the Crown* (Sweet and Maxwell, 1964), 340-343.

[63] See, for example, *R v Raleigh* (1603) 5 St Tr 1. See also David Mallett, *The Life of Francis Bacon* (A Millar, 1760), xix; Edwards, above n 52, 54-56; Emelyn, *Preface to State Trials (2nd ed),* 3. Though many prosecutors in the 1600 and 1700s did act with notable restraint, see Ibid; May, above n 54, 99.

[64] William Dickenson and Thomas Talfourd, *A Practical Guide to Quarter Sessions and other Sessions of the Peace* (Baldwin and Craddock, 3rd ed, 1829) 350; Beattie, above n 47, 253.

doubted, though some remarked upon its recent origin.'[65] Cairns' assessment is supported by the fact that, by the 1820s, contemporary observers were struck by the moderation and restraint with which prosecution counsel typically acted.[66] Prosecution counsel's observation during a manslaughter trial in 1824 that,

> '[t]he persons concerned in the prosecution had no object in view but the attainment and furtherment of public justice and let the verdict of the jury be what it might, they would be satisfied,[67]

illustrates the prevailing approach of prosecution counsel in England by the 1820s.[68] The role was to similarly emerge in colonial Australia by the 1850s in both rhetoric and reality.[69]

V THE PROSECUTOR AS A MINISTER OF JUSTICE – STILL STRONG IN AUSTRALIA AND ENGLAND

The notion of the prosecutor as a minister of justice remains powerful in both Australia and England; promulgated by many cases, professional guidelines[70] and the Codes of Conduct of public prosecuting agencies.[71] Indeed, so strong is the notion of the prosecution as the minister of justice that Lord Bingham has described it as an integral part of the defendant's fundamental right to a fair trial.[72]

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[65] Ibid. Though firmly established by the 1820s, it is unclear when the minister of justice role first appeared and it is the topic of some debate. See Allyson May, 'Book Review' (2001) 19 *Law and History Review* 676; 'Reply' (2002) 20 *Law and History Review* 448; David Cairns, 'Correspondence' (2002) 20 *Law and History Review* 445.

[66] See M Cottu, *On the Administration of Criminal Justice in England; and the Spirit of the English Government* (Richards Stevens, 1822) 87-89.

[67] *R v Connolly and Moran*, Hertford Assizes, 5 March 1824 (*The Times*, 6 March 1824).

[68] See also *R v Corder* in 1826 (see James Curtis, *The Mysterious Murder of Maria Marten at Polstead in Suffolk* (reprint) (Geoffrey Bless, 1928) 93-103 but especially 93) (a sensational murder); *R v Thurtell & Hunt*, Hertford Assizes, 6 January 1824 (*The Times*, 7 January 1824) (a murder that attracted intense press coverage); *R v Gorring*, Horsham Assizes, 24 March 1824 (*The Times*, 25 March 1824) (the prosecution of a 15 year old servant girl accused of the murder of her employer's young daughter which was undertaken in the 'most dispassionate way'); *R v Jones*, Central Criminal Court, 22 February 1828 (*The Times*, 23 February 1828) (the highly publicised trial for the brutal murder of a widow); *R v Flauntleroy* (Bleackley, above n 51, 74-75) (forgery). Though there were occasional aberrations, see, for example, *R v Vaughan* (*The Times,* 14 August 1828) (grave robbing) (see Cairns, above n 54, 39-40).

[69] See David Plater and Sangeetha Royan, 'The Development and Application in Nineteenth Century Australia of the Prosecutor's Role as a Minister of Justice; Rhetoric or Reality' (2012) 31(1) *University of Tasmania Law Review* 78, 130.

[70] See, for example, Rule 62 of the Australian Bar Association Model Rules; Rule 62 of the New South Wales Bar Rules; Rule 23.A.62 of the *New South Wales Solicitors Rules* 1995; Rule 9.2 of the *South Australian Bar Rules.*

[71] See further below n 78 and n 97.

[72] *R v Randall* [2002] 1 WLR 2237, 2241.

The classic modern formulation in England of the appropriate role of prosecution counsel is to be found in the introductory paragraph of the report of the Farquharson Committee that considered this issue in 1986. The Committee considered that a prosecutor's duties are different from defence counsel. It commented that the prosecutor must not strive unfairly for a conviction, press their case beyond the evidence supporting it, invite a conviction when there is not in his or her eyes sufficient evidence to sustain one, or present a witness severely discredited on cross-examination as worthy of credit. The Committee concluded:

> Great responsibility is placed upon prosecution counsel and although his description as a 'minister of justice' may sound pompous to modern ears it accurately describes the way in which he should discharge his function.[73]

This proposition is widely accepted by both academic commentators[74] and lawyers,[75] including eminent prosecutors[76] and at least one former Director of Public Prosecutions.[77] It is reflected in the official guidelines of various prosecuting agencies such as the Crown Prosecution Service[78] and is explicitly adopted in the professional rules for both solicitors[79] and barristers.[80] It has continued to be applied in decided cases.[81] A study at Wood Green Crown Court in London in the early 1990s[82] revealed that prosecution barristers 'adhered universally'[83] to the role of a minister of

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[73] Quoted by Martin Zander, *Cases and Materials on the English Legal System* (Cambridge University Press, 10th ed, 2007) 270. The advice of the Farquharson Committee is strictly confined to members of the 'independent' bar and not to either solicitors or employed barristers. However, the professional rules of conduct of both the Law Society and the Bar Council both prescribe a similar role for their members when they are prosecuting.

[74] See, for example, Andrew Ashworth, 'Prosecution and Practice in Criminal Justice' [1979] *Criminal Law Review* 480, 482; Francis Bennion, 'The New Prosecution Arrangements: The Crown Prosecution Service' [1986] *Criminal Law Review* 3, 5-7; Zander, above n 73, 271.

[75] See Ken MacDonald, 'Building a Modern Prosecution Authority' (2008) 22 *International Review of Law Computers and Technology* 7; Patrick Hastings, *Cases in Court* (William Heinemann Ltd, 1949) 287.

[76] See, for example, Humphreys, above n 4, 741; H Bull, 'The Career Prosecutor of Canada' (1962) 53 *Journal of Criminal Law, Criminology and Police Science* 89, 95-96.

[77] Sir Norman Skelhorn, *The Memoirs of Sir Norman Skelhorn: Public Prosecutor* (Harrap Ltd, 1981) 39 and 72.

[78] See Crown Prosecution Service, *Code for Crown Prosecutors* (CPS, 2004) [2.3].

[79] See Rule 21.19 of the previous *Solicitors Code of Conduct* (the present 2007 version deletes this reference), <http://www.lawsociety.org.uk/professional/conduct/guideonline/view=page.law?POLICYID=480>.

[80] See [10.1] and [10A] of the *Written Standards for the Conduct of Professional Work* for barristers.

[81] See *R v Gonez* [1999] All ER (D) 674; *R v Simpson* [2001] EWCA Crim 468; *R v Ikram & Paveen* [2008] Crim LR 912.

[82] Paul Rock, *The Social World of an English Crown Court: Witnesses and Professionals in the Crown Court Centre at Wood Green* (Clarendon Press, 1993).

[83] Ibid 170.

justice. The contributors to the study stated that their role was to 'prosecute fairly' and, in classic minister of justice terms, that they saw their role as excluding the notion of victory or defeat.[84] Importantly, the study found that prosecution counsel adhered to this role in practice and not just in rhetoric.[85]

The continued application of the minister of justice role has been made especially plain by the Privy Council over recent years in a number of leading cases such as *State v Mohammed*[86] in 1998, *R v Randall*[87] in 2002, *R v Benedetto and Labrador*[88] in 2003 and *State v Ramdhanie*[89] in 2005. In all of these cases the Privy Council allowed the appeals against conviction on account of the inappropriate conduct of prosecution counsel at trial. The decisions of the Privy Council must be regarded as powerful modern reaffirmation of the minister of justice role. No matter how grave the alleged offence (in both *Mohammed* and *Bendetto and Labrador* the defendants were charged with murder) or how overwhelming the evidence may appear to be (as was the situation in *Randall*),[90] any prosecutor who departs from the minister of justice role does so at the peril of their case. No matter how 'closely contested' or 'highly charged' the proceedings might prove, the minister of justice role prevails.[91] Even in the face of an obstructive defendant and/or defence advocate, as in both *Randall* and *Ramdhanie*, the prosecutor is still expected to adhere strictly to this role. As Lord Mance observed,

> [t]he high standards required of prosecuting counsel, as a "minister of justice" do not depend on defence counsel's compliance with the rules governing their conduct of the defence.[92]

In Australia, numerous judicial pronouncements similarly demonstrate the continuing adherence to the minister of justice concept,[93] and its

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[84] Ibid.
[85] Ibid 65.
[86] [1999] 2 AC 111.
[87] [2002] 1 WLR 2237.
[88] [2003] 1 WLR 1545.
[89] [2006] 1 WLR 796.
[90] See *R v Randall* [2002] 1 WLR 2237, 2250.
[91] Ibid 2241.
[92] *R v Ramdhanie* [2006] 1 WLR 796, 809. Defence obfuscation or partisan gamesmanship is far from unique, in either England (see, for example, *R v Bromley Magistrates' Court, Ex parte Smith* [1995] 4 All ER 146; *R v Gleeson* [2004] 1 Cr App R 406; *Malcolm v DPP* [2007] EWHC Admin 363) and Australia (see, for example, *R v Higgins* (1994) 71 A Crim R 429; *R v Wilson & Grimwade* (1994) 73 A Crim R 190; *R v Eastman* (1995) 84 A Crim R 118; *R v Sandford* (1994) 72 A Crim R 174, 188-189).
[93] See, for example, *R v Hay & Lindsay* [1968] Qd R 459, 474-475 and 476-477; *R v McCullough* [1982] Tas R 43, 56-57; *R v Libke* (2007) 81 ALJR 1309, 1320, 1327, 1333-1334; *R v Wood* [2012] NSWCCA 21, [577], [632].

consistent application.[94] Even in those cases where on the facts the courts have felt able to uphold the defendant's conviction,[95] they have not shirked from castigating the prosecutor if his or her conduct is deemed to have strayed from the correct role.[96] Professional guidelines in Australia, as in England, uniformly adopt the minister of justice model.[97] In short the continued application of the minister of justice role is a matter of reality and not just rhetoric.

VI THE MINISTER OF JUSTICE ROLE IS UNDERMINING THE MODERN ADVERSARIAL SYSTEM

As explained above, an underlying norm of the modern adversarial trial is the pursuit of fairness. The concept behind the adversarial trial – civil or criminal – is that two advocates of similar resources, ability and vigour present their conflicting arguments before an impartial judge or jury, wherein both adversaries must make best attempts to convince the decision-maker(s) that their version of the facts is the most likely.[98] This system is based on the belief 'that it is the open conflict between two opponents…that best leads to the ascertainment of truth and the rendering of justice.'[99] As Kirby J has explained,

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[94] See, for example, *R v R* (1997) 99 A Crim R 327; *R v Kennedy* (2000) 118 A Crim R 34; *R v Tran* (2001) 118 A Crim R 218.

[95] It can seem arbitrary where the judicial line will be drawn between inappropriate prosecutorial conduct which will lead to a conviction being quashed and when it will not.

[96] See, for example, *R v Bazley* (1986) 21 A Crim R 19; *R v Pernich & Maxwell* (1991) 55 A Crim R 464; *R v Libke* (2007) 81 ALJR 1309.

[97] See, for example, Guideline 2 of the *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*: 'A prosecutor is a 'minister of justice'. The prosecutor's principal role is to assist the court to arrive at the truth and to do justice between the community and the accused according to law and the dictates of fairness'; See further Guideline 1 of the *Guidelines for Prosecutors* (ACT); *Prosecution Policy of the Commonwealth*, 3 ('servant of justice'); Guideline 2 of the *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*, 5-6; Guideline 1.2(2) of the *Prosecution Guidelines* 2005 (NT); Guideline 1 of the *Director's Guidelines* 2010 (Qld); the *Statement of Prosecution Policy and Guidelines* (SA), 2-3; Guideline 1 of the *Director's Guidelines* (Qld); Guideline 1.1.3 of the *Prosecution Policy and Guidelines* 2010 (Vic) (see also Guideline 1.1.5-1.1.6); *Statement of Prosecution Policy and Guidelines 2005* (WA), 6, [9] and [11]. The Tasmanian DPP, perhaps surprisingly, makes no reference to the minister of justice (or any other for that matter) role, see *Prosecution Guidelines* (Tas).

[98] See, for example, James Tomkovicz, *The Right to the Assistance of Counsel* (Greenwood Press, 2002) 48; James Acker and David Brody, *Criminal Procedure: a Contemporary Perspective (3rd ed)* (Jones and Bartlett Learning, 2012), 404.

[99] Barry Grossman, 'The Role of the Prosecutor: New Adaptations in the Adversarial Concept of Criminal Justice' (1968) 11 *Canadian Bar Journal* 580. See also Shapray, above n 12, 124-126.

> [t]he adversarial system is based on the assumption that if each party presents its case in the strongest light, the court will be best able to determine the truth.[100]

Whether the adversarial system actually serves or encourages the finding of the truth is the subject of 'considerable debate'[101] and the premise is often doubted.[102] However, it is clear that the defining feature of the adversarial system is, and will continue to remain so for the foreseeable future,[103] the concept of 'legal combat'[104] or the 'gladiator model of lawyering'.[105] As Bankowski and Mungham comment, '[t]he [adversarial] system rests upon an assumption of genuine conflict between the parties.'[106] The lawyers on both sides will do their best to advance their case and undermine their opponent's case.[107]

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[100] *Commissioner of Federal Police v Propend Finance Ltd* (1997) 188 CLR 501, 561. See also *Herring v New York* (1975) 422 US 853, 862.

[101] Ellen Sward, 'Values, Ideology, and the Evolution of the Adversary System' (1989) 64 *Indiana Law Journal* 301). Nevertheless, despite this debate the adversarial system is not without its defenders, notably in its ascertainment of the truth. See, for example, David Luban, 'The Adversary System Excuse' in David Luban (ed), *The Good Lawyers: Lawyers' Roles and Lawyers' Ethics* (Rowman and Allanheld, 1984) 83, 92*;* Gerald Walpin, 'Truth, the Jury and the Adversarial System, America's Adversarial and Jury System: more likely to do Justice' (2003) 26 *Harvard Law Journal of Public Policy* 175). However, this view is widely disputed. See further below n 102. It is beyond this article to enter the debate as to the virtues of the adversarial system and, in particular, its success in arriving at the 'truth' and whether an inquisitorial system would be better suited in this respect.

[102] There is a strong view that the adversarial justice is 'inadequate, indeed dangerous, for satisfying a number of important goals of any legal or dispute resolution system' (Carrie Menkel-Meadow, 'The Trouble with the Adversarial System in a Post Modern Multicultural World' (1996) 38 *William and Mary Law Review* 5, 6) and it operates in practice to defeat the discovery or the establishment of the truth. See Marvin Frankel, 'The Search for Truth: an Umpireal View' (1975) *123 University of Pennsylvania Law Review* 1031-1059; David Ipp, 'Reforms to the Adversarial Process in Civil Litigation: Part 1' (1995) 69 *Australian Law Journal* 705, 713-715; Mirjan Damaska, 'Presentation of Evidence and Fact Finding Precision' (1975) 123 *University of Pennsylvania Law Review* 1083, 1093-1095; Cosmas Moididis, *Criminal Discovery: From Truth to Proof and Back Again* (Sydney Institute of Criminology, 2008), 239.

[103] This article proceeds upon the assumption that, for all its criticisms and recent changes in areas such as the growth of 'case management' and the advent of 'therapeutic justice' and specialised 'problem solving' courts for the foreseeable future the criminal justice system in both England and Australia will continue to be essentially governed by an adversarial model.

[104] Carrie Menkel-Meadow, 'The Lawyer as Problem Solver and Third Party Neutral: Creativity and Non-Partisanship in Lawyering' (1999) 72 *Temple Law Review* 785, 788.

[105] Ibid 791.

[106] Zenon Bankowski and Geoff Mungham, *Images of Law* (Routledge, and Kagan Paul Ltd, 1976) 102, n 135. See also Martin Moynihan QC, *Review of the Civil and Criminal Justice System in Queensland* (Queensland Government, 2008) 89.

[107] Menkel-Meadow, above n 104, 788.

If the wisdom of an adversarial system was, and still is, that truth and justice are ultimately best able to emerge from the conflict of a partisan contest between two opposing and evenly matched parties,[108] one must ask how such a system is to function on this basis and achieve its stated goals when the prosecutor is cast in the role of an impartial figure of restraint. The defence is entitled and expected in an adversarial system to defend fearlessly the interests of the defendant and to take any legitimate measure to fulfill that role.[109] Their role is 'unrelentingly confrontational'.[110] But if the prosecutor, in contrast, assumes the lesser role of a minister of justice then it is difficult to see how the adversarial process can achieve its stated aim of discovering or establishing the truth of the case when there is this apparent uneven playing field. As Toohey J has noted, '[i]ndeed, the adversary system that prevails in this country assumes the existence of contestants who are more or less evenly matched.'[111] Grossman is correct when he similarly argues 'If the adversarial system is to work, the combatants must be kept equal or at least relatively equal.'[112] If one side is in a much stronger position than that of the other, the adversarial system is undermined and 'the outcome is determined simply by superior power'.[113] The minister of justice role is at odds within a process that is premised upon a vigorous contest between two equally matched opposing parties.

In a civil trial, it is correct to say that when two contesting parties are in litigation, that they are on 'opposite sides'. However, in a criminal trial, it is contentious to say that the prosecutor and the defendant are on 'opposite' sides'. Some authors assert that the prosecutor is not on a 'side' at all, and that the minister of justice role demands a studied disinterest in the outcome.[114] The corollary of this interpretation of the

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[108] Though this premise is often doubted. Former Tasmanian Chief Justice Underwood bluntly comments that 'only those who believe in the tooth fairy believe that the [adversarial] process is designed to ascertain the truth.' See Peter Underwood, 'The Trial Process, Does One Size Fit All?', Speech to the Australian Insurance Law Association, 10 November 2005, <http://www.supremecourt.tas.gov.au/publications/speeches/underwood/the_trial_process>

[109] See, for example, [303(a)] of the *Code of Conduct of the Bar of England and Wales (8th ed)*; Rules 3 and 16 of the *Australian Bar Association Model Rules*; *Rondel v Worsley* [1969] 1 AC 191, 227. Though the defence lawyer, as any lawyer, must still act ethically and remember that their ultimate duty is to the court and not to their client. See *Rondel v Worsley* [1969] 1 AC 191, 227; *Giannerelli v Wraith* (1988) 165 CLR 543, 556.

[110] Martin Blakemore, 'Equality of Arms in an Adversary System', Conference Paper presented at the International Association of Prosecutors Annual Conference, Cape Town, 4 September 2000, <http://www.odpp.gov. au/speeches/Final%20paper%20Capetown.htm>.

[111] *R v Dietrich* (1992) 177 CLR 292, 354.

[112] Brian Grosman *The Prosecutor: an Inquiry into the Exercise of Discretion* (University of Toronto Press), 84.

[113] Ibid.

[114] See, for example, K Turner, 'The Role of Crown Counsel in Canadian Prosecutions' (1962) 40 *Canadian Bar Review* 439, 452; Dal Pont, above n 31, 18.2. [18.14].

role is that when the prosecutor presents their case, they must exhibit dispassion and even indifference.

This conception of the minister of justice role is not the best approach, as it ignores the importance of the proper functioning of an adversarial system. Criminal trials can involve high stakes to all involved – to the defendant, who may be subject to significant punishment, to the state, which seeks to demonstrate to the public its power to control deviance, to the public, which desires physical security, the reinforcement of societal norms, and possibly retribution.[115] Noting these high stakes and the multiple purposes which the criminal justice system must serve, it is crucial that the adversarial system that is in place in Australia and England operates the way in which it is intended to operate. It may not be the ideal system, and it may be improved, but it needs to remain true to its core operation – that two adversaries advocate strongly in opposition to each other.

The adversarial system was developed at a time when fairness between the state and the defendant was of integral importance.[116] Therefore, it is theoretically congruent that as an adversarial system by definition requires a contest between adversaries, and that because an adversarial system also values fairness, for this contest to be fair, there must be a balance between the parties in terms of their mutual ability to 'win' the contest. 'Balance' should not be presumed to be the equivalent of 'equality'. Such confusion is easily brought about, as 'balance' connotes an image of two equal weights positioned in opposition to each other. Clearly, in their most basic roles the prosecutor and the defendant are not on an equal footing, so it would be unjust to treat them equally. The prosecutor, who has nothing personally to lose and who enjoys the considerable authority and resources of the state cannot be compared as equal to the defendant who stands at risk of punishment. Therefore, the law has been developed to remedy this intrinsic inequality by advantaging the defendant; the presumption of innocence and the right to silence being just two of many advantages that the modern defendant enjoys. The purpose has been to create a system whereby all of these advantages and disadvantages as between the parties result in a balance which is fair - fair in the sense that both parties have a 'fighting chance' to 'win' their respective cases.

The conception of the minister of justice role as requiring an especially reticent and even-handed prosecutor upsets the entire adversarial system.

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[115] See *R v Mulvahill* (1992) 69 CCC (3d) 1, 8.

[116] This is not to assume that the adversarial systems as they operate in practice in Australia and England are completely fair. However, an analysis of how 'fair' the modern English and Australian criminal justice systems are, is contentious, complex and beyond the scope of this article.

The adversarial system not only expects the prosecutor to 'fight', it requires it. The minister of justice role merely qualifies how the 'fight' is fought – it does not remove the requirement that the prosecutor must 'fight'. The minister of justice role does not relegate the prosecutor to a passive observer or ringside commentator. The prosecutor must understand that the purpose of his or her work, in the English and Australian adversarial systems, requires him or her to strive to 'win' – that is, the prosecutor must do his or her very best, while still abiding by the rules, to convince the jury that the defendant is guilty of the charges reasonably brought. While the prosecutor must certainly be disinterested and unbiased, he or she has the duty to strive to advocate at the highest possible standard – as undoubtedly the counsel for the defendant is also presenting her own case as best he or she can. It is incorrect that the prosecutor is not on a side, and it is also incorrect that the minister of justice role removes the adversarial quality of the prosecutor's role. It merely qualifies the role.

VII THE MINISTER OF JUSTICE IN THE ADVERSARIAL SYSTEM – INCONGRUENT IN THEORY

There has always been an intrinsic tension between the adversarial system and the minister of justice role. The modern prosecutor is to act as an active advocate whose role is to establish the guilt of the defendant while at the same time being compelled by almost two centuries of etiquette, authority and precedent to act as an impartial minister of justice whose only concern is to seek the truth. The tension between these two divergent forces has never been satisfactorily reconciled.[117] Taylor and Byrne note that because the prosecutor is expected to act as a minister of justice while simultaneously participating in an adversarial justice system, he or she is faced with the daunting task of finding the narrow path that separates the two unacceptable extremes between indifferent bureaucrat who sacrifices public safety in the name of institutional efficiency and vengeful zealot whose narrow-mindedness may lead to wrongful convictions.[118]

The underlying tension in the prosecutorial role has been in existence since the early 1800s[119] with the emergence of the adversarial criminal process and the concurrent development of the role of the prosecutor as a minister of justice. This particular tension is unique within the judicial

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[117] Peter Henning, 'Prosecutorial Misconduct and Constitutional Remedies' (1999) 77 *Washington University Law Quarterly* 713, 726.

[118] Paul Taylor and Stephen Byrne, 'Reflections on Crown Attorneys and Cross-Examination' (2001) 45 *Criminal Law Quarterly* 303, 304.

[119] John Sutherland, 'Role of the Prosecutor: A Brief History,' *Criminal Lawyers Association Newsletter* (June 1998) 19(2), 17, <www.criminallawyers.ca.newslett/19-2/sutherland.htm>.

process.[120] The dual roles of minister of justice and zealous advocate are 'anchored in a contradiction'.[121] As was explained by Smith J when considering the American Bar Association *Model Rules of Professional Conduct* which prescribe the prosecutorial role as 'both an administrator of justice and an advocate':

> This mandate is quite paradoxical. On the one hand, it casts the prosecutor in the role as an advocate representing the people in an adversary proceeding, and on the other hand it restricts his functions as an advocate: in effect it says that the accused is one of the people whom he is to represent. Thus, the prosecutor's role is initially encumbered with a conflict of interest, not known or tolerated in any other judicial proceeding.[122]

In addition to this inherent tension, which makes conducting a trial hard enough for the prosecutor, it is argued that the minister of justice role if literally applied, as raised by Devlin, to obtain the fair 'balance' described above between the prosecutor and the defendant, risks swinging too far in favour of the defendant. Paradoxically, the pursuit of fairness has resulted in a greater risk of criminal trials being unfair – unfair to the state and to the public, which, as explained above, both have important interests in the outcome of trials which should be duly respected. The adversarial system and the minister of justice role both have fairness at their cores. The minister of justice role, which is already intrinsically in tension with the adversarial system, has been consistently interpreted in a way which stands in an irreconcilable tension with the mutually vigorous advocacy which is required in a functional adversarial system.

VIII THE PROSECUTOR IN AN ADVERSARIAL SYSTEM: TIME TO 'FIGHT FIRE WITH FIRE'?

The minister of justice concept gives rise to the fundamental question of how this role is to be performed in the context of the adversarial process that is the 'hallmark'[123] of adjudication in common law jurisdictions. As Chief Justice Underwood observes, 'Fundamental to our trial process is its adversarial nature.'[124] The minister of justice role in a modern adversarial context is outdated and risks undermining the entire system. There have been suggestions that prosecutors should be entitled to 'fight

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[120] Henning, above n 117, 725-727.
[121] David Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (Oxford University Press, 2002) 29. See also Susan Brandes, Loyalty to One's Convictions: the Prosecutor and Tunnel Vision' (2005) 49 *Howard Law Journal* 475, 485.
[122] R Smith, 'The Role of the Prosecutor in Texas,' 1973 Address, quoted by John Douglass, *Ethical Issues in Prosecution* (University of Houston, 1988) 24.
[123] Sward, above n 101, 301.
[124] Underwood, above n 108.

fire with fire'. [125] However, such a fundamental re-evaluation of the prosecutorial role has gained little support.[126] As Turner observed:

> [i]t may be thought by some that under modern conditions, it is necessary to fight fire with fire, even though that involves placing counsel for the prosecution in the position of the enemy of the man in the prisoner's dock. However, it is still essential that men be deemed innocent until proved guilty… that counsel for the prosecution shall continue to act as a minister of justice, and not as an advocate in an adversary proceeding.[127]

Turner, while recognizing the tension in the dual prosecutorial roles of adversarial advocate and minister of justice, considered that the minister of justice role should be paramount. It is contended that this approach is incorrect. The better approach is that the minister of justice role is a mere qualifier of the prosecutor's fundamentally adversarial role (and a not particularly easily reconcilable qualifier, at that).

However, to even argue that one role is paramount to another role or one role merely qualifies another role begs the question of whether the prosecuting lawyer can perform concurrently both of these seemingly conflicting prosecutorial roles. Sir Malcolm Hilbery, a former English judge commented, '[t]here is, perhaps, no occasion when the Barrister is called upon to exhibit a nicer sense of his responsibilities than when prosecuting.'[128] Admittedly there are many assertions that the tension in the dual prosecutorial roles can be reconciled.[129] Turner, for example, argues that as it is not the aim of prosecution counsel to obtain convictions (as the prosecutorial role is only to expose the truth),[130] the adversarial system has no application to his or her work. Justice is

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[125] See Fred Zacharias, 'Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors do Justice?' (1991) 44 *Vanderbilt Law Review* 45, 56, n 54 and 104; H Richard Uviller, 'The Neutral Prosecutor: the Obligation of Dispassion in a Passionate Pursuit' (2000) 68 *Fordham Law Review* 1695, 1718; Mitchell, above n 18, 498-500.

[126] See, for example, *R v Murray & Mahoney* (1916) 33 DLR 702, 710-711; *R v Boucher* [1955] SCR 16, *Berger v US* (1935) 295 US 78, 88; *People v P* [2003] 3 IR 550; *R v Thomas (No 2)* [1974] 1 NZLR 658. See also Bennett Gersham, 'The Prosecutor's Duty to Truth' (2001) 14 *Georgetown Journal of Legal Ethics* 309, 314-315; Bruce Green, 'Why Prosecutors should seek Justice' (1999) 26 *Fordham Urban Law Journal* 607; Bruce Green and Fred Zacharias, 'Prosecutorial Neutrality' (2004) *Wisconsin Law Review* 837, 838; Abbe Smith, 'Can You Be a Good Person and a Good Prosecutor?' (2001) 14 *Georgetown Journal of Legal Ethics* 355.

[127] Turner, above n 114, 458-459.

[128] Malcolm Hilbery, *Duty and Art in Advocacy* (Stevens and Son, 1946) 13.

[129] See, for example, John Brooks, 'Ethical Obligations of the Crown Attorney - Some Guiding Principles and Thoughts' (2001) 59 *University of New Brunswick Law Journa*l 229, 236-237; Bennett Gersham, 'Prosecutorial Ethics and Victim's Rights: the Prosecutor's Duty of Neutrality' (2005) 9 *Lewis and Clark Law Review* 559, 562-563; Gourlie, above n 33, 310-311; McNair, above n 14, 260; Kenneth Melilli 'Prosecutorial Discretion in an Adversary System' (1992) *Brigham Young University Law Review* 669, 698-699.

[130] See, for example, Humphreys, above n 4, 740-741, 748.

secured, Turner asserted, whatever the outcome of the case: '[i]n the truest sense of the term, the Crown never wins or loses a criminal case...technically, really or otherwise.'[131]

However, it is argued that such views are misplaced. In truth, the notion of the modern prosecutor as a non-partisan figure whose only concern is to promote the truth of the case is simplistic. The tension in prosecutorial roles ultimately cannot be reconciled.

There are two main solutions for this tension between the adversarial system and the prosecutor's role as a minister for justice. First, the system could be changed into something that is not adversarial so the tension can be alleviated. Second, the nature of the role of the prosecutor should change. Both will now be examined in order.

While the adversarial system can and no doubt will change,[132] it is doubtful that the tensions that the law places on the prosecutor's role would serve as sufficient impetus to initiate a radical overhaul. It has been noted that in respect of civil litigation there is now 'significant divergence of the practices' between adversarial and inquisitorial systems.[133] No country now operates strictly within the 'prototype model' of either system of justice.[134] There are valid arguments that the criminal justice process in both Australia and England is no longer 'purely adversarial' as a result of the advent of 'therapeutic justice' and 'problem solving' courts[135] and the increasingly structured and case managed approach to

[131] Turner, above n 114, 452. See also *Brady v Maryland* (1963) 373 US 83, 87-88.

[132] See, for example, Arie Frieberg, 'Post Adversarial and Post Inquisitorial Justice Transcending Traditional Penological Paradigms' (2011) 8 *European Journal of Criminology* 82; Nigel Stobbs, 'The Nature of Justice Paradigms: Exploring the Theoretical and Conceptual Relationship between Adversarial and Therapeutic Jurisprudence' (2011) 4 *Washington University Jurisprudence Review* 97.

[133] Australian Law Reform Commission ('ALRC'), *Review of the Federal Civil Justice System*, Discussion Paper 62, (1997) [2.26]. See also ALRC, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper 20 (1997) [5.1]; Annette Marfording and Ann Eyland, 'Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany', *University of New South Wales Faculty of Law Research Series 2010*, Working Paper 28.

[134] ALRC, Discussion Paper, above n 133, [1.116]. See also Sir Robin Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) [10.3].

[135] See, for example, King, above n 11; Bruce Winick, 'Therapeutic Justice and Problem Solving Courts' (2003) 30 *Ford Urban Law Review* 1056. The summary courts have been particularly influenced by this trend. See Judy Gutman, 'The Reality of Non-Adversarial Justice: Principles and Practice' (2009) 19 *Deakin Law Review* 29, 39-42. The development of therapeutic justice and problem solving courts has significant implications for the adversarial premise of criminal justice: see Ibid 46; and, in particular for a less partisan prosecutorial role: see, for example, Judith Kaye, 'Lawyering for a New Age' (1998) 67 *Fordham Law Review* 1, 3.

modern litigation that is now an established feature of the criminal courts.[136]

However, notwithstanding these changes 'the system of criminal justice in this jurisdiction remains, and will continue to remain, an essentially adversarial one.'[137] As Bennion argues, a 'change to an inquisitorial system, even if it could be shown to be desirable, would be so fundamental in its effect upon institutions that had taken centuries to build as to be impossible on political and practical grounds.'[138] The adoption of an inquisitorial system would be, as Sir Anthony Mason observed in 1999, 'an extraordinary act of faith' and

> would be contrary to our traditions and culture, it would generate massive opposition, and it would call for expertise that we do not presently possess and at the end of the day we would have a new system without a demonstrated certainty that it would be superior to our own.[139]

It is particularly unrealistic to think that the common law criminal trial, 'the purest expression of the adversary system',[140] is likely to undergo fundamental change over coming years to somehow become a non-adversarial process.

Turning to the second potential solution to the irreconcilable prosecutorial roles of minister of justice and adversarial advocate, we should reconsider the role of the modern prosecutor. A purely partisan or combative approach is inappropriate in some circumstances but with respect to some aspects of the prosecutorial role, especially in the conduct of the prosecution case during trial, the prosecutor should be free to be more adversarial. It is clear that the prosecutor must always be ethical and fair, but one can be an ethical and fair prosecutor without necessarily being a minister of justice. A prosecutor should not assume a supine role and in some circumstances, contrary to Turner's assertion, the modern prosecutor should be permitted to 'fight fire with fire.'

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[136] There have been strong pressures in both Australia and England over recent years on the criminal justice system to curb mounting costs and delays. Accordingly active 'case management' has become prominent in both jurisdictions to improve the 'performance' of the criminal courts and to identify the issues to be raised at an early stage and to 'manage' and 'streamline' the whole process, both before and at trial. See, for example, Jill Hunter, Camille Cameron and Terese Henning, *Litigation II: Evidence and Criminal Procedure* (LexisNexis, 7th ed, 2005) 712-716; Shorter Trials Committee, *Report on Criminal Trials* (AIJA, 1985); Brian Martin QC et al, *Working Party on Criminal Trial Procedure: Report* (Attorney-General's Department, 1999); Auld, above n 134.

[137] James Richardson, 'Comment [on *R v Glesson*],' *Criminal Law Weekly*, Issue 39, 3 November 2003. See also *R v Whitehorn* (1983) 152 CLR 657, 682; *R v Griffis* (1996) 91 A Crim R 203, 207; *R v Randall* [2002] 1 WLR 2237, 2241.

[138] Bennion, above n 74, 6 See also Auld, above n 134, [1.28].

[139] Sir Anthony Mason, quoted by ALRC, Discussion Paper, above n 133, 31.

[140] Blakemore, above n 110. See also *R v Petty* (1991) 173 CLR 95, 99-100.

IX THE MINISTER OF JUSTICE ROLE IS TOO ONEROUS FOR PROSECUTORS

The traditional conception of the prosecutorial role as the minister of justice has been reaffirmed over recent years in both England and Australia (as already discussed) and has especially featured in a series of sometimes controversial[141] decisions in New South Wales.[142] The traditional proposition that prosecutions must be 'conducted with fairness towards the accused and with the *single view* [authors' emphasis] to determining and establishing the truth'[143] was reaffirmed by the New South Wales Court of Appeal in *R v Livermore*[144] to represent the 'contemporary and continuing obligation of a prosecutor to present a case fairly and completely.'[145] The court confirmed that 'the [prosecutor's] sole objective ... [is] to expose the truth which may or may not result in a conviction'.[146] Further, the court offered the perhaps startling proposition that it was not part of the prosecutor's role at trial to 'ridicule or belittle' the defence case.[147] The court emphasised that the role of the prosecutor has to be performed 'without any concern' as to whether the case is won or lost and the sole objective of the prosecutor is 'to expose the truth which may or may not result in a conviction.'[148] Even if the court in *Livermore* reached a correct decision on the facts before it,[149] the court's strong reaffirmation of the minister of justice role is open to criticism. Such a formulation requires a degree of 'detachment' on the discharge of

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[141] The decision in *R v MG* (2007) 69 NSWLR 20, for example, was contentious and the subject of criticism. See Jeremy Rapke QC, 'Seeking Justice and Seeking Convictions: Striking the Proper Prosecutorial Balance in High Profile Cases,' Speech at the University of Melbourne, January 2008, <http://www.opp.vic.gov.au> 28; I Moore, 'Court frets about the rapist, not his victim', *The Australian*, 23 April 2007.

[142] See *R v MRW* (1999) 113 A Crim R 308; *R v Kennedy* (2000) 118 A Crim R 34; *R v Rugari* (2001) 122 A Crim R 1; *R v Attallah* [2005] NSWCCA 227; *R v Liristis* (2004) 146 A Crim R 547; *R v Livermore* (2006) 67 NSWLR 659; R *v KNP* (2006) 67 NSWLR 227; *R v MG* (2007) 69 NSWLR 20 *R v Gonzales* [2007] NSWCCA 321; *R v Causevic* [2008] NSWCCA 238, *R v GDD* [2010] NSWCCA 62, *R v Wood* [2012] NSWCCA 21.

[143] Ibid 669, quoting *R v Subramaniam* (2004) 79 ALJR 1126, 127-128.

[144] (2006) 67 NSWLR 659 ('*Livermore*'); See also *R v Wood* [2012] NSWCCA 21, [577], [632].

[145] *Livermore*, 669.

[146] Ibid.

[147] Ibid 667. This was stated to be one of the five specific requirements of a prosecutor's address. The others were to avoid a submission based on material that was not based on evidence, to refrain from, not to attack the credit of a prosecution witness without allowing that witness an opportunity to respond to such an attack and conveying the prosecutor's own personal opinions.

[148] Ibid 669.

[149] The court held that prosecution counsel in that case at trial had not only impermissibly criticised the defence case in robust (which on the facts in the case was arguably fully justified) and personalised terms but had also employed inflammatory or intemperate comments tending to arouse prejudice or passion in the jury.

the prosecutorial role that entails the risk pointed to by Devlin of 'emasculating' the adversarial quality of the criminal trial.

The statement that the prosecutor must act with the single view to determine and establish the truth, whilst consistent with the traditional minister of justice role, is reminiscent of an inquisitorial criminal process which no longer exists in England or Australia. The demand that the prosecutor 'expose the truth' assumes that the truth is discoverable by a prosecutor. Humans do not necessarily act logically and calculatedly at the best of times. It is unrealistic for a prosecutor to be expected to 'expose the truth'. A prosecutor must make their case even while the defendant may exercise their rights to remain silent and to not call witnesses. In such circumstances, it is unrealistic for the prosecutor to play psychologist and detective and 'expose the truth' behind perhaps complex criminal activity where the defendant and other parties may have been under the influence of drugs, alcohol, mental illnesses or otherwise unobvious personal motives.

Such formulations of the prosecutorial role fail to recognise that there may be many possible truths – as the court emphasised that the prosecutor must act without any concern whether the case is won or lost, this would seem to suggest that it is at the behest of the prosecutor to detail all possible likely scenarios of the truth – both advantageous and disadvantageous to the defendant. Further, the requirement that the prosecutor must 'expose the truth' confuses the roles of the prosecutor and the jury. If it is anyone's task, the jury's role is to determine the truth of the factual issues in dispute after having had the benefit of being presented with two opposing versions of what that the truth may be.

Such statements as in *Livermore* take the minister of justice doctrine too far and fail to reflect the practical reality of the prosecutor's role in an adversarial criminal process. The prosecutor's duty may well be to seek justice. Yet, as Gourlie notes, 'the ends of justice often demand a firm adversarial stance.'[150] Lord Simon LC observed that 'it is true that a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the accused.'[151] Others have also questioned the assumption that the prosecutor can, or should, act always as a minister of justice.[152] Such criticisms of the minister of justice concept are apposite. Zellick, for example, is unimpressed with the predictions of dire consequences should the prosecutor ever depart from this role:

> These dangers, however, are much exaggerated. Much nonsense is apt to be talked about prosecuting counsel's being a minister of justice. The fact

[150] Gourlie, above n 33, 297.
[151] *R v Stirland* [1944] AC 315, 324.
[152] Taylor and Byrne, above n 118, 329-330; Shapray, above n 12, 127; Grosman, above n 112, 86; Uviller, above n 125; Grossman, above n 39, 346.

> remains that he is there to secure a conviction, even if there are limits on the lengths to which he may go to obtain it… No accused is likely to regard counsel for the Crown as an impartial administrator of justice, and of course he is not.[153]

The minister of justice role should not be accepted without question. It has been widely accepted that there are sound reasons why the prosecutor's role as a 'pure' minister of justice must be qualified in an adversarial system so that the prosecutor has the ability to actively advocate to seek the conviction of the defendant[154] (despite the courts' apparent discounting of this factor on occasion).[155] 'Naturally enough a proper balance needs to be maintained,' as the New Zealand Court of Appeal has observed, and the minister of justice role 'ought not to lead to the assumption of a [prosecutorial] role so emasculated' as to give rise to the concern, that the adversarial system may be undermined.[156] In accordance with these sentiments, it is time to re-evaluate the role of the modern prosecutor to be more realistic.

X THE MINISTER OF JUSTICE ROLE QUALIFIED

There have been many illustrations of prosecutors applying the minister of justice role too staunchly and failing to prosecute effectively individual cases[157] or, even, categories of cases.[158] The traditional failure to

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[153] Graham Zellick, 'The Role of Prosecuting Counsel in Sentencing' [1979] *Criminal Law Review* 493, 499. Though Zellick's comments were about the prosecutor's contribution at the sentencing stage, they are of general application.

[154] See, for example, *Moss v Brown* [1979] 1 NSWLR 114, 126; *R v Fitzgerald* (1992) 106 FLR 331, *R v Deriz* (1999) 109 A Crim R, [66]; *R v Rugari* [2001] NSWCCA 64, [52]; *R v Attallah* [2005] NSWCCA [131]-[132].

[155] See, for example, *R v MG* (2006) 73 NSWLR 20.

[156] This concern was expressed by Sir Patrick Devlin in *R v Roulston* [1976] 2 NZLR 644, [32].

[157] See, for example, *R v DPP, Ex parte C* [1995] 1 Cr App R 136; Clare Dyer, 'Making a Pact with the Devil', *The Guardian*, 30 October 2000, 14 (describing how prosecution counsel had avoided a trial and been a party to a 'lamentable' agreement that had allowed a child sex offender to escape a deserved prison sentence). See further *R v Peverett* [2001] Crim LR 60 and the *Attorney-General Guidelines on the Acceptance of Pleas* 2001 which were prompted by the case. The controversy over the comments of prosecution counsel in late 2007 in Aurukun in Queensland during the sentencing of several Aboriginal defendants for the rape of a young girl provide a recent illustration. The prosecutor was widely criticised for adopting such a lenient, if not indulgent, approach to the case that he not only failed to protect the welfare of the victim, but also failed to convey the gravity of the offence and spared the defence the task of having to make a speech in mitigation. See Cosima Marriner, 'Prosecutor in Child Rape Case Stood Aside', *Sydney Morning Herald*, 12 December 2007; Roberta Mancuso, Paul Osborne and Gabrielle Dunlevy, 'Gang-rape Prosecutor Stood Aside', *Sydney Morning Herald*, 11 December 2007. See further *R v KU & Others; Ex parte A-G* [2008] QCA 20 and 154.

prosecute effectively cases of domestic violence is well known.[159] Similarly, the prosecution of rape cases has been strongly criticised throughout the common law world.[160] As Temkin observes it is often said that such prosecutions are conducted 'faithlessly' and that prosecution counsel remains passive in the face of aggressive defence tactics.[161] There is a danger that by trying to be fair, the prosecutor may forgo making valid points that should be made against the accused,[162] potentially ultimately 'allowing a guilty man to escape the proper consequences of his actions.'[163] Bull makes a similar point:

> [Prosecution] [c]ounsel must not be hoodwinked by those who, while affecting to tell the truth are really twisting facts to help the prisoner, and he must assiduously cross-examine the witnesses for the defence to find out how far they can be relied upon.[164]

Accordingly, there is a widespread recognition that the prosecutorial role must be flexible and sufficiently robust to accommodate the demands of prosecuting on behalf of the community in an adversarial criminal process. Humphreys observes that, 'It is not unfair to prosecute, and the defence will look after the defence.'[165] Humphreys expressed his belief in blows that were 'hard hitting' but 'scrupulously fair.'[166] The Supreme Court of the United States has noted 'the vigorous and fearless performance of the prosecutor's duty that is essential to the proper

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[158] Amongst the many issues associated with the prosecution of domestic violence and sexual assault, the historical lack of commitment with which prosecutors pursued both cases of domestic violence or sexual assault is well documented.

[159] See Antonia Cretney and Gwynn Davies, 'Prosecuting 'Domestic' Assault' [1996] *Criminal Law Review* 162, 163; Antonia Cretney and Gwynn Davies, 'Prosecuting Domestic Assault: Victims Failing Courts or Courts Failing Victims?' (1997) 36 *Howard Journal Criminal Justice* 146; Angela Corsilles, 'No Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution' (1994) *Fordham Law Review* 853, 854-855.

[160] See, for example, Leanne Bain, 'The Failures of "Shield Legislation", Sexual History Evidence, Feminism and the Law' (2010) 1 *Aberdeen Student Law Review* 96, 105-106; Jennifer Temkin, 'Prosecuting and Defending Rape Cases: Perspectives from the Bar' (2000) 27 *Journal of Law and Society* 230, 240; Gerry Chambers and Ann Millar, *Prosecuting Sexual Assault* (Scottish Office Central Research Unit, 1986) 89, n 8; Sue Lees, *Carnal Knowledge: Rape on Trial* (Hamish Hamilton, 1996) 253-254.

[161] Temkin, above n 160, 240. Temkin argues that a more assertive prosecutorial style would not be inconsistent with the prosecutor's role as a representative of the state rather than as an agent of the victim: see Ibid; The laws which ostensibly prohibit the introduction of evidence of the victim's sexual reputation that were intended to prevent such 'trashing' of complainants in sexual cases have not proved successful in practice. See Ibid nn 7, 8, 11, 12; Bain, above n 169, 96 -110.

[162] Richard Du-Cann, *The Art of the Advocate* (Penguin Books, 1964) 38.

[163] Ibid. DuCann cites a highly charged wartime trial in 1917 where prosecution counsel was too timid in cross-examination and the defendant was acquitted as an example of such an 'injustice.' See Ibid 57-58.

[164] Bull, above n 76, 96. See also Savage, above n 24, 169.

[165] Humphreys, above n 4, 740-741.

[166] Ibid 741.

functioning of the criminal justice system.'[167] There is a need for a 'proper balance' to be maintained in the criminal process and the minister of justice role should not be applied to such an extent that it undermines the prosecutor's legitimate functions.[168] A prosecutor is not only entitled, but is positively expected, albeit within certain important limits, to take both an active and a vigorous role in the criminal process.[169] An adversarial criminal trial is 'not a tea party'.[170]

This theme has emerged in a line of Canadian decisions. In *R v Savion*,[171] Zuber JA stated that 'by reason of the nature of our adversary system of trial, a Crown prosecutor is an advocate: he is entitled to discharge his duties with industry, skill and vigour.'[172] Similarly in *R v Cook*,[173] L'Heureux-Dubé J, delivering the unanimous judgment of the Supreme Court of Canada, held:

> It is well recognized that the adversarial process is an important part of our justice system and an accepted tool in our search for the truth. Nor should it be assumed that the Crown cannot act as a strong advocate within this adversarial process. In that regard, it is both permissible and desirable that it vigorously pursue a legitimate role to the best of its ability.[174]

That the prosecutorial role as a minister of justice should not stand in the way of the active and assertive approach that is often necessary in an adversarial system was also recognised in 2002 by the Alberta Court of Appeal:

> We recognise that Crown counsel are in a difficult role and we appreciate that Crown counsel ought not to be condemned for making the Crown's case in a compelling manner…Therefore, the proposition that Crown counsel are limited to weak, timid and non-compelling advocacy without similar restrictions on defence counsel is not one we accept. While the Crown's obligation is to seek the truth, not to win at any cost, the trial process, including closing addresses, remains an adversarial one. Thus, Crown counsel must have the freedom to pursue the Crown's position in a convincing, dynamic and eloquent fashion, always recognizing their special position in serving justice. *The State too is entitled to a fair trial* [authors' emphasis].[175]

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[167] *Imbler v Patchman* (1976) 424 US 409, 427-428.
[168] See *R v Roulston* [1976] 2 NZLR 644, 654.
[169] Bull, above n 76, 96.
[170] *R v Clarke* [2004] OJ No 195, [122]-[123].
[171] (1980) 52 CCC (2d) 276.
[172] Ibid 289.
[173] (1997) 146 DLR (4th) 437.
[174] Ibid 446.
[175] *R v Karaibrahimovic* (2002) 164 CCC (3d) 431, 449. See also *R v Daly* (1992) 57 OAC 70, 76.

There are many decisions throughout Australia similarly highlighting the adversarial dimension of the prosecutor's task and accepting that the prosecutorial role should not be overly constrained.[176] Carruthers AJ in 2001 commented that while prosecutors are subject to 'considerable constraints' in the performance of their duties, it is, nevertheless, incumbent upon them to 'discharge their obligations fearlessly in the interests of the Crown, acting on behalf of the community.'[177] Robust or blunt advocacy may well be necessary and prosecution counsel at trial is not prohibited from the use in an address of colloquial expressions such as might be out of place in a formal judgment or a scholarly legal article.[178] As Wright J has highlighted, '[o]ur system of criminal justice is adversarial. Crown counsel is an advocate.'[179]

McClellan CJ at common law in *R v Wood*[180] recently confirmed in an overview of the relevant law that the 'minister of justice' role does not preclude the prosecutor from firmly and vigorously urging their view about a particular issue, nor does it preclude their ability to test, and if necessary to attack, a defendant or evidence adduced on their behalf. He noted that adversarial tactics may need to be employed in one trial which may be out of place in another. A criminal trial is an accusatorial and adversarial procedure and the prosecutor should seek by all proper means provided by that process to secure the conviction of the perpetrator of the alleged crime.[181]

Such comments highlight that the minister of justice role is qualified to the extent that it is permissible for the prosecutor to act as an active advocate within an adversarial process. But how does the prosecutor's role as a minister of justice accommodate this? The minister of justice role remains paramount.[182] As Humphreys notes, '[a]lways the principle holds, that Crown counsel is concerned with justice first, justice second and conviction a very bad third.'[183] Unfortunately, the adversarial qualification to the minister of justice role does not resolve the tension between the roles of both minister of justice and advocate.[184] Indeed, the

[176] See, for example *R v Lyons* (1992-1993) 64 A Crim R 101, 104. *R v Karounos* 1995) 63 SASR 451, 464-465; *R v Day* (2000) 115 A Crim R 80, 86.
[177] *R v Rugari* (2001) 122 A Crim R 1, 10.
[178] *R v Attallah* [2005] NSWCCA 277, [133].
[179] Ibid. See also *R v Roulston* [1976] 2 NZLR 644, 654; *R v Deriz* (1999) 109 A Crim R 329, 339.
[180] [2012] NSWCCA 21.
[181] Ibid [577].
[182] *R v McCullough* [1982] Tas R 43, 57; *R v Wood* [2012] NSWCCA 21, [632].
[183] Humphreys, above n 4, 746.
[184] See Abby Dennis, 'Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power' (2008) 57 *Duke Law Journal* 131, 139; Hoeffel, above n 13, 1140-1141; Melilli, above n 129, 685-704.

judicial acknowledgement of the prosecutor's duty to act as a vigorous advocate may serve to exacerbate it.

XI A 'NEW' PROSECUTOR FOR THE 21ST CENTURY?

Modern prosecutors in England and Australia are subject to many pressures and demands – protecting the interests and welfare of victims and witnesses,[185] discharging duties of disclosure regarding unused material,[186] choosing and calling trial witnesses,[187] involvement in sentencing,[188] and managing with ever shrinking budgets and satisfying modern managerial responsibilities.[189] Many of these matters would not have troubled or disturbed the modern prosecutor's historical counterparts during earlier less transparent periods. The modern prosecutor is subject to a degree of public, press and political scrutiny that would not have been experienced by his or her historical counterpart.[190]

The historical rationale for the maintenance of the prosecutorial role as a minister of justice as existed in the 19th century is considerably diminished in the modern adversarial system, given the comprehensive protections accorded the modern defendant, the recent advances in the law of prosecution disclosure, and the emergence of robust defence tactics. The typical modern defendant and modern prosecutor are on a far more level, albeit not completely level, playing field than in the past.[191]

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[185] See, for example, Ken MacDonald, 'Our System of Justice Must Enjoy Public Confidence,' *The Independent*, 1 February 2005, highlighting the modern focus of 'putting the victim at the heart of the criminal justice system'. See further Geoffrey Flatman and Mirko Bagaric, 'The Victim and the Prosecutor: The Relevance of Victims in Prosecution Decision Making' (2001) 6 *Deakin Law Review* 238.

[186] See, for example, Robert Frater, 'The Seven Deadly Prosecutorial Sins' (2002) 7 *Canadian Criminal Law Review* 209, 216. See further David Plater and Lucy Devreeze, 'Is the Golden Rule of Full Prosecution Disclosure a Modern Mission Impossible? (2012) 14 *Flinders Law Journal* 133.

[187] See *R v Apostilides* (1984) 154 CLR 563, 575-576.

[188] See, for example, *R v MacNeil-Brown* [2008] 20 VR 667.

[189] Like most modern government agencies, prosecutors are not immune to the modern preoccupation with performance and cost, see Alan Mackie et al, 'Preparing the Prosecution Case' [1999] *Criminal Law Review* 460; Arie Freiberg, 'Managerialism in Australian Criminal Justice: RRIs for KPIs' (2005) 31 *Monash University Law Review* 12; Sanders and Young, above n 4, 41.

[190] See Elish Angiolini, 'Public Prosecutor: Hero or Villain,' Speech delivered at 'The Edinburgh Lectures,' 25 January 2005, <http://download.edinburgh.gov.uk/lectures/4_SG39s_speech.doc>.

[191] See, for example, Shorter Trials Committee, above n 136, 6. Some commentators, especially in England, however, have argued that the many legislative reforms of recent years have eroded the traditional protections accorded to an accused. See Sanders and Young, above n 4, 21; Bentley, above n 57, 300-301. Bentley asserts that recent legislative changes have so weakened the status of the defendant that 'if present trends continue we may yet come to look upon it [the 1800s]...as a golden age' (Ibid 301). This point is not entirely untenable. It is conceivable that a criminal justice system could be so stacked

The common law changes over time. It has always been accepted that both the practical requirements and the concept of what is fair and appropriate in the context of a criminal trial can, and indeed should, reflect changing social standards and circumstances.[192] 'Fairness is a constantly evolving concept', as Lord Bingham explains, and 'it is important to recognise that standards and perceptions of fairness may change, not only from one century to another but also, sometimes, from one decade to another.[193]

The modern prosecutorial role should not necessarily be held to a standard that is 'frozen in time' from the early 1800s and it may be appropriate to recognise that what was regarded as necessary in the early 1800s to ensure the fairness of the criminal trial need not necessarily apply unchanged today. Lord Justice Auld observed in 2001,

> [m]any aspects of a [criminal] system developed over the centuries to introduce safeguards against the forensically primitive jury trials and harsh penal regimes of the time, may not fit, or be necessary for, modern trials.[194]

Once unchallenged rules of evidence and procedure that also emerged in the 1700s and 1800s to enhance the fairness of the criminal process such as the rules requiring corroboration of 'suspect' categories of evidence as from children or victims of sexual assault have been modified or even discarded in the changing circumstances of today. Others such as the rule against hearsay have been widely questioned and criticised,[195] and while not abolished have certainly been the subject of reform in recent years.[196]

It is incongruous that a prosecutorial role that evolved in the distinctive circumstances of early 19th century England should continue to be rigidly applied unchanged to the very different process of the 21st century. The modern defendant enjoys a comprehensive range of protections to ensure a fair trial, notably the presumption of innocence, the right to silence (especially in Australia), the need for the state to establish guilt beyond reasonable doubt, the right to full legal representation, the ability to provide warnings to juries, the various judicial discretions to exclude legally admissible evidence that might operate unfairly upon the accused and rights of appeal. These protections go a long way to relieve the imbalance in available investigatory resources that still typically exists

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against the accused (as England and Australia were in the early 1800s) that the minister of justice role is necessary to ensure a level playing field between the parties.

[192] See *State v O'Donoghue* [1976] IR 325, 350; *R v Dietrich* (1992) 177 CLR 292, 328.

[193] *R v H* [2004] 2 AC 134, 150.

[194] Auld, above n 134, [11.5].

[195] See, for example, Ibid [10.95]-[10.104]; Hunter et al, above n 136, 1470-1473.

[196] See, for example, ss 116-123 of the *Criminal Justice Act* 2003 (England) and various provisions of the Australian *Uniform Evidence Act*, especially s 65(8).

between prosecution and defence.[197] The prosecution's modern duty of disclosure of any relevant material is intended to further relieve this imbalance.[198] The minister of justice role is not the vital prerequisite to a fair trial that it was two centuries ago. In a modern criminal justice system which accords defendants a comprehensive range of rights and protections that were not available in the early 1800s when the minister of justice concept first emerged, unquestioning adherence and even extension to a possibly outmoded concept of the prosecutorial role is inappropriate. It may have the practical effect of 'allowing guilty men to shelter behind rules which look back to an age when the defendant regularly took their trials undefended.[199]

XII IF NOT MINISTER OF JUSTICE, WHAT?

The term 'minister of justice' is confusing and capable of meaning different things to different people.[200] Bresler categorises the term as a 'pretty phrase'[201] and notes that as it has been applied at one time or another to virtually any party associated with the criminal justice system[202] (even process severs),[203] it loses any real meaning.[204] Bresler asserts that the advice of the American Bar Association to prosecutors to act as 'ministers of justice' or 'administrators of justice' is unclear and confusing and no more than 'juris-babble that is practically meaningless. Unfortunately, the minister of justice language, so lofty sounding at first, degenerates into malarkey on closer examination.[205] Bresler's criticisms are well-founded. The minister of justice term has been 'the source of much criticism amongst legal scholars' and is 'unworkably vague for the purposes of meaningful interpretation and application.'[206] As Zacharias

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[197] Blakemore, above n 110. See also Martin Hinton, 'Unused Material and the Prosecutor's Duty of Disclosure' (2001) 25 *Criminal Law Journal* 121.

[198] See, for example, *R v McIlkenny* (1991) 93 Cr App R 287, 312; *R v C and Others* [2006] SASC 158, [45]; *Ragg v Magistrates' Court of Victoria* (2008) 179 A Crim R 568, 581.

[199] Bentley, above n 57, 301. Bentley quotes this view but does not hold it himself.

[200] Zacharias, above n 125, 46-49.

[201] Kenneth Bresler, 'Pretty Phrases: The Prosecutor as "Minister of Justice" and "Administrator of Justice"' (1995) 9 *Georgetown Journal of Legal Ethics* 1301 quoting *Arthur v Johnson* (1954) 83 SE (2d) 314, 316.

[202] Ibid 1302-1303. Bresler notes that trial judges, appellate judges, lawyers in general, jurors, court personnel and police officers as well as prosecution counsel have all been labelled as 'ministers of justice'.

[203] *State v Smith* (1814)1 NH 346, 347.

[204] Bresler, above n 201, 1302.

[205] Ibid 1301.

[206] Samuel Levine, 'Taking Prosecutorial Ethics Seriously: a Consideration of the Prosecutor's Ethical Obligation to Seek Justice in a Comparative Analytical Framework' (2004) 41 *Houston Law Review* 1337, 1339. See also Stanley Fisher, 'In Search of the Virtuous Prosecutor' (1987) 15 *American Journal of Criminal Law* 197, 210.

contends, the 'special prosecutorial duty is worded so vaguely, that it obviously requires further explanation... [it provides] remarkably little guidance on its meaning.'[207] More than a 'glib phrase'[208] is needed to provide useful guidance to practitioners in the discharge of their professional duties. The question is what expression or role could replace it?

There are assertions that the traditional prosecutorial role should be refined to reflect the recent prominence of victims and witnesses within the modern criminal justice system.[209] It has been suggested that the prosecutor should act as a 'pure advocate and representative of the crime victim.'[210] There are even suggestions that prosecutors should act as 'avengers' and 'seek justice' on behalf of the victim.[211]

However, any such suggestions are untenable and fail to reflect the nature of the prosecutorial role in practice. Though modern prosecutors must be 'scrupulous in attention to the welfare and safety of witnesses,'[212] they must be astute to avoid appearing as 'the creature of a private interest' when exercising their powers.[213] Nichols dismisses any notion of the prosecutor as being simplified into an 'advocate' of the victim, due to the prosecutor's larger duty to the public interest. This is a compelling argument. There are strict limits to how far the prosecutorial role can be refined to accommodate the views of the victim. It is inevitable that the wider overriding public dimension of the prosecutor's role will conflict with any allegiance solely to the victim.[214] The fundamental objection to

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[207] Zacharias, above n 125, 46.

[208] See Andrew Ashworth and Meredith Blake, 'Some Ethical Issues in Prosecuting and Defending Criminal Cases' [1998] *Criminal Law Review* 16, 31.

[209] See, for example, Taylor and Byrne, above n 118, 329-330.

[210] Matthew Nichols, 'No One can Serve Two Masters: Arguments against Private Prosecutors' (2001) *13 Capital Defence Journal* 279, 287. See generally Stacy Caplow, 'What if there is no Client?: Prosecutors as 'Counsellors' of Crime Victims' (1998) 5 *Clinical Law Review* 1.

[211] Jeanine Pirro, *To Punish and Protect: a DA's Fight Against a System that Coddles Criminals* (Touchstone Books, 2005) 1.

[212] *R v Logiacco* (1984) 11 CCC (3d) 374, 379 (Cory J). See also Matthew Hall, 'The Relationship between Victims and Prosecutors; Defending Victim's Rights?' [2010] *Criminal Law Review* 31, 38-40. The need for the prosecutor to be responsive to the views and welfare of victims poses real issues as to the need for prosecutors to act on behalf of the public at large, see Ibid 31-32.

[213] *R v Milton Keynes Magistrates' Court; Ex parte Roberts* [1995] Crim LR 225. See further *Proulx v Quebec (Attorney-General)* [2001] 3 SCR 9; *R v Leominister Magistrates Court* [1996] EWHC Admin 384.

[214] See Hall, above, n 212, 31; Eric Erez, 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice' [1999] *Criminal Law Review* 545, 554. This issue is especially apparent in cases of sexual assault (see Jeffrey Pokorak, 'Rape Victims and Prosecutors: the Inevitable Ethical Conflict of De Facto Client/Attorney Relationships' (2007) 48 *South Texas Law Review* 695-732) or domestic violence (see Eve Buzawa and Carl Buzawa, *Domestic Violence: the Criminal Justice Response* (Sage Publications Inc, 2003) 178, 197-203; Hall, above, n 212, 40-41).

any reconceptualisation of the prosecutorial role as an advocate of the victim's interests is that the prosecutor's duty is a duty owed to the court and not to the public at large or the accused, or in fact to any other party within the criminal justice system.[215] 'The Crown Attorney', as Brooks declares, 'is not simply the lawyer for the police and/or victim of crime.'[216] Ultimately, as McKinnon J concludes, '[t]he Attorney-General[217] represents society at large and the public interest. The Attorney General is not counsel to victim nor accused.'[218]

It has been alternatively suggested that in the trial context the prosecution lawyer should be free to assume a fully adversarial role.[219] Seymour, a United States Attorney, describes how as the trial approaches 'we become more and more aggressive in our protection of the case that we believe to be right.'[220] He notes that:

> Finally at trial the prosecutor becomes the most zealous champion of justice you can imagine, he is then a full-fledged fighting advocate; and he should be ... His job is now to fight fairly and firmly with all his might to see that truth and justice prevail.[221]

Other commentators support this approach and argue that the nature of the prosecutorial role should depend upon whether the case is at the pre-trial or trial stage.[222] Uviller argues that whilst a neutral minister of justice approach should be adopted by those prosecutors who investigate, assess and negotiate,[223] those who conduct the trial of those cases that aren't

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[215] The prosecutor does not owe any fiduciary duty to a defendant, potential accused or witness. Any such duty 'would constitute bad law and render the task of prosecutor impossible,' see *M (K) v Desrochers* (2000) 52 OR (3d) 742, [26]. See also *Cannon v Tahche* (2002) 5 VR 317, 340-341.

[216] John Brooks, 'Ethical Obligations of the Crown Attorney – Some Guiding Principles and Thoughts' (2001) 59 *University of New Brunswick Law Journal* 229, 236. See, for example, *R v Tkachuk* (2001) 159 CCC (3d) 434, 441-442 (victims); *Dix v Attorney-General* [2002] AJ No 784 (police).

[217] In this context referring to the Attorney-General's traditional prosecutorial role.

[218] *M (K) v Desrochers* (2000) 52 OR (3d) 742, [27]. Even recent legislative measures in various jurisdictions designed to improve the victim's position within the criminal process cannot alter this basic fact, see *R v Tkachuk* (2001) 159 CCC (3d) 434, 442; *Vanscoy v Ontario* [1999] OJ No 1661.

[219] See, for example, Zacharias, above n 125, 56, n 54; Farrell, above n 16, 299-302, 304-306 and 323.

[220] Whitney Seymour, 'Why Prosecutors Act Like Prosecutors' (1956) 11 *Record of Association of the Bar of the City of New York* 302, 313.

[221] Ibid.

[222] See, for example, Mitchell, above n 18, 497-500; Zacharias, above n 125, 113.

[223] In this context 'plea bargaining' to try and resolve a case without it having to proceed to trial.

resolved belong to a 'different caste' and 'the trial mode of the [prosecution] advocate demands full partisan commitment.'[224]

Graham Mitchell QC offers a similar view. He suggests that once a criminal prosecution reaches the trial or 'adversary stage,' it is entirely appropriate for the prosecutor to act as a vigorous advocate for the public interest and, provided prosecution counsel avoids engaging in unprofessional conduct, it is entirely appropriate for him or her to advocate zealously on behalf of the state.[225] Mitchell notes that the important public responsibilities undertaken by prosecution counsel operate on a spectrum, and the significance of each role waxes and wanes depending upon which phase of the criminal process in which the prosecutor finds him or herself. He points out that at times these roles intersect, whilst at others they converge, and at still others, one or the other prosecutorial role predominates. Mitchell acknowledges that generally the quasi-judicial role of Crown counsel as a minister of justice is paramount throughout the pre-charge and charging phases, and predominates throughout much of the pre-trial phase, most especially when fulfilling the Crown's vital responsibility to provide full and frank disclosure of its case to the defence.[226] The adversarial role of prosecution counsel as a vigorous advocate on behalf of the public interest emerges and gains in significance in the final stages of the pre-trial phase, and predominates throughout the trial phase.[227]

This view has substance. In some situations the prosecution lawyer should adhere to a minister of justice role. As Mitchell suggests the pre-trial responsibility of the prosecution to provide full and frank disclosure of any relevant material in its possession is perhaps, one of the most important minister of justice prosecutorial responsibilities,[228] given its importance in securing a fair trial.[229] In other situations an adversarial approach may be appropriate.[230] For example, as Mitchell suggests, the prosecution lawyer at trial should be free, at least in some circumstances,

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[224] Uviller, above n 125, 1718.

[225] Mitchell, above n 18, 496-497. Mitchell acknowledges the tension between the prosecutor's quasi-judicial and adversarial roles. He argues, however, that these two functions are not incompatible when viewed 'contextually…[as] a synergy is created through the dynamic exercise of these functions': Ibid.

[226] Ibid 497-500.

[227] Ibid 497-498.

[228] See, for example, *R v O'Connor* (1995) 130 DLR (4th) 235, 284; *Ragg v Magistrates' Court of Victoria* (2008) 179 A Crim R 568, 589. See further 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(1) *University of Tasmania Law Review* 111, 152-155.

[229] See *R v Winston Brown* [1994] 1 WLR 1599, 1606; *R v Mallard* (2005) 224 CLR 125, 151 and 155; *Ragg v Magistrates' Court of Victoria* (2008) 179 A Crim R 568, 589.

[230] See Kevin McMunigal, 'Are Prosecutorial Standards Different?' (2000) 68 *Fordham Law Review* 1453, 1472.

to assume a vigorous and adversarial role. Though Mitchell is correct to suggest that the prosecutorial role may depend on the function it is performing, the suggestion that a neat distinction can be drawn between the pre-trial and trial stages to define the prosecutorial role is problematic. It is a 'simplistic solution' to assert that this distinction will necessarily govern the prosecutorial role.[231] Indeed, Mitchell himself acknowledges that this distinction is 'simplistic.'[232] It is also no easy task, given the modern regime of comprehensive pre-trial case management when decisions central to the conduct of the trial may be made,[233] to categorise just what is or is not part of the pre-trial or trial stage of proceedings. For example, is the prosecution's choice of the witnesses to be called at trial part of the pre-trial or trial stage?[234]

It is clear that in the performance of some of their pre-trial duties the prosecutor must still adhere scrupulously to the expectations of the traditional minister of justice role. The prosecutor's crucial role in the disclosure of relevant material in the prosecution's possession to the defence is one such example.[235] Furthermore there are other circumstances, even at the trial stage, which might still call for greater prosecutorial restraint than might otherwise ordinarily be the case in a trial where both parties are legally represented. In cases involving sexual offences of children which give rise to strong feelings, there remains a need for the prosecutor to refrain from appealing to passion or prejudice.[236] Another 'trial' situation that clearly calls for prosecutorial restraint and fairness is where the defendant is not legally represented.[237] No prosecutor should take advantage of a legally unrepresented defendant. However, even in these categories of cases there are limits to which it is realistic to expect the prosecutor to curtail his or her adversarial role. No prosecutor, no matter how fair or restrained, can perform or be expected to perform the function of either defence counsel[238] or the court. Ultimately it cannot be overlooked that 'a Crown

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[231] Melilli, above n 129, 698.
[232] Mitchell, above n 18, 498.
[233] For the importance of pre-trial case management in modern criminal litigation, see above n 136.
[234] This is not a simple question. Traditionally the prosecutor nominates the witnesses it intends to call at trial at, or soon after, committal, when the witnesses are said to be 'named on the back of the indictment'. This can be long before the actual trial.
[235] See, for example, Plater, above n 228, 155.
[236] See *R v M* [1981] 2 Qd R 68, 83.
[237] Though it is comparatively rare in either England (see Ministry of Justice, *Judicial and Court Statistics 2007* (London, Ministry of Justice, 2008), 184 (91% of defendants at the Crown Court receive publicly funded legal representation) or Australia (see Blakemore, above n 110, n 21) as a result of the ECHR and *R v Dietrich* (1992) 177 CLR 292 to find a defendant charged with a serious offence legally unrepresented except by choice.
[238] See *R v Dietrich* (1992) 177 CLR 292, 334-335 (Deane J) where it was stated that one reason for requiring a defendant to be legally represented was the fact that it was not part of

Prosecutor adopts an adversarial role in a criminal trial and is truly an adversary of the accused.'[239]

In conclusion, the practical content of the prosecutorial role should depend on the particular facts of the case and the precise function that prosecution counsel is performing. There is no neat distinction between the trial and pre-trial stages. What may be appropriate in one factual situation or with respect to one prosecutorial function may be inappropriate in another factual situation or prosecutorial function. It is suggested that in relation to certain functions or decisions or in certain factual situations the prosecutor should be free to assume a more vigorous and adversarial role in the proceedings. For example, the prosecutor should not be subject in an adversarial system to any minister of justice obligation to call any material witness at trial regardless of whether their evidence helps or hinders the prosecution case.[240] Therefore when choosing the witnesses to call at trial the prosecution should, once its modern duty of disclosure of relevant material has been satisfied, possess a broad 'adversarial' discretion to present its case at trial as it wishes.[241] Similarly, where the defendant is legally represented and there exists broad equality between the positions of the prosecution and defence, prosecution counsel should be free to assume a more robust approach at trial in the presentation of the Crown case, similar to that of defence counsel.

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the function of prosecution counsel, even if acting as a minister of justice, to provide the advice, guidance and representation which an accused must ordinarily have if his case is to be properly presented. See also *Elguzouli-Daf v Commissioner of Police for the Metropolis & CPS* [1995] QB 335, 348.

[239] *R v McCreed* [2003] WASC 275, [33].

[240] See, for example, *R v Woodhead* (1847) 2 Car & Kir 520; *El Dabbah v Attorney-General of Palestine* [1944] 2 All ER 139, 144; *Dallison v Caffery* [1964] 2 All ER 610, 622; *R v Cook* (1997) 146 DLR (4th) 437, 444-445. However, the contrasting 'minister of justice' concept of the prosecutorial role to call any material witness at trial regardless of whether they help or hinder the prosecution case (unless they are patently unreliable) commands resolute support in Australia. See, for example, *R v Whitehorn* (1983) 152 CLR 657, 663-664 (Deane J), 674 (Dawson J); *R v Apostilides* (1984) 154 CLR 563, 576. The resolution of this 'ancient conflict' (see *R v Mullen* [1980] NIJB 10) between the 'adversarial' and 'minister of justice' notions of the prosecutorial 'discretion' in calling witnesses is beyond the scope of this article.

[241] See, for example, *R v V (J)* (1994) 91 CCC (3d) 284, 287-288; *R v Richardson* (1994) 98 Cr App R 174, 177-178; *R v Cook* (1997) 146 DLR (4th) 437, 450-451; *R v Jolivet* (2000) 144 CCC (3d) 97, 106-107; *R v Harris* [2010] 2 WWR 477, [42]. Any rationale for the prosecution to call any material witness at trial has been extinguished as the defence should now be provided by the prosecution with all relevant unused material, including the account of a witness that the prosecution does not wish to call. The defence has the informed option to call that witness. This approach has not been accepted in Australia (see, for example, *R v Kneebone* (1999) 47 NSWLR 450, [48]) where the minister of justice role in calling witnesses prevails. See Martin Hinton, 'The Prosecutor's Duty with Respect to Witnesses: *pro Domina Veritae*' (2003) 27 *Criminal Law Journal* 260.

Accordingly, in some cases there may be a need for the modern prosecutor to 'fight fire with fire.' Not only are the parties in the modern adversarial process more evenly matched than they were in the early 1800s when the minister of justice role emerged, but the modern prosecutorial role must also take account of the overly zealous and 'no holds barred' approach that is adopted by at least some defence lawyers. Such tactics are by no means unusual.[242] A former Commonwealth Director of Public Prosecutions commented that 'it is arguable that some defence counsel have stretched their ethical obligations to the limit in assisting defendants who perceive it as in their best interest to delay and obfuscate the case against them.'[243] Ipp J in an extra-curial article commented on the 'perversion' of the adversarial system of justice arising from this trend, especially in cases of serious commercial fraud, where some defence lawyers resort to the 'filibuster defence' in an effort to secure the acquittal of their client 'through exhausting and confusing witnesses and the jury by causing as much delay and obfuscation as possible.'[244] Phillips J expressed a similar view and went so far as to warn that 'this culture will destroy our system of justice sooner rather than later unless steps are taken to stop it.'[245] Hunt CJ at common law in a 1994 decision has also criticised this style of defence advocacy. He contrasted the advocate who only fights the real issues with the vexatious advocate 'familiar to those with experience of the criminal courts' who fights every issue, in the apparent hope that by doing so an important Crown witness might be hit by a bus on the way to court and the prosecution will fail.[246] His Honour observed that such advocates would demand 'every rat to be chased up every drainpipe, every 'I' to be dotted and every 'T' crossed, whether or not they were really in issue.'[247]

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[242] See *R v Elliott* [2003] OJ 4694, [177]-[180]; William Simon, 'The Ethics of Criminal Defence' (1993) 91 *Michigan Law Review* 1703.

[243] Michael Rozenes QC, 'The Role of the DPP in the Investigation and Prosecution of Complex Fraud,' Speech delivered at the ASC Law Enforcement Conference, Perth, 16 September 1994, <http://www. cdpp.gov.au/ Director/Speeches/19940916mr.aspx>. See also the similar strong criticisms offered by a subsequent Commonwealth DPP, Damian Bugg QC, 'Prosecuting Fraud,' Speech delivered at the Australian Institute of Criminology Fraud Prevention and Control Conference, Surfers Paradise, 25 August 2000, <http://www.cdpp.gov.au/Director/Speeches/20000825db.aspx>.

[244] David Ipp, 'Lawyers' Duties to the Court' (1988) 114 *Law Quarterly Review* 63, 96-97, 98-102. See also the similar strong comments of a trial judge quoted by Justice Phillips deploring the 'alarming culture' of some vexatious defence counsel at the Victorian Bar. See John Phillips, 'The Duty of Counsel' (1994) 68 *Australian Law Journal* 834.

[245] Ibid. See also *R v Wilson & Grimwade* [1995] 1 VR 163, 180.

[246] *R v Sandford* (1994) 33 NSWLR 172, 188-189.

[247] Ibid. Hunt CJ at CL noted that this style of advocacy had 'blossomed' after the introduction of relatively unrestricted legal aid and expressed the hope that 'it will wither with the recent introduction of lump sum legal aid.' But 'old habits die hard' and in his opinion it would obviously require the strong exercise of the additional powers recently recommended for the criminal courts to bring the conduct of criminal trials back to the

It is opportune to ask whether the prosecuting lawyer at trial should be free, at least where the defendant is legally represented and there is a more genuine contest of equals, to 'fight fire with fire.' Corrigan argues that the prosecutorial role can be reduced to a 'single precept ... to press the prosecution case forcefully, according to the rules.'[248] The upshot is, that if defence counsel is permitted to adopt a 'raze to the ground' approach, prosecutors should be able to discard perhaps 'watered down' advocacy consistent with the conception of the minister of justice role, and counter 'fire with fire'. The prosecutor should not be compelled to 'turn the other cheek'.

In a modern criminal trial, particularly in the face of such vexatious defence tactics, it is not in the interests of justice that there is this imbalance between the defence and prosecution. Hunter and Cronin note the 'lack of symmetry in the criminal justice system.'[249] They highlight that while prosecutors are perceived 'as fighting with one hand tied behind their backs, defence lawyers by contrast are said to have a free hand in the trial.'[250] Such an unequal playing field does not support the rationale and purpose of an adversarial contest between two evenly matched parties.

Modern prosecutors may need to take a more assertive approach to resist 'excessive' defence zeal and to help ensure that the criminal trial functions properly. There is a danger that the minister of justice role expressed in cases such as *Livermore* is unrealistic within a process and especially a trial that remains fundamentally adversarial in nature. We should consider whether the prosecutor should be permitted greater freedom to adopt a more vigorous and forceful role. The tension between the prosecutorial roles of both active advocate and minister of justice cannot be satisfactorily reconciled. A more robust role may be appropriate where the defendant is legally represented. This would be more consistent with the nature of the prosecutor's role within a modern adversarial process and might diminish, or even eliminate, the tension that arises from casting the prosecutor as a minister of justice in an adversarial process.

The prosecutor should never become a 'crusader' for justice, as some American prosecutors have been known to do,[251] or an officious zealot.[252]

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realities of fighting the real issue. See Ibid 188-189. Both Ipp J (above n 243, 97) and Phillips J (above n 243, 834-835) warn that if this school of defence advocacy continued, legislation would be necessary.

[248] Corrigan, above n 38, 542.

[249] Cronin and Hunter, above n 9, 223.

[250] Ibid.

[251] See, for example, Pirro, above n 211; Melilli, above n 129, 685, 691, Fisher, above n 206, 209-210.

Like any lawyer, prosecution counsel should act always to promote the administration of justice and never act in an unethical or improper manner. It would be wrong for a prosecutor to take advantage of a legally unrepresented defendant. However, that is not tantamount to compelling the prosecutor to assume the role of a judicious minister of justice.

XIII CONCLUSION – IMPOSSIBLE BALANCING ACT

The minister of justice concept enjoys strong support as the 'silver thread' of the criminal law. Despite such support, the 'silver thread' should not be unquestionably accepted and the minister of justice role is open to valid criticism. Rhetoric alone cannot define the exercise of the prosecutorial role. 'The inherent richness and complexity of the prosecution's role'[253] in a modern context is such that there is no simple formula of general application that is capable of governing the prosecutorial role. Whilst the minister of justice role made sense in the early 1800s to alleviate the imbalance that typically existed between the prosecution and defence in the newly adversarial system of the period, the role has been arguably overextended in modern times. This risks timid prosecutors ill-fitted to prosecute effectively in a modern adversarial criminal system. The role needs to be reformulated to take into account the continuing adversarial nature of the criminal trial, the approach of some defence lawyers and the comprehensive protections afforded to modern defendants. Modern reiterations of the minister of justice role as in *Livermore* illustrate the dangers identified by Devlin of the adversarial aspect of the prosecutorial role being emasculated to the extent that it potentially undermines the rationale and purpose of the adversarial criminal trial.

The tension between the prosecutor's role as a minister of justice with an overriding duty to promote the truth of the case in dispute and his or her conflicting role as an active advocate in an adversarial criminal process is ultimately irreconcilable. The imposition of the 'fundamentally inconsistent obligations' of these dual roles, as Uviller argues, bends prosecutors into 'psychological pretzels'.[254] It would be a beneficial development if judges and prosecution guidelines could construe the prosecutorial role to reflect the need for prosecutors to advocate vigorously in a modern adversarial system. While there are obvious risks for the defendant to enjoy their right to a fair trial if prosecutors tip the

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[252] See, for example, Kenneth Bresler, 'I Never Lost a Trial: When Prosecutors Keep Score of Criminal Convictions' (1995-96) 9 *Georgetown Journal of Legal Ethics* 537; Jeffery Kirchmeier et al, 'Vigilante Justice: Prosecutor Misconduct in Capital Cases' (2009) 55 *Wayne Law Review* 1327.

[253] *R v Bain* [1992] 1 SCR 91, 117 (Gonthier J).

[254] Uviller, above n 125, 1697.

balance from firm advocacy to become 'zealots', the comprehensive protections accorded to a modern defendant, the trial judge's ability to issue directions, and juries with a healthy degree of skepticism (no doubt appreciating that criminal trials are an adversarial process) provide reasonable security against these risks.

Therefore, the minister of justice concept should be reformulated to allow a more robust and 'adversarial' approach to at least some aspects of the prosecutorial role, notably in the conduct of the prosecution case at trial. Or as an American commentator colourfully put his advice to prosecutors, '[k]ick butt, don't kick groin.'[255] This might serve as no better summary for the modern prosecutorial role.

[255] Bresler, above n 252, 544, n 27.