Matters to consider for your next domestic violence hearing

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Reasonable Cause CLE Conference
Rydges World Square
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1) The absent / unavailable complainant

- Part 2, clause 4 *Evidence Act* (NSW) 1995: definition of unavailable
- s 65: hearsay exception for unavailable witnesses re complainant's police statement
- s 67(1): requirement of reasonable notice in writing
- s 192: factors re s 67(4) direction (mandatory requirement: *Stanoevski v The Queen* [2001] HCA 4)
- s 137: if admissible under s 65, submit that procedural unfairness = unfair prejudice[1]
- failing that, seek a s 165(1)(a) direction
- prosecution may seek to tender medical report/records of injuries – patient history which provides version of events admissible to explain the medical expert opinion (ss 77 and 79); thereafter admissible for a hearsay purpose under s 60 – seek a s 136 direction re 'corroborative' patient history[2]

2) The unfavourable complainant – "I can't remember" but acknowledges the police statement + signature

- s 32: prosecution will seek to refresh the memory
- s 38: prosecution will seek leave to XX

[1] *Seven Network Limited v News Limited (No 8)* [2005] FCA 1348 at [26] per Sackville J; *Gordon (Bankrupt), Official Trustee in Bankruptcy v Pike* (Unreported, Federal Court of Australia, Beaumont J, 1 September 1995); *Commonwealth of Australia v McLean* (1996) NSWLR 389 at 401-402 per the joint judgment of Handley and Beazley JJA (Santow AJA agreeing); *R v Suteski* [2002] NSWCCA 509 at [126]-[127] per Wood CJ at CL; *Galvin v The Queen* [2006] NSWCCA 66 at [40] per Howie J (McClellan CJ at CL and Latham J agreeing); *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2009] NSWSC 769 at [35] per Barrett J; *Leybourne v Permanent Custodians Ltd* [2010] NSWCA 78 at [82] per the Court (Giles JA, Tobias JA and Sackville JA).
[2] *Mulcahy v R* [2012] ACTCA 3; *Jango v Northern Territory of Australia (No 4)* [2004] FCA 1539.

- bases: PIS, not making a genuine attempt, unfavourable in the sense of not favourable[3]

- s 192 re leave

- s 43: procedure to XX on a PIS

- s 101A: definition of credibility

- s 102: credibility rule

- s 103: relevant exception on which the prosecution will rely

- adjective "substantial" means: *R v Fowler* (unreported, NSWSC, 15 May 1997) per Dowd J – the potential to have a real and persuasive bearing on credibility

- s 136: defence should seek a direction that answers by unfavourable complainant acceding to prosecution questions be limited for a credibility purpose

- s 136 direction unwinds the effect of s 60

- s 192A: seek an advance ruling on the s 136 direction – that is, before the prosecution starts XX under s 38

    - basis for s 136 direction found in *Quick v Stoland Pty Ltd* [1998] FCA 1200; (1998) 87 FCR 371 per Branson J at 377-378:

      > In cases in which there is a genuine dispute as to the relevant facts, it might be expected that a court would ordinarily limit the operation of s 60 of the Act by exercising the power vested in it by s 136 of the Act.
      >
      > In a separate judgment, Finkelstein J remarked at 382:
      >
      > In many cases the extraordinary effect of s 60 would be unfair to the party against whom the evidence is tendered. For example, where the hearsay involves 'facts' that are in conflict or 'facts' that are unreliable it is quite unsatisfactory for those 'facts' to be proved by operation of s 60. One way in which this problem can be overcome is by an order under s 136 limiting the use to be made of that evidence.
      >
      > (cited with approval by the Court in *Mulcahy v R* [2012] ACTCA 3; applied in *Hamod v State of New South Wales (No 10)* [2008] NSWSC 611)

[3] *Regina v H Souleyman* (1996) 40 NSWLR 712 per Smart J; *R v Taylor* [2003] NSWCCA 194 at [74] per Bell J; *Lee v The Queen* [2009] NSWCCA 259 at [30] per Grove J (Spigelman CJ and McClellan CJ at CL agreeing).

- re s 136 direction, also see *Roach and Ors v Page and Ors (No.11)* [2003] NSWSC 907 at [74] per Sperling J

- s 106: after XX the complainant witness, the prosecution usually seeks to tender the complainant's police statement

- s 136: seek a direction re the police statement

- *Quick v Stoland*; *Roach and Ors v Page and Ors (No.11)*

- finally, if statement admissible for a hearsay purpose, seek a *Prasad*[4] direction

- and/or make a second limb *May v O'Sullivan*[5] submission

3) The unfavourable complainant – "I never gave that statement" and/or "that's not my signature"

- ss 55 and 56: provenance of purported complainant's statement not established

- prosecution will need to recall OIC to establish provenance in order to then rebut complainant's credibility under s 106

- prosecution will seek to rebut credibility and then have the statement admissible for a hearsay purpose under s 60

- oppose leave to recall OIC

    - waste of time
    - even if statement admitted for hearsay purpose, it will have low PV
    - seek advance ruling under s 192A re s 136 direction to unwind s 60
    - if court is minded to give the ruling, then utter waste of time to recall OIC simply to rebut credibility
    - if get ruling in your favour, interests of justice for prosecution case don't necessitate recall

- if officer recalled, then s 106

- s 136 direction applies re s 60 (vis s 106) if obtained advanced ruling

- *Quick v Stoland*; *Roach and Ors v Page and Ors (No.11)*

- finally, if statement admissible for a hearsay purpose, seek a *Prasad*[6] direction

[4] *R v Prasad* (1979) 2 A Crim R 45
[5] *May v O'Sullivan* (1955) 92 CLR 654.
[6] *R v Prasad* (1979) 2 A Crim R 45

- and/or make a second limb *May v O'Sullivan*[7] submission

4) Defence XX of complainant – allegation of fabrication/reconstruction

- s 108(1): prosecution will seek to re-establish complainant's credibility in re-examination

- s 108(3): prior consistent statement + leave

- s 192

- oppose leave

- s 136: seek direction re police statement tendered under s 108

- *Quick v Stoland*; *Roach and Ors v Page and Ors (No.11)*

5) compellability of familial witness

- often the corroborating witness will be a family member who was present in the household during the incident

- s 18: compellability of familial witness [but note s 19 + s 279 *Criminal Procedure Act* (NSW) 1986 re spousal complainant in DV matters]

- s 18(6):

    1) likelihood of harm
    2) balancing exercise – nature and extent of harm v desirability of receiving evidence

    [see *R v Khan* (unreported, NSWSC, Hidden J, 22 November 1995)]

- *R v B. O.* [2012] NSWDC 194 – Judge Haesler SC

- manslaughter charge – death of accused's 11 month old step-child by an assault resulting in a head injury

- compellability of accused's two sons – aged 10 and 14

- s 18 applied:

> [14] When I apply the test in s 18(6) and take into account the matters in s 18(7) I have to bring to bear my own experience of the relevant matters. I must take into account the distress felt by the two boys when they came into the witness box today: distress which was palpable. It is impossible to predict what the impact upon a child of giving evidence against their father will be. In many

[7] *May v O'Sullivan* (1955) 92 CLR 654.

respects that impact will be determined by the result of the trial. If the children do give evidence or are compelled to give evidence and their father is convicted then one can readily anticipate that they may blame themselves no matter what the reality of the situation is; even if, as the Crown submits, their evidence is quite neutral. This risk is real and substantial.

[18] The point as to whether an alternative hypothesis for the injuries to M involving the two boys should be allowed to be put to them is one that concerns me. If it is raised by the defence then there will simply be no evidence to rebut it before the jury. But if it is raised with the witnesses in evidence then that could increase the possible harm that might result from the children being accused by their own father, either directly or obliquely of causing the injuries to M. This would exacerbate the potential for harm to the children's relationship with their father. It provides a further reason that the children not be exposed to such cross-examination.

- Part 2, clause 4: unavailable

- s 65: Crown sought to admit the video tape interviews with the two sons

- s 18: also applies to out of court interviews / statements (not just to the witness physically sitting in the witness box):

[22] Section 65 applies where a person who "made a previous representation is not available to give evidence about an asserted fact".

[23] Section 65(2) notes "the hearsay rule does not apply to evidence of a previous representation that is given by a person ... if certain conditions are met".

[24] Section 18 allows a child of a defendant to object to being required to give evidence. That evidence is generally given in recorded form pursuant to s 306V *Criminal Procedure Act* 1986.

[25] As I understand it the Crown submit that to tender a witnesses' prior representation as evidence does not involve the giving of evidence by the witness.

[26] Here I do disagree. It appears to me the clear words of the sections noted above mean that when evidence is allowed pursuant to the exception in s 65 it is still evidence *given* by the witness whose prior representation it is.

[29] When s 18 is considered at this stage, separate consideration would need to be given to the balancing process required by s 18(6) and different weight might be given to the s 18(7) factors required to be considered. One example is the children would not be subject to the rigours of being at court or in a remote CCTV room and would not be cross-examined by their father's counsel. However, in this matter, when I consider the nature of the proceedings, the substance and importance of the evidence and the nature of the relationship between the boys and their father I am still of the view that the likelihood that harm would or might result means that the nature and extent of the harm outweighs the desirability of the evidence being given.

6) Directions

1. *Mahmood v Western Australia* (2008) 232 CLR 397

    - *Jones v Dunkel* inference re prosecution witness
    - accepted as changing the law in NSW in *Louizos v R, R v Louizos* [2009] NSWCCA 71 at [56] per Howie J (McClellan CJ at CL and Grove J agreeing)
    - See *YOUNAN, Adison v R* [2010] NSWDC 168

2. *Liberato v The Queen* (1985) 159 CLR 507

3. *R v Jovanovic* (1997) 98 A Crim R 1

4. *Markuleski* [2001] NSWCCA 290

5. *Murray* (1987) 11 NSWLR 12 / *Douglass v The Queen* [2012] HCA 34

6. s 165(1)(c): intoxication of the complainant – *MITCHELL, Malcolm v R* [2008] NSWCCA 275; *R v Murphy* [2000] NSWCCA 297

7. *Melbourne v The Queen* (1999) 198 CLR 1

    - vis s 110
    - general or in a particular respect
    - *PGM v The Queen* [2006] NSWCCA 310
    - although not mandatory / not a rule of law, it "would be wise to give [the direction]": *Simic v The Queen (*1980) 144 CLR 319 at 333-334 per the Court (Gibbs, Stephen, Mason, Murphy and Wilson JJ)
    - followed in *Melbourne v The Queen* (1999) 198 CLR 1

7) AVOs and the mentally ill defendant

- *Farthing v* Phipps [2010] NSWDC 317 – Judge Lakatos SC

- defendant described as "handicapped"

- court found there were good grounds for the making of an apprehended violence order (absent matters of intellectual capacity)

- AVO not made:

> [32] It is certainly true that the attributes of a hearing for an order under this Act have relevant similarities to many criminal proceedings. This includes the giving of evidence and the cross-examination in the relevant case. It is no quantum leap to suggest that to exercise the rights under this Act similar cognitive and intellectual abilities may be required to be used by a party to it. Accordingly, there is much merit in the appellant's argument that a minimum standard of intellectual capacity as referred to in Presser should also apply. There is also much to be said for that proposition and notions of fairness and

justice. However, in my view the Presser test in terms applies to committal proceedings whether conducted on indictment or summarily. Its extension to committal proceedings, which are an adjunct in my view of criminal proceedings in any event, is one which can fairly be described as intricately connected with criminal proceedings.

[33] Notwithstanding these notions of fairness, in my opinion it is inappropriate for a Judge of the District Court to extend the application of the common law in the way which the appellant seeks. That in my view is the province of the legislature or the higher courts. However, of course that is not the end of the matter. Section 17, as I have said, allows a court, including this Court, to take into account any other relevant matter in determining whether or not to make an order. As I have said, **the object of the Act is the protection of persons from domestic violence, intimidation and stalking. The Act proceeds on the basis that an order by the Court directed to the defendant would be understood by that defendant and acted upon, and I refer to my earlier references to the various sections of the Act. As a matter of principle it follows that if the Court concludes that the making of an order will not have the desired primary effect, then that will be a substantial reason in accordance with s 17 not to make the order. Furthermore, if the Court concludes that a person against whom the order is made cannot properly comprehend the terms of its order, so that the effect might be that he or she unwittingly breaches the order and therefore exposes him or herself to imprisonment, that in my view would also be a sufficient other reason why an order should not be made.**

Cl 4 Unavailability of persons

(1) For the purposes of this Act, a person is taken not to be available to give evidence about a fact if:

(a) the person is dead, or

(b) the person is, for any reason other than the application of section 16 (Competence and compellability: judges and jurors), not competent to give the evidence, or

(c) the person is mentally or physically unable to give the evidence and it is not reasonably practicable to overcome that inability, or

(d) it would be unlawful for the person to give the evidence, or

(e) a provision of this Act prohibits the evidence being given, or

(f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or secure his or her attendance, but without success, or

(g) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.

(2) In all other cases the person is taken to be available to give evidence about the fact.

18 Compellability of spouses and others in criminal proceedings generally

(1) This section applies only in a criminal proceeding.

(2) A person who, when required to give evidence, is the spouse, de facto partner, parent or child of a defendant may object to being required:

(a) to give evidence, or

(b) to give evidence of a communication between the person and the defendant,

as a witness for the prosecution.

(3) The objection is to be made before the person gives the evidence or as soon as practicable after the person becomes aware of the right so to object, whichever is the later.

(4) If it appears to the court that a person may have a right to make an objection under this section, the court is to satisfy itself that the person is aware of the effect of this section as it may apply to the person.

(5) If there is a jury, the court is to hear and determine any objection under this section in the absence of the jury.

(6) A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that:

(a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence, and

(b) the nature and extent of that harm outweighs the desirability of having the evidence given.

(7) Without limiting the matters that may be taken into account by the court for the purposes of subsection (6), it must take into account the following:

(a) the nature and gravity of the offence for which the defendant is being prosecuted,

(b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it,

(c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor,

(d) the nature of the relationship between the defendant and the person,

(e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the defendant.

(8) If an objection under this section has been determined, the prosecutor may not comment on:

(a) the objection, or

(b) the decision of the court in relation to the objection, or

(c) the failure of the person to give evidence.

65 Exception: criminal proceedings if maker not available

(1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation:

(a) was made under a duty to make that representation or to make representations of that kind, or

(b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or

(c) was made in circumstances that make it highly probable that the representation is reliable, or

(d) was:

(i) against the interests of the person who made it at the time it was made, and

(ii) made in circumstances that make it likely that the representation is reliable.

Section 67 imposes notice requirements relating to this subsection.

(3) The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the defendant in the proceeding to which this section is being applied:

(a) cross-examined the person who made the representation about it, or

(b) had a reasonable opportunity to cross-examine the person who made the representation about it.

Section 67 imposes notice requirements relating to this subsection.

(4) If there is more than one defendant in the criminal proceeding, evidence of a previous representation that:

(a) is given in an Australian or overseas proceeding, and

(b) is admitted into evidence in the criminal proceeding because of subsection (3),

cannot be used against a defendant who did not cross-examine, and did not have a reasonable opportunity to cross-examine, the person about the representation.

(5) For the purposes of subsections (3) and (4), a defendant is taken to have had a reasonable opportunity to cross-examine a person if the defendant was not present at a time when the cross-examination of a person might have been conducted but:

(a) could reasonably have been present at that time, and

(b) if present could have cross-examined the person.

(6) Evidence of the making of a representation to which subsection (3) applies may be adduced by producing a transcript, or a recording, of the representation that is authenticated by:

(a) the person to whom, or the court or other body to which, the representation was made, or

(b) if applicable, the registrar or other proper officer of the court or other body to which the representation was made, or

(c) the person or body responsible for producing the transcript or recording.

(7) Without limiting subsection (2) (d), a representation is taken for the purposes of that subsection to be against the interests of the person who made it if it tends:

(a) to damage the person's reputation, or

(b) to show that the person has committed an offence for which the person has not been convicted, or

(c) to show that the person is liable in an action for damages.

(8) The hearsay rule does not apply to:

(a) evidence of a previous representation adduced by a defendant if the evidence is given by a person who saw, heard or otherwise perceived the representation being made, or

(b) a document tendered as evidence by a defendant so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

Section 67 imposes notice requirements relating to this subsection.

(9) If evidence of a previous representation about a matter has been adduced by a

defendant and has been admitted, the hearsay rule does not apply to evidence of another representation about the matter that:

(a) is adduced by another party, and

(b) is given by a person who saw, heard or otherwise perceived the other representation being made.

Clause 4 of Part 2 of the Dictionary is about the availability of persons.

67 Notice to be given

(1) Sections 63 (2), 64 (2) and 65 (2), (3) and (8) do not apply to evidence adduced by a party unless that party has given reasonable notice in writing to each other party of the party's intention to adduce the evidence.

(2) Notices given under subsection (1) are to be given in accordance with any regulations or rules of court made for the purposes of this section.

(3) The notice must state:

(a) the particular provisions of this Division on which the party intends to rely in arguing that the hearsay rule does not apply to the evidence, and

(b) if section 64 (2) is such a provision--the grounds, specified in that provision, on which the party intends to rely.

(4) Despite subsection (1), if notice has not been given, the court may, on the application of a party, direct that one or more of those subsections is to apply despite the party's failure to give notice.

(5) The direction:

(a) is subject to such conditions (if any) as the court thinks fit, and

(b) in particular, may provide that, in relation to specified evidence, the subsection or subsections concerned apply with such modifications as the court specifies.

101A Credibility evidence

Credibility evidence, in relation to a witness or other person, is evidence relevant to the credibility of the witness or person that:

(a) is relevant only because it affects the assessment of the credibility of the witness or person, or

(b) is relevant:

(i) because it affects the assessment of the credibility of the witness or person, and

(ii) for some other purpose for which it is not admissible, or cannot be used, because of a provision of Parts 3.2 to 3.6.

1 Sections 60 and 77 will not affect the application of paragraph (b), because they cannot apply to evidence that is yet to be admitted.

2 Section 101A was inserted as a response to the decision of the High Court of Australia in *Adam v The Queen(2001) 207 CLR 96*.

102 The credibility rule

Credibility evidence about a witness is not admissible.

1 Specific exceptions to the credibility rule are as follows:

- evidence adduced in cross-examination (sections 103 and 104)
- evidence in rebuttal of denials (section 106)
- evidence to re-establish credibility (section 108)
- evidence of persons with specialised knowledge (section 108C)
- character of accused persons (section 110)

Other provisions of this Act, or of other laws, may operate as further exceptions.

2 Sections 108A and 108B deal with the admission of credibility evidence about a person who has made a previous representation but is not a witness.

103 Exception: cross-examination as to credibility

(1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness.

(2) Without limiting the matters to which the court may have regard for the purposes of subsection (1), it is to have regard to:

(a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth, and

(b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

106 Exception: rebutting denials by other evidence

(1) The credibility rule does not apply to evidence that is relevant to a witness's credibility and that is adduced otherwise than from the witness if:

(a) in cross-examination of the witness:

(i) the substance of the evidence was put to the witness, and

(ii) the witness denied, or did not admit or agree to, the substance of the evidence, and

(b) the court gives leave to adduce the evidence.

(2) Leave under subsection (1) (b) is not required if the evidence tends to prove that the witness:

(a) is biased or has a motive for being untruthful, or

(b) has been convicted of an offence, including an offence against the law of a foreign country, or

(c) has made a prior inconsistent statement, or

(d) is, or was, unable to be aware of matters to which his or her evidence relates, or

(e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth.

108 Exception: re-establishing credibility

(1) The credibility rule does not apply to evidence adduced in re-examination of a witness.

(2) (Repealed)

(3) The credibility rule does not apply to evidence of a prior consistent statement of a witness if:

(a) evidence of a prior inconsistent statement of the witness has been admitted, or

(b) it is or will be suggested (either expressly or by implication) that evidence given by the witness has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of a suggestion,

and the court gives leave to adduce the evidence of the prior consistent statement.

110 Evidence about character of accused persons

(1) The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character.

(2) If evidence adduced to prove (directly or by implication) that a defendant is generally a person of good character has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not generally a person of good character.

(3) If evidence adduced to prove (directly or by implication) that a defendant is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not a person of good character in that respect.

136 General discretion to limit use of evidence

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

(a) be unfairly prejudicial to a party, or

(b) be misleading or confusing.

137 Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

165 Unreliable evidence

(1) This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence:

(a) evidence in relation to which Part 3.2 (hearsay evidence) or 3.4 (admissions) applies,

(b) identification evidence,

(c) evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like,

(d) evidence given in a criminal proceeding by a witness, being a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding,

(e) evidence given in a criminal proceeding by a witness who is a prison informer,

(f) oral evidence of questioning by an investigating official of a defendant that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing, by the defendant,

(g) in a proceeding against the estate of a deceased person--evidence adduced by or on behalf of a person seeking relief in the proceeding that is evidence about a matter about which the deceased person could have given evidence if he or she were alive.

(2) If there is a jury and a party so requests, the judge is to:

(a) warn the jury that the evidence may be unreliable, and

(b) inform the jury of matters that may cause it to be unreliable, and

(c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(3) The judge need not comply with subsection (2) if there are good reasons for not doing so.

(4) It is not necessary that a particular form of words be used in giving the warning or information.

(5) This section does not affect any other power of the judge to give a warning to, or to inform, the jury.

(6) Subsection (2) does not permit a judge to warn or inform a jury in proceedings before it in which a child gives evidence that the reliability of the child's evidence may be affected by the age of the child. Any such warning or information may be given only in accordance with section 165A (2) and (3).

192 Leave, permission or direction may be given on terms

(1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.

(2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account:

(a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing, and

(b) the extent to which to do so would be unfair to a party or to a witness, and

(c) the importance of the evidence in relation to which the leave, permission or direction is sought, and

(d) the nature of the proceeding, and

(e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

192A Advance rulings and findings

Where a question arises in any proceedings, being a question about:

(a) the admissibility or use of evidence proposed to be adduced, or

(b) the operation of a provision of this Act or another law in relation to evidence proposed to be adduced, or

(c) the giving of leave, permission or direction under section 192,

the court may, if it considers it to be appropriate to do so, give a ruling or make a finding in relation to the question before the evidence is adduced in the proceedings.