DOMESTIC VIOLENCE EVIDENCE IN CHIEF
FUNDAMENTALS AND PRACTICAL ADVICE

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1 Part 4B of Chapter 6 of the *Criminal Procedure Act* entitled, *"Giving of evidence by domestic violence complainants"* was inserted by the *Criminal Procedure Amendment (Domestic Violence Complainants) Act* 2014. The insertion of Part 4B was a response by the State Government to a key reform identified by the Domestic Violence Justice Strategy 2013-2017. The provisions commenced on 1 June 2015 and apply to proceedings commenced on or after that date.

2 In short, the new provisions introduce a further statutory exception to the hearsay and opinion rules: see section 289I(1). In proceedings for a domestic violence offence, a complainant may now give their evidence in chief, in whole or in part, by way of a previously recorded statement made to police as soon as practicable after the commission of the alleged incident: ss.289D and 289F(1). A complainant who gives evidence in chief in this way must subsequently be available for cross-examination and re-examination: s.289F(5).

3 The detail of the provisions has already been the subject of considerable analysis. A paper by Nerissa Key entitled, *"DVEC evidence in chief reforms for victims of domestic violence – practical issues for defence*

lawyers" (July 2015) and a presentation by Robert Hoyles entitled *"Domestic Violence Evidence in Chief (DVEC)"* (December 2015) are both available online (at www.criminalcpd.net.au/evidence) and should be read by practitioners appearing in domestic violence matters. In addition, the Butterworths loose-leaf service *Criminal Practice & Procedure NSW* edited by Howie and Johnson provides helpful commentary on the operation of the new provisions, in particular, by reference to the second reading speech presented by then Attorney-General Brad Hazzard in the Legislative Assembly on 21 October 2014.

4 In light of this, I do not propose to address the detail of the provisions. What I will address is three things:

(a) First, I will discuss some fundamental aspects of evidence and trial procedure to try and "demystify" the new provisions for practitioners (if that is necessary) and help put them into a broader legal context.

(b) Second, I will offer some guidance to practitioners about how to approach some aspects of the preparation of defended hearings for domestic violence offences in light of the new provisions.

(c) Third, I will consider whether the new provisions materially alter the way in which domestic violence hearings are conducted and provide some further guidance to practitioners (more as a reminder) about common situations that arise from time-to-time in these types of hearings, and how they should be approached.

Some fundamental principles of evidence and trial procedure

5 In my experience, before the introduction of the new provisions, police attending a domestic violence incident would usually try to take a statement from a complainant during their attendance. The statement often took the form of a handwritten police notebook entry signed by the complainant either set out as a series of paragraphs or a set of questions asked by police and answers offered by the complainant.

6 Observations made by police of injuries to the complainant or the distress of the complainant, property damage, or anything said by way of initial complaint were all generally reproduced in police statements, sometimes with accompanying photographs.

7 If a statement from the complainant was not taken at the time of the police's initial attendance, arrangement was usually made for a complainant to attend the local police station to make a statement over the ensuing days.

8 With the introduction of Part 4B, written statements taken during these types of attendances are no longer the norm. A complainant's evidence may be taken by police in the form of a recorded statement either at the time of the initial attendance or over the ensuing days.

9 Given this change to police procedure in domestic violence matters and, consequently, the way in which a complainant's evidence in chief may be adduced at a future defended hearing, it is helpful to keep in mind some fundamental aspects of evidence and trial procedure.

10 A written statement of a complainant and a recorded statement of a complainant are both documents: see the definition of “document” in the *Evidence Act* Dictionary. Both are also the product of a process of questioning by police.

11 Ordinarily, if a representation within a document is adduced to prove the existence of a fact intended to be asserted by the representation, that representation is hearsay, and excluded by the hearsay rule: section 59 of the *Evidence Act.* Similarly, if evidence of an opinion within a document is adduced to prove the existence of a fact about the existence of which the opinion was expressed, that evidence is opinion, and excluded by the opinion rule: section 76 of the *Evidence Act.* The hearsay and opinion rules apply to documents adduced in proceedings to which the *Evidence Act* applies. A consequence of the hearsay rule is that written statements of witnesses are not usually admissible to prove the existence of facts, and the maker of a written statement is required to give evidence (including evidence in chief) in the proceedings *viva voce*.

12 The evidentiary effect of sections 289F(1) and 289I(1) of the *Criminal Procedure Act* is that the hearsay and opinion rules no longer apply to recorded statements of complainants in proceedings for domestic violence offences. The hearsay and opinion rules do not apply to that class of document, and the maker of the recorded statement may rely on the document as their evidence in chief in whole or in part.

13 The practical effect of these sections is a truncated approach to the adduction of evidence in chief of a complainant in proceedings for domestic violence offences. It is important to recognise however that in

modern litigation, truncated approaches to the adduction of evidence in chief are not uncommon.

14 The adduction of evidence in chief *viva voce* has been eradicated almost entirely from civil proceedings. Rule 31.4(1) of the *Uniform Civil Procedure Rules 2005* requires that parties to civil proceedings serve on each other active party to proceedings, written statements of any oral evidence that the party intends to adduce in chief on any question of fact to be decided at a hearing. If the maker of any written statement is called as a witness at a hearing in the proceedings, their written statement stands as the whole of that witness's evidence in chief, subject to the witness attesting to the truth of the written statement: see rule 31.4(5)(a) of the UCPR. Further evidence in chief may only be adduced from the witness by leave: rule 31.4(5)(b).

15 In criminal proceedings, there are already established truncated approaches to the adduction of evidence in chief for certain classes of witness:

(a) Section 33 of the *Evidence Act* permits police officers to give evidence in chief for the prosecution by reading or being led through a written statement previously made by the police officer (subject to the requirement of contemporaneity).

(b) Other provisions in Part 6 of the *Criminal Procedure Act* provide for the evidence in chief of children under the age of 16 and cognitively impaired persons to be given in the form of a recording made by police of a prior interview given by the person: see section 306S. The hearsay and opinion rules do not prevent the admission of

such a recording: see section 306V. Sections 306S and 306V are almost identical in terms to sections 289F(1) and 289I(1).

(c) Evidence in chief is often truncated by consent for forensic reasons: see section 190 of the *Evidence Act*.

16 In fact, tendering and treating a written statement or report as the evidence in chief of its maker is expressly contemplated by the *Evidence Act*: see section 37(3). However, it should be noted that it has previously been observed that ordinarily in a criminal trial witnesses should give their evidence *viva voce*: see *Clark v The Queen* (2008) 185 A Crim R 1 at [116].

17 Whilst not evidence in chief, it is also worth reminding ourselves of other examples of the use of prior recordings as evidence in criminal proceedings. In *R v NZ* (2005) 63 A Crim R 628 at [177] it was observed (Howie and Johnson JJ) that:

> There are many occasions when evidence is placed before a jury by the use of electrical recording of images and the human voice. The most obvious cases are where there has been a recorded interview of a suspected person by the police and the lawful recording of conversations by the use of a listening device or a telephone interception. But there are also videotaped re-enactments of the offence, video-taped identification parades and views of the scene of a crime often with the use of computer enhancements. These are common features of modern criminal trials.

18 How, as a matter of principle, a record of interview of an accused is admissible (considering that records of interview with accused persons bear some of the same qualities from an evidentiary standpoint to that of a recorded statement with a complainant) is worth further considering.

19 Where a record of interview contains admissions or partial admissions, the document is admissible pursuant to section 81 of the *Evidence Act* which states that the hearsay and opinion rules do not apply to admissions. However, where a record of interview contains only denials, the document is admitted because it is relevant (generally) for two reasons: the truth of the accused's denials (i.e., its hearsay purpose) and the credibility of the accused's plea of not guilty: see *R v Rymer* (2005) 156 A Crim R 84 at [64] per Grove J (Barr and Latham JJ agreeing). A record of interview with an accused is, in essence, a prior recorded statement in the form of questions and answers constituting some evidence exculpatory although not the equivalent of sworn evidence and of course not the subject of cross-examination: see *R v Davis* [1999] NSWCCA 15 at [50]-[51] per Wood CJ at CL (Spigelman CJ and McInerney J agreeing).

20 It is helpful to bear these principles in mind in coming to terms with the new provisions.

A couple of aspects concerning preparation

21 The new provisions do not fundamentally change how a practitioner acting for an accused in proceedings for a domestic violence offence should approach their task. However, there are two issues which arise as a result of the new provisions that practitioners should consider when appearing in these types of matters.

22 The first issue relates to the prohibition against giving to an accused a copy of the complainant's recorded statement: see section 289P.

23 Where an accused is legally represented, a copy of the complainant's recorded statement is served as part of the prosecution brief of evidence. In domestic violence matters in the Local Court, partial service of the brief of evidence is often effected at the first mention of the matter in court (or shortly thereafter). It is in fact a requirement of the Local Court's Practice Note Crim 1 that a complainant's statement be served as part of the prosecution's mini brief of evidence not later than the first mention of the matter in court: see paragraph 10.3(a). However, rather than being copied and sent to the accused for their review (as would normally be the case with a written statement), in light of section 289P, practitioners should arrange to conference the accused without delay.

24 The Local Court's Practice Note Crim 1 requires that, following service of the prosecution's mini brief of evidence, an adjournment of not more than two weeks is permitted for a plea to be entered or for an accused to view the complainant's recorded statement: paragraph 10.3(b). On the next occasion that the matter is mentioned in Court, the practice directions indicate that if the matter remains a defended one it be allocated a hearing date: paragraph 10.3(c).

25 At an initial conference with the accused, the complainant's recorded statement should be viewed by the accused. Instructions should be sought from the accused about the complainant's allegations in the recorded statement and any other evidence served as part of the mini brief of evidence. The accused should be given advice about plea options and the discount applicable to early guilty pleas.

26 This approach is consistent with practitioners' ethical obligations, particularly considering the terms of the Local Court's practice

directions. In *Gaudie v Local Court of New South Wales and Anor* [2013] NSWSC 1425 Johnson J emphasised this aspect of legal representatives' ethical obligations when making some closing observations in the context of that particular case (at [213]-[216]):

> The ethical obligations of legal representatives appearing for all defendants in the criminal courts are well known (see [124]-[129] above). The obligation of a legal practitioner in these circumstances is to take early instructions concerning the charge in question and, in that context, to comply with the requirements under the *Revised Professional Conduct and Practice Rules* to explain to the client the consequences of an early plea of guilty. Rule A.17B is intended to ensure that the client makes an informed decision as to plea. If the matter is to proceed as a defended hearing, the defendant's legal representatives must also comply with the obligations under Rules A.15A and 20.
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> These Rules serve to ensure the proper use of Local Court time to determine the real issues in dispute in the proceedings: *Director of Public Prosecutions (NSW) v Wililo* [2012] NSWSC 713; 222 A Crim R 106 at 121-122 [50].
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> This obligation is emphasised with respect to summary hearings in the Local Court for domestic violence offences. The Chief Magistrate has issued *Local Court Practice Note Crim 1*, which provides for case management of criminal proceedings in the Local Court: ss.26(2)(a) and 27 *Local Court Act 2007*. Clause 10 of the Practice Note relates expressly to domestic violence proceedings. The objects of paragraph 10 include ensuring *"that, where appropriate, pleas of guilty are entered at the first available opportunity and if a plea of not guilty is entered that a hearing occurs with expedition"* (clause 10.2(a)). A time standard is nominated, proposing a hearing within three months of a charge being laid (clause 10.2(b)). Provision is made for streamlining any hearing, with certain specific steps to be taken where a defendant is legally represented (clause 10.3).
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> These provisions give effect, as well, to a statutory object of the *Crimes (Domestic and Personal Violence) Act 2007* - to ensure that *"access to courts is as safe, speedy, inexpensive and simple as is consistent with justice"* (s.9(2)(b) at [113] above).

27 The current rules provided by the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* are less robust than the previous State-based rules applicable to solicitors referred to by Johnson J in *Gaudie* (see rules 3, 7 and 20.2 of the *Legal Profession*

Uniform Law Australian Solicitors' Conduct Rules 2015). However, in my view, the observations in *Gaudie* at [213]-[216] remain apposite to the proper ethical conduct of practitioners appearing in domestic violence matters. Rules 38, 58 and 80 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* remain in the same terms as were discussed in *Gaudie*.

28 It is important to recognise that these ethical obligations have not changed as a result of the new provisions, but the need to arrange an early conference with an accused, as a result of section 289P, means that practitioners are presented with an appropriate early opportunity to advise and to take necessary instructions from an accused about the future conduct of the proceedings. At an initial conference with an accused, considerations of the type discussed in *Gaudie* and the terms of the Local Court's practice directions should be kept in mind.

29 Following an initial conference with an accused, where the instructions are to either enter or maintain a plea of not guilty, then there is a second aspect of preparation that practitioners should consider. That is, whether there are any objections to be taken to the recorded statement.

30 Like matters where there is a recording of an interview with a child under 16 or a cognitively impaired person, a complainant's recorded statement should be carefully reviewed, with the particulars of the charge and the accused's instructions in mind. The aim of the review is to identify objections. Common grounds for objection include:

(a) Leading questions on the part of the questioning police officer: see section 37 of the *Evidence Act* and the definition of *"leading question"* in the Dictionary to the Act.

(b) Questions and/or answers that raise matters which are not relevant to the charges (section 55) and, if indirectly relevant, are arguably unfairly prejudicial to the accused (section 137).

(c) Answers by a complainant that raise a tendency on the part of the accused to act in a particular way, or to have a particular state of mind (where tendency reasoning is not relied upon by the prosecution) (see Part 3.6).

(d) Unfair prejudice which relates to some visual aspect of the recording itself usually arising from the manner in which the recording is set up by the police (section 137).

31 In cases where there are objections to the recorded statement, notice should be given to the prosecution of those objections and the grounds which support them. Unlike matters dealt with on indictment, there is no ordinary way in which a recorded statement will be edited before the summary hearing. Practically speaking, in most cases, practitioners will find themselves taking the objections on the day of the hearing. But this does not mean that a genuine attempt should not be made to reach agreement with the prosecution in advance of the hearing and, at a minimum, to put them on notice of the objections to be taken. Where no agreement can be reached before the hearing, practitioners should have a document prepared which sets out the objections to the recorded statement. Rulings should be sought from the magistrate hearing the matter after the recorded statement has been viewed in Court. Having a document prepared listing the objections (where they relate to identifiable questions and answers in the recording) will likely alleviate the need to raise each objection in the course of the Court's viewing of

the recording. But this is a practical matter that should be raised with the magistrate in each individual case because particular magistrates may have a view about how objections should be taken.

32 Finally, just a quick reminder to practitioners about the status of the recording itself – it should not be tendered by the prosecution, and, if it is, it should be objected to. The recording is not the evidence. The contents of the recording is admissible as the equivalent of oral evidence in chief: see *R v NZ* (2005) A Crim R 628 at [194]. Where a transcript has been prepared by the prosecution it should also not be tendered.

Some common situations in domestic violence hearings

33 The new provisions do impact the way in which domestic violence hearings are conducted. The prosecution has available to it a recorded statement of the complainant that may (in an appropriate case) be adduced as the whole of the complainant's evidence in chief. This does have a consequent effect on two common situations that commonly arise in domestic violence defended hearings:

(a) A complainant attends court, is sworn, but during their evidence begins to refuse to answer questions in chief.

(b) A complainant attends court, but their evidence in chief is exculpatory of the accused and inconsistent with their prior written statement to the police.

34 In each of these scenarios, the playing of the complainant's recorded statement as their evidence in chief means it is not possible for a

complainant to do either of these things until after that evidence has been adduced in the prosecution case.

35 It is still possible however that a prosecutor in attempting to elicit further evidence in chief following the playing of the recorded statement encounters one of these two situations, and still makes an application for leave to cross-examine the complainant pursuant to section 38. However, as a practical matter, prosecutors who expect that a complainant may be unfavourable may make the forensic decision to simply rely on the recorded statement as the whole of the complainant's evidence in chief (assuming that the recording establishes a *prima facie* case).

36 If a complainant is prepared to give evidence exculpatory of an accused and disavow their allegations in their recorded statement, then that evidence may be elicited from the complainant in cross-examination. As a practical matter, once it becomes apparent that the complainant intends to disavow their allegations, practitioners should consider their approach to cross-examination. Practitioners should be aware that section 42 of the *Evidence Act* contemplates the Court disallowing leading questions in cross-examination on a number of basis including when evidence has been given by the witness in examination in chief that is unfavourable (to the prosecution) or the witness is sympathetic to the party conducting the cross-examination, either generally or about a particular matter: section 42(2). If the Court is satisfied that the facts would be better ascertained if leading questions were not used, leading questions may be disallowed: section 42(3). In criminal proceedings, this obviously represents a radical departure from the ordinary practice.

37 In *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [117] Heydon J observed:

> The credibility of a witness in the position of Mr Kirk in relation to the defence under s 53 of the *Occupational Health and Safety Act* 1983 (NSW) ("the OH&S Act") is capable of being affected by the manner in which the testimony is elicited. The law grants considerable power to a cross-examiner to employ leading questions and otherwise to operate free from some of the constraints on an advocate examining in chief. It does so for particular reasons. In New South Wales at least, normally in a criminal case an advocate cross-examining an accused person will have had no contact with the witness being cross-examined before the trial, and will have no instructions about what that witness will say, apart from whatever the witness said to investigating officials acting on behalf of the State or to other persons to be called as witnesses in the prosecution case or in documents to be tendered in that case. But a cross-examiner's ordinary powers are, in a practical sense, much diminished when the witness being cross-examined is the client of the advocate conducting the cross-examination. The cross-examiner who persistently asks leading questions of a witness in total sympathy with the interests of the cross-examiner's client is employing a radically flawed technique. The technique is the more flawed when the witness is not merely in total sympathy with the client, but actually is the client. For an inevitable appearance of collusion between an advocate and a client who had many opportunities for pre-trial conferences is suggested by the persistent use of leading questions in these circumstances. It is an appearance which is likely to be ineradicable, and which is likely to cause the value of the evidence to be severely discounted. This risk is avoided if the client is giving the evidence in chief rather than under cross-examination, for the client's advocate is severely restricted in the capacity to ask leading questions in chief. Judging the credibility of a witness in the box can depend on the trier of fact making an assessment of that witness's whole character. It is a process assisted by knowing as much about the witness's character as possible. The credibility of testimony is often enhanced, and the assessment of credibility is assisted, when the testimony is given in answer to non-leading questions. Testimony given in answer to non-leading questions is the witness's own testimony, resting on the witness's own perceptions, and moulded by the witness's own values.

38 Practitioners should consider the possibility that favourable evidence elicited from a complainant in cross-examination as a result of leading questions may be discounted by the tribunal of fact. In some cases, a degree of flexibility might be called for. However, bearing in mind the onus and standard of proof in criminal trials, leading propositions of fact put to a complainant in cross-examination with which they agree, must

in most cases be capable of raising a reasonable doubt about an accused's guilt because their acceptance by the complainant must be relevant to an assessment of the credibility and reliability of the complainant's evidence. In most cases, subject to the Court exercising its power to disallow leading questions in cross-examination, the safer course, in my view, is to approach cross-examination in an orthodox way. Practitioners should ensure that they are well organised and efficient in eliciting the propositions of fact that are necessary to raise a reasonable doubt about the guilt of the accused. A practitioner's ability to do this obviously depends in part on the quality of their instructions.

39 In some cases, where a complainant disavows their recorded statement in cross-examination, and gives evidence which is exculpatory, practitioners should be alive to the possibility of an application by the prosecution for leave to cross-examine the complainant in re-examination: see sections 38 and 39 of the *Evidence Act.* In other cases, it may be that the prosecution indicates at the outset of the complainant's evidence that they anticipate that the complainant will be unfavourable to the prosecution. In those circumstances, practitioners should be alive to the potential for cross-examination by the defence to take place first, before the anticipated application for leave to cross-examine by the prosecutor pursuant to section 38.

40 Unlike the above situations, it is not apparent that the new provisions have had much effect on another common situation that commonly arises in domestic violence hearings. That is, when a complainant does not attend court to give evidence. The options available to a magistrate continue to be to:

(a) Issue a warrant for the arrest of the complainant (assuming that they were subpoenaed) for failure answer their subpoena.

(b) Grant the prosecution an adjournment.

(c) Dismiss the proceedings either following withdrawal of the charge or the offering of no evidence by the prosecution.

(d) Consider whether to apply section 65(2) of the *Evidence Act*.

41 It is important to note that these four options were all available before the introduction of the new provisions. Practitioners require no guidance from me in respect of the first three of these options. However, the fourth remains a continuing source of confusion and hesitancy for many practitioners.

42 It is important to recognise that applications by prosecutors to treat a complainant as not available so as to rely on a previous statement made by them, is not new, and the new provisions do not alter the way in which such applications should be approached.

43 The prosecution must still establish that, aside from simply not being present at court, the complainant is not available. This is a matter of evidence. In the usual case, evidence will be called from the informant about the steps taken to secure the complainant's attendance, but without success: see Part 2 of the Dictionary to the *Evidence Act*. It is usually expected at a minimum that the complainant was under subpoena to attend, and that some efforts were made in advance of the hearing to contact the complainant.

44 The prosecution must then satisfy the Court that the hearsay rule should not be applied to the complainant's recorded statement, in most cases because of either the application of section 65(2)(b) or 65(2)(c).

45 Section 65(2)(b) applies when it can be established that a particular representation in a recorded statement was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication.

46 Section 65(2)(c) applies when it can be established that a particular representation in a recorded statement was made in circumstances that make it highly probable that the representation is reliable.

47 The proper approach to the application of section 65(2) was recently considered by the High Court in *Sio v The Queen* [2016] HCA 32 in the context of a case concerning the application of section 65(2)(d). At [56]-[58] the Court explained:

> It may also be noted here that s 65(2)(b) makes it clear that when the provisions with which it is collocated speak of "a representation", they are speaking of the particular representation that asserts a relevant fact sought to be proved. That this is so is confirmed by s 65(2)(d)(i), which requires that *the* representation tendered against the other party is able to be seen to be against the interest of the maker of the statement.
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> It can be seen that the application of s 65(2) proceeds upon the assumption that a party is seeking to prove a particular fact relevant to an issue in the case. It then requires the identification of the particular representation to be adduced in evidence as proof of that fact. The circumstances in which that representation was made may then be considered in order to determine whether the conditions of admissibility are met. This process must be observed in relation to each relevant fact sought to be proved by tendering evidence under s 65.
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> It is apparent in the present case that neither the trial judge nor the Court of Criminal Appeal considered any particular representation upon which the Crown sought to rely in this way; rather, the application of the provision was approached on a compendious basis whereby an overall impression was

> formed of the general reliability of the statements made by Mr Filihia and then all his statements were held to be admissible against Mr Sio. That compendious approach does not conform to the requirements of the Act.

48 It is necessary for the prosecution to identify the particular representation to be adduced in evidence as proof of that fact. Practitioners should be mindful of not allowing a prosecutor's application to proceed in the compendious manner discouraged by the High Court.

49 The Court observed (at [63], citing *Walton v The Queen* (1989) 166 CLR 283 at 293):

> Section 65 gives effect to the view that the circumstances of the making of an out of court statement conveying an assertion of a relevant fact may be such as to indicate that the representation is likely to be reliable – and the asserted fact likely to be true – notwithstanding the hearsay character of the evidence. The section operates on the footing that the circumstances in which the representation was made may be seen to be such that "the dangers which the rule seeks to prevent are not present or are negligible in the circumstances". In such a case, "there is no basis for a strict application of the rule."

50 In relation to the operation of sections 65(2)(b) and 65(2)(c), practitioners should familiarise themselves with:

(a) *R v Mankotia* [1998] NSWSC 295 (in particular at [5]-[6] per Sperling J);

(b) *Conway v The Queen* (2000) 98 FCR 204 (in particular at [133] per Miles, von Doussa and Weinberg JJ);

(c) *Williams v The Queen* (2000) 119 A Crim R 490 (in particular [48]-[49] per Whitlam, Madgwick and Weinberg JJ);

(d) *R v Ambrosoli* [2002] NSWCCA 386 (in particular at [54] per Mason P, RS Hulme and Simpson JJ); and

(e) *Harris v The Queen* (2005) 158 A Crim R 454 (in particular at [37], per Studdert J, Grove and Whealy JJ agreeing).

51 Lastly, the prosecution must give reasonable notice in writing of their intention to rely on section 65(2): section 67(1). However, the practical reality is that notice is unlikely to be given in circumstances where the prosecution only become aware of the need to rely on the section on the morning of the hearing. The prosecution's failure to give notice is not fatal to the application: see section 67(4). Practitioners should however consider whether the absence of notice causes any identifiable prejudice to the conduct of the accused's defence.

52 The admission of the recorded statement as an exception to the hearsay rule is still subject to the exercise of judicial discretion: see section 137. Putting aside considerations of reliability and credibility, in most cases a Court is likely to assess the probative value of a complainant's recorded statement as high because of the extent to which the evidence could rationally affect the assessment of the probability of the existence of facts in issue. On the other hand, the inability to cross-examine will usually be significant to the danger of unfair prejudice to an accused because of that very fact. In *R v Suteski* (2002) 137 A Crim R 371 it was held that the inability to cross-examine is relevant to a Court's assessment of the discretions in sections 135 and 137, but its significance will depend in part on the character of the evidence involved (at [126]-[127]). In domestic violence cases, it is invariably the case that a complainant's evidence is essential to the prosecution's case against an accused and before cross-examination, the probative value of the

evidence will often be high. In cases where that observation is applicable, the inability to cross-examine is clearly unfairly prejudicial.

53 It was recently observed by the High Court in *Sio v The Queen* [2016] HCA 32 (at [60]):

> It is no light thing to admit a hearsay statement inculpating an accused. Where s 65 is successfully invoked by the prosecution, the accused will have no opportunity to cross-examine the maker of the statement with a view to undermining the inculpatory assertion.

54 If ultimately the complainant's recorded statement is admitted into evidence pursuant to either section 65(2)(b) or 65(2)(c), it is important that practitioners appreciate that a Court must still decide what weight it should ultimately give that evidence in light of the totality of the evidence adduced in the hearing.

55 In cases where a complainant does not attend court to give evidence, their recorded statement represents evidence to which the rule against hearsay would ordinarily apply. Practitioners should as a rule request that it be the subject of a warning (see section 165(1)(a) of the *Evidence Act*) because it may be unreliable. Some of the general reasons why hearsay evidence is considered potentially unreliable include:

(a) It involves a potential compounding of weakness of perception, memory, narration skills and sincerity.

(b) It may not be properly subject to cross-examination.

(c) It is not made in a court environment (and thus may be potentially more susceptible to pressures which might result in a false account).

(d) It is not on oath or affirmation.

56 These matters are identified by Odgers at [1.4.2920] and were substantively endorsed by the Court of Criminal Appeal in *R v TJF* [2001] NSWCCA 127 at [55].

57 One final point, it is worth recognising that a recorded statement of a complainant admitted into evidence in circumstances where it is not sworn evidence and an accused does not have an opportunity to cross-examine leaves the evidence in a not dissimilar evidentiary state to that of an accused's record of interview in which the accused denies the allegations but is not cross-examined upon those denials – in each case, the evidence constitutes some evidence (either inculpatory or exculpatory) although not the equivalent of sworn evidence and of course not the subject of cross-examination: see *R v Davis* [1999] NSWCCA 15 at [50]-[51]. The material difference however between these two types of evidence is that one is of course tendered by the prosecution, who bear the onus of proving the guilt of an accused beyond reasonable doubt.

58 Hopefully, this paper provides practitioners with a further resource to which they can refer when appearing in domestic violence matters in which there is a recorded statement of a complainant.