Defending your client when they are under cross-examination by the prosecution

Overview:

1. This paper is about defending your client when they are under cross-examination by the prosecution. It is structured as follows:

   i. Preparing your client for cross-examination;
   ii. Whether to object;
   iii. Section 41;
   iv. Questions that breach the prosecutor's duty of fairness;
   v. Questions that breach the accused's right to silence;
   vi. Questions that reverse the onus of proof;
   vii. Questions relating to an alleged breach of the rule in *Browne v Dunn*;
   viii. Questions that breach the credibility rule;
   ix. Questions about character;
   x. Section 137;
   xi. Miscellaneous objections; and
   xii. Re-examination.

2. This paper does not deal with any of the above topics exhaustively. However, it does aim to demonstrate that the range of objections that an advocate can make is far broader than those set out in the *Evidence Act 1995 (NSW)* ("Evidence Act"), and that the opportunities to object are also far broader. It is imperative that you familiarise yourself with the range of objections so that you can properly defend your client and ensure that they receive a fair hearing/trial.

3. This paper does not deal with the complicated topic of defending your client when they are under cross-examination by the advocate for a co-accused.

i. Preparing your client for cross-examination:

4. You can do the following to help prepare your client for cross-examination (but it is also relevant when preparing your client for evidence-in-chief):

   - **Take a detailed proof of evidence:** when it comes to preparing your client for cross-examination, this is the most important thing you can do. The proof should be typed, and each page should be signed and dated by your client. An example of

such a proof can be found at **Annexure A**. You can sometimes use the typed proof to re-establish your client's credit in re-examination. You will not be able to do this if the relevant pages are not signed and dated. This is discussed below.

- **Explain the rule in *Browne v Dunn* to your client**: it is very important that you explain this rule to your client when you are taking a proof. You should include in the proof something to the effect of, "I have told my lawyer everything about the incident that I can remember" and "If I think of any further details I will make sure I tell my lawyer before I give evidence". For an example of this see **Annexure A**.

- **Tell your client to "Stick to the facts":** it is not uncommon for clients to want to say disparaging things about a witness. For example, "She's a junkie". This is especially true in domestic violence matters. It is imperative that you tell your client that their personal views about a witness are generally not relevant and that it is inappropriate to convey them to the Court. In fact, expressing such views is likely to set the Tribunal of Fact against you. It is also not uncommon for clients to speculate about things. For example, "I think I would have done this" or "She is making this up to get back at me for sleeping with another woman". Again, it is imperative that you tell your client that it is generally not appropriate for them to speculate.

- **Tell them to listen carefully to the question and if they do not understand the question to say so:** this is a particularly important piece of advice to give to our clients, who will often simply agree with a proposition that they do not understand. While you can sometimes clean this up in re-examination, it is better if you can stop it from happening in the first place.

- **Tell your client that if they do not know the answer or are unsure to say so:** it is not uncommon for clients, especially when they are uneducated and have experienced significant disadvantage, to answer in "definitives". This often stems from a mistaken belief that they have to have an answer to every question or from underdeveloped language skills that limit their ability communicate nuanced answers. You should explicitly tell them that if they do not know the answer to a question or are unsure they should say so. This is consistent with your obligation to tell your client to tell the truth when giving evidence.

- **Tell them "Do not address the Tribunal of Fact directly. Direct your answers at the person asking you the question":** this piece of advice is more relevant when the Tribunal of Fact is a jury. There is nothing more uncomfortable than an accused, especially when they are charged with serious offences, directing their answers at the jury, and trying to endear themselves to the jury. However, it is still important when the Tribunal of Fact is a Magistrate or a Judge. The exception to

this is if the Magistrate or Judge asks them a question directly, in which case they should direct their answer at them.

- **Tell them "Do not take the prosecutor's attacks personally, that's just their job":** while the prosecutor should not be "attacking" your client (see below), it is important that you have explained to your client, and they understand, the prosecutor's role. While not strictly correct, I often say the prosecutor's job "is to get under your skin and make it look your are lying". You should explain to your client that losing their cool can damage the Tribunal of Facts assessment of their credibility.

- **Tell them "Do not just say want you think the Magistrate wants to hear":** the worst thing an accused can do is tailor their account to accord with what they think the Magistrate wants to hear. It is usually obvious when a client is doing this and it invariably results in their account being rejected.

5. In terms of the ethics of preparing your client for cross-examination, it is important to bear in mind rules 24 and 26 of the Solicitors Rules:

'Rule 24

24 Integrity of evidence—influencing evidence
24.1 A solicitor must not—
24.1.1 advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so, or
24.1.2 coach a witness by advising what answers the witness should give to questions which might be asked.

24.2 A solicitor will not have breached Rules 24.1 by—
24.2.1 expressing a general admonition to tell the truth,
24.2.2 questioning and testing in conference the version of evidence to be given by a prospective witness, or
24.2.3 drawing the witness's attention to inconsistencies or other difficulties with the evidence, but the solicitor must not encourage the witness to give evidence different from the evidence which the witness believes to be true.

Rule 26

26 Communication with witnesses under cross-examination
26.1 A solicitor must not confer with any witness (including a party or client) called by the solicitor on any matter related to the proceedings while that witness remains under cross-examination, unless—

26.1.1 the cross-examiner has consented beforehand to the solicitor doing so, or
26.1.2 the solicitor—
(i) believes on reasonable grounds that special circumstances (including the need for instructions on a proposed compromise) require such a conference,
(ii) has, if possible, informed the cross-examiner beforehand of the solicitor's intention to do so, and
(iii) otherwise does inform the cross-examiner as soon as possible of the solicitor having done so.'

ii. Whether to object?

6. This question does not have a simple answer. It goes without saying that it will depend on the particular circumstances. As a rule of thumb, if you are unsure, you should err on the side of objecting. However, you should also take into account who your Magistrate is and whether this is likely to be counterproductive. In some instances, you may not want to object for forensic reasons. For example, because your client is doing really well and their answer to objectionable questions is making them look more credible.

iii. Section 41:

7. Section 41 of the Evidence Act deals with "improper questions". Subsection (1) provides that the Court **must** disallow the following:

   - A question that is misleading or confusing;
   - A question that is **unduly** annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive;
   - A question that is put to a witness in a manner or tone that is belittling, insulting or otherwise inappropriate.
   - A question that has no basis other than a stereotype.

8. Each of the above is referred to in s 41 as a "disallowable question".

9. Subsection (2) sets out a non-exhaustive list of factors that the Court **must** take into account in determining whether a question is a disallowable question within the meaning of s 41(1). Importantly, these include:

- Any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality; and

- Any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject.

10. Subsection (4) provides that a party may object to a question on the basis that it is a disallowable question. However, subsection (5) provides that the duty to disallow such questions applies regardless of whether an objection is raised. In other words, the Court must disallow such questions even if neither party objects. Whether the Court does this in practice is a separate issue. And, although the Court has this duty, 'responsibility for deciding whether objection should be taken to the way in which a question is put to a witness … primarily rests with counsel, not with the judge': (*Libke v R* [2007] HCA 30 ("*Libke*") at [76]).

11. In my opinion, s 41 is one of the most underutilised provisions in the Evidence Act. Further, when it comes to protecting your client while they are under cross-examination, it is one of most useful provisions.

12. If you think a questions sounds or seems unfair but you are unsure why, don't be afraid to object. If a question sounds unfair, you can often argue it is captured by s 41.

General observations about s 41:

13. The following points are worth noting about s 41:

- The provision refers to 'a question', singular. However, it is well established that applies to questions, plural. In other words, a series of questions, viewed in their totality, may be "improper", even if each question viewed in isolation is not.

- It has been held that the word unduly in s 41(1)(b) applies to each of the adjectives that follow it. To illustrate, a question will not be a disallowable question, under this provision, simply because it is offensive. It will only be a disallowable question if it is *unduly* offensive. This reflects that fact that cross-examination sometimes requires the witness to answer questions that are offensive or humiliating.

- Section 41(1) is cast in mandatory terms. In other words, the Court must disallow the question if it is satisfied that it falls within the ambit of s 41(1).

- Whether a question is 'unduly harassing, intimidating, offensive, oppressive' etc. may depend on, among other things, the accused's evidence-in-chief. For example, in *Glenn (a pseudonym) v R* [2020] NSWCCA 308 ("*Glenn (a pseudonym)*") it was held at [240], 'Given that the applicant's account of what occurred painted the complainant in a very negative unfavourable light, it was clearly appropriate for the Crown to forcefully and firmly put the prosecution case to the jury.' Further, it has been held that 'the feel and atmosphere of one trial may make it reasonable and even necessary for tactics to be employed that would seem out of place and disproportionate to the circumstances of another': (*R v Rugari* [2001] NSWCCA 64 at [47]).

Any relevant condition or characteristic of the witness:

14. If you are making an objection under s 41(1), in particular on the basis that a question is misleading or confusing or because of the tone used, and your client is uneducated or of low intelligence or is very young etc. and you think this is relevant to the objection, then you should draw this to the Court's attention. As set out above, subsection (2) requires the Court to take this into account.

15. An example of this kind of argument can be seen in *Glenn (a pseudonym)* at [179]:

> 'It was further submitted that, it was relevant that the person being cross-examined in this offensive sarcastic and demeaning manner was a 51 year old Indigenous Australian raised in circumstances of social deprivation and the subject of *Bugmy v The Queen* (2013) 249 CLR 571; [2013] HCA 27 ("Bugmy") findings on sentence. It was submitted that the applicant gave evidence consistent with a person who was socially disadvantaged and the cross-examination is even more problematic when considered in that light'.

16. Justice Adams (Hoeben CJ at CL and Button J agreeing) dealt with this argument at [268] and [270]:

> 'There is no doubt that the approach a Crown Prosecutor might take to cross-examination of a highly educated accused will be different to that taken with an accused who has had limited education. I am satisfied that all persons of limited education should be treated with respect by a Crown Prosecutor, whether they are Aboriginal or not. The High Court took a similar approach in *Bugmy*.
>
> …..
>
> It is the experience of those who have practiced in the criminal law for many years that Aboriginal witnesses and accused persons are generally reluctant to give evidence and

can often feel excluded from the criminal justice process (Judicial Commission of NSW, Equality Before the Law at 2.2.4). Although I am not satisfied that the fact that the applicant is Aboriginal has any direct bearing on the resolution of this ground of appeal per se, I am satisfied that the submission made by Mr Carroll on this issue was one appropriately made in the circumstances.'

17. To establish that your client is uneducated or of low intelligence or from a background of disadvantage, you could ask the Court to infer this from the way they are giving their evidence. Further, if you have a report about your client's intellectual capacity or background, you could try and tender this on the s 41 objection, although other provisions in the Evidence Act may preclude it from being admitted.

18. For completeness, it is noted that s 42 of the Evidence Act gives the Court the power to prohibit leading questions in cross-examination in certain circumstances. While there is nothing in the terms of s 42 that preclude it from being used to limit a prosecutor in their cross-examination of an accused, I have never seen it used in this way. It may be that for a particularly vulnerable accused it could be invoked. It is unlikely that the prosecutor would be prohibited from asking such an accused any leading questions. Rather, they would be restricted from asking the accused leading questions relating to particular topics. The decision of *R v Xie (No. 13)* [2015] NSWSC 2125 provides some guidance as to the application of this provision.

Misleading or confusing:

19. The following are examples of questions commonly asked by Prosecutors of an accused that may be misleading or confusing:

- **Questions that contains a double negative:** for example, "You didn't close the door don't you agree?".

- **Questions that contains more than one proposition:** for example, "You punched the complainant and you ran out the front door onto the street, do you agree?" If the accused says yes, it is not clear if they are agreeing that they punched the complainant or ran out the front door onto the street or both.

- **Questions that assumes a fact in issue:** for example, "After you punched the complainant, you ran out the front door onto the street, do you agree?" when the accused has not agreed that they punched the complainant.

- **Questions that misstates the evidence:** for example, "You punched the complainant and then ran, do you agree" when the complainant's evidence was that the accused hit her, as opposed to punched her. It is very important that you object

to questions like this, even if the discrepancy is not substantial. Attention to detail is very important in this job. Accordingly, it is important that references to the evidence are precise. Objections of this kind also show the Magistrate and your client that you are across the details.

A manner or tone that is belittling, insulting or otherwise inappropriate:

20. In my opinion, this subsection is particularly underutilised. It is not uncommon for police prosecutors to question an accused in a manner or tone that is belittling, insulting or otherwise inappropriate. If you think your client is being questioned in this way, don't be afraid to object. This extends to the prosecutor yelling at your client, or laughing or sighing at evidence given by your client. Objections of this kind are made too infrequently.

iv. <u>Questions that breach the prosecutor's duty of fairness:</u>

21. It is well established that the prosecutor's overarching duty is to assist the Court to arrive at the truth and to present the case against the accused fairly and with detachment. The classic statement of this duty comes from Deane J in *Whitehorn v R* (1983) 152 CLR 657 at 664:

> '...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 [or she] will act with fairness and detachment and always with the objectives of establishing the whole truth.'

22. That said, 'The role of the prosecuting counsel is not to be passive. He or she may be robust, and be expected and required to conduct the prosecution conscientiously and firmly': (*Libke* at [35]).

23. The following are examples of questions that Prosecutors ask that may be objectionable on the basis that they breach the prosecutor's overarching duty of fairness:

- **Questions that convey the prosecutor's personal opinion:** for example, "I don't believe what you are saying" or "I'm trying to convey to you I'm not buying that". It is well established that a prosecutor should not, either through their questioning or when addressing, convey their personal opinion, rather than conveying the reasons why the prosecution say the charge has been proven. The prosecutor's personal opinion is irrelevant. There is also the risk, especially when the Tribunal of Fact is a jury, that the Tribunal of Fact may conclude that the prosecutor has

special expertise in this area and that their personal opinion should be afforded particular weight.

- **Questions that unduly disparages the accused's account:** for example, "that explanation was pretty pathetic, do you agree". The reason this is impermissible is because it is not consistent with the prosecutor's duty to present the case objectively and fairly. Questions of this kind are also likely captured by s 41(1)(b). They may also be captured by s 137. For example in *Glenn (a pseudonym)* it was conceded by the DPP that that the following questions asked by prosecutor during his cross-examination of the accused were improper, "You didn't give a rat's ass about how the complainant felt", [your account] is a "pack of lies" and "fairy tale": (at [221]).

- **Questions that cut an accused's answer off before they have finished giving it:** for example, "Answer: "Well our relationship didn't end till the end of 2015 [Crown cuts in]. Question: "I'm not interested in your relationship, I'm asking you a question.". Such questioning is impermissible because it is inconsistent with the prosecutor's duty to put the case fairly and fully. That said, the prosecutor is entitled to cut the accused's answer off if it is not responsive to the question, as are you when cross-examining a witness.

- **Questions that do not have a proper basis:** for example, "I suggest you are lying to cover for the co-accused, do you agree?". This rule applies to every advocate, but particularly to prosecutors because of the unique role they play in an adversarial system. In my view, this rule is commonly breached by police prosecutors when they suggest to an accused (or another witness) that they are lying for a particular reason. Unless there is an proper basis for making that suggestion the question is impermissible, at least in that form. If a prosecutor asks a question that they do not have a proper basis to ask, you should object and ask the prosecutor to identify the basis for asking the question. It is not sufficient for the prosecutor to say, "That's the Crown case". They need to identify the basis for the suggestion. The question may be permissible if it is asked in an open ended way. For example, "Are you lying to cover for the co-accused?".

- **Questions that uses inflammatory language:** for example, a question that referred to a gun as "weapon of war" or the accused as a "predator". Such language is inconsistent with the prosecutor's duty to present the case fairly and dispassionately. It is also likely objectionable under ss 41 and 137.

24. Much of the above also applies to comments made by the prosecutor in their closing submissions. However, a full discussion of this topic is outside the scope of this paper.

25. To frame an objection like this, just say "it is not permissible for the prosecutor to ask a question like this because of X".

v. Questions that breach the accused's right to silence:

26. The principles relating to the onus of proof in criminal trials are well established and do not need to be canvassed in this paper. However, the following are examples of questions that prosecutors ask that may be objectionable on the basis that they breach the accused's right to silence:

- **Questions relating to the accused's refusal to speak to the police:** for example, "Why didn't you speak to the police?". In my experience, it is relatively rare for police prosecutors to ask a question that so flagrantly breaches the right to silence.

- **Questions relating to the accused's failure to mention certain details when giving their account to the police:** for example, "When you spoke to police and gave them your side of the story, you did not say anything about the bag belonging to a friend". Or "You've told the Court about injuries you received, but you did not say anything to the custody manager about those injuries". This sort of questioning is impermissible because it is inconsistent with the accused's right to silence. It can be distinguished from questioning an accused about inconsistencies between the version they gave the authorities and the version they are giving in Court. Questioning about such inconsistencies will generally be permissible.

- **Questioning relating to the accused's failure to answer particular questions when speaking with the police:** for example, "When the police asked you about the brown bag, you said no comment, why was that?" The accused's right to silence extends to answering particular questions and not others. They cannot be cross-examined about answering particular questions, but refusing to answer others. When the Tribunal of Fact is a jury, "no comment" answers are usually removed from the record of interview because of the risk that the jury might erroneously draw an adverse inference from them.

27. To frame an objection like such as this say something like "the question breaches my client's right to silence because of X".

vi. Questions that reverse the onus of proof:

28. The principles relating to the onus of proof in criminal trials are well established and do not need to be canvassed in this paper. However, the following are examples of questions that prosecutors ask that may be objectionable on the basis that they reverse the onus of proof:

    - **Questions relating to why the complainant (or another witness) would lie:** for example, "Why would the complainant lie about this?". It is so well established that questions like this are impermissible that prosecutors rarely ask them.

    - **Questions relating to the accused failing to call a particular witness or produce a particular item of evidence:** for example, "You said Lisa was there when you made the phone call, are we going to hear from Lisa?" or "You mentioned you sent the complainant a Facebook message, are we going to see that message?" The accused, subject to certain exceptions, is not required to prove anything. Questioning like this is impermissible because reverses the onus of proof. Whether a witness is called or evidence is adduced is a matter for the advocate, not the accused. Accordingly, the accused's opinion as to why a witness was not called or evidence not adduced is irrelevant. Further, such questions invite the Tribunal of Fact to draw an adverse inference from the accused failing to call a particular witness or produce a particular item of evidence. It is impermissible for the Tribunal of Fact to do this. This is different from more comfortably drawing an adverse inference against an accused person when they have remained silent about matters that are peculiarly within their knowledge Also known as a *Weisteener* comment. This is a topic in its own right and is beyond the scope of this paper.

    - **Questions that invites the accused to comment on the complainant's evidence or the evidence of another witness:** for example, "The complainant said you punched her, why would she say that?". Determining whether such questions are impermissible is less straightforward than for a question like, "Why would the complainant lie?", which is clearly impermissible. The reason it is less straightforward is because s 44 of the Evidence Act permits an advocate to cross-examine a witness about representation made by another witness, if that representation is in evidence or will be in evidence. For example, a question such as, "Witness X said a red car pulled up at 1pm, is that what happened?" may be permissible, whereas a question such as "Witness X said a red car pulled up at 1pm, is witness X correct?" is unlikely to be permissible. Such questioning will not be permissible if seeks to elicit an opinion about the veracity of another witness' evidence or if it has the effect of reversing the onus of proof. The risk of this happening is heightened when the question relates to the evidence of the main prosecution witness. For an example of this see *Glenn (a psyeduonum)* at [251].

29. To object to a question like this you might say, "The question should not be allowed because it reverses the onus of proof by doing X".

vii. Questions relating to an alleged breach of the rule in *Browne v Dunn*:

30. It is not uncommon for police prosecutors to question an accused about alleged breaches of the rule in *Browne v Dunn*. This questioning is almost always impermissible or at least done in a way that is impermissible. It is usually highly prejudicial and is often latched onto by Magistrates – to say that your client version is inconsistent - and who are looking for an excuse to reject your client's account.

31. The leading authority on this issue is *Hofer v R* [2021] HCA 36. It is imperative that you are familiar with this decision, and are able to defend your client from attacks of this kind. Indeed, it is so important that it is probably worth having a copy of this decision in your Court folder. This topic has been covered extensively by previous presenters and is not canvassed any further in this paper.

viii. Questions that breach the credibility rule:

32. In short, s 102 of the Evidence Act provides that credibility evidence – evidence that is solely relevant to a witness's credibility - is not admissible. This is subject to certain exceptions.

33. Section 103(1) of the Evidence Act is an example of such an exception. It provides that the credibility rule does not apply to evidence adduced in cross-examination of a witness if that evidence could substantially affect the assessment of the credibility of that witness.

34. Section 103(2) sets out factors the Court must have regard to in determining whether evidence could substantially affect the credibility of a witness, including how much time has passed since the act to which the evidence relates occurred.

35. In short, you cannot cross-examine a witness about credibility evidence unless it could substantially affect the Court's assessment of that witness' credit. This protection applies to an accused person when they are being cross-examined.

36. Section 104 of the Evidence Act provides further protections for an accused when they are being cross-examined. Subsection (2) provides that the accused person must not be cross-examined about matters that are only relevant to theit credibility unless the Court gives leave.

37. Subsection (3) sets out a number of situations where leave is not required. These include: whether the accused is biased or has a motive to be untruthful; is, or was, unable to be aware of or recall matters to which his or her evidence relates; or has made prior inconsistent statements. This is probably consistent with your experience in Court. Motive

to lie, prior inconsistent statements, and the ability to recall matters are all things that an accused person is routinely cross-examined on without leave.

38. Importantly, subsection (4) provides that leave must not be given to cross-examine an accused person about credibility evidence unless the accused has adduced evidence that 'tends to prove that a witness called the prosecution has a tendency to be untruthful and is relevant solely or mainly to the witness's credibility'

39. In short, if you cross-examine a prosecution witness about their criminal record (and the evidence adduced tends to show that this witness has a tendency to be untruthful), the Prosecution can, with leave, potentially cross-examine the accused about matters on their record. While it is always good to be careful, concerns that cross-examining a prosecution witness about their record will open the accused up to cross-examination about their record are greatly overstated because it is unlikely to do so. If you are concerned about triggering this provision, you can always seek an advanced ruling under s 192A of the Evidence Act.

40. Factors that will affect whether leave is granted to cross-examine the accused about a matter on their record include: the ferocity of the attack on the prosecution witness; the "legitimacy" of the attack on the prosecution witness; the importance of the prosecution witness; and the nature of the matter on the accused's criminal record that the prosecution want to cross-examine about. Before the Court grants leave it must consider the factors under s 192 of the Evidence Act. You should always object under s 137.

41. In short, before the prosecution can cross-examine an accused person about a matter on their record the Court must:

    1. Be satisfied that the accused person has adduced evidence that would tend to prove that a prosecution witness has a tendency to be untruthful and this is evidence is solely or mainly relevant to the witness credit. Not every matter on a witness' record that you cross-examine them about will meet this description, for example, drug offences.

    2. Grant leave, which includes considering the factors under s 192 of the Evidence Act. When determining this the Court should have regard to what was said in *R v El-Azzi* [2004] NSWCCCA 455 at [199] – [200].

    3. If an objection is taken under s 137, be satisfied that the probative value outweighs the unfair prejudice.

    4. Be satisfied that the evidence could substantially affect the accused's credit, per s 103.

42. If the prosecutor tries to cross-examine your client about their record before clearing the above hurdles, you should object.

ix. <u>Questions about character</u>

43. Section 110 of the Evidence Act allows the accused to adduce evidence that they are a person of good character either generally or in a particular respect. The prosecution can, subject to certain exceptions, adduce evidence to rebut that (i.e. evidence of bad character). The prosecution cannot adduce evidence of bad character unless the accused has adduced evidence of good character.

44. The following are examples of questions relating to character asked by prosecutors that may be impermissible:

- **Questions that invite the accused to raise good character:** for example, "Are you saying that you would never do something like this?" or "Are you saying you are not the sort of person that would do this?". Such questions are plainly impermissible for a number of reasons. First, it is improper for the prosecutor to invite the accused to raise good character so that they can adduce rebuttal evidence. Secondly, questions like this invite tendency reasoning. Thirdly, s 112 of the Evidence Act provides that an accused person cannot be cross-examined about character evidence unless the Court has given leave, which requires consideration of the factors set out at s 192 of the Evidence Act. Fourthly, ss 103 and 104 may also apply as such evidence could be construed as credibility evidence. The situation may be different if the accused, in a way that is not responsive to the question asked, raises good character. For example, "Question: Did you hit the victim. Answer: No, I'm not the sort of person that would ever do that." The issue of whether an accused person has raised character so as to enable the prosecutor to adduce rebuttal evidence is beyond the scope of this paper.

- **Questioning the accused's about their character without a grant of leave:** as set out above, even if the accused has raised good character, the prosecutor cannot cross-examine them about their character unless the Court has given leave: s 112, Evidence Act. As soon as a prosecutor starts cross-examining your client about character, even if you have raised good character, you should object.

- **Questioning the accused about their character in a way that goes beyond the limited way in which it was raised:** as set out above, the accused can raise character in a limited respect. For example, in a sexual assault matter, the accused may adduce evidence that they have never been convicted of or even charged with a prior sexual offence. The prosecutor would not be entitled to cross-examine the accused about their character beyond the limited way it has been raised. For example, they could not cross-examine them about other offences on their record that are not of a sexual nature.

45. If you intend on raising good character, you should usually let the prosecutor know beforehand and ask them if will adduce any rebuttal evidence. If they indicate that they

intend to adduce rebuttal evidence, and you think that evidence might be objectionable, you should seek an advanced ruling under s 192A about the admissibility of that evidence. Sometimes rebuttal evidence will be inadmissible under s 137 of the Evidence Act.

46. The above issues are dealt with comprehensively in the decision of *IW v R* [2019] NSWCCA 311 ("*IW*") at [169] – [188].

x. Section 137:

47. Section 137 provides that the Court must refuse to admit evidence if the danger of unfair prejudice outweighs the probative value.

48. If the prosecutor asks a question and you think it is unfair, but you are unsure precisely why, you may be able to rely on s 137.

xi. Miscellaneous objections:

49. The following are further examples of questions by a prosecutor that may be objectionable:

- **Questions that invite consciousness of guilt reasoning, when consciousness of guilt reasoning is not relied on by the prosecution:** for example, "The reason you lied to police was because you punched the complainant, do you agree?" This question implies that the accused lied because he or she knew she was guilty. A prosecutor can only question an accused about an alleged lie in this way if they are saying the lie evidences a guilty conscience, as opposed to simply relying on the lie as going to the credibility of the accused's account. If the prosecutor intends to rely on a lie in this way they should let you know in advance, so you can prepare your defence accordingly. A full discussion of this topic is outside the scope of this paper.

- **Questions that put undue focus on uncharged acts:** if the prosecution is permitted to lead evidence of uncharged acts, for instance for a tendency or context purpose, the prosecutor's cross-examination of the accused should, generally speaking, not unduly focus on those uncharged acts, as opposed to the charged acts. If the prosecutor's cross-examination places undue focus on the uncharged acts it may be objectionable under s 137. For an example of this see *Glenn (a pseudonym)* at [243] – [246].

- **Cross-examination that invites tendency reasoning:** for example, "You are an angry person, do you agree?". Questions that suggest an accused has a tendency to act or think in a particular way are not permissible, subject to certain exceptions in

the Evidence Act. Tendency is a complex topic and is outside the scope of this paper. For an example of this see *Glenn (a pseudonym)* at [247] – [248].

- **Questions that suggest your client has manufactured an account to fit with the evidence in the brief:** for example, "The only reason you are saying that you were there is because there is CCTV footage of you in the brief of evidence, do you agree?" or "The only reason you conceding you had sex with the complainant is because your DNA was recovered?" Whether questioning like this is impermissible will depend on the circumstances. In some circumstances, it may be. However, in my view, the mere fact that the accused's account is consistent with the objective evidence, is not a sufficient basis, without more, for a prosecutor to make this suggestion. It is arguably inconsistent with the accused's right to silence, though this will depend on the particular form the questioning takes. For an example of this see *Glenn (a pseudonym)* where the Crown conceded that it was inappropriate for the Prosecutor to suggest the accused's account was 'pre-rehearsed' to fit with the brief of evidence: (at [260]

  > 'The jury were told that the applicant had maintained his right to silence when offered an interview following his arrest on 29 April 2015. Despite this, the Crown submitted to the jury that the applicant had invented the version he gave in court after being served with the prosecution brief. On this appeal the Crown conceded that it was not appropriate for the Crown Prosecutor to suggest that the applicant's evidence was "pre-rehearsed". I accept this concession.'

xii. <u>Re-examination:</u>

50. Section 108(3) of the Evidence Act allows you to lead evidence of a prior consistent statement made by your client, with leave of the Court, if it has been suggested (either expressly or by implication) that evidence given by them has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of a suggestion. In most cases, this will occur when the prosecutor suggests to them that the various aspects of their account are untrue.

51. This is where the signed proof becomes particularly relevant. Assuming the preconditions in s 108(3) are met, you could adduce this proof or portions of the proof to rebut the suggestion that the accused has made up parts of his or her account. Whether you are granted leave to do this requires the Court to consider s 192, and will depend on factors such as when the proof was taken, whether it is signed etc. Clearly, if the proof was taken the day before the hearing, the potential for it to re-establish your client's credibility, which is what the provision is directed at, is going to be limited.

52. Prosecutors sometimes try to use this provision to adduce evidence of portions of a complainant's written statement. Whether this permissible will depend on the circumstances.

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