**CLE presentation: S38 of the Evidence Act**

The purpose of this CLE is to provide an analysis of the function and application of section 38 of the Evidence Act NSW 1995 (“the Act”) in relation to common scenarios which may emerge in the context of a criminal trial. These include attempts to tender against an accused a transcript of evidence obtained from the various Crime Commissions using their compulsory examination procedures, and attempts to tender listening device transcript obtained by the “clandestine” recording of conversations amongst persons expected to be indemnified witnesses. Both of those scenarios illustrate the need for the Prosecution and the Defence to give close attention to the precise statutory requirements and, where the recorded material or the transcript is to be tendered, to examine the material sought to be put into evidence critically to determine whether it may contain statements which would more properly be said to have been made by other persons when they are sought to be tendered to incriminate an accused.

A recent judge alone trial in the District Court of NSW before Craigie DCJ raised these issues. This matter, DPP v HAMZE, will be discussed to provide useful examples of approaches to situations which may commonly arise with regards to compulsory examinations, transcript from listening devices and statements made by others regarding applications under section 38 of the Evidence Act NSW 1995 (s38 applications). The trial judge published a detailed judgment after full argument dealing with many of these issues and in due course published a final judgment which reflected the impact of the earlier judgment on the trial.

The relevant sections of the Evidence Act[[1]](#footnote-1) are attached to this hand out.

**The history of s38 of the Evidence Act**

Section 38 of the Evidence Act was enacted in response to the difficulties arising with having a witness being classified as “hostile” at common law and to enact the cross examination of a parties own witness. The common law had been reflected in the Evidence Act 1898, the effect of which is discussed in *Seminars on Evidence*[[2]](#footnote-2). The current s38 replaced that position and was intended to effect a significant change to that position[[3]](#footnote-3).

The common law position had been that a party needed to establish that a witness they had called was “unwilling to tell the whole truth” or had a demeanour “hostile” to the party calling the witness. By contrast s38 allows for an application to be made if the witness:

1. Is giving evidence that is “unfavourable to the party”[[4]](#footnote-4);
2. is not “making a genuine attempt to give evidence” with regards to a matter the witness “may reasonably be suspected of having knowledge”[[5]](#footnote-5); or
3. “has, at any time, made a prior inconsistent statement”[[6]](#footnote-6).

It has been accepted that the term “unfavourable” requires a lower threshold then the word “hostile” required at common law. Additionally, it was been held in *R v Le [2001] NSWSC 174* that the word “unfavourable” in s38 should be given a broad meaning. The purpose of such a decision is to enable the Court to have all relevant evidence before it and ensure that a party is not called to maintain a forensic advantage. The duty of the prosecutor to ensure that the court has all relevant information before it is found in the NSW Bar rules (see rules 82, 86, and 88) as well as the judgment of *R v Kneebone (1999) 47 NSWLR 450*.

**Procedure with regards to an application under section 38**

See attached flow chart guide provided for a general guide.

**Seeking an Advance ruling**

An advance ruling may be sought on the question of whether leave should be granted pursuant to s 192A of the Act[[7]](#footnote-7), however care should be taken with this approach as there are a number of factors that must be present to allow this application to succeed[[8]](#footnote-8). An application for an advance ruling on a s38 application would seem to be more often appropriate when made by the Crown, as the circumstances necessary to permit such an application are more likely to arise during the Crown case. Consideration should be given by the Crown, when calling a witness it knows will be, or is likely to be, unfavourable to s137 of the Act and the prejudicial effect when weighed against its likely probative value[[9]](#footnote-9).

It is a matter for the party applying for the declaration to clearly inform the court, during the application, as to the breadth of the matters sought to be permitted to cross exam on as general cross examination is not generally permitted by this provision[[10]](#footnote-10). There will however be circumstances however where “…it will be permissible to grant leave to examine at large without departing from the true purpose of s38”[[11]](#footnote-11) such as where the list proposed covered “virtually all matters (or all the major matters) about which the witness had given evidence”[[12]](#footnote-12).

A declaration that a witness is unfavourable will also enable the party to question the witness about matters only relevant to credibility with the intent being to cast doubt on the witness’s credibility on the matters subject to the declaration of unfavourability[[13]](#footnote-13).

**Opposing a s38 application**

Counsel may oppose an application pursuant to s38 on several grounds. Initially, these grounds could include:

* The party making the application has not made a genuine attempt to elicit the evidence by way of non-leading questions pursuant to section 37 of the Act;
* The evidence the witness is giving does not fulfil the definition of unfavourable to the party calling the witness;
* The witness appears to be making a genuine attempt to give evidence, which they may reasonably supposed to have knowledge of;
* The party calling the witness has not explored sufficiently the reasons the party is not able to give evidence which they may reasonably supposed to have knowledge of;
* The witness has not made a statement which fulfils the definition of a prior inconsistent statement according the act;
* The application has been made prematurely; or
* it appears the application is being made for an ulterior purpose.

**Case study: R v Bilal HAMZE**

Two important issues were raised in the matter by the Crown’s attempt to rely upon the transcript of the Crime Commission examination of G1, and the transcript of the listening device placed in G1’s car, these being:

1. Could the Crime Commissions examination of G1 be said to be a statement for the purpose of s38 (1(c)? and
2. Is the transcript of the listening device to be considered a statement for the purpose of s38 (1(c)?

These two questions, whilst they related to the same application by the Crown and the same witness, and involved very similar submissions as to their admissibility, involved documents of a different character to each other and should properly be considered separately.

The provenance of the statement is crucial to determining whether it would be properly considered a prior inconsistent statement and then to determine the admissibility of the evidence via the usual provisions of the act.

There are several methods statements, such as this, may be obtained:

* Given via interviews with law enforcement officials by way of police statement
* Telephone intercept
* Listening device
* Affidavit
* Evidence given under examination during course of trial
* Evidence given under compulsory examination

The listening device from which the transcript was said to have been created was activated upon G1 and G2 entering G1’s car as G1 picked G2 up from G2’s release from hospital. Their preliminary conversation, as recorded on the listening device, involves a discussion as to the likelihood of the car being bugged, immediately proceeded by a discussion as to where an unknown item was likely to be, or have been[[14]](#footnote-14). The conversation then proceeded with G1 asking questions of G2 as to his memories of the night, and G2’s memories of G2’s own actions as well as, apparently, seeking confirmation of G1’s recollection[[15]](#footnote-15) of the events of the night. This conversation lasted the entirety of the car trip[[16]](#footnote-16) although was interspersed at points with other discussions irrelevant to the matter.

It was then found, after consideration of the objections by His Honour to the tender as usage of this conversation, that due to the manner the conversation proceeded it was unable to be determined whether this evidence was “…*tainted with the risk of manufacturing or tailoring or perhaps simply a mix of questions of the kind cited by* [Counsel for the Accused] *asked by the witness where he adopted answers perhaps in a manner encouraging or merely debriefing his son, and material that may or may not have been the witnesses own opinion. This leaves aside the question as to whether in some* [form] *these could be described as “a statement” or “statements”[[17]](#footnote-17).*

His Honour then moved to considering sections of the listening device involving statements by G1 which were made without the input of G2. Counsel for the Accused had submitted that these comments, if they could be considered to be statements and therefore severed from the whole of the conversation, where nevertheless still subject to the taint referred to above which effected the entire conversation.

His Honour noted *“…the witness did, as the Crown, submit, make utterances confirming the presence of “Bill” and of hearing words shouted or spoken. Those matters are capable of being characterised as statements that are unfavourable. That said, the utterances in that category are, in my view, tainted by what I regard as aspects that would be fatal pursuant to the application of s 135 and 137.”[[18]](#footnote-18)*

His Honour then turned to considerations as to whether the discretions under ss 135 and 137, having been engaged by the listening device material were able to be cured. His Honour found there that, as the Crown had not yet established the statement containing the “Jurat” was a lie, the significant amount of conflicting and irreconcilable versions that would be available to Crown to cross examine upon would *“…place the accused in a position where he confronts insuperable difficulties in cross-examining himself, a process which of course would then be followed if the Crown so chose by re-examination.”* His Honour concluded his remarks on this issue by agreeing with the submission from Counsel for the Accused that *“…if the application is granted, the witness would be rendered effectively beyond effective cross-examination, if indeed he is susceptible to cross-examination in any meaningful way at all.* [His Honour saw]… *no remedy to that consistent with what the Crown seeks[[19]](#footnote-19).”[[20]](#footnote-20)*

His Honour then turned his considerations to the Crime Commission interview. As was stated above where portions of the listening device transcript had been read to G1 to adopt during the interview. His Honour considered whether the Crime Commission material should be able to be relied upon as a prior inconsistent statement, or as a method by which the Crown could seek to refresh G1’s memory.

While the recent High Court decisions in Lee[[21]](#footnote-21) and X7[[22]](#footnote-22) emphasise the effect that Compulsory Examination can have on a fair trial give guidance on this issue, each application involving statements made during compulsory examination will turn upon their own facts. However, some general guidance has emerged from these decisions.

A compulsory examination under one of the Crime Commission Acts involves a person who is ordered to attend and provide evidence. Importantly it has been held that the Australian Crime Commission[[23]](#footnote-23) is not permitted to compulsorily examine a person about matters relating to Commonwealth criminal charges they are currently facing, and it has been held that the NSW Crime Commission[[24]](#footnote-24) may not supply the DPP with transcripts from Compulsory Examinations of the Accused when the Accused is before the courts.

It was noted that this transcript of the NSW Crime Commission examination revealed that rather than a free flowing conversation where G1 was volunteering information and expanding on the questions asked, the examination was more akin to a cross examination of G1 where leading questions were forcefully put to him to agree or disagree with and when he became unresponsive veiled threats were made in order to reengage him in the examination.

His Honour ruled *“*[The Crime Commission transcript] *is to be rejected for the additional reason of the flaws in the material in the listening device, which is a large part of the substance of the material that the witness was obliged and indeed – to use a word that was put to him* [during the course of the Crime Commission examination] *– “forced” to adopt in the course of the examination.”*

In effect the Crime Commission had sought to manufacture a statement of G1 through cross examination, which could be used as a prior inconsistent statement should G1 not come up to proof during trial. His Honour was scathing of the Crime Commission’s attempt to take this course, and no blame should be placed on the Crown for the position the Crime Commission had placed the Crown in.

The Crime Commission material was therefore held by His Honour to fall foul of ss 135 and 137 as the methods utilised by the Crime Commission placed G1 in a position where he was *“effectively compromised in a way that has the effect of considerable prejudice to the accused in his access to a fair trial process. I would also regard the probative value of any evidence that would flow from cross examination on the Crime Commission transcript as assessed pursuant to s 135 and s137 as thereby greatly diminished, indeed to an unacceptable degree, by the virtue of the position in which the witness found himself before the commission.”[[25]](#footnote-25)*

1. S38, s135, s137, s192 and s192A [↑](#footnote-ref-1)
2. edited by Harold H Glass, The Law Book Company [↑](#footnote-ref-2)
3. *DPP v Nair (2009) 170 ACTR 15* [↑](#footnote-ref-3)
4. S38 (1(a)) of the Act [↑](#footnote-ref-4)
5. S38 (1(b)) of the Act [↑](#footnote-ref-5)
6. S38 (1(c)) of the Act [↑](#footnote-ref-6)
7. DPP v Mcrae [2010] VSC 114 at [20], R v SH, MV, & KC [2011] ACTSC 198 at [25] [↑](#footnote-ref-7)
8. For example in matter of *DDP v McRae* where the witnesses subject to the application for an advanced ruling by the Crown had already given evidence by way of a Basha inquiry and the witnesses were required to be called during the trial proper by the Crown in line with their duty to call all relevant witnesses. [↑](#footnote-ref-8)
9. *R v Fowler [2000] NSWCCA 142* [↑](#footnote-ref-9)
10. R v Hogan [2001] NSWCCA 292, see also Smart AJ’s judgment in R v White [2003] NSWCCA 64 at [68] [↑](#footnote-ref-10)
11. R v White [2003] NSWCCA 64, judgment of Smart AJ at [66] [↑](#footnote-ref-11)
12. ibid [↑](#footnote-ref-12)
13. *R v Le [2002] NSWCCA 186* [↑](#footnote-ref-13)
14. Defence submitted this should be interpreted as showing knowledge the car was bugged, a submission the Crown opposed, and one that, ultimately, His Honour did not decide one way or the other on. [↑](#footnote-ref-14)
15. This interpretation was also challenged by the Defence, however has been used to clarity at this stage. [↑](#footnote-ref-15)
16. which involved two side journeys to McDonalds and lasted over 30 minutes which, given the distance from Auburn Hospital to G1 and G2’s residence is less than 2 kilometres, was somewhat unusual and gave rise to further concerns about possible knowledge of the car having had a listening device installed. [↑](#footnote-ref-16)
17. Pg 38 of His Honour Craige’s judgment of 5 July 2014 on the s38 application by the Crown in the matter of R v Hamze. [↑](#footnote-ref-17)
18. Pg 38 of His Honour Craige’s judgment of 5 July 2014 on the s38 application by the Crown in the matter of R v Hamze. [↑](#footnote-ref-18)
19. Ie a declaration the witness was unfavourable and leave to use the listening device material, or sections of it, as a prior inconsistent statement. [↑](#footnote-ref-19)
20. Pg 39 of His Honour Craige’s judgment of 5 July 2014 on the s38 application by the Crown in the matter of R v Hamze. [↑](#footnote-ref-20)
21. Lee v The Queen [2014] HCA 20 [↑](#footnote-ref-21)
22. X7 V Australian Crime Commission [2013] HCA 29 [↑](#footnote-ref-22)
23. Drawn from the judgment in X7 V Australian Crime Commission [2013] HCA 29 [↑](#footnote-ref-23)
24. Drawn from the judgment in Lee v The Queen [2014] HCA 20 [↑](#footnote-ref-24)
25. Pg 40 of His Honour Craige’s judgment of 5 July 2014 on the s38 application by the Crown in the matter of DPP v Hamze. [↑](#footnote-ref-25)