Domestic Violence Evidence in Chief

DVEC

Rob Hoyles
8 December 2015

DVEC

- Commenced 1 June 2015
- 3000 discs served
- Ongoing rollout – we expect this to become much higher

Legislative Basis

- Falls under Chapter 6 of Criminal Procedure Act which is titled "Evidentiary Matters"
- Part 4B "**Giving of evidence by domestic violence complainants"**

- **289F Complainant may give evidence in chief in form of recording**
- (1) In proceedings for a domestic violence offence, **a complainant may give evidence in chief of a representation made by the complainant wholly or partly in the form of a recorded statement** that is viewed or heard by the court.
- (2) A representation contained in a recorded statement may be in the form of questions and answers.
- (3) A recorded statement must contain the following statements by the complainant:
- (a) a statement as to the complainant's age,
- (b) a statement as to the truth of the representation,
- (c) any other matter required by the rules.
- (4) If the representation contained in a recorded statement, or part of it, is in a language other than English:
- (a) the recorded statement must contain an English translation of the representation or part, or
- (b) a separate written English translation of the representation or part must accompany the recorded statement.

- (5) A complainant who gives evidence wholly or partly in the form of a recorded statement **must subsequently be available for cross-examination and re-examination**:
- (a) orally in the courtroom, or
- (b) in accordance with any other alternative arrangements permitted for the complainant under this or any other Act.
- (6) This section does not prevent a complainant from giving evidence in any other manner permitted for the complainant under this Act or any other law.

289G Determination as to whether evidence will be given by recording

In determining whether or not to have a complainant give evidence wholly or partly in the form of a recorded statement, the prosecutor must take into account the following matters:

(a) the wishes of the complainant,

(b) any evidence of intimidation of the complainant by the accused person,

(c) the objects of the *Crimes (Domestic and Personal Violence) Act 2007*.

289H Use of evidence in concurrent or related domestic violence proceedings

(1) This section applies if an application for an order under the *Crimes (Domestic and Personal Violence) Act 2007* is made concurrently with proceedings for a domestic violence offence or arises from the circumstances of the alleged domestic violence offence.

(2) If evidence is given wholly or partly in the form of a recorded statement in the proceedings for the domestic violence offence, that evidence may also be given in that form in the proceedings relating to the application for the order. Any such evidence is to be given in accordance with any rules made under the *Crimes (Domestic and Personal Violence) Act 2007*.

289I Admissibility of recorded evidence

(1) The hearsay rule and the opinion rule (within the meaning of the *Evidence Act 1995*) do not prevent the admission or use of evidence of a representation in the form of a recorded statement.

(2) Evidence of a representation of a complainant that is given in the form of a recorded statement is not to be admitted unless the accused person was given, in accordance with Division 3, a reasonable opportunity to listen to, and, in the case of a video recording, view the recorded statement.

(3) However, the recorded statement may be admitted even if the requirements of Division 3 have not been complied with if the court is satisfied that:

(a) the parties consent to the recorded statement being admitted, or

(b) the accused person or his or her Australian legal practitioner (if any) have been given a reasonable opportunity otherwise than in accordance with Division 3 to listen to or view the recorded statement and it would be in the interests of justice to admit the recorded statement.

- **289E Relationship to Evidence Act 1995**
- The provisions of this Part are in addition to the provisions of the *Evidence Act 1995* and do not, **unless a contrary intention is shown**, affect the operation of that Act.
- **Note.** For example, provisions of that Act such as section 21 (relating to oaths and affirmations) and **section 65 (an exception to the hearsay rule where a person is not available to give evidence) are not affected by this Part.**

A note about Notes

Section 3(2) of the ***Criminal Procedure Act*** reads:

> Notes included in this Act are explanatory notes and do not form part of this Act.

Statutory Interpretation

- ***Interpretation Act 1987* (NSW)**
- **34 Use of extrinsic material in the interpretation of Acts and statutory rules**
- (1) In the interpretation of a provision of an Act or statutory rule, if **any material not forming part of the Act or statutory rule is capable of assisting** in the ascertainment of the meaning of the provision, consideration may be given to that material:
- (a) **to confirm that the meaning of the provision is the ordinary meaning** conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made), or
- (b) to determine the meaning of the provision:
- (i) **if the provision is ambiguous or obscure**, or
- (ii) if the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made) leads to a result that is manifestly absurd or is unreasonable.

- (2) Without limiting the effect of subsection (1), the material that may be considered in the interpretation of a provision of an Act, or a statutory rule made under the Act, includes:
- (a) **all matters not forming part of the Act that are set out in the document containing the text of the Act** as printed by the Government Printer,
- (e) **any explanatory note or memorandum relating to the Bill for the Act**, or any other relevant document, that was laid before, or furnished to the members of, either House of Parliament by a Minister or other member of Parliament introducing the Bill before the provision was enacted or made,
- (f) **the speech made to a House of Parliament by a Minister or other member of Parliament on the occasion of the moving by that Minister or member of a motion that the Bill for the Act be read a second time in that House,**

Second Reading Speech

- **The Hon. NIALL BLAIR** (Parliamentary Secretary) [9.20 p.m.], on behalf of the Hon. John Ajaka: I move:

- The Government is pleased to introduce the Criminal Procedure Amendment (Domestic Violence Complainants) Bill 2014.

  The bill amends the Criminal Procedure Act 1986 to enable domestic violence complainants to give their evidence in chief by way of a prior recorded video or audio statement, in criminal proceedings for a domestic violence offence.

  The bill implements a key reform identified by this Government's Domestic Violence Justice Strategy 2013-2017 aimed at improving the criminal justice system's response to domestic and family violence. It demonstrates the high priority we place on the safety of victims of domestic violence and holding perpetrators accountable for their offending.

  The present bill also complements ongoing reforms progressed by this Government aimed at empowering victims of domestic violence.

  The power dynamic that typifies domestic violence does not stop at the court room door. There is a risk of re-traumatisation of victims. They must attend court and give oral evidence, from memory, and usually in front of the perpetrator, about a traumatic incident. They may face pressure from a perpetrator to stop cooperating with the prosecution**. This can result in victims who are reluctant to come to court or who change their evidence once in the witness box.** Some may choose not to report an incident to police: The Bureau of Crime Statistics and Research estimates only half of domestic assaults are reported to police.

  New measures for giving evidence using available technology are needed to reduce the trauma faced by victims when in court. These reforms provide such measures by introducing a new Part into the Criminal Procedure Act 1986 to apply to the evidence of domestic violence complainants.

  The key element of the new Part is **removing the hearsay rule of evidence as it applies to domestic violence complainants in criminal proceedings**. Recorded interviews of complainants taken by police at or shortly after a domestic violence incident will be able to be played in court as all, or part of, their evidence in chief. In committal proceedings, the recording will stand as the complainant's evidence instead of a written statement.

  The bill contains a number of necessary safeguards of complainants' privacy in light of the intensely personal or graphic nature of recorded material. These include a prohibition on a defendant possessing a copy of the recording, and a prohibition on copying or publishing the recording.

  Importantly, the rights of defendants to procedural fairness in a criminal proceeding are also protected. A complainant will still be required to attend court and give evidence on oath, and be available for cross examination and re-examination. Defendants will be provided with notice of the evidence against them prior to any hearing. Recorded evidence will not be able to be admitted into evidence unless the defendant has been given a reasonable opportunity to listen to and view the recording.

  The reforms strike an appropriate balance between supporting the domestic violence complainant's participation in the criminal justice process, while ensuring the defendant maintains the right to a fair trial.

  I now turn to the main detail of the bill.

- Schedule 1, item [1] to the bill defines a domestic violence complainant by reference to the existing definition of "domestic violence offence" in the Crimes (Domestic and Personal Violence) Act 2007. That is, certain personal violence offences committed in the context of domestic violence.

  Schedule 1, items [3], [9], [20]-[22] and [24] make consequential amendments. Schedule 1, items [4]-[8] amend the Act's provisions concerning committal proceedings for indictable matters.

  Proposed section 76A enables the recorded statement of a domestic violence complainant to be used in committal proceedings instead of a written statement. All relevant provisions that apply to written statements will apply to the complainant's recorded statement as if the recorded statement was a written statement. In short, where a brief of evidence would have included a written statement, it will include a recording and the same procedural and evidentiary rules apply, except for the specific provisions in this bill. This includes, for example, provisions relating to inadmissibility, admissibility as if it were oral evidence, death of a witness, notices of rights, attendance of the witness and later use of written statements.

  Proposed section 79A requires recorded statements to contain the age of the complainant and an endorsement of the truth of the representation, as if it were a written statement. Police will obtain this information verbally from the complainant at the start of the recording and it can be in the form of questions and answers. Where the complainant requires a translator, the translation can either be recorded on the video, at the time the statement is taken, or alternatively, a written translation can accompany the recording.

  Items [6] and [11] of schedule 1 are the offence provisions for the giving of false evidence by way of recording in committal and summary hearings. The penalties proposed mirror those already applying to written statements. Proposed sections 114, 142, 185, 247E and 2470 make further consequential procedural amendments. They clarify that any requirements to give a copy of the recording to the accused is subject to the special rules in this bill applying to the provision of recordings.

  Schedule 1, item [10] provides for briefs of evidence in summary proceedings for domestic violence offences. The bill provides that such briefs may include the recorded statement of the complainant, instead of a written statement. Again, for the purposes of summary procedure, the recorded statement will be treated the same way as a written statement.

  Items [12] to [16] of schedule 1 deal with the use of recorded statements in matters determined in the accused's absence. A court will be required to consider any recorded statement given to it by the prosecutor before determining the matter in the absence of an accused. Where a court requires the provision of additional evidence in the form of a recorded statement, the statement will not be admissible unless certain service and notice requirements have been complied with [proposed section 200 (2) (c).

  Schedule 1, item [19] provides for a new part 4B to be inserted into the Act which will govern the use of recorded statements in all criminal proceedings for domestic violence offences.

Proposed section 289D defines a recorded statement as a recording made by a police officer of the statement of the complainant, taken with the complainant's informed consent, as soon as practicable after the commission of the offence. The complainant must understand why the statement is being recorded and that it will be used in court at a later date. This consent must be obtained at the time of the recording. Requiring the recording to be made as soon as practicable after the commission of the offence reflects the broad range of circumstances in which these offences are committed. The complainant may not always be able to give their statement immediately at the scene. They may need to attend a hospital as a result of the incident. In some cases, police may consider it is more practicable to take the statement at the station, away from the defendant and any children.

The new part 4A will operate alongside existing special provisions of the Act that apply to prescribed sexual assault proceedings and vulnerable witnesses. Part 5 of the Act will apply to provide additional protections for a domestic violence complainant who is also a sexual assault complainant, such as an entitlement to give evidence from a remote witness facility or in camera. Where, however, a domestic violence complainant is also a vulnerable person within the meaning of the Act [a child or cognitively impaired person], then the vulnerable witness provisions of Part 6 of the Act will apply, instead of the provisions in this bill.

The new part 4A will also operate in conjunction with the Evidence Act 1995 except where specific exception is made. For example, a complainant will still need to attend court and give evidence on oath and evidence that the Court considers to be irrelevant or unfairly prejudicial to the accused may not be admissible. A complainant who gives evidence in the form of a recorded statement must be available to be cross-examined and re-examined.

The key exception in this bill to the Evidence Act 1995 is that domestic violence complainants will now be entitled to adopt, as their evidence in chief, their recorded statement. Proposed section 2891 makes clear that in allowing the recorded statement to be admitted as the complainant's evidence in chief, the hearsay rule and the opinion rule contained in the Evidence Act 1995 will no longer apply. Admissibility is, however, subject to compliance with the specific requirements for access and service set out in proposed division 3 of part 4A.

The recording will not be tendered as part of the prosecution's case; rather, it will be treated just as a witness's oral evidence. The existing common law principles concerning the discretion of the court and the procedure to be followed where evidence is given in chief by way of a recording, as set out in *R v NZ* (2005) 63 NSWLR 628 and other relevant authorities, are not affected by the new provisions. That is, the court will maintain discretion as to how the court and/or jury [if there is one] may be reminded of the evidence contained in the recording, and the procedures and safeguards around playing the recording multiple times in court, or in jury deliberations.

- Proposed section 289G details how a decision will be made as to whether evidence will be given by playing the recording, or orally. Where a complainant indicates a preference to give evidence orally, their wishes must be taken into account, but will not determine, whether the video is played in court. This decision will rest with the prosecutor. The prosecutor must, however, take into account any evidence of intimidation of the complainant by the accused, and the objects of the Crimes (Domestic and Personal Violence) Act 2007. As such, the bill recognises that the complainant's wishes may not always be freely given, but may be influenced by a controlling defendant. Where a complainant disavows a statement made in the recording, the usual provisions of the Evidence Act 1995 concerning unfavourable witnesses will continue to apply.

  Section 289H allows the recorded statement given In evidence in proceedings for an offence, to be given in the same form in concurrent proceedings, or those arising from the same conduct, for an apprehended violence order under the Crimes (Domestic and Personal Violence) Act 2007. This ensures that where the application for the apprehended violence order arises from the same set of circumstances or offending, and even where the criminal offence is dismissed, the complainant can still rely on the recorded statement in the civil proceedings. This is a common sense way of ensuring the efficient disposal of ADVO proceedings and avoids requiring a complainant who has given recorded evidence in one set of proceedings, from giving oral evidence in another related proceeding.

  Proposed section 289J requires a judge, in cases heard before a jury, to warn that no adverse inference to the accused should be drawn, and that the complainant's statement should not be given any greater or lesser weight, because the evidence is given in the form of the recorded statement, rather than orally in court.

  Division 3 of the new part 4A sets out the special service and access requirements for recorded statements. These are important measures balancing procedural fairness for defendants and the need to protect the complainants' safety and privacy. This is of particular concern where defendants are unrepresented: There IS an increased risk of dissemination of recorded statements as a tactic to embarrass or intimidate the complainant, a risk heightened by the ease of uploading recorded material to the internet. Developments in technology require an appropriate response to ensure domestic violence complainants are not re-traumatised because of a process which is intended to support them in the criminal justice process.

  Proposed section 289L provides that where a defendant is represented, a copy of the video recording must be served on their legal representative. Where a defendant is unrepresented, service of the audio copy only is required. To balance this limitation, the prosecution must, as far as is reasonably practicable, provide the defendant with an opportunity to view the video statement before the court hearing. This may occur at a police station immediately following charge either during an interview or alone, or on nominated days after being charged. As a last resort, recordings will be shown to an unrepresented accused on a day on which their matter is listed in court [proposed section 289M (4)].

  Section 2890 (3) expressly empowers the court to adjourn a case for up to two weeks to enable a defendant to view or listen to the recording, if they have not had a reasonable opportunity to do so prior to the hearing.

  Section 289M (5) makes it clear that evidence of the behaviour or response of the defendant when viewing the recorded statement may not be used in proceedings, except where the viewing took place as part of the police interview in relation to the alleged domestic violence offence, or where the proceedings relate to the behaviour of the accused. For example, where an accused's response to the video recording leads to a charge of assault on a nearby police officer, then evidence of that response could be admissible in support of the assault charge.

  As further protection for a defendant viewing the video during a police interview, the time taken to play the recording will count towards the maximum prescribed investigation period under section 115 of the Law Enforcement (Powers and Responsibilities) Act 2002.

  Similar to existing provisions for sensitive evidence, proposed section 289O enables the court to require the recorded statement to be returned to the prosecutor once criminal proceedings have finished, while section 289P provides that, with limited exceptions, it will be an offence to copy or publish, or give a copy of the recording to any other person. This offence provision makes it clear that no-one can give a copy to, or cause a copy of the recording to be made by, the accused person. This obligation and prohibition applies equally to a third party who has been given a copy of the recording for the purpose of criminal proceedings, for example, an interpreter or other expert witness. The offence will carry a maximum penalty of two years imprisonment or a fine of $11,000 or both.

  Although the court will otherwise retain its discretion to manage the conduct of proceedings, these specific reforms provide a significant new means of supporting a domestic violence complainant in giving evidence in criminal proceedings for a domestic violence offence by way of a previously recorded statement.

  I commend the bill to the House.

- **65 Exception: criminal proceedings if maker not available**
- (1) This section applies in a criminal proceeding if a person who made a previous representation is **not available** to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation:
- (a) was made under a duty to make that representation or to make representations of that kind, or
- **(b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or**
- **(c) was made in circumstances that make it highly probable that the representation is reliable**, or
- (d) was:
- (i) against the interests of the person who made it at the time it was made, and
- (ii) made in circumstances that make it likely that the representation is reliable.
- **Note.** Section 67 imposes notice requirements relating to this subsection.

- **67 Notice to be given**
- (1) Sections 63 (2), 64 (2) and 65 (2), (3) and (8) do not apply to evidence adduced by a party unless that party has given reasonable notice in writing to each other party of the party's intention to adduce the evidence.
- (2) Notices given under subsection (1) are to be given in accordance with any regulations or rules of court made for the purposes of this section.
- (3) The notice must state:
- (a) the particular provisions of this Division on which the party intends to rely in arguing that the hearsay rule does not apply to the evidence, and
- (b) if section 64 (2) is such a provision—the grounds, specified in that provision, on which the party intends to rely.
- (4) Despite subsection (1), if notice has not been given, the court may, on the application of a party, direct that one or more of those subsections is to apply despite the party's failure to give notice.
- (5) The direction:
- (a) is subject to such conditions (if any) as the court thinks fit, and
- (b) in particular, may provide that, in relation to specified evidence, the subsection or subsections concerned apply with such modifications as the court specifies.

- Evidence Act Dictionary, Part 2, Clause 4 reads:
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- **4 Unavailability of persons**
- (1) For the purposes of this Act, a person is taken not to be available to give evidence about a fact if:
- (a) the person is dead, or
- (b) the person is, for any reason other than the application of section 16 (Competence and compellability: judges and jurors), not competent to give the evidence, or
- (c) the person is mentally or physically unable to give the evidence and it is not reasonably practicable to overcome that inability, or
- (d) it would be unlawful for the person to give the evidence, or
- (e) a provision of this Act prohibits the evidence being given, or
- **(f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or secure his or her attendance, but without success, or**
- **(g) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.**
- (2) In all other cases the person is taken to be available to give evidence about the fact.

- **65 Exception: criminal proceedings if maker not available**
- (1) This section applies in a criminal proceeding if a person who made a previous representation is **not available** to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation:
- (a) was made under a duty to make that representation or to make representations of that kind, or
- **(b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or**
- **(c) was made in circumstances that make it highly probable that the representation is reliable**, or
- (d) was:
- (i) against the interests of the person who made it at the time it was made, and
- (ii) made in circumstances that make it likely that the representation is reliable.
- **Note.** Section 67 imposes notice requirements relating to this subsection.

Evidence Act 1995

Section 137

137 Exclusion of prejudicial evidence in criminal proceedings

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

R v Suteski

- It has been held that where a witness refuses to give evidence, he is an unavailable witness: **Regina v Suteski (2002) 56 NSWLR 182**

- Held: (1) A witness who refuses to give evidence is one who is "unavailable to give evidence" within the Evidence Act 1995, s 65, and there is no basis to exclude a person whom the accused has not had the opportunity of cross-examining. (197[98], 197 [99])
- (2) The out of court representations of such a witness may be tendered, notwithstanding the hearsay rule, provided one of the exceptions referred to in s 65 apply and subject to its possible exclusion under s 135 or s 137 of the Act. (195[83], 195 [84])
- (3) The out of court representations, made in an electronic recording of a police interview with an accessory to the crime, where they were representations against his interests at the time they were made were admissible under s 65(2)(d) and the court did not have to be satisfied that it was "highly probable" that the representations were reliable. (195 [87])
- (4) There is no basis to read into s 65(2) the qualifications appearing in s 65(3), (4) and (5). (196 [89])
- **(5) When considering the mandatory exclusion of the evidence under s 137 the inability of an accused to cross-examine the "unavailable person" is a relevant consideration but the mere fact that the accused cannot cross-examine is not decisive of the issue. (201 [126])**

- Argument about statutory interpretation of Part 4B
- Notice Requirements (s67)
- Unavailability of Witness
- S65(2)(b) or (c)
- S137 argument

Scenario

- You have a client charged with common assault. The complainant participates in an immediate DVEC shortly after the alleged incident, at the scene. She gives a compelling account of being attacked by her partner during an argument. She is teary, appears shaken, and talks about being struck by the accused multiple times that evening. There are no other witnesses. There is no evidence of injury (hence the common assault charge). The DVEC is lacking detail and is over in less than 6 minutes.

- The complainant fails to attend court. The prosecution seeks to tender the DVEC pursuant to section 65(2). They provide a section 67 notice on the morning of the hearing.

- You object on the basis that:
- - The Criminal Procedure Act specifically states that the complainant must be present for that Part to apply, and that the second reading speech should take precedence of an explanatory note that suggests s65 would still apply.
- - You argue that the notice provided was insufficient.
- - You argue that the prosecution hasn't properly shown the complainant is unavailable.
- - You argue that section 65(b) and (c) have not been satisfied.
- - You argue that even if they have, that the prejudicial effect must outweigh the probative value of the evidence and His Honour should exclude the evidence pursuant to section 137.

- The Magistrate reminds you that *XY and Shamouil* is still the law in NSW and that the probative value of the evidence should be assessed by taking the Crown case at its highest, making the evidence very strong indeed.

- The Magistrate rules against you on all your arguments and admits the evidence.

- The prosecution closes their case.
- Your client instructs you there was an argument but no assault occurred.
- **1) Would you call your client to give evidence?**
- **2) What are the pros and cons in doing so?**
- **3) Would your answer be different if the Magistrate seemed to be hinting at you that it was "all a matter of weight" and "it didn't seem that strong"?**
- **4) How might your answer effect your client's rights on appeal?**