Reliable Hearsay

The case for expanding the exception to the hearsay rule in criminal proceedings where the maker is available to give evidence and the previous representation was made "shortly after" the asserted fact.

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The *Evidence Act 1995* (NSW) dictates that hearsay evidence may be unreliable. On application by a party to proceedings, then at the discretion of the judicial officer, the Act provides for warnings to be given to juries of the need for caution in determining whether to accept hearsay evidence and the weight to be given to it.[1] Outside of the exceptions within Pt 3.2 Div 3 of the Act, the prosecution in criminal proceedings is generally confined to adducing first hand hearsay that is either an admission or relates to the identity of a person, place or thing.[2]

Many forms of hearsay in the traditional sense suffer from attributes that cause it to be unreliable. With the wider use of certain technologies to record what another person says and does on the spot (such as smart phones and wearable camcorders), modern forms of hearsay do not suffer from the same attributes contemplated when the current law governing hearsay was first developed. In this context, it is appropriate for judicial officers to exercise their discretion not to issue a warning to the jury. However, more importantly, the admission into evidence of video, digital or tape recordings of relevant previous representations made by available victims/witnesses contemporaneous to a crime should be admissible in the prosecution's case, for the purpose of proving the existence of facts it can reasonably be supposed the victim/witness intended to assert. Change to the law in this latter context is required. This is what this document advocates.

The reasoning behind the ALRC's recommendations on hearsay made in 1985[3] and the change in law advocated above will be examined in the context of current technology, policing and criminal procedure.

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[1] *Evidence Act 1995* (NSW) s 165.
[2] *Evidence Act 1995* (NSW) s 66(3) and Pt 3.4.
[3] Australian Law Reform Commission, *Evidence (Interim),* Report No 26 (1985) Vol 1, Pts III, IV (see discussion below for pinpoint references), <http://www.austlii.edu.au/au/other/alrc/publications/reports/26/> , accessed 24 Jun 2013.

Scope

The suggestion is not that previous representations be admissible if the maker is not available otherwise than already provided for within s 65 of the *Evidence Act 1995.* The suggestion is not that the representation/s form either the entirety or majority of the evidence in chief of the maker, as is often the practice regarding evidence given by Vulnerable Persons.[4]

When police arrive at the scene of an incident soon after the commission of a crime, they ask the victim and/or witness/es, "What happened?" The resulting valuable, probative and reliable representation of the victim/witness is generally unable to be put before the jury (including the magistrate/judge sitting as the jury), either due to it not being recorded or due to it falling within the category of inadmissible hearsay.[5]

As opposed to recording the "police interview" with the witness, it is in the context of recording what a victim/witness says to police in response to initial inquiries to determine what happened at the scene of an incident soon after the commission of a crime, that the suggestion is made.

Even though the majority of such recordings would be utilised in summary hearings, it is intended that the recording of the previous representation be played in court in front of the jury. It is not intended that the jury have access to the recording in the jury room during deliberations generally. However, in certain circumstances — that is, in simple cases or where the jury requests a copy following appropriate warnings and directions given by the judicial officer — this should be permitted. Otherwise, but still with accompanying warnings and directions, the recording may be played in open court.[6]

It is intended that the accused person and/or their legal representative be able to view the recording prior to the first mention date. However, such arrangement would carry with it safeguards to ensure the evidence provided was not inappropriately disseminated; for example on YouTube, via email or phone messaging.

[4] *Criminal Procedure Act 1986* (NSW) Pt 6.
[5] *Evidence Act 1995* (NSW) s 66(3) — see discussion below.
[6] As was outlined in *Gately v R* (2007) 241 ALR 1 at 10–11, [28] per Kirby J.

Recent history and the current situation regarding the use by police of video equipment

In December 2006, the NSW Ombudsman made the following recommendation:[7]

> Investigation kits
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> > To investigate domestic violence offences, police officers need to be equipped for the various methods of evidence collection and supported in the appropriate use of these methods. Investigation kits, containing digital/video cameras and voice recorders, are important for improving the collection of evidence. They can speed up the investigative process, and allow police to tender more comprehensive briefs of evidence at the earliest opportunity, improving court outcomes for victims. We have recommended that NSW Police fund all local area commands to obtain investigation kits to improve evidence collection.

This recommendation was followed through, in the form of an election commitment in 2007 that required all front-line police cars and police stations to be equipped with such kits. By 2008 a total of 640 Domestic Violence Evidence Kits (DVEK) containing a video and digital still camera were distributed to NSW Police across eighty Local Area Commands.

The usage rate of the video cameras is extremely low in comparison to the number of domestic violence incidents in New South Wales. For example, of the total domestic violence assaults investigated by police in July, August and September 2013, video was used in only 8.8% of cases.[8] Operational police are aware that video is not admitted into evidence unless the victim gives unfavourable evidence (whether this will be the case is not generally known at the time of investigation). As such, police do not perceive there is value in obtaining evidence in this form. It is expected that this perception will change and the usage rate increase should the suggestion be adopted in legislation.

The NSW Police Force has recently completed a pilot on the use of small body-worn video cameras.

Hearsay historically

For reasons that need not be examined, the presumption of innocence, prosecutorial fairness, proof beyond reasonable doubt, the connected right of an accused person to cross-examine their accuser and only convicting on reliable evidence are considered cornerstones of the criminal justice system. The hearsay rule ordinarily attaches itself to these cornerstones, most notably that only sufficiently reliable evidence be placed before the jury.

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[7] 'Domestic violence: improving police practice — A special report to Parliament under s 31 of the *Ombudsman Act 1974*' (NSW Ombudsman, Dec 2006), p ii, <http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0015/3480/DV-Improving-police-practice-dec-2006.pdf>, accessed 25 Jun 2013.

[8] Domestic and Family Violence Team, Operational Programs, Major Events and Incidents Group, NSW Police Force.

Traditionally, to prove facts, we have relied on in-court testimony. This is/was the case for the following reasons:[9]

- the witness has personal knowledge of the asserted facts;
- the witness is under oath/affirmation and subject to the criminal offence of perjury;
- the reliability of the witness's evidence can be tested by cross-examination; and
- the jury can observe and make determinations about the demeanour of the witness.

ALRC Report 26 Vol 1: Evidence in a modern context

An eyewitness's account, delivered in the witness box, is not the best evidence available. From *2012 NSW Criminal Court Statistics*, the median time from offence date until determination after a defended hearing was 150 days or approximately five months in the Local Court; from offence to outcome of trial was 20 months in the District Court and four years in the Supreme Court.[10] The effect time has on the cognitive processes of the mind and therefore reliability of recollection is undoubted. The ALRC, in their 1985 interim report on Evidence stated:[11]

> Psychological research confirms that there is far more value in statements in documents made while the facts were fresh in the mind of the maker or supplier. Such evidence is likely to be far less inaccurate than oral evidence at the trial …
>
> The research demonstrates that the accuracy and completeness of recollection decreases as time passes and that there is a rapid loss of information within the first 24 hours. This means that any statement, by an eyewitness and, in particular any written statement, made within the first 24 hours is likely to be more accurate and complete than any testimony given in court on oath some years later.
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> In addition as time passes between the event and the trial arising out of it, witnesses will be called upon to recall and state their observations—to police, solicitors, counsel, and at committal proceedings. They will discuss what they saw with friends and relatives. With each attempt at recall and recapitulation there is the potential for unconscious modification. Further, in recalling and stating their observations to police, lawyers, and at committal proceedings, the witnesses will all be subjected to questioning. This will inevitably involve some distortion of recollection, as the questioning will never be entirely neutral. These points are borne out by the research referred to elsewhere. In addition, reference should be made to an experiment by Marston in which:

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[9] P Faris et al, *Uniform Evidence Law: Principle and Practice*, CCH Australia, 2011, pp 99, 100; Australian Law Reform Commission, above at n 3, Pt IV [662]–[664], < http://www.austlii.edu.au/au/other/alrc/publications/reports/26/Ch_32.html#fnB225> , accessed 11 Sep 2013.

[10] NSW Bureau of Crime Statistics and Research, 'NSW Criminal Court Statistics 2012', 2013, pp 53, 120, 121, <http://www.bocsar.nsw.gov.au/Lawlink/bocsar/ll_bocsar.nsf/vwFiles/CCS2012.pdf/$file/CCS2012.pdf >, accessed 24 Jun 2013.

[11] Australian Law Reform Commission, above at n 3, Pt III, [342], <http://www.austlii.edu.au/au/other/alrc/publications/reports/26/Ch_13.html#fn24> , accessed 24 Jun 2013.

> The witness either made notes shortly after the incident, or was examined in court with questions designed to establish what had really happened, or was subjected to the usual cross examination, with leading questions, dishonest arguments and attempts to trick him. Generally, the notes made after the incident were the most accurate, and jury findings based on these notes were more accurate and complete than findings found on direct examinations or cross-examinations.[79]

It can be argued that:

> … the testimony that should be admitted to court is what the witness recalled soon after the event in question. Not what he is recalling of the event in the court-room, a product which will be hopelessly contaminated by experiences subsequent to the event in question, for example, television and newspaper reports, discussion with other witnesses, police interviews. The argument often advanced against this approach is that the present system allows the evidence of a witness to be tested and evaluated under cross-examination. However, the approach that we are advocating does not imply the abandonment of cross-examination, rather it should be focussed more on what the witness remembered in his initial recall.

On the impact of being required to recollect, being questioned and on suggestion, the ALRC stated:[12]

> But every time we recall an event we must reconstruct the memory, and so each time it is changed—coloured by succeeding events, increased understanding, a new context, suggestion by others, other people's recollections.
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> All the things that alter memory fuse with experience, and we become sure that we saw or said or did what we remember. And even that initial perception of events is not "pure".

Many factors contribute to distortion of recollection. Some come from outside the witness. Of particular relevance to hearsay evidence:

• Asking Questions. It has been found that more errors occur when witnesses are asked to answer questions than when they simply narrate what they observed. Having been asked questions and answered them, the answers tend to be recalled later as genuine recollections.

• Power of Suggestion. Much research has been done on the effect of the giving of incorrect information upon people's recollection of an event. Suggestions which influence recall can be made simply and often unconsciously.

…

> (d) Questions with False Facts. A number of experiments have been done by having witnesses observe film or a series of pictures of an event such as a motor car accident and then introduce subsequently, usually in a series of questions, some false information about the existence of what was in fact a non existent object—a giveway sign instead of a stop sign or the presence of a vehicle which was not in fact present. Repeatedly it is found that the non-existent object becomes incorporated into the memory of a significant number of witnesses. The leading question will distort the interviewee's memory.

[12] ibid., Pt IV, [665]–[666].

Consider what occurs in the current process leading to and during a criminal trial from offence date until a witness no longer is required to give evidence, particularly where the witness is required to give evidence at committal. The witness is required to recall the event numerous times. They are asked numerous questions about what occurred, numerous times. Cross-examination is, or predominantly includes, putting suggestions to the witness. Eliciting evidence in chief and/or cross-examination may involve asking questions, on instruction or even innocently, with false facts. In the main, the witness has no idea what this process does to their memory. By virtue of the process, at the time the witness's version is most important (that is, in front of the jury), their recollection of events is at its least reliable. This may have a detrimental effect on both the prosecution *and* the defence case. Magistrates and juries convict *and* acquit on evidence adduced when it is at its least reliable. Within the scope of eyewitness testimony, that we have traditionally solely relied upon in-court testimony need no longer be the reason for exclusion of probative out-of-court contemporaneous representations.

In criminal proceedings, s 66(3) of the *Evidence Act 1995* prohibits the admissibility of contemporaneous representations of victims/witnesses where they are made for the purpose of indicating the evidence that the victim/witness would be able to give in an Australian or overseas proceeding, unless the representation concerns the identity of a person, place or thing. In the context of a police investigation, it would be inappropriate and arguably unlawful[13] to keep the fact that their version is being electronically recorded for the purposes of in-court playback from a victim/witness. As soon as the witness is appropriately informed of what is happening, the representation then falls within the category of being made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding. On excluding statements in documents made when proceedings are pending or anticipated, the ALRC stated this has the effect of "keeping out contemporaneous statements made by key witnesses and parties which on psychological evidence will often be the most accurate evidence available".[14]

On the process of the admission of hearsay evidence, the ALRC also stated:

> Psychological research strongly supports the view that hearsay evidence is not the "best" evidence. Hearsay involves the application of perception, memory, recall and narration skills of at least two people. It involves a compounding of the weaknesses in those skills.[15]

It is important to note that the primary reason for the exclusion of hearsay relates solely to adducing evidence of the previous representation from the person who heard (not made) it:[16]

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[13] *Surveillance Devices Act 2007* (NSW) s 7.
[14] Australian Law Reform Commission, above at n 3, Pt III, [342].
[15] ibid., Pt IV, [664].
[16] ibid., [667].

> Not only would there be the primary risk of defective perception, recollection, and narration as to the fact in question on the part of the one who uttered the original statement, but there would be a similar secondary risk in the perception, recollection, and narration of the person who heard or saw the fact of the utterance of the extra-judicial statement and who is offered to reproduce it in court. While such a person's narration would be subject to the conditioning devices, yet these merely aid, and do not guarantee the trustworthiness of his testimony.

Today's environment of Information and Communication Technology (ICT) provides for such guarantee of trustworthiness. It provides devices that allow laypersons to easily record, store, retrieve and reproduce *exactly* what was previously said. This **removes** the said **compounding of weaknesses** because it removes the second person from the equation. Further, noting what the process leading to and during a criminal trial does to the reliability of a witness's version, combining non-leading or non-suggestive questions with electronic reproduction of exactly what the remaining "first" person with personal knowledge of the asserted facts said about an event contemporaneous to it will result in reducing, controlling or eliminating the "primary risk of defective perception" that evidence law currently tolerates.

Enlighteningly, the prohibition within s 66(3) was put in place *only* in contemplation of documentary evidence, or "proofs" (statements) prepared by police of a witness's version of events. On *The Criminal Trial — Maker Available,* the ALRC stated:[17]

> A provision has been included to exclude proofs of evidence. The NSW Law Reform Commission dealt with the issue by recommending control by a discretion to exclude. The Commission commented:
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> > Proofs obtained by the prosecution will normally be obtained by skilled interrogators who are accustomed to converting jumbled and half coherent answers into passages of connected prose. Whether or not there is any ill will involved, and the desire of the police for witnesses to come up to proof will help to ensure that there is not, the utterances of an uncertain and perhaps unreliable declarant may be converted into an impressive, confident and internally self-consistent document.
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> The English Law Reform Committee commented:
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> > As every judge and advocate knows, witnesses often fail to "come up to their proofs" in examination-in-chief—and this is one of the commonest ways in which truth will out. A proof is not really the witness's own narrative, but a summary by the proof-taker of the witness's answers to questions put by him which may themselves have suggested the answers. Had different questions been asked, the resulting narrative might have been different. When the witness goes into the box to give his evidence in chief, often different questions are asked. When the evidence is about disputed facts, we do not think this process should be omitted.

The reasoning behind the insertion of the prohibition within s 66(3) did not contemplate current ICT.

[17] ibid., [694].

Anomalously to s 66(3) of the Act, if the victim/witness was not available to give evidence and therefore not available to be cross-examined, the same representation may be admitted if made in circumstances that make it unlikely that the representation is a fabrication.[18] If the representation is not made "shortly after" the asserted fact, the circumstances must be such that it is highly probable that the representation is reliable.[19]

Pursuant to s 65(2)(b) and the term "shortly after", "there need not be anything like the strict contemporaneity required at common law to render the evidence admissible as res gestae".[20] Further:[21]

> … the predominant factor in the phrase "shortly after" must be the actual time that has elapsed and whether that fits the ordinary usage of the expression "shortly after" in the circumstances of the case. The judgment should, however, be influenced by the policy behind the provision. That is to put a brake on evidence being given of a recollection which may have faded in its accuracy with the passage of time. The judgment may therefore be influenced by **the subject matter of the event and by how long the memory of such an event is likely to have remained clear in the mind**. (Emphasis added.)

Circumstances contemplated for the purpose of s 65(2)(b)–(c) of the *Evidence Act 1995* include:

R v Mankotia:[22] Those that indicate an, **" … unlikelihood of concoction … "** (Emphasis added.)

The "factual setting at the time" the representation is made.

Williams v R:[23] " … it is principally a concern to **exclude concocted evidence** that informs the meaning of the phrase 'shortly after'." at [47]. (Emphasis added.)

" … statements be made spontaneously during (when) or under the **proximate pressure of** (shortly after) **the occurrence** of the asserted fact … " at [48]. (Emphasis added.)

As circumstances against both reliability and unlikelihood of fabrication:

> Evidence of an accomplice (as a circumstance against both reliability and unlikelihood of fabrication) (at [57]).

[18] *Evidence Act 1995* (NSW) s 65(2)(b).
[19] ibid., s 65(2)(c).
[20] *Conway v R* (2000) 98 FCR 204 at[133] per Miles, von Doussa and Weinberg JJ.
[21] *R v Mankotia* (NSWSC, Sperling J, No 70049 of 1997, 27 July 1998, unreported).
[22] ibid.
[23] (2000) 119 A Crim R 490 at 503–5 per Whitlam, Madgwick and Weinberg JJ.

The character of the maker: " … would assist a friend who had "done a rort" by making equipment available for the destruction of evidence"; "He was apparently a drug addict living a fringe existence." (At [56].)

R v Ambrosoli:[24] As circumstances against both reliability and unlikelihood of fabrication:

> " … a (genuine) express retraction by the maker of the previous representation." at [29].
>
> " … evidence indicating that the person who made the previous representation was incapable of having heard or seen the matter which was the subject of the previous representation." at [29].

As circumstances indicating reliability and unlikelihood of fabrication:

> **" … the immediacy of the allegation [representation] and the unlikelihood that a very seriously wounded person would have the opportunity or interest to make up a lie about the reason for her cut throat." at** [25]. (Emphasis added.)

Only to the extent that they touch the reliability of the circumstances: " … prior or later statements or conduct of the person making the previous representation … " at [36].

Whilst not commented upon in a generic sense, the making of a statement to police was contemplated as a circumstance: "This is not to say that a police statement always bears this stamp … " at [40].

Ratten v The Queen: [25] " … there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or **pressure as to exclude the possibility of concoction** or distortion to the advantage of the maker or the disadvantage of the accused." (Emphasis added.)

[24] [2002] NSWCCA 386 at [25], [29], [36], [40] per Mason P.
[25] *Ratten v The Queen* (PC) [1972] AC 378 at 391 per Lord Wilberforce.

Harris v R:[26] It was open to a judge to admit a statement of the deceased made to police the day after the asserted fact, including on the basis that:

- it was made within 24 hours: at [38];
- the statement began with the durat — asserting the truth of the statement and acknowledgement of the liability to prosecution for an untruthful statement: at [44], [45];
- there were no prior or later statements made by the deceased bearing upon the reliability of the circumstances of the making of the statement: at [42], [44], [45];
- the deceased would have appreciated that police were going to interview other witnesses: at [44], [45].

Further evidence of the anomalous nature of the way hearsay is treated within the *Evidence Act 1995* is that, if an available witness gives unfavourable evidence, is cross-examined on a prior inconsistent statement and denies, or does not admit or agree to the substance of a prior inconsistent statement, the operation of ss 60 and 106 of the Act allows the admission of such evidence for all purposes subject to s 136.[27] Whereas, if the same witness was not available, and there was evidence that the witness did not adhere to the statement they gave to police, this circumstance would operate to exclude the evidence from being admitted under s 65 of the Act.[28]

The intention of s 65 is to exclude from the jury's deliberation, evidence for which the maker of the representation has had time to concoct a version. The proximity and immediacy of the representation to the fact asserted within it militate in favour of its reliability or acceptability. The test for admissibility when the maker of the representation is not available is and should be higher than when they are available. Considering then the proposal on electronic recordings of contemporaneous representations, in circumstances where the prosecution has probative, reliable and acceptable evidence *and* the accused is given the opportunity to test it in cross-examination due to the maker being available, the jury should not be deprived of it on the basis that it is hearsay.

Where hearsay in the form of a contemporaneous record of events can be admitted without infringing the said cornerstones, it should be allowed to be considered by the jury. While perhaps not made under oath, such representations may be (and are) made after the maker is informed of the ramifications of making a false statement.[29] Even if this is not done at the time of recording, by requiring the witness to be available to give evidence in court, such previous representations may be adopted while under oath.

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[26] [2005] NSWCCA 432 per Studdert J.
[27] *R v Ryan* (No 7) [2012] NSWSC 1160.
[28] *R v Ambrosoli* [2002] NSWCCA 386 at [29], [36] per Mason P.
[29] *Local Court Rules 2009* (NSW) r 3.6.

Will it increase appropriate pleas of guilty?

One of the further reasons put forward by the ALRC for exclusion of hearsay evidence was that its admission would unnecessarily add to the length of the trial. Of course, if a plea of guilty is entered, there is no trial.

Although made in the context of video evidence of complainants in sexual assault cases, which usually is not as contemporaneous as that contemplated and may also be utilised as the majority of evidence in chief in Victorian trials, one of the "issues which goes to the weight of the evidence" as highlighted by Corns is, "a lack of corroboration of the taped evidence of the complainant".[30]

On observations open to be made by a jury of a witness in court, the court in *Butera* stated:[31]

> Oral evidence is public; written evidence may not be. Oral evidence gives to the trial the atmosphere which, though intangible, is often critical to the jury's estimate of the witnesses. By generally restricting the jury to consideration of testimonial evidence in its oral form, it is thought that the jury's discussion of the case in the jury room will be more open, the exchange of views among jurors will be easier, and the legitimate merging of opinions will more easily occur than if the evidence were given in writing or the jurors were each armed with a written transcript of the evidence.

Noting one of the traditional reasons for excluding hearsay — that the jury can observe and make determinations about the demeanour of the witness — one may consider what factors are taken into account when making such a determination. These include the tone; speed of narration; voice level, intonation and inflection; language, expression and elocution; emotional state of the witness; physical appearance and appearance of clothing.

Such factors observed of the witness in the witness box do not carry the weight of those observed of the witness at the scene of a crime soon after its commission. **The latter provide corroboration of the witness's version of events.** While a police officer can describe the demeanour of the witness at the scene, their description suffers from the same said risk of defective perception, recollection, and narration. If a picture paints a thousand words, a video must paint millions.

Compared to provision of a facts sheet to the accused person's legal representative prior to, or on the first mention date, provision of a video of a domestic violence victim providing an initial version of events immediately proximate to the occurrence of the offence — crying, flushed red in the face, voice quivering, hands shaking, wearing dishevelled clothing and pointing to

[30] C Corns "Videotaped Evidence in Victoria: Some Evidentiary Issues and Appellate Court Perspectives" (2004) 28 *Criminal Law Journal* 43 at 52.
[31] *Butera v DPP (Vic)* 76 ALR 45 at 50.

the injuries suffered as a result of the action of a perpetrator — has/will have such probative force as to induce the legal representative to advise the defendant to plead guilty.

Basis in the context of Domestic Violence

While issues in the context of domestic violence provide support for the ultimate suggestion, they are not put forward as the exclusive or main reasons behind it. Rather, they are in addition to the totality of the submissions previously made: **an electronically reproduced out-of-court contemporaneous representation asserting a fact is *more* reliable and carries more weight than one made later in court.**

Allegations of domestic violence assaults are the most prevalent failed prosecution in New South Wales, representing approximately 13% of all failed prosecutions.[32]

The nature and circumstances of a domestic violence assault lend themselves to there being few, if any, witnesses other than the victim and the offender. The offence of assault requires significant weight be given to the testimony of domestic violence victims. In circumstances where the prosecution must prove domestic violence allegations beyond a reasonable doubt, it is often the case that the prosecution will obtain an Apprehended Violence Order against the perpetrator due to the lower standard or onus of proof, but fail in the criminal matter.

At least 30% of *all* dismissed criminal proceedings prosecuted by a police prosecutor in the Local Court were dismissed due to non-attendance of a civilian witness/victim.[33] The perception of this statistic acts as motivation to enter and adhere to a plea of not guilty and advise accused persons to do so.

A significant proportion of domestic violence victims, after originally informing police that their partner assaulted them, either do not attend court, or, if they do attend, give unfavourable evidence. We also know that victims of domestic violence rarely report the first occasion of abuse to police. There has been significant research performed by Dr Dina McMillan in the area of Offender and Victim Psychology in Domestic and Family Violence. Briefly, and without seeking to diminish the complexities of domestic and family violence, the reason why victims either don't report abuse, don't attend court, or give unfavourable evidence is because of the power held by the abuser over the victim, gained through manipulative tactics (intended or otherwise) put in place and utilised long before the report of assault to the police.[34] This has

[32] Computerised Operational Policing System data, 1.4.12–30.3.13, NSW Police Force.
[33] Computerised Operational Policing System data extracted utilising Failed Prosecution System, April 2012 to March 2013, NSW Police Force.
[34] D L McMillan, *But He Says He Loves Me: How to avoid being trapped in a manipulative relationship*, Allen and Unwin, Sydney, 2007.

been recognised by the judiciary, in particular Wood CJ at CL in *R v Edigarov*:[35]

> … that form of conduct involves aggression by men who are physically stronger than their victims and who are often in a position economically, or otherwise, to enforce their silence and their acceptance of such conduct.

In *R v Dunn* Adams J commented:[36]

> Crimes involving domestic violence have two important characteristics which differentiate them from many other crimes of violence … secondly the continued estrangement requires continued threat … the victim never feels truly safe.

The court in *R v Hamid* said:[37]

> … an adequate account of domestic violence should recognise that it typically involves the exercise of power and control over the victim … the offender may no longer need to resort to violence in order to instil fear and control.

The projected probative force of electronically reproduced contemporaneous representations will act to counterbalance the said motivation. When the victim of a domestic violence offence is an unavailable witness (that is, they have been served with a subpoena and failed to attend or avoided service of the subpoena and failed to attend),[38] subject to previously identified circumstances against both reliability and unlikelihood of fabrication, the prosecution will be in a position to rely on the electronic recording.[39] As such, operating on the mind of the accused person and/or their legal representative at the time of making a decision on plea, will be the prospect of cogent evidence being put before the court whether or not the victim attends. This will increase appropriate pleas of guilty within the scope of proceedings that are currently set for hearing and fail due to the non-attendance of witnesses. This outcome will operate more predominantly in proceedings for domestic violence, but is not limited to such criminal proceedings.

A contributing factor in up to a further 10% of failed prosecutions is the performance of the victim/witness in court.[40] A victim giving unfavourable evidence is not an uncommon scenario in domestic violence prosecutions. Albeit predominantly on sentence, the reason behind this has been commented upon by the judiciary. In *Rowe v R* Hunt CJ said, " ... where the nature of the relationship is such that the victim will frequently, and clearly

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[35] [2001] NSWCCA 436 at [41]: "[confirming the decisions in] *Glen* NSWCCA 19 Dec 1994; *Ross* NSWCCA 20 Nov 1996; *Rowe* [1996] 89 A Crim R 467; *Fahda* [1999] NSWCCA; and *Powell* [2000] NSWCCA 108".
[36] [2004] NSWCCA 41 at [47].
[37] [2006] NSWCCA 302 at [77].
[38] *R v Rossi* (Ruling No 1) [2010] VSC 459.
[39] *Evidence Act 1995* (NSW) s 65(2).
[40] Computerised Operational Policing System data extracted utilising Failed Prosecution System, April 2012 to March 2013, NSW Police Force.

contrary to their own interest and welfare, forgive their attacker".[41] Simpson J in *R v Fahda* provides a reason in principle to adopt our suggestion:[42]

> Victims ought not be placed in a position where they hold, or appear to hold, the keys to the offender's release. To put them in that position is to impose on them a burden they ought not be required to bear.

In *Kershaw* Bryson J said:[43]

> ... it happens from time to time that a complainant is shown to have a forgiving and optimistic attitude about violence in the relationship which is difficult for others to understand or share.

In addition to the reason in principle to adopt our suggestion, the projected probative force of electronically reproduced contemporaneous representations will act to counterbalance the motivation to enter a plea of not guilty based on what at the time of making the decision on plea, may be a guess on whether the victim will give unfavourable evidence. The ALRC in "Family Violence — A National Legal Response" under the heading of "Pre-recorded evidence", quoting from a submission by the Northern Territory Legal Aid Commission, reported:[44]

> An advantage of the pre-recording of complainants' evidence in sexual cases is that if it is strong, **there is an opportunity for the case to settle by way of plea without the need for a jury trial**, and if it is weak there is an opportunity for the charges to be withdrawn, without the need for a jury trial. (Emphasis added.)

The probative value and weight of an electronically recorded contemporaneous representation combined with ever increasing judicial understanding and recognition of the nature of domestic violence and its effect on victims, especially when considered against other corroborative evidence, will militate to overcome any *reasonable* doubt that an accused person committed a domestic violence offence based solely on the not unexpected decision of a victim to give unfavourable evidence. Against the tide of information explaining a victim's conduct in this respect and the projected admission of evidence subject of the change in law advocated, any finding otherwise exhibits a level of naivety or craven indecision.

Is it fair to the accused person?

The issues under this subheading are also considered by Corns in his paper, "Videotaped Evidence of Child Complainants in Criminal Proceedings: A Comparison of Alternative Models."[45] While his points may be relevant, they

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[41] [1996] 89 A Crim R 467.
[42] [1999] NSWCCA 267 at [26].
[43] [2005] NSWCCA 56.
[44] ALRC 114, Vol 1, 26, "Reporting, Prosecution and Pre-trial processes" at 1230, <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114_WholeReport.pdf> , accessed 25 Jun 2013.
[45] (2001) 25(2) *Criminal Law Journal* 75.

are made outside the context of the initial version of events subject of the proposal.

From Kirby J in *Gately v R:*[46]

> Whilst it is doubtless appropriate to recognise and utilise technological advances that might assist juries in performing their task, it is self-evident that such assistance must accord with the fundamental requirements, and essential characteristics, of a fair criminal trial. Such a trial is accusatorial and adversarial. In a jury trial, a heavy duty falls on the presiding judge to protect the accused against material risks of unfairness and to direct (and sometimes warn) the jury about any particular dangers of unfairness to which they need to be alert in considering an electronic recording of evidence or a printed transcript based on such a recording.

In the same case quoting from the court in *Butera v DPP (Vic),* Haynes J states:[47]

> A witness who gives evidence orally demonstrates, for good or ill, more about his or her credibility than a witness whose evidence is given in documentary form.

Note, similar to the reasoning behind the prohibition within s 66(3) of the *Evidence Act 1995*, the commentary again focuses on documentary evidence. On our proposal, the witness will be required to give evidence orally; the accused person will be in a position to cross-examine the maker of the representation. As such, this "cornerstone" is preserved.

As a general rule, it is not intended that the jury be given unsupervised access to the recording.

It is intended that the recording be a short, sharp, initial version of events from the witness based on a few open-ended questions, such as "What happened?", "How did it happen?", "How did you get the red mark on your face?"; not the entirety of their evidence adduced by interrogation. The danger of unfairness resulting from evidence being repeated during viva voce evidence of the witness in the courtroom is reduced in this respect. The residual danger may be balanced by providing the judicial officer with discretion to warn/direct either themself or the jury:[48]

> (a) to avoid giving undue weight to evidence that is recorded and thus repeated as against the rest of the evidence that is not;
>
> (b) to consider the recorded evidence in the context of other, countervailing evidence, whether recorded or not, and of any arguments of the accused relevant to that evidence;
>
> (c) the playing of the recording is a routine practice;

[46] [2007] HCA 55 at [16] per Kirby J.
[47] [2007] HCA 55 at [88].
[48] Drawing from *Gately v R* [2007] HCA 55 at [28] per Kirby J; *R v NZ* (2005) 63 NSWLR 628*,* 663–4, [152] per Howie and Johnson JJ; *Question of Law Reserved (No. 2 of 1997)* (1998) 98 A Crim R 544 per Doyle CJ.

(d) the evidence is not to be given any greater or lesser weight than you otherwise would give it simply because it is on tape.

Police have already received training and instruction on the use of DVEK. Even so, the court would retain the discretion to exclude such evidence where the probative force of it is reduced by inappropriately suggestive or leading questions.[49]

Accused persons are routinely offered the opportunity to be electronically recorded in order to provide their version of events whether or not they are located at the scene of a crime or soon after it. There are procedural issues that may attach to such evidence being admitted in the prosecution case.[50] In order to be fair to the defendant, if they are present at the scene of the crime, subject to their level of sobriety and aggression, the suggestion is that they also be provided with the opportunity to provide their initial short version of events.

There is an ever-present danger that victims and/or other witnesses may be influenced throughout the course of an investigation, whether this be by friends, family members or investigators, innocently or otherwise, to project their recollection of events or the reliability of their version as being stronger than it actually is. This projection may remain following cross-examination, resulting in a finding of guilt. If a victim or witness's recollection at the scene of an incident, soon after its occurrence, is not as strong as may be projected later by in-court oral evidence, utilising ICT to record their initial version at the scene will operate to preserve convictions being based only on reliable evidence. It will provide accused persons with probative evidence that refutes the oral evidence of a confident witness, innocently ignorant of their lack of reliability. In this same vein, such evidence will provide investigators with a reason to decide not to commence criminal proceedings where appropriate.

Conclusion

Evidence of non-documentary, video, digital or tape recordings of previous representations made by available victims/witnesses contemporaneous to a crime should be admissible for the purpose of proving the existence of facts it can reasonably be supposed the victim/witness intended to assert in the representation.

Psychological evidence and judicial commentary on evidence classified as made in circumstances that make it unlikely to be a fabrication and/or highly probable to be reliable, supports the proposition that electronically reproduced out-of-court contemporaneous representations asserting a fact are *more* reliable, and either do or should carry more weight than those made later in court.

[49] *Evidence Act 1995* (NSW) ss 135, 137.
[50] For example: *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) Pt 9.

The threshold prohibition placed on the prosecution from adducing “fresh in memory” hearsay evidence of an available witness is based on reasoning foreign to the process of obtaining and reproducing electronically obtained contemporaneous hearsay.

While not reliant upon it, what is advocated for finds support in the context of domestic violence.

The proposal preserves fairness to the accused person. It strengthens the cornerstones of our criminal justice system.

Confronted with the probative force of the evidence projected to be adduced the (guilty) offender will be less willing to deny guilt. The proposal will increase appropriate pleas of guilty, providing for a more efficient criminal justice system. Confronted with the probative force of the video evidence projected to be adduced, investigators will be better equipped to make appropriate decisions on whether to commence criminal proceedings. This will militate against proceedings being commenced against not guilty accused persons. This also will positively affect the efficiency of the criminal justice system.