PRE-RECORDED EVIDENCE HEARINGS IN RESPONSE TO COVID-19: ISSUES TO CONSIDER

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PART I: THE PROVISIONS AND PRACTICAL CONSIDERATIONS

Introduction

1. The recently passed *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) amends the *Criminal Procedure Act* 1986 (NSW) ('the Act') to expand the availability of pre-recording of trial evidence in the absence of a jury.[1]

2. These new provisions present a significant departure from District Court trial procedure. This paper is intended to suggest some challenges which the new pre-recorded evidence hearing procedure may present, which may not be immediately apparent; and to offer some suggestions about what might be done to protect clients from potential unfairness resulting from the new pre-record process.

3. Part I is a guide to the provisions and some practical steps to take in a pre-recorded evidence hearing. Part II is a guide to what arguments might be made on applications to address any unfairness which may arise.

The Checklist

4. If you have begun reading this hoping to get a quick answer to a question, or a simple guide, then please turn to **Appendix 1: Checklist**.

5. Please be aware that the questions posed by the new legislation do not all have straightforward answers. So, the checklist may not be sufficiently meaningful without returning to the detail in this paper.

The unknown unknowns

6. Before considering how the new provisions might unfold, it is worth observing that there are likely to be further developments in this space, which will change the appropriateness of this initial guidance. There are two likely sources of this change: further regulation; and the response of the judiciary to the change in the law.

[1] All references in this paper to legislation are to the *Criminal Procedure Act* 1986 (NSW) unless otherwise specified.

Further regulation

7. There is a lot which is not yet known about how the pre-recorded evidence hearing process will be conducted. The legislature has passed the bill; and it is now law. Parliament is not scheduled to sit again until 20 August 2020. Between now and at least August, there is broad regulation-making provision in the Act, as follows:

> ***366 Regulation-making power***
>
> *(1) The regulations under any relevant Act may provide for the following matters for the purposes of responding to the public health emergency caused by the COVID-19 pandemic—*
>
> *(a) altered arrangements for criminal proceedings, including pre-trial proceedings, provided for by an Act or another law,*
>
> *(b) altered arrangements for apprehended violence order proceedings, including provisional and interim orders, provided for by an Act or another law,*
>
> *(c) matters relating to bail and sentencing,*
>
> *(d) matters relating to the administration of sentences provided for by an Act or other law…*
>
> *…(3) Regulations made under this section—*
>
> *(a) are not limited by the regulation-making power in a relevant Act, and*
>
> *(b) may override the provisions of any Act or other law.*

Regulations altering proceedings under the *Criminal Procedure Act*, require the consent of the Chief Justice and the Head of Jurisdiction.[2]

Judicial Response

8. There has not yet been a response by trial courts to this law, for example in the form of a practice note. It reasonable to anticipate that this will shortly occur.

9. Collective experience of judicial officers' response to the new provisions will be valuable. Please feel free to contact me on with feedback, or questions, arising from the progress of these matters; so that knowledge may be gathered and

[2] *Criminal Procedure Act* 1986 (NSW), s366(2)(c).

shared. I can best be contacted at **Caitlin.Akthar@legalaid.nsw.gov.au.**

The known unknowns

10. Three matters which are presently unclear are the purpose of the provision; the juncture in a proceedings at which a 'pre-recorded evidence hearing' is intended to occur; and how they are to be conducted.

The purpose of the legislation - text of the provisions

11. The new provision allowing for pre-recording is section 356 of the *Criminal Procedure Act* 1986 (NSW):

> ***356 Pre-recorded evidence hearing***
>
> *(1) A court may, on its own motion, order that the evidence of a relevant witness in a trial proceeding be given at a hearing (a **pre-recorded evidence hearing**) in the absence of the jury (if any).*
>
> *(2) The court may make an order under subsection (1) only if—*
>
> *(a) the accused person has sought and received advice from an Australian legal practitioner, and*
>
> *(b) both parties have been heard on the order, and*
>
> *(c) all pre-trial disclosure and case management requirements under Division 3 of Part 3 of Chapter 3 have been complied with, and*
>
> *(d) <u>the court is satisfied it is in the interests of justice to do so</u>.*
>
> *(3) In deciding whether to make the order, the court must consider—*
>
> *(a) the wishes and circumstances of the witness, and*
>
> *(b) the availability of court and other facilities needed for a pre-recorded evidence hearing to take place.*
>
> (my emphasis)

12. Therefore, assuming the necessary requirements in 356(2)(a) and (b) are complied with, the test is whether it is in the interests of justice to order that a pre-recorded evidence hearing be conducted.

The purpose of the legislation – textual context

13. Although apparently modelled on the Child Sexual Evidence Pilot Scheme,[3] the new provisions are not found within this part of the *Criminal Law Division* which provides for that scheme.[4] Instead, they occupy their own, new Part of the *Criminal Procedure Act* 1986 (NSW)(the **CPA**); which begins as follows:

Part 5 Response to COVID-19 pandemic

Division 1 Preliminary

353 Purpose of Part

> *The purpose of this Part is to enable criminal trials in the State to be conducted in a way that is appropriate given the public health emergency caused by the COVID-19 pandemic.*

14. The phrase 'appropriate given the public health emergency' does not provide particular guidance on the 'interests of justice' test.

The purpose of the legislation – second reading speech

15. No guidance is provided in the Second Reading speech to inform a decision-maker as to the application of the 'interests of justice' test in section 356. The following extract contains the comments relevant to the pre-recording provisions:

> *'The Leader of the House has asked me to be brief, so I will not go into detail with many of the substantive amendments in the bill.*
>
> *The bill amends the Criminal Procedure Act 1986: <u>to enable a judge to order that a relevant witness can give evidence by having their evidence recorded in advance of the trial</u>**;**[5] to enable a record of evidence given in the trial proceedings to be admissible in a subsequent trial; to facilitate more judge*

[3] Given the similarity of wording between the provisions.
[4] The Child Sexual Evidence Pilot Scheme is Part 29 of Schedule 2 of the *Criminal Procedure Act* 1986 (NSW).
[5] The phrase 'in advance of trial' is problematic, for reasons explored later in the paper.

only trials; and to introduce a general regulation-making power for exceptional circumstances.'[6]

(my emphasis)

16. Determination of whether it is 'in the interests of justice' to order a pre-recorded evidence hearing is therefore likely to be informed by interpretations of the expression of this test elsewhere. The new provisions, and the Second Reading speech, provide no basis for limiting the matters that may be considered by a Court when determining whether to make an order.

17. Matters which may be raised in consideration of the interests of justice test are explored in Part II: Remedies.

What the new pre-recorded evidence hearing is not

18. The addition of the Part 5 into the *Criminal Procedure Act* is not an expansion of the Child Sexual Offence Evidence Programme in the Downing Centre and Newcastle District Court.[7] Apart from its insertion in a different part of the act,[8] the new provisions require pre-trial disclosure and case management to be complied with (more on this below).

19. Additionally, none of the other features of the Child Sexual Offence Evidence Programme – Children's Champions or Witness Intermediaries; written reports by such persons; or ground rules hearings – feature in the COVID-19 amendments. The new provisions do not contemplate the pre-recording of complainant evidence in this way.

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[6] New South Wales, *Parliamentary Debates*, Legislative Assembly (Mark Speakman, Attorney-General), 24 March 2020 https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-110319'.

[7] For further information on that Scheme (previously a Pilot) see https://www.victimsservices.justice.nsw.gov.au/Pages/vss/vs_victims/vs_childrens-champion.aspx

[8] The Child Sexual Evidence Pilot Scheme is Part 29 of Schedule 2 of the *Criminal Procedure Act* 1986 (NSW).

Whether a pre-recorded evidence hearing should be held - AVL

20. The first version of this paper, written just two weeks ago, presumed that pre-recorded evidence hearings could happen without the consent of the accused. However, as accused persons on remand are currently appearing by AVL rather than being brought to court because of the COVID-19 pandemic, the effect of a recently enacted regulation relating to the use of AVL has re-introduced a hurdle to conducting such a hearing.

21. Section 5BA of the *Evidence (Audio and Audio Visual Links)* Act 1998 (NSW) ('AVL Act') requires that an accused cannot appear in such a hearing by AVL unless they consent, or it is in the interests of justice for them to appear in this way. Given the difficulties discussed under 'Practical Considerations' later in this paper, it is well open for practitioners to argue on behalf of accused persons who do not consent, that it is not in the interests of justice for them to appear by AVL at a pre-recorded evidence hearing.

22. A more detailed discussion of the application of various provisions of the AVL Act is provided as **Appendix 2** to this paper, in case that should become relevant in a particular matter.

When a pre-recorded evidence hearing is to be held

The opening of the Crown's case

23. Section 356(2)(c) requires that before an order for a pre-recorded evidence hearing can be made:

    (c) all pre-trial disclosure and case management requirements under Division 3 of Part 3 of Chapter 3 have been complied with.

24. Division 3 of Part 3 of Chapter 3 (sections 134-149F) of the CPA is a collection of provisions, of which principal attention is generally given to sections 141-143. These sections require the prosecution to serve a Notice of Prosecution Case,

the defence to file a response, and the prosecution response to the defence response.

25. It seems likely, therefore, that the intended juncture at which a pre-recorded evidence hearing is to be held, is at the time the matter is otherwise ready for trial. However, note the second reading speech described the hearing as occurring 'in advance of trial.'[9]

26. Whether the Crown opens their case prior to the pre-recorded evidence hearing is relevant in determining whether there has been unfairness of a kind that would give rise to the exclusion of evidence or a stay of proceedings. Applications for exclusion or stay are explored in Part II.

Practical Considerations

Arraignment

27. It seems likely that, for there to be any prospect of protecting the accused from an unfair process, the trial must have started. Because the District Court does not have jurisdiction until an indictment is presented,[10] at a minimum, practitioners must insist that the accused be arraigned prior to any pre-recorded evidence hearing. This may seem obvious for full-time courts; but is not always done in part-time courts.

Instructions

28. The fundamental importance of being adequately instructed remains unchanged. In the context of a pre-recorded evidence hearing, this may mean it will be appropriate to raise the issue with the Crown and trial judge at the start of

[9] New South Wales, *Parliamentary Debates*, Legislative Assembly (Mark Speakman, Attorney-General), 24 March 2020 https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-110319'.

[10] *JC v Director of Public Prosecutions (NSW)* [2014] NSWCA 228, court held that a trial has commenced when the accused is arraigned upon and indictment and enters pleas of not guilty.

proceedings; foreshadowing an anticipated requirement to pause and disconnect proceedings in order to establish private contact with the accused to obtain instructions at regular intervals.

29. As a consequence of this requirement, thought should be given to what arrangements are made while proceedings are adjourned for instructions to be taken. If the Crown is present in person at court, it may be appropriate to ask the trial judge to vacate the bench while the accused confers with their representative. If the Crown is not physically present in court, it would be prudent to ask that all parties disconnect from the virtual courtroom while instructions are taken.

30. Thought should also be given to how the accused may signal that they wish to speak with their representative during the hearing. They should ideally do so in a non-verbal way, such as raising their hand, particularly when dealing with vulnerable witnesses. Once this is done, practitioners could ask that there be a brief adjournment to confer with the accused.

31. If the audio-visual link is of insufficient quality for practitioners, or the accused, to hear all that is said, the court's attention should be immediately drawn to this and the matter should not proceed until this can be remedied.

32. While the steps outlined above may lead to significant inefficiencies in the progress of a pre-recorded evidence hearing, this consideration must give way to the fair trial of an accused. If steps are not taken to adequately protect the accused's right to a fair trial, miscarriages of justice may occur.

33. If difficulties arise during the pre-recorded evidence hearing which cannot be remedied, the appropriate order would be to vacate the order for the pre-recorded evidence hearing.

Access to transcript

34. Transcript is not guaranteed by section 356 of the Act; and so is subject to usual request processes and costs.[11] It will be prudent for defence practitioners to apply for a transcript which records every word said in the virtual courtroom in relation to the pre-recorded evidence hearing, as opposed to a recording of the complainant's evidence. This will ensure any words which may be said during disconnections by parties are known to the practitioner.

Access to the audio-vidual recording

35. Accessing evidence following the pre-recorded evidence hearing is likely to be a significant burden on defence practitioners. Section 357 provides that defence practitioners do not have an entitlement to a copy of the recording of a complainant, special witness, or vulnerable person.[12] However, section 357 provides for access to the evidence of these witnesses as follows:

   (2) The accused person and the person's Australian legal practitioner (if any) are to be given reasonable access, from time to time, to the recording of evidence taken at a pre-recorded evidence hearing under this Division to enable the person or practitioner to listen to or view the recording (or both).

   (3) If reasonable access to the recording of original evidence cannot be given to an accused person's Australian legal practitioner because of subsections (1) and (2),[13] the prosecuting authority must, as soon as practicable, give the legal practitioner reasonable access to the recording in the way the prosecuting authority considers appropriate.

36. These provisions are a further point of difference to the provisions for access to evidence under the Child Sexual Assault Evidence Programme.

37. Section 357 does not prohibit possession of a copy of the evidence obtained at a pre-recorded evidence hearing by a defence practitioner. Indeed, possession in

[11] Section 356(7) provides that the Court may order transcript be supplied to the court or jury. In practice, it is common for judges in the Child Sexual Evidence pilot scheme to order transcripts for parties. It is hoped this practice would be replicated for hearings under the new provisions.
[12] As defined by section 357(1) of the Act.
[13] What is meant by 'because of sections (1) and (2)' is somewhat opaque. It may be that 'because of' should be read as 'in accordance with.'

certain circumstances is contemplated by the restrictions imposed by the balance of the section:

> *(4) For subsection (3), in deciding on the appropriate way in which access to the recording should be given the prosecuting authority must ensure that—*
> *(a) there is no unauthorised reproduction or circulation of the recording, and*
> *(b) the integrity of the recording is protected.*
>
> *(5) A person given access to a record of evidence under this Division must not, without the consent of the prosecuting authority—*
> *(a) copy the recording, or*
> *(b) give it to another person, or*
> *(c) remove it from the custody of the prosecuting authority.*
>
> *(6) The regulations may provide for—*
> *(a) the procedures to be followed in connection with the giving of access to a record of evidence under this section, and*
> *(b) the way in which access is to be given to a record of evidence under this section, including the giving of access by other means.*

38. The provisions do not provide for any remedy if a defence practitioner considers the access provided is not reasonable. If communication with the Crown proves unsuccessful in resolving any access issue that arises between the pre-recording and the balance of the trial, it is likely that relisting the matter and putting on a Notice of Motion for access orders to be made would be required.

39. Importantly, section 357(3) allows defence practitioners copies of the evidence only at the absolute discretion of the prosecutor, and not the court. Therefore, while the court could make orders mandating the facilitation by a prosecutor of viewing access for defence practitioners in a particular way, the court could not order a defence practitioner be provided with a copy.

40. Despite this, a ventilation of access issues in court is likely to be productive in coming to a reasonable arrangement with the prosecuting authority if all else has failed. Alternatively, if no reasonable arrangement is achieved, this may ground an application for a temporary stay until such time as the trial may be properly prepared.

Strategic considerations

Evidence served after the pre-recorded evidence hearing

41. An issue of concern for defence practitioners arises from the prospect of a long delay between the pre-recorded evidence hearing and trial, during which further investigations might be undertaken and evidence obtained, having regard to any aspect of the accused's case which have been put to the complainant in compliance with *Browne and Dunn*.[14]

The limits of the pre-trial disclosure and case management safeguard

42. As previously identified, compliance with disclosure and case management provisions in the Act is a pre-requisite to an order for a pre-recorded evidence hearing.[15]

43. Section 146 of the Act provides for sanctions where the disclosure requirements are not complied with:

> ***146 Sanctions for non-compliance with pre-trial disclosure requirements***
>
> *(1)* ***Exclusion of evidence not disclosed*** *the court may refuse to admit evidence in proceedings that is sought to be adduced by a party who failed to disclose the evidence to the other party in accordance with requirements for pre-trial disclosure imposed by or under this Division.*

44. Where further evidence comes to light following a pre-recorded evidence hearing, whether because of the hearing or otherwise, the prosecution may not have failed to disclose evidence prior to trial; if 'failure to disclose' is interpreted as non-disclosure of material in the possession of the prosecutor.

45. Suggested avenues for exclusion of evidence served following a pre-recorded evidence hearing are contained in Part II.

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[14] [1893] R 67.

[15] Criminal Procedure Act 1986 (NSW), section 356.

The rule and Browne v Dunn

46. Most of the potential for unfair prejudice being occasioned to an accused from a pre-recorded evidence hearing arises from the prospect of revealing the accused's case at a time well before the balance of the trial. This may occur in putting the accused's case to the complainant, in compliance with the common-law authority in *Browne v Dunn.*[16]

47. Practitioners should be aware of the precise parameters of this authority. Commonly referred to as a 'rule of fairness', compliance with *Browne v Dunn* requires that witnesses be given the opportunity to comment on propositions which the accused later proposes to put through other evidence, or submission; where that evidence does not arise elsewhere on the Crown case.

48. The rule requires the substance of an issue to be put to a witness; but does not require a detailed alternative account to be put to them in all cases. The rule operates flexibly in the context of a criminal trial; and procedures are available, even within the more strict provisions of pre-recorded evidence hearings, for the recalling of witnesses; if the court is satisfied it is in the interests of justice to do so.[17]

49. While care should be taken to comply with the rule in *Browne v Dunn*, it will not universally be necessary for practitioners to provide a detailed account of the accused's version in cross-examination of the complainant.[18]

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[16] [1893] R 67.
[17] *Criminal Procedure Act* 1986 (NSW) section 358.
[18] For a detailed analysis of the law relating to the application o the rule in a criminal law context as at 2012, see Sophia Becket (now DCJ), 'Evidence Update on the rule in *Browne v Dunn* in criminal trials' (2012), available from: https://criminalcpd.net.au/wp-content/uploads/2016/09/Evidence_UPdate_on_the_Rule_in_Browne_v_Dunn_in_Criminal_Trials.pdf
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PART II: THE REMEDIES

Introduction

50. This Part explores applications which may be made to resist attempts by the Crown to rely on evidence obtained in consequence of an accused revealing their case via a pre-recorded evidence hearing.

51. Potential remedies can be premised on the following propositions:
    i. It must be assumed that parliament did not intend to abrogate any entitlements of the accused; absent the legislature making this explicit.[19]
    ii. No attempt to balance the challenges arising from the 'public health emergency'[20] on one hand; with the right of the accused to a fair trial on the other; can be gleaned from either a textual construction of the provisions, or from the second reading speech.[21]
    iii. In those circumstances, it may be safely assumed that the provisions in the emergency legislation do not infringe upon the right of an accused to a fair trial. To construct the provisions otherwise would be incorrect.

52. Two alternative arguments flow from this. The first is that, if the court accepts it would be unfairly prejudicial for the crown to be allowed to rely the evidence, the court must have the power to prevent this outcome. The court must either have the power to exclude it; or if it does not, a power to order a stay of proceedings; on the basis that to admit evidence obtained in this manner would be an abuse of process.

53. The alternative argument is that, if the court does not have the power to ensure the accused receives a fair trial, the legislation prevents the court from ensuring *'a fair trial according to law,'* and for that reason is constitutionally invalid.[22]

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[19] '*Those aspects of a fair trial known as the principles of natural justice apply by force of the common law and the presumed intent of Parliament unless clearly excluded in a particular context': DPP v Shirvanian* (1998) 102 A Crim R 180 Mason P at [185].
[20] *Criminal Procedure Act* 1986 (NSW) section 353.
[21] See discussion at paragraphs [11]-[16] of Part I of this paper for an analysis.
[22] See *Nicholas v The Queen* [1998] HCA 9; 13 CLR 173 PER Gaudron J at [74].

54. It Is hoped the following suggested avenues of challenge to evidence obtained between pre-recorded evidence hearing and trial will be of use, and that resort to constitutional challenge will not be necessary.

Laying the Foundations

Pre-Trial Disclosure

55. The pre-recorded evidence hearing provisions do not arise for consideration until such time as all pre-trial and case management requirements have been complied with.[23]

56. It is imperative that the requirement for the prosecutor's disclosure under section 142 is complied with fulsomely. A notice which simply 'confirms' that all relevant material was provided in the brief is not sufficient to comply with the terms of section 142, which requires disclosure of the evidence to be adduced at trial, as opposed to all evidence available in the matter.

57. In *R v Dickson; R v Issakidis (No. 6)* [2014] NSWSC 1368, the Crown proposed to tender particular documentary evidence on the thirty-second day of trial. The evidence had been served prior to the trial; but had not been referred to as an exhibit the Crown proposed to tender in the Crown's section 142 notice.[24]

58. A letter accompanying the Crown's section 142 notice included the following passage:

   'The Crown reserves its right to lead additional evidence at trial from the larger brief of evidence if it is required to do so and notwithstanding it is not included in the Crown tender bundle. It is envisaged that such material would be limited and likely in response to developments at trial. including the Defence case.'[25]

59. Beech-Jones J observed at [29]-[30]:

[23] *Criminal Procedure Act* 1987 (NSW) s356.
[24] *Criminal Procedure Act* 1986 (NSW).
[25] *R v Dickson; R v Issakidis (No. 6)* [2014] NSWSC 1368 at [27].

'I attribute very little weight to this reservation in this letter. The Crown cannot reserve a power to exempt itself from the operation of s 142(1)(f). The entire point of the pre-trial disclosure regime is to avoid complex trials going off the rails by additional material being adduced which catches the accused by surprise.'

60. Insisting upon fulsome Crown disclosure prior to any listing of a pre-recorded evidence hearing will maximise the potential for excluding evidence served after this time.

Pre-trial Arguments

61. Prior to consideration of whether a pre-recorded evidence hearing should be ordered, the requirement to comply with the pre-trial and case management requirements in Division 3 of Part 3 of Chapter 3 also include pre-trial hearings to 'give a ruling on any question of law that might arise at the trial'.[26]

62. Practitioners should therefore ensure that if any pre-trial rulings are foreshadowed, including any applications to exclude evidence, or tendency notices, these are brought to the attention of the court, to enable them to be heard before consideration is given to the listing of a pre-recorded evidence hearing. The requirement is not limited to rulings which relate to the particular complainant or other witness to be called at a foreshadowed pre-recorded evidence hearing. It extends to all applications to eb made in the trial.

63. Aside from this being a statutory requirement, it will generally be in the interests of the accused to have all pre-trial rulings settled in advance of the calling of the witness. One reason for this is that rulings may impact on the cross-examination of the witness. Another reason is that the more issues are ventilated and settled prior to the calling of the witness, the more the Crown case will be clear; and the less likely it will be that the court would grant leave to amend aspects of the crown case, such as dates or particulars.

[26] 139(3)(g) of the Act.

64. It is therefore incumbent upon practitioners to insist on compliance with the process of conducting pre-trial hearings before pre-recorded evidence hearings are considered.

The Interest of Justice Test

65. Section 356(2)(d) provides that the court may only order a pre-recorded evidence hearing if satisfied that it is in the interests of justice to do so. The wording of the provision makes clear that the court must make a positive finding that it is in the interests of justice to make the order before doing so.

66. In opposing an order for a pre-recorded evidence hearing, the following are suggested factors which may militate against this finding:

    a. denial of procedural fairness to the accused, in the absence of a concession by the Crown that in embarking on a pre-recorded evidence hearing, the Crown have opened their case;[27]
    b. the potential for unfair prejudice to be occasioned to the accused: arising from the requirement for the accused to reveal their case at a time well in advance of trial, in cross-examination of the complainant (see further discussion on this issue below);
    c. the lack of any safeguard against the adducing of evidence obtained following the pre-recorded evidence hearing by the Crown;
    d. the denial of procedural fairness arising from the barriers to an accused in custody adequately instructing their representatives during the hearing (see discussion of this above);
    e. the denial of procedural fairness arising from the additional resourcing burden placed on the accused's representatives, arising from the lack of entitlement to a recording of the complainant's evidence;
    f. the denial of fairness to the accused's legal representatives, by restricting access to the complainant's evidence to such an extent that, in the context of the current COVID-19 pandemic, it is an unacceptable risk to health to

[27] If the crown make such a concession, this may be a factor in favour of resisting later attempts to change the Crown's case or amend particulars which may arise following the unearthing of further evidence.

require a representative to physically attend a prosecuting office or court registry for long periods on more than one occasion to view the evidence; and

g. the lack of any practical efficiencies being created by the hearing, in circumstances where the evidence will be adduced at the pre-recorded evidence hearing, and then required to be re-played once a jury is empanelled.

67. If an order is made for a pre-recorded evidence hearing following these issues being raised on behalf of the accused, it will be useful to obtain a transcript of the submissions and ruling, for potential use in later applications to exclude evidence obtained following the hearing.

68. For an accused person in custody, this interests of justice test applies in addition to the interests of justice test for whether the hearing should be held by AVL (see above).

Exclusion of evidence served after pre-recorded evidence hearing

Restriction on recalling the witness

69. Section 358 limits the ability of either party to recall a witness who has already given evidence in a pre-recorded evidence hearing:

358 Further evidence by witness whose evidence is pre-recorded

(1) A witness in a proceeding whose evidence is pre-recorded at a pre-recorded
evidence hearing under this Division cannot give further evidence in the trial without the leave of the court.

(2) An application for leave may be made by any party to the proceedings.

(3) The court must not give leave unless it is satisfied—

(a) the witness or other party is seeking leave because of becoming aware
of a matter of which the party could not reasonably have been aware at the time of the recording, or

(b) it is otherwise in the interests of justice to give leave.

(4) The court is to ensure that the witness is questioned by a party to the proceedings only in relation to matters relevant to the matters mentioned in subsection (3).

(5) This section applies despite anything to the contrary in this Act or the Evidence Act 1995.

70. The terms of the restriction are reasonably wide. For example, it is foreseeable that if cross-examination of a complainant gives rise to a further avenue of investigation by police, and results in gathering further evidence against an accused; the Crown could make good an argument that the requirement in 358(3)(a) is made out. Further, if the probative value of any resulting evidence is high, the terms of 358(3)(b) may be met.

71. In any case, the risk of prejudice to the accused is not limited to evidence which would be adduced via the same witness who gave evidence at a pre-recorded evidence hearing. A more common scenario would be that evidence is identified because of investigations arising out of issues ventilated at the pre-recorded evidence hearing; but adduced through other witnesses. Section 358 does not place any limits on adducing such evidence; although adducing other evidence may necessitate an application on behalf of the accused to recall a witness who has given evidence in a pre-recorded evidence hearing to allow cross-examination on the further evidence.

Section 146 of the Criminal Procedure Act: evidence the Crown failed to disclose

72. As discussed in Part I,[28] the court may refuse to admit evidence at trial which a party failed to disclose in accordance with pre-trial disclosure requirements.[29] The relevance of section 146 may be readily inferred from the fact that it is found within the set of pre-trial disclosure and case management provisions which are

[28] See paras [39]-[40].

[29] These provisions are found in Division 3 of Part 3 of Chapter 3 of the *Criminal Procedure Act* 1986 (NSW).

required to be complied with, prior to a pre-recorded evidence hearing being held.[30]

73. The validity of challenge to evidence on the basis of this provision will turn on the facts of each case; but an important consideration is whether there could have been a failure of the Crown to 'comply with a requirement for pre-trial disclosure' of material, which only comes to light at a point after the time for pre-trial disclosure has passed.

74. Of further note, the use of the word 'may' indicates the provision is wholly within the discretion of the judge.

75. In *Dickson*, in excluding most of the impugned evidence under section 146(1), Beech-Jones observed at [21]:

    'In the time available, I have not been able to undertake any detailed research concerning the factors governing the exercise of the discretion conferred by s 146(1). Nevertheless, I am proceeding on the basis that those factors include: any reasons, or absence of reasons, for the relevant non-compliance; the probative value of the material sought to be adduced; any unfair prejudice occasioned by the tender of the material or, more importantly, by its late notification to the accused that it was proposed to be tendered and, overall, whether to allow its tender would be consistent with the conduct of a fair trial.'

76. In *R v Hawi & ors* (No 10) [2011] NSWSC 1656, investigating police inadvertently overlooked disclosure of an eyewitness statement to the Crown. The Crown disclosed the statement to the defendant shortly after receiving it from the police; after almost two weeks of trial. Counsel for an accused, Menzies, sought that the evidence be excluded under section 146. He had opened on an expected lack of eyewitness evidence identifying the accused. R A Hulme J ruled:
    a. '*The proposal of the Crown "to adduce at the trial" the evidence of Mr Moore did not arise until 3 June 2011 because until that date it was*

[30] Per section 356 of the Act.

completely unaware of the existence of his statement. Accordingly, there was no obligation on the Crown prior to that date to give to the accused notice by way of providing a copy of his statement';[31]

b. '[counsel for Menzies] *submitted that the disclosure requirements in the latter should be construed so as to incorporate the police within the prosecutor's obligations and therefore attract the sanction in section 146(1). With the greatest of respect to Mr Stratton I was not persuaded by such submissions'*[32]

77. The case ultimately turned on a determination that the prejudice occasioned by the late disclosure was insufficient to warrant the discretionary exclusion:

    c. *'My conclusion is that there is no cause for embarrassment or prejudice in the manner in which* [counsel for Menzies] *opened to the jury in response to the Crown case as he then understood it to be, in the light of it subsequently being disclosed that the Crown sought to add to its case the evidence of Mr Rodney Moore.'*[33]

78. In *R v Ludeke* [2016] NSWDC 57, Colefax DCJ excluded evidence of an expert report obtained and served by the Crown within three weeks of the trial, having commissioned the report late without satisfactory explanation for this. The evidence was excluded ''pursuant to sections 130 and 146(1)'.[34] A reading the judgment in that matter does not reveal whether argument was directed to the form of words 'failure to disclose' used in section 146.

79. These cases reveal a divergence of approach to the provision. Given the limited guidance provided in section 146 itself on how such an application for exclusion is to be determined, this is perhaps not surprising.

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[31] *R v Hawi & ors* (No 10) [2011] NSWSC 1656 at [20].
[32] Ibid at [23].
[33] Ibid at [32].
[34] *R v Ludeke* [2016] NSWDC 57 at [37].

Section 137 of the Evidence Act: evidence which is unfairly prejudicial

80. Where a challenge to evidence under section 146 of the *Criminal Procedure Act* fails, or is not open, practitioners could consider an application to exclude evidence under section 137 of the *Evidence Act.* This section provides:

> ***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.*

81. It is noteworthy that section 137 is a mandatory exclusion provision. If the court finds that the probative value of the evidence is outweighed by the danger of unfair prejudice to the accused, the evidence must be excluded.

82. There is often little utility in devoting significant argument to the effect that the probative value of the evidence is low.[35] Submissions can frequently be more usefully directed to persuade a court that the unfair prejudice to the accused is so great as to outweigh the probative value.

83. The unfair prejudice to the accused lies in in admitting evidence which directly arises from the obligation of the accused to put their case to the complainant far in advance of the balance of trial. This goes beyond the pre-trial disclosure contemplated elsewhere in the *Criminal Procedure Act*.[36]

84. In order to engage section 137, the evidence must not only be prejudicial to the accused; but unfairly so. In these matters, the unfairness will lie in the process of requiring the accused to reveal their case in the cross-examination of the complainant; before adjourning the trial for an extended period; creating an opportunity for prosecuting authorities to undertake further investigations in the

[35] Bearing in mind that this is to be assessed taking the evidence at its highest, without regard to the reliability and credibility of the evidence; and on the basis the jury will accept it: *IMM v The Queen* (2016) 257 CLR 300 at 314-316 [49]-[54] per French CJ, Kiefel, Bell and Keane JJ*; The Queen v Bauer* [2018] HCA 40; 92 ALJR 846 at [69]. However, each case will turn on its own facts; this is not suggested as a firm rule.

[36] See Division 3 of Part 3 of Chapter 3 of the Act.

matter. This process bears some similarity to an infringement on the privilege against self-incrimination; although this comparison should not be overstated.

85. In support of an argument that the prejudice in a particular matter is unfair, it is useful to consider the legislative intent behind the emergency measures bill.[37] Having regard to the silence of the legislature on preserving the right of an accused to a fair trial, it cannot be assumed that any unfairness to the accused resulting from the pre-recorded evidence hearing process was contemplated by parliament, and deemed acceptable. There is nothing in either the wording of the provisions, or the second reading speech, which could provide support for the proposition that the legislature contemplated the adducing of evidence obtained as a result of the accused being required to reveal their case far in advance of the balance of trial.

86. In arguing an application for exclusion under section 137, the unfairness of the prejudice to the accused may need to be established on a voir dire, generally by calling the officer in charge of the matter. Cross-examination should be directed to when, and how, the evidence was obtained; to establish that the prosecuting authority was alerted to the avenue of investigation as a result of issues ventilated during the pre-recorded evidence hearing. Connecting the identification of evidence to the pre-recorded evidence process will strengthen an unfairness argument.

Section 138: evidence which is obtained improperly

87. Section 138 of the Evidence Act provides:

> *138 Exclusion of improperly or illegally obtained evidence*
>
> *(1) Evidence that was obtained—*
>
> *(a) improperly or in contravention of an Australian law, or*
>
> *(b) in consequence of an impropriety or of a contravention of an Australian law,*

[37] The purpose of the legislation, and extract from the second reading speech, can be found in Part I of the paper at [13] and [15], respectively.

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

88. There is no prohibition on investigating matters arising from a pre-recorded evidence hearing. Further, there is no express prohibition on the admission of evidence obtained as a result of those investigations. In those circumstances, it would seem unlikely that a court would be satisfied that evidence was obtained improperly on this basis alone, sufficient to engage section 138.

89. If the circumstances of a particular case were sufficient to engage the section, the court must undertake a balancing exercise to determine whether the evidence is admissible.[38]

A Stay of Proceedings

90. A stay of proceedings is an exceptional remedy.[39] Where an abuse of process is demonstrated, and there is no other remedy to alleviate the unfairness, the Court has a discretion to order that the proceedings be stayed.[40]

91. In *DPP v Shirvanian* (1998) 102 A Crim R 180, Mason P stated at [185]:

    '*The duty to observe fairness, at least in its procedural sense, is a universal attribute of the judicial function. Those aspects of a fair trial known as the principles of natural justice apply by force of the common law and the presumed intent of Parliament unless clearly excluded in a particular context. In my view, the same can be said about the power to prevent abuse of process as an incident of the duty to ensure a fair trial. And I can see no principled ground for excluding a power to grant a stay to prevent or nullify other categories of abuse of process.'*

92. It is not possible to foresee whether a case may arise in which none of the exclusionary provisions suggested above apply; and yet the proceedings is

[38] See *Kadir v The Queen; Grech v The Queen* [2020] HCA 1; 94 ALJR 168.
[39] *Jago v District Court of NSW* (1989) 168 CLR 23 at 76 per Gaudron J.
[40] *R v Carroll* (2002) 213 CLR 635 at 657 per Gaudron and Gummow JJ.

marked by a pervasive unfairness amounting to an abuse of process. If such a case does arise, practitioners should be prepared to consider that a stay be sought.[41]

Conclusion

93. The introduction of pre-recorded evidence hearings for a wider range of trial matters will have as yet unknown consequences. Hopefully, the considerations in this paper may provide some guidance as to potential issues which may arise from these provisions. It is important to be vigilant in the face of novel legislation to protect, so far as possible, the right of an accused to a fair trial.

[41] For guidance on applications for a stay of proceedings, practitioners are directed to helpful papers on this topic, available on the CriminalCPD.net.au website: https://criminalcpd.net.au/procedure/.

Appendix 1: Checklist

1. Ensure your client is arraigned before any pre-recording commences.

2. If your client is on remand and does not consent to appearing via AVL, refer the court to 5BA of the AVL Act in arguing whether it is in the interests of justice for the accused to appear by AVL, highlighting the practical difficulties in obtaining instructions.

3. Ensure any known defects in prosecution disclosure are remedied prior to the listing of a pre-recorded evidence hearing, utilising section 134(2) if necessary.

4. Raise on the record your position that in embarking on a pre-recorded evidence hearing process, the Crown has opened its case. If this is not agreed, consider arguing that it is not in the interests of justice to proceed with a pre-recorded evidence hearing if the crown does not open its case prior to the hearing (s356(2)(d)), and seek that the order be vacated.

5. Raise on the record the potential for unfairness to be occasioned to the accused if the early recording of the complainant's evidence prompts further investigation, resulting in the Crown changing the case the accused must meet, to preserve the accused's position in relation to potential future applications.

6. Ensure consideration has been given to arrangements for the accused to provide instructions during the pre-recorded evidence hearing.

7. At the outset of the hearing, ventilate the requirement for breaks in the hearing to allow for further conferral between the accused and their legal representative.

8. Comply with *Browne v Dunn;* but be aware the authority does not necessarily require the accused to put their complete case in detail to a witness, and craft cross-examination accordingly.

9. After the hearing, request transcript for 'all words said' relating to the matter, rather than a transcript for the complainant's evidence only, if there have been any connection issues, or disconnection for the purpose of conferral with the accused.

10. After the hearing, request that a copy of the complainant's evidence be provided on an undertaking that it not be copied; distributed; or shown to the accused.

11. If further evidence is served following the hearing, consider applications to exclude the evidence or to apply for a stay of proceedings for unfairness.

Appendix 2: AVL Provisions

District and Supreme Court AVL appearances in the time of COVID-19

COVID-19 Provisions

1. Section 22C(3) of the *Evidence (Audio and Audio Visual Links)* Act 1998 (NSW)[42] provides that 'the appearance of an accused person in any physical appearance proceedings (other than proceedings relating to bail or proceedings prescribed by the regulations) may take place by way of audio visual link if the court directs.'

2. 'Physical appearance proceedings' are defined and include *'(a) any trial (including an arraignment on the day appointed for the trial) or hearing of charges.'* As a matter of construction, the fact that 'trial' includes arraignment makes clear that it must also include a pre-recorded evidence hearing.

3. Regulation 4A of the *Evidence (Audio and Audio Visual Links) Regulation 2015* prescribes proceedings on indictment, as follows:

   EVIDENCE (AUDIO AND AUDIO VISUAL LINKS) REGULATION 2015 - REG 4A

   COVID-19 pandemic--provision to facilitate appearance of accused by audio visual link not to apply to proceedings on indictment

   4A COVID-19 PANDEMIC--PROVISION TO FACILITATE APPEARANCE OF ACCUSED BY AUDIO VISUAL LINK NOT TO APPLY TO PROCEEDINGS ON INDICTMENT

   Proceedings on indictment are prescribed for the purposes of section 22C(3) of the Act.

4. The effect of the regulation is that 22C(3) does not provide a power for the court to conduct a pre-recorded evidence hearing with the accused appearing by AVL.

Older Provisions

5. Existing provisions in the *Evidence (Audio and Audio Visual Links)* Act 1998 (NSW) may allow the conduct of pre-recorded evidence hearings where the accused consents, or the court is satisfied it is in the interests of justice. Section 5BA provides:

   (1) An accused detainee who is charged with an offence and is required to appear (or be brought or be present) before a NSW court in physical appearance proceedings concerning the offence must, unless the court otherwise directs, appear physically before the court…

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[42] This provision was enacted in response to COVID-19 and is headed 'COVID-19 pandemic--special provisions'

(3) Subsection (1) does not apply if the parties to the proceeding consent to the accused detainee appearing before the court by audio visual link from any place within New South Wales at which the accused detainee is in custody other than the courtroom or place where the court is sitting.

(4) The court may make a direction under subsection (1) on its own motion or on the application of any party to the proceeding or of any person on behalf of a designated government agency.

(5) The court may make such a direction only if it is satisfied that it is in the interests of the administration of justice for the accused detainee to appear before the court by audio visual link from a place within New South Wales at which the person is in custody other than the courtroom or place where the court is sitting.

(6) Without limiting the factors that the court may take into account in determining whether it is in the interests of the administration of justice to make a direction under subsection (1), the court must take into account such of the following factors as are relevant in the circumstances of the case--

(a) the risk that the personal security of a particular person or persons (including the accused detainee) may be endangered if the accused detainee appears in the courtroom or place where the court is sitting,

(b) the risk of the accused detainee escaping, or attempting to escape, from custody when attending the courtroom or place where the court is sitting,

(c) the behaviour of the accused detainee when appearing before a court in the past,

(d) the conduct of the accused detainee while in custody, including the accused detainee's conduct during any period in the past during which the accused detainee was being held in custody in a correctional centre or detention centre,

(e) the potential for disruption of the accused detainee's participation in a rehabilitation or education program if the accused detainee were to be transported to, and appear in, the courtroom or place where the court is sitting,

(f) safety and welfare considerations in transporting the accused detainee to the courtroom or place where the court is sitting,

(g) the efficient use of available judicial and administrative resources,

(h) any other relevant matter raised by a party to the proceeding or other applicant for the making of the direction.