

c2020-225B
GRNS--The Greens

LEGISLATIVE COUNCIL

Stronger Communities Legislation Amendment (Domestic Violence) Bill 2020

First print

Proposed amendment

No. 1 Evidence in domestic violence proceedings

Page 9, Schedule 2[3]. Insert after line 11—

**Division 6 Special provisions relating to retrials of proceedings
for a domestic violence offence**

289AA Definitions

In this Division—

accused person, in relation to any proceedings, means the person who stands, or any of the persons who stand, charged in those proceedings with a domestic violence offence.

domestic violence offence witness is a witness in the proceedings, other than the complainant, against whom any of the following is alleged to have been committed by the accused person—

- (a) a domestic violence offence,
- (b) acts that would constitute a domestic violence offence were those acts to occur in this State at the time of the commencement of the proceedings.

original evidence of the complainant or of a special witness has the meaning given by section 289AB.

special witness means the following witnesses in relation to the domestic violence offence—

- (a) a domestic violence offence witness,
- (b) a witness who is a cognitively impaired person,
- (c) a witness who is under the age of 18 years.

289AB Admission of evidence of complainant or special witness in new trial proceedings

- (1) If a person is convicted of a domestic violence offence and, on an appeal against the conviction, a new trial is ordered, the prosecutor may tender as evidence in the new trial proceedings a record of the original evidence of the complainant or a special witness.

-
- (2) For the purposes of this Division, the *original evidence* of the complainant or a special witness means all evidence given by the complainant or special witness in the proceedings from which the conviction arose, referred to in this Division as the *original proceedings*, including—
 - (a) the evidence given by the complainant or special witness on examination in chief in the original proceedings, and
 - (b) any further evidence given on cross-examination or re-examination in those proceedings.
 - (3) Despite anything to the contrary in the *Evidence Act 1995*, or any other Act or law, a record of the original evidence of the complainant or a special witness is admissible in the new trial proceedings if—
 - (a) the prosecutor gives written notice to the accused person, in accordance with the regulations, of the prosecutor's intention to tender the record under this section, and
 - (b) the prosecutor gives written notice to the court of the prosecutor's intention to tender the record under this section, and
 - (c) the notices referred to in paragraphs (a) and (b) are given no less than 21 days before the court commences hearing the new trial proceedings or within such other period as the court may allow.
 - (4) The hearsay rule, within the meaning of the *Evidence Act 1995*, does not prevent the admission of a record of the original evidence of the complainant or a special witness under this Division or the use of that record to prove the existence of a fact that the complainant or special witness intended to assert by a representation made in the original evidence.
 - (5) The court hearing the new trial proceedings does not have any discretion to decline to admit a record of the original evidence of the complainant or a special witness if it is admissible under this Division.
 - (6) If a record of original evidence of a special witness is admitted in new trial proceedings under this section, the special witness is not compellable to give further evidence about the same matters in the new trial proceeding unless the court is satisfied that it is necessary for the special witness to give further evidence—
 - (a) to clarify a matter relating to the original evidence of the special witness, or
 - (b) to canvass information or material that has become available since the original evidence was given, or
 - (c) in the interests of justice.
 - (7) The court is to ensure that the special witness is questioned by a party to the new trial proceedings only in relation to matters that are relevant to the matters mentioned in subsection (6).
 - (8) Subject to subsection (7), if a special witness gives further evidence under this section, the special witness is compellable, for the prosecution or the accused person, to give evidence.
 - (9) The court hearing the new trial proceedings may decline to admit a record of the original evidence of a special witness if, in the court's opinion, the accused person would be unfairly disadvantaged by the admission of the record, having regard to the following—
 - (a) the completeness of the original evidence, including whether the special witness has been cross-examined on the evidence,
 - (b) the effect of editing any inadmissible evidence from the original evidence,

-
- (c) the availability or willingness of the special witness to attend to give further evidence and to clarify any matters relating to the original evidence,
 - (d) the interests of justice,
 - (e) any other matter the court thinks relevant.
- (10) However, the court may give directions requiring a record of the original evidence of the complainant or a special witness to be altered or edited for the purpose of removing any statements that would not be admissible if the original evidence of the complainant or a special witness had been given orally before the court hearing the new trial proceedings in accordance with the usual rules and practice of the court.
- (11) In addition, a record of the original evidence of the complainant or a special witness may be altered or edited in accordance with an agreement between the prosecutor and the accused person or the accused person's Australian legal practitioner, if any.
- (12) This Division applies in respect of proceedings for a new trial in which a person stands charged with a domestic violence offence whether or not—
- (a) the person stands charged with that offence alone or together with another offence, as an additional or alternative count, and
 - (b) whether or not the person is liable, on the charge, to be found guilty of any other offence.
- (13) This Division extends to proceedings for a new trial ordered before the commencement of this Division, including new trial proceedings that have been commenced or partly heard.

289AC Complainant or special witness not compellable to give further evidence

If a record of the original evidence of the complainant or a special witness, or any part of the record, is admitted in proceedings under this Division, the complainant or special witness is not compellable to give further evidence in the proceedings, despite anything to the contrary in this Act or the *Evidence Act 1995*, including for the purpose of examination in chief, or cross-examination or re-examination by or at the request of the accused person or the accused person's Australian legal practitioner.

289AD Complainant or special witness may elect to give further evidence

- (1) If a record of the original evidence of the complainant or a special witness, or any part of the record, is admitted in proceedings under this Division, the complainant or special witness may, with leave of the court hearing the proceedings, and only if the complainant or special witness so chooses, give further oral evidence in the proceedings.
- (2) The court is to give leave to the complainant or special witness to give such further evidence in the proceedings only if the court is satisfied, on application by one of the parties to the proceedings, that it is necessary for the complainant or special witness to give further oral evidence—
 - (a) to clarify any matters relating to the original evidence of the complainant or special witness, or
 - (b) to canvas information or material that has become available since the original proceedings, or
 - (c) in the interests of justice.
- (3) The court is to ensure that the complainant or special witness is questioned by any party to the proceedings only in relation to matters that are relevant to the reasons for the grant of leave by the court.

-
- (4) Subject to subsection (3), if a complainant or special witness gives any further oral evidence under this section, the complainant or special witness is compellable, for the prosecution or the accused person, to give evidence.
 - (5) Subsection (4) applies despite section 289AC.

289AE Form in which record of original evidence of complainant or special witness is to be tendered

- (1) A record of the original evidence of the complainant or a special witness tendered by the prosecutor under this Division must be the best available record, or be comprised of the best available records, of the original evidence of the complainant or special witness, and the record or records concerned must be properly authenticated.
- (2) For the purposes of this section, the *best available record* of the evidence, or any part of the evidence, given by a complainant or special witness is—
 - (a) an audio visual recording of the evidence, or
 - (b) if an audio visual recording of the evidence is not available—an audio recording of the evidence, or
 - (c) if neither an audio visual recording nor an audio recording of the evidence is available—a transcript of the evidence.
- (3) If the whole or part of the evidence given by the complainant or special witness in the original proceedings was given in the form of a recording made by an investigating official, as provided for by Part 6, the best available record of that evidence is the recording viewed or heard by the court in those original proceedings.
- (4) A record of any evidence given by a complainant or special witness is *properly authenticated* for the purposes of this section if—
 - (a) the record has been authenticated by the court before which the evidence concerned was given or by the registrar or other proper officer of that court in accordance with any directions of the court, or
 - (b) the record has been authenticated by the person or body responsible for producing the record, or
 - (c) the record has been authenticated in any other manner prescribed by the regulations.

289AF Access to audio visual or audio recording

- (1) If a record of the original evidence of the complainant or a special witness tendered or proposed to be tendered by the prosecutor under this Division is an audio visual recording or audio recording, the accused person, and the accused person's Australian legal practitioner, if any, are not entitled to be given possession of the record or a copy of it, despite anything to the contrary in this Act or the *Evidence Act 1995*.
- (2) However, the accused person and the accused person's Australian legal practitioner, if any, are to be given reasonable access to the recording to enable the person and the legal practitioner to listen to the recording and, if the record is an audio visual recording, to view the recording.
- (3) Access may be given on more than 1 occasion.
- (4) The regulations may make provision for the procedures to be followed in connection with the giving of access under this section, and may provide for the giving of access to other persons assisting the accused person or the accused person's Australian legal practitioner.

289AG Exhibits may also be tendered

- (1) If a record of the original evidence of a complainant or a special witness is tendered by the prosecutor under this Division, an exhibit tendered in the original proceedings on the basis of the original evidence of the complainant or special witness and admitted in the original proceedings are also admissible in the new trial proceedings as if the original evidence of the complainant or special witness had been given orally before the court hearing the new trial proceedings in accordance with the usual rules and practice of the court.
- (2) This section does not prevent another exhibit tendered in the original proceedings from being tendered and admitted in the new trial proceedings in accordance with the usual rules and practice of the court hearing the new trial proceedings.

Division 7 Special provisions relating to subsequent trials of proceedings for domestic violence offences

Note. Division 6 of this Part applies in relation to a retrial of proceedings that follows an appeal against a conviction for a domestic violence offence. This Division applies when a trial for a domestic violence offence has been discontinued and a new trial is listed.

289AH Definitions

In this Division—

accused person has the same meaning as in section 289AA.

original evidence of the complainant or a special witness has the meaning given by section 289AB.

special witness has the same meaning as in section 289AA.

289AI Admission of evidence of complainant or special witness in new trial proceedings

- (1) If the trial of an accused person is discontinued following the jury being discharged because the jurors could not reach a verdict, or discontinued for another reason, and, as a result, a new trial is listed, the prosecutor may tender as evidence in the new trial proceedings a record of the original evidence of the complainant or a special witness.
- (2) For the purposes of this Division, the *original evidence* of the complainant or a special witness means all evidence given by the complainant or special witness in the discontinued trial, referred to in this Division as the *original proceedings*, including the evidence given by the complainant or special witness on examination in chief in the original proceedings and any further evidence given on cross-examination or re-examination in those proceedings.
- (3) Despite anything to the contrary in the *Evidence Act 1995*, or another Act or law, a record of the original evidence of the complainant or a special witness is admissible in the new trial proceedings if—
 - (a) the prosecutor gives written notice to the accused person, in accordance with the regulations, of the prosecutor's intention to tender the record under this section, and
 - (b) the prosecutor gives written notice to the court of the prosecutor's intention to tender the record under this section, and
 - (c) the notices referred to in paragraphs (a) and (b) are given no less than 21 days before the court commences hearing the new trial proceedings or within such other period as the court may allow.
- (4) The hearsay rule, within the meaning of the *Evidence Act 1995*, does not prevent the admission of a record of the original evidence of the complainant or a special witness under this Division or the use of that record to prove the

existence of a fact that the complainant or special witness intended to assert by a representation made in the original evidence.

- (5) Despite subsection (3), the court hearing the new trial proceedings may decline to admit a record of the original evidence of the complainant or a special witness if, in the court's opinion, the accused would be unfairly disadvantaged by the admission of the record, having regard to the following—
 - (a) the completeness of the original evidence, including whether the complainant or special witness has been cross-examined on the evidence,
 - (b) the effect of editing any inadmissible evidence from the original evidence,
 - (c) the availability or willingness of the complainant or special witness to attend to give further evidence and to clarify any matters relating to the original evidence,
 - (d) the interests of justice,
 - (e) any other matter the court thinks relevant.
- (6) If the court allows a record of the original evidence of the complainant or a special witness to be admitted, the court may give directions requiring the record to be altered or edited for the purpose of removing a statement that would not be admissible if the original evidence of the complainant or special witness had been given orally before the court hearing the new trial proceedings in accordance with the usual rules and practice of the court.
- (7) A record of the original evidence of the complainant or a special witness may be altered or edited in accordance with an agreement between the prosecutor and the accused person or the accused person's Australian legal practitioner, if any.
- (8) This Division applies to proceedings for a new trial in which a person stands charged with a domestic violence offence whether or not—
 - (a) the person stands charged with that offence alone or together with another offence, as an additional or alternative count, and
 - (b) the person is liable, on the charge, to be found guilty of another offence.
- (9) This Division extends to proceedings for a new trial listed before the commencement of this Division, including new trial proceedings that have been commenced or partly heard.

289AJ Whether complainant or special witness compellable to give further evidence

- (1) If a record of the original evidence of the complainant or a special witness, or any part of the record, is admitted in proceedings under this Division, the complainant or special witness is not compellable to give further evidence in the proceedings unless the court is satisfied that it is necessary for the complainant or special witness to give further evidence—
 - (a) to clarify any matters relating to the original evidence of the complainant or special witness, or
 - (b) to canvas information or material that has become available since the original proceedings, or
 - (c) in the interests of justice.
- (2) Subsection (1) applies despite anything to the contrary in this Act or the *Evidence Act 1995*.
- (3) The court is to ensure that the complainant or special witness is questioned by any party to the proceedings only in relation to matters that are relevant to the matters mentioned in subsection (1).

-
- (4) Subject to subsection (3), if a complainant or special witness gives further oral evidence under this section, the complainant or special witness is compellable, for the prosecution or the accused person, to give evidence.

289AK Complainant or special witness may elect to give further evidence

- (1) If a record of the original evidence of the complainant or a special witness, or any part of the record, is admitted in proceedings under this Division, the complainant or special witness may, with leave of the court hearing the proceedings, and only if the complainant or special witness so chooses, give further oral evidence in the proceedings.
- (2) The court is to give leave to the complainant or special witness to give such further evidence in the proceedings only if the court is satisfied, on application by 1 of the parties to the proceedings, that it is necessary for the complainant or special witness to give further oral evidence—
- (a) to clarify any matters relating to the original evidence of the complainant or special witness, or
 - (b) to canvas information or material that has become available since the original proceedings, or
 - (c) in the interests of justice.
- (3) The court is to ensure that the complainant or special witness is questioned by a party to the proceedings only in relation to matters that are relevant to the reasons for the grant of leave by the court.
- (4) Subject to subsection (3), if a complainant or special witness gives further oral evidence under this section, the complainant or special witness is compellable, for the prosecution or the accused person, to give evidence.

289AL Application of provisions dealing with form of record of original evidence, access to recordings and exhibits

Sections 306E–306G, including any regulations made for the purposes of those sections, apply for the purposes of this Division with necessary modifications.