Police Statements

ss32 & 33 Evidence Act (NSW) 1995

I often see police officers give evidence by reading or even tendering their written statements in circumstances were this is clearly objectionable. This practice goes unchallenged because many defence lawyers wrongly believe that police have an absolute right to read their statements. This article seeks to assist legal practitioners appearing in the Local Court of NSW.

Ordinary Witnesses

The default position is that all witnesses give their evidence without the assistance of written statements made beforehand. Only once they exhaust their memory can they seek leave to refer to a written statement to 'refresh' their memory.[1] The result is that many witnesses spend hours memorizing their statement but only give evidence for a few minutes.

Police Witnesses

This was particularly annoying for police officers who might give evidence in multiple hearings in any given week and were prone to confuse each incident with another similar incident. So, the rules were changed to allow police officers to read their statements in criminal proceedings.[2] However, there are conditions precedent that must be met before a police officer can read their statement.

Section 33(2) Evidence Act provides that a statement may not be read unless:

> (a) *the statement was made by the police officer at the time of or soon after the occurrence of the events to which it refers, and*
> (b) *the police officer signed the statement when it was made, and*
> (c) *a copy of the statement had been given to the person charged or to his or her Australian legal practitioner or legal counsel a reasonable time before the hearing of the evidence for the prosecution.*

Is the Witness a Police Officer?

'Police officer' is defined in the dictionary to the Evidence Act as:

> (a) *a member of the Australian Federal Police, or*
> (b) *a member of the police force of a State or Territory.*

So, the section does not apply to council rangers or to civilians who happen to work for the police force. Yet the police will often try it on. Last month I won a littering matter against the Environment Protection Authority. They wanted their civilian informant to read his statement and I objected that as a civilian he was covered by s32 and not s33.

---

1 s32 Evidence Act (NSW)1995
2 s33 Evidence Act (NSW)1995

‘Soon After’

The next issue is whether the written statement was made ‘at the time or soon after’ the event. The leading case is Orchard v Spooner[3] which referred to s418 Crimes Act which was in force from 1991 until it was replaced by s33 Evidence Act in 1995. Newman J held at [119]:

> *… While, as I have said, ultimately it is a question of fact for the tribunal to determine, it seems to me that the subsection contemplates days rather than weeks as being a permissible time which is allowed to elapse in order to allow a statement to be read in accordance with the section.*

Taken literally this would impose a thirteen day limit on the police to make their statement as fourteen days would amount to two ‘weeks’. However, my rule of thumb is to object to the police reading any statement that was made more than 48 hours after the event.

Police officers are issued number notebooks for the purpose of making notes of an event. It may be unreasonable to expect police to make notes during the event itself, but it is perfectly reasonable to expect them to do so the next day. Any longer than this and they should be required to explain:

- Why they weren’t able to make a notebook statement the next day,
- Whether their memory faded during the interval, and
- Whether they relied on the Facts Sheet or another officer’s statement.

Reading v Led Through

The Court of Appeal has held that the court has a discretion as to whether a police officer can read or is led through his statement (answer questions with the assistance of it). They suggested the latter would be more appropriate where the police officer was involved directly as a victim.[4]

If you have any interesting issues, I'm available every day.

Chris Nowlan
Barrister-at-Law
Phone: (02) 8251 0066
chris@chrisnowlan.com

[3] Orchard v Spooner (1992) 28 NSWLR 114
[4] Chisari v The Queen (No 2) [2006] NSWCCA 325 [27]-[30]