

DVEC¹

EVIDENCE IN CHIEF REFORMS FOR VICTIMS OF DOMESTIC VIOLENCE - PRACTICAL ISSUES FOR DEFENCE LAWYERS

NERISSA KEAY²
TRIAL ADVOCATE
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BRIEF OVERVIEW – CRIMINAL PROCEDURE AMENDMENT (DOMESTIC VIOLENCE COMPLAINANTS) ACT 2014

The primary purpose of this legislation is to allow pre-recording of the evidence in chief, of complainants in domestic violence matters. Where evidence is recorded, the recording will replace written statements. It mirrors, in many respects, the use of recorded statements from children and other vulnerable witnesses in personal assault matters.³

The legislation which amends the *Criminal Procedure Act 1986* commenced on 1 June 2015. It applies to all domestic violence offences (as defined in the *Crimes (Domestic & Personal Violence) Act 2007*⁴) in the Local Court, Children’s Court and in higher courts.

There are essentially two preconditions to police opting to video record rather than write out the complainant’s statement where a DV offence is reported. They are that (s289D):

1. The complainant gives informed consent; and
2. The questioning occurs *as soon as practicable* after the offence.

According to the Second Reading Speech the purpose of the reforms is to enhance victim safety and improve perpetrator accountability. The police describe its advantages as including –

- Reducing victim trauma;
- Reduce the difficulty for victims in remembering details;

¹ “Domestic Violence Evidence in Chief” seems to be the common shorthand for these reforms.

² Many thanks to Alex Curnick from Strategic Policy & Planning who has been of great assistance in the preparation of this paper.

³ Chapter 6 Part 5 *Criminal Procedure Act 1986* (Sexual offences) and Part 6 Vulnerable People.

⁴ s11 - **domestic violence offence** means a personal violence offence committed by a person against another person with whom the person who commits the offence has or has had a domestic relationship (see s5).

- Assist victims to give an accurate account;
- Assist the court to understand the victims demeanour at the time;
- Reduce intimidation of victims to change their evidence;
- Increase guilty pleas; and
- Save time for victims in giving statements.⁵

By design it is expected to increase the number of guilty pleas, and the number of convictions in defended matters.

COMMENCEMENT DATE – 1 JUNE 2015 – SURVEY RESULTS

An email survey of the Criminal Law Division (not a reliable research tool) revealed single matters at DCLC, Sutherland (defendant in custody), Penrith and Lismore.

It was anticipated that the scheme would be rolled out on the commencement date, but anecdotally, that would not appear to be the case.

RECORDED STATEMENTS

The most important thing to note is that section 289P provides that is an offence to –

Copy, permit a person to copy,... give possession of the recorded statement to another person or to publish the recorded statement except

- (a) For the legitimate purposes of a criminal investigation or criminal proceedings, or
- (b) If the person is a public official, in the proper exercise of the person's public official functions (including any functions relating to education and training).

Maximum penalty: 100 penalty units, or 2 years imprisonment, or both

Furthermore (s289P(2)) –

This section does not permit any person, including an Australian legal practitioner who represents an accused person, to give possession of a video copy of a recorded statement to the accused person or to permit the accused person to copy or obtain a copy of a recorded statement.

So in no circumstances is an accused person entitled to be given a copy of the recorded evidence.

⁵ DVEC Summary Domestic & Family Violence Team – NSW Police Force
<http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Fwww.wlsnsw.org.au%2Fwp-content%2Fuploads%2FDVEC-external-summary.pdf&ei=UyeKVceUF8KF8gXWmZeYBg&usg=AFQjCNFZ-tmdprm-LGaeNtgV8NQTYwXVcQ>

It would appear that a lawyer may make a copy of a recorded statement for “the legitimate purpose of criminal proceedings.” The second reading speech refers to the fact that a recorded statement may be given to an interpreter or other expert witness, but that those third parties are also subject to the same obligation and prohibition created in s289P.

The purpose of this offence provision is clearly to stop the inappropriate use of recordings, such as by posting the recording on the internet.

There is no similar offence provision in relation to recorded evidence for vulnerable witnesses: recorded evidence cannot be served on an accused or their representatives (s306S(2)), but the accused must be given a reasonable opportunity to view the recording: s306V(3).⁶

SERVICE OF EVIDENCE

In many domestic violence cases in the Local Court, the evidence of the complainant will be the primary evidence in support of the charge. Like evidence in most summary hearings which allows the accused an opportunity to review the prosecution evidence before a hearing, it will not be admissible unless the accused has had a reasonable opportunity to *listen to and view* the recorded evidence: s289I. However an exception exists where there is consent to the recorded evidence being admitted or where reasonable opportunities have been given to view the evidence and it is in the interests of justice to admit the recording: s289I(3).

Considerable practical difficulties may arise in this area given the prohibition on the accused person having a copy of the recorded statement. Additionally, more time will be required to listen or view a recording (rather than to read a statement).

Unrepresented Accused

Unrepresented accused must be given an opportunity to view the evidence contained in a recorded statement: s289M.

Where an accused is unrepresented the prosecutor must cause an audio copy of the recorded statement to be served on an accused: 289M(2).

The prosecutor must also, as far as practicable, provide the accused with an opportunity to view the video recording on at least one of the following occasions:

- (a) when questioned by investigating police;
- (b) at the request of the accused, on a day arranged with the accused, or
- (c) on another day specified by notice in writing prior to committal proceedings or the trial. (s289M(3))

⁶ It is however an offence to copy sensitive evidence: s281D(7) with the same penalty.

If none of the above options are reasonably practical, the prosecutor must provide the accused the opportunity to view the recorded statement on the day of the proceedings (presumably the hearing day): s289M(4).

Most accused (about 90%) in DV matters are processed by way of arrest and charge, and it might be expected that those who are not too intoxicated are offered an opportunity to be interviewed; including the opportunity to view the recorded statement. As the accused is almost invariably unrepresented at the police station, questions may arise as to whether this opportunity is sufficient under s289I where a person subsequently becomes represented.

Represented Accused

If an accused person is represented (by an Australian Legal Practitioner) then the prosecutor must cause a copy of the recorded statement to be served *on the Australian Legal Practitioner*: s289L.

This provision varies from the ordinary rules of service of briefs in the Local Court because of the sensitive nature of this evidence, and the associated criminal offence attaching to its misuse. For briefs of evidence, the Local Court Rules provide that service of documents (other than originating documents such as Court Attendance Notices) can be effected by a number of methods including by posting the documents to a person's residential address, or giving them to an adult at their address.⁷ Where a person is legally represented documents may be served by leaving the document at the business address of that legal practitioner.⁸

Unless other arrangements are agreed to, it would appear that the disc of the video recording will need to be personally served, which will cause significant difficulties for police.

Considerable care will need to be exercised by solicitors who have carriage of these matters. Consideration needs to be given to whether –

- We would like to accept the service of recorded statement in the usual way;
- Whether the recorded evidence should be accepted BEFORE there is a grant of aid and a solicitor allocated to the hearing;
- Whether that disc can be given to another solicitor within Legal Aid, or to a private solicitor, if the matter is assigned; and
- Whether there needs to be
 - a special kind of recording that such evidence has been served on the file and/or on CASES,

⁷ Local Court Rules 2009 – 5.10(1)

⁸ Local Court Rules 2009.- 5.10(2)

- a procedure for clearly identifying this evidence and
- a better method of storing the evidence on the file.

Currently I doubt anyone has appropriate facilities (let alone the time) to view the recorded evidence at court to provide full advice.

For persons out of custody, time will need to be allocated for the accused to see the evidence at the office. Longer appointments will be needed.

Considerable difficulties exist for accused persons in custody. To take a disc to gaol with a laptop requires additional permission from the Correctional Centre. Our laptops, if you have one, do not have disc drives but require an external disc player.

Discs should be able to be played over the AVL system. I have not been able to play CCTV evidence over the Lync system, but I have been able to do so over the proper AVL system by attaching a laptop to the system.

In all matters, the viewing of recorded evidence, will take more time than it takes to read a written statement.

Returning the DVD

At the conclusion of the matter the Local Court must, if requested by the Prosecutor, order the return of the recorded statement: s289O. Returning the DVD would appear to be best practice.

DOMESTIC VIOLENCE MATTERS IN THE LOCAL COURT – PRACTICE NOTE

Local Court Practice Note Crim 1 covers case management in the Local Court. It has not been amended since the commencement of this legislative reform.

Part C provides specific provisions for Domestic Violence Offences which create tighter time constraints for the disposal of domestic violence offences and an obligation to serve a mini brief at the first return date. The mini brief or the main parts of the brief is required to contain the facts, a copy of the victim's statement and any photographs. The clear intention of this requirement was to provide duty solicitors with evidence upon which they could advise their clients. Service of the victim's statement (usually more instructive than a police facts sheet) and any photographs of injuries (often powerful evidence), is designed to encourage early guilty pleas, as well as to allow the matters to be listed for hearing promptly.

In a matter where the victim's statement is recorded, little more than the Facts Sheet can be served on the first return date. It might be that audio discs are served at Court or on the accused, but there is little that can be done with this given time and available facilities.

It is difficult to see how the recording of the evidence of the complainant will assist with giving thorough advice at an early point and reducing the delay between charge and finalisation.

It is worthwhile to note that s289Q allows the Local Court to adjourn proceedings to allow an accused person an opportunity to *view or listen* to a recorded statement, for no more than 14 days. This section refers to the opportunity of the accused rather than his legal practitioner. It may be that Courts impose this strict time limit in circumstances where an accused has an audio copy, or has been shown the footage when arrested.

HEARINGS – RECORDED EVIDENCE AS EVIDENCE IN CHIEF

Local Courts have an extremely high volume of work, and it will be difficult to prepare Local Court hearings, in the manner in which trials involving vulnerable witnesses can be prepared.

There are some mandatory requirements for recorded statements –

- informed consent (to be obtained off camera?): s289D(a)
- that the statement is obtained as soon as practicable after the commission of the offence: s289D(b)
- a statement as to the complainant's age: s289F(3)(a)
- a statement as to the truth of the statement: s289F(3)(b) and
- any other matter required by the rules: s289F(3)(c).

Most importantly, the complainant must be present in court and available for cross-examination for her recorded evidence to be played: s289F.

While the complainant must give informed consent to the recording of her statement, her wishes as to the use of the recording in court, is only one matter the Prosecutor can take into account: s289G. The other matters are any evidence of intimidation by the accused, and the objects of the *Crimes (Domestic and Personal Violence) Act 2007*. So if a complainant is embarrassed by her recording and does not wish it to be played, it may still be played by the Prosecutor.

The Second Reading Speech noted that where complainants disavow their statements, the provisions of the *Evidence Act 1995* relating to unfavourable witnesses apply. It is expected that the availability of a contemporaneous recording will reduce the number of instances of complainants retracting their original statements.

It is not expected that transcripts will be available, unless the matter is proceeding on indictment. The legislation provides that a court can only order a transcript to assist

the jury: s289K. It is acknowledged that this has implications for case preparation for both prosecutors and legal practitioners.⁹

In trial matters, transcripts of the evidence of vulnerable witnesses are carefully scrutinized. Where an inadmissible question is asked or where irrelevant or prejudicial material is volunteered, they are edited by agreement or by pre-trial ruling.

The legislation refers to the evidence in chief being “wholly or partly in the form of a recorded statement that is viewed by the Court.” (s289F). This may envisage editing of transcripts, but also the situation where additional questions can be asked in evidence in chief.

Interviewing police officers will follow a script. However that script will also include evidence to be obtained in support of an AVO and include questions such as:

Has he/she assaulted you before?

How has he/she behaved towards you before?

How did this behaviour make you feel?

It remains important that irrelevant and inadmissible material is excluded, however it is difficult to see how this might be practically done.

This part of the Second Reading Speech is particularly useful –

All relevant provisions that apply to written statements will apply to the complainant’s recorded statement as if the recorded statement were a written statement. In short, where a brief of evidence would have included a written statement, it will include a recording and the same procedural and evidentiary rules apply, except for the specific provisions of this bill. This includes, for example, provisions relating to inadmissibility, admissibility as if it were oral evidence, death of a witness, notices of rights, attendance of the witness and later use of written statements.

Evidence obtained in recorded statements may be more powerful because it will capture the demeanour of the complainant, contain more detail and will film recent injuries. It may detract from any attempt by the complainant to later minimise the accused’s conduct or to blame herself for the events leading up to an offence. It will reduce the amount of time a complainant spends giving evidence and assist her with recalling detail.

On the other hand, it is widely accepted that there are advantages to legal practitioners where they are able to view testimony prior to trial. This can mean giving strong advice to plead guilty, or assist in the preparation of cross examination.

⁹ Anastasi Krevenkova & Sean McDermott “Domestic Violence: Evidence in Chief Reforms” *Law Society Journal* June 2015 p72.

Evidence of an Accused's Response to Recorded Evidence

The Act provides that evidence of what an accused person says or how he behaves when watching the complainant's recorded evidence will not be admissible, with two exceptions.

The first exception is the viewing took place during the investigation, for example if the recording is shown during a Record of Interview: s289M(5)(a). If an accused is recorded in an ERISP viewing and reacting to the complainant's recorded evidence, perhaps inappropriately or outrageously, this will not assist his case. Alternatively, it might be thought that the viewing of powerful evidence might encourage an acceptance of responsibility.

The second exception is when the behaviour of the accused during the showing of the recorded evidence constitutes an offence: s289M(5)(b). The example given in the Second Reading Speech is where the accused assaults the police officer who shows him the recorded evidence.

DVEC AND OTHER PROTECTIONS FOR COMPLAINANTS

DVEC reforms co-exist with existing arrangements for the assistance of some classes of victims of personal violence offences. The availability of these arrangements usually requires careful consideration of the legislation.

Vulnerable witnesses (including children and cognitively impaired people) who are victims of personal violence can give evidence by way of a pre-recorded statement. Vulnerable witnesses have the right to give evidence via CCTV (s306ZB) as well as other protections such as the right to a support person (s306ZK).

The definition of a domestic violence complainant excludes a vulnerable person so that where a vulnerable person is also a DV victim, the provisions relating to vulnerable witnesses in Part 6 will apply: s3 (Definitions) and Second Reading Speech. In such a case there will be no entitlement to service (either audio or video) and access to the recorded evidence will usually have to take place at the police station.

Part 5 of the *Criminal Procedure Act 1986* provides that when alleged victims of prescribed sexual offences give evidence, the proceedings are to be *in camera*, or closed to the public. Complainants may choose to give evidence via CCTV or with other protective arrangements such as a screen: s294B. The complainant is entitled to a support person: s294C. In a re-trial, evidence may be given by replaying the original evidence from the first trial: s306B.

So where sexual offences are alleged to have occurred between partners, or former partners, or occupants of the same house, Part 5 applies in addition to Part 4A. That means, for example, that the complainant may give her evidence in chief via a pre-

recorded statement, the Court may be closed, she may use the remote witness room and have a support person with her.

THE WAY AHEAD

Further reforms in this area are in the pipeline. These include –

- DVDS – Domestic Violence Disclosure Scheme. Public submissions in relation to this proposed scheme closed on 19 June 2015. The purpose of such a scheme is to allow a person to access information as to the domestic violence history of their new partner, or a close friend or family member’s new partner. Such a scheme exists in the UK.
- Family Violence Courts - specialist or “problem solving courts” which deal exclusively with domestic violence cases and who seek to increase offender prosecution and accountability, improve victim support and increase community awareness.¹⁰
- Improved perpetrator behaviour programs.¹¹
- GPS tracking of domestic violence offenders.¹²

¹⁰ Christopher Angus Domestic & Family Violence Briefing Paper 5/2015 NSW Parliamentary Research Service, May 2015 at 31-34. Note also - Emma Birdsey & Nadine Smith “The Domestic Violence Intervention Court Model: A follow-up study” NSW Bureau of Crime Statistics & Research, Contemporary Issues in Crime & Justice #155, January 2012, which indicated that the DVICM was successful in achieving some but not all of its aims. Notably it did not increase guilty pleas or penalties imposed.

¹¹ Briefing Paper 5/2015 at 34-5.

¹² ABC news <http://www.abc.net.au/news/2015-05-17/government-proposal-to-monitor-domestic-violence-offenders/6475642>

REFERENCES

Second Reading Speech - Mr Brad Hazzard 21 October 2014

Anastasi Krevenkova & Sean McDermott "Domestic Violence: Evidence in Chief Reforms" *Law Society Journal June* 2015.

Christopher Angus Domestic & Family Violence Briefing Paper 5/2015 NSW Parliamentary Research Service, May 2015.

Lily Trimboli "Persons Convicted of breaching Apprehended Domestic Violence Orders: Their characteristics and penalties" NSW Bureau of Crime Statistics & Research, Issue Paper #102 January 2015.

Lily Trimboli "Legal Service for defendants in Apprehended Domestic Violence Order (ADVO) proceedings: An Evaluation" NSW Bureau of Crime Statistics & Research, Contemporary Issues in Crime & Justice #179 November 2014.

Emma Birdsey & Nadine Smith "The Domestic Violence Intervention Court Model: A follow-up study" NSW Bureau of Crime Statistics & Research, Contemporary Issues in Crime & Justice #155, January 2012.