Procedural and Ethical Considerations in Local Court Domestic Violence Matters

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Introduction

The intended audience of this paper is junior solicitors working in Local Courts in New South Wales appearing in domestic violence matters. It is not intended to be a comprehensive guide to the conduct of a domestic violence matter, but rather to assist junior practitioners in dealing with some of the common procedural and ethical issues that arise in these types of matters.

Matters of domestic violence are of course serious by their very nature, and are dealt with by the courts accordingly. Serious too, are the frustrations experienced by defendants who are facing exaggerated or entirely false complaints that may well result in significant custodial penalties upon conviction.

Matters of this nature can present unique challenges, such as an accused who instructs their legal representative that their partner or former partner won't show up to court, and who accordingly wishes to plead not guilty.

There are also a number of procedural considerations to be aware of. Police make mistakes. Being aware of potential deficiencies in the prosecution case can greatly assist advocates in achieving better results for their clients.

The Absent Complainant

This refers to a situation where the primary deficiency in the prosecution case is the physical absence of the complainant.

There are a number of considerations to bear in mind upon receiving these instructions:

1. The need to properly advise your client of the pros and cons of relying on the failure of the complainant to attend;

2. The need to comply with the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 so as to avoid:

    a. Dissatisfaction on the part of your client;
    b. Becoming a witness in your client's case;
    c. Any suggestion that you have influenced the complainant in the matter to do, or not to anything;
    d. The risk of additional charges (such as attempting to pervert the course of justice) being filed against your client (or you).

From the prosecution point of view, there are three ways in which they might seek to proceed:

1. They may seek an adjournment in order to make attempts to secure the attendance of the complainant. Defence lawyers should be aware of several considerations in this situation:

    a. You should know whether the complainant has been subpoenaed. Irrespective of your trust or lack thereof, of the prosecutor on the day, you should ask to see the subpoena *and* affidavit of service. A common mistake is to look only at a statement of service, usually completed by a police

officer. This is useful, but will not indicate to you whether there are any deficiencies in the subpoena itself, such as a mistake in the dates.

b. If there has been no subpoena issued for the attendance of the complainant, it may be appropriate to make a submission that the court cannot compel the attendance of the complainant on the next occasion by issuing a warrant, and accordingly it is an inappropriate allocation of court time to list a matter for hearing where there can be no assurance of the attendance of the complainant.

c. If a subpoena has been issued, you should check that the subpoena was served on the complainant at least five days prior to the day of court[1]. Generally if it is not, the subpoena has no utility in any application which the prosecutor may make (see below);

    i. If the subpoena has been served out of time, it may be appropriate to make a submission that the court should not adjourn the matter, because it is devoid of power to issue a warrant for the attendance of the complainant[2].

    ii. It is important to consider the consequences of a warrant being issued for the complainant. It may be that a complainant's attitude towards the proceedings is affected by consequences of a warrant issuing for their arrest. Often, prosecutors will indicate to the court indirectly (by not asking for a warrant to issue) that they do not wish to proceed with a matter.

[1] Section 223 *Criminal Procedure Act 1986* (NSW) Unless a Registrar has allowed the subpoena to be served inside that time – s223(2) *Criminal Procedure Act 1986* (NSW)
[2] Section 229 *Criminal Procedure Act 1986* (NSW). This is especially important where there is no explanation provided for the absence of the complainant. In circumstances where their non-attendance is unexplained, accompanied by the court having no power to issue a warrant, a submission that the matter should not be adjourned is a strong one.

3. Secondly, they may attempt to proceed on the basis of the written or video recorded statement of the complainant.[3]
    a. In my opinion this is an enormously unsatisfactory position, as it enlivens the possibility of an accused person being convicted and subjected to a criminal sanction, possibly even imprisonment, on the basis of unsworn, untested evidence. It is however, the practice at times of courts to do so. See for example *R v Suteski* (2002) 137 A Crim R 371[4] which is authority for the proposition that an inability to cross-examine is relevant to the court's discretions to exclude evidence – the importance of the evidence will be relevant to that consideration. More recently see *Sio v The Queen* [2016] HCA 32.

    b. Reliance here is placed on s65 of the *Evidence Act 1995* (NSW), which provides an exception to the hearsay rule (ie material which would otherwise be excluded may be admitted) subject to a number of qualifications.

    c. It is important to note that whilst a written and a recorded statement are both 'documents', s289F(5) draws a distinction which should cause them to be dealt with differently. There is a requirement that the complainant be available for cross examination in the event that a DVEC is used as the complainant's evidence in chief, so it would appear that to embark upon playing a recorded statement without the complainant present (or available by some other means such as AVL) would contravene the section. In addition to this requirement, a consideration of the way in which the matter should proceed in the presence of the complainant is also informative – the recording itself is not evidence – see *R v NZ* (2005) A Crim R 628 in which Howie and Johnson JJ said "*We believe there is no basis upon which the tape should become an exhibit because once it is played to the jury as the evidence in chief of the witness it becomes part of the court record just as*

[3] There is an excellent paper by Tom Quilter available at www.criminalcpd.net.au dealing with absent and unfavourable witnesses. Both a written statement and a recorded statement are 'documents' – see definition of 'document' in the *Evidence Act 1995* (NSW).
[4] See also R v TJF [2001] NCWCCA 127.

does a recording of the viva voce evidence of any other witness." That case involved evidence in chief that was both audio and video recorded.

d. Before a prosecutor can rely on s65 it must first be established that a witness is unavailable. There is a great deal of material on this concept so it will not be explored in detail. It is worth noting (and potentially cross examining the relevant police officer) on the following avenues through which information may be obtained:

    i. Centrelink records
    ii. RMS (or equivalent in other states) records
    iii. Telecommunication providers
    iv. The electoral roll
    v. Real estate agents or other agencies which may be able to provide a forwarding address in the event that the witness has moved

e. It has been ruled that even where police commenced their inquiries as to the whereabouts of the witness at a late stage, and did not conduct inquiries about the specific location of the witness overseas, that the witness was unavailable[5].

f. In *The Queen v Giovanni Rossi* [2010] VSC 459 it was ruled that a witness was unavailable where police had taken the following steps (noting that in this case there were threats to the witness in question):

    i. An unknown number of attempts were made to serve a subpoena
    ii. Discussions with the witness' daughter
    iii. Inquiries with VicRoads
    iv. Inquiries with Centrelink
    v. Messages left on the mobile telephone of the witness
    vi. A further urgent request to Centrelink
    vii. Inquiries with the Office of Housing

[5] *Regina v Kazzi*; *Regina v Williams*; *Regina v Murchie* [2003] NSWCCA 241

viii. A check of the electoral roll
ix. Inquiries with the mobile telephone provider responsible for the provision of services to the witness

g. Assuming that it has been determined that the complainant is unavailable, the prosecutor will usually rely on one of the following characteristics of the statement made by the complainant[6]:

i. That it was made soon after the incident occurred ***and*** in circumstances that make it unlikely that it is a fabrication ***or***

ii. That it was made in circumstances that make it highly probable that the representation was reliable.

h. Both of these relate to s65(2)[7]. Should the police be relying on the former scenario, the matter will likely have been reported to the police immediately upon their attendance (usually following a 000 call) or the attendance of the complainant a short time after. The timing of the report being provided will be relevant to the question of fabrication.

i. Where there has been a period of time between the incident and the making of the statement or where the complainant is intoxicated, suffering a head injury, or affected by medication you should consider making an objection on the basis of reliability.

j. An issue that may arise is where a complainant has made a retraction statement and provided this to police (in a less desirable situation, they may have provided it to the representative for the accused directly). In this situation such documents should not be received without the presence of a witness. Great care should be taken with the ensuing conversation. If in doubt, say nothing.

[6] Note that s65(2) of the *Evidence Act 1995* (NSW) provides additional matters not discussed here.
[7] *Evidence Act 1995.*

k. Arguably, this would be relevant to the 'circumstances' in which the statement was made. Consider the situation where the court is presented on one hand with the statement of the complainant incriminating the accused, and on the other with a statement saying that the allegation was made up due to reasons x y and z. In this situation careful consideration should be given to submissions that relate to reliability, and the difficulty the court may have in reconciling the two versions of events.

l. Importantly, the provisions of s65 that might assist the prosecution cannot be relied upon without the provision to the defence of reasonable notice in writing of the intention to adduce the evidence[8]. There is no definition within the *Evidence Act* of 'reasonable notice', however "notice given five minutes before the hearing of the application…would not normally be reasonable"[9].

m. If the matter proceeds on the basis of the statement of the complainant, regard should be had to ss 137 and 165 of the *Evidence Act 1995* (NSW).

4. Thirdly, the prosecution may seek to proceed relying on evidence of other witnesses, in the absence of the complainant (with or without trying to adduce the complainant's statement).

a. This method presents the obvious challenges above with respect to the admissibility of the complainant's statement.

b. There is no particular requirement that a complainant give evidence as part of a criminal prosecution, however depending on the type of offence, there may be issues faced by the prosecution – for example, if an accused was charged under s13 of the *Crimes (Domestic and Personal Violence) Act 2007* then the absence of evidence from the complainant as to the effect of

[8] Section 67 *Evidence Act 1995* (NSW).
[9] *Puchalski v The Queen* [2007] NSWCCA 220, as extracted in Odgers Uniform Evidence Law, 9th ed.

the relevant conduct upon him or her may be a significant hurdle for the prosecution.[10]

c. Finally, the prosecution may simply withdraw the charge. Given that no evidence has been received, there is no prohibition on the prosecution re-laying charges in the future, although (in Western NSW at least) in the Local Court context, it is a rare occurrence. Consider s281 and its effect.

d. In the event that a prosecutor wishes to effectively reserve their right to reinstitute proceedings in future, consideration should be given to objecting to the withdrawal of the charges. *Evans*[11] is a useful authority to assist in persuading a judicial officer not to simply permit the withdrawal of the charge in this fashion.

[10] It is to be noted that s13 does not specifically require proof that the complainant was intimidated
[11] *Evans v DPP* [2000] NSWSC 1005.

This is a common question in these types of matters and one that can be avoided with the provision of appropriate advice when you first meet your client.

Rule 20[12] provides that if your client admits (before or during a hearing) their guilt in relation to the offence charged, that you may not do three things:

a. Present a case inconsistent with the admission of guilt[13];
b. Falsely claim or suggest that someone else is responsible for the offence;
c. Keep acting for the client if they are determined to give evidence and deny their guilt, or require you to say, for example, that they weren't there, when they have told you that they were present.

Thus, where such a situation arises, if the complainant does attend, you are essentially restricted to putting the prosecution to proof. Certainly there is no requirement that you cease to act if the complainant attends, however it may be beneficial for your client to secure alternative representation in the unlikely event that they have previously indicated to you their guilt, and subsequently wish to run some manner of positive defence.

It is of course necessary to consider the desirability of matters being adjourned in such a situation where the complainant may be in attendance but reluctant, especially where your client is in custody and may not be granted bail for the adjournment period.

It is important to advise your client at the earliest possible stage of the restrictions on your ability to represent them if the complainant attends. It is not uncommon for a complainant to change his or her mind about their attendance, and you should not simply assume they would not attend.

It is important also to advise your client (in an appropriate manner) of the provisions of the *Evidence Act 1995* (NSW) which allow statements to be relied upon in the absence of a

[12] *Legal Profession Uniform Australian Solicitors' Conduct Rules.*
[13] Note that this is distinct from a submission that the prosecution have failed to prove their case beyond reasonable doubt – see Rule 20.2.2(iii)

witness, and accordingly that is possible (however unlikely) that they will be convicted even if s/he doesn't attend court on the day of hearing.

Advice should also be given about the possibility of adjournments – some Magistrates will go to great lengths to adjourn matters and issue warrants simply because they are dissatisfied with the notion that a complainant can effectively bring an end to a criminal prosecution by choosing not to attend court.

In some situations it may be suggested to you by your client (directly or indirectly) that they will have contact with the complainant prior to the hearing, and will encourage the complainant not to come. This raises some important issues:

1) If your client is in custody they should be aware that prison phone calls are recorded (sometimes even those from a prisoner to a legal practitioner) and that if they were found to be making such suggestions to a complainant that they risk further charges[14].

2) You have an obligation not to suggest or condone that your client in any way influence any witness in the matter[15] and they should be aware of the legal ramifications of doing so. Indeed it is prudent to advise your client specifically not to do this. If in doubt, err on the side of caution and advise your client of the serious consequences.

There is a great deal of information to provide to your client regarding the various permutations and combinations in matters such as these. There is a great skill in distilling these matters into advice that is comprehensible yet thorough.

[14] For example s326 *Crimes Act 1900* (NSW) – Reprisals against judges, witnesses, jurors etc
[15] Rule 24 *Legal Profession Uniform Australian Solicitors' Conduct Rules*.

Being Approached by the Complainant

In relatively small communities such as those in Western NSW, it is not uncommon for a complainant in a defended domestic violence matter to approach the solicitor for the accused and indicate their unwillingness to give evidence and/or their desire for the proceedings to be discontinued.

Police are apparently bound to continue domestic violence proceedings and will not generally discontinue them at the request of the complainant.

Rule 24[16] provides that

> *24.1 A solicitor must not:*
>
> *24.1.1 advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so; or*
>
> *24.1.2 coach a witness by advising what answers the witness should give to questions which might be asked.*
>
> *24.2 A solicitor will not have breached Rules 24.1 by:*
>
> *24.2.1 expressing a general admonition to tell the truth;*
>
> *24.2.2 questioning and testing in conference the version of evidence to be given by a prospective witness; or*
>
> *24.2.3 drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not encourage the witness to give evidence different from the evidence which the witness believes to be true.*

If your opponent becomes aware that you have engaged the complainant in some discussion about the matter (whether or not that was initiated by you), and the complainant is subsequently found to be unfavourable, the possibility of a breach of Rule 24 may be raised.

As a general rule you should not converse with the complainant without a witness, and then only to listen to their position and indicate that the appropriate course of action is to take their concerns to the prosecutor. It will be important for you to know if they are likely

[16] *Legal Profession Uniform Australian Solicitors' Conduct Rules*.

to be unfavourable, but you should not engage with them in any discussion about the evidence that they will or will not give.

Although it is not a breach of Rule 24 simply to remind a witness of their obligation to tell the truth, or bring to their attention any inconsistencies, in these circumstances good practice in my opinion rests on the side of caution.

A possible outcome of a conversation with a complainant not witnessed by any other person is that the practitioner involved becomes a witness in his/her own case.

For example, if a practitioner was approached a complainant and told "*I made it up, you know, I was really on the gear that day and I don't even remember talking to the police. I was angry with him and I just wanted him locked up*", that would be a powerful point of cross-examination, but if you are the only person to witness it, your position becomes very difficult.

With a witness present (such as a Field Officer if you work for the ALS) you could call that person to give evidence of the complainant's previous representation.

For further guidance on this topic, see the useful publication by the NSW Law Society[17] however note that this document refers to the repealed Revised Professional Conduct and Practice Rules 1995.

[17] https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/008726.pdf

1. Have the prosecution served all material at least 14 days prior to the hearing? (Have you also provided the listing advice within 7 days?)

2. Does the ADVO (if applicable) actually cover the alleged date of the breach?

3. Has the video copy of the DVEC been served on you? See s289L. Be cautious, however – there are restrictions on what you can do with that recording, including that you must not provide it to the accused, nor allow the accused to make a copy. There is no prohibition of course on you allowing the accused to view the DVEC in your presence, and this should occur as early as possible, and in all cases.

4. Was the statement of the complainant made soon after the alleged incident? If not, consider this on any application by the prosecution to tender the statement in the event that the complainant is declared unavailable.

5. Does your client have any domestic violence matters on his/her record? If so, find out whether they involved the same complainant. If they did, and they were dismissed, get the transcript. It may be that the complainant previously attended court and said that they had lied in their police statement. This may make for effective cross-examination.

6. What are the appropriate directions to request that a Magistrate gives him/herself at the conclusion of the matter:

    a. A *Murray*[18] direction will generally be appropriate where evidence of the acts alleged comes from a single prosecution witness, with an absence of corroborative evidence.
    b. A *Douglass*[19] type direction should be sought where your client has given evidence, to the effect that the Magistrate cannot convict unless he/she is satisfied that the evidence of the defendant is not reasonably possibly true (a useful direction in courts where there might exist a tendency to prefer one

[18] Murray (1987) 11 NSWLR 12
[19] *Douglass v The Queen [2012] HCA 34*

version, and not actually specifically accept or reject versions given by witnesses).

c. A warning pursuant to s165(1)(c)[20] if a witness is intoxicated.
d. A *Mahmood*[21] direction where the prosecution have to failed investigate and/or call a witness - the Magistrate is entitled to take into account that there was no such evidence in determining whether there is a reasonable doubt as to the guilt of the defendant.
e. A good character direction, if applicable. This is a powerful direction if the case comes down to the evidence of the complainant, and of the defendant (of course the matter must still be proved beyond reasonable doubt)

It is important not to underestimate the significance of a request for a Magistrate to give him/herself a direction. Even if you feel that the direction will not result in the Magistrate acquitting your client, a District Court Judge may take a different view in a subsequent conviction appeal. Even where a Magistrate declines to give him/herself a direction, the giving of the direction can be re-argued on appeal

Additionally, where a case hinges solely on the evidence of the complainant, it can make for powerful closing submissions to request a number of directions, all calling for a Magistrate to approach the matter with great care and a significant degree of scrutiny.

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[20] *Evidence Act 1995* (NSW)
[21] *Mahmood v Western Australia*(2008) 232 CLR 397