

30 June 2016

Ms Natasha Mann
Director, Crime Policy
Department of Justice

By email: Natasha.mann@justice.nsw.gov.au

Dear Ms Mann,

Review of Domestic Violence in Chief (DVEC) reforms

1. Women's Legal Service NSW (WLS NSW) thanks the Department of Justice for the opportunity to comment on the Domestic Violence in Chief (DVEC) reforms.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.
3. A significant proportion of our work involves working with women victims/survivors of domestic and family violence and sexual assault.
4. While we understand that a large number of DVEC recorded statements have been taken since the legislation commenced on the 1 June 2015, we have not had many clients who have sought advice specifically on this issue. However, some of our clients have raised issues and concerns arising out of the DVEC reforms and these will be raised in this submission. This submission will also identify areas for which we believe research and analysis of data would be useful.
5. At the outset, we want to take this opportunity to commend the NSW Government and the Department of Justice for establishing a DVEC reforms monitoring working group made up of government and non-government representatives to identify issues and provide input into a monitoring plan for these reforms. As you know Women's Legal Service NSW has participated in this working group. We believe it is important and recommend that such working groups continue to be established to monitor any new reforms. We also recommend ongoing monitoring and evaluation of the DVEC reforms.



Publishing of data, survey responses, submissions and final report

6. We understand that the NSW Bureau of Crime Statistics and Research (BocSaR) is providing data for this review. Additionally, we understand that a survey is to be conducted with complainants over a short period of time to gauge their experience of the process of recording the audio or video statement and having this evidence played in court. While we support and commend the gathering of victim/survivor narrative to ensure their experiences are considered as a part of this review, we are concerned that the short period of time over which the survey is intended to be conducted, may limit the number of complainants providing feedback. On this basis, we recommend ongoing monitoring and evaluation.
7. We further recommend that the BoCSaR data and survey results be published, including the number of complainants interviewed and the findings.
8. We also recommend submissions to this review be published.
9. The final report produced for this review should also be published. We believe this will increase understanding of and confidence in the reforms.
10. We believe that the publishing and making publically available of all the material mentioned above is in the interests of transparency, accountability and good governance.

Correct identification of primary aggressor and primary victim

11. For a number of years WLS NSW has raised concerns about the incorrect identification of the primary aggressor and primary victims by NSW Police in domestic violence situations.
12. In 2014 we published a report entitled *Women Defendants to AVOs: What is their experience of the justice system?* This report is an exploratory study of WLS NSW 2010 experience of representing women who were defendants to ADVO proceedings. While the research was limited by a number of factors and is not a random sample of NSW cases, the results highlight some of the systemic issues experienced by women AVO defendants.
13. As outlined in the executive summary of the report:

The study findings include that over two-thirds of [WLS NSW] women clients defending AVOs reported that they were the victims of violence in their relationship. Fewer than 40% of these clients had a final AVO made against them when the case came before the court....

In the majority of cases where women were defending AVOs, the other party's complaint related to a single incident only. In several of these cases injuries to the other party could be indicative of self-defence, such as scratching or biting on the arm or hand.

14. We have continued to see the incorrect identification of women defendants as primary aggressors since the introduction of the DVEC reforms.

15. Furthermore, we are very concerned that police are drawing adverse inferences from a complainant's request to give a DVEC statement at a later time rather than immediately at the scene of the crime.

16. See the case study below.

Case study

Susan is a young mother who recently separated from her partner. There had been a history of serious domestic violence. The parties had a two-year old son together. Susan attended the premises of her ex-partner late one afternoon for the purpose of collecting their child after a contact visit. The ex-partner refused to return the child and repeatedly physically assaulted Susan. A concerned neighbour called "000".*

Police and Ambulance attended the scene. Susan was treated by the Ambulance officers. The ex-partner presented with no injuries.

Susan was asked by Police officers to participate in a DVEC interview. She responded that she was tired and sore and wanted to take her son home. Susan informed police that she would come to the police station the next day to make a statement.

The ex-partner made a DVEC statement shortly after Susan left his premises.

Susan contacted the police the next day to arrange to participate in a DVEC interview. Police took her DVEC video recorded statement but by this stage a decision had been made by police to take out an apprehended domestic violence order against Susan for the ex-partner's protection.

Susan defended the ADVO taken out against her by the police and made her own private application for an ADVO against the ex-partner. At the ADVO hearing Police argued that an adverse inference should be drawn from Susan's failure to participate in a DVEC interview at the time police attended the incident.

Only a small section of Susan's DVEC statement was shown in court to highlight her injuries. The DVEC statement was fairly brief and did not include detail about the history of violence. A detailed written statement by Susan that included the history of violence was tendered in court.

The police application against Susan was dismissed. Susan's private ADVO application against the ex-partner was successful.

**Based on the experience of a client but not her real name.*

17. A trauma informed and domestic violence informed response should acknowledge that a victim of domestic violence may not be in a position at the time of the offence to provide a statement. Adverse inferences should not be drawn from this.

Trauma informed and domestic violence informed practice and taking of statements

18. We have also received anecdotal feedback of concerns expressed by women about the invasiveness of collection of evidence by way of video recording, for example, while they are in their pyjamas and/or in a distressed state, with particular concerns by complainants about who might see the video recording, specifically in the event that the video recording is shown in court.
19. It is imperative that there is sensitivity around the recording of statements and that consideration be given to the fact that some victims of domestic violence may feel very uncomfortable being filmed due to what they are wearing at the time, how they are feeling at the time and the subject matter. Other options such as providing evidence via a statement and still photographs should still be available and offered as an alternative, particularly in such circumstances. We understand that these options are still available. It would be useful to know the extent to which the options are still being offered and taken up.

Supplementary evidence

20. While we acknowledge a visual image of injuries may assist in court proceedings, it would be useful to know whether additional evidence, such as written statements, have been required and how the need for additional evidence has been viewed by the court. As mentioned above still photographs may be a less invasive form of visual image which is preferred by complainants in some circumstances.
21. One of the issues we raised at the time of the introduction of the reforms was that if a recorded statement is taken at the time of the violence or immediately afterwards, a complainant might not be able to recall all the relevant details at this time due to the impact of trauma. We were concerned that steps be taken so that adverse inferences as to a complainant's credibility not be drawn due to the impacts of trauma.
22. It would therefore be useful to know:
- a. In how many cases (and as a percentage) has a second statement been required to ensure all relevant details are included?
 - b. In such circumstances how many times has the complainant's credibility been questioned?
 - c. If a matter goes to trial, how many complainants have had to watch or listen to their recorded statement to refresh their memory?
 - d. What support has the complainant received in the circumstances outlined in (c) to limit re-traumatisation?

Impact of trauma and use of evidence

23. Other feedback we have received from early on in the reforms relates to complainants' lack of understanding of the process of giving a DVEC statement. We assisted a client who did not understand before giving a video recording of her statement that this would be her evidence-in-chief. She was distressed that she did not have the opportunity to gather her thoughts and provide what she thought would be a formal statement by way of a verbal statement to police that would be typed up for her to sign.
24. There may have been a range of reasons why this was the case, including that it was early on and police themselves were learning how to explain a DVEC statement and obtain informed consent.
25. However, this raises questions about complainants' experiences and the importance of ongoing monitoring and evaluation.

Further evidence gathering for review

26. In order to obtain a full picture of the role DVEC has played since its introduction in 2015, we recommend the publishing of data on the following:
 - a. How many guilty pleas have resulted where there is a video or audio-recorded statement by the complainant from 1 June 2015 – 1 June 2016?
 - b. What is this as a percentage of matters containing video or audio-recorded statements?
 - c. What is this as a percentage of matters prosecuted?
 - d. How many guilty pleas had there been for similar offences over the 12-month period prior to the reforms commencing?
 - e. How many convictions have there been for domestic violence related offences where there is a video or audio-recorded statement by the complainant from 1 June 2015 – 1 June 2016?
 - f. How many convictions had there been for similar offences over the 12-month period prior to the reforms commencing?
 - g. Has there been a reduction in incidence of complainants withdrawing from court proceedings? (Provide a number and as a percentage and compare to the 12 month period prior to the reforms).
 - h. What is the shortest, longest and average time to finalise a criminal matter involving a DVEC audio or video-recorded statement?
 - i. Prior to the reforms what was the shortest, longest and average time to finalise a criminal matter relating to domestic violence?
 - j. Has there been an increase in number of charges in matters involving a DVEC audio or video-recorded statement?
 - k. Have there been any court delays due to a defendant's inability to listen to or view an

audio or video-recorded statement?

27. When the reforms were introduced, we raised concerns about the further criminalisation of providing false statements in the context of complainants retracting statements in the context of domestic violence. At the time, we recommended that if s85(1A) and s189(1A) were retained, data should be collected on the following:

- a. the number of charges laid;
- b. the gender of those who are prosecuted;
- c. any history of domestic violence; and
- d. the outcome.

This data should also be included in the final published report.

28. Finally, we recommend the inclusion of data on whether or not there have been any charges laid in relation to improper copying or dissemination of recorded statements.

If you would like to discuss any aspect of this submission, please contact me or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,

Women's Legal Service NSW

Philippa Davis
A/Principal Solicitor