



Criminal Procedure (Domestic Violence Complainants) Bill 2014

Comments and questions raised by Women's Legal Services NSW, November 2014

Background

1. In November 2014 the NSW Government introduced a Bill to allow victims/survivors of domestic violence to give their evidence in chief by way of a video or audio recorded statement in criminal proceedings for a domestic violence offence.
2. We understand this is to be as soon as practicable after the domestic violence offence.
3. The NSW Police Force argue this will result in more successful prosecutions of domestic violence offences as victims will be less likely to retract a video or audio statement and the evidence will be obvious.
4. Women's Legal Services NSW welcomes clarification about the admissibility of a 'recorded statement' in domestic violence matters which includes an audio recording or a video and audio recording. We also hope this will lead to an increase of successful prosecutions. However, we have a number of questions and concerns about the legislation, including possible unintended consequences. These are outlined below.

Impact of trauma and use of evidence

5. We are concerned that the trauma experienced by a victim during a domestic violence incident may mean that she is not able to recall all the details of the current and previous incidents which she may otherwise be able to recall in calmer circumstances. If the recorded statement is taken at the time of the violence or immediately afterwards, what steps will be taken to ensure adverse inferences are not drawn as to a victim's credibility when using this evidence taken at the scene or shortly thereafter?
6. It is unclear when the recording will begin and end. We recommend that referrals to agencies and support services not be included in the recording as disclosure of such locations may have implications with respect to future stalking and harassment.
7. It is also unclear how the issue of editing of a recorded statement for evidence-in-chief will be addressed in jury trial settings where part of the evidence is edited out because it is inadmissible.
8. Currently when giving evidence, victims are able to refresh their memory by reading their statement. Will there be a transcript of the recording to help refresh a victim's memory rather than having to review the recording which may be traumatic and potentially used in a strategic manner to upset the victim in cross-examination? If there is a transcript and part of the recorded statement is a woman showing what happened, how will this be described?

Ongoing use of notebook entries and police training

9. We recommend notebook entries continue to be taken at the scene of the incident even where a recording is taken at the scene of the domestic violence incident. The loss of evidence caused through technology failures, either in the equipment itself, or for example, through human error such as the user forgetting to switch the camera or audio tape on at the time will be offset by the continued use of notebook records.
10. Given the importance of training in new procedures, what training will be available for police regarding the use of equipment?

Less intrusive methods of collecting evidence

11. While there may be some benefits in collecting visual images, for example, documenting physical injuries at the time, these could be captured in a less intrusive way than a video recording, for example, through still images. Has consideration been given to this?

Adequate recognition of psychological harm

12. We note in the NSW Government's response to domestic violence – *It Stops Here* – there is recognition of psychological harm as a form of domestic violence. However, we are concerned by the NSW Government's inadequate recognition of the impact of psychological harm as a form of domestic violence in other contexts. For example, under the *Victims Rights and Support Act 2013* where common assault can be shown, which includes fear, the psychological harm suffered is acknowledged through the lowest recognition payment.
13. A video recording will likely focus on physical injuries and damage to property. We fear this may shift the focus away from capturing the psychological harm caused to a victim of domestic violence.
14. While no violence is ever justified, our clients often say to us that they find the psychological harm particularly difficult to endure. We often hear the comment "With a physical injury, you can usually see a mark, but you can't see the psychological harm even though it lasts longer. I just can't get him out of my head".
15. What steps will be taken to ensure video recording evidence does not only focus on the physical injuries or damage to property?

Children

16. Where children are indirectly audible or visible in a recording will this result in closed court proceedings in order to protect their identify?

Restricted use of evidence

17. The legislation explicitly refers to the recorded statement being used as evidence for the prosecution of a domestic violence offence and concurrent civil proceedings to obtain an apprehended violence order.
18. We understand this to mean the evidence will not be used in other criminal proceedings or, for example, in care and protection proceedings. We recommend this be made clear in legislation.

Misuse of recorded statement

19. Clause 289P(1) provides it is an offence for a person who has possession of a recorded statement to copy or permit someone else to copy the recorded statement or give possession of the recorded statement to another person or publish the recorded statement.
20. How will clause 289P(1) be enforced, including in situations where it is unclear how the defendant came into possession of the recorded statement or where the recorded statement is shared but it is unclear who had possession of the recorded statement and/or who shared it?
21. We recommend it should also be an offence to threaten to copy and distribute the recording.
22. Further we note one of the exceptions to copying or publishing a recorded statement is if the person is a public official and the example is given if the function relates to education or training. We recommend that a recording should only be used for education and training purposes with the informed consent of the person who provided the recorded statement.

Criminalisation of providing false statements

23. Given s547B of the *Crimes Act 1900* provides for the offence of public mischief, we question the inclusion of clause 85(1A) and Clause 189(1A) as to false statements or representations. We therefore recommend these clauses are deleted.
24. We note with concern the issue of women who are victims of domestic violence being prosecuted and sometimes imprisoned, because they retract their statements, often due to the dynamics of domestic violence.¹
25. We note the NSW Police Force has since tried to address this and advises that it 'will only prosecute someone for making false representations where it can be established that the original allegation was untrue'.²
26. We understand through the Department of Justice Apprehended Violence Orders Legal Issues Co-ordinating Committee that NSW Police Standing Operating Procedures have been amended such that the matter should be referred to the Crime Manager before proceeding with charges and that the Crime Manager should be aware that the woman may be protecting the defendant.
27. However, we remain concerned about the possibility of victims of domestic violence being prosecuted in such circumstances. We recommend that it be mandatory for Police to refer all such matters to the Crime Manager before proceeding with charges.
28. If clauses 85(1A) and 189(1A) are retained, we further recommend the collection of data on the number of prosecutions under this section, the gender of those who are prosecuted, any history of domestic violence and the outcome. This data should be publicly available.

¹ Natasha Robinson, 'Lawyers stunned by police course of action,' *The Australian*, 4 May 2013; Natasha Robinson, 'Mercy plea from jailed mum living in fear,' *The Australian*, 6 May 2013; Natasha Robison, 'DPP 'should decide if victim charged,'" *The Australian*, 7 May 2013.

² Natasha Robinson, 'Charges against victims dropped,' *The Australian*, 22 June 2013

There should also be a legislated review mechanism.

Women defendants to AVOs

29. Earlier this year Women's Legal Services NSW published a report entitled: *Women defendants to AVOs: What is their experience of the justice system*. This report was an exploratory study of our 2010 experience of representing women who were defendants to Apprehended Domestic Violence Order (AVO) proceedings.
30. The study findings include that over two-thirds of our women clients defending AVOs reported that they were the victims of violence in their relationships. 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.³
31. Where the woman is the defendant to an AVO a video recording or stills may be beneficial if both the injuries of the identified victim as well as the identified defendant are taken.

We note we did receive a response from the then Attorney General that discussed our concerns. We are pleased to continue to work with the Department of Justice on these issues.

³ Women's Legal Services NSW, *Women defendants to AVOs: What is their experience of the justice system, 2014 at 4* accessed on 7 November 2014 at: <http://www.womenslegalnsw.asn.au/wlsnsw/law-reform/women-defendants-to-avos/>