

Domestic Violence Evidence in Chief

Part 4B Criminal Procedure Act (NSW) 1986

Complainants in domestic violence ¹ matters may, and usually do, give their evidence-in-chief in the form of a recorded video statement known as a DVEC. There are clear rules as to what makes a valid DVEC and every legal practitioner in NSW needs to understand them in order to represent their clients effectively. This paper aims to assist legal practitioners in the state of NSW.

A Valid DVEC

To be valid, a DVEC must comply with ss289D, 289F & 289L Criminal Procedure Act (NSW) 1986. These sections require that the DVEC must:

- Be made with the informed consent of the complainant,²
- Be recorded as soon as practicable after the commission of the offence,³
- Contain a statement as to the complainant's age,⁴
- Contain a statement as to the truth of the representation,⁵
- Be served on the accused person's lawyer as soon as practicable, ⁶ and
- Be tested by cross-examination and re-examination of the complainant.⁷

Can Body Worn Video Be Used as a DVEC?

Police will often attempt to use BWV in place of a DVEC. Police Standard Operating Procedures provide that a DVEC should be recorded on a MobiPol device and that BWV should be deactivated while the statement is recorded. The rationale for this is to avoid inconsistent statements – where the witness gives one version on BWV and a different version in the DVEC.

Nevertheless, police can and do try it on. When this happens, counsel must examine the statement to see if it complies with ss289D, 289F & s289L by asking the following:

1. Did the complainant give informed consent?
2. Did the questioning occur as soon as practicable after the offence?
3. Did the complainant state their age?
4. Did the complainant make a statement as to the truth of the representation?
5. Did the prosecutor serve the DVEC on the lawyer as soon as practicable?
6. Is the complainant available for cross-examination and re-examination?

These are all mandatory requirements and the defence need not show any prejudice.

¹ s11 Crimes (Domestic & Personal) Violence Act (NSW) 2007

² s289D(a) Criminal Procedure Act (NSW) 1986

³ s289D(b) Criminal Procedure Act (NSW) 1986

⁴ s289F(3)(a) Criminal Procedure Act (NSW) 1986

⁵ s289F(3)(b) Criminal Procedure Act (NSW) 1986

⁶ s289D(a) Criminal Procedure Act (NSW) 1986

⁷ s289F(5) Criminal Procedure Act (NSW) 1986

Submissions

It is not necessary to tender the DVEC as an exhibit as long as it is played to the court.⁸ When the prosecutor attempts to do this, you should object and say as much of the following as applies to your case:

May it please the court, I submit that the purported DVEC does not meet the requirements of Part 4B Criminal Procedure Act and cannot be used as the complainant's evidence-in-chief.

Firstly, there was no informed consent. It appears the witness believed she was simply talking to a police officer and didn't understand and consent to the recording being used as evidence in court.

Secondly, the complainant was not made until some weeks after the alleged incident and so it cannot be said that the questioning was recorded as soon as practical after the alleged incident.

Thirdly, the witness does not state their age.

Fourthly, the witness did not make a statement as to the truth of the representation.

Fifthly, the DVEC was not served on the Accused's lawyer until some weeks after the charge was laid.

Finally, the complainant is an unwilling witness and has not attended court for cross-examination and re-examination.

These are all mandatory requirements and the burden falls on the police to show that they have been met. The Defence is not required to show any prejudice.

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

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

⁸ [DPP v Al-Zuhairi \[2018\] NSWSC151](#)