Captured At The Scene: A proposal for the admissibility of visually recorded scene statements from domestic violence complainants in Western Australia

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CAPTURED AT THE SCENE:

A proposal for the admissibility of visually recorded scene statements from domestic violence complainants in Western Australia

This thesis is presented in partial fulfilment of the degree of Bachelor of Laws Honours

BENJAMIN PROCOPIS

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2018
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Name: Benjamin PROCOPIES

Signature: x Date: 24/10/2017

This thesis contains results of a survey conducted with police prosecutors at WA Police Force. The results reported are reflective of individual opinions only, and do not represent the policies or the views of WA Police Force.
ABSTRACT

In 2015, New South Wales introduced a legislative reform termed DVEC, which made admissible as evidence in chief, visually recorded statements from domestic violence complainants. Unlike other pre-recorded evidence, DVEC is captured at the scene of the incident, shortly after the event. The impetus for implementing DVEC was to overcome the issues identified with prosecuting domestic violence offences owing to the power imbalance in the relationship and the vulnerability of the complainant. In Western Australia, visually recorded statements from children and those with mental impairment are presently admissible for the same underpinning reasons. Police prosecutors and defence counsel participated in a survey to determine their views on introducing DVEC in Western Australia, which revealed some notable differences in opinion. Although it was generally perceived that DVEC would be more probative than oral evidence, and would likely result in an increase in conviction rates and guilty pleas, issues with respect to prejudice and the quality of the recordings were concerns raised. Following a doctrinal analysis of the legislation that governs both DVEC and presently admissible visually recorded statements in Western Australia, the concerns raised can arguably be sufficiently mitigated with careful drafting. Serious consideration should therefore be given to introducing DVEC in Western Australia to provide for a more just adjudication in domestic violence prosecutions.
I would firstly like to thank my supervisor, Ken Yin, for all of his guidance and support throughout this research. I would like to give a special mention to Dr Jane Tudor-Owen who provided invaluable guidance with the empirical component of my thesis. Lastly, I would like to thank my family for all their love and support over the whole Bachelor of Laws journey.
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I INTRODUCTION

Domestic violence\(^1\) is indisputably a national problem,\(^2\) from which the Western Australian community is not immune.\(^3\) It is estimated that one in four Australian women has been a victim of domestic violence,\(^4\) and in the 2016-17 financial year, there were 20,166 individual reports of domestic assault in Western Australia alone.\(^5\)

Australian society holds an abject condemnation of domestic violence, which is represented in the criminal and civil laws of all Australian jurisdictions which seek to protect the vulnerable and bring domestic violence offenders to account for their conduct.\(^6\)

Domestic violence offending\(^7\) is a complex social problem,\(^8\) and the power imbalance, which facilitates the offending behaviour has led to notable issues with respect to prosecuting such offences.\(^9\) This power imbalance, coupled with the vulnerability of a domestic violence victim, leads to a high level of anxiety that a complainant may experience in giving evidence at trial.\(^10\) This has led to an environment where victims are either unwilling to provide police a statement and those who do are prone to

\(^{1}\) There is no uniform definition for domestic violence in Australia. Where the term is used in a general sense within this thesis it means violence or intimidation against a person who is in a family or intimate relationship with the offender, as per the definition provided in Australian Law Reform Commission, Family Violence, A National Legal Response, Report No 114 (2010) 17.


\(^{3}\) See, eg, Law Reform Commission of Western Australia, Enhancing Family and Domestic Violence Laws, Project No 104 (2014).


\(^{6}\) See, eg, Restraining Orders Act 1997 (WA); Crimes (Domestic and Personal Violence) Act 2007 (NSW).

\(^{7}\) Although there is no uniform definition for a ‘domestic violence offence’ in Australia it is generally applied to offences involving violence, the threat of violence and breaches of restraining order offences committed within a domestic relationship. See, eg, Crimes (Domestic Violence and Personal Violence) Act s 11.


\(^{9}\) See, eg, New South Wales, Parliamentary Debates, Legislative Assembly, 21 October 2014, 1486, (Brad Hazzard, Attorney-General); Law Reform Commission of Western Australia, Enhancing Family and Domestic Violence Laws, Project No 104 (2014), 175.

\(^{10}\) See, eg, New South Wales, Parliamentary Debates, Legislative Assembly, 21 October 2014, 1486, (Brad Hazzard, Attorney-General); Law Reform Commission of Western Australia, Enhancing Family and Domestic Violence Laws, Project No 104 (2014), 175.
recanting or changing their testimony at trial.  Further, where the domestic violence complainant is a willing participant in the judicial process, the evidence is generally limited to ‘oath on oath’ where the evidentiary burden leads to failed prosecutions. The result is that successful conviction rates for the matters that progress to court are notably lower than non-domestic offences against the person. These issues have led to creative means of law reform to attempt to correct the power imbalance and put the ‘best evidence’ before the fact-finder.

In 2015 New South Wales introduced a statutory reform termed “DVEC – Domestic Violence Evidence-in-Chief”, which allows a contemporaneous visually recorded interview, taken by police from the alleged victim of a domestic violence offence, admissible into evidence. The recording captures not only a contemporaneous account of the incident, but also the demeanour of the victim, any injuries suffered, and any other evidence present at the scene. This recording can be played as the victim’s entire evidence in chief at trial.

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11 See, eg, New South Wales, Parliamentary Debates, Legislative Assembly, 21 October 2014, 1486, (Brad Hazzard, Attorney-General); Law Reform Commission of Western Australia, Enhancing Family and Domestic Violence Laws, Project No 104 (2014), 175.
12 Community Development and Justice Standing Committee, Parliament of Western Australia, A Measure of Trust, How WA Police Evaluates its Response to Family and Domestic Violence (2015), 82, evidence of Joseph McGrath, Director of Public Prosecutions.
14 See, eg, Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 (Cth) which is designed to prevent a domestic violence complainant from being cross-examined by the accused.
15 DVEC is an acronym for Domestic Violence Evidence in Chief, enacted under the Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014 (NSW).
16 Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014 (NSW) s 289C-D.
17 Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014 (NSW) s 289F.
19 Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014 (NSW) s 289F(1).
The admissibility of pre-recorded evidence is not entirely novel in Australia and is a recognised exception to the rule of hearsay in specified circumstances.\textsuperscript{20} The distinct difference with DVEC is that the recording is not only pre-recorded, it is captured at the scene.\textsuperscript{21} Therefore, not only does DVEC remove the stress of reciting the incident in court, it is spatially and temporally linked to the incident and therefore arguably provides a far more compelling account as it captures not only the oral evidence, it also provides an insight into the crime scene.\textsuperscript{22} Further, the evidence in chief is ‘locked in’ potentially reducing the risk of the victim recanting or changing their account through any duress applied by the offender.\textsuperscript{23}

Following the implementation of DVEC in New South Wales, some other jurisdictions around Australia have expanded their respective laws of evidence and procedure to allow for visually recorded statements from domestic violence victims to be admissible in evidence.\textsuperscript{24} Currently in Western Australia, special witness provisions, which are designed to mitigate the trauma experienced by vulnerable people in giving evidence, are potentially available to domestic violence victims.\textsuperscript{25} However, these provisions do not extend to a visually recorded statement such as DVEC, which would be deemed inadmissible as hearsay.\textsuperscript{26} There have been numerous recommendations for law reform relating to domestic violence offences in Western Australia,\textsuperscript{27} however none has involved a consideration of a regime analogous to DVEC.


\textsuperscript{22} New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 21 October 2014, 1486, (Brad Hazzard, Attorney-General).

\textsuperscript{23} New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 21 October 2014, 1486, (Brad Hazzard, Attorney-General).

\textsuperscript{24} \textit{Crimes (Domestic and Family Violence) Legislation Amendment Act 2015 (ACT); Justice Legislation Amendment (Body-worn Video and Domestic Violence Evidence) Act 2017 (NT).}

\textsuperscript{25} \textit{Evidence Act 1906 (WA) s106R.}

\textsuperscript{26} See, eg, discussion in Andrew Hemming, Miiko Kumar and Elisabeth Peden, \textit{Evidence Commentary and Materials} (Thomson Reuters, 8th ed, 2013) [16.10].

\textsuperscript{27} See, eg, Law Reform Commission of Western Australia, \textit{Enhancing Family and Domestic Violence Laws}, Project No 104 (2014).
A Problem Statement

The central question addressed in this thesis is whether the expansion of the special witness provisions under the Evidence Act 1906 (WA) to include a DVEC style regime would lead to a more just adjudication in domestic violence criminal matters in Western Australia. The sub-questions are an analysis of:

- whether a DVEC recording, by its temporal and spatial link to the incident, would translate to more probative evidence than sworn testimony at trial;
- what issues may arise through its implementation in Western Australia, and whether these issues could be sufficiently mitigated;
- whether DVEC would encourage greater participation of domestic violence complainants in the judicial process; and
- whether the other ancillary perceived benefits of DVEC may be achieved.

The research undertaken for this thesis is delimited to exploring the use of a DVEC style recording in criminal matters only. Arguably, the perceived benefits could equally apply to civil proceedings for domestic violence victims, indeed to all victims and witnesses in civil and criminal proceedings.

B Outline of Chapters

Chapter 1 is this introduction.

Chapter 2 provides a review of the literature, which focuses on recent law reform recommendations for domestic violence prosecutions, literature on DVEC, and recent research conducted with respect to pre-recorded evidence in trials. The chapter reviews the recommendations of both State and National law reform commissions to address the vulnerability issues encountered by domestic violence victims in the judicial process. It further explores the perceived strengths and weaknesses of pre-recorded evidence uncovered in previous studies, which collectively provide a base of issues to consider within the thesis.

Chapter 3 outlines the research methods employed to address the research question. The methods used were both a doctrinal and empirical approach. The doctrinal approach analyses the DVEC legislation and its intent and compares this to current law governing
special witnesses in Western Australia. This is supplemented by empirical research in the form of a survey conducted with police prosecutors and defence counsel to gauge their attitudes towards such a law reform. The techniques employed in the empirical component are explained and the chosen method is justified.

Chapter 4 provides a detailed explanation of the DVEC regime and the rationale for its implementation in New South Wales and other jurisdictions. This is contrasted with the current legislative setting in Western Australia, which outlines the provisions potentially available to a domestic violence complainant as well as the limited admissibility of visually recorded statements for children and those with a mental impairment. The evolution of these provisions are discussed to highlight the common theme for their introduction, namely the protection of vulnerable witnesses in the judicial process to ensure just outcomes. The purpose of this chapter is to outline the legislative framework of these regimes and to review the conditions for admissibility of this form and evidence. It further explores how DVEC limits prejudice to an accused, and how the courts in Western Australia address any prejudice arising from visually recorded evidence. This is undertaken to determine how DVEC may be inserted in to Western Australian legislation and whether it aligns with the rationale for the admissibility of visually recorded evidence as it currently stands.

Chapter 5 presents the results of the questionnaire distributed to police prosecutors and defence counsel. The questions posed address each research sub-question of the research question. Descriptive statistics are provided for each question, and an analysis of any differences in attitudes between prosecution and defence counsel is undertaken. Context to the results is given through analysis of the qualitative remarks provided by participants. Conclusions are then drawn with reference to the outcomes of the doctrinal research.

Chapter 6 provides a conclusion in the form of recommendations that flow from the research methods employed within the thesis.
II REVIEW OF LITERATURE

A Law Reform Recommendations

The alarming rate of domestic violence in Australia has led to a comprehensive review of the law on a National and State level to help stem the tide of harm suffered in a domestic relationship setting.28 A 2010 Australian Law Reform Commission (“ALRC”) report focused on domestic violence in Australia, and made numerous recommendations, including the expansion of pre-recorded evidence in chief.29 However, despite recognising the benefits of pre-recorded evidence, the ALRC recommended only an expansion of such evidence to adult victims of sexual assault rather than domestic violence offending generally.30 Similarly, a 2014 Law Reform Commission of Western Australia (“LRCWA”) report focused on the laws governing domestic violence and made numerous recommendations to better protect domestic violence victims throughout the judicial process.31 Reform was recommended for special witness provisions under the Evidence Act 1906 (WA), however, the report only proposed an automatic special witness status to domestic violence victims.32 Although the LRCWA report considered the admissibility of pre-recorded statements, this consideration was limited to allowing a prosecutor to tender the statement without declaring the victim hostile in the event that the victim recanted or substantially changed their evidence.33 No recommendations on this point were ultimately made.34

31 Law Reform Commission of Western Australia, Enhancing Family and Domestic Violence Laws, Project No 104 (2014).
32 Law Reform Commission of Western Australia, Enhancing Family and Domestic Violence Laws, Project No 104 (2014), 152-3.
33 Law Reform Commission of Western Australia, Enhancing Family and Domestic Violence Laws, Project No 104 (2014), 154.
34 Law Reform Commission of Western Australia, Enhancing Family and Domestic Violence Laws, Project No 104 (2014), 154.
B  **DVEC**

There is limited literature addressing DVEC, with current available material providing only a broad outline of the legislation, but offering no critical analysis of the law reform.\(^{35}\) The literature notes the rationale underpinning the DVEC reform and its anticipated outcomes, including: the anticipated reduced trauma to the victim during the judicial process, a better quality of evidence by capturing a contemporaneous account, an improvement in the conviction rates for domestic violence offences, and an increase in early guilty pleas.\(^{36}\) No literature was identified, however, that conducted any doctrinal or empirical research into the regime to determine its beneficial value or otherwise. Media releases from New South Police have, however, indicated that preliminary data tends to indicate a notable improvement in early guilty pleas and conviction rates where DVEC had been utilised.\(^{37}\)

C  **The Positives of Pre-Recorded Evidence**

The issues associated with vulnerable people giving evidence in court and their ability to elicit an accurate and detailed account of events are well recognised.\(^{38}\) These issues are compounded where there is a relationship involving power or control between the accused and the witness.\(^{39}\) A perceived key benefit of pre-recorded evidence is that, when conducted contemporaneously, the events will be fresh in the witness’s mind, before the memory is eroded.\(^{40}\) A study conducted in New Zealand provided a


comparison between the video-recorded evidence of adult sexual assault victims taken shortly after the offence, to the transcripts of their live in-court evidence. A staggering two thirds of the evidence required to prove the offence, which was present in the pre-recording, was omitted in the live testimony. Several theories were attributed to this, including the erosion of memory through the passage of time and the stress of giving evidence in front of the accused.

Another important consideration with respect to pre-recorded evidence is whether the recording will hold the same persuasiveness of live in court testimony where the fact-finder can also gauge the demeanour of the victim. In 2005, the New South Wales Attorney General commissioned a study to determine the effect on a juror’s perception of evidence given in three different forms, namely: oral evidence in court, evidence via closed circuit television, and pre-recorded evidence. The study found that no form of giving evidence was received more favourably than any other. Further, in a 2015 study involving interviews with prosecutors relating to pre-recorded evidence for sex assault victims, prosecutors believed that the contemporaneity of a pre-recorded interview, which contained raw emotion was far more compelling than live testimony.

No study was found, however, that analysed contemporaneous recordings at the scene of the incident.


**D Criticisms of Pre-Recorded Evidence**

Pre-recorded evidence has been subject to some criticism.\(^4\) A common reproach of pre-recorded evidence is that poor interviewing techniques may obviate the utility of the recording as evidence in chief.\(^5\) Police are generally charged with conducting the recordings and have limited training or forensic experience with the corollary being that the poor structure of questioning affects the proof of the key elements of the alleged offence.\(^6\) In one study, prosecutors cited the main reason for not playing a pre-recorded interview was the poor structure of questioning which made it difficult to establish the key elements of the relevant offence.\(^7\) Similarly, in a 2005 study in New South Wales, perceptions of jurors were sought with regards to visually recorded evidence of children. This study also noted that when a poor structure and technique is used by police, this in turn had a negative impact on the probative value of the evidence.\(^8\)

Another issue that may exist with DVEC is the prejudice to an accused by offering only the victim the DVEC recording.\(^9\) Evidence of the facts of the assault, and no more, due to its contemporaneity and thereby veracity, would tend unfairly to favour the victim and lead to the likely charging of the alleged aggressor, whilst tending to be indifferent to the more subtle, underlying nuances of the relationship which might have led to the assault.\(^10\) A 2010 ALRC report noted the difficulties police can face in determining

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\(^{9}\) Criminal Procedure Act 1986 (NSW) pt 4B.

which party is the ‘primary aggressor’ and how this may affect the administration of justice.55 Considering the benefits of an emotional contemporaneous recording afforded to one party and not the other, this is an aspect, which requires further consideration.

E Conclusion

Studies into pre-recorded evidence demonstrate that in relationships where a power imbalance exists, the recording provides a means to elicit a detailed account of the incident, divorced from the pressure of giving sworn evidence at trial where valuable evidence may be lost. The studies, however, do not examine pre-recorded evidence captured at the incident scene so closely after the incident. Further, the ability of police to elicit an admissible and probative account in a DVEC setting is a matter that requires further exploration to ensure there is adequate regulations governing training and structure of a DVEC recording. Lastly, the issue of offering only a DVEC recording to what police determine as the complainant will need to be explored to ensure a prejudice does not arise from the implementation of DVEC.

III METHODOLOGY

A Doctrinal Research

The doctrinal component firstly analyses the expectations and intent of the DVEC provisions by reference to second reading speeches, law reform reviews and other extrinsic materials. A detailed review of the legislation analyses the conditions contingent upon admissibility of a DVEC recording to ensure its veracity. Following this, the legislation is reviewed to determine the safeguards to mitigate any prejudice to an accused.

Western Australian legislation is then reviewed to determine the current state of the law governing vulnerable witnesses and the admissibility of visually recorded statements in criminal trials. The review discusses the intent of the vulnerable witness provisions available, the rationale for the gradual expansion of these provisions through reference

to parliamentary debates. Case law authority is then reviewed to determine how the courts deal with prejudices arising from visually recorded evidence.

The doctrinal approach provides a means to consider how DVEC may be integrated into the Western Australian evidence law. The doctrinal results are referred to throughout the empirical research component to address the research sub-questions.

B Empirical Research

Several aspects of the problem statement, particularly those articulated in the future tense, cannot be explored through a purely doctrinal approach. To adequately explore and address the research sub-questions, an empirical research method was applied with a view to gauging stakeholders’ perspectives with respect to implementing a DVEC regime in Western Australia. The method chosen is a ‘convergent parallel mixed methods’ approach which allows for the integration of both quantitative and qualitative results, where the quantitative results are supplemented and given context through the opinions of the participants. This form of research is recognised as a valuable method in law research where perceptions are sought regarding law reform.

1 Materials

The materials used were an invitation email per appendix 1, an invitation letter per appendix 2, and the survey itself with a debrief statement per appendix 3. The instrument used was an on-line survey containing 18 questions. Sixteen of these questions asked for participants responses on a five point Likert scale. The Likert scale contained anchor points ranging from either definitely yes or extremely likely to definitely no or extremely unlikely. The scale is demonstrated in the following table:

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<thead>
<tr>
<th>RESPONSE</th>
<th>Definitely yes</th>
<th>Probably yes</th>
<th>Might or might not</th>
<th>Probably Not</th>
<th>Definitely not</th>
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<td></td>
<td>Definitely yes</td>
<td>Probably yes</td>
<td>Might or might not</td>
<td>Probably Not</td>
<td>Definitely not</td>
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<td>SCALE</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
</tbody>
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58 Mohamed Khadijah, ‘Combining Methods in Legal Research’ (2016) 11(21) *Social Sciences* 5191
The participants were asked their perceptions on matters relating to the four research sub-questions, which is explained in detail under Analysis. The remaining two questions were open ended where participants could express their views on potential prejudices that may arise with the implementation of DVEC, and provide general remarks with respect to their opinions on DVEC.

2 Participants

To determine the attitudes of stakeholders with regards to the benefits or otherwise of introducing a DVEC regime in Western Australia, the survey was distributed to both police prosecutors and defence counsel. These groups were chosen as important stakeholders with valuable input regarding such law reform. Although victims of domestic violence and domestic violence advocates would be a valuable source of opinion, obtaining their perceptions could not be conveniently achieved within the time and resource parameters of this study. State prosecutors were invited to participate in the questionnaire, however declined, stating that police prosecutors were better positioned to field the questions posed through greater exposure to domestic violence offences and video evidence.60

There were 84 participants in total, comprising of 45 police prosecutors (53.6%) and 39 defence counsel (46.4%). The questionnaire was distributed to all 101 police prosecutors throughout Western Australia. This represents a participation rate of 45%. The number of lawyers in Western Australia identifying as defence counsel is more difficult to quantify. In order to reach as many as possible the questionnaire was distributed via email through various email groups including the Criminal Lawyers Association of Western Australia and Legal Aid Western Australia. The number of recipients identifying as defence counsel is estimated to be 200 recipients.61 This represents an approximate participation rate of 20% of those who received the email invitation.

60 Email from Nari Vanderzanden, Legal Projects Officer, Office of the Department of Public Prosecutions to Benjamin Procopis, 19 July 2017.
61 Email from Nari Vanderzanden, Legal Projects Officer, Office of the Department of Public Prosecutions to Benjamin Procopis, 19 July 2017.
3 Procedure

Online survey software ‘Qualtrics’ was used to host the questionnaire. Each participant received an email with a cover letter, per appendix 1, which provided a brief outline of the research, advised the participant that the results would be anonymous, and invited participation. The email contained a link to the survey, which in turn contained a cover letter of a similar nature and indicated the consent by selecting yes to continue. The survey could be completed via any computer at the convenience of the participant. A debrief statement was provided at the end of the survey.

4 Analysis

(a) Quantitative Analysis

The questions in the survey collectively address the four research sub-questions, and are broken into the respective areas and analysed under the following headings:

- the perceived probative value of a DVEC recording;
- the perceived issues that may be associated with the implementation of DVEC in Western Australia;
- whether DVEC would encourage greater participation of domestic violence complainants in the judicial process; and
- perceptions on the other perceived benefits expected of a DVEC regime.

A final appraisal question as to whether participants believed DVEC should be introduced in Western Australia completed the quantitative component of the questionnaire.

Statistical Package for the Social Sciences Version 24 (SPSS) was used to analyse the quantitative data. Descriptive statistics were generated for the sixteen questions (excluding the two open end questions) to determine the extent to which participants agreed with the statements. Further, an independent samples t-test\(^{62}\) was conducted to compare the mean scores between both prosecutors and defence counsel to determine if there were any significant differences in their responses.

(b) Qualitative Analysis

Two qualitative questions were also included in the survey. A content analysis approach was applied by coding the responses into interrelated themes where significant trends in the opinions provided were identified. The themes generated from this analysis are recorded in Appendices 4 and 5 respectively.

The first qualitative question followed the question; Does any prejudice arise from implementing a DVEC regime? The field was provided to respondents who selected either definitely yes or probably yes and asked, what prejudice to recognise as arising from DVEC? There were 26 responses in total and the responses were coded into themes as illustrated in the table found in Appendix 4. The second qualitative question was at the end of the questionnaire, which invited any general comments. There were 44 responses, which were coded into themes as illustrated in appendix 5.

The qualitative results provide context to the survey results and explain the differing perceptions of DVEC between prosecution and defence. The qualitative fields, although asking different questions, yielded results with a significant overlap in the themes. For ease of reporting and integrating both results, the qualitative findings are reported alongside the quantitative findings under the sub-questions addressed.

(c) Quantitative, Qualitative and Doctrinal Discussion

A conclusion to each sub-question is given by reference to both the quantitative and qualitative results. It is here that the doctrinal component is interwoven with the empirical research to reach a determination about each of the research sub-questions.

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IV THE DIFFERING LAWS OF EVIDENCE AND CRIMINAL PROCEDURE

A Introduction

The rules of evidence and criminal procedure are significantly different in Western Australia to that of other jurisdictions within Australia. Following an Australian Law Reform Commission review into the state of the rules of evidence in the varying jurisdictions within Australia the Commonwealth and several other States and Territories introduced a uniform Evidence Act, codifying their rules of evidence. Western Australia is one of the few jurisdictions that has not adopted the uniform legislation, with the rules of evidence in Western Australia found in the Evidence Act 1906 (WA) and the common law. The provisions dealing with special or vulnerable witnesses differ in all jurisdictions of Australia, as do the definitions of who are categorised as such. These provisions fall within either the jurisdictions’ respective evidence legislation or other legislation governing the rules of procedure.

The same fundamental principles of evidence apply throughout all Australian jurisdictions, with the Crown bearing the onus of proving all elements of any criminal charge beyond reasonable doubt at trial. Witnesses provide sworn oral evidence at trial through examination in chief, have their evidence tested in cross-examination, and then may be re-examined by the party calling the witness. In order to ensure that the

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64 Andrew Hemming, Miiko Kumar and Elisabeth Peden, Evidence Commentary and Materials (Thomson Reuters, 8th ed, 2013) [1.20].
69 David Field, Kate Offer, Western Australian Evidence Law, (LexisNexis Butterworths, 2015) [1.5].
72 Woolmington v DPP [1935] AC 462. Note, however the limited circumstances where the onus if shifted, as discussed in David Field, Kate Offer, Western Australian Evidence Law, (LexisNexis Butterworths, 2015) [1.67]-[1.74].
73 See discussion in Andrew Hemming, Miiko Kumar and Elisabeth Peden, Evidence Commentary and Materials (Thomson Reuters, 8th ed, 2013) ch 7.
accused receives a fair trial, evidence tendered to prove the charge can be excluded where the prejudicial nature of the evidence is considered to outweigh its probative value.\textsuperscript{74} Hearsay evidence is a perfect example of this exclusion in practice.\textsuperscript{75} The primary shift with DVEC is in the manner of giving evidence in chief, which expressly dispenses with the rule against hearsay and allows an out-of-court statement to be used in lieu of oral evidence in chief in court.\textsuperscript{76}

B \textit{DVEC New South Wales}

New South Wales was the first Australian jurisdiction to make admissible visually recorded statements from domestic violence complainants.\textsuperscript{77} The impetus for the regime was a failed scheme introduced in 2008 by New South Wales police which saw the rollout of ‘domestic violence evidence kits’,\textsuperscript{78} provided to front-line police to capture the best evidence available at the scenes of domestic violence incidents.\textsuperscript{79} The kits included video cameras, which were used to record the victim, their injuries and their account.\textsuperscript{80} The recordings were, however, deemed inadmissible by the Courts as hearsay, which resulted in a decrease in the use of the kits.\textsuperscript{81} New South Wales police hierarchy branded the hearsay rule in these instances as ‘ludicrous’ and called for law reform.\textsuperscript{82}


\textsuperscript{75} Law Reform Commission of Western Australia, \textit{Review of the Criminal and Civil Justice System in Western Australia}, Project No 92 (1999) [20.8]. See also \textit{Pollitt v R} (1992) 174 CLR 558, 620, as referred in David Field, Kate Ofer, \textit{Western Australian Evidence Law}, (LexisNexis Butterworths, 2015) [9.7].

\textsuperscript{76} \textit{Criminal Procedure Act 1986} (NSW) s 289I, inserted by the \textit{Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014} (NSW).

\textsuperscript{77} \textit{Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014} (NSW).


This was based on the belief that the video-recorded evidence captured the true emotion and events as described by the complainant as well as the scene of the alleged offence, which would be far more compelling than oral evidence in court.\(^{83}\)

1 **The Legislation**

In 2014 the DVEC regime was introduced into legislation in New South Wales through the *Criminal Procedure Act 1986* (NSW) (“*Criminal Procedure Act*”) via the *Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014* (NSW) (“*DVEC Act*”). The *DVEC Act* commenced on 1 June 2015 with its application acting prospectively.\(^{84}\)

(a) **Family and Domestic Violence Legislation**

Several terms applied in DVEC are drawn from the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).\(^{85}\) A primary purpose of this legislation is to create laws to provide for the ‘safety and protection of all persons [relating to] domestic violence’\(^{86}\) and is the legislation governing the conditions under which restraining order may be issued.\(^{87}\)

The admissibility of the pre-recorded evidence is limited to an allegation of a ‘domestic violence offence’\(^{88}\) made by a ‘domestic violence complainant’\(^{89}\) that is committed within a ‘domestic relationship’.\(^{90}\)

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\(^{86}\) *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9.

\(^{87}\) *Criminal Procedure Act 1986* (NSW) s 76A, referring to *Criminal Procedure Act 1986* (NSW) s 3(1).

\(^{88}\) *Criminal Procedure Act 1986* (NSW) s 76A, referring to *Criminal Procedure Act 1986* (NSW) s 3(1).

\(^{89}\) *Crimes (Domestic Violence and Personal Violence) Act* s 5 provides that a domestic violence offence ‘means an offence committed ... in a domestic relationship.’
The term ‘domestic violence offence’\textsuperscript{91} applies to offences under the \textit{Crimes (Domestic and Personal Violence) Act 2007} (NSW) which includes a breach of restraint order\textsuperscript{92} and stalking,\textsuperscript{93} as well as numerous offences under the \textit{Crimes Act 1900} (NSW) including assaults\textsuperscript{94} and sex offences.\textsuperscript{95}

The term ‘domestic relationship’\textsuperscript{96} is broadly defined and covers spouses, de-facto relationships, and other family members, but also those ‘living … in the same household’\textsuperscript{97} as the complainant.

The term ‘domestic violence complainant’\textsuperscript{98} refers to the alleged victim of the ‘domestic violence offence’.\textsuperscript{99}

(b) \textit{Conditions for Admissibility}

The \textit{Criminal Procedure Act} provides that where an offence is a domestic violence offence, prosecution may lead a ‘recorded statement’ in evidence.\textsuperscript{100} A recorded statement is a ‘recording made by a police officer of a representation made by a complainant…[relating to] a domestic violence offence.’\textsuperscript{101}

For the recording to be admissible into evidence it must be made with the ‘informed consent of the complainant’,\textsuperscript{102} the recording must be made ‘as soon as practicable [to] the commission of the offence’\textsuperscript{103} and be undertaken in a prescribed format.\textsuperscript{104} The form requirements include that the recording must be ‘in the form of questions and

\begin{itemize}
  \item \textsuperscript{91} \textit{Crimes (Domestic Violence and Personal Violence) Act} s 11, which includes offences as defined as a ‘personal violence offence’ which is defined under s 4.
  \item \textsuperscript{92} \textit{Crimes (Domestic and Personal Violence) Act 2007} (NSW) s 13.
  \item \textsuperscript{93} \textit{Crimes (Domestic and Personal Violence) Act 2007} (NSW) s 14.
  \item \textsuperscript{94} See, eg, \textit{Crimes Act 1900} (NSW) ss 58, 59, 61.
  \item \textsuperscript{95} See, eg, \textit{Crimes Act 1900} (NSW) ss 61I, 61J.
  \item \textsuperscript{96} \textit{Crimes (Domestic Violence and Personal Violence) Act} s 5.
  \item \textsuperscript{97} \textit{Crimes (Domestic Violence and Personal Violence) Act} s 5.
  \item \textsuperscript{98} \textit{Criminal Procedure Act 1986} (NSW) s 3.
  \item \textsuperscript{99} \textit{Criminal Procedure Act 1986} (NSW) s 3.
  \item \textsuperscript{100} \textit{Criminal Procedure Act 1986} (NSW) s 76A.
  \item \textsuperscript{101} \textit{Criminal Procedure Act 1986} (NSW) s 289D.
  \item \textsuperscript{102} \textit{Criminal Procedure Act 1986} (NSW) s 289D.
  \item \textsuperscript{103} \textit{Criminal Procedure Act 1986} (NSW) s 289D.
  \item \textsuperscript{104} \textit{Criminal Procedure Act 1986} (NSW) s 79A.
\end{itemize}
answers'\textsuperscript{105} and include a statement by the complainant ‘as to the truth of the representation.’\textsuperscript{106}

The recording can be used ‘wholly or partly’\textsuperscript{107} as the complainant’s evidence in chief. The prosecutor bears the discretion as to whether to play the recording, and in reaching their decision, they must weigh up certain factors, which includes whether there is ‘any evidence of intimidation of the complainant by the accused person.’\textsuperscript{108} The rules against hearsay and opinion under the \textit{Evidence Act 1995 (NSW)} are expressly dispensed with, with respect to these recordings.\textsuperscript{109}

(c) \textit{Balancing Any Prejudice to the Accused}

The \textit{DVEC Act} enacted provisions designed to limit potential prejudices arising from the regime. Firstly, despite the DVEC recording being admissible as the entirety of the complainant’s evidence in chief, the complainant is still required to attend court and engage in the rest of the judicial process.\textsuperscript{110} This means that the complainant must be available to have their evidence within the recording tested under cross-examination, and be available for re-examination at trial.\textsuperscript{111} The complainant may, however, still utilise the special witness accommodations in giving their evidence.\textsuperscript{112} If a recording is used in evidence, the jury must be warned ‘not to draw any adverse inference to the accused or give the evidence any greater or lesser weight’\textsuperscript{113} because the evidence was in the form of a recording.

The release and disclosure of the DVEC recordings are limited to protect a complainant due to the sensitive and personal nature of the content of the recording, and to prevent any further distribution of the recording.\textsuperscript{114} To mitigate any undue prejudice arising from this restriction the \textit{Criminal Procedure Act} provides that limited disclosure is

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\textsuperscript{105} \textit{Criminal Procedure Act 1986 (NSW)} ss 79A(1).
\textsuperscript{106} \textit{Criminal Procedure Act 1986 (NSW)} s 79A(2)(b).
\textsuperscript{107} \textit{Criminal Procedure Act 1986 (NSW)} s 289F.
\textsuperscript{108} \textit{Criminal Procedure Act 1986 (NSW)} s 289G(2).
\textsuperscript{109} \textit{Criminal Procedure Act 1986 (NSW)} s 289I.
\textsuperscript{110} \textit{Criminal Procedure Act 1986 (NSW)} s 289F(5).
\textsuperscript{111} \textit{Criminal Procedure Act 1986 (NSW)} s 289F(5).
\textsuperscript{112} \textit{Criminal Procedure Act 1986 (NSW)} s 289F(6).
\textsuperscript{113} \textit{Criminal Procedure Act 1986 (NSW)} s 289I.
\textsuperscript{114} \textit{Criminal Procedure Act 1986 (NSW)} ss 289L, 289M.
\end{flushleft}
provided to an unrepresented accused.\footnote{Criminal Procedure Act 1986 (NSW) s 289M.} An unrepresented accused will not be provided the video, rather an audio version of the recording,\footnote{Criminal Procedure Act 1986 (NSW) s 289M.} however they shall be provided a reasonable opportunity to view the video recording in a controlled environment.\footnote{Criminal Procedure Act 1986 (NSW) s 289M.} A represented accused will be served the video recording on their legal counsel.\footnote{Criminal Procedure Act 1986 (NSW) s 289L.}

A complainant is required to state within a DVEC recording that the contents of their statement represents the truth.\footnote{Criminal Procedure Act 1986 (NSW) s 79A(2)(b).} The DVEC regime extends the already existent offences relating to providing a false and misleading statement.\footnote{Criminal Procedure Act 1986 (NSW) s 85.} The offence is enlivened when a false or untrue representation ‘in the form of a recorded statement’\footnote{Criminal Procedure Act 1986 (NSW) s 85(1A).} which is ‘given in evidence.’\footnote{Criminal Procedure Act 1986 (NSW) s 85(1A)-(b).} Penalties vary depending on whether the matter was heard on indictment or summarily.\footnote{Criminal Procedure Act 1986 (NSW) s 85(1A)(a)-(b).}

2. The Intent of DVEC


Principally, the Bill introduced a ‘key reform’ recommended by the New South Wales Government’s ‘Domestic Violence Justice Strategy’\footnote{Department of Attorney General and Justice (NSW), ‘The NSW Domestic Violence Justice Strategy: Improving the NSW Criminal Justice System’s Response to Domestic Violence’ (2013)} - a strategy created to ‘improve
the criminal justice system’s response to domestic violence.”126 This reform was for ‘improved evidence collection’127 as the legislative limitations to video-recorded statements were recognised as an area for review.128

The then Attorney General, Brad Hazzard, gave an overview of the issues facing victims of domestic violence in proceeding through the judicial process, highlighting the power imbalance within the relationship as a key contributor to these issues.129 Although some of the expected outcomes were framed in the negative, the expectations of the DVEC Bill were as follows:

- A reduction of re-traumatisation experienced during the judicial process;130
- The removal of the need to give evidence after the fact from memory, and generally in front of the accused;131
- A reduction in undue pressure from an accused to recant their original account;132 and
- A reduction in complainants failing to attend court.133

In a joint media release by the then Deputy Premier and Minister for Justice, Troy Grant, and Police Commissioner Andrew Scipione, the Commissioner stated:

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129 New South Wales, Parliamentary Debates, Legislative Assembly, 21 October 2014, 1486-8 (Brad Hazzard, Attorney-General).

130 New South Wales, Parliamentary Debates, Legislative Assembly, 21 October 2014, 1486-8 (Brad Hazzard, Attorney-General).

131 New South Wales, Parliamentary Debates, Legislative Assembly, 21 October 2014, 1486-8 (Brad Hazzard, Attorney-General).

132 New South Wales, Parliamentary Debates, Legislative Assembly, 21 October 2014, 1486-8 (Brad Hazzard, Attorney-General).

133 New South Wales, Parliamentary Debates, Legislative Assembly, 21 October 2014, 1486-8 (Brad Hazzard, Attorney-General).
'Never before has a victim of domestic abuse been able to articulate in court the detail and the raw emotion of an incident as clearly as when it happened. That is, until now.'

The Commissioner made reference to several other expectations arising from the DVEC regime, including a reduction in the incidence of complainants being pressured into changing or recanting their evidence as well as the removal of the trauma of the complainant having to relive the incident. Following this, several media releases from New South police stated that anticipated outcomes that would flow from the DVEC regime were an increase in both conviction rates and early pleas of guilty.

C Other Jurisdictions

Following New South Wales, the Northern Territory and the Australian Capital Territory have implemented similar regimes to DVEC. In 2015 the Australian Capital Territory passed the Crimes (Domestic and Family Violence) Legislation Amendment Bill 2015 (ACT) allowing for DVEC style recordings in domestic violence matters. The explanatory memorandum referred heavily to human rights obligations owed to women and children. Following its implementation, prosecutors in the Australian Capital Territory have cited a marked increase in early pleas of guilty following the implementation of the regime.

On 14 March 2017 the Northern Territory passed the Justice Legislation Amendment (Body-worn Video and Domestic Violence Evidence) Bill 2016 (NT) which also makes admissible a visually recorded statement from a domestic violence victim at the incident.

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137 Explanatory Statement (Revised), Crimes (Domestic and Family Violence) Legislation Amendment Bill 2015 (ACT).
scene, captured through police body-worn video. The second reading speech cites that a key motivator for the reform is to ‘empower domestic violence victims [to] hold perpetrators accountable.’\textsuperscript{139} It was further anticipated that the regime will ‘reduce the trauma’ suffered by domestic violence victims and reduce incidences of the victims being coerced to not pursue the matter criminally.\textsuperscript{140}

\section*{D Summary on DVEC Reforms}

Law reform in three jurisdictions within Australia have made admissible visually recorded scene statements for domestic violence victims for a range of reasons. The common thread to all is the acknowledgement that domestic violence victims are vulnerable throughout the judicial process with a view to balancing the effects of this imbalance to achieve just outcomes. The contemporaneity of the recording is seen as highly probative and provides the Court a true insight into the lives of a domestic violence victim.

DVEC includes prescribed regulations on how a DVEC recording can be undertaken and includes safeguards to ensure any undue prejudice from the regime is mitigated. This includes the requirement that the complainant is still available for cross-examination, the issuance of a warning to the jury not to make inferences from the recording being undertaken and criminal sanction attaching to any false assertions included in the recording.

\section*{E Western Australia Evidence Law and Special Witness Provisions}

1. \textit{The Hearsay Rule in Western Australia}

Visually recorded evidence is prima facie inadmissible in Western Australia as it offends the common law rule against hearsay.\textsuperscript{141} The rule against hearsay is an exclusionary rule of evidence, which renders inadmissible out of court statements that

\begin{itemize}
\item \textsuperscript{139} Northern Territory, \textit{Parliamentary Debates}, Legislative Assembly, 30 November 2016, 619-23 (Ms Fyles, Attorney-General) 619.
\item \textsuperscript{140} Northern Territory, \textit{Parliamentary Debates}, Legislative Assembly, 30 November 2016, 619-23 (Ms Fyles, Attorney-General) 620.
\item \textsuperscript{141} Law Reform Commission of Western Australia, \textit{Review of the Criminal and Civil Justice System in Western Australia}, Consultation Paper, Project No 92 (1999) section 2, 607.
\end{itemize}
are sought to be used to assert the truth of the statement. The hearsay rule has been consistently strictly applied in Western Australia with the rationale underpinning this strict approach being that hearsay is not the ‘best evidence’ and is inherently unreliable.

This hearsay exclusion exists for several reasons that arguably do not apply with respect to visually recorded evidence. The key reasons cited by the LRCWA that underpins the rule are: hearsay evidence is not on oath, it cannot be tested in cross-examination, and ‘the demeanour of the maker of the statement’ cannot be viewed and assessed by the court. A DVEC recording, however, does not suffer these issues as the maker of the statement attends court to give sworn evidence, is available for cross-examination, and their demeanour can be assessed on both the recording and in court. There are numerous common law and statutory exceptions to the rule against hearsay in Western Australia, however, without statutory reform, none would serve to make admissible a DVEC recording.

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142 There are numerous variations to expressing the rule against hearsay. The version applied here aligns with the definition provided in John Huxley Buzzard, Richard May and M N Howard, *Phipson on Evidence* (Sweet & Maxwell, 13th ed, 1982) 239, as cited in Andrew Hemming, Miiko Kumar and Elisabeth Peden, *Evidence Commentary and Materials* (Thomson Reuters, 8th ed, 2013) [15.10].
143 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Consultation Paper, Project No 92 (1999) section 2, 609, citing Clementi (Unreported, Supreme Court of Western Australia, Heenan j, 13 February 1996), Perich (Unreported, Supreme Court of Western Australia, Walsh J, 12 July 1995).
148 David Field, Kate Offer, *Western Australian Evidence Law*, (LexisNexis Butterworths, 2015) [9.7].
149 See, eg, the rule in *Subramanian v Director of Public Prosecutions* [1956] 1 WLR 965 and the res gestae exception as accepted in *Ratten v R* [1972] AC 378, both discussed in David Field, Kate Offer, *Western Australian Evidence Law*, (LexisNexis Butterworths, 2015) ch 9.
150 See, eg, *Evidence Act 1906* (WA) s 79C.
2. Family and Domestic Violence Legislation

In Western Australia the Restraining Orders Act 1997 (WA) (“Restraining Orders Act”), is the legislative regime to obtain ‘orders to restrain people from committing family violence’ and creates criminal offences for non-compliance with these orders. The Act creates the legislative definitions relating to domestic violence, which are subsequently relied upon by other pieces of Western Australian legislation. The Restraining Orders Act is Western Australia’s closest equivalent to the Crimes (Domestic and Personal Violence) Act 2007 (NSW), the New South Wales Act that provides their respective domestic violence definitions.

The Restraining Orders Act defines a family relationship and family member in a similarly broad manner to its New South Wales counterpart, which captures married and de-facto relationships, relatives in the traditional sense or through cultural bonds and those who are or were in an ‘intimate personal relationship’. A family member simply means persons who fall within the family relationship definition.

The term ‘family violence’ is also defined very broadly under the Restraining Orders Act, and includes violence offences, threats of violence offences, but also factors that are forms of emotional and psychological control. Unlike its New South Wales counterpart, there is no definition of ‘family violence offence’.

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153 See, eg, *Criminal Code Act Compilation Act 1913* (WA) s 221 regarding circumstances of aggravation for an assault when the offender is in a ‘family relationship’ with the victim, with s221(2) drawing the definition of family relationship from the *Restraining Orders Act 1997* (WA).
159 *Restraining Orders Act 1997* (WA) s 4(3).
160 *Restraining Orders Act 1997* (WA) s 5A(2)(a) and (b).
161 *Restraining Orders Act 1997* (WA) s 5A(1).
162 *Restraining Orders Act 1997* (WA) s 5A(2)(c)-(l).
3. Provisions Available to Domestic Violence Victims in Western Australia

The Evidence Act 1906 (WA) expressly provides for those deemed special witnesses\(^{163}\) which provides ‘measures to assist’\(^{164}\) vulnerable witnesses to reduce the trauma attached to giving evidence in court.\(^{165}\) The Evidence Act 1906 (WA) also provides for the admissibility of pre-recorded evidence to a limited sub-set of witnesses and in limited cases.\(^{166}\)

Prosecution in a criminal matter may apply to the court for special witness accommodations if certain pre-conditions are met.\(^{167}\) To be deemed a special witness, the applicant must demonstrate to the court that the witness would be likely to suffer ‘severe emotional trauma’\(^{168}\) or be ‘so intimidated or distressed to be unable to give evidence or give evidence satisfactorily.’\(^{169}\) Domestic violence victims can be provided special witness status if these pre-conditions are met. Victims of a serious sexual offence are automatically granted a special witness status.\(^{170}\)

Should a domestic violence complainant be granted special witness status, they will be able to utilise the support measures in giving evidence that are afforded to special witnesses.\(^{171}\) These are: having an approved support person with them in court;\(^{172}\) having a ‘communicator’,\(^{173}\) and giving their evidence via a video link or from behind a screen.\(^{174}\)

Evidence can be pre-recorded for special witnesses,\(^{175}\) however not in a manner analogous to a DVEC regime. There are several distinctions. Firstly, the prosecution

\(^{163}\) Evidence Act 1906 (WA) ss 106A, 106R(1).
\(^{164}\) Evidence Act 1906 (WA) s 106R.
\(^{165}\) See rationale for introducing the measures in Law Reform Commission of Western Australia, Evidence of Children and Other Vulnerable Witnesses, Project No 87 (1991) ch 9. See also discussion in David Field, Kate Offer, Western Australian Evidence Law, (LexisNexis Butterworths, 2015) [6.95].
\(^{166}\) Evidence Act 1906 (WA) ss 106HB, 106RA.
\(^{167}\) Evidence Act 1906 (WA) 106R(2).
\(^{168}\) Evidence Act 1906 (WA) s 106R(3)(b)(i).
\(^{169}\) Evidence Act 1906 (WA) s 106R(3)(b)(ii).
\(^{170}\) Evidence Act 1906 (WA) s 106R(3a).
\(^{171}\) Evidence Act 1906 (WA) s 106R.
\(^{172}\) Evidence Act 1906 (WA) s 106R(4)(a).
\(^{173}\) Evidence Act 1906 (WA) s 106R(4)(b).
\(^{174}\) Evidence Act 1906 (WA) ss S 106R(4)(c), 106N(2), 106N(4).
\(^{175}\) Evidence Act 1906 (WA) s 106RA.
must have ‘commenced in a court’ before an order for pre-recorded evidence can be made. This means that a contemporaneous recording would still be inadmissible. Secondly, the recording is conducted by way of a special hearing. Unlike DVEC, which can be recorded at the incident scene, this pre-recorded evidence will be taken in a manner ‘provided for by the rules of [the relevant] court.’

4. Visually Recorded Interviews

Child witnesses and those with a mental impairment may give their evidence in chief in the form of a ‘visually recorded interview’. This recording can be used in evidence for a criminal offence, and the previous restrictions of relationship of the witness to the offence and nature of the offence no longer applies. The recordings dispense with the rule against hearsay and are admissible ‘to the same extent as if [the evidence was] given orally in the proceeding’, however a mentally impaired witness must be declared a special witness for the recording to be admitted into evidence.

(a) Conditions for Admissibility

The admissibility of visually recorded statements in Western Australia are subject to regulations concerning who may undertake the interview and the training and experience the interviewer must hold. Further, the courts may deem an otherwise admissible recording inadmissible if it is otherwise prejudicial to an accused.

The Evidence (Visual Recording of Interviews with Children and Persons with Mental Impairment) Regulations 2004 (WA) provides the strict training requirements for police officers to be permitted to conduct a visually recorded interview. The interview

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176 Evidence Act 1906 (WA) s 106RA.
177 Evidence Act 1906 (WA) s 106S.
178 Evidence Act 1906 (WA) s 106HA. The term ‘child’ which is defined in s 106A as a person under 18 years.
179 Evidence Act 1906 (WA) s 106HA(2). The term ‘mental impairment’ is defined in s 106A as the per the definition provided under the Criminal Law (Mentally Impaired Accused) Act 1996 (WA).
180 Evidence Act 1906 (WA) s 106HA(3).
181 Explanatory Memorandum, Evidence Amendment Bill 2015 (WA); Western Australia, Parliamentary Debates, Legislative Assembly, 14 September 2016, 5961 (L.M. Harvey).
182 Evidence Act 1906 (WA) s 106HB(4).
183 Evidence Act 1906 (WA) s 106HB(1a).
184 Evidence Act 1906 (WA) s 106HC.
should not ‘as far as practicable’ use leading questions and further requires the interviewer to be satisfied that the interviewee can ‘respond rationally to questions and to give an intelligible account.’ Where a recording is ‘tainted’ by leading questions, the court may rule that the recording is inadmissible. However, a probative yet unreliable account will generally be admitted, with a determination of the weight given to the contents of the recording undertaken by the fact-finder by an assessment of the credibility and reliability of the witness. The Court will only exclude unreliable evidence in ‘the most exceptional case’ where directions to the fact-finder could not remove the risk of injustice. This is limited to where the ‘factors assessing reliability [cannot] be understood or assessed’ by the fact-finder.

(b) Balancing Any Prejudice to the Accused

There are several safeguards to protect any undue prejudice to an accused arising from a visually recorded statement, namely:

- a transcript of the visually recorded interview must be disclosed to the accused, and they must be availed with the opportunity to view the recording:

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187 Evidence (Visual Recording of Interviews with Children and Persons with Mental Impairment) Regulations 2004 (WA) reg 5b(iii).
188 Hardwick v The State of Western Australia (2011) 211 A Crim R 349, 354.
189 Hardwick v The State of Western Australia (2011) 211 A Crim R 349, 360, citing R v Kotzmann (No 2) 128 A Crim R 479 [16]. See also Rozenes and DPP v Belajev [1995] 1 VR 533, as cited in Andrew Hemming, Miiko Kumar and Elisabeth Peden, Evidence Commentary and Materials (Thomson Reuters, 8th ed, 2013) [1.160].
190 Hardwick v Western Australia (2011) 211 A Crim R 349, 361, referring to Director of Public Prosecutions (Vic) v Moore (2003) 6 VR 430 [86].
191 Hardwick v Western Australia (2011) 211 A Crim R 349, referring to Director of Public Prosecutions (Vic) v Moore (2003) 6 VR 430 [86].
192 Hardwick v Western Australia (2011) 211 A Crim R 349, 361, referring to Director of Public Prosecutions (Vic) v Moore (2003) 6 VR 430 [86].
193 Evidence Act 1906 (WA) s 106HB(2)(a).
194 Evidence Act 1906 (WA) s 106HB(2)(b).
• where the recording is admitted into evidence the judge is to issue a warning to the jury that visually recorded evidence is ‘routine practice’ and not to infer guilt from it;\(^{195}\) and
• the witness is still required to be available for cross examination and re-examination, whether in Court or through any of the other accommodations available to vulnerable witnesses.

5.  *The Intent of the Provisions*

Special witness provisions were first inserted into the *Evidence Act 1906 (WA)* following the 1987 Child Sexual Abuse Taskforce Report\(^ {196}\) and the 1991 Law Reform Commission Report of Western Australia titled *Evidence of Children and Other Vulnerable Witnesses*.\(^ {197}\) The Report outlined the deficiencies in the law in protecting vulnerable witnesses and made law reform recommendations to ‘reduce the trauma’\(^ {198}\) and ‘improve the quality of … evidence’\(^ {199}\) provided by those deemed vulnerable. This report recommended the use of pre-recorded evidence for children, which was based on the belief that the fresh account captured would be more accurate than one told many months later at trial.\(^ {200}\) The recommendation tempered any prejudice to an accused by providing that the child must be available for cross-examination.\(^ {201}\) Since its introduction the admissibility of pre-recorded evidence has periodically been expanded, motivated by the need to provide accommodations for vulnerable witnesses to ensure just outcomes.\(^ {202}\)

\(^{195}\) Evidence Act 1906 (WA) s 106HB(7).
\(^{196}\) Carmen Lawrence, ‘A Report to the Government of Western Australia’ (Research Report, Child Sexual Abuse Taskforce, 1987).
\(^{200}\) Law Reform Commission of Western Australia, Evidence of Children and other Vulnerable Witnesses Report (project 87) (1991) 45.
\(^{201}\) Law Reform Commission of Western Australia, Evidence of Children and other Vulnerable Witnesses Report (project 87) (1991) 3.32-3.33
\(^{202}\) See, eg, Criminal Law Amendment (Sexual Assault and Other Matters) Act 2004; Criminal Law and Evidence Amendment Act 2008 (WA); Evidence Amendment Act 2016 (WA).
The admissibility of visually recorded interviews for children was inserted into the Evidence Act 1906 (WA) in 2004. In 2008, the provisions were amended to allow those with mental impairment to give evidence in chief in the form of a visually recorded interview. This amendment was prompted from a District Court of Western Australia decision where a mentally impaired person was too traumatised to give evidence. Parliament noted the challenges mentally impaired witnesses face in giving evidence, and therefore expanded the admissibility of visually recorded statements to ensure the mentally impaired could ‘participate effectively in the criminal justice system’

Similarly, in 2016, a further amendment was introduced specifically to overcome a District Court of Western Australia decision where a pre-recorded statement from a child witness was deemed inadmissible by the Court as it fell outside the narrow exceptions to the rules against hearsay found in the Child Witness provisions. This was despite the fact that defence counsel consented to the recording being played. Here, the child witness gave evidence of an offence committed against an adult, not against himself or another child, which did not fall within the legislative exception to the admissibility of the recording. In her second reading speech the then Minister for Police, Liza Harvey, noted that the giving of evidence in court is ‘complex and daunting’ for children and those who are otherwise vulnerable witnesses. The purpose of the provisions, she stated was to ‘reduce the distress … associated with the court process’ and provide a more reliable form of evidence due to the contemporaneity of the recording. Interestingly, the then shadow Attorney General John Quigley, in

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203 Criminal Law Amendment (Sexual Assault and Other Matters) Act 2004 (WA).
204 Criminal Law and Evidence Amendment Act 2008 (WA).
207 Criminal Law and Evidence Amendment Act 2016 (WA).
208 See discussion in Explanatory Memorandum, Evidence Amendment Bill 2015 (WA); Western Australia, Parliamentary Debates, Legislative Assembly, 14 September 2016, 5961 (L.M. Harvey).
209 Explanatory Memorandum, Evidence Amendment Bill 2015 (WA); Western Australia, Parliamentary Debates, Legislative Assembly, 14 September 2016, 5961 (L.M. Harvey).
210 Western Australia, Parliamentary Debates, Legislative Assembly, 14 September 2016, 5961 (L.M. Harvey).
211 Western Australia, Parliamentary Debates, Legislative Assembly, 14 September 2016, 5961 (L.M. Harvey).
212 Western Australia, Parliamentary Debates, Legislative Assembly, 14 September 2016, 5961 (L.M. Harvey).
supporting the Bill, briefly suggested that the expansion of admissibility of visually recorded evidence should include victims of domestic violence.\textsuperscript{213} It is significant to an indication of the likely implementation of a DVEC style regime, to note that Mr Quigley is the current Attorney General for the Labor party, who came into power on an election platform based heavily upon law reform for domestic violence complainants.\textsuperscript{214}

The common theme emerging from these reforms is that vulnerable witnesses require more accommodations to ensure the best evidence is presented to the court, thereby ensuring justice is achieved. The admissibility was limited to a narrow set of instances in the first instance but has periodically expanded to more circumstances. The tenor of all these provisions mirrors the underlying purpose for introducing a DVEC regime.

6. \textit{The Accused’s Interview}

In Western Australia, an accused to a criminal offence may be afforded the opportunity to participate in a visually recorded interview.\textsuperscript{215} This recording is undertaken following the accused being cautioned that the contents of the recording may be used in evidence against them.\textsuperscript{216} This recording is also prima facie hearsay.\textsuperscript{217} The exception to the hearsay rule lies in an accused making an admission against self-interest.\textsuperscript{218} Where the recording is self-serving, it does not fall within this exception.\textsuperscript{219} Where the recording contains mixed statements – partial admissions coupled with self-serving statements then it is at the discretion of prosecution, not defence to play the recording.\textsuperscript{220} However, if prosecution do elect to play the recording, the entire recording must be played.\textsuperscript{221} If

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{213} Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 22 September 2016, 6644-6651 (John Quigley, shadow Attorney-General).
  \item \textsuperscript{215} \textit{Criminal Investigation Act 2006} (WA) pt 11.
  \item \textsuperscript{216} \textit{Criminal Investigation Act 2006} (WA) s 138.
  \item \textsuperscript{217} See discussion in David Field, Kate Offer, \textit{Western Australian Evidence Law}, (LexisNexis Butterworths, 2015) [9.66], [9.88].
  \item \textsuperscript{218} See, eg, \textit{Middleton v The Queen} (1998) 19 WAR 179, 182.
  \item \textsuperscript{219} See, eg, \textit{Middleton v The Queen} (1998) 19 WAR 179.
  \item \textsuperscript{221} See, eg, \textit{Middleton v The Queen} (1998) 19 WAR 179, 182.
\end{itemize}
\end{footnotesize}
prosecution do not play the recording then the accused does not get the benefit of providing a contemporaneous account.\textsuperscript{222}

An important distinction must be drawn, however, between an accused’s record of interview and a complainant’s visually recorded statement. Although the accused’s recording can be admitted into evidence, it is not sworn testimony.\textsuperscript{223} Where the recording is played, the accused is still not required to give evidence at trial,\textsuperscript{224} thereby removing the ability to test the accused’s account provided in the recording through cross-examination. Therefore, the veracity of the contents of the recording cannot be tested, unlike a complainant’s visually recorded statement.

8. Summary on Western Australia’s Current Position

The current state of the law in Western Australia would exclude a DVEC recording as hearsay. The Evidence Act already allows for visually recorded statements for children and mentally impaired witnesses and these provisions were enacted for the same underlying issues experienced by domestic violence complainants. Legislation exists which aptly defines some of the terms relevant to domestic violence, in a manner analogous to the New South Wales counterpart.

Further, the legislation and the common law ensures that the admissibility of the visually recorded statements is not unduly prejudicial upon an accused. This is achieved through strict regulations of the admissibility of the recording, the requirement of disclosure, the requirement of the maker of the statement to still be cross-examined to test the evidence, and the discretion of the courts to exclude an unduly prejudicial recording. An accused can participate in a recorded interview; however, this is only admissible when an accused makes admissions. However, the recording is not sworn testimony and the contents may not be able to be tested in cross-examination.

\textsuperscript{222} See, eg, Middleton v The Queen (1998) 19 WAR 179, 182.

\textsuperscript{223} See, eg, Middleton v The Queen (1998) 19 WAR 179, 181-2.

\textsuperscript{224} Evidence Act 1906 (WA) s 8(1) provides that a criminal accused is ‘a competent but not a compulsable witness.’
V STAKEHOLDERS’ PERSPECTIVES ON DVEC

The survey questions and their respective results are summarised in the table on the next page. For each question, the data is analysed to determine the mean, standard deviation, and whether any significant difference existed in the views of prosecution and defence. The results are then discussed under the sub-questions with reference to the qualitative content drawn from the survey. Each sub-question is then concluded with reference to the doctrinal research.
Table 1

Means, standard deviations, and results of t-tests

<table>
<thead>
<tr>
<th>Item</th>
<th>Prosecution</th>
<th>Defence Counsel</th>
<th>df</th>
<th>t</th>
<th>p</th>
</tr>
</thead>
<tbody>
<tr>
<td>Q1 – More Probative/Injuries?</td>
<td>1.64</td>
<td>2.24</td>
<td>57.257</td>
<td>-2.628</td>
<td>0.011</td>
</tr>
<tr>
<td>Q2 – Inaccurate Due To Emotions?</td>
<td>3.07</td>
<td>2.00</td>
<td>81</td>
<td>5.253</td>
<td>.000</td>
</tr>
<tr>
<td>Q3 – Police Competent in Obtaining?</td>
<td>2.40</td>
<td>3.24</td>
<td>81</td>
<td>-3.830</td>
<td>.000</td>
</tr>
<tr>
<td>Q4 – Does a Prejudice Arise?</td>
<td>3.31</td>
<td>2.11</td>
<td>81</td>
<td>5.680</td>
<td>.000</td>
</tr>
<tr>
<td>Q5 – More Willing to Give Statement?</td>
<td>2.18</td>
<td>2.54</td>
<td>72.228</td>
<td>-1.924</td>
<td>.058</td>
</tr>
<tr>
<td>Q6 – More Likely Attend Trial?</td>
<td>2.53</td>
<td>3.03</td>
<td>81</td>
<td>-2.554</td>
<td>0.13</td>
</tr>
<tr>
<td>Q7 – Reduce Changing Account?</td>
<td>2.18</td>
<td>2.42</td>
<td>81</td>
<td>-1.026</td>
<td>.308</td>
</tr>
<tr>
<td>Q8 – Increase Guilty Pleas?</td>
<td>2.13</td>
<td>2.81</td>
<td>79</td>
<td>-3.748</td>
<td>.000</td>
</tr>
<tr>
<td>Q9 – Higher Conviction Rates?</td>
<td>2.09</td>
<td>2.36</td>
<td>79</td>
<td>-1.563</td>
<td>.122</td>
</tr>
<tr>
<td>Q10 – Greater Protection to Victims?</td>
<td>2.31</td>
<td>2.81</td>
<td>66.260</td>
<td>-1.985</td>
<td>.051</td>
</tr>
<tr>
<td>Q11 – Less Trauma in Giving Evidence?</td>
<td>2.29</td>
<td>2.92</td>
<td>81</td>
<td>-2.377</td>
<td>.020</td>
</tr>
<tr>
<td>Q12 – More Accurate Contemporaneous?</td>
<td>1.82</td>
<td>2.42</td>
<td>63.302</td>
<td>-2.966</td>
<td>.004</td>
</tr>
<tr>
<td>Q13 – Should WA Adopt DVEC?</td>
<td>1.76</td>
<td>3.11</td>
<td>50.606</td>
<td>-5.262</td>
<td>.000</td>
</tr>
<tr>
<td>Q14 – Written Statements Enough Detail?</td>
<td>3.66</td>
<td>3.51</td>
<td>81</td>
<td>.639</td>
<td>.524</td>
</tr>
<tr>
<td>Q15 – More Probative/ Demeanour?</td>
<td>1.84</td>
<td>2.47</td>
<td>81</td>
<td>-2.992</td>
<td>.005</td>
</tr>
<tr>
<td>Q16 – More Probative/Incident Scene?</td>
<td>1.78</td>
<td>2.45</td>
<td>81</td>
<td>-3.683</td>
<td>.000</td>
</tr>
</tbody>
</table>
1. **Will a DVEC Recording Provide More Probative Evidence?**

In response to the question: *Do you believe that DVEC would be more probative evidence to sworn evidence at trial as it captures any injuries to the alleged victim?* the overall mean was 1.91 representing definitely yes to probably yes. The t-test results indicate that prosecution responses ($M = 1.64, SD = .743$) were significantly higher than defence ($M = 2.47, SD = 1.109; t(57.26) = -2.628, p = .011$, two-tailed).

In response to the question: *Do you believe that DVEC would be more probative evidence to sworn evidence at trial as it captures the demeanour of the alleged victim at the time of the recording?* the overall mean was 2.13 representing probably yes to might or might not. The t-test results indicate that prosecution responses ($M = 1.84, SD = .852$) were significantly higher than defence ($M = 2.47, SD = 1.109; t(81) = -2.992, p = .005$, two-tailed).

In response to the question: *Do you believe that DVEC would be more probative evidence to sworn evidence at trial as it captures the incident scene?* the overall mean was 2.08 representing probably yes to might or might not. The t-test results indicate that prosecution responses ($M = 1.78, SD = .765$) were significantly higher than defence ($M = 2.45, SD = 0.891; t(81) = -3.683, p = .001$, two-tailed)

In response to the question: *Do you believe that DVEC will provide a more accurate account of events to sworn evidence at trial due to the contemporaneity of the recording?* the overall mean was 2.10 representing probably yes to might or might not. The t-test results indicate that prosecution responses ($M = 1.82, SD = .716$) were significantly higher than defence ($M = 2.42, SD = 1.056; t(63.302) = -2.966, p = .004$, two-tailed)

In response to the question: *As the recording can be used as evidence, do you believe there is a risk that the alleged victim’s account may be inaccurate due to the victim still being in an emotionally charged state when participating in the recording?* the overall mean was 2.58 representing probably yes to might or might not. The t-test results indicate that prosecution responses ($M = 3.07, SD = .939$) were significantly lower than defence ($M = 2.00, SD = .900; t(81) = 5.253, p = .001$, two-tailed).
In response to the question: *Do you believe written statements currently taken by police contain enough detail of the event alleged?* the overall mean was 3.59 representing might or might not to probably not. The t-test results indicate no significant difference between prosecution and defence.

**(a) Discussion with Qualitative Findings**

Data from both prosecutors and defence counsel reveals a perception that DVEC would be more probative evidence; however, there was a significant difference in the attitudes of each party. In every question explicitly addressing probative value, prosecutors perceived that DVEC would be significantly more probative than defence. Additionally, the risk of exaggeration is perceived to be much greater by defence. Both prosecution and defence perceived to the same extent that statements currently obtained by police do not contain enough detail. As DVEC is recorded, this may remedy the issue of statements being greatly abridged versions of the events as disclosed.

The most recurring theme found within the qualitative component centred on concerns about how reliable contemporaneous evidence at the scene of the alleged assault will be due to the heightened emotions of a complainant arising from to the proximate spatial and temporal connection to the alleged incident. Twenty-one contributions under the prejudice remarks and 13 contributions under the general remarks were coded as falling into this area. Two competing views emerged from these remarks. Firstly, many respondents viewed the heightened emotions as a negative, which would lead to an inaccurate account or lead to a bias towards the victim. For example, participant eight stated “[the] emotional state of the complainant can be misleading. A crying woman is much more sympathetic...” Similarly, participant 13 stated “DVEC [is] obtained at a time when emotions of victim are particularly heightened so may not be accurate.”

The almost diametrically contrary position was that the emotions captured, along with the peripheral aspects in the recording such as the scene and the injuries, would provide a far more accurate account of the events over oral evidence given later at trial. For example, participant 74 stated: “The main benefit ... would be the ability to show the true emotions of the victims injuries and the offence scene which the court never gets to see.” Similarly, participant 79 stated “How can that not be the best evidence available, when it is so fresh in the mind of the witness?”
The former view was expressed predominantly by defence counsel, and the latter by prosecution. This issue has arisen as a key concern to be determined with respect to DVEC, with the probative value of the recording being possibly offset by embellishment, exaggeration and heightened emotions that may affect an objective analysis of the evidence.

(b) Conclusion on Probative Value

The data and the qualitative responses signify that the recording would be more probative due to the spatial and temporal link to the incident. A key concern centres on the reliability of the recording owing to heightened emotions, however, there are several points which may ameliorate the concerns in respect of this issue.

Firstly, as much an emotional recording may engender the sympathy of the fact finder, it is suggested that the recording could equally so expose a questionable complaint. A complainant is still required to attend court where defence in cross-examination can test the content of the recording. The fact-finder can then assess the probative value and the reliability of the account where any hyperbole by the complainant can be challenged.

Secondly, the New South Wales DVEC legislation requires a warning to be issued to the fact-finder that the recording is common practice which may obviate the risk of the prejudice of a contemporaneous recording. This warning would be a vital inclusion in any DVEC regime in Western Australia to ensure that any prejudice arising from this concern is mitigated.

Thirdly, visually recorded statements are already admissible in Western Australia, subject to the regulations that govern the training and pre-conditions required to record the interview. A DVEC regime, if made admissible in Western Australia, would need

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225 Criminal Procedure Act 1986 (NSW) s 289F(5).
226 See, eg, Hardwick v The State of Western Australia (2011) 211 A Crim R 349, 360, citing R v Kotzmann (No 2) 128 A Crim R 479 [16]. See also Rozenes and DPP v Beljajev [1995] 1 VR 533, as cited in Andrew Hemming, Miiko Kumar and Elisabeth Peden, Evidence Commentary and Materials (Thomson Reuters, 8th ed, 2013) [1.160].
227 Criminal Procedure Act 1986 (NSW) s 289J.
228 Evidence Act 1906 (WA) s 106HA(3).
to be subject to similar regulations relating to trained police staff in performing the role. This training would need to include the ability to appraise whether the complainant is in an adequately stable state of mind to participate in the recording.\textsuperscript{230}

Lastly, any introduction of DVEC would require a criminal sanction, as is the case in New South Wales, should the complainant include any testimony that they know to be false or misleading.\textsuperscript{231}

The process of providing a contemporaneous account while fresh in the memory of the complainant, and inclusive of all peripheral matters such as injuries and property damage would be a solid starting position to ensuring the best evidence is before the court, thereby facilitating a more just adjudication. The safety mechanisms as discussed would, however, be vital to ensure that any prejudice arising is sufficiently mitigated.

2 Will DVEC Encourage Participation in the Judicial Process

In response to the question: \textit{Do you believe an alleged victim of domestic violence would be more willing to provide an initial statement under DVEC?} the overall mean was 2.35 representing probably yes to might or might not. The t-test results indicate no significant difference between prosecution and defence.

In response to the question: \textit{Do you believe DVEC affords greater protection to victims of domestic violence throughout the judicial process?} the overall mean was 2.53 representing probably yes to might or might not. The t-test results indicate no significant difference between prosecution and defence.

In response to the question: \textit{Do you believe that DVEC will reduce the trauma for an alleged domestic violence victim in giving evidence in trial?} the overall mean was 2.58 representing probably yes to might or might not. The t-test results indicate that prosecution responses ($M = 2.29, SD = 1.100$) were significantly higher than defence ($M = 2.92, SD = 1.323$; $t(81) = t-2.377 \ p = .020$, two-tailed)

In response to the question: \textit{To what extent do you believe that DVEC would reduce the incidence of an alleged domestic violence victim changing their account due to external...}

\textsuperscript{230} See, eg, the need to ensure the witness can respond rationally, as per Evidence (Visual Recording of Interviews with Children and Persons with Mental Impairment) Regulations 2004 (WA) reg 5b(ii).
\textsuperscript{231} Criminal Procedure Act 1986 (NSW) s 85.
pressures? the overall mean was 2.29 representing probably yes to might or might not. The t-test results indicate no significant difference between prosecution and defence.

(a) Discussion with Qualitative Findings

The views of prosecution and defence significantly align with respect to this sub-set of questions. There is a view that the regime will probably encourage greater participation in the judicial process, however there were numerous remarks centred on whether there will be a tangible improvement in the ‘willing complainant’ issue.

The qualitative responses highlighted a perception that many complainants may still be unwilling to give evidence at trial. This was attributed to a reconciliation in the relationship, and a perception that they may wish to amend their evidence. For example, participant 5 stated “Victims of DV will still be subject to pressure from their abuser even if the system is adopted.” Similarly, participant 9 stated “many complainants will still refuse to give evidence or fail to turn up to trial’ and participant 42 stated ‘DVEC is unlikely to have a great deal of impact in reducing “change of heart” incidences with complainants.’

Several comments recognised the vulnerability of a domestic violence complainant, and how a DVEC regime may address the issue. For example, participant 29 stated ‘perpetrators have to stop relying on the “reluctant complainant” defence and complainant …should not … be permitted to sabotage a fair prosecution by refusing to cooperate in giving evidence.’ Participant 67 stated ‘It would primarily reduce the subsequent minimisation of the event by testifying victims.’

(b) Conclusion on Participation in the Judicial Process

The introduction of DVEC in Western Australia may encourage a greater participation from domestic violence victims in the judicial process, as it provides a method of giving evidence at the time rather than the need to later recite the incident. As the evidence is pre-recorded, DVEC may prove valuable in reducing the trauma experienced at trial by domestic violence victims. This may lead to less complainants changing their account prior to trial, however, despite the data indicating this perception, several participants provided qualitative contributions that DVEC would not achieve this outcome.
The expansion of admissible visually recorded evidence in Western Australia has occurred in part to achieve greater participation in the judicial process.\textsuperscript{232} DVEC aligns with this rationale; however, whether it achieves this outcome may not be known without an assessment post implementation to determine whether greater participation flowed from its introduction.

3 Potential Issues Associated with DVEC

In response to the question: \textit{Do you believe frontline police officers would be competent to obtain DVEC evidence from a domestic violence victim?} the overall mean was 2.78 representing probably yes to might or might not. The t-test results indicate that prosecution responses ($M = 2.40$, $SD = .963$) were significantly higher than defence ($M = 3.24$, $SD = 1.025$; $t (81) = -3.830$, $p = .001$, two-tailed)

In response to the question: \textit{Does any prejudice arise from implementing a DVEC regime?} the overall mean was 2.76 representing probably yes to might or might not. The t-test results indicate that prosecution responses ($M = 3.31$, $SD = .949$) were significantly lower than defence ($M = 2.11$, $SD = .981$; $t (81) = 5.680$, $p = .001$, two-tailed)

\textit{(a) Discussion with Qualitative Findings}

Prosecution were generally more optimistic than defence concerning perceived issues with DVEC. The main perceived issue from both prosecution and defence was the lack of competence of police in obtaining a statement that could be admissible as evidence in chief. Defence were the only participants to provide opinions on any further perceived prejudices, with the main ones highlighted as being the potential for exaggeration on the complainant’s behalf, as already discussed, and to a lesser extent, the prejudice of only providing the contemporaneous recording to the perceived ‘victim’.

\textsuperscript{232} Carmen Lawrence, ‘A Report to the Government of Western Australia’ (Research Report, Child Sexual Abuse Taskforce, 1987).
\textsuperscript{232} See, eg, Law Reform Commission of Western Australia, \textit{Evidence of Children and Other Vulnerable Witnesses}, Project No 87 (1991). See also discussion in Explanatory Memorandum, Evidence Amendment Bill 2015 (WA).
(i) Police Competence to Interview

The first issue recognised was the ability of police to undertake what is effectively a forensic role. The impetus for this aspect of the research, noted in the literature review, was that poor interviewing techniques may obviate the utility of the recording.\(^{233}\)

The concerns articulated in the responses are generally consistent with the concerns highlighted in previous studies on pre-recorded evidence as discussed in chapter 2. The qualitative responses highlight that police are not trained in the rules of evidence, which may result in leading questions being asked, and inadmissible evidence being elicited within the recording.

For example, participant 12 stated ‘Police officers [are] untrained in the rules of evidence and liable to lead and call inadmissible evidence’, participant 31 stated ‘likely leading question put to comp [sic]’. Several noted that careful training would be required, for example participant 5 stated ‘the collection of such evidence will require careful training of police officers’, participant 65 stated ‘Police would require extra training’, and participant 66 stated ‘Great idea if implemented ... with sufficient training.’

It is important to note that the rules of evidence will apply to a DVEC recording to the same extent as oral testimony and questioning and responses that offend the rules of evidence would very likely be deemed inadmissible.\(^{234}\) A strong comparison can be drawn from the Western Australian Supreme Court decision of *Hardwick v Supreme Court of Western Australia*,\(^{235}\) where the court deemed inadmissible pre-recorded evidence of a child due to poor interviewing techniques in the form of leading questions. It would be expected that this position would be followed with respect to a DVEC recording that suffers the same issues. It should also be noted that the outcome

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\(^{234}\) See, eg, *Hardwick v Western Australia* (2011) 211 A Crim R 349.

\(^{235}\) (2011) 211 A Crim R 349.
of the exclusion was not the loss of the right to give evidence in chief, rather that the
evidence in chief was given orally rather than via the recording.\footnote{Hardwick v Western Australia (2011) 211 A Crim R 349. Note also, the decision to play the recording with DVEC under Criminal Procedure Act 1986 (NSW) s 289G(2).}

Secondly, should DVEC be introduced in Western Australia, it must be regulated in a
manner analogous to currently admissible visually recorded statements in Western
Australia, which provide for strict training requirements before an officer is deemed
capable of undertaking the recording.

(ii) Availability of DVEC to Only the Perceived Victim

Several respondents noted that a prejudice arose by providing the DVEC recording to
only the perceived victim of the domestic assault. For example, respondent 8 stated:

“This is dangerous to an accused person, who is not afforded this opportunity in
the same circumstances, but after at a police station with two officers surrounding
him, thus compounding the appearance of guilt.’

This issue was identified in the literature review\footnote{Australian Law Reform Commission, Family Violence, A National Legal Response, Report No 114 (2010), [9].} and raises an interesting concern. As
noted in chapter 4, an accused’s visually recorded interview is undertaken following a
cautions being administered to an accused\footnote{Criminal Investigation Act 2006 (WA) s 138.} and is undertaken for the purpose of
eliciting admissions to the relevant offence.\footnote{See discussion in Middleton v The Queen (1998) 19 WAR 179, which provides that a recording must
contain admissions against interest to be admissible.} In a domestic violence setting, an
accused’s interview may well contain partial admissions, such as presence at the scene,
however may contain denials or defences to the allegation. The discretion to play a
recording of this nature lies entirely with prosecution.\footnote{Middleton v The Queen (1998) 19 WAR 179.}

As noted in chapter 4, there is a distinct difference between an accused recording and a
complainant’s visually recorded interview. The accused’s recording is not sworn
testimony\footnote{See, eg, Middleton v The Queen (1998) 19 WAR 179, 181-2.} and an accused is under no requirement to give sworn evidence at trial.\footnote{Evidence Act 1906 (WA) s 8(1) provides that a criminal accused is ‘a competent but not a compellable witness.’}
therefore the veracity of the contents of the recording cannot be tested, unlike a complainants visually recorded statement. Although on face it may appear that a prejudice arises, the requirement of a DVEC complainant to be cross-examined arguably mitigates this prejudice.

(b) Conclusion on Issues Associated with DVEC

The prejudices highlighted are capable of sufficient mitigation to ensure that a just adjudication would flow from the introduction of DVEC in Western Australia. Visually recorded statements are already admissible in Western Australia, subject to the regulations that govern the training and pre-conditions required to record the interview, and a DVEC regime would need to be subject to similar regulations. Should the police fail to elicit admissible evidence, or if their method of interview offends the rules of admissibility, with the asking of leading questions being a primary reason for inadmissibility, then the recording would very likely be deemed as inadmissible, as is the current status of the law with respect to visually recorded child interviews.243 Further, the recording would need to be disclosed consistent with current legislation governing visually recorded statements from children and those with mental impairment.244

The participant of the recording would be the party that is making a complaint to police, and should both parties complain then this would be an assessment to be undertaken by the police to determine the principal offender.245 An accused can still provide a contemporaneous account through an electronic record of interview, but it must be noted that this interview is not sworn evidence so should not be used in a manner analogous to a DVEC recording where the complainant still gives sworn evidence.

4 Other Anticipated Benefits

In response to the question: Do you believe that a DVEC regime will lead to an increase in early pleas of guilty? the overall mean was 2.43 representing probably yes to might or might not. The t-test results indicate that prosecution responses (M = 2.13,
were significantly higher than defence ($M = 2.81, SD = .856; t(79) = -3.748, p = .001, two-tailed)

In response to the question: Do you believe that a DVEC regime will lead to higher conviction rates? the overall mean was 2.21 representing probably yes to might or might not. The t-test results indicate no significant difference between prosecution and defence.

(a) Discussion with Qualitative Findings

Both prosecution and defence perceive that higher conviction rates and early pleas of guilty will flow from implementing DVEC, however, prosecution were more optimistic about the impact on early guilty pleas. One participant noted that DVEC would ‘stop perpetrators relying on ‘reluctant complainant’ and prevent sabotage a fair prosecution.’ Further, participant stated that DVEC would make it ‘more difficult for [an] accused to dispute allegations.’

(b) Conclusion on Other Anticipated Benefits

Media releases in New South Wales have indicated that there has been a significant improvement in both conviction rates and early pleas of guilty, however no peer reviewed study supporting this outcome has been identified. Higher conviction rates will be largely contingent on the quality of the visually recorded statement and its probative value, which has already been discussed. Early pleas of guilty will be contingent on the same; however, the impact of the introduction of DVEC on early pleas may arguably only change where there is a perception that a complainant would be willing to attend trial.

5 Final Appraisal

In response to the question: Do you believe Western Australia should adopt a DVEC regime? the overall mean was 2.35 representing probably yes to might or might not. The t-test results indicate that prosecution responses ($M = 1.76, SD = .773$) were

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significantly higher than defence \((M = 3.11, SD = 1.357; t (50.606) = -5.262, p = .001,\)  two-tailed)

(a) Discussion

Despite the overall mean in support of introducing a DVEC regime, this question led to the greatest difference in opinion between prosecution and defence. Prosecution responses sat between definitely yes to probably yes, whereas defence sat between might or might not to probably not. This distinction in attitudes has been canvassed under the sub-questions results.

VI CONCLUSION AND RECOMMENDATIONS

DVEC was introduced in New South Wales to address the issues associated with domestic violence complainants giving evidence due to their vulnerability during the judicial process.\(^{247}\) Visually recorded scene statements are already admissible in Western Australia for children and the mentally impaired, which were introduced for the same reasons.\(^{248}\) The admissibility of visually recorded evidence in Western Australia has evolved significantly since its inception to ensure the protection of vulnerable witnesses through the judicial process, and to ensure the best evidence is put before the fact-finder.\(^{249}\) Although domestic violence complainants in Western Australia may be provided some accommodations in giving evidence\(^{250}\) these are arguably not currently adequate to ensure a just adjudication in these matters.

The empirical results indicate a strong perception that a DVEC regime would result in more probative evidence being given in domestic violence matters, likely due to the spatial and temporal link to the incident. A conflicting perception was however noted by a large number of participants who believed that this close link to the event may equally have a prejudicial effect and actually be an inhibitor to the complainants providing quality evidence owing to their emotional state. Taken to its logical limits,

\(^{247}\) New South Wales, Parliamentary Debates, Legislative Assembly, 21 October 2014, 1486-8 (Brad Hazzard, Attorney-General).
\(^{248}\) See, eg, discussion in Western Australia, Parliamentary Debates, Legislative Assembly, 14 September 2016, 5961 (L.M. Harvey).
\(^{249}\) See discussion in Western Australia, Parliamentary Debates, Legislative Assembly, 14 September 2016, 5961 (L.M. Harvey).
\(^{250}\) Evidence Act 1906 (WA) s 106R.
the perception is that the determination of the question of the value of a contemporaneous recording can potentially fall either way; they could capture compelling evidence of a sincere complainant as much as they will capture inconsistent evidence that could be readily challenged of an exaggerating complainant. These are obviously important matters to be considered by the fact-finder, and it underpins the argument that a just adjudication applies equally to an accused wrongly charged as it does to a genuine complainant.

Further, there is a perception that DVEC would lead to a greater participation rate in the judicial process by domestic violence complainants, and higher conviction rates and early guilty pleas. Whether these outcomes will be realised would depend largely on the quality of the recording. There were numerous concerns regarding the capabilities of police to undertake a DVEC recording in a manner that would provide quality admissible evidence. Secondly, these outcomes are also contingent on whether the complainant perceives that greater protection is afforded to them during the judicial process. Conviction rates and early guilty pleas may only increase when there is a perception that the complainant will engage in the judicial process, should the matter proceed to trial.

A What Must Be Included to Mitigate Prejudice

The issues identified that may arise from introducing DVEC in Western Australia, can be sufficiently mitigated through the inclusion of several provisions to ensure the veracity and fairness of the regime. DVEC will only be an effective tool in ensuring just adjudications in domestic violence matters if all of these factors are included:

1. For the visual recording to be admissible, the regime must require that the complainant attends trial to be cross-examined. This will provide an accused to test the recording and the fact-finder can assess their demeanour in court.

2. The taking of a visually recorded statement must be regulated in a manner similar to presently admissible visually recorded statements in Western Australia.\(^{251}\) Police would be required to undertake specific training to ensure

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\(^{251}\) Evidence (Visual Recording of Interviews with Children and Persons with Mental Impairment) Regulations 2004 (WA).
the recording is conducted fairly and contains admissible content. Further, police will need to ensure that the complainant ‘can respond rationally to questions to give an intelligible account’\(^{252}\) prior to deciding whether to undertake the recording.

3. The regime must include a warning similar to that under DVEC\(^{253}\) and for presently admissible visually recorded statements in Western Australia.\(^{254}\) The warning must state that the recording is standard practice and that the fact finder must not draw any adverse finding from this method of giving evidence being employed. This will assist in mitigating the empathy concern with respect to the ‘teary complainant.’

4. The recording must also include an acknowledgement from the complainant that they are telling the truth.\(^{255}\) Further, a criminal offence for providing false, misleading material must be included. This inclusion will further mitigate any embellishment within the recording.\(^{256}\)

5. The visually recorded statement must be disclosed in a manner analogous to presently admissible visually recorded statements in Western Australia.\(^{257}\) This will ensure that the accused is aware of the nature of the allegation, as they are presently through the disclosure of any written statement.

B \textit{How DVEC could be inserted in Western Australian Legislation}

The rules of evidence and criminal procedure are distinctly different in Western Australia and New South Wales, which lastly requires consideration as to how DVEC may be inserted into Western Australian legislation. As noted in chapter 4, Western Australia has domestic violence legislation and special witness accommodations

\(^{252}\) \textit{Evidence (Visual Recording of Interviews with Children and Persons with Mental Impairment) Regulations 2004 (WA)} reg 5b(ii).

\(^{253}\) \textit{Criminal Procedure Act 1986 (NSW)} s 289I.

\(^{254}\) \textit{Evidence Act 1906 (WA)} s 106HB(7).

\(^{255}\) See, eg, \textit{Criminal Procedure Act 1986 (NSW)} s 79A(2)(b).

\(^{256}\) See, eg, \textit{Criminal Procedure Act 1986 (NSW)} s 85(1A).

\(^{257}\) \textit{Evidence Act 1906 (WA)} s 106HB(2)[a]-[b].
governing visually recorded evidence. Both of these pieces of legislation could be used to incorporate a DVEC regime in Western Australia.

Firstly, the *Restraining Orders Act 1997 (WA)*, provides a definition for ‘family relationship’ which could readily be applied to a DVEC regime. The Act does not, however, define a ‘family violence offence.’ Consideration would need to be given with respect to what offences a DEVEC regime in Western Australia may apply to.

Secondly, section 106HA *Evidence Act 1906 (WA)* provides for taking of a visually recorded statement from either a child or a person with mental impairment. This section could be amended to include a visually recorded statement from a domestic violence complainant in a ‘family relationship’ as defined under the *Restraining Orders Act 1997 (WA)*. Section 106HA establishes the requirements of the recording in the form of prescribed requirements, and by a prescribed person, and section 106HC provides the regulations. As discussed, these are equally vital to ensure the quantity of a DVEC recording and to mitigate any prejudice.

Section 106HB *Evidence Act 1906 (WA)* provides for the admissibility of a visually recorded statement. Again, this section could be amended to include a visually recorded statement from a domestic violence complainant. This section sets out the disclosure requirements and the judicial warning, which, as discussed, must be included in a DVEC regime. This section also requires a mentally impaired witness to be declared a special witness before the recording is admissible. Further consideration would need to be given as to whether to give domestic violence complainants automatic special witness status as is currently provided to adult victims of sexual assault, or whether a successful application would need to made out as is the case with the admissibility of visually recorded scene statements for mentally impaired.

C **Final Remarks**

It is important to note that a DVEC recording is not mandatory. It will firstly require the consent of the complainant, and secondly the assessment of the police officer in

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259 *Evidence Act 1906 (WA)* s 106HB(1a).
260 *Evidence Act 1906 (WA)* s 106R(3a).
determining whether it is practical in the circumstances, taking into account the emotional state of the complainant. DVEC may be a powerful insight to a scene of domestic violence, however it does not alone cure the power imbalance and duress a complainant may endure. This method alone is not a panacea to the issues surrounding prosecuting domestic violence matters, however, if obtained in the right circumstances and from a complainant willing to proceed through the judicial process, it may lead to the court being availed the best evidence thereby leading to a more just adjudication.
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Appendix 1

Dear Participant

Below is a link to a short questionnaire, which relates to a research project, the findings of which will be written as part of a Bachelor of Laws Honours thesis.

https://ecuau.qualtrics.com/jfe/form/SV_3Prl5BRxX30BBpX

The questionnaire relates to your views on legislative reform as adopted in New South Wales known as "DVEC" which allows police to video record a statement from an alleged victim of domestic violence at the incident scene. This recording can be used as part or all of the alleged victim's evidence in chief. The alleged victim is still required to attend trial for cross-examination and re-examination. The alleged victim must consent to the recording; however, their consent is not essential to playing the recording at trial. This component of the research is to determine your views on a DVEC regime, including the potential benefits and issues with adopting such law reform.

The questionnaire is open to criminal prosecutors and defence counsel. Your participation is voluntary and responses are anonymous. The questionnaire should only take about 5 minutes to complete.

This research project has been approved by ECU’s BEEN Ethics Sub Committee.

Yours sincerely,

Benjamin Procopis

bprocopi@our.ecu.edu.au
Appendix 2

Information Letter

Dear Participant,

This information letter relates to a research project, the findings of which will be written as part of an Honours thesis, titled: 'Captured at the Scene: A Proposal for the Admissibility of Video Recorded Scene Statements from Domestic Violence Victims in Western Australia.'

This research project is being undertaken under the supervision of Edith Cowan University law lecturer, Ken Yin. The research method to be employed is the completion of a short questionnaire, which will be offered for completion by both prosecutors and defence counsel. The research is a review of the current status of the law with respect to the taking of evidence in chief from alleged victims of domestic violence, and in particular, the impact of incorporating a procedure akin to that presently in place in New South Wales.

In 2015, New South Wales introduced a legislative reform known as "DVEC" which allows police to video record a statement from an alleged victim of domestic violence at the incident scene. This recording can be used as part or all of the alleged victim's evidence in chief. The alleged victim is still required to attend trial for cross examination and re-examination. The alleged victim must consent to the recording, however their consent is not essential to playing the recording at trial. This component of the research is to determine your views on a DVEC regime, including the potential benefits and issues with adopting such law reform.

Your participation in this research is voluntary. The research questions are not sensitive and unlikely to be upsetting. However, should you wish to withdraw your participation at any stage, you may do so without any repercussions. In exercising your right to withdraw from the research, you may withdraw any information or material we have collected. The results of the questionnaire will be included in an Honours thesis and may be later published. Your responses’ will be completely anonymous.

This research project will be approved by ECU’s * Ethics Sub Committee.

Yours sincerely,

Benjamin Procopis
bprocopi@our.ecu.edu.au
**Researcher’s Contact details**

Benjamin Procopis  
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Edith Cowan University  
270 Joondalup Drive  
Joondalup WA 6027.  
bprocopi@our.ecu.edu.au

**Supervisor’s Contact details**

Ken Yin  
School of Business and Law  
Edith Cowan University  
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Joondalup WA 6027.  
k.yin@ecu.edu.au

**ECU Research Ethics Office**

Ethics Officer  
Edith Cowan University  
270 Joondalup Drive  
Joondalup WA 6027.  
research.ethics@ecu.edu.au

**Statement indicating consent to participate**

I have agreed to participate in this research. I have read the Information Letter and understood the contents.

I understand what is required of me for this research. I will conduct a questionnaire at my convenience. I have been given the topics that will be covered. I understand that my participation will be anonymous. I understand that the information I give will form the basis of an Honours thesis. The results may be published.

I also understand that I may withdraw my participation and any information I had given, without penalty. The information I give will be securely protected at all times.

All information I give will be locked in a cabinet at ECU, and will be deleted after 5 years. All electronic information will be secured via password protection.

I freely agree to participate in the research project.

☐ Yes

☐ No
Appendix 3

Survey

Q Is a greater proportion of your work as a prosecutor or defence counsel?
   ○ Prosecutor (1)
   ○ Defence Counsel (2)

Q Do you believe an alleged victim of domestic violence would be more willing to provide an initial statement under DVEC?
   ○ Definitely yes (1)
   ○ Probably yes (2)
   ○ Might or might not (3)
   ○ Probably not (4)
   ○ Definitely not (5)

Q Do you believe written statements currently taken by police include enough detail of the event alleged?
   ○ Definitely yes (1)
   ○ Probably yes (2)
   ○ Might or might not (3)
   ○ Probably not (4)
   ○ Definitely not (5)

Q Do you believe that DVEC will provide a more accurate account of events to sworn evidence at trial due to the contemporaneity of the recording?
   ○ Definitely yes (1)
   ○ Probably yes (2)
   ○ Might or might not (3)
   ○ Probably not (4)
   ○ Definitely not (5)

Q Do you believe DVEC will be more probative evidence to sworn evidence at trial as it captures the demeanour of the alleged victim at the time of the recording?
   ○ Definitely yes (1)
   ○ Probably yes (2)
   ○ Might or might not (3)
   ○ Probably not (4)
   ○ Definitely not (5)
Q. Do you believe that DVEC would be more probative evidence to sworn evidence at trial as it captures any injuries to the alleged victim?

○ Definitely yes (1)
○ Probably yes (2)
○ Might or might not (3)
○ Probably not (4)
○ Definitely not (5)

Q. Do you believe that DVEC would be more probative evidence to sworn evidence at trial as it captures the incident scene?

○ Definitely yes (1)
○ Probably yes (2)
○ Might or might not (3)
○ Probably not (4)
○ Definitely not (5)

Q. As the recording can be used as evidence, do you believe there is a risk that the alleged victim's account may be inaccurate due to the victim still being in an emotionally charged state when participating in the recording?

○ Definitely yes (1)
○ Probably yes (2)
○ Might or might not (3)
○ Probably not (4)
○ Definitely not (5)

Q. To what extent do you believe that DVEC would reduce the incidence of an alleged domestic violence victim changing their account due to external pressures?

☐ Extremely likely (1)
☐ Somewhat likely (2)
☐ Neither likely nor unlikely (3)
☐ Somewhat unlikely (4)
☐ Extremely unlikely (5)

Q. Do you believe that DVEC will reduce the trauma for an alleged domestic violence victim in giving evidence at trial?

○ Definitely yes (1)
○ Probably yes (2)
○ Might or might not (3)
○ Probably not (4)
○ Definitely not (5)
Q. Do you believe an alleged domestic violence victim would be more likely to attend trial when they have provided a DVEC recording?
- Definitely yes (1)
- Probably yes (2)
- Might or might not (3)
- Probably not (4)
- Definitely not (5)

Q. Do you believe frontline police officers would be competent to obtain DVEC evidence from a domestic violence victim?
- Definitely yes (1)
- Probably yes (2)
- Might or might not (3)
- Probably not (4)
- Definitely not (5)

Q. Does any prejudice to an accused arise from implementing a DVEC regime?
- Definitely yes (1)
- Probably yes (2)
- Might or might not (3)
- Probably not (4)
- Definitely not (5)

Q. If 'definitely yes' or 'probably yes' what prejudice do you recognise as arising from DVEC?

Q. Do you believe a DVEC regime will lead to an increase in early pleas of guilty?
- Definitely yes (1)
- Probably yes (2)
- Might or might not (3)
- Probably not (4)
- Definitely not (5)

Q. Do you believe that DVEC will lead to higher conviction rates?
- Definitely yes (1)
- Probably yes (2)
- Might or might not (3)
- Probably not (4)
- Definitely not (5)
Q: Do you believe that DVEC affords greater protection to victims of domestic violence throughout the judicial process?
   - Definitely yes (1)
   - Probably yes (2)
   - Might or might not (3)
   - Probably not (4)
   - Definitely not (5)

Q: Do you believe Western Australia should adopt a DVEC regime?
   - Definitely yes (1)
   - Probably yes (2)
   - Might or might not (3)
   - Probably not (4)
   - Definitely not (5)

Q: Please provide your general comments

Debrief Statement

If you would like any further information with respect to this research please contact Benjamin Procopis on bproopi@our.ecu.edu.au. Should you or someone you know require support services for domestic violence, please be aware of the following contacts:
Men's Domestic Violence Helpline Telephone (08) 9223 1199 or free call 1800 000 599
Women's Domestic Violence Helpline (including for referral to a women’s refuge) Telephone (08) 9223 1188 or free call 1800 007 339
## Appendix 4

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<thead>
<tr>
<th>THEME</th>
<th>TERMS USED</th>
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<td><strong>Probative Value of Contemporaneous Recording</strong></td>
<td>Emotional, heat of the moment (5)</td>
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<td></td>
<td>Emotional, sympathetic, emotive (8)</td>
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<td>Emotional, sympathy, objectivity (9)</td>
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<td></td>
<td>Concoction, exaggeration (12)</td>
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<td>Assess demeanour, credibility (12)</td>
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<td>Emotional state, not accurate (13)</td>
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<td>Not accurate, comprehensible (14)</td>
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<td>Inaccuracy of statement (17)</td>
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<td>Distress (18)</td>
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<td>Distresses, heightened state of emotion (21)</td>
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<td></td>
<td>Differ significantly from subsequent statements (22)</td>
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<td>Exaggerated, vengeance (30)</td>
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<td>Emotionally charged (32)</td>
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<td>Sympathy, emotional complainant (33)</td>
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<td>Greater weight, highly emotional, heat of the moment (34)</td>
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<td>Embellish (35)</td>
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<td>Highly charged emotions (28)</td>
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<td>Distressed state of complainant (39)</td>
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<td>Emotionally fuelled, tainted (59)</td>
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<td>Heightened emotions, exaggerate (63)</td>
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<td><strong>Encourage Participation of Complainant</strong></td>
<td>Absent victim, reconciled (2)</td>
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<td>Cooling off, complainant unhappy with proceeding (18)</td>
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<td></td>
<td>Differ significantly from subsequent statements (22)</td>
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<td>Change their statements (38)</td>
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<td><strong>Police Competence in Obtaining Evidence</strong></td>
<td>Police, evidence elicited, untrained, inadmissible evidence (12)</td>
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<td>Leading questions (31)</td>
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<td>Leading questions (32)</td>
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<td>Hearsay evidence (53)</td>
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<td><strong>Only available to one party</strong></td>
<td>One side captured contemporaneously, both should have opportunity (27)</td>
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<td>Bias towards victim (28)</td>
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# Appendix 5

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<thead>
<tr>
<th>THEME</th>
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| **Probative Value of Contemporaneous Recording** | Emotional charge (5)  
Bolster lies told by complainant, blame effect of assault on discrepancies  
May eliminate false claims (15)  
Not all complaints are true (17)  
Contradictory, garbled statement (17)  
Intrusive, in a distressed state (27)  
Court presented with what occurred (37)  
More difficult for accused to dispute allegations, contemporaneous (39)  
Taken when events are clear and not coloured by pressures (60)  
Emotion, injuries, evidence at scene captured (72)  
Great evidence, fresh in minds (73)  
Show true emotions of victim, injuries, offence scene – court doesn’t usually see (74)  
Fresh in mind, best evidence available (79) |
| **Encourage Participation of Complainant** | Recommencement of relationship, absence of willing victim (2)  
Subject to pressure from abuser even if adopted (5)  
Complainants still refuse to give evidence, attend trial (9)  
Not all dv victims want to pursue (17)  
Complainant changes story, offender pressure (38)  
Little impact in ‘change of heart incidences (42)  
Taking pressure off victims (43)  
show victim when considering recanting to remind them (46)  
Reduce minimisation of event by victim (67)  
Will improve regarding victims recanting evidence, have no recollection (71) |
| **Other Benefits** | Stop perpetrators relying on ‘reluctant complainant’ and prevent sabotage a fair prosecution. |
| **Police Competence in Obtaining Evidence** | Careful training of police (5)  
Implication to police is required police training (52)  
Must be strict guidelines during interview (63)  
Police require extra training (65)  
Sufficient training [needed] (66)  
Officers need to be trained (72) |
| **Only Available to one party** | Accused not afforded this opportunity, only at station, surrounded by police (8) |