



New South Wales

# **Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014 No 83**

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New South Wales

# **Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014 No 83**

Act No 83, 2014

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An Act to amend the *Criminal Procedure Act 1986* with respect to evidence in proceedings for domestic violence offences. [Assented to 28 November 2014]

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**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014*.

**2 Commencement**

This Act commences on a day or days to be appointed by proclamation.

## Schedule 1      **Amendment of Criminal Procedure Act 1986 No 209**

### [1]    **Section 3 Definitions**

Insert in alphabetical order in section 3 (1):

*domestic violence complainant*, in proceedings for a domestic violence offence, means the person against whom the domestic violence offence is alleged to have been committed, but does not include a person who is a vulnerable person.

*domestic violence offence* means a domestic violence offence within the meaning of the *Crimes (Domestic and Personal Violence) Act 2007*.

*recorded statement*—see section 289D.

*vulnerable person* has the same meaning as it has in Part 6 of Chapter 6.

### [2]    **Section 60 Time for taking prosecution evidence**

Insert “, which includes a reference to a recorded statement in the case of a domestic violence offence (see section 76A (5))” after “Division 3” in the note to section 60 (1).

### [3]    **Section 76 Recordings of interviews with vulnerable persons**

Omit the definition of *vulnerable person* from section 76 (8).

### [4]    **Section 76A**

Insert after section 76:

#### **76A    Recordings of interviews with domestic violence complainants**

- (1) Evidence for the prosecution may be given in the form of a recorded statement instead of a written statement, if the offence is a domestic violence offence.
- (2) If a recorded statement is to be given instead of a written statement, the prosecutor must serve on the accused person a notice in the form referred to in section 75 (4).
- (3) The requirements of Division 3 of Part 4B of Chapter 6 in relation to service of, and access to, a recorded statement must be complied with in relation to any recorded statement given instead of a written statement.
- (4) However, if the requirements of Division 3 of Part 4B of Chapter 6 have not been complied with, the recorded statement may be admitted if the court is satisfied that:
  - (a) the parties consent to the recorded statement being admitted, or
  - (b) the accused person or his or her Australian legal practitioner (if any) have been given a reasonable opportunity otherwise than in accordance with that Division to listen to or view and listen to, the recorded statement and it would be in the interests of justice to admit the recorded statement.
- (5) This Part applies to a recorded statement and the person whose representation is recorded in the recorded statement in the same way as it applies to a written statement under this Division and the person who made the written statement.
- (6) Sections 74 (1), 76, 79, 81, 82, 83 (2) and (3), 84 and 85 (1) do not apply to a recorded statement.
- (7) This section does not affect section 289I (2).

**[5] Section 79A**

Insert after section 79:

**79A Form and requirements for recorded statements**

- (1) A representation contained in a recorded statement may be in the form of questions and answers.
- (2) A recorded statement must contain the following statements by the domestic violence complainant:
  - (a) a statement as to the complainant's age,
  - (b) a statement as to the truth of the representation,
  - (c) any other matter required by the rules.
- (3) If the representation contained in a recorded statement, or part of it, is in a language other than English:
  - (a) the recorded statement must contain an English translation of the representation or part, or
  - (b) a separate written English translation of the representation or part must accompany the recorded statement.

**[6] Section 85 False statements or representations**

Insert after section 85 (1):

- (1A) A person who made a representation given in evidence under this Division in the form of a recorded statement is guilty of an offence if the representation contains any matter that, at the time the representation was made, the person knew to be false, or did not believe to be true, in any material respect.  
Maximum penalty:
  - (a) If the offence is dealt with summarily, 20 penalty units or imprisonment for 12 months, or both.
  - (b) If the offence is dealt with on indictment, 50 penalty units or imprisonment for 5 years, or both.

**[7] Section 114 Copies of transcripts of evidence, recorded statements and witnesses' statements**

Insert after section 114 (2):

- (3) The accused person is also entitled, in accordance with Division 3 of Part 4B of Chapter 6, to a copy of any recorded statement played at the proceedings.

**[8] Section 142 Prosecution's notice**

Insert after section 142 (1) (c):

- (c1) in accordance with Division 3 of Part 4B of Chapter 6, a copy of any recorded statement that the prosecutor intends to adduce at the trial,

**[9] Section 185 Recording of interviews with vulnerable persons**

Omit the definition of *vulnerable person* from section 185 (7).

**[10] Section 185A**

Insert after section 185:

**185A Recordings of interviews with domestic violence complainants**

- (1) If the prosecutor intends to call a domestic violence complainant to give evidence in proceedings for a domestic violence offence, the brief of evidence may include a recorded statement relating to the offence.
- (2) For the purpose of the service of a recorded statement included in a brief of evidence, the requirements of Division 3 of Part 4B of Chapter 6 in relation to service of, and access to, a recorded statement must be complied with.
- (3) This Division (other than section 185 (1)) applies to a recorded statement included in a brief of evidence and the person whose representation is recorded in the recorded statement in the same way as it applies to a written statement included under this Division and the person who made the written statement.
- (4) A brief of evidence that includes a recorded statement is not required also to include a written statement from the domestic violence complainant.
- (5) This section does not affect section 289I (2).

**[11] Section 189 False statements or representations**

Insert after section 189 (1):

- (1A) A person who made a representation given in evidence in proceedings in the form of a recorded statement is guilty of an offence if the representation contains any matter that, at the time the representation was made, the person knew to be false, or did not believe to be true, in any material respect.  
Maximum penalty:
  - (a) If the offence is dealt with summarily, 20 penalty units or imprisonment for 12 months, or both.
  - (b) If the offence is dealt with on indictment, 50 penalty units or imprisonment for 5 years, or both.

**[12] Section 199 Material to be considered when matter determined in absence of accused person**

Insert “or recorded statement” after “written material” in section 199 (2).

**[13] Section 200 When court may require prosecution to provide additional evidence**

Insert “, including in the form of any recorded statement that may be given instead of a written statement under that Division” after “Division 3 of Part 2 of Chapter 3” in section 200 (2) (a).

**[14] Section 200 (2) (b)**

Insert “in the case of a written statement,” before “a copy”.

**[15] Section 200 (2) (c)**

Insert at the end of section 200 (2) (b):

, and

- (c) in the case of a recorded statement, the requirements of Division 3 of Part 4B of Chapter 6 in relation to service of, or access to, a recorded statement are complied with in relation to the recorded statement.

**[16] Section 200 (4)**

Insert “or recorded statement” after “written statement” wherever occurring.

**[17] Section 247E Notice of prosecution case to be given to defendant**

Insert after section 247E (1) (c):

- (c1) in accordance with Division 3 of Part 4B of Chapter 6, a copy of any recorded statement of a witness that the prosecutor proposes to adduce at the hearing of the proceedings,

**[18] Section 247Q Requirements as to notices**

Insert after section 247Q (5):

- (6) Nothing in this section requires a recorded statement to be given to a defendant other than in accordance with Division 3 of Part 4B of Chapter 6.

**[19] Chapter 6, Part 4B**

Insert after Part 4A:

## **Part 4B Giving of evidence by domestic violence complainants**

### **Division 1 Preliminary**

**289C Interpretation**

- (1) In this Part:  
*complainant* means a domestic violence complainant.  
*recording* means:  
(a) an audio recording, or  
(b) a video and audio recording.  
*view* a video recording means view and listen to.
- (2) Words and expressions that are defined in the *Evidence Act 1995* and that are used in this Part have the same meanings in this Part as they have in the *Evidence Act 1995*.

**289D Meaning of “recorded statement”**

In this Act, a *recorded statement* means a recording made by a police officer of a representation made by a complainant when the complainant is questioned by a police officer in connection with the investigation of the commission of a domestic violence offence if:

- (a) the recording is made with the informed consent of the complainant, and  
(b) the questioning occurs as soon as practicable after the commission of the offence.

**289E Relationship to Evidence Act 1995**

The provisions of this Part are in addition to the provisions of the *Evidence Act 1995* and do not, unless a contrary intention is shown, affect the operation of that Act.

**Note.** For example, provisions of that Act such as section 21 (relating to oaths and affirmations) and section 65 (an exception to the hearsay rule where a person is not available to give evidence) are not affected by this Part.

## **Division 2 Giving of evidence of out of court representations**

### **289F Complainant may give evidence in chief in form of recording**

- (1) In proceedings for a domestic violence offence, a complainant may give evidence in chief of a representation made by the complainant wholly or partly in the form of a recorded statement that is viewed or heard by the court.
- (2) A representation contained in a recorded statement may be in the form of questions and answers.
- (3) A recorded statement must contain the following statements by the complainant:
  - (a) a statement as to the complainant's age,
  - (b) a statement as to the truth of the representation,
  - (c) any other matter required by the rules.
- (4) If the representation contained in a recorded statement, or part of it, is in a language other than English:
  - (a) the recorded statement must contain an English translation of the representation or part, or
  - (b) a separate written English translation of the representation or part must accompany the recorded statement.
- (5) A complainant who gives evidence wholly or partly in the form of a recorded statement must subsequently be available for cross-examination and re-examination:
  - (a) orally in the courtroom, or
  - (b) in accordance with any other alternative arrangements permitted for the complainant under this or any other Act.
- (6) This section does not prevent a complainant from giving evidence in any other manner permitted for the complainant under this Act or any other law.

### **289G Determination as to whether evidence will be given by recording**

In determining whether or not to have a complainant give evidence wholly or partly in the form of a recorded statement, the prosecutor must take into account the following matters:

- (a) the wishes of the complainant,
- (b) any evidence of intimidation of the complainant by the accused person,
- (c) the objects of the *Crimes (Domestic and Personal Violence) Act 2007*.

### **289H Use of evidence in concurrent or related domestic violence proceedings**

- (1) This section applies if an application for an order under the *Crimes (Domestic and Personal Violence) Act 2007* is made concurrently with proceedings for a domestic violence offence or arises from the circumstances of the alleged domestic violence offence.
- (2) If evidence is given wholly or partly in the form of a recorded statement in the proceedings for the domestic violence offence, that evidence may also be given in that form in the proceedings relating to the application for the order. Any such evidence is to be given in accordance with any rules made under the *Crimes (Domestic and Personal Violence) Act 2007*.

**289I Admissibility of recorded evidence**

- (1) The hearsay rule and the opinion rule (within the meaning of the *Evidence Act 1995*) do not prevent the admission or use of evidence of a representation in the form of a recorded statement.
- (2) Evidence of a representation of a complainant that is given in the form of a recorded statement is not to be admitted unless the accused person was given, in accordance with Division 3, a reasonable opportunity to listen to, and, in the case of a video recording, view the recorded statement.
- (3) However, the recorded statement may be admitted even if the requirements of Division 3 have not been complied with if the court is satisfied that:
  - (a) the parties consent to the recorded statement being admitted, or
  - (b) the accused person or his or her Australian legal practitioner (if any) have been given a reasonable opportunity otherwise than in accordance with Division 3 to listen to or view the recorded statement and it would be in the interests of justice to admit the recorded statement.

**289J Warning to jury**

If a complainant gives evidence wholly or partly in the form of a recorded statement in accordance with this Division in proceedings in which there is a jury, the judge must warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the evidence being given in that way.

**289K Transcripts of recordings**

The court may order that a transcript of all or part of the evidence given in the form of a recorded statement be supplied to the jury if it appears to the court that a transcript would be likely to aid the jury's comprehension of the evidence.

**Division 3 Service of and access to recorded statements**

**289L Service of recorded statement**

- (1) This section applies if an accused person is represented by an Australian legal practitioner in proceedings for a domestic violence offence in which it is proposed to give the evidence of a complainant wholly or partly in the form of a recorded statement.
- (2) The prosecutor must cause a copy of the recorded statement to be served on the Australian legal practitioner representing the accused person as soon as practicable after the proceedings are commenced or the prosecutor determines that evidence is to be given in the form of the recorded statement, whichever occurs later.

**289M Access to recorded statement**

- (1) This section applies if an accused person is not represented by an Australian legal practitioner in proceedings for a domestic violence offence in which it is proposed to give the evidence of a complainant wholly or partly in the form of a recorded statement.
- (2) The prosecutor must cause an audio copy of the recorded statement to be served on the accused person as soon as practicable after the proceedings are commenced or the prosecutor determines that evidence is to be given in the form of the recorded statement, whichever occurs later.

- (3) The prosecutor must also, so far as is reasonably practicable, provide the accused person with an opportunity to view a recorded statement that is in the form of a video recording at a police station on at least one of the following occasions:
  - (a) when the accused person is being questioned in relation to the alleged domestic violence offence,
  - (b) at the request of the accused person, on a day arranged with the accused person,
  - (c) on another day specified by notice in writing given to the accused person by the prosecutor before committal proceedings or the trial commences.
- (4) If it is not reasonably practicable for the prosecutor to comply with subsection (3), the prosecutor must provide the accused person with an opportunity to view a recorded statement that is in the form of a video recording on a day on which proceedings relating to the offence are being held.
- (5) Evidence may not be adduced in any proceedings of the behaviour or response of an accused person when viewing a recorded statement at a place specified for that purpose under this section, unless:
  - (a) the viewing took place while the person was being questioned in relation to an alleged domestic violence offence, or
  - (b) the proceedings relate to the behaviour.
- (6) Any period during which an accused person views a video recording under subsection (3) (a) is to be included in the time to be taken into account for the purposes of determining the maximum investigation period under section 115 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

#### **Division 4      Miscellaneous**

##### **289N    Validity of proceedings not affected**

- (1) The failure of a complainant to give evidence in accordance with a provision of this Part does not affect the validity of any proceeding or any decision made in connection with that proceeding.
- (2) The failure of a police officer to record a representation of a complainant in accordance with the requirements of any rules or regulations made under this Part does not affect the validity of any proceeding in which evidence of the representation is given.

##### **289O    Prosecutor entitled to retain possession of recorded statement**

- (1) At the completion of any criminal proceedings in which a recorded statement is played, the court must, on application by the prosecutor, direct that the recorded statement be returned to the custody of the prosecutor.
- (2) In this section, a reference to a recorded statement includes a reference to any copy of a recorded statement made for the purposes of the proceedings.

##### **289P    Improper copying or dissemination of recorded statement**

- (1) A person who has possession of a recorded statement must not copy, or permit a person to copy, the recorded statement, give possession of the recorded statement to another person or publish the recorded statement, except:
  - (a) for the legitimate purposes of a criminal investigation or criminal proceedings, or

- (b) if the person is a public official, in the proper exercise of the person's public official functions (including any functions relating to education or training).

Maximum penalty: 100 penalty units, or 2 years imprisonment, or both.

- (2) This section does not permit any person, including an Australian legal practitioner who represents an accused person, to give possession of a video copy of a recorded statement to the accused person or to permit the accused person to copy or obtain a copy of a recorded statement.
- (3) In this section, a reference to a recorded statement includes a reference to any copy of a recorded statement made for the purposes of the proceedings.
- (4) An offence under this section is to be dealt with summarily.
- (5) In this section:

*public official* has the same meaning as in the *Independent Commission Against Corruption Act 1988*.

*publish* means disseminate or provide access to one or more persons by means of the internet, radio, television or other media.

#### **289Q Court powers**

- (1) The court may make, vary or revoke an order under a provision of this Part either on its own motion or on application by a party to the proceeding or by the complainant giving evidence.
- (2) Unless a contrary intention is shown, nothing in this Part limits any discretion that a court has with respect to the conduct of a proceeding.
- (3) Without limiting any other power of a court to adjourn proceedings, a court may adjourn any proceedings relating to a domestic violence offence for not more than 14 days to enable an accused person to view or listen to a recorded statement on the ground that the accused person has not had a reasonable opportunity to view or listen to the recording.

#### **289R Rules of court**

Rules of court may (subject to any regulations made under this Act) be made in respect of the giving of evidence in the form of a recorded statement in proceedings for a domestic violence offence.

#### **289S Regulations**

Without limiting any other provision of this Part, regulations may be made for or with respect to the following matters:

- (a) the giving of informed consent to the recording of a representation for the purposes of a recorded statement,
- (b) service of, or access to, a recorded statement,
- (c) the form in which a copy of a recorded statement is served on an accused person.

#### **[20] Section 291A Other parts of proceedings may be heard in camera**

Omit "(within the meaning of Part 6)" from section 291A (6) (b).

#### **[21] Section 291B Incest offence proceedings to be held entirely in camera**

Omit "(within the meaning of Part 6)" from section 291B (3) (b).

**[22] Section 294B Giving of evidence by complainant in prescribed sexual offence proceedings—alternative arrangements**

Omit “(within the meaning of Part 6) if Division 4 of that Part” from section 294B (2).

Insert instead “if Division 4 of Part 6”.

**[23] Section 294B (2A)**

Insert after section 294B (2):

(2A) This section applies in addition to Part 4B, if the complainant is a domestic violence complainant.

**[24] Section 294C Complainant entitled to have support person or persons present when giving evidence**

Omit “(within the meaning of Part 6)” from section 294C (7).

**[25] Schedule 2 Savings, transitional and other provisions**

Insert at the end of clause 1 (1):

any other Act that amends this Act

[Second reading speech made in—

Legislative Assembly on 21 October 2014

Legislative Council on 18 November 2014]