



19 June 2015

Ms Gabrielle Upton MP
Attorney General

Ms Pru Goward MP
Minister for Women
Minister for Prevention of Domestic Violence and Sexual Assault
Minister for Medical research and Assistant Minister for Health

By email: dvds@facs.nsw.gov.au

Dear Ms Upton and Ms Goward,

Submission to the NSW Domestic Violence Disclosure Scheme Discussion Paper

1. Women's Legal Services NSW (WLS NSW) thanks you for the opportunity to provide comments on the NSW Domestic Violence Disclosure Scheme Discussion Paper as well as through the roundtable consultation held on 28 May 2015.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.
3. A significant part of our work is with women who have experienced domestic and family violence.

Introduction

4. A Domestic Violence Disclosure Scheme (DVDS) has the potential to strengthen police and interagency partnerships to provide improved protection, however a scheme also brings with it potential risks and dilemmas which must be carefully considered in our view. To date there is no substantive evidence base which can inform the policy development process (see comments on UK Clare's Law below) and we submit that the question of how a DVDS will strengthen our current system should remain as a guiding test. We are not yet persuaded such a scheme is needed.



5. An overview of our concerns include the risk that 'nothing to disclose' may raise a false sense of security since much domestic violence is undisclosed and / or not prosecuted; the risks associated with disclosure which will require careful assessment and response and additional funding; a risk that a failure to exercise the right to ask or to take action in response to what is learnt through a right to know or a right to ask process may be used in other proceedings, including care and protection or family law proceedings; and the potential for such a scheme to put other demands on victims to take responsibility rather than perpetrators of violence.
6. We provide the following comments on the identified elements of the discussion paper.

UK Domestic Abuse and Disclosure Scheme (Clare's Law)

7. The following outlines our understanding of the Domestic Violence Disclosure Scheme in UK and its pilot assessment¹.
8. There was a pilot in 4 counties from July 2012- September 2013. The scheme was then rolled out nationally in March 2014.
9. The scheme has two key aspects: a 'right to ask' police for information (triggered by member of public contacting police), and a 'right to know' (which is triggered by police based on information received from police or a partner agency that an individual is at risk of harm from their partner). In both cases police perform checks and risks assessment prior to a referral to a local decision-making forum for a decision. In cases of imminent risk of harm police can immediately disclose to the victim.
10. During the pilot there were:
 - 386 applications for disclosure: 231 Right to Ask applications and 155 Right to Know applications
 - Of the 231 Right to Ask requests, 75% came from a person who had concerns about their partner
 - Of the 155 Right to Know requests: most were initiated by statutory and voluntary services (86) and 67 by police
 - 98% of applications requested information for women about male partners. 63% had children.
11. Information was disclosed in 111 (29%) cases. Right to Know applications were more likely to result in a disclosure (34%) compared to Right to Ask applications (26%). In Right to Know applications, the woman generally did not know the application had been made and police commented on the difficulty in finding an appropriate time to inform her of her partner's past abusive offences. It is important a support worker is present at such meetings.
12. In the assessment of the pilot only a small number of people who applied for and/or received a disclosure completed questionnaires (38 out of 386). Of these only 4 said they sought the assistance of support service following disclosure.

¹ Home Office, *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment*, accessed on 16 June 2015 at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260894/DVDS_assessment_report.pdf

13. The pilot assessment report notes the shortcomings of the sample in so far as it was a small number, primarily from one area and most questionnaires were conducted in the presence of Police which may have impeded frank responses.
14. In the 111 cases where information was disclosed the person about whom the information was disclosed was not informed, due to safety concerns.
15. There is, however, the possibility that a subject of a disclosure may be informed and given an opportunity to challenge disclosure. This has safety implications for the victim/survivor of domestic violence.
16. Common reported reasons for not disclosing were:
- the decision-making forum felt there was 'no pressing need' (this test has been criticised for being too subjective)
 - there was no information available about previous violent offending that suggested individual at risk from the partner
 - the case did not meet the scheme criteria
17. The pilot assessment report commented on the inconsistency of information disclosed between pilot sites.
18. An analysis of costs was not undertaken in the assessment report. However, based on material provided from the Wiltshire pilot, a disclosure costs on average £740 to process which was considered a conservative estimate.
19. Overall, those involved in implementing the pilot disclosure scheme and the applicants involved in the research were positive about the process. The major perceived benefit of the scheme was that it gives individuals information that may help them to make a more informed choice about their relationship. Ensuring support for those who receive a disclosure was considered extremely important for the success of the scheme.
20. Some concerns expressed about the scheme include:
- the need for adequate funding of specialist domestic violence support services to ensure consistency in risk assessment and support offered during and following the disclosure process, including where there is a refusal to disclose.² (The pilot in the UK rolled out at the same time as cuts to legal aid and sexual assault and domestic violence services).
 - risk of giving applicants a false sense of security where nothing is disclosed - particularly given much violence goes unreported³
 - responsibility on victim rather than holding the perpetrator accountable:
 - what should she do with the information if it is disclosed?
 - blaming her if she does not leave the relationship

² Refuge, *Response to Domestic Violence Disclosures Consultation Paper*, UK, January 2012 at 3-4, 9-10 accessed on 16 June 2015 at:

http://www.refuge.org.uk/files/FINAL_disclosure_scheme_consultation_response_Jan_2012.pdf

³ Women's Aid, 'Low pick-up for Clare's Law suggests other services might be more effective', (media release) 24 June 2013 accessed on 16 June 2015 at: <http://www.womensaid.org.uk/domestic-violence-press-information.asp?itemid=3129&itemTitle=Low+pick-up+for+Clare%C2%92s+Law+suggests+other+services+might+be+more+effective§ion=0001000100150001&preview=1>

- fears about the possibility that a victim/survivor may not be fully supported by police if she does not act on the information quickly.⁴

21. In the case of Clare Wood (whom the scheme is named after) there was an investigation following Clare's death by the Independent Police Complaints Commission which found individual and systemic failures in the way Greater Manchester Police conducted the matter.⁵
22. Refuge, a UK DV service, argues 'disclosure schemes will not help to protect women and children until the basic police response to domestic violence is improved'.⁶
23. We share the view it is also important to focus on improving Police responses to domestic violence in NSW.

Right to Ask and / or Right to Know

24. If a DVDS is implemented in NSW we do not favour a third party Right to Ask. Issues of agency and safety arise, including what a third party can safely do with the information they receive. Third parties worried about the safety of a friend or family member should have access to existing mechanisms for seeking a risk assessment and intervention to respond to a serious threat if one exists.
25. A Right to Ask and a Right to Know should extend beyond intimate partner relationships to include people with a disability having a right to ask and a right to know about their carers or co-residents in residential facilities. The elderly should also have the right to ask and the right to know with respect to their carers and co-residents in aged-care facilities. We submit both people with disability and the elderly should be included as they are vulnerable to abuse in circumstances akin to intimate partner violence.

When information should be disclosed

26. Introducing a threshold for when information can be disclosed brings with it risks. To ask if the circumstances are serious enough for a disclosure to be made requires expert risk assessment within a full understanding of the context in which the question is being asked.
27. A specialist domestic violence service is best placed to be the service through which a Right to Ask and a Right to Know is provided. Newly established Local Coordination Points where they exist could be well placed to provide this function provided they are resourced to do so. Once a threshold is established, for example the person is assessed by the specialist domestic violence service as 'at threat' or 'at serious threat' (using the current DVSAT instrument) then a right to ask and right to know would be triggered. Once this threshold is reached we do not support a DVDS that introduces a discretion to disclose or not to the person in need of protection. The information should be disclosed as a matter of right.

⁴ Ibid; Refuge, *Response to Domestic Violence Disclosures Consultation Paper*, UK, January 2012 at 6.

⁵ IPCC *Independent Investigation: Greater Manchester Police contact with Clare Wood prior to her death*, 11 March 2010 accessed on 16 June 2015 at: http://www.ipcc.gov.uk/sites/default/files/Documents/investigation_commissioner_reports/clare_wood_report_final_10_march.pdf

⁶ Refuge, *Response to Domestic Violence Disclosures Consultation Paper*, UK, January 2012 at 2.

28. We submit that a person experiencing violence is well placed to know the risk and needs as much information as possible to manage that risk. It is not appropriate to withhold information from them. It would be useful to better understand if information gathered about people experiencing domestic violence through the Safer Pathways mechanisms is shared with the victim/survivor of domestic violence. We are of the view that it should be.
29. Although we still maintain reservations about the need and potential efficacy of a DVDS, if introduced we consider that the information should be disclosed as a matter of right once the appropriate threshold 'to ask' or 'to know' applies. We recommend that further consultation and deliberation on such details be undertaken prior to the conclusion of the policy development process. See also below at [para 33].

What information should be disclosed

30. We favour including convictions, section 10 dismissals, and Apprehended Domestic Violence Orders (ADVOs) from NSW and other jurisdictions. A serious history of domestic violence may be evidenced by the narrative leading to an ADVO rather than a conviction for a criminal offence which is why we advocate for the inclusion of ADVOs. Breach ADVO matters are commonly dealt with by section 10 bonds.
31. We are also persuaded by the arguments put at the Roundtable of the potential advantages of a register-based DVDS. This would include having judicial oversight of matters that should be included on the Register. This allows due process in relation to people being aware they are listed on a register and so can be the subject of disclosure, but in a way that would limit the risk to the victim/survivor.
32. We note, however, that this would not operate retrospectively and so nothing may come up through the disclosure process, since it was prior to the introduction of the Register, further highlighting one of our general concerns about giving people a false sense of security if they are informed there is nothing to disclose.
33. Additionally, a dilemma to be considered is that a DVDS may contribute to an even further lightening of sentences in domestic violence offence cases since being listed on a Register could be considered a punishment. There is also a risk that a very high threshold could be applied for being added to the Register which could create a false sense of security for victims/survivors if their disclosure application results in their being informed there is nothing to disclose.

What process could be adopted for applications, approvals and disclosures

34. As outlined above, a specialist domestic violence service is best placed to be the service through which a Right to Ask and a Right to Know is provided – both for assistance to complete the application, and for support to receive the disclosure. Newly established Local Coordination Points where they exist could be well placed to provide this function provided they are adequately resourced to do so.
35. We have reservations about introducing approvals ie the exercise of a discretion to accept the application and / or to make the disclosure either by police or a local multi-agency decision-making forum. Placing the DVDS within existing **Safer Pathways** mechanisms has the potential to enhance the existing information sharing

arrangements. Basing a DVDS on a Register that has judicial oversight could provide a partial solution to our reservations, however we do not feel in a position to provide any further comment of this at this stage.

36. The UK DVDS includes a requirement that the disclosure is made verbally and not in writing. We see problems with this, including that a person is unlikely to be able to remember the detail accurately.
37. Further, sanctions imposed on passing on the information disclosed are unrealistic and could lead to further isolation of a victim/survivor. We oppose harsh consequences or an 'offence to tell'.

What risk assessments and other safeguards should be in place.

38. A risk assessment should be required at both the application and the disclosure stage and is best undertaken by a specialist domestic violence service, as outlined above.

Primary victim identification

39. WLS NSW has written extensively on the issue of women defendants to ADVOs who are primarily victims of domestic violence.⁷ The issue arises due to factors such as inadequate police practice to look beyond a single incident of domestic violence and to identify who the primary victim is prior to applying for an ADVO.
40. The efficacy of a DVDS will require this issue to be dealt with.

Evaluation

41. If a pilot of the DVDS proceeds it is essential that there be a proper monitoring and evaluation framework developed in consultation with key stakeholders, including the non-government organisation sector and that civil society be able to participate in the monitoring and evaluation.

Opportunity for further comment on a proposal

42. We support further consultation on a draft proposal, which would build on the roundtable consultation that has already occurred. In the absence of cogent research to support the efficacy of a DVDS, it is sound to continue to seek the input from practitioners in the field and other relevant bodies.

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

Yours faithfully,
Women's Legal Services NSW

Janet Loughman
Principal Solicitor

⁷ Women's Legal Services NSW (Julia Mansour), *Women Defendants to AVOs: What is their experience of the justice system?* March 2014