



THE LAW SOCIETY
OF NEW SOUTH WALES

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The Hon. Pru Goward, MP
Minister for the Prevention of Domestic Violence and Sexual Assault
Women NSW
Department of Family & Community Services
GPO Box 5341, SYDNEY NSW 2001

By email: dvds@fac.s.nsw.gov.au

Dear Minister,

NSW Domestic Violence Disclosure Scheme Discussion Paper

I write to you on behalf of the Criminal Law, Juvenile Justice, Indigenous Issues and Human Rights Committees of the Law Society of NSW ("Committees"). The Committees include experts drawn from the ranks of the Law Society's membership.

The Committees note that the NSW Government recently announced that it is developing a model of a Domestic Violence Disclosure Scheme ("DVDS") to pilot in NSW. The Committees understand that the model will be based on a similar initiative introduced in the United Kingdom.

The Committees support measures which contribute towards reducing the incidence of domestic violence in the community. However, domestic violence is a complex issue that is not easily amenable to simple solutions. The Committees are of the view that the goal of preventing domestic violence and keeping victims safe would be better served through directing resources at outreach, community awareness and the provision of specialist services that are appropriate to the needs of specific groups.

It is submitted that an appropriate time to consider implementing such a scheme would be after the UK model has had the opportunity to be properly evaluated. This would ensure that any scheme implemented in NSW has been proven to be effective with regard to its intended aim, and that any shortcomings identified with regard to the UK model are not repeated here.

Nonetheless, the Committees understand that the Government intends to pilot a DVDS in NSW and the preliminary comments that follow are made on that basis. The Committees would appreciate the opportunity to be involved in further consultation once the Government has decided on a model for the scheme.

I trust these comments are of assistance. Any questions can be directed to Rachel Geare who is available on rachel.geare@lawsociety.com.au or 9926 0310.

Yours sincerely,

John F. Eades
President

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Comments of the Human Rights Committee

The Human Rights Committee of the Law Society of NSW ("HRC") is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and includes experts drawn from the ranks of the Law Society's membership.

1. General observations

The HRC notes that pursuant to the *Convention on the Elimination of All Forms of Discrimination Against Women*, ("CEDAW"), gender-based violence against women is a form of sex discrimination that State parties are required to eliminate.¹ State parties are accountable for the conduct of private actors 'if they fail to act with due diligence to prevent violations of rights or to investigate and punish...' violations by such actors, including domestic violence.²

The HRC notes that General Recommendation 19 of the UN Committee on the Elimination of Discrimination Against Women states specifically that:

- (r) Measures that are necessary to overcome family violence should include:
 - (i) Criminal penalties where necessary and civil remedies in cases of domestic violence;
 - (ii) Legislation to remove the defence of honour in regard to the assault or murder of a female family member;
 - (iii) Services to ensure the safety and security of victims of family violence, including refuges, counselling and rehabilitation programmes;
 - (iv) Rehabilitation programmes for perpetrators of domestic violence;
 - (v) Support services for families where incest or sexual abuse has occurred;

Further:

- (s) States parties should report on the extent of domestic violence and sexual abuse, and on the preventive, punitive and remedial measures that have been taken;
- (t) States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, inter alia:
 - (i) Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace;
 - (ii) Preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women;

¹ Articles 2, 5, 11, 12 and 16, CEDAW, and the UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38)*, 1992, A/47/38, available at: <http://www.refworld.org/docid/453882a422.html> [accessed 9 June 2015]

² See *A. T. v. Hungary*, Communication No. 2/2003, UN Doc. CEDAW/C/32/D/2/2003 (26 January 2005) at [9.2] available at: <http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/CEDAW%20Decision%20on%20AT%20vs%20Hungary%20English.pdf> [accessed 9 June 2015]

(iii) Protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence [...]³

In the HRC's view, the proposed DVDS may further goals that are compatible with the CEDAW. However, given that there is significant potential for the DVDS to be misused, the HRC notes that there are other issues that must be considered such as the rights of the subject (adopting the terminology used in the Discussion Paper) to privacy and the criminal justice policy goal of rehabilitation. The HRC notes that the human rights compatibility of the scheme will largely turn on the detail and the implementation.

In respect of the potential for misuse of the scheme, members of the HRC noted that in their experience, ADVOs (determined on the balance of probabilities) can be misused in family law proceedings. For many reasons, parties may consent to ADVOs even if the allegations of violence are unfounded, particularly if they are not receiving adequate (or any) legal advice. The HRC would be concerned about ADVOs being included in a DVDS in this context, especially if the "right to know" processes, and the consequent disclosures made, are not appropriately safeguarded.

As a general concern, the HRC queries whether the DVDS will in fact improve the safety of victims of domestic violence, particularly for current victims of domestic violence. The effectiveness of the scheme may be affected by the fact that, in members' experience, victims often do not disclose violence or press charges, because they do not want their partners to have a criminal record. There may be many perpetrators who would therefore not be caught by a disclosure scheme.

Further, the HRC is concerned that the DVDS could draw further resources away from crucial services that are already in existence, including specialist shelters. The HRC notes that the CEDAW requires State parties to provide services to ensure the safety and security of victims of family violence, including refuges, counselling and rehabilitation programs. However, the HRC understands that there are now only 14 refuges run by women for women, whereas prior to the NSW Government's Going Home Staying Home reforms, there were over 100 refuges run by women for women.⁴ The HRC understands that if women are faced with the prospect of leaving violence to go to a generalist homelessness shelter, they are unlikely to leave their homes, particularly if they have children. The HRC is of the view that specialist domestic violence refuges (and the services attached to them) are a crucial part of the range of responses required to address the complex issues and needs that often accompany domestic violence.⁵

The HRC queries also whether a new structure, such as the DVDS, will in fact assist potential victims of domestic violence. Members of the HRC note that in their experience, many victims are unaware of their rights and of the resources that are already available. This concern is addressed in more detail in the comments made in relation to the questions in respect of addressing the needs of people from specific communities.

2. Right to Know and Right to Ask and thresholds for disclosure

The HRC notes that in discussing the DVDS in the UK, the Discussion Paper states that the UK DVDS operates within the existing UK legal framework, which includes the *Human*

³ See note 1.

⁴ SOS Women's Services, <http://www.soswomensservices.com/theproblem> (accessed 9 June 2015).

⁵ See for example the information available on the Leichhardt Women's Community Health Centre website: <http://www.lwchc.org.au/index.php/2014/04/concerns-many-womens-refuges-close/> and Jane Bullen, "The evidence supports specialist refuges for domestic violence", *The Conversation*, 18 February 2015, available at: <https://theconversation.com/the-evidence-supports-specialist-refuges-for-domestic-violence-37066> (accessed 9 June 2015).

*Rights Act 1998, the Data Protection Act 1998 and the Rehabilitation of Offenders Act 1974.*⁶ The HRC is concerned particularly that the principles of necessity and proportionality which have legislative force in the UK pursuant to the *Human Rights Act*, do not enjoy similar status in NSW.

The HRC submits that the principles that should underlie the determination of the parameters of any Right to Know and the Right to Ask should be whether it is necessary and proportionate. That is, is it necessary for the parties asking to know, and what disclosure to those parties would be necessary and proportionate to the risk of harm to the victim? The HRC's view is that it is preferable for these principles to have legislative force.

In respect of the Right to Know, the HRC is concerned about the potential scope of people who might have a Right to Ask, and notes that necessity and proportionality are the relevant tests in determining who has a Right to Ask. The HRC suggests that the disclosure of any violence convictions may also be unnecessary and disproportionate if the convictions are not directly relevant to the risk of a person becoming a victim of domestic violence. In this respect, the HRC notes that the UK model adopts a case-by-case approach in determining whether there is a "pressing need to make a disclosure to prevent further criminal abuse or harm."⁷

3. Impact on people from specific communities

The HRC submits that the needs of specific groups, such as culturally and linguistically diverse and Indigenous communities, should be the subject of careful and detailed consultation.

For example, in the HRC's experience victims who are spousal visa applicants may not disclose domestic violence, or may not leave violent relationships as they fear that such disclosure will adversely affect their residency applications, or affect their residency status. The HRC notes that applications for spousal visas can take two and a half to three years, and in that time applicants are not eligible for social security assistance. While the *Migration Regulations 1994* (Cth) contain provisions to allow applicants to "escape" violent situations, many applicants are simply unaware of their rights and of the resources available. They may be non-English speakers, and are often isolated, sometimes deliberately isolated by the perpetrators. In these circumstances, the HRC queries the utility of a DVDS and suggests that the goal of preventing domestic violence and keeping victims safe would be better served through directing resources at outreach, awareness and the provision of specialist services that are appropriate to the needs of specific groups.

Comments of the Indigenous Issues Committee

The Indigenous Issues Committee of the Law Society of NSW ("IIC") represents the Law Society on Indigenous issues as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

1. Need for better support services

The IIC believes that the most pressing priority in providing safety for victims of domestic violence is to address the presently inadequate financial and infrastructure resourcing for outreach, awareness and refuges, particularly in regional and remote areas. The IIC is concerned that the proposed DVDS may not in fact result in greater safety for victims of

⁶ Discussion Paper at 10.

⁷ *Ibid* at 12.

violence. It represents another information-sharing scheme, rather than addressing the issue of inadequate financial and infrastructure resourcing for outreach, awareness and refuges. The IIC queries the utility of a register when there are limited specialist refuges for women fleeing violence, particularly in regional and remote areas.

The IIC considers it difficult to comment on whether the proposed DVDS will achieve an appropriate balance without further detail on how the scheme will operate. In this regard, the IIC notes that the UK model has not yet been evaluated and there is little indication of whether that model is operating effectively and appropriately.

2. Considerations in relation to scope

There are potentially a number of negative consequences which need to be considered in the development of a DVDS.

2.1. Application to ADVOs

It is unclear whether Apprehended Domestic Violence Orders ("ADVOs") are to be included in the scheme. A number of potential issues arise if they are. In particular:

- a) A significant proportion of ADVOs are made by consent. This allows those apprehensive of violence to get the benefit of the order without the need for a contested hearing. It also reduces the burden on the Court process. If ADVOs are to be included in the scheme, the IIC is of the view that alleged perpetrators are more likely to contest them. This is likely to have an impact on the court system.
- b) Some breaches of ADVOs may be considered minor and not informed by violence, and under current scheme it is unclear whether there will be a process for distinguishing a serious breach, and one which is not informed by violence. To provide an example, in the IIC's experience, a husband might be under an ADVO, but the wife nonetheless might invite him to the house to provide child care because of an emergency. The husband may be in breach of the ADVO in these circumstances. A discretionary element would need to be retained to provide for flexibility for the various circumstances.
- c) The inclusion of interim ADVOs in the scheme may include people who in fact have no history of violence. If an interim ADVO has been made against a person, and it is subsequently found to be baseless, it would result in injustice for that person if the interim ADVO was also subject to disclosure. The IIC considers that this measure would likely be disproportionate to the aim of the scheme.
- d) The IIC notes for consideration that if the scheme was intended to include only final ADVOs, it may have the unintended consequence of parties requesting that orders be made only on an interim basis.

For these reasons, the IIC would not support the inclusion of either interim or final ADVOs in this scheme.

2.2. Application to Violent Offenders

The IIC notes that, if other violence offences are to be included, depending on the scope of the disclosure, this may discourage guilty pleas. The IIC notes that this too could have significant impacts on the court system.

Further, given the fact that many people may have committed violence offences as young people,⁸ the IIC is concerned that the scheme may stigmatise those who may have already addressed their past violent behaviour, and may undermine the equally legitimate policy goal of rehabilitation.

2.3. Retrospective operation

The IIC also queries whether the DVDS will operate retrospectively. If so, the IIC has concerns in respect to upholding the rule of law. For example, it may be that defendants may not have entered guilty pleas if they knew at the time they would be subject to a disclosure scheme. If the scheme is to include ADVOs, people may have made the decision to contest them. Further, as noted above, if interim ADVOs have been made against people and they are subsequently found to be baseless, it would result in injustice for that person if the interim ADVO was also subject to disclosure, where retrospective application would compound the injustice.

3. Disclosure authority

The IIC is of the view that, if the DVDS is to go ahead, consideration should be given to making the disclosing authority a different body than the enforcement authority, particularly given the history of mistrust between Indigenous people and the NSW police.

The IIC suggests that it may be more appropriate, to give an example of an alternative, for the NSW Ombudsman to receive adequate resourcing to be the disclosure body.

4. Framing issues: range of family and domestic violence

The IIC notes also that the Discussion Paper frames the issue of violence as violence against women. While acknowledging the high rate of violence against women and the level of harm caused, the IIC considers that the DVDS would benefit from a full and sophisticated understanding of the range of violence that occurs in family and domestic situations, including violence by and against children and against men. The IIC notes that BOCSAR figures demonstrate that 20% of all victims of recorded domestic assault are aged 10-24 yrs.⁹ In the IIC's experience, violence is often perpetrated against children by mothers.¹⁰ In the IIC's experience in AVO proceedings, parents may also take out ADVOs against children, or have ADVOs taken out by police to protect them from children.

On this point, the IIC further notes that although males make up the largest proportion of domestic violence offenders (82%), a proportion of offenders are also female (18%).¹¹ Further, the meaning of "domestic relationship" has been defined in s 5(h) of the *Crime (Domestic and Personal Violence) Act 2007* (NSW) in relation to Aboriginal people to include relationships where a person "is or has been part of the extended family or kin of the other

⁸ In NSW, 15–19 year olds constitute the highest proportion of offenders (ABS, *Recorded Crime – Offenders 2012-2013*, available online: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4519.0main+features52012-13> (accessed 18 June 2015)); where the second most common principal offence is acts intended to cause injury (ABS, *Recorded Crime – Offenders 2012-2013*, available online: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4519.0~2012-13~Main%20Features~Youth%20offenders~19> (accessed 18 June 2015)).

⁹ BOCSAR, "Trends and patterns in domestic violence", 11 August 2011, media release, available online: http://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2011/bocsar_mr_bb61.aspx (accessed 18 June 2015).

¹⁰ In the majority of filicide cases, females accounted for over half (52%) of offenders for this category of domestic/family homicide (Australian Institute of Criminology, *Domestic/family homicide in Australia*, Research in practice no. 38, May 2015 available online: <http://www.aic.gov.au/publications/current%20series/rip/21-40/rip38.html> (accessed 18 June 2015))

¹¹ *Ibid.*

person according to the Indigenous kinship system of the person's culture." The IIC notes that this definition is broad, and may include many different sorts of relationships.

5. Impact on people in specific communities

The IIC is also concerned that the DVDS has the potential to introduce and entrench a model that places an even greater burden on victims, and may do little to address the culture of victim-blaming. The IIC is concerned that the existence of a disclosure scheme may in fact see a rise in attitudes that victims were put on notice and may therefore share in the culpability.

In the IIC's experience, even without the DVDS in place, Indigenous women in care and protection proceedings can already face unhelpful service delivery responses (from both the police and the Department of Family and Community Services). In the IIC's experience, if women do not leave violent relationships, they may face unwillingness by frontline agencies such as the NSW Police to provide timely assistance. Further, in the IIC's experience, domestic violence perpetrated against women may sometimes be used as evidence against them in assessments of their ability to care for their children in care and protection proceedings.

6. Observations previously raised in respect of the UK scheme

As noted above, the UK model has not yet been evaluated, and it is not clear whether the model is operating effectively and appropriately. Concerns were expressed in the UK in relation to that scheme, and the IIC notes these concerns as they also have application in NSW.

For example, Women's Aid in the UK noted that the relatively low pick-up of the UK DVDS model suggested that it may not be the most effective way of supporting women experiencing abuse.¹² Women's Aid further noted that the scheme risked giving applicants a false sense of security if nothing is disclosed, particularly given that domestic violence is under-reported.¹³

The IIC notes that its concerns in relation to victim-blaming were also expressed in the UK by Refuge (a domestic violence service in the UK), which submitted that the scheme may unwittingly promote attitudes which blame victims for the abuse.¹⁴ Refuge noted that in its experience, these attitudes already prevail. Refuge advocated, among other things, for better basic police response to domestic violence instead of this scheme.¹⁵ The IIC notes that in the case of Clare Wood (for whom the UK scheme is named after), there was an investigation following Clare's death by the Independent Police Complaints Commission ("IPCC"), which found individual and systemic failures in the way the Greater Manchester Police conducted the matter. The IPCC Commissioner stated in respect of the Greater Manchester Police's response that:

¹² Women's Aid, "Low pick-up for Clare's Law suggests other services might be more effective," 24 June 2014, media release available online: <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> (accessed 17 June 2015).

¹³ *Ibid.*

¹⁴ Refuge submission, 2012 at 6, available online: http://www.refuge.org.uk/files/FINAL_disclosure_scheme_consultation_response_Jan_2012.pdf (accessed 17 June 2015).

¹⁵ Note 14 at 2.

There were flaws in their intelligence systems and individual failings by officers who demonstrated in some cases a shocking lack of understanding about the nature of domestic violence.¹⁶

Finally, the IIC notes that the UK DVDS Pilot Assessment, a report carried out about the 14 month pilot in the UK, found that:

an approximation of scheme costs based on information supplied by one pilot area (Wiltshire) suggests that the average cost of an application is around £740 (the average cost of a Right to Ask application is around £690 and the average cost of a Right to Know application is around £810). This is based on the estimated time required of police officers and other agency workers on each stage of the process, for example performing research and checks on a request, attendance at a decision-making forum and delivering a disclosure.¹⁷

The assessment report went on to note that:

It is important to note that these figures are likely to be underestimates because of conservative assumptions about the time taken on certain stages of the process.¹⁸

The IIC notes that 386 disclosure applications were made (231 Right to Ask applications, and 155 Right to Know applications), and that only 29% of these applications resulted in disclosure.¹⁹ The total cost of the UK pilot was approximately £285,640 (or more than \$500,000 Australian dollars at today's exchange rate). If the cost of the NSW scheme is likely to be similar, the IIC is of the view that a cost benefit analysis should be carried out.

Comments of the Criminal Law and Juvenile Justice Committees

The Criminal Law and Juvenile Justice Committees of the Law Society of NSW ("Committees") represent the Law Society on criminal law and juvenile justice issues as they relate to the legal needs of people in NSW and include experts drawn from the ranks of the Law Society's membership. The comments provided below adopt the numbering used in the Discussion Paper.

General Observations

The Committees support measures which contribute towards reducing the incidence of domestic violence in the community. The Committees note, however, that domestic violence is a complex issue. While the DVDS may appear attractive on the surface, domestic violence is not a problem easily amenable to simple solutions. It is noted that the discussion paper provides no evidence that if individuals who think they may be at risk of domestic violence, or who are experiencing domestic violence, have knowledge of previous offending that they will choose to leave a relationship. There are a number of difficulties that people face that prevent them from leaving domestic violence situations, including:

¹⁶ Independent Police Complaints Commission, "IPCC find failings in GMP dealings with Clare Wood prior to her murder," 11 March 2010, media release available online: <http://www.ipcc.gov.uk/news/ipcc-find-failings-gmp-dealings-clare-wood-prior-her-murder?auto=True&l1link=pages%2Fnews.aspx&l1title=News%20and%20press&l2link=news%2FPages%2Fdefault.aspx&l2title=Press%20Releases> (accessed 17 June 2015).

¹⁷ UK Home Office, *Domestic Violence Pilot Assessment* at 16, available online: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260894/DVDS_assessment_report.pdf (accessed 17 June 2015).

¹⁸ *Ibid.*

¹⁹ Note 17 at 11.

- Fear for their safety.
- Fear of homelessness and a shortage of crisis and longer term accommodation.
- Lack of access to support especially in rural and remote areas.
- Fear of children being removed by welfare services.
- A reluctance to seek assistance due to fear, shame and family, cultural or religious pressures.
- Financial pressures.²⁰

The Committees hold a number of concerns in relation to the implementation of this scheme, including:

- The potential misuse of information.
- The impact upon the right to privacy.
- The impact upon the criminal justice policy goal of rehabilitation.
- That the scheme is unlikely to be utilised by people most needy with particular concern in relation to Aboriginal and Torres Strait Islander people and specifically those living in regional and remote areas.²¹
- Issues regarding data integrity.
- A criminal record check would not expose the significant amount of domestic violence that goes unreported or without convictions. The effectiveness of the scheme may be affected by the fact that, in members' experience, victims often do not disclose violence or press charges, because they do not want their partners to have a criminal record. There may be many perpetrators who would therefore not be caught by a disclosure scheme.
- The risk that the absence of a criminal record (or non-disclosure) may give a person a false sense of security, particularly given the high rates of underreporting of domestic violence.

In circumstances where:

- the potential effectiveness of this scheme is unknown;
- significant concerns are held in relation to the implementation of the scheme; and
- it is arguable that the resources required to fund this scheme could be better directed towards support services which specialise in supporting women, men and children to move away from dangerous domestic situations,

it is submitted that implementing a scheme in NSW which was broader than the UK model would be short sighted (particularly given issues raised in the Home Office's report regarding their own pilot).

The Committees are of the view that the DVDS should, at least initially, be narrow in scope in relation to what is disclosed and in what circumstances disclosures are made. The issues with the UK pilot (discussed under "14. Further questions") should be considered so that these issues can be taken into account and improved in relation to any scheme implemented in NSW.

²⁰ 'Staying/Leaving: Barriers to Ending Violent Relationships', Australian Domestic & Family Violence Clearinghouse, The University of New South Wales, 2012, pp2-3,

²¹ In a study of domestic assaults reported to the police in NSW from 2001 to 2010, 19 out of the top 20 NSW Local Government Areas (LGAs) for domestic assault were rural or regional LGAs. The top five LGAs were all remote - Bourke, Walgett, Moree Plains, Coonamble and Wentworth. Four of these five LGAs have large Aboriginal and Torres Strait Islander populations (20 to 30 per cent, with the fifth at around ten per cent), 'Domestic, family and sexual violence in Australia: an overview of the issues', Parliament of Australia, Parliamentary Library Research Paper, October 2014, p11.

It is submitted that a paramount concern should be ensuring that any information disclosed pursuant to this scheme is accurate. Issues relating to the integrity of data are outlined below at "11. Technology".

4. Right to Ask and/or Right to Know

4.1. Right to Ask

Do you support adopting a Right to Ask in NSW?

Yes, in principle, but this will depend on the final form of the scheme.

If yes, should it be limited to people who are in a current intimate relationship? Or, should it be extended to someone who was previously in a relationship with a person, and who continues to have ongoing contact with that person?

A Right to Ask should extend to someone who was previously in an intimate relationship and who continues to have ongoing contact with that person.

How should current and/or former intimate relationships be defined? Are the relationships set out in section 5(a)-(c) of the Crimes (DPV) Act (located at Appendix A) relevant?

An intimate relationship should be strictly limited to the relationships set out in section 5(a)-(c) of the *Crimes (Domestic and Personal Violence) Act 2007* as follows:

- (a) is or has been married to the other person, or
- (b) is or has been a de facto partner of that other person, or
- (c) has or has had an intimate personal relationship with the other person, whether or not the intimate relationship involves or has involved a relationship of a sexual nature.

Do you support a third party being able to apply under a Right to Ask?

While there may be superficial arguments in favour of allowing a third party to apply under a Right to Ask, the Committees consider that on balance the disadvantages outweigh the benefits.

Third party applications could be potentially alienating for the individual, which could unwittingly put the person at further risk. Third party applications open the scheme to possible abuse, for instance applications could become common place in family law proceedings.

If yes, in what circumstances? What nexus should there be with the primary person?

Not applicable.

What other broad eligibility criteria/parameters would need to be put in place?

Not applicable.

4.2 Right to Know

Do you support adopting a Right to Know in NSW?

Yes, in principle, but this will depend on the final form of the scheme.

If yes, what broad criteria/parameters would need to be put in place?

The Committees suggest that the test set out in section 98M of the *Crimes (Domestic and Personal Violence) Act 2007* is appropriate and is preferred on grounds of consistency.

Section 98M allows police to disclose information about a person without their consent if:

- it is necessary to prevent or lessen a domestic violence threat to another person, and
- the threat is a serious threat, and
- it is unreasonable or impractical to obtain the person's consent.

Using this test would formalise an avenue that is currently open to police.

5. Thresholds for disclosure

5.1. When information should be disclosed

Do you support the Option 1 threshold: Prior convictions for domestic violence offences as the relevant threshold for disclosure?

No.

If yes, should prior convictions include any sexual offences that are not domestic violence offences under the Crimes (DPV) Act.

If this option is adopted, it may be appropriate to include serious sexual offences.

Should prior convictions include a section 10 bond where no conviction has been recorded?

No.

Should prior convictions include crimes committed in other states and territories?

Yes, so long as the integrity of the data can be assured and the offences are broadly equivalent to offences in NSW.

Do you support the Option 2 threshold: Prior convictions for domestic violence offences and current and/or previous final ADVOs as the relevant threshold for disclosure?

No.

Do you support the Option 3 two staged process as the threshold for disclosure: Prior convictions for domestic violence offences and/or current or previous final ADVO trigger further enquiries?

Yes.

If yes, should the first step be limited to prior offences? Or should it include ADVOs?

The Committees are of the view that the first step should be limited to prior convictions for domestic violence offences committed in an intimate partner relationship (section 5(a)-(c) of the *Crimes (Domestic and Personal Violence) Act 2007*).

The Committees do not support the inclusion of current and/or previous ADVOs. ADVOs are civil orders, made on the balance of probabilities, a much lower threshold than is set for criminal convictions. As noted in the Discussion Paper, a majority of ADVOs are made by consent, but without admissions on the part of the respondent.²² If disclosure of ADVOs is included in the DVDS the number of contested hearings is likely to increase substantially.

Do you support the adoption of a test:

- **similar to that in the UK: *a pressing need to make a disclosure to prevent further criminal abuse or serious harm***
- **under Part 13A: *where disclosure is necessary to prevent or lessen a serious threat to the life, health or safety of a person***
- **or used by Centrelink: *where disclosure is necessary to prevent or lessen a threat to the life, health or welfare of a person or***
- **some other threshold?**

The Committees suggest using the test set out in section 98M of the Crimes (*Domestic and Personal Violence*) Act 2007 rather than creating a new threshold test.

Section 98M would permit disclosure if:

- it is necessary to prevent or lessen a domestic violence threat to another person, and
- the threat is a serious threat, and
- it is unreasonable or impractical to obtain the person's consent.

What principles should underlie any disclosure decision? Should they reflect the UK principles of the disclosure being lawful, proportionate and necessary to an assessed need or threat?

The UK principles of the disclosure being lawful, proportionate and necessary are appropriate. Principles relating to the offender's privacy and interests of rehabilitation should also be relevant.

5.2. Spent convictions

Should spent convictions be disclosed? If yes, in what circumstances?

Spent convictions should not be disclosed.

In NSW, the *Criminal Records Act 1991* states that a person is not required to disclose their spent convictions and it is unlawful to disclose information concerning spent convictions unless an exclusion applies under the Act. The rationale behind the spent conviction scheme is to ensure that past offenders are not disadvantaged for past offences after lengthy periods without offending. Under the UK model spent convictions cannot be disclosed.

In NSW an offender's conviction is spent when the person's sentence is six months imprisonment or less, and, if the person is an adult, they have not been convicted of a crime punishable by imprisonment for 10 consecutive years (section 9), or, if the person is a child, they have not been convicted of a crime punishable by imprisonment, or subject to a control

²² Discussion Paper at 13.

order, for three consecutive years (section 10). Convictions for sexual offences can never become spent.

5.3. Age limit for subject and applicant/person identified

Age of subject:

Do you support Option 1: Subject's adult and juvenile criminal convictions included in disclosure information?

No.

Do you support Option 2: Subject's adult criminal convictions and juvenile criminal convictions committed 16 years or over included in disclosure information?

No.

Do you support Option 3: Subject's adult history only included (exempting all juvenile history) in disclosure information?

The Committees support the exemption of all juvenile history in disclosure information.

The Discussion Paper refers to the long standing legal principle that prevents disclosure of any criminal offending by a child in New South Wales.²³ This principle is contained in NSW legislation (*Children (Criminal Proceedings) Act 1987* and the *Young Offenders Act 1997*). This principle reflects the reality of youth offending, that most young people do not continue criminal behaviour into their adult lives, the maintenance of a criminal record incurred as a young person stigmatises the young offender, and this stigmatisation could drive them further into criminality.

It is the experience of the Committee members that most domestic violence offences committed by young people are against parents, carers or co-residents in share houses. Much of it is "acting out" behaviour and is not indicative of a pattern of violence towards intimate partners.

Age of applicant/person identified:

Do you support restricting the age of primary applicants/persons concerned to 16 years and over, which is the age of consent?

The age of the primary applicants could be restricted to 16, not because of a link to the age of consent, but because other protections are in place for people under the age of 16 pursuant to Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998*.

Should there be an age restriction for third party applicants?

The Committees do not support the inclusion of third party applicants in the DVDS.

²³ Discussion Paper at 15.

If yes, what should be the age limit?

Not applicable.

If no, what supports/considerations should be in place?

Not applicable.

What considerations should be taken in matters where there is a potential risk of harm to a child?

Considerations should be taken in accordance with the provisions of the *Children and Young Persons (Care and Protection) Act 1998*.

5.4. What information should be disclosed?

What convictions are disclosed?

Do you support Option 1: Disclosure of a person's domestic violence related criminal history only?

Yes.

Do you support Option 2: Disclosure of a person's domestic violence related criminal history and any other violent conviction?

No.

How much contextual information is disclosed?

Do you support Option 1: Limited disclosure (for example, the existence of a relevant offence in subject's criminal and/or civil history only)?

The Committees suggest that for the pilot period there should be limited disclosure of criminal history only, in order to test the accuracy of the information provided. The police data and communication systems would require significant enhancement to ensure the quality and accuracy of the information disclosed.

Do you support Option 2: Broader disclosure of contextual information? If yes, what considerations should be taken into account when deciding what information should be disclosed?

No.

What restrictions/safeguards would need to be put in place to ensure the confidentiality and privacy of the subject and any third party is maintained?

The Committees recommend an offence of publication of the information, similar to that in section 15A of the *Children (Criminal Proceedings) Act 1987*.

6. Application process – Right to Ask

What should be the process for making an application?

The application process should take place at a police station.

Who would be the most appropriate first point of contact for applicants?

Domestic Violence Liaison Officers (DVLOs) and Aboriginal Liaison Officers for Aboriginal and Torres Strait Islander applicants.

What assistance, if any, are people likely to need to complete their application?

Assistance will be required if the person is not literate or proficient in English. A support person will be needed for any vulnerable applicants, for example, those vulnerable because of their age, Aboriginality, people with cognitive or mental health issues, physical disabilities.

Who is best placed to assist applicants to complete the application?

DVLOs.

Should DVLOs manage the receipt of the application and make initial enquiries/checks?

Yes.

7. Identification process – Right to Know

What should be the process for managing a Right to Know process? Should DVLOs manage the receipt of the information and make initial enquiries/checks?

DVLOs should make initial enquiries and checks and then seek approval to disclose the information.

8. Approval process

Do you support Option 1: Determination of disclosure by NSWPF? If yes, what level of seniority in NSWPF should approve disclosure requests?

No.

Do you support Option 2: Determination of disclosure by a local decision-making body? If yes, which key agencies would need to be included in the local decision-making body?

The Committees support discretion in decision-making and are of the view that the determination of disclosure should be made by a local decision-making body.

The NSW Safety Action Meetings, which are multi-agency forums with representatives from NSW justice and health service agencies and non-government service providers, and could provide a framework for a local decision-making body.

Do you support Option 3: Determination of disclosure by a centralised decision-making body? If yes, which key agencies would need to be included in the centralised decision-making body?

No.

9. Disclosure process

9.1. Disclosure to the applicant/person identified

Do you support DVLOs being the primary contact point for people about disclosures?

Yes.

Do you support DVLOs making the disclosure?

Yes.

Should someone from a support service be present when a disclosure is made? If yes, should a disclosure be made by a DVLO even where someone from a support service cannot be present?

Yes, where possible. If there is an imminent risk of harm the disclosure should be made by a DVLO even where someone from a support service cannot be present.

What supports should be available to the applicant/person identified after a disclosure?

Referrals to appropriate local support services.

9.2. Disclosure to a third party

When would it be appropriate, if at all, to disclose information with a third party present? When would it be appropriate, if at all, to make a disclosure to a third party only?

It would only be appropriate to disclose information with a third party present when the third party is an authorised support person. It would not be appropriate in any circumstances to make a disclosure to a third party only.

If you agree that a disclosure should be made with a third party present, or to a third party only, who should make the decision to approve this disclosure; the DVLO or the authority approving the decision?

The authority approving the decision should approve the disclosure being made with an authorised support person present.

What supports should be available to the person identified, and the third party, after a disclosure resulting from a third party application?

The Committees do not support the inclusion of third party applications in the DVDS.

9.3. Informing the subject of the disclosure

Should consideration be given to seeking representations from the subject before a disclosure is made? If yes, what exceptions should apply to seeking such input?

In principle, consideration should be given to seeking representations from the subject. However, in practice, in particular circumstances, it would undermine the purpose of the scheme, therefore, discretion should lie with the decision making body.

Should the subject be informed of a disclosure? If yes, in what circumstances should the subject be informed?

In principle, consideration should be given to informing the subject of a disclosure. However, in practice, in particular circumstances, it would undermine the purpose of the scheme, therefore, discretion should lie with the decision making body.

Who should make the decision to inform the subject of the disclosure? Would it be the authority approving the decision to disclose under Section 8?

Yes.

What processes or safeguards would need to be put in place if the subject is notified of an application?

The decision making body would need to consider what appropriate safeguards would need to be in place to protect the applicant if a subject is notified of an application.

Should the subject have a right to appeal a decision where a disclosure is made?

No, because of the resources implications, and there would be less need for an appeal process if, as the Committees suggest, the initial application is determined by a decision-making body and not the police.

If yes, on what grounds could an appeal be lodged?

Not applicable.

Who should be able to decide an appeal?

Not applicable.

9.4. No disclosure to the applicant under a Right to Ask

Where there is no disclosure, should this also be done in person?

This should be decided on a case by case basis. Where the decision is given in person, a DVLO could connect the applicant to other relevant services, and in this way go beyond the purpose of the scheme in a positive way.

Should support services be present?

This should be decided on a case by case basis.

Should these two (previous) questions be decided on a case by case basis?

Yes.

If yes, who should make the decision? The DVLO or the authority approving the decision to disclose under Section 8?

The authority approving the disclosure should make the decision.

What safeguards/information/support should be provided to an applicant where no disclosure is made? For how long should these supports be available?

This should be determined on a case by case basis, and could include local services such as the Women's Legal Services NSW, shelters and refuges, mental health service providers etc.

Should an applicant have a right to appeal a decision where no disclosure is made?

No.

If yes, on what grounds could an appeal be lodged?

Not applicable.

Who should be able to decide an appeal?

Not applicable.

10. Other issues/safeguards

10.1. Risk assessment for applicant/person identified

Do you support applying the DVSAT to applicants at the point when an application is made and make referrals as necessary?

Yes.

Do you support reapplying the DVSAT to applicants at the point of disclosure under a Right to Ask?

Yes.

Do you support reapplying the DVSAT to applicants at the point of no disclosure?

Yes, if circumstances have changed.

Do you support applying the DVSAT to persons identified at the point of disclosure under a Right to Know?

Yes.

What additional follow up would applicants/persons identified need once the disclosure process has been completed?

Referrals to appropriate support services should be an important part of the follow up process.

10.2. False information and misuse of disclosed information

Do you support making it a criminal offence to provide false information in an application?

No.

Do you support making it a criminal offence to disseminate information from a disclosure further? If yes, do you support including an exception where the disclosure is for the purpose of receiving domestic violence support services?

The Committees support making it a criminal offence to publish the information, similar to that in section 15A of the *Children (Criminal Proceedings) Act 1987*. This offence would cover publishing information on social media, which would be inconsistent with privacy rights.

The Committees do not support making it an offence for general disclosure to family or friends, for example, where it is necessary to help a vulnerable person in a domestic violence situation make decisions.

Do you support asking the applicant/person identified to sign an undertaking not to further disseminate the information disclosed following a disclosure?

Yes, if the undertaking is limited to further publication.

Should a disclosure be oral only?

Yes.

Do you support a record of the disclosure being made?

Yes.

Do you support having the applicant/person identified be asked to sign the record following the disclosure?

Yes.

What information should be recorded about an application, decision and a disclosure/no disclosure?

The information recorded should only state whether the information was or was not disclosed. There is no reason to record further information about an application, if, as the Committees suggest, there is no appeal process.

10.3. Impact on people from specific communities

What other considerations should be taken into account for any of the above groups in designing a NSW DVDS?

The Committees are of the view that the scheme is unlikely to be utilised by vulnerable and disadvantaged individuals and communities.

11. Technology

Do you support using the NSWPF WebCOPS system for the DVDS?

The police data and communication systems would require significant enhancement to ensure the quality and accuracy of the information disclosed.

The Committees have concerns about relying on WebCOPS providing accurate information in relation to the particular conviction recorded and also the basis of the finding of guilt. The Committees have concerns about relying on COPS for the basis of a conviction ; that is, using the COPS printout rather than the facts on the court record, and having difficulties determining facts found after the hearing.

The Committees submit that where the decision maker is unable to ensure the accuracy of the data/facts they should err on the side of non-disclosure.

12. Pilot locations

What criteria should be taken into account in the selection of sites for the pilot?

The Committees suggest having one rural and one metropolitan pilot location. Safety Action Meetings are currently held in Orange and Waverley. The DVDS could be piloted at these locations to make use of the existing infrastructure.

Are there any other issues to be considered when setting up a pilot?

It is important that both pilot locations are run similarly with the same culture in order for the evaluation to be effective.

How could we best communicate to the community the existence of the pilot in the local area and more broadly, including how to access the scheme?

Local media, domestic violence services and DVLOs could all assist in communicating to the community the existence of the scheme.

13. Evaluation and outcomes

Do you support the evaluation approach?

Yes.

What measures need to be considered in the evaluation to assess whether the process is functioning as intended?

The evaluators should gather both quantitative and qualitative data. The measures should be consistent with the objects of the scheme. All participants (or, if the numbers are too

large, at minimum a random sample of each category of participant) should be interviewed about their view about, experiences with, and outcomes from the scheme.

What measures need to be considered to assess whether the DVDS is assisting applicants/persons identified to make informed decisions and receive support services?

The UK Home Office evaluation did not consider any impact the scheme may have had on domestic abuse victims.

It is important the NSW evaluation properly assess whether the DVDS is assisting applicants to make informed decisions and receive support services, as this is the fundamental purpose of the scheme.

14. Further questions

Is there anything else that you would like to add in relation to a model NSW DVDS?

The UK Home Office's evaluation identified a number of shortcomings of the pilot as follows:

- Perceived bureaucracy of police process;
- Lack of public awareness and understanding of the scheme;
- Frontline police awareness of the scheme;
- Overlap between disclosure processes;
- Lack of understanding of the term "pressing need to disclose";
- Delivery of Right to Know disclosures;
- Lack of consistency in information given in disclosures;
- Follow-up support for non-disclosures.²⁴

These issues should be addressed so that they can be included in the data gathered for the evaluation in relation to any scheme implemented in NSW.

²⁴ Home Office, *"Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment"*, 2013, London: Home office, pp4-5, issues expanded on at 16-21.