Submission to the

Queensland Law Reform Commission

Review about whether a domestic violence disclosure scheme should be introduced in Queensland.

February 2017

This submission was primarily researched and drafted by senior law students **Hennie Lui** and **Carmen Nicholls** under the academic supervision **Professor Heather Douglas.** The submission was run as a project through the UQ Pro Bono Centre, with students undertaking this task on a *pro bono* basis - without any academic credit or reward - as part of their contribution to service as future members of the legal profession. Additional academic staff also provided valuable input into the project with the result being a collaborative submission between senior law students and law academics.

1 February 2017

The Secretary
Queensland Law Reform Commission
PO Box 13312
George Street Post Shop
QLD 4003
By email: LawReform.Commission@justice.qld.gov.au

Dear Sir / Madam,

Re: Review about whether a domestic violence disclosure scheme should be introduced in Queensland (WP No 75)

We thank the Queensland Law Reform Commission for the opportunity to contribute to its review about whether a domestic violence disclosure scheme should be introduced in Queensland.

We do not support the implementation of a Domestic Violence Disclosure Scheme (DVDS) in Queensland.

In Part A of this submission, we acknowledge the potential benefits that the DVDS may deliver, and identify a number of risks associated with the implementation of the scheme. It is our submission that the risks outweigh the benefits at this time. Further, we note the lack of empirical evidence to support the effectiveness of the scheme. We submit that the risks identified are disproportionate to the positive outcomes the scheme could potentially achieve.

If a DVDS is to be implemented in Queensland, we propose a framework for the basis, administration, procedure and operation of the DVDS in Part B of this submission. We suggest this framework because we believe it will minimise the identified risks and balance the DVDS with the need to rehabilitate domestic and family violence offenders and protect the privacy concerns of individuals.

Part A

1. Should a Domestic Violence Disclosure Scheme be implemented in QLD?

1.1 Objectives and Principles

The objectives of a Queensland DVDS should be to prevent or reduce incidents involving domestic and family violence, facilitate and strengthen a process through which protection and support can be provided and hold perpetrators of domestic and family violence accountable.[1]

The scheme should embody the principles of *accessibility* to facilitate access to legal and other responses to family violence, *fairness* to ensure that legal responses to family violence are fair and just and *effectiveness* to facilitate effective interventions and support in circumstances of family violence.[2]

[1] Home Office, *Domestic Violence Disclosure Scheme Impact Assessment* (31 October 2013) 1; NSW Government, *NSW Domestic Violence Disclosure Scheme,* Discussion Paper (2015) 2.
[2] Australia Law Reform Commission, *A National Legal Response,* Report No 114 (2010) 16.

2. Potential Benefits & Risks

2.1 Benefits

A DVDS has the potential to reduce incidents of domestic violence and abuse in Queensland through early intervention.[3] It may empower individuals by providing them with information to help them make a more informed choice about their relationship and give them a greater ability to exercise control over decisions in their own lives.[4] For some individuals, this may encourage them to leave an unhealthy and dangerous relationship before an incident involving domestic violence and abuse can arise or before a pattern of coercive and controlling behaviour develops.[5]

By disclosing the previous history of an individual, a DVDS may hold perpetrators accountable through deterrence. Individuals may think twice before engaging in domestic violence if they are aware of the repercussions of their actions.

A reduction in incidents of domestic violence and abuse may also reduce the costs associated with domestic violence in the Queensland health and criminal justice system and thus redirect economic resources to other State priorities.[6] It may therefore help to make workplaces more productive and improve the safety of the community, for all individuals.[7]

Additionally, a DVDS may strengthen the ability of the police and other multi-agency partnerships to provide appropriate protection and support to individuals at risk.[8] If appropriately designed and implemented, the scheme may help individuals gain access to support services along with information about processes and available protections that they may not be aware of.[9] Finally, perpetrators may be brought to the police's attention.[10]

2.2 Risks

2.2.1 False sense of security

A major concern is the false sense of security that a DVDS will give individuals.[11] A decision to not disclose or to confirm that there are no prior recorded convictions to disclose may give rise to the inference that the applicant is not at risk.[12] This may cause the applicant to believe they are relieved of any concern and they may be more inclined to stay with their partner and potentially ignore signs of risk. Many victims do not obtain domestic violence protection

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[3] Home Office, *Domestic Violence Disclosure Scheme: A Consultation* (October 2011) 5.
[4] Home Office, *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment* (2013) 3.
[5] Claire Bessant, 'Protecting victims of domestic violence: Have we got the balance right?' 2015 Journal of Criminal Law 79(2) 102, 114.
[6] Access Economics, 'The cost of Domestic Violence to the Australian economy: Part 1', (2004) 63.
[7] Ibid.
[8] Women's Legal Services NSW, Submission to NSW Government, *NSW Domestic Violence Disclosure Scheme Discussion Paper,* 19 June 2015, 1.
[9] Home Office, *Domestic Violence Disclosure Scheme Impact Assessment* (31 October 2013) 14.
[10] Ibid.
[11] Refuge, 'Submission to the domestic violence disclosure scheme consultation' (2012) https://www.refuge.org.uk/files/FINAL_disclosure_scheme_consultation_response_Jan_2012.pdf accessed 4 January 2017.
[12] Kate Fitz-Gibbon and Sandra Walklate, 'The efficacy of Clare's Law in domestic violence law reform in England and Wales' (2016) *Criminology & Criminal Justice* 13; Women's Aid, 'Low pick-up for Clare's Law suggests other services might be more effective' 24 June 2014, < http://www.womensaid.org.uk/domestic-violence-pressinformation.asp?itemid=3129&itemTitle=Low+pickup+for+Clare%C2%92s+Law+suggests+other+services+might+be+more+effective&section=000100010015 0001&preview=1>.

orders and many perpetrators are not convicted, as domestic violence is unreported.[13] The lack of convictions is likely to result in many dangerous individuals 'flying under the radar' and being undetected by a DVDS.[14] A DVDS may therefore undermine an applicant's legitimate concern of being at risk of domestic violence and abuse, and give individuals a reason to stay in an unhealthy and dangerous relationship when they are possibly looking for a reason to leave.[15] Consequently, applicants may also believe that their concerns are imagined, exaggerated or a product of their own paranoia.[16]

2.2.2 Shifting responsibility onto victims

In cases where information is disclosed under a DVDS, some individuals will not necessarily choose to leave the violence, and may instead opt to try to resolve the issues.[17] Receiving a disclosure under a DVDS effectively places the onus to address the issue and effect change onto the victim rather than the perpetrator, which arguably conflicts with the policy objective of keeping the perpetrator accountable.[18] Underpinning the scheme is an inaccurate assumption that an applicant at risk will take action to leave the relationship after being informed of a partner's history of violence.[19] However, there is a lack of evidence to show that individuals who have knowledge of previous offending will choose to leave a relationship.[20] Many individuals cannot leave a violent relationship due to "the dynamics of disempowerment, power and control"[21] involved.

Therefore, the assumption underpinning a DVDS may encourage a shift in community attitudes that victims are put on notice and may therefore share the culpability of an incident of domestic violence and abuse.[22] Questions then arise as to how the justice system will treat individuals who come before it in scenarios where the individual has decided not to leave following disclosure and is subsequently involved in an incident of domestic violence with a violent partner who was the subject of the prior disclosure.[23] For example, disclosures may promote subsequent police inaction where police perceive that post-disclosure the situation should be managed by the victims themselves and the victim does not follow the police's recommendations.

2.2.3 Privacy and confidentiality

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[13] Statistics of the Australia's National Research Organisation for Women's Safety show that 58% of women who had experienced violence from a former partner "had never contacted the police"; *Taskforce Report* (2015) vol 1, 74-5.
[14] Victoria, Royal Commission into Family Violence, *Summary and Recommendations,* 2016, 145.
[15] Fitz-Gibbon and Walklate, above n 12,9.
[16] Ibid.
[17] Monash University, Submission to the Government of South Australia, *Domestic Violence Discussion Paper,* 2 September 2016, 5; Kate Fitz-Gibbon and Sandra Walklate, 'UK experience of domestic violence disclosure schemes is a cautionary tale for Australia' *The Conversation* (online) 12 October 2016 <https://theconversation.com/uk-experience-of-domestic-violence-disclosure-schemes-is-a-cautionary-tale-for-australia-66553>.
[18] Ibid.
[19] Women's Aid, 'Low pick-up for Clare's Law suggests other services might be more effective', above n 12.
[20] The Law Society of New South Wales, Submission to NSW Government, *NSW Domestic Violence Disclosure Scheme Discussion Paper,* 22 June 2015, 3*;* Heather Nancarrow, Stewart Lockie, Renett Viljoen, Karena Burke and Jahar Choudhury, 'Intimate partner abuse of women in Queensland' (Research Report, Queensland Centre for Domestic and Family Violence Research, 2011) 8 <http://www.noviolence.com.au/public/reports/ipainqldreport.pdf>.
[21] The Greens, Submission to NSW Government, *NSW Domestic Violence Disclosure Scheme Discussion Paper,* 22 June 2015, 4; Australian Institute of Criminology, Australian Government, *Domestic-related homicide keynote papers from the 2008 international conference on homicide* (2009); The University of New South Wales, 'Staying/Leaving: Barriers to Ending Violent Relationships' (2012) 2.
[22] Fitz-Gibbon and Walklate, above n 12.
[23] Marian Duggan, 'Using victims' voices to prevent violence against women: A critique' (2012) British Journal of Community Justice 10(2), 31; The Law Society of New South Wales, Submission to NSW Government, *NSW Domestic Violence Disclosure Scheme Discussion Paper,* 22 June 2015, 6.

Laws relating to privacy and confidentiality stand to protect human autonomy and dignity and the individual's right to control the dissemination of information about one's private life.[24] A DVDS directly interferes with both the perpetrator's right to control their personal information and right to form relationships.[25]

While there is an argument that perpetrators lose their right to privacy and confidentiality once they are convicted of domestic violence offences, of greater concern is the risk that the personal information of other victims in past offences might be revealed in a DVDS process.[26] While names are not disclosed, a past victim's identity can be quickly identified as a former partner or a family member, which may be particularly relevant in small towns and communities. As a consequence, personal information can be revealed without that person's consent, leading to further disempowerment and contribution to the stigma attached to victims of domestic violence in the community.[27]

2.2.4 Potential misuse of information

A DVDS is susceptible to misuse through vexatious claims, and may be used as a tool to intimidate, manipulate, threaten or blackmail the individual about whom the disclosure is made.[28] Third parties who receive the disclosure, such as those involved in family law proceedings, meddling families and employers, may also utilise the information provided for ulterior purposes.[29]

2.2.5 Increase in contested Domestic Violence Orders

A significant proportion of DVOs are made by consent.[30] This is often very positive for victims of violence as it allows those apprehensive of violence to receive the benefit of the order without the need for a contested hearing. Many DVOs are also made 'by consent and without admissions'. If DVOs are disclosable under a DVDS, perpetrators may be more likely to contest them, thereby requiring applicants to give evidence and be cross-examined in proceedings, ultimately reducing the number of DVOs issued.[31] Finally, an increase in contested DVOs will place a heavier burden on court resources and processes.

2.2.6 Undermining the criminal justice policy goal of rehabilitation

[24] *Information Privacy Act 2009* (Qld) sch 3 IPP 10, 11; Monash University, Submission to the Government of South Australia, *Domestic Violence Discussion Paper,* 2 September 2016,7; *Taskforce Report,* above n 13.
[25] Jamie Grace, 'Clare's Law, or the national Domestic Violence Disclosure Scheme: the contested legalities of criminality information sharing' (2015) *The Journal of Criminal Law* 79(1) 37.
[26] Jamie Grace, 'Privacy, stigma and public protection: A socio-legal analysis of criminality information practices in the UK' (2013) 41(4) *International Journal of Law, Crime and Justice,* 318.
[27] Women's Aid, above n 12.
[28] The Greens, Submission to NSW Government, *NSW Domestic Violence Disclosure Scheme Discussion Paper,* 22 June 2015, 3.
[29] The Law Society of New South Wales, Submission to NSW Government, *NSW Domestic Violence Disclosure Scheme Discussion Paper,* 22 June 2015, 9.
[30] Heather Douglas and Robin Fitzgerald, 'Legal Processes and Gendered Violence: Cross-Applications for domestic Violence Protection Orders' (2013) 36(1) *University of New South Wales Law Journal* 56.
[31] The Law Society of New South Wales, above n 29, 5.

Another risk that a DVDS poses is the potential to undermine the policy goal of rehabilitation. A DVDS may stigmatise those who may have already taken steps to address their past behaviour unfairly interfering with their capacity to form social relationships.[32]

2.2.7 Undermining the rule of law through retrospective operation

It is unclear whether a DVDS will operate retrospectively and effectively undermine the rule of law. One of the most basic principles of the rule of law is that laws are applied prospectively. The importance of this is obvious: a person can only comply with laws that actually exist. If defendants knew that they would be subject to a disclosure scheme around DVOs, it is less likely that they would have accepted a DVO on a without admissions basis.[33]

2.2.8 Inconsistent Disclosure of Information

The effectiveness of a DVDS will rely on the capacity to give accurate information. However, there is a lack of uniform standards of information across each jurisdiction in Australia given the varying domestic violence laws in each state.[34] Significantly, not all states flag criminal offence matters as domestic violence matters. Therefore, it will be difficult to gather information in a way that supports consistent, national information- sharing on domestic violence histories. This may mean a DVDS that operates with incomplete information risks providing individuals with inaccurate and ambiguous advice, thereby exacerbating the false sense of security that an individual may have.[35]

Yet another issue arising from the disclosable information is the skewed reality of the situation that the disclosed information gives.[36] Research shows that the frequency with which partners seek protection orders is inconsistent with the notion that domestic violence is characterised by one person being subjected to an ongoing pattern of abuse by another person.[37] Both people in a relationship cannot be a victim and perpetrator of this type of violence at the same time.[38] A DVDS may therefore return information on both parties involved, which arguably does not reflect the reality of the situation. In cases where a victim has used violence in self-defence against an abusive partner and obtained a charge against them, they too will return a record under the scheme.[39] Under these circumstances a DVDS may inadvertently disadvantage the very individuals it is designed to protect.[40]

3. Evaluation of Impact

In considering whether a DVDS should be implemented in Queensland, we tried to identify research that has considered the effectiveness of similar schemes operating in other jurisdictions. There is very little available. In part this is because the evaluations have focussed on the processes rather than the outcomes of DVDSs.

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[32] R Kelly and S Farthing, 'Liberty's Response to the Home Office Consultation on the Domestic Violence Disclosure Scheme' (2012) <https://www.liberty-human rights.org.uk/sites/default/files/Liberty's%20Response%20to%20the%20Government's%20Pre-Charge%20Bail%20Consultation%20(Feb%202015).pdf>.

[33] The Law Society of New South Wales, above n 29, 10.

[34] NSW Government, *NSW Domestic Violence Disclosure Scheme,* Discussion Paper (2015) 12.

[35] Monash University, above n 17; The Greens above n 28, 319.

[36] Jane Wangmann, 'Has he been violent before? Domestic violence disclosure schemes' (2016) 41(4) *Alternative Law Journal,* 232.

[37] Fitz-Gibbon and Walklate, above n 12.

[38] Explanatory Notes, Domestic and Family Violence Protection Bill 2011 (Qld) 3*;* Kelly and Farthing above n 32.

[39] Fitz-Gibbon and Walklate, above n 12.

[40] Ibid.

The pilot assessment of the UK DVDS was designed to evaluate the process rather than the outcome.[41] 386 applications for a disclosure were made during the pilot assessment of the UK DVDS between July 2012 and September 2013.[42] Only a small sample of 38 of the applicants completed the questionnaire that was part of the data collated to assess the pilot of the DVDS.[43] Of the applicants who completed the survey, four reported that they would be likely to seek assistance from support services after receiving the disclosure.[44] The majority of the applicants acknowledged that the information disclosed helped them make more informed choices about their relationships. Applicants also noted that they would be more likely to keep a closer look out for signs of domestic abuse and seek support from family and friends.[45]

The New South Wales DVDS is currently being evaluated over a two-year pilot period, which ends in April 2018.[46]

Overall, there is a lack of empirical evidence to substantiate the scheme's ability to: reduce incidents relating to domestic and family violence; strengthen the support of those at risk; and improve accountability of perpetrators of such violence.[47]

4. Effectiveness of scheme for specific communities

Individuals in specific communities are placed at higher risk of domestic violence and are less likely to seek help or identify abusive relationships. Such communities include the Indigenous community, disabled community, lesbian, gay bisexual, transgender and intersex and queer communities, remote communities and those who are culturally and linguistically diverse.[48]

Factors that contribute to underreporting include remoteness and isolation both socially and geographically, fear of prejudice and discrimination, low income and limited access to transport and support services.[49]

Without further outreach and public awareness strategies to break down the barriers that these specific communities face in recognising domestic violence and seeking help and support, we do not believe that many individuals in these specific communities will benefit from the operation of a DVDS. In fact, these individuals are more likely to be lured into a false sense of security, having never previously obtained a DVO against a perpetrator or reported a matter to the police.

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[41] Home Office, *(DVDS) Pilot Assessment, a*bove n 4; Victim Support Service to the Government of South Australia, *Domestic Violence Discussion Paper,* September 2016, 9; Jane Wangmann, 'Violent offenders registers sound good, but are a costly unproven distraction' *The Conversation* (online) July 8 2015 https://theconversation.com/violent-offenders-registers-sound-good-but-are-a-costly-unproven-distraction-44182; "The assessment was not designed to consider any impact the scheme may have had on domestic abuse victims or estimate the 'value for money' of the scheme" Home Office, *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment* (2013) 2.

[42] Home Office, *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment,* above n 4.

[43] Ibid.

[44] Ibid.

[45] Ibid.

[46] NSW Government, 'Factsheet: NSW Domestic Violence Disclosure Scheme' (April 2016) 3. http://www.domesticviolence.nsw.gov.au/__data/assets/pdf_file/0008/371195/dvds-fact-sheet.pdf.

[47] The Greens, *NSW Domestic Violence Disclosure Scheme Discussion Paper* and *The* University of New South Wales, above n 21; Women's Aid, above n 12.

[48] Australian Government, Attorney-General's Department, *National Domestic and Family Violence Bench Book* (2016).

[49] Ibid.

5. Diversion of Resources

It is important to ensure that a DVDS would not divert resources from other schemes that have a greater prospect of achieving similar policy objectives.[50] A DVDS may do little to improve the safety of those who are experiencing domestic violence and abuse who already are well aware that they are at risk. Further, it is possible that many of those who can benefit from the scheme will not make use of it as they may be reluctant to seek help to address their concerns.

Neither the UK DVDS Pilot Assessment nor the National Roll-Out Assessment examined the economic impact of the scheme and the cost and burden of resources that it entails.[51] It was noted that costs were likely to vary depending on how the scheme was implemented and the volume of cases that were processed.[52]

Without any empirical evidence of the effectiveness of a DVDS in other jurisdictions or the financial implications of the scheme, we question whether the resources to be injected into the effective delivery of the scheme are proportionate to the potential positive outcomes that would be achieved. A DVDS is essentially an information sharing scheme, rather than prioritising and addressing resources to provide safety for victims of domestic violence.[53] At a time when reporting of family violence across Australia has significantly increased and services are experiencing increased demand we do not believe allocating resources to a DVDS in Queensland is a worthwhile investment.

The resources that would be injected into a DVDS may be more effective and beneficial in achieving the objectives through schemes focusing on front line responses, outreach, awareness and refuges, particularly in regional and remote areas.[54]

Part B

6 Basis and Administration of DVDS

6.1 Administration

A Queensland DVDS should operate within the current legislative framework and be administered by a multi-agency entity, which includes the Queensland police force and a multi-agency decision-making authority to facilitate the process of applications and to offer support to those who receive a disclosure. An alternative administering entity beyond the Queensland police force is necessary for the scheme to be effective, as some individuals may feel that they will receive inadequate police support due to past experiences.[55] To avoid exhausting resources, an agency should be selected based on its potential to enhance existing information-sharing mechanisms.

6.2 Eligibility

In the UK, an applicant can be a person who is currently in an intimate relationship with the alleged perpetrator.[56] An 'intimate relationship' is defined as a 'relationship between two people, regardless of gender, which may be reasonably characterised as being physically and emotionally intimate'.[57]

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[50] See generally Queensland Government, *Domestic and Family Violence Prevention Strategy* (5 December 2016) https://www.communities.qld.gov.au/gateway/end-domestic-and-family- violence/dfvp-strategy.

[51] Home Office, *DVDS Impact Assessment,* above n 4, 4; Home Office, *Domestic Violence Disclosure Scheme (DVDS) One year on – Home Office assessment of national roll-out* (March 2016) 3.

[52] Ibid.

[53] Women's Aid, above n 12.

[54] The Greens, Submission to NSW Government, *NSW Domestic Violence Disclosure Scheme Discussion Paper,* (22 June 2015), 9.

[55] Home Office, *DVDS Impact Assessment,* above n 9.

[56] Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (December 2016) 4.

The NSW DVDS extends the eligibility of applicants to those who were in a former intimate relationship with the individual, provided that ongoing contact is maintained with the former partner.[58]

In most jurisdictions, a third party must have some form of contact with the individual at risk to be eligible to apply.[59] Third parties can include parents, neighbours or friends.[60]

A Queensland DVDS should extend the eligibility of applicants beyond intimate partner relationships, to take into account of older people or those who have a disability who wish to be informed about their carers or co-residents in their respective facilities.[61] Applicants must be aged 16 and over.

Statistics suggest separation is a time of great danger for victims.[62] A Queensland DVDS should follow the NSW model and allow people with ongoing contact with a former partner to be eligible to apply for a disclosure.

We acknowledge that allowing third parties to apply may disempower the individual at risk and further encroach on their right to ask and their right to make a decision.[63] Perpetrators of domestic violence often exercise power and control over the individual at risk by isolating them from friends and family.[64] An individual who receives unwanted information may potentially be isolated and marginalised, and consequently exposed to an increased risk of violence.[65] On the other hand, as a victim's isolation may prevent an individual from recognising signs that they are at risk a third party may be in a better position to make an application on the individual's behalf. On this basis, we support third party applications if they have ongoing contact with the individual at risk and are genuinely concerned about the individual's safety. However, the information disclosure should only be given with the consent of the individual at risk. If no consent is obtained, no disclosure should be made.

6.3 Entry into DVDS

Application forms should be lodged at any one of the multi-agency entities to establish an initial point of contact. This may be either the police or a domestic violence support agency, which will refer the application to the multi-agency decision making authority. The applicant may schedule an appointment to meet with a multi-agency representative if further support is needed. This may be helpful to ascertain whether immediate assistance is required or whether an urgent disclosure should be made.

Upon receipt of the application, the multi-agency representative with the assistance of the police should then undertake a range of standard intelligence checks and determine whether the application should progress. If it is to progress, the multi-agency decision-making body should also determine what contextual information should be disclosed and how the disclosure should be made to the applicant.

The Right to Know entry provides an alternative method through which an individual may be made aware of potential risk.[66] During the UK Pilot Assessment, the Right to Know option was more likely to result in a disclosure.[67]

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[57] Ibid, 24.

[58] Home Office, *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment,* above n 4, 1.

[59] Home Office, *DVDS Impact Assessment,* above n 9, 24; NSW Government, *NSW Domestic Violence Disclosure Scheme: Consultation Report* (2015) 5.

[60] Ibid.

[61] See the definition of 'relevant relationships': Domestic and Family Violence Protection Act 2012 (QLD) s 13; Home Office, Domestic Violence Disclosure Scheme Impact Assessment, above n 9, 4.

[62] Legal Aid NSW, Submission to the NSW Government, *NSW Domestic Violence Disclosure Scheme Discussion Paper,* June 2015, 3.

[63] Ibid.

[64] Ibid.

[65] Ibid.

[66] Queensland Law Reform Commission, *Whether a domestic violence disclosure scheme should be introduced in Queensland,*

Respondents of the NSW Consultation Report stated that agencies responding to domestic and family violence incidents were the likely source of most applications.

Further, the Right to Know option does not have the same effect of disempowerment on a victim as it would on a third party application, as the information will simply provide the person at risk with the information necessary for them to make informed choices about their relationship.[68]

On the other hand, the UK Impact Assessment has raised privacy concerns over the Right to Know pathway, along with issues involving 'spying' and the possible stigmatisation of alleged perpetrators.[69] The UK Pilot Assessment also noted that the police and support workers found it difficult to practically manage the delivery of the disclosure, especially in circumstances where the individual at risk was not aware that an application for disclosure had been made.[70] It was also challenging to ascertain a time when experienced domestic abuse police officers knew that the alleged perpetrator was not present when the information was to be disclosed to the individual.[71]

Overall, if there are sufficient resources available, we support a Right to Know option, which allows the responsible entity to disclose information without the subject's consent where it is necessary to prevent or lessen a domestic violence threat to another person, the threat is a serious threat and where it is unreasonable or impracticable to obtain the person's consent.[72]

6.4 Disclosable Information

Offences covered under a Queensland DVDS should include offences committed within the 'relevant relationships' to which the *Domestic and Family Violence Protection Act* apply,[73] and certain personal violence offences committed outside the Act, including sexual offences, child abuse offences and murder. Breaches of DVOs should also be disclosed, although we stress that contextual information must be provided to allow for more informed decisions. We believe it is important that a Queensland DVDS should include convictions imposed in other jurisdictions outside of Queensland.

Without any contextual information disclosed, convictions could be incorrectly interpreted by the applicant, giving applicants a false sense of security and unfairly prejudicing the perpetrator.[74] This is particularly so when considering the facts around how the DVO came into place. For example, individuals may consent to a DVO on a without admissions basis even if the allegations are unfounded as a means to move on with their lives; or, an individual may have breached their DVO by coming within one hundred metres of the aggrieved which may be considered a minor breach not characterised by violence at that particular time.[75] Further, in determining a DVO, the court is not bound by the rules of evidence and it need only be satisfied on the balance of probabilities.[76] The standard of proof for the respective conviction should also be disclosed as a part of the contextual information so as not to avoid further

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Discussion Paper WP No 75 (2016) 37.

[67] "Of the 386 applications, Right to Know applications were more likely to result in a disclosure (34%) compared to Right to Ask applications (26%)": Home Office, *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment,* above n 4.

[68] Home Office, *Domestic Violence Disclosure Scheme (DVDS) One year on – Home Office assessment of national roll-out,* above n 51, 5.

[69] Home Office, *Domestic Violence Disclosure Scheme Impact Assessment,* above n 9, 8.

[70] Home Office, *DVDS Impact Assessment,* above n 4, 19.

[71] Ibid, 20.

[72] NSW Government, *NSW Domestic Violence Disclosure Scheme: Consultation Report,* above n 59, 4.

[73] *Domestic and Family Violence Protection Act 2012* (QLD) s 13.

[74] Law Reform Commission of Western Australia, *Enhancing Family and Domestic Violence Laws: Final Report,* Project No 104 (2014) 179.

[75] Legal Aid Queensland, Someone has applied for a domestic violence protection order against me - what are my legal options? (2015) Legal Aid Queensland <http://www.legalaid.qld.gov.au/Find-legal-information/Relationships-and-children/Domestic-and-family-violence/Someone-has-applied-for-a-domestic-violence-protection-order-against-me-what-are-my-legal-options>.

[76] NSW Government, *NSW Domestic Violence Disclosure Scheme: Consultation Report,* above n 59, 5.

prejudice against the perpetrator. A decision on the extent of the contextual information disclosed should be made on a case-by-case basis. Safeguards imposed by a multi-agency decision-making body should be required in order to prevent the misuse of the disclosed information.

A Queensland DVDS should not disclose allegations, arrests and charges that did not result in a conviction, juvenile convictions, or spent convictions. Interim or temporary DVOs should also be excluded. The identity of the victim or involved parties of other convictions should never be disclosed, nor should any information that would be irrelevant to assisting the applicant to make an informed choice about the relationship.

6.5 Criteria / Threshold for Disclosure

As noted by the Law Reform Commission of Western Australia, "the usefulness of any disclosure will be dependent on the nature of the information disclosed".[77] In the UK, an applicant will only be informed of an offence if there is a "pressing need" for disclosure.[78] The disclosure must also be lawful, necessary and proportionate to protect the individual at risk.[79] However, the UK Pilot Assessment noted that professionals interpreted the term "pressing need to disclose" differently, although practitioners ultimately exercised their own judgement on a case-by-case basis.[80]

Overall, we do not think that there should be a threshold for the disclosure of a criminal offence that has been committed in the context of domestic violence. However, a Queensland DVDS should adopt the principles underpinning the UK model to determine the amount of contextual information an applicant should receive; it should be lawful, proportionate and necessary to protect that individual.

7 Procedure and Operation of DVDS

7.1 Entity responsible for assessing and deciding application

All requests, whether a Right to Ask or a Right to Know, should be considered through a multi-Agency decision making body.

7.2 Risk assessment

Risk assessments similar to the NSW model should be undertaken when a multi-agency body receives an application and when a disclosure is made.[81] The risk assessment should identify the potential risks to both the subject of the disclosure and the applicant that would result from a decision to disclose. The assessment should also take into account the risks associated with the method, location and agency responsible to deliver the disclosure to the applicant.

The authority will be responsible for balancing the safety and welfare of the applicant with the subject's right to confidentiality and privacy. Further, it will also assess and decide the contextual information that should be disclosed. This information will be limited to police criminal history, agreed facts, sentencing judgment, whether a DVO was contested, consented to, or made on a no admissions and consent basis.

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[77] NSW Government, *NSW Domestic Violence Disclosure Scheme: Consultation Report,* above n 59.

[78] The Greens, Submission to NSW Government, *NSW Domestic Violence Disclosure Scheme Discussion Paper* ,above n 54, 18.

[79] Ibid, 6.

[80] Home Office, *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment* above n 4, 18.

[81] The risk assessment tool approved by the NSW Government is the Domestic Violence Safety Assessment Tool, which includes a series of questions that relate to recurring factors or behaviours recognized as indicators of threat or domestic violence: NSW Government, *NSW Domestic Violence Disclosure Scheme,* Discussion Paper (2015) 26.

Applicants should provide proof of identity when completing the application form at the police station. Third party applicants should provide evidence of their relationship with the applicant, and former partners should provide evidence on their ongoing contact with their partner.

7.3 Maximum timeframe

An application should be completed within 30 days. Applicants should also be notified of any delays experienced in the decision-making process.

7.4 How the disclosure is to be communicated

Regardless of whether a disclosure is to be made, the decision should be orally communicated in person at the police station or at an alternative location requested by the individual at risk.

To prevent applicants misinterpreting information or having a false sense of security, they should be provided with information about the statistics of domestic violence underreporting and contacts for domestic and family violence support agencies.

7.5 Third party to receive disclosure or non-disclosure

Even if an application is made by a third party, he or she should only receive a disclosure if the individual at risk chooses to invite them as a support person at the disclosure meeting.

7.6 Support services

A support worker should attend the disclosure alongside the disclosing authority to give a potential victim immediate support. Support workers should assist individuals in understanding what the information means and what their options are. Immediate support offered should include the option to talk through the information contained in the disclosure so that the applicant can understand how it was relevant to their situation and having a safety plan in place following the disclosure.

There should be a follow up in the period post-disclosure where independent domestic violence advisors from the multi-agency body continue to offer ongoing contact and support to ensure the applicant's safety. If adequate support is not put in place, applicants who are armed with information about their partner's history and who are trying to leave the relationship may be placed at greater risk than before disclosure.[82] A Queensland DVDS should therefore rest heavily on post-disclosure support protocols and the ability to adequately connect persons with support services.

7.7 Non-disclosures

To minimise the risk of a false sense of security arising from inferences made where no information has been disclosed, the same support services as above should be given in circumstances of a non-disclosure.

A non-disclosure should not prevent the person from making a subsequent application.

7.8 Dealing with the subject

The subject of the disclosure should not be consulted or notified about the application or whether a disclosure has been made about them. While we do not question the importance of the rights of the subject of the disclosure, a

[82] Fitz-Gibbon and Walklate, *The Conversation,* above n 17.

subject's knowledge of an application may also place the applicant at a heightened risk of domestic violence and defeat the 'protection' purposes of the scheme.[83]

8 Privacy and Confidentiality

8.1 Confidentiality requirements

To ensure that the subject's right to confidentiality and privacy is preserved, the individual receiving the disclosure should be required to sign an undertaking that details the purpose for which the information is being disclosed and that it is an offence to disseminate that information further unless it is being disclosed to a support service for the purpose of receiving domestic violence support.[84] If the individual is not willing to sign the undertaking, the disclosing authority will need to consider if the disclosure should still take place. An oral disclosure also acts as a safeguard to prevent any further unintended disclosure of the information.

Conclusion

In conclusion, we do not support this scheme due to the lack of evidence available to demonstrate the scheme's ability to achieve its prescribed objectives or highlight any major benefits that will outweigh the risks involved. We recommend that the resources that were initially allocated to this scheme be redirected to other related reforms that are currently being implemented by the Queensland Government.

Regards,

Hennie Lui and Carmen Nicholls

We have reviewed this submission, commend the students on their diligent research, and endorse their recommendations:

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[83] Above n 60, 12.

[84] As suggested in NSW Government, *NSW Domestic Violence Disclosure Scheme,* Discussion Paper (2015) 27.