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# Assessing vulnerabilities in the Domestic Violence Disclosure Scheme

**Marian Duggan and Jamie Grace<sup>1</sup>**

## **Abstract**

The Domestic Violence Disclosure Scheme ('Scheme') is one of a raft of measures that has been spearheaded by the Home Office to tackle violence against women. Since its national implementation in March 2014, thousands of applications have been made to the police for information regarding a person's history of violence. Also known as 'Clare's Law', the Scheme, as a piece of criminal justice policy created by the Home Office, importantly has no specific statutory basis, instead resting on existing legal frameworks. Drawing on both a legal analysis of new Scheme guidance published by the Home Office in December 2016 and early empirical research into its operation, this paper offers a close reading of the Scheme and highlights several persistent procedural and practical vulnerabilities for 'right to ask' victims in the operation of Clare's Law. These vulnerabilities, it is argued, could have significant ramifications for the Scheme's efficacy and for public confidence in the policy in the longer term. The conclusion proposes recommendations for reform to improve the current working of the Scheme and offers insight to those seeking to adopt of this policy in other jurisdictions.

**Keywords: Domestic violence, victims, human rights, safeguarding, police, law**

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## Introduction

The Domestic Violence Disclosure Scheme in England and Wales (the 'Scheme') is predicated on potential victims of domestic violence having the 'right to ask' or the 'right to know' about a partner's history of violence. In a typical case, a person at risk of abuse from a partner will be able to approach the police to seek any past history of domestic violence perpetrated by their partner (the 'right to ask' route). Alternatively, a potential victim of domestic violence may be proactively informed by the police of the risk a new partner poses, following a multi-agency information sharing and risk evaluation exercise (the 'right to know' route). This article focuses on the 'right to ask' route as a new approach to preventing domestic violence.

The Scheme has been criticised for being an instrument for imposing responsibility on victims or potential 'victim blaming',<sup>2</sup> and as more of a public relations exercise for the policing of domestic violence.<sup>3</sup> A key limitation of the Scheme is that it requires active criminal justice engagement from victims of domestic violence in order for there to be any information about a violent person on record that can later be disclosed.<sup>4</sup> It has also been noted that mothers and immigrant women might not be effectively supported to use the Scheme and other multi-agency initiatives, due to the complexities of caring for children as a mother in an abusive relationship with a partner – and perhaps, on top of this, as a mother in the context of a patriarchal/sexist culture.<sup>5</sup> The victim-focused nature of the Scheme has also drawn criticism that it merely deflects, rather than prevents, perpetration.<sup>6</sup> This has not stopped the model of 'Clare's Law' (so named after Clare Wood, who was killed by her former partner in 2009) from spreading from England and Wales to several other jurisdictions.<sup>7</sup> The Scheme now operates in an equivalent form in both Scotland and Northern Ireland.<sup>8</sup> A model of the Domestic Violence Disclosure Scheme also now operates

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<sup>2</sup> M Duggan, 'Using victims' voices to prevent violence against women: A critique' (2012) 10(2) *British Journal of Community Justice* 25, at p 33.

<sup>3</sup> J Grace, 'Clare's Law, or the national Domestic Violence Disclosure Scheme: The contested legalities of criminality information sharing' (2015) 79(1) *J. Crim. Law* 36, at p 36.

<sup>4</sup> M Duggan, 'Victim hierarchies in the domestic violence disclosure scheme' (2018) 24(2) *International Review of Victimology* 199, at p 206.

<sup>5</sup> N Westmarland, *Violence Against Women: Criminological Perspectives on Men's Violences* (Routledge, 2015), at p 27; S Graca, 'Domestic violence policy and legislation in the UK: A discussion of immigrant women's vulnerabilities' 22(1) *European Journal of Current Legal Issues* (2017) [www.webjcli.org/article/view/531/715](http://www.webjcli.org/article/view/531/715) (last accessed 13 March 2018).

<sup>6</sup> M Duggan, 'Using victims' voices to prevent violence against women: A critique' (2012) 10(2) *British Journal of Community Justice* 25, at p 31; K Fitz-Gibbon and S Walklate, 'The efficacy of Clare's Law in domestic violence law reform in England and Wales' (2017) 17(3) *Criminology and Criminal Justice* 284, at p 295.

<sup>7</sup> K Fitz-Gibbon and S Walklate, 'The efficacy of Clare's Law in domestic violence law reform in England and Wales' (2017) 17(3) *Criminology and Criminal Justice* 284, at p 285.

<sup>8</sup> A Disclosure Scheme for Domestic Abuse Scotland has been in operation in Scotland since October 2015; working a different legal basis to the common law model used in England and Wales. This

in New South Wales, Australia.<sup>9</sup> The Victorian state government in Australia instigated a Royal Commission report on domestic violence, which explored the possibility of a 'perpetrator register' that could be used for the basis of disclosures in the manner of the Scheme in England and Wales. However, the report concluded that the 'effect of such a scheme on increasing women's safety has not been demonstrated', and that 'under such a scheme the onus remains on the victim to keep herself safe', while such a scheme is 'usually limited to those perpetrators who have a criminal history'.<sup>10</sup> The authors of this article share the same reservations about the Scheme as currently operated in England, Wales, Scotland and Northern Ireland.

Certain concerns have emerged in the short time that the Scheme – and specifically the 'right to ask' element of it – has been operational.<sup>11</sup> These include: the problem for those tasked with implementing the policy of judging the need for a disclosure given the vagueness of the guidelines around it; the vulnerabilities of those seeking and obtaining information through the policy; and marked variation in local police forces' implementation the Scheme across England and Wales.<sup>12</sup> Little detailed evaluation or evidence has been published in relation to its efficacy on the ground; instead, the Home Office has focused its regulatory efforts on trying to ensure greater consistency and clarity in relation to the Scheme as a policy instrument. Guidance on its operation was updated in December 2016, following a review by the Home Office. The biggest single policy change so far was to bring 'spent convictions' within the ambit of the Scheme, reversing the prior policy that such convictions would not be disclosed under Clare's Law by virtue of the Rehabilitation of Offenders Act 1974.

During the preparation of this article, the Home Office announced a forthcoming 'Domestic Violence and Abuse Act', giving rise to the possibility that the common law powers that underpin the Scheme might be placed on the statute book.<sup>13</sup> Codification in a new, high-

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piece does not allow room for discussion of the Scots law model; for an overview see [www.scotland.police.uk/contact-us/disclosure-scheme-for-domestic-abuse-scotland/](http://www.scotland.police.uk/contact-us/disclosure-scheme-for-domestic-abuse-scotland/) (last accessed 13 March 2018). A Domestic Violence and Abuse Disclosure Scheme pilot began in Northern Ireland in March 2018 following a public support for implementing the policy.

<sup>9</sup> K Fitz-Gibbon and S Walklate, 'The efficacy of Clare's Law in domestic violence law reform in England and Wales' (2017) 17(3) *Criminology and Criminal Justice* 284, at p 290.

<sup>10</sup> See Government of Victoria, *Royal Commission into Family Violence: Report and Recommendations* (2016), at p 145: [www.rcfv.com.au/Report-Recommendations](http://www.rcfv.com.au/Report-Recommendations) (last accessed 26 March 2018).

<sup>11</sup> Prior to the establishment of the Domestic Violence Disclosure Scheme, the police had common law powers to disclose information in a manner similar to that used under the 'right to know' route today.

<sup>12</sup> M Duggan, 'Victim hierarchies in the domestic violence disclosure scheme' (2018) 24(2) *International Review of Victimology* 199, at p 206.

<sup>13</sup> While we describe the Scheme as based upon police common law powers in England and Wales, the whole regulatory framework of the context in which the Scheme operates is comprised broadly of

profile piece of legislation might give Parliament an opportunity to clarify the exact operation, scope and value of the Scheme; in addition, reform might also better educate the public around police and multi-agency methods for addressing and preventing domestic violence in society.<sup>14</sup> However, in the interim, policies such as the Domestic Violence Disclosure Scheme arguably illustrate an increasing governmental shift towards active citizen engagement in personal violence prevention. This might be thought to reflect the gradual move towards increasing state agent engagement with victims in the criminal justice system, with the aim of preventing domestic violence and abuse, in particular. But this has not been matched by funding for vital services; for example, there is evidence that women's refuges have been closing in an era of government austerity policy.<sup>15</sup> These developments are at odds with the idea that a disclosure might tip the balance for a person (typically a woman) minded to end a relationship. Why end the relationship if, amongst other things, it will be harder, and not easier, to find somewhere safe to live once the relationship has ended?

Beginning with an overview of the current domestic violence prevention framework in England and Wales, this paper next sets out the context in which the Scheme emerged. Particular attention is paid to the case prompting the establishment of a 'right to ask' route: the murder of Clare Wood in 2009. As will be noted, the escalation of violence in this case occurred *after* she had separated from her partner. The paper goes on to outline the legal framework underpinning the Scheme, before illustrating the variation in implementation by police forces. The critical analyses presented in these sections invoke key cases and judgments pertaining to domestic violence provision and provide the context for understanding the vulnerabilities outlined in the latter section of the paper. This draws on a small-scale empirical research study undertaken in 2015-2016 with selected statutory agents working with various aspects of the Scheme in one policing district. The analysis demonstrates how some of the procedural and practical vulnerabilities highlighted are impeding access to, or effective use of, the information theoretically available to members of the public. Finally, the paper concludes with suggestions for reform to improve the efficacy of the Scheme.

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the common law, data protection law, and human rights law. In essence, data protection law and human rights law place a series of checks on the decision-making process that is made lawful, in the public law sense, by the common law police power to disclose confidential information for public protection purposes.

<sup>14</sup> See Home Office, 'Prime Minister's plans to transform the way we tackle domestic violence and abuse': [www.gov.uk/government/news/prime-ministers-plans-to-transform-the-way-we-tackle-domestic-violence-and-abuse](http://www.gov.uk/government/news/prime-ministers-plans-to-transform-the-way-we-tackle-domestic-violence-and-abuse) (last accessed 6 November 2017).

<sup>15</sup> See [www.yorkshireeveningpost.co.uk/news/women-s-refuge-funds-reduced-in-west-yorkshire-as-domestic-abuse-figures-rise-1-8807948](http://www.yorkshireeveningpost.co.uk/news/women-s-refuge-funds-reduced-in-west-yorkshire-as-domestic-abuse-figures-rise-1-8807948) (last accessed 6 November 2017) and [www.thebureauinvestigates.com/stories/2017-10-16/a-system-at-breaking-point](http://www.thebureauinvestigates.com/stories/2017-10-16/a-system-at-breaking-point) (last accessed 6 November 2017).

## Overview of the Domestic Violence prevention framework in England and Wales

Many of the legislative measures concerning domestic violence implemented in the UK reflect the obligations created by the United Nations *Convention on the Elimination of all Forms of Discrimination Against Women* (1979) and the United Nations *Declaration on the Elimination of Violence against Women* (1993). Subsequent resolutions, recommendations and conventions have broadened this remit to include male victims, particularly through recognising 'gender-based violence'.<sup>16</sup> However, a dominant 'violence against women and girls' narrative still exists in relation to interpersonal violence in the UK and internationally, as evidenced in the Government's recent decision to ratify the *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, also known as the Istanbul Convention. Legislation in the 1970s and '80s first introduced special injunctions (non-molestation orders) and ouster orders in relation to the matrimonial and quasi-matrimonial home.<sup>17</sup> Part IV of the Family Law Act 1996, which replaced much of the previous legislation in this field, permitted a newly wide category of 'associated persons' (in many cases, still current or former partners) to seek civil remedies such as non-molestation and occupation orders, including (as under earlier legislation) on an ex parte basis.<sup>18</sup> However, the use and effectiveness of these orders has been affected by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which aimed to reduce the civil legal aid budget by removing whole sections of law (including private law, children and family proceedings) from its scope while also altering the criteria around financial eligibility.<sup>19</sup> Although legal aid continues to be available for domestic abuse victims, in particular to apply for these protective orders, legal aid is not available for alleged perpetrators.<sup>20</sup> This has resulted in an increase in perpetrators being able effectively to ignore orders otherwise prohibiting contact with the victim when acting as unrepresented civil litigants then seeking to cross-examine victims in person in family proceedings.<sup>21</sup>

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<sup>16</sup> C Bessant, 'Protecting victims of domestic violence—Have we got the balance right?' 79(2) *J. Crim Law* (2015) 102, at p 104.

<sup>17</sup> Domestic Violence and Matrimonial Proceedings Act 1976, ss 1-2, repealed in 1997; Matrimonial Homes Acts 1967 and 1983, now both repealed; and Domestic Proceedings and Magistrates' Courts Act 1978, ss 16-18 (now repealed).

<sup>18</sup> Family Law Act 1996 s 62(3).

<sup>19</sup> C Bessant, 'Protecting Victims of Domestic Violence—Have We Got the Balance Right?' (2015) 79(2) *J. Crim. Law* 102, at p 111; M Burton 'Emergency barring orders in domestic violence cases: what can England and Wales learn from other European Countries' (2015) 27 *CFLQ* 25, at p 42.

<sup>20</sup> Schedule 1, paragraph 12.

<sup>21</sup> S Laville, 'Revealed: how family courts allow abusers to torment their victims' *Guardian* (22 December 2016): [www.theguardian.com/society/2016/dec/22/revealed-how-family-courts-allow-abusers-to-torment-their-victims](http://www.theguardian.com/society/2016/dec/22/revealed-how-family-courts-allow-abusers-to-torment-their-victims) (last accessed 5 March 2018); HMCTS, *Interim Report of the Children and Vulnerable Witnesses Working Group* (July 2014), at p 1; Library Briefing Paper 7113, *Litigants in person: the rise of the self-represented litigant in civil and family cases in England and*

The New Labour government introduced some policy initiatives as set piece legal measures, between 1997 and 2010, in order to combat particular behaviour tantamount to or included within concepts of domestic violence, such as stalking. The Protection from Harassment Act 1997 was revisited on more than one occasion. For example, the Domestic Violence Crimes and Victims Act 2004 'amended the 1997 Act to provide for courts to be able to issue restraining orders to a defendant acquitted of an offence where the court considers it necessary to do so to protect a person from harassment from that defendant'.<sup>22</sup> The 2004 Act also introduced a criminal offence for breaches of non-molestation orders that can be obtained under the Family Law Act 1996.<sup>23</sup> The Protection from Harassment Act 1997 was amended by the Serious and Organised Crime Act 2005 to allow victims of stalking to apply for civil injunctions against stalkers, and to allow the award of a restraining order in the civil courts on the civil standard of proof, with breach of any order obtained constituting a criminal offence.<sup>24</sup> But further changes were made later: 'In 2012 the Coalition Government added two specific criminal offences of stalking to the 1997 Act following widespread concern that the Act was not dealing adequately with this problem.'<sup>25</sup>

Importantly, from our perspective, the Domestic Violence Crimes and Victims Act 2004 did not create any specific 'crime' of domestic abuse. Part of the Government's recent proposals for legislation explore the need for a statutory definition of domestic abuse, rather than an offence of domestic abuse per se.<sup>26</sup> In the longer term, the introduction of an offence of domestic abuse could help educate the wider public about domestic abuse and in turn help promote use of the Domestic Violence Disclosure Scheme. It might also help to remedy possible shortcomings in police databases 'flagging' (or not) domestic violence-related offences that should be considered for disclosure.<sup>27</sup> In the meantime, the introduction of the offence of controlling and coercive behaviour by the Serious Crime Act 2015 at least addresses both the repetitive nature of domestic abuse and shortcomings in existing

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Wales: [www.researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07113](http://www.researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07113) (last accessed 5 March 2018); and MoJ, *Alleged Perpetrators of Abuse as Litigants in Person in Private Family Law: The Cross-examination of Vulnerable and Intimidated Witnesses* (January 2017):

[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/592873/alleged-perpetrators-of-abuse-as-litigants-in-person.PDF](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/592873/alleged-perpetrators-of-abuse-as-litigants-in-person.PDF) (last accessed 5 March 2018).

<sup>22</sup> See [researchbriefings.files.parliament.uk/documents/SN06648/SN06648.pdf](http://researchbriefings.files.parliament.uk/documents/SN06648/SN06648.pdf) (last accessed 7 November 2017), at p 7.

<sup>23</sup> See [www.lawgazette.co.uk/law/a-history-of-violence/4416.article](http://www.lawgazette.co.uk/law/a-history-of-violence/4416.article) (last accessed 7 November 2017).

<sup>24</sup> J Korkodeilou 'Stalking victims, victims of sexual violence and criminal justice system responses: Is there a difference or just 'Business as usual'?' (2016) 56 *Bri. J. Criminol.* 256, at p 259.

<sup>25</sup> See [researchbriefings.files.parliament.uk/documents/SN06648/SN06648.pdf](http://researchbriefings.files.parliament.uk/documents/SN06648/SN06648.pdf) (last accessed 7 November 2017), at p 3.

<sup>26</sup> See throughout HM Government, *Transforming the Response to Domestic Abuse* (March 2018).

<sup>27</sup> See throughout HMIC, *Building the Picture* (July 2015).



legislation to deal with that aspect of the offending.<sup>28</sup> Elsewhere, a statutory offence of domestic abuse has now been enacted by the Scottish Parliament.<sup>29</sup>

The Crime and Security Act 2010 introduced two new key orders. The Domestic Violence Protection Notice (DVPN), issued by the police without court proceedings, is intended to give the victim 'breathing space' by separating them from the perpetrator for up to 48 hours, either through restrictions being placed on the perpetrator or having them ousted from the family home.<sup>30</sup> A DVPN may be issued even in cases where the police decide to take no further action, or where the perpetrator agrees to a caution or is bailed without conditions. The police must then bring the matter for court by applying for a Domestic Violence Protection Order (DVPO), to be heard within 48 hours of the DVPN being issued. If the magistrates decide, on the balance of probability, that the perpetrator has been violent or threatened violence to an associated person and that it is necessary to make the DVPO to protect that person from violence or a threat of violence, they may issue a DVPO to run for a period between 14 and 28 days.<sup>31</sup> This allows the victim further space to access any legal and support services. Failing to comply with these measures may result in the perpetrator being detained into custody for civil contempt of court for up to two months.<sup>32</sup> Current Home Office consultation on a new-style Domestic Abuse Protection Notice/Order may result in legislative reform in relation to the perceived shortcomings of DVPNs and DVPOs: breaches of the new DVPN/Os would be criminalised, and the orders would require positive engagement by perpetrators with rehabilitation schemes and could mandate electronic tagging and/or alcohol monitoring.<sup>33</sup>

The efficacy of these legal measures for victims of domestic violence has been critiqued on several bases. The responsive (rather than proactive) approach often evident in criminal

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<sup>28</sup> Home Office (2014) *Strengthening the Law on Domestic Abuse Consultation - Summary of Responses* [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/389002/StrengtheningLawDomesticAbuseResponses.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389002/StrengtheningLawDomesticAbuseResponses.pdf) (last accessed 24 October 2017); S Nevala 'Coercive control and its impact on intimate partner violence through the lens of an EU-wide survey on violence against women' (2017) 32(12) *J. Interpers. Violence* 1792, at p 1801.

<sup>29</sup> Part 1 of the Domestic Abuse (Scotland) Act 2018 asp 5.

<sup>30</sup> Crime and Security Act 2010, s 25; M Burton 'Emergency barring orders in domestic violence cases: what can England and Wales learn from other European Countries' (2015) 27 *CFLQ* 25, at p 34.

<sup>31</sup> M Burton 'Emergency barring orders in domestic violence cases: what can England and Wales learn from other European Countries' (2015) 27 *CFLQ* 25, at p 35.

<sup>32</sup> See College of Policing Authorised Professional Practice on 'Using Domestic Violence Protection Notices and Domestic Violence Protection Orders to make victims safer': [www.app.college.police.uk/app-content/major-investigation-and-public-protection/domestic-abuse/arrest-and-other-positive-approaches/domestic-violence-protection-notices-and-domestic-violence-protection-orders/#be-proactive-with-breaches](http://www.app.college.police.uk/app-content/major-investigation-and-public-protection/domestic-abuse/arrest-and-other-positive-approaches/domestic-violence-protection-notices-and-domestic-violence-protection-orders/#be-proactive-with-breaches) (last visited: 13 March 2018)

<sup>33</sup> See throughout HM Government, *Transforming the Response to Domestic Abuse*, March 2018



justice practice does little to prevent victimisation occurring in the first place.<sup>34</sup> In many cases, reliance on police intervention for a problem that predominantly occurs in private spaces makes the prevention of individual or repeat incidents difficult. Furthermore, the pervasiveness of victim-blaming attitudes concerning domestic violence (informed by strong cultural histories) may make it difficult for victims to seek help through legal recourse.<sup>35</sup>

The Domestic Violence Disclosure Scheme differs from the above measures in that it sits somewhere between responsive and proactive policing, and is not *statutorily* grounded. The Scheme enables members of the public to request information about a person's previous domestic violence. Colloquially referred to as 'Clare's Law', the Scheme was initiated following the murder of Clare Wood by her ex-partner George Appleton in 2009. George's violence towards Clare escalated following their separation, causing her to report him to Greater Manchester Police at least five times in four months. Clare was unaware of George's history of violent behaviour towards women; he had three previous convictions under the Protection from Harassment Act 1997 and had served a prison sentence for one particularly brutal assault on a former partner.<sup>36</sup> The subsequent Independent Police Complaints Commission (IPCC) investigation found that, although there had been many failings by Greater Manchester Police, none had directly resulted in Clare's death. Following this, Michael Brown (Clare's father) called for a change in policy that would allow members of the public to request relevant information held by the police about a partner's violent history. His request was echoed by the Coroner in Clare's case, Jennifer Leeming, who suggested in her report that a disclosure process ought to be established to allow 'potential victims' to 'make informed choices about matters affecting their safety and that of their children'.<sup>37</sup> In Clare's case, however, it is unclear how this additional information – had it been available to her – would have been of use, as she had already been separated from her partner for some months before her death.

Disclosures under the Scheme are intended to contain 'sufficient information to allow the recipient to make an informed choice with regard to their relationship or contact' with a

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<sup>34</sup> C Crowther-Dowey and M Silvestri, 'The gendering of violent crime: towards a human rights approach' (2017) 14(3) *British Journal of Community Justice* (online pre-print):

[http://irep.ntu.ac.uk/id/eprint/30467/1/8071\\_Crowther-Dowey.pdf](http://irep.ntu.ac.uk/id/eprint/30467/1/8071_Crowther-Dowey.pdf) (last visited: 22 March 2018)

<sup>35</sup> C Bessant, 'Protecting Victims of Domestic Violence—Have We Got the Balance Right?' (2015) 79(2) *J. Crim. Law* 102, at p 106.

<sup>36</sup> Independent Police Complaints Commission, Commissioner's Report, *IPCC Independent Investigation: Greater Manchester Police Contact with Clare Wood Prior to her Death* (February 2010):

[www.ipcc.gov.uk/sites/default/files/Documents/investigation\\_commissioner\\_reports/clare\\_wood\\_report\\_final\\_10\\_march.pdf](http://www.ipcc.gov.uk/sites/default/files/Documents/investigation_commissioner_reports/clare_wood_report_final_10_march.pdf) (last accessed 27 April 2017).

<sup>37</sup> See Home Office, *Domestic Violence Disclosure Scheme Pilot: Guidance* (TSO 2013), at p 2.

(potentially) abusive partner, referred to in the Scheme as B.<sup>38</sup> The Scheme's 'right to ask' route therefore offered a proactive, early interventionist mechanism instigated by the applicant, either the individual whose safety is in question (A) or a concerned third party (C): the relevant Home Office policy encourages individuals 'to take responsibility for safety of the victim' who may not be in a position to do so themselves.<sup>39</sup> However, as will be demonstrated later in this paper, their safety can only be addressed up to a certain point, as the police are concerned with a person's immediate safety and do not have the resources to oversee longer-term safeguarding measures. They are also only required to engage with the applicant up to the point of a disclosure, and so are unlikely to know if the person's safety was compromised as a result of the disclosure unless A presents as a victim of further harm at a later date.<sup>40</sup>

The Scheme does not guarantee applicants or victims an actual right to *receive* information about their partner's background. Indeed generally, at present, victims in the England and Wales only have limited procedural rights; once involved with the criminal justice system as a victim or witness, they can expect to be kept informed as their case progresses and to be consulted about decisions being made on their behalf. These 'rights', first outlined in 1990, have been updated with various iterations of Victims' Codes of Practice and Victims' Charters, but they remain more akin to guidelines for good practice than the enforceable rights afforded to defendants and offenders. Over the past decade, there have been several calls for more codified victims' rights in the criminal justice system in England and Wales, and for the development of 'victims' laws'. Pending such reform, the enhanced focus on victims has nevertheless provided very powerful rhetoric among those who invoke victims and their experiences to promote particular pro-victim criminal justice measures.<sup>41</sup> For example, the introduction of increased tariffs for 'hate crimes' (offences motivated by hostility towards one of the five protected characteristics)<sup>42</sup> were promoted as a victim-focused initiative but appear to have done little to reduce instances of hostility-based victimisation. In this sense, they are victim-focused in their retributive (rather than crime-reductive) capacity. Increasing penalties for sexual or domestic violence may similarly be described as victim-oriented, but are often more effective at punishing offending than preventing it.

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<sup>38</sup> See Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance*, (TSO, 2016): [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FIN\\_AL\\_v3.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FIN_AL_v3.pdf) (last accessed 6 November 2017), at p 20.

<sup>39</sup> *Ibid.*, at p 6.

<sup>40</sup> M Duggan, 'Victim hierarchies in the domestic violence disclosure scheme' (2018) 24(2) *International Review of Victimology* 199, at p 207.

<sup>41</sup> M Duggan and V Heap, *Administrating Victimization: The Politics of Anti-Social Behaviour and Hate Crime Policy* (Palgrave Macmillan, 2014), at p 102.

<sup>42</sup> Racial identity, religious affiliation, sexual orientation, disability and gender identity.

Prime Minister Theresa May, who is currently fashioning a ‘domestic violence champion’ image, has indicated that she intends to push for tougher legal measures to address domestic abuse. She stated in a press release that:

Domestic violence and abuse shatters lives but the way we deal with it at the moment does not go far enough – with a plethora of different offences and procedures scattered across the statute book. This lack of clarity has led to an unacceptable diversity across the country in terms of the degree of effort put in to try and tackle it. Although the prosecution of, and convictions for, such offences have started to improve in recent years, there is inconsistency in the use and effectiveness of the various law enforcement measures across the country.<sup>43</sup>

However, as will be detailed in this paper, the fact that ‘Clare’s Law’ lacks a substantive statutory grounding has ramifications. Since the Scheme is currently based prima facie upon common law powers for police to disclose information about criminal convictions, and other police intelligence or ‘criminality information’ to vulnerable ‘third parties’, and so it is to the common law framework underpinning the Scheme that this paper now turns.

## **The legal framework underpinning the Scheme**

### *Tests for disclosures under the Scheme*

There are three main elements to the legal operation of the Scheme.<sup>44</sup> These are domestic common law powers of the police that prima facie underpin the Scheme, and two sources of law that act as external checks on disclosures under the common law: the Data Protection Act 1998 (the ‘DPA’), implementing EU data protection law, and the Human Rights Act 1998, making the European Convention on Human Rights effective in UK law.

The Scheme guidance observes that:

The Domestic Violence Disclosure Scheme did not introduce any new legislation. The scheme is based on the police’s common law power to disclose information where it is necessary to prevent crime. The scheme provides structure and processes for the exercise of the powers. It does not, in itself, provide the power to

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<sup>43</sup> Prime Minister’s Office, Home Office, Ministry of Justice and the Rt Hon Theresa May MP, Prime Minister’s plans to transform the way we tackle domestic violence and abuse, (17 February 2017): [www.gov.uk/government/news/prime-ministers-plans-to-transform-the-way-we-tackle-domestic-violence-and-abuse](http://www.gov.uk/government/news/prime-ministers-plans-to-transform-the-way-we-tackle-domestic-violence-and-abuse).

<sup>44</sup> Current government consultation on the scope and content of a Domestic Violence and Abuse Bill suggests there could in future be a statutory duty on police bodies to have regard to Home Office-issued guidance on the Scheme; but there are currently no proposals to give the Scheme a substantive basis in statute per se. HM Government, *Transforming the Response to Domestic Abuse*, (March 2018), at p 42.

disclose or to prevent disclosures being made in situations which fall outside this scheme... Any disclosure must be within the existing legal framework and, in particular, have due regard to established case law, the Human Rights Act 1998 and the Data Protection Act.<sup>45</sup>

The Scheme itself has not yet generated any case law, so we turn to earlier authorities concerning the police's common law power to disclose information for the purposes of public protection and crime prevention.

Lady Hale has set out a useful starting point by way of general proposition that: 'There is no doubt that the police owe a positive duty in public law to protect members of the public from harm caused by third parties.'<sup>46</sup> However, in terms of police disclosures of criminal records information outside of employment contexts,<sup>47</sup> there must be a 'pressing need' for disclosure in the public interest.<sup>48</sup> The courts have suggested that that evidence of immoral or anti-social behaviour that is not criminal behaviour should not be treated as evidence of a risk that supports the conclusion that a 'pressing need' for disclosure exists.<sup>49</sup> So, as both current and past Scheme guidance has acknowledged, lower levels of perceived risk of harm will not justify a disclosure at common law.

The courts have also made it plain that, under the common law, disclosures by the police should be made in good faith,<sup>50</sup> and only to those who 'need to know',<sup>51</sup> while disclosures should be made containing information to an extent that is 'proportionate' to that need to know, in the language of the Scheme guidance.<sup>52</sup> As such, the Scheme guidance presents its 'first principle' of decision-making under the Scheme as follows, and partly mapped to the case law outlined above:

The police have the common law power to disclose information about an individual where it is necessary to do so to protect another individual from harm. The following three stage test should be satisfied before a decision to disclose is made:

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<sup>45</sup> See Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (TSO, 2016): [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FIN\\_AL\\_v3.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FIN_AL_v3.pdf) (last accessed 6 November 2017), at p 4.

<sup>46</sup> *Michael v The Chief Constable of South Wales Police* [2015] UKSC 2 at [195].

<sup>47</sup> Disclosures in the recruitment process can be made through the statutory (Enhanced) Criminal Record Check Process administered by the Disclosure and Barring Service, under the Police Act 1997 as amended.

<sup>48</sup> *R v Chief Constable for North Wales, ex parte Thorpe* [1999] QB 396.

<sup>49</sup> *A v B* [2010] EWHC 2361 (Admin).

<sup>50</sup> *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804, 811.

<sup>51</sup> *Ibid.*

<sup>52</sup> See Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (TSO, 2016): [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FIN\\_AL\\_v3.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FIN_AL_v3.pdf) (last accessed 6 November 2017), at p 19.

- a. it is reasonable to conclude that such disclosure is necessary to protect A from being the victim of a crime;
- b. there is a pressing need for such disclosure; and
- c. interfering with the rights of B, including B's rights under Article 8 of the European Convention of Human Rights, to have information about his/her previous convictions kept confidential is necessary and proportionate for the prevention of crime. This involves balancing the consequences for B if his/her details are disclosed against the nature and extent of the risks that B poses to A. This stage of the test involves considering:
  - i. whether B should be asked if he or she wishes to make representations, so as to ensure that the police have all the necessary information at their disposal to conduct the balancing exercise, and
  - ii. the extent of the information which needs to be disclosed - e.g. it may not be necessary to tell the applicant the precise details of the offence for the applicant to take steps to protect A.<sup>53</sup>

This section of the guidance accords well with the common law position on the issue of seeking representations/engaging in consultation with the potential subject of a disclosure. In *Thorpe*<sup>54</sup> the court highlighted that police should consider seeking representations from the (potential) subject of a disclosure where suitable.<sup>55</sup> Woolf LJ in *Thorpe* noted that:

Before reaching their decision as to whether to disclose the police require as much information as can reasonably practicably obtained in the circumstances. In the majority of the situations which can be anticipated, it will be obvious that the subject of the possible disclosure will often be in the best position to provide information which will be valuable when assessing the risk.<sup>56</sup>

Again, this is reflected in the current Scheme guidance, with the important reservation that victims should not be placed at increased risk through consultation with the subject over a

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<sup>53</sup> See Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (TSO, 2016): [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FIN\\_AL\\_v3.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FIN_AL_v3.pdf) (last accessed 6 November 2017), at pp 18,19.

<sup>54</sup> *R v Chief Constable of North Wales, ex parte Thorpe* [1999] QB 396.

<sup>55</sup> In a much more recent case, some limits were placed on procedural rights of the subject of (potential) disclosures. In *R (XX) v Secretary of State for the Home Department* [2016] EWCA Civ 597, the claimant failed to establish that there should be a presumption in favour of subject consultation under the non-statutory guidance on the operation of the Child Sex Offender Disclosure Scheme; the Court of Appeal also held that it was not unlawful for that guidance to make no provision for exemptions for subjects from the CSODS.

<sup>56</sup> *R v Chief Constable of North Wales, ex parte Thorpe* [1999] QB 396, at p 15.

possible disclosure. In relation to potentially notifying or consulting the subject (B) of a disclosure, the Scheme guidance observes that:

Consideration must also be given as to whether B should be told that information about him/her may be disclosed to the applicant. Such a decision must be based on an assessment of risk of harm to A, if B were to be informed. Due consideration must be given on whether the disclosure to B would have potential to escalate the risk of harm to A. [If] this were to be the case, no disclosure must be given to B.<sup>57</sup>

However, following changes made to the Home Office's Scheme guidance in December 2016, what are known as 'spent convictions' can now be disclosed under the Scheme. Spent convictions are those that do not result in a sentence of imprisonment of more than 30 months; less than this, and after a suitable, scaled period, the convictions become 'spent' pursuant to section 4 of the Rehabilitation of Offenders Act 1974.<sup>58</sup> Spent convictions are legally complex in character, and the recent change in policy on the inclusion of spent convictions within the ambit of the Scheme likely stems from that complexity.<sup>59</sup>

As noted above, there is as yet no direct case law arising from the operation of the Scheme – no aspect of its operation, including the potential disclosures of spent convictions, has yet been challenged by way of judicial review. From a public protection perspective, it is desirable that the Scheme guidance allows the potential disclosure of spent convictions, although it is unclear whether or why the Home Office intended a serious policy shift in the operation of the Scheme by making this amendment.<sup>60</sup> However, it is interesting to note that section 327B of the Criminal Justice Act 2003 states that the protections of section 4 of the

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<sup>57</sup> See Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance*, (TSO, 2016): [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FIN\\_AL\\_v3.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FIN_AL_v3.pdf) (last accessed 6 November 2017), at p 19.

<sup>58</sup> See for example [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/216089/rehabilitation-offenders.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/216089/rehabilitation-offenders.pdf) (last accessed 6 November 2017).

<sup>59</sup> See *N v Governor of HMP Dartmoor* [2001] EWHC Admin 93. The most recent version of the Scheme guidance notes that: "Where police officers have the power in the course of their duties to disclose spent convictions under the Domestic Violence Disclosure Scheme it is important that disclosure still needs to be *reasonable and proportionate* [emphasis in the original]. The police will want to take into account the age of the spent conviction during the decision-making process. Legal advice should be sought where necessary. Where such disclosure is lawful the Rehabilitation of Offenders Act (ROA) 1974 provides an exemption under that Act from prosecution for the disclosure." Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (TSO, 2016): [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FIN\\_AL\\_v3.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FIN_AL_v3.pdf) (last accessed 6 November 2017), at pp 16, 17.

<sup>60</sup> A freedom of information request made to the Home Office by one of the authors in April 2017 only produced the acknowledgement that: 'In developing the revised DVDS guidance the Home Office consulted with practitioners with expertise in this area. Their advice, provided freely and in confidence, was used to inform development of the policy and guidance.' Further detail was refused by the Home Office on the basis that to release the memoranda concerned would 'inhibit the free and frank provision of advice' by those practitioners to the Home Office in future policy projects.



1974 Act are to be disregarded in relation to the operation of the Child Sex Offender Disclosure Scheme,<sup>61</sup> which is to some extent a parallel to the Domestic Violence Disclosure Scheme. If the Scheme were placed on a statutory footing, that statute could provide similar clarity on whether and how spent convictions and related information might be disclosed.

#### *Data protection law and disclosures under the Scheme*

As the Scheme guidance acknowledges, 'Any disclosure must be within the existing legal framework and, in particular, have due regard to established case law, the Human Rights Act 1998 and the Data Protection Act [1998]'.<sup>62</sup> As for its detail on the way that the DPA 1998 applies to the decision-making process around disclosures, the Scheme guidance further explains that: 'Information considered for disclosure may include sensitive, personal data (such as information about a person's previous convictions) and therefore the local multi-agency forum must also be satisfied that disclosure is in accordance with the eight principles set out in that Act...'<sup>63</sup> In summary, these data protection principles, found in Schedule 1 of the DPA 1998, require that personal data are processed (here, 'shared' or 'disclosed') in a way that is fair, lawful, relevant, not excessive, accurate, and secure.

However, section 29 of the DPA 1998 heavily qualifies the relevant data protection principles in the context of the prevention of crime, i.e. in this context the prevention of domestic violence through the sharing or disclosure of personal information. For example, a 'data subject' would normally need to be notified of the processing of their data e.g. the disclosure to an applicant under the Scheme, as part of the process. But this notification need not take place per se under data protection law: because of section 29, and because (i) under Schedule 2 of the DPA, such disclosure is 'necessary for compliance with any legal obligation to which the data controller is subject' (i.e. public protection duties at common law); and (ii) under Schedule 3, the processing (the disclosure) takes place to protect the interests of the applicant where the data controller (the police) cannot 'cannot reasonably be expected to obtain the consent of the data subject'. And as explained above, the Scheme guidance states that a subject should not be consulted or approached for representations on a possible disclosure of their criminal history should this be likely to increase the risks faced by a potential victim.

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<sup>61</sup> The Child Sex Offender Disclosure Scheme is itself a creature of statute, created under s 327A of the Criminal Justice Act 2003.

<sup>62</sup> See

[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FIN\\_AL\\_v3.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FIN_AL_v3.pdf) at para 4 (last accessed 6 November 2017).

<sup>63</sup> Ibid, at para 64.



Data protection law is complex. Whilst it is based on readily-understood principles, the qualifications of those principles in the criminal justice and law enforcement context mean that data subjects under the Scheme do not necessarily benefit from much protection under the DPA 1998. But this also reflects the limited protection of offender privacy at common law and under Article 8 ECHR, given the tests for disclosure that are set down, as discussed above. Unfortunately, however, this does not come across in the Scheme guidance; instead, the spectre of data protection law looms over both the process of decision-making around disclosures and the manner in which disclosures to vulnerable people or potential victims under the Scheme are regulated. Reference is made in the Scheme guidance to the potential criminalisation, under the DPA 1998, of victims who receive a disclosure under the Scheme and who then (re)share that information with people they might feel themselves need to know. As we explore below, this is likely a mistaken emphasis in the guidance. Interview data presented below also show how fears of criminality or disciplinary action has also tinged the way that practitioners view the extent of permissible disclosures under data protection law.

### **Variation in implementation by police forces in England and Wales:**

There is evidence that the Scheme's rules for disclosure are applied in a greatly varied manner from force to force.<sup>64</sup> The variation in the extent to which the scheme is being used and the rate of disclosures made might be explained by the complexity of the interacting legal bases that underpin it.<sup>65</sup> A higher rate of disclosures made by Greater Manchester Police, for example, may reflect the established nature and working of the policy in that force, since GMP were part of the initial pilot Scheme, plus an enhanced commitment as a result of the notoriety of Clare's case.

The Home Office evaluation of the pilot phase of the Scheme did, however, highlight that the legal tests for disclosures as articulated in the Scheme guidance were hard to interpret consistently.<sup>66</sup> The same call for clarity was made by the 'one-year-on' review of the national roll-out of the Scheme, published in early 2016.<sup>67</sup> Judging the consistency with which tests for disclosure are applied is made difficult by the fact that few police forces are alike in their

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<sup>64</sup> See for example, the force-level reports underpinning the HMIC report on police effectiveness for 2016: [www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016.pdf](http://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016.pdf) (last accessed 6 November 2017).

<sup>65</sup> See [www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016.pdf](http://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016.pdf) (last accessed 6 November 2017).

<sup>66</sup> See [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260894/DVDS\\_assessment\\_report.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260894/DVDS_assessment_report.pdf) (last accessed 6 November 2017).

<sup>67</sup> See [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/505434/2016-03-08\\_DVDS\\_report\\_final\\_.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/505434/2016-03-08_DVDS_report_final_.pdf) (last accessed 6 November 2017).

demographic or geographic remit – and because forces submit data for compilation by the Home Office only on a voluntary basis.<sup>68</sup>

By early 2015, when the Scheme had been in national operation for nearly a year, the police in England and Wales had made 1,335 disclosures under the Scheme to members of the public following 3,760 applications – so 35% of applications overall were successful. But police responses to freedom of information requests by the Press Association and as reported by the BBC showed that disclosure rates under the Scheme (expressed as a proportion of the total number of combined ‘right to ask’ and ‘right to know’ applications received that then led to disclosure) varied considerably between force areas: between 11% in Merseyside and 60% in Greater Manchester.<sup>69</sup>

In December 2015, Her Majesty's Inspectorate of Constabulary (HMIC) noted that, across data from 41 out of 43 police forces in England and Wales, it could be seen that since the introduction of the Scheme in March 2014 ‘there [had] been 4,724 applications, and the rate of disclosure is 42 percent nationally’ (and so up from 35% nationally at the start of 2015). However, the report also highlighted that ‘the range in the number of applications made across forces from [goes from] one per 100,000 population in...Thames Valley Police to 43 per 100,000 in Gwent Constabulary. There is also a large variation in the [rate] of disclosures made, with the disclosure rate ranging from 0 percent to 92 percent across forces.’<sup>70</sup>

In a wide-ranging 2015 report on the work of the police in preventing domestic violence and gendered abuse, HMIC noted that: ‘The use of Clare’s Law is still at an early stage within many forces, but it is important that members of the public and officers are made aware of its purpose and the application process. Both external and internal force communications and awareness-raising activity is important here.’<sup>71</sup> A new Domestic Violence and Abuse Act, aimed at reforming, and promoting public confidence in, police and multi-agency actions to address and prevent domestic violence, as noted above, might in part seek to boost the

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<sup>68</sup> A freedom of information request in April 2017 by one author of this piece led to an acknowledgement by the Home Office that ‘Information on the number of applications and disclosures made under the DVDS will be provided on a voluntary basis by police forces in England and Wales to the Home Office by 30 April 2017 under the 2016/17 Annual Data Requirement and will be published by the Office for National Statistics in the Autumn [of 2017].’

<sup>69</sup> See Home Office, *Domestic Violence Disclosure Scheme Pilot: Guidance* (TSO, 2013); BBC News, ‘Clare’s Law: 1,300 domestic abuse disclosures made’, (26 January 2015): [www.bbc.co.uk/news/uk-30977759](http://www.bbc.co.uk/news/uk-30977759) (last accessed 6 November 2017).

<sup>70</sup> It should be noted here that Gwent took part in the pilot, so has been operating the Domestic Violence Disclosure Scheme since 2011 and likely has more familiarity with the workings of this policy.

<sup>71</sup> See HMIC, *Increasingly Everyone’s Business: A Progress Report on the Police Response to Domestic Abuse*, (HMIC, 2015), at pp 60,61.

Scheme's use by creating statutory duties to promote the operation of the Scheme, as opposed to simply requiring police bodies to have regard to the Scheme guidance.<sup>72</sup>

In addition to awareness-raising, statutory codification might help to make the approach to, and substantive judgments concerning, disclosures under the Scheme more consistent across the different police force areas around England and Wales. In early 2017, when the Domestic Violence Disclosure Scheme had been in operation across all 43 police forces for three years, HMIC drew upon what it knew about forces' implementation of 'Clare's Law' in order to give an overall conclusion on the state of the Scheme as part of police practice. It found great variance in the way that different police forces in England and Wales had chosen to deploy or promote the Scheme in their working with (potential) victims of domestic violence, and concluded that, as of late June 2016, the use, promotion and monitoring of the Scheme was too inconsistent between forces. It therefore recommended that forces should review their approach to the Scheme, along with their deployment of other preventative measures to combat domestic violence, such as Domestic Violence Protection Notices and Orders, and so on.<sup>73</sup>

However, HMIC found that some forces were clearly being more innovative in their use of the Scheme, engaging what it considered to be several best practice approaches. West Yorkshire police were to provide more online and face-to-face training on the Scheme to officers;<sup>74</sup> a new oversight and monitoring group dedicated to the operation of the Scheme was to be set up in Cleveland;<sup>75</sup> and specialist 'triage'-style officers or co-ordinators were being used to make initial assessments of applications to the Scheme and referrals in Wiltshire,<sup>76</sup> Derbyshire,<sup>77</sup> and Hertfordshire.<sup>78</sup> Finally, in Wiltshire, an online application portal was being created for use by members of the public to make 'right to ask' requests under the Scheme.<sup>79</sup> A new Act might help to make the best practice identified by HMIC a statutory requirement for all police forces.

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<sup>72</sup> HM Government, *Transforming the Response to Domestic Abuse* (TSO, 2018), at p 42.

<sup>73</sup> See [www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016.pdf](http://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016.pdf) (last accessed 6 November 2017), at p 86.

<sup>74</sup> [www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016-west-yorkshire.pdf](http://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016-west-yorkshire.pdf) (last accessed 6 November 2017), at p 42.

<sup>75</sup> [www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/peel-police-effectiveness-2016-cleveland.pdf](http://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/peel-police-effectiveness-2016-cleveland.pdf) (last accessed 6 November 2017), at p 49.

<sup>76</sup> See [www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016-wiltshire.pdf](http://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016-wiltshire.pdf) (last accessed 6 November 2017), at p 37.

<sup>77</sup> See [www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016-derbyshire.pdf](http://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016-derbyshire.pdf) (last accessed 6 November 2017), at p 43.

<sup>78</sup> See [www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016-hertfordshire.pdf](http://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016-hertfordshire.pdf) (last accessed 6 November 2017), at p 43.

<sup>79</sup> See [www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016-wiltshire.pdf](http://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/peel-police-effectiveness-2016-wiltshire.pdf) (last accessed 6 November 2017), at p 37 and [www.wiltshire.police.uk/contact-us/click-on/domestic-abuse-contact-form](http://www.wiltshire.police.uk/contact-us/click-on/domestic-abuse-contact-form) (last accessed 6 November 2017).

## **Recognising Vulnerabilities in the Scheme**

Given its relatively recent commencement, there is very little research and literature regarding the implementation and efficacy of the Scheme. A small empirical pilot study was undertaken by one of the authors over a six-month period across 2015-2016 to assess how it was operating in one policing district. The research comprised semi-structured interviews with a purposively selected sample of eight key local stakeholders working to implement the Scheme. Participants were domestic violence specialists from the statutory and third sectors, including three Independent Domestic Violence Advisers, two Single Point of Contact Police Officers, one Single Point of Contact Police Community Support Officer, one Domestic Violence Charitable Organisation Manager and one Domestic Violence Prevention Programme Facilitator (who was also a retired Police Officer). These participants were central to the organisation and delivery of domestic violence services in the chosen policing district and had various levels of involvement with the Scheme. This included assisting applicants to request information; deciding whether to permit a disclosure; relaying this to the applicant; providing information and support; and separately working with domestic violence victims and perpetrators. To protect interviewees' anonymity, pseudonyms are used throughout. The research underwent full ethical review in the author's home institution and had the full support of the local police force assisting with the project. Drawing on the findings of this scoping study, the following section identifies some of the practical and procedural concerns inherent in the 'right to ask' route of the policy, demonstrating several vulnerabilities pertaining to applicant engagement and assessment as well as information-sharing and safety management. This analysis is divided into three areas: the application process; decisions and disclosures; and safeguarding and aftercare.

### *The Application Process*

The 'right to ask' element of the Scheme necessitates that the applicant instigate the process by getting in touch with the police and making the request for a disclosure. Information about how to undergo this process can be found online from most domestic abuse charities' websites and police web pages. The latter, however, do not tend to have the same 'cover your tracks' facilities available as are commonly found with domestic violence organisations' internet sites.<sup>80</sup> Unless a person knows to take the appropriate measures to delete the relevant browsing history information, any pages accessed to obtain information may be discoverable by others. The police also offer the 101 telephone helpline which members of the public can call for more information about the Scheme (and to report non-

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<sup>80</sup> This allows people to be directed away from the webpage they are currently on, usually to a web browser page.

urgent, police-related matters). However, in order to progress with the application, ordinarily the applicant will at some point have to visit the police station, either to complete the necessary paperwork to initiate the process, or to provide the documentation necessary to verify their own identity. The risk of exposure affiliated to such actions is evident:

For people walking into the police station it's quite a... that's quite a thing to do, especially in places like [names her area] where people know them; *they're walking into the police station, why are they walking into the police station?* (Tanya, Independent Domestic Violence Adviser, her emphasis)

The applicant can be either person A – someone who is in a relationship with the subject of the application (person B); or person C – someone who is concerned about person A and applying on their behalf, such as a parent:

I think a few that have come in to front counter for right-to-ask they're more... I think a few mums have come in to raise concerns about their daughters' boyfriends. (Kate, Police and Community Support Worker, Single Point of Contact)

Person C need not have the knowledge or consent of person A to apply for information on A's behalf under the Scheme, but if a disclosure is to be forthcoming, it is usually made to person A, the person who is deemed in need of safeguarding. This raises concerns of issues of trust between potential victims and those who seek to ensure their safety by approaching the police. Expanding on her above example, Kate went on to explain how this dynamic could cause turbulence in already fractured family relationships:

If it's a case of: *I don't want my daughter to know I'm here*, well if we find something and we feel it needs to be disclosed, you know, your daughter's going to have to be the one that's going to be told, so potentially it would cause problems (Kate, Police and Community Support Worker, Single Point of Contact, her emphasis)

Part of the application process involves a face-to-face meeting. In this, the police officer or representative who is conducting the interview is required to warn the applicant that they may be prosecuted under section 5(2) of the Criminal Law Act 1967 if they wilfully or maliciously provide false information to the police in order to try and obtain a disclosure they are not entitled to, and waste police time.<sup>81</sup> This comes with a maximum six months' imprisonment or a fine. The police are also required to inform the applicant that if evidence of an offence is disclosed during the discussion, it may not be possible to maintain the

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<sup>81</sup> See [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FIN\\_AL\\_v3.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FIN_AL_v3.pdf) (last accessed 6 November 2017), at p 11.

applicant's confidentiality if a criminal investigation is warranted.<sup>82</sup> Although procedurally necessary, interviewees recognised that such information was likely to prove intimidating and potentially traumatising to an applicant. On the one hand, they may be unsure whether their fears are founded and thus whether they are indeed wasting police time. On the other, if they detail the victimisation they are experiencing without knowing how serious it may be, they risk having their partner arrested which may not be what they (initially) want from this interaction with the police.

Assuming the process is followed to the next stage, the applicant must wait up to 35 working days for a decision about their request, while the required steps are undertaken:

1. initial contact checks, made within 24 hours;
2. a face-to-face meeting, within 10 working days of step one;
3. a full risk assessment, completed within five working days of step two; and
4. cases being referred to the local decision-making forum, within 20 working days of step three.<sup>83</sup>

The length of time involved in this process was a cause of concern to some of the statutory agents interviewed:

The process has got to be cut down in terms of [time]... Because some people, you are going to lose people in six weeks, aren't you? You know, people are going to say, 'Oh I can't be bothered to wait six weeks. Oh don't worry about it. Oh he's being nice to me this week, I won't bother.' And that's... I think that's the problem. (Tanya, Independent Domestic Violence Adviser)

Keeping applicants on board while a decision about their request is being made can prove difficult. As Tanya observes, the nature of domestic violence can make relationships very emotionally volatile. Several shorter periods of separation between partners may occur before a more definitive continuation or cessation of the relationship is decided. This was of concern to several interviewees, as previously the Domestic Violence Disclosure Scheme criteria stipulated that a person who is applying via the 'right to ask' on their own behalf must be in an 'intimate relationship' with the subject of the application in order to request and receive a disclosure.<sup>84</sup> Therefore, if – in the interim period – the applicant decided to safeguard themselves and/or their children by temporarily ending the relationship and were

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<sup>82</sup> Ibid.

<sup>83</sup> Ibid, at p 9.

<sup>84</sup> See

[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FIN\\_AL\\_v3.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FIN_AL_v3.pdf) (last accessed 6 November 2017), at p 24, where 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'.

not aware of the potential impact of this on their application, they forfeited their ability to be provided with a disclosure, even if their concerns were valid.<sup>85</sup> The impact of this was noted by Fiona:

We had a lady who came in, she wanted a DVDS and it was declined because basically she'd separated. Now, she'd only recently separated. Unfortunately she then went back [to her partner], maybe because she didn't get that information?  
(Fiona, Police Officer and Domestic Violence Single Point of Contact Officer)

The reason for this stance in the previous policy was due to the applicant's risk level no longer being considered such that it was proportionate to provide information, which would otherwise be considered in breach of the Data Protection Act 1998. This disregarded research that suggests people may still be at risk – sometimes at *greater* risk – of victimisation from a partner even if they have ended the relationship.<sup>86</sup> Indeed, this was the case for Clare Wood. However, the 2016 guidance explicitly refers to 'widening the scope of the scheme to include ex-partners', while in its appendix of definitions, applicants (that is, potential victims and recipients of information disclosed under the Scheme) are now defined as a 'partner who is in, or was previously in, an intimate relationship with a potentially violent and/or abusive individual'.<sup>87</sup>

Another point to note on the application process is who is likely to apply. The decision by Theresa May (while she was Home Secretary) to launch the Scheme nationally on International Women's Day (8<sup>th</sup> March) – coupled with the colloquial 'Clare's Law' epithet – indicates the gendered nature of this policy. Men are vulnerable to domestic violence from partners of any gender, yet the promotion of the policy under the name of 'Clare's Law' may hinder some men from accessing it. Indeed, one representative from a male domestic violence organisation has spoken out publicly in favour of using the full title of the policy in media reports to avoid gendered inferences.<sup>88</sup> The issues around this gendered dynamic were mentioned by one of the interviewees when discussing accessibility for male victims:

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<sup>85</sup> The empirical research upon which this section of this paper is based was carried out prior to a change in this element of Scheme policy.

<sup>86</sup> See throughout C Humphreys and R Thiara, *Routes to Safety: Protection Issues Facing Abused Women and Children and the Role of Outreach Services* (Women's Aid Federation of England, 2002); E Krug, L Dahlberg, J Mercy, A Zwi and R Lozano (eds.) *World Report on Violence and Health*, (World Health Organisation, 2002), at p 93; S Lees 'Marital rape and marital murder'. In J Hanmer and N Itzin (eds). *Home Truths about Domestic Violence: Feminist Influences on Policy and Practice: A Reader*, (Routledge, 2000), at p 65.

<sup>87</sup> See

[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FIN\\_AL\\_v3.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FIN_AL_v3.pdf) (last visited 6 November 2017), at p 4 and p 24.

<sup>88</sup> See [redditchstandard.co.uk/news/plea-to-make-domestic-violence-disclosure-scheme-more-accessible-to-men-and-women/](http://redditchstandard.co.uk/news/plea-to-make-domestic-violence-disclosure-scheme-more-accessible-to-men-and-women/) (last visited 6 November 2017).



And would the men know? Again, *Clare's Law*; do they automatically think female with Clare's Law but at the same time, as we said, do we just use DVDS all the time? But then people find it's easier to say Clare's Law. *What's that? Well that's when you can find out about your partner.* (Fiona, Police Officer and Domestic Violence Single Point of Contact Officer, her emphasis)

The naming of policies after female victims (see also 'Sarah's Law' in the UK and 'Megan's Law' in the USA) demonstrates and reinforces the feminisation of victimisation affiliated to particular types of interpersonal violence.<sup>89</sup> Whether it is having a negative impact on wider accessibility remains to be seen, but the gendered imagery constructed around such violence prevention initiatives is notable. Certainly, the Home Office assessment of the 2012 pilot indicated that 98% of the 386 applicants were female.<sup>90</sup> Data routinely suggests that the majority of domestic violence victims are female, and perpetrators male, which would naturally generate more female than male applicants under the Scheme.<sup>91</sup> But male applicants may be dissuaded from accessing the Scheme if they feel their victim status is lessened due to their gender. For those men who do apply, some may be seeking information on behalf of someone else (i.e. if they are person C); in such cases, the gender of the person deemed to be at risk will not be reflected in this application data, only the gender of the person seeking the information. Therefore, there is much research to be done in terms of how male victims and applicants engage with the Scheme.

### *Decisions and Disclosures*

'Right to ask' applications are reviewed during a decision-making forum comprising of representatives from Multi Agency Risk Assessment Conferences or the Public Protection Unit (here from the force studied in this empirical research). This involves a process whereby 'concerns' are taken into consideration. For a 'concern' to be raised, the criteria pertaining to the subject's (person B's) risk of harm to person A includes an assessment of relevant information, which may include some or all of the following: B's past convictions; whether B is a serial (two or more past victims) perpetrator of domestic violence; what intelligence exists relating to B's previous violent offending (including any incidents of coercive control to

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<sup>89</sup> M Duggan and V Heap, *Administering Victimization: The Politics of Anti-Social Behaviour and Hate Crime Policy* (Palgrave Macmillan, 2014), at p 46.

<sup>90</sup> Home Office, *Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment*, (TSO, 2013): [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260894/DVDS\\_assessment\\_report.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260894/DVDS_assessment_report.pdf) (last visited 6 November 2017), at p 11.

<sup>91</sup> Office for National Statistics, *Domestic Abuse in England and Wales: Year Ending March 2017* (23 November 2017): [www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2017](http://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2017) (last visited 23 March 2018).

prior partners); and/or B's concerning behaviour towards A. Decisions are made on a case-by-case basis applying the threshold requirement of a 'pressing need' for disclosure.

The information provided by the applicant is vital to assess whether the risk posed to them by the subject warrants disclosure. Drawing on her experiences as part of decision-making panels, Tanya highlighted the balancing act between applicants and subjects that takes place during these meetings:

We have to weigh it up and I think there still is that: *do we tell them that because that could breach his data protection?* Well my opinion is it definitely outweighs his data protection, you know? (Tanya, Independent Domestic Violence Adviser, her emphasis)

The Scheme is predicated on the notion of early intervention, but in practice this may be problematic. Apply too early, when the risks presented to the applicant appear to be minor, and the concerns raised as evidence of why they should be privy to otherwise confidential information may fall short of the data protection threshold. Apply too late, when the behaviours have become more habitual or threatening, and they may not be in a position to access the Scheme if their partner is exerting control over them. This threshold aspect of the Scheme needs to be made clear to the applicant, as they may be dissuaded from applying again (if the relationships worsens) if they are under the impression that no information was held the first time round.

This meeting is also important for determining exactly what information will be imparted, the wording of the disclosure and any stipulations regarding how and where it will be provided, with this all being recorded as part of an agreed action plan. Under the updated Scheme criteria, the information that can be shared is not limited to convictions but can include the level of further detail needed to make the disclosure relevant to the individual concerned.<sup>92</sup> However, some interviewees felt that members of the decision-making panel may err on the side of caution when it came to deciding how much and what information to disclose.<sup>93</sup> This may result in disclosures being of limited use to recipients, as two interviewees noted:

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<sup>92</sup> See Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (TSO, 2016): [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FIN\\_AL\\_v3.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FIN_AL_v3.pdf) (last visited 6 November 2017) paras 10, 13, 52 and Annex A.

<sup>93</sup> This may come about as a result of the Home Office guidance stipulating that proportionate disclosures may well be those which limit the details of the content of a disclosure. See Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (TSO, 2016): [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FIN\\_AL\\_v3.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FIN_AL_v3.pdf) (last visited 6 November 2017), at p 19, where it is stated that 'it may not be necessary to tell the applicant the precise details of the offence for the applicant to take steps to protect' a member of the public.

It's usually convictions. The one I give is: 'they have a known history'. I'm trying to think of the ones I've given. Again, it's so very basic sometimes. (Fiona, Police Officer and Domestic Violence Single Point of Contact)

Generally people seem to know what I'm telling them. Generally they're familiar with the information and it can come as a bit of anticlimax I think sometimes because you make the arrangements to meet specifically for it and then you go through the process of disclosure and then you get the disclosure and it's often a couple of lines. (Tony, Police Officer and Domestic Violence Single Point of Contact)

The information can only assist in preventing future victimisation if the subject's previous behaviour has come to the attention of the police and a sufficient record has been made. In some cases, this will be as a result of the police having been called out to an incident where the perpetrator was apprehended and some record was made of the fact that it was an offence related to *domestic* violence. In most cases, however, domestic violence victims are unlikely to notify the police, therefore the kinds of information which may prove useful to a Scheme applicant (such as controlling behaviours relating to the early stages of abuse) are less likely to be held on record.

Again the specificity of the Scheme applying to *domestic* violence victims requires discussion. Research has indicated that many victims do not recognise what is happening to them as domestic violence, and few may tell anyone about it or notify the police.<sup>94</sup> Therefore, there is a significant amount of hidden victimisation that does not show up in surveys. It is important to differentiate between whether these surveys are charting *incidence* or *prevalence*. For example, police data for 2016-17 indicated that there were just over 1.1 million domestic abuse-related incidents and crimes recorded by in England and Wales.<sup>95</sup> Compare this to findings from the 2016-2017 Crime Survey for England and Wales which demonstrated that 7.0% of women and 4.4% of men aged 16 to 59 were estimated to have experienced domestic abuse in the previous 12 months; this is equivalent to an estimated 1.2 million female and 713,000 male victims.<sup>96</sup> This far outweighs the police data. The often-repeated nature of domestic abuse means a single victim may experience multiple incidents and crimes, not all of which will be reported to the police. Thus, it appears that relying on

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<sup>94</sup> D Bagshaw, D Chung, M Couch, S Lilburn, B Wadham, *Reshaping Responses to Domestic Violence* (University of South Australia, 2000), at p 25; M Fugate, L Landis, K Riordan, S Naureckas and B Engel, 'Barriers to Domestic Violence Help Seeking', (2005) 11(3) *Violence Against Women* 290, at p 303.

<sup>95</sup> Office for National Statistics, *Domestic Abuse in England and Wales: Year Ending March 2017* (23 November 2017): [www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2017](http://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2017) (last visited 23 March 2018).

<sup>96</sup> *Ibid.*

police intelligence alone to inform a person about their level of risk may be doing them a disservice.

Of those who report to the police, some may not have these recorded, or investigated, or subsequently result in a conviction. Where there is a record, the conviction may reflect neither the particular incident nor the domestic context surrounding it. As noted earlier, in the absence of specific domestic violence legislation, even relevant prosecutions/convictions (such as for assault) may not reflect the particular nature and impact of it being related to *domestic* violence. Certainly, it was clear from speaking to the domestic violence specialists that the truly useful or important information about a person's character or propensity for partner abuse is not recorded in criminal justice language or in the wording of the conviction, and so may not show up on a later application to the Scheme.

### *Safeguarding and Aftercare*

'Right to ask' disclosures are made by a police officer accompanied, where possible, by an Independent Domestic Violence Adviser (IDVA). In addition to the information, they impart relevant safeguarding advice and can address any concerns or questions arising from the disclosure. Since obtaining a disclosure immediately increases a recipient's risk level, they are also given information about local domestic violence support organisations and the disclosing officer's contact details where necessary. However, there is no requirement for the police or the IDVA to stay in touch with recipients, or to undertake any form of follow-up to see what – if any – action they took as a result of the disclosure. In some cases, as highlighted by the IDVA interviewees, recipients who were initially standard-risk present at a later date as high-risk victims as a result of a serious domestic violence incident. These cases often come to light when an IDVA suggests invoking the 'right to know' element the Scheme as part of their involvement, only to be told by the victim that they have already applied for and received a disclosure at an earlier stage. In such cases, it could be argued that the lack of a requirement for police to follow up with disclosure recipients may be a missed opportunity to find out how they are managing the information and the situation. Furthermore, as previously mentioned, the police may choose to consult with B (the subject) before making a disclosure decision, therefore increasing the need for a follow-up if B was aware that their partner possessed information about their past history of offending.

Ultimately, however, there is currently no way of knowing what the full impact this particular policy is having on 'right to ask' applicants as no information is held (in the force area studied for this paper) regarding the post-disclosure period. On the other hand, Alice indicated a level of reassurance that the initial contact she had as an IDVA made a positive enough impact that, if further abuse did occur, the victim would contact her accordingly:

I have had some that have gone away and went, 'Okay, I'll do what I need to do,' and then like a year later have come back and said, 'Please don't say you told me so.' ... I think it's important that [victims] know that they can go off and if something does happen they can come back and talk to us. (Alice, Independent Domestic Violence Adviser)

Having received the information, the recipient needs to decide what to do with it, which may mean choosing to ignore it. However, any decisions about what to do have to be taken alone (or only in consultation with the IDVA) as the recipient cannot share what they have been told with anyone; to do so would potentially breach the Data Protection Act 1998 and render them liable for criminal prosecution. This may cause additional distress and exacerbate a person's sense of isolation:

I can see that [this clause] might put a person off because they're going to want to be able to tell someone; their mum or just anyone that they can share that information with. When they're being told by a police officer, 'You cannot share this information because you could be in serious trouble,' ... it's definitely a barrier. (Amy, Manager of a Domestic Violence Charity)

It is somewhat reassuring to see that while the 2016 edition of the Scheme guidance document still includes this stipulation, it is less pronounced than in previous iterations.<sup>97</sup> The 1998 Act presupposes that what is shared under the Scheme is personal data, but the data protection principles under the 1998 Act do not apply to data 'processed' for purely domestic purposes.<sup>98</sup> Telling your children that your partner has been abusive in past, and that is why you are leaving them, is a truly domestic use of otherwise personal data under the 1998 Act. In addition, and more crucially, there is a defence in section 55 of the 1998 Act if the data sharing by 'persons' was 'necessary for the purpose of preventing... crime'. In light of this, both the old and new guidance may have misstated the law on compliance with the 1998 Act.

Another quandary arises where a person with children who receives a disclosure about their partner needs to decide whether continuing the relationship is in the best interests of them and their children. Research has indicated that for many women, leaving an abusive male

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<sup>97</sup> See Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* (TSO, 2016): [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FIN\\_AL\\_v3.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FIN_AL_v3.pdf) (last visited 6 November 2017), at p 11.

<sup>98</sup> See [ico.org.uk/for-organisations/guide-to-data-protection/exemptions/](http://ico.org.uk/for-organisations/guide-to-data-protection/exemptions/) (last visited 6 November 2017).

partner puts them at greater risk if their partner will be incensed by their decision to go.<sup>99</sup> As evidenced in Westmarland's research, women with children who are aware of this may conclude that the situation is better managed by staying.<sup>100</sup> However, social services will know that they have had a disclosure and, if risks to their safety or the safety of their children have been highlighted at the decision-making panel, social services might seek to ensure safeguarding measures have been put in place. This might deter some women from applying to the Scheme if they fear that doing so might risk their children being removed at a later date in child protection proceedings.<sup>101</sup> Nonetheless, these statutory third parties with whom recipients *can* discuss the information may alleviate the aforementioned potential isolation recipients may face upon disclosure:

If there's social services involved they're usually aware as well of the information and the client can speak to the social worker about the information. As long as they're only talking to people who already know it then it's not so bad but for any [recipients] who haven't got that, that's a real issue because they have got no-one to share it with. (Eleanor, Independent Domestic Violence Adviser)

As recipients are ordinarily guided towards local domestic violence support organisations, it may be the case that they presume it is safe to share information with IDVAs who may be working there. The guidance around whether a recipient can discuss their situation with a *second* IDVA, who has not previously been part of the application process, is unclear. If this is seen as prohibited, then there may be reluctance on the part of the recipient (who is left wondering whether to re-share the information), and a worrying information gap for the second IDVA (who would presumably be keen to receive the information in order to assist with ongoing safeguarding). In other words, it is a problem that the guidance is unclear about whether it would breach the 1998 Act for the recipient to share this information with other domestic violence professionals. Similar concerns regarding the perimeters of the 1998 Act were raised in relation to the wider statutory sector, as Fiona outlined:

...if we give [the applicant] too much information and they share it, professionals then put themselves in a position of: *hang on, data protection, we've given too much away*. ... we'd get the blame; we're liable. (Fiona, Police Officer and Domestic Violence Single Point of Contact, her emphasis)

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<sup>99</sup> As discussed in the *Femicide Census 2016* report, see [zx 1q7dqy2unor827bjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2016/12/The-Femicide-Census-2016.pdf](https://www.wpengine.netdna-ssl.com/wp-content/uploads/2016/12/The-Femicide-Census-2016.pdf) (last visited 6 November 2017).

<sup>100</sup> N Westmarland *Violence Against Women: Criminological Perspectives on Men's Violences* (Routledge, 2015), at p 27.

<sup>101</sup> *Ibid.*

So we would recommend (a) that the guidance be revised to explain more carefully to recipients of information with whom they are permitted to (re)share information where they do so in order to protect themselves, their close family and/or children, and (b) that they are reminded that there is a defence to any accusation that the sharing of data provided by the police for the purposes of public protection may be an offence. Indeed, such a defence has a wider ambit – the recipient victims to whom the police make disclosures could rely on this too, should they inform those close to them about the risk their partner may pose.

## Conclusion

The Scheme clearly attracts concerns around its potential to deflect responsibility for preventing domestic abuse on to potential victims, and encounters some procedural difficulties, But if, on balance, it can be concluded despite these concerns that the Scheme is a positive force for the prevention of domestic violence for applicants overall, then attempts must be made to ensure its greater take-up by the public and its more proactive use by police forces. At a number of points in this article, we have suggested some issues that the development of a substantive statutory basis for the Scheme might address, as part of a new Domestic Violence and Abuse Act. On a macro-level, one thing such an Act might do is afford victims of domestic abuse a set of guarantees and protections against the further reduction of key services and public functions, such as the funding of a national target of domestic violence refuge places. Combatting the impact of austerity on the rights and wellbeing of victims of domestic violence and abuse is not about the detail of the Scheme per se, but that broader context cannot be forgotten, because disclosures under this policy are not made in a vacuum. If a victim of domestic abuse learns about the violent past of a partner and they want to leave them/cut them out of their lives, how do support services guarantee a level of provision to facilitate this? As was demonstrated in Clare's case, leaving the violent partner may mark the beginning of a *greater* need for safeguarding and support rather than a culmination of the abusive behaviour.

In light of the Government's latest consultation document,<sup>102</sup> a new Domestic Violence and Abuse Act might not address the vulnerabilities of victims of domestic abuse and raise awareness of domestic abuse specifically by creating a new and specific criminal offence. The symbolism of such a move would have proved important to counteract societal normalisation or minimalization of the 'low-level' types of harms that can progress onto more

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<sup>102</sup> HM Government, *Transforming the Response to Domestic Abuse* (March 2018), at p 11.



serious forms of victimisation.<sup>103</sup> The recent criminalisation of 'coercive control' is a good example of that.<sup>104</sup>

However, whatever is done about criminalisation of domestic abuse itself, we argue that if it is to remain in place then the Scheme should be put on a substantive statutory footing. Greater awareness of the Scheme could be achieved amongst victims of domestic abuse if there were a statutory duty on the police to promote the Scheme in a suitable manner via appropriate channels. Variations and differences in the rates of disclosure between different police forces could be addressed by means of a statutory system providing clearer disclosure criteria and processes, such as greater clarification of whether or when spent convictions can be disclosed or information on ex-partners can be sought. A wholly different statutory approach could be adopted, such as the 'reasonable cause to believe' model, as used by the statutory Child Sex Offenders Disclosure Scheme ('Sarah's Law').<sup>105</sup> Statute could also make compulsory identified 'best practice' gradually developed by some police forces, such as using 'triage' decision-making officers and (secure) online application portals, to speed up disclosure processes.

However, as researchers, we remain sceptical about the usefulness and effectiveness of the Scheme. There will always be a concern about the focus on victim responsibility, and the potential for enhanced 'victim blaming' if the recipient chooses to remain in a relationship where the violence escalates, despite having obtained relevant information under the Scheme. Use of the gendered term 'Clare's Law' in place of official terminology will continue to hamper male victims' engagement with the Scheme. Lack of support and follow-up for recipients of disclosures (and non-disclosures) remains a problem, and the expectation that such support will fall to the increasingly under-funded third sector is concerning to all involved.

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<sup>103</sup> A Mullender *Rethinking Domestic Violence: The Social Work and Probation Response* (Routledge, 2002), at p 226; A Gill 'Voicing the silent fear: South Asian women's experiences of domestic violence' (2004) 43(5) *The Howard Journal of Crime and Justice* 465, at p 472; D Epstein and L Goodman 'Discounting credibility: Doubting the testimony and dismissing the experiences of domestic violence survivors and other women' 167 *U. Penn. L. Rev.* (forthcoming): [scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3055&context=facpub](http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3055&context=facpub) (last visited 3 March 2018).

<sup>104</sup> This came into force on 29 December 2015 under Section 76 of the Serious Crime Act 2015.

<sup>105</sup> Under s 327A of the Criminal Justice Act 2003 as amended, where a police force has 'reasonable cause to believe' that '(a) a child sex offender managed by it poses a risk in that or any other area of causing serious harm to any particular child or children or to children of any particular description, and (b) the disclosure of information about the relevant previous convictions of the offender to [a] particular member of the public is necessary for the purpose of protecting the particular child or children, or the children of that description, from serious harm caused by the offender', then there is 'a presumption that the responsible authority should disclose information in its possession about the relevant previous convictions of the offender to the particular member of the public', 'whether or not the person to whom the information is disclosed requests the disclosure'.

There is also a particular institutionalised vulnerability around parenthood *and* victimhood for those with children whose rely on their 'right to ask'. But the greatest vulnerability in relation to the Scheme, particularly for applicants relying on their 'right to ask', is that crucial factor identified (with considerable understatement) by the state government of Victoria, Australia: the Scheme is 'limited to those perpetrators who have a criminal history' or upon whom the police hold relevant intelligence. This fundamentally overlooks the abuser who has hitherto escaped detection. These are the 'false negatives' that result in a *non-disclosure* under the Scheme following a 'right to ask' application. Just because there is no relevant information for the police to disclose does not mean a person's fears are unfounded; therefore, care should be taken not to create a false sense of security for individuals who may in fact be at future risk of domestic abuse. While the Scheme guidance has noted that efforts should be made to indicate this to applicants, it is a pressing concern for those tasked with implementing this policy. It is also an indication that initiatives such as the Scheme must clearly form part of a wider package of adequately resourced, effective measures that are designed to address and reduce domestic violence victimisation. Without these, the Scheme risks potentially exacerbating a victim's likelihood of suffering harm as a result of seeking help.

There are also concerns about the right to privacy for subjects of disclosures. However, we argue that we must accept on a *systemic* level that if the Scheme as a whole is proportionately operated and measures are used to standardise decision-making across England and Wales, then a risk of some small number of over-disclosures is acceptable in a vital field of public protection work. After all, the behaviour of such individuals must be of a relevant level of concern for the application to be made and the information on record to be imparted.

Overall, however, if the Scheme is to achieve its objectives, both the substantive legal framework for the Scheme and its practical operation must be reformed in a number of respects, as we have outlined in this article. A new Domestic Violence and Abuse Act presents an opportunity to do this vital work.