

NSW Domestic Violence Disclosure Scheme Submission Greens NSW



22 June 2015

Dear Submissions Manager,

Re: New South Wales Domestic Violence Disclosure Scheme (DVDS)

1. Thank you for the opportunity to make a submission on the proposed Domestic Violence Disclosure Scheme (DVDS) for New South Wales.

Executive summary

2. The Greens NSW are not persuaded that the proposed DVDS will assist in tackling domestic violence, particularly where funding has been cut to vital support services such as women's shelters that would be needed to implement it. It raises a large number of implementation issues that have not been adequately considered and that pose real risks to both safety and civil rights.
3. The Greens NSW strongly support an integrated, coordinated and collaborative approach to eliminating domestic violence. In order to create meaningful change, we need to address the cycle of violence, focussing on prevention and tackling root causes. In conjunction with this, we should be providing adequately resourced specialist support, counselling and accommodation for victims.
4. While international models can be an invaluable starting point for implementing programs to address this issue, the proposed Domestic Violence Disclosure Scheme is based on an under evaluated UK model with very low uptake, the total number of applications since implementation being 0.01% of the population. The proposed NSW scheme erroneously puts the onus on the victim to address the issue and change, instead of the perpetrator. This DVDS is also underpinned with the assumption that after being informed of a partner's history of violence, a victim will take action to leave the relationship. This demonstrates a narrow understanding of the dynamics of abusive relationships. We also echo the concern of the Women's Legal Services NSW that there is a real risk that a failure to exercise the right to ask or take action in response to a disclosure may be used in other proceedings against a person at risk, such as care and protection or family law proceedings.
5. We note that the NSW Domestic Violence Liaison Officer (DVLO) pilot scheme (only operational in two regions) is also yet to be evaluated, and that the relatively new Part 13A of the *Crimes (Domestic and Personal Violence) Act 2007* may well provide sufficient scope for support workers and victims to receive information that is needed in the interests of safety. The 'Going Home Staying Home' scheme is also yet to be formally evaluated. In this respect, the proposed DVDS scheme lacks any evidence base. If any scheme is adopted, the Greens

NSW strongly urge the government to ensure there are strict legal, necessity and proportionality requirements.

6. The proposed model is silent on the support and assistance that is required by those at risk. For example, under-funded domestic violence services would need to follow through with support services to help the victim exit the domestic violence cycle. Consideration must be given to the risk of reprisals following a 'right to ask' request by a person at risk or their family. If a perpetrator is still genuinely dangerous, there is potential for a 'false negative' report. Convictions are a deeply flawed indicator of risk, because of the high levels of underreporting of domestic violence, and the difficulty in securing criminal convictions.
7. The Greens NSW make the following recommendations:
 - a. The proposed scheme will be ineffectual and potentially dangerous without adequately funded support services to assist victims exiting abusive relationships.
 - b. There should not be a third party 'Right to Ask', since it disempowers victims. If this is implemented, it should be a very limited category.
 - c. A judicially oversights domestic violence register is preferred over discretionary decisions regarding disclosure.
 - d. If information is disclosed, it should include non-conviction orders, all sexual offences, all serious violence offences, and from all Australian jurisdictions. Disclosure of the existence of ADVOs must be given more consideration in light of the likelihood that fewer ADVOs will be by consent with no admissions.
 - e. Further consideration should be given to following the spent convictions scheme and protecting juveniles who are subjects of a DVDS.
 - f. The proposed scheme poses a serious risk to the privacy of previous victims of domestic violence, particularly in smaller communities, which needs to be addressed, for example through statutory confidentiality obligations.
 - g. Any police discretion would need to be tightly controlled and subject to independent oversight.
 - h. Subjects should not be consulted in advance of a disclosure, given the risk of reprisals.

Content of disclosures

8. We do not accept that a DVDS will have a meaningful impact on addressing domestic violence. However if a DVDS is adopted, we recommend that it be implemented in the most limited form that would support victims. In short, only information that is necessary for a person to make an informed assessment of their level of risk should ever be able to be disclosed.

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9. The Greens NSW would be very concerned to see disclosure of the existence of Apprehended Domestic Violence Orders (ADVOs), although we accept that this information may be of use in assessing risk. The inevitable outcome will be a disinclination of respondents to consent to ADVOs being imposed, leading to more contested applications. This results in applicants being required to give evidence and be cross-examined, longer and more traumatic proceedings, and the risk that ADVOs will not be put in place where they are needed. The 'without admissions' ADVO is a key, practical component of the protection system, without which the system would not function. It may be sufficient if convictions for the criminal offence of breaching ADVOs were disclosed. In our submission, more information concerning ADVOs would be better used by domestic violence experts to assess risk.
 10. Regarding the distinction at page 18 of the Discussion Paper of 'limited' or 'broader' disclosure, there is a risk that disclosure of too little information will lead to a person at risk confronting a convicted perpetrator directly to find out more information, which may increase their level of risk. Concerns regarding privacy, particularly of previous victims, weigh against disclosure of details of prior incidents of violence (discussed below). On the other hand, it is not necessarily in the best interests of the applicant to know specific details of prior offending either. We recommend that careful consideration be given to disclosing any more than the fact of a conviction, with a requirement that the privacy of any previous victim be protected as much as possible.
 11. It is our submission that if convictions are to be disclosed, they must be collated from all states and territories. Limiting disclosure to convictions in NSW alone increases the risk of false negatives, as discussed above. The same logic applies to including disclosure of non-domestic violence convictions, but we submit that this should be limited to serious violence offences only.
 12. We submit that for the purposes of supporting and encouraging rehabilitation, there are good arguments for applying the spent conviction scheme to any DVDS adopted. We note that convictions are only spent after a 'crime-free period' of ten years (s9, *Criminal Records Act 1991*)¹ and cannot be spent if they are sexual offences or offences for which a sentence of more than six months imprisonment was imposed (s7). The spent convictions concept is vital to the criminal justice system, because it allows minor offending to be punished and then be put behind the offender. Redemption and rehabilitation must be possible, including for domestic violence offences.²
 13. Further, we are concerned that disclosing juvenile convictions may impact on the rights and wellbeing of the subject, particularly if they are still juveniles. There must be further consideration of how to protect children who may be the subject of any DVDS adopted.

Privacy concerns

14. The application process is problematic considering that it has potential to breach privacy principles. A Right to Ask has the potential for abuse in terms of blackmail and discrimination

¹ Three years for juvenile offences: s10

² We note that Victoria is currently considering joining all other Australian states and territories in adopting a spent convictions scheme.

of both the person at risk and a person about whom a disclosure may be made. It is also likely to be abused in family law proceedings.

15. What is of primary concern is the potential for personal information about other victims being revealed. Particularly in small towns and small communities, disclosure of past domestic violence offences will quickly narrow the potential victims to a former partner or a family member, such that anyone in the community could infer the victim's identity. The outcome would be that this information is revealed without that person's consent. This may contribute to stigma in the community or further disempowerment of that person.
16. We recommend that any person to whom a disclosure is made be subject to a statutory confidentiality obligation, which must be explained to them at the time of disclosure. This may pose difficulties for support people for victims of domestic violence, and we recommend that further consideration be given to how best to support a person at risk whilst not unduly impacting on the privacy of the subject or any past victims.
17. We support the submission of the Women's Legal Services NSW at paragraph 31, that a register-based DVDS with judicial oversight would be the safest and fairest way of implementing this policy. We agree that formalising the process, ensuring that the offender knows their offence is disclosable, would limit the risk of abuse of process and the risk of reprisals.

'Right to Ask' - category of applicants

18. The Greens NSW submit that applicants who are already in a physically and emotionally intimate relationship with a person they believe may pose a risk to them are unlikely to benefit from this scheme. Such individuals are generally either going to be capable of leaving the relationship on the basis of the information they already have, or incapable of leaving the relationship due to the dynamics of disempowerment, power and control that typify abusive relationships. It is difficult to conceive of a scenario in which a DVDS will make real change to a person's choices.
19. The Greens NSW do not support a third party 'Right to Ask'. The risks associated with third party applications would seem to entirely outweigh the benefits. In particular, the likely effect is further disempowerment of a person at risk or victim of domestic violence. There are also risks associated with what a third party may do with potentially threatening information about a person capable of serious violence.
20. Any criteria for a third party application would need to be established by proof, which is problematic when it extends to friends, neighbours, co-workers or housemates. We submit that the UK test of 'some form of contact' is woefully inadequate to prevent abuses of the system, and is likely to result in disempowerment of the person who is in the relationship. There is no reason to give the power to ask to a third party where the person in the relationship is a competent adult.
21. A Right to Ask by third party applicants has the potential to be used as a tool to intimidate, manipulate or threaten individuals, particularly in small or remote communities (including

indigenous communities). There is potential for discrimination by employers (eg. domestic violence leave is now available in some sectors of the workforce) or other groups, both of the person at risk and of a person about whom a disclosure is made. There is, further, the risk of attacks on or discrimination against people who have committed domestic violence offences in the past.

22. We are not aware of any circumstance where a disclosure should be made only to a third party and not to a person at risk. Exceptions to this must be carefully circumscribed to where it is absolutely necessary.
23. If allowed at all, third party applications must be rare and only in the most extraordinary of circumstances, such as where the person at risk has a disability or other specific vulnerability. In fact, from this perspective, one of the more compelling uses of such a scheme is not proposed for NSW in the Discussion Paper: the checking of carers and co-residents by and for people with disabilities and the elderly. This should be given further consideration.
24. If a third party Right to Ask is implemented, there must be strict checking of the nature of the person's relationship with both the person at risk and the subject, as well as checks that the person's application is in good faith and not for some ulterior purpose.
25. In terms of former partners, it should only be allowed if they have ongoing contact with that person by reason of joint or separate arrangements regarding access to or the residence of their children. If a third party Right to Ask scheme is adopted, a senior police officer will need to consult with the DVLO first, or in the absence of the DVLO, another domestic violence support service, before making a disclosure.

'Right to Know' disclosures

26. We reiterate our concern that these disclosures may already be possible under Part 13A of the Crimes (DPV) Act within the DVLO scheme that is yet to be rolled out state-wide. The Greens NSW consider, however, that the judicious application of this principle may be of assistance in addressing domestic violence, particularly in the circumstance described in the example on page 10 of the Discussion Paper. It has the advantage that it does not have the same victim disempowering effect of third party 'Right to Ask' applications, since it should simply arm a person at risk with the facts necessary to make informed choices about managing their own level of risk.
27. First and foremost, however, the best interests of the person at risk must be paramount. If such a scheme is adopted, a senior police officer should be required to consult with the DVLO first, or in the absence of the DVLO, another domestic violence support service, before making a disclosure. There must be careful consideration of whether a disclosure would in fact put a person at increased risk.
28. There must also be education and training of police to ensure that this mechanism is not used as a way to exert pressure on people at risk who are in abusive relationships. This consequence of disempowerment is antithetical to the aims of the scheme.

29. There would need to be tight controls on any police discretion, since there is a serious risk of misuse of this tool. Given the sensitivity of the scheme and the relationships involved, independent oversight must ensure that the threat of disclosure of a person's convictions to their current partner is not used in any abuse of police power, harassment or intimidation.

Disclosure Process

30. A third party should only be present during the application and disclosure process if the applicant requests it. Where appropriate, the DVLO should offer access to domestic violence support services, again only at the request of the applicant.

31. Appropriate services need to be in place to provide additional assistance to at risk groups including:

- Aboriginal and Torres Strait Islander
- People with disabilities
- Culturally and Linguistically Diverse Backgrounds (CALD)
- LGBTQI community
- Regional and remote communities, and
- Elderly or youth.

32. Consideration must be given to the risk of reprisals for a person at risk who makes a 'Right to Ask' application, especially where they have already been given reason to fear for their safety. Alternatives to applications made in police stations should also be considered, for example it may be safer for the applicant if the DVLO visited the applicant in an alternative location.

33. We recommend that any decisions to disclose are made by senior police and a domestic violence service (eg. a DVLO) together. We would not support decisions being made by a centralised decision-making body, since this removes the decision-making from the context of the parties involved and is likely to introduce delays, which are undesirable if the situation is one where a person is at risk of harm.

34. We support determination of disclosure by a local decision-making body and advocate for its proper resourcing in order to ensure additional stress is not placed on already stretched services, in particular workloads and deadlines.

35. The Greater Newburyport Domestic Violence High Risk Team (DVHRT)³ based in Canada is a good example of agencies coming together in order to protect victims and help perpetrators. The DVHRT assesses the risk of domestic violence, and if present, then develops individualised intervention plans to interrupt the cycle and minimize the risk of domestic violence. A local decision making body could liaise with the NSWPF, domestic violence support services and appropriate advocacy groups in order to provide for well-considered safety and support for victims, including after an application is made. In providing a safe and supportive environment, the prospect of making a disclosure when a third party is present becomes less of an intrusion.

³ http://www.learningtoendabuse.ca/sites/default/files/6_YEAR_REPORT.pdf

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36. If an abuser has no prior instance of domestic violence recorded, there is a significant risk that a victim may be lulled into a false sense of security – the risk of a ‘false negative’. Expert risk assessment must be built into the system to avoid what may be a dangerous lay risk assessment by a person at risk.
 37. At the request of the person at risk, it may be appropriate to make a disclosure when a third party is present. Clearly there are certain groups that have a history of strained relations with the NSWPF that may value having a third party present during application and/or disclosure. Third parties must also be subject to approval and statutory confidentiality obligations.
 38. We recommend that any disclosures are made in person wherever possible, following an explanation of the person’s statutory confidentiality obligations, but this could be decided on a case by case basis. We do not support disclosures being made in writing due to the risk of dissemination. In circumstances where there is no disclosure to be made, a referral to a domestic violence support service should be offered.
 39. If a decision is made not to disclose information to an applicant, follow up checks by the Local Decision Making Body should be made with the applicant over a six month period (if it is their current intimate partner). A case worker or local violence prevention group who has the capacity and resources should be given the responsibility to undertake the follow up.
 40. We are not convinced at this stage that there is a need for an applicants' appeals process, provided that there is sufficiently collaborative and informed decision-making that involves *both* police and a domestic violence support service.

Involvement of the subject

41. In the interests of safety, we would not support seeking representations from the subject before a disclosure is made. This needs to be a limited scheme that does not involve the subject. As the cycle of domestic violence is founded in power dynamics, when a victim begins to seek help and leave their violent partner is when they are most at risk. Any indication that a potential victim could be recognising their violent behaviour and seeking help could be detrimental to the applicant. Their safety should be seen as a priority.
42. The scheme must also protect the rights of persons who are subjects. This is a function that we recommend may be properly given to the Information and Privacy Commission NSW. Some oversight from outside the NSW Police Force (NSWPF) would help to ensure that a DVDS is not unduly impacting on the rights of subjects, including honouring the spent convictions scheme, making accurate and fair disclosures, and ensuring that the necessity and proportionality requirements are complied with. This is especially crucial in the context of family law disputes. We recommend that regular reviews of disclosures are conducted to ensure accuracy and compliance.

Criminal offences

43. As discussed above, we support a statutory confidentiality obligation as accompanying disclosure, and for disclosures to be oral only. A record of any applications and disclosures should be kept by the NSWPF for the purpose of monitoring and evaluating the scheme.
44. To protect the integrity of a DVDS, and to safeguard against the risk of its abuse, it would be appropriate to introduce summary criminal offences for providing false information in an application and disseminating a disclosure. We would support the exemption for where the disclosure is for the purpose of receiving domestic violence support services and medical treatment including counselling.

Launching Pilot Scheme

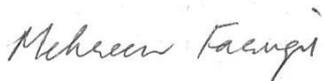
45. The Greens NSW are concerned by the lack of evaluation of the effectiveness of Clare's Law. The Pilot Assessment did not consider any impact the scheme may have had on domestic abuse victims. If this were to be implemented in NSW, we would need systematic evaluation and feedback. For example, how many applications are made, how many disclosures are made, how the specific needs of people from at risk groups are taken into account, and how many applicants subsequently left their partner and were able to secure assistance from domestic violence support services.
46. When selecting locations for the Pilot Scheme due consideration needs to be given to both metropolitan and regional/rural areas. Further, it may be best served to implement the pilot in areas of high incidences of domestic violence so as to provide these communities with an additional DVLO.

Conclusion

47. Addressing the root causes of domestic violence through properly resourced prevention programs and changing societal attitudes, whilst adequately supporting those at risk requires a multi-pronged approach focussing equally on both prevention and support.
48. The Greens NSW believe that investment in violence prevention initiatives across all parts of society is needed if change is going to occur. These include amongst other initiatives funding targeted education programs in schools from early childhood to high school to build awareness of gender stereotyping, inequality and attitudes that encourage violence, and funding community and workplace based initiatives to prevent violence and foster respectful and equal relationships between men and women.
49. The Greens NSW would be concerned to endorse the proposed Domestic Violence Disclosure Scheme. We believe it will be an ineffective measure, especially whilst the 'Going Home Staying Home' program has significantly reduced funding to women's shelters, refuges and legal services.

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50. A Domestic Violence Disclosure Scheme cannot work without restoring and increasing funding to women's services. Any scheme must be supported with case workers, counsellors and shelters for victims and their children, or it will simply give people information they are unable to safely act upon. Such a scheme would need to be implemented as a part of larger reforms with an emphasis on support services, education programs and skills development for community workers at the front line of supporting victims of domestic and family violence.
51. Additionally, the Greens NSW would seek to support a safe and supportive justice system by improving access to specialist family violence support workers, court staff and magistrates who understand the dynamics of family violence, and by increasing funding for free legal advice for women. We need to ensure all courts are properly resourced and trained to deal sensitively with domestic violence issues.
52. Assuming that an applicant will take positive and evasive action after disclosure not only puts responsibility on a potential victim, but puts pressure on them too. This will only be magnified by any right for third parties to apply, which will ultimately exacerbate the disempowerment of any victims of domestic violence. Domestic violence needs to be addressed in a more preventative, systematic way.
53. We recommend careful consideration and consultation from both domestic violence experts and lawyers to ensure that both the safety of persons at risk and the rights of subjects are properly protected.
54. The Greens NSW are committed to ending domestic violence. Thank you for the opportunity to comment and please do not hesitate to contact either spokesperson for further information.

Kind Regards,



Dr Mehreen Faruqi MLC

Greens NSW Status of Women and Prevention
of Domestic Violence Spokesperson



David Shoebridge MLC

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