IN THE MATTER OF THE ROYAL COMMISSION INTO FAMILY VIOLENCE

ATTACHMENT WS AH-23 TO JOINT STATEMENT OF ASSISTANT COMMISSIONER WENDY MAREE STEENDAM AND SENIOR SERGEANT AILSA CAROLINE HOWARD

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Filed on behalf of: the Applicant
Prepared by:
Victorian Government Solicitor's Office
Level 33
80 Collins Street
Melbourne VIC 3000

[redacted]

This is the attachment marked **'WS AH-23'** produced and shown to **WENDY MAREE STEENDAM** and **AILSA CAROLINE HOWARD** at the time of signing their Joint Statement on 3 August 2015.

Before me: [redacted] .....

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An Australian legal practitioner
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http://www.crimeandjustice.org.uk/publications/cjm/article/dodgy-dvds-some-problems-national-roll-out-domestic-violence-disclosure

CENTRE FOR CRIME AND JUSTICE STUDIES UK – includes critique of DVDS Pilot Assessment

Dodgy DVDS: some problems with the national roll-out of the Domestic Violence Disclosure Scheme

Jamie Grace highlights apparent early flaws in implementing a new policy move

In November 2013 the Home Secretary announced that from March 2014 the 'right to ask' and 'right to know' strands of the Domestic Violence Disclosure Scheme (the Scheme) would be operated nationally under existing police common law powers. The Scheme sees the police proactively (right to know) and reactively (right to ask) disclose 'intelligence' on (alleged) offenders to their partners, for example, supposedly in order that those partners can take better-informed decisions as to remaining in a relationship/continuing to live with the 'risky' individual concerned. The common law nature of these powers is a distinct weakness, since it makes the proportionality of the Scheme in specific cases more difficult to determine. The efficacy of the Scheme is in doubt with some public protection professionals and some civil liberties and victims' organisations (Strickland, 2013).

Problems with (evaluating) the Scheme

The Home Office study (Home Office, 2013) (the Report) was carried out through a mixture of both workshops with practitioners such as police officers and support workers, and questionnaires completed by those who had applied for, or received, a disclosure of information under the Pilot Scheme (conducted in Gwent, Wiltshire, Nottinghamshire and Greater Manchester). Two workshops took place, and some 38 (less than 10 per cent) of the eligible respondents completed a questionnaire. Some of those who did complete a questionnaire did so in the presence of a police officer. Despite this, only four respondents reported that they were likely to seek support from support services following the disclosure of information they had received as 'intelligence' about their partner. Yet there were 111 disclosures about individuals made in total under the pilot Scheme. The Scheme is not a fix for the difficulties in helping (mainly) women seek assistance from organisations which will help them address, cope with, and diminish the risk of domestic violence in their lives. Doubts over this fundamental purpose of the Scheme had already been expressed in the academic as well as the practitioner community before the pilot had concluded (Duggan, 2012), but also before the decision was made at a political level to roll out the national Scheme.

Tellingly, none of the 111 individuals who were the subject of disclosures during the pilot were invited to attend any kind of workshop or were invited to fill out any kind of questionnaire. This fits with the general (and perhaps unlawful) lack of regard the Scheme will have for (alleged) offenders or perpetrators of domestic violence, because of problems

with the way the operational guidance which underpins the Scheme (Home Office, 2013a) is constructed - or followed.

There were significant teething problems suffered by the pilot Scheme as identified in the Report (Home Office, 2013b). Police officers felt the process of decision-making was overly bureaucratic. Practitioners felt public awareness of the pilot Scheme was low. There was a perception that the Scheme overlapped with other disclosure processes under Multi-Agency Public Protection Arrangements and/or the parallel Child Sex Offender Disclosure Scheme, presumably introducing some confusion and complexity in that regard. There was a lack of consistency in the information given in disclosures, and in the type and nature of follow-up support proffered in situations where disclosures were not made following a refusal of an application under the 'right to ask' strand of the pilot Scheme. There were perceived difficulties with logistical support in timing and making proactive disclosures of public protection 'risk' information to individuals under the 'right to know' strand of the pilot Scheme, given the enormous emotional pressures this would then potentially place on the individual deemed officially 'at risk' of harm. I write 'officially "at risk"' because the Scheme guidance stipulates that one of the three criteria that must be met for disclosure to be made under the Scheme, and to be lawful under the common law of England and Wales, is an identifiable 'pressing need' for that disclosure to be present in the situation concerned. It seems the participants in the practitioner workshops that were part of the study behind the Report felt the term 'pressing need' was unclear and overly subjective.

The three recommendations of the Report address many of these issues: making practitioner and police training more cohesive with regard to other public protection information disclosure channels, standardising packages of support, including in cases where requests for disclosures must be refused for some reason, and raising inter-agency awareness of the operation of the Scheme generally. But the last concern mentioned above, namely the unclear and subjective nature of a 'pressing need' test for disclosure, cannot properly be addressed through carrying out these recommendations alone, while there exists another (legal) flaw in the way the (pilot) operational guidance that underpins the Scheme addresses a three-part test for disclosure as a whole.

Criticism of the Scheme guidance

As the guidance underpinning the (pilot) Scheme makes clear, the powers of the police to disclose public protection 'intelligence' to individuals at risk of harm through domestic violence are common law powers, rather than more transparent, and better-defined, statutory powers. The three-part test for appropriate and lawful disclosure is thus: 1) that the disclosure is necessary to protect a person from being the victim of a crime related to domestic violence, 2) that there is a pressing need for such disclosure and 3) that the disclosure is proportionate in aiming to prevent crime.

With regard to the important third point, concerning proportionality, an element of the (pilot) guidance places the correct emphasis on 'considering the consequences for [an individual] if his/her details are disclosed against the nature and extent of the risks [that that person poses to another person]' (Home Office, 2013a).

In terms of correctly judging the proportionality of information-sharing using a kind of balancing exercise, there is added complexity in terms of the consideration of the nature of the information which might be disclosed under the Scheme: this can include not just convictions, but also records of arrest, charges, cautions, failed prosecutions, allegations, evidence of non-criminal but anti-social or immoral behaviour, and, perhaps surprisingly, spent convictions. Giving appropriate weight to the nuances of these items of information in the process of making proportionate decisions as to public protection information sharing is a particularly complex process (Grace, 2013b). Some of the offences listed in an appendix to the guidance, suggesting they may form the substance of a disclosure, are not even necessarily ones relating to violence or sexual harm (e.g. theft and criminal damage) unless we were to know a great deal about the circumstances of the offence concerned.

In conducting this 'balancing exercise' according to established principles of human rights law and wider concerns of natural justice, input should be sought from the person who might seek to prevent a disclosure being made about themselves, where practicable. I noted above that it is a concern from an evaluative point of view that not one of the 111 subjects of a disclosure of information under the pilot Scheme were asked to provide their views and perceptions in any way for the Report.

More of a (legal) concern is that none of the 111 individuals who were the subject of a disclosure were consulted about their concerns before a decision was reached to disclose. The guidance underpinning the Scheme was revised in March 2013 due to a successful legal challenge to the operation of the somewhat parallel Child Sex Offender Disclosure Scheme: there had not been enough emphasis placed, in the original guidance underpinning that Scheme, upon the importance of consulting with (alleged) child sex offenders before a decision about a possible or likely disclosure to a third party such as a concerned parent was to be made (Grace, 2013a).

For all 111 eligible individuals to go unconsulted prior to disclosures being made in these cases under the pilot Scheme smacks of scant regard for the requirements of the common law in either the way the guidance from March 2013 is being interpreted, the way the guidance is worded, or both. It is acceptable in appropriately high-risk cases under the common law that instead of consulting in advance of making a decision as to the suitability of a disclosure, the individual concerned might instead be notified that a disclosure about them is to be made for a particular purpose (ibid). But in the pilot Scheme, again, none of the 111 cases involving a disclosure resulted in even a notification of the individual (alleged) offender either, purportedly over concerns for the safety of the (potential) victim of domestic violence following that notification. This degree of imbalance could be empirical evidence of unlawfulness in the way the pilot Scheme operated given the common law concerned.

Enduring concerns about the Scheme

Lawfully sharing 'criminality information' outside the criminal justice system is a difficult exercise with sometimes competing goals. This is made harder when there is a complex, diverse array of information-sharing powers at the disposal of criminal justice professionals and public protection practitioners (Grace, 2013b). But there clearly needs to be, from a

perspective of human rights-compliance, greater emphasis on offender/perpetrator consultation, notification and engagement generally, under the Scheme.

I would make the final point that empirical research is desperately needed to establish the extent to which disclosure or potential disclosure of information about (alleged) perpetrators of domestic violence, particularly where this goes ahead without offender consultation, notification or engagement, results in a damaging sense of futility over the efforts of rehabilitation and desistance from perpetrating domestic violence, 'which could result in future victims being created' (Duggan, 2012).

Jamie Grace is Senior Lecturer in Law, Sheffield Hallam University

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References

Duggan, M. (2012), 'Using Victims' Voices to Prevent Violence Against Women: A Critique', British Journal of Community Justice, 10(2), pp. 25-37.

Grace, J. (2013a),'"Too well-travelled", not well-formed? The reform of 'criminality information sharing' in England and Wales', Police Journal, 86, pp. 29-52.

Grace, J. (2013b), 'Privacy, stigma and public protection: A socio-legal analysis of criminality information practices in the UK', International Journal of Law, Crime and Justice, 41, pp. 303-321.

Home Office (2013a), Domestic Violence Disclosure Scheme pilot: guidance (Revised March 2013), London: Home Office.

Home Office (2013b), Domestic Violence Disclosure Scheme (DVDS) Pilot Assessment, London: Home Office.

Strickland, P. (2013), (House of Commons Library Standard Note), Clare's Law: The Domestic Violence Disclosure Scheme, London: House of Commons Library.

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cjm 97: Criminal justice marketisation