Consultation - Have YourSAy

Topic 1: Domestic Violence Disclosure Scheme

The South Australian Government has committed to considering the development and implementation of a DVDS. In developing a DVDS for our state, we can draw upon what has been learnt from a similar scheme operating in the UK, and a new scheme in NSW.

The UK Scheme

The Home Office in the UK announced on 25 November 2013 that it would introduce a national DVDS across England and Wales. The main objectives of the scheme are to reduce incidents of domestic violence and to strengthen the ability of police and agencies to provide appropriate protection and support to victims of abuse.

The DVDS commenced in the UK in March 2014 and was implemented under existing police common law powers. The scheme provides for two types of disclosures: Right to Ask and Right to Know.

Right to Ask requests are triggered when a member of the public contacts the police directly to request a disclosure. This can be the individual who is in the relationship with a potentially violent partner, or a third party, such as a parent or friend, who has concerns on that person's behalf. The police complete initial checks and attend a face-to-face meeting with the applicant to verify their identity.

Right to Know requests are triggered by the police where they receive indirect information or intelligence (from police or partner agencies) that indicates an individual is at risk of harm from their partner.

For both Right to Ask and Right to Know requests, risk assessments and other checks are carried out by police in order to develop a greater understanding of the potential victim and their partner.

If initial checks give the police cause for concern, the case is referred to a local decision-making forum comprised of relevant agencies, such as health, child protection, housing and other specialists, for a determination about whether a disclosure should be made and, if so, what information should be disclosed and to whom. A decision to disclose information should only be made if there is a 'pressing need' to disclose in order to prevent abuse and the decision-making forum should also ensure that the disclosure is lawful and proportionate in the circumstances.

If a decision has been made to disclose information, consideration is given to which agencies are best placed to deliver the information. Support to the potential victim can then be offered at the same time as the disclosure.

The information that may be disclosed under the UK DVDS is broad, allowing not only convictions for violent offences to be disclosed but also allegations, arrests or charges where it is deemed necessary and proportionate in order to protect the victim from harm. The UK Home Office includes a non-exhaustive list of offences in Annexure A of the *Domestic Violence Disclosure Scheme Guidance* (revised March 2013) which includes offences such as battery, murder, common assault, manslaughter, kidnapping, false imprisonment, offences under the *Public Order Act 1986*, offences under the *Offences Against the Person Act 1861* and offences under the *Sexual Offences Act 2003*. The only limitation is in relation to spent convictions, as defined under the UK *Rehabilitation of Offenders Act 1974*, which cannot be disclosed.

If a decision is made to not disclose the information, and the request was triggered by a Right to Ask application, then the disclosure scheme recommends that police visit the applicant to discuss any concerns the applicant may have and offer support.

The UK Home Office completed an assessment of the pilot (which ran from July 2012 to September 2013 across four local command areas) and found that the views of those involved in the pilot were essentially positive and that "the scheme was perceived as a useful way of providing individuals with information to help them make a more informed choice about their relationship, and...encouraged multi-agency working around domestic abuse...The majority of respondents who had received a disclosure felt that the information had helped them to make a more informed choice about their relationship".[54] Out of the 386 applications for a disclosure that were received by police over the course of the pilot, 111 disclosures were made. The reasons given for not making a disclosure included that "there was no pressing need to disclose information" and that "there was no information available to disclose that suggested an individual was at risk of harm from their partner".[58]

More recently, the UK Home Office conducted an assessment of the operation of the DVDS since national roll-out commenced in March 2014. This assessment report was released in March 2016 and made a number of policy suggestions to improve the DVDS. For example, it recommended that the national DVDS Guidance be reviewed and updated to:

- provide greater clarity on the legal and common law powers of the police to make disclosures in order to protect the public;
- make clear that disclosures can be made regarding former partners where it is legal and proportionate to do so;
- make clear what should be included in a disclosure and the timeframe;
- consider the inclusion of a pro-forma using standard wording for non-disclosures[59].

The impact of the UK DVDS on the prevalence of domestic violence is still unknown as neither of the two assessments completed by the Home Office have considered the impact the scheme may have had on domestic abuse victims.

The NSW Scheme

On 6 March 2015, the NSW Government announced it would pilot a DVDS similar to the scheme introduced in the UK and released a discussion paper seeking comments on the proposed scheme. After wide public consultation, which included a roundtable and targeted workshops with government and non-government organisations, the Government announced, on 14 October 2015, that the DVDS would be piloted in four NSW Police Force Local Area Commands (Sutherland, St George, Oxley and Shoalhaven). The NSW DVDS was rolled out on 13 April 2016 and will be evaluated over two years.

NSW Police will receive and review all applications made by a person who is concerned about their partner, or a concerned third party, to find out if their partner has a history of domestic violence.

Under the NSW DVDS, a third party includes someone who has some form of contact with the primary person, e.g. family, friends or legal guardians. It also includes professionals working with a member of the family.

On receipt of an application, NSW Police will check whether a relevant conviction exists that leads to a disclosure being made to the primary person. A conviction will be disclosed where the person who is the subject of the application has a relevant offence in their criminal history. Relevant offences include personal violence offences committed in a domestic relationship and certain specific personal violence offences committed outside of a domestic relationship. Breaches of apprehended violence orders will also be disclosed as they constitute a criminal offence.

Offences and orders that will not be disclosed under the NSW scheme include spent convictions and apprehended domestic violence orders.

A disclosure will be made in person at a police station or other agreed safe place, and the person receiving the information will be required to sign an undertaking that they will not misuse any information disclosed. Also present at the time of disclosure will be an expert from a domestic and family violence support service to provide support and help plan for the person's safety. Support services will be present regardless of whether a disclosure is made or where a primary person is advised that no relevant conviction exists. This ensures that the primary person will have immediate access to the necessary support that is required when making a decision about their safety. The NSW Government also announced that it was investing $2.3 million to assist non-government organisations provide specialist services in the four local command areas.

A DVDS in South Australia: Issues to Consider

This Discussion Paper is seeking community and expert views on a DVDS for South Australia. Such a scheme would require a number of issues to be considered. For this reason, the NSW trial will be monitored and evaluated to determine what policies, procedures and resourcing impacts are likely to arise for South Australia and specifically for SAPOL.

Who should be allowed to make an application for disclosure?

Under the UK Scheme, an application for disclosure can be made by an individual who is in an intimate relationship with a potentially violent individual, or a third party who has some form of contact with the person whose safety they are concerned about. The scheme does not extend to obtaining information about former partners or other types of domestic relationships such as siblings or carers.

Under the Act, what constitutes a relationship for the purposes of determining whether abuse is domestic abuse or non-domestic abuse is understandably broad. For example, two people are in a relationship if: they are married to each other; they are domestic partners; one is a child of the other; they are brother and sister; one is the carer of the other; they are related according to Aboriginal and Torres Strait Islander kinship rules, etc.

The scheme in the UK is limited to intimate relationships. In NSW, the scheme applies to both current and former intimate relationships, provided there is ongoing contact with the former partner. Similar limitations should ideally apply in South Australia.

If a DVDS was introduced in South Australia, should it apply only to those in a current intimate relationship, as is the case in the UK, or to both current and former intimate relationships, as is the case in NSW? If yes, how should intimate relationships be defined?

Both the NSW and the UK Scheme also allow third parties, such as friends, neighbours and relatives, to make an application to police for disclosure.

Should a third party be entitled to make an application on behalf of someone else in South Australia?

If yes, in what circumstances should it occur?

Setting the scene

Intimate Relationship

Kate

James

Third Parties

Grant
Kate's brother

Mary
Kate's neighbour

Kate and James have been in a relationship for two years. Grant (Kate's brother) recently noticed changes in Kate's behaviour and is worried about her. Mary (Kate's neighbour) also has concerns about their relationship, having overheard loud voices.

We are asking you to consider who should be able to ask for information, and under what circumstances. Would it include Kate? Grant? Mary?

The Application Process

It is essential that any DVDS introduced in South Australia has a relatively simple application process, with appropriate support available for those who may be illiterate or not proficient in English, to ensure that everyone has access to the scheme.

In the UK, an appointment is made at a police station with a specialist officer from the Police's Community Safety Unit, who collects the applicant's details and runs a preliminary check to determine whether there are any concerns that would require immediate disclosure. Applications may only be made by people who are 16 years and over.

A similar process has been adopted in NSW. Applications are made to the NSW Police Force who undertake an assessment of the application and criminal record checks to determine whether a disclosure should be made. If police are of the view (as a result of the assessment) that there is a serious threat to the life, safety or health of a person, then the disclosure can be fast tracked.

Should applications be made to SAPOL or some other agency?

Should there be an age limit for the applicant, the person identified or the subject?

How should an application be made and who should be the first point of contact?

What initial checks should be carried out?

What assistance should be made available for people who may need help in completing their application?

Should a checklist be developed to ensure that applications are assessed, and support offered, in a consistent manner?

What factors should be taken into account in determining whether an immediate disclosure is required?

Assessment of Applications

In the UK, if there is no immediate risk to the applicant and urgent disclosure is not required, the application is referred to a local decision-making forum to determine whether or not a disclosure should be made.

In most instances, cases are referred to the Multi-Agency Risk Assessment Conference (MAARC) which includes representatives from local police, child protection, housing, health and other specialists from government and non-government sectors. If it is not possible to refer a case to MAARC, the application is referred to a multi-agency body that includes, at a minimum, the police, the probation service and an independent domestic violence advisor.

In determining whether a disclosure should be made, who it should be made to and what information should be disclosed, the local decision-making forum is required to consider whether the information can be disclosed, whether there is a pressing need for such disclosure and whether it is necessary and proportionate for the prevention of a crime to disclose information about a person's previous convictions.

Following a court ruling in March 2013 on the Child Sex Offender Disclosure Scheme, the UK DVDS Guidance was amended so that, at the point where a decision is being made on whether to make a disclosure, consideration must also be given on whether to seek representations from the subject of the disclosure request before the disclosure is made. However, consideration should also be given to whether there are good reasons not to seek a representation, such as the need to disclose information in an emergency or where seeking the representation might put the potential victim at risk of harm.

In South Australia, decisions to disclose could be made by SAPOL or by a local decision-making body, for example MAPS, which currently establishes a process for multi-agency action planning to reduce risk and harm at early points of intervention and complements the Family Safety Framework.

Another option would be to link in with the Family Safety Framework meetings, which occur regularly in 19 local police service areas across the state and includes representatives from Health SA, Families SA, SAPOL, Housing SA, Community Corrections, non-government women's domestic violence services and the South Australian Victim Support Service.

Who should have responsibility for assessing applications for disclosure and making a determination?

What sort of risk assessment should occur?

What factors should the decision-making body take into account in determining whether or not to make a disclosure?

Disclosure of Information

In the UK, police have a common law power to disclose information where it is necessary to prevent a crime. However, any disclosures must be made in accordance with existing statutory obligations, such as the *Data Protection Act 1998* and the *Human Rights Act 1998*. The UK Home Office DVDS Guidance[60] states that information sharing must:

- be lawful, for example, the prevention, detection, investigation and punishment of a serious crime and the prevention of abuse or serious harm will usually be sufficiently strong public interests to override the duty of confidence;
- comply with the eight Data Protection Principles set out in the *Data Protection Act 1998;*
- be necessary; and
- be proportionate.

The question of what information should be disclosed requires careful consideration. In the UK, Annex A of the DVDS Guidance sets out a non-exhaustive list of offences that may be disclosed. The only limitation is in relation to spent convictions which cannot be disclosed.

Disclosure under the NSW DVDS is limited to relevant offences which include personal violence offences committed in a domestic relationship, stalking, intimidation, breaches of Apprehended Domestic Violence Orders and specific personal violence offences, such as sexual offences, child abuse offences or murder, where they were committed outside of a domestic relationship. Offences that cannot be disclosed under the NSW scheme include offences from jurisdictions outside NSW, offences where no conviction has been recorded, spent convictions, juvenile convictions, Apprehended Domestic Violence Orders and any other offence not listed in the relevant offences list.

SAPOL is of the view that any initiative which increases awareness and safety for victims, particularly in a preventative capacity, is worthy of favourable consideration. However, SAPOL has some reservations relative to the NSW pilot model and its restricted criteria for information release. The NSW DVDS will not disclose convictions for offences which have occurred outside of NSW, offences where no conviction is recorded, spent convictions, juvenile convictions, or the presence of an order (unless there are breaches).

In the view of SAPOL, this approach leaves significant gaps in information sharing as offences which have not resulted in a conviction are not identified in this process. Similarly, other contextual factors which may place a victim at higher risk (for example, misuse of alcohol or other drugs and mental health issues) would not be revealed.

SAPOL has noted that if the disclosure parameters were broadened, it would increase victim safety but would come at a resourcing cost (noting that the model is resource intensive for police). SAPOL also noted that it is unknown, at this early stage of the NSW pilot, how many applications may be received. In addition to the work generated by the application process which includes a risk assessment process, it is highly likely that disclosures will be made to in a face-to-face meeting. This in turn would generate further work in both supporting victims and investigating offences.

The disclosure of information by Government agencies in South Australia is governed by the Information Privacy Principles and the Information Sharing Guidelines. An agency may disclose personal information about a person to a third party in a number of circumstances including where the disclosure is required or authorised by, or under, law and if the person disclosing the information believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious threat to the life, health or safety of a person.

The question of what information should be able to be disclosed requires careful consideration. Disclosure of all offences may not be necessary or proportionate and could undermine an individual's basic right to privacy. A similar issue arises in relation to the disclosure of intervention orders. An intervention order is a civil order that does not require a finding of guilt by a court that the alleged perpetrator has committed a criminal offence. Indeed, an intervention order can be made by mutual consent without any admissions by the defendant as to the matters in issue. A breach of an intervention order, on the other hand, is a criminal offence.

Careful attention should therefore be given to the question of whether the disclosure of information should be limited to prior convictions for relevant criminal offences (for example, domestic violence offences, sexual offences and some offences against the person that involve violence) or whether the threshold should be wider? Should it include intervention orders and/or charges or allegations relating to relevant offences?

In the UK, a two-stage process is adopted in the DVDS. The first step is to determine whether there is a need for the disclosure in order to prevent abuse or serious harm. The second step requires consideration of the legal principles discussed above.

When should information be disclosed? What principles should be considered in making a determination to disclose?

What offences should be included? Should they relate to domestic violence convictions only or should convictions for other offences be included? Should allegations be included?

What offences should be excluded? For example, should spent convictions or juvenile convictions be disclosed?

Should current and/or prior intervention orders be included?

If current and/or prior intervention orders are to be included, should there be an assessment of the level of risk posed by that order before determining whether a disclosure should be made?

What information should be disclosed? Should a disclosure be limited to the existence of a relevant offence or an intervention order or should further details be disclosed, for example, the date of the offence, the facts of the offence and any sentence imposed?

The Disclosure Process

Once a decision is made to disclose information, a process should be put in place that provides clear guidelines for how the information should be disclosed, who it should be disclosed to and what support should be available both at the time of disclosure and after the disclosure has been made.

If a decision is made to disclose information in the UK, the multi-agency forum will determine who will receive the information and what help and support is needed to safeguard the at risk individual. Any disclosure will be made in person.

Prior to making a disclosure in the UK scheme, consideration must also be given to whether or not the subject of the disclosure request should be advised of the disclosure and invited to make representations. If the 'subject' is advised of the request, it must be done in person and they must be given information about the DVDS and, where possible, referred to relevant support services.

In NSW a disclosure is made in person at a police station or other agreed safe place to the 'primary person', i.e. the person in the intimate relationship. Present at the time of disclosure is an expert from a domestic and family violence support service who helps develop a plan for the person's safety. To further ensure the person's safety, and the safety of others, the subject of the disclosure is not advised that an application or disclosure has been made about them.

Both the UK scheme and the NSW scheme allow for disclosures to be made to third parties. In the UK a disclosure can be made to the person best placed to protect the applicant or at risk person. In NSW disclosure is only made to a third party in exceptional circumstances. However, the at risk person may invite a support person to attend the disclosure meeting who may, or may not be, a third party.

Once information has been disclosed, the UK and NSW schemes include safeguards to ensure that any information disclosed is not misused. For example, in both schemes a person who is present at disclosure is required to sign an undertaking that they will not misuse or share the information that has been disclosed. It is also an offence to provide false or misleading information in an application.

Who should make the disclosure and where should it occur?

Should information be disclosed to a third party?

Once disclosure has occurred, what sort of support should be made available to the person?

Should the subject be informed of a disclosure? If so, in what circumstances? Should the subject have a right to appeal a decision to disclose?

Should there be safeguards in place to protect against the misuse of information once it has been disclosed? For example, should the person receiving the disclosure be required to sign an undertaking that they will not share or misuse the information provided?

No Disclosure

Where a decision is made not to disclose information, that decision should be communicated clearly to the applicant and processes should be developed for providing the person with appropriate advice and support.

In the UK, the applicant is advised in person that no disclosure will be made. However, advice and support is still made available to the applicant because it does not automatically follow that a decision not to disclose means there is no risk of harm. Just because a person has no prior convictions for violence does not mean that the person is not capable of violence.

In NSW, the person who may be at risk will be informed in person that there is no relevant conviction to disclose. As with the UK scheme, the person who may be at risk is still referred to appropriate support services as the absence of a relevant conviction does not mean that the person has nothing to fear.

What should the process be if a decision is made not to disclose information?

Should the applicant have a right to appeal a decision not to disclose?

Should the at risk person be referred to appropriate support services? Should these support services be present when the at risk person is advised that no disclosure will be made?

A Victim's Story: Can information really make a difference?

Elizabeth, a full time working professional, experienced domestic violence at the hands of her fiancé, Michael.

When Elizabeth fell pregnant, she was shocked because Michael started to become violent and emotionally abusive. When their baby died, Michael got even worse. Prompted by a conversation with his friends, Elizabeth tried to find out more about Michael's history and began to wonder about the details of some of his stories and explanations. Michael had a son, but his son lived interstate with his mother. Michael had complained that they just up and left one day, and the Family Court didn't order them to come back. Michael had also said another ex-girlfriend had just up and left to return to her home town. Elizabeth began to question who Michael really was. Weeks later, Elizabeth thought Michael was going to kill her and called a friend, who convinced Elizabeth to drive to her parents' house. Elizabeth's parents did everything they could to keep Elizabeth safe. Her parents said they always suspected something was going on, but felt there was nothing they could do. Elizabeth was an expert in hiding what was happening, so they only had a suspicion. After she left Michael, Elizabeth discovered that there had been an intervention order taken out against Michael in the past.

A domestic violence disclosure scheme may have made a difference to Elizabeth and her parents.

Names have been changed to protect people's identity.

Topic 2: Expiry Dates on Intervention Orders

The Act currently contains provisions whereby an intervention order placed on a person will continue without an end date. Section 11 of the Act prevents a court from fixing an expiry date for an intervention order by providing that an order is ongoing and continues in force until revoked by way of an application to the court. This position is unique to South Australia as, when the Act was drafted, the Government took the position that intervention orders would be ongoing to avoid potential situations where a person who is protected by an intervention order is re-exposed to abuse once that order has expired and the defendant is no longer subject to restraint.

An ongoing order is aimed at ensuring continued protection for a victim of abuse. Rather than requiring the victim to come back to court to show they still require the protection of an intervention order, and possibly expose themselves to unwanted contact with the perpetrator of the abuse, the Act currently places the onus on the defendant to establish, in an application to revoke the order, that the victim is no longer at risk of abuse.

However, there is also an argument that, over time, the number of intervention orders continuing in force will accumulate. These orders may no longer be necessary due to the passage of time and changed circumstances. For example, the protected person and the defendant will have reconciled and be living together, unaware of the ongoing effect of an order prohibiting their actions.

In its latest annual report the CAA stated, in relation to the number of intervention orders confirmed since the Act came into force on 9 December 2011 (over 7,000), "over time this is likely to result in a substantial number of intervention orders continuing in force which may no longer be necessary, potentially criminalising otherwise lawful behaviour"[58].

Further, the high numbers of intervention orders accumulating every year must be kept active on CAA and SAPOL records. This raises practical challenges and a strain on resources that may be avoided where the orders are no longer necessary.

Questions have arisen as to how to appropriately manage this issue. A potential solution is the imposition of an expiry date on intervention orders – that is, amending the Act to allow for intervention orders to lapse after a certain period of time.

In all other jurisdictions in Australia, the relevant domestic violence order legislation gives the court the power to impose an expiry date on the order. For example, in Queensland, protection orders under the *Domestic and Family Violence Protection Act 2012* (QLD) remain in force for a maximum of two years unless the court is satisfied that special reasons exist for the imposition of a longer term. In Victoria, a family violence intervention order remains in force for the period specified in the order.

New Zealand, however, takes a similar approach to South Australia in relation to protection orders for victims of abuse. Under sections 45 and 47 of the *Domestic Violence Act 1995* (NZ) a final protection order continues in force until it is discharged by the court.

Whilst there is an argument that an intervention order may no longer be necessary because of the passage of time, there is an equal argument that, due to the nature of domestic violence, there may never be a point in time where a victim of domestic violence would feel safe from further abuse from a perpetrator. It is important that any solution does not risk the safety of victims of domestic violence and the people who rely on the protection of intervention orders.

The community and experts are asked to consider whether the current legislation should be amended to impose an expiry date on intervention orders.

Should the Act impose a fixed time limit for all orders or should the court be given the discretion to impose a time limit that it deems appropriate (or both)?

If a time limit is thought to be appropriate, what period of time is suitable?

Are there certain types of situations of domestic violence that should be exempt from having an expiry date placed on an intervention order (i.e. situations of physical assault)?

Should only those orders that are consented to by a defendant expire after a certain period of time?

Topic 3: Comprehensive Collection of Data

There are limitations about the way that data relating to domestic violence is collected and the fact that the data currently collected does not accurately identify domestic violence related offences.

From the data above, we know that domestic violence incidents are flagged by police, but important data on the number of domestic violence related offences and the history of perpetrators is not readily available and cannot be accessed on an ongoing basis.

Some people believe the creation of separate domestic and family violence offences would be a solution to this problem. In addition, the SDC recently recommended in the SDC Report that the Attorney-General conduct an extensive public consultation process to explore the implications of the inclusion of the crime of domestic and family violence in the *Criminal Law Consolidation Act 1935* (CLC Act) (recommendation 30). It has been suggested that creating a specific domestic violence offence would ensure access to better data that records the prevalence of domestic violence in our community. This argument is based on labelling for statistical and sentencing purposes: if a perpetrator's offences are categorised as domestic violence, rather than a general criminal offence such as assault, then their criminal record would show a pattern of behaviour.

Recent inquiries into domestic and family violence in Queensland and Victoria considered the creation of new general domestic violence offences and were not satisfied that new offences were necessary to keep victims safe and hold perpetrators to account. The Victorian Royal Commission stated that "there are many existing offences which apply to perpetrators of family violence…If these offences are not being applied properly to family violence, this may reflect the approach, attitude or expertise of those applying or prosecuting these offences. Simply changing the laws by carving out a specific response for family violence is not likely to address these underlying deficiencies"[62]. The Special Taskforce on Domestic and Family Violence in Queensland, in declining to recommend a new offence, noted that "the difficulties with prosecuting domestic and family violence offences relate more to problems with evidence gathering, witness cooperation, police practice and court processes…Enacting a new offence…that faced the same evidentiary and process issues, would still not achieve the goal of protecting victims or increasing accountability of perpetrators"[63].

A simple and more direct solution would be to appropriately code instances of offending as being domestic violence related. This would mean flagging both relevant charges and convictions as being domestic violence related. The use of a such a 'flag' would ensure that a person's criminal record shows a pattern of behaviour so that sentencing can be tailored appropriately and better statistical data collected.

This enhanced recording could also be utilised by other agencies that have interactions with either perpetrators or victims of domestic violence incidents, for example, a hospital or financial counsellor.

In order to implement such coding, a definition of 'domestic violence offence' would need to be developed to ensure it covers offences that involve non-physical behaviour, such as financial and emotional control, as well as offences of physical violence.

SAPOL notes their use of a DAR (explained earlier) to record incidents of domestic abuse that are not criminal offences.

Which agencies of Government should be expected to enhance their databases to flag or code identified circumstances of domestic violence?

Who should be responsible for collecting this information? How should this information be used?

Should a court be able to flag circumstances of domestic violence when considering a case? How should this information be used, for example, should it be used in sentencing and/or for reporting on domestic violence?

What behaviour should be included within a flag of domestic violence? Should it be based on the definition under the Act or broader?

Topic 4: Allowing Video Evidence

Recommendation 29 of the SDC Report provides as follows:

> *It is recommended that the Attorney-General amend the Evidence Act 1929 (SA):*
>
> - *to enable the potential evidence that is taken from a victim by police, using body cameras at the time of the domestic abuse incident, to be admissible as evidence when the substantive charge/s come to trial; and*
> - *to improve confidentiality of client records for victims of domestic and family violence.*

The South Australian Magistrates Court in its submission to the SDC stated it was "keen to see changes to the Evidence Act which would enable material that is taken from women by police at the time of the initial incident, the assault, to be able to be used as evidence at the later trial when the substantive charge comes to court"[64]. This is because, although an interim intervention order may have been issued at the time of the incident, by the time the actual criminal offending is dealt with by a court,. the victim may refuse to give evidence and want to withdraw the charges. According to the Deputy Chief Magistrate, "more than 50% of cases before the courts fail to end up with prosecution of the perpetrator for the aggravated domestic violence assault, not only because of pressure from the perpetrator for the victim to withdraw the charges, but also because of a range of other issues..."[65]. Without the evidence of the victim, there is little chance of a successful prosecution, and so the case goes nowhere. However, the option to use video evidence and avoid attending court and face the perpetrator may encourage victims to pursue with charges.

NSW aimed to address the problem of complaints being withdrawn in domestic violence cases, and reduce the stress for victims associated with the court process, by amending the *Criminal Procedure Act 1986* (NSW). The amendments came into force on 1 June 2015 and allow police to take a victim's statement by video or audio recording (including at the scene of the incident) and use this recording as part or all of the victim's main evidence. Under the Act, police need the consent of the victim before they can commence recording. The victim must also be consulted about whether they want the recording to be played in court but the prosecutor does not need their permission to play it.

Amending the *Evidence Act 1929* (SA) to allow police video recordings to be admissible as evidence would be a significant step, particularly in the context of criminal trials, as it goes against the principle that an accused has the right to face his or her accuser. It would also go against established legal principles against hearsay evidence court matters.

Further, a victim may not want a particular video taken by police to be shown in court. Consideration must be given to how the decision to use police video evidence of a victim can impact the victim, either positively or adversely.

At present, police video recordings are admissible in South Australia under the exception to the hearsay rule in section 21(4a) of the Act. In an application for an interim intervention order, where a police officer is the applicant, the court is not bound by the rules of evidence but may inform itself as it thinks fit. An alternative may be to amend the Act so that police video recordings can also be considered by the court in a hearing for a final intervention order.

Community and expert views are sought on whether amendments to the *Evidence Act 1929* (SA) are warranted to allow police video recordings (using body cameras at the time of the incident) to be admissible as evidence when the substantive charge comes to trial or whether such reform should be limited to hearings for final intervention orders.

Topic 5: Confidentiality

As noted above, the SDC recommended the Attorney-General amend the *Evidence Act 1929* (SA) to improve confidentiality of client records for victims of domestic and family violence.

The issue of confidentiality of client case records concerning victims of domestic violence was also raised in evidence before the SDC[66]. The example given was a defamation action taken in the small claims court, by an alleged perpetrator, against a domestic violence service who held sensitive and confidential case notes containing information provided by the victim. The agency settled the action at significant cost on the understanding that, if the action was defended, information contained in the case notes would be required to be released to the plaintiff (the perpetrator) in the discovery process.

Under the common law, the only relationship in which communications are protected from disclosure in court is that between a lawyer and a client. There is no general client privilege that protects counselling records from disclosure. The confidentiality of counselling records is therefore limited, as access to these records can be requested in relation to legal proceedings under subpoena. Agencies could argue that disclosure of the notes would be prejudicial to the client if revealed in court or that it would otherwise be contrary to the interests of justice to admit the document in evidence. It would then be up to the court to determine whether or not the records should be admitted into evidence.

What we have currently in South Australia is a protection for sexual assault counselling communications. Part 7, Division 9 of the *Evidence Act 1929* (SA) provides that "a communication relating to a victim or alleged victim of a sexual offence is, if made in a therapeutic context, protected from disclosure in legal proceedings by public interest immunity". This protection cannot be waived, even if the counsellor or the victim agree to its disclosure. Section 67F further provides that evidence of a protected communication is entirely inadmissible in committal proceedings, is not liable to discovery or any other form of pre-trial disclosure and cannot be admitted in other legal proceedings unless the court gives permission and the admission of the evidence is consistent with any limitations or restrictions fixed by the court.

There is no general privilege currently in South Australia for medical records or other records produced where there is a duty of confidentiality, or an expectation of confidentiality by the victim. Whether or not some form of client privilege should apply, either generally, or limited to domestic violence counselling records, therefore requires careful consideration.

Community and expert views are sought on whether amendments to the *Evidence Act 1929* (SA) are warranted to improve confidentiality for client records for domestic violence victims.

Topic 6: Drug and Alcohol Treatment

Under the Act, an intervention order may contain a condition that the defendant participate in an "intervention program". The term "intervention program" is defined to mean a program that provides:

- supervised treatment; or
- supervised rehabilitation; or
- supervised behaviour management; or
- supervised access to support services; or
- a combination of any 1 or more of the above.

Under this definition, each of these services must also be designed to address behavioural problems (including problem gambling), substance abuse or mental impairment.

In order for this to occur, an assessment must be undertaken by the intervention program manager to determine if there is an intervention program that is appropriate for the defendant and whether the defendant is eligible for the services included on the program. The intervention program manager is a person employed by the CAA to have general oversight of intervention programs and coordinate the implementation of relevant court orders (and includes a delegate of such a person).

There is an intervention program that operates in through the South Australian Magistrates Court via the Family Violence Court, called the Abuse Prevention Program (explained in more detail later). If the intervention program manager advises the court that the defendant is eligible for inclusion on the Abuse Prevention Program, and those services are available to the defendant at a suitable time and place, the court may make it a condition of the defendant's intervention order that the defendant participate. The Abuse Prevention Program is available in the metropolitan area, as well as Port Augusta, Murray Bridge and Mount Gambier.

The domestic violence prevention programs include discussions about misuse of alcohol and other drugs, and steps aimed at assisting defendants to overcome such issues.

The court has the discretion to order that a defendant be assessed for inclusion in an intervention program, for example, for treatment of drug and alcohol abuse. However, such an assessment is not mandatory. This may mean not all eligible defendants end up being referred for assessment. The court also has discretion about whether or not the defendant should be required to undertake an intervention program.

It may also be that a defendant would benefit from attending a different intervention program other than the Abuse Prevention Program, for example, treatment programs such as drug and alcohol counselling, if there is evidence to suggest that drugs and/or alcohol have played a part in a domestic violence matter.

Should assessments for drug and alcohol abuse, for attendance at a treatment program, be mandatory as part of the intervention order process?

Should a court be required to refer a defendant to a program where certain factors exist in a matter?

Are the current intervention programs available sufficient to meet the needs of defendants?

Topic 7: Domestic Violence and Housing and Homelessness Service Priorities

The current National Partnership Agreement on Homelessness (NPAH) expires on 30 June 2017. The continuation of this agreement was discussed when housing and homelessness Ministers met in Brisbane on 31 March 2016. Ministers considered the importance of a sustainable and longer-term policy and funding approach to integrated housing and homelessness services. The Ministers also recognised the need for all Australians to have access to safe, appropriate and affordable housing and the need for a reliable and flexible service support system to meet the current and future needs of vulnerable people. They also noted the importance of ensuring funding certainty for continuity of homelessness services, that any funding should not be at the expense of existing services and discussed the important national issue of domestic and family violence (including the need for a multi-faceted approach to prevent and address homelessness caused by domestic and family violence).

Ministers agreed to commission a report (to be completed by 30 September 2016) on future policy reforms and funding options for beyond July 2017 to include a proposal for a five year funding arrangement. Commonwealth, state and territory Ministers will to consider the report ahead of making recommendations to COAG by the end of 2016.

To support the Ministers in undertaking this task, Housing SA is consulting with the community and the homelessness sector to identify South Australia's service reform priorities. Question to this end are posed below as part of this consultation.

Housing SA is committed to the continuation of an integrated specialist and generic service response to women and children experiencing domestic violence.

From a homelessness perspective, "housing first" has been a critical platform to advocate the centrality of stable long-term housing as the solution to homelessness. However, the sector also strongly advocates and practices a "safety-first" approach because services are predominantly delivered to very vulnerable and at risk people. The current model that is delivered by government and non-government providers embraces both housing and safety-first principles.

Housing SA is committed to supporting a local dialogue with the sector and community stakeholders, to deliver improvements to services currently being provided. Housing SA is committed to managing and supporting the sector as an integrated partnership, recognising that over a third of women and children experiencing domestic and family violence who access homelessness services, do so from non-specialist domestic violence services.

Recent service reforms within Housing SA has strengthened the integrated service partnerships between the delivery of social housing, private rental and bond assistance to women and their children seeking longer term housing options. The "no wrong door" approach that is currently part of our sector, provides women and children experiencing domestic violence with expanded service choices that are integrated with specialist responses. As part of future tendering processes, Housing SA will continue to treat domestic violence specialist service responses as a priority to meet the needs of women and their children.

What are your views on the way homelessness services are currently delivered to people experiencing domestic violence?

Aboriginal women residing in regional and remote communities are particularly vulnerable to domestic and family violence. What are the key strengths and limitations in the way services are currently delivered?

How do we improve our understanding of the cultural context in which Aboriginal Domestic and Family Violence occurs in order to deliver effective service responses for Aboriginal women and children?

How do we better support women and children's safety in circumstances where the perpetrator is still engaged in the family? Can you identify best practice models that can support workers to assertively engage with women and children in these circumstances?

The evidence linking domestic and family violence and young people in statutory care or within the homelessness sector is growing. How can the homelessness sector support young people who have experienced domestic and family violence trauma to transition successfully into independent pathways?

Topic 8: Fostering Supportive Environments

The Australian Human Rights Commission advocates the inclusion of domestic violence as a ground of discrimination on the basis that domestic violence can, for example, impact a victim's ability to attend work or access services.

In addition, the SDC Report made the following recommendation:

> *"It is recommended that the Attorney-General amend the Equal Opportunity Act 1984 to make it illegal to discriminate against a person on the grounds of domestic or family violence."*

Discrimination against domestic violence victims in the workplace may take the form of transferring the employment of a victim, overlooking them for promotion or terminating their employment altogether, on the basis that her or his work has been adversely affected by abuse or because the abuse is adversely affecting the workplace. Discrimination against victims of domestic violence might also occur in the provision of services, including a landlord choosing not to lease a property to a person they know to be a victim of domestic violence.

Protections against many forms of discrimination already exist in South Australia, including by reason of:

- age;
- association with a child;
- caring responsibilities;
- chosen gender;
- disability;
- marital or domestic partnership status;
- pregnancy;
- race;
- religious appearance or dress (in work or study);
- sex;
- sexuality;
- spouse or partner's identity; or
- victimisation.

Given the majority of domestic violence victims are female, it is arguable that discrimination based on domestic violence may sometimes (although not necessarily) be captured in part by protections against gender discrimination.

A key issue relating to discrimination by reason of domestic violence is whether the individual can demonstrate a causal link to one of the grounds listed above. Further, victims may not disclose that domestic violence is actually a contributing factor in workplace issues, such as cases of being performance managed for being late. Many victims of domestic violence may not disclose the fact for various reasons: for instance, they may feel it is not safe to do so or they may not feel comfortable or supported in their workplace to do so.

On the other hand, the cost to business of the introduction of domestic violence as a ground of discrimination must be a consideration. It would clearly not be reasonable to expect an employer to underwrite the cost of unexplained absences of an employee where no explanation is given. The primary aim must be ensuring victims feel confident and supported in speaking up about her or his experience of domestic violence and educating workplaces in managing these circumstances.

Currently, there is no Australian state or territory that explicitly includes domestic violence as grounds for discrimination (subject to those protections listed above, in respect of gender). The question was raised in submissions made to, and considered by, the Victorian Royal Commission into Family Violence (the Victorian Royal Commission). In its March 2016 report, the Victorian Royal Commission chose not to make any recommendations concerning amendments to Victoria's equal opportunity laws. Rather, it expressed support for workplace-based initiatives, stating that the Victorian Government should model best practice in this respect in the public service (see Chapter 37 of the Report and Recommendations of the Victorian Royal Commission are available at: **www.rcfv.com.au**).

The South Australian Government has taken positive steps in this respect. For example, we have recently introduced paid leave arrangements in the public sector (see page 74). We have also introduced workplace policies that outline the appropriate response within a workplace when an employee is a victim of domestic violence (see page 75). In addition, White Ribbon Workplace Accreditation could also assist (see page 72) by educating people about domestic violence and how to prevent it.

Such arrangements aim to achieve positive action by increasing awareness around domestic violence and reducing the perceived stigma victims may fear will arise from speaking up.

With the support of education and leave arrangements, an environment can be fostered that allows and encourages employees to speak up about domestic violence and seek the support they need from employers. Such education and policies are equally as crucial in other environments, such as housing and services providers, educational institutions and even sporting clubs.

The key aim is to empower victims to speak up about their experience of domestic violence and to provide employers and service providers with the opportunity and the knowledge to be able to support victims.

Community feedback is sought on how we can assist domestic violence victims to be more confident in seeking appropriate support and assistance in the workplace and other environments and what actions would be most effective.

Summary of Questions Posed

The Corrections System

Breaches of Intervention Orders

Community and expert views are sought as to whether police and courts should have greater discretion in considering whether a person should be granted bail for breach of an intervention order?

Perpetrators of Domestic Violence

Community and expert feedback is sought on appropriate responses to more effectively deal with perpetrators of domestic violence. Does imprisonment deter re-offending?

Is there a way we can safely protect a victim(s) of domestic violence without sending the perpetrator to jail?

Are there more responses that address the attitudes of perpetrators and target the underlying causes of domestic violence, including within Aboriginal and CALD communities?

Topic 1: Domestic Violence Disclosure Scheme

Who should be allowed to make an application for disclosure?

If a DVDS was introduced in South Australia should it apply only to those in a current intimate relationship, as is the case in the UK, or to both current and former intimate relationships, as is the case in NSW?

How should intimate relationships be defined?

Should a third party be entitled to make an application on behalf of someone else in South Australia? If yes, in what circumstances should it occur?

Should applications be made to SAPOL or some other agency?

Should there be an age limit for the applicant, the person identified or the subject?

How should an application be made and who should be the first point of contact?

What initial checks should be carried out?

What assistance should be made available for people who may need help in completing their application?

Should a checklist be developed to ensure that applications are assessed, and support offered, in a consistent manner?

What factors should be taken into account in determining whether an immediate disclosure is required?

Who should have responsibility for assessing applications for disclosure and making a determination?

What sort of risk assessment should occur?

What factors should the decision-making body take into account in determining whether or not to make a disclosure?

When should information be disclosed?

What principles should be considered in making a determination to disclose?

What offences should be included? Should they relate to domestic violence convictions only or should convictions for other offences be included? Should allegations be included?

What offences should be excluded? For example, should spent convictions or juvenile convictions be disclosed?

Should current and/or prior intervention orders be included?

If current and/or prior intervention orders are to be included, should there be an assessment of the level of risk posed by that order before determining whether a disclosure should be made?

What information should be disclosed? Should a disclosure be limited to the existence of a relevant offence or an intervention order or should further details be disclosed, for example, the date of the offence, the facts of the offence and any sentence imposed?

Who should make the disclosure and where should it occur?

Should information be disclosed to a third party?

Once disclosure has occurred, what sort of support should be made available to the person?

Should the subject be informed of a disclosure? If so, in what circumstances? Should the subject have a right to appeal a decision to disclose?

Should there be safeguards in place to protect against the misuse of information once it has been disclosed? For example, should the person receiving the disclosure be required to sign an undertaking that they will not share or misuse the information provided?

What should the process be if a decision is made not to disclose information?

Should the applicant have a right to appeal a decision not to disclose?

Should the at risk person be referred to appropriate support services? Should these support services be present when the at risk person is advised that no disclosure will be made?

Topic 2: Expiry Dates on Intervention Orders

The community and experts are asked to consider whether the current legislation should be amended to impose an expiry date on intervention orders.

Should the Act impose a fixed time limit for all orders or should the court be given the discretion to impose a time limit that it deems appropriate (or both)?

If a time limit is thought to be appropriate, what period of time is suitable?

Are there certain types of situations of domestic violence that should be exempt from having an expiry date placed on an intervention order (i.e. situations of physical assault)?

Should only those orders that are consented to by a defendant expire after a certain period of time?

Topic 3: Comprehensive Collection of Data

Which agencies of Government should be expected to enhance their databases to flag or code identified circumstances of domestic violence?

Who should be responsible for collecting this information? How should this information be used?

Should a court be able to flag circumstances of domestic violence when considering a case? How should this information be used, for example, should it be used in sentencing and/or for reporting on domestic violence?

What behaviour should be included within a flag of domestic violence? Should it be based on the definition under the Act or broader?

Topic 4: Allowing Video Evidence

Community and expert views are sought on whether amendments to the *Evidence Act 1929* (SA) are warranted to allow police video recordings (using body cameras at the time of the incident) to be admissible as evidence when the substantive charge comes to trial or whether such reform should be limited to hearings for final intervention orders.

Topic 5: Confidentiality

Community and expert views are sought on whether amendments to the *Evidence Act 1929* (SA) are warranted to improve confidentiality for client records for domestic violence victims.

Topic 6: Drug and Alcohol Treatment

Should assessments for drug and alcohol abuse, for attendance at a treatment program, be mandatory as part of the intervention order process?

Should a court be required to refer a defendant to a program where certain factors exist in a matter?

Are the current intervention programs available sufficient to meet the needs of defendants?

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