



office of the
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commissioner
new south wales

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24 JUN 2015

Dear Attorney,

NSW Domestic Violence Disclosure Scheme Discussion Paper, May 2015

I write to you to provide comments on the proposed NSW Domestic Violence Disclosure Scheme (DVDS). The DVDS discussion paper states that the primary objective of the DVDS is to help prevent domestic violence by informing people of their partner's history of domestic violence offending. I strongly support this aim and present the following comments to support its delivery within a privacy-respectful framework.

The discussion paper identifies the United Kingdom's (UK) scheme, Clare's Law, as the model for the NSW approach.

This is a complex area and the discussion paper demonstrates that a high level of care and sensitivity must be exercised in the development of the NSW pilot scheme. In particular, I note that the scheme provides the NSW Police Force (NSWPF) and potentially other NSW public sector agencies and their service providers, with an ability to decide and disclose sensitive information in the absence of an offence having occurred or in response to an unproven allegation about abuse or harm. To provide an agency with this kind of authority requires careful scrutiny.

The Law Reform Commission of Western Australia in its April 2014 report, *Enhancing Family and Domestic Violence Laws: Final Report, Project No. 104*, considered the merits of developing a similar scheme to Clare's Law in Western Australia. It observed that, "any potential benefits of a public disclosure scheme need to be balanced against the potential detriments".

While limited, there are some useful observations that can be gleaned from the feedback received on the UK scheme that could be considered in the NSW DVDS, in particular:

- the mixed reaction to the scheme by practitioners and non-government organisations working on domestic violence in 2012, with some organisations asserting that further effort and resources were required to improve existing support services and police effort rather than creating a new 'tool'

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- the focus on processes by the 2013 UK assessment report on its pilot programs, *Domestic violence disclosure scheme (DVDS) pilot assessment, 25 November 2013*
- the UK assessment report's recommendation for clearer guidance and training to improve the understanding of operational police and staff of the threshold for disclosure and ensure consistency of approach when disclosing information.

The objective of the pilot scheme in NSW should be to prove the concept of a disclosure scheme and its reasonableness. An evaluation of the pilot's outcomes is imperative, in order to develop a robust evidence-base for the program's continuation. This evaluation should look at the privacy risks for applicants (that is, the potential victims of abuse) and the subject of the disclosure. Such an evaluation would add significant value by strengthening the evidence base for such schemes.

Consideration should be given to adopting a 'privacy by design' approach to ensure that the NSW DVDS pilot scheme is respectful of the privacy rights of applicants and the subjects of disclosures. This would assist to minimise the risk of breaching NSW privacy law. A privacy impact assessment could be conducted to identify the privacy risks of the proposed model and the options to mitigate these risks. This could assist in preventing any potential challenges to the scheme, and could be a useful tool to designing the overall privacy management framework and aid in the evaluation of pilot outcomes.

Another suggestion that could help minimise the risk of privacy breaches and improve the pilot scheme's success is to ensure that there is strong communication on the roles and responsibilities of the scheme's key participants – the NSW Police Force (NSWPF), other NSW public sector agencies and non-government organisations. This could be done by conducting training about the scheme, the sensitivity of the information being disclosed and the importance of respecting potential victims of abuse engaged under the Right to Ask and Right to Know.

Specific comments on privacy issues that arise in the discussion paper are attached (**Attachment A**). The comments identify various options proposed in the DVDS discussion paper which contain several design features that could breach the *Privacy and Personal Information Protection Act 1998* (the PPIP Act).

I note that the NSWPF have a general immunity from complying with the PPIP Act except in connection with the exercise of their administrative and educative functions (section 27). I draw to your attention a recent NSW Civil and Administrative Tribunal (NCAT) case which considered the scope of this immunity, *AEC v Commissioner of Police, NSW Police Force (GD) [2013] NSWADTAP 30*. The factual circumstances in that case cannot be directly extrapolated to every situation relevant to the DVDS but it provides a useful starting point from which to consider whether the immunity provided by section 27 can be relied on as the sole basis for the sharing of information. I think it doubtful given that section 27 relates to law enforcement and the proposal is more one of crime prevention.

To avoid any ambiguity, the benefit in making a public interest direction under the PPIP Act to enable the implementation of a pilot program or a Privacy Code of Practice for a full scheme needs to be considered. I would be happy to assist to facilitate either or both processes, but given the likely scale of the work would require further resources to progress the matter in a timely manner.

I have written in similar terms to the Minister for Women, Minister for Prevention of Domestic Violence and Sexual Assault, Minister for Mental Health, Minister for Medical Research and Assistant Minister for Health, the Hon Pru Goward, MP.

Please do not hesitate to contact me if you have any queries on (direct line,
Monday, Wednesday and Friday) or on the other days.

Yours sincerely

Dr Elizabeth Coombs
NSW Privacy Commissioner

24/6/2015

ATTACHMENT A

Specific comments on privacy aspects of the Domestic Violence Disclosure Scheme

Please note that these issues are organised according to headings used in the discussion paper rather than the specific questions that have been asked, as the privacy issues are relevant generally across the options under each heading.

Please note that the PPIP Act is used as an example in the comments below. Consideration should also be given to the HRIP Act, if the information being handled is health information as defined in section 6 of the HRIP Act.

Right to Ask/Right to Know

- Collecting personal information about an alleged offender without that person's consent: under the Right to Ask channel, NSWPF officers could be required to collect information about an alleged offender from an applicant. This could breach section 9 of the PPIP Act, which requires public sector agencies to collect personal information directly from the individual to whom the information relates.

Threshold for disclosure

- When should information be disclosed: the definition of the threshold requires care. I note that one of the findings from the 2013 UK assessment report was a lack of understanding among police officers and support staff of core concepts in the threshold for disclosure.

The objective of the DVDS appears to be crime prevention and promotion of community safety. This objective appears to have influenced the focus on prior convictions for domestic violence offences as a minimum threshold for disclosure.

The PPIP Act includes a range of law enforcement exemptions to enable NSW public sector agencies to perform law enforcement functions, such as section 23 and the general exemption provided to NSWPF from complying with the PPIP Act except in respect to the exercise of their administrative and educative functions (section 27). It is uncertain whether the scheme's crime prevention focus would fall within the law enforcement exemptions under the PPIP Act. This would depend, for example, on the individual concerned and the nature of their criminal history. This issue is further complicated if information is shared amongst other agencies.

Section 17 of the PPIP Act also permits use of information for another purpose where it is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person. Section 18(1)(c) of the PPIP Act likewise permits the disclosure of information where the agency believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person. It is possible that the scheme could deal with situations where the threat may not be imminent and where these exemptions could not be relied on. A privacy direction or code could be options to resolve any uncertainty.

- Access to convictions in other States and Territories: the discussion paper raises the idea of obtaining criminal histories from other States and Territories. It may be more effective to identify and explore what existing initiatives are in place, if any, to achieve

the policy aim. I note that there is currently no privacy legal framework in NSW on the transborder disclosure of information.

- What information should be disclosed: the Law Reform Commission of Western Australia's report noted that "... the usefulness of any disclosure will be dependent on the nature of the information disclosed". Accordingly, the information to be disclosed should be clearly identified and standardised. For example, mixed terminology is used in the discussion paper around convictions, offences, related or unrelated offences and criminal matters. There should be precision in the selection of these terms to simplify and more clearly identify the information.

Section 4 defines what constitutes personal information under the PPIP Act, and could likely encompass much of the information that could potentially be disclosed.

- Approach to spent convictions: I note that the UK's model does not allow for disclosure of spent convictions. Unless a very strong case was put forward on this matter, I do not see a rationale why this should be otherwise in NSW.

Application process and approval process

- Using the person's personal information to conduct a risk assessment without their consent: the application and approval processes proposed in the discussion paper for the Right to Ask and Right to Know channels could involve an assessment process that includes checking the information held by NSWPF about the subject of an application.

These processes could breach section 17 of the PPIP Act, which requires public sector agencies to use information for the purpose for which it was collected. The PPIP Act also includes obligations to take reasonable steps in the circumstances to ensure the information is accurate, up to date, complete and not misleading, before it is used (section 16).

- Adopting a multi-agency decision-making model: the adoption of a multi-agency decision-making model (whether local or centralised) could require the use and sharing of information between NSW public sector agencies in ways that are not permitted under the PPIP Act (section 17 and section 18).

Disclosure process

- Disclosure of someone else's personal information to another person: the discussion paper proposes a model under both the Right to Ask and Right to Know channels that requires the disclosure of personal information of one person to another person, that is, the victim at risk of harm or a third party. Under the Right to Know channel, NSWPF would have the authority to inform a person at risk of harm, even where that person has not asked for the information. The Right could also exist for another agency to alert NSWPF to a potential victim without the potential victim's knowledge or consent.

The PPIP Act does not permit the disclosure of personal information to another person or body except in limited circumstances. Disclosing a person's personal information to a third party without their consent, and for a purpose that is different from the purpose for which the information was collected, would breach section 18 of the PPIP Act.

- Informing the subject of the disclosure: the UK process includes the step of considering whether the subject of an application should be informed that disclosure is being made. This is based on an assessment of risk of harm to the potential victim.

I acknowledge the importance of ensuring the safety for the potential victim of abuse. The NSW model could also consider examining the potential deterrent effects of informing the subject of the disclosure, bearing in mind that the subjects of the disclosures also have a right to privacy that is recognised under the PPIP Act and the HRIP Act.

Other issues

- What happens to the disclosed information, including confidentiality: security safeguards are an important part of how information is managed. The PPIP Act contains obligations for NSW public sector agencies to take appropriate safeguards to ensure that information is retained and securely managed (section 12). This includes ensuring that information is protected against loss, unauthorised access, use, modification or disclosure, and against all other misuse. I am broadly supportive of measures that protect against the misuse of information that is disclosed, including steps to ensure the confidentiality of this information.